

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LUCIA MAR UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2013010704

DECISION

Administrative Law Judge (ALJ) Theresa Ravandi, from the Office of Administrative Hearings (OAH), State of California, heard this matter in Arroyo Grande, California, on March 19, 2013.

Peter A. Sansom, Attorney at Law, represented the Lucia Mar Unified School District (District). Don Dennison, the District's Director of Student Services, and Cynthia Ravalin, Principal on special assignment, were present throughout the hearing as the District's representatives.

There was no appearance on behalf of Student. Andrea Marcus, Attorney at Law for Parent and Student, faxed a letter to OAH and to the District's attorney the morning of the hearing indicating that the family declined to attend the hearing.¹

On January 22, 2013, the District filed a request for a due process hearing (complaint) naming Student. On February 1, 2013, OAH granted Student's request for a continuance, and the parties' joint request for continuance on February 14, 2013. At hearing, the ALJ received oral and documentary evidence from the District. The record was closed and the matter submitted for decision on March 19, 2013.

ISSUES

Issue One: Does the District have the right to select qualified personnel of its choice to assess Student pursuant to the assessment plan dated December 14, 2012?

Issue Two: If Student wishes to receive special education services at public expense, must he reasonably, with the assistance of Parent, make himself available for reassessment by the District pursuant to the assessment plan dated December 14, 2012?

CONTENTIONS OF THE PARTIES

The District asserts that it needs to assess Student in several different areas of suspected disability to obtain current information so that it can develop an appropriate individualized education program (IEP) to meet his unique needs, and that it has the

¹ This March 19, 2013 letter has been marked for identification only as Student's Exhibit S-1. It presents Student's position by way of argument to the District's complaint and was not admitted into evidence. Statements of opinion that are unsupported by the evidence admitted in the case and which cannot be deduced from that evidence, cannot be considered. (Evid. Code, § 140.)

right to assess Student with qualified assessors of its choice. The District contends that Student is incorrect in his assertion that Student will respond with fear to a District assessor previously known to him. Even so, the District asserts that its assessors will monitor for this remote possibility and take necessary measures to ensure Student's wellbeing and the integrity of the assessment, including terminating an assessment and securing an alternate assessor if needed.

Student contends that he cannot reasonably be evaluated by District personnel whom he may associate with his past negative experiences of physical restraint and seclusion. Student contends that he will suffer emotional harm that will cause him to regress if evaluated or observed by such personnel, and that any assessment results would be invalid as they would measure his trauma reaction to the assessors, as opposed to his functioning as related to his disability. Student also contends that the District has filed for hearing solely to intimidate Parent into foregoing Student's rights to special education services.

FINDINGS OF FACT

BACKGROUND AND JURISDICTION

1. Student is a 10-year-old boy who resides with his Parent within the District boundaries. He last attended a District school, Dana Elementary School, on October 21, 2011, and currently attends a private school. The District found Student eligible for special education as a preschooler during the 2005-2006 school year based upon autistic-like behaviors. Student also qualifies for special education based upon a specific learning disability.

2. When he last attended a District school, Student's non-compliant, off-task, and aggressive behaviors that stemmed from his challenges with emotional regulation, most impeded his learning. The District initially developed a behavior support plan (BSP)

for Student in December of 2007 and updated it over the years. Following a functional analysis assessment (FAA) in March of 2011, the District developed a positive behavior intervention plan (BIP), dated June 8, 2011, to address Student's behavioral difficulties.²

THE DISTRICT'S NEED FOR CURRENT ASSESSMENTS

3. Federal and State special education law calls for the periodic reassessment of a student with a disability at least every three years and not more often than once a year, unless the parent and district agree to a different assessment schedule.³ When a district requires current information on a student's functioning or suspects that a student's needs may have changed, the district can request that a parent consent to an assessment plan. If the parent refuses to consent, the district may file a request for a due process hearing to obtain an order permitting the district to assess the student without parental consent.

4. Student's last triennial assessment occurred in the fall of 2010. In addition, in February and March of 2011, the District conducted an FAA by Dr. Randall Ball, an independent board certified behavior analyst (BCBA). Even with this assessment information, at the start of the 2011-2012 school year, Student presented with escalated behaviors. On two occasions in October 2011, District staff physically restrained Student as an emergency behavioral intervention due to his physical aggression that presented a

² Under California law, for a student with serious behavior problems that impede a child's learning or that of others, a district is required to conduct an FAA and, if warranted, develop a BIP. (Cal. Code Regs., tit. 5, §§ 3001, subd. (g), 3052, subds. (a) & (b).)

³ California state law uses the term "assessments" in lieu of "evaluation." These terms have the same meaning and are often interchanged. (Ed. Code, § 56302.5.)

risk of harm to himself and others. Following these two incidents, Parent withdrew Student from school on October 21, 2011. The District has had no contact with Student, nor received any updated information regarding him, since then.

5. Student's annual IEP was due in February 2013. Because the District had no current information regarding Student's needs and present levels of functioning to develop new annual goals and a new IEP, the District appropriately proposed a comprehensive assessment to include the administration of standardized test instruments, as well as observations by multiple qualified assessors.⁴

The December 14, 2012 Assessment Plan

6. On December 14, 2012, the District sent Parent a proposed assessment plan and requested that she sign and return it. In its cover letter, the District invited Parent to submit in writing any questions or input she had regarding the assessment plan. The District also enclosed a release of information for Parent to sign so the District could obtain information from Student's current private school and regional center providers, a health and education update for Parent to complete, and a notice of procedural safeguards. Parent did not respond to any of the District's requests in this packet.

7. The District continued its attempts to obtain Parental consent to the December 2012 assessment plan. On January 14, 2013, Mr. Dennison sent Parent a letter reminding her of the District's need to communicate with Student's current providers

⁴ As established on the record at the March 11, 2013 prehearing conference, Student does not challenge the need for a reassessment, but rather the personnel qualified to serve as assessors. Specifically, Student challenges the involvement of individuals whom Student would likely negatively associate with his prior experiences of physical restraint and seclusion while attending a District program.

and to conduct a reevaluation, which required Parent's consent to the assessment plan previously provided to her. On February 7, 2013, the District's attorney sent a letter to Student's attorney, along with the December 2012 assessment plan, informing her that the District will not revise the plan by removing assessors who had previous contact with Student, and encouraging her to inform the District if she consented to any portion of the assessment plan. At the time of hearing, Parent had not provided consent to any of the proposed assessments.

8. The December 14, 2012 assessment plan proposes assessment in the following areas of suspected disability: academic/pre-academic achievement by a special education teacher; social/adaptive behavior by a school psychologist and autism behavior specialist (ABS); sensory-motor development by an occupational therapist; communication development by a speech and language therapist; health and development history by a nurse; and an FAA by Dr. Ball or other qualified personnel. The assessment plan further identified the types of assessment tools likely to be used and what the tools would measure, and stated that each assessor, except the nurse, would also observe Student at his current private school. As established by the credible testimony of Mr. Dennison, the District agreed to Student's request to conduct assessments at his private school setting, in a spirit of cooperation to obtain Parent's consent to the assessments as the District did not agree that Student would suffer emotional harm if assessed at a District location.⁵

⁵ Mr. Dennison has held his current position for 21 years and his duties include overseeing the provision of special education services to students including support services. Prior to his current position, he worked as a school psychologist for the District. Mr. Dennison holds an elementary teaching credential and pupil personnel services credential as well as an advance authorization in school psychology.

9. Although Student did not challenge the identified areas of assessment or any particular assessment tool, the District, through the credible testimony of its proposed assessors, established that it planned to utilize assessment tools which are technically sound, non-biased, and likely to yield accurate data in all suspected areas of disability. The evidence showed that the District would use a variety of assessment measures including records review, interviews, administration of standardized test instruments including rating scales, and observation of Student. The persuasive testimony of the District's witnesses established that direct observation of Student throughout his school day would yield valuable information as to Student's true functioning, practical abilities and needs which they would correlate to results obtained from standardized testing. The evidence further showed that each assessor is experienced in conducting school observations, aware of the need to be unobtrusive and able to ensure this, and planned to interview teachers and staff to verify that what they observed was typical for Student as opposed to a reaction to their presence.

10. Accordingly, the District met its burden of proof that the proposed assessments are warranted, that the District complied with all procedural and substantive requirements in the development of the assessment plan and the provision of notice and procedural safeguards, and made reasonable attempts to obtain Parental consent.

THE ASSESSMENT TEAM

11. The District provided Student with the names and titles of the specific assessors it selected for each assessment. Mr. Dennison established that each District assessor was selected due to his or her assignment to Student's school of residence and last school of attendance. These individuals are the professionals who would work with Student should he return to the District. The assessment team is currently comprised of the following professionals: Dr. Ball; Jacqueline Williams, a District ABS; Christina

Johnson, a District school psychologist; Lynette Roberts, a District special education teacher; Christina Canales, a District speech and language pathologist; and Lisa Arakaki, an occupational therapist with the San Luis Obispo County Office of Education. Each proposed assessor testified at hearing as to his or her specific qualifications and experience in working with and evaluating students with autism, administering specific measurement tools, and interpreting assessment results.

Behavioral Assessments

12. The District proposed that Dr. Ball complete a new FAA. Since 1978, Dr. Ball has worked with children with autism in the area of behavior. In addition to being a BCBA, he is a licensed marriage and family therapist. He earned a doctorate of education in counseling and educational psychology from the University of San Francisco in 1988. For over 11 years he served as a behavior analyst with Tri-County Regional Center. Dr. Ball has been in private practice since 1990, specializing in evaluating children and adults with psychological and developmental disabilities and has conducted independent behavior assessments and psycho-educational evaluations of students since 1998.

13. The District intends to have Christina Johnson, a school psychologist with the District since August of 2010, assess Student in the area of social/adaptive behavior. As a school psychologist, Ms. Johnson routinely assesses students in this area. She previously served as an ABS with the District for two years, worked as an instructional aide at a non-public school, and provided in-home behavioral therapy for autistic children through the Lovaas Instructional Institute. Ms. Johnson earned a bachelor's of science degree in psychology in 2003, and a master's degree in counseling in 2008 along with a pupil personnel services credential in school psychology from the California State University at Northridge. Ms. Johnson credibly established that she is qualified to assess Student and would utilize the following tools which she is trained to administer

and interpret and has experience using: the Childhood Autism Rating Scale, the Gilliam Autism Rating Scale and the Behavioral Assessment Scales for Children, as well as some projective tests for Student.

14. The District selected Jacqueline Williams to assess Student's social and behavioral needs in conjunction with the school psychologist and in collaboration with Dr. Ball. As a District ABS since August of 2009, Ms. Williams observes and assesses students with autism, devises educational programs and reinforcement schedules based upon Applied Behavior Analysis (ABA) and trains and supervises staff in delivering these programs.⁶ Prior to her current position, she worked for two years as an instructional assistant with the District and then as a clinician at the Koegel Autism Center. In 2009, she earned a master's degree in education from the University of California at Santa Barbara and holds a moderate to severe special education teaching credential. She is completing her second masters in administration and leadership, and will graduate in July 2013 with an administrative services credential. Ms. Williams is currently working on her certifications as a behavior analyst and a behavior intervention case manager. Her testimony and that of Dr. Ball's persuasively established that she is qualified to conduct a behavioral observation as part of Student's reassessment.

Academic Achievement

15. To determine Student's current academic abilities, the District plans to have Lynette Roberts, a special education teacher for 24 years, the past 15 years with the District, administer the Woodcock Johnson III, Battery of Achievement (WJ-III). Ms. Roberts holds a learning handicapped and a multiple subject teaching credential. She also has an autism authorization certificate and has experience teaching and evaluating

⁶ ABA is the methodology used by the District to work with autistic students.

autistic students in the area of academics. She has administered the WJ-III many times, and is trained in the administration and interpretation of this tool.

Related Services Needs

16. To determine Student's current communication needs, the District selected Christina Canales, a licensed speech and language pathologist, to assess Student. Ms. Canales has worked as a contracted speech and language pathologist for the District since 2010, the year she obtained her license. She earned a bachelor of arts in 2007 and a master's degree in 2009, both in communication disorders and deaf studies from the California State University, Fresno. Ms. Canales holds a certificate of clinical competence, which authorizes her to provide speech services in a medical setting and a speech language pathology services credential, which authorizes her to provide services in a public school setting. She has experience providing language services to autistic children and assessing them in the area of communication. Given Student's deficits in expressive and receptive language, pragmatic skills and articulation, Ms. Canales identified three test instruments that she would utilize: the Clinical Evaluation of Language Fundamentals IV, the Test of Problem Solving, and the Goldman Fristoe Test of Articulation. Ms. Canales credibly established that she is qualified to administer and interpret these instruments, based upon her education, training and experience, and is familiar with these tools.

17. The District plans to have Lisa Arakaki, Student's prior occupational therapist, assess his occupational therapy needs. Ms. Arakaki received her state license as an occupational therapist in 2002 and has worked in this capacity with the San Luis Obispo County Office of Education since October 2009. She provides direct and consultation services to students and provides occupational therapy evaluations. Prior to her current employment, she worked for six years at Bright Start Early Intervention Program, a vendor through the Tri-Counties Regional Center, where she provided

occupational therapy to children with autism. Ms. Arakaki earned a master of arts degree in child development from the California State University, Los Angeles in 1990 and a bachelor's of science in occupational therapy in 1984. Based upon her prior assessment of Student in November of 2010, and her work with him, she identified the Wide Range Assessment of Visual Motor Abilities and the Sensory Profile School Companion as two instruments she intends to use as part of her assessment. Her testimony established that she has utilized these tools many times and is qualified to administer each and interpret the results.

18. The evidence showed that each proposed assessor holds the necessary licenses or credentials, or is otherwise qualified by way of experience and training, to assess and observe Student in his or her respective field of expertise and competent to administer identified test instruments and interpret the results. The District's proposed assessors verified that they would utilize appropriate, validated, non-discriminatory test instruments relevant to assessing Student in all suspected areas of disability. The District established that the proposed assessments will be conducted by qualified personnel. Therefore, the District may conduct a reassessment of Student pursuant to the December 14, 2012 assessment plan without Parent's consent.

STUDENT'S CLAIM OF EMOTIONAL HARM

19. Prior to hearing, Student raised a defense to the District's right to use qualified assessors of its choice. Student alleges that he suffered emotional and physical trauma at the hands of District personnel during their practice of physical restraint and seclusion, and that the involvement of these individuals as assessors, or those he would negatively associate with them, would cause him current emotional harm. However, Parent and Student's counsel both declined to attend the hearing and, therefore, Student did not put on any evidence. Based upon Student's failure to present evidence of his defense at hearing, this Decision does not make any factual findings that Student

suffered emotional trauma from his past contacts with District personnel, or that current assessments and observations of Student by District personnel previously known to him, or those whom he may associate with negative experiences, would result in current harm, trauma, or regression. Accordingly, Student's defense fails.

20. The evidence at hearing established that three proposed assessors, Ms. Arakaki, Dr. Ball, and Ms. Williams, have previously observed or worked with Student. The three remaining assessors have never met Student nor had any involvement with him. Ms. Arakaki provided occupational therapy to Student for two school years. She was not involved in any physical restraints of Student, found him to be cooperative during her sessions, and described their relationship as positive. She was convincing that it was unlikely that Student would react negatively to her. Dr. Ball conducted several hours of observation of Student over four days during his FAA in early 2011, and also observed Student from a distance on a fifth occasion in October of 2011, during a behavioral escalation. He was never introduced to Student and had limited exposure to him during his observations. Dr. Ball credibly testified that Student does not know him and likely would not recognize him. Therefore, it is not reasonably likely that Student would react negatively to his presence.

21. Lastly, Ms. Williams met with Student three to four times weekly and spent a minimum of 24 hours each month with him as his ABS for the 2009-2010, 2010-2011 and start of the 2011-2012 school years. Ms. Williams physically restrained Student on two occasions at the start of the 2011-2012 school year, including his last day of attendance on October 21, 2011. The testimony of several witnesses established that Student never displayed a negative reaction to Ms. Williams over the years. He was always happy to see her, had a good rapport with her, and did not appear fearful of her

even after she first restrained him.⁷ The second restraint ended with a police officer handcuffing Student, and Ms. Williams last saw him crying as he left campus with his Parent. Ms. Williams' testimony, as corroborated by other witnesses, credibly established that based upon her direct work with Student, extending over two school years, they formed a positive relationship such that it was unlikely Student would react negatively to her.

22. Dr. Ball and Ms. Johnson persuasively established that just because a staff member restrained a student, it does not necessarily follow that the student would be afraid of that individual. Dr. Ball has needed to physically restrain many children over his career, and was still able to successfully maintain a good relationship with them. He was persuasive that most children are resilient and bounce back from a physical restraint employed as an emergency behavioral intervention. Ms. Johnson testified clearly and persuasively that there are times school personnel need to restrain students for safety reasons, but they are able to continue to serve and effectively work with these same students in their daily programs after a crisis intervention.

23. Each assessor convincingly established that it is not reasonably likely that Student would react negatively to him or her or display fear. Even so, the District proved that its assessors are skilled at reading students' emotional states and mental wellbeing and are prepared to take appropriate measures to monitor Student for anxiety or fear. The evidence showed that the proposed assessors are experienced in establishing

⁷ Several witnesses also testified about Student's strong, positive relationship with his instructional assistant Brenda Parker, who worked with him for two school years. The District's witnesses credibly established that even though Ms. Parker physically restrained Student on more than one occasion, he did not fear her, continued to see her as his helper and positive re-enforcer, and she was able to effectively support Student.

rapport with students and placing them at ease to conduct a thorough assessment, and are familiar with using reinforcement systems to assist a child with autism to engage in the assessment process. Although the assessment team was confident in its ability to effectively evaluate Student, the proposed assessors convincingly testified that they would terminate their assessments if Student was fearful or otherwise exhibited reactive behaviors in relation to them, and assign an alternate assessor. Based upon the evidence, the District selected qualified assessors of its choice to assess Student pursuant to the December 14, 2012 assessment plan.

STUDENT'S CLAIMS OF INVALID ASSESSMENT RESULTS AND HARASSMENT

24. Prior to hearing, Student contended that as a result of his alleged prior emotional trauma from the District's behavior intervention practices, the involvement of any personnel as assessors, whom Student may associate with his prior alleged trauma, would yield an invalid result by measuring his trauma reaction rather than his functioning as related to his disability. Again, Student did not introduce any evidence in support of this contention.

25. Student also contended, but the evidence did not establish, that the District filed a request for a due process hearing solely to harass Parent and force her to forego Student's rights to special education services. On the contrary, the District established that Parent has not waived Student's rights to special education, that Student's prior annual IEP has expired, and that the District requires current assessments to develop an appropriate IEP for Student. Further, the evidence showed that the District tried unsuccessfully to obtain Parental consent to its assessment plan beginning in December 2012. Accordingly, Student's claims fail.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49, 58 [126 S.Ct. 528, 163 L.Ed.2d 387 (*Schaffer*)], the party who filed the request for due process has the burden of persuasion at the due process hearing. In this case, the District filed for a due process hearing and therefore bears the burden of persuasion as to all issues.

ELEMENTS OF A FREE APPROPRIATE PUBLIC EDUCATION (FAPE)

2. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA) and State law. (20 U.S.C. §§ 1400(d), 1412(a)(1)(A); 34 C.F.R. § 300.101 (2006); Ed. Code, § 56000, subd. (a).)⁸ FAPE is defined as special education and related services, that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Ed. Code, § 56031, subd. (a); Cal. Code Regs., tit. 5, § 3001, subd. (p).) For a district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, reasonably calculated to provide the student with some educational benefit, and must comport with the student's IEP. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 206-207 [102 S.Ct. 3034, 73 L.Ed.2d 690].)

⁸ All subsequent references to the Code of Federal Regulations are to the 2006 version.

PROCEDURAL AND SUBSTANTIVE REQUIREMENTS OF REASSESSMENTS

3. Assessments are required in order to determine eligibility for special education, and what type, frequency and duration of specialized instruction and related services are required. In evaluating a child for special education eligibility and prior to the development of an IEP, a district must assess him in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) 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); 34 C.F.R. § 300.303(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); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

4. In conducting the assessment, the district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student. This may include information provided by the parent, which may assist in determining whether the student is a child with a disability, and the content of the IEP. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) No single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or for determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; must be provided in the student's native language or other mode of communication; and must be provided in the form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless it is not feasible to do so. (20 U.S.C. §

1414(b)(3); 34 C.F.R. § 300.304(c)(1); Ed. Code, § 56320, subds. (a) & (b).) The school district must use technically sound instruments to assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C).)

Use of Qualified Assessors

5. Special education assessments must be conducted by qualified individuals who are both knowledgeable of the student's disability and competent to perform the assessment, as determined by the local educational agency. (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (g), 56322.) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) A person is qualified if he or she has met federal and state certification, licensing, or other comparable requirements which apply to the area in which he or she is providing special education or related services. (Cal. Code Regs., tit. 5, §§ 3023, 3065.)

Parental Consent for Reassessment or Consent Override Procedures

6. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § (c)(i); 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 parents. (20 U.S.C. §§1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56329.) The notice consists of the proposed written assessment plan and a copy of the procedural safeguards under the IDEA and state law. (20 U.S.C § 1414(b)(1); Ed. Code, §§ 56321, subd. (a).) The assessment plan must be understandable, explain the assessments that the district proposes to conduct, and state that the district will not implement an IEP based on the assessment without the consent of the parents. (Ed. Code, § 56321, subd. (b).) A school district must give the parents and/or the student at least 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

7. If 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(a)(1)(D)(ii)(I), 1414(c)(3), 1415(b)(6)(A); 34 C.F.R. § 300.300(a)(3)(i) & (c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3), 56506, subd. (e); *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.”].)

FAA’s

8. Under California law, when a child exhibits “serious behavior problems,” the district must conduct an FAA which may result in a BIP. (Cal. Code Regs., tit. 5, §§ 3001, subd. (g), 3052(a) & (b).) Serious behavior problems are defined as behaviors which are self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the IEP are found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (ab).)

9. An FAA is a highly prescriptive evaluation which includes the systematic observation of targeted behaviors, and their antecedents and analyzes the consequences to determine the function of the behavior, as well as the setting in which the behavior most frequently occurs. (Cal. Code Regs., tit. 5, § 3052, subd. (b).) An FAA must be conducted by, or be under the supervision of a person who has documented training in behavior analysis with an emphasis on positive behavioral interventions. The qualified assessor must gather information from three sources: direct observation, interviews with significant others, and other available data such as assessment reports and other individual records. (Cal. Code Regs., tit. 5, § 3052, subd. (b).)

THE DISTRICT'S OBLIGATION TO CONTINUE TO OFFER SPECIAL EDUCATION

10. A parent must permit the local educational agency to conduct necessary and appropriate assessments if the parent wishes that the child receive special education services under the IDEA. The Ninth Circuit held, "if the parents want [their child] to receive special education services under the [IDEA], they are obliged to permit [re-assessment] testing." (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315 (*Gregory K.*) A parent who desires for the child to receive special education must allow the school district to reevaluate the child using its own personnel. "We hold that there is no exception to the rule that a school district has a right to test a student itself in order to evaluate or reevaluate the student's eligibility under IDEA." (*Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 179 (*Andress*) [finding no exception to the district's right to reevaluate a student based upon medical or psychological harm to the student].)

11. Parents who want their children to receive special education services must allow the district to conduct the reassessments by experts of its choice and cannot force the district to rely solely on an independent evaluation. (*M.T.V. v. DeKalb County School Dist.* (11th Cir. 2006) 446 F.3d 1153, 1160; *Johnson v. Duneland Sch. Corp.* (7th Cir. 1996) 92 F.3d 554, 558; *Andress, supra*, 64 F.3d at pp. 178-79; *Gregory K., supra*, 811 F.2d at p. 315; *Dubois v. Conn. State Bd. of Ed.* (2d Cir. 1984) 727 F.2d 44, 48 [a school is entitled to current evaluative data and "may insist on evaluation by qualified professionals who are satisfactory to the school officials".]) Until a parent waives all claims under the IDEA, the parent must comply with the reasonable and necessary assessment requests of the District. (*Id.* at p. 49.)

DETERMINATION OF ISSUE ONE: DOES THE DISTRICT HAVE THE RIGHT TO SELECT QUALIFIED PERSONNEL OF ITS CHOICE TO ASSESS STUDENT PURSUANT TO THE ASSESSMENT PLAN DATED DECEMBER 14, 2012?

12. Based on Factual Findings 1-5 and 10, and Legal Conclusions 1-3 and 8, the District demonstrated that Student's educational and related services needs warrant a reevaluation, as proposed by the District in its December 2012 assessment plan. Based upon Factual Findings 6-9 and Legal Conclusions 4-6, the District's assessment plan was detailed, understandable and met all legal requirements. The District provided Parent with proper notice of its proposed assessment plan and advised her of her rights. As shown in Factual Findings 6-7, 10 and 25, and Legal Conclusions 6-7, the District took reasonable measures to obtain Parent's consent to its assessment plan without success.

13. Pursuant to Factual Findings 11-25 and Legal Conclusions 4-5 and 9, the District established that it has qualified personnel knowledgeable about autism available to conduct each assessment, and who are trained and experienced in administration and interpretation of the identified testing tools. Each assessor discussed plans to use a variety of measures including interview, record review, observation and the administration of standardized testing and has experience conducting assessments including observation. As established by Legal Conclusions 10-11, the District has the right to select personnel of its choice to conduct a reassessment of Student. Therefore, the District established it may select qualified personnel of its choice to assess Student pursuant to its December 14, 2012 assessment plan.

DETERMINATION OF ISSUE TWO: IF STUDENT WISHES TO RECEIVE SPECIAL EDUCATION SERVICES AT PUBLIC EXPENSE, MUST HE REASONABLY, WITH THE ASSISTANCE OF PARENT, MAKE HIMSELF AVAILABLE FOR REASSESSMENT BY THE DISTRICT PURSUANT TO THE ASSESSMENT PLAN DATED DECEMBER 14, 2012?

14. Pursuant to Factual Findings 19-23, Student produced no evidence that he would be harmed if he were evaluated by District personnel and, therefore, Student did not meet his burden of proof to defeat the District's right to select qualified assessors of its choice.⁹ As established by Factual Finding 25 and Legal Conclusions 10-11, if Student wishes to receive special education services from the District, he must reasonably comply with the District's reassessment pursuant to the December 14, 2012 assessment plan.

ORDER

1. The District is entitled to reassess Student in accordance with its December 14, 2012 assessment plan with qualified assessors of its choice. The District shall notify Parent in writing of the date(s) of the reassessment of Student at least 15 calendar days before the reassessment begins.

2. The District's FAA shall comply with the requirements of the California Code of Regulations, title 5, section 3052.

⁹ To defeat the District's right to use qualified assessors of its choice, Student bore the burden to prove his claim that District assessors would put him at risk of harm. (*P.S. v. Brookfield Board of Education* (D. Conn. 2005) 353 F. Supp.2d 306, 315, affd. (2nd Cir. 2006) 186 Fed.Appx. 79, 2006 WL 1788293 [nonpub. opn.].) This Decision does not find that there is a legal exception to the District's right to reassess Student based upon a claim of emotional harm. Student produced no evidence upon which to entertain the viability of his claim.

3. If Student's Parent wishes to have Student receive special education services from the District at public expense, Parent shall make Student reasonably available for the reassessment in accordance with the December 14, 2012 assessment plan.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires this decision to indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on both issues.

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: April 10, 2013

/s/

THERESA RAVANDI

Administrative Law Judge

Office of Administrative Hearings