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

In the Matter of: LAKE ELSINORE UNIFIED SCHOOL DISTRICT, Petitioner, v. STUDENT, Respondent.	OAH CASE NO. N 2007030019

DECISION

Elizabeth Feyzbakhsh, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division (OAH), heard this matter on April 20, 2007, in Lake Elsinore, California.

Student's mother (Parent) was present throughout the hearing and appeared on behalf of Student. At the request of Parent, a Mandarin interpreter was present throughout the hearing.

Attorney Cynthia Vargas appeared on behalf of Respondent, Lake Elsinore Unified School District (District).

At the hearing on April 20, 2007, witness testimony and documentary evidence were received. At the request of the parties, written closing arguments were submitted by the close of business on May 4, 2007. The record was closed and the matter submitted on May 7, 2007.

PROCEDURAL MATTERS

On February 28, 2007, District filed a request for due process hearing. A pre-

hearing conference was scheduled for March 26, 2007. On March 26, 2007, Parent sent a handwritten letter to the Office of Administrative Hearings indicating that she would not participate in the pre-hearing conference because, according to Parent, "this case is only a simple example of how District waste[s] public funds." The letter further stated that she would not "help with it."

On March 26, 2007, District filed a motion to continue the hearing scheduled for March 30, 2007. The basis for the request was that March 30, 2007, was a District-wide holiday.

After attempting unsuccessfully to contact Parent via telephone, the Administrative Law Judge conducted the pre-hearing conference in Parent's absence. During the pre- hearing conference, the ALJ granted the District's motion to continue and the hearing was re- scheduled for April 20, 2007.

On March 28, 2007, Student filed an opposition to Petitioner's motion to continue. In the opposition, Student opposed the motion on the grounds that (1) District should have known that the date was the first day of spring break at the time the hearing notice was received, (2) District did not observe the Cesar Chavez holiday on March 30, 2007, and (3) District has held IEP meetings on holidays and during spring break in past years.

On April 20, 2007, at the commencement of the hearing, Student brought a motion to vacate the continuance. The motion to vacate the continuance was denied because it was moot and because the evidence contradicted Student's assertion that District did not observe the Cesar Chavez holiday.

Parent then requested that the ALJ recuse herself because Parent believed that the ALJ was biased in that she had presided over a prior due process hearing held in November 2006 between the same parties.

Government Code sections 11425.30 and 11425.40 govern disqualification of presiding officers. Government Code section 11425.30 sets forth the situations in which persons are prohibited from serving as presiding officer over a particular proceeding. A person may not serve as the presiding officer in an adjudicative proceeding if the person

has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage, or if the person is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage. However, a person may serve as presiding officer at successive stages of an adjudicative proceeding. Additionally, a person who has participated only as a decisionmaker or as an advisor to a decisionmaker in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding or its preadjudicative stage may serve as presiding officer in the proceeding.

Government Code section 11425.40 governs disqualification of a presiding officer. A presiding judge is disqualified from presiding over a hearing for bias, prejudice, or interest in the proceeding. It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the presiding officer has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding.

Parent argued only that the ALJ should not hear this case because she heard a prior case involving the same parties. Nothing occurred in the prior hearing which would disqualify the ALJ from hearing the matter. The ALJ has no bias against either party in this matter. Parent did not present sufficient evidence to substantiate recusal.

ISSUE

Does District have the right to assess Student, pursuant to the proposed assessment plan dated February 6, 2007, in the absence of parental consent; and, if Parent home schools Student, refuses special education services, and refuses to make Student available for assessments, is District relieved from its obligation to provide Student a free and appropriate public education (FAPE)?

CONTENTIONS

District contends that it is entitled to conduct assessments pursuant to its

assessment plan dated February 6, 2007, because (1) District has an obligation to reassess Student once every three years; (2) District has an absolute right to reassess Student if it believes reassessment is necessary so long as an assessment has not occurred within one year, and in this case, Student has not attended school in more than one year and reassessment is necessary in order to develop an appropriate IEP; and (3) District is obligated to assess Student in certain areas based on a previous OAH decision involving the same parties.

Parent contends (1) that District cannot override Parent's refusal to consent to assessment because Student is not seeking special education services since Student is now being home schooled; (2) that it is improper to order assessments that were already ordered in a prior decision; and (3) that District failed to provide prior written notice when it proposed to initiate an assessment of Student.

FACTUAL FINDINGS

BACKGROUND FACTS

1. Student is a six-year-old female who is eligible for special education services due to autistic-like behaviors and mental retardation as a result of Down syndrome. Student resides with her parents within the geographical boundaries of District.

2. Student was first made eligible for special education services in Walnut School District in 2004. Student moved within the boundaries of District in the summer of 2004 and began receiving services from District in October 2004. From October 2004 through April 2005, Student was placed in a classroom for children with mild to moderate disabilities at Heald Elementary School. This was not a class that focused on children with autism.

3. In March 2005, after an autism assessment by the District, Student was diagnosed with autism. From March 2005 through February 2006, Student attended Cottonwood Canyon Elementary School (Cottonwood Elementary) where she was placed

in a special day class in the autism program.

4. On February 14, 2006, Student's mother removed Student from Cottonwood Elementary and informed District that Student would not be returning. On February 15, 2006, Student's mother wrote District a letter stating that Student would not attend Cottonwood Elementary any longer because, according to Parent, the school was unsafe for her.

5. On June 13, 2006, Student filed a request for due process hearing alleging that District denied Student a FAPE and requesting an appropriate placement for Student. A decision in that matter was rendered by the Office of Administrative Hearings on December 26, 2006; (OAH Case Number N2006060377). The ALJ found that Student's offer of placement in the autism program at Cottonwood Elementary was appropriate. However, the ALJ found that District had denied Student a FAPE in her prior placement at Heald Elementary. The ALJ awarded compensatory education based on the denial and ordered that District conduct certain assessments.

6. In a letter dated January 9, 2007, Parent sent a letter to District informing District that Student was enrolled in home school. Attached to the letter was a Private School Affidavit Confirmation dated January 9, 2007. The one-page confirmation covered the period of October 1, 2006, through September 30, 2007.

7. On January 11, 2007, District sent an IEP conference notice to Student via certified mail. The meeting was scheduled for Tuesday, February 6, 2007. District received no response from Parent.

8. On February 16, 2007, an attorney representing District sent a letter to Parent in an effort to comply with the placement, compensatory education and assessments ordered by the ALJ in Case Number N2006060377. A proposed assessment plan dated February 6, 2007, was attached to the correspondence. District received no response from the Parent.

9. On March 9, 2007, District sent a letter to the Parent indicating a willingness to discuss District's proposed assessment plan and a willingness to discuss

"what is behind [Student's mother's] decision to prevent [Student] from attending school at this time." District received no response from the Parent.

DISTRICT'S PROPOSED ASSESSMENT PLAN

10. A school District must conduct reassessments of a student receiving special education services after the initial assessment establishing eligibility. These reassessments may not be conducted more frequently than once a year, without agreement of both the parent and the District, but must be done at least once every three years (generally referred to as the "triennial review"). In addition to the triennial review, a District may perform reassessments if the District determines that the educational or related services needs of the Student warrant reassessment.

11. While the law provides that a local educational agency (LEA) has the right and obligation to conduct assessments, parental consent is generally required before a school District may conduct assessments. Normally, when a parent refuses to consent to an assessment, a District may utilize the consent override provisions contained in the IDEA and in the California Education Code. The override provisions authorize a District to bring a due process complaint seeking an order that the parents make a student available for assessment.

12. While the IDEA provides that the school District may seek authority to conduct an evaluation over the objection of a parent or guardian, the Act explicitly recognizes that a parent or guardian is free to refuse any publicly funded special education services offered by the District. In addition, a federal regulation provides that, if a parent of a child who is home schooled refuses to provide consent to a reevaluation, the District cannot use the consent override procedure of a due process proceeding.

13. District sent a proposed assessment plan to Student on February 16, 2007. The correspondence indicated that an assessment of Student's current educational needs was necessary because District had no contact with Student during the 2006-2007 school year. District has received no response from Student. The proposed assessment plan was

not returned to District.

14 In order to provide an appropriate educational program for Student, District must be permitted to gather pertinent information regarding Student's current educational needs and levels of functioning. Student has not attended school within the District for more than one year, so no informal observations could be made regarding Student's educational needs. Moreover, Student is due for her triennial review in 2007 and District is obligated to ensure that Student has been appropriately assessed in all areas of suspected disability.

15. District established at the due process hearing that conditions warrant reassessment of Student as outlined in the February 6, 2007 assessment plan. There is no dispute that the last triennial assessment of Student occurred in 2004, and that her current triennial review is due in 2007. Further, there is no dispute that Student has not been formally assessed by District in any area since March 2, 2005, and that Student has not attended a school within District since February 2006. Reassessment is necessary to determine Student's current present levels of performance.

16. District personnel determined that Student, who had not been attending school for nearly one year, needed reassessment in a variety of areas. Such areas include cognitive, functional, and behavioral abilities.

17. District established that its proposed assessors are competent and qualified to conduct the assessments specified in the February 6, 2007 assessment plan.

18. The proposed assessment plan adequately provided Student notice of District's intention to assess Student. Parent claimed that District did not make a reasonable effort to provide parent with the necessary information. No evidence supported this contention. There was no defect in the proposed assessment plan and Parent did not specify what information was lacking in the proposed assessment plan. This argument is without merit.

STUDENT IS HOME SCHOOLED AND REJECTS SPECIAL EDUCATION SERVICES

19. Parent contends that District is not entitled to assess Student because Student is currently home schooled. Parent testified that Student is home schooled[1] and argues that Student is not enrolled in District, not seeking to be enrolled in District, and is refusing special education services from District.

20. Parent has been ambiguous regarding whether or not special education services are being refused. Student indicated in February 2006, that Student was not returning to the classroom at Cottonwood Elementary. Student's mother argued in this hearing that the February 2006 letter showed that Student was not seeking special education services from District. However, Student filed for a due process hearing (OAH Case Number N2006060377) challenging Student's placement and alleging a denial of FAPE, after she removed Student from the classroom. Therefore, Student did not refuse special education services at that time.

21. Parent presented conflicting arguments in this proceeding regarding whether or not she was seeking special education services. Specifically, Parent, on the one hand, argues that District cannot assess because special education services have been refused. On the other hand, the Parent argues that she has consented to certain assessments and will allow District to assess Student in those areas. Although she argues

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[1] During the hearing, while under oath, Parent refused to respond to questions regarding Student's home school and initially the ALJ concluded that this refusal would prevent Parent from arguing that District could not utilize the consent override procedures. However, upon further contemplation, it is clear that whether or not Student's home school is properly registered or providing appropriate education is not an issue for determination within the jurisdiction of the Office of Administrative Hearings under the IDEA. Therefore, Student's argument regarding the consent override procedures will be considered

that Student consents to certain assessments, Parent has not made Student available for assessment or responded to telephonic or written correspondence from District. Additionally, during the hearing, parent was asked if she would stipulate that for as long as Student is home schooled, District is relieved from its obligation to provide Student a FAPE. Parent refused to so stipulate.

22. Parent cannot have it both ways. Either Parent is seeking special education services and must make the Student available for assessment, or Parent is refusing special education services and is home schooling Student. Based on Parent's testimony and written representation, the ALJ finds that Student is home schooled. District may not use the consent override procedures to compel attendance at an assessment and District is not required to consider Student eligible for special education services under Code of Federal Regulations section 300.300(d)(4)(i).

LEGAL CONCLUSIONS

APPLICABLE LAW AND DETERMINATION OF ISSUES

1. Petitioner has the burden of proving at an administrative hearing the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, [126 S.Ct. 528, 163 L.Ed.2d387].)

2. Under the federal Individuals with Disabilities Act (IDEA) and companion state law, students with disabilities have the right to a free and appropriate public education (FAPE). (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's individualized education plan (IEP). (20 U.S.C. § 1401(a)(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

3. IDEA and state law require that, in order to provide FAPE, a school district must develop an IEP that is reasonably calculated to provide the child with an educational benefit. (*Board of Education of the Hendrick Hudson Central School Dist. v.*

Rowley (1982) 458 U.S. 176, 203 [102 S.Ct. 3034, 3049].) The IEP must contain specified information including a statement of the child's present levels of academic achievement and functional performance, and a statement of measurable annual goals. (20 U.S.C. § 1414((d)(1)(A)(i)(I), (II); Ed. Code, § 56345, subds. (a)(1) & (2).) The district must review the child's IEP at least once a year in order to determine whether or not the annual educational goals are being achieved, and make revisions if necessary. (20 U.S.C. § 1414(d)(4)(B)(i); Ed. Code, § 56341.1, subd. (d).)

4. In order to meet the continuing duty to develop and maintain an appropriate IEP, the school district must assess the educational needs of the disabled child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) In addition, the school district may conduct a reassessment of the special education student not more frequently than once a year, but must reassess at least once every three years. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) The district must conduct a reassessment if the district "determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation." (20 U.S.C. § 1414(a)(2)(A)(i); see also Ed. Code, § 56381, subd. (a).)

5. Based on factual findings 1 through 5, 15 and 16, District personnel determined that Student needed reassessment in a variety of areas including cognitive, functional, and behavioral abilities. This satisfies the requirements of Education Code section 56381, subdivision (a)(1).

6. Based on factual finding 5, District had been ordered to conduct certain assessments. To include these assessments in the February 6, 2007 assessment plan, while redundant, was not inappropriate.

7. Based on factual findings 1, 2, 3, and 15, District had not conducted an assessment of Student within one year before the February 6, 2007 assessment plan was created, and a triennial review was due in 2007. This satisfies the requirements of Education Code section 56381, subdivision (a)(2).

8. School districts must perform assessments and reassessments according to

strict statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor. The district must select and administer assessment materials that appear in the student's native language and that are free of racial, cultural and sexual discrimination. (20 U.S.C. § 1414(b)((3)(A)(i); 34 C.F.R. § 300.304(c)(1)(ii); Ed. Code, § 56320, subd. (a).) The district must administer assessment materials that are valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) The district must administer assessment materials that are sufficiently comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(C); 34 C.F.R. § 300.304(c)(6); Ed. Code, § 56320, subd. (c).) Trained,knowledgeable and competent district personnel must administer special education assessments. (20 U.S.C. § 1414(b)(3)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.)A credentialed school psychologist must administer psychological assessments andindividually administered tests of intellectual or emotional functioning. (Ed. Code, §§ 56320, subd. (b)(3), 56324, subd. (a).) A credentialed school nurse or physician must administer a health assessment. (Ed. Code, § 56324, subd. (b).)

9. In addition, to perform a reassessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the district must identify any additional information that is needed by the IEP team to determine the present levels of academic achievement and related developmental needs of the student and to decide whether modifications or additions in the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subds. (b)(2)(B) & (D).) The district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).)

10. In order to start the process of assessment or reassessment, the school district must provide proper notice to the student and his/her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the

proposed assessment plan and a copy of parental and procedural rights under IDEA and companion state law. (20U.S.C. § 1414(b)(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 individualized education program without the consent of the parent. (Ed. Code,§ 56321, subd. (b)(1)-(4).) The district must give the parents and/or the student 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

11. Based on factual findings 8, 9, 13, and 18, District provided proper notice of its need to assess.

12. Based on factual findings 16, and 17, the content of the assessments and the qualifications of the assessors were appropriate.

13. Normally, before a school district performs an assessment of a child with a disability, the district must obtain parental consent for the assessment. (20 U.S.C. § 1414(a)(1)(D); Ed. Code, § 56321, subd. (c).) However, the district need not obtain informed consent if the district can demonstrate that it took reasonable measures to obtain such consent and the student and/or the child's parents failed to respond. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f).) Instead, in the event that a parent or disabled student does not provide consent, the district may bring a due process complaint seeking an order that requires the child to present for the reassessment. (20 U.S.C. § 1415(b)(6)(A); Ed. Code, § 56501, subd. (a)(3); *Schaffer, supra*, 546 U.S. at pp. 52-53 [school districts may seek a due process hearing "if parents refuse to allow their child to be evaluated."].)

15. This consent override procedure is not without limitation. In the case of *Fitzgerald v. Camdenton R-III*, (8th Cir. 2006) 439 F.3d 773, 776, the court addressed the issue of whether a district may conduct an initial evaluation of a student after the student had withdrawn from public school to be home schooled and the parents had expressly rejected special education services. The court acknowledged that title 20 of United

States Code section 1412(a)(10)(C)(i) allows parents to decline services and all benefits under the IDEA and when parents waive a child's right to services, school districts may not override their wishes.

The court held that "while the IDEA states that a District 'may' pursue proceedings to obtain authority to conduct an evaluation, the use of permissive language in the statute does not give a school District 'absolute discretion' [to act] if [doing so] is inconsistent with the overall purposes of the statute." The court further determined that the overarching goal of providing all children access to a FAPE regardless of disability status was not furthered by forcing an evaluation on a student who did not wish to receive special education services.

16. Additionally, title 34 of the Code of Federal Regulations, section 300.300 subd. (d)(4)(i), which went into effect on October 13, 2006, specifically provides that if a parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures which allow for the filing of a due process complaint by the district in order to compel an assessment.

17. Based on factual findings 10 through 12, and 19 through 22, District is not entitled to assess. While Parent has been ambiguous in the past about whether or not she is seeking special education services from the District, her testimony was clear at the hearing that she was rejecting services from the District and intended to home school Student. District may not use the consent override procedures to compel an assessment to determine the appropriateness of services already rejected by the parent. Compelling assessment in this case would not further the IDEA's purpose of ensuring that all children have access to a FAPE and would be pointless.

18. Based on factual findings 10 through 12, and 19 through 22, Parent's refusal of special education services relieves District from it's obligation to provide Student a FAPE because District is no longer required to consider Student eligible for

services. Student will not be considered eligible for special education services within the District until Parent requests special education services from District and the Student is made available for assessment.

ORDER

1. District is not authorized to conduct an assessment pursuant to the assessment plan dated February 6, 2007.

2. Until such time as Student requests the provision of special education services from District, District is relieved from any obligation to assess or provide FAPE to Student.

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 that statute:

The Student has prevailed on the issue heard and decided.

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

Date: May 29, 2007

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ELIZABETH R. FEYZBAKHSH

Administrative Law Judge

Special Education Division

Office of Administrative Hearings