

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

VISALIA UNIFIED SCHOOL DISTRICT,

v.

PARENT(S) ON BEHALF OF STUDENT.

OAH Case No. 2018020456

DECISION

Visalia Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on February 9, 2018, naming Student.

Administrative Law Judge Tiffany Gilmartin heard this matter in Visalia, California, on March 6, 2018¹.

Amanda Ruiz, Attorney at Law, represented Visalia. Angela Dillon and Kimberly Paz, the directors of special education attended the hearing on behalf of Visalia.

Student's Mother attended the entire hearing and Father attended briefly in the afternoon while caring for Parents' other children. Student attended the hearing until shortly after lunch.

At the conclusion of the hearing, on March 6, 2018, the record was closed and the matter was submitted for decision.

¹ ALJ Cynthia Fritz observed the entire hearing.

ISSUES

May Visalia assess Student in the areas of academic achievement, health, intellectual development, language and speech development, and social and emotional behavior, and review records and conduct observations without parental consent, as proposed in the December 11, 2017 assessment plan?²

SUMMARY OF DECISION

Visalia seeks permission to conduct special education assessments of Student to develop an appropriate individualized education program. Visalia met its burden of proof that its proposed assessments are warranted; that it provided Parents appropriate notice of the proposed assessments; and that it has qualified personnel to conduct the assessments. Therefore, this Decision authorizes Visalia to assess Student pursuant to its December 2017 assessment plan without parental consent.

FACTUAL FINDINGS

1. Student is a 10-year-old boy who has resided within Visalia's jurisdictional boundaries at all relevant times. Since 2010, he has been eligible for special education and related services as a student with a speech and language impairment. At the time of hearing he was attending fifth grade at his home school, which is Mineral King Elementary School. He was last assessed in 2013.

2. Although no findings were based on the ALJ's personal observations of Student it was established Student is a nice, hard-working, well-behaved boy. He has many friends at school and is well-liked. He lives with Parents and younger siblings in Visalia.

² At the outset of the hearing, Visalia withdrew its request to assess Student in the area of adaptive behavior skills.

3. Mother participated in the due process hearing in English. English is Parents' primary language. There was no request for translation services and she did not demonstrate any inability to understand English.

4. An IEP team meeting regarding Student was held on December 11, 2017. Mother was present at the meeting. A member of Student's IEP team presented Mother with a copy of their proposed assessment plan dated December 11, 2017 in English. The assessment plan proposed to have Student assessed by an education specialist in academic achievement. Student's health assessment would be performed by the school nurse. Student would be assessed by a school psychologist in intellectual development and social/emotional behavior. A Visalia speech and language pathologist would assess Student in language/speech communication development. The assessment plan provided an overview of the types of assessments used such as rating scales, one-on-one testing, and classroom observations of Student.

5. Mother was concerned about Student being separated from his peers as a result of the proposed assessments. Mother requested an opportunity to review the proposed assessments and IEP with her husband before consenting to them. Director of Special Education Angela Dillon agreed the team would finalize the changes to the draft IEP and mail a copy of the draft IEP and proposed assessment plan to Parents. Parents have not consented to the assessment plan.

6. Ms. Dillon, who testified at this hearing, was familiar with Student. Ms. Dillon holds a Tier I and Tier II Administrative Services Credential, a mild/moderate disabilities special education teaching credential, and a master's degree in curriculum and teaching. Ms. Dillon's testimony was thoughtful and thorough and consistent with the documentary evidence. Her testimony was given substantial weight.

7. Ms. Dillon concluded that new assessments of Student were necessary to help Visalia gain a comprehensive view of Student's academic needs. His last assessment

was previously conducted in 2013 and he was due for a triennial assessment in 2016. Student failed a district vision exam in September 2017; therefore, Visalia reasonably concluded that a school nurse should investigate any potential hearing or vision problems Student may have that could be adversely impacting his ability to access his curriculum. Also, by addressing any hearing or vision issues at the outset, Visalia's assessment process would be more accurate.

8. Visalia proposed administering the Weschler Individual Achievement Test, Third Edition to determine his academic needs. This assessment was normed for Student's age; was not culturally, racially or sexually discriminatory; and valid. Ms. Dillon plans to assign an educational specialist or a teacher on special assignment, who was a credentialed faculty member, and had embedded training through their credentialing program to provide the assessment. Further, Visalia provided additional in-service training to their educational specialist personnel in conducting this assessment.

9. Student's fifth grade teacher, Beverly Wells, who testified at this hearing, observed Student was performing academically below grade level in math and reading about a month into the 2017-2018 school year. Ms. Wells was knowledgeable of Student's educational needs and academic performance as she saw him daily in her classroom. The first month of school was primarily a review of fourth grade material. Student retained many of the skills he learned in the previous years. However, as the academic year progressed, he failed to keep pace. His academic struggles were especially apparent when Ms. Wells listened to him read aloud. Ms. Wells was reasonably concerned about Student's inability to perform at grade level. Ms. Wells started working for Visalia in 1985. She holds a multiple subjects credential from California State University, Sacramento. She has a master of arts in elementary education and a holds a preliminary administrative services credential from California State University, Fresno. As an experienced elementary school teacher and his current fifth

grade teacher, her testimony was given significant weight.

10. Ms. Wells reasonably concluded after reviewing Student's benchmark scores on his Scholastic Reading Inventory and the Standardized Testing and Reporting assessments coupled with her informal classroom observations, Student likely needed additional academic support. Thus, Visalia sought to assess student in the area of academics because he was falling behind his peers and struggling with the classwork.

11. The extent of which Student could comprehend information presented in the classroom was unknown; therefore, Ms. Dillon reasonably concluded current assessment data regarding Student's phonological and language processing skills was required. To that end, Visalia proposed Student be assessed in this area using the Comprehensive Test of Phonological Processing which assesses Student's phonological processing; the Test of Auditory Processing Skills, which was used to assess how he comprehends what he hears; and, the Motor Free Visual Perception test to determine how well Student can comprehend what he saw. These assessments were normed for Student's age; not culturally, racially or sexually discriminatory; and are valid.

12. Yolanda Prado-Gonzalez was the school psychologist assigned to Mineral King Elementary and she also testified at the hearing. Ms. Prado-Gonzalez has worked for Visalia for 14 years. Her duties include conducting psychological evaluations to identify students for special education, conducting functional behavior assessments, and providing consultation to school staff in areas of academic and social/emotional needs, and participate in student support team meetings, section 504 meetings, and IEP meetings. Ms. Prado- Gonzalez held a master's degree in social work from California State University, Fresno. She holds a credential in pupil personnel services in school psychology and a preliminary administrative services credential. She has held a Licensed Educational Psychologist certificate since 2014. Ms. Prado-Gonzalez's testimony and her knowledge of the testing protocols was thorough. Her testimony was given significant

weight.

13. As the school psychologist assigned to Student's school, Ms. Prado-Gonzalez was familiar with all Students who receive special education at the school. Ms. Prado-Gonzalez was aware Student struggled academically. She reviewed Student's case history since he was first found eligible for special education in 2010. Ms. Prado-Gonzalez did not participate in the formulation of the assessment plan presented to parents in December 2017.

14. The plan proposed a school psychologist like Ms. Prado-Gonzalez would administer the assessments in intellectual development and social/emotional behavior. Ms. Prado-Gonzalez detailed the three proposed tests a school psychologist would administer to Student included the Weschler Intelligence Scale for Children; Fifth Edition, the Behavior Assessment for Children; Third Edition, and the Comprehensive Test for Phonological Processing, Second Edition. Ms. Prado-Gonzalez received extensive training in assessment administration through the pupil personnel services credentialing program she completed. She administered the Weschler and Behavior Assessment for Children more than 100 times. The Comprehensive Test for Phonological Processing is a new test for Visalia and she has administered it approximately 10 times.

15. Through his IEP, Student received speech and language services. He met twice per week with Rachel Reher, a speech and language pathologist at Visalia. Ms. Reher testified at this hearing. Ms. Reher's testimony provided insight into Student's current needs and appropriateness of assessing student. Her testimony is given significant weight. Speech and language remains an issue for Student. He was able to understand simple directions, identify nouns and verbs, and comprehend simple questions. However, Student has difficulty with more complex, multi-step language such as understanding inferences and figurative language. He also displays difficulty in creating grammatically correct sentences beyond three to five words. When the

breakdown occurs, he displays incorrect verb tenses and word order errors.

16. Ms. Reher started working with Student in August 2017. As the Student's speech and language pathologist, she explained she will likely administer his speech and language assessment. For eight years Ms. Reher has worked as a licensed speech-language clinician in California. Ms. Reher's clinical experience began in August of 2008 as a graduate clinical student at the speech-language hearing clinic at Fresno State. She later held a graduate externship at Kaweah Delta District Hospital in 2009 and a graduate internship at Pinkham Elementary School in 2010. She did a clinical fellowship year in 2010-2011. She first worked for Visalia in 2011. She returned to Visalia full time in August 2017.

17. One of the proposed assessments Ms. Reher testified she will likely administer to Student was the Goldman-Fristoe Test of Articulation, 3 as an overall speech assessment. Ms. Reher also proposed using the Comprehensive Assessment of Spoken Language. Finally, she proposed Student be assessed with the Receptive and Expressive One-Word Picture Vocabulary Test. These tests are racially, culturally, and sexually non-discriminatory. She's administered these tests approximately 20-50 times over the course of her career.

18. In Ms. Reher's time working with Student he demonstrated some growth. However, he still struggles in areas that could be supported. The speech and language assessments are necessary to determine Student's present levels, his continued eligibility, and to allow the team to recommend new goals for him.

19. Ms. Reher enjoys working with Student. He works hard, is well-behaved, and gets along well with other students. She believes he would benefit from the speech and language assessment.

PRIOR WRITTEN NOTICE OF DECEMBER 19, 2017

20. After the December 2017 IEP team meeting, Ms. Dillon sent Parents a prior

written notice on December 19, 2017 via regular and certified mail. Included in the mailing was among other things, parent procedural safeguard notices, another copy of the proposed December 2017 assessment plan, and an IEP amendment team meeting notice for January 9, 2018.

21. Visalia reconvened the Student's IEP team meeting on January 9, 2018. Ms. Dillon reviewed Student's proposed assessment plan with Mother and Student. Mother remained concerned about Student's social development and was fearful seeking supports would open Student to ridicule. Mother requested more time to discuss the matter with her husband.

22. Visalia filed for due process on February 9, 2018 as it had not received Parental consent to assess Student pursuant to the December 2017 assessment plan. As of hearing, Parents still had not provided consent to assess Student.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

1. This hearing was held under the Individuals with Disabilities Education Act (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 appropriate public education that emphasizes special education and related services designed to meet their unique

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.

needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. 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).)

Burden of Proof

3. 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].) In the instant case, Visalia, as the complaining party bears the burden of proof.

reassessment Requirements

4. 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 request 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).)

5. Reassessments generally require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, §56381, subd. (f)(1).) If the parents do not consent to a proposed reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(a)(3)(i), (c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) A district may also file for due process, “for example, if they wish to change an existing IEP but the parents do not consent, or if parents refuse to allow their child to be evaluated.” (*Schaffer v. Weast, supra*, 546 U.S. 49, 53.) 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.)

6. Visalia’s request to assess Student is warranted. Student is currently eligible for special education and related services. Student has not been assessed since 2013. The Visalia members of Student’s IEP team established that changes may be necessary to Student’s IEP. The evidence further established that to propose changes, Student’s IEP team requires current assessment information to determine his educational and related service needs. Student is now a fifth grader and the data representing Student’s most up-to-date data is outdated.

Notice Requirements

7. To obtain parental consent for a reassessment, the school district must provide proper notice to the student and his parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must: appear in a language easily understood by the public and

the native language of the parent; explain the assessments that the district proposes to conduct; and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parents 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

8. Visalia provided parents multiple copies of the proposed assessment plan. Visalia personally presented Parents with a copy of the assessment plan on December 11, 2017. Mother asked for time to consult with her husband. Visalia complied. Visalia also mailed a copy to Parents along with a prior written notice, parent procedural safeguards, and an IEP meeting notice on December 19, 2017. Mother never responded. Ms. Dillon explained the process to Mother again on January 9, 2018 at the amendment IEP team meeting. Visalia made diligent efforts to obtain Parent's consent to the proposed assessment plan.

9. The proposed assessment plan outlines the areas to be evaluated and identifies the titles of the examiners. The plan describes the possible tests and procedures to be conducted. It also explains the information being sought through the evaluation of the various areas. The plan is written clearly in English and in terms understandable by the general public. The plan is clear in that no special education services will be provided to Student without Parents' written consent. All statutory requirements of notice are met, and the assessment plan itself complies with the applicable statutes.

Visalia has competent personnel to perform assessments

10. 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 tests of intellectual or emotional functioning of students 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).)

11. Visalia has qualified personnel competent to perform the assessments. Visalia will arrange for an educational specialist with the requisite credentialing, training and competence to conduct Student's academic assessment. Further, Visalia presented evidence it has qualified school personnel who met the state licensing, training and experiential requirements to assess Student in more discrete areas such as speech-language, intellectual development, and social/emotional needs. For instance, Ms. Reher is a licensed speech and language pathologist, who holds a master's degree in communication disorders and almost a decade of experience as a speech-language pathologist. Ms. Prado-Gonzalez, the school psychologist, is a credentialed and licensed school psychologist who has administered numerous assessments. The plan adequately identified the appropriate assessors qualified to conduct the assessment to which he or she is assigned. Visalia established that the individuals who testified at the hearing, or equally qualified individuals, will conduct the proposed assessments.

12. Visalia proved that the December 11, 2017 assessment plan complied with all applicable statutory requirements regarding form, function, and notice. Visalia also established that assessments are warranted and its assessors competent.

ORDER

1. Visalia is entitled to assess Student according to the December 11, 2017 assessment plan, without parental consent.

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

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, Visalia 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 26, 2018

_____/s/_____
TIFFANY GILMARTIN
Administrative Law Judge
Office of Administrative Hearings