

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Garvey school district,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2010050503

DECISION

This matter was heard before Glynda B. Gomez, Administrative Law Judge, Office of Administrative Hearings, State of California, on June 14, 2010, in Rosemead, California.

James Meeker, attorney at law, represented the Garvey School District (District). Barbara Razo (Razo), program administrator, was also present on behalf of the District.

Student's mother (Mother) represented Student. Student was not present.

Following the hearing, the record was held open until June 29, 2010, for the parties to submit closing briefs. The record was closed and the matter was submitted on June 29, 2010.

ISSUE

May District proceed with the psychoeducational and speech/language portions of the March 10, 2010 triennial assessment plan over the objection of Student's parents (Parents)?

FACTUAL FINDINGS

1. Student is a six-year-old girl with Down's Syndrome. She is eligible for special education and related services under the category of mental retardation.¹

Student is non-verbal. Her primary mode of communication is by approximations of American Sign Language (ASL). She attends a special day class (SDC) at Bitely Elementary School (Bitely) within the District.

2. Student was first made eligible for special education and related services in June of 2007 when she turned three years old and transitioned from services provided by the East Los Angeles Regional Center (ELARC) to District educational services. In preparation for the transition to District, Mother granted permission for District to conduct its initial assessment. Mother was permitted to be present during the assessments conducted in June of 2007 because Student was a very young non-verbal child and unfamiliar with the assessors. The assessors used observational tools, parent interviews, and reviewed prior assessments conducted by ELARC vendors to obtain most of the information gathered during the assessments.

3. On March 10, 2010, District sent Parents a triennial assessment plan (March 10, 2010 assessment plan) which proposed to have a special education teacher assess Student in areas designated as "academic/pre-academic/functional achievement," a school psychologist assess Student in the areas of "social emotional development/adaptive behavior" and "cognitive development," a speech and language pathologist assess Student in the areas of "language/speech/communication development," and a school nurse to conduct a vision and hearing screening. With the

¹ There is no dispute as to eligibility for special education or the category of eligibility.

March 10, 2010 assessment plan, District provided Parents a copy of their procedural rights. Parents did not respond to the March 10, 2010 assessment plan.

4. On April 6, 2010, a second copy of the March 10, 2010 assessment plan was sent by District to Parents. On April 20, 2010, Mother returned the assessment plan. Mother checked the box indicating consent to the assessment, but wrote in handwriting that the consent was subject to conditions set forth in an attachment to the assessment prepared by Mother. The attachment provided that the assessments would be conducted by an interdisciplinary team of "UCLA University Affiliated Programs" or in the alternative, that Mother must be allowed 24 hours advance notice of each assessment and attend each assessment. The attachment indicated that Mother was concerned with obtaining "accurate levels of performance" and avoiding "unwarranted expense and delay incurred by either Garvey District or Student's parent in disputing and defending the inaccurate Ramirez O.T. report."²

5. On April 26, 2010, program administrator Razo notified Mother in writing that District rejected the conditions that Mother had placed on the assessment. She also included an additional copy of the March 10, 2010 assessment plan. By the letter, Razo advised Mother that District had concerns about the impact of Mother's presence on Student during testing. Specifically, Razo wrote that:

[Student] has been with us for three years. She has had frequent testing in the classroom without your presence. The testing we are proposing is to see how she functions in the school setting, which does not include the parent, and to

² The "Ramirez OT report" refers to the prior OT assessment which was the subject of a prior due process hearing and is not at issue in this case.

assist us in planning a classroom curriculum for [Student]. Accurate school-related results would be difficult since she would be aware of you in the room. The testing is set up to be between the assessor and the child. [Student] is very attached to you and would not be able to disregard your presence. This would alter the testing environment and skew the results of the testing for our purposes.

6. Razo's April 26, 2010 letter also advised Mother that if Mother chose to have Student tested at UCLA or anywhere else, District "would be interested in the testing results and would consider them along with the results of our testing."

7. On May 5, 2010, Mother signed the March 10, 2010 assessment plan, but again placed conditions on her consent and made changes to the assessment plan. Specifically, Mother added a proposal for an OT assessment by an occupational therapist and a physical therapy (PT) assessment by a physical therapist. She also noted that she consented only to assessments by a physical therapist, occupational therapist, school nurse and an academic assessment. Mother wrote that she did not consent to the proposed assessment by the school psychologist or the speech and language pathologist.

8. On May 6, 2010, Razo again wrote to Mother about the conditions Mother had placed on the assessment plan. Razo noted that "the areas you are restricting are essential to a full assessment. Three year evaluations are required to be done by all school districts in order to measure progress and your child's needs." With the May 6, 2010 letter, Razo included a new assessment plan which contained all of the proposed assessments contained in the March 10, 2010 assessment plan and added the physical therapy and occupational therapy assessments proposed by Mother. Nevertheless,

Mother did not provide consent for the entire assessment plan. District subsequently conducted the portions of the assessment plan to which Mother had consented.

9. District intends to have Julie Sena (Sena), a District speech and language pathologist conduct the speech, language and communication portion of Student's triennial assessment. Sena is a licensed speech and language pathologist. She earned a bachelor's degree in social work from Brigham Young University in 1984 and a master's degree in speech pathology from California State University at Los Angeles in 1997. Sena received her Certificate of Clinical Competence in speech pathology from the American Speech Hearing Association (ASHA) in 1998. Sena has 15 years of experience as a school speech and language pathologist. She has served as a speech and language pathologist in the District for 12 years. She also holds a California Clinical Rehabilitation Credential and has completed extensive continuing education in the field of speech and language pathology. Sena has conducted over 100 speech and language assessments and is the speech and language pathologist assigned to Bitely. Sena has provided Student's speech therapy for three years. Currently, she provides therapy to Student four times per week.

10. District intends to have Nancy Kugler (Kugler), a District school psychologist conduct the psychoeducational and social emotional portion of Student's triennial assessment. Kugler is a credentialed school psychologist and also holds a multiple-subject teaching credential. She earned a bachelor's degree in liberal studies from San Diego State University, and a master of arts in education and a School Counseling Credential from Azusa Pacific University. Kugler was an elementary school teacher for 22 years. She has nine years of experience as a school psychologist. She has undertaken extensive continuing education in the areas of special education and assessments. Kugler has performed over 1,000 assessments as a school psychologist and has experience assessing students with mental retardation. Kugler performed the initial

psychoeducational assessment of Student in June of 2007 and is the school psychologist for Bitely. She has seen Student around campus and observed her in class one or two times per week over the course of the last three years. She is familiar with Student, her disabilities, and her sign language approximations.

11. Mother is concerned that District will underestimate Student's cognitive abilities and believes that it is necessary for her to be present during District's assessments to interpret Student's signs, to keep Student on task during the assessments, and to ensure that Student has a dry diaper. Mother does not trust District to conduct an appropriate assessment of Student's abilities because the parties were previously involved in a dispute about an occupational therapy assessment. She also believes that there is sufficient information available to District without further testing. Mother relies on an assessment report prepared by Renee Kim (Kim) a clinical psychologist retained by ELARC (Kim Report) for support of her position that Student should not be assessed by District.

12. According to the Kim Report, Kim conducted an assessment of Student for ELARC on May 11, 2009. The Kim Report was provided to District on or about October 6, 2009. Kim's assessment was specifically limited to the assessment of developmental disabilities including mental retardation and autism. The assessment was designed to evaluate whether or not Student continued to meet ELARC's eligibility criterion for services as having mental retardation or another qualifying developmental disability. The Kim Report noted that the assessor did not intend the report to be a comprehensive psychodiagnostic evaluation of mental or emotional disorders or conditions. Kim's assessment consisted of a review of ELARC's records, an interview with Mother, behavior observations, and an aborted attempt to administer the Wechsler Preschool Primary Scales of Intelligence, Third Edition (WPPSI-III) and administration of the Vineland Adaptive Behavior Scales, Second Edition (VABS-II).

13. According to the Kim Report, the assessor was not able to administer the WPPSI-III to Student because of Student's resistance to participating in the assessment and inability to follow testing directives. Mother was present during the assessment, but unable to persuade or coax Student into participation. Kim concluded that Student had "a history of global developmental delays, and displays difficulties following simple commands and responding to requests. Due to the difficulties, formal measures of [Student's] cognitive functioning could not be obtained." She noted that the history of global developmental delays, adaptive deficits, previous assessments and her own clinical opinion supported a diagnosis of mental retardation, severity unspecified. Based upon the diagnosis, Kim concluded that Student continued to meet the eligibility criterion for ELARC services. Kim recommended that Student remain in a SDC, and receive speech therapy, occupational therapy, and behavior support. She also recommended that ELARC provide respite services to Student's family. Finally, Kim recommended that Student be reassessed in three to four years. In the report, she opined that "[i]t is likely that with 3 to 4 years of intervention services and participating in a formal school program, [Student] would be better equipped to respond to directives and attend to structured activities." Mother understood the recommendation to mean that Student should not be assessed by anyone for at least three years and that earlier testing would be invalid. Kim did not testify at hearing; however, nothing in the Kim Report supports Mother's interpretation. To the contrary, rather than a ban on further assessment, the Kim Report merely reaches the conclusion that Student may require many years of intervention before being able to respond to the structured demands of standardized testing.

14. Kugler credibly opined that Kim's report was a year old and did not provide sufficient information upon which to design an offer of a free appropriate public education (FAPE) or to determine Student's educational needs. Kim's report lacked

cognitive and academic testing. Kim's report was intended solely for the purpose of confirming continued eligibility for ELARC services due to the presence of a developmental disability. District's proposed assessment is more comprehensive in that it is designed to provide information upon which an IEP team can base an academic program. Kugler opined that assessment of Student's cognitive functioning, adaptive skills and social emotional development was necessary to determine her present levels of performance, educational needs and the effectiveness of strategies and interventions used by the District over the course of the last three years. These areas were first examined before Student entered elementary school. The initial District assessments did not include standardized testing because of Student's young age and communication problems. Student has now been in a District program receiving special education and related services for three years. According to Kugler's testimony, the triennial assessment is intended to provide information about Student's current needs. The assessments conducted by ELARC-related personnel contained outdated information about Student's abilities. Kugler credibly testified that Kim's report was not thorough enough to provide data upon which to base an educational program.

15. Kugler further opined that Mother's presence during the assessment would be distracting to Student because Student looks to Mother for attention and direction. Kugler also credibly testified that she is familiar with ASL. Additionally, the members of the Bitely staff, including Kugler have access to pictures of the signs that Student uses with interpretation of the meaning of each sign. Kugler understands Student's signs without need for interpretation from Mother.

16. Similarly, Sena, the speech and language pathologist who regularly works with Student, credibly opined that Mother's presence during assessment would have an impact on the assessment. Sena has observed that when Mother is present, Student is distracted and wants to be with Mother. Additionally, Student looks to Mother for

approval, assistance and direction. Sena was very concerned about the impact of inadvertent cueing to Student from Mother during assessment. Sena explained that Student looks to the assessor and any one else present for cues. In an assessment, cueing will effect the validity of the assessment results. Sena's opinion was credible because it was based on her observations of Mother's impact during speech and language sessions, Sena's knowledge of Student, and on Sena's professional experience and judgment. Sena also credibly opined that although Student has speech and language delays, she is able to understand and respond to simple commands sufficiently to permit assessment without need for Mother's presence. Sena believed that the triennial assessment would provide valuable information about Student's present levels of performance that the IEP team could use in designing Student's educational program.

17. There was no evidence that District has ever failed to timely change Student's wet diapers.

LEGAL CONCLUSIONS

1. In a special education administrative due process hearing, the party seeking relief has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, District has the burden of proof.

2. District contends that District has a right and legal obligation to conduct a triennial assessment of Student. District contends that its triennial assessment plan is appropriate, its assessors are qualified and that the assessments are necessary to provide Student a FAPE. Student contends that Mother withheld consent for the psychoeducational and speech/language portions of the March 10, 2010 triennial assessment plan because an ELARC psychologist recommended that Student not be reassessed for three to four years and sufficient data already existed for District to use in

developing an offer of a FAPE. Student also contends that either Mother's presence or outside assessment by UCLA personnel was necessary due to Student's limited communication skills and approximations of sign language. Mother also contends that she needs to be present to ensure that Student's diaper is not wet and distracting during the assessments.

3. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related services needs. (20 U.S.C. § 1414(a)(2)(A)(i); Ed. Code, § 56381, subd. (a)(1).)

4. Reassessment plans must be based on a review of existing assessment data on the student, including current observations by teachers and related service providers. (Ed. Code, § 56381, subd. (b)(1).) Based on a review of current data, a school district must determine what additional data is required to determine: 1) whether the student is still eligible for special education; 2) the present levels of performance and educational needs of the student; 3) whether any additions or modifications to the student's IEP are needed to enable the student to meet his or her annual goals and participate as appropriate in the general curriculum. (Ed. Code, § 56381, subd. (b)(2).)

5. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1)). To obtain parental consent for a reassessment, the school district must provide proper notice to the student and his/her parents. (20 U.S.C. § 1414(b)(1); 20 U.S.C. § 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law, (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must: be 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 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

6. Assessments shall be conducted by persons competent to perform the assessment, as determined by the local educational agency. Any psychological assessments of pupils shall be made in accordance with Section 56320 and shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, §§ 56322 and 56324, subd. (a).)

7. If the parents do not consent to a reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(ii)(2006); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) Parents who want their children to receive special education services must allow reassessment by the district, with assessors of its choice and cannot force the district to rely solely on an independent evaluation. (*Johnson v. Duneland Sch. Corp.* (7th Cir.1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir.1995) 64 F.3d 176, 178-79; *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315.)

8. In order to override parental consent to the triennial assessments, the district must prove that it met all of the statutory requirements of notice to the parents and must prove that the proposed assessment plan was appropriate. On March 10, 2010, District provided the proposed triennial assessment plan to Parents with a copy of Parents' procedural rights. District provided explanatory letters and additional copies of the assessment plan on April 6, 2010; April 26, 2010; and May 6, 2010. District also

incorporated Mother's request for additional assessments in the area of OT and PT in to the assessment plan. The March 10, 2010 assessment plan was in Student's native language of English. The assessment plan identified the assessments that District proposed to conduct. The assessment plan explained that assessments were in conjunction with Student's triennial review. The assessment plan also explained that Parents' consent to assess was required and the evidence established that District made reasonable efforts to obtain Parents' consent to the assessment plan.

9. School psychologist Kugler and speech pathologist Sena were competent to perform the proposed assessments. Moreover, District's choice of Kugler, a credentialed school psychologist, to conduct the proposed psychoeducational assessment was appropriate.

10. In sum, District was required to assess Student every three years unless the parties agreed otherwise. Student's triennial assessment was due and the evidence showed that the reassessment was necessary in all areas identified in the assessment plan. The evidence also showed that the District complied with all procedural requirements of the IDEA to conduct the assessments and proposed competent assessors to conduct the evaluations. Thus, District has met its burden by a preponderance of the evidence that it is entitled to perform a speech and language and psychoeducational assessment of Student under the March 10, 2010 assessment plan without parental consent. (Factual Findings 1-17; Legal Conclusions 1-10.)

11. The preponderance of the evidence did not support Mother's contention that her presence was necessary at the assessments. (Factual Findings 1-17; Legal Conclusions 1-11.)

ORDER

The District is entitled to proceed with the psychoeducational and speech/language portions of the March 10, 2010 triennial assessment plan over the objection of Student's parents.

PREVAILING PARTY

The decision in a special education administrative due process hearing must indicate the extent to which each party prevailed on the issues heard and decided at the hearing. (Ed. Code, § 56507, subd. (d).) The District prevailed on the sole issue in this matter.

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

Dated: July 1, 2010

_____/s/_____
GLYNDA B. GOMEZ
Administrative Law Judge
Office of Administrative Hearings