

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

VISTA UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2018010196

DECISION

Vista Unified School District filed a due process hearing request with the Office of Administrative Hearings on January 5, 2018, naming Parents on behalf of Student. OAH continued this matter on January 23, 2018.

Administrative Law Judge Linda Johnson heard this matter in Vista, California, on February 22, 2018.

Student and his mother attended the first few minutes of the hearing, but chose not stay and participate. A Spanish interpreter was present to interpret for Parents. Student's father did not attend the hearing.

Sarah Orloff and Tiffany Santos, Attorneys at Law, represented District. Rebecca Nobriga, District's Interim Executive Director of Special Education, attended the first hour of the hearing on behalf of District.

At District's request, OAH continued this matter to March 8, 2018, for closing

briefs. Student did not submit a written closing brief.¹ The record closed on March 8, 2018, upon receipt of District's written closing brief.

ISSUE

Is District entitled to conduct the assessments on Student proposed in the September 25, 2017 assessment plan, absent parental consent?

SUMMARY OF DECISION

District met its burden of proof as to its right and legal obligation to assess Student in the areas of academic achievement, health, and social-emotional behavior. District's assessment plan was appropriate, its proposed assessors qualified, and the assessments necessary to obtain information regarding Student's present levels of academic achievement, educational needs, and required supports and services. District may assess Student pursuant to its September 25, 2017 proposed assessment plan without parental consent.

FACTUAL FINDINGS

1. At the time of the hearing Student was a 16-year-old male who resided with his parents within District's boundaries. Student was eligible for special education under the categories of specific learning disability and other health impairment.

2. Student attended school in District since kindergarten and has qualified for special education services since 2010. Student is bilingual in English and Spanish, but Spanish is the primary language spoken at home.

¹ On February 23, 2018, OAH notified Parents of the timeline for the closing briefs via written order translated into Spanish.

PREVIOUS ASSESSMENTS

3. District conducted a triennial psychoeducational assessment on March 25, 2016, when Student was in ninth grade. District assessed Student in the areas of health, academics, and social-emotional behavior as part of its continuing obligation to provide Student with a free appropriate public education.

Health

4. District conducted a health assessment that indicated Student did not have any significant illnesses, injuries, or hospitalizations. Student had 20/20 vision and passed the hearing test.

Academic Achievement

5. To determine Student's current level of academic functioning District conducted the Wechsler Intelligence Scale for Children, Version Five; the Beery Test of Visual-Motor Integration; the Test of Auditory Processing Skills, Version Three; the Test of Visual Perceptual Skills, Third Edition; and the Woodcock-Johnson Test of Achievement, Version Four. District determined that Student had average ability with processing deficits in auditory memory and attention. Based on the assessments, Student continued to meet the eligibility criteria for a specific learning disability.

Social-Emotional Behavior

6. District assessed Student's social-emotional functioning and behavior by conducting the Behavior Assessment Scale for Children, Second Edition; observing Student in class, and speaking with teachers. District concluded that Student was quiet and well-behaved at school.

7. During observations Student sat near the front of the class, had his materials on his desk, and spoke to other students in class.

IEP TEAM MEETINGS MARCH 2017

8. Student's individualized education program team attempted to meet on March 1, 2017, to review Student's progress and update the IEP. However, Student's Parents did not attend so District rescheduled the meeting. The IEP team reconvened on March 17, 2017; however, Parents again did not attend. The IEP team rescheduled the meeting for March 24, 2017, and at that time convened the meeting without Parents. Student was making progress in the classroom and did not require one to one support.

2017-2018 SCHOOL YEAR TEACHER OBSERVATIONS

9. Brooke Wiestling, Student's math teacher, saw a very different student than the one presented in the March 25, 2016 assessment. Ms. Wiestling has a bachelor's degree in mathematics, a single subject teaching credential in mathematics with an English learner authorization, and four years of teaching experience with District.

10. In Ms. Wiestling's math class Student sat toward the back of the room and off to one side. Ms. Wiestling tried to move Student toward the front of the class and pair him with peers, however, Student always requested to move to the back of the class. Most days Student needed significant prompting to get materials out, to take notes, or work on problems. Student rarely spoke to peers, even when placed in a group. Student only paid attention for a few minutes during a 50 minute class. Student was more withdrawn than other students in Ms. Wiestling's class, and fell asleep more often. Student did not take direction well and was failing the class. As a result of Student's withdrawn behavior, lack of friends, and poor grades, Ms. Wiestling believed a new assessment was warranted.

THE SEPTEMBER 25, 2017 PROPOSED ASSESSMENT PLAN AND CORRESPONDENCE

11. On September 1, 2017, Ms. Nobriga sent Parents an IEP team meeting notice, in English and Spanish, for an IEP team meeting on September 21, 2017, via

registered mail and electronic mail. Ms. Nobriga included procedural safeguards in both English and Spanish. Ms. Nobriga has been a supervisor for special education for District since July 2016. Prior to that Ms. Nobriga was a bilingual school psychologist, a program specialist, a district psychologist, and a director of pupil services. Ms. Nobriga has 25 years of experience working in education and has a master's degree in counseling and school psychology from San Diego State University.

12. Parents did not attend the September 21, 2017 IEP team meeting.

13. On September 25, 2017, District's education specialist Loretta Feldt, in conjunction with other IEP team members, developed an assessment plan for Student. Ms. Feldt has been an education specialist for District for 19 years and has conducted more than 100 special education assessments. Ms. Feldt has a bachelor's degree, a multiple subject clear credential, and a moderate to severe education specialist credential. Ms. Feldt has the qualifications and expertise to develop an assessment plan.

14. The September 25, 2017 assessment plan proposed to assess Student in the areas of academic achievement, health, and social-emotional behavior. Ms. Feldt spoke with Student's teachers several times a week to discuss Student's change in behavior. Student appeared lethargic in class and would often put his head down or fall asleep. Student no longer participated in class or completed homework. Student did not appear to have any friends and was no longer participating in extracurricular activities. Consequently, the IEP team determined that a new assessment was warranted because Student's behavior and academic performance had changed significantly.

15. The proposed assessment plan identified the professionals assigned to conduct the assessment for each area. It explained that the tests and procedures to be conducted may include classroom observations, rating scales, interviews, record review, one-on-one testing, or some other types or combination of tests. The proposed assessment plan was written in both English and Spanish. The plan was written clearly

and in terms understandable by the general public. It advised Parents that no educational services would be provided to Student without Parents' written consent.

16. On October 17, 2017, Ms. Feldt emailed the assessment plan and procedural safeguards to Parents. Ms. Feldt sent both documents in English and Spanish and a letter in both languages that explained why District wanted to conduct an assessment.

17. On November 2, 2017, Ms. Feldt emailed Parents, again expressing her concern for Student's lack of progress, and sent an IEP team meeting notice for November 14, 2017. Ms. Feldt sent the email and meeting notice in both English and Spanish and also sent both documents via registered mail.

18. On November 14, 2017, the IEP team convened a meeting; however, Parents did not attend. The team discussed their concerns regarding Student's affect and lack of progress. Student's teachers noticed that he appeared unkempt and withdrawn. District school psychologist Danielle Saltarelli wanted to conduct an assessment to determine what was causing the change in Student's behavior, and to determine any need for counseling services.

19. On November 27, 2017, Ms. Nobriga sent Parents the proposed assessment plan and procedural safeguards in both English and Spanish through regular mail, certified mail, and email. Ms. Nobriga also sent a prior written notice letter that outlined why District wanted to conduct an assessment, and the attempts it had made in meeting with Parents.² Ms. Nobriga gave Parents a deadline of December 15, 2017, to sign and return the assessment plan, otherwise District would file for due process to

² There was a typographical error in Ms. Nobriga's letter; she identified the assessment plan with an incorrect date. District only developed one assessment plan on September 25, 2017.

complete the assessment.

20. In her letter, Ms. Nobriga also explained that District required Parents' consent to assess Student. Parents were invited to contact Ms. Nobriga to schedule an IEP team meeting to discuss the proposed assessments and to address any other questions or concerns they may have. Despite numerous efforts from District, Parents continued to withhold consent to the assessment. Parents have not requested to meet with the IEP team, nor have Parents explained why they have withheld their consent.

QUALIFICATIONS OF PROPOSED ASSESSORS

21. Ms. Saltarelli would conduct the social-emotional behavior portion of the assessment. Ms. Saltarelli is a school psychologist for District; she conducts psychoeducational assessments and prepares corresponding reports, attends IEP team meetings, and provides counseling to students. Ms. Saltarelli has a bachelor's degree, a master's degree in educational psychology, and a pupil personnel services credential authorizing service as a school psychologist. Ms. Saltarelli has seven years of experience as a school psychologist and has conducted over 500 assessments during her career.

22. Ms. Saltarelli met Student, attended two IEP team meetings for him, and reviewed his previous assessment. In conducting the proposed assessment Ms. Saltarelli would administer the Behavior Assessment Scale for Children, the Adolescent Psychopathology Scale, the Milton Adolescent Clinical Inventory, and conduct observations. Ms. Saltarelli would administer the behavior assessment scale to compare the results to the previous assessment, and the clinical inventory would garner insight into how Student thinks and processes information. In reviewing Student's previous assessment, Ms. Saltarelli opined that Student had the ability to pass his classes, but was not currently doing so, nor was he on track to graduate with his class. Ms. Saltarelli does not know what caused the decline in Student's behavior, but believes that an assessment would give the IEP team the insight necessary to propose appropriate goals

to address the withdrawal and provide services.

23. Keri Miller would conduct the health portion of the assessment. Ms. Miller is a credentialed school nurse as well as a registered nurse, and has a master's degree in nursing. Ms. Miller has 17 years of nursing experience, has been a nurse for District for seven years, and has conducted over 300 assessments.

24. Ms. Miller reviewed Student's previous assessment and noted that at that time, Student did not have any health concerns. Student had a history of attention deficit hyper active disorder, but no significant health issues or surgeries. However, Ms. Miller also reviewed Student's health file which listed significant concerns; Student had a pilonidal cyst, had magnetic resonance imaging to look at the cyst, had the cyst removed, and may need to have surgery again. Ms. Miller would conduct a vision and hearing assessment, speak with student, and speak with parents. Ms. Miller believes a new health assessment is necessary because of the change in Student's mood and behavior, and declining grades.

25. Ms. Feldt would conduct the academic achievement portion of the assessment. Ms. Feldt has been aware of Student since the 2016-2017 school year. Although she was not Student's case manager at that time, she consulted with his previous case manager. Ms. Feldt was assigned as Student's case manager for the 2017-2018 school year and frequently discussed Student's academic performance and behavior with his teachers. As discussed above, Ms. Feldt has the experience and qualifications necessary to conduct academic achievement assessments.

26. District established that, because of the change in Student's behavior and academic performance, the previous assessment data was unreliable to develop an appropriate IEP for Student. Assessments were necessary to obtain Student's present levels of functioning and crucial to developing an IEP with appropriate goals and services.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁴ 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 available to them a free and appropriate public education 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. 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 individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed

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

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

under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and 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 and expanded upon its decision in *Rowley*. In *Endrew F. v. Douglas County School District*, the court stated that the IDEA guarantees a FAPE to all students with disabilities by means of an IEP, and that the IEP is required to be reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances. (*Endrew F. v. Douglas County School Dist.* (March 22, 2017, No. 15-827) 580 U.S. ____ [137 S.Ct. 988, 996, 197 L.Ed.2d 335]).

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.) 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).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; *see* 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) By this standard, District had the burden of proof for the issue alleged in this matter.

MAY DISTRICT ASSESS STUDENT PURSUANT TO THE SEPTEMBER 25, 2017 ASSESSMENT PLAN WITHOUT PARENTAL CONSENT?

6. District contends that it has the right and obligation to assess Student pursuant to its September 25, 2017 assessment plan because that plan was presented to Parents and Parents have withheld their consent.

Is Reassessment of Student Warranted?

7. If the educational or related services needs of a child with a disability, including improved academic achievement and functional performance, warrant a reevaluation, the request for a reevaluation can be made by either the parent or a public agency. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

8. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and District agree otherwise, but at least once every three years unless the parent and District agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd.

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

9. If parents do not consent to a reevaluation assessment plan, the district may conduct the reevaluation assessment by showing at a due process hearing that it needs to assess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c); 34 C.F.R. § 300.300(a)(3)(i); Ed. Code, §§ 56321, subd. (c), 56501, subd. (a)(3).)

10. Parents who want their children to receive special education services must allow reassessment by the district. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; *Dubois v. Conn. State Bd. of Ed.* (2d Cir.1984) 727 F.2d 44, 48.)

11. The evidence established that District had good reason to conduct an assessment of Student, even though it had done an assessment just two years prior. Student’s health needs had changed significantly in the two years since District last assessed Student. Student had failed several classes and was no longer on track to graduate; however, his previous assessment showed he had the ability to obtain a high school diploma. Additionally, Student’s behavior suggested he may need additional goals and services in areas which were previously not a concern.

12. Although Student’s last assessments were conducted two years ago, Student’s behavior has changed dramatically. Student is withdrawn, does not participate in class, does not turn in homework, no longer participates in extracurricular activities, and does not appear to have friends. Student also has new health issues that he did not have during the previous assessment.

13. The assessments would provide valuable information as to Student’s present levels of academic achievement, functional performance, and educational needs.

It would allow District to accurately identify the appropriate services, accommodations, and other supports Student needs. Without the assessments, developing an appropriate IEP for Student is impossible. Therefore, District met its burden of persuasion in establishing the need to assess Student.

Is the Assessment Notice Proper?

14. Without an order after a due process hearing, reevaluation assessments require parental consent. (34 C.F.R. § 300.300(c).) To obtain parental consent, the school district must provide proper notice to the student and his or her parent. (20 U.S.C. §§ 1414(b)(1); 1415(b)(3),(c)(1); 34 C.F.R. § 300.304(a); Ed. Code, §§ 56321, subd. (a).) The notice consists of the proposed assessment plan, and a copy of parental procedural rights under the IDEA and related state laws. (Ed. Code, § 56321, subd. (a).) The assessment plan must be in a language easily understood by the public and 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).)

15. District made multiple attempts to obtain Parents' consent to the proposed assessment plan. District attempted to convene an IEP team meeting on September 21, 2017, to discuss its concerns, however, Parents did not attend. Ms. Feldt emailed the proposed assessment plan to Parents on October 17, 2017. District convened another IEP team meeting on November 14, 2017, however, Parents did not attend that meeting either. District sent a second copy of the proposed assessment plan to Parents on November 27, 2017. All correspondence, the assessment plan, and procedural safeguards were provided in English and Spanish. Spanish is Parents' native language. District's correspondences to Parents explained the purpose for the proposed

assessment plan and what information District was hoping to obtain through these assessments. It also explained that District required their consent to assess Student.

16. The proposed assessment plan outlined the areas to be evaluated and identified the titles of the examiners. The plan described the possible tests and procedures that may be conducted. It also explained the information being sought through the evaluation of the various areas. The plan was written clearly and in terms understandable by the general public. The plan was clear in that no special education services would be provided to Student without Parents' written consent. All statutory requirements of notice were met, and the assessment plan itself complied with the applicable statutes.

Will the Proposed Assessment be Conducted by Competent Persons?

17. Reassessments must be conducted by persons competent to perform them, as determined by the local educational agency. (20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c)(1)(iv); Ed. Code, § 56322.) Any psychological assessments of pupils shall be made in accordance with Education Code section 56320 and shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, §§ 56322, 56324, subd. (a).) Similar requirements apply to health examinations, which must be performed by a credentialed school nurse or physician. (Ed. Code, § 56324, subd. (b).)

18. All the assessments proposed by District would be conducted by persons competent to conduct them. Ms. Saltarelli, Ms. Feldt, and Ms. Miller all had the licensure, training, and experience required to conduct assessments. Each assigned assessor maintained the appropriate credentials to conduct their respective evaluations. The plan adequately identified the appropriate assessors qualified to conduct the assessment to which she was assigned.

19. In sum, District proved that the September 25, 2017 assessment plan

complied with all applicable statutory requirements regarding form, function, and notice. District also established that assessments are warranted and its assessors competent to perform them. Therefore, District may assess Student without parental consent.

ORDER

1. District is entitled to assess Student according to the September 25, 2017 assessment plan, without parental consent.

2. District shall notify Parents, within 10 business days of the date of this decision, of the days, times, and locations Parents are to present Student for assessment. Parents shall reasonably cooperate in presenting her for assessment on those days, times and locations.

3. Parents shall timely complete and return any documents reasonably requested by District as a part of the assessments.

4. If Parents do not present Student for assessment as specified above, or do not complete and return documents as specified above, District will not be obligated to provide special education and related services to Student until such time as Parents comply with this Order.

PREVAILING PARTY

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

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: March 22, 2018

_____/s/_____

LINDA JOHNSON

Administrative Law Judge

Office of Administrative Hearings