

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

YUCAIPA-CALIMESA JOINT UNIFIED
SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2006100272

DECISION

Administrative Law Judge (ALJ) Glynda B. Gomez, Office of Administrative Hearings, Special Education Division (OAH), heard the above-captioned matter in Yucaipa, California on February 14, 2007.

Petitioner Yucaipa-Calimesa Joint Unified School District (District) was represented by Gail Lindberg, Program Manager for the East Valley Special Education Local Planning Area. Patty Metheney, Director of Student Services, also appeared on behalf of the District.

Respondent Student (Student) was not present. Student was represented by Ralph O. Lewis, Attorney at Law. Student's mother (Parent) also appeared on behalf of Student.

The District's Due Process Complaint/Due Process Hearing Request was filed on October 6, 2006. The initial Due Process Hearing date was continued on November 1, 2006. Testimony and documentary evidence were received on February 14, 2007 and the record remained open until February 21, 2007 for the submission of closing briefs. On February 21, 2007, the parties filed their respective closing briefs. The record was closed on February 21, 2007.

ISSUES

1. Was the District's Occupational Therapy (OT) Assessment of Student appropriate?
2. If the District's assessment was not appropriate, is Student entitled to an independent occupational therapy assessment at public expense?

FACTUAL FINDINGS

Jurisdiction

1. Student is a special education student residing within the boundaries of the Yucaipa-Calimesa Joint Unified School District.

Background

2. Student was born on April 10, 2001. He is five years and 10 months old. Student was diagnosed with Autism in 2003 and began receiving Early Start Services from the Inland Counties Regional Center (IRC) in early 2004. In mid-2004, Student transitioned to a District program. He is currently attending a pre-kindergarten program at Yucaipa Christian Preschool in a general education class for three hours per day three days a week. Yucaipa Christian Preschool is a private school. Student receives 40 hours per week of Applied Behavioral Analysis (ABA) through Behavioral and Educational Support Team (BEST), a certified non-public agency that provides ABA intervention services for autistic children based on ABA principles developed by Dr. Ivar Lovaas and the Lovaas Institute for Early Intervention. This placement is pursuant to an OAH Due Process Hearing Decision dated January 9, 2006, in Case No. N2005070042. Student has a 1:1 aide at school during the entire school day. He also receives direct occupational services four times a week pursuant to a prescription from his physician.

3. An Individual Educational Plan (IEP) meeting was held on May 25, 2006, wherein a proposed change of placement was discussed. At that IEP meeting, Parents requested an OT assessment of Student. On August 1, 2006 and August 2, 2006, an OT assessment of Student was conducted by District. On October 2, 2006, the IEP team reconvened to discuss the results of the OT assessment. Parents disagreed with the assessment and its conclusions. At the IEP meeting on October 2, 2006, Parents made a written request for an IEE in the area of occupational therapy at public expense. The District refused the request for an IEE and filed this Due Process Hearing Request on October 6, 2006.

District's OT assessment

4 Assessments must be conducted by individuals who are knowledgeable about the Student's disability, competent to perform the assessment, and the tests and assessment materials must be validated for the specific purpose for which they are used. The tests and assessment materials must be selected and administered so as not to be racially, culturally or sexually discriminatory; must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. The assessors must use a variety of assessment tools including information provided by the parent.

5. Gayle Wray (Wray), a licensed school occupational therapist II employed by the East Valley SELPA, conducted an OT assessment of Student on August 1 and 2, 2006. The assessment occurred at the Yucaipa Christian Preschool.

6. Wray received a bachelor's degree in Occupational Therapy from Loma Linda University in 1997. She has worked as an Occupational Therapist with the East Valley SELPA for nine years. She first became registered as an Occupational Therapist in February of 1998 and then received her license in 2000, when the state determined that Occupational Therapists should be licensed, not registered. Prior to serving as an Occupational Therapist, Wray worked as an instructional aide with the San Bernardino County School District for 10 years.

7. Wray no longer personally provides direct occupational therapy services. Instead, she is a supervisor and oversees implementation of assessments. She supervises an Occupational Therapist I and several Certified Occupational Therapy Assistants (COTAs) providing both consultative and direct services to 150 students in the five school districts served by the East Valley SELPA.

8. Wray was familiar with Student because she had been involved with Student since he transitioned to the District at the age of three. She conducted an initial OT assessment of Student on May 21, 2004, wherein she found Student was not in need of occupational therapy to access the school environment and curriculum.

9. On August 1, 2006, Wray spent two hours at the Yucaipa Christian Preschool during which time she observed Student in his classroom setting. On August 2, 2006, Wray spent thirty minutes observing Student and thirty minutes working at a table with Student. Wray did not speak to Student's teachers or school staff during either visit.

10. Wray utilized the Short Sensory Profile (SSP) which was developed to provide a standard method for professionals to measure sensory processing abilities and to profile the effect of sensory processing on functional performance. The profile is standardized on children between five and ten years of age with special directions for interpretations for children three to four years of age. The short form is a condensed checklist designed for screening purposes. The checklist covers all areas of sensory processing and modulation.

11. The SSP is designed to be completed by parents. It specifically instructs the reader to: "Please check the box that best describes the frequency with which your child does the following behaviors. Please answer all of the statements. If you are unable to comment because you have not observed the behavior or believe that it does not apply to your child, please draw an X through the number for that item." The response key also indicates that the reader should select "always", "frequently", "occasionally", "seldom" or "never" based upon the percentage of time that "your child" responds to the activity or sensation identified.

12. Parent was not given the opportunity to participate in the SSP. Instead, Wray opted to have one of the BEST aides complete the questionnaire. Wray did not identify the BEST aide on the SSP where the form requires identification of the person completing the form and their relationship to the child. Wray remembered that the aide was female, but did not remember her name and had no information to offer about how long the particular aide had worked with Student. The BEST aide left the Taste/Smell sensitivity portion of the form completely blank. Parent attempted to speak with Wray about the assessment before it was completed, to no avail. Wray did not discuss the SSP with Parent and did not allow Parent to contribute to the SSP information as is required by the test protocols. Instead, Wray determined that the BEST aide was a caregiver, and as such, was an appropriate person to prepare the SSP.

13. Wray also administered the fine motor portion of the Peabody Development Motor Scales Second Edition (PDMS-2) to student. This test was developed to provide educators, therapists, and researchers a tool to assess fine motor functioning of individual children, birth to six years of age. The complete test provides a comprehensive index of motor proficiency as well as separate measures for gross and fine motor. The test is divided into sections, which makes it compatible with specific testing or partial completion. There are a total of four subtests that measure motor skills. The complete assessment process yields three scores for motor proficiency, gross motor, fine motor and a battery composite. Normalized scores can be transferred into standard scores for each age group, as well as percentiles and age equivalents for subtests. Wray chose only to administer the fine motor portion of the test because she utilized observation to assess Student's gross motor skills. Wray did not administer item numbers 1 to 21 of the Fine Motor Skills subtest. She administered portions of the Visual-Motor Integration subtest, but either did not administer or record scores for item numbers 1 to 36, 58, 62 to 72. Wray conducted a visual observation of Student and observed the gross motor, self regulation and attention aspects of Student's development.

14. The PDMS-2 and SSP instruments were chosen because they require less verbal instruction than some of the other available instruments. Student's verbal skills and attention are extremely limited. Wray found Student's fine motor skills to be significantly below typical levels. Wray calculated Student's grasping score in the fifth percentile and his visual motor score within the second percentile in comparison to same age peers.

15. Wray also conducted a records review. She reviewed psychological assessment reports from June of 2004 prepared by San Bernardino County, an August 23, 2003 report from Dr. Gross of the Inland Regional Center, an assessment from the Riverside Children's Center and the Brain Cell assessment. She did not review psychological assessments by Dr. Cherazi or a neurological assessment by Dr. Bauman of Casa Colina. Although she was aware of the comprehensive speech/language and occupational therapy assessment report from Playworks dated April 4, 2004, she did not utilize the report or consider it in her assessment.

16. District's assessment was not appropriate because the administration of the SSP by Wray was flawed. In all other respects that assessment was appropriate. Wray was qualified to perform the assessments. She has the education, license and professional experience to perform an occupational therapy assessment of Student. There is no dispute that the instruments utilized were appropriate. The tests and assessment materials were validated for the purposes for which they were used and were selected and administered so as not to be racially, culturally or sexually discriminatory. Student's own expert, Ann Fleck, a licensed occupational therapist, used the same instruments to assess Student and opined that the instruments utilized by Wray were appropriate. Lastly, Wray utilized multiple measures to conduct her assessment.

17. However, contrary to the instructions of the assessment, Wray did not contact Parent to have the SSP completed. Instead, although Parent was ready, willing and able to complete the SSP, the assessor unilaterally determined that an unidentified BEST aide would complete the SSP. The SSP was not completed in its entirety. Furthermore, the name and relationship of the person completing the form was not provided as required. Similarly, the BEST aide was unable to complete one section of the SSP presumably because the aide lacked the information. When the Parent completed the SSP on a subsequent assessment performed by Ann Fleck, the assessment scores and conclusions were very different. Accordingly, the Assessment was not administered according to its instructions and was therefore not appropriate.

18. Furthermore, Wray only selectively considered Student's condition and disability by not reviewing the complete file including a previous occupational therapy assessment and neurological assessment of Student making her knowledge of Student's disability flawed and further compromising the assessment.

LEGAL CONCLUSIONS

Applicable Law

1. District has the burden of persuasion that its assessment plan was appropriate. (*Schaeffer v. Weast, Superintendent, Montgomery County Public Schools, et al., Weast* (2005) 546 U.S. 49, [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. A parent is entitled to obtain an IEE of a child. (20 U.S.C. § 1415(b) (1).) An IEE is an evaluation conducted by a qualified examiner not employed by the school district responsible for the child’s education. (34 C.F.R. § 300.502(b) (1); Ed. Code, § 56329, subd. (b).) When a parent disagrees with an assessment by the educational agency, the parent has the right to an IEE from qualified specialists at public expense unless the educational agency is able to demonstrate at a due process hearing that its assessment was appropriate. (Ed. Code, §§ 56329, subds. (b) & (c); and 56506 subd. (c); 34 C.F.R. § 300.502.)

3. 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 also 20 U.S.C. § 1414 (b) (3).)

4. Assessments must be conducted in accordance with assessment procedures specified in the federal IDEA and state special education law. (Ed. Code, § 56381, subd. (e).) For example, tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; must be provided and administered in the student’s primary language or other mode of communication unless this is clearly not feasible; and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b); 34 C.F.R. §300.532; Ed. Code, § 56320, subd. (a), (b).) The assessors must use a variety of assessment tools and strategies to gather relevant functional and developmental information about the child including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum, that may assist in determining whether the child is a child with a disability and what the content of the child’s IEP should be. (34 C.F.R. §300.532(b).)

Determination of Issues

Issue 1. Was the District’s Occupational Therapy assessment of Student appropriate?

1. Based upon Factual Findings 1 through 18 and Legal Conclusions 1 through 4, the District’s Occupational Therapy Assessment was not appropriate. The administration of the SSP was flawed by the failure to obtain data from Student's parents as required by the assessment protocol.

Issue 2. If the District's Assessment was not appropriate, is Student entitled to an independent occupational therapy assessment at public expense?

2. Based upon Factual Findings 1 through 18 and Legal Conclusion 2, Student is entitled to an independent occupational therapy assessment at public expense.

ORDER

1. The District's Occupational Therapy Assessment was not appropriate.
2. Student is entitled to an Independent Educational Evaluation for Occupational Therapy 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 Student has prevailed on all issues.

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).)

March 7, 2007



GLYNDA B. GOMEZ
Administrative Law Judge
Office of Administrative Hearings
Special Education Division