

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

WILLIAM S. HART UNION HIGH SCHOOL
DISTRICT,

v.

OAH Case No. 2016010872

DECISION

The William S. Hart Union High School District filed a request for due process hearing with the Office of Administrative Hearings on January 26, 2016, naming Parent on behalf of Student. OAH continued this matter on February 12, 2016.

Presiding Administrative Law Judge Peter Paul Castillo heard this matter in Santa Clarita, California, on March 8, 2016.

Ian Wade and Laila Tafreshi, Attorneys at Law, appeared on behalf of District. Sharon Amrhein, District's Director of Special Education, was present throughout the hearing.

Neither Mother nor Student was present during the hearing.¹

The record closed at the completion of the hearing on March 8, 2016.

¹ Parent informed District by way of email that she would not attend the hearing, and the email contained the correct hearing date of March 8, 2016. OAH properly notified Parent of the hearing date and time in the February 12, 2016 continuance order and the February 29, 2016 prehearing conference order.

ISSUE

May District conduct a comprehensive initial assessment of Student, pursuant to its November 17, 2015 assessment plan, without parental consent?

SUMMARY OF DECISION

This Decision holds that District's November 17, 2015 assessment plan complies with all applicable statutory requirements, that the assessors it proposes to use are competent to perform the assessments, and that the notice of the plan given to Parent was proper. It also holds that the assessments District proposes are warranted because Student has not been assessed since 2012, Parent exited him from special education services, and based on Student's performance this school year and information in Student's educational records from prior school districts, Student may require special education services. Further, even if the assessment finds Student eligible for special education services and Parent does not consent to the provision of these services, the assessment will permit District to serve Student by having accurate information regarding his learning challenges. Therefore, District may assess Student pursuant to the November 17, 2015 plan, without Parent's consent.

FACTUAL FINDINGS

JURISDICTION

1. Student is a 14-year-old male who resides with Parent inside the geographical boundaries of District. Student suffered at birth from hydrops fetalis (the abnormal accumulation of fluid in the fetus) and right congenital femoral deficiency, which caused the growth plates in Student's right leg to die. Student has undergone numerous surgeries to permit his right leg to be extended to make up for the death of his growth plate. On May 12, 2004, Student was first found eligible for special education under the eligibility categories of orthopedic impairment and other health impaired by the Los

Angeles Unified School District where he then attended.²

2. Student attended school in the Castaic Union School District from April 13, 2009, to November 8, 2010, when he moved to Newport-Mesa Unified School District. On June 3, 2014, OAH issued a decision that found that Newport-Mesa's April 1, 2013 multi-disciplinary assessment was appropriate. The decision further found that Newport-Mesa's April 1, 2013 individualized educational program was appropriate and constituted a free appropriate public education in the least restrictive environment, and Newport-Mesa may implement the April 1, 2013 IEP immediately.

3. Parent removed Student from Newport-Mesa and enrolled him at California Virtual Academy. California Virtual Academy (CAVA) is an independent charter school that offers on-line instruction. Student attended CAVA for the 2014-2015 school year.

4. Parent enrolled Student with District on August 13, 2015, the start of the 2015-2016 school year, at West Ranch High School for ninth grade. Mother provided District with a copy of a Section 504 plan³ that CAVA had prepared for Student. School counselor Ci Ci Cazan and Assistant Principal Donna Manfredi assisted with the school registration. Parent informed Ms. Cazan and Ms. Manfredi that Student did not require any

² Some of the background facts are from the prior decision involving Student. (*Student v. Newport-Mesa Unified School District* (2014) Cal.Offc.Admin.Hrngs.

2013071304 and 2013040881.) Official notice is taken of this decision. Student did not appeal the decision.

³ A Section 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning.

special education services, and that Student was great in math and average in English. Parent was explicit that she did not want special education services for Student. District then enrolled Student with typical ninth grade general education classes in math, English, biology and computers because Parent stated that Student was excellent with computers.

5. District scheduled a Section 504 meeting for September 1, 2015, to develop its Section 504 plan, and in the interim would implement the plan from CAVA that Parent provided. Parent did not bring a copy of Student's records, so District requested a copy of his records from CAVA.

NEED FOR INITIAL ASSESSMENT

6. As of the September 1, 2015 Section 504 plan meeting, District had not yet received Student's prior school records. The CAVA Section 504 plan that Parent provided District recommended a full assessment. Further, medical information provided by Parent to support the Section 504 plan not only mentioned Student's physical disability, but also that Student was cognitively impaired. Ms. Manfredi asked Parent if District could conduct a full assessment, and Parent refused, as all she wanted was for District to accommodate Student's physical disability. District prepared a Section 504 plan that dealt with Student's physical disability, such as more time between classes, but it did not address academic issues. Parent did not provide written consent to this plan.

7. Student's records arrived a week or two later in two boxes. Ms. Manfredi went through the records, which included the OAH decision mentioned above, and the Newport-Mesa multi-disciplinary assessment. Ms. Manfredi had school psychologist Leana Duzdabanyan review the Newport-Mesa assessment. The assessment found that Student had significant deficits in math, reading and writing, in complete contrast with what Parent told District. Further, Newport-Mesa's IEP offer was for Student to be placed in special day classes for academic instruction. Information in Student's record appear to indicate that Parent exited Student from special education after the decision, but no specific document

existed that specifically exited Student.

8. Student's ninth grade teachers thereafter reported that Student was struggling in math, which was grade level algebra, ninth grade English, biology, and computer science. Student's English teacher, Ryan Lindgreen, was convincing as to the struggles Student had comprehending grade level assignments and classroom instruction. Student's English class has 37 students. Student regularly failed to turn in homework, and when he did, it included numerous errors that indicated significantly below grade level work. Mr. Lindgreen provided Student with additional time to complete assignments, provided additional one-on-one assistance in class and repeated instructions to ensure that Student understood the assignment. Mr. Lindgreen established that Student is not anywhere near grade level in reading and writing. Student failed the first semester of ninth grade English. Student's most recent work was supposed to be a five paragraph essay, and Student only completed one paragraph with grammar and other errors that he would not expect a ninth grade student to make. Mr. Lindgreen was convincing as to the need to assess Student to find out his present levels of performance in all areas related to reading and writing and to help identify possible reasons why Student is so far behind, and to develop strategies to address these deficits.

9. In January 2016, District provided Student with a one-to-one aide for math, English and biology, until Mother rescinded consent at the beginning of February. Ms. Cazan spoke to Student's math, biology and computer science teachers, who all relayed similar information as to Student's inability to understand classroom instruction and inability to produce grade level work, even with the aide. Ms. Cazan was convincing regarding the need to assess Student because of Student demonstrating significantly below grade level academic skills. The academic deficits District teachers noted are substantially similar to those deficits Student exhibited while at Newport-Mesa as noted in the prior decision.

10. Ms. Duzdabanyan⁴ established that even though District possesses a comprehensive assessment done in April 2013, Student requires a new comprehensive assessment. First, Student was in a home learning environment, not a school, during the 2014-2015 school year, where he did not receive specialized academic instruction, and present levels of performance do not exist as to his ability to perform in a school setting. Also, the 2013 assessment occurred when Student was completing sixth grade, and Student is now in high school, with significantly increased demands, which Student was not able to meet based on information from his teachers.

11. While Parent need not consent to special education services if District assesses Student and finds him eligible to receive special education services, District requires the information from a current assessment to attempt to properly educate Student. District established its need for current information regarding Student's present levels of performance, strengths and weaknesses and possible processing issues to attempt to determine possible special education eligibility. Therefore, District correctly determined that Student's educational needs warranted an initial assessment as Student might be eligible for special education services based on information District possessed from the prior school records, prior decision, and present academic difficulties.

THE NOVEMBER 17, 2015 ASSESSMENT PLAN

12. District proposes to assess Student in the following areas: academic achievement; health; intellectual development; motor development; social/emotional; and adaptive behavior.⁵ Each of these areas is related to Student's known or suspected

⁴ Ms. Duzdabanyan has been a school psychologist with District for over 11 years. She possesses a bachelor's degree in psychology and a master's degree in school psychology, along with the requisite credential to be employed by District.

⁵ At hearing, District attempted to broaden the requested assessment areas to

disabilities, based on information District possessed from the prior school records, prior decision, and present academic difficulties.

13. The November 17, 2015 assessment plan was sent to Mother on that date, accompanied by a notice of parental procedural rights. Student's and Mother's native language is English, and the assessment plan was in English. The assessment plan was written clearly, in language easily understood by the general public, and advised Mother that no IEP would result from the assessment without her written consent. Mother returned the assessment, unsigned, on December 1, 2015, with a note that stated that Student "will never have an IEP."

14. On December 4, 2015, District sent to Parent a new assessment plan, by certified mail, which included the same areas of assessment as in the November 17, 2015 assessment plan, and included post-secondary transition as an area of assessment.⁶ Parent did not accept the letter and it was returned to the District. District subsequently emailed Parent this assessment plan on January 7, 2016, and Parent replied 20 minutes later that she would never permit District to assess Student.

QUALIFICATIONS OF PROPOSED ASSESSORS

15. Ms. Duzdabanyan established the qualifications of the District's proposed

include language/speech communication development. However, language/speech communication development was not on the November 17, 2015 assessment plan as an area to be assessed.

⁶ District did not allege in its complaint any allegations regarding the December 4, 2015 assessment plan, which added post-secondary transition. Therefore, this decision only analyzes the adequacy of the November 17, 2015 assessment plan. The December 4, 2015 assessment plan also did not include language/speech communication development.

assessors to conduct the assessments in the November 17, 2015 assessment plan. Her testimony at hearing was careful and precise, and was consistent with contemporaneous documents. She was a credible witness, and her testimony is given substantial weight here.

16. Each assigned assessor, by licensure and training, is capable of conducting an assessment in the assigned area and evaluating the results, and is knowledgeable about the disability the assessment addresses. The academic, intellectual, social emotional, motor development, and adaptive behavior assessments, would be performed by Ms. Duzdabanyan, who as a credential school psychologist, by way of education and experience, is qualified to conduct these assessments and use these assessment tools. A qualified school nurse will conduct the health examination. As Ms. Duzdabanyan persuasively testified, the assessors District intends to use for the assessments are qualified to perform them.

DISTRICT'S ATTEMPTS TO OBTAIN CONSENT TO THE ASSESSMENT PLAN

17. District made many attempts to persuade Parent to consent to the proposed assessments before it sought a due process hearing. Its efforts began at the September 1, 2015 Section 504 plan meeting, when Ms. Amrhein inquired to Mother about District assessing Student. District wanted to discuss assessing Student at the November 2015 Section 504 meeting, but Parent did not attend. District sent Parent an assessment plan on November 17, 2015, which listed the assessments District hoped to conduct to determine possible special education eligibility, with a cover letter that explained why. Parent rejected this request on December 1, 2015. In response, District sent a more detailed letter on December 4, 2015, listing the desired assessments and enclosing an assessment plan form. Parent did not pick up the certified letter, so on January 7, 2016, District emailed the cover letter and December 4, 2015 assessment plan, which Parent responded shortly afterwards to reject District's request to assess Student.

PARENT'S OBJECTIONS TO THE ASSESSMENT PLAN

18. While Parent did not provide any evidence at hearing as to her objections to District assessing Student, evidence from Ms. Amrhein and Ms. Cazan who spoke to Parent, and Parent's email responses indicated that she did not believe that Student required special education services if District properly implemented Student's Section 504 plan. However, Parent never signed the Section 504 plan, and the accommodations in the plan concerned primarily Student's physical disability. Further, District attempted some general education accommodations, such as additional time to complete assignments, repeating classroom directions and instructions, providing individualized instruction, as well as the one-to-one aide until Parent removed consent, as Mr. Lindgreen described. None of these general education accommodations in any of his classes were successful despite District's best efforts. Further, Student's academic abilities were significantly below grade level, despite what Parent informed District, based on Student's poor performance in math, English and biology. While Parent may have personal reasons she does not want District to assess Student, District established its need to conduct an initial assessment based on Student's present significant academic difficulties that indicate possible need for special education services.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁷

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.

⁷ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

§ 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006)⁸; 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 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. The IDEA affords parents and local educational agencies the procedural

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

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, District, as the filing party, had the burden of proof on all issues here.

MAY DISTRICT ASSESS STUDENT ACCORDING TO THE NOVEMBER 17, 2015 ASSESSMENT PLAN WITHOUT PARENTAL CONSENT?

4. A request for an initial evaluation to determine whether a student is a child with a disability in need of special education and services can be made by either the parent or a public agency. (34 C.F.R. § 300.301(b).) A school district is required to actively and systematically seek out, identify, locate, and evaluate all children with disabilities, including homeless children, wards of the state, and children attending private schools, who are in need of special education and related services, regardless of the severity of the disability, including those individuals advancing from grade to grade. (20 U.S.C. §1412(a)(3)(A); Ed. Code, §§ 56171, 56301, subds. (a) and (b).) This duty to seek and serve children with disabilities is known as "child find." "The purpose of the child-find evaluation is to provide access to special education." (*Fitzgerald v. Camdenton R-III School District* (8th Cir. 2006) 439 F.3d 773, 776.) A district's child find obligation toward a specific child is triggered when there is reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Rae* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

5. If parents do not consent to an initial assessment plan, the district may conduct the initial assessment by showing at a due process hearing that it needs to assess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c); 34 C.F.R. § 300.300(a)(3)(i); Ed. Code, §§ 56321, subd. (c), 56501, subd. (a)(3).)

6. The evidence established that even though Parent did not request an initial assessment for special education and related services, sufficient information existed to trigger District's child find duties. Student displayed significant academic problems in his math, English, biology and computer classes, despite Parent's assertion that Student's abilities were at grade level. Further, Student's prior local educational agency recommended an assessment during the 2014-2015 school year. Finally, information in Student's educational records from prior local educational agencies indicated Student's need for special education services.

Is the Assessment Notice Proper?

7. Without an order after a due process hearing, initial assessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent, the school district must provide proper notice to the student and his or her parent. (20 U.S.C. §§ 1414(b)(1); 1415(b)(3),(c)(1); 34 C.F.R. § 300.304(a); Ed. Code, §§ 56321, subd. (a).) The notice 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 in a language easily understood by the public and 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. On November 17, 2015, District provided the proposed assessment plan to

Parent with a copy of her procedural rights. The assessment plan also explained that no IEP would result from the assessment without Parent's consent. The assessment plan explained the types of assessment it wanted to conduct. (Ed. Code, § 56321, subd. (b)(3).) Parent declined to consent to the assessment on December 1, 2015. District sent another assessment plan, with a cover letter explaining why District wanted to assess Student, which Parent refused to accept. District emailed Parent the assessment plan and cover letter on January 7, 2016, and Parent again refused to consent in a reply email sent 20 minutes afterwards.

9. The evidence established that District made reasonable efforts to obtain Parent's consent to the assessment plan; that it provided her at least 15 days to review and sign it; and that she was fully informed of the contents of its proposal. All statutory requirements of notice were met, and the assessment plan itself complied with the applicable statutes.

Is the Assessment of Student Warranted?

10. The circumstances warrant the initial assessment of Student in all the areas identified in the November 17, 2015 assessment plan. Although Student was last assessed in April 2013, there have been significant changes since then to warrant a new assessment. The last assessment was conducted when Student was in elementary school and Student is now in high school, and the academic demands are significantly greater. Student spent last school year in a home school program in which he did not succeed and did have the demands on being in a class with over 30 students. Further, CAVA recommended that Student be assessed, and the doctor's note Parent provided states that Student has a cognitive impairment, which Parent denies.

11. Additionally, Student's performance in ninth grade has demonstrated that he cannot meet ninth grade academic demands as he is failing in all academic classes. Mr. Lindgreen convincingly described Student's struggles in ninth grade English, as Student

did not understand classroom instructions, even when repeated or given one-to-one. Even with accommodations, such as more time, Student either could not complete assignments or the work that he did complete was several years below grade level. Ms. Cazan established that Student had similar difficulties in math and biology, even after District provided Student with a one-to-one aide to assist him in his academic classes.

12. Ms. Duzdabanyan further established the need for current information after her review of the April 2013 assessment. As noted above, significant changes have occurred to Student since the last assessment and his academic performance in ninth grade has shown him to be well below grade level. Without new assessments, District has no information that will allow it to determine Student's present levels of academic and functional performance to determine if Student requires special education services and to provide those if Parent does consent to eligibility. Even if Parent does not consent, this information would be helpful to District in trying to meet Student's unique needs in a general education environment to the best of its abilities.

13. District is obliged by law to assess him in all areas of suspected disability. (20 U.S.C § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) Each of the assessments proposed in the November 17, 2015 assessment plan is in an area in which District has reason to believe Student is disabled, or in which he has previously received special education, accommodations, related services, or some combination. If found eligible for special education services, it is highly likely that any new IEP for Student will have to address each of the proposed assessment areas. Each of the proposed assessments is therefore required for District to provide Student a FAPE if he is eligible for special education services and Parent consents to those services.

14. For the foregoing reasons, information as to Student's significant academic problems while in ninth grade and information from CAVA as to the 2014-2015 school year, established Student's educational and related service needs, especially his inability to perform at grade level in academics, which warranted an initial assessment.

Will the Proposed Assessments be Conducted by Competent Persons?

15. Assessments must be conducted by persons competent to perform them, as determined by the local educational agency. (20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c)(1)(iv); Ed. Code, § 56322.) Any psychological assessments of pupils shall be made in accordance with Education Code 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, 56324, subd. (a).) Similar requirements apply to health examinations, which must be performed by a credentialed school nurse or physician. (Ed. Code, § 56324, subd. (b).)

16. All the assessments proposed by District will be conducted by persons competent to conduct them. As Ms. Duzdabanyan established, each assigned assessor has the licensure and training required to conduct the assessment to which he or she is assigned. Each is knowledgeable of the disability to which his or her assigned assessment relates. For example, the psychological assessment will be performed by a credentialed school psychologist, Ms. Duzdabanyan, and the health assessment by a credentialed and registered nurse. The qualifications of the proposed assessors comply with legal requirements and are not in dispute.

17. Therefore, District established that the November 17, 2015 assessment plan complies with all applicable statutory requirements and that the notice of the plan it gave Parent was proper. It also established that the assessments are warranted and that the assessors it proposes to use are competent to perform the assessments. Therefore, District may assess Student without Parent's consent.

ORDER

1. District is entitled to assess Student according to its November 17, 2015 assessment plan, without Parent's consent.

2. If Student is unable to attend school on any school day during the

assessments, due to illness or other cause, Parent shall promptly communicate this fact to District and District shall inform Parent of the days and times for the assessments to be conducted that are no more than 30 days from the dates that District originally proposed. Any delay due to this will toll the 60-day timeline for assessment.

3. Parent shall timely complete and return any documents reasonably requested by District as a part of the assessments.

4. If Parent does not cooperate with District during the assessment process, or does not complete and return any documents as specified above to permit District to complete its assessment, District will not be considered to have a basis of knowledge that Student is a child with a disability.

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. District prevailed on the only issue heard and 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: March 28, 2016

_____/s/_____

PETER PAUL CASTILLO
Presiding Administrative Law Judge
Office of Administrative Hearings