

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020020591

CORONA-NORCO UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

APRIL 6, 2020

On February 14, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Corona-Norco Unified School District, naming Parents on behalf of Student. Administrative Law Judge Alexa Hohensee heard this matter in Norco, California on March 10, 2020.

Summer Dalassandro, attorney at law, represented Corona-Norco. Dawn Rust, Special Education Local Plan Area administrative director, attended the hearing on Corona-Norco's behalf. Neither Parent appeared for the hearing. OAH called Parents to inquire about their attendance, but the call went to voicemail and the voicemail box was

full, so no message could be left. Ms. Dalassandro represented that she had also made calls and sent email messages to Parents over the preceding week, which had not been answered. The hearing was continued for 30 minutes, and went forward when Parents still did not appear.

At Corona-Norco's request, the matter was continued to March 23, 2020, for submission of written closing argument. On March 11, 2020, OAH informed Parents on behalf of Student of their right to submit a closing brief. Corona-Norco submitted a closing brief on March 23, 2020, and Student did not submit a closing brief. The record was closed, and the matter was submitted on March 23, 2020.

ISSUE

Does Corona-Norco have the right to conduct the assessments of Student proposed in its November 25, 2019 assessment plan, without parental consent?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, 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.) All references to the Code of Federal Regulations are to the 2006 version unless otherwise specified. The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- 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

- 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, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Corona-Norco has the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was nine years old and would have been in third grade at the time of hearing if attending school. Student resided within Norco-Corona's geographic boundaries at all relevant times. Student was eligible for special education under categories of autism and specific learning disability.

ISSUE: DOES CORONA-NORCO HAVE THE RIGHT TO CONDUCT THE ASSESSMENTS OF STUDENT PROPOSED IN ITS NOVEMBER 25, 2019 ASSESSMENT PLAN, WITHOUT PARENTAL CONSENT?

Corona-Norco seeks permission to conduct comprehensive assessments of Student without parental consent to determine his current need for special education and related services. Corona-Norco contends that it has complied with all statutory requirements for notice of proposed assessment and made repeated, documented efforts to obtain parental consent. It asserts that reassessment is necessary to prepare for Student's three-year review of his individualized education program, called an IEP. Parents did not respond to Corona-Norco's due process hearing request.

In general, a child eligible for special education must be provided access to specialized instruction and related services, that are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, 300.501.)

School district evaluations of students with disabilities under the IDEA serve two purposes:

1. identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and

2. helping IEP teams identify the special education and related services a student requires.

(34 C.F.R. §§ 300.301, 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur throughout the course of the student's education. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).)

The IDEA provides for reevaluations, referred to as reassessments in California law, to be conducted no more frequently than once a year, but at least once every three years, unless the parent and school district agree otherwise. (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 pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment." (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

Without updated information from a reassessment, it may be difficult to develop an educational program that would ensure a student's continued receipt of a FAPE. (*Cloverdale Unified School Dist. v. Student* (March 21, 2012) OAH Case No. 2012010507.) A substantial change in the student's academic performance or disabling condition is an example of conditions that warrant a reevaluation. (*Gilroy Unified School Dist. v. Student* (June 5, 2018) OAH Case No. 2018031204.)

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's parent.

(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 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, and provided in the native language of the parent. It must 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); see also 34 C.F.R. § 300.304(a).)

In addition, the proposed written assessment plan must include a description of any recent assessments conducted, including available independent assessments. It must include any assessment information the parent requests to be considered, and information indicating the pupil's primary language and the pupil's language proficiency in the primary language. (5 Cal. Code Regs. § 3022.)

The assessment plan must be accompanied by notice that advises parents that an IEP team meeting will be scheduled to discuss the assessment results and recommendations. (Ed. Code § 56329, subd. (a)(1).) The notice must also explain limitations on eligibility for special education and related services, and that parents will receive a copy of the assessment report and documentation of the determination of eligibility. (Ed. Code, § 56329, subds. (a)(2), (3).) It must state that a parent has the right to obtain, at public expense, an independent educational assessment under certain circumstances, and explain the procedure for requesting such an assessment. (Ed. Code, § 56329, subd. (b).) It must explain the due process hearing procedure that a school district may initiate to defend against an independent assessment at public expense, and the rights of a school district to observe a student in a proposed publicly financed nonpublic school placement. (Ed. Code, § 56329, subds. (c), (d).)

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 conduct the reassessment without parental consent if it shows at a due process hearing that conditions warrant reassessment of the student 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).) Therefore, a school district must establish both that the educational or related services needs of the child warrant reassessment of the child, and that the district has complied with all procedural requirements to obtain the parent's informed consent.

The school district must also demonstrate that it has taken reasonable measures to obtain informed consent, but the parent has failed to respond. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) "Consent," as defined in title 34 of the Code of Federal Regulations, part 300.9(a), 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. Reasonable measures require the school district to keep detailed records of telephone calls, copies of correspondence and any responses received, and records of visits made to the parent's home or place of employment and the results of those visits, and the use of interpreters, as appropriate. (Ed. Code, § 56381, subd. (f)(2), 34 C.F.R. § 300.322(d).)

REASSESSMENT WARRANTED

Student's last assessment was conducted for a three-year review IEP team meeting, called a triennial review, on December 5, 2016. Student's next triennial review was due on or before December 5, 2019. Parents and Corona-Norco did not agree to

forego reassessment in preparation for Student's December 2019 IEP. Accordingly, both the IDEA and California law mandated that Corona-Norco reassess Student.

In addition, Parents pulled Student and his siblings out of school on February 13, 2019, for alleged safety concerns. Parents asserted that on February 12, 2019, a staff member at Student's school tugged on Student's shirt to pull him into the front office when Student was being disciplined for disruptive conduct after school. Parents characterized this as physical assault. Multiple investigations were made in response to Parents' complaints, including by Corona-Norco and the Riverside County Sheriff's Department, and each found Parents' claims unsubstantiated. In response to another Parent complaint, the California Department of Education found Corona-Norco was not out of compliance with California law by not revising Student's IEP to address Parents' safety concerns. Despite these findings, Parents kept Student at home and by October 2019, Student had been out of school for eight months. The effects of months of missed instructional content and possible regression were concerns that warranted reassessment by October 2019, whether or not Student's triennial review was due.

REASONABLE MEASURES TAKEN AND DOCUMENTED TO OBTAIN CONSENT

On September 11, 2019, Corona-Norco received a request from an attorney for a copy of Student's educational records. The request included an authorization signed by Parent for release of records to this attorney. During a telephone call with one of Student's IEP team members on October 1, 2019, documented in the notes of the October 1, 2019 IEP, Parent directed Corona-Norco to schedule IEP team meetings through Student's attorney.

Corona-Norco routinely conducted comprehensive assessments of students for their triennial reviews. On October 3, 2019, Corona-Norco prepared and emailed a proposed assessment plan to Parent. Despite being sent on October 3, the assessment plan was dated October 5, 2019, and will be referred to in this Decision as the October 5, 2019 assessment plan. The October 5, 2019 assessment plan was written in English. English was Parents' native language. That assessment plan proposed to assess Student in the areas of cognitive processing, academic achievement, social emotional functioning, and speech and language. It indicated that a psychologist would test Student for perceptual/motor development, and a nurse would assess Student's health and development. It also proposed a records review for educationally-related mental health services. The assessment plan and email indicated that the assessment was necessary for Student's triennial review in December 2019.

On October 15 and November 4, 2019, Corona-Norco's counsel sent written letters and emails to the attorney identified by Parent to schedule an IEP team meeting. Both letters also sought Parents' consent to the October 5, 2019 assessment plan, which was attached. However, that attorney did not respond to letters, emails, or telephone calls from Corona-Norco's counsel about Student. Accordingly, Corona-Norco reasonably questioned whether Student was represented by counsel regarding assessment, and properly continued to email and mail requests for consent to assess directly to Parents.

On November 25, 2019, Corona-Norco mailed and emailed Parents a revised assessment plan in English, a copy of parental rights and procedural safeguards, and a copy of its counsel's October 15, 2019 letter to the attorney identified by Parent. The revised assessment plan added assessments in occupational therapy and educationally related mental health. It indicated that the occupational therapy assessment, including

perceptual/motor development, would be conducted by an occupational therapist. The occupational therapy assessment, in conjunction with the psychoeducational assessment, would evaluate Student's visual-motor processing, visual-perceptual skills and visual-motor integration abilities, which were areas of concern for Parents.

Student had also been receiving educationally related mental health services, and assessment in that area would confirm continued eligibility for that related service. The November 25, 2019 assessment plan proposed assessments that would gather information for Student's IEP team to determine his educational or related services needs, including improved academic achievement and functional performance.

Throughout December 2019, Corona-Norco made multiple unsuccessful attempts to schedule an IEP team meeting with Parents. Corona-Norco held Student's triennial review on December 16, 2019 without Parents' attendance and without a response from Parents regarding the assessment plan.

On January 20, 2020, Corona-Norco sent Parents an email attaching another copy of the November 25, 2019 assessment plan with the parental rights and procedural safeguards, again requesting consent to assess. Parents did not respond.

On February 14, 2020, Corona-Norco filed its due process hearing request and served Parents. On February 20, 2020. Parent responded to an email from Corona-Norco's counsel that all correspondence in this due process matter should be directed to the attorney identified by Parent. The attorney identified by Parent did not respond to counsel's calls or correspondence on behalf of Corona-Norco, and did not file a notice of representation in this matter.

Corona-Norco documented its attempts to obtain Parents' consent to assess Student, including emails and letters to Parents and the attorney identified as representing them, on October 3, 2019, October 15, 2019, November 4, 2019, November 25, 2019, and January 10, 2020. Although some of these attempts sought consent to the October 5, 2019 assessment plan, the November 25, 2019 assessment plan was merely a revision of the October 2019 plan, and the correspondence demonstrated repeated attempts by Corona-Norco over many months to obtain parental consent to a comprehensive reassessment of Student.

The October 1, 2019 IEP documented Parent's refusal to speak with Corona-Norco staff directly regarding Student. In light of Parent's expressing refusal to discuss the proposed assessment with Corona-Norco staff directly, Corona-Norco was excused from making further attempts to contact Parent by telephone, or visiting Parent at work or at home. Correspondence to Parents and the attorney identified by Parents were reasonable measures taken by Corona-Norco to obtain Parents' consent to assess Student, and the copies of correspondence sufficiently documented Corona-Norco's reasonable efforts.

CORONA-NORCO COMPLIED WITH PROCEDURAL REQUIREMENTS

The November 25, 2019 email and letter to Parents contained the revised assessment plan, a copy of parental rights and procedural safeguards under the IDEA and State law, and a copy of the letter from Corona-Norco's counsel to the attorney identified by Parents. All of the documents were in English, Parents' native language.

The November 25, 2019 assessment plan was in language easily understood by the general public. It described the types of assessments Corona-Norco proposed to conduct, using qualified assessors. It explained that assessments could include

classroom observations, rating scales, one-on-one testing, interviews, and records review, including review of recent assessments, independent educational assessments, and information requested by Parents to be considered. The November 25, 2019 assessment plan stated that an IEP would not result from the assessment without Parents' consent. It also corrected some minor typographical errors in the October 5, 2019 assessment plan. Both assessment plans specifically stated that they were for triennial review purposes, and that was also clearly stated in the letters and emails that accompanied the assessment plans.

The November 25, 2019 assessment plan did not include a description of recent assessments because there were none. Student had not been assessed since 2016. The assessment was requested by Corona-Norco, so did not include assessment information provided by Parents. However, the occupational therapy assessment, in conjunction with the assessment of perceptual motor development, was included to address parental concern over Student's visual motor processing. The assessment plan indicated that Student's language was English only, and that he was not an English language learner with limited English language proficiency.

The October 5 and November 25, 2019 assessment plans were accompanied by a notice of procedural safeguards and parents' rights. That document gave Parents notice of their rights in regard to assessment of Student. It explained that an IEP team meeting would be held to discuss the assessment and determine eligibility. The notice stated that parents were entitled to a copy of the assessment report and documentation of the determination of eligibility. It explained the procedure and circumstances under which parents could obtain an independent educational assessment at public expense, or at their own expense. It gave information on the due process hearing that could be

requested by the school district to defend its assessment, and the scope of the school district's right to observe a student in a proposed new school setting.

Corona-Norco gave Parents 15 days to review, sign and return the November 25, 2019 assessment plan.

In summary, Corona-Norco proved by a preponderance of the evidence that Student's educational or related services needs warranted reassessment. The November 25, 2019 assessment plan contained all required components and was accompanied by the required notice. Corona-Norco complied with all procedural requirements to obtain Parents' informed consent, and took reasonable measures to obtain that consent, but Parents failed to respond. Corona-Norco is entitled to assess Student without Parents' consent.

COMPETENT ASSESSORS

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

The November 25, 2019 assessment plan stated that the assessment would be conducted by qualified staff. It indicated that the psychological assessment, including cognitive development, processing, academic achievement, perceptual/motor

development and social/adaptive/behavior/emotional functioning, would be conducted by a psychologist. The health and developmental assessment would be performed by a nurse, and the communication development assessment would be performed by a speech language pathologist. The plan also noted that the educationally related mental health services and occupational therapy assessments would be conducted by a psychologist, speech language pathologist, and occupational therapist.

Accordingly, in addition to complying with the procedural requirements for an assessment plan, Corona-Norco also informed Parents that it had appropriately credentialed and competent staff available to conduct the proposed assessments.

CORONA-NORCO'S POST-ORDER REQUEST

Corona-Norco requests, in addition to an order permitting assessment without parental consent, that Corona-Norco be absolved of its obligation to provide Student with a FAPE if Parents do not make Student available for assessment at school.

Corona-Norco cites three cases in support of its request, only one of which is precedent from the Ninth Circuit. However, that Ninth Circuit case does not support Corona-Norco's request.

In *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307 (*Gregory K.*), the District Court heard an appeal of a state administrative law decision regarding a student's claim that his local school district had denied him a FAPE. Subsequently, the school district filed a post-trial motion to compel an assessment of the student. The District Court denied the motion. On appeal to the Ninth Circuit, the school district argued that under Washington State law it was required to reassess the student at least once every three years. The Ninth Circuit made the often quoted statement, included in

Corona-Norco's closing brief, that "If the parents want [student] to receive special education under the Act, they are obliged to permit such testing." (*Id.* at p. 1315; see *DuBois v. Connecticut State Bd. of Ed.*, (2d Cir. 1984) 727 F.2d 44, 48.) But the Ninth Circuit also stated that, under the facts of that case, "If the parents wish to maintain [student] in his current private tutoring program, however, the District cannot require a reassessment." (*Ibid.*) The school district was not successful in compelling testing of the student. Therefore, it would be overreaching to extend the limited impact of *Gregory K.* to a blanket rule that school districts are absolved from providing students with a FAPE if parents do not make their child available for assessment.

Special education due process hearings are limited to an examination of the time frame pleaded in the complaint and as established by the evidence at the hearing and expressly do not include declaratory decisions about how the IDEA would apply hypothetically. (Gov. Code, § 11465.10-11465.60; Cal. Code Regs, tit. 5, § 3089; see also *Princeton University v. Schmid* (1982) 455 U.S. 100, 102 [102 S.Ct. 867, 70 L. Ed. 2d 855] ["courts do not sit to decide hypothetical issues or to give advisory opinions"]; *Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 539-542 [court deemed the matter not ripe for adjudication because it was asked to speculate on hypothetical situations and there was no showing of imminent and significant hardship].)

Here, Corona-Norco seeks an advisory opinion on how the IDEA will be applied in the future if Parents do not make Student available for assessment. It seeks an order that if Parents do not comply with this decision, it will no longer be obligated to provide Student with special education and related services. However, whether or not Corona-Norco is obligated to provide Student with a FAPE in the future is not an issue in this due process proceeding. If Student files a post-decision due process complaint

alleging a failure to offer a FAPE, this decision does not bar Corona-Norco from raising a failure by Parents to make Student available for assessment as an affirmative defense. Corona-Norco's request for an advisory declaration is denied.

CONCLUSIONS AND PREVAILING PARTY

As required by 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.

Corona-Norco may assess Student according to its November 25, 2019 assessment plan without Parents' consent. Corona-Norco prevailed on the sole issue in this case.

ORDER

1. Corona-Norco may assess Student pursuant to its November 25, 2019 assessment plan, without Parents' consent.
2. All other relief sought by Corona-Norco is denied.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Alexa Hohensee

Administrative Law Judge

Office of Administrative Hearings