BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: EL RANCHO UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2016090403

DECISION

On September 7, 2016, El Rancho Unified School District filed a request for a due process hearing with the Office of Administrative Hearings, naming Student.

Administrative Law Judge Chris Butchko heard this matter in Whittier, California, on October 4, 2016.

Jeremy Rytky, Attorney at Law, represented District. Katherine Aguirre, District's Director of Special Education, was present for the entire hearing. Parent represented Student at hearing, and Student was present for the entire hearing.

At the close of testimony the matter was continued to October 14, 2016, to allow the parties to submit briefs in lieu of closing arguments. District filed a brief on October 14, 2016, but Parent did not submit a brief or seek an extension of the deadline. Accordingly, the record was closed on October 14, 2016, and the matter was submitted for decision.

ISSUE

May District assess Student pursuant to District's June 6, 2016 assessment plan

without Parent's written consent?

SUMMARY OF DECISION

District did not meet its burden of proof on the issue of its right to conduct an assessment of Student because it did not establish that Parent had 15 days to review the assessment plan before District filed this action.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTION

1. Student is 15 years old and has resided within District's geographical boundaries since March 24, 2016. Student attended school in the Whittier Union High School District from approximately October 2015 to March 2016, and prior to that was enrolled in the Ontario-Montclair School District. Student has been eligible for Special Education services under the qualifying category of other health impairment at all relevant times.

2. Student's last agreed-upon individualized educational program was created by Ontario-Montclair at individualized education program, team meetings held on March 12, 2015, and April 7, 2015. Whittier Union held an IEP team meeting on November 16, 2015, at which the team agreed to continue to services provided in Student's Ontario-Montclair IEP. Mother signed the Whittier Union IEP, but objected to the behavioral contract and some factual statements in the IEP. The Ontario-Montclair IEP is the last agreed upon and implemented IEP.

3. After Student moved into District, District attempted to hold a 30-day IEP team meeting on April 21, 2016, but Parent did not attend the scheduled meeting. The 30-day IEP team meeting was held in two parts on May 3 and 6, 2016. Student attended the meetings, but Parent was only present telephonically. District proposed changes to Student's services. Parent did not agree to District's offer of a free and appropriate

public education and did not sign the IEP.

4. Parent believed that Student needed a higher level of services than were offered by District, and preferred the offers of FAPE contained in Ontario-Montclair's April 2015 IEP and Whittier Union's November 2015 IEP. Parent felt that District was offering Student less support than previous districts. In addition, Parent believed that Student had behaviors that were impacting his education and which prevented him from benefitting from his education.

JUNE 6, 2016 ASSESSMENT PLAN

5. School psychologist Dena Pegadiotes was a member of Student's IEP team. She brought Parent's concerns to the attention of Katherine Aguirre, the director of special education for District. Ms. Pegadiotes was also concerned about Student's behavior and his ability to attend to tasks. Ms. Pegadiotes and Ms. Aguirre noted that District had never assessed Student, and that the last assessment of Student was conducted by Ontario-Montclair over a year earlier . District did not have that assessment in its files. Ms. Aguirre directed Ms. Pegadiotes to draft an assessment plan for psychological and health assessments of Student and send the plan to Parent to obtain her consent.

6. District's assessment plan sought consent for assessments in academic achievement by a special education teacher and in intellectual development, motor development, and social/emotional status by a school psychologist. In addition, the Assessment team would conduct "Record review [sic], Observation, [and] Interviews."

7. The assessment plan provided notice that the purpose of the assessments was to determine Student's continued eligibility for special education and present levels of academic performance and functional achievement. The plan stated that Student would be assessed in all areas of suspected disability, and that tests would include, but not be limited to, classroom observations, rating scales, interviews, record review, one-

on-one testing, or some other types of combination of tests. The plan noted that the results of the assessment would be kept confidential and that Parent would be invited to an IEP team meeting to discuss the results. In addition, the plan stated that no special education services would be provided to Student without Parent's written consent. The cover letter to the plan noted that District had attached a copy of the draft May 3, 2016 IEP plan, the assessment plan, and a Notice of Parent Rights and Procedural Safeguards.

ATTEMPTS TO OBTAIN WRITTEN CONSENT

8. District sent the assessment plan and the attachments to Parent by certified mail and by regular mail on or about June 6, 2016. The school year ended on June 17, 2016.

9. The certified letter was returned unclaimed. The returned certified letter was routed to Ms. Pegadiotes by her office some date in the summer of 2016. Ms. Pegadiotes was on vacation from late June through mid-August. When she became aware that the certified letter had not been delivered, she informed Ms. Aguirre of that fact either during or after the summer break. Ms. Pegadiotes was unable to recall if Ms. Aguirre directed her to follow up on the Parent's receipt of the assessment plan, but Ms. Pegadiotes did not take any further action.

10. Ms. Aguirre recalled that her conversation with Ms. Pegadiotes regarding the returned certified letter took place after District filed this action.

11. Ms. Aguirre instructed staff to contact Parent regarding the assessment plan. Ms. Aguirre recalled that there were emails exchanged between Parent and staff regarding the proposed assessment plan, but none were produced at hearing. Ms. Aguirre did not discuss the proposed assessment plan with Parent by email.

12. The letter sent by regular mail was not returned to District.

13. Ms. Aguirre met in her office with Parent over an incident at school involving Student. Ms. Aguirre recalled asking Parent about the assessment plan in that

meeting, but Parent was very upset and left the office. Ms. Aguirre could not recall the exact date of the meeting, but believed it took place in the 2016-2017 school year and was within the "last few weeks" of the October 4 hearing date.

14. Parent received a copy of the proposed assessment plan as part of the prehearing exchange of exhibits on October 14, 2016. Parent did not agree to the assessment plan. She stated that she had not had sufficient time to review and consider the assessment plan. Parent received other mail at her address during that time, but did not receive the assessment plan mailed to her at her address. Parent's address did not change during Student's enrollment in District.

NECESSITY AND APPROPRIATENESS OF ASSESSMENTS

15. Student previously qualified for special education under the other health impairment and specific learning disability categories. Although there was no issue whether Student still qualified for special education services, Parent disagreed with the level of services offered in District's IEP. In addition, staff at District had concerns that Student had behaviors which may be interfering with his education and might require additional services.

16. Student's last assessment was a psychoeducational assessment conducted by Ontario-Montclair in March 2015. Although the assessment was not in District's files at the time the assessment plan was generated, Ms. Aguirre testified credibly that District would still have needed to assess Student if it had a copy of the assessment. Given the passage over a year's time and staff's perception of changes in Student's behavior, a new assessment was necessary.

17. Ms. Pegadiotes, as a school psychologist, was to assess Student's intellectual development, motor development, and social/emotional status. The academic achievement assessment was to be conducted by a special education teacher. Each assigned assessor, by licensure and training, was capable of conducting an

assessment in the assigned area and evaluating the results and knowledgeable about the disability the assessment addresses.

18. The assessments proposed by District were designed to provide District with updated information on Student's present levels of performance, his unique needs, and strategies on how to support Student's access to his education. Student needed to be assessed in the areas identified in the assessment plan to enable District and the IEP team to respond to Parent's concerns and to develop an appropriate IEP.

Credibility

19. Parent testified at hearing and was credible. Her demeanor was appropriate, she testified to matters for which she was competent to testify, and did so in a manner which was internally consistent. No evidence was proffered that directly contradicted her testimony.

20. The testimony of Ms. Pegadiotes was likewise credible. Ms. Aguirre's testimony was acceptably credible, although she discounted Parent's testimony as to whether Parent received the assessment plan prior to October 14, 2016. Ms. Aguirre did not directly contradict Parent's testimony on that point, as she had no means of knowing whether Parent did receive the assessment plan in the mail. Ms. Aguirre stated that emails referencing the assessment plan were sent between Parent and staff, but none were produced at hearing and no dates for these emails were given at hearing. Ms. Aguirre's testimony is entirely consistent with Parent's testimony portraying the regular-mail copy of the assessment plan sent on or after June 6, 2016 going astray and there being no follow-up by District until after the filing of this action.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA[1]

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 (2006) et seq.[2]; 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 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, which meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "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,

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[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 version.

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 (*Mercer Island*) [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. 951, fn. 10.)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with

the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149.) In determining the validity of an IEP, a tribunal must focus on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K. v.Longview School Dist.* (9th Cir.1987) 811 F.2d 1307, 1314 (*Gregory*).)

BURDEN OF PROOF

5. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) District requested the hearing and, therefore, District has the burden of proof related to the issue for hearing.

ISSUE: DISTRICT'S RIGHT TO ASSESS WITHOUT PARENTAL CONSENT

6. District contends that it had the right and obligation to assess Student when it presented its proposed assessment plan, dated June 6, 2016, to Parent, but it could not do so because Parent refused to provide written consent. Student asserts that he did not have sufficient notice of the assessment plan, having first received it on October 14, 2016.

Assessments

7. 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 must be conducted if the local educational agency "determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment." (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

8. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining 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), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must: appear in a language easily understood by the public and the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parents and/or pupil 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

9. If parents do not consent to a reassessment plan, a school district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) "Every court to consider the [Individuals with Disabilities Act's] reevaluation requirements has concluded that "'if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student . . . " (*M.T.V. v. DeKalb County*

School Dist. (11th Cir. 2006) 446 F.3d 1153, 1160, quoting *Andress v. Cleveland Indep. Sch. Dist. (5th Cir. 1995)* 64 F.3d 176, 178-79.) The Ninth Circuit has held that "if the parents want [their child] to receive special education services under the [IDEA], they are obliged to permit [re-assessment] testing." (*Gregory* at p. 1315.)

11. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

12. Assessments shall be conducted by individuals who are "knowledgeable of the student's disability" and "competent to perform the assessment," as determined by the local educational agency. (Ed. Code, § 56320, subd. (g), and 56322; see 20 U.S.C. §

1414(b)(3)(B)(ii).) Psychological assessments shall be performed in accordance with the procedures set forth in Education Code section 56320, by assessors who are trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, § 56324.) Any psychological assessment of a pupil shall be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a)).

Analysis

13. District did not meet its burden of establishing that Parent received a copy of the assessment plan 15 days prior to the date of filing of this action.

Need to Assess and Assessors

14. District established that the assessments were necessary for several reasons. District had no assessment data in its records. Although Parent testified at hearing that she provided a copy of the Ontario-Montclair assessment to the school's registrar when she first enrolled Student in District, no evidence was presented that the assessment was known by or given to the IEP team. Further, that assessment was over a year old and Parent and District staff were concerned that Student's needs were not being met by District's IEP or that his behavior may have changed. District needed current, specific information on Student's present levels of performance and ability to determine if he needs new goals and additional or different related services, supports, and accommodations.

15. District's assessment plan complied with the procedural requirement of the IDEA. It identified several types of measures to assess Student, including one-to-one tests, observations, interviews, and review of records. A credentialed special education teacher would conduct the academic assessment. A credentialed school psychologist would conduct the assessment of Student's intellectual development, motor development, and social/emotional status.

Notice

16. The assessment plan was generated on or about June 6, 2016. This action was filed on September 7, 2016. The law requires that Parent have at least 15 days to review, sign, and return the assessment plan before a district may file to conduct the assessment without parental consent. Fifteen calendar days before that date is August 23, 2016.

17. District sent the notice to Parent by regular and certified mail. The letter sent by certified mail was returned to District. Although the letter sent regular mail was not returned, Parent testified that she did not receive the assessment plan until it was given to her as a proposed exhibit in this matter in October 2016.

18. No evidence has been presented that the assessment plan was received by Parent prior to that date. Ms. Pegadiotes testified that she brought the returned certified letter to Ms. Aguirre's attention in either late June or Mid-August of 2016, but did not herself follow up with Parent to see if the plan had been received and did not deliver another copy to Parent.[3]

19. Ms. Aguirre recalled being told by Ms. Pegadiotes that the certified letter had been returned unclaimed and instructing her or other staff to contact Parent, but

[3] District states in briefing that Ms. Aguirre had another copy of the assessment plan sent to Parent "towards the end of June," presumably after Ms. Aguirre "followed up with [Parent] when they met regarding [Student's] discipline incident and the District sent home the assessment plan a second time via regular mail." Support for those statements cannot be found in the record of the hearing, and the proposal that the assessment plan was sent out in late June following a meeting on Student's discipline incident is at odds with Ms. Aguirre's testimony that her sole in-person meeting with Parent took place shortly before the date of the due process hearing.

recalled that those conversations took place after the September 7, 2016, date of filing of this action. She recalled asking about the assessment plan in an in-person conversation with Parent, but got no response to her question. That does not prove that Parent had received the assessment plan. Further, she placed the conversation within a "few weeks" of the October 4, 2016, start of the hearing in this matter, which would be well after August 23, 2016. District has not presented any witness who has discussed the proposed assessment plan with Parent before that date or any letter, email, or text message from Parent displaying knowledge of the existence of the assessment plan.

20. District has argued in its briefing that the "mailbox rule," codified as Evid. Code § 641, creates a presumption that a properly addressed and mailed letter is presumed to have been received by the addressee. District states that Parent did not present any contrary evidence to rebut the presumption. District is incorrect. Parent's testimony that she did not receive the letter is sufficient to rebut the presumption and restore to District the burden of proof.

21. Evidence Code section 604 prescribes the effect of such a rebuttable presumption: "The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its non-existence, in which case the trier of fact shall determine the existence or non-existence of the presumed fact from the evidence and without regard to the presumption." Once the responding party testifies that they did not receive the letter, the presumption of delivery ceases to exist. (*Bonzer v. City of Huntington Park* (1993) 20 Cal.App.4th 1479, 1481) ("Any inference, in the face of appellants' declarations, that the subject notices were actually received is, as a matter of law, inappropriate.") District has not established that Parent received the assessment plan prior to the filing of this action.

22. District further argues that the 15-day requirement is moot because Parent

stated at hearing that she would not sign the assessment plan. Parent stated that she would not do so because she had not had sufficient time to consider the plan. Pressed for further objection, Parent opined that she did not think the plan was clear. District seizes upon that to argue that it should be relieved of the statutory requirement to wait 15 days before bringing an action. No case law is cited to support that view. Further, Parent's objection to the clarity of the assessment plan is consonant with the law's requirement of waiting before filing an action. If the plan seems unclear to Parent, allowing additional time to consider it, consult with knowledgeable persons, or even contact District for explanation might lead Parent to reconsider her objection and agree to the plan. There is no basis in law or reason to waive Parent's right to consider the assessment plan for 15 days before bringing this action.

23. Because it has not proven that it complied with the statutory requirements before bringing this action, District may not conduct assessments of Student without obtaining Parent's consent. While Student needs to be reassessed so that an IEP team may determine his proper level of support and services, District did not establish that it properly notified Parent prior to filing this action. Parent has been in receipt of the assessment plan since at least October 4, 2016, so as of the date of this decision District may again request a hearing to conduct an assessment of Student pursuant to that plan.

ORDER

1. District may not assess Student pursuant to the June 6, 2016 assessment plan without parental consent.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on the only issue presented for decision.

RIGHT TO APPEAL THIS DECISION

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b); Ed. Code, § 56505, subd. (k).)

DATE: October 27, 2016

/s/

CHRIS BUTCHKO

Administrative Law Judge

Office of Administrative Hearings