BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: WHITTIER CITY SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH Case No. 2017040244

DECISION

Whittier City School District filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on April 6, 2017, naming Student.

Administrative Law Judge June R. Lehrman heard this matter in Whittier, California, on May 2, 2017.

Darin Barber, Attorney at Law, represented District. Special Education Director Frances Stearns attended and testified on District's behalf. Parent was provided notice of the hearing but no one appeared on behalf of Student.

On May 2, 2017, the day of hearing, a continuance was granted for written closing arguments and the record remained open until May 12, 2017. Upon timely receipt of District's written closing arguments, the record was closed and the matter was submitted for decision.

ISSUE

May District assess Student pursuant to its November 15, 2016, assessment plan, without parental consent?

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SUMMARY OF DECISION

District contends that it is legally obligated to perform Student's triennial assessment, and has complied with all legal requirements to obtain parental consent which has been withheld. Thus, District contends it is legally required to file this due process hearing seeking the right to assess Student over parental objection. Student did not appear for the hearing, but the evidence established that Student had notice of the proceedings, and that Student's objection to the assessment plan, and the reason for Parent's refusal to consent to it, was that the psychoeducational assessment would be performed by a school psychologist, and Student did not wish to speak to a psychologist. District prevails here, and may assess Student pursuant to its November 15, 2016 assessment plan without parental consent. The length of time since Student's prior assessment in February 2014, the need to update Student's present levels and goals, measure his progress or lack thereof, and determine his continuing eligibility for special education and related services, as well as the propriety of his educational program, were all conditions that warrant assessment. Thus, District met its burden of proof on the issue of its right to conduct the proposed triennial assessments of Student. District gave Parent proper notice of the proposed assessments, and Parent was given 15 days or more to review, sign and return the assessment plan. Accordingly, this Decision authorizes District to conduct the proposed assessments without parental consent.

FACTUAL FINDINGS

1. Student is an 11-year-old male who has resided in the District at all relevant times, and was eligible for special education under the categories of specific learning disability and language and speech impairment. Student moved into District in the fall of 2015 from Montebello, a neighboring school district.

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2. District held an individualized education program team meeting for Student on October 1, 2015, within 30 days of his transfer into District. Mother was unavailable and the meeting reconvened on October 19, 2015, on which date Mother attended.

3. Student had last been assessed, by his prior district, on February 26, 2014. However, this assessment was missing from Student's school records, thus District has never been in possession of a copy of it.

4. Student's eligibility category at Montebello was and remained, specific learning disability. At the October 19, 2015 IEP team meeting, Mother raised concerns about Student's speech-related issues, specifically that Student took time to gather his thoughts to express his thoughts and feelings, and became "stuck" on words while reading. District team members asked Student to slow down while speaking so he could gather his thoughts. The IEP offered placement at Mill School Technical Academy and related services, to which Parent consented.

5. District wanted to assess Student's language and speech functioning. District proposed a speech and language assessment through an assessment plan dated October 28, 2015, to which Mother consented on October 30, 2015. Student was assessed for language and speech, resulting in a report dated January 1, 2016. On January 11, 2016, District convened an annual IEP team meeting, to review the assessment report and Student's overall program. The IEP team proposed a secondary eligibility category for Student of speech or language impairment, and it proposed updated goals, placement and services. Mother participated in the IEP team meeting by telephone. She consented to its implementation on January 13, 2016.

6. In late 2016, District wanted to do a triennial assessment of Student, excluding the language and speech assessment that had recently been conducted.

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Resource Specialist Eric Richardson, in consultation with School Psychologist Yvonne Sandoval, authored the proposed assessment plan dated November 15, 2016.

7. Mr. Richardson holds a bachelor's degree from University of California Los Angeles and a teaching credential from California State University Los Angeles. He has served as a resource specialist since 2011, first in a prior district and then within District since 2013. He has worked with Student at Mill School Technical Academy since Student arrived there in 2015. As a resource teacher, he conducts informal assessments via work samples and observation. He also conducts standardized academic assessments including the Woodcock Johnson, Fourth Edition, and the Kaufman Test of Educational Achievement, Third Edition, both of which measure reading, writing, and math. In his career he has administered such assessments over 100 times. In his opinion, it was necessary to assess Student to chart growth, determine his continuing eligibility for special education and related services, determine whether his program was still appropriate and to draft current present levels of performance and new goals. This was especially the case, given that District had never seen a copy of the February 26, 2014 assessment from Montebello. Mr. Richardson is competent to perform his duties and has the appropriate credential to assess students as a resource specialist. He is knowledgeable about Student's disability.

8. School Psychologist Yvonne Sandoval has been employed by District for three years. She obtained a bachelor's degree and her master's degree in 2013 in school psychology from Azusa Pacific University. In addition, she holds an educational specialist degree in educational psychology from Azusa Pacific University. She holds a Pupil Personnel Service credential. Prior to her education, and tenure with District, as a school psychologist, she served previously as a behaviorist at Norwalk La Mirada School District. In her opinion, assessment of Student was necessary to determine if Student's eligibility for special education under the category of specific learning disability was still

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appropriate, to determine the areas in which he had discrepancies, and to draft appropriate goals and offer appropriate services. Ms. Sandoval is competent to perform her duties and has the appropriate credential to assess students as a school psychologist. She is knowledgeable about Student's disability.

9. The proposed November 15, 2016, assessment plan called for assessments in academic achievement, health, intellectual development, social emotional and "other," which was specified as vision and hearing. The plan explained the content of the assessments and specified the persons who would conduct the assessments. Academic achievement assessments would be conducted by the resource specialist, i.e. Mr. Richardson. The assessment plan explained that academic achievement assessments measured reading, spelling, arithmetic, oral and written language skills, and general knowledge. Health assessments, specifically concerning hearing and vision, would be conducted by a school nurse. The assessment plan explained that health assessments included health information and testing to determine how a student's health affected school performance. Intellectual development assessments would be conducted by a school psychologist, i.e. Ms. Sandoval. The assessment plan explained that intellectual development assessments measured how well a student thinks, remembers and solves problems. Social/emotional functioning would also be conducted by a school psychologist. The assessment plan explained that social/emotional assessments indicate how a child feels about him or herself, gets along with others, takes care of personal needs at home, in school and in the community. The plan included a category of "other" assessments to be conducted by a school psychologist, specifically concerning visual and motor functioning.

10. The specific assessments Ms. Sandoval would have administered would have included the Kaufman Assessment Battery for Children which yields a full scale IQ score, with subtests measuring verbal and nonverbal intelligence, working memory and

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visual processing. Information regarding Student's processing skills and nonverbal as well as verbal intelligence would be relevant to his categorizations as learning disabled, and speech and language impaired. She would also have administered the Comprehensive Test of Phonological Processing, the Test of Visual Perceptual Skills, and the Bender Gestalt, to assess Student's visual and auditory processing skills. She would have administered the Behavior Assessment System for Children, Third Edition, to evaluate Student's social and emotional functioning. The instruments are technically sound, not discriminatory and not racially biased. Ms. Sandoval appeared knowledgeable and well-qualified, and her testimony concerning the propriety of the assessments she proposed to conduct was given great weight. She does not perform the same battery of tests on each student regardless of that student's individual profile, but rather reviews the particular student, focusing on his areas of need. She has performed the assessments she proposed to conduct here, approximately 150 times. Although she would typically, in a case like Student's, perform both a parent and a student interview, she would have omitted the interview of Student in this particular case, and so advised Mother by telephone. She is familiar with and would have followed the protocols of the various standardized instruments she proposed.

11. Leticia Sedano is the school nurse. She is competent to perform her duties and has the appropriate credential to assess students as a school nurse, and to perform vision and hearing screenings. She is knowledgeable about Student's disability.

12. Mr. Richardson and Ms. Sandoval both opined at hearing that only a school psychologist may perform cognitive, IQ, intellectual development or social emotional assessments. Ms. Sandoval stated that the purview of a school psychologist is to address thinking, how students process information, and how they learn. According to her training and experience, no other profession is competent to do so. Frances Stearns, District's director of special education, stated at hearing that the testing

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protocols for cognitive and social emotional testing instruments restrict the persons authorized to conduct them. Ms. Stearns stated that the license number of either a school psychologist or an outside psychologist license must be provided to the testing companies when ordering these types of testing instruments.

13. Mr. Richardson sent the assessment plan home with Student on November 16, 2016, and called Mother to discuss it, as was his normal practice, but he was unable to reach Mother at that time. The next day, November 17, 2016, Mr. Richardson spoke with Student, who said that he did not want to answer questions about his life. Mr. Richardson characterized Student as "vague and introverted" when Student said this. The Thanksgiving break intervened, then on November 28, 2016, Mr. Richardson spoke with Mother by telephone. Mother told him that she had returned the assessment plan to school with a note that said "[Student] does not wish to see a psychologist at this time. Please modify documents." Mr. Richardson ended that phone call by saying that he would ask the school psychologist to call Mother about her concerns.

14. On or around November 29, 2016, Ms. Sandoval spoke with Mother to explain the assessment process, stating that it involved no therapy or counselling. On November 29, 2016, Mr. Richardson sent the assessment plan home again with Student. On December 2, 2016, Mother wrote a letter to District stating that the assessment plan sent November 29 was the same document that had been sent earlier, that it still designated the school psychologist, and that Student did not want to speak to the psychologist.

15. On December 5, 2016, Ms. Sandoval wrote a letter to Mother, again enclosing the assessment plan. The letter stated that Student was due for his triennial. The letter stated that the cognitive and academic evaluation results would be used to determine Student's continuing eligibility and to measure his progress or lack of progress. The letter also stated that the school psychologist's role was to complete

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standardized, cognitive and processing assessments as well as social emotional rating scales, but that "[n]o therapy or counseling will be conducted at this time."

16. On December 5, 2016, the assessment plan was returned unsigned. On December 8, 2016, both Ms. Sandoval and Mr. Richardson spoke on the telephone again with Mother, who was unhappy about the school psychologist still being on the assessment plan.

17. Ultimately, Mr. Richardson referred the matter to the District because he was unable to obtain parental consent. Ms. Sandoval also contacted Ms. Stearns. Ms. Stearns called Mother on December 9, 2016, to explain the assessment process and District's obligation to assess, or to file for due process. Mother complained to Ms. Stearns about the school psychologist being designated, and said that she would not be agreeing to the assessment. Ms. Stearns wrote a follow up letter dated December 9, 2016, enclosing a copy of Parents' Rights and Procedural Safeguards.[1]

18. The telephone number Mr. Richardson, Ms. Sandoval and Ms. Stearns contacted Mother at was accurate and they succeeded in reaching Mother there. The contact number and Student's address had been entered into District's database of student contact information called PowerSchool. The contact information in PowerSchool was transcribed onto Student's IEP's, and was the same contact information as was stated in District's due process complaint. Although Mother did not appear at the hearing, District established that Mother had received notice of the complaint, which was served by first class mail on her accurate home address.

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[1] Mother had also received copies of the Parents' Rights and Procedural Safeguards document at the October 1, 2015 thirty-day IEP and in connection with the January 11, 2016 annual IEP.

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19. Mr. Richardson's conversations with Mother have always been in English. The IEP's, assessment plan, and correspondence Mother received and responded to, prior and after the assessment plan, were all in English. Mother has never requested translation. Ms. Stearns spoke to Mother in English, which she understood to be Mother's native language.

20. On April 27, 2017, the Thursday before the due process hearing, Ms. Stearns and an instructional assistant drove to Student's home address to leave a packet of information concerning the upcoming hearing. No one was home and Ms. Stearns did not leave the packet there. Instead, because Ms. Stearns was aware that Mother generally picked Student up at school at 5:30 p.m. each day from an after-school program, Ms. Stearns attempted to meet Mother there. On that day, Student's brother, who drove and appeared to be an adult, arrived. Ms. Stearns handed him the packet of information, which contained District's complaint, the Scheduling Order, District's prehearing conference statement and District's exhibits.

21. School mail addressed to Student's home address has in general never been returned to District by the United States Postal Service as undeliverable.

22. Official notice is taken of the administrative file in this proceeding, which indicates that the address and telephone number used to notify Mother of events connected with this due process proceeding are the same address and telephone number as are listed in District's complaint. However, the Scheduling Order served on all parties by OAH on April 6, 2017, was returned as undeliverable by the United States Postal Service on April 17, 2017. Mother did not answer the telephone for the April 24, 2017 prehearing conference. And the prehearing conference order, served on all parties

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on April 25, 2017, was returned by the United States Postal Service as undeliverable on May 8, 2017.[2]

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA[3]

1. This hearing was held under the Individuals with Disabilities Education Act (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) 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 free appropriate public education (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).)

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 individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education"

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[2] Judicial notice is generally called official notice when taken by an administrative tribunal. (See, e.g., Gov. Code, § 11515.) Evidence Code, section 452, subdivision (h) allows the taking of judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

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

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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 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.)

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] ("*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*

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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.) In a recent unanimous decision, the United States Supreme Court 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)]* (*Endrew*)). 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 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).) 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

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review for IDEA administrative hearing decision is preponderance of the evidence].) Here, as the filing party, District bears the burden of proof.

REASSESSMENTS

5. 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).)

6. 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).) A reassessment must be conducted if the school district "determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests 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).)

7. 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.Hrngs. Case No. 2012010507, 58 IDELR 295, 112 LRP 17304.) A substantial change in the student's academic performance or disabling condition is an example of conditions that warrant a

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reevaluation. (*Corona-Norco Unified School Dist.* (SEHO 1995) 22 IDELR 469, 22 LRP 3205.)

8. Reassessment generally requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his or her parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion State law. (*Id.*) The assessment plan must: appear in language easily understood by the public and in the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subds. (b)(1)-(4).) The school district must give the parents and/or student 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

9. 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 Dist.* (5th Cir. 1995) 64 F.3d 176, 178 (*Andress*), 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."

10. If a parent does not consent to a reassessment plan, the school district may conduct the reassessment without parental consent if it shows at a due process

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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.

ISSUE 1: ASSESS PURSUANT TO NOVEMBER 15, 2016 ASSESSMENT PLAN WITHOUT PARENTAL CONSENT

11. District contends that it is legally obligated to perform Student's triennial assessment, and has complied with all legal requirements to obtain parental consent which has been withheld. Thus, District contends it is legally required to file this due process hearing seeking the right to assess Student over parental objection. Student did not appear for the hearing, but the evidence established that Student's objection to the assessment plan, and the reason for Parent's refusal to consent to it, was that the psychoeducational assessment would be performed by a school psychologist, and Student did not wish to speak to a psychologist.

Proceeding With Due Process Hearing in Parent's Absence

12. 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 Mother's failure to appear at the due process hearing, she had notice of the proceedings and therefore District was entitled to proceed in her absence. The complaint was sent by mail to Mother's last known address. The evidence amply established that the address was recorded in District's PowerSchool database at which

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Mother received numerous other pieces of correspondence. District therefore complied with its legal obligations concerning the sending of the complaint. In addition, on April 27, 2017, Ms. Stearns provided another copy of District's complaint, as well as the Scheduling Order, District's prehearing conference statement and District's exhibits to Student's adult brother. It is also clear from the administrative record that correspondence to this same address from OAH concerning the pendency of the due process proceeding, specifically the Scheduling Order and the Order Following Prehearing Conference, was returned as undeliverable, notwithstanding the fact that other correspondence from District was routinely received there. In addition, although Mother had received telephone calls from District at the telephone number listed in PowerSchool, that same number failed to answer for the prehearing conference in this matter. It thus appears that Mother selectively rejected calls and mail pertaining to the hearing. In summary, Mother received notice of the due process proceeding in accordance with the law, and District was entitled to proceed despite Mother's non-appearance.

Reassessments Warranted

13. The weight of the evidence established that Student's educational needs warranted the reassessments proposed by District in the assessment plan of November 15, 2016. Mr. Richardson and Ms. Sandoval testified credibly and corroboratively that conditions warranted, and continue to warrant, reassessment of Student in the areas of academic achievement, intellectual development, social functioning, emotional functioning, and health including visual motor. Assessments in these areas were necessary to provide comprehensive data to the IEP team to develop an appropriate IEP for Student. Student has not been comprehensively assessed since February 26, 2014, and District is not in possession of that report to inform Student's program. Moreover, the 2014 assessment is more than three years old and the law requires reassessment at

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least once every three years unless the parent and school district agree that a reevaluation is not necessary. Without updated information, Student's eligibility categories, present levels of performance, goals and services are out of date and it may be difficult to develop an educational program that would ensure a student's continued receipt of a FAPE. Accordingly, District reasonably determined that a reassessment of Student in these areas was necessary in fall 2016.

14. It appears that Mother's sole resistance was to a school psychologist performing the cognitive and intellectual development assessments, due to Student's unwillingness to "talk about his life." Ms. Sandoval explained both by telephone and in writing to Mother, that the assessment involved no therapy or counselling, and that she would forego interviewing Student directly.

15. As long as statutory requirements for assessments are satisfied, parents may not put conditions on assessments. The U.S. Department of Education, Office of Special Education Programs, which is tasked with interpretation of the IDEA and issuing guidance for its implementation, has advised that selection of particular testing or evaluation instruments is left to the discretion of State and local educational authorities. (*Letter to Anonymous* (OSEP Sept. 17, 1993) 20 IDELR 542, 20 LRP 2357; *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.) Moreover, the right to assess belongs to school districts, and parents have no right to insist on particular assessors. (See, *Andress, supra,* 64 F.3d at p. 179.) A school district has the right to evaluation by an assessor of its choice. (*M.T.V. v. DeKalb County School Dist.* (11th Cir. 2007) 446 F.3d 1153, 1160.)

16. Moreover, as confirmed by Ms. Stearns and Ms. Sandoval, only school psychologists may perform cognitive and social emotional testing. (See Ed. Code, § 56324, subd. (a)("Any psychological assessment must be performed by a credentialed

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school psychologist who is trained an prepared to assess cultural and ethnic factors appropriate to the child being assessed.").)

17. In summary, District met its burden of proving by a preponderance of the evidence that reassessment of Student in the areas of academic achievement, health intellectual development, social emotional functioning and visual motor functioning was warranted to determine Student's educational needs at the time the November 15, 2016 assessment plan was prepared and provided.

Notice of Proposed Assessments

18. District gave proper notice of the proposed assessment to Student and his Mother. The notice consisted of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion State law. Mr. Richardson sent the assessment plan home with Student on November 16, 2016, and on November 28, 2016, Mr. Richardson spoke with Mother by telephone. On or around November 29, 2016, Ms. Sandoval spoke with Mother to explain the assessment process, stating that it involved no therapy or counselling. On November 29, 2016, Mr. Richardson sent the assessment plan home again with Student. On December 2, 2016, Mother wrote a letter to District objecting to the school psychologist. On December 5, 2016, Ms. Sandoval wrote a letter to Mother, again enclosing the assessment plan. On December 5, 2016, the assessment plan was returned unsigned. On December 8, 2016, both Ms. Sandoval and Mr. Richardson spoke on the telephone again with Mother, who was still unhappy about the school psychologist still being on the assessment plan. Ms. Stearns called Mother on December 9, 2016 to explain the assessment process and District's obligation to assess, or to file for due process. Ms. Stearns wrote a follow up letter dated December 9, 2016, enclosing a copy of Parents' Rights and Procedural Safeguards, which Mother had also received at the October 1, 2015 thirty-day IEP and in connection with the January 11, 2016 annual IEP. District's letters and phone calls explained why District

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determined that the assessments were necessary, gave additional details regarding the nature and scope of the assessments, and identified qualified assessors to conduct the assessments.

19. The assessment plan was in language easily understood by the public and in English, the native language of Mother. It explained the assessments that the district proposed to conduct. District gave Mother more than 15 days to review, sign, and return the proposed assessment plan. The weight of the evidence established that District properly took all necessary steps to provide Mother with notice of the proposed assessments and to obtain Mother's consent to those assessments. In summary, all procedural requirements for obtaining consent to the proposed assessments were met.

REMEDIES

District prevailed on the sole issue presented. As a remedy, District is entitled to an Order that District may assess Student pursuant to its November 15, 2016 assessment plan without parental consent.

ORDER

1. District is entitled to reassess Student according to its November 15, 2016 assessment plans, without Parent's consent.

2. District shall notify Parent in writing, within 10 business days of the date of this Decision, of the days, times and places Parent is to present Student for assessment, and Parent shall reasonably cooperate in presenting him for assessment on those days and times, and in those places.

3. If Student is unable to attend school or appear for assessment on any school day during the assessments, by reason of illness or other such cause unrelated to the parties' disputes, Parent shall promptly communicate this fact to District. Any delay due to this will toll the timelines within which District must complete its assessments.

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

5. Parent shall not attempt to attach any conditions to District's assessments, including but not limited to the identity or qualifications of the person conducting an assessment.

6. If Parent does not make Student available for assessment, or does not timely complete and return any documents in compliance with this Order, District will not be obligated to provide special education and related services to Student, or otherwise to provide Student 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).)

Accessibility modified document

DATED: May 31, 2017

/s/

JUNE R. LEHRMAN

Presiding Administrative Law Judge

Office of Administrative Hearings

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