

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CORCORAN JOINT UNIFIED SCHOOL  
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2018010666

DECISION

Corcoran Joint Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on January 18, 2018, naming Parent on Behalf of Student as respondent. A continuance was granted for good cause on February 2, 2018.

Administrative Law Judge Penelope Pahl heard this matter in Corcoran, California, on April 3 and 4, 2018. Corcoran was represented by Kidd Crawford, attorney at law. DeLinda Chubbuck, Corcoran's School Psychologist, attended throughout the hearing on behalf of Corcoran. Cindy Crose Kliever, Attorney at Law, represented Student. Student's Mother and Father attended throughout the hearing. Student did not attend.

A continuance was granted for the parties to file written closing arguments, and the record remained open until April 13, 2018 to receive them. Corcoran submitted a timely closing brief. Student's closing brief was submitted late and without a signature or proof of service. Student did not provide a signed brief or proof of service in response to the call made by OAH asking for clarification regarding whether the brief

had been served and requesting a signed submission. As such, Student's closing brief was not considered.

## ISSUE

May Corcoran Joint Unified School District assess Student in accordance with the assessment plan dated October 5, 2017, without parental consent?

## SUMMARY OF DECISION

Corcoran Joint Unified School District met its burden of proving that the proposed assessments of Student were necessary and qualified personnel were available to conduct the assessments. Parents' assertions that the assessments would harm Student, or that they were not necessary, were not supported by the evidence. Corcoran is, therefore, authorized to conduct the assessments proposed in the October 5, 2017 assessment plan without parental consent.

## FACTUAL FINDINGS

### JURISDICTION

1. Student is an 11 year-old girl who has resided within the geographical boundaries of Corcoran Joint Unified School District at all relevant time periods. Her current placement is in a fourth grade general education class in a Corcoran elementary school. Student is currently eligible for special education and related services under the category of speech and language impairment, and has an individualized education program in place.<sup>1</sup>

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<sup>1</sup> Student asserted that her eligibility category had been changed to autism. However, the evidence established that the IEP indicating an eligibility category of autism was not a final copy and Student's special education eligibility had not been

2. Student's last triennial assessment was conducted in 2012 when she attended transitional kindergarten in a neighboring school district. Per agreement of the IEP team, limited assessments were conducted by Corcoran in 2015, the year Student's last triennial evaluation was due. In 2015, Corcoran assessed her gross motor skills, vision, and hearing; and conducted a classroom observation and a record review.

3. During an IEP team meeting on January 23, 2017, Corcoran members of student's IEP team determined that Student needed to be assessed to evaluate her current levels of performance and needs. These team members suspected Student demonstrated attributes of additional disabilities and areas of need that required updated assessments. The Corcoran team members deemed assessments necessary to evaluate whether autistic-like behaviors and dyslexia required additional specialized academic instruction, or additional related services. The team also had concerns about Student's academic performance and her social functioning as she seemed to have difficulty sustaining friendships.

4. During the January 2017 IEP team meeting, Mother presented a note from Dr. Bradley Wajda, D.O., indicating Student had been diagnosed with autism spectrum disorder on Axis I, with academic issues on Axis IV, and on Axis V "45 last year 0 (unspecified)."<sup>2</sup> The note recommended Student follow a gluten free and dairy free diet.

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changed, as of the time of hearing, because Corcoran had not performed assessments to determine eligibility under the category of autism.

<sup>2</sup> Dr. Wajda was not called to testify and Mother was not adequately familiar with his qualifications to testify to them at hearing. The signature on the note presented to the IEP team in January of 2017 includes the designation "D.O." without further explanation. The listing of the various diagnoses in the note was provided without explanation of the notation used.

None of these diagnoses were further explained in the note which stated it was provided at Mother's request but a release of information would be required for additional information. Corcoran considered the note when developing the proposed assessment plan.

5. Corcoran's October 5, 2017 Assessment Plan proposed assessments in the areas of academic achievement, health, intellectual development, language and speech/communication development, motor development, social emotional behavior, and adaptive behavior. School psychologist DeLinda Chubbuck also planned to conduct a review of Student's records as part of the triennial assessment. Identical assessment plans were sent to both parents with cover letters and Prior Written Notices on May 31, 2017, August 10, 2017 and October 5, 2017. Parents also received copies of Parental Procedural Safeguards with the assessment plans. The letters to Parents advised them that they had 15 days to review the proposed assessments, and that their signatures were necessary for the Corcoran to proceed with the assessments. The letters advised Parents that their consent did not authorize changes to Student's special education program, or related services.

6. Parents did not respond to the May and August letters. The October 2017 letter advised Parents that, absent their consent to assess, Corcoran would proceed to a due process hearing to request an order allowing Corcoran to assess Student without parental consent. Parents did not consent to the October 5, 2017, Assessment Plan and Corcoran filed the instant action.

## NEED FOR ASSESSMENT

### Psychoeducational Assessment

7. Ms. Chubbuck, is a school psychologist employed by Corcoran Joint

Unified School District.<sup>3</sup> Her duties include, among others, coordinating Corcoran's special education services and conducting psychoeducational assessments. In the past 14 years, Ms. Chubbuck has conducted over 400 special education assessments. Ms. Chubbuck's testimony was detailed, sincere, and professional. It was consistent on cross examination and was given significant weight.

8. Ms. Chubbuck planned to conduct the Differential Ability Scale, 2nd Edition, to gather information about Student's cognitive and achievement levels and the Comprehensive Test of Phonological Processing, 2nd Edition to evaluate Student's capabilities in the area of reading fundamentals and the processing abilities that affect reading. Both of these are standardized, norm-referenced tests that are not biased. In addition to the data obtained regarding cognitive and achievement levels, the assessments would also allow Ms. Chubbuck to observe how Student handles the testing; specifically, whether she guesses when trying to answer a question, or uses a process of elimination; whether she is impulsive in her responses; and whether she self-corrects.

9. Ms. Chubbuck planned to use the Autism Diagnostic Observation Schedule and the Autism Spectrum Rating scales to identify the presence of behaviors related to autism spectrum disorder. The Autism Diagnostic Observation Schedule is semi-structured and uses a variety of play activities performed with Student to gain information in the areas of her level of conversation, interest in other people, ability to ask for help and ability to engage in pretend play. Ms. Chubbuck would also evaluate

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<sup>3</sup> Ms. Chubbuck holds a Master's degree in Education and holds a pupil personnel services credential, as well as a credential as a school psychologist. She has completed the coursework to qualify as a Board Certified Behavior Analyst but has not yet taken the examination to become certified.

the presence of repetitive behaviors, difficulty transitioning between tasks, use of eye contact, and her ability to anticipate routines. This assessment is not norm-referenced because it is individualized. However, it is standardized.

10. To supplement the information gleaned from the Autism Diagnostic Observation Schedule, the Autism Spectrum Rating Scales would be distributed to Parents and teachers. These questionnaires give Parents and teachers the opportunity to identify and rate behaviors related to autism spectrum disorder in a number of different settings. This is a norm-referenced and standardized test. Neither of the autism assessments are biased.

11. Ms. Chubbuck would use the Adaptive Behavior Assessment System to gather information regarding how Student functions at home and in school, in a range of areas including academics, social skills, communication, play, community use, and school. The Adaptive Behavior Assessment System is a standardized, norm-referenced test that is not biased.

#### Academic Assessment

12. Tiffany Edginton has been a fourth and fifth grade special education teacher for Corcoran for six years.<sup>4</sup> Student is one of Ms. Edginton's pupils. She provides Student with "resource" services, that is, specialized academic instruction. Additionally, Student is occasionally sent to Ms. Edginton when she is struggling in her general education class with anxiety issues. Ms. Edginton's testimony evidenced a personal concern about Student's well-being, as well as concern for Student's academic

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<sup>4</sup> Ms. Edginton has earned a Master's degree in Education with an emphasis in special education and holds a single subject social science teaching credential and an educational specialist instructional level II credential.

achievement. Ms. Edginton's testimony was straightforward and credible and thus was given considerable weight.

13. Ms. Edginton explained the need for assessments of Student's academic strengths and weaknesses to the team, which included Mother, during the January 2017 IEP team meetings. Subsequent to the IEP team meeting, Ms. Edginton also met with Mother to explain the assessments to be conducted.

14. Ms. Edginton would use subtests from the Woodcock-Johnson IV Test of Academic Achievement covering reading, writing and math. The data obtained would provide information regarding Student's academic abilities so that appropriate goals could be developed to meet Student's needs. Ms. Edginton has administered the current form of the test 45 to 50 times and has administered the test in different versions over 100 times.

15. Ms. Edginton would also administer the Test of Auditory Processing Skills to assess Student's auditory memory and auditory comprehension to help determine whether Student has difficulty processing information she hears. The information would be used to determine whether accommodations, such as shorter instructions or written instructions, or other accommodations, need to be provided. Ms. Edginton has administered this test over 100 times. All assessments Ms. Edginton proposes are standardized and norm-referenced. None are biased.

#### Speech and Language

16. April Aquino has been employed by the Kings County Office of Education as a speech pathologist for 20 years.<sup>5</sup> Student receives speech and language services

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<sup>5</sup> Ms. Aquino has earned a Master's degree in Speech and Language Pathology and is licensed by the State of California as a speech pathologist. She has been employed by the Kings County office of Education as a speech pathologist for 20 years.

from Ms. Aquino. A formal speech and language assessment is required so that Corcoran has updated information regarding her speech and language strengths and weaknesses to determine the services she needs. Student last received formal speech assessments in 2012. Additionally, she has been evidencing possible disfluency, as demonstrated by word repetition in her speech as well as difficulty with pragmatic language. Student's receptive language also requires evaluation, as this is an area in which Student has never been tested.

17. Ms. Aquino would utilize a variety of testing instruments to gather a complete picture of Student's current abilities, including an interview with Parents and an observation of Student, both in the classroom and while she is working with her one-on-one aide. Ms. Aquino would then administer the Goldman-Fristoe test of articulation and record two samples of Student speaking while interacting with peers, one in an informal setting, such as the cafeteria or playground; and one in the resource room. Ms. Aquino would also administer the Oral Written Language Scales, the Expressive One Word Picture Vocabulary Test, the Receptive One Word Picture Vocabulary Test and the Social Language Development Test. The tests evaluate different aspects of Student's language abilities, including clarity, expressive and receptive language abilities, use of social language with peers, and non-verbal communication awareness. All of these tests are standardized and norm-referenced. None are biased. Ms. Aquino has administered the tests, or tests similar to those selected, in the past, and she is qualified to administer each test recommended.

#### Adaptive Physical Education

18. Tracy Brown has been employed by the Kings County Office of Education as an adaptive physical education specialist and teacher in the Alternative Education



Program for 16 years.<sup>6</sup> Mr. Brown has taught Student in Adaptive Physical Education for the past eight months, working on her gross motor skills. Student's gross motor skills were last assessed in 2015; therefore, assessment is necessary to provide Mr. Brown with the data necessary to evaluate whether Student's current physical education goals are adequate for her needs. The Bruininks-Oseretsky Test of Motor Proficiency, Version 2 has been selected utilizing the various subtests related to gross motor skills to evaluate Student's abilities. Mr. Brown has administered similar tests in the past and is qualified to administer this test.

#### Occupational Therapy

19. Michael Mason has been an occupational therapist with Kings County Office of Education since 2004.<sup>7</sup> The need to assess Student in this area was discussed with Parents in IEP team meetings. While Student is progressing with the occupational therapy she currently receives, assessment is required to identify Student's current level of need.

20. Student was last assessed using the Bruininks-Oseretsky Test of Motor Proficiency in 2015 and Ms. Mason would choose that instrument again. Use of the test by both the Adaptive Physical Education teacher and the occupational therapist would not be duplicative because she would use the fine motor skill subtests and Mr. Brown

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<sup>6</sup> Mr. Brown is credentialed in both Physical Education and Adaptive Physical Education. He earned a Bachelor's degree from California State University at Bakersfield in 1997.

<sup>7</sup> Ms. Mason has earned a Bachelor's Degree in occupational therapy and a Master's Degree in Health Psychology. She has worked as an occupational therapist since 1996.

would use the gross motor skill subtests. The fine motor skill assessments would provide information regarding how Student uses her hands and eyes together. Ms. Mason is qualified to administer the proposed assessment.

#### Health Assessment

21. Teresa Baker has been employed by Corcoran as a District school nurse since October of 2017.<sup>8</sup> Corcoran also employs school nurses at various school sites in the district. A review of Student's records indicates that updated information is necessary regarding whether Student currently takes any medications or supplements and whether they need to be administered at school; whether Student has any dietary restrictions and whether those have been communicated to school site personnel; confirmation of any chronic medical conditions; and whether Student's current vision correction is adequate. Ms. Baker noted specifically that she saw information in the file that Student was recommended a gluten-free, dairy-free diet but she saw no meal accommodation form on file alerting school site personnel to the possible restrictions.

22. A health assessment consists primarily of a parent interview via telephone and a record review. Parents would be questioned on the current status of any allergies, asthma, hospitalizations, injuries, surgeries, medications and food restrictions. If Student required a hearing or vision re-assessment those would be conducted. Updated information is then put into Corcoran's database so it can be accessed by school site personnel if needed.

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<sup>8</sup> Ms. Baker is a Registered Nurse and holds a Master's of Education in Nursing Education with a Clinical Specialty. She is currently attending classes with the intention of completing a school nurse credential.

## PARENTS' CONCERN THAT ASSESSMENT WOULD HARM STUDENT

### Mother's Concerns

23. Parents did not consent to the proposed assessments of Student. Parents asserted that they were concerned the assessments would cause Student anxiety. Mother also questioned the need for assessment given the note from Dr. Bradley Wajda regarding Student's autism diagnosis. Mother also noted that Student was not comprehensively assessed in 2015, arguing that this indicates the requirement for Triennial assessments is not absolute.

24. Mother believes Student will suffer if the assessments are required because Student associates testing with inadequacy. Mother testified that Student, "becomes three instead of 11. She will act like a little kid and she's not." Student also gets anxious when her schedule changes. Mother is concerned that Corcoran will not be able to gather accurate information about Student's abilities because she will get anxious during the assessments.

25. Mother observed Student struggle with a private speech and language assessment in 2016, during which Student fidgeted, contorted her body, and sometimes stuck her finger up her nose. She started picking at her skin twice during the assessment. However Mother acknowledged that Student was able to be redirected to stop the picking. Student was agitated but concentrated throughout the assessment, and was able to complete it in the allotted time. That assessment was conducted for one hour per week over three weeks. At no time did Student cry or show any other signs of extreme distress during the assessment.

26. According to Mother, Student was assessed by Dr. Wajda for three and a half hours in a single session. Mother did not report any anxiety during this assessment. Dr. Wajda interviewed Mother and interviewed Student. Dr. Wajda also observed Student coloring. No evidence of the testing instruments or methods used to reach a

diagnosis was presented at hearing. Nor did Parents present evidence establishing that Dr. Wajda had appropriate credentials to make a diagnosis of autism spectrum disorder.

27. Mother testified that, on March 19, 2018, she informed Dr. Wajda that Corcoran wanted to “do a battery of every test you can think of.” In response to this information, Dr. Wajda gave Mother a note on a prescription pad that states, “[Student] has Autism Spectrum D/O. This is a diagnosis made by history – not by testing (check the DSM5). Testing exacerbates her anxiety and is not recommended.” Parents chose not to call Dr. Wajda as a witness to explain the basis for his autism spectrum disorder diagnosis or to explain his conclusion that assessing Student was not “recommended.” Dr. Wajda did not want to testify. Mother chose not to subpoena him to preserve the good relationship he has with their family.

#### Student’s Therapist’s Observations

28. Ms. Amy Durst, M.F.T., is Student’s therapist.<sup>9</sup> Ms. Durst began working with Student as an Intern and has continued Student’s treatment since completing her licensure requirements. Ms. Durst’s experience with assessments of children is very limited. She has personally administered only the Beck Inventory for Anxiety and an internal assessment used by the Tulare County Office of Education which was standardized but not norm-referenced. While she is aware of other educational assessments, such as the Autism Rating Scales and the Comprehensive Test of Phonological Testing, 2nd Edition, she is not familiar with them.

29. Student sees Ms. Durst for therapy every two weeks. Ms. Durst treats Student for skin picking, which is related to an anxiety diagnosis. The problem has subsided, to a degree, since Student began working with Ms. Durst in 2016. Student’s

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<sup>9</sup> Ms. Durst has been licensed as a Marriage and Family Therapist (MFT) since 2017. She earned a Master’s degree in Marriage, Family and Child Therapy in 2013.

skin picking can be caused by a change in her schedule, or not being mentally prepared for something she encounters, as well as other reasons. It flared up due to a recent visitation dispute between Parents. Test anxiety has not been an aspect of Student's therapy.

30. Ms. Durst admitted that she had no familiarity with the proposed assessments, and she did not know how or when the tests would be administered. Although her apparent purpose in testifying was to support the assertion that the assessments would be harmful to Student, Ms. Durst's testimony regarding the potential harm to Student was equivocal.

31. Ms. Durst's own experience assessing Student did not support her assertions regarding the possible harm Student might experience during assessments administered by Corcoran personnel. Ms. Durst conducted a Beck Inventory of Anxiety with Student which is a survey requiring responses from the subject being tested. Ms. Durst administered the inventory in her office over the course of an hour with breaks. The inventory consisted of 20-25 questions. Student was angry at Ms. Durst for administering the assessment but Student's skin picking behaviors did not increase.

32. During another session with Student, Ms. Durst conducted a white board exercise with her in which Student had to copy numbers. Student began picking at herself, but was able to be redirected successfully. Student was able to complete the exercise over the course of the hour-long appointment with breaks.

33. Ms. Durst stated that Student would require breaks during any assessment. Ultimately, she concluded that she was unable to state whether the Corcoran assessments would be a problem for Student because she did not know the nature of the testing that was planned. She also stated that assessing Student might be in Student's best interest, despite the possibility of stress, as testing might be beneficial for Student's education.

### Student's General Education Teacher's Observations

34. Ms. Jill Boyett is employed by Corcoran as a fourth grade general education teacher. Student is in her class this year. Ms. Boyett maintains a routine in her classroom. She has not observed Student to become agitated if the routine is changed.

35. Ms. Boyett has observed Student take over 50 tests over the course of the 2017-2018 school year in a range of academic subjects including reading, writing, math, science, and spelling. Student does not become agitated before tests and Student has never told Ms. Boyett that she does not like taking tests. About half of the time, Student is able to manage tests without a problem. The other half of the time, there is some gradation of frustration behaviors. These range from simply sighing, at which point Ms. Boyett reminds Student that she is capable of doing the work, to, at worst, hitting the desk and growling. Student is tested one-to-one with Ms. Boyett as required by her IEP. Ms. Boyett usually "chunks up" the test, that is, divides the material so it can be covered over more than one session. Generally, Student is able to test for an hour. Sometimes, Student requires a break if she gets frustrated. Because she is given breaks, Student's anxiety does not degrade her performance.

36. Ms. Boyett has observed Student picking at her skin only a few times and on 4 or 5 occasions has observed Student pick at her skin to the point that she bled. Ms. Boyett could not specifically recall Student picking at her skin during a test. However, she believed it had probably happened during the course of the year. Student picks at her skin during other types of frustrating situations as well, such as when someone she wants to play with does not want to play with her.

### ASSESSORS' PLANS FOR ADDRESSING STUDENT'S ANXIETY DURING TESTING

37. Each assessor would make efforts to alleviate Student's anxiety by taking breaks during testing to play for a bit with preferred items, or to simply stop for a break.

Alternatively, testing in most cases could be administered over a number of days if required. Administering tests over a longer period of time is allowed by the protocols of the various testing instruments, and does not impact the validity of the outcomes. Student would be tested in the resource room, or in another appropriate location that is familiar and comfortable, and offers a quiet testing space that limits distractions.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>10</sup>

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.; 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 a free appropriate public education (FAPE) available that emphasizes special education and related services designed to meet their unique needs and prepare them for higher education, employment, and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other

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<sup>10</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

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. The IEP describes the child's needs, academic and functional goals related to those needs; and contains 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 nondisabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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.)

4. The Supreme Court recently clarified the *Rowley* standard in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. \_\_\_, 137 S.Ct. 988 [197 L.Ed.2d 335]. It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit a child to achieve passing marks and advance from grade to grade. (*Id.*, 137 S.Ct. at pp.



995-996, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his circumstances. (*Endrew F.*, *supra*, 137 S.Ct. at p. 1001.) The high court noted that "[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." (*Id.* at p. 999 [italics in original].)

5. 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, § 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).)

6. 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.) In this case, Corcoran, as the complaining party, bears the burden of proof. However, once Corcoran establishes entitlement to assess, the burden shifts to Student to prove assessment should be prohibited. (*Schaffer*, *supra*, 546 U.S. at p.57.)

#### REQUIRED REASSESSMENT

7. A student eligible for special education must be assessed at least every three years, or more frequently if the local educational agency determines that conditions warrant reassessment, or if a reassessment is requested by the student's teacher or parent. (20 U.S.C. § 1414(a)(2)(A); Ed. Code § 56381, subds. (a)(1),(2).) While

parents and the district can agree that a triennial assessment is not necessary, such a decision is not the norm and requires a written agreement from both the Parent(s) and the local education agency that the reassessment is not necessary. (Ed. Code § 56381, subd. (a)(2).)

8. A reassessment usually requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain consent, a school district must develop and propose a reassessment plan which is provided to the parents in writing. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) If the parents do not consent to the plan, the district can conduct the reassessment only by showing at a due process hearing that it needs to reassess the student and is lawfully entitled to do so. (34 C.F.R. §§ 300.300(3)(i), 300.300(4)(c)(ii); Ed. Code, §§ 56381, subd. (f)(3); 56501, subd. (a)(3); 56506, subd. (e).) Accordingly, to proceed with a reassessment over a parent's objection, a school district must demonstrate at a due process hearing (1) that the parent has been provided an appropriate written reassessment plan to which the parent has not consented, and (2) that the student's triennial reassessment is due and conditions warrant reassessment, or that the student's parent or teacher has requested reassessment. (Ed. Code, § 56381, subd. (a).)

9. The required notice of assessment 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 provided in a language easily understood by the public and in the native language of the student; explain the types of assessments to be conducted; and notify parents that no IEP will result from the assessment without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4); see also 34 C.F.R. § 300.9(a).) The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

## CONTENTIONS OF THE PARTIES

10. Corcoran asserts that it has a right to assess Student on two grounds: 1) because her triennial assessment is due and there is not an agreement between Corcoran and the parents that it is unnecessary; and 2) conditions warrant reassessment.

11. Parents assert that conducting the requested assessments over the course of sixty days would be harmful to Student and, further, that Corcoran has adequate information to forego assessing Student. Specifically they contend Corcoran has a diagnosis of autism from Dr. Wajda with a note regarding her recommended dietary restrictions; and Corcoran has the information it gathers when providing her with services. Parents also claim that because Student is progressing with her goals, assessment is not necessary.

## COMPLIANCE WITH REQUIRED ASSESSMENT PLAN PROCEDURES

12. Corcoran's assessment plan was appropriately worded and provided descriptions of the types of assessments to be conducted. As required by statute, the plan also notified Parents that no changes to Student's IEP would be made without their consent. Parents were also provided with procedural safeguards as required. Each of the three times Corcoran presented the assessment plan to Parents, they were given more than the minimum 15 days to review and consent to it.

## THE ASSESSMENTS PROPOSED ARE WARRANTED

13. Corcoran presented evidence establishing the need to assess Student. It had been more than a year since Student had been assessed and more than three years since a triennial assessment had been completed. Student's last comprehensive assessments were in 2012, when Student was in transitional kindergarten in another school district. In 2015, when triennial assessments would have been due, the IEP team arranged for limited assessments, agreeing that there was no need for a comprehensive

triennial review of Student's abilities or needs at that time.

14. By the time of the January 2017 IEP team meeting, team members, including Parents, suspected that Student might be demonstrating additional disabilities. Therefore, assessments were necessary to determine Student's current areas of need so her IEP team could determine if additional special education or related services are necessary. Mother had raised concerns about Student possibly having dyslexia and had presented Dr. Wajda's note regarding academic issues, "ASD," and recommending a restricted diet. The need to assess Student was clearly established based on the facts that 1) suspicions of additional disabilities and possible needs were raised by Dr. Wajda's letter; 2) Corcoran did not have its own complete assessment data regarding Student; 3) Student's triennial assessment was due; and 4) all members of the IEP team identified a need for assessment.

15. Corcoran established that it had qualified staff available to conduct the proposed assessments in the areas of academic achievement, health, intellectual development, language and speech/communication development, gross and fine motor development, social-emotional behavior, and adaptive behavior. Corcoran is prepared to choose well respected instruments that meet statutory requirements of reliability, and avoid bias in order to assess Student in the proposed areas. The assessments proposed are tailored to evaluate only those areas of suspected and established disabilities for which Student may require special education and related services.

#### STUDENT DID NOT ESTABLISH A BASIS FOR PROHIBITING ASSESSMENT

##### Potential Harm to Student

16. Parents assert that assessing Student will cause her to suffer. Parents point to Student's history of picking her skin when she becomes anxious, and her "regression" into "a three year old" when faced with testing.

17. The evidence did not support the conclusion that Student would suffer harmful anxiety if she was assessed. Student's therapist, Ms. Durst, loyally tried to support Parent's wishes that Student not be assessed; however, she was equivocal in her predictions of possible harm to Student resulting from the proposed assessments. Ms. Durst's testimony established that other than becoming "mad," Student suffered no harm, such as increased skin-picking behaviors. Nor did she experience greater anxiety when Ms. Durst assessed Student or when non-preferred activities were conducted during therapy sessions. Student was successfully redirected when she picked her skin, and the exercise was able to be completed during the time originally planned. Most telling was Ms. Durst's conclusion that any possibility of regression resulting from assessments was likely outweighed by the benefit to Student's education.

18. The experiences of Student's current classroom teacher when testing Student on approximately 50 occasions during the 2017-2018 school year were similar to those of Ms. Durst. Ms. Boyett routinely tested Student for an hour at a time and rarely witnessed Student picking at her skin and, when she did, found her to be redirectable. When Student exhibited her most extreme reactions to testing, which included pounding the desk, and growling, Ms. Boyett would give Student a break from the testing. Using these approaches, Ms. Boyett was able to complete all necessary testing with Student without impact on the testing outcomes.

19. Mother reported observing Student during a private speech and language assessment in 2016 during which Student became anxious. However, the evidence of anxiety was relatively mild and Student responded to redirection. Student completed the assessment in the originally allotted time frame with breaks. Mother reported no negative impacts on Student during or following the three and a half hour assessment conducted by Dr. Wajda.

20. All potential assessors who testified described the methods they would

use to reduce stress on Student during the administration of the tests. Ms. Chubbuck, who would have the responsibility for coordinating the assessments, was aware of Student's potential test taking anxiety and testified credibly about her commitment to minimize the impact of the testing on Student.

21. Parents did not meet their burden of proving that Student would be harmed by the assessment to such a degree that assessment should be prohibited. Corcoran provided detailed descriptions of its employees' intended techniques for curtailing stress to Student as much as possible during the assessment process.

#### Lack of Necessity for Assessment due to Physician Diagnosis

22. Parents' second assertion against having Student assessed by Corcoran was that the existence of Dr. Wajda's note stating that Student had been diagnosed with autism spectrum disorder should eliminate the need for assessment. It was not clear which assessments Parents believed were obviated by Dr. Wajda's diagnosis.

23. The record was not clear as to exactly what information was provided to Corcoran by Dr. Wajda. Mother testified that Corcoran had received a note from Dr. Wajda dated January 30, 2017, stating that he had diagnosed Student with Autism Spectrum disorder and academic difficulties. A third diagnosis is listed cryptically and not explained. A second note dated March 19, 2018 stated that Student has Autism Spectrum D/O, a diagnosis "made by history not by testing. (check the DSM5)." The note went on to state, "Testing exacerbates [Student's] anxiety and is not recommended."

#### OUTSIDE ASSESSMENT NOT REQUIRED TO BE ACCEPTED IN LIEU OF CORCORAN'S ASSESSMENT

24. Parents argue that Corcoran should accept the information they have provided to determine Student has autism spectrum disorder. However, a child must meet eligibility criteria under both state and federal law to be a child with exceptional

needs. (Ed. Code, § 56329(a)(2).) To be eligible for special education, a child must not only have a disability but, because of that disability, require instruction and services which cannot be provided with modification of the regular school program. (Ed. Code, § 56026(b); (*W.H. v. Clovis Unified School District* (E.D. Cal. 2009) 2009 WL 1605356, at p. 21, citing 34 C.F.R. § 300.8(a)(2)(i) (2006).) An autism diagnosis is not in itself sufficient to establish special education eligibility. Additionally, private assessments must be thorough and well-reasoned; soundly supported by recognized assessment instruments and reliable information.

25. Parents did not present any documents explaining the bases of Dr. Wajda's diagnoses. No information was provided regarding the assessment methods used or instruments administered. Nor was evidence admitted establishing Dr. Wajda's credentials for making an Autism Spectrum Diagnosis. Parents chose not to call Dr. Wajda to testify as to the basis for his conclusion that testing would exacerbate Student's anxiety or the basis of his diagnosis of Autism Spectrum Disorder. The documents presented did not, indisputably, support a conclusion that Student has Autism Spectrum Disorder. Furthermore, Corcoran is entitled to conduct its own assessments to determine eligibility of autism-like symptoms.

26. No evidence was presented by Parents that Dr. Wajda's diagnosis of autism spectrum disorder was based on a comprehensive assessment and, even if it had been, Corcoran would not be required to rely solely on that assessment to determine Student had needs due to autistic-like behaviors. Corcoran proceeded appropriately by proposing assessments of Student based on the suspicion of disability raised by Dr. Wajda's notes.

#### REQUEST FOR ADDITIONAL TIME FOR ASSESSMENT FROM CORCORAN

27. In its closing brief, Corcoran requested an order allowing an extended timeline to conduct assessments. Corcoran asserts that completing assessments by the

end of the current school year would be unusually compressed.

28. An IEP required as a result of an assessment of a pupil, shall be developed within a total time not to exceed 60 calendar days from the date of receipt of written consent for assessment, not counting days between the pupil's regular school session, and days of school vacation in excess of five schooldays, unless the parent agrees to an extension of time, in writing. Should consent to assess be received 30 days or less prior to the end of the school year, the IEP must be developed within 30 days after the commencement of the subsequent regular school year. (Ed. Code §56344 subd. (a).)

29. The issue of extending the timeframe was not at issue in this case. Further, Corcoran presented no legal authority permitting the statutory timeline to be extended absent written agreement from the Parent. Moreover, the 60-day timeframe within which to assess Student will not commence until this Decision is issued. Therefore, no requirement exists that the assessments be completed before the end of the current school year. Finally, should Parents wish for the assessments to be spread out over a longer time, as Mother stated at hearing, Parents and Corcoran may agree in writing to extend Corcoran's time to assess.

## ORDER

Corcoran is entitled to reassess Student according to its October 5, 2017 assessment plan without Parents' consent.

## 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. Corcoran prevailed on the only issue heard and decided.



## RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: April 20, 2018

/s/

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PENELOPE S. PAHL

Administrative Law Judge

Office of Administrative Hearings