

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

In the Matter of:

BEVERLY HILLS UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007030833

DECISION

Administrative Law Judge (ALJ) Debra Huston, State of California, Office of Administrative Hearings, Special Education Division (OAH), heard this matter on May 24, 2007, in Beverly Hills, California.

Beverly Hills Unified School District (District) was represented at hearing by attorney Howard J. Fulfroost. Also present was Susan Curtis, Coordinator of Special Education for District.

No appearance was made by or on behalf of Student or his parents (Parents), and neither Student nor Parents appeared, testified, or presented any evidence.

On March 26, 2007, District filed a request for a due process hearing (Complaint)¹ regarding Student. At the hearing, witness testimony and documentary evidence were

¹ A request for a due process hearing under California Education Code section 56502 is the due process complaint notice required under Title 20 United States Code section 1415(b)(7)(A).

received. The record was closed and the matter was submitted on May 24, 2007.

ISSUE

Does District have the right to assess Student pursuant to the proposed assessment plan dated November 1, 2006, in the absence of parental consent?

CONTENTIONS OF THE PARTIES

District contends that: (1) District suspected that Student has a disability and proposed to assess Student, by assessment plan dated November 1, 2006, in the areas of academic achievement, social/emotional/adaptive behavior, psycho-motor development, language/speech/communication development, intellectual development, and health and development; (2) This assessment plan was sent to Parents on November 1, 2006, November 22, 2006, and January 3, 2006; and (3) Parents refused to consent to the proposed assessment. District contends that it has taken reasonable measures to obtain Parents' consent for the assessments after providing proper notice and advisement of rights. District seeks an order authorizing it to conduct an assessment of Student and an order that Parents make Student available for the assessment.

PROCEDURAL MATTERS

On March 26, 2007, District served a copy of the Complaint on Parents at their address of record. On March 27, 2007, OAH served a Notice of Due Process Hearing and Mediation on both the District and Parents at their respective addresses of record. The Notice set mediation for April 10, 2007, and set the due process hearing for April 26, 2007, at 9:30 a.m., at the District offices at 255 South Lasky Drive, Beverly Hills, California.

On April 4, 2007, OAH called Parents twice to confirm the mediation date. The person who answered Parents' phone each time terminated the phone call. The date of April 26, 2007, was converted from the due process hearing to a prehearing conference.

On April 26, 2007, the ALJ called Parents' home telephone number several times in an attempt to ensure Parents' participation in the prehearing conference. Each time, the ALJ reached Parents' voicemail. With the assistance of a Russian interpreter, the ALJ left a message on Parents' voicemail, informing them that the prehearing conference would be conducted as scheduled. The prehearing conference was held, as scheduled, with District represented by Mr. Fulfrost. No appearance was made on behalf of Student. After the prehearing conference concluded, the ALJ left another message on Parents' voicemail, again with the assistance of a Russian interpreter, informing Parents of the date, time, and place of the due process hearing, and of their right to have a Russian interpreter at that hearing. On May 2, 2007, a copy of the prehearing conference order, translated into Russian, was served on Parents at their address of record. That order informed Parents of the issue to be heard at the hearing and that OAH would provide an interpreter at the hearing upon Student's request. On May 24, 2007, at the time and the place set for the hearing, Parents did not appear. Parents did not contact OAH at any time prior to the hearing. Mr. Fulfrost represented that he had served District's witness list and evidence binder on Parents at their address of record by Federal Express and by First Class Mail. Both packages were returned to Mr. Fulfrost unopened. Mr. Fulfrost served a third package containing District's witness list and evidence binder by Overnight Express. Mr. Fulfrost received confirmation from Overnight Express that the package was left at the door of Parents' apartment. Neither Mr. Fulfrost nor District had heard from Parents regarding the hearing. Ms. Curtis represented that she made several attempts to discuss the proposed assessment with Parents, but Student's father said he was not interested and hung up the telephone. Student's parents did not respond to District's letters, which included a copy of the assessment plan. The due process hearing commenced at approximately 9:30 a.m., as scheduled, and the ALJ noted the above procedural history on the record. The hearing concluded just after noon. At no time prior to or during the hearing did Parents appear or

telephone OAH or District.

FACTUAL FINDINGS

BACKGROUND

1. Student is 12 years old and lives with Parents within the boundaries of District. He attends 7th grade at Hawthorne School (Hawthorne), a public school within District boundaries serving pupils in kindergarten through 8th grade. Student has attended Hawthorne since kindergarten. Since Student has attended school within District, Student has never been assessed for, or received, special education services.

2. Student's family came from Russia seven or eight years ago. Student speaks English fluently. Student's father is a physician at Cedars-Sinai Medical Center, and speaks English fluently. District personnel have always spoken with Student's father in English, and have had no language difficulties at all. District personnel have never spoken with Student's mother, although District has Russian-speaking staff available and could have used them to speak with Student's mother if the need had ever arisen. Student's father is the person whom the District contacts, and has always contacted, for decisions regarding Student's education.

3. Student is a capable student who has performed well academically. However, his achievement has not consistently been commensurate with his ability. In addition, since kindergarten, school personnel have expressed concern regarding Student's behaviors and emotional functioning. Student would simply "shut down" at times. He would run away and cower and hide under tables. He would refuse to go into the classroom at times. Student also had a flat affect. However, Student was functioning well academically in general, and he was advancing from grade to grade.

4. In the current (2006-2007) school year, although Student plays basketball with others at school, he rarely interacts with anyone during class. Student has a flat affect

and flat voice, he never smiles, and he never responds to his social studies and study hall teacher, Ms. Cheri Kaminsky, with more than one or two words. Student will not engage in conversation with Ms. Kaminsky, and he frequently makes inappropriate and disrespectful comments under his breath in class. One day early in the school year, Student acted as though he were going to staple his finger to his desk while in Ms. Kaminsky's class. When another Student attempted to take the stapler from Student, Student threatened the other student. On another occasion, Ms. Kaminsky observed Student slam his younger brother against a locker at school. The look on Student's face was fierce and frightening. Student noticed that Ms. Kaminsky was watching him and released his grip on his brother. Ms. Kaminsky feared for the safety of Student's brother. Ms. Kaminsky, who has taught for 35 years and has had Student in two classes each day all school year, is of the opinion that Student is very depressed and that his behavior is abnormal.

5. Kathy Schaeffer, ²the assistant principal at Hawthorne, was a second grade

² Ms. Schaeffer holds a Bachelor of Arts degree in speech pathology and audiology from George Washington University, a Master of Arts in speech pathology of Catholic University, and a Master of Science in school administration from Pepperdine University. She holds a state license in speech pathology and audiology, and credentials in regular education (clear credential), special education (speech and language services with a special class authorization), and administration. Ms. Schaeffer began teaching in 1989 and has been with Hawthorne for 20 years. She has worked for District as a speech and language pathologist, a special education teacher, and a regular education teacher. Ms. Schaeffer became the assistant principal of Hawthorne in 2006.

teacher when Student was in second grade at Hawthorne, and she has known Student throughout his years of attendance at Hawthorne. Prior to the beginning of the 2006-2007 school year, Ms. Schaeffer became concerned based on a report from Student's teacher from the 2005-2006 school year that Student was "at risk" for social/emotional problems. Ms. Schaeffer met with Student and Parents on August 22, 2006, to discuss her concerns. Parents refused Ms. Schaeffer's offer of school counseling services for Student.

6. On September 1, 2006, Ms. Schaeffer requested a child study team (CST) meeting because Student seemed more withdrawn and less communicative than in the past. He appeared to be unmotivated and depressed, and his performance in school was not commensurate with his ability. Ms. Schaeffer believes Student's performance is lower than expected due to social/emotional problems, and that Student has emotional issues that interfere with his ability to function in the school setting.

7. On September 20, 2006, a meeting was held regarding Student to discuss the possibility of a counselor "screening" Student. Parents were informed of that meeting. When Ms. Schaeffer called to invite Parents to the meeting, Student's father said he did not have time and hung up. Parents did not attend the meeting. At the meeting, it was agreed that Student should be screened by a counselor. On November 1, 2006, a follow-up meeting was held to discuss the results of the screening, which showed significant indications of depression.

8. District held another CST meeting on November 1, 2006. Parents were informed of the meeting and invited to attend, but did not do so. The CST recommended that District complete a comprehensive assessment of Student, citing emotional concerns as Student's area of suspected disability. Student's areas of suspected disability include emotional disturbance, specific learning disorder, speech and language impairment, and orthopedic impairment, and Student's behaviors may, in Ms. Curtis's opinion, result from any of these disabilities.

DISTRICT'S NOVEMBER 1, 2006, PROPOSED ASSESSMENT PLAN

9. As discussed in Legal Conclusion No. 2, a school district is required to identify, locate, and assess individuals with exceptional needs who reside within the school district's jurisdictional boundaries, and to provide a comprehensive individual evaluation before special education services are initially provided to a child. As is further discussed in Legal Conclusion No. 2, a school district is required to assess a child in all areas of suspected disability, including, if appropriate, health and development, vision, hearing, language function, general intelligence, academic performance, communicative status, motor abilities, career and vocational abilities and interests, and social and emotional status.

10. On November 1, 2006, Ms. Curtis, Coordinator of Special Education for District, sent to Parents, by First Class Mail and in English, a cover letter explaining District's desire to assess Student and a formal assessment plan form for Parents' consent to the assessment. District offered to assess Student in the areas of academic achievement, social/emotional/adaptive behavior, psycho-motor development, language/speech/communication development, intellectual development, and health and development. A copy of the procedural rights and safeguards booklet was sent along with the assessment plan. All portions of the assessment were to be performed by properly qualified and credentialed District personnel.

11. Parents did not respond to the District's request to assess Student. Another copy of the assessment plan and procedural rights and safeguards booklet were sent to Parents on November 22, 2006, and also on January 3, 2007, also by First Class Mail and in English. District informed Parents in its cover letter of January 3, 2007, that District has a right and an obligation to conduct an assessment upon receipt of a special education referral, and that District may initiate a due process proceeding in order to obtain an order allowing District to assess Student. District received no response from Parents.

12. The November 1, 2006, assessment plan was properly served on Parents with written notice of parental rights and an explanation of procedural safeguards that are required by law on three separate occasions. The assessment plan, which was in English, was understandable to Student's father, a physician, who is the parent who interfaces with District and makes educational decisions regarding Student, and may have been understandable to Student's mother as well. The assessment plan explained the general types of assessments that were proposed, as well as the District personnel who would conduct the assessments.

13. District established that its concerns that Student is an individual with exceptional needs who should be assessed for eligibility for special education and related services are valid, based on Student's behavior at school, indications that Student is suffering from depression, and the fact that Student's behavior and depression affect his academic performance and interfere with his ability to function in the school setting.

14. Parents' failure or refusal to consent to the proposed assessments listed in the November 1, 2006, assessment plan, and Parents' failure to present Student for assessment pursuant to that assessment plan has continued to date. District's proposed assessment plan represents a comprehensive assessment of Student. District has shown that it has taken reasonable measures to obtain Parents' consent and that Parents have failed to do so.

LEGAL CONCLUSIONS

APPLICABLE LAW AND DETERMINATION OF ISSUES

1. District, as the petitioner, has the burden of proof in this proceeding. (Schaffer v. Weast (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. A school district is required to identify, locate, and assess individuals with exceptional needs who reside within the school district's jurisdictional boundaries. (Ed.

Code, § 56302.) Before any action is taken with respect to the initial placement of a child with special needs, a school district is required to conduct an assessment of the pupil's educational needs. (Ed. Code, § 56320.) The school district is required to assess the student in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program. (20 U.S.C. § 1414(b)(2), (3); Ed. Code, § 56320, subds. (e), (f).) Areas of suspected disability include, if appropriate, health and development, vision, hearing, language function, general intelligence, academic performance, communicative status, motor abilities, career and vocational abilities and interests, and social and emotional status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).)

3. As determined in Factual Findings 1 and 3 through 8, Student resides within the jurisdictional boundaries of District, and District has established that its concerns that Student is an individual with exceptional needs who should be assessed for eligibility for special education and related services are valid, based on Student's behavior at school, indications that Student is suffering from depression, and the fact that Student's behavior and depression affect his academic performance and interfere with his ability to function in the school setting. As determined in Factual Finding No. 8, District's assessment plan proposed to assess Student in all areas related to his suspected disability.

4. The assessment plan must be accompanied by a notice of the parent's rights and a written explanation of the procedural safeguards under IDEA 2004 and California law. (Ed. Code, § 56321, subd. (a).) The assessment plan must be in language easily understood by the general public, and must be provided in the native language of the parent or guardian or other mode of communication used by the parent or guardian, unless to do so is clearly not feasible. (Ed. Code, § 56321, subd. (b)(1) & (2).) The parent has at least 15 days from the receipt of the proposed assessment plan to arrive at a

decision. (Ed. Code, § 56321, subd. (c).)

5. As found in Factual Findings 10 through 12, the November 1, 2006, assessment plan was properly sent to Parents along with written notice of parental rights and an explanation of procedural safeguards on three separate occasions. The assessment plan and notice of procedural safeguards were in English, which, as determined in Factual Finding No. 2, is a language that Student's father, a physician, speaks fluently. Parents were given from November 1, 2006, through March 26, 2007, when District filed its request for a due process hearing, to respond to District's request to assess.

6. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producers of the tests. (20 U.S.C. § 1414(b)(2), (3); Ed. Code, § 56320, subds. (a), (b).) Assessments must be conducted by individuals who are knowledgeable and competent to perform the assessment, as determined by the school district, county office, or special education local plan area. (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (g), 56322.)

7. As determined in Factual Finding No. 10, District's November 1, 2006, proposed assessment plan meets the requirements in Legal Conclusion 6, because all portions of the assessment were to be performed by properly qualified and credentialed District personnel.

8. While the law provides that a school district has the right and obligation to conduct assessments, parental consent is generally required before a school district may conduct assessments. (20 U.S.C. § 1414(a)(1)(C)(i); Ed. Code, § 56321, subd. (c).)

9. As found in Factual Findings 11 and 12, Parents failed to consent to any of the proposed areas of assessment in the November 1, 2006, assessment plan.

10. A school district can override a lack of parental consent if the school district prevails at a due process hearing. (20 U.S.C. § 1414(a)(1)(C)(ii); Ed. Code, § 56506, subd. (e).) The school district must demonstrate at hearing that it has taken reasonable measures to

obtain the consent of the parent, and that the child's parent has failed to respond. (Ed. Code, § 56506, subd. (e).)

11. As found in Factual Findings 10 through 12, District properly served Parents with a formal proposed assessment plan on November 1, 2006, November 22, 2006, and January 3, 2007. District provided Parents with sufficient time within which to consent. Parents failed to respond. District has met its burden of proof to establish that it has taken reasonable measures to obtain Parents' consent, and that Parents have failed to respond.

ORDER

1. The Beverly Hills Unified School District may conduct assessments of Student pursuant to the proposed assessment plan of November 1, 2006.

2. Parents shall make Student reasonably available for the assessments.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to this mandate, it is determined that the Beverly Hills Unified School District prevailed on the only issue that was heard and decided in this matter.

NOTICE OF APPEAL RIGHTS

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 (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

IT IS SO ORDERED THIS 5th day of June, 2007.

A handwritten signature in black ink, appearing to read "Debra R. Huston", written over a horizontal line.

DEBRA R. HUSTON

Administrative Law Judge

Office of Administrative Hearings

Special Education Division