

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2021110515

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TUSTIN UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

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DECISION

January 6, 2022

On November 18, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Tustin Unified School District, naming Student. Administrative Law Judge, or ALJ, Linda Johnson heard this matter by videoconference on December 14, 2021.

Attorneys Melissa Hatch and Beatrice Hoffman represented Tustin. Dr. Amy Lambert, Tustin's Assistant Superintendent of Special Education, attended the entire hearing on Tustin's behalf. Parent One appeared on Student's behalf and attended the entire hearing. The undersigned ALJ called Parent Two at the beginning of the hearing, while on the record, and left a message giving Parent Two 15 minutes to join the videoconference by computer or phone. The undersigned ALJ reconvened the hearing and called Parent Two again 15 minutes later advising Parent Two that the hearing would proceed without Parent Two. The hearing commenced and the evidentiary phase concluded.

OAH continued the matter to December 24, 2021, for closing briefs to give Parent Two an opportunity to make an argument. Parent Two was notified in writing of the right to submit a closing brief. Tustin timely submitted a closing brief. Neither Parent submitted a closing brief. The record was closed, and the matter was submitted on December 24, 2021.

## ISSUE

May Tustin assess Student for his triennial assessment pursuant to the April 30, 2021 assessment plan without Parent Two's 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; 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, Tustin filed the complaint and has the burden of proof on the issue. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 14 years old and in ninth grade at the time of hearing. Student resided within Tustin's geographic boundaries at all relevant times. Student's Parents

are divorced and share joint educational decision-making rights for Student. Student was eligible for special education under the eligibility category of emotional disturbance.

## ISSUE: MAY TUSTIN ASSESS STUDENT FOR HIS TRIENNIAL ASSESSMENT PURSUANT TO THE APRIL 30, 2021 ASSESSMENT PLAN WITHOUT PARENT TWO'S CONSENT?

Tustin contends that it needs to reassess Student to gather current assessment data to develop goals and services for his individualized education program, referred to as an IEP and to determine appropriate services and placement in the least restrictive environment. Parent One consented to the assessment plan and does not object to Tustin conducting the triennial assessment. Parent One agrees that the triennial assessment is necessary to determine an appropriate program and services for Student. Parent Two specifically forbade Tustin from conducting the triennial assessment, however, did not provide any specific objections to Tustin conducting Student's triennial assessment.

If a parent refuses to consent to the reassessment the local agency may override the lack of consent by filing for a due process hearing to obtain an order that it may assess the student absent parental consent. (34 C.F.R. 300.300(a)(3) & (c)(1)(ii); Ed. Code, § 56381, subd. (f)(3).)

## NEED FOR REASSESSMENT

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).)

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).)

Student's triennial reassessments are due, and Tustin proved a comprehensive reassessment of Student is both warranted and necessary. Tustin has never assessed Student as he transferred into the district in April 2021. Irvine Unified School District conducted Student's last assessment in 2018, and his triennial reassessment was due by September 16, 2021. Tustin needs updated assessment data to develop appropriate present levels of performance and goals, as well as determine appropriate services and placement in the least restrictive environment.

When Student transferred into Tustin, he was placed in the behavior support program special day class at Foothill High School. Bianca Guillen, Tustin's special education coordinator, oversaw Foothill's behavior support program and observed Student in class. Guillen also reviewed Student's records and met with his IEP team. Student was a model student within the behavior support program. Student was always ready for school, completed his homework, and earned grades of an A or B in all classes. Katharine Messerschmidt, Foothill's school psychologist, Cynthia Ficken, Student's educationally related mental health therapist, and Justin Lewis, Student's teacher in the behavior support program, all agreed that Student was performing well within the

program. All four Tustin witnesses opined that Student's triennial reassessment is necessary not only because it has been over three years since his last assessment, but also because Tustin needs updated information to determine an appropriate program for Student. All four Tustin witnesses also expressed concern with the restrictiveness of Student's program and that it might not be the least restrictive environment for Student.

Tustin established that reassessment of Student was warranted in the areas of academic achievement, health, social emotional, educationally related mental health services, and cognitive ability. The evidence showed Student's triennial assessment was overdue and Tustin needed to reassess Student to complete his annual IEP and offer FAPE in the least restrictive environment. Therefore, Tustin proved the need to reassess Student.

## 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).) If the parent refuses to consent to the reassessment, the local agency may, but is not required to, pursue the reassessment by using the consent override procedures described in Section 300.300(a)(3) of the United States Code. (34 C.F.R. § 300.300(c)(1)(ii); Ed. Code, § 56381, subd. (f)(3).) 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).)

## NOTICE

On April 23, 2021, a Tustin School psychologist spoke with Parent Two about Student's upcoming reassessment and the 60-day timeline Tustin had to complete the assessment. On April 30, 2021 Tustin sent, via electronic mail, or email, the April 30, 2021 assessment plan to both Parent One and Parent Two. On May 7, 2021, a Tustin school psychologist left a message for Parent Two about the assessment plan and on May 14, 2021 the psychologist spoke with Parent Two and confirmed that Parent Two received the assessment plan. Parent Two orally informed the Tustin school psychologist that Parent Two did not want to consent to the assessment plan during the 2020-2021 school year. On June 4, 2021, Guillen mailed Parent Two a prior written notice letter that detailed the phone conversations Tustin had with Parent Two in April and May 2021 regarding the assessment plan. Guillen also included a copy of the April 30, 2021 assessment plan and procedural safeguards with the June 4, 2021 prior written notice letter. Tustin established by a preponderance of the evidence that it provided proper notice to Parents.

## ASSESSMENT PLAN

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).) They must explain the evaluation procedures and the areas of proposed reassessment. (20 U.S.C. §§ 1415(c), 1414(b)(1).)

The April 30, 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, Parents' native language. It explained the types of assessments Tustin would conduct and what each assessment measured, what functional ability was being tested, and stated Tustin would not provide special education services as a result of the assessment without Parents' consent.

The April 30, 2021 assessment plan proposed assessments to address all areas of Student's suspected disability:

- academic achievement,
- health,
- social emotional,
- educationally related mental health services, and
- cognitive ability.

The assessment plan identified assessment examiners, including a special education teacher, nurse, school psychologist, and educationally related mental health services specialist. Accordingly, Tustin established by a preponderance of the evidence that the April 30, 2021 assessment plan provided proper notice to Student's Parents of the suspected areas of need in which Tustin intended to assess Student.

## CONSENT

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).)

Tustin attempted to obtain parental consent multiple times over several months. In addition to the phone conversations Tustin had with Parent Two in April and May 2021, Tustin attempted to schedule an IEP team meeting with both Parents to discuss the assessment plan. Tustin did not hold an IEP team meeting to discuss the assessment plan but did hold an informal meeting with both Parents on August 10, 2021. On August 20, 2021, Tustin sent another copy of the assessment plan via email to both Parents. The assessment plan sent on August 20, 2021, was identical to the April 30, 2021 assessment plan except for the date. On August 24, 2021, Tustin sent a follow-up email to both Parents requesting consent to the assessment plan. On August 26, 2021, Parent One consented to the assessment plan. On August 26, 2021, Tustin sent Parent Two a copy of the assessment plan Parent One signed. Tustin contacted Parent Two on August 26, 2021, August 30, 2021, and September 9, 2021, requesting consent to the assessment plan. On September 9, 2021, Parent Two confirmed receipt of the assessment plan and procedural safeguards. On October 1, 2021, Guillen sent another prior written notice letter via email to Parent Two again including a copy of the assessment plan and procedural safeguards. On October 1, 2021, Parent Two responded to Guillen's email that Parent Two did not consent to any assessment of Student until custody matters had been resolved. Parent Two threatened legal action if Tustin conducted any assessments. Tustin attempted multiple times to obtain Parent Two's consent to the assessment plan. It was not until Parent Two specifically forbade Tustin to conduct any assessments that Tustin filed for a due

process hearing to assess Student without Parent Two's consent. Tustin proved it made reasonable efforts to obtain parental consent prior to filing for a due process hearing.

## 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).)

Tustin proved the proposed assessors in the April 30, 2021 assessment plan were competent. Messerschmidt would conduct the social and emotional portion of the assessment in addition to using alternative means to assess Student's cognitive ability. Messerschmidt had a master's degree in psychology, a school psychology credential, and 10 years of experience assessing students for special education. Messerschmidt was familiar with the assessment tools and protocols for each test she would administer. Ficken would conduct the educationally related mental health services portion of the assessment. Ficken was a licensed marriage and family therapist, had a master's degree in counseling, and worked for Tustin for nine years. Ficken would interview both Parents and Student as part of the assessment and would incorporate Messerschmidt's data into her portion of the report. Ficken had the qualifications and experience necessary to complete the educationally related mental health service portion of the assessment.

Lewis would conduct the academic portion of the assessment. Lewis had a master's degree in educational administration, a special education teaching credential, and over 10 years of teaching experience, three of which were in the behavior support program special day class at Foothill High School. Lewis was familiar with the assessment tools and protocols for the assessment he would administer and had administered the assessment at least 10 times.

The assessors were trained and experienced in conducting cognitive and social-emotional assessments. The assessors were trained and prepared to assess cultural and ethnic factors appropriate to Student. Tustin proved it provided Parents an appropriate written reassessment plan to which Parent Two has not consented, that the Student's triennial reassessment is due and conditions warrant reassessment, that it took reasonable measures to obtain Parent Two's consent, and that its proposed assessors were competent to perform the triennial reassessment. Tustin proved it may assess Student pursuant to the April 30, 2021 assessment plan without Parent Two's consent.

## 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.

Tustin may assess Student for his triennial assessment pursuant to the April 30, 2021 assessment plan without Parent Two's consent. Tustin prevailed on the sole issue heard in this matter.

## ORDER

Tustin may assess Student pursuant to the April 30, 2021 assessment plan without Parent Two's 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.

/s/

Linda Johnson

Administrative Law Judge

Office of Administrative Hearings