

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

TORRANCE UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2013010162

DECISION

Carla L. Garrett, Administrative Law Judge (ALJ), from the Office of Administrative Hearings (OAH), heard this matter on February 7, 2013, in Torrance, California.

Sharon Watt, Attorney at Law, from the law firm of Filarsky & Watt, represented the Torrance Unified School District (District). District representative, Jacquelynne Williams, Director of Special Education, attended the hearing.

Student's father (Father) attended the hearing and represented Student.

District filed its request for due process hearing (complaint) on January 8, 2013. On February 7, 2013, at the close of the hearing, the parties were granted a continuance to file written closing arguments by February 25, 2013. Upon the timely receipt of the parties' written closing arguments, the record was closed and the matter was submitted.

ISSUE

May District conduct a triennial assessment of Student pursuant to a November 8, 2011 assessment plan, and, if so, may District be relieved of its obligation to provide Student with a free appropriate public education (FAPE) if Parents fail to present Student for assessment?

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND INFORMATION

1. Student is a seven-year-old girl, who, at all relevant times, resided within the boundaries of the District. Student is eligible for special education under the eligibility category of autistic-like behaviors. She currently receives home/hospital instruction.

JANUARY 6, 2009 TRANSDISCIPLINARY PRESCHOOL ASSESSMENT

2. On January 6, 2009, four days before Student's third birthday, District conducted a transdisciplinary preschool assessment of Student, pursuant to a referral by the Harbor Regional Center. The transdisciplinary team included District's school psychologist, speech and language pathologist, special education teacher, and a teacher from the Autism Spectrum Services / Inclusion Support Torrance Team (ASSISTT)¹. Mother was present at Student's transdisciplinary preschool assessment session.

3. The assessment was designed to determine Student's current levels of functioning, to examine eligibility for special education services, and explore areas of educational need. The assessment procedures included the Developmental Play Based Assessment, Childhood Autism Rating Scale, Behavior Assessment System for Children (2nd Edition) (BASC-2), MacArthur Communicative Development Inventory, Preschool Language Scale (4th Edition), Achenbach Child Behavior Checklist for ages one and one-

¹ ASSISTT was a team of credentialed special education teachers, behavior analysts, and paraeducators who provided services for children who had autism spectrum disorders and children with moderate to significant disabilities.

half to five years, a parent interview, and a review of records. The assessment also included behavioral observations, as well as evaluation of concept development, preacademic skills, motor skills, self-help skills, and play and social skills. In addition, the assessment included a measurement of Student's speech and language development, an evaluation of behavior, social and emotional functioning, and attention skills. Finally, the assessment measured behaviors essential for learning basic skills and concepts, such as sitting and attending, responding, contingency, and compliance.

4. The assessors concluded that Student met the criteria for special education services under the classification of autistic-like behaviors. However, Student never received special education services, as Student never attended preschool in District.

MAY 25, 2011 IEP AND ASSESSMENT PLAN

5. On May 25, 2011, when Student was five-years-old, the IEP team convened for the purpose of discussing Student's upcoming transition to kindergarten for the 2011-2012 school year. The attendees included Parents, an administrative designee, a general education teacher, a special education teacher, a counselor, speech and language pathologists, the principal, and ASSISTT teachers. District team members advised that they were unable to determine Student's present levels of performance, because Student never attended preschool. Consequently, the District members presented Parents with an assessment plan so District could perform an early triennial assessment, initially due by January 6, 2012, in order to determine Student's present levels of performance.

6. The assessment plan provided that: (1) a special education teacher would conduct an academic/preacademic achievement assessment in the areas of prereadiness skills, basic reading, reading comprehension, mathematics calculation, mathematics reasoning, and written expression; (2) a school psychologist would assess Student's

social and emotional development in the areas of social maturity, social/emotional adjustment, ability to function independently, and self-help and interpersonal skills; (3) a speech and language specialist would conduct a language, speech, and communication assessment by measuring Student's ability to understand, relate to, and use language and speech clearly and appropriately; (4) a program specialist and a special education teacher would assess Student's general ability by measuring how well she remembered what she had seen and heard, how well she used the information, and how effectively she solved problems. These measures, which could include intelligence tests and/or alternative measures, if appropriate, were designed to help determine Student's learning rate, and assist in predicting how well Student would perform in school; and (5) an ASSISTT teacher would conduct an ASSISTT behavior assessment. The assessment plan explained that Parents' consent was necessary to assess Student. District also provided Parents a copy of procedural safeguards.

7. The team discussed completing Student's assessment within the first 30 days of the 2011-2012 school year, and then convening an IEP meeting to discuss Student's present levels, goals, services, and placement. However, for the time being, District concluded that the best kindergarten placement for Student would be a special day class (SDC) for specialized academic instruction, along with individual speech and language services, and individual and group ASSISTT behavior services. Parents consented to the May 25, 2011 IEP.

8. On September 6, 2011, Student's mother (Mother) executed the May 25, 2011 assessment plan.

9. Student began attending the kindergarten SDC in September 2011, but only attended six days of school. Beginning September 23, 2011, Parents stopped bringing Student to school. In a letter dated October 18, 2011, Parents cited safety concerns as their reason for not permitting Student to return to school. Specifically, the

letter noted that the staff in Student's SDC was "unable to assist or control [Student] when eating at lunch or in class because of her disability." Parents provided no further explanation in the letter concerning their safety concerns. However, the letter noted that the staff failed to assist Student with toileting, and, on one occasion, failed to retrieve Student's lunch from her backpack at lunch time. As such, Parents advised that they would not permit Student to return to school until they were satisfied that the school would be able to meet her safety needs. In addition, Parents elected not to present Student for any assessment sessions.

OCTOBER 18, 2011 IEP

10. Parents requested District to provide Student with a one-on-one paraeducator. The IEP team met on October 18, 2011 to discuss Parents' request. The attendees included Parents, District administrator, the SDC teacher, the school psychologist, the program specialist, and an ASSISTT behavior intervention teacher. The District team members concluded that Student required no one-on-one paraeducator, as the student to teacher ratio in the SDC was sufficient to meet Student's needs. However, the team agreed to discuss paraeducator support after District assessed Student and the team reviewed the assessment results.

11. Parents advised the team that they were concerned about District conducting a psychoeducational assessment, because they felt District questioned whether or not Student had a diagnosis of autism. District team members advised Parents that the purpose of the assessment was not to determine whether Student truly had autism. Rather, the purpose was to determine the appropriate placement and services for Student, especially because Student had not been in school prior to her placement in her current SDC. District team members then asked Parents whether they would bring Student to school so District could complete the assessment, as Student

had been absent from school since September 23, 2011. Parents advised that they would.

NOVEMBER 8, 2011 IEP AND ASSESSMENT PLAN

12. On November 8, 2011, the IEP team met for the purpose of establishing Student's present levels of performance, and discussing Student's absence from school since September 23, 2011. The attendees included a general education teacher, the principal, a program specialist, an ASSISTT teacher, a school psychologist, a counselor, the SDC teacher, and the speech and language pathologist. Although Parents signed the invitation to attend this meeting, Parents did not attend. However, Parents gave their permission for the IEP team to proceed in their absence.

13. The team determined it could not establish Student's present levels of performance, as a result of Student's lack of school attendance, coupled by Parents' failure to make Student available for testing. The team agreed to send Parents a new assessment plan, because the assessment plan Parents signed in September 2011 was outdated. The November 8, 2011 assessment plan provided that: (1) a special education teacher would conduct an academic/preacademic achievement assessment in the areas of prereadiness skills, basic reading, reading comprehension, mathematics calculation, mathematics reasoning, and written expression; (2) a school psychologist would assess Student's social and emotional development in the areas of social maturity, social/emotional adjustment, ability to function independently, and self-help and interpersonal skills; (3) a speech and language specialist would conduct a language, speech, and communication assessment by measuring Student's ability to understand, relate to, and use language and speech clearly and appropriately; (4) a program specialist and a special education teacher would assess Student's general ability by measuring how well she remembered what she saw and heard, how well she used the information, and how effectively she solved problems. These measures, which would

include intelligence tests and/or alternate measures, if appropriate, would help determine Student's learning rate, and assist in predicting how well Student would do in school; (5) a school nurse would assess Student's health and development by reviewing educationally relevant health, and developmental and medical findings; and (6) an ASSISTT teacher would conduct an ASSISTT behavior assessment. The assessment plan explained that Parents' consent was necessary to assess Student. District sent Parents the assessment plan on that day, and provided Parents a copy of procedural safeguards.

14. District school psychologist, Melissa Laidlaw, who attended Student's IEP meetings, testified at hearing. In 2003, Ms. Laidlaw received her bachelor's degree in social work from California State University at Los Angeles. She received her master's degree in education and school psychology, with an embedded school psychology credential, in 2007 from Azusa Pacific University. District employed Ms. Laidlaw as a school psychologist in September 2011. Her duties include conducting, writing, and reporting on psychoeducational assessments using a variety of cognitive, processing, and social/emotional assessment instruments. She has conducted approximately 70 triennial assessments. In addition, she consults with school staff and parents to develop effective interventions for students, and consults with IEP teams to develop appropriate behavior support plans.

15. Ms. Laidlaw explained that if District is authorized to assess Student, she would use the Naglieri Non-Verbal Ability Test (NNAT) to measure Student's cognitive and general abilities, and the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI) to measure her visual processing and sensory motor skills. She would also use the Behavior Assessment System for Children (BASC) to look at Student's general social and emotional functioning, the Gilliam Autism Rating Scales (GARS) to look at Student's behaviors associated with autism, and the Vineland Adaptive Behavior Scales to look at Student's adaptive skills. She would also consider administering the

Test of Auditory Processing (TAPS) if she determines Student has the verbal skills to perform the test. These instruments are considered valid and reliable, are well-researched, and Ms. Laidlaw is qualified to administer them. Ms. Laidlaw would also conduct interviews of teachers, review Student's records, observe Student's behavior during the assessment, make a determination of the effects of any cultural disadvantages, administer the instruments in Student's main mode of communication, and would administer the tests in accordance with the publisher's instructions. Ms. Laidlaw would administer the tests at the school site or in the District's office, and would need approximately one hour to administer the tests to Student.

16. District special education teacher, Andrea Rosa Menz, who was Student's SDC teacher for the six days that Student attended school, testified at hearing. Ms. Menz received her bachelor's degree in fine arts in 2001 from California State University at Long Beach. She received her masters' degree in special education at California State University at Dominguez Hills in 2008, where she received her mild-to-moderate credential, as well as her moderate-to-severe credential in 2009. Ms. Menz has been employed by District as a special education teacher for four and one-half years in a SDC with students from kindergarten to second grade. Prior, she worked as a special education teacher for the Los Angeles Unified School District for three years. In her capacity as a special education teacher, Ms. Menz conducts the academic portion of triennial assessments of students, approximately two to five a year. She would perform Student's academic assessment by administering the Brigance Diagnostic Inventory of Early Development (Brigance) to measure Student's reading, writing, and math levels. The Brigance is considered valid and reliable, and is well-researched. Ms. Menz is qualified to administer the Brigance, would administer it in a quiet environment with minimal distractions, such as her classroom, and would require approximately 30 minutes to administer it. In addition to the Brigance, Ms. Menz would interview Parents,

make observations of Student, review Student's records, interview Student's home hospital teacher,² and complete rating scales provided to her by the school psychologist that measure Student's autistic-like, adaptive, and social and emotional behaviors.

17. District program specialist, Dr. Keichea Reeve, who attended Student's IEP meetings, testified at hearing. Ms. Reeve received her masters' degree in speech communication and her clinical rehabilitative services credential in 1995 from California State University at Fullerton. She received a masters' degree in administration, as well as a preliminary administration services credential in 2005 from Pepperdine University (Pepperdine). In 2009, she received a doctorate in education from Pepperdine in the area of organizational leadership. Dr. Reeve has been a program specialist with District since 2010, where she oversees staff to ensure IEP's are implemented appropriately. In addition, Dr. Reeve has been a practicing speech and language therapist for 17 years, and has conducted approximately 1700 speech and language assessments. At hearing, Dr. Reeve, who is qualified to assess and select proper assessment tools, recommended a variety of tests, should District receive authorization to assess Student. Specifically, Dr. Reeve recommended the Language Processing Tests (LPT) to assess Student's auditory processing, the Comprehensive Assessment of Spoken Language (CASL) to measure Student's oral language skills, and the Goldman-Fristoe Test of Articulation (GFTA) to assess Student's articulation skills. In addition, Dr. Reeve recommended observation of Student, interview of Parents, as well as her home/hospital teacher, a review of records, and a 50 utterance language sample that would examine all areas of speech, including pragmatics, morphology, syntax, and semantics. Dr. Reeve estimated that the maximum time required to complete Student's speech and language assessment would be approximately three hours.

² Details concerning Student's home/hospital instruction are set forth below.

18. District ASSISTT behavior specialist, Mandy Juarez Nicholson, testified at hearing. Ms. Nicholson earned a bachelor's degree in psychology from the University of California at Los Angeles in 2000, and earned her board certified associate behavior analyst certificate in 2003. She currently attends graduate school to earn a masters' degree. Ms. Nicholson has been a behavior analyst with District since 2006, where she provides students with direct behavior intervention and social support, develops goals, attends IEP's, collects data, and makes recommendations. In her capacity as a behavior analyst, she works primarily with the ASSISTT team, which is trained in research-based educational, behavioral, and social approaches and techniques. Prior, she was employed by the Lovaas Institute for Early Intervention for six years as a one-on-one instructor and as a supervisor for workshop and clinic-based programs.

19. If permitted to assess Student, Ms. Nicholson would conduct an ASSISTT behavior assessment, entailing approximately three hours of observations of Student in the classroom with her peers, as well as during transition periods, recess, lunch, and group instruction. During a portion of the three hours, Ms. Nicholson would complete a Behavior Assessment System for Children – Student Observation System (BASC-SOS) during three 15-minute observations. The BASC-SOS is valid, reliable, published, peer-reviewed, and well-recognized. Ms. Nicholson is qualified to conduct observations using the BASC-SOS, and has conducted approximately 10 to 15 assessments a year since the 2011-2012 school year. In addition, Ms. Nicholson would interview staff that works with Student, and provide rating scales to Parents.

20. District nurse, Eileen Lipp, testified at hearing. Ms. Lipp earned her bachelor's degree in nursing from San Francisco State University in 1991, and is currently attending California State University at Fullerton to earn her school nurse credential. She has been employed with District as a school nurse since 2008. Prior, she worked as a staff nurse in the emergency department of Torrance Memorial Medical

Center from 1995 to 2000, and again from 2005 to 2007. She also worked as a staff nurse in the emergency department of Med-Surgical Mills-Peninsula Hospital from 1991 to 1994. As a school nurse, Ms. Lipp has conducted hundreds of health and development assessments. As part of Student's triennial assessment, she would obtain a vision and hearing screening, which would take approximately 15 minutes, review Student's health history form, and ensure her records concerning Student's medical condition are up to date.

21. Parents did not provide their consent to the November 8, 2011 assessment plan.

FIRST HOME/HOSPITAL REQUEST

22. On January 24, 2012, Student's pediatrician, Dr. Juan Modega, completed and submitted a District form requesting Student be placed on home/hospital instruction for three to five months due to safety concerns, frequency of asthma symptoms, and a sleep disorder. Dr. Modega provided no other details or information specifically setting forth his safety concerns, or how a diagnosis of asthma or sleep disorder necessitated home/hospital instruction.

23. On February 9, 2012, the IEP team met for the purpose of discussing Dr. Modega's request for home/hospital instruction for Student. The attendees included Mother, the SDC teacher, the school counselor, a program specialist, and the principal. Mother advised the team that Student had sleep issues, which manifested in sleep walking and waking in the middle of the night. District members agreed to offer Student five hours per week of home/hospital instruction, to which Mother consented.

JUNE 1, 2012 ANNUAL IEP

24. On June 1, 2012, when Student was six-years-old, the IEP team met for Student's annual review. The attendees included Parents, an ASSISTT instructor, a

speech and language pathologist, a program specialist, a SDC teacher, a counselor, and a general education kindergarten teacher.

25. The IEP team reviewed Student's present levels of performance. The SDC teacher discussed Student's academic status, including information she received from the home/hospital instructor. The speech and language pathologist was unable to report on Student's present levels, as she had not had an opportunity to work with Student due to her home/hospital placement. The ASSISTT teacher reported on Student's present levels based on her interaction with Student when she attended school for six days in September 2011.

26. The IEP team developed goals in the areas of social skills, language arts, number sense, writing, receptive language, and expressive language. District offered home/hospital instruction for an additional two weeks, until June 14, 2012. For the 2012-2013 school year, District offered specialized academic instruction in a SDC, individual speech and language therapy, individual behavior intervention services, and group behavior intervention services. District also offered extended school year (ESY) services for 2012.

27. The IEP notes indicated that Student required a full re-evaluation, and that the program specialist offered Parents an assessment plan at the meeting; however, there was no evidence presented at hearing to substantiate this, including a copy of the proposed assessment plan, and what, if anything, it proposed to assess. There was no evidence presented as to whether Parents consented to the June 1, 2012 IEP or the assessment plan District purportedly gave to Parents that day.

SECOND HOME/HOSPITAL REQUEST

28. On July 25, 2012, Dr. Modega used the District form and made a second request that Student be placed on home/hospital instruction due to a sleep disorder,

and recommended another three to five months of home/hospital instruction. Dr. Modega also noted on the form that Student suffered from episodic asthma.

29. On September 14, 2012, the IEP team met for the purpose of discussing Dr. Modega's request. The IEP team agreed to provide Student with home/hospital instruction until December 21, 2012. Specifically, the District members offered 300 minutes per week of home/hospital instruction as an addendum to Student's June 1, 2012 IEP, to which Father consented.

NOVEMBER 8, 2012 AUGMENTATIVE ALTERNATIVE COMMUNICATION ASSESSMENT

30. Parents expressed a concern to District concerning Student's ability to communicate. On November 8, 2012, pursuant to Parents' request, District conducted an Augmentative Alternative Communication (AAC) assessment to determine Student's possible need for an AAC device. The assessor, who was a speech and language pathologist, a board certified behavior analyst, and certified in the area of assistive technology, conducted the assessment in Student's home. The assessment consisted of a parent interview, a records review, informal observations of Student, administration of portions of the Wisconsin Assistive Technology Initiative (WATI), and the introduction of various screen devices and communication application programs. In the assessor's report, dated November 9, 2012, the assessor noted Student's "limited ability to appropriately verbalize," which "decreased [Student's] functional communication of her wants/needs, feelings, and social communication." Consequently, the assessor recommended a speech and language evaluation in order to determine Student's current level of speech and language skills.

PARENTS' CONDITIONAL CONSENT

31. Father testified at hearing, and advised that if District permits Mother or Father's presence at Student's assessment, as District had done during Student's

transdisciplinary preschool assessment in 2009, Parents would present Student for assessment. Father explained that he wanted a parent present to ensure Student's safety, given Student's asthma, which required constant monitoring of her breathing and respiratory needs, as well as to determine Student's needs given the AAC assessor's conclusion that Student has a "limited ability to appropriately verbalize" and communicate her "wants/ needs, feelings, and social communication." However, Father acknowledged that Student never had an asthma attack during the six days she attended school at District, and he provided no documentary or testimonial evidence from a healthcare expert or any other individual specifically setting forth how Student would be unsafe during District's proposed assessment sessions. In addition, Father presented no evidence demonstrating District staff would be unequipped or otherwise unable to address Student's needs during the assessment, despite her limited communication.

32. At hearing, Ms. Lipp (school nurse) explained that Student's records included no doctor's recommendations that her Parents must be with Student at all times because of her asthma. Similarly, Director of Special Education Jacquelynne Williams, who testified at hearing, reviewed Student's case file, and noted that no IEP's reflected that, as an accommodation, Parents could attend Student's assessment sessions, and read no other statement in her case file indicating Parents must be with Student at all times because of her respiratory issues. Ms. Williams, who has also been a school psychologist since 2005, explained that District permits preschool parents to attend their child's transdisciplinary preschool assessment, because it is the child's first exposure to the educational setting, and separating the child from the parent could be too stressful for the child. However, when moving to the kindergarten through high school educational setting, the child has matured, tests are more stringent, and the parent's presence is neither warranted nor encouraged. A parent's presence during the

administration of these tests could confound the assessment, and violate the testing procedures set forth in the publisher's manual, thereby invalidating the tests.

33. At hearing, Ms. Laidlaw explained that the presence of Parent at an assessment session could influence the way Student performs, thereby invalidating the tests. In addition, Ms. Menz expressed concern that Parents' presence at Student's assessment could cause Student to become distracted. Also, Dr. Reeve felt Parents should not be present during Student's assessment, because their presence could cause Student to become clingy or distracted, thereby impacting the test results. Moreover, Ms. Nicholson opined that Parents' presence during the assessment/observation could alter Student's behavior, resulting in an inaccurate picture of Student's behavior.

LEGAL CONCLUSIONS

1. District contends it has the right to perform a triennial assessment of Student, pursuant to its November 8, 2011 assessment plan, as it has not conducted any assessments of Student since her transdisciplinary preschool assessment of January 6, 2009, except for an AAC assessment conducted on November 8, 2012. District further contends that its assessment plan was appropriate, and that the assessments were necessary to provide Student with an appropriate placement and related services, because the 2009 assessment data were out of date. District also argues that it should be permitted to conduct these assessments without the presence of Parents at the assessment sessions, as their attendance could impact or invalidate the assessment results. Father disagrees, and contends that if District is permitted to conduct assessments of Student, Parents should be permitted to attend the assessment sessions in order to ensure the safety and well-being of Student, given her medical issues, coupled by the AAC assessor's conclusion that Student has a "limited ability to

appropriately verbalize” and communicate her “wants/ needs, feelings, and social communication.”³

BURDEN OF PROOF

2. As the petitioning party, District has the burden of persuasion on the issue alleged in District’s complaint. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

FAPE

3. Under the Individuals with Disabilities Education Act (IDEA), eligible children with disabilities are entitled to a FAPE, which means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child’s individualized education program. (See 20 U.S.C. §§ 1400(d), 1401(3), 1401(9), 1401(29), 1412(a); Ed. Code, §§ 56001, 56026, 56040.) “Special education” is defined as “specially designed instruction at no cost to the parents, to meet the unique needs of a child with a disability....” (20 U.S.C. § 1401(29).) California law also defines special education as instruction designed to meet the unique needs of individuals with exceptional needs, coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.)

³ Father’s closing brief contained a number of facts, allegations, and documents he failed to present at the time of the hearing, many of them unrelated to the issue at hand. Consequently, the ALJ did not consider them in this Decision. In addition, Father made arguments concerning violations of the Americans with Disabilities Act, under which the Office of Administrative Hearings has no jurisdiction. As such, those arguments were not considered in this Decision.

“Related services” (also known as designated instruction and services) are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

TRIENNIAL ASSESSMENTS

4. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and District agree otherwise, but at least once every three years unless the parent and District agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child’s educational or related service needs. (20 U.S.C. § 1414(a)(2)(A)(i); Ed. Code, § 56381, subd. (a)(1).)

5. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) In order to start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his 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. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must: appear in a language easily understood by the public and 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, subd. (b)(1)-(4).) The district must give the parents and/or pupil 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

6. If the parents do not consent to a reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess

the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(a)(3)(i), (c)(ii)(2006); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

7. Parents who want their children to receive special education services must allow reassessment by the district. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; *Dubois v. Conn. State Bd. of Ed.* (2d Cir.1984) 727 F.2d 44, 48.)

8. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) The determination of what tests are required is made based on information known at the time. (See *Vasherresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

9. Triennial assessments, like initial assessments, must be conducted by individuals who are both “knowledgeable of the student’s disability” and “competent to

perform the assessment, as determined by the school district, county office, or special education local plan area.” (Ed. Code, § 56320, subd. (g), and 56322; see 20 U.S.C. §1414(b)(3)(B)(ii).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) A health assessment shall be conducted by a credentialed school nurse or physician who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, § 56325, subd. (b).)

ANALYSIS

10. As set forth in Legal Conclusion 4, District must assess Student every three years, unless an assessment is waived by both District and Student. To override the parental consent requirement for triennial assessments, District must prove that it met all of the statutory requirements of notice to parents and must prove that the proposed assessment plan was appropriate.

11. Here, Student had not been assessed since January 6, 2009, four days shy of her third birthday, because Parents have refused to present Student for her triennial assessments. The evidence showed that District provided Parents an assessment plan on May 25, 2011 for an early triennial assessment, because Student never attended preschool, and, as such, District could not determine Student’s present levels of performance. The May 25, 2011 assessment plan included an explanation of the proposed assessment areas, as well as identified the District staff who would administer the assessments. In addition, District provided Parents with a copy of procedural safeguards. While Mother provided her consent to the assessment plan on September 6, 2011, Parents never presented Student for evaluation, and failed to return Student to school after September 23, 2011, after only six days of instruction. As such, District prepared a new assessment plan on November 8, 2011, so that Student could be assessed in time for her triennial review, January 2012, which included an explanation of

the proposed assessment areas, as well as identified the District staff who would administer the assessments. In addition, the November 8, 2011 proposed assessment plan explained that Parents' consent was necessary to assess Student, and District provided Parents' with a copy of procedural safeguards. However, the evidence shows that Parents never provided their unconditional consent to the November 8, 2011 assessment plan, but, rather, have subsequently attempted to impose conditions on their consent, namely the requirement that they attend Student's assessment sessions.

12. While Father contends that Parents should be present at Student's assessment sessions in order to ensure Student's safety and to determine her needs at the assessment sessions given her limited ability to communicate, he has submitted no documentary or testimonial evidence from a healthcare expert, including from Student's physician, Dr. Modega, specifically setting forth how Student would be unsafe during District's proposed assessment sessions. In addition, Father presented no evidence demonstrating that District staff was unequipped or otherwise unable to address Student's needs during the assessment, despite her limited communication. Moreover, Ms. Williams, Ms. Laidlaw, Ms. Menz, Dr. Reeve, and Ms. Nicholson all credibly testified that Parents' presence during the administration of the assessment tests could confound the assessment, and violate the testing procedures set forth in the publisher's manual, thereby invalidating the tests. In addition, Parents' presence could serve as a distraction and interfere with District's efforts to obtain a clear picture of Student's present levels of performance. Finally, as established through the credible testimony of Ms. Lipp and Ms. Williams, Student's records included no doctor's recommendations that her Parents must be with Student at all times because of her medical condition, and no IEPs reflected that, as an accommodation, Parents could attend Student's assessment sessions. Given these reasons, and as set forth in more detail below, Parents' presence at Student's assessment sessions will not be permitted.

13. In sum, District was required at a minimum to assess Student every three years. Not only was Student due for a triennial assessment, but the evidence showed, through the credible, uncontradicted testimony of Ms. Laidlaw, Ms. Menz, Dr. Reeve, Ms. Nicholson, and Ms. Lipp, that the assessment was necessary given District's outdated information. The evidence further demonstrated that the District complied with all procedural requirements of the IDEA to conduct the assessments. Thus, District met its burden by a preponderance of the evidence that it is entitled to assess Student under the November 8, 2011 assessment plan without parental consent, and without the presence of Parents at any assessment sessions. (Factual Findings 1 - 33; Legal Conclusions 1 - 13.)

14. District also demonstrated that should Parents fail to produce Student for assessment, it has the right to cease providing special education and related services to Student. As set forth in Legal Conclusion 7, Parents who want their children to receive special education services must allow reassessment by the district. However, the evidence showed a significant history of Parents' refusal to permit District to reassess Student. Specifically, as established above, Parents refused to produce Student for reassessment after Mother signed the May 25, 2011 assessment plan, even though District lacked pertinent information concerning Student's present levels of performance. This lack of information stemmed from Parents' initial decision not to permit Student's attendance at a District program following the 2009 preschool assessment. In addition, after only six days of instruction, Parents refused to permit Student's continued attendance in kindergarten, which necessitated District's use of time, energy, and resources to convene an IEP meeting on November 8, 2011 to discuss the issue, and prepare a new assessment plan to conduct a triennial assessment. Yet, despite Parents' signed invitation expressing their intention to attend this IEP meeting, Parents neither attended the meeting nor provided their consent to the November 8,

2011 assessment plan. Parents' longstanding lack of cooperation has resulted in a four-year period during which Student has not been comprehensively assessed. Given these factors, the IEP team cannot effectively develop an IEP for Student outlining her unique needs or determining changes, if needed, to her eligibility categories for special education services. If Parents want District to continue to provide special education and related services to Student, they must make Student available for assessment at the locations, times, and dates selected by District, and remain outside the presence of Student during her assessments. Otherwise, District is authorized to cease providing special education and related services to Student. (Factual Findings 1 - 33; Legal Conclusions 1 - 14.)

ORDER

1. The District may assess Student pursuant to the November 8, 2011 triennial assessment plan without parental consent.
2. District shall deliver to Parents by certified mail at their last known address, notice of the dates, times, and locations of the assessments set forth in the November 8, 2011 assessment plan. Parents shall present Student for the assessments on the dates, times, and at the locations set by District. Parents may not be present in the same room with Student during her assessment sessions.
3. If Parents fail to present Student for the various assessments set forth in the November 8, 2011 assessment plan, District is relieved of its obligation to provide Student a FAPE. District shall not be obligated to provide a FAPE until Parents request an assessment, consent to the assessment plan the District provides in response to their request, present Student for the assessment as set forth in such assessment plan, and allow assessment outside the presence of Parents.

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 prevailed on all issues heard and decided in this matter.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

DATED: March 11, 2013

_____/s/_____

CARLA L. GARRETT

Administrative Law Judge

Office of Administrative Hearings