BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CARLSBAD UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH Case No. 2017050174

DECISION

Carlsbad Unified School District filed a due process hearing request with the Office of Administrative Hearings on May 2, 2017, naming Student. On May 19, 2017, OAH granted Student's request to continue this matter.

Administrative Law Judge Kara Hatfield heard this matter in Carlsbad, California, on July 20, 2017.

Justin Shinnefield, Attorney at Law, represented District. Timothy Evanson, Director of Pupil Services, appeared on behalf of District.

Mother appeared by telephone on Student's behalf. Student did not attend the hearing.

The record closed on July 20, 2017, at the conclusion of the hearing after the parties gave oral closing arguments. On July 31, 2017, Student filed a written closing statement, although Mother had been informed that the parties would not be filing written closing statements.

ISSUES

May District assess Student pursuant to the March 29, 2017 Assessment Plan

without parental consent?

SUMMARY OF DECISION

Through a settlement agreement reached during a prior due process proceeding, the parties had agreed District would assess Student in the spring of 2017 and would prepare an assessment plan by April 1, 2017. District sent Parents an assessment plan and notice of Parent's procedural rights and safeguards on March 29, 2017. Student contends District gave Parents a different, revised version of the assessment plan on April 25, 2017, and that Parents had not been given 15 days to consider and consent to the assessment plan before District filed this case. Student stipulated that all other requirements related to District obtaining authorization to assess without parental consent had been satisfied.

This Decision finds that District may assess Student pursuant to the March 29, 2017 assessment plan without parental consent. OAH declines District's request for an advisory opinion on what would happen if Student did not participate in assessments.

FACTUAL FINDINGS

BACKGROUND

1. Student was 14 years old and resided with his parents within District's boundaries during the applicable time frame. Student was eligible for special education under the category of autism.

2. During prior litigation in OAH Case Nos. 2016050271 and 2016080484, Parents and District entered into a Settlement Agreement on September 28, 2016. The parties agreed District would reassess Student in spring 2017. District promised to provide Parents an assessment plan by April 1, 2017, and Parents promised to consent to the entire assessment plan and return the plan within 5 business days.

MARCH 29, 2017 ASSESSMENT PLAN

3. On March 29, 2017, District's Director of Pupil Services, Timothy Evanson, emailed Parents regarding the assessment plan for Student's triennial individualized education program and attached to the email an assessment plan and a copy of the Procedural Safeguards. Mr. Evanson sent the email message and attached documents to Parents at the email address Mr. Evanson regularly used for frequent communications he had with Parents. Mr. Evanson's email explicitly acknowledged that the assessment plan included District assessors reviewing and considering all portions of the independent educational evaluation Parents provided District in September 2016. The March 29, 2017 assessment plan proposed to assess Student in the following areas:

- academic achievement, explained as assessment measuring reading, spelling, arithmetic, oral and written language skills, and/or general knowledge;
- health, explained as information and testing gathered to determine how Student's health affected school performance;
- intellectual development, explained as measuring how well Student thought, remembered, and solved problems;
- language/speech communication development, explained as measuring Student's ability to understand and use language and speak clearly and appropriately;
- motor development, explained as measuring how well Student coordinated body movements in small and large muscle activities, and possibly measuring perceptual skills;
- social/emotional, explained as identifying how Student felt about himself, got along with others, and took care of personal needs at home, school, and in the community;
- functional behavior assessment; and

- "Interview, Observations, & Records Review, to include September 2016 [independent educational evaluation] Provided by Family."

4. At the due process hearing, Student stipulated reassessment was necessary, that conditions warranted District reassessing Student in all the areas proposed on the March 29, 2017 assessment plan. Due to the stipulation, no testimony was taken on this point.

5. At the due process hearing, Student stipulated that English was Parents' native language, and that the March 29, 2017 assessment plan was in English. Student stipulated that the assessment plan explained the types of assessments to be conducted, and stated that no IEP would result from the assessment without parental consent. Student did "not necessarily agree" that the language of the assessment was "in language easily understood by the general public,"[1] but later agreed that Student stipulated that all requirements for District to receive authorization from OAH to assess Student without parental consent were satisfied, with one exception: Student did not stipulate that Parents had been given 15 days to read, consider, and consent to the assessment plan.

6. At the due process hearing, Mother denied that Parents had received Mr. Evanson's March 29, 2017 email, but evidence suggested Parents were aware that an assessment plan had been presented to them before April 10, 2017. Mother acknowledged that she did receive the March 29, 2017 assessment plan on April 10, 2017, when Mother came to District's office without an appointment and met with Mr. Evanson. They looked at, reviewed, and discussed a paper copy of the March 29, 2017

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[1] Mother stated she was not sure she understood the assessment plan because Student's primary qualifying condition was autism, but Parents did not see anything in the assessment plan pertaining to autism.

assessment plan. Mother did not sign consent at that time. Mother denied receiving the Procedural Safeguards on April 10, 2017.

7. On April 17, 2017, Mr. Evanson again emailed Parents regarding the need to reassess Student and the fact that Parents had not yet signed the assessment plan he sent on March 29, 2017, and personally reviewed with Mother on April 10, 2017. He again attached to the email the same assessment plan and a copy of the Procedural Safeguards. Mother stipulated that she received the Procedural Safeguards, along with a copy of the assessment plan, on April 17, 2017.

8. Parents requested an IEP team meeting be held on April 25, 2017, to discuss the assessment plan, and other topics. Mr. Evanson emailed Parents on April 21, 2017, with an IEP team meeting notice for the date, time, and location Parents had requested. He also attached another copy of the March 29, 2017 assessment plan and the Procedural Safeguards.

9. Mr. Evanson emailed Parents again on the morning of April 24, 2017, stating he had not received the signed assessment plan and he again attached another copy of the assessment plan and Procedural Safeguards. He asked whether Parents were going to attend the IEP team meeting they had requested, scheduled for the next day.

10. Mother replied before dawn on April 25, 2017, asking for the assessment plan to be amended to add a functional behavior assessment and consideration of the September 2016 independent educational evaluation. Both of these items were already included in the assessment plan first sent to Parents on March 29, 2017; no amendment was necessary to address Parents' request. Mother requested that a paper copy of the assessment plan, with the amendments she requested, be left for her at the front desk of Student's local middle school or District's office.

11. Mr. Evanson replied to Parents around 9:00 a.m. on April 25, 2017, informing them that copies of the assessment plan, the Procedural Safeguards, and the

meeting notice for that day's IEP team meeting were in an envelope with Parents' name on it at the front desk of the local middle school. Mr. Evanson explained that the assessment plan included a functional behavior assessment and a records review that would include the September 2016 independent educational evaluation.

12. Mother replied just after 11:30 a.m. on April 25, 2017, confirming she had received the assessment plan and inexplicably stating she believed District could not meet for the IEP team meeting that District had noticed for that day.

13. Mother testified that District gave Parents a revised assessment plan on April 25, 2017, but Student did not present any documentary evidence to substantiate Mother's contention that District ever gave Parents an assessment plan that was different than the one given to Parents on March 29, April 10, and April 17, 2017. Mr. Evanson was convincing in his testimony that District only provided Parents one version of the assessment plan, and never added or deleted items or information. The thread of email correspondence between Mr. Evanson and Parents, including the text of the emails as well as the electronic versions of the attachments to the emails, corroborated Mr. Evanson's testimony that 1) the assessment plan sent to Parents on March 29, 2017, included a functional behavior analysis and consideration of the September 2016 independent educational evaluation, and 2) all the copies of the assessment plan that District provided Parents after March 29, 2017, were the same as the March 29, 2017 assessment plan.

14. By May 1, 2017, Parents still had not consented to the March 29, 2017 assessment plan. Parents had been afforded 32 days since March 29, 2017, 21 days since April 10, 2017, and 14 days since April 17, 2017, to review, sign and return the assessment plan. On May 2, 2017, District filed a request for due process hearing seeking authorization from OAH to assess Student without Parents' consent.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA[2]

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

[3] 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] ("*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.) 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. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950, fn. 10.) The Supreme Court's recent decision in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S._____[137 S.Ct. 988] (*Endrew F.*)] reaffirmed that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances; any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

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.) 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, § 56502, 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. 49, 56-62 [126 S.Ct. 528]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, District, as the complaining party, bears the burden of proof.

DISTRICT'S RIGHT TO ASSESS STUDENT WITHOUT PARENTAL CONSENT

5. District seeks authorization to assess Student pursuant to the March 29, 2017 assessment plan without parental consent. District asserts all criteria for overriding the lack of parental consent have been fulfilled. Student stipulated that all criteria for District to receive OAH authorization to assess were satisfied, except Student contends Parents were not afforded 15 days after being presented with the assessment plan to sign their consent before District filed its request for due process hearing.

Legal Authority

6. A local educational agency must conduct a reassessment at least once every three years, unless the parent and the agency agree that it is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2); Ed. Code, §§ 56043, subd. (k), 56381,

subd. (a)(2).) The agency must also conduct a reassessment if it determines that the educational or related service needs of the child, including improved academic achievement and functional performance, warrant 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).) If parents do not consent to a reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

7. Without an order after a due process hearing, reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56 381, 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 language easily understood by the public and in the native language of the parent; explain the types of assessments to be conducted; and state that no IEP will result from the assessment without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4); 20 U.S.C. § 1415(b)(3)&(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).)

Analysis

8. District provided Parents an assessment plan on March 29, 2017, along with a copy of the notice of Parents' procedural rights and safeguards. The same assessment plan was repeatedly provided to Parents, and they were afforded more than 15 days to review, sign, and return the assessment plan before District filed a request for a due process hearing to obtain authorization to assess Student without parental

consent.

9. The March 29, 2017 assessment plan was in Parents' native language, in language easily understood by the public, explained the types of assessments to be conducted, and stated that no special education services would result from the assessment without parental consent. It was necessary and appropriate to reassess Student for his triennial IEP in spring 2017.

10. All criteria have been satisfied for District to be authorized to conduct assessments pursuant to the March 29, 2017 assessment plan, without Parents' consent.

DISTRICT'S REQUEST FOR AN ORDER ABSOLVING DISTRICT OF OBLIGATION TO PROVIDE STUDENT A FAPE IF STUDENT FAILS TO PARTICIPATE IN ASSESSMENTS

11. District seeks an order stating District will not be obligated to provide special education and related services to Student if Parents do not make Student available for the assessments OAH authorizes.

Legal Authority

12. District cites three cases in support of its request for an order absolving it of any obligation to provide Student a FAPE if Student fails to participate in assessments. District asserts they all stand for the proposition that a District is not obligated to provide a student a FAPE if the parents do not allow the district to conduct assessments: *Gregory K. v. Longview School Dist.* (9th Cir.1987) 811 F.2d 1307, 1315 (*Gregory K.*); *Johnson by Johnson v. Duneland School Corp.* (7th Cir. 1996) 92 F.3d 554, 558 (*Johnson*); and *M.T.V. v. DeKalb County School Dist.* (11th Cir. 2006) 446 F.3d 1153, 1160 (*M.T.V.)*. District relies on the following statements in *Johnson*, which contains the statement and authority from *Gregory K.* on which District also relies: "Every circuit court to address the issue has held that 34 C.F.R. § 300.534(b) grants schools a right to conduct a three-year

reevaluation. These courts reason that because the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation of the student and the school cannot be forced to rely solely on an independent evaluation conducted at the parents' behest. *Andress v. Cleveland Independent School District,* 64 F.3d 176 (5th Cir.1995) ('If a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation.'), *petition for cert. filed*, 64 U.S.L.W. 3780 (U.S. Dec. 22, 1995) (No. 95–1837); *Gregory K. v. Longview School Dist.,* 811 F.2d 1307, 1315 (9th Cir.1987) ('If the parents want [the student] to receive special education under the Act, they are obliged to permit such testing.'); *Dubois v. Connecticut State Bd. of Educ.,* 727 F.2d 44, 48 (2d Cir.1984) ('[T]he school system may insist on evaluation by qualified professionals who are satisfactory to the school officials.'); *Vander Malle v. Ambach,*673 F.2d 49, 53 (2d Cir.1982) (School officials are 'entitled to have [the student] examined by a qualified physician of their choosing.'). We agree with the reasoning of these courts." *Johnson, supra,* F.3d 554, 558.

13. District relies on the statement in *M.T.V.* that is the same as the above quotation in *Johnson* from *Andress v. Cleveland Independent School Dist., supra*, 64 F.3d 176, 178-179, and summary the summary of *Gregory K.*, *supra*, 811 F.2d 1307, 1315. *M.T.V.*, *supra*, 446 F.3d 1153, 1160.

14. Special education due process hearings are limited to an examination of the time frame pleaded in the complaint and as established by the evidence at the hearing and expressly do not include declaratory decisions about how the IDEA would apply hypothetically. (Gov. Code, § 11465.10-11465.60; Cal. Code Regs, tit. 5, § 3089; see also *Princeton University v. Schmid* (1982) 455 U.S. 100, 102 [102 S.Ct. 867, 70 L. Ed. 2d 855] ["courts do not sit to decide hypothetical issues or to give advisory opinions"]; *Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 539-542 [court deemed the matter not ripe for adjudication because it was asked to speculate on

hypothetical situations and there was no showing of imminent and significant hardship].)

Analysis

15. In *Gregory K.*, after the District Court heard an appeal of the state administrative law decision regarding the student's claim that his local school district denied him a FAPE, the school district filed a post-trial motion to compel testing of the student. The District Court denied the motion. On appeal to the Ninth Circuit, the school district argued that under Washington State law, it was required to reassess the student "at least once every three years." The Ninth Circuit stated the often quoted or cited articulation of the law, "If the parents want [student] to receive special education under the Act, they are obliged to permit such testing. *See DuBois v. Connecticut State Bd. of Ed.,* 727 F.2d 44, 48 (2d Cir.1984); *Carroll v. Capalbo,* 563 F.Supp. 1053, 1058 (D.R.I.1983)." *Gregory K*, *supra*, 811 F.2d 1307, 1315. And the Ninth Circuit added, "If the parents wish to maintain [student] in his current private tutoring program, however, the District cannot require a reassessment." (*Ibid.*) Therefore the school district was not successful in compelling testing of the student.

16. *Johnson* involved a student who filed a case at the state administrative level alleging his local school district denied him a FAPE. As an affirmative defense to the student's claim, the school district asserted it had been unable to provide an appropriate program of instruction and services due to the parents' failure to allow the school district to assess the student. While other claims were presented and procedural postures were involved by the time the case was at the District Court and Seventh Circuit Court of Appeals, the genesis of the case involved a complaint filed by a student. The statements in *Johnson* that District relies on pertain to the sufficiency of the school district's defenses to the student's case. *Johnson* was not a case filed by a school district to obtain authorization to assess the student resulting in an order not only permitting assessments but also, in advance, immunizing the school district from any liability for

future failures to provide the student a FAPE.

17. In *M.V.T.*, the student was found eligible for special education and related services under the category of "speech and language impairment" when the school district first evaluated him. Two years later, based on an assessment the parents privately arranged due to their ongoing concerns about his motor coordination, the student also began to receive services under the eligibility category of "other health impairment." Three years later, an IEP team met and, based on a recent reevaluation, determined the student still qualified for services due to his speech and language impairment eligibility; but the IEP team questioned his continued eligibility for services addressing his motor impairments. He had made significant progress on his goals connected to his "other health impairment" eligibility, so the school district hired an expert to administer several different tests to the student. The school district requested that the parents consent to the reevaluation, explaining that the student was due for his triennial evaluation under the IDEA and his services might no longer be appropriate given his progress. The parents refused to consent to reevaluation of the student, for a variety of reasons. After several attempts to secure consent from the parents, the school district requested a due process hearing to enforce its right to evaluate the student by an expert of its choice. The ALJ "ruled in favor of the school district and ordered [student's] parents to cooperate with the reevaluation." *M.V.T.*, *supra*, 446 F.3d 1153, 1156.

18. The student filed a case in the District Court alleging a variety of claims under several federal statues, and challenging "the order entered by the ALJ requiring [student's] parents to consent to the School District's reevaluation." *M.V.T.*, *supra*, 446 F.3d 1153, 1156. The Eleventh Circuit affirmed the District Court's dismissal of the student's statutory claims for failure to exhaust administrative remedies. The Eleventh Circuit also affirmed the District Court's decision affirming the Georgia State ALJ's order, relying on the Seventh Circuit's analysis from *Johnson*, including the statement from *Gregory K.*, which both arose in different contexts than the ALJ's order in *M.V.T.* The

Eleventh Circuit stated the District Court did not err in affirming the ALJ's order requiring the student to submit to the school district's reevaluation in order to remain eligible for services under the "other health impairment" category. *M.V.T, supra,* 446 F.3d at 1160. In *M.V.T.*, there was no threat that the student would lose his right to all special education and related services, and specifically those due to his undisputed speech and language impairment, if the student did not participate in the assessment regarding the student's motor coordination. The ALJ's order, and the Eleventh Circuit's affirmation of it, only concerned the student's eligibility for ongoing services to address his motor coordination challenges.

19. In this case, District seeks an advisory opinion, with a declaration of how the IDEA would be applied in the future hypothetical situation that Student does not participate in the assessments this Decision authorizes District to conduct without parental consent. District seeks an order declaring that if Parents do not make Student available for the assessments OAH authorizes, District will not be obligated to provide special education and related services to Student. The posture of this case is very different from *Gregory K.*, *Johnson*, and *M.V.T.* It is premature either to rule on the availability of any affirmative defense to any potential claim Student might file regarding a future denial of FAPE, or to forecast the outcome of any action filed by District to exit Student from special education based on Parents' failure to cooperate in the March 29, 2017 assessment plan after this Decision. And it would be overreaching to extend the limited impact of the Eleventh Circuit's decision. District's request is denied.

ORDER

1. District may assess Student pursuant to the March 29, 2017 assessment plan, without Parents' consent.

2. All other relief sought by District is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on the issue in this case.

RIGHT TO APPEAL THIS DECISION

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).)

DATE: August 4, 2017

/s/
KARA HATFIELD
Administrative Law Judge
Office of Administrative Hearings