

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020090678

ANAHEIM ELEMENTARY SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

DECEMBER 1, 2020

On September 21, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Anaheim Elementary School District naming Student as respondent. OAH continued the matter for good cause on October 5 and 12, 2020. Administrative Law Judge Rommel P. Cruz heard this matter by videoconference in California, on October 27, 28, and 29, 2020.

Lauri Arrowsmith represented Anaheim Elementary. Senior Director of Special Services Kristin Cinco attended all hearing days on behalf of Anaheim Elementary. Father represented Student and attended portions of the hearing. Student did not attend the hearing.

At Anaheim Elementary's request, OAH continued the matter to November 9, 2020, for written closing briefs. The record was closed and the matter submitted on November 9, 2020.

STUDENT'S MOTION FOR REHEARING

On October 30, 2020, OAH denied Student's request for rehearing based on a failure to establish a basis, supported by legal authority, to set aside the hearing held on October 27, 28, and 29, 2020. On November 17, 2020, Student filed a second Request for Rehearing with Good Cause Showing, seeking reconsideration of the October 30, 2020 Order, and to set aside the hearing. Anaheim Elementary filed an opposition on November 18, 2020.

OAH will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when the party seeks reconsideration within a reasonable period of time, generally within ten days. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.)

Student's second Request for Rehearing seeking reconsideration of the October 30, 2020 Order is untimely, and based on the same deficient grounds that his first request for a rehearing was denied. Student's second Request for Rehearing fails to establish new facts, circumstances, or law to warrant reconsideration of the prior order denying his initial request for rehearing. Accordingly, Student's request for rehearing is denied.

ISSUE

May Anaheim Elementary assess Student pursuant to the January 22, 2020 assessment plan without Parent's consent and without the limitations and conditions placed on the assessment by Parent?

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.) 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] (*Schaffer*); and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Anaheim Elementary requested the hearing, and had the burden of proof as to the issue. 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 six years old at the time of the hearing and resided within the Anaheim Elementary's geographic boundaries at all relevant times. He was enrolled in Anaheim Elementary, but had not been assessed and found eligible for special education.

ISSUE: MAY ANAHEIM ELEMENTARY ASSESS STUDENT PURSUANT TO THE JANUARY 22, 2020 ASSESSMENT PLAN WITHOUT PARENT'S CONSENT AND WITHOUT THE LIMITATIONS AND CONDITIONS PLACED BY PARENT?

Anaheim Elementary contends that Parent placed improper limitations and conditions on its ability to fulfill its obligation under the IDEA to assess Student in all areas of suspected disability. Anaheim Elementary argues that the limitations and conditions placed by Parent have impeded its ability to gather relevant and reliable information to make an informed decision on Student's eligibility for special education. Student contends that his medical provider, not Parents, placed the limitations and conditions to his assessments, and that Anaheim Elementary must honor those limitations and conditions.

IS AN ASSESMENT OF STUDENT WARRANTED?

The IDEA places an affirmative, ongoing duty on the state and school districts to identify, locate, and evaluate all children with disabilities residing in the state that are in

need of special education and related services. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a).) This duty is commonly referred to as “child find.” California law specifically incorporates child find in Education Code section 56301, subdivision (a). 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. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at pp. 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.*)

Here, Anaheim Elementary was aware that Student resided within its boundaries and had reason to suspect he was a child with a disability who may need special education services. Anaheim Elementary’s Director of Special Services Kristin Cinco testified that, in 2019, Parents requested Student be assessed for special education. During that assessment process, Parents shared that Student was diagnosed with Autism Spectrum Disorder, referred to as autism, and a cleft lip and palate. However, Parents rescinded their request for assessments before Anaheim Elementary could complete its assessments.

On January 16, 2020, Father contacted Anaheim Elementary to renew his request for Anaheim Elementary to assess Student for special education. As a result, Anaheim Elementary’s child find duty was again triggered and it had a duty to assess Student.

IS THE ASSESSMENT NOTICE PROPER?

Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(a)(1)(D)(i)(I); Ed. Code, § 56321, subd. (c)(1).)

To obtain parental consent, the school district must provide proper notice to the student and to the student's parent. (20 U.S.C. §§ 1414(b)(1); 1415(b)(3), (c)(1); 34 C.F.R. § 300.304(a); Ed. Code, §§ 56321, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and related state laws. (Ed. Code, §56321, subd. (a).)

The assessment plan must:

1. be in a language easily understood by the public;
2. be in the native language of the student;
3. explain the types of assessments to be conducted; and
4. notify parents that no individualized education program, called an IEP, will result from the assessment without the consent of the parent.

(Ed. Code, § 56321, subd. (b)(1)-(4). The school district must give the parents and/or student 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

Anaheim Elementary proved that the January 22, 2020 assessment plan met all legal requirements for notice. On January 22, 2020, Cinco timely provided Parents an assessment plan dated January 22, 2020, along with a copy of parental procedural rights. (Ed. Code, §§ 56043, subd. (a); 56321, subd. (a).) The January 22, 2020 assessment plan was written in English, the language Parents used to communicate with Anaheim Elementary. It was written clearly in terms understandable by the general public. The plan explained no special education services would be provided to Student without Parent's written consent.

The assessment plan was comprehensive and outlined the areas to be evaluated. It proposed to assess Student's academic achievement; health; intellectual development;

language and speech communication development; motor development; social emotional functioning; behavior; and adaptive behavior. The plan explained the information being sought through the assessment of the various areas and described the possible tests and procedures to be conducted, which included interviews and a review of records. (Ed. Code, § 56321(b)(3).) The statutory requirements for notice were met, and the January 22, 2020 assessment plan complied with applicable statutes.

WILL THE PROPOSED ASSESSMENTS TO BE CONDUCTED BY COMPETENT PERSONS?

Assessments 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, § 56324, subd. (a).) A health assessment must be conducted by a credentialed school nurse or physician. (Ed. Code, § 56324, subd. (b).)

The January 22, 2020 assessment plan identified qualified professionals to conduct the assessments in the areas to be assessed. An education specialist would assess Student's academic achievement and a school nurse would assess his health. A school psychologist would assess Student's intellectual development, social emotional functioning, behavior, and adaptive behavior. Additionally, the assessment plan called for a speech-language specialist to assess Student's language and communication development.

Anaheim Elementary assigned qualified professionals to assess Student. Anaheim Elementary's school psychologist Luis Mendez possessed a master's degree in school psychology and was a board certified behavior analyst. He was also certified in administering the Autism Diagnostic Observation Schedule. Menendez was a school psychologist for 10 years. He testified and estimated having conducted roughly 500 assessments. Of the estimated 500 assessments Menendez conducted, around 20 percent involved children with autism.

Similarly, Anaheim Elementary's speech-language pathologist Loranna McGranahan was well qualified, with 25 years of experience. She conducted over one thousand speech and language assessments. The qualifications of the proposed assessors identified by the assessment plan met the legal requirements, and are not in dispute.

IS AN ASSESSMENT OF STUDENT'S HEALTH NECESSARY?

A local educational agency must assess a special education student in all areas of suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) Specifically, an assessment of a child's health is warranted if there is a suspicion that the child may have limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that could limit the child's alertness with respect to the educational environment due to chronic or acute health problems such as asthma, that adversely affects the child's educational performance. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(9).)

School nurses strengthen and facilitate the educational process by improving and protecting the health status of children and by identification and assistance in the removal or modification of health-related barriers to learning in individual children. (Ed. Code, § 49426.) A school nurse may assess and evaluate the health and developmental status of a student and communicate with the primary care provider. (Ed. Code, § 49426, subd. (a).)

However, a parent may exempt a student from a physical examination by submitting an annual written statement to the principal of the school the student is enrolled in stating that parents will not consent to a physical examination of the student. (Ed. Code, § 49451.) A school's ability to conduct hearing or vision testing is also subject to the parental exemption. (Ed. Code, § 49452.)

A school district can overcome a lack of parental consent for an initial assessment if it prevails at a due process hearing regarding the need to conduct the assessment. (20 U.S.C. §§ 1414(a)(1)(D)(ii)(I) & 1415(b)(6)(A); *Schaffer, supra*, 546 U.S. at p. 53 [school districts may seek a due process hearing "if parents refuse to allow their child to be evaluated."]; Ed. Code, § 56501, subds. (a)(1)-(a)(3), 56506, subd. (e), 56321, subd. (c).) If a parent does not consent to an initial assessment, the school district may, but is not required to, file a request for a due process hearing. (34 C.F.R. § 300.300(a)(3)(i); Ed. Code, § 56321, subd. (c)(2).)

As to Student's health, Cinco concluded that a physical examination of Student would not be part of its proposed health assessment. The purpose of a school nurse's involvement in the assessment process was typically limited to a vision and hearing assessment, and a review of medical records. However, if a parent reported that a student had serious health conditions, then a school nurse would communicate with

that student's medical providers to discuss those conditions and their impact on the student's education.

Father provided written consent to the January 22, 2020 assessment plan on January 24, 2020, and emailed the consented assessment plan to Cinco that same day. However, in the area of health, Father noted on the assessment plan that he was not consenting to a health assessment of Student pursuant to Educational Code section 49451. Father initially reported that Student had no health issues to warrant a health assessment.

However, Cinco suspected that Student's health would need to be assessed based on her extensive interactions with Parent regarding Student and his siblings. McGranahan acknowledged at the hearing the need to review Student's medical records as part of the assessment. McGranahan testified that information from medical providers regarding the condition of Student's cleft lip and palate was necessary to assess his ability to articulate sounds and speak clearly. Cinco provided Parents with an authorization for Parents to allow Anaheim Elementary to communicate with Student's medical providers who could help in planning for Student's health needs in the educational setting.

Father explained to Cinco that Parents' request to assess Student was based solely on Student's diagnosis of autism and for no other reason. Father insisted that the assessments focus only on the areas of speech, occupational therapy, and applied behavioral analysis services based on Student's autism. Father told Cinco he would not consent to allow Anaheim Elementary to communicate with Student's medical providers.

However, Father misrepresented Student's health. Student had significant health problems according to his medical provider. On June 9, 2020, Father emailed Anaheim

Elementary a letter signed by Jason Berry, Doctor of Osteopathic Medicine. The purpose of the letter was to document the medical necessity for Student to receive home hospital instruction while he received care and treatment for his mental and medical conditions. The letter described Student as having autism and a severe respiratory condition. The letter also noted that Student had a cleft lip and palate, had trouble eating and swallowing, and was still in diapers. Student required a live-in care provider to provide 24-hour care. Dr. Berry recommended Student be placed on home hospital instruction during school closures as a result of the COVID-19 pandemic, until it was determined by Dr. Berry's office that it was safe for Student to return to a school campus.

On August 24, 2020, Father provided Anaheim Elementary with more concerning information about Student's health. Dr. Berry signed a Student and Physician Verification form on August 24, 2020. The verification form noted that Student had autism with behaviors, a cleft lip and palate, and a sleeping disorder. The verification form also noted that he had trouble swallowing food, was asthmatic, and had tubes in his ear. The form reported that Student had two to three "episodes" per month. The form did not explain the nature of the episodes. The form indicated that the episodes required Student to take approximately two to three days leave. It noted Student could not do more than five hours a week of home hospital instruction.

The verification form also listed a number of Student's symptoms that included dizziness, unsteadiness, severe headaches associated with his neurological system. Regarding his respiratory system, Student experienced weakness, fatigue, continual coughing, congested airway, difficulty breathing and pain. He also experienced nausea, vomiting, diarrhea, and abdominal pain, as well as pain, inflammation and swelling associated with his musculoskeletal system.

Yet, despite Dr. Berry's concerning reports of Student's health and its impact on his education, Father throughout the assessment process denied Anaheim Elementary's requests to allow its school nurse to communicate with Student's medical provider. On at least three occasions, Anaheim Elementary requested permission from Parents to allow a school nurse to speak to Student's medical provider to determine how his health conditions could factor into his eligibility for special education services. In each instance, Father declined to allow Anaheim Elementary to communicate with Student's medical provider. Father also continued to withhold consent for Anaheim Elementary to conduct its own health assessment. Furthermore, Father insisted on at least three different occasions throughout the assessment process that his consent to assess Student was limited to special education eligibility and services on the basis of Student's autism, and nothing else.

Anaheim Elementary had a duty under the IDEA to assess Student in all areas of suspected need, which included needs beyond those associated with autism. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) The evidence clearly demonstrated that Student's general health was an area of concern necessitating an assessment that Anaheim Elementary had a legal obligation to pursue, regardless of Father's insistence that Student's assessments be limited to areas related only to autism.

Student's doctor reported Student had a myriad of health conditions, that included a cleft lip and palate, respiratory troubles, and a sleeping disorder, that would likely impact his ability to access and participate in his education. A health assessment by a school nurse was necessary to allow Anaheim Elementary to make a fully informed decision about health-related barriers that would impact Student's learning and qualify him for special education, including modifications to accommodate his physical disabilities.

Anaheim Elementary proved the January 22, 2020 assessment plan complied with all applicable statutory requirements regarding form, function, and notice. Anaheim Elementary also proved that the assessments, including an assessment in the area of health, were warranted. Therefore, Anaheim Elementary met its burden of proving by a preponderance of the evidence that it may assess Student for eligibility pursuant to the January 22, 2020 assessment plan without parental consent. However, pursuant to Education Code section 49451, Anaheim Elementary may not conduct a physical examination of Student, unless Parent provides written consent to do so.

ASSESSMENTS WITHOUT LIMITATIONS AND CONDITIONS

It is well settled that parents may not place conditions on a school district's ability to assess. As long as the statutory requirements for assessments are satisfied, parents may not put conditions on assessments; "selection of particular testing or evaluation instruments is left to the discretion of State and local educational authorities." (*Letter to Anonymous*, OSEP September 17, 1993.)

Federal courts have held that a parent who insists on placing conditions on assessments may be regarded as having refused consent. In *G.J. v. Muscogee County Sch. Dist.* (M.D. Ga. 2010) 704 F. Supp.2d 1299, affd. (11th Cir. 2012) 668 F.3d 1258, for example, parents purported to agree to a reassessment. However, they attached conditions to their approval, including requiring particular assessors, meetings with parents before and after the assessments, and limitations on the use of the assessments. The District Court deemed this a refusal to consent, noting, "With such restrictions, Plaintiff's purported consent is not consent at all." (*Id.*, 704 F.Supp.2d at p. 1309) The Eleventh Circuit affirmed, finding that parents' conditions "vitiating any rights the school district had under the IDEA for the reevaluation process" (*Id.*, 668 F.3d at p. 1264.)

Similarly, in *Student R.A. v. West Contra Costa Unified Sch. Dist.*, a parent approved an assessment plan on the modest condition that she be allowed to observe the assessment when conducted. (N.D. Cal., Aug. 17, 2015, Case No. 14-cv-0931-PJH) 2015 WL 4914795 [nonpub. Opn.], affirmed (9th Cir. 2017) 696 Fed.Appx. 171.) The District Court found that condition negated the mother's consent, stating, "[t]he request to observe the assessment amounted to the imposition of improper conditions or restrictions on the assessments, which the District had no obligation to accept or accommodate." (*Id.* at p. 3.)

COMMUNICATION WITH STUDENT'S MEDICAL PROVIDER

School districts are required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information that would assist in determining the educational needs of a child. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) This includes consideration of information provided by the parent. (*Ibid.*)

Anaheim Elementary was required by the IDEA to consider the documents signed by Dr. Berry and provided by Parents in its assessment of Student. Dr. Berry signed three documents: a June 9, 2020 letter, a Student and Physician Verification form signed on August 24, 2020, and a September 3, 2020 letter. Dr. Berry's September 3, 2020 letter stated that Student was a child with a respiratory condition that placed him at high risk of the COVID-19 virus. Dr. Berry recommended that Student not attend or participate in any in-person assessments or individualized education programs for his safety during the COVID-19 epidemic.

Dr. Berry's September 3, 2020 letter did not, however, state whether he considered the safety measures and protocols put into place by Anaheim Elementary in

weighing the risks to Student in being assessed in-person. The three documents offered an incomplete picture of Student's medical conditions relative to his education and his ability to be safely assessed in-person. Accordingly, Anaheim Elementary had no obligation to accept the documents at face value without having an opportunity to discuss with Dr. Berry his findings and recommendations.

The severity of Student's medical conditions was unclear. Dr. Berry's letters contradicted Father's initial report that Student had no health issues, and photos posted by Father on his public Facebook profile created further ambiguity as to Student's medical condition. Facebook is a social networking site that allows its members to post messages, photos, and videos. Dr. Berry's reports left the impression that Student was too ill to leave the home and be assessed in-person. Father's reports to Anaheim Elementary left the same impression, that the family could not leave the home for fear of contracting the COVID-19 virus. However, the photos Father shared on Facebook showed family outings in the community. The photos showed Student and his family at the beach and parks, at a miniature golf course, and the San Diego Safari Zoo, in July and August 2020.

Most notably, on August 13, 2020, Student was absent from the first day of distance learning for the 2020-2021 school year. Instead, Student was with his family enjoying themselves on a boat in San Diego County that day. The family outings continued through September 2020, with outings to a restaurant and Downtown Disney. The photos demonstrated that Student could safely leave the home. These inconsistencies only furthered the need for a school nurse to communicate directly with Dr. Berry to clarify the severity of Student's medical conditions and to develop a plan to safely assess him in person.

Parents refusal to allow Anaheim Elementary's school nurse to communicate with Dr. Berry as to his findings and recommendations improperly limited Anaheim Elementary's ability to gather relevant information that would assist in assessing how Student's health would impact his education. A preponderance of the evidence established that Anaheim Elementary must communicate with Dr. Berry regarding his findings and recommendations set forth in the June 9, 2020, and September 3, 2020 letters and the Student and Physician verification form dated August 24, 2020, for Anaheim Elementary to develop a plan to safely assess Student in person and to make a fully informed decision as to Student's eligibility for special education.

IN-PERSON ASSESSMENTS

Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) Tests must be selected and administered to produce results that accurately reflect the student's aptitude, achievement level, or any other factors the test purports to measure. (Ed. Code, § 56320, subd. (d).)

Anaheim Elementary was required to assess Student in-person to obtain valid and reliable results. Anaheim Elementary timely scheduled appointments to begin on February 18, 2020. However, the initial assessment appointments had to be rescheduled due to Student's illnesses, Parents' scheduling conflicts, unavailability and limited schedule. As a consequence, Anaheim Elementary did not complete the assessments before the school closures on March 13, 2020, due to the COVID-19 pandemic.

On March 13, 2020, Father requested that Anaheim Elementary postpone further assessments of Student because of the COVID-19 pandemic. That same day, Cinco

emailed Father informing him that Anaheim Elementary would be closing for two weeks and that closures may be extended. Anaheim Elementary's program specialist Holly Shubin testified that at least six hours of assessments, plus parent interviews, still needed to be completed.

On May 6, 2020, Father emailed Cinco to propose Anaheim Elementary complete the assessments by video or through a window with a screen between Student and the assessor. Cinco explained to Father that the assessments may not be valid if conducted remotely. She advised that Anaheim Elementary was planning on reopening schools in August 2020. In addition, Anaheim Elementary would contact him once public health guidelines allowed for in-person assessments to resume. Otherwise, the assessments would resume when Anaheim Elementary reopened. (See Senate Bill No. 117 (2019-2020 Reg. Sess.) § 6 [days a school is closed due to COVID-19 as days between a pupil's regular school session for purposes of the timelines affecting special education programs and waiving certain special education timelines if a local educational agency has closed due to COVID-19 up until the school reopens and the regular school session reconvenes].) Father contacted Cinco three times over the summer, requesting Anaheim Elementary complete the assessments by video or by phone.

Cinco credibly opined at hearing that conducting parts of the assessments by video would invalidate the assessments. She explained that distractions in Student's home environment, interference by Parent, and the need for a facilitator to assist Student in the assessments would call into question the validity of the assessment results.

Mendez shared the same concern at the hearing. He explained that the Autism Diagnostic Observation Schedule he planned to administer required Student to be in a controlled environment to accurately assess his response to social communications and

interactions using scripted prompts and cues. He credibly opined that administering the Autism Diagnostic Observation Schedule remotely by video with Student in the home would invalidate its findings.

In an effort to work with Parents to complete the assessments, Anaheim Elementary agreed to attempt portions of the assessments by video. However, Cinco testified that she was concerned about Father's inability to stay out of the assessor-child interaction, as he had a history of interfering in teacher-student interactions during distance learning. Her concerns were valid. McGranahan attempted to assess Student virtually, meaning remotely via the internet, on two occasions in September and October 2020. During the first attempt, Father recorded the assessment without McGranahan's knowledge. In the second attempt, Father stood over Student on numerous occasions during the assessment, which distracted Student and McGranahan.

In addition, Student's home was noisy and distracting. McGranahan reported that Parents spoke loudly, cleaned the house, and left the television on during the assessment. There were also loud, unidentifiable noises coming from outside and inside the home.

Furthermore, Student's video at times did not allow McGranahan to see his mouth, which she needed to do to assess his speech. Also, the video and sound connections were disrupted, which required her to repeat aspects of the assessment. Doing so did not conform to the instructions for the assessment and invalidated the assessment.

In addition, McGranahan had to hold the testing materials up to her video camera to show Student since Student did not have the materials, which also did not conform the assessment's instructions. As a consequence, McGranahan opined that her

virtual assessments of Student were not valid. Therefore, Anaheim Elementary discontinued its efforts to assess Student by video.

Anaheim Elementary's witnesses, including Cinco, persuasively opined that Student could be safely assessed in person with the current safety measures and protocols in place. Anaheim Elementary resumed in-person assessments on August 13, 2020, the first day of school for the 2020-2021 school year. Anaheim Elementary implemented safety measures and procedures to safely assess students in-person. All assessors were to use the safety measures and follow the protocols. The testing rooms were sanitized and temperature screenings done of the students and staff. In addition, staff used personal protective equipment including masks, face shields, gloves, and sanitizers. A plexiglass-like barrier was placed between the assessor and student. The barriers had slots to allow for the exchange of testing materials, which were sanitized.

Students to be assessed were also expected to wear masks. However, if a student was unable to do so, the assessor could wear additional equipment to further reduce the possibility of COVID-19 transmission. Anaheim Elementary's safety measures and protocols were consistent with the public health guidelines issued by the county and state. Students were safely and successfully assessed in person since the start of the 2020-2021 school year.

On August 19, 2020, Shubin emailed Father a revised assessment schedule that involved parent interviews and in-person assessments at an elementary school. Father replied that Student was unable to participate with in-person assessments. He insisted that assessments must be done virtually due to Student's health. He also insisted that the school psychologist complete his assessment virtually, and he did not consent to an in-person assessment by the speech-language pathologist. Father also declined to

participate in parent interviews because he did not trust Anaheim Elementary. As a result, Student did not attend the assessment appointments.

On August 27, 2020, Shubin emailed Father a questionnaire related to the occupational therapy assessment and rating scales for Parents to complete. Anaheim Elementary previously provided the questionnaire to Mother in February 2020. Father emailed Shubin later that day indicating that Parents were willing to allow Student to attend in-person assessments on the condition that Student attend with a mask and face shield, with the assessor six feet away from Student. However, shortly thereafter, Father again informed Anaheim Elementary that Student would not attend in-person assessments at the time due to Student's compromised immune system.

However, despite Father's instance that Student could not safely be assessed in-person, the evidence demonstrated that Anaheim Elementary could safely assess Student in-person with its proposed safety measures in place. Father's refusal to allow Anaheim Elementary to assess Student in person and his request that Student only be assessed virtually was an unreasonable impediment to Anaheim Elementary's ability to assess Student in a manner that would produce results that accurately reflected Student's levels of functioning. Therefore, Anaheim Elementary proved by a preponderance of the evidence that it may assess Student in-person with appropriate safety measures and protocols in place to limit Student's exposure to the COVID-19 virus.

OUTSIDE ASSESSMENT REPORTS

As part of Anaheim Elementary's assessment of Student, Father requested Anaheim Elementary consider the findings and recommendations of a psychological

testing report and speech and language evaluation report of Student. However, Parents refused to provide Anaheim Elementary a complete copy of either assessment report.

Anaheim Elementary requested on numerous occasions for Parents to provide copies of the outside assessments Father referenced. On August 21, 2020, in response, Father emailed Cinco part of a psychological testing report prepared by Benjamin Stepanoff, Psy.D., dated May 30, 2018. Father also emailed a partial speech and language evaluation report prepared by speech-language pathologist Tram Nguyen of Riverview Hearing, Speech and Language Centers dated February 11, 2020.

Parents refused to provide Anaheim Elementary with complete copies of the assessment reports, whose findings and recommendations Parents requested Anaheim Elementary consider. Mendez and McGranahan opined at the hearing that a review of the complete assessment reports was necessary to verify whether the assessments were comprehensive, and their findings and conclusions valid. Hence, Anaheim Elementary could not rely on incomplete reports, and therefore, Anaheim Elementary had no obligation to consider the portions of the reports selected and provided by Father.

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.

Issue: Anaheim Elementary may assess Student pursuant to the January 22, 2020 assessment plan without Parent's consent and without the limitations and conditions placed on the assessment by Parent. Anaheim Elementary prevailed on the issue.

ORDER

1. Anaheim Elementary is entitled to assess Student pursuant to the January 22, 2020 assessment plan without parental consent. However, Anaheim Elementary is not entitled to conduct a physical examination of Student, unless Parent provides written consent to do so. The 60-day timeline to complete the assessments shall begin on the date of Decision.
2. Anaheim Elementary shall notify Parent within 10 business days from the date of this Decision, of the days, times, and locations Parent is to present Student for in-person assessments. Parent shall reasonably cooperate in presenting Student for assessments on those days, times, and locations.
3. If Student is unable to attend the assessments due to illness, Parent shall promptly communicate this fact to Anaheim Elementary and provide Anaheim Elementary with documentation, written and signed by a qualified medical provider. Parent shall permit Anaheim Elementary to communicate, verbally or in writing, with the medical provider who wrote and signed the document regarding Student's medical condition. Anaheim Elementary shall inform such medical provider of this Decision's findings and order that Anaheim Elementary has the right to assess Student without conditions or limitations. In rescheduling the assessments, the parties shall mutually agree on days and times for assessments to be conducted that are no more than 30 days from the dates that Anaheim Elementary originally proposed. Parent shall reasonably cooperate in timely rescheduling the assessments.
4. Parent shall permit Anaheim Elementary to communicate with Jason Berry, Doctor of Osteopathic Medicine, to discuss the contents of the June 9, 2020, and September 3, 2020 letters, and the Student and Physician Verification form dated August 24, 2020. Anaheim Elementary shall inform Dr. Jason Berry of this

Decision's findings and order that Anaheim Elementary has the right to assess Student without conditions or limitations.

5. Parent shall timely complete and return any documents reasonably requested by Anaheim Elementary as part of the assessments, including ratings scales and questionnaires.
6. Parent must provide Anaheim Elementary, within five business days of the date of this Decision, a complete copy of any assessment report Parent wants Anaheim Elementary to consider in its assessment of Student. Anaheim Elementary is not obligated to consider the findings, conclusions, and recommendations of any incomplete assessment report.
7. Parent shall comply with any parameters that Anaheim Elementary deems necessary to conduct a valid assessment, which includes but is not limited to, Anaheim Elementary's ability to test and observe Student outside the presence of Parent and without Parent interference.
8. Any delay due to Parent's failure to present Student for assessment or comply with any of the orders as specified above, will toll the 60-day timeline for assessment, and Anaheim Elementary will not be obligated to provide special education and related services to Student until such time as Parent complies with this Order.

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/

Rommel P. Cruz

Administrative Law Judge

Office of Administrative Hearings