

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

DEL MAR UNION SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2013120020

DECISION

The Del Mar Union School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on November 26, 2013, naming Student's parents on behalf of Student (Student). The matter was continued for good cause on December 11, 2013.

Administrative Law Judge Susan Ruff heard this matter in San Diego, California on March 25, 2014.

Sundee Johnson, Attorney at Law, represented Del Mar. Student's parents represented Student at the hearing. Student did not attend. Interpreter Ruth Levy provided language assistance to Student's mother when necessary during the hearing.

On March 25, 2014, the record was closed and the matter was submitted for decision.

ISSUE

May Del Mar assess Student pursuant to the October 15, 2013 assessment plan, over the objection of Student's parents?

## SUMMARY OF DECISION

This action is part of Del Mar's attempt to fulfill its child find obligation to Student. Due to circumstances which arose in the early part of Student's first grade year, Del Mar sent an assessment plan to Student's parents. Student's parents refused to sign it. Del Mar then filed this action, seeking to assess Student over the objections of Student's parents.

Student's mother contends that the assessment is not necessary because Student does not need special education. Student's father does not wish Del Mar to assess his child. He contends that Del Mar did not bring in sufficient evidence to meet its burden of proof in this case to show that an assessment is necessary at this time.

This Decision finds in favor of Student's parents. There is insufficient evidence that Student needs to be assessed for special education eligibility at this time.

## FACTUAL FINDINGS

1. Student is a seven-year-old girl who has resided within the jurisdiction of the Del Mar Union School District at all times relevant to this case. She has never been found eligible for special education.

2. Student did very well academically during her kindergarten year of school. Her report card showed that she was "advanced" in almost every area reported and "secure" in the others. Her citizenship and efforts in class were reported to be "excellent."

3. The teacher comment to her report card recognized her achievement:

[Student] was a pleasure to teach. She showed a true desire to learn. [Student] was a tremendous help in the classroom. She would always assist the other students when asked. [Student] will excel in 1st grade.

4. Student had a little difficulty adjusting at the beginning of her first grade year. Because the mix of pupils was different in first grade than in kindergarten, Student did not start school in a classroom with her kindergarten friends. Shortly after the first grade school year began in late August 2013, there was an incident in which Student attempted to elope from school. Student was six years old at the time.

5. During the hearing, the parties stipulated to the following facts regarding that elopement incident:<sup>1</sup>

On August 29, 2013, [Student] attempted to leave the Carmel Del Mar school campus unaccompanied and was upset. Lori Smiley, District Nurse, spent about 20 minutes with [Student] until she was calm enough to return to her class.

6. There may also have been a second incident in which Student attempted to elope from school. Student's mother reported that it occurred near the beginning of the school year. She did not personally witness the incident, but she believed that it occurred at some point in approximately September 2013. Del Mar did not bring in direct evidence as to the circumstances of the second elopement and there was no stipulation as to the facts of that elopement. Student's mother testified that at least one of the elopement incidents occurred when there was a substitute teacher in the room who was having difficulty handling the class. There was no evidence of any other attempts by Student to elope since that time.

7. Student's mother explained that Student has now developed friendships in her first grade class. Student's mother described Student as a happy child.

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<sup>1</sup> In light of the stipulation, Del Mar did not call the school nurse as a witness to testify about the incident.

8. The teacher's comments to Student's report card for the first trimester of the current school year show that Student has been doing well in first grade:

[Student] is an absolute pleasure to teach. She is a very strong student. I would like to see [Student] participate more in class/small group instruction. This will also help her become a deeper thinker. [Student] should also take academic chances and persevere through them. I look forward to working with [Student] the rest of the year.

9. Del Mar is now using a report card that follows the new "common core" standards. Student's report card for the first trimester listed Student as "S" (meeting grade level expectations) in most areas and "D" (developing steadily toward grade level expectations) in the remaining areas. Cara Schukoske, Director of Pupil Services for Del Mar, explained that Del Mar did not give any pupils the "E" designation (exceeds grade level expectations) on the first trimester report card, because instruction in the grade level standards had just begun, and no child could exceed standards that had not yet been presented in class.

10. In October 2013, Student's father sent a letter to Del Mar requesting that Del Mar fund an independent educational evaluation of Student. In the letter, Student's father stated that Student had been seen by doctors. The letter raised concerns about Student's elopement and the possibility that she had an eating disorder. The letter did not request to have an assessment done by school district personnel.<sup>2</sup>

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<sup>2</sup> The letter was not entered into evidence, so the only information about the contents of the letter came from the testimony of Ms. Schukoske.

11. Because Del Mar had never assessed Student for special education, Del Mar denied the request for an independent educational evaluation. According to Ms. Schukoske, at the time Del Mar received the letter, the staff thought that Student's father might have been confused about how the process for assessment worked, and that he did not realize a school district had to conduct its own assessment before a parent could request an independent assessment at district expense.

12. When the Del Mar staff considered the concerns raised by Student's father in his letter along with the difficulties Student exhibited at the beginning of her first grade year, the staff felt they should offer an assessment by school district personnel to investigate whether Student should be found eligible for special education.

13. On October 15, 2013, Del Mar sent an assessment plan to Student's parents, proposing to assess Student in the areas of academic achievement, health, intellectual development, language/speech communication development, motor development, and social/emotional development. According to Ms. Schukoske, Del Mar was primarily concerned with Student's social-emotional functioning, but wanted to assess in all areas to make certain they had a complete picture of Student's functioning.

14. During the hearing, the parties stipulated that Del Mar has qualified staff available to perform a proper assessment.

15. Neither of Student's parents signed their agreement to the assessment plan. On November 26, 2013, Del Mar filed the instant action seeking an order from OAH permitting Del Mar to assess Student despite the lack of consent by Student's parents.

16. During the hearing, Student's mother voiced strong objections to an assessment by Del Mar. She believes that Student is a happy child who is excelling in school. She does not believe that Del Mar has any reason to assess at this time. She pointed out that Student's current teacher Jason Bethurum was not called to testify at

the hearing, even though he would be in the best position to know if Student requires an assessment.

17. Student's mother contends that Del Mar filed this action solely to avoid litigation with Student's father. Student's parents are divorced and have a strained relationship. Student's father also has a strained relationship with Del Mar.

18. Student's father chose not to testify during the hearing, but he made it clear during his closing argument that he did not want Del Mar to conduct an assessment of Student. He also clarified that when he sent his letter requesting an independent assessment, he had no intention of requesting an assessment conducted by Del Mar personnel.

19. Del Mar brought in insufficient evidence to show that Student is emotionally disturbed or has an eating disorder.<sup>3</sup> Instead, the only evidence presented during the hearing showed that Student is doing well both socially and academically. The District did not meet its burden to show that Student has a suspected disability which requires a special education assessment at the present time.

## LEGAL CONCLUSIONS

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 et seq. (2006); Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet

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<sup>3</sup> In his opening statement, Student's father expressed concern that Student might be emotionally disturbed. However, he chose not to testify and did not present other evidence to support his statement.

their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. The IDEA affords parents and school districts the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511 (2006); Ed. Code, §§ 56501, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

3. A school district is required to “actively and systematically” seek out all children with exceptional needs who reside within the district. (Ed. Code, § 56300.) All children with disabilities who are in need of special education and related services shall be “identified, located, and assessed....” (Ed. Code, § 56301, subd. (a).) A district is also responsible for “the planning of an instructional program to meet the assessed needs.” (Ed. Code, § 56302.) These duties are often described as a district’s “child find” obligations.

4. Prior to making a determination of whether a child qualifies for special education services, a school district must assess the child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) The request for an initial assessment to see if a child qualifies for special education and related services may be made by a parent of the child or by a state or local educational agency. (20 U.S.C. § 1414(a)(1)(B).)

5. According to Del Mar’s closing argument, Del Mar relied upon two legal provisions in deciding its course of action in this case. The first was Education Code

section 56029, which provides, in part, that a referral for assessment means “any written request for assessment” to identify an individual with exceptional needs made by a parent or guardian of the individual, or a teacher or other service provider of the individual.

6. The second provision relied upon by Del Mar was California Code of Regulations, title 5, section 3021, subdivision (a) (Section 3021). That section provides in part: “All referrals for special education and related services shall initiate the assessment process and shall be documented. When a verbal referral is made, staff of the school district, SELPA [special education local plan area], or county office shall offer assistance to the individual in making a request in writing, and shall assist the individual if the individual requests such assistance.”

7. Had Student’s father made a written request for a special education assessment by Del Mar, then Del Mar would have been obligated to initiate the assessment process under Section 3021. Arguably, the request made by Student’s father might not have met the requirements of Section 3021, because he requested an independent assessment by non-district personnel. However, in light of Del Mar’s uncertainty about whether Student’s father was confused by the process, it was logical for Del Mar to offer an assessment plan to Student’s parents. The concerns stated by Student’s father in his letter, as well as Student’s difficulties at the beginning of her first grade year, were additional factors that justified Del Mar’s decision to propose an assessment.

8. Once Student’s parents refused to sign the assessment plan, the law permitted Del Mar to file an action before OAH seeking to assess Student, despite her parents’ refusal to agree. (Ed. Code, § 56321, subd. (c)(2).) Given Student’s circumstances at the beginning of the year and the concerns raised by her father, Del Mar chose to do so in order to make certain that it complied with its child find obligations under the law.



9. During the hearing, Student's mother expressed frustration with Del Mar's decision to file this action because she believed it was done solely to avoid litigation with Student's father. Del Mar's motivations in bringing this action are not directly relevant to this case – this case focuses on whether there was cause to assess Student based on Student's needs. Even if Student's mother was correct, there is nothing wrong with Del Mar filing this action in an abundance of caution. Although Del Mar met its child find obligation when it proposed an assessment plan which Student's parents refused to sign, it was perfectly acceptable for Del Mar to take the additional step of seeking a ruling from OAH. Given the relationship between Del Mar and Student's father, it was understandable that Del Mar would wish to exhaust every possible avenue of its child find obligation.

10. However, given the evidence presented at the hearing, there is no need for Del Mar to assess Student for special education at the present time. Student's report cards from both kindergarten and first grade show her to be an outstanding pupil who excels academically. The uncontested testimony of Student's mother confirmed that Student is also doing well socially. Although Student apparently had a difficult time at the beginning of her first grade year, there was no evidence that her difficulties have continued to the present. One or two isolated incidents of elopement under these circumstances are not enough to demonstrate the necessity for an assessment of this child, without more evidence of problems. There was no evidence of emotional disturbance or an eating disorder except for hearsay testimony about the contents of one letter sent by a parent.

11. Del Mar did not meet its burden to show that Student is suspected to be a child with a disability who is in need of special education. Del Mar's request to assess is denied. Del Mar has fulfilled its child find obligations with respect to this Student. There is no need for assessment at this time.

## ORDER

The relief sought by the Del Mar Union School District is denied. Del Mar may not assess Student pursuant to the October 15, 2013 assessment plan.

## PREVAILING PARTY

Pursuant to 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. Here, Student was the prevailing party on the sole issue presented in the case.

## RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: April 23, 2014

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SUSAN RUFF

Administrative Law Judge

Office of Administrative Hearings