

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ELK GROVE UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2016020899

DECISION

The Elk Grove Unified School District filed a request for due process hearing on February 19, 2016, naming Student. The matter was continued on March 9, 2016.

Administrative Law Judge Charles Marson heard this matter in Elk Grove, California, on June 7, 2016.

Lauri Arrowsmith, Attorney at Law, represented Elk Grove. Patricia Spears Lee, Elk Grove's Regional Program Specialist, was present for the hearing on behalf of Elk Grove. There was no appearance for Student.¹

At the end of the hearing on June 7, 2016, the record was closed and the matter

¹ The ALJ waited an hour after the scheduled starting time of the hearing for Parent or her advocate, James Peters III, to appear, and then telephoned Mr. Peters's office twice while on the record. At both of Mr. Peters's extensions, a recording announced that his voicemail box was full and could not accept messages. The ALJ then proceeded with the hearing.

was submitted for decision.

ISSUE

Is Elk Grove entitled to conduct assessments of Student pursuant to the January 12, 2016 assessment plan without Parent's consent?

SUMMARY OF DECISION

Elk Grove discharged its burden of proving that on January 12 and 22, 2016, it sent to Parent an assessment plan proper in form, accompanied by a statement of procedural safeguards; that Parent declined to return it for more than 15 days; and that conditions warrant the proposed assessments. This Decision therefore authorizes Elk Grove to conduct the proposed assessments without parental consent.

FACTUAL FINDINGS

1. Student is a six-year-old boy who lives with Parent within the geographical boundaries of Elk Grove and is eligible for special education and related services in the category of Other Health Impairment. Student has difficulty with impulse control, sustained attention, emotional regulation, and compliance with activities he does not prefer.

2. Student was originally made eligible for special education in May 2014 by the Fullerton Union School District, in which he was then residing. In summer 2014 his residence changed to Elk Grove. On September 19, 2014, Parent registered Student in Elk Grove. Elk Grove offered Student placement and services in its Arthur C. Butler School that were comparable to those in Student's individualized education program from Fullerton, but he did not immediately attend class. At IEP team meetings on October 1 and 17, 2014, Elk Grove offered Student a new IEP. Parent disputed the offer and filed a request for due process hearing. The matter was resolved in March 2015 by a

settlement agreement in which Parent agreed to several assessments. Because of this dispute, Student did not actually begin to attend kindergarten until March 23, 2015.

3. For reasons not in the record, Parent withdrew Student from Butler on May 7, 2015, and he has not attended a public school in Elk Grove since that date. Most of the assessments to which Parent had agreed in March 2015 were under way but incomplete when Parent withdrew Student from Butler, and were not completed because Parent would not make Student available for testing or return rating scales or questionnaires after she withdrew him from Butler. Student is now attending a private school in Elk Grove.

4. On January 12, 2016, the parties attended an IEP team meeting at which Student's needs for placement and services were discussed. Parent, Mr. Peters, and Dr. David Partin attended the meeting by telephone. Dr. Partin, who had assessed Student three years earlier and seen him more recently, told the team that Student had a diagnosis of attention deficit hyperactivity disorder and could also be affected by autism spectrum disorder, as he also had a diagnosis of Asperger's Syndrome. Dr. Partin expressed concerns about Student's behaviors, executive functioning, and socialization in his private school, and recommended that Student be provided a one-to-one aide. The parties discussed the prospect of further assessments, and the Elk Grove team members offered to conduct assessments at Student's private school.

5. As a result of the January 12, 2016 IEP team meeting, Elk Grove IEP team members concluded that further assessments of Student were necessary. Elk Grove then prepared an assessment plan requesting permission to conduct further assessments of Student and sent it to Parent on January 12, 2016, and to Mr. Peters on January 22, 2016, accompanied by notices of procedural safeguards. The January 12, 2016 assessment plan was in English, the native language of Student and Parent. The plan proposed assessments in the following areas and identified the professionals who would

do each assessment:

Academic Achievement	Special Education Teacher
Health	District School Nurse
Intellectual Development	District School Psychologist
Language/Speech Communications Development	District Speech Therapist
Social/Emotional	District School Psychologist
Adaptive/Behavior	District School Psychologist
Other (Functional Behavior Assessment/ ASD / ADHD)	District Behaviorist, School Psychologist, Speech-Language Pathologist

6. The January 12, 2016 assessment plan also contained a brief, clear textual explanation of each proposed assessment. For example, the assessment plan described the academic achievement assessment as follows: "These tests measure reading, spelling, arithmetic, oral and written language skills, and/or general knowledge." By the time of hearing, Parent had not responded to the assessment plan.

NEED FOR ASSESSMENT

7. Elk Grove has insufficient information about Student to determine his continued eligibility for special education and related services or to decide upon an appropriate educational program for him. Most of the assessment data it has are obsolete. Elk Grove has assessments from Fullerton conducted in 2013 and 2014, but these were completed when Student was three and four years old. The evidence showed that the needs of young boys change rapidly. Patricia Spears Lee, a resource specialist, behaviorist, speech and language pathologist and Elk Grove Regional Program Specialist with 35 years of special education experience, established at hearing that in the time between the spring 2015 assessments and the present, and at his age, Student could be "a different little boy."

8. Elk Grove has insufficient direct experience with Student to determine his eligibility or create educational programming because he was in a district school only from March 23 to May 7, 2015. As a result, Elk Grove does not have much of the usual information – grading, tests, teacher reports and the like – it would have for a student regularly attending its schools. It has very little information on Student’s progress in his private school.

9. As shown more specifically below, most of the assessments to which Parent agreed in spring 2015 were conducted in the brief period Student attended Butler, but were incomplete when Parent withdrew Student from Butler on May 7, 2015.

10. The parties dispute the specifics of Student’s disabilities, eligibility and needs. Much of this dispute is caused by the absence of current information that new assessments would provide. For example, Parent requested that Elk Grove provide Student related services such as speech and language support at his private school, but the incomplete information Elk Grove has suggests he no longer needs that support. Elk Grove also lacks the information necessary to evaluate Dr. Partin’s assertion that Student needs a one-to-one aide.

Academic Assessment

11. In March 2015, just as Student was entering Butler, resource specialist Olivia Hansen completed an assessment of his academic performance. Ms. Hansen established at hearing that her academic information from March 2015 was obsolete because it did not reflect Student’s development or progress during a year in his private school, where the curriculum may be different from Butler’s. District therefore lacks adequate information to establish present levels of performance and to write annual goals for Student.

Functional Behavior Analysis

12. At the time Parent withdrew Student from Butler, Elk Grove behaviorist Erica Winn was in the process of conducting a functional behavior analysis of Student. Ms. Winn established at hearing that she was able to complete several standardized tests, but was unable to observe Student sufficiently to determine whether his behavior in class, and with peers and adults was consistent with her tests results. Her draft report from May 2015 states: "The results in this report are deemed incomplete because [Student] was not made available to the examiner in order to complete all observations and assessments."

13. The concerns of Ms. Winn and other Elk Grove IEP team members about Student's behaviors substantially increased at the January 16, 2016 IEP team meeting because of new information provided by Dr. Partin and Mr. Peters about Student's difficulties in his private school.

Health Assessment

14. Student's immunization records were not complete when Parent withdrew him from Butler on May 7, 2015. The health assessment proposed by Elk Grove in the January 12, 2016 assessment plan would require the school nurse to complete those records, to acquire general health and developmental information, and to conduct vision and hearing screenings to ensure that Student is able to participate fully in other assessment measures. The health assessment would also respond to Dr. Partin's statement, at the January 12, 2016 IEP team meeting, that Student has a diagnosis of attention deficit hyperactivity disorder.

Occupational Therapy Assessment

15. Elk Grove occupational therapist Adrienne Brown established at hearing that she had just begun an occupational therapy assessment of Student by acquiring the

necessary paperwork when Parent withdrew Student from Butler. Ms. Brown did not have an opportunity to observe him or administer standardized tests. Student was not receiving occupational therapy when he was attending Butler, and Ms. Brown cannot determine without further assessment whether he now needs occupational therapy services.

Psychoeducational Assessment

Intellectual Development Assessment

Adaptive Skills Assessment

16. In spring 2015, Elk Grove school psychologist Gabriela Macias was able to administer to Student a number of standardized tests measuring Student's executive functioning, language, sensory and visual processing and adaptive skills. She was also able to analyze rating scales from Parent and Student's kindergarten teacher relating to the possibility of autism spectrum disorder. But she was not able to measure his cognitive functioning, conceptual or motor development, or conduct behavioral observations before he left Butler. Her draft report notes that Student was not made available for such testing and observation, and that "[f]urther updated information is needed . . . to determine and document if [Student] meets eligibility as a student with Other Health Impairment (OHI)." She was also unable to determine, without more testing and observation, whether Student was eligible for special education in the category of autism.

17. Ms. Macias was on leave when the January 12, 2016 IEP team meeting was held, so her supervisor, lead school psychologist Armando Fernandez, attended in her place. Dr. Partin's claims at that meeting that Student has diagnoses of Asperger's Syndrome and attention deficit hyperactivity disorder, caused Mr. Fernandez to be mindful of Elk Grove's duty to assess Student in all areas of suspected disability. At the

meeting, Mr. Fernandez therefore recommended further psychoeducational testing because Ms. Macias's testing was incomplete in the area of autism, among others. Mr. Fernandez informed the IEP team at the time, and established at hearing, that Elk Grove lacks sufficient current information to determine Student's eligibility for special education.

18. Elk Grove has reason to be concerned about Student's adaptive skills. Documents from Student's previous school in Fullerton suggested he was having daily "toileting incidents." He had two such incidents in his brief stay at Butler, suggesting that he may need support in that and other life skills areas. On the Adaptive Behavior Assessment System (Second Edition), a standardized test of adaptive functioning, Ms. Macias found that Student did not yet look both ways when crossing a street, did not order his own food, and could not find a restroom in a public place. Elk Grove does not know whether he still lacks those skills. It does not have the current information about his adaptive skills that an assessment would produce.

Speech and Language Assessment

19. In spring 2015, Elk Grove speech-language pathologist Jennifer Spring was able to administer to Student a number of standardized tests of his speech and language functioning. She had been providing direct speech services to Student while he attended Butler. Ms. Spring tentatively concluded that Student was no longer eligible for special education in the category of speech and language impairment. However, she established at hearing that her analysis was incomplete because, after Student left Butler, she was unable to finish her analysis of Student's pragmatic language. In addition, Ms. Spring attended the January 12, 2016 IEP team meeting. Dr. Partin's new information about Student's social skills, language and behavior at his private school buttressed her view that further speech and language assessment was necessary.

CONCLUSIONS OF LAW

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA²

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);³ Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability

² Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

³ All subsequent references to the Code of Federal Regulations are to the 2006 version.

that is developed under the IDEA's procedures with the participation of parents and school personnel, that describes the child's needs, academic and functional goals related to those needs, and specifies the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island Sch. Dist.* (9th Cir. 2010) 592 F.3d 938, 950-951.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the

complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) By this standard, Elk Grove had the burden of proof on the sole issue decided.

IS ELK GROVE ENTITLED TO CONDUCT ASSESSMENTS OF STUDENT PURSUANT TO THE JANUARY 12, 2016 ASSESSMENT PLAN WITHOUT PARENT'S CONSENT?

5. Reassessment of a student eligible for special education must be conducted at least every three years, or more frequently if the local educational agency determines that conditions warrant reassessment, or if a reassessment is requested by the student's teacher or parent. (20 U.S.C. § 1414(a)(2)(A); Ed. Code, § 56381, subds. (a)(1), (2).)

6. A reassessment usually requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain consent, a school district must develop and propose to the parents a reassessment plan. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) If the parents do not consent to the plan, the district can conduct the reassessment only by showing at a due process hearing that it needs to reassess the student and is lawfully entitled to do so. (34 C.F.R. §§ 300.300(3)(i), 300.300(4)(c)(ii); Ed. Code, §§ 56381, subd. (f)(3); 56501, subd. (a)(3); 56506, subd. (e).) Accordingly, to proceed with a reassessment over a parent's objection, a school district must demonstrate at a due process hearing (1) that the parent has been provided an appropriate written reassessment plan to which the parent has not consented, and (2) that the student's triennial reassessment is due, that conditions warrant reassessment, or that the student's parent or teacher has requested reassessment. (Ed. Code, § 56381, subd. (a).)

7. The required notice of assessment consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and related state laws. (Ed. Code, § 56321, subd. (a).) The assessment plan must be provided in a language easily

understood by the public and in the native language of the student; explain the types of assessments to be conducted; and notify parents that no IEP will result from the assessment without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4); see also 34 C.F.R. § 300.9(a).) The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

8. The evidence showed that Elk Grove provided Parent an assessment plan on January 12 and 22, 2016, that complied with the above requirements, and accompanied it with a notice of procedural safeguards. Parent has had more than 15 days to review, sign and return it but has not done so.

9. The evidence showed that conditions warrant reassessment of Student in the areas proposed by the January 16, 2016 assessment plan. As set forth in more detail in the Factual Findings, Elk Grove had only a few weeks of direct experience with Student, and cannot determine his eligibility, present levels of performance or service needs based on his performance in its school. Student's assessments from Fullerton are obsolete. Only one of the assessments begun in spring 2015 – the academic assessment – had been completed by the time Student left Butler, and that assessment is now obsolete because Student has spent a year in a private school with a different curriculum. Elk Grove does not know Student's present levels of academic performance. In addition, Dr. Partin's presentation at the January 16, 2016 IEP team meeting raised several new concerns, including what Dr. Partin called Student's diagnoses of Asperger's Disorder and attention deficit hyperactivity disorder.

10. Reassessment is also warranted to resolve, if possible, disputes between the parties about Student's continued eligibility for special education in particular categories, and his need for services. Parent has requested speech and language support at Student's private school, but the incomplete speech and language assessment from spring 2015 tentatively concluded he no longer needs such support

and is no longer eligible for services in that category. Dr. Partin opined to the IEP team that Student should have a one-to-one aide, but nothing in Elk Grove's current information supports that request. Without further assessments, the IEP team simply lacks the necessary information to determine eligibility, describe present levels of performance, develop goals or decide upon necessary services.

11. The record reflects previous disagreements between the parties about the personnel conducting Elk Grove's assessments and the conditions under which they have done so. A parent who wishes that his or her child receive special education services must allow the school district to reassess if conditions warrant it. In *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315, the court stated that "if the parents want [their child] to receive special education under the Act, they are obliged to permit such testing." (See, e.g., *Patricia P. v. Board of Educ. of Oak Park and River Forest High Sch. Dist. No. 200* (7th Cir. 2000) 203 F.3d 462, 468; see also *Johnson v. Duneland Sch. Corp.* (7th Cir. 1996) 92 F.3d 554, 557-558.) In *Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 179, the court concluded: "[t]here 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."⁴

12. As long as the statutory requirements for assessments are satisfied, parents may not put conditions on assessments; "selection of particular testing or evaluation instruments is left to the discretion of State and local educational authorities." (*Letter to Anonymous* (OSEP 1993) 20 IDELR 542.) Moreover, the right to assess belongs to the school district; parents have no right to insist on outside assessors.

⁴ In California, a district may not reassess within a year of a previous assessment without parental consent. (Ed. Code, § 56381, subd. (a)(2).) More than a year has passed since Elk Grove has administered any assessment to Student.

(See, e.g., *Andress v. Cleveland Independent. School Dist.*, *supra*, 64 F.3d at p. 179.) In *G.J. v. Muscogee County Sch. Dist.* (M.D. Ga. 2010) 704 F.Supp.2d 1299, *affd.* (11th Cir. 2012) 668 F.3d 1258, for example, parents purported to agree to reassessments, but attempted to require particular assessors to conduct them. The ALJ deemed this a refusal of consent, and the District Court agreed, noting: "With such restrictions, Plaintiffs' purported consent is not consent at all." (*Id.*, 704 F.Supp.2d at p. 1309.) In affirming, the Eleventh Circuit observed that parents' conditions "vitiating any rights the school district had under the IDEA for the reevaluation process . . ." (*Id.*, 668 F.3d at p. 1264.) If Parents disagree with an assessment conducted by a school district, they have the right, under certain circumstances, to obtain an independent educational evaluation at district expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1), (b)(1); Ed. Code, § 56329, subd. (b); Ed. Code, §§ 56329, 56506, subd. (c).)

13. Elk Grove proved at hearing that conditions warrant reassessment of Student according to the January 12, 2016 assessment plan, and it will be allowed to proceed with those assessments in the absence of parental consent.

ORDER

1. Elk Grove is entitled to reassess Student according to its January 12, 2016 assessment plan, without Parent's consent.

2. Elk Grove shall notify Parent in writing, within 20 business days of the date of this Decision or later, of the days, times, and places Parent is to present Student for assessment, and Parent shall reasonably cooperate in presenting him for assessment on those days and times, and in those places. Parent shall give permission for Elk Grove to assess Student at his private school if, in Elk Grove's sole judgment, assessment in that setting is necessary.

3. If Student is unable to attend school or appear for assessment on any school day during the assessments, by reason of illness or other such cause unrelated to

the parties' disputes, Parent shall promptly communicate this fact to Elk Grove and the parties shall mutually agree on days and times for the assessments to be conducted that are no more than 30 days from the dates that Elk Grove originally proposed. Any delay under this provision will toll the 60 day timeline for assessment.

4. Parent shall timely complete and return any documents reasonably requested by Elk Grove as a part of the assessments.

5. Parent shall not attempt to attach any conditions to Elk Grove's assessments, including but not limited to conditions concerning her presence during an assessment, the methods used in an assessment, or the identity or qualifications of the person conducting an assessment.

6. If Parent does not present Student for assessment as specified above, or does not timely complete and return any documents as specified above, Elk Grove will not be obligated to provide special education and related services to Student, or otherwise to accord Student the rights of a special education student, until such time as Parent complies with this Order.

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. Elk Grove prevailed on the sole issue decided.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: July 5, 2016

/s/

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings