

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF
CAJON VALLEY UNION SCHOOL DISTRICT,
v.
PARENT ON BEHALF OF STUDENT.
OAH CASE NUMBER 2019070136

DECISION

Cajon Valley Union School District filed a due process hearing request, referred to as the complaint, with the Office of Administrative Hearings, State of California, on July 3, 2019, naming Parent on behalf of Student. The Office of Administrative Hearings is referred to as OAH.

Administrative Law Judge Brian H. Krikorian heard this matter in El Cajon, California, on July 30, 2019. The Administrative Law Judge is referred to as the ALJ.

Attorney Pamela Townsend represented Cajon Valley. Jenine Henry, Assistant Superintendent of Student Services, attended the hearing on behalf of the Cajon Valley. Student was not represented. Parent did not attend the hearing.

At the close of testimony and oral closing argument on July 30, 2019, the ALJ granted a continuance for Cajon Valley to file written closing arguments to be filed with OAH and served on Parent. The record remained open until August 7, 2019. Upon timely receipt of the written closing arguments, the record was closed, and the matter was submitted for decision.

ISSUE

May Cajon Valley conduct a comprehensive initial assessment of Student, pursuant to its April 30, 2019 assessment plan, without Parent's consent?

SUMMARY OF DECISION

Cajon Valley sought authorization from OAH to assess Student to evaluate if he qualifies for special education and related services. Over four school years, Student was working below grade level and exhibited disruptive and violent behavior. These factors caused Cajon Valley to consider assessing Student to determine eligibility under the Individuals with Disabilities Education Act, referred to as the IDEA. Parent did not consent to the assessment plan.

Cajon Valley proved Student's academic performance and behavior in the classroom could be related to a disability, that it complied with the procedural safeguards, and timely sought Parent's consent for Student's evaluation. The fact that Student did not benefit from general education interventions used to address Student's academic and behavioral difficulties reinforced Cajon Valley's suspicion. Therefore, Cajon Valley may assess Student according to the April 30, 2019 assessment plan, without parental consent.

FACTUAL FINDINGS

STUDENT'S EARLY HISTORY AT CAJON VALLEY

Student was a 12-year-old who resided, at all times, within Cajon Valley's boundaries. In the 2015-2016 school year, Student was in second grade at Rancho Elementary School, a district school. Student began to exhibit violent and disruptive behavior during classes, as well as struggled academically. On January 13, 2016, the school convened a Student Success Team meeting. The Student Success Team noted Student was falling behind academically and had difficulty staying on task and attending to work. Student also exhibited deficiencies in impulse control and self-esteem. The Student Success Team created strategies and interventions to assist Student.

Student attended Magnolia Elementary School, a district school, from August

2016 to June 20, 2019. In third grade, Student continued to exhibit behavioral and academic difficulties. Between December of 2016 and May of 2017, Student was suspended numerous times for fighting and striking other students. In addition to the suspensions, there were multiple disciplinary actions taken against Student for disruptive behavior. He continued to fall behind academically and exhibited an inability to stay on task in the classroom.

FOURTH GRADE

Student was in fourth grade in the 2017 to 2018 school year. Sarah Robinson was the principal at Magnolia Elementary since the start of that school year in August of 2017. She held a Professional Clear Administrative Services Credential and Multiple Subject Credential, with authorization for English language arts and social science. In her prior experience as a teacher and assistant principal, implemented individualized education program meetings and oversaw special education services. Individualized education programs are referred to as IEPs.

At the start of the 2017-2018 school year, Ms. Robinson witnessed Student bullying other students. When this escalated to fights with other students, Ms. Robinson contacted Mother and discussed disciplinary options short of suspension. On October 18, 2017, Student agreed to a "no contact" agreement with one particular student and received counseling. Ms. Robinson also directly counseled Student with self-regulation strategies.

One day later, on October 19, 2017, Student violated the "no contact" agreement and was involved in a violent incident with the same student. Ms. Robinson contacted Mother after this incident and implemented a "daily contract." Student's teacher and staff completed the daily contract. The daily contract provided color-coded assessments throughout the day, with "blue" meaning "Doing Awesome!" to "red" meaning "STOP! Unsafe behavior. Sent to Office." Student would receive rewards associated with each

daily contract, as well as consequences for breaking the contract.

The first daily contract was dated October 25, 2019. The daily contract system worked at first. However, within a month, Student's conduct slipped back to being disruptive and violent. Much of his conduct occurred at recess, which created unsafe situations for Student, staff, and other children. Student had a further suspension in October 2017 and continued to exhibit violent, disruptive behavior. This behavior remained consistent throughout Student's attendance at Magnolia Elementary.

On December 5, 2017, in response to Student's ongoing behaviors, Magnolia Elementary School convened another Student Success Team meeting. Mother attended the meeting. The Student Success Team developed an intervention plan that set up procedures to monitor and report progress on goals set for Student at the meeting, including his behavior and academics. The school psychologist also recommended that Student undergo a psychoeducational assessment to determine if additional supports through an IEP would be advisable. The school psychologist prepared an initial assessment plan for Student in the following areas: academic achievement, health, intellectual development, and social-emotional/behavior. Cajon Valley sent Mother an initial assessment plan along with the Notice of Procedural Safeguards in January 2018. Mother declined the assessment in writing and returned the plan on January 22, 2018.

After another violent incident on February 9, 2018, Ms. Robinson was concerned Student was still falling behind academically and wanted him more involved with his school studies. Instead of suspending Student from school, Student entered into an "Other Means of Correction Contract" for one month. School staff also recommended that Student attend several weeks of group counseling with the San Diego Youth Services. Student participated in some of the programs offered by Youth Services.

Magnolia Elementary suspended Student for fighting in late March 2018, and again in mid-April of 2018. For both suspensions, Ms. Robinson offered "in-school"

suspension rather than “at home” suspension. During these “in-school” suspensions, Ms. Robinson directly monitored or worked with Student. Ms. Robinson observed Student having difficulty completing math worksheets two grade levels below his. Student struggled to complete the math worksheets even with Ms. Robinson’s prompting. Student exhibited “shut down” behaviors when he got frustrated with school work, which included putting his head down, pushing his work away, or pulling his hood over his head.

Based on these observations, her experience, and a review of Student’s cumulative file, Ms. Robinson grew concerned that Student might be suffering from a learning disability, and that Student’s violent and disrupting behaviors were directly related to his academic struggles. On April 24, 2018, Ms. Robinson corresponded with Mother and requested that Mother reconsider the proposed initial assessment of Student. The letter provided notice to Mother that Cajon Valley suspected Student might have learning disabilities. Mother did not respond, nor indicate to Ms. Robinson why she did not want to have Student assessed. On May 9, 2018, after Student threatened to beat another child, Cajon Valley convened a District Safety Team meeting. Cajon Valley, rather than the local school, convenes a District Safety Team meeting when a greater level of discipline may be required. Mother did not attend due to a family emergency. At the end of the meeting, the District Safety Team recommended several interventions, including counseling, a special education assessment, and a behavioral support plan.

FIFTH GRADE

At the commencement of the 2018-2019 school year, Student was in fifth grade. Cajon Valley provided an initial assessment plan dated May 30, 2018, to Mother in the following areas: academic achievement, health, intellectual development, and social-emotional/behavior, and functional behavior, behavior intervention plan, and

mental health services. Mother returned the assessment plan on September 14, 2018, declining the assessment in writing. In early 2019, following more disruptive behavior by Student, Ms. Robinson recommended to Mother that if she did not want to agree to a special education assessment, the school could place Student on a general education 504 Plan. Section 504 of the Rehabilitation Act refers to a program that is different from the programs, supports, and services available by way of an IEP. Mother declined. Student's disruptive conduct continued throughout the 2018-2019 year, and he continued to struggle academically.

When Ms. Robinson analyzed Student's behavior, it tended to show that he exhibited worse behaviors when he was studying math than in language arts. Ms. Robinson opined that a review of Student's report cards showed that he was regressing in both academics and social skills. For example, while Student's fourth-grade report cards showed Student was excelling and growing in some categories, Student's fifth-grade report cards contained numerous codes for "little or no progress," "approached grade level," and "Area of Concern."

Jennifer McSparran was the special education coordinator for Cajon Valley since 2014. Ms. McSparran held a bachelor's degree in elementary education and special education and a master's degree in special education. Ms. McSparran also held credentials in several areas, including administrative services and special education. On March 11, 2019, at Ms. Robinson's request, Ms. McSparran wrote to Mother and recounted Cajon Valley's concerns about Student's behavior and academic struggles. She provided to Mother another initial assessment plan dated March 11, 2019, with the procedural safeguards, and requested Mother sign and return the assessment. Ms. McSparran opined at the time, and at the hearing, that a comprehensive initial assessment was necessary to determine whether Student was eligible for special education as a child with a disability under the IDEA.

Ms. McSparran sent a follow-up letter with a revised initial assessment plan to Mother on April 11, 2019. Because she had denied consent on previous occasions, Mother called and asked why she was receiving the letter and the assessment plan. Ms. McSparran informed Mother that Cajon Valley believed Student had learning disabilities that affected his behaviors. Ms. McSparran advised Mother that while she could withhold consent, Cajon Valley could file a due process request and request an order allowing the assessment. Ms. McSparran suggested the parties could go to OAH for mediation only. Cajon Valley filed a “mediation only” request on April 15, 2019.

APRIL 30, 2019 ASSESSMENT PLAN

An OAH mediation took place on April 30, 2019. Following mediation, Cajon Valley prepared a revised initial assessment plan dated April 30, 2019. The April 30, 2019 assessment plan set forth assessments in the following areas: academic achievement, health, intellectual development, and social-emotional/behavior, and functional behavior, behavior intervention plan, and mental health services. An education specialist would conduct the academic assessment and the functional behavior assessment in conjunction with a school psychologist. A school nurse would conduct a health assessment. A school psychologist would conduct the remaining assessments.

The April 30, 2019 assessment plan provided that Cajon Valley’s district-level assessment team would assess Student and not Magnolia Elementary school personnel. The April 30, 2019 assessment plan was in language easily understood by the general public, in Mother’s native language and stated that Cajon Valley would not provide special education services to Student without Mother’s consent. Mother had 15 days to review the plan. A Notice of Procedural Safeguards accompanied the assessment plan.

On May 13, 2019, Ms. McSparran contacted Mother by email and sent another copy of the April 30, 2019 initial assessment plan. On May 14, 2019, Mother emailed Ms. McSparran. Mother voiced concerns about who would pay for the assessment. Ms.

McSparran responded to Mother by email and then by telephone. She informed Mother that Cajon Valley would pay for the cost of the assessment. Mother wanted non-district personnel to conduct the assessment. Ms. McSparran informed Mother that the proposed assessment team did not include local school personnel, and Cajon Valley would use a team of district-level personnel who customarily assessed Cajon Valley pupils attending non-public and private schools. Cajon Valley does not have assessment personnel who are not employed by the district. Mother continued to object to the assessment and verbally rejected the April 30, 2019 assessment plan in her conversations with Ms. McSparran. Mother never returned the April 30, 2019 assessment plan. At the time of the hearing, Student was expected to attend Greenfield Middle School beginning in August 2019. Greenfield is also a district school.

LEGAL CONCLUSIONS

INTRODUCTION – USE OF LEGAL CONCEPTS THROUGHOUT THE DECISION

In this discussion, unless otherwise indicated, this introduction's legal citations are incorporated into the conclusion. All references to the Code of Federal Regulations are to the 2006 version.

LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

This hearing was held under the IDEA, its regulations, and California statutes and regulations. (20 U.S.C. §1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are:

1. to ensure that all children with disabilities have available to them a free 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).)

A free, appropriate public education, often called a FAPE, means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective or 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 that is developed by parents and school personnel using the IDEA's procedures. The IEP describes the child's present levels of performance, needs, and academic and functional goals related to those needs. It also provides a statement of the special education; related services, which include transportation and other supportive services; and program modifications and accommodations that will be provided for the child to work towards the stated goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14) and (26), 1414(d)(1)(A); Ed. Code, §§ 56031, 56032, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.17, 300.34, 300.39 Cal. Code Regs., tit. 5, § 3001, subd. (p).)

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 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.)

In *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (*Endrew F.*), the Supreme Court held that a child’s “educational program must be appropriately ambitious in light of his circumstances.” “Every child should have a chance to meet challenging objectives.” (*Ibid.*) *Endrew F.* explained that “this standard is markedly more demanding than the ‘merely more than de minimis’ test... The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at pp. 1000-1001.) The Court noted that “any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” (*Id.* at p.999.) However, the Supreme Court did not define a new FAPE standard in *Endrew F.* The Court acknowledged that Congress had not materially changed the statutory definition of a FAPE since *Rowley* was decided and so declined to change the definition itself. The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

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, assessment, 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).) Generally, a party is limited to filing a request

for due process two years from the date the person knew or should have known of the facts which form the basis for the request for a due process hearing.

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] (*Schaffer*); see 20 U.S.C. §1415(i)(2)(C)(iii).) Here, Cajon Valley requested the hearing, and therefore Cajon Valley has the burden of proof on the issue.

ISSUE: MAY CAJON VALLEY CONDUCT AN INITIAL ASSESSMENT OF STUDENT WITHOUT PARENT'S CONSENT

Cajon Valley contends that Student struggled academically and socially, that it had reason to suspect Student had a disability, and that this triggered its assessment obligation toward Student. Cajon Valley had requested parental consent to assess Student since January 2018, which had been declined by Mother. Parent did not attend the hearing, did not file an argument, and did not respond to Cajon Valley's written closing argument.

School districts have an affirmative, ongoing duty to actively and systematically seek out, identify, locate, and evaluate all children with disabilities residing within their boundaries who may need special education and related services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, §§ 56171, 56300 et seq.) This ongoing duty to seek and serve children with disabilities is referred to as "child find." California law specifically incorporates child find in Education Code section 56301. (Ed. Code, § 56301, subds. (a), (b).)

A school district's child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect, a disability and reason to suspect that special education services may be needed to address that disability. (*Department of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F. Supp. 2d 1190, 1194 (*Cari Rae S.*)). The threshold for suspecting that a child has a disability is relatively low. (*Id.* at

p. 1195.) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

A district's child find duty is not dependent on any request by the parent for special education testing or referral for services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, § 56301.) Child find obligations apply to children who are suspected of having a disability and being in need of special education, even if they are advancing from grade to grade, and regardless of the severity of the disability. (*Cari Rae S., supra*, 158 F.Supp.2d at p. 1194; 34 C.F.R. § 300.111(a)(1) & (c)(1).) "(A) child should not have to fail a course or be retained in a grade in order to be considered for special education and related services." (71 Fed. Reg. 46580 (Aug. 14, 2006).)

Once a child is identified as potentially needing specialized instruction and services, the district must conduct an initial evaluation to confirm the child's eligibility for special education. (34 C.F.R § 300.301; Ed. Code, § 56302.1.)

Before any action is taken to place a student with exceptional needs in a program of special education, an assessment of the student's educational needs must be conducted. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) The IDEA uses the term "evaluation," while the California Education Code uses the term "assessment." This decision will use the term "assessment." An assessment may be initiated by request of any one of a number of people or agencies, including a teacher or other service provider of the student. (20 U.S.C. § 1414(a)(1)(B); Ed. Code, § 56029, subd. (b).)

When a student is referred for assessment, the school district must provide the student's parent with a written proposed assessment plan, along with notice of the parent's rights. (Ed. Code, § 56321, subd. (a).) The assessment plan must be in a language easily understood by the general public, be provided in the native language of the parent, explain the types of assessments to be conducted, and state that no individualized education program will result from the assessment without the consent of

the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) A school district shall make reasonable efforts to obtain informed consent from the parent before conducting an initial assessment. (20 U.S.C. § 1414(a)(1)(D); Ed. Code, § 56321, subd. (c)(1).) The parent shall have at least 15 days from the receipt of the proposed assessment plan to arrive at a decision. (Ed. Code, § 56321, subd. (c)(4).) If a parent or student does not provide consent, the district may bring a due process complaint seeking an order allowing it to conduct the proposed assessment. (20 U.S.C. § 1414(a)(1)(D)(ii)(I); Ed. Code, § 56321, subd. (c)(2); *Schaffer, supra*, 546 U.S. at pp. 52-53 (school districts may seek a due process hearing “if parents refuse to allow their child to be evaluated”).)

Student has resided within Cajon Valley’s boundaries since the 2015-2016 school year. During the second grade, Student was falling behind academically and had difficulty staying on task. During the third through fifth grades, despite general education interventions and counseling, Student continued to struggle academically and had violent, disruptive behaviors including multiple suspensions. He also “shut down” when he got frustrated with school work. None of the general education interventions employed by Cajon Valley over four school years worked for more than a period of several weeks to one or two months.

Based upon their credentials and first-hand dealings with Student and Mother, Ms. Robinson and Ms. McSparran credibly opined that Student’s violent and disruptive conduct directly correlated with his academic struggles. Ms. Robinson opined at hearing that Student remains two to three years below grade level in math and reading. Student’s school record and report cards supported Ms. Robinson’s opinion. Both Ms. Robinson and Ms. McSparran believed that the April 30, 2019 assessment plan would determine if Student is eligible for special education, and would be the only way for Cajon Valley to address Student’s behavior and academic struggles moving forward.

Cajon Valley demonstrated by a preponderance of the evidence it complied with

all statutory requirements to allow Cajon Valley to assess without parental consent. Its evidence was uncontroverted. Cajon Valley had a reasonable basis to suspect that Student's academic and behavioral challenges could be related to a disability, and that special education services might be needed to address Student's needs. Cajon Valley offered to assess Student in December 2017, and again in May 2018. Attempts to assess Student at the beginning of the 2018-2019 school year, and in early 2019, were met with resistance from Parent. On April 30, 2019, after considering Parent's input, Cajon Valley prepared a revised initial assessment plan. Cajon Valley agreed to have district personnel unrelated to Student's school of attendance do the assessment. Cajon Valley timely provided the assessment to Mother in her native language and in language the general public would understand. Cajon Valley provided Mother with the written procedural safeguards. Mother verbally declined to consent to the assessment and did not return the assessment plan to Cajon Valley within 15 days after receiving it.

Cajon Valley met its burden by demonstrating that it needed to assess Student in all areas outlined in the April 30, 2019 assessment plan, and it may do so without parental consent.

ORDER

Cajon Valley may assess Student pursuant to the April 30, 2019 assessment plan if Student resides within Cajon Valley Union School District.

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, Cajon Valley prevailed on the sole issue.

RIGHT TO APPEAL

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

DATED: August 19, 2019

/s/

BRIAN H. KRIKORIAN

Administrative Law Judge

Office of Administrative Hearings