

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021070206

VICTOR VALLEY UNION HIGH SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

DECISION

October 20, 2021

On July 7, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Victor Valley Union High School District, naming Student. On July 26, 2021, OAH granted Student's request to continue the matter. Administrative Law Judge Marlo Nisperos heard this matter by videoconference September 21 and 22, 2021.

Jack Clarke, attorney at law, represented Victor Valley Union High School District. Dr. Margaret Akinnusi, Director of Special Education, attended both hearing days on Victor Valley's behalf. Parent represented Student and attended the first day of hearing. Student did not attend the hearing.

After Victor Valley concluded its case-in-chief, OAH granted Student's request to continue the matter until the next day, prior to Student's opening statement. On September 22, 2021, Parent called OAH and informed a case manager that Parent was unable to attend the hearing based upon a family emergency. Parent provided a telephone number requesting the ALJ call during the hearing. The hearing on September 22, 2021, began as scheduled and the ALJ twice called Parent using the videoconference technology with Victor Valley's attorney and director of special education present. The ALJ delayed the hearing for 30 minutes after Parent did not answer the telephone call at the number provided. Parent did not answer the second telephone call and did not attend or participate in the second day of hearing. The hearing then commenced and the evidentiary phase concluded.

OAH continued the matter at Victor Valley's request to September 28, 2021, for written closing briefs. Student was notified in writing of the right to submit a closing brief. Both parties timely submitted closing briefs. Student's brief was submitted without a proof of service. OAH notified Parent via telephone to resubmit the brief with a proof of service. Student failed to resubmit the brief with a proof of service. Typically, the brief would be stricken. However, in this case, due to the unusual nature of this matter proceeding on the last day without Parent, Student's brief was considered. On October 7, 2021, OAH provided Victor Valley a copy of Student's closing brief.

Additionally, Victor Valley suffered no prejudice from the delay because OAH ordered simultaneous briefing rather than responsive briefing. The record was closed and the matter was submitted on September 28, 2021.

ISSUE

May Victor Valley Union High School District assess Student pursuant to the May 19, 2021 assessment plan without Parents' 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 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 (2006); 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).) Victor Valley filed the request for due process hearing, so it had the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 17 years old at the time of hearing. Student resided within Victor Valley's geographic boundaries at all relevant times. Student was eligible for special education under the primary eligibility category of other health impairment due to a medical diagnosis of attention deficit hyperactivity disorder and secondary eligibility category of specific learning disability.

ISSUE: MAY VICTOR VALLEY ASSESS STUDENT PURSUANT TO THE MAY 19, 2021 ASSESSMENT PLAN WITHOUT PARENTS' CONSENT?

Victor Valley contended it provided a procedurally compliant assessment plan to Parents on May 19, 2021, and Parents refused to consent. Victor Valley claimed that it tried to obtain parental cooperation for many months without success. Victor Valley asserted the proposed assessments were necessary to complete Student's required three-year, called triennial, assessment. Victor Valley also contended it needed fresh educational data to create a new individualized education program, referred to as an IEP, for Student.

Victor Valley argued that the assessment plan was appropriate and that highly qualified and experienced assessors would conduct the assessments in accordance with the requirements of the law. Victor Valley contended that it met all procedural and substantive requirements to receive authorization to conduct assessments without parental consent. Victor Valley also sought an Order that it is not required to provide special education and related services to Student if it prevails and Parents do not comply with OAH's Order.

Parent objected to Victor Valley assessing Student without consent. Parent did not raise specific legal objections to the assessment plan or the assessors' qualifications. Rather, Parent asserted that due to a 2018 incident at school, Parent objects to Student's then and proposed placement. Parent noted there is ongoing legal action regarding that incident. Parent is also concerned that given the prior incident, Student's mental health would be harmed by being assessed at school and by Victor Valley employees. Despite making reasonable efforts to work with Victor Valley, Parent is not willing to consent to the assessment plan unless the placement issue is resolved and Parent's concerns regarding who would assess and where are satisfactorily resolved.

VICTOR VALLEY GAVE PARENTS PROPER NOTICE OF THE MAY 19, 2021 ASSESSMENT PLAN

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 (2006).) 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 (2006).)

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].)

Dr. Akinnusi was Victor Valley's director of special education for seven years. Dr. Akinnusi's job duties included making sure Victor Valley followed federal regulations relative to the identification, placement, and program development for special education students living in the district. Dr. Akinnusi earned a doctorate degree in educational leadership, master's degree in special education, a clear administrative service credential, a moderate to severe special education credential, and a cross language and academic development credential. Dr. Akinnusi testified at hearing and was knowledgeable regarding the procedural and substantive requirements under state and federal law to develop an assessment plan. Dr. Akinnusi's testimony was credible and was given significant weight.

Reassessment of a student requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent, school districts must follow procedural safeguards. (20 U.S.C. § 1414(a)(2)(A)(i).) The school district must provide proper notice to the parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3)&(c)(1); 34 C.F.R. § 300.304(a) (2006).)

School districts must give notice of the proposed assessment plan and a copy of the parents' procedural safeguards, a copy of parental procedural rights under the IDEA and related state laws. (20 U.S.C. § 1415(c), (d); Ed. Code, § 56321, subd. (a).) The assessment plan must be accompanied by notice that advises parent that an IEP team meeting will be scheduled to discuss the assessment results and recommendations. (Ed. Code, § 56329, subd. (a)(1).)

Dr. Akinnusi prepared the May 19, 2021 assessment plan, and sent it to Parent with a notice of an IEP team meeting scheduled for June 1, 2021. The IEP team meeting was scheduled for reasons unrelated to the assessment; however, Dr. Akinnusi's notice stated the parties could discuss any questions regarding the intended assessments. Dr. Akinnusi also provided Parent with a copy of procedural safeguards and parental rights under the IDEA and related state laws. Dr. Akinnusi sent these documents to Parent via certified mail and email on May 19, 2021. Victor Valley established by a preponderance of the evidence that it provided proper notice to Parents.

The assessment plan must be in language easily understood by the public and in the native language of the parent; explain the types of assessments to be conducted; and state that no IEP will result from the assessment without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4); 20 U.S.C. § 1415(b)(3)&(4); see also 34 C.F.R. § 300.9(a) (2006).) They must explain the evaluation procedures and the areas of proposed reassessment. (20 U.S.C. §§ 1415(c), 1414(b)(1).)

The May 19, 2021 assessment plan explained the evaluation procedures and the areas of reassessment. The assessment plan was written in language easily understood by the public and was in the English language, Parent's native language. It explained

the types of assessments to be conducted and what each assessment measured, what functional ability was being tested, and stated that no IEP would result from the assessment without Parent's consent.

The May 19, 2021 assessment plan contained many of the same areas of assessment as Student's last triennial assessment plan dated November 3, 2016. The assessment plan listed the following assessments to be conducted to address all areas of Student's suspected disability:

- academic and pre-academic achievement;
- career and vocational development;
- cognitive, intellectual development, and learning ability;
- health, developmental, and medical; observations and interviews;
- perceptual and motor development;
- self-help and adaptive;
- social, emotional, and behavioral development;
- and speech, language, and communication development.

The assessment plan identified assessment examiners, including a special education teacher, nurse, school psychologist, and speech therapist. Accordingly, Victor Valley established by a preponderance of the evidence that the May 19, 2021 assessment plan provided proper notice to Student's Parents of the suspected areas of need in which Victor Valley intended to assess Student.

THE REASSESSMENT WAS TIMELY AND NECESSARY

The IDEA provides for reevaluations, referred to as reassessments in California law, to be conducted no more frequently than once a year, but at least once every three years, unless the parent and the agency agree that it is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2) (2006); Ed. Code, §§ 56043, subd. (k), 56381, subd. (a)(2).)

The district must also conduct a reassessment if it determines that the educational or related service 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) (2006); Ed. Code, § 56381, subd. (a)(1), (2).)

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) (2006); 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).)

Student was initially found eligible for special education and related services on January 23, 2009. Student's most recent comprehensive triennial assessments were

discussed in a two-part IEP team meeting held November 3, 2016, and February 13, 2017. The November 3, 2016 triennial assessment plan assessed Student in the following areas of suspected disability:

- academic and pre-academic achievement;
- cognitive, intellectual development, and learning ability;
- functional behavioral assessment; observations and interviews;
- social, emotional, and behavioral development; and speech, language, and
- communication development.

Parent timely consented to the triennial assessment plan on October 25, 2016.

Student's most recent triennial assessments were reviewed at an IEP team meeting held on February 13, 2017. Accordingly, Student's next triennial assessment was due by February 13, 2020. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2) (2006); Ed. Code, §§ 56043, subd. (k), 56381, subd. (a)(2).)

Dr. Akinnusi established that Student should be reassessed in accordance with the May 19, 2021 assessment plan because, among other reasons, Victor Valley did not have information regarding Student's current needs as he had not attended school since March 2018. Dr. Akinnusi contended the assessment plan would assist the IEP team in developing a program using current information regarding Student's functioning and present levels of performance to offer Student a FAPE. Dr. Akinnusi established that although Student will be an adult soon, he is still entitled to special education and related services and the assessments would help determine needed accommodations in the educational setting. Dr. Akinnusi's testimony was persuasive and established that Victor Valley needed to evaluate Student pursuant to the May 19, 2021 assessment plan to determine Student's educational or related service needs.

Dr. Bevans was a credentialed school psychologist for Victor Valley for 10 years and previously assessed Student in October 2016. Dr. Bevans earned a doctorate degree in educational psychology, a master's degree in psychology and a pupil personnel services credential. Dr. Bevans had training and experience assessing students' psychological, social and educational needs, including administering

- intelligence tests,
- achievement tests,
- personality tests,
- tests measuring perceptual and motor development, and
- other tests as needed for those requiring periodic re-evaluation.

Dr. Bevans was prepared to assess cultural and ethnic factors appropriate to Student.

Dr. Bevans intended to complete the psychoeducational reassessment pursuant to the May 19, 2021 assessment plan if Victor Valley was given authorization to assess Student.

Dr. Bevans' 2016 psychoeducational report for Student was thorough and included details about assessment results. Dr. Bevans explained that the psychoeducational report provided data to the IEP team to understand Student's educational needs, strengths and weaknesses as a learner, which helped the team determine an appropriate program. Dr. Bevans established that the May 19, 2021 assessment plan met Student's needs and was appropriate because it covered areas that would provide adequate data to facilitate educational planning. Dr. Bevans established that comprehensively assessing Student was necessary based on the date of Student's last triennial, and the fact that Student's IEP team did not have current information regarding Student's needs.

Randall Habovsky was a certified and licensed speech and language pathologist since 2016. As a speech and language pathologist for Victor Valley, Habovsky had education, training and experience to assess, diagnose and provide intervention for communication disorders of varying levels of severity. Habovsky held a certification of clinical competence from the American Speech-Language-Hearing Association since 2017 and was qualified to render an opinion in this matter. Habovsky reviewed Student's 2016 speech and language and psychoeducational triennial evaluations to prepare for his testimony at hearing. Based on a review of the assessments, Habovsky established that Student should be reevaluated as proposed in the May 19, 2021 assessment plan. Habovsky observed that Student performed moderately low in the 2016 speech and language assessment and noted that limited areas were examined at that time; only one portion of the Goldman-Fristoe Test of Articulation was completed and Student was only tested in the area of semantics. Habovsky established that a comprehensive evaluation in all five areas of language should be conducted to determine Student's current areas of need.

The evidence established that the assessment plan and its delivery to Parents procedurally met the requirements of the IDEA. The evidence further established that the assessments were necessary for Student's IEP team to develop an educational program that would appropriately address Student's needs. Victor Valley established the assessments selected would provide the information required for the IEP team to design Student's educational program based on Student's current academic strengths and weaknesses. The evidence established that Victor Valley employed qualified

assessors to assess Student. Victor Valley proved by a preponderance of the evidence that a reassessment was required based upon the date of the last triennial assessment and was necessary to develop Student's IEP based on Student's present functioning.

VICTOR VALLEY MADE REASONABLE EFFORTS TO OBTAIN PARENT'S CONSENT TO THE ASSESSMENT PLAN BEFORE FILING FOR DUE PROCESS

The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).) If parents do not consent to a reassessment plan, the district may request judicial override 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) (2006); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) Without an order after a due process hearing, reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).)

A school district must establish it made reasonable efforts to obtain consent by keeping a record of its attempts to obtain consent, such as detailed records of telephone calls made or attempted, and the results of those calls; copies of correspondence sent to parents and any response from them, and detailed records of visits made to the parents' home or work, and the results of those visits. (34 C.F.R. §§ 300.300(d), 300.322 (d) (2006).)

To proceed with a reassessment over a parent's objection, a school district must demonstrate at a due process hearing that the parent has been provided an appropriate written reassessment plan to which the parent has not consented, that the student's

triennial reassessment is due, that conditions warrant reassessment, or that the student's parent or teacher has requested the reassessment. (Ed. Code § 56318, subd. (a).) Victor Valley closed down schools in March 2020 based on the COVID-19 pandemic and reopened in April or May 2021. Dr. Akinnusi did not have contact with Parent during the school closure and became concerned Student may have moved out of the district. Dr. Akinnusi knew from prior experiences that families often move out of the district without informing the school they had moved. Based upon the lack of communication with Parent during the COVID-19 school closure, Dr. Akinnusi asked the school resource officer to conduct a welfare check at Student's home on November 4, 2020. The school resource officer conducted a home visit and informed Dr. Akinnusi that Student still resided in the district.

Victor Valley made a reasonable effort to obtain Parents' consent to the assessment plan by sending it to Parent via certified mail and email on May 19, 2021. Parent did not consent to the assessment plan after 15 days. Parent argued that Victor Valley should not be permitted to assess Student based on health and safety concerns, including Student's mental health. Even if such a contention were established, Student provided no legal authority that it would prevent assessment. Rather, had the record indicated a suspected mental health concern, that would establish an even greater need to assess Student.

Victor Valley had the burden to prove it complied with all laws prior to receiving authorization to conduct assessments without parental consent. Accordingly, Victor Valley demonstrated that it provided Parent an appropriate written reassessment plan to

which parent has not consented, and that Student's triennial is due and that reassessment was warranted at this time. Victor Valley proved by a preponderance of the evidence that it complied with all requirements under state and federal law to permit it to assess Student over parent's objection.

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.

Victor Valley Union High School District may assess Student according to its May 19, 2021 assessment plan without Parents' consent. Victor Valley prevailed on the sole issue in this case.

REMEDIES

In its closing brief, Victor Valley requested an Order that it not be required to offer or provide special education and related services of any type to Student until Parent complies with OAH's Order granting Victor Valley authorization to assess Student without Parents' consent. To support its proposition, Victor Valley cited three OAH decisions that made the order that Victor Valley is requesting.

OAH decisions are not binding precedent, but may be persuasive authority. (Cal. Code Regs., tit. 5, § 3085.) Special education due process hearings are limited to an examination of the time frame pleaded in the complaint and as established by the

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

Victor Valley sought an advisory opinion determining how special education law should be applied if Parents refuse to comply with the ordered assessments. Victor Valley's request is denied. The issue of whether Parents will comply with the Order made in this Decision is not ripe as this hypothetical situation has not occurred. Victor Valley's request is also denied because the order requested exceeds the scope of the claim it raised in the request for due process hearing, namely permission to assess Student without Parents' consent.

ORDER

Victor Valley may assess Student pursuant to the May 19, 2021 assessment plan without parental consent. The 60-day timeline to complete the assessments and hold an IEP team meeting to review the assessments shall begin on the date of this Decision.

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.

Marlo Nisperos

Administrative Law Judge

Office of Administrative Hearings