

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

TORRANCE UNIFIED SCHOOL  
DISTRICT,

v.

PARENTS ON BEHALF STUDENT.

OAH CASE NO. 2012100114

**DECISION**

Eileen M. Cohn, Administrative Law Judge (ALJ), from the Office of Administrative Hearings (OAH), heard this matter on November 26, 2012, in Torrance, California.

Sharon Watt, Attorney at Law, represented Torrance Unified School District (District). Jacqueline Williams, Director of Special Education, attended the hearing on behalf of District. No one appeared for Student.<sup>1</sup>

Student filed his request for due process hearing (complaint) on October 1, 2012. On October 22, 2012, the matter was continued. At hearing, sworn testimony was heard, and District's request to submit the testimony of school psychologist, David Feldman, Ph.D., (Dr. Feldman), by affidavit was granted. Dr. Feldman's affidavit was timely received and made part of the record.<sup>2</sup> At hearing, District was also provided the opportunity to submit closing

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<sup>1</sup> District recognized Student's mother (Mother) and stepfather (Stepfather) as holders of the educational decision-making rights on behalf of Student, a minor. In this decision, Mother and Stepfather, who acted as the family's representative, individually, or collectively, shall be referred to Parents. Parents did not appear at the prehearing conference (PHC). Parents notified OAH that they would not appear at the hearing. As set forth in OAH prehearing Orders, including the Scheduling Order, Order Following Prehearing Conference, and Order Denying Student's Request for Continuance, and Striking Exhibits, the parties were notified that the hearing would be going forward on the continued hearing date that was previously found acceptable to Student.

<sup>2</sup> OAH also notified the parties that District's timely request to submit witness testimony by affidavit in lieu of live testimony would be decided at the hearing. At hearing, the ALJ granted District's motion to submit the affidavit of a District psychologist, in lieu of

written argument. The matter was continued to the close of business on Monday, December 3, 2012, so that District could submit written closing argument. District timely filed its written closing argument and on December 3, 2012, the matter was submitted and the record closed.

## ISSUES

1. Whether the District is entitled to conduct a triennial assessment of Student using qualified District staff.
2. Whether Student is no longer entitled to special education and related services if Parents refuse to present Student for a triennial assessment.

## FACTUAL FINDINGS

### *Jurisdiction and Background Information*

1. Student is a 17-year-old high school pupil, who resides with Parents and siblings within the boundaries of the District. District found Student eligible for special education in 1998.
2. In February 2009 District requested consent from Parents to refer Student to the Department of Mental Health for a mental health assessment. Parents would not consent to the referral, and Student never received a mental health assessment from District.
3. District completed Student's most recent triennial assessment on April 2, 2009. Mother consented to the triennial assessment plan which included assessments to

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testimony. (Gov. Code, § 11514.) The ALJ also ordered District to serve the affidavit on Student as a courtesy. By their election not to attend District's due process hearing, Student and Parents waived their right to challenge District's evidence, including witness testimony by affidavit. (See *Wienke v. Smith* (1918) 179 C. 220, 226, 176 P. 42 (Waiver is the intentional relinquishment of a known right after knowledge of the facts); *Lancaster School Dist.*, 107 LRP 21603 (2007) (Student's failure to appear after notice of due process proceedings constituted a waiver of her right to contest eligibility determinations).) On December 6, 2012, after the matter was submitted, and the record closed, Student filed a Notice of Objection to the affidavit of Dr. Feldman, consisting of Student's affidavit. Student's affidavit was not reviewed or considered because neither he nor Parents appeared at hearing. Even assuming Student and Parents had not waived their right to challenge Dr. Feldman's affidavit by their failure to appear at hearing, Student's affidavit would not have been considered because it was untimely. Student's affidavit was filed with OAH after the matter was submitted and the record closed.

measure Student's academic achievement, social and emotional development, general ability, and health and development.

4. At the individualized education program (IEP) meeting conducted after Student's 2009 triennial assessment, the IEP team, including Parents, confirmed Student's eligibility in the categories of other health impaired (OHI) and emotional disturbance (ED). Student's OHI eligibility was due to his diagnosis of attention deficit disorder (ADD), and distractibility, which impacted his access to education. Student was prescribed medication to control his ADD, but he did not take the medication consistently. Student's ED eligibility was based upon his depression and inability to interact appropriately with his peers. Student also required prescription reading glasses, but he did not like wearing them and District staff had not observed him wearing them at school. Student's academic performance was in the average range when compared with his same-aged peers.

5. Student began receiving home hospital instruction for medical reasons in October 2010, and at the time of hearing, was still receiving home hospital instruction. To receive home hospital instruction, Parents had to sign permission for District to contact Student's physician so that it could obtain information to determine the optimal placement. Student's doctor also had to use a District form to specify and verify the basis for Student's request. In the first paragraph of District's form, home hospital instruction was defined as teaching a pupil with a temporary disability; i.e., pupils recovering from an accident, recent hospitalization, emotional or mental condition, or short-term physical injury or illness. The first paragraph of District's form, stated that "other educational alternatives need to be considered" when the pupil has a chronic illness or condition.<sup>3</sup>

6. District's school nurse, Debora Haas (Ms. Haas) approved the home hospital instruction recommendation of Student's doctor on October 7, 2010, and on September 19, 2011. On both occasions, the doctor based his recommendation for home hospital instruction on Student's ADD and his diagnosis of post-traumatic stress syndrome (PTSD).

7. Student had not been assessed by District since his 2009 triennial assessment. Student's next triennial assessment was due on April 2, 2012.

8. In preparation for his triennial assessment, District staff reviewed the information it had about Student and on January 23, 2012, District prepared a triennial assessment plan (Assessment Plan) for Parents to sign. The Assessment Plan advised Parents

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<sup>3</sup> Home hospital instruction is one of the available placement options for special education pupils, but it is the most restrictive. (34 C.F.R. § 300.115 (2006); Ed. Code §§ 56360, 56361.) Home hospital instruction is disfavored. The IEP team may recommend home instruction for a limited period of time where assessment information includes a medical report from the attending physician or the report of the psychologist certifying that the severity of the condition prevents the pupil from attending school. (Cal. Code Regs., tit. 5, § 3051.4).

that their consent to the Assessment Plan was required before the assessment could be conducted, and that the assessments were needed to determine Student's eligibility and special education needs. The Assessment Plan also advised that an IEP meeting would occur after the assessment was completed, and confirmed that no change to Student's educational program would occur without parental consent. The Assessment Plan also advised Parents that it would consider any available independent assessments, or other assessment information that parents provided to District.

9. The Assessment Plan encompassed assessments by qualified District personnel. The Assessment Plan provided that a special education teacher would administer an assessment of Student's academic achievement which measured reading and reading comprehension skills, mathematic skills, including calculations and reasoning, and written expression. It provided that District psychologist would assess Student's general intelligence and capacity for learning, including his memory, learning rate, and problem-solving ability. The Assessment Plan provided that District's psychologist, with input from the special education teacher and parents, would assess Student's social and emotional development, including Student's social maturity, social-emotional adjustment, ability to function independently, self-help and interpersonal skills (collectively, functional development). The Assessment Plan provided that District's nurse would assess Student's educationally relevant, health, developmental and medical needs.

10. On January 24, 2012, District mailed the Assessment Plan to Parents. District requested a response by February 23, 2012.

11. District made numerous attempts to cooperate with Parents and obtain their consent for the Assessment Plan so that it could be timely completed before the triennial IEP. On January 26, 2012, Parents telephoned District stating that they would agree to the assessment tests if it could be administered at a location other than the high school. In response, District arranged for testing to be done at District's offices. On February 15, 2012, District delivered another copy of the Assessment Plan to Parents, but they refused to sign it without a copy of District's handbook of parental rights. On February 27, 2012, Parents received the requested parental rights, and they notified District that they would supply their signed consent to the Assessment Plan by facsimile transmission to District's offices.

12. In or around the beginning of March 2012, Parents submitted another request for home hospital instruction, signed by Student's doctor. This time District's nurse did not approve the request, and, instead, on March 3, 2012, referred the decision to the IEP team.

13. On March 13, 2012, District sent Parents written notification of the triennial IEP team meeting. District scheduled the IEP team meeting for March 30, 2012.

14. After waiting three weeks more for Parents to consent to the Assessment Plan, on March 22, 2012, District called Parents to remind them to send in their signed consent to the Assessment Plan, and also to remind them of the upcoming IEP. Further communications ensued. On March 23, 2012, Parents informed District by voicemail that

they had supplied the Assessment Plan to Student's home hospital teacher, who was also a special education teacher. When contacted, Student's home hospital teacher contradicted Parents, and informed District that Parents would not give him the signed Assessment Plan, but represented that they would personally transmit it to District via facsimile. Later, on March 23, 2012, District contacted Parents by phone to let them know that they needed to send the signed Assessment Plan via facsimile as Students' home hospital teacher did not receive it. Immediately after that call, Parents sent the signed Assessment Plan, executed that day, to District's offices.

15. During District's phone call with Parents on March 23, 2012, District notified them that the IEP team meeting could not be held as scheduled, because the assessments would not be completed by then. Parents agreed to postpone the IEP team meeting to May 21, 2012, to allow the District 60 days to complete the triennial assessment.

16. After Parents signed the Assessment Plan, Dr. Feldman was directed to conduct an assessment of Student's functional development, and general ability, and to prepare a psychoeducational report of his assessment results. Dr. Feldman possessed the necessary credentials and experience to conduct assessments and to prepare a psychoeducational report. He obtained bachelor of arts, master of arts, and doctoral degrees in psychology. He was credentialed by the State of California as a school counselor and school psychologist. For the last 17 years he was employed by District, first as a counselor, and, for the last 12 years, as a school psychologist. His duties as a school psychologist included administering assessments and providing counseling services. At the time of Student's triennial assessment, his primary duty was to assess District's pupils and assist IEP teams in determining pupils' eligibility for special education, and their unique needs. Since 2000, when Dr. Feldman began assessing pupils, he conducted approximately 100 assessments yearly. By the time of Student's triennial assessment in 2012, Dr. Feldman had conducted at least 1100 assessments.

17. As part of his triennial assessment, Dr. Feldman first reviewed Student's educational records, including his previous IEP's, assessments, grades, attendance and disciplinary records. As with most other triennial assessments, Dr. Feldman conducted, he concluded that a record review was insufficient to determine Student's present levels of academic and functional performance. Based upon his experience, Dr. Feldman knew that the development of pupils of Student's age was rapid and volatile. He found that class grades and "citizenship marks" did not provide a complete or necessarily accurate picture of Student's present levels of performance, when contrasted with the data he obtained from standardized assessments, which he believed to be more accurate.

18. In Student's case, the IEP team required a comprehensive triennial assessment because Student had been on home hospital instruction since October 2010, and isolated from District personnel who would have otherwise been able to observe him during the typical six-hour school day, five days a week.

19. Dr. Feldman considered it especially important in Student's case to have Student's medical history. Student had a history of ADHD and depression, and he had no information about Student's medication, other than a report from his 2009 triennial assessment that Student had taken medication for ADHD. Dr. Feldman attempted to obtain medical information directly from Student's medical providers. Dr. Feldman contacted the doctor who referred Student for home hospital instruction. The doctor informed Dr. Feldman that he could not provide him with any relevant medical information about Student because he had not treated Student for any of the diagnoses listed on his home hospital referral.

20. Dr. Feldman also required the results of the Ms. Haas's health report concerning Student's health, developmental, and medical status, to complete his assessment and prepare his report. From his review of Student's 2009 triennial assessment, Dr. Feldman knew that Student's mother reported that he had ADHD for which he was taking medication, and that he suffered from depression, for which no medication was reported. Information from the Ms. Haas's report about Student's medication, health and medical problems, was necessary for him to fully interpret Student's assessment results. More particularly, it was necessary for Dr. Feldman to understand whether Student's health, vision or hearing deficits affected his academic or functional performance.

21. Ms. Haas was qualified to prepare a health report containing Student's health, developmental and medical information, and to administer his vision and hearing screening. Ms. Haas was a registered nurse, with a school nurse services credential, and a certified audiometrist. She had decades of nursing experience, including a decade as a staff nurse in various hospitals and medical centers prior to her tenure as school nurse. At the time of Student's triennial, she had been employed by District as a nurse for approximately 13 years. Ms. Haas was well educated for her position. She possessed a bachelor of science in health sciences, and a master of education in school nursing.

22. Ms. Haas attempted to work with Parents to obtain the relevant health, developmental medical information, and arrange for his vision and hearing screening, without success. Ms. Haas provided Parents two forms for them to complete with Student's most recent health and medication information. The forms were needed to update Student's health and medical information from 2009.

23. As part of his assessment, Dr. Feldman planned to administer the Wechsler Adult Intelligence Scale (WAIS-III), which is a well-recognized and standardized measure of intellectual ability in the areas of verbal comprehension, perceptual organization, working and visual memory, processing speed. Dr. Feldman planned to administer the Test of Information Processing Skills, (TIPS), a standardized, and well recognized, measure of executive functioning, working memory, auditory and visual processing, and general ability to learn, retain organize, and use new information. He also planned to assess Student's social-emotional development by administering the Child Behavior Check List (CBCL) to Parents and the Youth Self Report (YSR) to Student, versions of the Achenbach System of Empirically Based Assessment (Achenbach). Achenbach is a highly regarded standardized psychometric tool. It measures social and emotional functioning in the areas identified as

anxious/depressed, withdrawn/depressed, somatic complaints, social, thought and attention problems, rule-breaking and aggressive behavior. The Achenbach is comprised of a series of questions that Parents and Student can answer on their own and submit to Dr. Feldman when completed. Dr. Feldman was trained and experienced in the administration and interpretation of these assessments.

24. Dr. Feldman provided the CBCL and YSR to Parents, but they never returned the completed questionnaires, or communicated to him why they had not.

25. In April 2012 at the direction of Dr. Feldman, who planned to incorporate the assessment results into his report, Student's home hospital teacher administered the Wechsler Individual Achievement Test, Third Edition (WIAT –III). The WIAT-III was only one component of District's psychoeducational assessment.

26. Parents failed to make Student available to Ms. Haas so that she could complete her health report, and screen Student's vision and hearing. On April 17, 2012, Ms. Haas left a voice mail with Parents requesting that they arrange for a vision and hearing screening. Parents did not return her call.

27. Dr. Feldman made numerous attempts to obtain the cooperation of Parents. Dr. Feldman made two appointments with Parents in April 2012 to assess Student at District's offices, on April 17 and April 30, 2012. Parents cancelled the appointments.

28. On May 1, 2012, in anticipation that Parents would cooperate in the completion of the triennial assessment, District sent Parents, via certified mail, written notification of a May 21, 2012, IEP team meeting, with a copy of their parental rights. Parents received the notification, but on May 10, 2012, they contacted District to advise that the family pet had eaten the certified mail slip.

29. In early May 2012, Dr. Feldman made appointments with Parents to assess Student on May 3, and May 8, 2012. Parents cancelled these appointments.

30. Ms. Haas also contacted Parents in early May 2012, by certified mail, and by phone, to schedule Student's vision and hearing screening, and to obtain the completed forms with Student's most recent medical information. On May 15, 2012, Parents left their first and only message with Ms. Haas regarding Student's health screening. In that one call, they requested a change in location of the vision and hearing screening. Ms. Haas left several more voicemail messages. Ms. Haas returned Parents' call on May 15, 2012, and left a voicemail message requesting them to bring Student to District's offices on either May 16, 17, or 18, 2012. She called again on May 16, 2012, to remind them to complete the health update forms she had provided to them. On May 17, 2012, she left messages on their cell phones. Parents never cooperated with Ms. Haas. They never supplied Ms. Haas with the requested forms containing Student's health, developmental and medical information. They had not made Student available for his vision and hearing screening.

31. On May 14, 2012, District delivered to Parents, via certified mail, notification of a change of time for the May 21, 2012, IEP team meeting. Parents received the notification.

32. On May 15, 2012, Parents brought Student to District's offices so that Dr. Feldman could interview Student as part of the assessment. Dr. Feldman was unable to complete Student's interview due to Parents' distracting presence.

33. That same day, Dr. Feldman notified District's IEP administrator that he would not be able to complete his assessment report by the May 21, 2012, IEP because of Student's parent's numerous cancellations.

34. The IEP team meeting was held as noticed on May 21, 2012. Parents did not attend. Dr. Feldman and Ms. Haas attended but had no reports to present to the IEP team.

35. After the May 21, 2012, IEP team meeting, Ms. Haas made additional attempts to finalize Student's assessment. On May 23, 2012, Ms. Haas sent her second certified letter to Parents requesting that they make Student available for his vision and hearing screening and complete the health form.

36. After the May 21, 2012, IEP team meeting, Dr. Feldman also made additional attempts to schedule Student's assessment with Parents, without success. Dr. Feldman arranged with Parents to assess him on May 22, 2012, and June 4, 2012. Both times, Parents cancelled the assessment appointments. After cancelling the June 4, 2012, appointment, Parents promised to contact Dr. Feldman the next day, but they never did.

37. To complete Student's assessment, and obtain reliable results, Dr. Feldman required Parents to make Student available at District's office. Dr. Feldman needed to administer assessments to Student alone, outside his parents' presence, and away from the distraction of his parents, siblings, and residence. Dr. Feldman estimated that he required approximately three hours to complete Student's assessment. Dr. Feldman also required Parents and Student to complete and deliver the CBCL and YSL, supply Ms. Haas with the requested medical and health information, and allow her to administer the vision and hearing screenings.

38. On July 24, 2012, Student's doctor made another request for home hospital instruction on the basis of Student's 10 year history of ADHD, two year history of depression, and one year history of PTSD. He reported that Student had difficulty adopting and coping with the school environment. The request was referred to the IEP team.

39. At the time of the hearing, Parents had not made Student available to Dr. Feldman or Ms. Haas for his triennial assessment. Parents had not cooperated with Dr. Feldman by returning the completed CBCL and YSR and making Student available for their assessments, despite repeated requests that they do so. Parents had not cooperated with Ms.



Haas by completing documentation which would provide District with Student's health, developmental, and medical history.

## LEGAL CONCLUSIONS

1. In a special education administrative due process hearing, the party seeking relief has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) As the petitioning party, District has the burden of proof.

### *Issue One: District's right to conduct a triennial assessment without parental consent*

2. District contends that it has an unequivocal right and legal obligation to conduct a triennial assessment of Student without parental consent. District contends that the Assessment Plan was appropriate and that the assessments were necessary to satisfy its obligation to offer Student a free appropriate public education (FAPE). District contends that it could not satisfy its obligation by a mere review of Student's educational records. District had not been able to conduct observations of Student in a school setting as he had been on home hospital instruction since October 2010. District did not have recent medical reports related to Student's diagnoses, records of his medication, or records related to his vision and hearing. For the reasons set forth below, District met its burden of proof on this issue.

3. Under the IDEA, eligible children with disabilities are entitled to a FAPE, which means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child's individualized education program. (See 20 U.S.C. §§ 1400(d), 1401(3), 1401(9), 1401(29), 1412(a); Ed. Code, §§ 56001, 56026, 56040.) "Special education" is defined as "specially designed instruction at no cost to the parents, to meet the unique needs of a child with a disability...." (20 U.S.C. § 1401(29).) California law also defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) "Related services" (also known as designated instruction and services) are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

4. Assessments are required in order to determine eligibility, and what type, frequency and duration of specialized instruction and related services are required. An assessment of a student who is receiving special education and related services must occur at least once every three years unless the parent and the school district agree that such a reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2); Ed. Code, § 56381, subd. (a)(2).) Three-year (triennial) assessments have the same basic requirements applicable to initial assessments. (20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303 (2006); Ed. Code, § 56381, subd. (e).) A pupil must be assessed in all areas related to the suspected disability, prior to the

development of an IEP. (Ed. Code, § 56320, subds. (f)). The school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, which may assist in determining whether the student is a child with a disability, and the content of the IEP. (20 U.S.C. § 1414(b)(2)(A)(i).) The school district must use technically sound instruments to assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C).)

5. Triennial assessments, like initial assessments, must be conducted by individuals who are both “knowledgeable of the student’s disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (Ed. Code, §§ 56320, subd. (g), and 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) A health assessment shall be conducted by a credentialed school nurse or physician who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, § 56325, subd. (b).)

6. As part of triennial assessments, as with all reassessments, the IEP team and other qualified professionals must review existing assessment data on the child, including teacher and related service-providers’ observations. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. § 300.305 (2007); Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the school district must identify any additional information that is needed by the IEP team to determine the present level of academic achievement and related developmental needs of the student, and to decide whether modifications or additions to the child’s special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The school district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).) A school district is required to use the necessary assessment tools to gather relevant functional and developmental information about the child to assist in determining the content of the child’s IEP. (34 C.F.R. § 300.304(b)(1)(ii) (2006); Ed. Code, § 56320, subd. (f).)

7. The assessor must prepare a written report that includes: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student’s academic and social functioning; (5) the educationally relevant health, development and medical findings, if any; (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (7) the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting required after the assessment. (20 U.S.C. § 1414(b)(4)(B); Ed. Code, § 56329, subd. (a)(3).) A parent has the right to request an IEE at public expense if the parent disagrees with the school district’s assessments. (34 C.F.R. § 300.502(b)(1) (2006) ; Ed. Code, § 56329, subd. (b).)

8. The district must obtain informed parental consent prior to conducting an assessment or reassessment of a child with a disability. (34 C.F.R. § 300.300 (2008).)

Parental consent pursuant to the IDEA requires that the parent has been fully informed of all information relevant to the evaluation, and the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom. (34 C.F.R. § 300.9 (2008).) In order to start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to pupils and their parents. (20 U.S.C. § 1414(b)(1); 20 U.S.C. § 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law. (U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must: appear in a language easily understood by the public and the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an individualized education program without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parents and/or pupil 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

9. An IEP meeting to review the results of the assessment must be held within 60 days from the receipt of the parent's written consent to the assessment, with certain exceptions for vacation days and other circumstances, Parent may agree, in writing, to an extension of the 60-day period. (Ed. Code, §§ 56043.).

10. If the pupil's parents do not consent to the reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student, and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300 (c)(ii)(2006); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

#### *Analysis of Issue One: May District Assess Without Parental Consent*

11. District met its burden of proving by a preponderance of the evidence that Student's triennial assessment was required, and that the District followed the required procedures for developing an Assessment Plan and obtaining parental consent. The evidence established that the Assessment Plan contained a clear description of the required assessments. The evidence established that Parents received the Assessment Plan, and that they understood the Assessment Plan, because they signed the Assessment Plan and did not express any misunderstanding regarding its contents. The evidence established that Parents received their parental rights on at least one occasion, if not more. The evidence established that Parents understood what was required to complete the Assessment Plan, as they permitted Student's special education home hospital instructor to administer Student's standardized achievement test, and brought Student to Dr. Feldman to be interviewed as part of the assessment. Likewise, from their receipt of mail and phone communications from Dr. Feldman and Ms. Haas, the evidence showed that Parents knew who was going to perform the assessments. The evidence established that Dr. Feldman and Ms. Haas were qualified to perform the assessments. The evidence further established that Student's triennial assessment was required, not only because it was three years since one had been performed, but because District did not have sufficient data to determine Student's needs without

administering formal assessments, interviewing Student, and obtaining information from Parents and Student from the CBCL, YSR, and the medical and health forms that Ms. Haas supplied to them. Student remained on home hospital instruction, which was the most restrictive educational placement. Consequently, he was removed from a campus setting where the IEP team would have had the benefit of the observations of District staff to better understand Student's present levels of performance and needs. Further, little information was known about his current medical status, as the doctor who prescribed home hospital placement was not his treating physician and denied knowledge of the treatments Student was receiving for the very conditions listed on the home hospital physician recommendation form. It was also important for Dr. Feldman to know whether Student had any visual or hearing problems which had a bearing on his access to education. Overall, the evidence established that District required a triennial assessment, that it fulfilled its obligations to develop and deliver the Assessment Plan, and to retain trained personnel to administer assessments and prepare reports.

12. The evidence also established that District exhausted available means to secure Parents' cooperation. Parents impeded the triennial assessment process by delaying their consent for two months, and then failing to present Student for all the required assessments. Parents permitted the home hospital instructor to administer the achievement assessment, but that assessment was but one of many that comprised Dr. Feldmans' triennial assessment. Moreover, Parents had not cooperated at all with Ms. Haas. They had not provided any updated health, developmental and medical information, or allowed Ms. Haas to conduct a vision or hearing screening. Student's health, developmental and medical information was crucial since Student was being educated in the most restrictive educational environment, his home, and his medical diagnosis was the basis for this placement. In general, the evidence showed that Parents engaged District in a protracted process whereby District was forced to expend considerable resources to secure their compliance. District's numerous attempts to communicate with Parents were met with responses which could only be interpreted as attempts to thwart the triennial assessment process. At one point, Parents misdirected District to the home hospital instructor for the consent form; another time, they claimed that their dog ate a certified mail receipt. The evidence established that Parents refused to cooperate by failing to complete and return the CBCL, and YSR, and Ms. Haas's forms, which were necessary to complete Student's triennial assessment. The evidence established that when Parents allowed Student to be interviewed by Dr. Feldman, they disrupted the interview, and impeded Dr. Feldman's ability to obtain complete and accurate information.

13. In sum, District met its burden by a preponderance of the evidence that it was entitled to conduct Student's triennial assessment under the Assessment Plan. Not only was Student due for a triennial assessment, but the evidence showed that the assessment was necessary in the areas identified in the Assessment Plan, and that the District complied with all procedural requirements of the IDEA to conduct the assessments. (Factual Findings 1 through 39, and Legal Conclusions 1 through 12.)

*Issue Two: District's Obligation to Continue Providing Special Education*

14. In Issue Two, District contends that if Parents do not make Student available for his triennial assessment, Student forfeits his right to District-funded special education and related services. For the following reasons, District met its burden of proof.

15. Legal Conclusions 1, and 3 through 12, are incorporated herein by this reference.

16. Parents who want their children to receive special education and related services must allow reassessment by the school district. (*Johnson v. Duneland Sch. Corp.* (7th Cir.1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir. 1995) 64 F.3d 176, 178-79; *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; *Dubois v. Conn. State Bd. of Ed.* (2d Cir. 1984) 727 F.2d 44, 48.)

17. Here, Parents have thwarted District's attempts to conduct Student's triennial assessment for purposes of determining eligibility and special education needs, without withdrawing Student from special education. District expended extensive resources in its attempts to secure the cooperation of Parents and complete his assessment. District developed the Assessment Plan in January 2012, for a triennial due in April 2012, and attempted to work with parents for several months to complete Student's assessments, without success. District had noticed and re-noticed IEP's, and Parents ignored the IEP team meeting. By the time District filed its complaint, the triennial assessment was four months late. Under these circumstances, when Student has not attended a District school in over two years as of the date of hearing, and Student has not been assessed by District in over three years, District cannot possibly develop an IEP for Student that accurately determines whether, and under what categories, Student might be eligible for special education, and if so, Student's current unique needs.

18. In sum, District met its burden of proof that it does not have to provide special education and related services if Parents fail to cooperate with District's triennial assessment. If Parents want District to continue to provide special education and related services to Student, they must: deliver to District completed CBCL and YSR forms; deliver to Ms. Haas the requested and health, developmental and medical information; make Student available to Dr. Feldman and Ms. Haas for their assessments, (or current District psychologist and nurse), at the location(s), time(s) and date(s) selected by District; and remain outside the presence of Student during his assessments. (Legal Conclusions 13 through 16, and Factual Findings 1 through 39.)

ORDER

1. The District may complete the triennial assessment of Student, pursuant to the Assessment Plan.

2. If Parents want District to continue providing Student special education and related services, Parents shall make Student available at the location(s), date(s) and time(s) selected by District, to complete all outstanding assessments in the Assessment Plan, as specified by Dr. Feldman and Ms. Haas. The assessments shall be administered by Dr. Feldman and Ms. Haas, or if no longer employed by the District, at District's election, another school psychologist or school nurse. Parents shall not be present during assessments. District shall give Parents 14 days written notice of the date, time and place that Student is required for completion of the assessments.

3. If Parents want District to continue providing Student with special education and related services, Parents shall return completed CBCL, YSR, and Ms. Haas's requested health, developmental and medical information, no later than January 7, 2013.

4. District's written notification to Parents by United States Mail to the address included in its proof of service of pleadings filed with OAH in this action shall constitute sufficient notification to Parents of the location(s), date(s) and time(s) of the assessments. District shall not be required to obtain the signature of Parents as proof of delivery of District's notification.

5. District is relieved of its obligation to further provide Student a FAPE if Parents do not produce Student for the triennial assessment, consistent with paragraph two, above, and timely provide the information required in paragraph three, above.

#### PREVAILING PARTY

The decision in a special education administrative due process hearing must indicate the extent to which each party prevailed on the issues heard and decided at the hearing. (Ed. Code, § 56507, subd. (d).) The District prevailed on both issues heard and decided in this matter.

## RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: December 24, 2012

/s/  
EILEEN M. COHN  
Administrative Law Judge  
Office of Administrative Hearings