

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PANAMA-BUENA VISTA UNION
SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2011070635

DECISION

Administrative Law Judge (ALJ) Stella L. Owens-Murrell, Office of Administrative Hearings (OAH), State of California, heard this matter in Bakersfield, California, on September 13-14, 2011.

Monica Batanero, Attorney at Law, of Schools Legal Service represented the Panama-Buena Vista Union School District (District). Dr. Rita Pierucci, Director of Special Education, was present on behalf of the District throughout the hearing.

Advocate Donnalee Huffman, represented Student. Mother (Parent) was present throughout the hearing.

On July 19, 2011, District filed a request for due process hearing (complaint). The matter was continued on August 8, 2011. Oral and documentary evidence were received at the hearing. At the close of the hearing, the matter was continued to October 5, 2011, for the submission of closing briefs. On that day, the briefs were filed, the record was closed, and the matter was submitted.

ISSUES

1. Whether District may assess Student, without parental consent, in the areas specified in the assessment plan dated March 16, 2011?

2. Whether District provided parent an opportunity to examine all school records within five business days after parent's request?¹

FACTUAL FINDINGS

1. Student is three years of age and resides within District's jurisdictional boundaries with his parents. Student has only attended a private preschool, and has not attended any District school. Student has not been determined eligible for special education services and is not currently receiving special education services.

2. On February 16, 2011, District received a search and serve referral from the Kern County Consortium Special Education Local Plan Area (SELPA) and the Kern County Superintendent of Schools (KCSOS) regarding Student. Based upon information provided to KCSOS from Affiliated Speech Pathology (ASP), which Parent retained to provide speech and language services, Student had a speech and language deficit. The referral information also indicated that Student had a bilateral myringotomy² in October 2010. Following the

¹ District requested a determination or declaratory judgment that District timely provided records in response to Parent's request for educational records. At the hearing the undersigned ALJ invited the parties to show why this issue should not be dismissed for lack of jurisdiction under Education Code Section 56501, subdivision (a), which provides that the subject matter of IDEA due process complaints is limited to: a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a free appropriate public education (FAPE) to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility. The parties asserted that the issue related to a possible procedural violation. The issue was taken under submission. The ALJ has determined that the issue does not meet the requirements of Education Code section 56501, subdivision (a), such that it will be dismissed and will not be discussed in this decision.

District filed the complaint, not Student. If Student had an issue with document production, Student was, and still is, free to file Student's own complaint. As to District, District's complaint does not allege any issue regarding eligibility, assessment, or the provision of a free appropriate public education (FAPE) to Student because of District's alleged failure to timely provide records in response to a records request by Student. In essence, District is seeking a factual finding that it properly complied with a document request from Student without alleging a cognizable legal theory for hearing. In addition, neither party presented any relevant evidence at hearing concerning any alleged denial of FAPE related to the District's response to Student's request for documents. Thus, issue two is dismissed, both for failure to raise a legal issue that is cognizable at hearing, and because no evidence was presented at hearing to support it.

² A myringotomy is a surgical procedure in which a small incision is made in the eardrum (the tympanic membrane), usually in both ears. This is done so that fluid trapped in

procedure, Student's speech improved slightly but generally remained unclear. Student was also a client of the Kern County Regional Center and receiving services as a child with a pervasive developmental disorder (PDD).

3. On February 24, 2011, District staff contacted Parent to conduct an intake interview. Lisa Riffle, District's Speech and Language Pathologist, reviewed the intake information, and noted Parent's concerns that Student had been receiving services from ASP, but the services would be ending soon. Parent wanted Student to continue speech services with District. The intake information also revealed that Student tried to verbalize, but did not enunciate clearly. Parent also described Student as hyperactive. Ms. Riffle referred the intake information for review by the Special Education Director, who would determine whether Student required a screening or any further action.

4. On February 28, 2011, District contacted Parent to schedule a speech screening, which was scheduled for March 9, 2011.

5. On March 9, 2011, Ms. Riffle, who was a credentialed speech and language pathologist with District, met with Parent and Student. Parent signed the consent form for a preliminary evaluation of Student's speech and language skills. Ms. Riffle conducted the speech and language screening to determine if Student required a comprehensive assessment.

6. Ms. Riffle completed a Preschool Intake Form by obtaining family medical and developmental history from Parent. Ms. Riffle noted on the form that Parent's areas of concern for Student were that his speech was unclear and the need for ongoing speech and language therapy. The family history included a sibling with autism and other relatives, including Parent, with learning disabilities.

7. Ms. Riffle also administered the Preschool Language Scale-Fourth Edition (PLS-4), and took a language sample from Student. The Preschool Language Scale consisted of six sections including language, articulation, connected speech, social/interpersonal skills, stuttering, and voice. Ms. Riffle noted that Student did not obtain passing scores in any of the sections of the PLS-4, and that District needed to obtain additional information. Ms. Riffle also noted Student's language sample demonstrated that he was only 20 percent intelligible.

8. Ms. Riffle prepared a Speech and Language Preliminary Evaluation Report, in which she noted that Student had possible language delays and other speech related and developmental deficits. Ms. Riffle informed Parent that based upon the screening results, she was recommending that Student undergo a more comprehensive assessment by a school nurse, speech pathologist, and school psychologist. The further assessments would provide District with more information about Student in order to properly determine his educational

the middle ear can drain out. In many cases, a small ventilation tube is inserted into the hole in the ear drum. The tube helps to maintain drainage. This surgery is most often done on children. (Wikipedia Encyclopedia, www.wikipedia.org)

needs, and the most appropriate program to meet the identified needs. Parent initially agreed to the health and speech and language assessment, but told Ms. Riffle that she would not agree to a cognitive assessment by District. Ms. Riffle scheduled another meeting, which Parent agreed to attend on March 16, 2011.

9. Thereafter, Ms. Riffle requested District's special education coordinator and the school psychologist to attend the March 16, 2011 meeting in order to assist her in explaining the assessment process to Parent. They could also help Ms. Riffle answer Parent's questions concerning the assessment plan and the assessment.

10. On March 16, 2011, Mary Ann Krating, District's School Psychologist, and Ellen Anderson, District Special Education Coordinator, attended the meeting with Ms. Riffle and Parent. The purpose of this meeting was to discuss the assessment plan, and to obtain Parent's consent to conduct further assessments. Ms. Riffle prepared and presented to Parent the assessment plan. Ms. Krating and Ms. Anderson reviewed the assessment plan with Parent, and provided her with a notice of Parent Rights and Procedural Safeguards.

11. The assessment plan proposed to assess Student in the following areas of suspected disability: Academic/Preacademic; Social and Adaptive Behavior; Psycho-Motor Development; Intellectual Development; Language/Speech Communication Development; and Health. The assessment plan identified the school psychologist, speech and language pathologist, and the school nurse as the evaluators.

12. Parent refused to sign the assessment plan because the plan proposed to assess Student in the area of cognitive ability. Parent told District that her preference would be to have a cognitive ability assessment done outside of the District because she felt an independent assessor would be more reliable. Ms. Krating informed Parent that the cognitive assessment, as well as the academic and behavior assessments, was necessary in order for District to know the level of Student's preacademic, motor, social, and adaptive skills. Ms. Krating further explained that the information was necessary to get a picture of Student's cognitive abilities in order to develop an appropriate program for him. Parent was not persuaded and would not consent to any part of the proposed assessment plan.

13. On March 17, 2011, District wrote Parent requesting her consent to the assessment plan. Parent replied on March 27, 2011, and informed District that Student had already been given the language assessment on March 9, 2011, and that no further assessments were necessary.

14. On April 13, 2011, District received a copy of the March 16, 2011 consent to assessment plan form from Parent. Parent had written on the form "I only consent to the speech and I only give consent for speech assessment that [Student] started 3-9-11 and was continued on 3-16-11."

15. At hearing, Parent testified that Student had been attending a private preschool, but Student was no longer enrolled due to financial hardship. She wanted District

to provide speech and language services to Student. She explained that she did not want District to conduct a cognitive assessment because she believed District might determine Student was mentally retarded or autistic and she did not believe that he had such disabilities. As such, she told District that if such assessments were necessary, she wanted a private assessor. Parent offered no explanation of why she would not consent to a health assessment. Parent expressed reluctance to have Ms. Riffle conduct a further assessment, because Ms. Riffle had difficulty understanding Student's speech during the March 9, 2011 screening. This caused Parent to question Ms. Riffle's qualifications. Parent also testified that she believed Student had already been assessed for speech and language services on March 9, 2011, and determined eligible to receive special education services. She stated that Ms. Riffle told her that District could waive the assessment of all areas of suspected disability so that Student could obtain speech and language services, as well as placement in a District school program. However, Parent was not credible in her testimony concerning her understanding of the effect of the preliminary evaluation. Parent also was not credible concerning her testimony that District would allow her to waive a comprehensive assessment in order to obtain speech services for Student. As discussed below, her testimony was not confirmed or corroborated by District personnel and Parent was aware of special education assessment procedures because she had another child who was receiving special education services at a District school. Because of Parent's knowledge of District's assessment procedures it was not reasonable for Parent to believe that a speech screening could result in an eligibility determination for Student.

16. Ms. Riffle, who testified at hearing, has a bachelor's degree and a master's degree in speech and language pathology, and has a certificate of clinical competency in speech and language pathology. She has been employed as a speech pathologist with District since 2006, and has conducted over 400 to 500 speech and language assessments in the course of her career. During her discussions with Parent, she explained the purpose of the preliminary evaluation, and administered all test instruments in Parent's presence. She advised Parent of the assessment results, and told her that further evaluations were necessary. As such, she scheduled a meeting with Parent for March 16, 2011, so that Parent could sign an assessment plan. She answered Parent's questions about District's programs; however she, at no time, told Parent that Student was eligible for District's programs and services based upon the preliminary evaluation. She also never told Parent that Parent could waive a comprehensive assessment so that Student could begin receiving speech and language services. Ms. Riffle's testimony was credible and persuasive.

17. District's Special Education Director, Dr. Rita Pierucci, met with Parent on April 25, 2011, to obtain her consent to the entire proposed assessment plan. Dr. Pierruci, who provided credible testimony at hearing, was familiar with Parent because Parent had another child receiving special education services in a District school. Dr. Pierruci explained that Parent was familiar with District requirements, as she had been through the assessment and individualized educational program (IEP) process with her other child. Regarding Student, she explained to Parent that District was required by law to evaluate him because of the referral from KCSOS for determination of eligibility for special education services. She told Parent that the March 9, 2011 preliminary evaluation was only a screening tool to

determine the need for a complete assessment. She further explained that a health assessment was necessary because Parent expressed concerns during the intake interview and at the preliminary evaluation about Student's speech and the need for ongoing speech and language therapy. In addition, Parent reported that Student was hyperactive, that members of her family, including Parent, had learning disabilities, and that Student had a sibling with autism. Dr. Pierucci also explained to Parent that the results of the preliminary evaluation required District to obtain additional information on Student through a more comprehensive multidisciplinary assessment, followed by an IEP team meeting, which was required before District could offer Student a special education program and services. Dr. Pierruci also advised Parent that although Ms. Riffle was highly qualified to administer an assessment, she would assign a different speech pathologist to conduct the speech and language assessment. Parent still refused to consent to an assessment of all areas of suspected disability proposed in the assessment plan.

LEGAL CONCLUSIONS

1. As the petitioning party, District has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. District contends that it has a legal obligation to search and serve students within its jurisdictional boundaries who are determined eligible for special education services. In this case, based upon the KCSOS referral, District's preliminary evaluation, and Parent's information and request for services, District has an obligation to assess Student in all areas of suspected disability. As such, District seeks a determination that it may assess Student without Parent's consent.

3. Student contends that District was not entitled to a comprehensive assessment of Student because the only area of possible need identified in the search and serve referral was related to Student's possible speech and language deficits. Student further contends that Parent has or would consent to private assessments by non-District personnel.

Applicable Law

4. The Individuals with Disabilities Education Act (IDEA) and State law impose upon each school district the duty to actively and systematically identify, locate, and assess all children with disabilities or exceptional needs who require special education and related services, including children with disabilities who may be homeless or migrant, wards of the state, or not enrolled in public school program. (20 U.S.C. §1412(a)(3); 34 C.F.R. §300.125 (2006);³ Ed. Code, §§56300, 56301.) This statutory obligation of a school district to identify, locate, and assess children with disabilities is often referred to as the "child find" obligation and applies also to children who are suspected of having a disability and in need of special education, even though they may be advancing from grade level to grade level. (34 C.F.R. §300.125(a)(2).) A state must ensure that these "child find" duties are

³ All subsequent references to the Code of Federal Regulations are to the 2006 edition.

implemented by public agencies throughout its jurisdiction as part of its general obligation to ensure that a FAPE is available to all children with disabilities who reside within the state. (34 C.F.R. §300.300(a)(2).)

5. “The purpose of the child-find evaluation is to provide access to special education.” (*Fitzgerald v. Camdenton R-III School District* (8th Cir. 2006) 439 F.3d 773, 776.) A district’s child find obligation toward a specific child is triggered when there is reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Rae* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Id.*)

6. California law imposes additional requirements. Each special education local plan area (SELPA) must have written policies and procedures for use by its constituent agencies for a continuous child-find system. (Ed. Code, § 56301, subd. (c).) Parents must receive written notice of their rights under special education law and the procedure for initiating a referral for assessment to identify students who are eligible for special education services. (*Id.*) Parents must be given copies of their rights and procedural safeguards upon initial referral for assessment, notice of an IEP meeting or reassessment, or filing a complaint, request for pre-hearing mediation, or a request for a due process hearing. (*Id.*)

7. A district shall be deemed to have knowledge that a student is a child with a disability if the parent has expressed concern in writing to staff of the district that the child needs special education and related services; the behavior or performance of the child demonstrates the need for the services; the parent has requested an evaluation of the child; or the teacher or other personnel have expressed concern about the child’s behavior or performance. (20 U.S.C. § 1415(k)(8); 34 C.F.R. § 300.457(b).) A parent’s expression of concern must include enough information to indicate that the child is in need of special education and related services. (64 Fed.Reg. 12628 (Mar. 12, 1999).)

8. In order to be eligible for special education services, a student must have one or more specific disabilities. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.7(a)(1); Ed. Code, § 56026, subd. (a); Cal. Code Regs., tit., 5, § 3030.) For purposes of special education eligibility, the term “child with a disability” means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, require instruction, services, or both, which cannot be provided with modification of the regular school program. (20 U.S.C. §1402(3)(A)(ii); 34 C.F.R. §300.7(a).) Similarly, California law defines an “individual with exceptional needs” as a student who is identified by an IEP team as “a child with a disability” pursuant to 20 U.S.C. section 1402(3)(A)(ii), and who requires special education because of his or her disability. (Ed. Code, §56026, subd. (a), (b).) California Code of Regulations, title 5, section 3030 includes a list of conditions, referred to in the

regulation as impairments that may qualify a pupil as an individual with exceptional needs and thereby entitle the pupil to special education if required by “the degree of the pupil’s impairment.”

9. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the student’s educational needs shall be conducted. (Ed. Code, § 56320.) The student 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).)

10. In order to assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56831, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under IDEA and state law. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must be understandable to the student, explain the assessments that the district proposes to conduct, and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) A school district must give the parents and/or the student 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

11. A student must permit the local educational agency to conduct the necessary and appropriate assessments if student intends to avail himself of the benefits afforded under the IDEA. (*Wesley Andress v. Cleveland Independent School District* (5th Cir. 1995) 64 F.3d 176, 178; *S.F. v. Camdenton R-III School District* (8th Cir. 2006) 439 F.3d 773; *see also* 20 U.S.C. § 1414 (a)(1)(D)(ii)(II); 34 C.F.R. § 300.505 (a) (1) (ii).) Until student’s parents waive all claims under IDEA, they must comply with the reasonable and necessary assessment requests of the District (*Dubois v. Connecticut State Board of Education*, (2nd Cir. 1983), 727 F.2d 44, 49.)

12. Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(a)(1)(B)(i); Ed. Code, § 56321, subd. (a)(2).) A school district can overcome a lack of parental consent for an initial assessment if it prevails at a due process hearing regarding the need to conduct the assessment. (20 U.S.C. §§ 1414(a)(1)(D)(ii)(I) & 1415(b)(6)(A); *Schaffer, supra*, 546 U.S. at pp. 52-53 [school districts may seek a due process hearing “if parents refuse to allow their child to be evaluated.”]; Ed. Code, §§ 56501, subd. (a)(3), 56506, subd. (e), 56321, subd. (c).) If a parent does not consent to an initial assessment, the school District may, but is not required to, file a request for a due process hearing. (34 C.F.R. § 300.300(A)(3)(i); Ed. Code, § 56321, subd. (c)(2).)

Analysis

13. District has met its burden by a preponderance of the evidence that it was required to conduct a comprehensive initial assessment of Student in all areas of suspected disability. First, the KCSOS referral of Student for evaluation triggered District’s obligation

to assess and evaluate Student's needs, as the referral caused District to have reason to suspect a disability in Student, and reason to suspect that special education services may be needed to address that disability. Parent confirmed District's suspicion when Parent advised District that she was concerned about Student's speech and language deficits, as well as Student's tendency to be hyperactive. In addition, the evidence showed that Parent was interested in seeking special education services for Student from District, but was not willing to have Student assessed in all suspected areas of disability.

14. Second, the credible testimony of Ms. Riffle and Dr. Pierruci established that the preliminary evaluation or screening was not a comprehensive assessment, and was conducted for the sole purpose of determining whether a further assessment, including a health assessment, was required. The results of the preliminary evaluation indicated that further and more comprehensive assessments were necessary in order to identify Student's needs, determine if he was eligible for special education, and if so, to develop an appropriate program and services for him. Specifically, Student's speech, language, and articulation deficits apparent in the test results, as well as Student's family history for autism and learning disabilities, and his reported hyperactive tendencies, establishes that more comprehensive assessments were necessary.

15. Third, the evidence also established that District complied with the legal requirements of notice to Parent when it prepared and presented to Parent a detailed and understandable assessment plan. District also provided Student with notice of Parent Rights and Procedural Safeguards. Parent's refusal to consent to the assessment out of concern that District would determine Student was mentally retarded or autistic did not eradicate District's legal obligation to assess Student.

16. Fourth, Parent's testimony that she was misled by District's representations at the March 9, 2011 preliminary evaluation meeting was not credible. The evidence established that District provided, and Parent signed, the preliminary evaluation form consenting to the preliminary evaluation, and participated in every aspect of Student's evaluation on that day with Ms. Riffle. However, contrary to Parent's assertions that Ms. Riffle told her she could waive a comprehensive assessment and that Student was now eligible for a District special education program for speech and language, the evidence established that Parent was familiar with the assessment process and that an IEP was required before a child with a qualifying disability could receive special education services.

17. Finally, the evidence established that Parent sought special education services for Student. As such, Parent was required to comply with the District's reasonable and necessary requests to assess Student. Given the above, District has met its burden of showing by a preponderance of the evidence that it was required to assess Student under the assessment plan and complied with all relevant procedures to do so. Accordingly, District may conduct the referenced assessments without parental consent. (Factual Findings 1 to 17; and Legal Conclusions 1 to 17.)

