

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

RIVERDALE JOINT UNIFIED SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2018030746

DECISION

The Riverdale Joint Unified School District filed a request for due process hearing with the Office of Administrative Hearings on March 16, 2018, naming Student. On April 2, 2018, OAH granted Parents' request to continue the matter.

Administrative Law Judge Charles Marson heard the matter in Riverdale, California, on May 15 and 16, 2018.

Kathleen A. McDonald, Attorney at Law, represented Riverdale. Jeff Moore, Riverdale's Assistant Superintendent for Educational Services, attended the hearing on its behalf.

Student's Mother and Father represented Student, and were assisted throughout the hearing by Spanish language interpreters. Student was not present.

On May 16, 2018, at Riverdale's request, OAH continued the matter to June 4, 2018, for closing briefs. On that day the parties filed closing arguments, the record was closed, and the matter was submitted for decision.

ISSUES

1. May Riverdale conduct Student's triennial re-evaluation pursuant to the May 23, 2017 assessment plan without parental consent?
2. May Riverdale make a referral to the Fresno County Superintendent of Schools for an educationally related mental health services (ERMHS) consultation in conjunction with Student's triennial re-evaluation, and may the Superintendent's Office proceed with the ERMHS consultation without parental consent?
3. Is Riverdale entitled to a release of information signed by Parents authorizing Riverdale to communicate with Dr. Isabelo Artacho and a medical doctor from Adventist Health?

SUMMARY OF DECISION

Riverdale proved that it proposed triennial reassessments in a legally compliant assessment plan dated May 23, 2017, and provided it to Parents two days later, but Parents have not consented to it. Riverdale proved that Student's triennial review was due to be conducted in March 2018, but could not be conducted because Riverdale lacked the information required to propose an adequate individualized education program. Riverdale also proved that circumstances warrant reassessment.

Parents' demand for reassessment only in their home and presence was not supported by any showing of medical or other necessity, and compliance with that demand is not required by law. Riverdale will be allowed to reassess Student in locations of its choice, refer him for an ERMHS consultation, and obtain appropriate releases of information confidentiality in order to conduct an adequate triennial review.

FACTUAL FINDINGS

JURISDICTION

1. Student was a 13-year-old boy who lived with Parents within Riverdale's boundaries during the time period at issue. He was eligible for, and had been receiving, special education and related services in the category of Other Health Impairment. He had Tourette's syndrome, a related pediatric autoimmune neuropsychiatric disorder associated with streptococcal infections (PANDAS), attention deficit hyperactivity disorder, obsessive compulsive disorder and anxiety. Student was also obese, slept poorly, and may have had additional health difficulties. He had average cognitive ability and received average to high average grades when attending school.

2. In December 2014, Student was attending Riverdale Elementary School in fifth grade general education classes when Parents decided he was too anxious to continue going to school and began to keep him home. Except for a two-hour appearance on August 13, 2015, Student had not attended school since December 3, 2014. He briefly received home hospital instruction and then was placed on an independent study program.

3. Student was last assessed in February and March 2015 in conjunction with an earlier triennial review. His triennial review was due again in March 2018 but was not held because Riverdale could not assess Student. Parents have been unwilling to authorize assessments of Student and, with limited exceptions, unwilling to authorize access to medical information about him. They now will permit the assessments but only if they are conducted in their presence and in their home. Riverdale has been unwilling to accept those conditions.

4. Since 2015 the parties have frequently attended IEP team meetings to discuss Student's placement, but have reached the same impasse: Parents believe that notes from their health professionals and their own opinions are enough to justify home

hospital instruction without a more informed decision by the entire IEP team, while Riverdale does not believe it has sufficient information about Student to justify an IEP team decision that he cannot attend school or needs a program as restrictive as home hospital instruction.

OVERDUE TRIENNIAL REVIEW

5. Student's last triennial review was conducted on March 11, 2015. Another was due by March 11, 2018, but was not conducted because Riverdale had no current information about Student's disabilities or his academic or functional levels.

NEED FOR ASSESSMENTS

6. Riverdale does not have enough information about Student to conduct a triennial review or write an IEP that reflects his current condition and levels of academic and functional performance. Its staff have not seen him at school since December 2014. One of its teachers attempted to provide home hospital instruction to Student early in 2015, but failed because Parents cancelled most of her visits. Since then, Student's independent study program has called for him to visit a teacher at school once a week, but Parents have rarely allowed Student to do that. Instead, Mother usually picks up his assignments and returns them completed a week later. District staff have only seen Student sporadically during these visits and twice during Riverdale's annual rodeo. Parents have declined Riverdale's repeated requests to observe Student in the home.

7. From December 2014 to the time of hearing, Parents insisted that Student should be given home hospital instruction, but Student's IEP team never authorized that program because it had insufficient information to decide whether it would provide him a free appropriate public education in the least restrictive environment. Parents occasionally provided Riverdale notes from health professionals recommending or prescribing home instruction for Student, but those communications typically requested

such a program for lengthy periods of time (up to an entire school year), and did not explain why Student cannot attend school beyond referring to his diagnoses and the fact that he takes medication.

8. Parents have largely obstructed Riverdale's efforts to obtain more medical information about Student in order to decide on his program. At least since 2015, Student has been a patient of Dr. Isabelo Artacho, a pediatric neurologist. Dr. Artacho sent several cryptic notes to Riverdale, usually on a prescription pad, stating that Student needed home instruction because of Tourette's and anxiety, and the fact that he took medication, with no further explanation. Since 2015, Riverdale has attempted many times to obtain Parent's permission to speak to Dr. Artacho and obtain his medical records about Student, but Parents have consistently declined to provide consent.

9. At least since 2016, Student has been receiving in-home services from the Fresno County Department of Social Services, but Parents have consistently declined to authorize Riverdale to access any information about Student from the Department. Student has also been receiving medical services from a physician at the Adventist Health Medical and Community Health Center. In October 2017, a physician's assistant at the Center sent Riverdale a note recommending home instruction. Parents have declined to authorize Riverdale to communicate with that provider.

10. At least since October 2016, Student has been seen by Dr. Steven Ehrreich, a pediatric neurologist at Valley Children's Healthcare about once every six months. On September 13, 2016, Riverdale provided Parents a form which would have authorized it to obtain information from Dr. Artacho, the Fresno County Department of Social Services, and Dr. Ehrreich. Parents wrote "No" beside the first two but did authorize sharing of information by Dr. Ehrreich. Riverdale then received some records from Valley Children's Healthcare, which generally described Student's diagnoses, repeated a request for home instruction and mentioned that Student would undergo a "procedure"

in January 2017. When that authorization expired, Parents declined to renew it, and Riverdale never could learn what the procedure was or why Student needed it. Mother later permitted Valley Children's to send a letter to Riverdale describing Student's diagnoses, but did not authorize the provider to discuss Student's conditions with Riverdale. In the letter that followed, Dr. Ehrreich reported that Student shouted out compulsively, sometimes ran out of the house, engaged in compulsive behaviors and talked to himself.

11. Assistant Superintendent for Educational Services Jeff Moore oversees Riverdale's special education programs. In November 2017, Parents signed a limited permission for Riverdale to speak to Dr. Ehrreich but not to receive medical records from him. Mr. Moore then spoke to Dr. Ehrreich on November 13, 2017. Dr. Ehrreich told Mr. Moore that while Student will eventually be able to return to school, he was not yet ready to do so because of his anxiety. Dr. Ehrreich did not express concern that Student was too anxious to be in a classroom. Instead, he was concerned that Student would be disruptive to the other students because he was given to spontaneous shouting.

12. Father told Student's IEP team on May 26, 2016, that Student had suffered a stroke, but Parents have been unwilling to give any information about this event to Riverdale.

13. In spring 2017, Riverdale determined in that Student's educational and related service needs, including improved academic achievement and functional performance, warranted a reassessment. The evidence supported that conclusion. Parents did not disagree with that conclusion at hearing, or introduce any evidence to question it; instead they argued that assessments must occur in their home and presence.

THE PROPOSED ASSESSMENTS AND CONSULTATION

14. On May 23, 2017, Riverside produced an assessment plan that proposed

triennial assessments of Student in the following areas, each with an assessor described by professional role: academic achievement (special education teacher); health (school nurse); intellectual development (school psychologist); language/speech communication development (speech therapist); motor development (occupational therapist); social/emotional (school psychologist); and adaptive behavior (school psychologist). Each of these areas was related to Student's known or suspected disabilities.

15. At the same time, Riverdale requested permission from Parents to refer Student for a consultation to the Fresno County Superintendent of Schools, which is Riverdale's provider of educationally related mental health support and regularly advises its IEP teams on students' ERMHS needs.

16. Mr. Moore provided the assessment plan and related documents to Parents on May 25, 2017, by mail and hand delivery. He included an explanatory letter, forms for consent and release of information, and descriptions of procedural safeguards under the Individuals with Disabilities Education Act. He also sent a form by which Parents would authorize referral of Student to the Fresno County Superintendent of Schools for an ERMHS referral. All the documents were in Spanish and English.¹

17. Upon receipt of the assessment plan and related documents on May 25, 2017, Father went to the District's office, returned all the documents unsigned, and presented another doctor's note requesting home hospital instruction for Student until the end of the calendar year. Subsequently, on several occasions, Riverdale sent the assessment plan and related documents to Parents for signature, but Parents never

¹ Parents and Student speak Spanish at home. However, in spring 2013, Student scored "proficient" in English language arts on state testing and was reclassified as "fluent English proficient."

signed any of them. On at least one occasion, Parents declined to accept certified mail containing the documents.

LOCATION OF ASSESSMENTS

18. Parents recognize the need to assess Student and do not oppose assessments. However, they contend that in order to protect Student's health and prevent excessive anxiety, Riverdale must conduct all assessments in their home and presence.

19. Mother testified that she wanted to have Student assessed at home because she did not trust the school district, and because Student was afraid to go out. When asked why he could not be assessed in an office, she responded: "Because he doesn't want to." Father also testified that his primary reason for wanting Student assessed at home was that Student did not want to go out of the house and he did not want to force Student to do so.

20. Mother testified that she was unwilling to authorize an ERMHS referral because Student "doesn't have a mental problem"; Tourette's is not a mental disorder. Father agreed, stating that Student "is not suffering from a mental sickness."

Medical Opinions about Assessing Student at Home

DR. MONTANA

21. Riverdale's March 2015 triennial psychoeducational assessment report noted that, at the time, Student's primary care physician was a Dr. Montana at the Riverside Health Center. Dr. Montana's notes stated, on February 4, 2015: "Child may go to school for testing only, otherwise needs home schooling." Dr. Montana advised that Student should not attend school until after March 31, 2015. Nothing in the record shows any more recent information from Dr. Montana or that he has seen Student since 2015.

22. The parties disputed whether Dr. Ehrreich thought Student was able to undergo assessments anywhere. Mr. Moore testified that, in their November 13, 2017 telephone conversation, he informed Dr. Ehrreich that Riverdale proposed a complete reassessment of Student, and that Dr. Ehrreich enthusiastically supported the proposed assessments, saying that the District should obtain as much information about Student as possible. Mr. Moore memorialized that conversation in a December 4, 2017 letter to Parents.

23. Mother testified, in contrast, that on Student's last visit, in March 2018, Dr. Ehrreich told her that Student was not only not ready to return to school; he was not ready to be assessed. When asked about the apparent contradiction between that and Mr. Moore's testimony, Mother stated that Dr. Ehrreich told her Mr. Moore was "crazy" and that he was tired of being "bugged" by letters and calls from Mr. Moore. She agreed that it seemed that the doctor was telling Mr. Moore one thing and telling her another. Dr. Ehrreich did not testify; no document was introduced in evidence stating his view about the wisdom of assessing Student; and Riverdale had no current release that would allow it to contact Dr. Ehrreich.

24. Mr. Moore's reporting of Dr. Ehrreich's view was more persuasive than Mother's. Mr. Moore described his version of the conversation in writing in a letter to Parents shortly after it occurred, and Parents did not contradict Mr. Moore's description of their conversation at the time. Parents have in the past solicited several writings from Dr. Ehrreich to the District, but did not attempt to have Dr. Ehrreich contact the District to disagree with Mr. Moore's description of their conversation or to state that Student should not be assessed. Mother's representation of the views of Dr. Ehrreich was less persuasive than it otherwise would have been in light of her unwillingness to allow Riverdale to communicate directly with Student's medical providers, including her

unwillingness to renew Riverdale's permission to speak to Dr. Ehrreich or obtain records from him.

25. In addition, Mother's version of Dr. Ehrreich's view was apparently never expressed to anyone prior to her testimony at hearing. She never informed Student's IEP team that anyone thought Student should not be assessed at all. Her testimony suggested that Dr. Ehrreich acted unprofessionally and contrary to the interest of his patient in telling Riverdale one thing and saying the opposite to Mother. Most importantly, if Dr. Ehrreich said that Student should not be assessed, it is implausible that Mother and Father would now approve of assessing Student in the home. To be consistent with Dr. Ehrreich's alleged advice, they would instead believe he should not be assessed at all. The preponderance of evidence therefore supported the conclusion that Dr. Ehrreich believes that assessment of Student is appropriate and desirable.

MR. UNDERWOOD

26. Student's older sister testified that Parents and "the doctors" feel that it is in Student's best interest to do the assessments at home because that is where he is most comfortable and would be able to do his best. Asked what "doctors" she was referring to, she stated that she went to most of Student's therapy sessions with a "Dr. Underwood." According to her, Dr. Underwood did not directly say Student should not be assessed outside of the home, but he did say that if Student is brought for assessment to a place where he is not comfortable, he will not relax and all the progress made with him so far would be lost.

27. Scott Underwood was a licensed clinical social worker who worked for Fresno County's Behavioral Health Services and provided counseling to Student for his anxiety between December 2014 and February 2015. Pursuant to written permission from Parents in December 2014, Janelle Martin, the school psychologist who assessed Student in 2015, obtained progress notes from Mr. Underwood and summarized them

in her March 2015 assessment report. Riverdale's permission to obtain information from County Behavioral Health lapsed in December 2015 and Parents have been unwilling to renew it. Nothing in the record suggests that Mr. Underwood has seen Student more recently than 2015.

28. The preponderance of evidence did not show that there is a medical or disability-related reason to assess Student only in the home.

Student's Ability to Undergo Assessment Outside the Home and Without Parents' Presence

29. Riverdale successfully assessed Student away from his home in 2015, though Parents played an active part in those assessments. Ms. Martin assessed Student for intellectual development, social/emotional status and adaptive behavior. She has a pupil personnel services credential with an advanced specialization in school psychology, and has worked as a school psychologist since 2003. She or someone similarly qualified will conduct the psychoeducational portion of Student's upcoming assessments if allowed.

30. In 2015, Parents declined to permit Ms. Martin's psychoeducational assessment to proceed in her office unless one parent was present. About two thirds of the way through the Comprehensive Test of Nonverbal Intelligence, Second Edition, Student developed a facial tic. He said he could continue, but Father (who was in the room) said he was too anxious, put a towel over Student's head, and stopped the testing. Ms. Martin concluded the test the next day with Mother in the next room. Student was able to cooperate with the testing, and he and Ms. Martin developed and maintained a good rapport. Ms. Martin successfully completed two standardized test measures and interviews of Student and Parents, reviewed his files, and produced a thorough report.

31. Richard Arieas successfully assessed Student for academic skills in 2015 in

a conference room at Riverdale's district office. Mr. Arieas was credentialed as a resource specialist program teacher, which required a special education teaching credential or a clinical services credential with a special class authorization, and at least three years of experience. (See Ed. Code, § 56362, subd. (b).) Mr. Arieas or an equivalently credentialed resource specialist will conduct the academic portion of Student's assessments if allowed.

32. Student was anxious during Mr. Arieas's 2015 academic testing. Parents declined to leave Student alone in the room with him. When testing began, however, Student became more relaxed, and Mr. Arieas successfully administered the Kaufman Test of Educational Achievement, Level II. Mr. Arieas reported that Student "tried his best throughout the assessment and he did exceptionally well." The only time Student's anxiety rose was when he could hear Mother talking to someone in the hallway; when the talking stopped, he became calm again. Mr. Arieas produced a complete report.

33. Mary Maddox is the speech and language pathologist who successfully assessed Student for speech and language needs in 2015. She or someone similarly credentialed will do so again if allowed. Ms. Maddox has worked as a speech and language pathologist for the Fresno County Office of Education since 1982. She assessed Student at school, with Mother sitting in the back of the room behind Student. Student was agitated when Ms. Maddox and Mother discussed his behaviors in his presence, but during Ms. Maddox's testing he was friendly and cooperative, answering questions without difficulty and behaving well. He became anxious again only when Mother joined them at their table after the assessment had been completed. Ms. Maddox was able to produce a complete report.

34. Myrna Wilson successfully assessed Student for occupational therapy needs in 2015, and she or someone similarly qualified will do so again if allowed. Ms. Wilson is certified as an occupational therapist by the California Board of Occupational

Therapy and has been employed since 2010 by the private Goodfellow Occupational Therapy practice in Fresno. By contract, she provides occupational therapy services to Riverdale, among other school districts.

35. Ms. Wilson assessed Student in 2015 in a conference room at his elementary school. She was alone with him, though Mother was outside the door. Student stated at the outset that he was shaky, but as the assessment proceeded, Ms. Wilson did not notice any shakiness. Student was friendly and cooperative, and transitioned from one part of the testing to another without difficulty. Ms. Wilson observed his fine and gross motor abilities, interviewed Mother and administered two standardized tests. She reported that Student “tried everything asked of him to the best of his abilities” and produced accurate scores.

36. Three of the assessors who assessed Student in 2015, and are likely to assess him again this year if permitted, stated at hearing their professional opinions that doing all of the assessments in Student’s home might skew some of the results. All three stressed that they needed the flexibility to decide for themselves which portions, if any, would be conducted in the home and which portions would be conducted elsewhere. Ms. Martin added that while she was willing to do some of her observations in the home, she could not measure Student’s school anxiety there, and Riverdale needs to know how, or if, Student can interact with peers at school. In addition, she believed that a student can be easily distracted at home, and Parents’ presence could potentially interfere. Ms. Wilson had done home assessments in the past, and had noticed that often a child will perform in the home according to parents’ expectations of him. She believed it would be better to assess Student in a neutral environment, where she would get a clearer picture of his true skills. Ms. Maddox would prefer to assess Student in an environment in which she would be more in control than in the home. In her experience, students can act differently at home because they know that someone could come in at

any time.

37. Each of those three assessors described at hearing her familiarity with assessing anxious students and her methods for reducing and coping with that anxiety.

38. Mr. Moore spoke to Trish Small, the County's lead school psychologist who will select the ERMHS consultant, about the possible location of that office's interactions with Student. Ms. Small advised him that it was not a good idea to conduct the entire assessment in the home; some data could be misleading if obtained there. Parents did not introduce any evidence in rebuttal to these professional opinions.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA²

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 et seq. (2006);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 FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further 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 Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

³ All subsequent references to the Code of Federal Regulations are to the 2006 version.

2. A FAPE means appropriate special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central Sch. Dist. 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.

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 in *Endrew F.* 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 the student in *Endrew F.*, 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.)

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), (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) 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].) By this standard, Riverdale had the burden of proof.

ISSUE NO. 1: MAY RIVERDALE CONDUCT STUDENT'S TRIENNIAL RE-EVALUATION PURSUANT TO THE MAY 23, 2017 ASSESSMENT PLAN WITHOUT PARENTAL CONSENT?

6. Reassessment of a student eligible for special education must be conducted 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).)

7. 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 to the parents a reassessment plan. (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 parents' 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, that conditions warrant reassessment, or that the student's parent or teacher has requested reassessment. (Ed. Code, § 56381, subd. (a).)

8. 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 their consent. (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).)

The assessment plan was legally compliant, and parents received proper notice of it but did not consent to it

9. The evidence showed that Riverdale provided Parents an assessment plan in English and Spanish dated May 23, 2017, that complied with the above requirements, and sent it to Parents by mail and hand delivery on May 25, 2017, accompanied by a notice of procedural safeguards. Parents received it that same day. Parents have had more than 15 days to review, sign and return it but have not done so.

More than three years have passed since Student's last triennial review

10. Student's last triennial review was in March 2015. Another should have occurred in March 2018, but Riverdale could not conduct it for lack of current assessment information about Student.

Conditions warrant reassessment of student

11. The evidence showed that conditions warrant reassessment of Student in the areas proposed by the May 23, 2017 assessment plan. Riverdale has not seen Student in a classroom since December 2014, save for two hours in August 2015. He has not been assessed since February or March 2015. He has no grades on classwork or teacher-supervised assignments since December 2014, nor is there any information more recent than 2014 about his classroom behavior, functional skills, or health. His

ability to interact with peers is unknown. Parents assert he is ill and has suffered a stroke, but have for the most part not permitted Riverdale to obtain current medical information about him.

12. Reassessment is also warranted to resolve disputes between Riverdale and Parents about Student's condition. Parents assert that Student cannot attend school, but no medical information made available to Riverdale has explained this claim. Parents assert that Student is so intolerant of noise he cannot sit in a classroom, yet Riverdale staff have twice seen him at the annual rodeo, a crowded noisy event. Parents assert that Student has no psychological difficulties, but he has diagnoses of anxiety, attention deficit hyperactivity disorder and obsessive compulsive disorder. Dr. Ehrreich told Mr. Moore that Student shouts out compulsively, sometimes runs out of the house, engages in compulsive behaviors and talks to himself.

13. Parents do not argue that conditions do not warrant assessment of Student.

No reliable professional opinion supported parents' claim that student must be assessed at home

14. The evidence showed that while Parents believe Student can only be assessed in the home, that belief is not supported by any medical or professional opinion available to Riverdale or to the ALJ. Dr. Montana thought in 2015 that Student could be successfully assessed at school, and events proved that judgment correct. The weight of evidence showed that Dr. Ehrreich supported assessing Student and did not opine that it had to be done at home. Mr. Underwood's 2015 opinion was not that assessment should be done in the home; it was only that it should be done in some place where Student was comfortable.

15. The testimony of Student's 2015 assessors showed that Student was sufficiently comfortable then to be successfully assessed at school or in the district

office. The preponderance of evidence did not show that he now needs to be assessed at home. Instead it showed that there are sound professional reasons for the assessors to decide, in their best professional judgments, which parts of the assessments may be conducted in the home and which parts should be conducted elsewhere.

Parents who desire special education for their child must allow the school district to reassess and may not place conditions on its reassessments

16. Parents who want their child to receive special education and related services must allow the school district to reassess if conditions warrant it. In *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315, the court stated that "if the parents want [their child] to receive special education under the Act, they are obliged to permit such testing." (See also *Patricia P. v. Board of Educ. of Oak Park and River Forest High Sch. Dist. No. 200* (7th Cir. 2000) 203 F.3d 462, 468; *Johnson v. Duneland Sch. Corp.* (7th Cir. 1996) 92 F.3d 554, 557-558.) In *Andress v. Cleveland Independent Sch. Dist.* (5th Cir. 1995) 64 F.3d 176, 179, the court concluded: "[T]here is no exception to the rule that a school district has a right to test a student itself in order to evaluate or reevaluate the student's eligibility under IDEA."⁴

17. As long as the statutory requirements for assessments are satisfied, parents may not put conditions on assessments. "[S]election of particular testing or evaluation instruments is left to the discretion of State and local educational authorities." (*Letter to Anonymous* (OSEP 1993) 20 IDELR 542.) Moreover, the right to assess belongs to the school district; parents have no right to insist on particular assessors or on outside assessors. (See, e.g., *Andress v. Cleveland Independent Sch.*

⁴ In California, a district may not reassess within a year of a previous assessment without parental consent. (Ed. Code, § 56381, subd. (a)(2).) More than a year has passed since Riverdale has administered any assessment to Student.

Dist., supra, 64 F.3d at p. 179; *G.J. v. Muscogee County Sch. Dist.* (M.D. Ga. 2010) 704 F.Supp.2d 1299, 1309, *affd.* (11th Cir. 2012) 668 F.3d 1258.) If Parents disagree with an assessment conducted by a school district, they have the right, under certain circumstances, to obtain an independent educational evaluation at district expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1), (b)(1); Ed. Code, §§ 56329, subd. (b); 56506, subd. (c).) They may also decline to consent to any IEP offer based on the district's assessments. (20 U.S.C. § 1414(a)(1)(D)(II); Ed. Code, § 56346, subd. (a).)

18. Nor does special education law allow parents to impose other conditions on the conduct of assessments. In *Student R.A. v. West Contra Costa Unified Sch. Dist.* (N.D. Cal., Aug. 17, 2015, Case No. 14-cv-0931-PJH) 2015 WL 4914795 [nonpub. opn.], for example, a parent refused to allow an assessment of her child without a one-way mirror and an audio feed through which she could see and hear the assessment as it took place. The school district believed this would interfere with the accuracy of the results. (*Id.* at p. 5.) The District Court agreed with an ALJ's holding that the demand to observe the assessments amounted to the imposition of improper conditions or restrictions on the assessments, and that the District had no obligation to accept or accommodate those conditions. It held that the parent's refusal to proceed without the right to see and hear the assessment amounted to the withdrawal of consent for the assessment. (*Id.* at p. 13.) The Ninth Circuit affirmed, agreeing with the ALJ and the District Court that the parent could not impose such a condition on the assessment. (*R.A. v. West Contra Costa Sch. Dist.* (9th Cir. 2017) 696 Fed.Appx. 171, 172 [nonpub. opn.].)

19. In *G.J. v. Muskogee Cty. Sch. Dist., supra*, 704 F.Supp.2d 1299, parents attempted to impose a wide variety of conditions on district assessments, including that a parent had to be present at the assessment, parents had to approve each test instrument, and that assessors had to meet with parents before and after assessments to

discuss the results. The District Court held that these conditions constituted a refusal to consent to the assessment (*id.* at p. 1309) and the Eleventh Circuit agreed. (*G.J. v. Muskogee Cty. Sch. Dist.*, *supra*, 668 F.3d at pp. 1264-1265.; see also *Haowen Z. v. Poway Unified Sch. Dist.* (S.D.Cal., Aug. 14, 2013, Case No. 13–CV–1589–JM (BLM)) (Order Denying Motion for Preliminary Injunction), 2013 WL 4401673, p. 5; Letter to Anonymous, *supra.*) Parents may not, therefore, lawfully insist that Riverdale conduct the proposed assessments at their home.

20. Riverdale proved at hearing that Student’s triennial review is overdue, and that conditions warrant reassessment of Student according to the May 23, 2017 assessment plan. Riverdale will be allowed to proceed with the assessments in the absence of parental consent.

ISSUE NO. 2: MAY RIVERDALE REFER STUDENT TO THE FRESNO COUNTY SUPERINTENDENT OF SCHOOLS FOR AN EDUCATIONALLY RELATED MENTAL HEALTH SERVICES (ERMHS) CONSULTATION IN CONJUNCTION WITH STUDENT’S TRIENNIAL RE-EVALUATION, AND MAY THE SUPERINTENDENT’S OFFICE PROCEED WITH THE ERMHS ASSESSMENT WITHOUT PARENTAL CONSENT?

21. The evidence showed that the Fresno County Superintendent of Schools is Riverdale’s provider of ERMHS-related support. Riverdale must provide psychological support to Student as a related service if he needs it. (20 U.S.C. § 1401(9), (26)(A); 34 C.F.R. §§ 300.17, 300.34(a); Ed. Code, § 56363, subds. (a), (b)(10).)

22. The evidence showed that an ERMHS consultation for Student is needed because he probably needs psychological services, and the Superintendent’s Office may be involved in the delivery of those services. Dr. Artacho, Dr. Ehrreich and Parents all describe his anxiety – a psychological condition – as the principal reason he needs to be educated at home. In addition, the parties dispute Student’s ability to control his behavior in a classroom and the extent of his ability to interact with peers. Riverdale will

therefore be allowed to refer Student to the Superintendent's Office for an ERMHS consultation, and the Superintendent's Office will be allowed to proceed with it.

ISSUE NO. 3: IS RIVERDALE ENTITLED TO A RELEASE OF INFORMATION SIGNED BY PARENTS AUTHORIZING RIVERDALE TO COMMUNICATE WITH DR. ISABELO ARTACHO AND A MEDICAL DOCTOR FROM ADVENTIST HEALTH?

23. An ALJ may order parents to authorize a school district to obtain information from the student's medical providers in an appropriate case, over their objection that it would intrude on the child's right to privacy. (*Oconee County Sch. Dist. v. A.B.* (M.D. Ga., July 1, 2015, No. 3:14-CV-72 (CDL)), -- F.Supp.3d --, 2015 WL 4041297, pp. 8-9; see also *Shelby S v. Conroe Ind. Sch. Dist.* (5th Cir. 2006) 454 F.3d 450, 454-455, cert. denied, (2007) 549 U.S. 1111 [hearing officer may order medical examination of student in aid of assessment over parents' objection].)

24. Riverdale must base its IEP decisions about Student on a wide variety of data identified by statute in order to determine his educational needs. (20 U.S.C. § 1414(c)(1), (2).) Its assessors must use a variety of tools and strategies to obtain "relevant functional, developmental and academic information" that may assist the IEP team in the content of the student's program. (20 U.S.C. § 1414(b)(2)(A).) An assessor's report must contain "educationally relevant health and development, and medical findings . . ." (Ed. Code, § 56327, subd. (e).) A developmental history must be obtained when appropriate (Ed. Code, § 56320, subd. (f)), and such a history is appropriate in this case. Since Student has not been in school since December 2014, almost all the information about his current condition is controlled by Parents and possessed by them and their medical providers. Access to information from Dr. Artacho and his treating physician at Adventist Health will be indispensable to Riverdale's assessments and to the ERMHS consultation.

25. The evidence showed that Dr. Artacho is Student's principal medical

provider at present, and that Student is also being seen by a physician at Adventist Health. Dr. Artacho and Adventist Health possess medical and other information about Student's disabling conditions that is likely to be essential to the creation of a legally compliant educational program for him. In addition, Parents assert that Student has several serious health problems which interfere with his ability to attend school, and Riverdale proposes to assess Student's general health. If Parents desires Student's special education and related services to continue, they must execute appropriate releases so that Riverdale may obtain current medical, developmental, functional and other relevant information from these providers.

26. In their closing argument, Parents reiterate that they do not understand why Riverdale will not accept their judgment and the judgment of their doctors that Student needs home hospital instruction. The reason is two-fold. First, Riverdale has not for the most part been able to communicate with Student's doctors because Parents will not authorize the needed exchange of information, so it does not know the grounds for his doctors' recommendations. Second, the decision whether Student needs home hospital instruction must by law be made by the entire IEP team, acting on adequate information. (20 U.S.C. § 1414(c)(1), (2); Cal. Code Regs., tit. 5, § 3051.4, subd. (a).) The law does not permit Riverdale to delegate its judgment about Student's appropriate program to Parents and their doctors, no matter how correct they may be. Nor are Student's doctors necessarily aware of such matters as the resources available to Riverdale, the nature of home hospital instruction, or the legal necessity of educating Student in the least restrictive environment. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a); Ed. Code, § 56040.1.)

27. The results of the assessments authorized here may well support Parents' view and may show that Student requires home hospital instruction. By cooperating with the assessment process, Parents would not be agreeing that Student does not need

home instruction. They are free to argue for home instruction at the IEP team meeting that will follow the assessments, and the assessments may equip them with persuasive reasons in support of that argument. But the law requires all the members of Student's IEP team to come to an informed judgment about Student's program on their own; it does not permit them simply to delegate that judgment to others.

ORDER

1. Riverdale may reassess Student according to its May 23, 2017 assessment plan without Parents' consent.

2. Riverdale may conduct all or portions of its assessments at school, in the district office, or in similar locations if, in the sole judgment of Riverdale's assessors, assessment in those settings is wise. Nothing in this Order is intended to prevent Riverdale's assessors or representatives of the Superintendent's Office from conducting some or all of their assessments or observations in the family home or in the presence of Parents if, in the sole judgment of the assessors or observers, such a setting is appropriate.

3. Riverdale shall promptly notify Parents in writing of the days, times, and places Parents are to present Student for assessment, and Parents shall reasonably cooperate in presenting him for assessment on those days and times and in those places. If Student is unable to appear for assessment on any day during the assessments, by reason of illness or other such cause unrelated to the parties' disputes, Parent shall promptly communicate this fact to Riverdale and the parties shall mutually agree on days and times for the assessments to be conducted that are no more than 30 days from the dates that Riverdale originally proposed. Any delay by Parents beyond the schedules set by Riverdale or the Superintendent's Office will toll the 60-day timeline for assessment, report and IEP team consideration.

4. Parents shall not attempt to attach any conditions to the manner in which

Riverdale's assessments are conducted, including but not limited to conditions concerning the location of all or part of any assessment, the presence of one or both Parents or one or more of Student's siblings during an assessment, the methods used in an assessment, or the identity or qualifications of the person conducting an assessment.

5. Riverdale may refer Student to the Office of the Fresno Superintendent of Schools for an ERMHS consultation in conjunction with its triennial review. The Superintendent's Office may proceed with that consultation, including but not limited to observations, record review and interviews, and Parents shall not attempt to attach any conditions to the manner in which that consultation is conducted.

6. Parents shall timely complete, sign and return any documents reasonably requested by Riverdale as a part of its assessments or by the Superintendent's Office as part of its consultation. This obligation includes documents authorizing the exchange of documentary and oral information about Student's condition from January 1, 2015 to the present 1) between Riverdale or the Superintendent's Office and Dr. Isabelo Artacho; and 2) between Riverdale or the Superintendent's Office and Student's regular treating physician at Adventist Health. These documents shall allow direct contact by Riverdale and the Superintendent's Office with those physicians and shall not be limited to contact through the staffs of those physicians. This obligation includes parental authorization for the referral by Riverdale to the Superintendent's Office for the ERMHS consultation. It also includes the timely completion, signing and return of any documents reasonably requested by Riverdale or the Superintendent's Office related to the substance of their assessments or consultation such as questionnaires, parent information or input forms and rating scales.

7. If Parents do not present Student for assessment as required above, or do not timely complete, sign and return any documents as required above, Riverdale will not be obligated to provide special education and related services to Student, or

otherwise to accord Student the rights of a special education student, until such time as Parents comply with this Order and Riverdale has had a reasonable time to assess Student and make an IEP offer that is informed by the assessment results.

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. Riverdale prevailed on the three issues 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: June 14, 2018

_____/s/_____
CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings