

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2023010808
CASE NO. 2023010438

THE CONSOLIDATED MATTERS INVOLVING

PARENT ON BEHALF OF STUDENT, AND

MAGNOLIA SCIENCE ACADEMY.

DECISION

June 5, 2023

On January 18, 2023, Magnolia Science Academy-Santa Ana filed with the Office of Administrative Hearings, called OAH, a Request for Due Process Hearing in OAH case number 2023010438, Magnolia Science's Case, naming Student. On January 26, 2023, Parent on behalf of Student filed a Request for Due Process Hearing in OAH case number 2023010808, Student's Case, naming Magnolia Science Academy-Santa Ana. On February 6, 2023, Student filed an amended complaint. On March 16, 2023, OAH granted a continuance for good cause. On March 20, 2023, OAH consolidated the cases and designated Student's Case as the primary case. On April 7, 2023, OAH dismissed Student's issues, following an Order to Show Cause re dismissal.

Administrative Law Judge June R. Lehrman heard this matter via videoconference on April 18 and 19, 2023, concerning Magnolia Science's issue that remained to be decided, following the dismissal.

Attorneys Rebecca Diddams and Stacy Tolkin represented Magnolia Science Academy. Mother represented Student. Mother attended all hearing days on Student's behalf. CART transcriber Susan Thomas of eCaptions attended all hearing days and provided CART transcription services as an accommodation.

At the parties' request, OAH continued the matter to May 5, 2023, for written closing briefs. The record was closed, and the matter was submitted on May 5, 2023.

ISSUE

MAGNOLIA SCIENCE'S ISSUE

Can Magnolia Science assess Student under the November 10, 2022 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.) All

subsequent citations to the Code of Federal Regulations are to the 2006 version, unless otherwise noted. The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disability 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).)

Magnolia Science bore the burden of proof on its issue, which was the sole issue remaining in the case following the dismissal of Student's issues. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

At the time of the hearing, Student was 15 years old, resided in the County and attended Magnolia Science Academy, a charter school that is a self-contained local educational agency responsible for the provision of a FAPE to eligible students. Student had previously attended schools in Santa Ana and, before that, in Garden Grove during the 2018-2019 school year.

ISSUE 1: CAN MAGNOLIA SCIENCE ASSESS STUDENT UNDER THE NOVEMBER 10, 2022 ASSESSMENT PLAN WITHOUT PARENTAL CONSENT?

Magnolia Science contends Student's educational progress requires the school to assess her. Magnolia Science contends it met all procedural requirements entitling it to assess Student pursuant to the November 10, 2022 assessment plan.

Parent contends there is no need to assess Student given that Student had a final, implementable IEP from Garden Grove in 2019.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an individualized education program, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); 34 C.F.R. §§ 300.320, 300.321, and 300.501; and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363, subd. (a).)

To determine the contents of an IEP, a student eligible for special education under the IDEA must be assessed in all areas related to his or her suspected disability and no single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate.

(20 U.S.C. § 1414(a)(2) & (3); Ed. Code, § 56320, subds. (e) & (f).) School district evaluations of students eligible for special education under the IDEA help IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.303, 300.320(a)(4), 300.324(a)(1)(iii) & (iv).)

The IDEA provides for reevaluations, referred to as reassessments in California law, to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must be conducted if the school district determines that the educational or related services needs, including improved academic achievement and functional performance, of the student warrant a reassessment, or if the pupil's parents or teacher requests a reassessment. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a); Ed. Code, § 56381, subd. (a)(1); see also, *Patricia P. v. Board of Education of Oak Park, et al.* (7th Cir. 2000) 203 F.3d 462, 468 [if parents want their child to receive special education under the IDEA, they must allow a reevaluation and cannot force the school to rely solely on an independent evaluation].)

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 student and his or her parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, § 56321, 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 or other mode of

communication used by parent. It must also explain the types of assessments the district proposes to conduct and 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 give the parent 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

If a parent does not consent to a reassessment plan, the school district may request a due process hearing to obtain permission to conduct the reassessment without parental consent by establishing that the assessment was necessary 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), 56506 subd. (e).) Therefore, a school district must establish both that the educational or related services needs of the child warrant reassessment of the child, and the district has complied with all procedural requirements to obtain the parent's informed consent.

Prior written notice is required to be given by the public agency to parents of a child with exceptional needs, upon initial referral for assessment, and a reasonable time before the public agency initiates or changes, or refuses to initiate or change, the identification, assessment, or educational placement of the child, or provisions of FAPE. (Ed. Code, § 56500.4, subd. (a).) The notice is required to include a description of the action proposed, and an explanation why the agency proposes the action. It must also contain a description of each assessment procedure, assessment, record, or report used as a basis for the proposed action. It is required to include a statement that the parents of the individual with exceptional needs have protection under the procedural safeguards, the means by which a copy of the description of the safeguards can be obtained, and sources for parents to contact to obtain assistance. The notice must also

include a description of any other options that the IEP team considered and the reasons why those options were rejected, and other factors relevant to the proposal or refusal of the agency. (Ed. Code, § 56500.4, subd. (b).)

BACKGROUND

Garden Grove Unified School District had, in the spring of 2019, assessed Student for eligibility for special education and related services. The assessment report was not placed into evidence. Garden Grove then convened an IEP team meeting and generated an IEP document dated May 13, 2019, June 11, 2019, and June 13, 2019. The parties dispute whether that document constituted a final, implementable IEP. That dispute is outside the scope of this due process hearing and is not addressed. The contents of the document are pertinent here solely as they provide information that pertains to the assessment plan that is at issue.

The 2019 IEP document noted Mother's concerns with Student's reading, writing, and math progress. Mother reported that Student struggled with

- reading fluency and comprehension,
- test-taking,
- writing,
- spelling,
- math fractions, and
- word math.

Mother was worried about social stigma and was concerned that Student might be dyslexic or have dysgraphia. She reported that Student had trouble with

- expressive language,
- finding the right words,
- lacked appropriate ability to plan ahead, and
- had poor executive functioning skills.

The IEP document indicated that there had been a multi-disciplinary assessment report. A speech-language pathologist had formally assessed Student's communication development, using a variety of formal communication assessment tools. A school psychologist had administered some formal instruments to discern Student's academic achievement levels and processing skills. Although the Garden Grove assessment report was not placed into evidence, it was clear that as of the 2019 IEP team meeting, Garden Grove had conducted a formal assessment.

Student's social-emotional functioning was also assessed at that time, using interviews and questionnaires. The results indicated Student was very emotional and had a hard time explaining herself. Student became frustrated when unable to read fluently. She was often respectful, but had difficulty following rules and sometimes disturbed others.

The notes of the IEP document indicated Mother had numerous concerns about the testing that had occurred. For example, Mother felt the multidisciplinary evaluation was inaccurate and that the psychologist had asked Student inappropriate questions.

The Garden Grove IEP's reporting of the assessment is pertinent in that it established the fact that Student had been formally assessed prior to May 2019. It also established the areas of concern that Garden Grove and Mother were investigating.

After Garden Grove, Student attended school in Santa Ana. In January 2020, Mother requested that Santa Ana assess Student. In light of the Garden Grove assessment that had been conducted within the previous year, Santa Ana declined that request. Then in April 2020, after a year had elapsed, Santa Ana proposed that a new assessment be conducted. Santa Ana reiterated that proposal in August 2020, but no such assessment occurred.

Student then enrolled in Magnolia Science in August 2020. Once Student enrolled, and sometime prior to or in March 2021, Mother expressed to Magnolia Science that Student had had an IEP at Garden Grove. After Magnolia Science determined that, in its opinion, the Garden Grove IEP was incomplete and could not be implemented, Magnolia Science prepared an assessment plan that proposed to assess Student in the areas of academic achievement, health, intellectual development, and social-emotional functioning/behavior. The reasons for the proposed assessments were that Student was attending Magnolia Science in the seventh grade, Mother reported Student's history of academic challenges, and because the parties disputed whether the Garden Grove IEP could be implemented. The proposed assessment plan was dated March 15, 2021, almost two years since the Garden Grove assessment had occurred.

On March 17, 2021, Magnolia Science wrote Mother a prior written notice letter stating its position that the Garden Grove IEP could not be implemented, and proposing

that the new assessment be completed to provide accurate present levels of performance data. Mother did not consent, and the parties did not communicate again on this topic until the following spring.

In February 2022, Student was suspended. Magnolia Science then prepared another assessment plan dated March 1, 2022, when Student was in the eighth grade. The proposed assessment plan was identical to the prior year's. In April 2022, email exchanges documented that Mother had been provided the proposed assessment plan, but the parties could not agree because Mother asserted, and Magnolia Science disputed the existence of, an implementable IEP from Garden Grove.

Magnolia Science then prepared another assessment plan dated May 2, 2022. This document date was just shy of three years since Garden Grove had assessed Student.

On August 26, 2022, Magnolia Science prepared a proposed Section 504 plan document, by which it sought to accommodate Student's educational needs in the absence of a formal assessment for special education and related services, and in light of the parties' ongoing dispute over whether the Garden Grove document was an implementable IEP. Only informal observations, interviews, and classroom assessment were performed to inform the Section 504 team of Student's areas of need. Student had still not been formally assessed since Garden Grove in 2019. The proposed Section 504 plan noted that Student exhibited

- some inattention,
- some poor focus,
- had a difficult time remembering,

- exhibited disorganization in the classroom, and
- exhibited anxiety and feelings of being overwhelmed at school.

It also noted Mother's input that Student had deficits in the area of conceptualization. The school psychologist also noted Student's anxiety.

Dr. Artis Marie Callaham was Magnolia Science's Director of Student Support Services. Her background was as a school psychologist and educational administrator with experience in creating and overseeing special education programs, and in developing and implementing IEP's for students with special needs. Dr. Callaham recalled that Student exhibited difficulty with work completion. In Dr. Callaham's view, the Section 504 plan was a best estimate of how to accommodate Student's needs in the absence of a consented to formal assessment, and in the absence of a formal assessment was the only available avenue. Greater specificity would be needed and could have been provided by a formal assessment. Mother never consented to the Section 504 plan.

THE NOVEMBER 11, 2022 ASSESSMENT PLAN AND NOTICE TO PARENT

On November 11, 2022, Magnolia Science prepared yet another assessment plan. The document stated that a more thorough assessment of Student's academic, language, and social-emotional functioning skills was warranted to ensure her access to her education. The assessment plan proposed to assess Student in the areas of:

- academic achievement, to be conducted by an education specialist;
- health, to be conducted by a nurse;
- intellectual development, to be conducted by a school psychologist;

- language and speech development, to be conducted by a speech-language pathologist; and
- Social-emotional functioning/behavior to be conducted by a school psychologist.

Magnolia Science emailed the proposed assessment plan to Mother on November 14, 2022. From that time until December 2022, email exchanges documented that Mother was provided the proposed assessment plan and Section 504 document. Mother continued to assert, and Magnolia Science continued to dispute, the existence of an implementable IEP.

The assessment plan complied with the law and Magnolia Science provided Parent proper notice. The plan was in English, Mother's native language. Its language was clear and easily understood. It explained the types of assessments Magnolia Science proposed to conduct. The language on the form complied with the requirement to inform Mother that an IEP would not result from the assessment without the consent of the parent. The notice was provided to Mother by email and actually received by her. Parent had at least 15 days to review, sign, and return the proposed assessment plan.

As part of the assessment plan, Magnolia Science included prior written notice to Parent regarding the proposed assessments. The prior written notice, taken together with the assessment plan, contained a description of the proposed action, an explanation why Magnolia Science proposed conducting a reevaluation of Student, a statement that parents had protection under procedural safeguards, and a copy of the procedural safeguards. In short, the assessment plan provided proper notice to Mother and complied with the law.

CIRCUMSTANCES WARRANTING REASSESSMENT

Magnolia Science proved by a preponderance of evidence that Student's educational needs justified reassessment. Updated assessments were necessary to clarify Student's current strengths and weaknesses, to determine eligibility for special education and to determine what supports, if any, were currently necessary to support her to make educational progress.

Dr. Callaham wanted to start assessing since at least February 2022. She especially wanted to conduct a triennial evaluation beginning and after May 2022, when three years had elapsed from the Garden Grove May 2019 assessment. She based this opinion on the legal duty to reassess every three years, even if there had been agreement on the implementation of the Garden Grove IEP. Three years from the Garden Grove assessment would be a point where reassessment would be necessary, because Student's needs had likely evolved, and there was an ongoing need for current and updated information to revisit an IEP even if it once was agreed upon. However, in Mother's view, agreeing to the assessment would be tantamount to agreeing that an IEP had never been in place, which she felt she could not in good conscience do.

The circumstances warrant reassessment despite the parties' difference of opinion concerning the Garden Grove IEP, which is irrelevant to the sole issue to be decided here. Dr. Callaham persuasively testified that given Parent's concerns and concerns by the school team, an updated assessment would be beneficial and necessary to clarify Student's

- strengths,
- weaknesses,
- needs,

- eligibility, and
- how to support her.

More than three years had elapsed from the most recent assessment, by the time of the November 2022 assessment plan. The law provides for reassessments every three years even when there is a current IEP in place. The proposed assessment tools are used to evaluate areas over which Parent has voiced many concerns. Mother's argument, that reassessment was unwarranted because of the prior IEP, is without legal merit. Local educational agencies are required to assess at least once every three years, irrespective of the existence, or not, of an ongoing IEP. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).). As such, the assessments proposed by the November 11, 2022 assessment plan are mandated by this three-year rule.

PROPOSED ASSESSMENTS WERE APPROPRIATE

Dr. Callaham was familiar with the assessment tools that would be used to evaluate Student. The evaluation areas identified on the assessment plan were appropriate areas to explore, based on Mother's input, the school's input, and Student's educational performance and records.

Dr. Callaham thoroughly described the assessments that Magnolia Science wanted to conduct, and why. In academic achievement, Magnolia Science wanted to establish accurate present levels of performance in reading, writing, and math, and to discern current strengths and possible areas of need. A qualified education specialist, certified by the state to administer and interpret the test results, would administer the Woodcock Johnson Tests of Achievement, an individually administered, norm-referenced test that assesses academic and cognitive skills, or the Wechsler Individual Achievement Test, also known as the WIAT, or California Alternate Assessments. To assess health, a school nurse

would conduct vision and hearing screenings and assess any other health concerns that might impact Student's ability to access her education. For intellectual development, a credentialed school psychologist would assess Student's visual processing, auditory processing, visual motor integration, and cognitive levels to see which, if any, processing areas were impacting or might impact Student.

Potential instruments included the Test of Visual Perceptual Skills to measure different aspects of visual processing including tracking, and visual memory, and other visual-motor integration assessment, and the Test of Auditory Perceptual Skills.

The assessment team would conduct a records review, interview teachers and Parent, and conduct at least three observations of Student across settings, including unstructured time. A qualified speech-language pathologist would administer tests to measure phonemic awareness and phonological processing, using for example the Comprehensive Test of Phonological Processing, called CTOPP, and other tests different from those administered by the school psychologist. Student's social-emotional functioning would be assessed using surveys to be completed by Mother, Student, and teachers, using an adaptive skills instrument called the Behavior System Assessment for Children, referred to as BASC, or the Achenbach System of Empirically Based Assessment, which has an attention deficit component. Depending on the results, more tests could be conducted delving into particular areas of deficit. The social-emotional component was needed, based on some disciplinary history and some recent incidents of aggression, vaping, and other behaviors Student exhibited in the general education environment.

Magnolia Science proved that the proposed assessments are appropriate areas for evaluation. Dr. Callahan was persuasive that it was appropriate to assess Student in all of the areas listed on the assessment plan. The proposed assessment areas, and the proposed assessment tools, and assessors, were appropriate to clarify Student's strengths, weakness, and needs.

REASONABLE MEASURES WERE TAKEN TO OBTAIN PARENTAL CONSENT

Magnolia Science took reasonable measures to obtain Mother's consent for the evaluation proposed in the assessment plan, but Mother refused. Magnolia Science had been attempting since Student's enrollment to obtain Mother's permission to assess Student and had sent numerous assessment plans over time. Magnolia Science made numerous and reasonable attempts to obtain Parent's consent for assessment. Mother's perception that her consent to the assessment plan was tantamount to conceding the insufficiency of the Garden Grove IEP prevented her from consenting. As discussed above, however, regardless of the sufficiency or insufficiency of the Garden Grove IEP document, which is not decided here, Magnolia Science established that reassessments are warranted.

In conclusion, Magnolia Science sought permission to conduct a comprehensive reevaluation of Student pursuant to a November 10, 2022 assessment plan, without parental consent to determine Student's current levels of functioning and needs related to special education and related services. The assessment plan identified certain assessment areas, and it contained a notice of procedural rights and prior

written notice. Magnolia Science established that Student's educational or related services needs warrant reassessment pursuant to the assessment plan. Updated assessments in the proposed assessment areas are necessary to clarify Student's current strengths and weaknesses, to determine eligibility for special education, and to determine what supports, if any, are currently necessary to support her to make educational progress. The assessment plan and notice complied with the law. As such, Magnolia Science may conduct the assessments proposed in the assessment plan without Parent's consent, if Parent wants Magnolia Science to provide any special education and related services to Student.

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 1:

Magnolia Science may assess Student under the November 10, 2022 assessment plan without parental consent.

Magnolia Science prevailed on the only Issue.

ORDER

Magnolia Science may reassess Student pursuant to the November 10, 2022 assessment plan, without parental consent.

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.

June R. Lehrman

Administrative Law Judge

Office of Administrative Hearings