BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: LOS ANGELES UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017041180

DECISION

Los Angeles Unified School District filed a Request for Due Process Hearing with the Office of Administrative Hearings (OAH), State of California, on April 26, 2017, naming Student.

Administrative Law Judge Tara Doss heard this matter in Van Nuys, California, on May 23, 2017.

Patrick Balucan, Attorney at Law, represented District. Juan Tajoya, Due Process Specialist, attended the hearing on behalf of District.

There was no appearance for Student.[1]

[1] Service of notice of special education due process proceedings must be either delivered personally, or "sent by mail or other means to the …person, or entity at their last known address." (Cal. Code. Regs., tit. 5, § 3083, subd. (a).) Service of notice may be by first-class mail. (Cal. Code. Regs., tit. 5, § 3083, subd. (b).) District established that notwithstanding the failure to appear at the due process hearing, Parent had notice of

District submitted oral closing arguments at the conclusion of the hearing. The record was closed and the matter was submitted for decision on May 23, 2017.

ISSUE

May District assess Student pursuant to its March 1, 2017 assessment plan, without parental consent?

SUMMARY OF DECISION

District contends it was legally required to reassess Student, as three years had passed since his last comprehensive reassessment. District also contends formal assessment data was required to determine whether Student continued to meet eligibility criteria for special education and related services; and to offer an appropriate individualized education program. Finally, District contends that its March 1, 2017 assessment plan met all legal requirements, such that it should be allowed to assess

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the proceedings and therefore District was entitled to proceed in his absence. During the hearing, District's attorney indicated on the record that his office mailed the complaint and evidence binder to Parent's last known address, as indicated in Student's school records, and that the items were not returned to District as being undelivered. On April 27, 2017, OAH mailed Parent the Scheduling Order Setting Due Process Hearing and Mediation to the last known address, as indicated in the complaint. OAH did not receive notice the document was undelivered or returned. On May 10, 2017, Parent called OAH to cancel mediation scheduled for May 11, 2017, and to update his telephone number. This established that Parent had received actual notice of the proceedings. The ALJ attempted to contact Parent via telephone three times at the telephone number Parent provided, for the May 15, 2017 prehearing conference, but Parent did not answer and had a voicemail box that was full.

Student without parental consent.

District met its burden in proving Student's three-year assessment was due and conditions warranted reassessment of Student. District also met its burden in proving it met all procedural requirements with respect to obtaining informed parental consent for the assessment. Therefore, District may assess Student pursuant to the March 1, 2017 assessment plan, without parental consent.

FACTUAL FINDINGS

BACKGROUND

1. Student was a 17-year-old, 11th grade male at the time of the hearing. He resided within District boundaries and attended Gardena Senior High School for all relevant times. He was initially found eligible for special education at an individualized education program team meeting on January 14, 2005. His eligibility was speech or language impairment.

DISTRICT'S ATTEMPTS TO ASSESS STUDENT

2. Student's last comprehensive assessment was during the 2013-2014 school year when he was in eighth grade. Student's last three-year review IEP team meeting, where the assessments were reviewed was held on May 16, 2014.

3. Dr. Jahnell Jones-Tam was the Intervention Coordinator at Gardena Senior High. She held this position for approximately three years. In this position, she coordinated IEP team meetings, acted as the administrative designee at IEP team meetings, and served as the liaison between the local district and the school site with respect to special education. Prior to being the Intervention Coordinator, Dr. Jones-Tam was a District English teacher for approximately five years and worked at a local district office as an expert in developing better readers and writers. Dr. Jones-Tam also worked as an English teacher and assistant principal with Oxnard Union High School District. Dr.

Jones-Tam held a Bachelor of Arts degree in English, Master of Arts degrees in English and Special Education, and a Doctoral degree in Education. She also held credentials in Administrative Services, English, and Special Education.

4. Dr. Jones-Tam attempted several times during Student's ninth and tenth grade years to have him assessed, but Parent did not consent.

5. On March 1, 2017, Dr. Jones-Tam sent Parent an assessment plan, in preparation for Student's comprehensive three-year review IEP team meeting, which was due by May 16, 2017. The assessment plan included proposed assessments in health and development, general ability, academic performance, language function, motor abilities, and social-emotional status; as well as descriptions of each assessment area. The assessment plan was in Student's native language of English. The assessment plan indicated that "A Parent's Guide to Special Education Services (Including Procedural Rights and Safeguards)" was included and that no educational placement or services would be provided without parental consent. The reasons given on the assessment plan for assessment were: (1) to determine Student's eligibility; (2) to conduct the three-year review for special education services; and (3) to determine if a change in Student's placement was needed.

6. Parent returned the assessment plan to Gardena Senior High on March 5, 2017. Parent checked the box stating: "No, I do not consent to the Assessment Plan."

7. Dr. Jones-Tam believed reassessment of Student was necessary because he had not been assessed since the 2013-2014 school year, and the IEP team needed current data from formal assessments to determine the appropriate offer of special education and related services for Student.

8. Dr. Jones-Tam's testimony was precise, thoughtful, and consistent with documentary evidence. She was a credible witness and her testimony is given substantial weight.

STUDENT'S APRIL 17, 2017 TRIENNIAL IEP

9. On March 13, 2017, District sent Parent a "Notification to Participate in an IEP Meeting" for Student's three-year review. The proposed IEP date was April 17, 2017. Parent returned the form having checked the box stating: "I am not able to attend the meeting. Please forward a copy of the IEP for my review and signature."

10. District convened Student's three-year review IEP team meeting on April 17, 2017. Parent did not attend the meeting. Jeffrey Ponce attended the IEP team meeting as District's administrative designee. Mr. Ponce worked for District for 15 years and had been a special education teacher for 13 years. Mr. Ponce held an Educational Specialist II credential and was a special education teacher at Gardena Senior High at the time of the IEP team meeting.

11. Student's special education eligibility was speech or language impairment due to a fluency (e.g. stuttering) disorder. He was fully mainstreamed in general education and received speech and language services for 30 minutes per month on an indirect, consultative basis. Student's teachers did not report any concerns with respect to his speech fluency during the 2016-2017 school year. Student only had one IEP goal in the area of fluency and had met the fluency annual goal developed during the 2015-2016 school year. District speech and language pathologist, Wakana Pardo, who attended the IEP team meeting, did not believe there was a further need for speech and language services based on teacher interviews, observation, and record review; and recommended a formal speech and language assessment to determine Student's current functioning levels and continued eligibility for speech and language services.

12. According to Mr. Ponce, the IEP team wanted to conduct formal assessments of Student because it believed additional information was needed to support Student and offer an appropriate program. Specifically, the IEP team did not believe Student continued to meet the eligibility criteria for speech or language

impairment and thus, was no longer in need of special education and related services.

13. Mr. Ponce's testimony was precise, thoughtful, and consistent with documentary evidence. He was a credible witness and his testimony is given substantial weight.

LEGAL AUTHORITY AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA[2]

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)[3]; 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 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

[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.

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 District 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.) 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, 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.)

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.

DISTRICT'S RIGHT TO ASSESS STUDENT

7. District seeks an order permitting it to assess Student pursuant to a March 1, 2017 assessment plan, without parental consent. District asserts that Student's three-year reassessment was due and that formal assessment data was needed to determine whether Student continued to meet eligibility criteria for special education and related services; and to offer an appropriate educational program. District also asserts the assessment plan presented to Parent proposing to conduct assessments in the areas of health and development, general ability, academic performance, language function, motor abilities, and social-emotional status complied with all legal requirements.

8. 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).)

9. A district must conduct a reassessment at least once every three years, unless the parent and the agency agree that it is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2); Ed. Code, §§ 56043, subd. (k), 56381, subd. (a)(2).) The agency 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).)

10. A district must assess in all areas related to suspected disability, including,

if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).)

11. A district must assess a student before changing his or her eligibility or determining the student no longer has a disability as defined by the IDEA. (20 U.S.C. § 1414(c)(5); 34 C.F.R. § 300.305(e).)

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. 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; see also, *Johnson v. Duneland School Corp.* (7th Cir. 1996) 92 F.3d 554, 557-58.) In *Andress v. Cleveland Independent School District* (5th Cir. 1995) 64 F.3d 176, 178, the court concluded that "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."

14. 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.

15. District established that conditions warrant reassessment of Student. Student was last assessed during the 2013-2014 school year as part of a three-year review IEP meeting held on May 16, 2014. Since three years had passed since Student's last reassessment, District was legally entitled to re-assess Student. Additionally, Dr. Jones-Tam and Mr. Ponce testified credibly that Student's IEP team required current data from formal assessments to determine whether Student continued to meet eligibility criteria for speech or language impairment and to offer Student appropriate special education and related services. District was legally required to assess Student prior to making a determination he was no longer eligible for special education and related services.

16. District also established that it complied with all procedural requirements to obtain informed parental consent to conduct the reassessment of Student. District provided an assessment plan to Parent on March 1, 2017, that met all legal requirements, including being accompanied by parent's rights and procedural safeguards, being in a language easily understandable and in Student's native language of English, including a description of the proposed assessments, and stating that no

educational placement or services would be provided without parental consent. Parent returned the assessment plan on March 5, 2017, but did not consent to the assessments.

ORDER

1. District is entitled to reassess Student pursuant to its March 1, 2017 assessment plan, without parental consent.

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: June 12, 2017

/s/

TARA DOSS

Administrative Law Judge

Office of Administrative Hearings