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

In the Matter of: LANCASTER ELEMENTARY SCHOOL DISTRICT, Petitioner, v. STUDENT, Respondent.	OAH CASE NO. N 2007120356

DECISION

Administrative Law Judge Richard T. Breen, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in Lancaster, California, on January 22, 2008.

Alan B. Harris, Attorney at Law, represented Petitioner, Lancaster Elementary School District (District). District representative Benay Loftus attended the hearing.

Christian M. Knox, Attorney at Law, represented Respondent, Student. Student's mother (Mother) attended the hearing.

The District filed a Request for Due Process Hearing (Complaint) on December 12, 2007. At the hearing, the parties were granted permission to file written closing arguments by February 15, 2008. The parties stipulated that the decision would be due on or before February 29, 2008. Upon receipt of written closing arguments on February 15, 2008, the matter was submitted and the record was closed.

ISSUE

May the District assess Student, pursuant to the August 28, 2007 assessment plan, without parental consent.

CONTENTIONS OF THE PARTIES

The District contends that it is entitled to assess Student pursuant to the August 28, 2007 assessment plan without parental consent in order to assess Student in all areas of suspected disability. According to the District, the decision in consolidated OAH case numbers N2006100037 and N2007030809 established the need for assessments and the assessment plan is otherwise appropriate. Student contends that OAH lacks jurisdiction to hear the District's complaint on this issue because OAH does not have jurisdiction to enforce its own orders. Student further contends that assessments may not be conducted because Student cannot be assessed more than one time per year absent agreement of the parties.

FACTUAL FINDINGS

1. Student is a 12-year-old male, who, at all relevant times, resided within the District. At the time of hearing, Student was not eligible for special education.

2. On September 29, 2006, Student filed a due process hearing request (complaint) in OAH case number N2006100037, in which he contended, in relevant part, that the District had failed to assess him in all areas of suspected disability in the 2004-2005, 2005-2006 and 2006-2007 school years and that he was eligible for special education under the categories of emotional disturbance (ED), specific learning disability (SLD) or autism. In relevant part, Student's requested remedies included funding for an independent educational evaluation (IEE) and reimbursement for the April 16, 2007 assessment by Paula Solomon, Ph.D.

3. Student was assessed by the District in February and March of 2007 in the areas of academics and speech and language. A psychoeducational assessment was also performed to determine whether Student was eligible for special education as a student with autistic-like behaviors. The District prepared a multi-disciplinary assessment report on March 3, 2007.

4. On March 26, 2007, the District filed a complaint in OAH case number N2007030809, in which it contended that Student was not entitled to IEE's because the February and March of 2007 District assessments had been appropriate. The District's complaint was ordered consolidated with Student's complaint in OAH case number N2006100037.

5. On August 24, 2007, Administrative Law Judge Stella Owens-Murrell (ALJ Owens-Murrell) issued a decision in OAH case numbers N2006100037 and N2007030809. ALJ Owens-Murrell's decision found, in relevant part, that the District's March 7, 2007 psychoeducational assessment, which had not resulted in a finding of special education eligibility, had not been appropriate because of failures to follow standardized test protocols, errors in scoring, and unreliable teacher observations. The decision also found that an April 17, 2007 independent assessment of Student by Paula Solomon, Ph.D. did not establish eligibility for special education under the category of autistic-like behavior. Student was not entitled to reimbursement for Dr. Solomon's assessment because: it was based on an inadequate observation of Student in a school setting; a limited amount of standardized testing had been conducted; Dr. Solomon's observations and standardized tests were performed in a McDonald's restaurant rather than an appropriate setting; and Dr. Solomon's report was not conclusive in that it recommended further testing. The decision did not make any specific findings as to what assessments would need to be conducted in the future, other than to identify areas of suspected disability that should be assessed. ALJ Owens-Murrell concluded that insufficient evidence had been produced at

hearing to make a determination as to whether Student was eligible for special education under the categories of ED, SLD or autism, and accordingly ordered the District: "to develop an assessment plan and appropriately assess Student to determine whether Student is eligible for special education" under the disability categories of ED, SLD or autistic-like behaviors. The assessments were awarded to Student as the prevailing party on the issues of whether Student had been assessed in all areas of suspected disability in the 2005-2006 and 2006-2007 school years.

6. On August 28, 2007, the District developed an assessment plan, which was received by Mother on or about September 12, 2007. The parties stipulated that the assessment plan met all procedural requirements of federal and state law and complied with the relief ordered in OAH case numbers N2006100037 and N2007030809. In light of the decision in OAH case numbers N2006100037 and N2007030809, the District initiated the assessments to meet its obligation to assess Student in all areas of suspected disability.

7. Mother refused to sign the District's August 28, 2007 assessment plan.

8. On November 19, 2007, Student brought a civil action in the United States District Court for the Central District of California in which he sought to appeal the decision in OAH case numbers N2006100037 and N2007030809. Student has not sought or obtained a stay of the decision in OAH case numbers N2006100037 and N2007030809.

CONCLUSIONS OF LAW

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

2. In order to assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, §56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of

parental and procedural rights under IDEA and state law. (20 U.S.C. § 1414(b)(l); Ed. Code, § 56321, subd. (a).) The assessment plan must be understandable to the student, explain the assessments that the district proposes to conduct, and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(l)-(4).) A school 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).)

3. Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(a)(1)(B)(i); Ed. Code, § 56321, subd. (a)(2).) A school district can overcome a lack of parental consent for an initial assessment if it prevails at a due process hearing regarding the need to conduct the assessment. (20 U.S.C. §§ 1414(a)(1)(D)(ii)(I) & 1415(b)(6)(A); *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."]; Ed. Code, §§ 56501, subd. (a)(3), 56506, subd. (e), 56321, subd. (c).) If a parent does not consent to an initial assessment, the school District may, but is not required to, file a request for a due process hearing. (34 C.F.R § 300.300(A)(3)(i); Ed. Code, § 56321, subd. (c)(2).)

4. Under the doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *(Allen v. McCurry* (1980) 449 U.S. 90, 94 [101 S.Ct. 411, 66 L.Ed.2d 308]; *Lucido* v. *Superior Court* (1990) 51 Cal.3d 335, 341.) For collateral estoppel to apply, the issue presented for adjudication must be the same one that was decided in the prior action, there must be a final judgment on the merits in the prior action, and the party against whom it is asserted must have been a party to the prior action. *(Levy v. Cohen* (1977) 19 Cal.3d 165, 171.) Administrative decisions are subject to collateral estoppel. (See *Pacific Lumber Co. v. State Resources Control Board* (2006) 37 Cal.4th 921, 944, citing *People v. Sims* (1982) 32 Cal.3d

468, 479; *Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control* (1961) 55 Cal.2d 728, 732.)

5. Here, the parties stipulated that the assessment plan met all procedural requirements. Under the doctrine of collateral estoppel, the decision in OAH case numbers N2006100037 and N2007030809 unequivocally established the necessity for the District's assessment plan. Student was the petitioning party in OAH case number N2006100037 and contended that the District had failed to assess him in all areas of suspected disability and denied him a FAPE by not finding him eligible for special education. Student is bound by the finding that additional assessments are necessary because there was insufficient evidence to make an eligibility determination. Student has not sought a stay of the decision in OAH case numbers N2006100037 and N2007030809. Accordingly, the assessments should proceed without parental consent absent a jurisdictional or statutory bar. (Legal Conclusions 1, 2, 3, and 4; Factual Findings 2, 3, 5, 6, 7, and 8.) As discussed below, no such bar exists.

6. Reassessments of children who have already been found eligible for special education may not occur more frequently than once per year absent an agreement between the parents and a school district. (20 U.S.C. § 1414(a)(2); Ed. Code §§ 56043, subds. (k) & 56381, subd. (a).) However, initial evaluations are not subject to the once per year limitation. (20 U.S.C. § 1414(a)(1).) Here, the once per year limitation on reassessments does not apply. Student is not currently eligible for special education, such that the District's assessments are not "reassessments" for purposes of the once per year limitation. The only assessment that was conducted in 2007 was for the purpose of determining whether Student was eligible for special education under the category of autism and no eligibility determination resulted. ALJ Owens-Murrell found that both the District's assessment and Student's independent assessment were not properly conducted and that no eligibility determination could be made. Thus, any new, proper assessment cannot be

considered a "reassessment" given that Student is not presently eligible for special education. The assessments plans ordered by ALJ Owens-Murrell are also not "reassessments" because they include assessments for ED and SLD that were not previously addressed by the District's assessments. Accordingly, the statutory once per year limitation on reassessments does not apply here because the assessments are not reassessments. (Legal Conclusions 1, 4, and 6; Factual Findings 1, 2, 3, 5, 6, 7, and 8.)

7. Student also contends that OAH does not have jurisdiction over the District's complaint in this matter. OAH has jurisdiction to hear due process claims arising under the Individuals with Disabilities Education Act (IDEA). *(Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.) This limited jurisdiction does not include jurisdiction over claims alleging a school district's failure to comply with a settlement agreement or an OAH order. *(Id.* at p. 1030.) *Wyner* held that the proper avenue to enforce an administrative order was the California Department of Education's compliance complaint procedure. *(Ibid.)*

8. The decision in OAH case numbers N2006100037 and N2007030809 did not address the issue of whether the District would need to override parental consent in order to provide the assessments that Student needs. To the contrary, Student's contention in OAH case number N2006100037, was that he is, and has been, eligible for special education for many years. The District was ordered to "develop an assessment plan and appropriately assess Student." The fact that ALJ Owens-Murrell ordered an assessment plan to be developed and conducted, as compared to just ordering that assessments be conducted, indicates that ALJ Owens-Murrell's order contemplated that the District would prepare an assessment plan and seek Mother's consent. This conclusion is supported by the fact that ALJ Owens-Murrell did not make any findings regarding the need for specific assessment instruments, but instead ordered the District to conduct "appropriate" assessments. In other words, nothing in the decision supports an order mandating that

the District could conduct whatever assessments it deemed appropriate without at least seeking parental permission or an order overriding parental permission. Thus, the prior decision had not reached the issue of whether Mother's consent needed to be overridden. Accordingly, the District's filing in the instant matter cannot be considered as an attempt to enforce the decision in OAH case numbers N2006100037 and N2007030809 because the issue of consent was not addressed in that proceeding. OAH has jurisdiction over the instant matter. (Legal Conclusions 1, 4, and 7; Factual Findings 1, 2, 4, 5, 6, and 7.)

ORDER

The District may implement the August 28, 2007 assessment plan without parental consent.

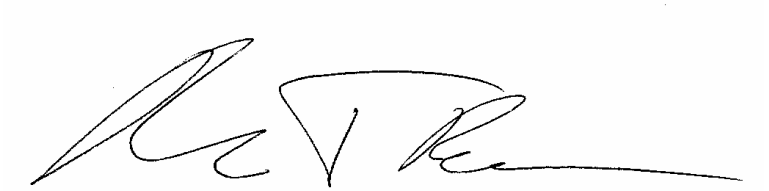
PREVAILING PARTY

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, the District prevailed on the sole issue presented.

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. (Ed. Code, § 6505, subd. (k).)

DATED: February 27, 2008



RICHARD T. BREEN

Administrative Law Judge

Office of Administrative Hearings

Special Education Division