

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021030488

VAL VERDE UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

DECISION

May 10, 2021

On March 12, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Val Verde Unified School District, naming Student. The matter proceeded to hearing without a continuance or mediation. Administrative Law Judge Ted Mann heard this matter on April 6, 2021 by videoconference.

Constance Taylor, Attorney at Law, represented Val Verde. Jeffery Janis attended the hearing on Val Verde's behalf. Parents did not appear on behalf of Student, and Student did not attend the hearing.

At Val Verde's request, and to give Student an opportunity to make an argument, the matter was continued to 5:00 pm on April 19, 2021, for written closing briefs. The record was closed, and the matter was submitted on April 19, 2021.

ISSUES

1. May Val Verde assess Student pursuant to the October 30, 2020 assessment plan without parental consent?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) 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, also called a FAPE, that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- 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 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).) Val Verde has the burden of proof in this matter. 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 16 years old and in eleventh grade at the time of hearing. Student resided within Val Verde's geographic boundaries at all relevant times. He transferred to Val Verde in August 2019, before the start of tenth grade. He was previously enrolled in the Long Beach Unified School District, and ABC Unified School District before that. Student was eligible for special education under the eligibility categories of specific learning disability and language disorder.

ISSUE 1: MAY VAL VERDE ASSESS STUDENT PURSUANT TO THE OCTOBER 30, 2020 ASSESSMENT PLAN WITHOUT PARENTAL CONSENT?

Val Verde contends that it needs to reassess Student to gather current assessment data to guide an individualized education program, referred to as an IEP, in determining if Student continues to be eligible for special education. If Student is eligible for special education and related services, Val Verde asserts that the IEP team requires a comprehensive assessment of Student to determine his current needs, present levels of performance, goals, supports, services and placement to make an appropriate offer of FAPE.

Val Verde further contends that the participation of its school psychologist in the assessments is necessary in order to obtain valid assessment data, and Parents had repeatedly refused consent to the use of a school psychologist. Val Verde seeks an order from OAH allowing it to assess Student, including the use of a school psychologist, over Parents' objection.

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) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 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].)

School district evaluations of students with disabilities under the IDEA serve two purposes. They identify students who need specialized instruction and related services because of an IDEA-eligible disability, and help IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur throughout the course of the student's educational career. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).)

Evaluations are referred to as assessments in California (Ed. Code § 56302.5), and the terms are used interchangeably in this Decision.

Once a student is found eligible for special education, they must be reassessed at least once every three years, unless the parent and the school district agree in writing that a reassessment is unnecessary. (Ed. Code, § 56381, subd. (a)(2).) The student also must be reassessed if the school district determines that the educational or related services needs of the child warrant a reassessment, or if the parent or teacher requests a reassessment. However, a student may not be reassessed more than once a year unless the parent and school district agree to more frequent assessment. (Ed. Code, § 56381, subds. (a)(1) and (2).)

The required three-year reassessment provides the IEP team with information to determine whether the student remains eligible for special education. It also informs the IEP team of new or ongoing needs resulting from the student's disability that may require revision of the student's IEP. (Ed. Code, § 56381, subd. (b)(2).)

PROCEDURAL REQUIREMENTS

CIRCUMSTANCES WARRANTING ASSESSMENT

Val Verde has demonstrated a reasonable need for the assessments described in the assessment plan, including those performed by a school psychologist. Val Verde was required to meet its triennial assessment obligations, as well as obtain all information needed to determine Student's eligibility for special education, and his educational needs, particularly in light of the lack of recent assessment data for Student.

Student arrived for his first year at Val Verde with an IEP from Long Beach, dated April 16, 2019. The April 16, 2019 IEP document indicated that Long Beach sought to

conduct comprehensive assessments for a three-year review of Student's eligibility and educational program. However, at that time, Parents had objected to any assessment involving a school psychologist, and had refused to sign an assessment plan.

When Student transferred into Val Verde in August 2019, Val Verde received assessment information from 2013, when Student attended school in the ABC Unified School District. Val Verde requested assessment information from Long Beach. Long Beach responded that it had not conducted assessments of Student.

The Val Verde IEP team needed accurate present levels of performance for Student so the team could develop a current IEP. The Val Verde team also needed information on Student's present needs and abilities, including assessment of cognitive, processing, sensory motor, social-emotional, behavior, and transition. Val Verde needed assessment information to determine whether Student continued to qualify for special education, and if so, to meet its obligation to develop an IEP and offer Student a FAPE. Student's last assessment was completed more than three years before Student transferred to Val Verde, so he was long over-due for a triennial assessment.

ATTEMPTS TO OBTAIN INFORMED CONSENT

Reassessment generally requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental rights and procedural safeguards under the IDEA and companion State law. (*Id.*) The assessment plan must be in language easily understood by the general public. It must be provided

in the native language of the parent and explain the types of assessments the district proposes to conduct. An assessment plan must state that an IEP will not result from the assessment without the consent of the parent. (Ed. Code, § 56321, subds. (b)(1)-(4).)

The school district must make reasonable efforts to obtain informed consent to assessment from the parent. (Ed Code, § 56321, subd. (c)(1).) If a parent does not consent to a reassessment plan, the school district may conduct the reassessment without parental consent if it shows at a due process hearing that conditions warrant reassessment of the student and that it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) Therefore, a school district must establish that the educational or related services needs of the child warrant reassessment of the child, and that it has complied with all procedural requirements to obtain the parent's informed consent. The school district must also demonstrate that it has taken reasonable measures to obtain informed consent, but the parent has failed to respond, in order to override parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).)

Consent means that the parent has been fully informed of all relevant information regarding the proposed action, and understands and agrees in writing to the proposed action. The parent must also understand that the granting of consent is voluntary and may be revoked, although any revocation is not retroactive. (Ed. Code, § 56021.1; 34 C.F.R. § 300.9.)

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

Parents who want their child to receive special education services must allow reassessment if conditions warrant it. The Ninth Circuit has stated that if the parents

want their child to receive special education under the Act, they are obliged to permit testing by the school district. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315.)

Val Verde convened an IEP team meeting including Parents on September 10, 2019, and Val Verde presented an assessment plan for assessment by Val Verde school Psychologist, Bianca Ruiz. Parent did not consent to a comprehensive assessment, and would agree only to updated academic testing to obtain current academic achievement levels. Parent explicitly refused testing of Student by a school psychologist. Parents were provided with further copies of the assessment plan for Student in October, November and December of 2019. Parents did not consent to the assessment plan.

Val Verde convened another IEP team meeting on October 30, 2020, and Parents attended. Parents were offered an updated assessment plan for Student, and provided with a notice of procedural safeguards and parent rights. Val Verde sought to conduct the assessments identified and explained in the updated assessment plan. Many of the assessments in the October 30, 2020 assessment plan required the participation of a school psychologist, including assessments in the areas of social-emotional, processing, perceptual and cognitive abilities and needs. Other areas required the participation or oversight of a school psychologist, including the preparation of a comprehensive, multi-disciplinary report of assessment results and findings. The need for the assessments was discussed with Parents at the IEP team meeting. Parents did not consent to the assessment plan.

Over the next two months, Val Verde's administrators followed-up with Parents by e-mail in continuing attempts to obtain Parents' consent to the October 30, 2020 assessment plan. Their e-mail correspondence attached copies of the assessment plan

and a notice of procedural safeguards and parent rights. Parent finally responded in writing on December 16, 2020. Parents refused to consent to any assessment by a school psychologist. Val Verde responded to Parents refusal of consent with prior written notice, dated January 7, 2021, noting Parents' refusal and indicating that it would file for due process to obtain an order allowing assessment over Parents' refusal. Val Verde filed for due process on March 12, 2021, seeking an order allowing it to assess Student over Parents' objection.

The October 30, 2020 assessment plan complied with all requirements. The assessment plan was in language easily understood by the general public and in Parents' native language. The assessment plan was discussed with and explained to Parents on multiple occasions, including the need to use a school psychologist. The types of assessments were discussed, along with the school personnel needed to perform each assessment. On multiple occasions, Parents were given 15 days to review and sign the plan.

The October 30, 2020 assessment plan provided explicit notice to Parents that an IEP would not result from the assessment without the consent of the parent. Parents were also explicitly notified in writing that their granting of consent was voluntary and may be revoked, although any revocation was not retroactive. It is also found that the IEP team adequately explained the need for assessment of Student to Parents and that Val Verde established that the educational or related services needs of Student warranted his reassessment.

Val Verde has proven by a preponderance of the evidence that it is entitled to an order allowing it to assess Student, consistent with the October 30, 2020 assessment plan, over Parents' objection and without their consent. Val Verde has provided Parents

with an explanation for the assessments it seeks, and also provided notice of procedural safeguards and parent rights. Parents were given sufficient information to give informed consent, and the efforts by the District met the requirement of taking reasonable measures to obtain consent.

Parents have continually refused to provide consent to assessment since Student enrolled in Val Verde in August 2019. Val Verde's efforts at taking reasonable measures to obtain consent were taken before filing this request for due process. Parents who want their child to receive an offer of FAPE must allow reassessment if conditions warrant it. In this case, reassessment was warranted as it had been more than three years since the last assessment. Significantly, the IEP team needed current information on Student's present levels of performance, along with his current needs and abilities, in order to determine his eligibility for special education and design an appropriate IEP for him.

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.

Val Verde may assess Student pursuant to the October 30, 2020 assessment plan without parental consent. Val Verde prevailed on Issue 1.

ORDER

1. If Parents want Student to receive special education services from Val Verde, Val Verde may assess Student using the October 30, 2020 assessment plan, including the use and or participation of Val Verde's school psychologist.

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/

Ted Mann

Administrative Law Judge

Office of Administrative Hearings