

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

VISTA UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2016020251

DECISION

The Vista Unified School District filed a due process hearing request naming Student with the Office of Administrative Hearings, State of California, on February 3, 2016.

Administrative Law Judge Marian H. Tully heard this matter in San Diego, California, California, on March 1, 2016. A Spanish language interpreter was provided.

Attorney Tiffany Santos represented Vista Unified School District. Executive Director of Special Education Dawn Dully attended the hearing on behalf of District.

Student was represented by his mother. Student's father assisted his mother and Student's sister was present during part of the hearing.

Upon completion of the hearing, the record was closed and the matter was submitted for decision.

ISSUE

Is District entitled to conduct the assessments described in the annual/triennial assessment plan dated December 3, 2015, without parental consent?

FACTUAL FINDINGS

1. Student was eligible for special education, resided with his parents and his sister, and attended Vista High School within District at all times relevant to this hearing.

2. On December 3, 2015, District sent two copies of Student's annual/triennial assessment plan to Parents. One copy of the assessment plan was written in English. The assessment plan was written in language understandable by the general public. Parent's native language was Spanish. The other copy was a Spanish translation of the assessment plan. The plan sought to assess Student in the areas of academic achievement, health, intellectual development, social/emotional and specified Student's records would be reviewed, and would include, as appropriate classroom observations, rating scales, one-on-one testing, or a combination of methods. The plan described the areas to be assessed in sufficient detail to inform Parents of the nature and purpose of the assessments. Parents received both copies of the assessment plan. Parents did not consent to the assessment.

3. On March 1, 2016, the parties identified specific academic, intellectual and social/emotional standardized testing instruments to be used for the assessment. The parties handwrote a list of testing instruments on the December 3, 2015 assessment plan. Mother agreed, on the record, to the assessment plan so long as the assessment included the specific standardized instruments the parties handwrote on the plan and signed her consent to the assessment plan as modified. The parties stipulated, on the record, that Brittany Roberson would not conduct the assessments.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA¹

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)² et seq.; 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 free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for 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 California, related services are also called designated instruction and

¹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

² All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

services].) 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 a statement of 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); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District 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 School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an

individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

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); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) 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. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, District bears the burden of persuasion.

DECEMBER 3, 2015 ASSESSMENT PLAN

5. 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 service needs. (20 U.S.C. §

1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

6. Reassessments of a pupil with special needs require parental consent. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(i); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent for a reassessment, the local educational agency 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 must be given to parents of a child with a disability in written language understandable to the general public, and in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. (34 C.F.R. § 300.503(c)(1).)

7. District's complaint alleged it should be allowed to assess Student without Parents' consent because Parents did not timely return a signed consent form. Parents argued that the reason they did not consent to the assessment plan was because it was not sufficient to assess all areas of need.

8. The December 3, 2015 assessment plan met the legal requirements of proper notice to Parents. The plan described the areas to be assessed in language understandable by the general public and adequately informed Parents of the nature and purpose of the assessments such that Parents could provide informed consent. The plan was sent in both English and Spanish, Parents' native language. After the hearing started, on March 1, 2016, the parties made handwritten modifications to the December 3, 2015 assessment plan by adding a list of specific assessment instruments. This modification was sufficient to obtain Mother's consent to the December 3, 2015, assessment plan as modified on March 1, 2016. Accordingly, the December 3, 2015 assessment plan met all legal requirements when it was sent to Parents. The evidence further demonstrates that District is entitled to assess Student as set forth in the December 3, 2015 assessment plan as modified and signed by Mother on March 1, 2016.

ORDER

1. District shall assess Student according to the assessment plan dated December 3, 2015, as modified and signed by Mother on March 1, 2016.
2. The 60 day timeline begins on March 1, 2016.

PREVAILING PARTY

Pursuant to 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. In accordance with that section, the following finding is made: District prevailed on the issue heard and decided in this case.

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 in accordance with Education Code section 56505, subdivision (k).

Dated: March 15, 2016

/s/

MARIAN H. TULLY

Administrative Law Judge

Office of Administrative Hearings