

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF
UPLAND UNIFIED SCHOOL DISTRICT
v.
PARENT ON BEHALF OF STUDENT.
OAH CASE NUMBER 2019041141

DECISION

On April 25, 2019, Upland Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, naming Parents on Student's behalf. The Office of Administrative Hearings is referred to as OAH. Upland Unified School District is referred to as Upland.

Administrative Law Judge Adrienne Krikorian began the hearing in this matter in the city of Upland, California, on May 21, 2019. An Administrative Law Judge is referred to as an ALJ. Before any witnesses were called or evidence was presented, the ALJ continued the matter for good cause from May 21, 2019, to September 4, 2019.

Administrative Law Judge Laurie Gorsline heard this matter in Upland, California on September 4 and 5, 2019. Attorney Jonathan Read represented Upland. Director of Special Education Anthony Farenga, and Program Manager for the West End Special Education Local Plan Area, Royal Lord, attended both days of the hearing. Parent and her niece attended a portion of the hearing on September 4, 2019. Parent left the hearing while the first witness testified and declined to participate further in the hearing. Silvia Giordano provided Spanish to English and English to Spanish interpretation while Parent was present and remained available in the hearing room in the event Parent returned to the hearing room. Student did not attend the hearing.

On September 5, 2019, the evidentiary portion of the hearing was concluded and the ALJ continued the matter to September 19, 2019 to permit the parties the

opportunity to file written closing briefs. On September 19, 2019, the record was closed and the matter was submitted for decision.

ISSUE

Is Upland entitled to conduct the assessments proposed in the March 15, 2019 assessment plan without parental consent?

SUMMARY OF DECISION

Upland sought permission from OAH to conduct a comprehensive reevaluation of Student pursuant to a March 15, 2019 assessment plan, without parental consent to determine Student's current levels of functioning and needs related to special education and related services. In March 2019, OAH found that Upland's prior March 5, 2018 assessment plan did not provide proper notice to Parent because the assessment plan did not include a copy of parent's rights and procedural safeguards and the assessment plan was not in Parent's native language, Spanish.

On March 15, 2019, Upland sent Parent a new assessment plan identifying the same assessment areas, a notice of procedural rights and prior written notice, in both English and Spanish. Upland established that Student's educational or related services needs warrant reassessment pursuant to the March 15, 2019 assessment plan. Upland proved that updated assessments in the proposed assessment areas are necessary to clarify Student's current strengths and weaknesses, to determine his continuing eligibility for special education, and to determine what supports, if any, are currently necessary to support him to make educational progress. The assessment plan complied with the law. To the extent that Upland's prior written notice was procedurally deficient, there was no evidence that such deficiency resulted in the loss of an educational opportunity to Student or interfered with Parent's opportunity to participate in developing Student's individualized education program, referred to as an IEP. Upland

may conduct the assessments proposed in the March 15, 2019 assessment plan without Parent's consent, if Parent wants Upland to provide any provision of special education and related services to Student.

FACTUAL FINDINGS

At the time of the hearing, Student was a fourteen-year-old male who resided within Upland's school district boundaries at all relevant times. Student was eligible for special education under the category of other health impairment and had a diagnosis of attention deficit hyperactivity disorder, known as ADHD. Since the 2017-2018 school year he attended Upland's Pioneer Junior High School.

Parent's native language was Spanish, although Parent had some ability to communicate in English. Among the documents contained in Student's cumulative file was a 2010 Home Language Survey filed out by Parent. In response to questions on the survey, Parent identified English as the language most frequently spoken by Parent to Student and English as the language most often spoken by adults at home. Parent routinely communicated with Upland in writing in English, but on October 16, 2018, notified Upland that Parents' native language was Spanish and to send all future correspondence in English and Spanish.

THE 2016-2017 TRIENNIAL EVALUATIONS

Upland conducted Student's triennial evaluation in December 2016 and January 2017. The evaluation consisted of an assessment in the areas of intellectual functioning, visual motor skills, auditory processing, visual perceptual skills, academics, behavioral functioning, including externalizing behaviors and social skills, health, and occupational therapy. Written reports were generated by the assessors including, a December 2016 Occupational Therapy Triennial Evaluation report, a January 23, 2017 Registered Nurse's Health Assessment Update, and a January 27, 2017 Transdisciplinary Assessment report.

Occupational Therapy

Deena Ligorria conducted the December 2016 occupational therapy assessment. She was both a licensed and board certified occupational therapist since 2002. She was employed by Upland as an occupational therapist since 2015. Her duties at Upland included providing services and conducting assessments. She provided Student's IEP occupational therapy services during the 2015-2016 school year.

In the school setting, an occupational therapist addresses three areas, visual motor skills, fine motor skills, and sensory. Visual motor skills focus on the use of eyes and hands at the same time, such as writing. Fine motor skills focus on the use of small muscles in the hands to perform a task. Sensory can involve visual, tactile, and auditory sensibilities. An occupational therapist typically looks at attention and behavior as part the assessment process. Behavior and attention issues could affect visual motor skills and sensory issues can affect attention and behavior.

The occupational therapy assessment conducted by Ms. Ligorria included visual motor and functional classroom skills, including fine motor, handwriting, and keyboarding, as well as sensory processing and behavior. She attempted to obtain input from Parent in the form of a Parent Interview Form and the Sensory Processing Measure Home Form, but Parent did not complete them. Based on Ms. Ligorria's assessment, Student's scores did not indicate a significant obstacle to his ability to complete school tasks efficiently and successfully and on his own. In her recommendations, she concluded that Student did not require occupational therapy services in order to access his current educational curriculum and that he did not qualify for occupational therapy services.

Health Assessment

The health assessment report indicated that Student had been diagnosed with asthma and had been prescribed an inhaler. The report stated "not reported per parent"

in the following areas: dental, specialized health care procedures, doctor's physical exam, Parent's perception of child's school progress, recent changes in family structure, and dietary habits.

Transdisciplinary Assessment

The health and developmental history portion of the transdisciplinary assessment report documented that Student was diagnosed with ADHD when he was seven years old and that his physician had prescribed medication to control the symptoms. It was unknown to the assessors whether Student was taking medication for ADHD because Parent did not respond to the school staff's attempts to contact her. The assessors also documented Student had allergies, had been diagnosed with asthma and was approved for an inhaler.

Upland's assessors used the Behavioral Assessment System for Children, Second Edition, and the Conners, Third Edition. The Behavioral Assessment System for Children was an assessment tool which examined behavior, including hyperactivity and attention. The Conners was designed to assess ADHD. Parent did not return the assessment forms for either assessment tool. Based on the responses from teachers on the Behavior Assessment System for Children, the assessor reported no evidence of hyperactivity or inattention. This finding was consistent with the teachers' scores on the Conners. On the last page of the transdisciplinary assessment report, the assessors recommended that Student no longer qualified for special education services and that his needs could be met in the general education setting.

THE MARCH 2017 IEP TEAM MEETING

Upland held Student's triennial IEP team meeting on March 22, 2017. While waiting for the interpreter to arrive to begin the meeting, Parent turned to the last page of the transdisciplinary assessment report and questioned whether it was true that

Student no longer qualified for special education. One of the team members explained to Parent that the IEP team would discuss that portion of the report during the meeting after reviewing the assessment results. Parent stood up, announced the meeting was over and left. The IEP team continued with the meeting, reviewed the assessment reports, and determined that Student did not qualify for special education.

JULY 2017 SETTLEMENT AGREEMENT

On July 11, 2017, Parent and Upland entered into a written settlement agreement. The parties agreed that Student qualified for special education and related services under the category of other health impairment. The parties agreed to hold an IEP team meeting within the first 30 days of the 2017-2018 school year, that the IEP would include one period per day of specialized academic instruction and 450 minutes per year of consultation with the occupational therapist, and to implement those services at the beginning of the 2017-2018 school year. The parties agreed that Upland would conduct assessments prior to the end of the 2017-2018 regular school year in the areas of academics, health, intellectual development, motor development, social/emotional, and adaptive/behavior.

MARCH 2018 ASSESSMENT PLAN

Maurice Levy, Ph.D. was credentialed school psychologist for Upland during the 2017-2018 school year, assigned to Pioneer and Upland High School, and its lead school psychologist since August 2018. He had a doctorate in philosophy for clinical and school psychology, and a master's degree in clinical and school psychology. He had over ten years of experience as a school psychologist. He was also a licensed psychologist and maintained a private practice since 2006. His duties at Upland included assisting school psychologists in assessments, conducting functional behavior assessments and temporary special needs assessments, and serving as a behavior consultant for all

programs across the school district.

Dr. Levy reviewed Student's records sometime before March 5, 2018, including Student's January 2017 transdisciplinary assessment report, and the registered nurse health assessment update. Around the same period of time, he reviewed Student's most recent IEPs. The purpose of his review of Student's records was to generate an assessment plan for Student. Dr. Levy was familiar with the assessment tools used to evaluate Student which were identified in the January 2017 transdisciplinary assessment report. Dr. Levy generated an assessment plan dated March 5, 2018, which was sent to Parent. The evaluation areas identified on the assessment plan were: academic achievement, health, intellectual development, motor development, social emotional/behavior, and adaptive behavior. Dr. Levy's review of the 2017 transdisciplinary assessment report assisted him in selecting the areas of assessment listed on the assessment plan.

On March 15, 2018, Parent sent a letter to Upland refusing to consent to the proposed assessments. Parent claimed that Upland conducted triennial assessments in January 2017. She also claimed Student had a history of difficulty with accessing the curriculum in the areas of reading, writing, and spelling. She attached two letters from a doctor. The August 3, 2012 letter stated that Student was diagnosed with learning difficulties and developmental coordination disorder. The letter recommended that Student have an occupational therapy evaluation. The April 16, 2013 letter stated that Student had a diagnosis of ADHD and was taking medication for his symptoms.

On May 11, 2018, Upland attempted to convene an IEP team meeting to resolve Parent's objection to the proposed assessments. Because Parent did not attend, the Upland staff participants signed in, but no meeting was held.

THE 2018-2019 SCHOOL YEAR

English and History

Robert Perkins was an Upland general education teacher assigned to Pioneer for the past 22 years where he taught English and history. He held a master's degree in English and a multiple subject teaching credential.

Student was in Mr. Perkin's eighth grade English and history classes during the 2018-2019 school year. Student was quiet, prompt, polite, and turned his work in on time. He had no attendance issues. At the beginning of school year, Parent sent Mr. Perkins an email in English regarding her concerns that Student had too much work. Mr. Perkins responded in writing, instructing Parent to contact him if an occasion arose that Student had too much work and he would be given more time. Parent never followed up.

In English, Student earned a B plus the first trimester, and a B minus in the second and third trimesters. In history, Student earned a B in the first and third trimesters, and a B minus in the second trimester.

Directed Studies

Cristal Palma was a special education teacher employed by Upland since August 2018. She worked as an educational specialist in a special day class for another school district during the 2017-2018 school year. She held a master's degree in education, and an education specialist teaching credential. She had bachelor's degree in liberal studies with a human development and Spanish concentration. She was fluent in Spanish and had experience conducting academic assessments.

During the 2018-2019 school year, part of Ms. Palma's duties included teaching special education courses, including a directed studies class. Student was in Ms. Palma's directed studies course at Pioneer beginning in October 2018. Directed studies was an

elective for special education students to make up work for other classes or work on homework. It was a very structured class with 18 students. Student was a model student. He was quiet, kind, organized, and task-oriented. He did not demonstrate any hyperactivity or attention deficits. He had no attendance issues and completed his work. Student's writing was very neat and legible. He received a grade of A in the first trimester and an A minus in the second and third trimesters.

In Ms. Palma's opinion, Student did not require a directed studies class. She opined Student would have benefitted more from taking a general education elective with his general education peers.

Student's Other 2018-2019 Grades

In the first trimester, Student earned a grade of C in math, a B in science and an A in physical education. The second trimester, he earned a grade of F in math, a C in science, and a B in physical education.

OCTOBER 3, 2018 IEP TEAM MEETING

On October 3, 2018, Upland convened an IEP team meeting. Parent, an interpreter, Dr. Levy, Mr. Perkins, and school psychologist Indra Chapman, among others, attended the meeting.

Ms. Chapman was Pioneer's school psychologist employed by Upland since August 2018. She held a master's degree in education, and a bachelor's degree in psychology. She held a learning handicapped teaching credential, and a pupil personnel services credential. She worked as a special day class teacher and as a resource specialist between 1992 and 2017, and has been a school psychologist since 2006. Her duties included assessing students for special education, consulting with classroom teachers, and assisting teachers with accommodations and modifications.

For the IEP, Mr. Perkins completed Student's present levels of functioning

portions of the IEP for English and history. In class, Student was attentive, polite, and respectful. All assignments were completed, done well, and his handwriting was easy to read. In English, there were no academic concerns. Student had a great attitude, his behavior was excellent, he displayed initiative, and he had a good work ethic. In history, Student made test corrections for a higher score.

At the IEP team meeting, Parent expressed concerns regarding Student's writing ability. Parent believed that Student wrote slowly, did not know how to write his thoughts on paper, needed extra time for writing and reading, and required accommodations and modifications in all subjects. Parent did not believe Student held his pencil correctly. Mr. Perkins and the occupational therapist attempted to address Parent's concerns. Mr. Perkins provided Parent with work samples and explained that Student was doing well in class, was able to access the curriculum, and completed his classwork. Mr. Perkins reported that Student completed essay writing. Student confused cause and effect, but Mr. Perkins addressed areas of need in the classroom.

Parent provided the IEP team with a doctor's note containing Student's medical diagnosis of ADHD. Dr. Levy told Parent that they would consider whether Student's diagnosis had an educational impact and offered to assess Student. Ms. Chapman provided Parent with the same assessment plan Dr. Levy sent to Parents on March 5, 2018, identifying the same areas of evaluation, but with Ms. Chapman's name and the IEP date of October 3, 2018. Parent did not consent to the assessment plan.

OCTOBER 2018 COMMUNICATIONS WITH PARENT

On October 9, 2018, Parent sent an email to Upland stating her areas of disagreement with the October 3, 2018 IEP and attached a copy of Student's school medical history and emergency card. The attachments documented, among other things, Parent's concerns as of May 1, 2018, regarding Student's frequent ear infections, that he had ADHD and was taking medication, and that he had oculomotor dysfunction

and had been receiving vision therapy for more than one year. Parent's disagreement with the IEP was based in part on Parent's claim that Student's ADHD was impeding his learning and causing him to rush through his work, make mistakes, and produce sloppy writing.

On October 11, 2018, Director of Special Education Anthony Farenga sent a prior written notice letter to Parent. Mr. Farenga held master's degrees in public administration and education. He was responsible for all special education programs and personnel, compliance, and all dispute resolution. He reviewed Student's educational records.

In his letter, Mr. Farenga explained why Upland sought to assess Student. He referenced the March 22, 2017 IEP team meeting, the settlement agreement, and the letter from the doctor sent by Parent to Upland on March 15, 2018. He explained that the IEP team considered all outside assessments and diagnoses, but that did not replace the formal assessment process conducted by educational assessors for purposes of determining continued eligibility and the need for special education services. He also explained that Upland was unable to determine Student's continued need for special education services because it had been unable to assess Student. He informed Parent that her refusal to consent to assessment was violating the terms of the settlement agreement and that Upland would have no choice but to commence due process proceedings to obtain the right to assess. Mr. Farenga offered to meet with Parent to resolve her concerns with the assessment plan. He also agreed to schedule an IEP team meeting to take place by November 8, 2018. The letter attached a copy of the Notice of Procedural Safeguards in English.

On October 16, 2018, Parent responded in writing, stating her position that Student's next evaluation was not due until January 27, 2020. Parent requested an IEP team meeting to resolve the pending issues, and a due process hearing. Parent also

notified Upland that her native language was Spanish and that any future correspondence be in English and Spanish.

NOVEMBER 6, 2018 IEP TEAM MEETING

On November 6, 2019, Upland convened a continuation of the October 3, 2018 IEP team meeting. Parent, an interpreter, an occupational therapist, Dr. Levy, Mr. Perkins, and Ms. Chapman attended, among others.

Parent stated that the medical diagnosis paperwork she provided to Upland was not reflected in the documents she received. Dr. Levy attempted to explain where the information was located within the draft IEP. Parent stated that Student could not write without copying information and that his ADHD was impeding his learning. Parent stated she was seeking accommodations, not services. Mr. Perkins reported on Student's grades, informed Parent that legibility was not an issue for Student and that Student was near or at grade level in English and history. The occupational therapist asked clarifying questions regarding legibility, time management, breaks, and ADHD. Parent stated that Student's next assessments should not occur until 2020. Parent did not sign the assessment plan and requested a due process hearing.

NOVEMBER 2018 COMMUNICATIONS WITH PARENT

On November 26, 2018, Mr. Farenga sent an email to Parent inquiring as to whether Parent was interested in meeting to resolve any issues without a due process hearing. On November 27, 2018, Parent responded that there had already been two IEP team meetings on October 3 and November 6, 2018, and that Parent had already requested a due process hearing. On November 28, 2018, Mr. Farenga had the school interpreter call Parent. Parent told the school district interpreter that Upland should file for due process.

MARCH 2019 OAH DECISION

Upland filed for due process in December 2018, seeking permission to assess Student pursuant to the March 5, 2018 assessment plan. On March 14, 2019, OAH published a decision in that case. In the decision, the ALJ determined that Upland was not entitled to conduct the assessments proposed in the March 5, 2018 assessment plan without parental consent because the assessment plan sent to Parent on March 5, 2018, did not include a copy of parent's rights and procedural safeguards and the assessment plan was not in Parent's native language.

MARCH 15, 2019 ASSESSMENT PLAN AND PARENT'S REFUSAL TO CONSENT

On March 15, 2019, Upland sent a new assessment plan dated March 15, 2019, a copy of the notice of procedural safeguards, and prior written notice to Parent, in both English and Spanish. The March 15, 2019 assessment plan identified the same areas of evaluation as the March 5, 2018 assessment plan: academic achievement, health, intellectual development, motor development, social emotional/behavior, and adaptive behavior. Adaptive behavior looks at behavior at home and at school and how it related to how a student was functioning in the classroom. The assessment plan was written in a manner understandable to the general public. The assessment plan identified the position of the person who would be conducting the evaluations. It stated that Upland proposed to assess Student to determine his eligibility or continued eligibility and present level of academic performance and functional achievement. It listed Ms. Chapman's contact information if Parent sought further information about Parent's rights. It stated that Parent would be invited to attend an IEP team meeting to discuss the assessment results but no special education services would be provided without written parental authorization.

The prior written notice, taken together with the assessment plan, described the

assessments Upland intended to conduct, and an explanation why it proposed to reevaluate Student. It included a statement that parents had protection under the procedural safeguards, and attached a copy of the safeguards. The prior written notice and the notice of procedural safeguards included sources for parents to contact to obtain assistance. The prior written notice identified the November 6, 2018 IEP at the top of the page and generally referenced prior testing requiring updating to determine Student's present levels in all areas of suspected disability. The prior written notice did not contain a description of other options that the IEP team considered, or the reasons why those options were rejected.

On March 21, 2019, Ms. Chapman wrote an email to Parent following up on the return of the assessment plan, asking Parent to sign and return the assessment plan. It instructed Parent to contact Ms. Chapman in the event Parent had questions. She sent the email to Parent in both English and Spanish.

On March 27, 2019, Parent responded by letter, refusing to consent to the March 15, 2019 assessment plan. Parent reiterated that Upland had already conducted assessments in January 2017, and that Student should not be reassessed until 2020. Parent did not consent to the March 15, 2019 assessment plan.

UPLAND'S EXPERTS' OPINIONS ON THE NEED FOR REEVALUATION

At hearing, all of Upland's experts expressed the opinion that a reassessment was warranted. Their opinions were credible and uncontroverted. Dr. Levy opined that reassessment of Student was necessary. The 2017 assessment indicated that the symptoms of ADHD were not indicative of that disorder within the school setting at that time, but in 2018, Parent brought in medical documentation regarding Student's diagnosis of ADHD. Reassessment would clarify Student's current strengths and weaknesses, and what supports Student needed related to his academic performance. A reassessment was necessary to determine if Student was impacted at school by ADHD.

An updated assessment would help the IEP team determine Student's eligibility, needs, and how to support him in a general education setting given the issues raised by Parent and the concerns of the IEP team.

In Dr. Levy's opinion, assessing Student in all of the areas listed on the March 15, 2019 assessment plan was appropriate to determine Student's strengths, weaknesses, and needs across these areas given the concerns raised by Parent in 2018 and Student's history. The proposed assessment areas identified on the March 15, 2019 assessment plan would address Parent's concerns discussed during the October and November 2018 IEP team meetings.

Ms. Chapman opined that reassessment was warranted because more information was needed given Student's diagnosis of ADHD, and to determine if Student had any attention-related issues that could be affecting him in the classroom. Student did not have a current assessment, and it was important to determine if Student continued to qualify for special education. If he did not qualify, he should be in a regular education classroom, instead of being pulled out for special education services he did not need. She opined Student's best interest was served by being with his general education peers if he did not require special education.

Upland's other experts corroborated Dr. Levy's and Ms. Chapman's opinions. In Mr. Perkin's opinion, Student's performance in the classroom was inconsistent with what Parent reported at the October and November 2018 IEP team meetings. In his opinion, Student should be assessed to more accurately and completely determine his present level of performance to effectively assist him in making educational progress.

Ms. Ligorria opined Parent's concerns voiced in the October and November 2018 IEP team meetings could implicate all three areas of occupational therapy. An assessment was necessary to determine Student's present levels and current needs to give him the support he needed to be successful.

Mr. Farenga opined that Student should be reassessed. In his judgment, based on Student's progress, performance and other data, Student may be able to access more general education. While it was important to provide Student with the support he needed, not having updated assessments for determining Student's need for special education moving forward did Student a disservice.

Ms. Palma's view was that reassessment was appropriate to determine Student's current levels of functioning and whether he was in the appropriate placement. She opined Student did not require her special education directed studies class.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – USE OF LEGAL CONCEPTS THROUGHOUT THE DECISION

In this discussion, unless otherwise indicated, legal citations are incorporated into each issue's 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 intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are:

1. to ensure that all children with disabilities have available to them a free appropriate public education, referred to as 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).)

The IDEA affords parents and local educational agencies the procedural

protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, 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. (20 U.S.C. § 1415(f)(3)(C), (D).)

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. 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 this matter, Upland had the burden of proof.

ISSUE: UPLAND'S RIGHT TO ASSESS

Upland contends Student's educational progress requires the school district to assess him. Upland contends it met all procedural requirements entitling it to assess Student pursuant to the March 15, 2019 assessment plan.

Parent contends Student's triennial IEP is not due until January 2020, and that there is no need to assess Student prior to that time. Parent claims that Upland only seeks to assess Student to exit him from special education.

To determine the contents of an IEP, a student eligible for special education under the IDEA must be assessed in all areas related to his or her suspected disability and no single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code, § 56320, subds. (e), (f).) School district evaluations of

students eligible for special education under the IDEA help IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.303, 300.320(a)(4), 300.324(a)(1)(iii) & (iv).)

The IDEA provides for reevaluations, referred to as reassessments in California law, to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school 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 be conducted if the school district determines that the educational or related services needs, including improved academic achievement and functional performance, of the student warrant a reassessment, or if the pupil's parents or teacher requests a reassessment. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a); Ed. Code, § 56381, subd. (a)(1); see also, *Patricia P. v. Board of Education of Oak Park, et al.* (7th Cir. 2000) 203 F.3d 462, 468 [if parents want their child to receive special education under the IDEA, they must allow a reevaluation and cannot force the school to rely solely on an independent evaluation].)

Reassessment generally requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his or her parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, § 56321, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental rights and procedural safeguards under the IDEA and companion state law. (*Id.*)

The assessment plan must be in language easily understood by the general public. It must be provided in the native language of the parent or other mode of communication used by parent. It must also explain the types of assessments the district proposes to conduct and state that an IEP will not result from the assessment without the consent of the parent. (Ed. Code, § 56321, subds. (b)(1)-(4).) The school district must

give the parent 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

If a parent does not consent to a reassessment plan, the school district may request a due process hearing to obtain permission to conduct the reassessment without parental consent by establishing that the assessment was necessary and that it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3), 56506 subd. (e).) Therefore, a school district must establish both that the educational or related services needs of the child warrant reassessment of the child, and the district has complied with all procedural requirements to obtain the parent's informed consent.

Informed parental consent need not be obtained for the reassessment of an individual with exceptional needs if the local educational agency can demonstrate that it has taken reasonable measures to obtain that consent and the parent of the child has failed to respond. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) Consent means the parent has been fully informed, in the parent's native language, of all information relevant to the activity for which consent is sought, the parent understands and agrees in writing to the carrying out of the activity for which consent is sought, and the consent describes that activity. (34 C.F.R. § 300.9(a), (b).)

Prior written notice is required to be given by the public agency to parents of a child with exceptional needs, upon initial referral for assessment, and a reasonable time before the public agency initiates or changes, or refuses to initiate or change, the identification, assessment, or educational placement of the child, or provisions of FAPE. (Ed. Code, § 56500.4. subd. (a).) The notice is required to include a description of the action proposed, and an explanation why the agency proposes the action. It must also contain a description of each assessment procedure, assessment, record, or report used as a basis for the proposed action. It is required to include a statement that the parents

of the individual with exceptional needs have protection under the procedural safeguards, the means by which a copy of the description of the safeguards can be obtained, and sources for parents to contact to obtain assistance. The notice must also include a description of any other options that the IEP team considered and the reasons why those options were rejected, and other factors relevant to the proposal or refusal of the agency. (Ed. Code, § 56500.4. subd. (b).)

In a district-filed case conducted pursuant to Education Code section 56505, a hearing officer shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian of the pupil to participate in the formulation process of the individualized education program. (Ed. Code, § 56505, subd. (j).)

Circumstances Warranting Reassessment

Upland proved by a preponderance of evidence that Student's educational needs justify reassessment. The evidence established that updated assessments are necessary to clarify Student's current strengths and weaknesses, to determine his continuing eligibility for special education and to determine what supports, if any, are currently necessary to support him to make educational progress.

Upland's January 2017 transdisciplinary assessors recommended that Student be exited from special education. Specifically, the results of the assessment were not indicative of symptoms associated with ADHD. Similarly, the occupational therapist determined that Student did not require occupational therapy services in 2016.

Parent claimed in 2018 that Student's ADHD was impeding his learning and causing him to rush through his work, make mistakes and produce sloppy writing. At the October and November 2018 IEP team meetings, Parent raised concerns about Student's writing, his inability to hold a pencil correctly, and his inability to put his

thoughts on paper. Parent claimed Student needed extra time for writing and reading, as well as accommodations and modifications in all subjects.

Some of Student's grades also declined during the 2018-2019 school year. Specifically, Student's math grade dropped from a C to an F, his science grade dropped from a B to a C, and his physical education grade dropped from an A to a B, between the first and second trimesters.

Dr. Levy persuasively testified that given Parent's concerns and some concerns by the IEP team, an updated assessment would be beneficial to clarify Student's strengths, weaknesses, needs, his eligibility, and how to support him in general education. He opined that an assessment was necessary to determine if Student's ADHD was impacting his education at school.

Student's teachers' testimony also established reevaluation was needed. Although neither of Student's teachers reported any significant concerns with Student's work, both opined that reassessment was appropriate so that current data could be obtained. Specifically, Ms. Palma persuasively testified that reevaluation was necessary to determine Student's current levels of functioning for proper placement because Student did not require her special education directed studies class. Mr. Perkins was convincing in his testimony that Student should be reassessed for the purposes of determining his current levels of performance because of the inconsistency between Student's performance in the classroom and Parent's reports during the October and November 2018 IEP team meetings. In his opinion, Student should be assessed to more accurately and completely determine his present levels of performance to effectively assist him in making educational progress.

The teachers' opinions about the need for reassessment were persuasively corroborated by the testimony of occupational therapist, Ms. Ligorria, school psychologist, Ms. Chapman, and special education director, Mr. Farenga. Although Ms.

Ligorria concluded in 2016 that Student was not eligible for occupational therapy services, at hearing she opined that the concerns Parent raised during the fall 2018 IEP team meetings could implicate current occupational therapy needs. It was her judgment that reassessment was in Student's best interest to determine his needs and current levels to give him the support he needs to be successful. Similarly, Ms. Chapman believed that Student should be reassessed because more information was needed given his ADHD diagnosis, to evaluate if there were any attention-related issues affecting Student in the classroom. In her opinion, it was important to obtain a current assessment to determine if Student qualifies for special education so he was not pulled from his general education class to receive services he did not need. Mr. Farenga also opined updated assessments were necessary because Student may be able to access more general education.

The fact that Parent did not participate in the prior 2016-2017 assessments also justifies a reassessment to obtain current and more complete information about Student. The evidence established that Parent did not participate in key portions of Student's 2016-2017 triennial evaluations, and refused to provide any input to the IEP team during the March 22, 2017 IEP team meeting when the assessments were reviewed. Specifically, Parent failed to complete and return the Parent Interview Form and the Sensory Processing Measure Home Form sent home by the occupational therapist. Yet, Parent thereafter raised concerns related to Student's needs which could implicate occupational therapy. Parent also failed to participate in the Behavioral Assessment System for Children and the Conners assessments. These assessment tools were used to evaluate hyperactivity and inattention, areas which Parent has since 2017 voiced many concerns related to Student. Significantly, the health assessment was also missing numerous pieces of information from Parent, including information about Student's physical exam, Parent's perception of Student's school progress, and Student's

dietary habits. The 2017 assessors also reported that they were unaware if Student was taking medication because Parent did not respond to the school staff's attempts to contact her to determine if Student was taking medication for ADHD.

Parent's claim that reassessment was premature because Student's triennial evaluation is not due until 2020 is without merit. The law does not prohibit a school district from conducting assessments more often than once every three years. School districts are required to assess at least once every three years, but are generally prohibited from assessing more than once a year. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).). Here, the March 15, 2019 assessment plan was created more than two years after the triennial assessments conducted in 2016 and 2017. As such, the March 15, 2019 proposed assessments are not barred by the once per year reassessment rule.

Proposed Assessments Were Appropriate

Upland proved that the proposed assessments are appropriate areas for evaluation. Dr. Levy was persuasive in his testimony that it was appropriate to assess Student in all of the areas listed on March 15, 2019 assessment plan. The assessment areas on the earlier March 5, 2018 assessment plan he prepared, and the March 15, 2019 assessment plan at issue, were identical. Dr. Levy reviewed Student's most recent IEPs, and prepared the March 5, 2018 assessment plan after reviewing the 2017 transdisciplinary assessment report. The proposed assessment areas were appropriate to clarify Student's strengths, weakness, and needs, given Student's history and the concerns raised by Parent during the October and November 2018 IEP team meetings. Dr. Levy's testimony about the appropriateness of the proposed areas of assessment was corroborated by Ms. Ligorria's testimony. She convincingly testified that the concerns raised by Parent in the October and November 2018 IEP team meetings could implicate all three areas of occupational therapy.

Notice to Parent

The weight of evidence established that Upland provided Parent proper notice of the March 15, 2019 assessment plan and that the assessment plan complied with the law. The notice consisted of the proposed assessment plan dated March 15, 2019, and a copy of the notice of procedural safeguards, and both documents were provided to Parent in English and Spanish, Parent's native language. The March 15, 2019 assessment plan was in language easily understood by the general public. It explained the types of assessments Upland proposed to conduct and the language on the form substantially complied with requirement that an IEP would not result from the assessment without the consent of the parent. More particularly, it stated that Parent would be invited to attend the IEP team meeting to discuss the results, but that no special education services would be provided to the child without Parent's written consent. Parent had at least 15 days to review, sign and return the proposed assessment plan.

Accompanying the assessment plan and notice of procedural safeguards, Upland also sent a prior written notice to Parent regarding the proposed assessments in both English and Spanish. The prior written notice taken together with the assessment plan, contained a description of the proposed action, an explanation why Upland proposed conducting a reevaluation of Student, a statement that parents had protection under the procedural safeguards, and attached a copy of the procedural safeguards. The prior written notice and the notice of procedural safeguards included sources for parents to contact to obtain assistance.

The only records identified on the prior written notice as to the basis of the proposed reevaluation was a non-specific reference to the 2016 and 2017 testing which needed updating for purposes of determining Student's present levels in all areas of suspected disability. The prior written notice did not contain a description of other options that the IEP team considered, or the reasons why those options were rejected.

To the extent that Upland's prior written notice was procedurally deficient, there was no evidence that such deficiency resulted in the loss of an educational opportunity to Student or interfered with Parent's opportunity to participate in the IEP formulation process.

Reasonable Measures Were Taken to Obtain Parental Consent

Upland proved that it took reasonable measures to obtain Parent's consent for the reevaluation proposed in the March 15, 2019 assessment plan, but that Parent refused to consent. Upland had been attempting since March 5, 2018, to obtain permission to assess Student in the assessment areas proposed on the March 15, 2019 assessment plan. Upland attempted to convene an IEP team meeting in May 2018 to resolve Parent's concerns after sending Parent the March 5, 2018 assessment plan. Upland convened an IEP team meeting in October 2018 with an interpreter where it again offered to assess Student and provided Parent with another copy of the assessment plan. Mr. Farenga made further attempts to obtain Parent's consent for assessment, sending correspondence, offering to convene an IEP team meeting, and offering to otherwise meet with Parent.

Parent refused to consent to the March 15, 2019 assessment plan and instructed Upland to file for due process. Upland has established that reassessments are warranted. Upland may conduct a reassessment of Student without parental consent in the areas of academic achievement, health, intellectual development, motor development, social emotional/behavior, and adaptive behavior pursuant to the March 15, 2019 assessment plan.

ORDER

Upland may reassess Student pursuant to the March 15, 2019 assessment plan, without parental consent, in the areas of academic achievement, health, intellectual

development, motor development, social emotional/behavior, and adaptive behavior, if Parent wants Upland to provide to Student any provision of special education and related services under the IDEA.

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, Upland prevailed 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: October 4, 2019

/S/

Laurie Gorsline

Administrative Law Judge

Office of Administrative Hearings