

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

UPLAND UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2017021090

DECISION

Upland Unified School District filed a Request for Due Process Hearing with the Office of Administrative Hearings, State of California, on February 23, 2017, naming Parent on behalf of Student. On March 13, 2017, OAH granted District's Motion to Amend its complaint. On May 1, 2017, OAH granted a continuance of the due process hearing for good cause.

Administrative Law Judge Tara Doss heard this matter in Upland, California, on May 31, June 1, 15, and 19, 2017.

Jonathan Read, Attorney at Law, represented District. Rochelle Yatomi, Special Education Director, attended the first and second days of hearing on behalf of District. Dr. Geraldine Tamayo, Special Education Coordinator, attended the first, third, and fourth days of hearing on behalf of District. Dr. Royal Lord, Program Manager of West End Special Education Local Plan Area, attended the first, third, and fourth days of hearing on behalf of District.

Student's mother appeared on Student's behalf on all days of hearing. Student's father attended the third day of hearing. David Palmer, non-attorney representative,

assisted Parent on all days of hearing. Rita Loof, community volunteer, assisted Parent on the first and fourth days of hearing.

OAH granted a continuance to July 3, 2017, to allow the parties to file written closing briefs. On July 3, 2017, the parties timely submitted their final written closing briefs, the record was closed, and the matter submitted for decision.

ISSUE¹

May District assess Student without parental consent, pursuant to its December 22, 2016 assessment plan, as revised on March 2, 2017?

SUMMARY OF DECISION

District contended it needed a comprehensive assessment of Student because Student was making limited progress and the individualized education program team needed current assessment data to better understand Student's cognitive, academic, and functional needs, so that it could offer appropriate special education placement and services. District also contended the December 22, 2016 assessment plan, as revised on March 2, 2017, met all legal requirements. Student contended she did not require reassessment because she was making adequate progress, and the IEP team had sufficient data to develop an appropriate program. Parent also contended the proposed assessment plan did not meet all legal requirements.

District met its burden in proving it needed to reassess Student. Student was making slow progress on her IEP goals and was performing three to four years below

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 Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

grade level. District and Parent disagreed with the amount of special education instruction Student required. District needed updated assessment data regarding Student's needs to better understand how she learned and to develop an appropriate program for her. District also met its burden in proving it complied with all procedural requirements with respect to obtaining informed parental consent for the assessments. District may assess Student without parental consent, pursuant to the December 22, 2016 assessment plan, as revised on March 2, 2017.

FACTUAL FINDINGS

BACKGROUND

1. Student was a 10-year-old, fourth grade female at the time of the hearing. She resided within District boundaries for all relevant times. She was initially found eligible for special education at an IEP team meeting on September, 3, 2009. Her initially eligibility was other health impairment. District added speech or language impairment as a secondary eligibility.

2. Student enrolled at District in December 2015 and began attending a District school on January 13, 2016. Prior to enrolling at District, Student attended school within the Placentia-Yorba Linda Unified School District.

3. Student had health needs related to Trisomy 21, which is the genetic description of what is commonly referred to as Down syndrome. Down syndrome can involve global delays in development of physical, social, linguistic, and intellectual functioning. Student had a history of seizures and a health plan while attending Placentia-Yorba Linda.

4. Placentia-Yorba Linda completed a multidisciplinary assessment team report in January 2015. The report included assessments in multiple areas by the school psychologist, resource specialist program teacher, speech and language specialist,

physical therapist, pediatric occupational therapist, and adapted physical education specialist. The report did not include any cognitive or psychological standardized testing.

2015-2016 SCHOOL YEAR: STUDENT'S ENROLLMENT WITH DISTRICT

5. During the end of the 2014-2015 school year and the beginning of the 2015-2016 school year, Placentia-Yorba Linda referred Student for independent educational evaluations in assistive technology, speech and language, vision therapy, occupational therapy, and psychoeducation. District received copies of each report, with the exception of the psychoeducational report. District reviewed the reports at various IEP team meetings throughout the 2015-2016 school year.

6. District convened a 30-day IEP team meeting on February 10, 2016. District did not conduct any assessments in preparation for this meeting. The IEP team discussed the independent assistive technology evaluation. District offered placement in general education with pull-out specialized academic instruction in English-language arts for 45 minutes, five times per week, in math for 30 minutes, three times per week, and collaboration with the general education teacher for 30 minutes per week. District also offered speech and language, occupational therapy, adapted physical education, assistive technology, and a temporary special needs assistant (one-to-one aide) for the full school day. Parent did not consent to District's offer of specialized academic instruction and informed District she was only authorizing pull-out specialized academic instruction in English-language arts for 45 minutes, four times per week and in math for 30 minutes, three times per week. District agreed to implement Parent's requested specialized academic instruction.

7. Student's special education teacher worked with the third grade general education teacher to modify Student's classwork to her developmental level, which was at kindergarten to first grade level. Student was very shy and quiet, and only spoke to

select persons. She did not speak to the general education teacher and would stop working if she was nearby. She spoke to the one-to-one aide, the special education teacher, the speech and language pathologist, and one other student.

8. District held Student's annual IEP team meeting on March 16, April 15, and May 2, 2016. The IEP team reviewed Student's present levels and progress on goals. Student made progress towards meeting her goals but only met five of 13 academic goals. She was able to read a first grade passage without comprehension, verbalize a complete sentence with teacher prompting, and count to ten consistently. The team recommended adding speech or language impairment as a secondary eligibility to reflect a recent diagnosis of selective mutism. The team also provided Parent with an assessment plan that proposed assessments for a temporary special needs assistant and functional behavior, to be conducted by a District school psychologist. Parent consented to the assessment plan. District continued to offer placement in general education but recommended an increased amount of pull-out specialized academic instruction. District wanted to increase Student's pull-out specialized academic instruction because Student was making slow progress on her IEP goals, some of which she had for multiple years. Parent consented to the IEP, with the exception of the increase in pull-out specialized academic instruction.

9. A District school psychologist conducted the temporary special needs assistant assessment and functional behavior assessment in April and May 2016. The temporary special needs assistant assessment consisted of Student, teacher, and Parent interviews; and observations of Student in academic and non-academic settings. The assessor recommended a more intensive academic environment with a smaller teacher to student ratio, additional support in specialized academic instruction, and a fading plan and goals to support Student's independence from her one-to-one aide. The functional behavior assessment consisted of review of records, Parent and teacher

interviews, observations of Student in academic and non-academic settings, Parent and teacher rating scales of the Behavior Assessment System for Children, Second Edition, a Parent Reinforcement Survey, and a Reinforcement Sentence Completion sheet completed by Student and her aide. The assessor recommended a behavior intervention plan and a behavior goal to increase communication with non-preferred staff and peers. Neither assessment included cognitive or psychological standardized testing. District convened an IEP team meeting on May 23, 2016, to discuss the results of these assessments.

2016-2017 SCHOOL YEAR

10. Parent did not believe Student's needs were being met, so on or around August 26, 2016, she requested an independent temporary special needs assistant evaluation. Parent was also concerned Student's IEP did not have annual goals in speech fluency and articulation; so on October 13, 2016, District's speech and language pathologist sent Parent an assessment plan proposing an assessment in language/speech communication development. Parent consented to the assessment plan. On November 14, 2016, Parent requested an independent functional behavior assessment.

11. As of Student's progress report on November 7, 2016, she met 14 of 27 short-term objectives. She met three of 13 short-term objectives for academic goals. She made some progress towards the short-term objectives she did not meet.

12. District convened an IEP team meeting on December 14, 2016, to review the speech and language assessment. District denied Parent's request for independent evaluations in vision therapy, temporary special needs assistant, and functional behavior. District offered to move up Student's triennial evaluation and do a comprehensive assessment with the exception of speech and language. District wanted updated assessment data in all areas of suspected disability so it could get a complete picture of

Student's needs. As part of the comprehensive assessment, District offered to conduct another temporary special needs assistant assessment and functional behavior assessment using a different District assessor.

13. Susan Thorndyke, served as Student's case carrier and was the special education teacher who provided Student's specialized academic instruction during the 2016-2017 school year. Ms. Thorndyke modified Student's work in the general education classroom to her developmental level, which was still at kindergarten to first grade level. Ms. Thorndyke was employed with District for 33 years. She worked as a resource specialist program teacher for two years. Prior to that, she worked as a special day class teacher for students with mild to moderate disabilities for 32 years. She held a Bachelor of Arts in Liberal Studies/Psychology from California State University, Long Beach and a Master of Arts in Learning Handicapped from California State University, Los Angeles. She also held a multiple subjects credential, a learning handicapped specialist credential, a resource specialist authorization, and an autism certification. She had conducted thousands of informal assessments and approximately 500 formal assessments of students. She was qualified to assess Student in the area of academic achievement.

14. Ms. Thorndyke attended the December 14, 2016 IEP team meeting. She was not satisfied with Student's progress on goals. Student was three to four years below grade level in all areas. In her opinion, assessment was warranted because the IEP team needed more information regarding how Student learned to better design an educational program for her. Through psychological assessments, the team would be able to see her strengths and weaknesses with respect to her processing skills. District had never conducted a formal academic assessment of Student. Ms. Thorndyke's testimony was precise, thoughtful, and consistent with documentary evidence. She was a credible witness and her testimony was given substantial weight.

15. Heather Hoornbeek, provided school-based occupational therapy to Student since she entered District in January 2016. Ms. Hoornbeek worked with District for two and a half years.² In total, she had worked as an occupational therapist in a school setting for 17 years. Her job duties included conducting assessments, writing reports, and providing occupational therapy services. She had assessed an estimated several hundred students. She held a Bachelor of Science in Psychology (emphasis on Neuropsychology) from University of Michigan and a Master of Science in Occupational Therapy from Washington University School of Medicine. She was qualified to assess Student in motor development and occupational therapy.

16. Ms. Hoornbeek attended the December 14, 2016 IEP team meeting. In her opinion, Student needed an occupational therapy assessment so that goals could be developed using current information. Ms. Hoornbeek's clinical observations were strong, but standardized assessments would provide more detail regarding Student's developmental levels. District had never conducted an occupational therapy assessment of Student. Ms. Hoornbeek's testimony was precise, thoughtful, and consistent with documentary evidence. She was a credible witness and her testimony was given substantial weight.

17. On December 22, 2016, District school psychologist, Christian Guerrero, emailed Parent an assessment plan, which included assessments in academic achievement, health, intellectual development, motor development, social/emotional, adaptive/behavior, temporary special needs assistant, and a functional behavior assessment. The proposed assessments were to be conducted by trained and knowledgeable persons, competent to conduct the assessments, including the special

² Ms. Hoornbeek was a District employee for two years and worked with District through a contracting agency for six months.

education teacher, District nurse, school psychologist, occupational therapist, and adapted physical education teacher. Each evaluation category explained the types of assessments to be conducted. Academic achievement included reading, spelling, oral and written language skills, and/or general knowledge. Health included health information and testing to determine how health affects the child's performance. Intellectual development included measuring how well the child thinks, remembers, and solves problems. Motor development included measuring how well the child coordinates body movements in small and large muscle activities, and perceptual skills. Social/emotional included how the child feels about him/herself, gets along with others, takes care of personal needs at home, school, and in the community. Adaptive/behavior included how the child takes care of personal needs at home, school, and in the community. The assessment plan included a statement that tests and procedures may include, but are not limited to, classroom observation, rating scales, interviews, record review, one-on-one testing, or some other types or combination of tests. The assessment plan was in a language easily understood by the general public and was in Parent's native language of English. The assessment plan also stated no special education services would be provided without parental consent.

18. Mr. Guerrero worked as a school psychologist with District since August 2016. Prior to that, he worked as a school psychologist with several other school districts for approximately eight years. He held a Bachelor of Arts in Sociology from California State University, San Bernardino, a Master of Arts in Educational Psychology from Azusa Pacific University, and a pupil personnel services credential in school psychology. In his role as a school psychologist, Mr. Guerrero prepared assessment plans, administered assessments, consulted with teachers and staff, participated in IEP team meetings, and counseled individual students. He was qualified to assess Student

in the areas of intellectual development, social/emotional, adaptive/behavior, temporary special needs assistant, and functional behavior.

19. Mr. Guerrero had never met or assessed Student. In preparation for drafting the assessment plan, he spoke to Terri Scott, who served as the District administrator at the December 14, 2016 IEP team meeting, reviewed the notes from that IEP team meeting, and reviewed Student's file. In Mr. Guerrero's opinion, Student needed a psychoeducational assessment due to the IEP team's concern regarding her progress and because none of Student's previous assessments District reviewed, including Placentia-Yorba Linda's multidisciplinary assessment, provided sufficient information regarding Student's cognitive and psychological processing abilities. A psychoeducational assessment of Student would provide insight on her learning profile, areas of need, strengths and weaknesses, and how she learned best. District had never conducted a psychoeducational assessment of Student. Mr. Guerrero's testimony was credible and was given substantial weight.

Revised Assessment Plan and Parent's Conditions on Assessment

20. District convened an IEP team meeting on February 13, 2017, at Parent's request. Parent requested an assessment by an inclusion specialist, and reiterated prior requests for independent evaluations in vision therapy, temporary special needs assistant and functional behavior. District denied Parent's assessment requests and asked for her consent to move forward with the assessments proposed in the December 22, 2016 assessment plan. Mr. Guerrero explained the assessments would involve observations, interviews, review of records and prior assessments. Parent agreed to take the assessment plan home for consideration.

21. On February 24, 2017, Parent informed District she was not refusing to allow District to assess, but could not consent to District doing another temporary special needs assistant assessment or functional behavior assessment. Parent expressed

concern with Student missing instruction during testing and requested that District conduct the assessments after school or during extended school year. Parent also requested further clarification on what assessments District was proposing as part of the reassessment.

22. On March 2, 2017, Ms. Yatomi sent a letter to Parent informing Parent that District agreed to fund or provide independent evaluations for a temporary special needs assistant and functional behavior. Ms. Yatomi revised the December 22, 2016 assessment plan by removing District's proposed assessments for a temporary special needs assistant and functional behavior. The revised assessment plan did not add any new assessment areas. Ms. Yatomi enclosed the revised assessment plan and a Notice of Parental Rights and Procedural Safeguards with the letter to Parent.

23. On March 9, 2017, District filed a Motion to Amend its complaint with OAH. The amended complaint asserted District should be allowed to assess Student without parental consent, pursuant to the revised assessment plan sent to Parent on March 2, 2017.

24. District convened Student's annual IEP team meeting on March 14, 2017. Ms. Yatomi discussed District's continued interest in moving up Student's triennial and conducting assessments to obtain current information. She stated the disagreement regarding placement between Parent and District as a reason for assessing Student. Parent's advocate, Chris Russell, stated Parent had issues with the proposed assessments, including disruption to Student's day. The IEP team reviewed Student's progress on goals. Overall, Student met 12 of 29 annual goals. She met four of 13 academic goals. She did not meet any of her four occupational therapy goals. District continued to offer an increased amount of pull-out specialized academic instruction.

25. On March 15, 2017, Mr. Russell requested information regarding which assessments District was proposing and an answer regarding Parent's disagreement with

an IQ test being conducted. Mr. Russell requested assessments in vision therapy and assistive technology be added to the proposed assessment plan.

26. Ms. Yatomi sent Parent several prior written notice letters throughout Student's enrollment with District. Parent felt intimidated by the length and frequency of the letters. Parent also felt intimidated by District's threats to file due process against her for not agreeing to increased pull-out specialized academic instruction or consenting to District's proposed assessment plans.

27. Parent had no intention on consenting to the December 22, 2016 assessment plan, as revised on March 2, 2017, unless District made her requested changes to the plan. Parent wanted the assessment plan to include additional assessments, assurance that no IQ tests would be administered, and agreement the assessments would be conducted after school hours. District had not agreed to Parent's requests.

LEGAL AUTHORITY AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006)⁴; 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

³ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁴ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

education and related services designed to meet their unique needs and prepare them for further education, 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).)

2. 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;) "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 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 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 specifies 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)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690], 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.) In a recent unanimous decision, the United States Supreme Court also declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court’s analysis, and clarified FAPE as “markedly more demanding than the ‘merely more than the de minimus test’...” (*Endrew F. v. Douglas County Sch. Dist. RE-1 (2017) 580 U.S. ___ [137 S. Ct. 988] (2017 WL 1066260)*). The Supreme Court in *Endrew* stated that school districts needed to “offer a cogent and responsive explanation for their decisions...” and articulated FAPE as that which is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstance.” *Id.*

4. The Supreme Court revisited and clarified the *Rowley* standard in *Endrew F. v. Douglas County School District* (2017) 580 U.S. __ [137 S.Ct. 988, 197 L.Ed.2d 335]. It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, Slip Op. at pp. 13-14, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student’s IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Endrew*, Slip Op. at p. 12.)

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) & (f); 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, § 56502, 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); Ed. Code, § 56505, subd. (l).)

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].) In this matter, District had the burden of proof on the sole issue.

ISSUE: DISTRICT'S RIGHT TO ASSESS STUDENT WITHOUT PARENTAL CONSENT

7. District contended it should be allowed to assess Student without parental consent, pursuant to its December 22, 2016 assessment plan, as revised on March 2, 2017, because conditions warranted reassessment and District complied with all procedural requirements. District contended Student was making slow progress on her IEP goals and the IEP team needed current data regarding Student's present levels of cognitive ability, academic achievement, and functional performance. District also contended it had never conducted health, psychoeducational, occupational therapy, or adapted physical education assessments of Student. Finally, District contended current assessment data was needed to determine the appropriate special education placement and services for Student.

8. Student contended District should not be allowed to assess her without parental consent because District's motives in seeking reassessment were improper and the assessment plan did not reflect Parent's requested conditions for assessment. Student contended she made adequate progress on her IEP goals and that the IEP team had sufficient data to develop an appropriate program. Student also contended District's motives for reassessment were to deny Parent's request for independent

evaluations and to recommend a change of placement to a more restrictive setting. Moreover, Student contended District engaged in bullying and intimidation in an attempt to force Parent to sign the assessment plan. Finally, Student contended District did not agree to the conditions she requested, including adding additional assessments to the assessment plan, informing her of the specific test instruments, and assessing Student after school or during extended school year.

Legal Authority

REASSESSMENTS

9. School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur throughout the course of the student's educational career. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).)

10. The IDEA provides for reevaluations (referred to as reassessments in California law) to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school 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).) The school district must also conduct a reassessment if it determines that the educational or related service needs of the child, including improved academic achievement and functional performance, warrant a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

11. Without updated information from a reevaluation, it may be difficult to develop an educational program that would ensure a student's continued receipt of a FAPE. (*Cloverdale Unified School Dist.* (March 21, 2012) Cal.Off.Admin.Hrnngs. Case No. 2012010507, 58 IDELR 295, 112 LRP 17304.)

PROCEDURAL REQUIREMENTS AND PARENTAL CONSENT

12. A district must obtain informed consent from the parent before conducting the evaluation. (20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. § 300.300(a).) Specifically, the parent must be given a proposed assessment plan, in writing, within 15 days of the referral for assessment, along with a notice of IDEA procedural safeguards and parent's rights under the Education Code. (Ed. Code, § 56321, subd. (a).) The proposed assessment plan must: (1) be in a language easily understood by the general public; (2) be provided in the native language of the parent or other mode of communication, unless to do so is clearly not feasible; (3) explain the types of assessments to be conducted; and (4) state that no IEP will result from the assessment without parental consent. (Ed. Code, § 56321, subd. (b).) The parent has at least 15 days from receipt of the proposed assessment plan to arrive at a decision and the assessment may begin immediately upon receipt of parental consent. (Ed. Code, § 56321, subd. (c)(4).)

13. Assessments must be conducted by trained and knowledgeable persons, who are competent to perform them, as determined by the local educational agency. (20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c)(1)(iv); Ed. Code, § 56322.) Any psychological assessments must be conducted by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).) Any health assessments must be conducted by a credentialed school nurse or physician. (Ed. Code, § 56324, subd. (b).)

14. As part of the procedural safeguards of the IDEA, school districts are required to send prior written notice to parents whenever the district proposes to

initiate or change; or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).)

15. Parents who want their child to receive special education services must allow reassessment if conditions warrant it. In *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315, the court stated that “if the parents want [their child] to receive special education under the Act, they are obliged to permit such testing.” (See, e.g., *Patricia P. v. Board of Educ. of Oak Park and River Forest High School Dist. No. 200* (7th Cir. 2000) 203 F.3d 462, 468; *Johnson v. Duneland School Corp.* (7th Cir. 1996) 92 F.3d 554, 557-58 “[B]ecause the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation”]; *Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178 “[A] parent who desires for her child to receive special education must allow the school district to evaluate the child ... [T]here is no exception to this rule”].) Moreover, parents who want their children to receive special education services cannot force the district to rely solely on an independent evaluation. (*Patricia P., supra*, at p. 468; *Andress, supra*, at pp. 178-179.)

16. As long as statutory requirements for evaluation procedures have been met, parents may not put conditions on assessments. (See *M.T.V. v. DeKalb County School Dist.* (11th Cir. 2007) 446 F.3d 1153, 1160 [a school district has the right to evaluation by an assessor of its choice]; *M.W. v. Poway Unified School Dist.* (SD Cal. Aug. 14, 2013) (unpub.) citing *K.S. v. Fremont* (ND Cal., 2009) 679 F.Supp.2d 1046, 61 IDELR 250, 113 LRP 33620 [holding school district may proceed with cognitive testing over the objection of the parent]; *Letter to Anonymous* (OSEP Sept. 17, 1993) 20 IDELR 542, 20 LRP 2357 [the selection of particular testing or evaluation instruments is left to the discretion of State and local educational authorities].)

17. If a parent does not consent to the assessment plan, the school district may conduct the reassessment without parental consent if it shows at a due process hearing that conditions warrant reassessment of the student and that it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) Therefore, a school district must establish that (1) the educational or related services needs of the child warrant reassessment of the child, and that (2) the district has complied with all procedural requirements to obtain parental consent.

Analysis

CONDITIONS WARRANTING REASSESSMENT

18. District met its burden of proving conditions warranted reassessment of Student pursuant to its December 22, 2016 assessment plan, as revised on March 2, 2017. Student had a need for improved academic and functional performance. She was performing three to four years below grade level in all areas. She was making slow progress on many of her IEP goals, some of which she had for multiple years. She relied on a one-to-one aide for most of her academic needs throughout the school day.

19. Moreover, Student had demonstrated health, academic, motor, social, and behavioral needs. District staff testified credibly the IEP team needed updated assessment data to better address those needs and develop an appropriate educational program for Student. Ms. Thorndyke testified a psychoeducational assessment would allow the IEP team to see Student's strengths and weaknesses with respect to her processing skills. Ms. Hoornbeek testified standardized occupational therapy testing would provide more detail regarding Student's developmental levels. Mr. Guerrero testified psychological testing would provide insight on Student's learning profile, areas of need, strengths and weaknesses, and how she learned best.

20. Finally, while District had conducted several assessments of Student and reviewed several independent evaluations of Student, District had not assessed Student in health, psychoeducation, occupational therapy, or adapted physical education. District also did not have any cognitive or psychological testing data regarding Student because none of Student's previous assessments District reviewed contained such testing. Mr. Guerrero testified credibly that a psychoeducational assessment of Student was necessary to understand how she learned.

21. Student's contention that she was making adequate progress on her IEP goals was not persuasive. Student's goals were written at kindergarten to first grade level, and she had some goals for multiple years. Student only met five of 13 annual goals at the end of the 2015-2016 school year. By November 2016, Student had only met 14 of 27 short-term objectives, including only three of 13 academic short-term objectives. At Student's March 14, 2017 annual IEP team meeting, she only met 12 of 29 annual goals. She met only four of 13 academic goals, and did not meet any of her four occupational therapy goals. While Student was making some progress, the fact she did not meet the majority of her academic goals and short-term objectives since enrolling with District, or any of her occupational therapy goals at the most recent annual IEP team meeting, supported District's conclusion that Student had a need for improved academic achievement and functional performance.

22. Student's contention that District initially offered to move up her triennial evaluation at the December 14, 2016 IEP team meeting in order to deny Parent's requests for independent evaluations, did not establish District should not be allowed to assess Student pursuant to the December 22, 2016 assessment plan, as revised on March 2, 2017. In order to assess Student, District only had to establish that conditions warranted reassessment and the procedural requirements were met. Similarly, Student's contention that District should not be allowed to assess her because they wanted to use

the assessment data to change her placement to a more restrictive setting was not persuasive. On the contrary, a proposed change in placement would be an appropriate reason to propose assessment of Student.

23. Student's contention District used bullying or intimidation in an attempt to force Parent to sign the assessment plan was not persuasive. Parent testified she felt intimidated by Ms. Yatomi's lengthy and frequent letters that referenced District's intention to file a due process complaint if Parent did not take certain actions, such as signing the assessment plan. School districts are required to send parents prior written notice whenever the district proposes to initiate or change; or refuses to initiate or change, the identification, evaluation, or educational placement of a child, or the provision of a FAPE to a child. Ms. Yatomi's letters to Parent fulfilled District's obligation to provide prior written notice and were appropriate. Additionally, both school districts and parents have the right to initiate a request for a due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of a child, or the provision of a FAPE to a child. Ms. Yatomi informing Parent District would exercise this right, did not establish District intimidated or bullied Parent.

PROCEDURAL REQUIREMENTS AND PARENTAL CONSENT

24. District met its burden in showing it complied with all procedural requirements to obtain informed parental consent for reassessment of Student pursuant to the December 22, 2016 assessment plan, as revised on March 2, 2017. The assessment plan met all legal requirements. District included a copy of parent's rights and procedural safeguards. It was written in Parent's native language of English and was easily understandable. It included a description of the proposed assessments, and informed Parents no educational placement or services would be provided without parental consent. The assessment plan identified assessors who were trained and knowledgeable persons, and were competent to conduct the proposed assessments,

including the school nurse, school psychologist, special education teacher, occupational therapist, and adapted physical education teacher. Mr. Guerrero was qualified to conduct the psychoeducational assessment. Ms. Thorndyke was qualified to conduct the academic portion of the psychoeducational assessment. Ms. Hoornbeek was qualified to conduct the occupational therapy assessment.⁵

25. District established it provided Parent with notice of the assessment plan and gave Parent sufficient time to consider providing consent. Mr. Guerrero initially emailed Parent the assessment plan seeking a comprehensive reassessment of Student on December 22, 2016. The IEP team discussed the assessment plan during the February 13, 2017 IEP team meeting. Ms. Yatomi again requested that Parent consent to the assessment plan in a February 22, 2017 letter. Parent informed Ms. Yatomi she would not consent to the assessment plan if it included temporary special needs assistant and functional behavior assessments, so Ms. Yatomi revised the assessment plan to remove the assessments Parent did not want, and sent the revised plan to Parent on March 2, 2017. At the March 14, 2017 IEP team meeting and in an email to Ms. Yatomi on March 15, 2017, Parent's advocate, Mr. Russell, informed District Parent would not consent to the revised assessment plan unless District agreed to the conditions she placed on assessment. Thus, even though District amended its complaint less than 15 days after sending Parent the revised assessment plan, Parent had no intention on signing the revised assessment plan unless District agreed to her conditions. Moreover, Parent had been considering the proposed assessment areas on the revised assessment plan since District sent her the December 22, 2016 assessment plan. The revised assessment plan did not include any new assessment areas for Parent

⁵ Student did not contend the school nurse or adapted physical education teacher were not qualified to assess Student.

to consider. Therefore, Parent had sufficient time to consider providing consent to the December 22, 2016 assessment plan, as revised on March 2, 2017.

26. Student did not legally support her contentions that the assessment plan did not comply with procedural requirements because (1) it failed to include the additional assessments Parent requested, (2) it failed to include detailed information regarding the proposed assessments, and (3) District did not agree to restrict assessments to after school or during extended school year. District's refusal to include Parent's requested assessments on the assessment plan was not relevant to determine whether the December 22, 2016 assessment plan, as revised on March 2, 2017, complied with procedural requirements.⁶ As discussed above, the assessment plan included sufficient detail about the assessments District proposed to administer. As long as statutory requirements are met, Parent cannot place conditions on District's assessment of Student. District had discretion to select the testing or evaluation instruments and to select when the assessments would be conducted.

27. In summary, District proved conditions warranted reassessment of Student and that it complied with all procedural requirements in obtaining informed consent from Parent. Therefore, District is entitled to assess Student without parental consent, pursuant to the December 22, 2016 assessment plan, as revised on March 2, 2017.

ORDER

1. District may reassess Student without parental consent, pursuant to the December 22, 2016 assessment plan, as revised on March 2, 2017. Parent shall not place any conditions on District assessing Student.

⁶ Whether District should have included additional assessments on the assessment plan was not an issue before OAH, so it will not be discussed in this decision.

2. District shall notify Parent in writing within 15 business days of the date of this Decision, of the days, times, and places Parent is to present Student for assessments, and Parent shall reasonably cooperate in presenting Student on the indicated days, times, and places.

3. Parent shall timely complete and return any documents reasonably requested by District as part of the assessments.

4. If Parent does not make Student available for the assessments, or does not timely comply and return documents as indicated in this Order, District will not be obligated to provide special education and related services to Student, or otherwise provide Student with the rights of a special education student, until such time as Parent complies with this Order.

PREVAILING PARTY

Pursuant to California 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. Here, District was the prevailing party on the sole issue presented.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: July 13, 2017

/s/

TARA DOSS

Administrative Law Judge

Office of Administrative Hearings