

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020010158

TRIVIUM CHARTER SCHOOL,

v.

PARENT ON BEHALF OF STUDENT.

DECISION

MARCH 19, 2020

On January 3, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Trivium Charter School, naming Parent, on behalf of Student, as respondent. Parent on behalf of Student shall be referred to as Student. On January 13, 2020, Trivium moved to continue the matter due to unavailability of counsel. On January 17, 2020, OAH granted Trivium's motion to continue for good cause. On January 30, 2020, Student requested a continuance because Parent did not receive Trivium's evidence binder five business days prior to the hearing. On January 31, 2020, OAH granted Student's motion to continue for good cause. Administrative Law

Judge Cararea Lucier heard this matter in Santa Barbara, California, on February 5, 6, and 7, 2020.

Hollis R. Peterson represented Trivium Charter School. Trisha Vais, Executive Director, attended all hearing days on Trivium's behalf. Annette Lawrence, Special Education Service Specialist, attended some hearing days on Trivium's behalf. Parent represented Student. Student did not attend the hearing.

At the parties' request, OAH continued the matter to February 24, 2020, for written closing briefs. The record was closed, and the matter submitted on February 24, 2020.

ISSUE

Is Trivium entitled to perform Student's triennial assessment as proposed to Parent on November 14, 2019, without parental consent?

JURISDICTION AND BACKGROUND

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]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Trivium filed the complaint and has the burden of proof on all issues. 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).)

BACKGROUND

Student was 16 years old and in tenth grade at the time of hearing. Student was enrolled in Trivium Charter School at all relevant times. Student was eligible for special education under the category of other health impairment.

Student was diagnosed with Tourette's Syndrome, Generalized Anxiety Disorder, Obsessive Compulsive Disorder, and Pediatric Autoimmune Neuropsychiatric Disorder associated with Streptococcus, referred to as PANDAS. PANDAS is a rare disorder that occurs due to a bacterial infection that affects the body's immune system. PANDAS can

produce a wide range of neuropsychiatric symptoms, including sudden onset tic disorders, obsessive compulsive disorders, and irritability. Other symptoms include aggression, severe separation anxiety, panic attacks, emotional lability, chronic fatigue, restrictive eating, attention deficit, and deterioration in school performance. Despite her disabilities, Student created beautiful artwork and music. Student was a talented singer and aspiring song writer.

Student attended school each day at Trivium accompanied by her mother and her service dog. Trivium was an independent study charter school. Trivium was authorized by Blochman Union School District, but was its own local educational agency, referred to as an LEA. Although it was a non-classroom-based program, Trivium offered a classroom experience for two days per week. The classroom days were referred to as A Classical Education days, referred to as ACE days. On ACE days, students attended classes with teachers and peers, from 9:00 AM to 3:15 PM. Parent's goal was for Student to attend as many ACE days as possible.

ISSUE: IS TRIVIAM ENTITLED TO PERFORM STUDENT'S TRIENNIAL ASSESSMENT AS PROPOSED TO PARENT ON NOVEMBER 14, 2019, WITHOUT PARENTAL CONSENT?

Trivium contends it should be allowed to assess Student, as proposed on November 14, 2019, without parental consent. Trivium asserts Student's triennial assessment was due in February 2020, and multiple individualized education program, called an IEP, team members believed reassessment was warranted. Trivium further contends reassessment is necessary to clarify Student's needs and resolve disagreements within the IEP team over the level of services and accommodations

Student requires to receive a FAPE. Trivium additionally contends an educationally related mental health services assessment is necessary to address Student's social-emotional and mental health needs and to explore whether she requires educationally related mental health services to receive a FAPE. Finally, Trivium contends that because Student has turned 16 years old, it must be allowed to conduct a post-secondary transition assessment to develop a legally compliant individualized transition plan in her next IEP.

Student contends she should receive an independent educational evaluation in lieu of reassessment by Trivium. Student asserts Trivium does not have staff competent to assess Student because they do not have expertise in PANDAS. Student contends Trivium will misunderstand Student's medical needs and view Student's actions as psychological or volitional in nature rather than medical. Student argues Trivium's proposed reassessments will result in Student being misdiagnosed, causing Student substantial harm. Student further contends Trivium's assessment plan was procedurally deficient. Student contends Parent and Student's doctors were left out of the development of the assessment plan. Finally, Student alleges the proposed reassessments are intended to drive Student out of the school, as retaliation for filing compliance complaints with the California Department of Education.

LEGAL FRAMEWORK UNDER THE IDEA

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) 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.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which 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].)

SPECIAL EDUCATION ASSESSMENTS

A district must ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) The assessment must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the child is classified. (34 C.F.R. § 300.304(c)(6).)

A reassessment shall occur not more frequently than once a year, unless the parent and the district agree otherwise, and shall occur at least once every three years, unless the parent and the district agree in writing that a reassessment is unnecessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code § 56381, subd. (a)(2).)

Beginning not later than the first IEP to be in effect when the student is 16 years of age, or younger if determined appropriate by the IEP team, and updated annually thereafter, the IEP shall include appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education,

employment, and where appropriate, independent living skills; and the transition services, including courses of study, needed to assist the pupil in reaching those goals. (20 U.S.C. § 1414 (d)(1)(A)(i)(VIII); Ed. Code, §§ 56345, subd. (a)(8); 56043, subd. (g)(1).)

"Transition services" are defined in the IDEA as a coordinated set of activities designed within a results-oriented process, focused on improving the academic and functional achievement to facilitate movement from school to post-school activities, such as postsecondary education, vocational education, integrated employment, including supported employment, continuing and adult education, adult services, independent living, or community participation. Transition services are to be based upon individual needs, taking into account individual strengths, preferences, and interests. Transition services include instruction, related services, community experiences, development of employment and other post-school adult living objectives. If appropriate, transition services include acquisition of daily living skills and provision of a functional vocational evaluation. (Ed. Code, § 56345.1, subd. (a); 20 U.S.C. § 1401(34); 34 C.F.R. § 300.43(b).)

On November 14, 2019, Trivium provided Parent with an assessment plan proposing assessments of Student in six areas:

- Academic Achievement, by a Special Education Teacher;
- Health, review of records, by a School Nurse;
- Intellectual Development, by a School Psychologist;
- Motor Development, review of records, by an Occupational Therapist;
- Social emotional/behavioral, educationally related mental health services, by a School Psychologist; and

- Post-Secondary Transition, including student and parent interviews, by a Special Education Teacher.

NEED FOR REASSESSMENTS

A local educational agency must conduct a reassessment at least once every three years, unless the parent and the agency agree that it is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2); Ed. Code, §§ 56043, subd. (k), 56281, subd. (a)(2).) The agency must also conduct a reassessment if it determines that the educational or related services needs of the child, including improved academic achievement and functional performance, warrant 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).) To the extent possible, school agencies must encourage the consolidation of meetings to review reassessments with other IEP team meetings, such as those to discuss post-secondary individualized transition plans. (Ed. Code, § 56381, subd. (j).)

Trivium has the legal right to conduct a triennial reassessment of Student. Trivium last conducted a comprehensive assessment of Student in February 2017, when Trivium first considered her initial eligibility for special education. Student's IEP team met on February 27, 2017, to discuss the initial assessments. Within the past three years, Trivium assessed Student in the areas of assistive technology, health, and occupational therapy, at Parent's request. Trivium had not conducted a comprehensive assessment of Student in all areas of suspected disability since 2017.

Levi Henry was a school psychologist for Trivium. He was a licensed educational psychologist with over 20 years of experience. He believed a triennial reassessment was warranted for Student. He had known Student for three and one half years. He

assessed Student for her initial IEP. Henry provided Student with counseling services pursuant to her IEP. At the time of the hearing, Henry and Student were working on reducing Student's anxiety at school. Henry presented as a highly credible witness because he was thoughtful and direct, with a careful and measured demeanor.

Henry felt strongly that triennial reassessments were warranted for several reasons. First, the IEP team needed updated information about Student and changes in her condition. In previous school years, Student did not attend many classes or complete much work. In eighth grade, Student attended class less than 10 percent of ACE days and 23 percent of partial ACE days. At the beginning of ninth grade, Student attended ACE days on only 16 percent of days, and completed 17 percent of the expected work. Student struggled with attendance and work completion throughout her ninth grade year and did not receive credit for any classes. In contrast, for tenth grade during the 2019-2020 school year, Student attended many more classes and improved her work completion. Student performed well academically.

Second, Henry saw fluctuations in Student's symptoms, which warranted an assessment to consider her educational needs. Although Student still exhibited substantial anxiety, Student's separation anxiety from her mother was inconsistent. Sometimes separating from her mother was a big problem, but sometimes not. Additionally, Henry saw Student's reactions to her paper phobia as inconsistent. She did not display adverse responses to paper in 100 percent of circumstances.

Henry believed the IEP team also needed reassessments to fully consider disagreements at IEP team meetings over the services and accommodations Student required to receive a FAPE. Parent requested a scribe and specialized academic

instruction for every minute of the school day. Henry believed the IEP team did not have evidence to support Parent's requests, and therefore needed reassessments.

Fourth, Henry believed Trivium needed to conduct an educationally related mental health services assessment of Student. Trivium had not previously conducted a mental health assessment of Student. Henry described Student as having a neuropsychiatric disorder. The disorder, PANDAS, caused a region of Student's brain, the basal ganglia, to inflame, which affected her emotions and behavior. Her condition was linked to suspected problems with executive functioning, emotional regulation, and behavior. Although the medical condition was the underlying cause of Student's behaviors, Student may have adopted negative learned behaviors and continued to use them past the time of the medical flare up. Henry believed a mental health assessment was necessary to identify Student's needs as well as potential services to address her needs. After an assessment, Student would be considered for access to educationally related mental health services, which were not available to her yet at the time of the hearing.

Finally, Henry felt that Trivium needed to assess Student to develop a post-secondary transition plan. Student recently turned 16 years old. Trivium was required to assess Student, invite Student to an IEP team meeting, and develop a post-secondary individualized transition plan. During her tenth grade year, Student completed a school project in which she investigated a career as a singer and song writer. However, this project was within the context of her general education classes and not tied to her IEP or transition goals.

Annette Lawrence was the special education service specialist for Trivium. Among other duties, Lawrence maintained the IEP team meeting notes and documents

for special education students, including releases of information. Lawrence attended IEP team meetings for Student. She was responsible for submitting the assessment plan and procedural safeguards to Parent.

Lawrence believed a triennial reassessment was warranted. It was required to assess Student to develop a post-secondary transition plan. Lawrence stressed that the IEP team needed current and accurate information about Student. Student recently improved, making well documented progress in her tenth grade year. Student suffered emotional or psychiatric symptoms in response to external events and circumstances, which her providers referred to as triggers. Lawrence believed the IEP team had a list of triggers that no longer appeared to be triggers.

Robert Bradfield was a general education teacher at Trivium. He held a multiple subject teaching credential. He knew Student for four years. Bradfield attended Student's IEP team meetings, and believed a triennial reassessment was warranted.

Bradfield thought the IEP team needed to reassess Student because of changes in her school performance. During the 2019-2020 school year, Student attended almost every day, a significant improvement. Student was at the top of her class academically. Bradfield did not believe Student required a scribe, which Parent requested. Bradfield felt that the IEP team needed assessment data to guide the team's decision-making process.

Trisha Vais was the Executive Director of the Trivium Charter School Network. She oversaw all aspects of the fiscal, academic, and operational areas of the three charter schools within the Trivium network. Vais knew Student and Parent for two years.

Vais attended all of Student's IEP team meetings except for one. Vais presented as a dedicated educator and credible witness, with a compassionate and patient demeanor. She believed a triennial reassessment was warranted.

As the Executive Director, Vais recognized that Trivium was obligated by the Education Code to conduct a triennial reassessment of Student unless the parties agreed it was unnecessary. Numerous Trivium staff members told Vais that a reassessment was warranted, including Student's teachers Bradfield and Hannah Sheets, school psychologist Henry, and Linda Harley, the Director of Special Education.

Since December 2018, the IEP team met on a monthly basis to discuss Student's services and accommodations. Parent and Trivium vigorously disagreed whether Student still required her mother to attend classes with her as an IEP accommodation. Pursuant to the last signed IEP of December 13, 2018, one accommodation Student received was "Parent can attend ACE Day classes or be in proximity of the classroom environment to ease student separation anxiety." Sandy Patterson, Learning Center Coordinator, believed Parent was disruptive to staff on at least two occasions. Parent passionately disputed the idea that she disrupted the school. Parent filed a police report alleging that Trivium made false allegations against her. Additionally, the IEP team disagreed as to whether Student required a scribe. Vais stressed that the IEP team needed reassessment data to discuss Student's improved school performance and disagreements over Student's IEP accommodations. Within the monthly IEP team meetings, the parties had discussed their opinions, thoughts, and beliefs, and in Vais's opinion, it was time to collect data.

ASSESSMENT NOTICE

Reassessments require parental consent, or, in the absence of parental consent, an order following a due process hearing. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent the school district must provide proper notice to the student and his or her 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 safeguards under the IDEA and related state laws. (Ed. Code, § 56321, subd. (a).) The assessment plan must:

- be in a language easily understood by the public and the native language of the parent;
- explain the types of assessments to be conducted; and
- notify parents that no IEP will result from the assessment without the consent of the parent.

(Ed. Code, 56321, subd. (b)(1)-(4); see also 34 C.F.R. § 300.9(a).) The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

Trivium provided Parent with a legally compliant assessment plan. On November 12, 2019, Trivium emailed Parent with an assessment plan dated October 31, 2019, as well as a copy of parental procedural safeguards. On November 13, 2019, Parent faxed to Trivium her disagreement with the assessment plan. Parent noted the date on the assessment plan as being different from the date she received it. Lawrence

corrected the date on the assessment plan, but made no other changes. On November 14, 2019, Trivium emailed Parent the corrected assessment plan. Parent did not respond.

The assessment plan provided on November 14, 2019, was in a language easily understood by the public. It was in Parent's native language of English. The assessment plan explained the types of assessments to be conducted and that no IEP would result from the assessment without the consent of the parent. In her email to Parent on November 14, 2019, Lawrence explained that Parent had 15 days to sign and return the assessment plan. In sum, Trivium provided Parent with a proper assessment plan under the law.

COMPETENT ASSESORS

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).)

Parent refused to consent to the assessment plan in part because she strongly believed Trivium did not have assessors competent to assess Student. Parent worried that Trivium staff were not experts in PANDAS, so Student would be misdiagnosed.

Parent thought the IEP team misunderstood Student's symptoms of her medical disorder and might attribute the symptoms to more widely understood psychological conditions.

Parent had sincere trepidations about the assessment process due to Parent's long history of trying to get a medical diagnosis and proper care for Student. Parent spent four years having Student assessed by doctors before Student was diagnosed with PANDAS. However, the law does not allow parents to choose assessors for a special education assessment. (See 20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c)(1)(iv); Ed. Code, § 56322.) The school agency is entitled to select the assessors as long as they are competent under the parameters established by the Education Code and the school agency.

Trivium proved the assessments proposed to Parent on November 14, 2019, would be conducted by persons competent to perform them. Trivium assigned Deborah Johnson to conduct the intellectual development, social emotional/behavioral, and educationally related mental health services portions of the assessments proposed to the Parent on November 14, 2019. Johnson was a credentialed school psychologist. She had a Bachelor of Arts in Psychology and a Master of Science in School Psychology. She had over 20 years of experience conducting assessments of students in public schools. Johnson was experienced in conducting assessments for a diverse population of students and trained and prepared to assess cultural and ethnic factors appropriate to a pupil being assessed. Trivium chose Johnson to conduct the intellectual development, social emotional/behavioral, and educationally related mental health services portions of the assessment rather than Levi Henry, Student's school counselor, to protect the rapport between Student and Henry.

Trivium assigned Laura Gardener to conduct the academic achievement and post-secondary transition portions of the proposed assessments. Gardener was a credentialed special education teacher. She had nine years of experience teaching in both general education and special education classrooms. She was experienced in conducting special education assessments. Trivium chose Gardener, in part, out of deference to Parent's concerns about the proposed assessments being conducted by another teacher Parent believed triggered Student's anxiety.

Trivium proved it would conduct the motor development and health portions of the proposed assessments by persons competent to perform them. Trivium would assign a licensed occupational therapist to conduct the motor development assessment and a credentialed school nurse to conduct the health assessment. School psychologist Henry drafted the assessment plan in consultation with Trivium staff. Henry was thoughtful and careful in developing the plan. Trivium considered the needs of Student and Parent's preferences in choosing the assessors.

PARENT CONCERNS AND CONDITIONS

Parent was concerned about the proposed assessments for a number of reasons. First, the proposed assessments would involve paper. Student had a paper phobia. Second, some proposed tests were to be timed. Student had test-taking anxiety, fatigued easily, and needed breaks. Third, the assessments would take place during academic instructional time. Student would miss some academic instruction. Fourth, the assessments would capture Student's performance on a particular day and time. Student's symptoms of PANDAS fluctuated due to the waxing and waning nature of the condition. Finally, Parent believed Trivium should have allowed Student's doctors,

private providers, and Parent to discuss the assessments proposed at an IEP team meeting, and should have solicited input regarding the assessment instruments and process.

As long as the statutory requirements for assessments are satisfied, parents may not put conditions on assessments. A school agency is not required to convene an IEP team meeting to discuss and develop a plan for a student's reassessment. (34. C.F.R. § 300.305(b); Ed. Code, § 56381, subd. (g).) The 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).) Parental conditions on assessment "vitiates any rights the school district had under the IDEA for the reevaluation process." (*G.J. v. Muscogee County Sch. Dist.* (11th Cir. 2012) 668 F.3d 1258, 1264.) A parent does not have the right to observe assessments, as this places an imposition on district testing, which a school district is not obligated to accept or accommodate. (*Student R.A. v. West Contra Costa Unified Sch. Dist.* (N.D. Cal., August 17, 2015, Case No. 14-cv-0931-PJH) 2015 WL 4914795 [nonpub. Opn.], affirmed (9th Cir. 2017) 696 Fed. Appx. 171.) In sum, the law does not allow Parent to place any conditions on the assessments of Student proposed by Trivium on November 14, 2019.

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.

Trivium is entitled to perform Student's triennial assessment as proposed to Parent on November 14, 2019, without parental consent. Trivium prevailed on the sole issue in this matter.

REMEDIES

If parents do not consent to a reassessment plan, the school district or charter school may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) Trivium properly filed a request for a due process hearing in this matter. Trivium proved with overwhelming evidence and testimony that it needed to reassess Student, the areas of assessment, its assessors were qualified, and was legally entitled to do so.

It is well settled that parents who want their children to receive special education services must allow reassessment by the district, with assessors of its choice. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; *Johnson v. Duneland Sch. Corp.* (7th Cir. 1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir. 1995) 64 F.3d 176, 178-179; *Dubois v. Connecticut State Bd. of Educ.* (2d Cir. 1984) 727 F.2d 44, 48.)

In its closing brief, Trivium also seeks an order mandating that Parent sign and return releases of information between Trivium and three of Student's private providers and doctors. Trivium seeks an order that it is not obligated to provide special education services, or otherwise accord Student of the rights of a special education student, until Parent has complied.

For several years Parent has insisted that Student's IEP team adopt educational recommendations from Student's private providers and doctors. Parent made her perspective clear in the IEP team meeting of January 6, 2020. Parent and Student's treating psychologist insisted that because Student had a medical condition, PANDAS, the IEP team must defer to the educational recommendations of medical specialists. Medical recommendations were ultimatums.

Parent has provided Trivium with 26 letters from Student's private providers and doctors with educational recommendations within the past three years. These recommendations included:

- Student must have a one-on-one aide during school hours;
- Student must have a different special education teacher;
- Student must be allowed flexible school attendance;
- Student must not be given written tests, or computerized tests for math, or closed book tests for math;
- Student must take all test, exams, and quizzes before or after normal school hours;
- Student must not be asked to read quickly, remember material, or demonstrate competence through testing;
- Student must be exempted from physical education and the Presidential Fitness Exam;
- Student's behaviors must not be interpreted as defiance;
- Student must be allowed to turn in classwork after the semester deadline;

- Trivium must give Student marks of incomplete for work not turned in by the semester deadline, and give her full credit for classes if she is able to demonstrate knowledge through special projects;
- Trivium must give Student credit for elective classes to help her feel secure and positive about her education;
- Student must not participate in cognitive behavior therapy at school; and
- Student must not be exposed to phobia triggers at school, including paper, spiders, tests, and needles.

Parent did not allow Trivium to communicate directly with Student's private providers and doctors about these recommendations.

Trivium was frustrated that it could not communicate with Student's doctors and private providers. Trivium believed Parent was providing the doctors with inaccurate information. The providers made recommendations without ever seeing Student in the school environment. The recommendations may have been made solely based upon information from Parent, without the providers seeing Student in person or conducting a medical evaluation. Trivium directed substantial resources toward meeting the demands of Student's private providers and doctors, even when the IEP team did not agree the recommendations were educationally appropriate for Student.

At the time of the hearing, Trivium strongly believed it needed to communicate with Student's private providers and doctors to develop an appropriate educational program for Student. In January 2020, Trivium provided Parent with five release of information forms. Trivium asked Parent to sign and return them. Parent refused.

The sole legal issue in this case relates to the assessment plan proposed to Parent on November 14, 2019. Trivium did not attach any release of information forms to the assessment plan provided to Parent on November 14, 2019. Additionally, the assessment plan did not mention Trivium's desire to communicate with Student's private providers and doctors.

In a letter to Parent dated November 18, 2019, Vais cited legal cases in other jurisdictions in which administrative law judges and hearing officers ordered an independent medical examination of a student or limited a family's transportation reimbursement remedy due to noncooperation with medical releases. (See *Oconee County Sch. Dist. v. A.B.* (M.D. Ga., July 1, 2015, 2015 WL 4041297) [nonpub. opn.]); see also *Shelby S. v. Conroe Ind. Sch. Dist.* (5th Cir. 2006) 454 F.3d 450, 454-455, cert. denied (2007) 549 U.S. 1111.) Vais mentioned the cases in a two-page letter that included 18 legal citations. Parent did not understand the legal references and took the letter as a threat of retaliation. The language of the letter would not put a reasonable person on notice that Trivium was requesting Parent consent to broad releases of medical and psychiatric information as part of the triennial reassessment process.

Trivium relies on *Oconee County Sch. Dist. v. A.B.* (M.D. Ga., July 1, 2015, 2015 WL 4041297) [nonpub. opn.] and *Shelby S. v. Conroe Ind. Sch. Dist.* (5th Cir. 2006) 454 F.3d 450, 454-455, cert. denied (2007) 549 U.S. 1111.) to support its request for an order mandating that Parent sign releases of information. However, Trivium misses the point. Unlike in *Shelby S.*, Trivium did not propose an independent medical evaluation of Student in the assessment plan provided to Parent on November 14, 2019. Furthermore, *Oconee County* does not support Trivium's position. In *Oconee County*, the ALJ limited the family's transportation reimbursement claim on equitable grounds,

because the family was uncooperative in the IEP process and did not allow the school district to communicate with the student's doctor. The ALJ did not order the family to sign a release of medical or psychiatric information. Trivium is not legally entitled to an order forcing Parent to sign releases of medical and psychiatric information as a condition of receiving special education services.

However, Trivium is proposing to review records as part of its assessment process. If an educational agency is provided with private assessments or doctor's recommendations, it is not required to accept the information as unquestionably true. (See *G.D. v. Westmoreland Sch. Dist.* (1st Cir. 1991) 930 F.2d 942, 947 [The duty to consider an evaluation does not obligate the school district to accept the evaluation or its recommendations.]) An educational agency must be able to verify the information through communication with the doctors, reliable supporting documents, or its own assessment results. The IEP team must consider private and medical information proffered by a parent, but is not bound to accept it. (34 C.F.R. § 300.502(c)(1).)

Trivium cannot be compelled to embrace unreliable recommendations as part of assessments that it is legally entitled to conduct. Within the scope of the records review component, if Parent provides Trivium with records for Trivium to consider as part of the assessment process then Parent must allow Trivium unfettered communication with the author of any document provided by Parent on the topic of that document, including the author's underlying basis for any recommendations. If Parent does not provide such a release, then Trivium need not consider the records provided by Parent in its assessment. If Parent places Student's medical condition at issue as part of the assessment process by providing Trivium with Student's records, such as

recommendations from Student's medical providers, then Parent has waived any confidentiality. (*Freed v. Home Depot U.S.A., Inc.* (S.D. Cal. Jan. 4 2019, Case No. 18cv359-BAS (LL)) 2019 W.L. 183833, p. 5; *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th. 1, 37.)

ORDER

1. Trivium is entitled to assess Student according to the assessment plan provided to Parent on November 14, 2019, without Parent's consent.
2. Trivium shall notify Parent within 10 business days of the date of this Decision, of the dates, times, and places Parent is to present Student for reassessment, and Parent shall reasonably cooperate in presenting her for assessments on those dates, times, and places.
3. If Student is unavailable for reassessment due to her medical condition on the dates Trivium proposes, Parent shall provide Trivium with documentation of the specific reasons she is not available, written and signed by a qualified medical provider. Parent shall allow Trivium to communicate with the medical provider who wrote and signed the documentation, verbally and in writing, regarding Student's medical condition. Trivium shall inform such medical provider of this Decision finding that Trivium has the right to assess Student without conditions.
4. If Parent does not cooperate with the reassessments as specified above, Trivium will not be obligated to provide special education and related services to Student until such time as Parent complies with this Order.
5. All other claims for relief are 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/

Cararea Lucier

Administrative Law Judge

Office of Administrative Hearings