

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019061161

LOS ALAMITOS UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

DECISION

OCTOBER 31, 2019

On, June 26, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Los Alamitos Unified School District, naming Parent on behalf of Student as respondent. Administrative Law Judge Rita Defilippis heard this matter in Los Alamitos, California on October 1, 2, and 3, 2019.

Attorney Courtney Brady represented Los Alamitos Unified School District. Ms. Grace Delk, Director of Special Education, attended all hearing days on behalf of Los Alamitos. Mother represented Student. Mother and Father, attended all hearing days on Student's behalf.

At the parties' request the matter was continued until October 21, 2019, for written closing briefs. On October 21, 2019, the record was closed and the matter was submitted for decision.

ISSUE

May Los Alamitos assess Student pursuant to the May 28, 2019 assessment plan without Parent's permission?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (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 Individuals with Disabilities Education Act, referred to as the "IDEA," are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. §1400(d)(1); See Ed. Code, §56000, subd. (a).)

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, assessment, 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. §1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. §1415(i)(2)(C)(iii).) Los Alamitos has the burden of proof in this matter. The factual statements below constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. sec. 1415(h)(4); Ed. Code, sec. 56505, subd. (e)(5).)

Student is 17 years old and in grade 12. He resides within the boundaries of Los Alamitos, and is eligible for special education under the primary eligibility category of autism and the secondary category of intellectual disability. He attends a nonpublic school through his individualized education Program, called an IEP.

ISSUE: MAY LOS ALAMITOS ASSESS STUDENT PURSUANT TO THE MAY 28, 2019 ASSESSMENT PLAN WITHOUT MOTHER'S PERMISSION?

Mother and Father hold educational rights and, in this case, the consent of both is required regarding Student's educational decisions. Only Father consented to the May 28, 2019 assessment plan. Los Alamitos contends that it is necessary to assess Student to obtain accurate information to develop an individualized education program, called IEP, for Student. It further contends it has met all legal requirements to assess Student without Mother's consent. Los Alamitos asserts specifically that it provided Mother with prior written notice of the proposed assessment and a legally compliant proposed assessment plan, and took reasonable measures to obtain Mother's consent.

Mother did not consent to the May 28, 2019 assessment plan for three reasons. She contends that the assessment plan was not valid as it did not contain a check in the box entitled Alternate Means of Assessment. Second, she contends that the proposed assessment plan is invalid because it was not presented to her in the course of an IEP

team meeting. Finally, Mother contends that the assessment results may be negatively affected by Student's current placement, which Mother claims is inappropriate.

Need for Assessment

A local educational agency shall ensure that a reevaluation of each child with a disability is conducted if it determines that the educational or related service needs, including improved academic achievement and functional performance of the child, warrant reevaluation; or if the child's parents or teacher requests a reevaluation. (20 U.S.C. §1414(a)(2)(A); Ed. Code, § 56381(a)(1).). Such a reevaluation shall occur not more frequently than once a year, unless the parent and the local educational agency agree otherwise, and at least every three years, unless the parent and the local educational agency agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381(a)(2).).

Student was last assessed for his triennial assessment between January 18, 2018, and March 13, 2018, over a year before the hearing in this matter. An OAH decision in case number 2018081156, issued in February 2019, involving the same parties as the present matter, concluded that Los Alamitos failed to establish that the triennial assessment conducted between January and March 2018 met all legal standards for assessments.

On May 28, 2019, Los Alamitos held an annual IEP team meeting for Student. Father attended the IEP team meeting. Mother was not present. The IEP team determined that further assessments were required to accurately determine Student's present functioning levels and develop annual IEP goals.

Father testified at hearing. His testimony was clear, detailed and consistent and was accordingly given great weight. He recalled the May 28, 2019 IEP team meeting with specificity. Father agreed with Los Alamitos's proposal to conduct a comprehensive assessment. The IEP team was unable to develop goals because the team lacked accurate information about Student's present levels of functioning. Additionally, he believed reassessing Student, was necessary due to the OAH decision finding that the prior triennial testing was not legally compliant. At the meeting, Father also requested a speech and language and alternative and augmentative communication assessment be conducted.

Mr. Andrew Sellers testified at hearing. Mr. Seller's testimony was detailed, well-reasoned, and thoughtful and was accorded great weight. Mr. Sellers is a Los Alamitos Program Specialist and has had Student on his caseload since 2017. Mr. Sellers attended the May 28, 2019 IEP team meeting. He recalled the meeting and the IEP team's inability to determine progress on IEP goals and to develop new IEP goals with accurate baselines due to the lack of information about the current levels of Student's functioning.

Mr. Sellers drafted the assessment plan during the IEP team meeting. The IEP team determined that a post-secondary transition assessment was needed because Student will turn 18 during the school year and will be transitioning to post-secondary services. A transition assessment was needed to determine Student's current independent living and adaptive skills and to determine areas of Student's interests and areas of motivation to inform decisions regarding transition services. The IEP team also proposed to conduct a speech and language and augmentative and alternative communication/assistive technology assessment. Father consented to the assessment plan during the IEP team meeting.

Los Alamitos established that its proposed assessment, pursuant to the May 28, 2019 assessment plan, was warranted and necessary to develop an IEP for Student, including appropriate goals, services and supports.

Notice of Proposed Assessment

A local educational agency must provide notice to the parents of a child with a disability that describes the evaluations the agency proposes to conduct. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321(b)(3).) Additionally, the proposed assessment plan must be in language easily understood by the general public; in the native language of the parent; and must state that no IEP will result from the assessment without the consent of the parent. (Ed. Code, § 56321(b).) A copy of the notice of parent's rights must be attached to the assessment plan and must be provided to parent, in writing, within 15 days of the referral for assessment. (Ed. Code, § 56321(a).) The parent shall have at least 15 days from receipt of the proposed assessment plan to arrive at a decision. (Ed. Code, § 56321(c)(4).)

The March 28, 2019, assessment plan proposed to assess Student in the following areas: academic achievement; health; intellectual development; speech and language communication development; motor development; social/emotional behavior; adaptive behavior; post-secondary transition; and augmentative and alternative communication/assistive technology. The assessment plan used language understandable to the general public, was written in English, the native language of Parents, and explained the areas proposed to be assessed and the title of the examiner and agency proposed to conduct each assessment. The assessment plan included a statement that no special education services will be provided to Student without written consent.

On May 29, 2019, a day after the IEP team meeting, Mother sent an email to Mr. Sellers and other Los Alamitos administrators, informing them she did not consent to the assessment plan. On May 31, 2019, Mother received a prior written notice letter with the proposed assessment plan signed by Father and a copy of procedural safeguards. The prior written notice letter requested that Mother consent to the assessment plan within 15 days. The letter stated that if Mother did not consent within 15 days, Los Alamitos would file a request for a due process hearing seeking to assess Student. Mother did not respond to Los Alamitos.

Los Alamitos established that Mother was given at least 15 days to consider the assessment plan. The evidence further established that the assessment plan contained all legally required information, including a copy of parent's procedural safeguards.

Reasonable Measures to Obtain Mother's Consent

A local educational agency must obtain informed parental consent prior to conducting any reevaluation of a child with a disability, except that such consent need not be obtained if the local educational agency can demonstrate that it has taken reasonable measures to obtain such consent and the child's parent has failed to respond. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381(f)(1).)

The May 31, 2019, letter listed resources with contact information that could assist Mother if she had any questions or had difficulty understanding her procedural rights. The letter also encouraged Mother to call Los Alamitos if she had any questions.

On June 17, 2019, Los Alamitos sent Mother and Ms. Danielle Alvarado, the advocate working with Mother at the time, a second letter via email correspondence. The letter stated Mother had not responded to Los Alamitos' letter and assessment plan and informed Mother it intended to file a due process hearing request seeking to assess

Student. Again, Los Alamitos attached a copy of the May 28, 2019 proposed assessment plan, a copy of parent's procedural safeguards, and a list of resources regarding questions about parent's procedural rights, to the email and encouraged Mother to call Los Alamitos if she had any questions.

Later on June 17, 2019, Ms. Alvarado responded to Los Alamitos's correspondence stating that Mother was away for two weeks and would respond upon her return. By the time of hearing, Mother had not responded to the letter or consented to the proposed assessment plan.

Los Alamitos sustained its burden of proof by a preponderance of the evidence that it gave Mother over 15 days to respond to the proposed assessment plan and took reasonable measures to obtain Mother's consent to assess. Mother made clear the day after the May 28, 2019, IEP team meeting that she did not consent to the proposed assessment and did not provide any further response to Los Alamitos' prior written notices of the proposed assessment of Student, thereafter.

Testimony Regarding the Proposed Assessment

Los Alamitos presented testimony regarding the qualifications of likely assessors, should the May 28, 2019 proposed assessment plan be implemented without Mother's consent. Los Alamitos established that it had qualified staff available to conduct the proposed assessments of Student in all areas proposed by the assessment plan. Los Alamitos is prepared to choose professionally accepted assessment instruments that meet statutory requirements of reliability, and avoid bias, in order to assess Student in the proposed areas. The assessments proposed are tailored to evaluate the areas of suspected and established disabilities for which Student may require special education and related services.

Mother's Contentions

Mother testified at hearing. Her testimony conveyed her passion and consistent advocacy on behalf of Student. However, the majority of Mother's testimony concerned allegations against Los Alamitos which are not at issue in this case. Mother's focus on these extraneous allegations made it difficult for her to accept the narrow scope of evidence relevant to the sole issue of whether Los Alamitos may assess Student without her consent. Her contentions regarding these extraneous allegations combined with her interpretation of the law governing proposed assessments, impacted her decision not to agree to the assessment plan.

Mother did not present any persuasive evidence or legal authority that the proposed assessment plan, dated May 28, 2019, was invalid because the box indicating Alternative Means of Assessment was not checked. Historically, Mother checked that box herself on prior assessment plans. She believed Student has not been assessed using standardized measures during past assessments due to his disability.

The evidence at hearing established that assessors have discretion to use alternate measures of assessment, such as informal assessments, if Student is unable to respond to attempts to use traditional standardized assessment tools. Ms. Grace Delk, Director of Special Education; Mr. Andrew Sellers, Program Specialist; Ms. Kayley Peacock, School Psychologist; and Ms. Rosemary Lotts, Speech and Language Pathologist, all testified at hearing. Mr. Andrew Sellers drafted the May 28, 2019 assessment plan. Ms. Delk has worked as a school psychologist for four years during her career and in the course of that position developed many assessment plans. Ms. Delk, in her current position as Director of Special Education, also oversees the implementation of Los Alamitos's assessment plans. Ms. Peacock, in her position as school psychologist, develops assessment plans weekly. Relying on their education,

training, and experience, these witnesses established that Alternative Means of Assessment is checked on an assessment plan when standardized assessments are not appropriate. They each established, for example, that standardized intelligence tests are legally prohibited for African American students. The alternative assessment box would, therefore, be checked. These witnesses established that assessors generally are not limited to standardized assessment tools and have discretion to use alternate measures of assessment if the student being assessed is unable to access the standardized measures, even though the Alternative Means of Assessment box is not checked. Accordingly, the assessment plan is not invalid because the alternate assessment box was not checked.

Mother's second contention, that an assessment plan is legally required to be presented at an IEP team meeting, so that a parent can ask questions about the assessment, is without merit. Student provided no legal support for this contention. Mother's contention is also inconsistent, in light of her testimony that she consented to an assessment plan in the past without an IEP team meeting. The assessment plan is not invalid because it was provided to Mother outside of an IEP team meeting.

Lastly, Mother asserts that assessing Student in his current placement will yield inaccurate results because his placement is inappropriate. This contention is also without merit. Assessments drive decisions regarding appropriate placement and services, not vice versa. Ms. Peacock, who testified that she would likely be one of the assessors pursuant to the May 28, 2019 proposed assessment plan, provided well-reasoned and persuasive testimony establishing that a comprehensive assessment can be performed in Student's current placement. A comprehensive assessment includes student observations in various settings; interviews with Student's service providers and Parents; various standardized checklists completed by Parents and

Student's service providers; and direct assessment using standardized and informal measures, as appropriate. Assessment is necessary to the process of identifying the appropriate placement and services for a student. Additionally, Mother's contention that Los Alamitos's assessment results would be negatively impacted if implemented in Student's current placement is premature. Any objection to the appropriateness of the assessment may be raised after the assessment is conducted. The assessment plan is not invalid on this basis.

Los Alamitos sustained its burden of proof by a preponderance of the evidence that it met all legal requirements for implementing the proposed assessment plan, dated May 28, 2019, without Mother's consent.

CONCLUSION AND 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. Los Alamitos prevailed on the sole issue heard and decided.

ORDER

Los Alamitos may assess Student according to its May 28, 2019 proposed assessment plan without Mother's consent.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

RITA DEFILIPPIS

Administrative Law Judge

Office of Administrative Hearings