

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

SOUTH WHITTIER SCHOOL
DISTRICT,

v.

PARENT(S) ON BEHALF OF
STUDENT.

OAH Case No. 2015010327

DECISION

South Whittier School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on January 9, 2015, naming Student.

Administrative Law Judge Ted Mann heard this matter in Whittier, California, on February 17, 2015.

Darin W. Barber, Attorney at Law, represented District. Marsha Escalante, Director of Special Education, attended the hearing on behalf of District.

There was no appearance by Student, Student's Parents, or any representative on his behalf.¹

A continuance was granted for District to file written closing arguments and the record remained open until Monday, February 23, 2015. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

¹ OAH notified Student's Parents on January 12, 2015, of the hearing date in the scheduling order. Parents did not appear for the February 9, 2015 prehearing conference but did receive a copy of the prehearing conference order that confirmed the February 17, 2015 hearing date. On February 14, 2015, Parents notified OAH that they would not appear at the hearing.

ISSUE²

Whether the District's occupational therapy assessment of Student was appropriate such that Student is not entitled to an independent educational evaluation at public expense.

SUMMARY OF DECISION

District met its burden of proof on the issue by showing the occupational therapy assessment was administered by trained and knowledgeable personnel, used a variety of appropriate, technically sound, valid, and reliable instruments, tools and strategies, and met all legal requirements. Accordingly, Student is not entitled to an occupational therapy independent educational evaluation at public expense.

FACTUAL FINDINGS

1. Student is a four-year-old male who resided in the District at all relevant times, and was eligible for special education under the category of autism. He originally entered District's special education program on February 3, 2014, just before his third birthday. Student was evaluated ahead of his entry into the special education program, and the evaluation was considered in his initial IEP of February 3, 2014.

2. Student's initial IEP of February 3, 2014, provided him with occupational therapy services and contained three goals to measure his progress with his occupational therapy services. Student received occupational therapy services one time per week for 50 minutes within the clinic setting. Occupational therapy services focused on vestibular and proprioceptive activities to increase his tolerance to eating foods with a variety of textures. He also received occupational therapy services one time per week for 25 minutes at school, focusing on his ability to grasp a writing utensil and imitate pre-writing lines and shapes.

3. Following an IEP meeting in May, District sent Student's parents an assessment plan dated May 22, 2014. The assessment plan proposed assessments of Student in the areas of physical therapy and occupational therapy. Parents provided written consent to the assessments on or about October 20, 2014.

4. The District contracted with Gallagher Pediatric Therapy of Fullerton, California to undertake the occupational therapy assessment. Gallagher had contracts with approximately 45 school districts including District. Gallagher had an occupational therapist that it employed to service its contract with District.

² The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

Occupational Therapy Assessment of November 3, 2014

5. The occupational therapy assessment was conducted by Leslie Anderson, an employee of Gallagher. Ms. Anderson is an occupational therapist, licensed as an occupational therapist with the State of California and the National Board of Occupational Therapy. She has a bachelor's of science degree in kinesiology from California State University Fullerton in 2006. She also earned a master's degree in occupational therapy from Loma Linda University in 2009.

6. She is currently employed by Gallagher and has worked for Gallagher for more than three years. Her duties for Gallagher include conducting classroom groups and performing treatment, consultations, and assessments. She has performed more than 100 assessments. She has also performed more than 100 clinical observations.

7. Ms. Anderson is familiar with Student, having assessed, treated, and observed him. She has worked with Student since he entered the District's special education program.

8. Ms. Anderson began her assessment of Student on November 3, 2014. Her assessment of Student used standardized assessments, observations, and informal assessments. She reviewed her notes and records of her work with Student, and conducted a comprehensive review of Student's cumulative file records including prior assessments, prior IEP's, and other educational records. She also interviewed Student's special day class teacher, Teresa Castelli, and his private program general education teacher at First Lutheran School, Melody.

STANDARDIZED TESTS

9. The standardized assessments used by Ms. Anderson included the Peabody Developmental Motor Scales, Second Edition, which is a standardized test for children from birth to six years of age. The test measures gross motor, fine motor, and ball skills over six subtests of inter-related motor abilities. Student was assessed as to grasping and visual-motor integration. Student scored in the 5th percentile in grasping, which is considered "poor." In visual-motor integration, Student scored in the 37th percentile, which is considered "average."

10. Ms. Anderson also administered the Sensory Profile: School Companion Questionnaire and Caregiver Questionnaire. The Sensory Profile is a standardized assessment tool utilizing teacher and caregiver questionnaires for measuring a student's sensory processing abilities and their affect on the student's functional performance in the classroom and school environment. Student scored in the normal range on the Sensory Profile.

11. Student's special day class teacher, Ms. Castelli, completed the School Companion Questionnaire. Student's parents did not return the Caregiver Questionnaire until December 15, 2014, at the scheduled IEP of that day. The Caregiver questionnaire was

also incomplete and Ms. Anderson did not consider the questionnaire in preparing her report or providing her input and recommendations at the IEP meeting. The assessment conducted by Ms. Anderson was valid and reliable, despite her not considering the Caregiver Questionnaire, as she relied upon a sufficient variety of assessments from multiple sources to formulate her opinions of Student.

CLINICAL OBSERVATIONS AND EVALUATION

12. Ms. Anderson directed Student to perform various tasks while she observed and evaluated Student's performance. Such clinical observations are standard practice in occupational therapy assessments. The tasks and observations were grouped into components or disciplines related to Student's occupational therapy performance and needs, including organization of behavior, neuromuscular status, sensory processing (including vestibular processing, proprioceptive processing, and tactile processing), motor planning, fine motor skills, visual motor skills, self-care skills, and oral motor/feeding skills. Ms. Anderson observed Student in the classroom and at play during his occupational therapy sessions at both the clinic and the District's pre-school program.

13. The first set of clinical observations were to assess Student's Organization of Behaviors, such as his activity level, performance of goal directed behaviors, attention to task, purposefulness of play, and reactions to changes in his environment. Ms. Anderson determined that Student's performance was adequate in five areas (initiates, engages purposefully, activity transitions, communication of needs, and adapts to changes), inconsistent in three areas (attends, completes, and ability to remain still), and of concern in one area (coping behaviors/strategies).

14. Ms. Anderson evaluated Student's neuromuscular status, finding that his joint range, muscle tone, strength, trunk control, and endurance were within functional limits for school-related activities. Student was able to access his educational environment without any modifications or adaptive equipment.

15. Ms. Anderson evaluated Student's sensory processing as to vestibular processing (related to movement and head position), proprioceptive processing (awareness of one's body in space), and tactile processing (discrimination and localization of touch). Ms. Anderson found that Student was adequate in all 20 component areas tested for vestibular processing. She also found that Student's proprioceptive processing skills were adequate in all 8 areas tested. In tactile processing, she found that Student was adequate in 5 of 7 component areas, and inconsistent in the 2 areas of seeking/avoiding behaviors and textures.

16. Ms. Anderson evaluated Student's motor planning (praxis), which was his ability to spontaneously sequence, time, and organize movements in a coordinated fashion to complete unfamiliar tasks. "Good" praxis was dependent upon accurate sensory feedback

from the body. Ms. Anderson found Student to be adequate or appropriate in the seven component areas tested, commenting that Student was able to create, plan, and execute tasks and to follow verbal commands.

17. Student's fine motor skills involve his use of small muscles of the hand for grasping, prehending, and manipulating objects for play, exploration, functional tool use, and activities of daily living. Ms. Anderson evaluated and found Student functional in five fine motor skill component areas. She found Student's skills in hand strength and motoric separation of the hand either emerging or inconsistent. She recorded Student's grasp patterns and affirmed his in-hand manipulation of palm to finger, but found his finger to palm skill to be emerging. For graphic and motor tasks, the assessment showed Student has a flexion wrist position, a digital pronate writing grasp, and absent distal finger movements³, but is able to stabilize paper with his non-dominant hand. Student was observed to use appropriate pressure on the paper when writing or drawing. Student tolerated an adult adjusting his grasp to a tripod grasp, and he maintained that grasp, once corrected, for 15 seconds or more. Overall, Student had a mix of emerging and age appropriate fine motor skills with the need for some continued work on his grasping of writing instruments.

18. Ms. Anderson evaluated Student's visual motor skills, which was the coordination of visual, perceptual, and motor abilities for task performance. This included Student's eye-hand coordination skills (fine motor tool use and writing). She observed Student's scissor and graphomotor skills and determined that Student was functional in graphomotor skills, but inconsistent or emerging in scissor skills. Ms. Anderson observed that Student demonstrated age appropriate motor skills, as well as an ability to complete both simple and complex puzzles.

19. In looking at Student's self-care skills, Ms. Anderson found Student independent or functional in all component areas tested for dressing, hygiene, and toileting. Student was able to perform self-care, daily living activities.

20. Ms. Anderson evaluated Student's oral motor/feeding skills. She noted that parents had initially reported difficulties with eating, but that in her observations she found him able to be successful at mealtime within the classroom, and that he was able to eat a wide variety of foods. Student met his goal in the area of tactile processing related to food consumption.

³ Each of these individual fine motor skill assessments measures the level of advancement or efficiency of Student's manipulation of a writing instrument or fine control of his hand. Here, the Student continued to demonstrate emerging or inconsistent skills in this area.

OCCUPATIONAL THERAPY REPORT

21. Ms. Anderson summarized her findings and recommendations in her occupational therapy report, which was provided to both the parents and the rest of the IEP team. Student's areas of strength were in visual motor skills and sensory processing as related to school activities. Student's area of concern as related to school performance was his fine motor skills as related to his ability to grasp writing utensils. Ms. Anderson recommended school-based occupational therapy services related to his grasping of writing utensils.

DECEMBER 15, 2014 IEP MEETING

22. At the IEP meeting on December 15, 2014, the IEP team discussed the assessments and recommendations, and Student's parents agreed with all parts of the IEP with the exception of the occupational therapy services. The parents subsequently made a written request for an occupational therapy independent educational evaluation. District promptly responded to parents, and subsequently filed its request for a due process hearing on January 9, 2015.

LEGAL CONCLUSIONS

1. District contends that the November 3, 2014 occupational therapy assessment of Student was appropriate such that District need not provide an independent educational evaluation at public expense. No evidence or argument was presented on behalf of Student. As discussed below, the District met its burden of proving by a preponderance of the evidence that the November 3, 2014 occupational therapy assessment was appropriate.

2. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement the IDEA and its regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁴ et seq.; 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 FAPE that emphasizes special education and related services designed to meet 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).) 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, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the

⁴ All subsequent references to the Code of Federal Regulations are to the 2006 version.

issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) 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. 56-62 [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].) In this matter, because District filed the complaint and requested the hearing, District has the burden of proof.

3. 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, §56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under the 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).) The proposed written assessment plan must contain a description of any recent assessments that were conducted, including any available independent assessments and any assessment information the parent requests to be considered, information about the student's primary language and information about the student's language proficiency. (Cal. Code Regs., tit. 5, § 3022.)

4. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) The determination of what tests are required is made based on information known at the time. (See *Vasherresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

5. “The assessment shall be conducted by persons competent to perform the assessment, as determined by the local educational agency.” (Ed. Code, § 56322.) “Occupational therapy shall be provided only by personnel who possess a license in occupational therapy issued by a licensing agency within the Department of Consumer Affairs.” (Cal. Code Regs., tit. 5, § 3051.6, subd (b)(2).) In general, assessors must be knowledgeable about the student’s suspected disability and must pay attention to the student’s unique educational needs such as the need for specialized services, materials and equipment. (Ed. Code, § 56320, subd. (g).)

6. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 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) consistent with superintendent guidelines for low-incidence disabilities (those affecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

7. As part of an initial evaluation, the IEP team and other qualified professionals, as appropriate, must review existing evaluation data on the student, including evaluations and information provided by the parents of the child; current classroom-based observations; and teacher observations. On the basis of that review and input from the student’s parents, the IEP team must identify what additional data is needed to determine whether the student has a disability which affects his educational needs. (34 C.F.R. § 300.305)

8. A student may be entitled to an independent educational evaluation if he or she disagrees with an evaluation obtained by the public agency and requests an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent educational evaluation].) In response to a request for an independent educational evaluation, an educational agency must, without unnecessary delay, either: 1) File a due process complaint to request a hearing to show that its evaluation is appropriate; or 2) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(b)(2); see also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

9. District met its burden of proof in establishing that its occupational therapy assessment met all IDEA and California criteria and was appropriate. District followed all required procedures prior to assessment, including providing the proposed assessment plan to Student's parent, and obtaining parent's written permission to proceed with the assessment. The assessment was properly conducted and was completed and presented to the IEP team in a timely manner.

10. District contracted with Gallagher to have Ms. Anderson perform the occupational therapy assessment. Ms. Anderson's education, training, knowledge, and experience qualified her to assess Student's occupational therapy needs, including the use of informal assessment tools and standardized instruments. Ms. Anderson used multiple measures to assess Student's occupational therapy needs. She administered two standardized tests – the Peabody Motor Skills and the Sensory Profile. The evidence established that the standardized tests were validated for the purposes used and were not discriminatory, that Ms. Anderson was trained in administering the standardized instruments, and that she followed and did not deviate from the test publisher's instructions. She included the results of her testing and evaluation in her occupational therapy report.

11. Ms. Anderson conducted thorough occupational therapy clinical observations and evaluations of Student. She assessed Student's organization of behaviors, neuromuscular status, vestibular processing skills, proprioceptive functions, tactile processing, motor planning, fine motor skills, visual motor skills, self-care skills, and oral motor/feeding skills. She found Student's areas of strength were in sensory processing skills and visual motor skills as related to school activities. Student's area of concern, as related to school performance, was his fine motor skill as it relates to his ability to grasp writing implements.

12. She recommended school based occupational therapy services to address concern with Student's grasping writing implements, but did not recommend continuing with services for oral motor/feeding skills. She specifically noted Student meeting his goal in this regard and his ability to eat a wide variety of foods in a school setting.

13. Ms. Anderson summarized her assessment, observation, findings, and recommendations in a written report dated November 3, 2014. The evidence indicated that the report was explained to parents at the IEP meeting of December 15, 2014, and considered by the IEP team at that meeting.

14. Ms. Anderson convincingly testified that she evaluated Student in a full range of areas of occupational therapy. She exhibited a clear understanding of the standardized instruments. She knowledgeably described her clinical assessments, identifying Student's unique strengths and struggles. Her presentation was thoughtful, measured, and detailed. No evidence to the contrary was presented at hearing.

15. The District has met its burden of establishing that its November 2014 occupational therapy assessment was appropriate such that District need not provide Student with an independent educational evaluation at public expense.

ORDER

1. District's November 3, 2014 occupational therapy assessment was properly conducted.
2. District does not have to provide Student with an independent educational evaluation at public expense.

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. The District prevailed on the sole issue presented.

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 ninety days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

DATED: February 26, 2015

/s/
TED MANN
Administrative Law Judge
Office of Administrative Hearings