

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPECIAL EDUCATION DIVISION  
STATE OF CALIFORNIA

In the Matter of the Dispute Between:

IRVINE UNIFIED SCHOOL DISTRICT,

Petitioner,

and

STUDENT,

Respondent.

OAH NO.N 2005090857

DECISION

James R. Goff, Administrative Law Judge, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on February 21, 22 and 23, 2006, and on March 6, 2006, in Irvine, California.

Sundee M. Johnson, Esq., of the law firm of Atkinson, Andelson, Loya, Ruud & Romo, represented Petitioner Irvine Unified School District (IUSD or District). Also present at the hearing on behalf of the District was Nancy Melgares, Director for Special Education for IUSD.

Student, Respondent, was represented by his Father. Also present at the hearing on behalf of Student was his Mother.

On September 30, 2005, IUSD filed its request for a due process hearing. Originally the case was set for hearing on October 28, 2005. However, on October 19, 2005, the Office of Administrative Hearings received a motion for continuance from the Student. The motion was based on unavailability of Student because of a pending surgery. The motion was granted. On December 21, 2005, the due process hearing was calendared for February 21, 22 and 23, 2006. During the course of the hearing it was necessary to continue the hearing

to March 6, 2006, to accommodate the attendance of a witness. Pursuant to the request of the parties the record was left open to accommodate written final arguments. The record was closed and the case was submitted on March 13, 2006.

## STATEMENT OF ISSUES

The issue at the hearing was whether IUSD had the right to assess Student pursuant to the November 23, 2004 and January 12, 2005 assessment plans in order to gather information crucial to providing Student with a free appropriate public education (FAPE).

## FACTUAL FINDINGS

1. Student is a 17-year-old male who attended Northwood High School. He resides with his parents within the boundaries of IUSD. Student qualified for special education under the category of other health impairment (OHI). In the Fifth Grade Student was diagnosed with Juvenile Dermatomyositis. Since the diagnosis Student has suffered with varying levels of the disease and the complications thereof. Juvenile Dermatomyositis is an autoimmune inflammatory disease of the connective tissue. Notable overlapping diseases include rheumatoid arthritis, calcinosis and contractures.

2. On January 29, 2002, IUSD received a letter from one of Student's doctors that indicated that he should not be exposed to viral infections. Student was referred for assessment and an individual education program (IEP) after he became seriously ill in Seventh Grade. Since then a tug of war has ensued over whether parents would agree to provide a medical release so that IUSD personnel could contact Student's doctors to determine his health status and the procedures necessary to keep him functioning in school. IUSD has continued to seek a medical release. Parents have declined repeatedly to provide a release. Parents were concerned that, with a release, IUSD might harass the doctors leading them to refuse service to Student.

3. Student enrolled at Northwood High School in September 2003. He attended one period every other day with a resource specialist, but otherwise attended general education classes. Student enjoyed a fairly successful ninth grade at Northwood High

School. He received straight "A" grades in those classes undertaken. When Student entered the tenth grade in 2004, he encountered a flare up in his disease, the curriculum was more difficult, his attendance suffered, and his grades dropped. At this time, Student weakened, and he was fatigued by the end of the day. The manifestations of his disease made it difficult for him to write. He could not walk long distances. He could not carry a backpack. He was stressed which caused aggravation of his condition.

4. On November 23, 2004, an IEP team meeting was held and the Student's parents attended. The IEP team noted that Student was exhausted when he got home from school. Although Student's grades had declined with his illness they were good, the team discussed dropping an academic class to relieve stress on Student. The team provided a referral of Student to Orange County Mental Health (OCMH) for an AB 3632, assessment and the provision of counseling services for Student to deal with his health problems. An assessment plan for Student was presented at the November 23, 2004 IEP. It provided for an Academic Assessment, a Social/Emotional Assessment, an Intellectual Development Assessment, a Health Assessment, an Assistive Technology Assessment, and an OCMH Assessment. These assessments were to update IUSD on where Student was in regard to his class work, whether his load was too heavy and how he was dealing with his health issues. Student's father signed as approving the assessment plan.

5. At the November 23, 2004 IEP meeting, Parents discussed their concerns for Student with the team and the proposed assessments. They added to the IEP "continue and develop a proper and complete IEP." They did not sign as agreeing to the IEP. Student's father signed the proposed assessment plan. Later, father revoked his consent to the assessment plan. IUSD was able to complete the record review, nurse's health assessment, a portion of the academic achievement test relying on Student's prior assessment, the assistive technology assessment, and the interview with Student. The District was not able to complete the remaining subtests of the academic achievement assessment, the

intellectual development assessment, nor the AB3632 referral for counseling as a result of Student's absence from school.

6. At the parents' request, an IEP review was held on January 4, 2005. The purpose of the meeting was to permit Father the opportunity to provide IUSD and staff information concerning Student's disease and its manifestations. Father provided 12-15 pages of in-depth material on Juvenile Dermatomyositis. Parents felt that this information, plus the letters from the Student's doctors expressing the need for infection control, would satisfy IUSD's need for medical information. However IUSD felt it did not have enough current health information to proceed to develop a meaningful IEP. On January 12, 2005, Mr. Gutierrez-Lohrman wrote to parents indicating that "[i]n the absence of a current exchange of information, the district is compelled to amend the current assessment plan dated 11/23/04 and seek additional information through a medical evaluation." This evaluation was to be conducted by a doctor as opposed to the earlier Health Assessment that was to be conducted by the school nurse. The Medical Assessment plan was attached to the letter. The parents did not sign the assessment plan.

7. On March 8, 2005, Student's triennial IEP meeting was held. Student's parents attended the meeting. One of the purposes of the meeting was for Ms. Simmons, the school psychologist, to discuss the referral to OCMH for counseling services for Student, but the parents rejected the referral. At this time, Student had been absent for three weeks. The parents were provided with copies of the proposed Assessment Plans and the referral to OCMH to consider.

8. On March 29, 2005, an IEP review meeting was held. No action could be taken because the parents did not attend. IUSD expressed its concern that Student was not attending school.

9. Student has not attended class at Northwood High School since February 8, 2005.

10. On September 23, 2005, an IEP meeting was held. Student's parents attended this meeting. The meeting was called to consider placement in response to an indication that Student would soon be undergoing another oral surgery. He had enrolled in classes again. IUSD proposed a home teacher for Student. Father expressed his feeling that the assessment plans of IUSD were made outside the parameters of appropriate IEP process. matter.

11. On September 30, 2005, IUSD filed its request for a due process hearing in this

12. Parents contend that to compel the subject assessments would endanger Student's health. Specifically, parents note that exposure to any bacteria or virus is life threatening to Student.

13. Exacerbating the parents' concern for Student's health was their experience dealing with IUSD. Apparently, IUSD had referred the parents to the School Attendance Review Board (SARB), because Student was not attending school. At some point, SARB indicated it would not take action until the due process hearing in this matter was resolved. Additionally, IUSD had referred the parents to the Orange County Department of Social Services on the complaint that the parents had been neglecting Student's health. Apparently this action was resolved without any further action.

## CONCLUSIONS OF LAW

1. A child must be assessed by a school district in all areas related to the suspected disability (Ed. Code, §§ 56320, subd. (f); 56381, subd. (f)), including, if appropriate health and social and emotional status. (34 C.F.R. § 300.532(g).) A district's evaluation is held to a standard provided in the statute of "reasonableness." (*Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 205-207 [73 L.Ed.2d 690, 102 S.Ct. 3034].) The IDEA does not prescribe substantive goals for evaluation, but provides only that it be "reasonably calculated to enable the child to receive educational benefits." (*Id.* at 206-207.) Any

assessment must be conducted by persons knowledgeable of the student's disability. (Ed. Code, § 56320, subd. (g).) The school district must present a written plan to the student's parents encompassing the areas it seeks to assess. (Ed. Code, §56321, subd. (a).) The school district cannot perform an assessment without parental consent. (Ed. Code, §56321, subd. (c).) If a parent refuses to provide consent for a school district assessment, the school district can request a due process hearing to compel compliance with an assessment. (Ed. Code, §§ 56321, subd. (c), 56501, subd. (a)(3), 56506, subd. (e).)

2. The scope of the administrative hearing mandated by 20 U.S.C. § 1415(b)(2), is limited to the due process request filed to obtain the hearing. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.) Thus, OAH is limited to determining the necessity and appropriateness of IUSD's assessment plans and it will not rule on whether IUSD's actions violated Student's rights other than resolving the questions of necessity and appropriateness. In that regard, the threat posed by Student's exposure to these assessments is part of the determination of necessity and appropriateness. Student's failure to file his own due process request limits the scope of review.<sup>1</sup>

3. Here, Student's parents have refused to give consent to IUSD's requested assessments contained in the November 23, 2004, and January 12, 2005, assessment plans. If the parents do not consent to the assessment plans, a school district can override the lack of parental consent if it establishes at a due process hearing the need to conduct such an assessment. (Ed. Code, §§ 56321, subd. (c), 56501, subd. (a)(3), 56506, subd. (e); 20 U.S.C. § 1414(a)(1)(C)(ii); *Wesley Andress v. Cleveland Independent School District* (5th Cir. 1995) 64 F.3d 176, 178; *P.S. v. The Brookfield Board of Education* (D. Conn. 2005) 353 F.Supp.2d 306, 314, fn. 5; *Los Alamitos Unified School District v. Student*, SEHO Case SN04-0258 (2004).) In

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<sup>1</sup> Student's parents raised a number of procedural defaults in the IEP process that are not addressed in this decision as a result of the failure to file a request for due process.

*P.S.*, the court relied on *Dubois v. Connecticut State Board of Education* (2nd Cir. 1984) 727 F.2d 44, 49, in determining that “[A] school system may insist on evaluation by qualified professionals who are satisfactory to the school officials.”

Additionally, Student must permit IUSD to conduct necessary and appropriate assessments if he intends to seek the benefits of IDEA. In *S.F. v. Camdenton R-III School District* (8th Cir. 2006) 439 F.3d 773, the court refused to order compliance with the School District’s assessment plans “when parents refuse consent, privately educate the child, and expressly waive all benefits under IDEA.” (See also, 20 U.S.C. § 1414(a)(1)(D)(ii)(II); 34 C.F.R. § 300.505(a)(1)(ii).) Until Student’s parents waive all claims under IDEA, they must comply with the reasonable and necessary assessment requests of IUSD. (*Los Alamitos Unified School District v. Student*, *supra*, SEHO Case SN04-0258.) Although Student has not attended school since February of 2005, there is no evidence that Student is being privately educated and does not intend to return to school. In *Los Alamitos Unified School District v. Student*, *supra*, SEHO Case SN04-0258, the hearing officer found necessity for an assessment by the school district in the fact that Student had not attended school for a year. The seriousness of Student’s illness and the need for careful planning of any infection control necessary for his return to school justify the requested assessment by a medical doctor contained in the amendment to the assessment plan offered on January 12, 2005, as opposed to the simple health checkup performed by a nurse. Medical services conducted by a doctor are appropriate for diagnostic and evaluation purposes. (20 U.S.C. § 1401(a)(17).) The medical assessment should precede the other requested assessments to permit the doctor to determine whether Student’s health can appropriately be subjected to the assessments remaining to be completed. (20 U.S.C. § 1412(a)(10)(C)(iv)(II); 20 U.S.C. § 1414(b)(3)(A)(iv); cf. *P.S. v. The Brookfield Board of Education*, *supra*, 353 F.Supp.2d 306, 315 [assessments performed by qualified professional].) This conclusion is supported by Factual Findings 1, 2, 3, 4, 5, 6, 7, 8, 10 and 11.

4. During the hearing, Student cited several times to *Irving Independent School District v. Tatro* (1984) 468 U.S. 883, 892, fn. 11 [82 L.Ed.2d 664, 104 S.Ct. 3371] and *Cedar Rapids Community School District v. Garret F.* (1999) 526 U.S. 66, 73 [143 L.Ed. 2d 154, 119 S.Ct. 992], in opposition to implementation of the assessment plans. In *Tatro*, the United States Supreme Court indicated that “[c]hildren with serious medical needs are still entitled to an education.” The court pointed to 20 U.S.C. § 1401(16), and its definition of special education as including instruction in hospitals and at home. The court concluded that the student there was entitled to clean intermittent catheterization to be provided by a person at school so that he could obtain an educational benefit. In *Cedar Rapids*, the court upheld *Tatro*, by requiring the school district to provide manual air pumping for student. While these cases support Student’s efforts to obtain infection control so that he could attend school, they do not support Student’s refusal to provide IUSD with medical releases, or his refusal to agree to the proposed assessments. The releases or completion of the assessments would permit IUSD to determine Student’s appropriate placement in school or at home and the necessary infection control measures that should be implemented by IUSD if Student was to return to school. This conclusion is supported by Factual Findings 4, 7 and 8.

5. Student contends that IUSD held secret meetings and did not consult parents in preparing the assessment plan of January 12, 2005, providing for a medical evaluation by a doctor. However, not all discussions between members of the IEP team require notice to the parents or their participation. (34 C.F.R. § 300.533 (b).) 20 U.S.C. § 1414(b)(1), provides: “Notice. The local education agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 615 [20 U.S.C. § 1415], that describes any evaluation procedures such agency proposes to conduct.” Thus, IUSD must provide notice of the scope of the assessments to be conducted. However, IUSD can determine what assessments can be conducted and the IEP team can determine the need for particular information relating to an assessment. (Cf. *Elida Local School District v.*

*Erickson* (N.D. Ohio, W.D. 2003) 252 F.Supp.2d 476, 484.) It was not essential to the validity of the assessment plans that parents were not consulted regarding the parameters of the plan. As indicated above, if the parents did not consent to the plans, then IUSD could seek through a due process hearing an order to compel the assessments. (*Dubois v. Connecticut State Board of Education, supra*, 727 F.2d 44, 49.)

## ORDER

Accordingly, IUSD's November 23, 2004 and January 12, 2005 Assessment Plans are appropriate and necessary, and Student and his parents are ordered to comply with the assessments indicated in those assessment plans, that were not previously completed. Further, Student's parents are ordered to make Student available for the ordered assessments unless a medical doctor indicates that Student is unable to participate in the assessments, in which case the assessments will be held in abeyance until the medical doctor indicates that it is safe for Student to participate in the assessments. It would be appropriate to conduct the January 12, 2005, medical assessment prior to the assessments in the November 23, 2004, assessment plan so that a doctor familiar with Student's health status can determine Student's availability for the more general assessments. Since there is no dispute as to the seriousness of Student's illness, IUSD is ordered to modify its assessment plan of January 12, 2005, to provide that the medical doctor will be qualified to assess a Student afflicted with Juvenile Dermatomyositis. In lieu of subjecting Student to another physical examination by an unfamiliar doctor, parents can provide IUSD with a medical release permitting the District to obtain the information to meet its needs. If parents provide a medical release satisfactory to IUSD, then IUSD can conduct the other assessments with approval of Student's existing doctor.

## 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. The following findings are made in accordance with this statute: *The district prevailed on all issues heard and decided.* Although IUSD is the prevailing party, its action is not that of a party entitled to equitable relief. Both parties have been intransigent. A court would have to review this record carefully to find any basis to award fees.

## 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 ninety days of receipt of this decision. California Education Code section 56505, subdivision (k).

Dated: May 8, 2006

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JAMES R. GOFF

Administrative Law Judge

Office of Administrative Hearings