

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CHICO UNIFIED SCHOOL
DISTRICT,

v.

PARENT on behalf of STUDENT.

OAH CASE NO. 2008120095

DECISION

Administrative Law Judge (ALJ) Rebecca P. Freie, Office of Administrative Hearings, State of California (OAH), heard this matter in Chico, California, on January 5, 2009.

Attorney Paul Gant represented the District. David Scott, Director of Student Support Services for the District, was present for the hearing. Student was represented by his father (Parent). The hearing was public at Parent's request.

The District filed the request for due process hearing on December 2, 2008. No continuances have been granted. The record was closed on January 5, 2009, following oral closing arguments, and the matter was submitted for decision.

ISSUE

May the District conduct an assessment of Student without the consent of Student's Parent?

CONTENTIONS

The District contends that it needs to assess Student in several different areas of suspected disability in order to gain sufficient information so it can offer him an

appropriate program and services to meet his unique needs.

Student contends that he cannot be fairly evaluated by District personnel because the District is biased against him. He also contends that the District does not have qualified personnel to conduct the assessment, and that Student will be harmed by multiple assessments if he later has an independent educational evaluation (IEE). Finally, Parent does not believe that Student will willingly participate in the assessment because Student is refusing to go to school. Therefore, Parent will not consent to any assessment by District personnel.

PROCEDURAL MATTERS

Student sought to raise new issues beyond the sole issue raised in his complaint. However, only issues identified in the due process complaint may be decided at the hearing. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Specifically, Student attempted to argue that he is entitled to an IEE at District expense. However, this issue was previously decided by ALJ Peter-Paul Castillo in OAH Case Number 2008090019, which resulted from a complaint filed by Student requesting an IEE. In addition, Student sought to raise the issue that the District was engaged in a conspiracy to deprive Student of his educational rights because it was biased against his family and Student, due to the fact that the District was familiar with his family, and the District had expelled Student in 2003. This claim is also outside the jurisdiction of an ALJ in a special education due process hearing filed pursuant to the Individuals with Disabilities Education Act (IDEA). (See Ed. Code, § 56501, subd. (a).)

Parent was not called as a witness at the hearing, but he was administered the oath before he made his opening argument. Therefore, his opening and closing arguments, objections, the statements he made while questioning witnesses, and his offers of proof concerning the admissibility of evidence he attempted to elicit from the witnesses, were

considered evidence in this hearing. The ALJ determined the weight to be given to each of his arguments, objections, statements, and offers of proof.

FACTUAL FINDINGS

JURISDICTION

1. Student is 16 years of age and is currently eligible for special education under the sole category of specific learning disability. He resides with Parent within District's boundaries. Student is currently registered to attend Fair View School (Fair View), a continuation high school in the District, but he has not attended school for at least two months.

2. Student began residing with Parent before the beginning of the 2008-2009 school year, following his release on parole from a California Youth Authority (CYA) facility in Stockton, California, during the summer of 2008. The District's school year began on August 13, 2008, and Parent attempted to register Student on August 12, 2008. On that date Parent met with David Scott, the District's Director of Student Support Services. Parent informed Mr. Scott that Student was eligible for special education, and he presented Mr. Scott with a letter dated August 10, 2008. In the letter, which is addressed to the District, Parent requests a due process hearing, an IEE and copies of Student's educational records. On August 12, 2008, the District also received a copy of Student's last IEP dated June 26, 2008, from Johanna Boss High School (Boss), a CYA school operated by the California Education Authority. The District and Parent stipulated on the record at the hearing that the IEP of June 26, 2008, is insufficient to meet Student's needs. The ALJ agrees.

3. On August 27, 2008, Mr. Scott responded by letter to Parent's letter of

August 12, 2008. Mr. Scott informed Parent that the District agreed to an IEE of Student.¹ Mr. Scott enclosed an assessment plan for the IEE and asked Parent to sign his consent. The assessment plan called for evaluations of Student in the areas of intellectual development, academic achievement, communication, social/behavioral functioning, adaptive behavior, perceptual and perceptual-motor skills, and health and development. Mr. Scott also enclosed a copy of the Parents Rights Handbook.

4. On September 8, 2008, Parent attended an IEP meeting and consented to an interim IEP. At that meeting, Parent was asked to sign the IEE assessment plan sent to him on August 27, 2008, but refused to do so. He also declined a copy of the special education procedural safeguards that was offered to him. The District never received the signed consent for the IEE.²

5. When a district suspects that a student may be a child with a disability, or believes that a student already eligible for special education may have additional undiagnosed needs, the district can request that a parent consent to an assessment. If the parent refuses to consent to the assessment within 15 days, the district may file a request

¹ No evidence was presented as to why the District agreed to an IEE when it had not conducted its own assessment of Student.

² Parent filed the August 10, 2008 letter with OAH on August 27, 2008, as a due process hearing request (complaint). The due process hearing on that complaint (OAH Case No. 2008090019) was set for October 21, 2008. Parent left the hearing without calling witnesses, after the ALJ denied an untimely request to amend his complaint, and no evidence was presented by either side. The decision, issued October 31, 2008, denied Parent's request for an IEE. Throughout the hearing on January 5, 2009, Parent attempted to introduce evidence concerning IEEs.

for a due process hearing to obtain an order permitting the district to assess the student without parental consent.

6. On November 5, 2008, the District sent an assessment plan to Parent by email, asking for permission for the District to assess Student in the same areas as proposed in the previous assessment plan sent on August 27, 2008. The District also mailed a copy of the assessment plan to Parent in the United States Mail, and enclosed the Parents Rights Handbook. On November 10, 2008, Parent met with a school psychologist for the District, Mireya Juaregui. His purpose for meeting with Ms. Juaregui was to cancel a scheduled IEP meeting. Ms Juaregui then asked if Parent would sign the November 5, 2008 assessment plan, and he refused. He told her that he would only sign the form if the District provided his son with an attorney.³ On December 2, 2008, the District filed the underlying complaint in this matter.

7. The District is asking to assess Student for several reasons. First, Student appears to have one or more disabilities beyond the specific learning disability that is reflected in the June 26, 2008 IEP. The District received records from CYA showing that Student was assessed at CYA in 2007. The assessor reported that Student might have had social and emotional problems affecting his ability to obtain an education. The District was also concerned about Student's lack of school attendance, as well as behaviors observed when he did attend school at Fair View. Although Student only attended Fair View for eight days since September 4, 2008, his teachers are very concerned about him. One of Student's teachers at Fair View, John Cowan, testified credibly that Student did not hand in any completed school work in the eight days that he attended school, although he did give Mr.

³ During the hearing, Parent repeatedly requested that an attorney be provided to represent his son, and it was explained to him that IDEA does not give students the right to free legal counsel.

Cowan school papers "to hold onto." Student would not get out of his seat in the classroom to pick up a textbook. In order to get Student to do work in class, Mr. Cowan often was required to hand Student a textbook, paper, and a writing implement. Sometimes Student would not open up the text book to the page where the lesson for the day began, and Mr. Cowan would do that for him. Often Student spent much of his time in the classroom with his head on the desk, appearing to be asleep. Mr. Cowan never saw Student interacting with any other students at school.

8. The District wants to assess Student because, without adequate assessment, the District does not have sufficient knowledge about Student's current needs to place him appropriately, and provide him with necessary programs and services.

9. When a school district assesses a student, the testing must be conducted by trained and knowledgeable personnel. A variety of tools must be used to gather sufficient information about the functional, developmental and academic achievement levels of the student.

10. The District has the equivalent of ten full-time credentialed school psychologists on staff. The District has credentialed resource specialist program (RSP) teachers, credentialed speech and language therapists and credentialed school nurses. A school psychologist will conduct the assessments of intellectual development, perceptual and perceptual-motor skills, and social/behavioral functioning. An RSP teacher will conduct the assessment of Student's academic achievement, a speech and language therapist will conduct the communication assessment, and a school nurse will conduct the health and development assessment. District personnel are clearly trained and knowledgeable, and have experience conducting these assessments, and the evidence showed that they would use a variety of appropriate, validated, unbiased tools in evaluating Student. Mr. Scott and Ms. Juaregui testified convincingly that, if Student is reluctant to go to school for assessment purposes, or participate in the evaluation process, District personnel have a

variety of strategies they can use.

11. The evidence showed that unless the District can evaluate Student in all of the suggested areas on the assessment plan, it is unlikely that the District will be able to provide Student with an appropriate educational program and services. The District has sufficiently qualified personnel to conduct these evaluations, and will do so in an appropriate manner. Student introduced no evidence to the contrary. Parent's statements during the hearing were evidence that he agreed in principle that Student needed to be reassessed; he just did not want District personnel to conduct the assessment.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. The District filed the request for due process, and therefore has the burden of persuasion in this matter.

ELEMENTS OF A FREE APPROPRIATE EDUCATION (FAPE)

2. Under both the IDEA and state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the student at no charge to the parent or guardian that meet the state's educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (hereafter *Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational

benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, 458 U.S. at pp. 198-200.) For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, reasonably calculated to provide the student with some educational benefit, and must comport with the student's IEP. (*Rowley, supra*, 458 U.S. at p. 188; 20 U. S.C. § 1401(9).)

ASSESSMENTS

4. A parent who wishes that a child receive special education services must allow reassessment if conditions warrant; "if the parents want [their child] to receive special education under the Act, they are obliged to permit such testing." (*Gregory K. v Longview School Dist.* (9th Cir. 1987) 811 F.2d 130, 1315.) "A parent who desires for her child to receive special education must allow the school district to reevaluate the child using its own personnel; there is no exception to this rule." (*Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 179.)

5. A reassessment requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, §§ 56321, subd. (c), 56381, subd. (f).) To obtain consent, a school district must develop and propose a reassessment plan. (20 U.S.C. § 1414(b)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (f).) If the parents do not consent to the plan, the district may conduct the reassessment only by showing at a due process hearing that it needs to reassess the student and is lawfully entitled to do so. (20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. § 300.300(c) (2006); Ed. Code, §§ 56321, subd. (c), 56381, subd. (f), 56501, subd. (a)(3), 56506, subd. (e).) The district must propose a written assessment plan and include notice of the procedural safeguards under the IDEA and state law. (20 U.S.C. § 1414(a)(1)(D)(ii); Ed. Code, §§ 56321, 56329, 56381.)

6. The assessments shall be conducted by trained and knowledgeable

personnel, except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. (Ed. Code, § 56320, subd. (b)(3).) In conducting an assessment, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student. This may include information provided by the parent that may assist in determining whether the student is a child with a disability, and the content of the student's IEP, including information related to enabling the child to be involved and progress in the general education curriculum. (34 C.F.R. § 300.304(b)(1)(i), (ii) (2006).) No single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or for determining an appropriate educational program for the student. (34 C.F.R. § 300.304(b)(2) (2006).) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's native language or other mode of communication unless this is clearly not feasible. (Ed. Code, § 56320, subd. (a); 20 U.S.C. § 1414(b)(2), (3); 34 C.F.R. § 300.304(c)(1)(i), (ii) (2006).)

MAY THE DISTRICT CONDUCT AN ASSESSMENT OF STUDENT WITHOUT THE CONSENT OF STUDENT'S PARENT?

7. The evidence established that the District does not have sufficient, current information about Student to determine exactly what his unique needs are, and what programs and services can best be utilized to give him a FAPE. (See, Factual Findings 1-4, 7-8 and 11; Legal Conclusions 2-3.) Student's failure to attend school and his behavior in school properly concern the District. The District asked Parent for consent to have District personnel evaluate Student only after Parent would not sign consent for the IEE he requested for Student. (Factual Findings 2-6; Legal Conclusions 4 and 5.)

8. As demonstrated by Legal Conclusion 7, the District has demonstrated a

need for the requested assessment. The District demonstrated that it has qualified personnel to conduct that assessment. (Factual Findings 9-11; Legal Conclusion 6.) Parent was provided with an assessment plan and the appropriate notices of IDEA procedural safeguards at the appropriate times. (Factual Findings 3-6; Legal Conclusion 5.) The District has appropriate personnel to conduct the various parts of the assessment, as well as the appropriate tools and strategies to evaluate Student. (Factual Findings 9-11; Legal Conclusion 6.) The District has shown that it needs to assess Student, and is entitled to do so.

ORDER

The District is entitled to assess Student pursuant to the November 5, 2008 assessment plan, without parental consent. Parent shall make Student reasonably available for assessment by the District.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed on the single issue heard and decided in this case.

RIGHT TO APPEAL

The parties to this case have the right to appeal this decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: January 14, 2009

_____/s/_____

REBECCA P. FREIE

Administrative Law Judge

Office of Administrative Hearings