

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

GARVEY SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2016100171

DECISION

Garvey School District filed a due process hearing request (complaint) with the Office of Administrative Hearings on October 5, 2016, naming Student. On October 24, 2016, OAH granted a continuance for good cause. Administrative Law Judge Sabrina Kong heard this matter in Rosemead, California, on January 18, 2017.

Attorney Sharon Watt represented District. Alma Guerrero, District's special education coordinator, attended the hearing. No one attended the hearing on Student's behalf.¹

¹ OAH left multiple telephone messages for Parents requesting their participation at the first prehearing conference on October 24, 2016. At the first prehearing conference, OAH continued the prehearing conference to January 9, 2017, and the hearing to January 17, 2017, and properly served the order following the prehearing conference on Parents. On January 5, 2017, OAH issued an order resetting the prehearing conference to January 17, 2017, and the first day of hearing to January 18, 2017, and properly served the order on Parents. ALJ left multiple telephone messages

Ms. Watt delivered oral closing arguments at the conclusion of the hearing. The record was closed and the matter was submitted for decision on January 18, 2017.

ISSUE²

May District assess Student, without parental consent, according to its May 25, 2016 assessment plan?

SUMMARY OF DECISION

District proved that it complied with the procedural requirements for assessing Student under the Individuals with Disabilities Education Act. The evidence established that District was required by the IDEA to reevaluate Student so District would have updated information about Student's present levels of performance and unique needs, for District to provide Student a free appropriate public education. District provided an appropriate proposed assessment plan to Parents and sought their consent for Student's triennial re-evaluation. Parents did not consent to the assessment plan. District

for Parents requesting their participation at the January 17, 2017 PHC. Parents did not respond or participate in the prehearing conference on January 17, 2017, at which the ALJ confirmed the 9:30 a.m. hearing start time for January 18, 2017. OAH staff called and left a message for Parents on January 17, 2017, to remind them of the hearing. Parents did not respond. The ALJ began the hearing at 9:30 a.m. Parents did not attend the hearing.

² The issue has been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

may assess Student in accordance with its May 25, 2016 assessment plan, without parental consent.

FACTUAL FINDINGS

1. Student was 12 years old, and resided within District at all relevant periods.
2. Student attended another District school for a short time in 2013, after which he attended Los Angeles Unified School District in the fall of 2013. On September 9, 2015 Los Angeles developed an amended individualized education program for Student. The September 9, 2015 Los Angeles IEP offer placed Student in a general education classroom, and offered Student speech and language, counseling, behavior intervention and behavior consultation services. It identified autism as Student's special education eligibility, and stated that October 23, 2013 was Student's last triennial assessment. Parents consented to the September 9, 2015 Los Angeles IEP.
3. On January 19, 2016, Student began attending Arlene Bitely Elementary School, a District school. District received a copy of the September 9, 2015 Los Angeles IEP when Student enrolled at Arlene Bitely. District held an IEP team meeting on February 19, 2016. District continued implementing the September 9, 2015 Los Angeles IEP. On April 21, 2016, Parents requested an IEP team meeting, at which they expressed concerns with Student's education, including District's IEP implementation, Student's safety, and his maladaptive behaviors.
4. On May 25, 2016, District provided an assessment plan to Parents. The plan proposed assessments in the areas of areas of academic achievement, health, language/speech communication development, social/emotional, and adaptive behavior, which included records review and observations by District's specialists, and input by Parents. District also included a copy of Parents Rights and Procedural Safeguards. Each of the proposed areas for assessment was related to Student's known or suspected disabilities and based on special education services Student received from

Los Angeles. The assessment plan identified by title the professional who would be assessing Student in each area. The assessment plan was written clearly, and in English. Parents spoke English during the April 21, 2016 IEP team meeting, and Parents communicated in and understood English. The assessment plan also informed Parents that District would hold an IEP team meeting to discuss the assessment results and Student's placement in special education would not be made without parental consent.

5. Student's annual IEP was due on September 9, 2016, and triennial assessments were due on October 23, 2016. District included 15 days for Parents to review and return the May 25, 2016 assessment plan into the 60-day calculation for assessments, so that it could timely hold Student's annual IEP, after the new school year began, by September 9, 2016. Parents did not consent to the May 25, 2016 assessment plan.

6. District gave Parents written notice and convened an annual IEP team meeting on September 16, 2016. Parents notified District in an e-mail a few minutes after the IEP team assembled of their intent not to attend the IEP team meeting. District postponed and continued the September 16, 2016 annual IEP team meeting because of Parents' non-attendance. District gave Parents written notice and attempted to convene another annual IEP team meeting on October 13, 2016. Parents did not attend. The District IEP team members adjourned the meeting. District gave Parents written notice and attempted to convene a third annual IEP team meeting on November 3, 2016, which Parents also did not attend.

7. District made several requests to Los Angeles for Student's complete file. The only assessment reports Los Angeles provided to District were Student's March 10, 2011 speech and language assessment, and Student's March 15, 2011 psycho-educational report. Those reports reflected Student's present levels of performance at the age of six years.

8. Student's triennial assessments were overdue. District needed updated information to develop appropriate goals to meet Student's current educational and related service needs, and to offer Student a FAPE.

9. Julie Sena, District's speech and language pathologist, would conduct Student's speech and language assessment. Ms. Sena held a master's degree in speech pathology, was certified by the American Speech and Language Association and licensed as a California speech and language pathologist. She would administer the Clinical Evaluation of Language Fundamentals, Fifth Edition; the Comprehensive Assessment of Spoken Language; and the Student Oral Language Observation Matrix to Student. Michael Oyler, District's specialized education teacher, would administer the academic assessment. He held a mild/moderate teaching credential, an autism certificate and had experience working with autistic students. He would administer the Woodcock Johnson Test of Cognitive Abilities, Fourth Edition, to Student. Lenore Rios, District's nurse, was a nurse practitioner, and would conduct Student's health assessment, including a vision test, a hearing test, and a review of Student's medical needs at school, such as medication or allergies. Nancy Kugler, District's psychologist, would assess Student's adaptive behavior, intellectual development, and social/emotional development. She held a master's degree in education, was credentialed as a school psychologist, a school counselor and multiple subjects teacher. She would administer the Vineland Adaptive Behavior Scales; the Behavior Assessment System, Second Edition; the Gilliam Autism Rating Scale 2; the Asperger Spectrum Rating Scale; and the Wechsler Intelligence Scale for Children, Fifth Edition. Sarah Bass, an outside consultant, held a master's degree in education with an emphasis in applied behavior, and was a board-certified behavior analyst. She would conduct Student's social/emotional assessment which would include a functional behavior and/or a functional analysis assessment to determine the antecedents, behaviors, and

consequences of Student's maladaptive behaviors. Ms. Guerrero would be the counselor who would participate in Student's social/emotional assessment by observing him. Ms. Guerrero held a master's degree in special education and was credentialed in special education instruction.

10. District would use assessors who were qualified to assess Student in accordance with its May 25, 2016 assessment plan. District's proposed assessors who testified at hearing did so precisely and credibly as to their qualifications and the proposed evaluation instruments, including the use of standardized tests for their intended purposes. They were all qualified to assess Student in the areas proposed by District. District had other qualified assessors on staff if the specific proposed assessors who testified at hearing were not available. The assessors for each area of need would decide whether certain subtests were necessary based on how Student performed during test administration. They would use multiple instruments to assess Student. They would also seek teachers' and parental input.

LEGAL AUTHORITY AND CONCLUSIONS

ISSUE: ASSESSMENT WITHOUT PARENTAL CONSENT

District contends it needs to conduct triennial assessments of Student to obtain updated information for providing Student a FAPE. Parents did not consent to District's assessment plan.

Legal Authorities and Analysis

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

1. This due process hearing was held under the 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 et seq. (2006)⁴; Ed. Code, § 56000, et seq.; and 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 to 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); 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.) "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 as may be 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 called designated instruction and services].) In general, an IEP is a written

³ Unless otherwise indicated, the legal citations in this introduction are incorporated by reference into the analysis of each issue decided below.

⁴ All subsequent references to the Code of Federal Regulations are to the 2006 edition.

statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel, and which sets forth 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 Dist. v. Rowley* (1982) 458 U.S. 176, 200 [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*, to date, 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 or local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6)(f) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; 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); Ed. Code, § 56505, sub. (l).)

5. 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]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].) In this case, District has the burden of proof as to its one issue.

ASSESSMENTS

6. Assessments are required 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).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

7. To assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under the IDEA and state law. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must be understandable to 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).) A school district must give the parents and/or the student 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).) The proposed written assessment plan must contain a description of any recent assessments that were conducted, including any available independent assessments and any assessment information the parent requests to be considered, information about the student's primary language and information about the student's language proficiency. (Cal. Code Regs., tit. 5, § 3022.) Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(a)(1)(B)(i); Ed. Code, § 56321, subd. (a)(2).)

8. If parents do not consent to a reassessment plan, the district may conduct the reassessment by showing at a due process hearing that the district 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).) Parents who want their children to receive special education services must allow reassessment by the district, with assessors of the district's choice. (*Johnson v. Duneland Sch. Corp.* (7th Cir.

1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir.1995) 64 F.3d 176, 178-79; *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; *Dubois v. Connecticut State Bd. of Educ.* (2d Cir. 1984) 727 F.2d 44, 48.)

9. Here, District demonstrated by a preponderance of the evidence it complied with all statutory requirements to justify allowing District to assess without parental consent. Its evidence was uncontroverted.

10. The assessors District proposed for Student's assessments were qualified to perform the assessments. District staff credibly testified that, if those specific proposed assessors were not available, District had equally qualified assessors available to assess Student. The proposed areas of assessment, and the assessment tools, were designed to address all of Student's known or suspected unique needs. District provided Parents with proper notice of the assessment plan. It gave Parents a proposed written assessment plan which met all procedural requirements under the IDEA. District included a copy of Parents' Procedural Rights. Neither Los Angeles, nor District had assessed Student after October 2013. District only had Student's 2011 Los Angeles speech and language and psycho-educational reports. District also had only limited information from District teachers in the short time Student was enrolled at District, adding to District's concern about the need to assess. At Student's April 21, 2016 IEP team meeting, Parents expressed concern about Student's education and behaviors, which also triggered District's duty to consider assessing Student. Parents' refusal to consent to the May 25, 2016 assessment plan deprived District of the ability to acquire updated information necessary to determine Student's unique needs, and to develop an IEP, including appropriate goals and services, that would provide Student a FAPE.

11. District met its burden of demonstrating that it needed to assess Student in all the areas of need set forth in the May 25, 2016 assessment plan, and, it may do so without parental consent.

ORDER

1. District may begin assessing Student without parental consent within 15 days of this Decision, in the areas of academic achievement, health, language/speech communication development, social/emotional, and adaptive behavior. District shall convene an IEP team meeting in accordance with the procedural requirements of the IDEA after its assessments have been completed. Within seven days of this Decision, District shall notify Parents of the dates and times of the assessments. Parents shall agree on dates and times for the assessments, which shall not be more than 30 days from the dates originally proposed by District. Parents shall make Student available for the assessments on the agreed dates, and shall timely complete and return any documents reasonably requested by District as part of the assessments. Any assessment delays caused by Student's unavailability, or parental non-cooperation, will toll the 60-day timeline for assessments and the date for the subsequent IEP team meeting for the corresponding number of days.

2. If Parents do not present Student for assessment as specified above, or does not complete and return any documents as specified above, District shall not be legally obligated to provide Student a FAPE until such time as Parents comply with this Order.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District was the prevailing party as to its one issue.

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: February 3, 2017

/s/

SABRINA KONG

Administrative Law Judge

Office of Administrative Hearings