

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021030990

SOLEDAD UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

DECISION

JULY 2, 2021

On March 26, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Soledad Unified School District, naming Parent on behalf of Student. Parent, on behalf of Student, shall be referred to as Student. On April 12, 2021, OAH granted the parties' Motion to Continue for good cause. Administrative Law Judge Cararea Lucier heard this matter by videoconference on May 18, and 19, 2021.

Erin Frazor, Attorney at Law, represented Soledad Unified School District. Melanie Grunde, Director of Special Education, attended all hearing days on Soledad's behalf. Parent represented Student. Student briefly attended the hearing at various times.

At the parties' request, OAH continued the matter to June 7, 2021, for written closing briefs. The record was closed, and the matter submitted on June 7, 2021.

ISSUE

Is Soledad Unified School District entitled to conduct assessments of Student not already completed, pursuant to the January 10, 2020 triennial assessment plan, without Parent's consent and without limitations and conditions placed on the assessment by Parent?

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, 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, Soledad 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).)

Student was 13 years old and in eighth grade at the time of hearing. Student resided with her Parent within Soledad at all relevant times. Student was eligible for special education under the categories of specific learning disability and speech or language impairment.

ISSUE: IS SOLEDAD UNIFIED SCHOOL DISTRICT ENTITLED TO CODUCT ASSESSMENTS OF STUDENT NOT ALREADY COMPLETED, PURSUANT TO THE JANUARY 10, 2020 TRIENNIAL ASSESSMENT PLAN, WITHOUT PARENT'S CONSENT AND WITHOUT LIMITATIONS AND CONDITIONS PLACED ON THE ASSESSMENT BY PARENT?

Soledad contends that Parent signed a January 10, 2020 triennial assessment plan but has not made Student available for the cognitive and social-emotional assessments that Parent consented to in the plan. Soledad contends assessment is warranted because Student was last assessed in 2016, and Student's triennial review is due. Soledad further contends assessment is warranted because Student's doctor diagnosed Student with anxiety and post-traumatic stress disorder, and Soledad has reason to suspect Student may have social or emotional issues impacting her education. Finally, Soledad contends it made numerous proactive attempts to assess Student, but Parent has not made Student available.

Parent contends she is waiving triennial assessments of Student due to the Covid-19 pandemic and related public health emergency. Parent contends Soledad staff disrespected her and Student, and that Soledad questioned doctor's notes and sought confidential information to which it was not entitled. Finally, Parent contends Student would be harmed if Soledad conducted the cognitive and social-emotional assessments.

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 individualized education program, referred to as 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; *Andrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

NEED FOR REASSESSMENT

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 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 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).)

Student's triennial reassessments are past due, and a comprehensive reassessment of Student is both warranted and necessary. Soledad last assessed Student on December 7, 2016. Student's triennial reassessment was due by December 7, 2019. Melanie Grunde, Director of Special Education, believes that triennial assessments of Student are warranted to meet Soledad's legal requirement to conduct a triennial assessment of Student to determine her eligibility for special education, and to offer Student a free appropriate public education. Grunde was highly experienced in the field of special education, with a Masters of Art degree in Special Education, and credentials in the areas of mild-moderate, moderate-severe, and administration. She is familiar with Student. Grunde attended IEPs for Student during the 2019-2020 and 2020-2021 school years. Based upon her expertise and knowledge of Student, Grunde presented as a credible witness with respect to Soledad's need to assess Student.

Soledad proved reassessment of Student in the areas of cognitive ability and social-emotional is warranted so that the IEP team can finish Student's annual and triennial IEPs. Kelly Forrest, School Psychologist, believes triennial assessments of Student are necessary for the IEP team to determine her continued eligibility for special education and to complete her IEP. She communicated with Parent throughout the 2020-2021 school year regarding Soledad's need to assess Student in the areas of social-emotional and cognitive. Forrest attended IEP team meetings for Student during the 2020-2021 school year. Forrest credibly testified that team was unable to finish the draft triennial assessment report for Student or consider her continued eligibility under the category of specific learning disability because Parent did not make Student available for cognitive and social-emotional assessments.

A social-emotional assessment is warranted because Student's social-emotional needs have impacted school attendance and educational performance. Since Student's

2016 assessment, Student's doctor diagnosed her with anxiety and post-traumatic stress disorder. From August 12, 2019, through November 30, 2020, Parent provided numerous letters to Soledad from Student's doctor recommending home hospital instruction due to these conditions. For the 2019-2020 school year, Student attended 55.5 percent of school days. For the 2020-2021 school year, Student attended 12.5 percent of school days.

Parent and Soledad had differing opinions on why Student struggled with attendance. In Parent's opinion, Soledad failed to provide a home hospital teacher, and failed to create a safe and comfortable school environment for Student. In Soledad's opinion, expressed by Forrest at hearing, Student's social-emotional functioning likely impacted attendance. A district is on notice of a suspected disability and required to assess in that area if a student has displayed symptoms of that disability. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119, cert. den. (Apr. 17, 2017, No. 16-672) 137 S.Ct. 1578 [2017 WL 1366731].) Because Soledad has reason to suspect that Student may have disability in the area of social-emotional functioning, affecting her educational progress, it was required to assess Student in that area.

Parent did not have the right to waive Student's triennial assessments due to the Covid-19 pandemic and related health concerns. The U.S. Department of Education has not waived legal requirements relating to triennial assessments during school closures for Covid-19 and distance learning. (*California Department of Education Special Education Guidance for Covid-19*, September 30, 2020.)

The evidence showed Student's triennial assessment was overdue, Soledad needed to reassess Student to complete her annual and triennial IEPs, and that Student

had a suspected area of need in social-emotional functioning. Therefore, assessment of Student in cognitive ability and social-emotional functioning is warranted.

PROCEDURAL REQUIREMENTS FOR REASSESSMENT

PARENTAL CONSENT AND NOTICE REQUIREMENTS

Reassessments require informed parental consent, or, in the absence of parental consent, a local educational agency must prove at a due process hearing, that it took reasonable measures to obtain consent and the child's parent failed to respond.

(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).)

Soledad proved the January 10, 2020 assessment plan was legally compliant. Jessica Robles, special education teacher, arranged a time to bring the assessment plan and procedural safeguards to Student's home. At Parent's dining room table, Robles explained the assessment process to Parent, who checked the boxes and signed in

Robles's presence. The assessment plan was in a language easily understood by the public. It was in Parent's native language of English. It explained the types of assessments to be conducted and that no IEP would result from the assessment without the consent of the parent. Parent understood the assessment plan and consented to Soledad conducting the proposed assessments. On January 13, 2020, Robles submitted the signed assessment plan to Soledad's administrative staff.

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 students 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 student being assessed. (Ed. Code, §§ 56322, 56324, subd. (a).) 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.)

Soledad proved the proposed assessors in the January 10, 2020 assessment plan, and the alternative assessors offered through Presence Learning, were competent. Soledad assigned Kelly Forrest to conduct the cognitive and social-emotional assessments. Forrest was a credentialed school psychologist. She had a Bachelor of Arts in Child and Adolescent Development and a Master of Science in School Psychology. She was trained and experienced in conducting cognitive and social-emotional assessments. Forrest was experienced in conducting assessments for a diverse population of students and trained and prepared to assess cultural and ethnic

factors appropriate to the student being assessed. Forrest was also trained in trauma-informed assessment practices. To address Parent's concerns with Covid-19, she offered to conduct the assessments in an outside area, such as a park, and to wear personal protective equipment.

Furthermore, in response to Parent's concerns with in-person assessment, Soledad offered to have Presence Learning conduct online assessments of Student, proctored by Soledad staff. Presence Learning was a company that contracted with school districts to conduct special education assessments in an online format. Grunde was familiar with the training and experience of Presence Learning school psychologists who conducted assessments for Soledad. The assessors were trained and experienced in conducting cognitive and social-emotional assessments, including conducting assessments for a diverse population of students, and prepared to assess cultural and ethnic factors appropriate to the student being assessed.

PARENT HAS NOT MADE STUDENT AVAILABLE FOR SOCIAL-EMOTIONAL OR COGNITIVE ASSESSMENTS

Soledad has been unable to complete the triennial reassessments because Parent has not made Student available for the social-emotional and cognitive portions of the assessment. On January 10, 2020, Soledad provided Parent with an assessment plan proposing reassessments of Student in the following areas:

- Health and developmental history;
- Cognition;
- Perceptual and motor ability;
- Speech and communication development;

- Preacademic and academic performance; and
- Social, emotional, and behavioral development.

Parent consented to the assessment plan on January 10, 2020.

Soledad has completed some, but not all, parts of the triennial reassessment. On January 31, 2020, Amanda Martini, occupational therapist, assessed Student in the area of perceptual and motor ability. On February 7, 2020, Jessica Robles, special education teacher, completed an academic achievement assessment of Student. On April 21, 2020, Athena Haggerty completed the speech and language assessment. Forrest compiled the results of the completed assessments into a draft assessment report, which the IEP team discussed at the meeting on November 9, 2020. To complete the triennial reassessments, Soledad still needs to assess Student in the areas of social-emotional and cognitive.

Soledad made numerous, proactive attempts to assess Student in the areas of social-emotional and cognitive. During the Spring of 2020, Soledad sent Parent two Prior Written Notice letters attempting to obtain Parent cooperation with the assessments. Soledad followed up with additional Prior Written Notice letters on September 18, 2020, and February 22, 2021.

Because Soledad could not obtain Parent cooperation, it enlisted assistance from Allison Gribben, program specialist for Monterey Special Education Local Plan Area, referred to as SELPA. Gribben was trained as an IEP facilitator and saw her role as a neutral party on Student's team to help and support the process. She credibly testified as to her frequent communications with Parent regarding Parent's concerns about the social-emotional and cognitive assessments. Between November 2020, and February 2021, Gribben spoke with Parent three-to-five times per week. Gribben facilitated IEP

team meetings for Student on December 1, 2020, and January 26, 2021. Gribben reviewed the Notice of Procedural Safeguards with Parent. Parent told Gribben she did not want or trust district assessments of Student in the areas of cognitive and social-emotional.

At times Parent consented to make Student available for social-emotional and cognitive assessments, but canceled or did not follow through. At the November 9, 2020, December 1, 2020, and January 26, 2021, IEP team meetings Parent agreed to make Student available for assessments. However, Parent declined to schedule the assessment sessions. Because Parent has not made Student available, Soledad has been unable to complete the social-emotional and cognitive portions of the triennial reassessment.

PARENT MAY NOT PUT CONDITIONS ON ASSESSMENT

As long as the statutory requirements for assessments are satisfied, parents may not put conditions on assessments. (See *M.T.V. v. DeKalb County School Dist.* (11th Cir. 2007) 446 F.3d 1153, 1160 [a school district has the right to evaluation by an assessor of its choice]. 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 “vitiat[e] any rights the school district ha[s] under the IDEA for the reevaluation process.” (*G.J. v. Muscogee County Sch. Dist.* (11th Cir. 2012) 668 F.3d 1258, 1264.) In sum, the law does not allow Parent to place any conditions on the assessments of Student proposed by Soledad on January 10, 2020.

In *R.A. v. West Contra Costa Unified School District* (*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.] affd. (9th Circ. 2017) 696 Fed.Appx.171), a parent's refusal to permit her child to be assessed unless she was allowed to see and hear the assessment while it was being conducted was considered unreasonable. In that case, the 9th Circuit determined that the school district had the right to assess student and denied parent's requested conditions. Here, Student provided no legal authority supporting her position that Parent is entitled to impose conditions on assessments that impede Soledad's ability to complete an assessment necessary to evaluate Student's special education needs.

Soledad proved it is legally entitled to conduct cognitive and social-emotional assessments of Student, pursuant to the January 10, 2020 assessment plan, because Parent consented to the assessments, conditions warrant reassessment, and the assessment plan met all procedural requirements.

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.

Soledad is entitled to conduct assessments of Student not already completed, pursuant to the January 10, 2020 assessment plan, without Parent's consent and without limitations and conditions placed on the assessment by Parent. Soledad prevailed on the sole issue in this matter.

REMEDIES

Parents who want their child to receive special education services must allow reassessment if conditions warrant it. In *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315, the court stated that “if the parents want [their child] to receive special education under the Act, they are obliged to permit such testing.” (See, e.g., *Patricia P. v. Board of Educ. of Oak Park and River Forest High School Dist. No. 200* (7th Cir. 2000) 203 F.3d 462, 468; *Johnson v. Duneland School Corp.* (7th Cir. 1996) 92 F.3d 554, 557-58 [“[B]ecause the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation”]; *Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178 [“[A] parent who desires for her child to receive special education must allow the school district to evaluate the child ... [T]here is no exception to this rule”].)

This Decision finds that Soledad is legally entitled to conduct cognitive and social-emotional assessments of Student pursuant to the January 10, 2020 assessment plan. Therefore, Parent must make Student available for assessment if Parent wants Student to continue receiving special education services from Soledad.

ORDER

1. Soledad is entitled to assess Student in the areas of social-emotional and cognitive, according to the January 10, 2020 assessment plan, without Parent’s consent and without limitations or conditions placed on the assessment by Parent.
2. Soledad shall notify Parent within 10 business days of the date of this Decision, with the dates, times, and places Parent is to present Student for assessment, and

Parent shall reasonably cooperate in presenting Student for assessment on those dates, times, and places.

3. If Parent does not cooperate with the assessments as specified above, Soledad will not be obligated to provide special education and related services to Student until such time as Parent complies with this Order.
4. 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