

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

NEWARK UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

CASE NO. 2023020144

DECISION

MAY 04, 2023

On February 2, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Newark Unified School District, naming Parent on behalf of Student. On February 24, 2023, OAH granted a continuance of the due process hearing. Administrative Law Judge Theresa Ravandi heard this matter by videoconference on April 4, and 5, 2023. The administrative law judge, called ALJ, sent each party an electronic ZOOM invite for both hearing days.

Attorneys Jennifer Fain and Rebecca Buchsbaum represented Newark. Newark's Director of Special Education Olivia Rangel attended all hearing days on its behalf. There was no appearance on behalf of Student. The ALJ called Parent at the start of the hearing. The call went to a voicemail system indicating the mailbox was full. The ALJ

delayed the hearing for 30 minutes to afford Parent additional time to log into the hearing room. Parent failed to appear or otherwise contact OAH, and the hearing proceeded in Parent's absence.

At Newark's request the matter was continued to April 20, 2023, for written closing briefs. The record was closed, and the matter submitted on April 20, 2023.

ISSUE

Is Newark authorized to assess Student pursuant to its August 29, 2022 assessment plan without Parent'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] (*Schaffer*); and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Newark requested this hearing and bore 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 10 years, nine months of age at the time of hearing. Student enrolled in Newark at the start of the 2020-2021 school year and resided with Parent in Newark's geographic boundaries at all relevant times. He last participated in school during the 2021-2022 school year as a fourth grader. Student had not attended school during the 2022-2023 school year at the time of hearing.

Dry Creek Joint Elementary School District developed Student's last agreed-upon and implemented individualized education program, called IEP, in April 2019 when

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Student was in first grade. Student was eligible for special education under the primary category of orthopedic impairment and the secondary category of speech and language impairment. The April 2019 IEP documented Student's needs in the areas of

- academics,
- fine and visual motor,
- eye-hand coordination,
- bilateral coordination,
- strength,
- balance and mobility,
- expressive and receptive language, and
- articulation.

Student's IEP offered a special day class with specialized academic instruction, a one-to-one instructional assistant, speech and language services, occupational therapy, and physical therapy, as well as transportation and extended school year services. He required specialized mobility and postural support equipment as well as assistive technology to access his education.

Dry Creek completed Student's triennial assessments and prepared a multidisciplinary educational evaluation report dated December 17, 2019. It included a health, psychoeducational, speech and language, occupational therapy, assistive technology, and physical therapy assessment. Student had Down Syndrome, a heart condition, asthma, and allergies, and was followed by several medical specialists. This assessment concluded Student continued to qualify for special education and appeared to meet the eligibility categories of intellectual disability and speech or language impairment. The assessors recommended continued specialized academic instruction,

speech and language services, occupational therapy, assistive technology, and physical therapy. Dry Creek also completed Student's adaptive physical education evaluation in November 2019. This evaluation recommended adaptive physical education given Student's emerging gross motor skills.

Newark has never assessed Student. It has attempted, unsuccessfully, to obtain Parent consent to assess since September 2020.

ISSUE: IS NEWARK AUTHORIZED TO ASSESS STUDENT PURSUANT TO ITS AUGUST 29, 2022 ASSESSMENT PLAN WITHOUT PARENT'S CONSENT?

Newark contends it must comprehensively assess Student to identify Student's present levels of academic and functional performance and determine his educational needs. Newark asserts Student's IEP team requires this information to develop an IEP with updated goals, appropriate services, and placement in the least restrictive environment. It argues current assessments are warranted because Student's last assessments were in December 2019; Newark has not been allowed to assess him; Student has not attended school for approximately one year; and his triennial assessments are overdue. Newark maintains it created a legally compliant assessment plan proposing assessments in all areas of need, provided it to Parent with a notice of procedural safeguards, and made ongoing reasonable efforts to obtain Parent consent.

Parent's main objection to assessments is the use of norm-referenced or standardized tools which Parent believes will not yield fair or accurate information on Student's abilities. Parent contends standardized instruments will highlight Student's deficits because they are normed against typically developing peers, do not allow for accommodations, and require Student to do tasks he is unable to do, such as write.

Parent believes the assessment plan is deficient as it does not require collaboration between the assessors and Parent, alternative assessment methods, and tools with embedded supports.

If a parent refuses to consent to the reassessment, the school district 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).) Because Parent has not consented to its August 29, 2022 assessment plan, Newark filed this due process hearing request.

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. 386 [137 S.Ct. 988, 1000].)

NEWARK ESTABLISHED A NEED FOR REASSESSMENT

School districts assess students with disabilities to determine special education eligibility and the type, frequency, and duration of specialized instruction and related services. In California, the term assessment has the same meaning as the term evaluation under the IDEA. (Ed. Code, § 56302.5.) A school 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 student's identified disability category. (34 C.F.R. § 300.304(c)(6).) Given the importance of assessments, the IDEA and accompanying regulations set forth an extensive set of procedural safeguards to ensure that evaluations achieve "a complete result that can be reliably used to create an appropriate and individualized educational plan [sic] tailored to the needs of the child." (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1110, cert. den. (Apr. 17, 2017, No. 16-672) 137 S.Ct. 1578[2017 WL 1366731] (*Timothy O.*.)

A local educational agency must reassess an eligible student at least once every three years, unless the parent and the agency agree 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), 56381, subd. (a)(2).) The required three-year assessment serves two purposes. First, it examines whether the student remains eligible for special education. Second, it informs the IEP team of new or ongoing needs resulting from the student's disability that may require IEP revisions. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The agency must also conduct a reassessment if it determines that the child's educational or related services needs 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).)

Newark did not have a current understanding of Student's strengths, deficits, or educational functioning. Student enrolled as a fourth grader at the start of the 2020-2021 school year during the COVID-19 pandemic. Schools remained closed to in-person instruction, and Student had not attended any in-person programming since March 2020. Student had a difficult time participating in virtual instruction and services, and Parent was concerned he had regressed. On September 9, 2020, Parent informed

the IEP team at Student's 30-day IEP team meeting that Newark was asking Student to complete work that was too difficult for him. In follow-up email correspondence, Parent expressed disagreement with Dry Creek's 2019 assessments and asked Newark to assess Student in all areas of need to determine his present levels. Newark agreed and sent Parent an October 2020 assessment plan proposing to assess Student's

- academics,
- health,
- intellectual development including auditory processing, language and speech,
- motor skills,
- social-emotional and behavioral functioning, and
- adaptive skills.

Parent had several questions about the assessment process and did not consent to the October 2020 assessment plan. Newark responded to Parent's assessment questions. Newark explained the test instruments the school psychologist would likely administer and why, provided the proposed testing instruments' website links, and informed Parent of the assessors' willingness to discuss the tools they planned to use. Parent emailed Newark several times expressing concern that norm-referenced tests would not obtain fair and accurate information on Student's abilities. Parent told Newark that Student required testing accommodations and alternative means of assessment. Newark sent Parent a March 2021 and September 2021 assessment plan, both continuing to propose comprehensive assessments. Parent did not consent.

Distance learning due to the COVID-19 pandemic ended, and Newark welcomed its students back fulltime for in-person instruction at the start of the 2021-2022 school

year. Parent did not send Student to school for in-person instruction or services during the 2021-2022 school year. Newark provided Student virtual instruction and services with some in-home aide support for a portion of the year. Student's school attendance and educational program were not at issue and no determinations are made herein.

Parent gave Newark a June 2022 nurse practitioner letter recommending that Student participate in distance learning for the 2022-2023 school year given the ongoing COVID-19 pandemic and Student's complex medical history and immunocompromised state. Student did not participate in any IEP specialized academic instruction or related services during the 2022-2023 school year through the time of hearing. Any dispute regarding Student's need for home instruction was not at issue in this hearing. Parent did not object to any of the proposed assessments based on Student's health status.

Special Education Director Rangel prepared the August 29, 2022 assessment plan. As with the prior years' plans, this one proposed to assess Student in the areas of academic achievement, health, intellectual development, language and speech communication development, motor development, social-emotional and behavior, adaptive behavior, and added the area of assistive technology and augmentative alternative communication.

Rangel and all eight of Newark's proposed assessors, specifically a school nurse, school psychologist, two speech language pathologists – one specializing in assistive technology and augmentative alternative communication, an occupational therapist, physical therapist, adaptive physical education teacher, and an education specialist testified at hearing. All opined Student's triennial reassessment was necessary not only because it had been over three years since the last assessments, but also because Student's IEP team needed updated information to develop an appropriate program.

They provided thoughtful and detailed testimony that rendered their opinions persuasive. Newark established that Student's 2019 assessment data was insufficient to support informed determinations about Student's present levels of performance and unique needs. For example, the assistive technology and augmentative alternative communication specialist opined Student continued to require assistive technology to access the curriculum. However, some of the technology noted in the operative April 2019 IEP was outdated, and new technologies were available that could assist Student.

Student's operative IEP was developed when he was in first grade, and he was last assessed in second grade. Given his outdated IEP and assessment data, and the negative impact of distance learning and Student's non-participation in any specialized instruction or related services as a fifth grader during the 2022-2023 school year, Newark proved a comprehensive reassessment of Student is warranted. A comprehensive reassessment is necessary to obtain updated information in all suspected areas of need. Newark's August 2022 assessment plan reasonably identified those areas of need based on Student's operative IEP goals and services, and past assessments. Further, Parent requested Newark assess Student in all areas to determine present levels more than two and a half years ago. Student's present levels are still unknown, and his triennial reassessments are now past due.

New assessments will help Student's IEP team develop appropriately ambitious goals in light of Student's current circumstances. The assessment results will better inform the IEP team discussions and determinations of appropriate services, accommodations and modifications, supplementary supports, and placement in the least restrictive environment. Newark appropriately tailored its assessment plan and proposed to evaluate only those areas of suspected and established disabilities for which Student may require special education and related services. Therefore, Newark proved the need to reassess Student.

PARENTAL NOTICE AND CONSENT REQUIREMENTS

Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); 34 C.F.R. §300.300(c)(1)(i); Ed. Code, § 56381, subd. (f)(1)). To obtain parental consent for a reassessment, the school district must provide proper notice to the 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 written assessment plan and a copy of the procedural safeguards under the IDEA and state law. (20 U.S.C § 1414(b)(1); Ed. Code, §§ 56321, subd. (a).) A school district must give the parent at least 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

PROPER NOTICE AND A LEGALLY COMPLIANT ASSESSMENT PLAN

Rangel sent Parent the August 29, 2022 assessment plan via email, U.S. mail and certified mail on August 30, 2022, with a notice of procedural safeguards as legally required. Parent was given more than the minimum 15 days to review and consent. Newark resent the assessment plan to Parent on September 19, 2022, and twice in February 2023. Newark established it provided Parent with proper notice of its request to assess pursuant to the August 2022 assessment plan.

The assessment plan must be in language easily understood by the public and in the native language of the parent. (Ed. Code, § 56321, subd. (b)(1) and (2).) It must explain the types of assessments to be conducted, and state that no IEP will result from the assessment without the parent's consent. (Ed. Code, § 56321, subd. (b)(3) and (4).)

Newark's August 2022 assessment plan was appropriately worded, written in a manner easy to understand, and in English, Parent's preferred language. It specified the

types of assessments that may be conducted including observations, rating scales, interviews, record review, and one-to-one testing. It identified each proposed assessment area and specified the title of a qualified examiner for each area. The plan identified the following areas of assessment:

- Academic Achievement by a special education teacher
- Health by the school nurse, with a school psychologist to administer a developmental history
- Intellectual Development by a school psychologist
- Language/Speech Communication Development by a speech language pathologist
- Motor Development by an occupational therapist, physical therapist, and adaptive physical education teacher
- Social Emotional/Behavior by a school psychologist
- Adaptive Behavior by a school psychologist
- Assistive Technology and Augmentative and Alternative Communication by a speech language pathologist specially trained in these areas.

The plan also described what each assessment area measured. For example, the plan explained that intellectual development assessments measure how well the child thinks, remembers, and solves problems. The assessment plan notified Parent that no changes to Student's IEP would be made without Parent consent. Newark established that the August 2022 assessment plan was legally compliant.

REASONABLE EFFORTS TO OBTAIN PARENT CONSENT TO ASSESS

The obligation to obtain informed consent is central to the IDEA's overall adherence to the principal of parental participation. Meaningful parent participation and informed parental consent is a "core principle" of the IDEA. (*M.M. v. Lafayette Sch. Dist.* (9th Cir. 2014) 767 F.3d 842, 851.) The school district must make reasonable efforts to obtain informed parent consent to assess. (Ed. Code, § 56381, subd. (f).) To meet the reasonable efforts requirement, the district must document its attempts to obtain parental consent. (Ed. Code, § 56381, subd. (f)(2); 34 C.F.R. § 300.300(d)(5).) Such documentation includes keeping

- detailed records of telephone calls made or attempted, and the results of those calls;
- copies of correspondence sent to the parents and any response received; and
- detailed records of visits made to the parent's home or place of employment and the results of those visits. (34 C.F.R. § 300.322(d).)

A school district may, but is not required to, override a lack of parental consent if it establishes at a due process hearing that assessment is needed. (34 C.F.R. § 300.300(c)(1)(ii); Ed. Code, § 56381, subd. (f)(3); see also *Schaffer, supra*, 546 U.S. 49, 53.) The school district must also demonstrate at hearing that it has taken reasonable measures to obtain the parent's consent, and the parent has failed to respond. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(2); Ed. Code, § 56381, subd. (f)(1).)

Newark made numerous attempts to meaningfully discuss with Parent its proposal to reassess Student and to obtain Parent's consent. Prior to the August 2022 assessment plan, Newark provided Parent multiple, substantively similar assessment plans with notices of procedural safeguards.

Rangel testified to Newark's reasonable and ongoing efforts to obtain consent beginning in October 2020, and continuing through March 2023. Rangel held an education specialist and administrative services credential. Since 2011, Rangel worked for Newark as a special education teacher, program specialist, principal, and its special education director beginning this school year.

Rangel reviewed Newark's documents and Student's education records and detailed Newark's efforts to obtain Parent consent to assess in an August 29, 2022 prior written notice. Newark documented its requests for Parent's consent in emails and prior written notices and kept copies of these records. These records showed Newark responded to Parent's assessment questions and asked for Parent's input. Newark discussed the need for current assessments at several IEP team meetings as recorded in the IEP team meeting notes. Newark scheduled a mediation with Parent in August 2021 to discuss its assessment request. Newark's assistant superintendent of educational services called Parent in October 2021 in an effort to obtain Parent's consent to assess Student. Newark kept records of these efforts and listed them in the August 29, 2022 prior written notice to Parent.

Rangel's August 2022 prior written notice explained Newark's responsibility to assess, and why it was proposing to assess pursuant to the August 2022 plan, namely, to determine Student's needs and present levels so the IEP team could develop an appropriate IEP. Rangel further explained that Student's triennial assessments were due

in December 2022, outlined the evaluation areas, and asked Parent to consent to the attached August 29, 2022 assessment plan. Rangel encouraged Parent to contact her if Parent had any questions, concerns, or input regarding the assessment plan, and attached a notice of procedural safeguards.

Newark placed the August 2022 assessment plan on the IEP team meeting agendas for September 2022 and arranged for multiple proposed assessors to attend and answer Parent's questions about the assessment tools. In email correspondence prior to the scheduled team meetings, Parent noted her continuing objection to norm-referenced assessment tools. Parent also opined that assessments could only occur on a triennial basis, expressed concern that Newark IEP team members had not worked with Student, and asked that the school psychologist attend the IEP meeting to discuss the assessment process. Rangel responded that Newark required Parent consent by October 2022 to timely complete Student's triennial assessments by December 2022, and explained that assessors new to Student could gather accurate assessment data to identify Student's needs. Parent cancelled one meeting and did not appear at the second.

On September 19, 2022, Rangel resent Parent the August 2022 assessment plan. In a November 1, 2022 prior written notice, Newark again requested that Parent consent to the proposed assessment plan and attached a notice of procedural safeguards. Parent did not consent.

Newark's efforts to obtain Parent's consent to the August 2022 assessment plan continued after it filed for due process on February 2, 2023. Rangel emailed Parent twice in February 2023 in an effort to obtain Parent's consent to assess and attached the August 2022 assessment plan. Rangel explained Newark had filed a due process

hearing request on its request to assess Student and expressed hope that Parent would consent to the assessment plan. Rangel attached an IEP agenda with the topic of Parent's concerns and input regarding the assessment plan. Newark planned to have all eight proposed assessors attend Student's next IEP team meeting to answer Parent's questions. In her email, Rangel again identified each evaluation area and explained why it was a suspected area of disability for which the IEP team required current information to develop an IEP appropriate to Student's needs.

Student's IEP team convened on March 3, 2023. Parent attended with two nonpublic agency advocates, as did all eight proposed assessors. Parent provided a health update on Student but did not share any medical concerns that would prevent Student from participating in assessments.

Parent and Newark had differing views on Student's present levels. Newark had not worked with Student since the 2021-2022 school year, and the conflicting reports of Student's functioning further supported its need to reassess. Parent reiterated concerns with standardized assessment tools and written tests. School psychologist Asif Khan answered Parent's questions. Khan explained the importance of standardized tools and how they would help identify Student's needs and how to best support him. Khan further explained the assessors would accommodate Student as needed to obtain accurate data, but did not support identifying accommodations on the assessment plan. Rather, Student's assessment performance informed the assessor's approach, and they required flexibility to respond and accommodate along the way.

At the March 2023 IEP team meeting, Newark agreed to provide Parent a list of proposed tools for each assessment and offered to set up individual meetings for Parent with each assessor. On March 11, 2023, Rangel provided Parent a chart of the proposed

assessors and their proposed tools, noting the assessors may select other tools and accommodations as deemed appropriate. In a follow-up email, Rangel provided an updated proposed assessor chart that included the school nurse and proposed health assessment tools and identified a different academic assessor.

Newark satisfied the collaborative process under the IDEA that necessitates parental input and informed discussions. (*Timothy O., supra*, 822 F.3d 1105, 1125-1126].) Newark established it made reasonable and ongoing efforts to obtain Parent consent to the August 2022 assessment plan both before and after it filed for due process. These efforts included

- providing Parent several copies of the assessment plan with notices of procedural safeguards;
- requesting consent through email correspondence and prior written notices;
- attempting to convene IEP team meetings to discuss Parent's concerns with the assessment plan;
- arranging for all assessors to attend an IEP team meeting;
- offering additional meetings with the assessors; and
- providing Parent the names of each proposed assessor and their likely assessment tools.

Newark documented its efforts to obtain Parent consent. Newark proved it made reasonable efforts to obtain Parent's consent to the August 2022 assessment plan.

QUALIFIED ASSESSORS

Special education assessments must be conducted by qualified individuals who are both knowledgeable of the student's disability and competent to perform the assessment, 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, §§ 56320, subd. (g), 56322.) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) A person is qualified if they have met federal and state certification, licensing, or other comparable requirements which apply to the area in which they are providing special education or related services. (Cal. Code Regs., tit. 5, §§ 3023, 3065.)

Parents who want their child to receive special education services must allow the district to conduct reassessments by experts of its choice. The right to assess belongs to the school district; parents have no right to insist on particular assessors or on outside assessors. (*Andress v. Cleveland Independent Sch. Dist.*, supra, 64 F.3d at p. 179; see *M.T.V. v. DeKalb County School Dist.* (11th Cir. 2006) 446 F.3d 1153, 1160; *Johnson v. Duneland Sch. Corp.* (7th Cir. 1996) 92 F.3d 554, 558; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315 (*Gregory K.*)). A school district is entitled to current evaluative data and "may insist on evaluations by qualified professionals who are satisfactory to the school officials". (*Dubois v. Conn. State Bd. of Ed.* (2d Cir. 1984) 727 F.2d 44, 48.)

Newark proved the proposed assessors for the August 29, 2022 assessment plan were knowledgeable about Student and qualified to assess him. The proposed assessors reviewed Student's past assessments and education records and were knowledgeable of his disabilities. Each assessor was trained, experienced, and appropriately licensed or credentialed to conduct assessments in their respective

areas of competence. Newark established it had qualified personnel available to conduct its proposed assessments. Further, it is Newark's right to select qualified personnel of its choice to reassess Student pursuant to the August 29, 2022 assessment plan.

The district must use a variety of assessment tools and strategies when reassessing a student. No single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or for determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, §56320, subd. (e).) Tests and assessment materials

- must be validated for the specific purpose for which they are used;
- must be selected and administered so as not to be racially, culturally or sexually discriminatory;
- must be provided in the student's primary language or other mode of communication; and
- must be provided in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is not feasible to do so. (20 U.S.C. § 1414(b)(3); 34 C.F.R. § 300.304(c)(1); Ed. Code, § 56320, subds. (a) & (b).)

Newark established its proposed assessors were qualified to administer and interpret the instruments they intended to use and would select and administer any tools in a manner free from bias and in Student's primary language of English. They were prepared to use various assessment measures including testing instruments, record review, interviews, observations and rating scales, selecting reliable and valid

tools likely to yield accurate information. They would follow administration protocols but were ready to deviate as needed, noting this in their report, to obtain valid information on Student's needs and abilities.

Parent opposed standardized assessments of Student. However, once a school district establishes a need for assessment and meets the statutory requirements, parents may not put conditions on assessments. "[S]election of particular testing or evaluation instruments is left to the discretion of State and local educational authorities." (*Letter to Anonymous* (OSEP September 17, 1993).) Parents' conditions on assessments "vitiating any rights the school district had under the IDEA for the reevaluation process." (*G.J. v. Muscogee County Sch. Dist.* (M.D. Ga. 2010 704 F.Supp.2d 1299, 1309, *affd.* (11th Cir. 2012) 668 F.3d 1258, 1264.)) Parents who want their child to receive special education and related services must allow the school district to reassess if conditions warrant. The Ninth Circuit held, "if the parents want [their child] to receive special education services under the [IDEA], they are obliged to permit such testing." (*Gregory K., supra*, 811 F.2d at 1307.)

Khan was sensitive to Parent's concerns that standardized tools would not provide an accurate picture of Student. Khan was a licensed educational psychologist and credentialed school psychologist qualified to assess Student's intellectual development, social-emotional and behavior needs, and adaptive behavior, as well as administer a health and developmental history. He had conducted hundreds of psychoeducational evaluations of students with disabilities over his eight-year career. Kahn testified that it was important to start with standardized tools administered in accordance with the publisher's instructions. Khan opined this approach would provide a better understanding of what Student could and could not do, rather than assuming

Student could not perform a particular task. Khan's testimony made sense and was persuasive. He explained that if the assessor believed Student knew more than he was able to show, the assessor would then determine what accommodations to use to obtain accurate information on Student's functioning. Common accommodations for a student unable to complete standardized testing included repeating, simplifying, or clarifying instructions, prompting, providing breaks, and allowing extra time. The assessor would note any administration deviations in the report. The other assessors' testimony was consistent.

Although Parent may have disagreed with the use of standardized or norm-referenced assessments, Newark had the obligation to draw upon a variety of sources to evaluate Student's educational needs, including aptitude and achievement tests. (34C.F.R. § 300.306(c)(1).) Newark's chosen assessors had the right to select the particular testing or evaluation instruments they deemed necessary. Khan established that standardized assessments provide valuable observational data on Student's functioning and support needs even if the assessor could not reliably report a standardized score. Newark proved its qualified assessors were prepared to select and administer well respected instruments that met statutory requirements of reliability and avoided bias to assess Student in all proposed areas.

In its closing brief, Newark requests, for the first time, an order allowing it to communicate with Student's treating doctors. Newark argues it has repeatedly asked Parent to provide legally sufficient medical documentation to support Parent's request for home hospital instruction. Whether Student qualified for home instruction was not at issue in this hearing. Newark sent Parent an August 2022 release of information

requesting permission to communicate with Student's nurse practitioner who recommended distance learning for the 2022-2023 school year. Newark did not establish it made reasonable efforts to obtain Parent consent for the school nurse to communicate with Student's treating doctors as part of its health assessment. Accordingly, its requested order is denied.

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.

ISSUE:

Newark is authorized to assess Student pursuant to its August 29, 2022 assessment plan without Parent's consent.

Newark prevailed on the sole issue.

ORDER

1. Newark may reassess Student pursuant to the August 29, 2022 assessment plan with qualified assessors and assessment tools of its choice.
2. Parent shall cooperate in making Student reasonably available for each assessment.
3. Newark's other requests 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.

THERESA RAVANDI

Administrative Law Judge

Office of Administrative Hearings