

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

BERKELEY UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2018120695

DECISION

Berkeley Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California on December 17, 2018, naming Student.

Administrative Law Judge Tiffany Gilmartin heard this matter in Oakland, California, on January 10, 2019.

Attorney Jennifer Nix represented Berkeley. Dr. Jan Hamilton, Executive Director of Special Education attended the hearing on behalf of Berkeley. Mother represented Student. Student attended until the lunch break.

Berkeley's motion for oral closing arguments was granted. At the conclusion of testimony on January 10, 2019, the record was closed and the matter was submitted for decision.

This hearing only addressed the non-expedited issue; the expedited issue will be addressed at the due process hearing scheduled to begin on January 29, 2019.

ISSUE

1. May Berkeley assess Student pursuant to its November 5, 2018, assessment plan without Parent's consent?

SUMMARY OF DECISION

Berkeley seeks permission to conduct special education assessments of Student to develop an appropriate individualized education program. Berkeley met its burden of proof that its proposed assessments are warranted; that it provided Mother appropriate notice of the proposed assessments; and that it has qualified personnel to conduct the assessments. Berkeley failed to meet its burden that the proposed testing instrument Differential Ability Scales—Second Edition satisfied the injunction in *Larry P. v. Riles* (N.D. Cal. 1979) 495 F.Supp.926, *affd. in pt., revd. in pt., Larry P. v. Riles* (9th Cir. 1986) 793 F.2d 969 (*Larry P.*). This injunction prohibits full scale intelligence quotient testing of African American students in California. Thus, while Berkeley demonstrated the need for an intellectual development assessment of Student as identified in its assessment plan, Berkeley is precluded from using any of the subtests of the Differential Ability Scales—Second Edition as discussed as a potential option during hearing. Berkeley presented evidence of other testing instruments capable of assessing Student appropriately that are not subject to the *Larry P.* injunction. Therefore, this Decision authorizes Berkeley to assess Student pursuant to its November 5, 2018 assessment plan without parental consent, and subject to the restrictions held in this Decision.

FACTUAL FINDINGS

1. Student is a 14-year-old male who resided in the District at all relevant times, and was eligible for special education under the category of autism. Student enrolled in Berkeley in 2015. At the time of hearing, Student was in the ninth grade.

Student was last formally assessed in 2012. Student is eligible for special education in the category of autism.

2. An individual education program team meeting was held regarding Student on October 10, 2018 to discuss conducting updated assessments of Student including a functional behavior assessment. Mother opposed any formal assessments of Student. Mother was concerned Berkeley did not want to attempt to understand him as a person. The team explained the need for assessments to determine Student's present levels of performance and to craft goals that meet his needs.

3. Following the IEP team meeting, Berkeley special education program supervisor Lena Sweeney, who testified at the hearing, prepared a prior written notice for Mother on October 16, 2018, explaining Berkeley's position on assessing Student. The IEP team had concerns about Student's maladaptive behaviors and wanted to conduct a functional behavioral assessment of Student to determine if a behavior intervention plan is necessary. There was no dispute that Mother received the October 16, 2018 prior written notice. Ms. Sweeney mailed the prior written notice and procedural safeguards to the address Berkeley had on record for Mother. Berkeley also emailed a copy of the prior written notice and procedural safeguards to an email address Mother had replied from before.

4. A formal assessment plan was prepared and presented to Mother on November 5, 2018. Special education program administrator Susannah Bell, who also testified at the hearing, was present at the meeting when Mother was presented with the assessment plan. The assessment plan was written in English, Mother's native language. The assessment plan identified the areas in which Berkeley proposed to assess Student in. The assessment plan also identified the testing procedures and personnel who would conduct the assessments. Testing procedures included: classroom observations, rating scales, interviews, and one-on-one testing. The assessment plan did

not identify by name the standardized test instruments that would be administered; that was reported by testimony at the hearing. Mother refused to sign the assessment plan, Berkeley prepared and mailed another prior written notice and a copy of parental procedural safeguards to Mother on November 5, 2018.

5. The assessment plan proposed to have Student assessed by an educational specialist to determine his level of academic achievement. Student's intellectual development, social/emotional behavior, and adaptive behavior would be assessed by the school psychologist. Student's language and speech and communication development would be assessed by the speech and language pathologist. Berkeley also proposed to conduct a functional behavior assessment. The assessment plan provided an overview of the types of assessments used such as observations, interviews, rating scales criterion, and norm-referenced assessments to be conducted by all assessors as needed. The assessment plan was easily understood by a lay person, and advised Mother that an IEP would not be implemented without parental consent.

6. As the special education program manager, Ms. Bell, was familiar with Student. Ms. Bell has almost thirty years of special education teaching experience. She also had three years of special education supervisory experience. Ms. Bell holds a clear administrative services credential, as well as a clear mild/moderate education specialist certificate with an autism authorization. Ms. Bell's testimony was thoughtful and thorough and consistent with the documentary evidence. Ms. Bell's testimony was given substantial weight.

7. Ms. Bell concluded new assessments of Student were necessary to help Berkeley gain a comprehensive view of Student's academic and behavior needs. Student's last assessment was previously conducted in 2012 when Student was in the second grade. Berkeley reasonably concluded Student was in need of comprehensive

reassessment to determine his present levels of academic achievement and functional behavior.

8. Student had recently had an uptick in concerning behaviors and Student had physically assaulted another student, been reported for stealing, committed a sexual battery against a staff member, and had attempted to remove the service weapon of Berkeley's resource officer. Student's escalating maladaptive behaviors were the chief concern of the district members of his IEP team. These team members determined a need for a functional behavior assessment in an attempt to address or redirect these maladaptive behaviors.

9. Ms. Sweeney, worked closely with Student and Mother in an attempt to obtain consent for assessment. Ms. Sweeney knew Student participated in his school and community activities and the escalating behaviors might result in negative consequences for him. Ms. Sweeney's job responsibilities included participating in numerous IEP team meetings, coaching new special education teachers, and drafting and reviewing assessment plans. Ms. Sweeney has a special education credential in mild/moderate learning disabilities, as well as an administrative service credential. Due to Student's outgoing and friendly disposition, Ms. Sweeney had almost daily interaction with Student. Ms. Sweeney was responsible for preparing and sending the two prior written notices Berkeley sent in effort to obtain Mother's consent. The prior written notice of November 5, 2018 sent to Mother via U.S. mail and email included a proposal for also assessing Student to see if he would benefit from assistive technology. Ms. Sweeney had included it on her prior written notice as she believed Student had strengths, but he may have communication difficulties, and she believed he could benefit from an assistive technology assessment. However, since an assistive technology assessment was not included as part of his assessment plan dated November 5, 2018, Berkeley is not seeking to assess Student in assistive technology at this time. As an

experienced program supervisor who was readily familiar with Student, Ms. Sweeney's testimony was given significant weight.

10. Ms. Sweeney participated in numerous IEP team meetings for Student. She understood Mother's concern that Student should be treated as an individual, and why Mother distrusted the educational system. Ms. Sweeney concluded because his behavior escalations were concerning and Berkeley needed to understand his present needs that reassessment was necessary.

11. Shala Jones was the school psychologist assigned to Student and she also testified during the hearing. Ms. Jones has worked for Berkeley as a school psychologist for four years. Ms. Jones holds an M.S. in counseling and guidance and a credential in school psychology. As the school psychologist assigned to Student, Ms. Jones, was familiar with Student having reviewed his records, his eligibility determination, and his cumulative file. Ms. Jones reviewed Student's case history and was aware Student was made eligible for special education when he was three for autistic-like behaviors.

12. The plan proposed a school psychologist, like Ms. Jones, would administer the assessments in intellectual development, social-emotional/ behavior, and adaptive behavior. To assess Student's intellectual development, Ms. Jones initially recommended three tests: the Differential Ability Scales—Second Edition, Wide Range Assessment of Memory and Learning-Second Edition; and the NEPSY-II, a neuropsychological development test¹. Ms. Jones was knowledgeable in the administration of these tests. Since Student's cognitive abilities were unknown, Ms. Jones recognized Student may also need alternative means of assessment, such as observations and interviews. Student may also require the Autism Diagnostic Observation Schedule; however, should Student need that assessment, Ms. Jones would be unable to provide it as she does not have the

¹ NEPSY is not an acronym.

specific training to conduct it. Berkeley does have assessors who are trained to administer the Observation Schedule should Student require that assessment. Ms. Jones' testimony was consistent with the evidence and given due weight.

13. The Abilities Scales, Ms. Jones proposed administering has the ability to generate a full-scale intelligence quotient test. Student is African-American. In California, school districts may not administer a full-scale IQ tests to African American students due to a court injunction, which will be discussed in the Legal Conclusions. Ms. Jones explained the Abilities Scales can be broken into different subtests to test Student's cognitive, processing, and memory functioning without generating a full-scale IQ score. No evidence was presented which subtests Berkeley proposed to use in order to satisfy the court injunction which does not permit IQ testing of African-American students.

14. Berkeley demonstrated that there were other testing instruments available that would not generate a full-scale IQ tests such as the Wide Range of Abilities and the NEPSY. Ms. Jones, who has assessed more than 200 students as a school psychologist is also trained in the administration of the additional testing instruments Berkeley identified could be used to assess Student's intellectual ability.

15. Berkeley also proposed to assess Student's academic achievement. Education specialist Josh Austin, who testified at this hearing, would perform the proposed assessments. Mr. Austin holds an education specialist credential and has seventeen years' special education experience. Mr. Austin, at the time of hearing, was also Student's math, reading, and life skills teacher. Mr. Austin was familiar with Student's education needs and academic performance as he saw him daily in his classroom. Student was often inconsistent in his focus and performance. In English, Student had the ability to write some sentences utilizing word banks. In the area of life skills, Student was required to demonstrate his ability to do some jobs such as washing,

cleaning, and stocking shelves for the student store. Student specifically struggled on tasks he did not prefer and needed additional redirection.

16. Mr. Austin concluded that due to Student's inconsistencies in his performance, behavior, and focus, Student likely needed more academic support than he was receiving. Mr. Austin proposed to use the following testing instruments: Brigance Inventory of Basic Skills and the Brigance Inventory of Transitional Skills. Mr. Austin was concerned about Student's ability to access some of the formalized tests which determine academic achievement, such as the Woodcock Johnson Test of Academic Achievement, because he believed Student lacked the skills necessary to meet the minimum requirements for administration. Mr. Austin also proposed to conduct observations where he would generate a narrative about Student's observed skills, interviews, and teacher-created tests intended to capture information not assessed by the Brigance Inventory. Mr. Austin's testimony was thoughtful, consistent with the evidence, and given substantial weight.

17. Through his IEP, Student received speech and language services. He met five times during the fall semester of 2018 with Chris Baskett, who testified at this hearing, a licensed speech and language pathologist. Student still struggles with verb tenses, articles and prepositions. When given jumbled sentences to decode, Mr. Baskett found Student especially attentive and engaged in his programming. Mr. Baskett recommended Student be assessed in using the Receptive and Expressive One-Word Picture Vocabulary Test. Mr. Baskett also proposed using the Clinical Evaluation of Language Fundamentals, Fifth Edition to assess Student's pragmatic language use. Mr. Baskett, a licensed speech and language pathologist for 24 years believed these assessments are necessary to gain an understanding of Student's current communication abilities. Mr. Baskett's testimony was thoughtful, consistent with the evidence, and given due weight.

18. Mother, who also testified at this hearing, believes Student was in a period of transition and assessments were not proper for him at the time Berkeley proposed to assess him. Mother also believes the formalized academic testing does not provide an accurate information of Student's abilities. Mother provided no evidence other than her testimony supporting this contention. Mother had a difficult experience when Student was last assessed in 2012 and she determined at that time Student would not be formally assessed again. Mother viewed the proposed assessments as a way for Berkeley to punish the Student rather than try to understand him as an individual.

19. Berkeley filed for due process on December 17, 2019 as it had not received Parental consent to assess Student pursuant to the November 5, 2018 assessment plan. As of the hearing, Parent still had not provided consent to assess Student.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA²

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)³ 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 further education, employment and independent

² Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

³ All subsequent references to the Code of Federal Regulations are to the 2006 version.

living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic, and functional goals related to those needs, and 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)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*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.

4. The Supreme Court recently clarified the *Rowley* standard in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. ___, 137 S.Ct. 988 [197 L.Ed.2d 335] (*Endrew F.*). The Court explained that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated

to permit a child to achieve passing marks and advance from grade to grade. (*Id.*, 137 S.Ct. at pp. 995-996, citing *Rowley*, 458 U.S. at p. 204.) In cases in which a student is not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his circumstances. (*Andrew F.*, *supra*, 137 S.Ct. at p. 1001.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) 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. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii).) In this case, Berkeley bears the burden of proof as to the sole issue presented.

MAY BERKELEY REASSESS STUDENT WITHOUT PARENTAL CONSENT?

6. Berkeley seeks to reassess Student, a ninth grader, who has not been reassessed since 2012 when he was in the second grade. Mother opposes the reassessment because she disagrees additional data on Student's present academic and behavior levels will provide any relevant information

Reassessment Requirements

7. 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); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must also be conducted if the local educational agency “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 request 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).)

8. Reassessments generally require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, §56381, subd. (f)(1).) If the parents do not consent to a proposed 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); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) A district may also file for due process, “for example, if they wish to change an existing IEP but the parents do not consent, or if parents refuse to allow their child to be evaluated.” (*Schaffer v. Weast, supra*, 546 U.S. 49, 53.) 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.)

9. Berkeley’s request to assess Student is warranted. Student is currently eligible for special education and related services. Student has not been assessed since 2012. The Berkeley members of Student’s IEP team established that Student’s recent behavior challenges indicate changes may be necessary to Student’s IEP. The evidence further established that to propose changes, Student’s IEP team requires current

assessment information to determine his educational and related service needs. Student is now a ninth grader and the last data representing Student is outdated; he was last assessed in the second grade.

Notice Requirements

10. To obtain 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 parent; 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 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

11. Berkeley provided Mother multiple copies of the proposed assessment plan, which met all legal requirements. There is no dispute that Berkeley provided Mother with appropriate notice of its proposed assessment plan. Mother disputed the necessity of assessing Student; therefore, she refused to consent to the assessment plan.

12. The proposed assessment plan outlines the areas to be evaluated and identifies the titles of the examiners. The plan describes the possible tests and procedures to be conducted. It also explains the information being sought through the evaluation of the various areas. The plan is written clearly in English and in terms understandable by the general public. The plan is clear in that no special education services will be provided to Student without Parents' written consent. All statutory

requirements of notice are met, and the assessment plan itself complies with the applicable statutes.

Berkeley Failed To Meet The Larry P. Injunction Burden

13. In California, school districts may not administer tests that measure a student's intellectual quotient (IQ) if a student is African American. Other measures must be used to measure the cognitive abilities of an African American student. (*Larry P. v. Riles, supra*, 495 F.Supp.926, *affd. in pt., revd. in pt., Larry P. v. Riles, supra*, 793 F.2d 969.)

14. The proposed assessment plan seeks to assess Student's cognitive ability but does not specify the instruments to be used. That omission does not invalidate the assessment plan. Ms. Jones testified that she believes the *Larry P.* injunction would not preclude her from utilizing some subtests of the Ability Scales, and that she considered administering "some." The Ability Scales is a test designed to generate a full scale intelligence quotient of a subject. Berkeley provided no evidence of which subtests would be used, nor did Berkeley provide any legal authority establishing that the Ability Scales can be administered without violating the *Larry P.* injunction. Since Berkeley was unable to meet its burden, it is prohibited from assessing Student utilizing the Ability Scales as a testing instrument.

Berkeley Has Competent Personnel To Perform Assessments

15. Reassessments must be conducted by persons competent to perform them, as determined by the local educational agency. (20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c)(1)(iv); Ed. Code, § 56322.) Any tests of intellectual or emotional functioning of students shall be made in accordance with Education Code section 56320 and shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, §§ 56322, 56324, subd. (a).)

16. Berkeley has qualified personnel competent to perform the assessments. Berkeley will arrange for an educational specialist with the requisite credentialing, training and competence to conduct Student's academic assessment. Ms. Jones, the school psychologist, is a credentialed and licensed school psychologist who has administered hundreds of assessments. She is qualified to assess Student in the areas of intellectual development, adaptive behavior, and social/emotional needs. Further, Berkeley presented evidence it has qualified school personnel who meet the state licensing, training and experiential requirements to assess Student in more discrete areas such as speech and language, intellectual development, and social/emotional needs. For instance, Mr. Baskett is a licensed speech and language pathologist with two decades of experience as a speech-language pathologist. The plan adequately identified the appropriate assessors qualified to conduct the assessment to which he or she is assigned. Berkeley established that the individuals who testified at the hearing, or equally qualified individuals, will conduct the proposed assessments.

17. Berkeley met its burden of proof that the November 5, 2018 assessment plan complied with all applicable statutory requirements regarding form, function, and notice. Berkeley also established that the assessments are warranted and its assessors are qualified and competent to conduct them. Berkeley's failure to overcome the *Larry P.* injunction burden on its intellectual development assessment is not fatal to its request to assess because it presented evidence of alternative testing instruments that comply with *Larry P.* are available.

ORDER

1. Berkeley is entitled to assess Student according to the November 5, 2018 assessment plan without parental consent.

2. Berkeley is precluded from utilizing the Ability Scales in any subpart as a testing instrument for Student.

3. Parent will timely complete and return any documents reasonably requested by Berkeley as part of the assessment.

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, Berkeley prevailed on the sole issue presented.

RIGHT TO APPEAL

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

DATED: January 30, 2019

/s/

TIFFANY GILMARTIN

Administrative Law Judge

Office of Administrative Hearings