

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

GLENDALE UNIFIED SCHOOL DISTRICT,

v.

PARENTS on behalf of STUDENT.

OAH CASE NO. 2009040894

DECISION

Administrative Law Judge (ALJ) Steven Charles Smith, Office of Administrative Hearings (OAH), State of California, heard this matter in Glendale, California on June 25, 2009.

Jonathan P. Read, Attorney at Law, appeared as counsel to the Glendale Unified School District (District). Lou Stewart, Assistant Superintendent – Special Education, attended on behalf of District.

Mother appeared on behalf of Student. Father also attended. Student did not attend. OAH provided Mother and Father with an Armenian language interpreter throughout the hearing.

On April 24, 2009, District filed a Request for Due Process Hearing (District's Complaint) naming Student as Respondent. A continuance was granted for good cause on May 15, 2009. Following the parties' closing arguments on June 25, 2009, the record was closed and the matter was submitted.

## ISSUE<sup>1</sup>

May the District assess Student pursuant to District's November 3, 2008 written assessment plan, without parental consent?

## FINDINGS OF FACT

### JURISDICTION AND GENERAL BACKGROUND

1. At the time of the hearing, Student was five days shy of his thirteenth birthday and had just completed the seventh grade. At all relevant times, Student resided with Parents within the boundaries of District. Student's public school of attendance was Rosemont Middle School (Rosemont). Student had not been found eligible for, nor was he receiving, special education services.

2. Student's first language was Armenian and, until May 2007, Student was designated by District as an English Language Learner (ELL). In May 2007, at Parents' request, Student's language designation was changed to Fluent English Proficient (FEP). Mother's first language was Armenian. Mother spoke, read and wrote in fluent conversational level English. Father spoke Armenian and very limited English. Mother undertook all District-Parent written and spoken communications for Parents, in English. Mother kept Father informed of significant, school-related matters and communications.

3. Since at least Student's fourth grade year (2005-2006 school year), Student's grade reports and performance on Standardized Testing and Reporting (STAR) indicated that Student was struggling academically in the areas of language arts and mathematics. In response to Student's struggles, District developed an individual

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<sup>1</sup> The issue originally set out in District's Complaint has been restructured for clarity, but is materially the same.

intervention learning plan (ILP). The ILP was not a special education program. The ILP comprised after-school tutoring, summer school and classroom interventions, and small group assistance from Student's classroom teachers and classroom assistants.

4. Despite the ILP, Student continued to make inadequate academic progress during his fifth grade year (2006-2007). Student's spring 2007 STAR report revealed Student's English-Language Arts performance as "basic level" and his Mathematics performance as "below basic level." Student's Standards-Based Student Achievement Report revealed that Student did not meet grade level standards in reading, writing or mathematics.

5. During the 2007-2008 school year, Student's sixth grade year, Student's academic struggles continued. Student's Standards-Based Student Achievement Report revealed that, by the end of that academic year, Student again did not meet grade level standards in reading, writing or mathematics. Over a period of two and one-half academic years, Student's ILP had proven ineffective.

6. On November 3, 2008, District convened a Student Success Team (SST) meeting to discuss Student's academic program. The SST was composed of District staff who reviewed and discussed Student's progress and challenges. His teachers had observed and reported to the SST that Student was failing all of his core classes, his class work and homework were often not completed, he seemed distracted and unfocused, he made little effort in his classes, he seemed to have difficulty comprehending his assignments, and he had become increasingly disruptive in class by often leaving his desk and walking around in the classroom during inappropriate times. Student's "social skills" (respects/accepts authority, respects rights of others, respects property, follows classroom rules, gets along with others, resolves conflicts appropriately, etc.), as shown on his 2007-2008 year end report card, had declined from a first trimester average of "excellent" to a third trimester average of "needs

improvement" with few "satisfactory" marks. Based on their consideration of Student's continued lack of adequate educational progress and the ineffectiveness of the ILP, the SST referred Student for a special education assessment. Mother and Student attended the SST meeting. Based on the SST's referral, District sought Parents' written consent to assess Student and provided Mother with a written copy of their procedural safeguards. While at the SST meeting, on behalf of both Parents, Mother orally declined consent to assess Student.

7. On November 17, 2008, District mailed a copy of the November 3, 2008 written assessment plan, in English, along with another copy of Parents' procedural safeguards and an explanatory cover letter (collectively, the assessment plan), and requested Parents' written consent to assess Student. The written assessment plan identified the proposed areas of assessment as, "academic/pre-academic performance; self-help, social and emotional status; motor ability; language and speech; and, general ability." The assessment plan provided a description of materials, procedures and purposes for each assessment area, informed Parents that the assessment process could include observations of Student in classroom and other settings, and could include a review of any reports that Parents might authorize, or that existed in Student's school records. The personnel assigned to undertake the assessment were identified as, "special education teacher," "school psychologist," and "language/speech pathologist." District also informed parents that if Student were determined to be eligible for special education, Parents would retain their rights to withhold consent for special education placement and services. District informed Parents that if they did not consent to the assessment, District might exercise its right to seek legal authority to assess Student without Parent's consent. Parents received District's written assessment plan and safeguards. With Mother's assistance, both Parents understood the plan and safeguards, including their right to receive the plan in their native language. Parents did not request

that the assessment plan be provided in Armenian. Parents declined to consent to the assessment of Student.

8. Student's December 2008 seventh grade report card showed that Student was failing all of his core classes (math, life science, world history, English, and computer applications) and almost failing his physical education class. The "comments" section of his report card was annotated with the remarks, "poor work habits," "unprepared for class," and "assignments missing."

9. On January 23, 2009, Student's Progress Report in Language Arts revealed that Student had received a failing grade for every class assignment, except where the only requirement for a non-failing grade was to attempt to participate; for example, to obtain a parent's signature on a homework grading sheet or to be willing to stand in front of the class and attempt to read.

10. Elizabeth Avery (Avery) was a District general education teacher and Student's seventh grade English teacher. Avery's educational background included a Bachelor of Arts in Studio Arts from Scripps College and a Master of Education, with California single subject teaching credential in English, from Claremont Graduate University. She had taught English in the District for five years and was certified to teach ELL students. As his English teacher, Avery had determined that Student could "decode" well; that is, look at a word, discern its pronunciation, and speak it. However, Student could not understand the meaning of many age and grade level appropriate individual words, and had extreme difficulty understanding the meaning of groups of words, including those that he successfully read. Avery had observed that Student struggled to focus or "stay on task." Avery candidly acknowledged that she had no real understanding of why Student was challenged, but likened Student's conduct to the conduct of other students whom she knew to have been diagnosed as having Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD). It was Avery's

belief that, without some type of assessment and further assistance, Student would continue to fail in his academic efforts. Avery had participated in the November 3, 2008 SST meeting and, based on the team's discussion, as well as her own experience with Student, she agreed with the SST's recommendation that Student undergo special education assessment.

11. Celine Young (Young) was a District general education teacher and Student's seventh grade, beginning-level, math teacher. Young's educational background included a Bachelor of Science in Electronics and Communications Engineering from Mapua Institute of Technology, Philippines and a Master of Arts in Education, with California single subject teaching credential in mathematics from California State University, Northridge. She had taught mathematics in the District for five and one-half years. Young observed that Student had a short attention span and often got up from his seat and walked around the classroom. Student would often fail to do his math work, even with the individualized help of Young's teaching assistant. Young characterized Student as well behaved, except for his walking around the classroom and failing to do his math work. Young testified that Student had made no progress in math during the 2008-2009 school year and that he had failed Young's class. Young did not attend the SST meeting, but did provide several SST members with information about Student prior to the meeting. Young believed Student needed some type of special education assistance, but, as had Avery, Young stated that she had no clear understanding of the source of Student's difficulties and, therefore, supported the SST's referral of Student for assessment.

12. Karen Bomar (Bomar) was a District school guidance counselor assigned to Rosemont. Bomar was familiar with Student and his academic challenges. Bomar's educational background included a Bachelor of Arts in Mathematics from University of Southern California, and a Master of Arts in Education, Counseling & Guidance from

Point Loma Nazarene College. Bomar had been a counselor for District for the preceding twelve years, the last year of which had been at Rosemont. Prior to that, Bomar had taught middle school and high school mathematics for District and non-District schools since 1992. Bomar held the following California education credentials: Preliminary Administration, Pupil Personnel Services, Cultural Language and Academic Development (CLAD), and Clear Single Subject Instructorship - Mathematics. Bomar convened the November 3, 2008 SST meeting on behalf of District. Prior to convening the SST meeting, Bomar had reviewed all of Student's relevant educational records, had spoken with his teachers and Mother, and had spoken and interacted with Student. Based upon her overall knowledge of Student, her education and experience as a counselor and teacher, and the discussion of the SST members at the SST meeting, Bomar believed that Student needed to be assessed for special education services and supported the SST's referral for assessment.

13. Lilit Mkrtchyan (Mkrtchyan) was a District school psychologist. Her educational background included a Bachelor of Arts in Psychology from University of California, Los Angeles (UCLA) and a Master of Arts in Psychology from California State University, Northridge. Mkrtchyan had been a school psychologist with District since 2000. She had undertaken her school psychologist internship with Burbank Unified School District during the 1999-2000 school year. For the 1998-1999 academic year, Mkrtchyan was a behavior specialist with UCLA's Neuropsychiatric Institute where she tested, prepared treatment plans for, and taught children aged two to twelve years with severe behavioral and emotional disorders. During her nine years as a District school psychologist Mkrtchyan had conducted over 600 student assessments. She attended the SST meeting, participated in the discussions, and was familiar with Student's educational records and reported challenges. She was culturally and linguistically qualified to assess Student in Armenian and English. Mkrtchyan agreed with the SST that assessment of

Student was necessary and had concluded that the assessment plan for Student was appropriate.

14. Adele Wolff (Wolff) was a District speech and language pathologist (SLP). Her educational background included a Bachelor of Arts in Communications from University of Southern California and a Master of Arts in Speech Pathology and Audiology from Whittier College. Wolff also held a California Teaching Credential with Special Classroom Authorization – Life and a California Speech Language Pathologist license, both having been active since 1978. She had been an SLP with District since 1989. For the prior eleven years, Wolff had been an SLP for various southern California school districts. During her career of 31 years, Wolff had served the speech and language pathology needs of over 2,000 students, 40 percent of whom were ELL, and had conducted the assessments of over 1,000 of the students whom she had served. Wolff was familiar with Student’s language arts and academic performance challenges and his educational records. She advised that tests and testing methods were readily available to assist with a determination of whether Student’s language challenges were based, in part, on speech pathology or Armenian-English bilingual difficulties. Wolff believed that a proper assessment was critical to helping Student succeed in obtaining an adequate education.

15. Mother testified that Student had no disability and that any failure for him to make educational progress was actually the result of District’s failure over the years to provide motivating teachers and adequate time for assignments. She presented no additional, credible evidence to support her testimony. Mother’s testimony and theory were unpersuasive in light of the testimony of District’s educational staff and Student’s education records. The evidence was convincing that District reasonably perceived that Student had stopped making academic progress for reasons not apparent to District’s staff. The evidence was equally convincing that, in order for District to provide Student

with any educational opportunity, District needed to assess Student to determine if his academic struggles were related to a disability, and if so, to develop an appropriate education program for him.

## CONCLUSIONS OF LAW

1. In due process hearings under Individuals with Disabilities Education Act (IDEA), the petitioning party bears the burden of proof. (*Schaeffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528].) In this case, District was the petitioning party and so, bore the burden of proof as to its issue.

2. District contends that Student's academic challenges and social skills decline led District to suspect that Student may have one or more disabilities. Therefore, District further contends that, pursuant to state and federal special education law, District may assess Student in all areas of suspected disability, even though his Parents have denied their consent. Parents contend to the contrary.

3. IDEA and California law require District to identify, locate and evaluate all children with disabilities within District's geographical boundaries. (20 U.S.C. § 1412(a)(3); Ed. Code, § 56300, et seq.) All children with disabilities have the right to a free, appropriate, public education (FAPE) under the IDEA. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.)

4. To determine whether a child has a disability, and therefore a right to a FAPE, a school district must assess<sup>2</sup> a student in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are

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<sup>2</sup> "Evaluation" and "assessment" have the same legal meaning in this Decision and are used interchangeably, consistent with the terminology used by the parties, the witnesses and documentary evidence. (See 20 U.S.C. § 1414(b); Ed. Code, § 56302.5.)

required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

5. In order to assess a student, a school district must provide proper notice to the student's parents. (20 U.S.C. § 1414(b)(1); Ed. Code, §56321, 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 in language understandable to the general public, explain the assessments that the district proposes to conduct, and provide that the district will not implement an individualized education program (IEP) without the consent of the parent. (Ed. Code, § 56321, subds. (b)(l)-(4).) The proposed assessment plan must also give the parent notice that an IEP team meeting will be scheduled to discuss the assessment, the educational recommendations, and the reasons for the recommendations. (Ed. Code, § 56329, subd. (a)(1).) The assessment plan must include a description of any recent assessments conducted, including independent assessments, and any information parents want considered, along with information regarding the student's primary language and language proficiency. (Cal. Code Regs., tit. 5, § 3022.) A school district must give the parents 15 days to review, sign and return their written consent or objection to the proposed assessment plan. (Ed. Code, § 56321.) If procedural violations have occurred, they will be considered only if they impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (Target Range).)

6. Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(a)(1)(D)(i)(I); Ed. Code, § 56321, subd. (c)(1).) 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, subds. (a)(1)-(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).)

7. Here, since Student’s fourth grade year, District, through its educational staff, made observations, graded Student’s course work and conducted standardized testing of Student that revealed Student was struggling to make academic progress. As a result, during the 2005-2006 school year, District implemented an ILP to remediate Student’s difficulties. By the end of the 2007-2008 school year, Student’s ILP had proven ineffective and Student had ceased making academic progress. He had a shown a pattern of declining grades and was failing all core academic classes. Student’s social skills report card marks had significantly declined in the areas of “respects/accepts authority,” “respects rights of others,” “respects property,” “follows classroom rules,” “gets along with others,” and “resolves conflicts appropriately.” On November 3, 2008, in part, in response to the failure of the ILP to remediate Student’s academic challenges and Student’s decline in social skills, District staff convened an SST meeting to consider how to best assist Student. Mother and Student attended the SST meeting. (Legal Conclusions 1-6; Factual Findings 1-6 and 10-15.)

8. The SST determined that Student might be eligible for special education services in light of Student’s: on-going failure in all core academic classes; failure to

make academic progress, even with implementation of the ILP; distracted and unfocused appearance; difficulty comprehending assignments; and, declining social skills. Accordingly, the SST developed an assessment plan and referred Student for a special education assessment. At the meeting, District requested Mother's consent to assess Student. Mother declined for herself and Father. (Legal Conclusions 1-7; Factual Findings 1-6 and 10-15.)

9. On November 17, 2008, District gave proper written notice to Parents by delivery of a copy of its written, November 3, 2008 assessment plan for Student, along with notice of Parent's procedural safeguards. The written assessment plan identified the proposed areas of assessment, provided a description of materials, procedures and purposes for each assessment area, and informed Parents that the assessment process could include observations of Student and a review of any reports that Parents might authorize, or that existed in Student's school records. The assessment plan identified the personnel assigned to undertake the assessment and informed parents that, if Student were determined to be eligible for special education, Parents would retain their rights to withhold consent for special education placement and services. District informed Parents that if they did not consent to the assessment, District might exercise its right to seek legal authority to assess Student without Parent's consent. Parents received District's written assessment plan and safeguards. With Mother's English language ability and assistance to Father, both Parents understood the plan and safeguards, including their right to receive the plan in their native language. Parents did not request that the assessment plan be provided in their native language of Armenian. Along with its written assessment plan, District again requested Parents' consent to the assessment. Parents did not consent within the fifteen days they were allowed by law, or at any other time. (Legal Conclusions 1-7; Factual Findings 2, 6 and 7.)

10. Review of the assessment plan revealed that District failed to mention that, following the assessment, an IEP team meeting would take place to review the assessment results, educational recommendations, and the reasons for the recommendations. Procedural violations will be held against a district only if they impeded a child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. District's failure to mention the post-assessment IEP team meeting did not implicate any of these factors. Further, District's repeated written advice to Parents that no special education placement or services would be provided to Student following the assessment, without Parents' consent, fortifies this conclusion. (Legal Conclusions 1 and 5; Factual Findings 1-15.)

11. In sum, the District presented convincing evidence that, based on Student's academic struggles, his cessation of academic progress, and his classroom behavior, a special education assessment was required. District developed an appropriate, written assessment plan and complied with the procedural requirements of IDEA and California special education law to attempt to obtain Parents' consent. Parents declined to give their consent. Accordingly, District may assess Student pursuant to its November 3, 2008 assessment plan without Parents' consent. (Legal Conclusions 1-10; Factual Findings 1-15.)

## ORDER

The District may assess Student pursuant to District's November 3, 2008 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, District prevailed on the only issue 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 receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: July 15, 2009

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Steven Charles Smith  
Administrative Law Judge  
Office of Administrative Hearings