BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: SAN DIEGUITO UNION HIGH SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2016021044

DECISION

The San Dieguito Union High School District filed a due process hearing request naming Parent on behalf of Student with the Office of Administrative Hearings, State of California, on February 25, 2016.

Administrative Law Judge Cole Dalton heard this matter in San Diego, California, California, on March 22, 2016.

Attorney Justin Shinnefield represented District. Director of Special Education, Charles Adams, attended the hearing on behalf of District.

Parent represented Student. Student attended the hearing.

At the conclusion of the hearing, OAH granted the parties' request for a continuance to March 31, 2016, to submit written closing briefs. Briefs were timely filed and the matter was submitted on March 31, 2016.

ISSUE[1]

1. May District conduct assessments of Student pursuant to its November 2, 2015 assessment plan without parental consent if Student continues to request special education services from District?

SUMMARY OF DECISION

District seeks permission to conduct triennial special education assessments of Student to develop an appropriate individualized education program. Student consented in writing to assessments, but she did not make herself reasonably available for them. The evidence showed that assessments sought by District were necessary and appropriate, and District followed all required procedures to obtain Student's consent for and participation in the assessments. Student failed to show she was unable to undergo assessments for more than one or two hours per week due to emotional or physical issues. District has established its right to assess Student. District will not be obligated to continue to provide special education services to Student if she does not make herself reasonably available for timely completion of the assessments.

FACTUAL FINDINGS

1. Student, who was 18 years old at the time of hearing, resided with her parent and attended Torrey Pines High School within District at all times relevant to this hearing. Student was eligible for special education as a child with autism, speech and language impairment and other health impairment due to attention deficit disorder. During the 2015 – 2016 school year, she was enrolled in five general education classes,

[1] The issue has been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School District* (9th Cir. 2010) 626 F.3d 431, 442-443.)

cross-country track and a special education class called Learning Center.

2. District held Student's last triennial individualized education program meeting on January 14, 2013. District reviewed the need for additional data to appropriately address Student's areas of need at subsequent annual IEP meetings on September 21, 2015, and October 29, 2015. Student reported she needed additional adult support to help her understand directions, complete homework assignments and prepare for tests. At the time of the 2015 meetings, Student was failing her biology class.

3. District concluded it needed to assess and observe Student to determine present levels of functioning and achievement. Assessment results would inform the IEP team sufficiently to develop an appropriate program and offer Student a free appropriate public education.

4. District provided an assessment plan to Parent at both of the 2015 IEP meetings in anticipation of the January 2016 triennial IEP meeting. The assessment plan was written in Parent's primary language of English, in a manner understandable to the general public. The plan sought to assess Student in the areas of academic achievement, health, intellectual development, language/speech communication development, motor development, social/emotional, and adaptive behavior, and specified that an assistive technology consultation and record review would be performed. The plan described the areas District wanted to assess in sufficient detail to inform Parent of the nature and purpose of the assessments.

5. District had appropriately qualified personnel available to conduct each of the assessments. A credentialed school nurse would conduct the health assessment. A credentialed school psychologist would conduct the intellectual development, social/emotional, adaptive behavior and motor development assessments. Credentialed providers would conduct academic achievement, post-secondary transition and assistive technology assessments, in their respective areas of expertise.

6. Parent did not sign the assessment plan at either the September or October

2015 IEP meetings. District mailed the assessment plan to Parent on November 2, 2015, and emailed it on November 23, 2015. District unsuccessfully followed up with Parent to obtain consent using email and telephone calls. District provided copies of procedural safeguards to Parent at the September and October 2015 IEP meetings and in a subsequent prior written notice letter dated December 4, 2015. In the December letter, District explained that it believed conditions warranted reassessment and observation of Student in the educational setting to obtain sufficient information to offer Student a free appropriate public education.

7. Parent modified the assessment plan by adding a post-secondary transition assessment. She signed consent to the modified plan on January 22, 2016. District accepted the modification and began the health assessment on January 22, 2016.

8. Student turned 18 years old on January 27, 2016, and, on that date, granted Parent educational rights. On January 28, 2016, Student revoked the assignment of educational rights. On March 15, 2016, Student signed the modified assessment plan. On March 22, 2016, Student again granted Parent educational decision-making authority.

STUDENT'S LIMITATIONS ON ASSESSMENTS

9. The parties did not dispute that the assessments on the modified plan were appropriate and necessary. Neither Parent nor Student, revoked their consent to any of the assessments. However, both sought restrictions on the amount of time Student would be assessed during any given school week, due to Student's alleged physical and emotional limitations.

10. Student initially sought to limit testing one-half hour per week until assessments were completed. She later agreed she could be tested up to one or two hours at a time. Student felt more testing time per week would create an undue burden on her to keep up with her academics due to her attention issues. Further, she was involved in an automobile accident on March 6, 2016, when she hit her head, had

whiplash and felt dizzy afterwards. She provided District a note from a doctor indicating she could not be tested for a two-week period.

11. Student claimed the head injury continued to compromise her ability to participate in testing for longer than one or two hours at a time. However, Student did not credibly demonstrate through documentary evidence or expert testimony that she required severe time limitations on triennial testing. Most of Student's classes were held in two-hour blocks and she did not have difficulty sitting and attending those classes either before or after her accident. Student offered no evidence that any emotional or physical issue impaired Student's ability to undergo triennial assessments.

12. District offered 20 different testing sessions during class periods chosen by Student and during non-academic periods. Testing sessions were scheduled in one to two hour blocks, over the course of several days. District offered to provide supervised breaks during testing sessions, to address fatigue. Student had only agreed to one testing session by the time of hearing. District continued to offer Student testing in small increments with accommodations so that the triennial assessments could be completed and reviewed at an IEP team meeting.

13. Student was on track to graduate with a regular high school diploma and intended to enroll in a four-year college. Since the September 2015 IEP meeting, she requested more specialized academic instruction or support from District to succeed in her core curriculum. Without triennial assessments and a subsequent IEP meeting, District cannot appropriately update Student's IEP to address her current levels of functioning and request for additional support.

LEGAL AUTHORITIES AND CONCLUSIONS

ISSUE 1: DISTRICT'S RIGHT TO ASSESS

1. District contends that, because it has not assessed Student in over three years, it must conduct triennial assessments to determine Student's academic

achievement and present levels of performance so District can offer appropriate supports and services. Student agreed that the assessments proposed in District's plan, as modified by Parent, are necessary and appropriate. However, Student contends assessments should be limited to one to two hours per week, at a time of her choosing, due to her inability to attend for longer periods of time.

LEGAL AUTHORITIES

Introduction – Legal Framework under the IDEA[2]

2. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)[3] et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

3. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and

[2] Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

[3] All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

4. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the

Rowley standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).)

6. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, District bears the burden of persuasion.

DUTY TO ASSESS

7. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parent[4] and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related

[4] Parent rights transferred to Student at the age of majority. (20 U.S.C. § 1415(m)(1); 34 C.F.R. § 300.520(a)(ii); Ed. Code, § 56041.5.)

service needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (Ed. Code, § 56320, subd. (g), and 56322; see 20 U.S.C. §1414(b)(3)(B)(ii).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) A health assessment must be performed by a credentialed school nurse or physician who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, § 56325, subd. (b).)

8. Reassessments of a pupil with special needs require parental consent. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(i); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent for a reassessment, the local educational agency must provide proper notice. (20 U.S.C. §§1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56329.) The notice must be given to the parent of a child with a disability in written language understandable to the general public, and in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. (34 C.F.R. § 300.503(c)(1).) The district must give the parent 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

9. Parents who want their children to receive special education services must allow reassessment by the district. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; *Dubois v. Conn. State Bd. of Ed.* (2d Cir.1984) 727 F.2d 44, 48.) There is no exception to this rule. (*Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178.) If the parent does not consent to a reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(a)(3)(i), (c)(ii)(2006); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

Analysis and Conclusions

10. District proved that it needed and is entitled to assess Student pursuant to the November 2, 2015 assessment plan, as modified and signed by Parent in January 2016 and Student in March 2016.

11. The modified November 2, 2015 assessment plan met the legal requirements of proper notice. The plan described the areas to be assessed in language understandable by the general public. It adequately informed Parent and Student of the nature and purpose of the assessments such that they could provide informed consent. District sent the plan to Parents in their native language of English. Student did not disagree with the qualifications of District's assessors.

12. District had not conducted comprehensive assessments of Students for over three years. District proved assessments were necessary to determine Student's present levels of performance and areas of need to inform the IEP team as to what changes needed to be made to Student's educational program.

13. Student did not show she required restrictions on the frequency or duration of assessments due to emotional or physical limitations. District made extensive but unsuccessful efforts to confer with Parent and Student to develop a mutually agreeable assessment timeline. District's efforts to administer tests in smaller time increments with accommodations were reasonable. However, Student continued to refuse to make herself available for testing. Student presented no valid reason for not allowing completion of triennial assessments over the two months between Parent signing the plan and District's due process complaint.

14. Student must be made available for assessment by District if she wants to continue to receive special education services from District.

ORDER

1. District shall assess Student according to the assessment plan dated

November 2, 2015, as modified and signed by Parent on January 22, 2016, and by Student on March 15, 2016.

2. Student shall make herself available for District to complete all assessments, within 45 days of the date of this Decision. District shall schedule testing in increments of no more than two hours per day, no more than three days per week, and offer Student supervised breaks to address attention and fatigue for up to 15 minutes after each full hour of testing. If Student does not complete the assessment process within the 45 day timeframe, District will no longer be obligated to provide Student with special education services unless or until all assessments are completed and an IEP team meeting is held.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

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 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

DATED: April 14, 2016

/s/

COLE DALTON

Administrative Law Judge

Office of Administrative Hearings