

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

In the Matter of:

CASTRO VALLEY UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007120336

DECISION

Administrative Law Judge Gregory P. Cleveland, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in Castro Valley, California, on January 22, 2008, February 14, 2008, and February 19, 2008.

Student was represented by his mother and father (Parents). Castro Valley Unified School District (District) was represented by Daniel Osher, Attorney at Law. Sandra Nevin, Special Education Coordinator, attended the hearing on all days on behalf of the District. Kenneth Wyatt Ph.D., Special Education Director, Mid-Alameda County Special Education Local Plan Area (SELPA) attended all days on behalf of the SELPA.

On December 11, 2007, the District filed a request for Due Process Hearing. At the hearing, the parties requested, and were granted, permission to file written closing arguments. Upon receipt of written closing arguments, received from the District on February 28, 2008, and from the parents on February 29, 2008, the matter was submitted and the record was closed.

ISSUE

Was the District's physical therapy (PT) assessment of Student, conducted by Jennifer Carothers-Liske, MPT, appropriate, such that Student is not entitled to an Independent Educational Evaluation (IEE)?

CONTENTIONS OF THE PARTIES

The District contends that the PT assessment presented at the Individualized Education Plan (IEP) meeting on November 27, 2007, met all legal requirements. Specifically they contend the assessment was conducted by a qualified person, took into account all areas of Student's disabilities, was not biased in any way, and included assessment methods that are reliable.

Student contends that the assessment was not accurate, in that the assessor did not speak with Student's Parents and did not assess in accord with existing IEP goals. Student further contends the assessment report does not provide accurate information of how Student performed on various assessment tasks, nor does the assessment report contain adequate descriptive background information.

FACTUAL FINDINGS

Jurisdiction and Background

1. Student is a non-verbal, 9-year-old, African-American male with a primary disability of vision impairment (due to cortical visual impairment), and secondary disabilities of mental retardation and severe orthopedic impairments (due to cerebral palsy). All Student's disabilities are the result of a traumatic brain injury. His current developmental level is below 24 months. At all relevant times Student resided within the District.

2. During the 2006-2007 and 2007-2008 school years Student attended Vannoy Elementary School, within the District, in a special day class (SDC) for students with moderate-severe disabilities. On May 15, 2006, the Parents and District representatives all attended an IEP meeting, wherein it was agreed that the District would provide Student PT services 4 days per week for 1 hour per day, at Sun Physical Therapy (Sun PT) provided by Urvashi Patel, PT, M.A.¹

¹ In addition the Parents and District agreed to provision of other services which are not the subject of dispute in this proceeding.

Physical Therapy Assessment

3. A pupil must be assessed in all areas related to the suspected disability including, if appropriate, health and development, vision, including low vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. Testing, assessment materials, and procedures used for the purposes of assessment must be selected and administered so as not to be racially, culturally, or sexually discriminatory. Materials and procedures shall be provided in the pupil's native language or mode of communication, unless it is clearly not feasible to do so. Tests and other assessment materials shall be provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer. Tests and other assessment materials shall be administered in accordance with any instructions provided by the producer of the assessments.

4. The assessment of a pupil, including the assessment of a pupil with a suspected low incidence disability, shall be conducted by persons knowledgeable of that disability. "Low incidence disability" means a severe disabling condition of hearing impairment, vision impairment, and severe orthopedic impairment, or any combination thereof.

5. Dr. Kenneth Wyatt knows Student thorough his duties as the director of special education for the SELPA. Dr. Wyatt received his Ph.D. in educational psychology from the University of California at Berkeley in 1991. He is credentialed as a school psychologist and has been a school administrator for 19 years. In November 2006 Dr. Wyatt sought to have Student assessed for educational physical therapy because Student had been receiving only medical physical therapy at Sun PT, rather than educational PT in his school environment. Dr. Wyatt explained the difference between the two types of PT as medical PT being for the purpose of addressing motor function, while education PT is to allow a student access to their education. He stated he wanted to know Student's limitations from his disabilities, and any accommodations needed for Student's education.

6. On November 16, 2006 Dr. Wyatt met with Student's mother to discuss the need for a PT assessment for education purposes. Dr. Wyatt then expressed his concerns to the Parents in a letter dated November 20, 2006, but no agreed upon assessment plan was signed by the Parents. In a further letter from Dr. Wyatt to the Parents, Dr. Wyatt elaborated on the need for the PT assessment:

The district maintains that a PT evaluation is warranted at this time. A full PT evaluation will identify not only (Student's) needs, which will enable the District to develop appropriate goals and objectives in the area of PT, but also helps to identify the continuing level of PT service Remington requires. Thus, a PT evaluation is essential prior to (Student's) annual IEP team meeting.

7. An assessment plan was proposed on July 5, 2007, calling for a PT assessment by Jennifer Carothers-Liske of Progressus Therapy, a certified non-public agency, chosen by Dr. Wyatt. The Parents did not give written consent to that assessment plan. In a letter from Dr. Wyatt to the Parents, dated August 2, 2007, Dr. Wyatt stated the PT evaluation was necessitated because Sun PT was a medically based clinical environment which did not address Student's educationally based PT need for services and equipment. In a follow-up letter of August 7, 2007, Dr. Wyatt re-iterated that the District felt the PT assessment was necessitated to determine Student's levels of functioning, to develop educational PT goals, to determine what level of PT consultation would be needed for Student's classroom staff, and identify any equipment Student may require to full access his educational program.

8. Pursuant to a settlement agreement, an assessment by Jennifer Carothers-Liske was conducted on October 8, 2007. Ms. Carothers-Liske received a Masters in PT from Samuel Merritt College, in 1996. She worked as a physical therapist in clinical settings for 4 years, and has worked for Progressus Therapy since August 1999. At Progressus Therapy, Ms. Carothers-Liske job duties are to identify and assess students under the Individuals with Disabilities Education Improvement Act (IDEA). She estimates she has performed over 300 educational PT assessments. Of those assessments, approximately 100 were performed on pupils at Student's age level. She has assessed pupils with multiple impairments, including pupils with a combination of visual, orthopedic and cognitive impairments.

9. Prior to conducting her assessment of Student, Ms. Carothers-Liske reviewed a proposed IEP for Student, dated May 9, 2007, which included reports from the APE teacher, the vision specialist, and the developmental specialist. She also reviewed an annual report of Ms. Patel, dated May 8, 2007, along with documents prepared by the Parents dated May 9, 2007, in which the Parents stated Student's present functional levels on gross and fine motor tasks, strengths, and their areas of concern. Of the Parents' documents, there was a one page listing of Student's strengths and weaknesses on gross motor development and another one page document on fine motor development. Ms. Carothers-Liske spoke with Student's classroom teacher, his APE teacher, his developmental specialist, and his one-to-one aide, all in order to gain a sense of how Student functioned in a typical school day. She did not speak with either parent or Ms. Patel because she felt she'd already learned all she needed from them based on their written documents. She stated she was not required to speak with the Parents prior to the assessment.

10. Ms. Carothers-Liske observed Student over the course of 5 hours, in a variety of settings, including adaptive physical education (APE), snack time, while Student worked on gait, at lunchtime, in a mainstreaming reading class, during activities of daily living (ADL's), during occupational therapy (OT), and at departure. According to Ms. Carothers-Liske, 1-2 hours observation is usually sufficient for an assessment but she spent the extra time to ensure she saw Student in a cross-setting of school environments. All of Ms. Carothers-Liske's observations were detailed in her assessment report of October 8, 2007. Included amongst those observations were descriptions of Student's behaviors, his use of equipment such as an ablegaitor or a gait-belt for ambulation, and Student's overall gross motor control.

11. Along with observations of Student, Ms. Carothers-Liske administered the School Functional Assessment (SFA), to measure Student's performance on functional tasks that support his participation in the social and academic aspects of a school program. The assessment is designed for students with a variety of disabling conditions. Ms. Carothers-Liske assessed only part III of the SFA as that part addresses areas specific to PT. Of nearly all tasks measured Student scored either a 1 or 2 on a scale of 1-4². Ms. Carothers-Liske's interpretation of the SFA indicated Student needs significant help to participate in functional activities typically seen in a school curriculum. The results are helpful in program planning for Student to partake in school day tasks. She further identified areas of strengths and needs for Student in the school environment, and made recommendations for PT services or modifications in the school environment, so as to allow Student to perform educational tasks.

12. Ms. Carothers-Liske had administered the SFA some 25-30 times before she administered it to Student. She chose the SFA because it is a reliable tool to measure subjects such as Student's function on tasks such as ability to travel around. She did follow the instructions provided in the manual provided along with the SFA. She further testified the SFA is neither culturally, sexually or racially biased because it is based on task completion. Overall the assessment of Ms. Carothers-Liske provided a description of Student in his school environment.

13. Ms. Carothers-Liske is aware Student is visually impaired and knows there are visual impairment guidelines established by the California Department of Education for use in assessment of pupils with visual impairments, but she did not follow those guidelines with Student because they are guidelines, not mandates. Ms. Carothers-Liske believes Student can see enough to track objects placed in front of him within his visual field. That belief was confirmed by a May 9, 2007, report from Student's visual specialist, Yardley Hoffman M.Ed. Dr. Wyatt also confirmed the visual impairment guidelines are just that, guidelines, as opposed to mandates. He further established they do not even apply to Student because Student has multiple disabilities rather than just visual impairment.

14. Ms. Carothers-Liske freely admitted that she was not qualified to assess Student's cognitive functioning or learning ability, nor his sensory processing ability, or general medical health, as those were areas for assessment by other experts. She similarly admitted that the ablegaitor was something she had not used before and its benefit was something requiring further assessment. Her admissions in this regard added to her credibility as a witness because the admissions made clear her assessment was limited only to PT, her area of expertise.

² The Rating Scale is scored as follows:

1. Does not perform-activity is too difficult or lack essential component skill to initiate the activity.
2. Partial performance-makes meaningful contribution or attempt in activity, but unable to complete fully.
3. Inconsistent performance-sometimes initiates and completes task, but not at level of same age, grade peers, may require cues or help to initiate.
4. Consistent performance-consistently initiates and completes activity.

15. Parents' objection to the assessment is based on their lack of input with the assessor. Student's mother pointed out that the May 9, 2007, documents Ms. Carothers-Liske reviewed in preparation for the assessment were taken from a proposed IEP, rather than an IEP agreed to by the Parents. Because the May 9, 2007 IEP was not agreed upon by the Parents, they claim the assessment was unrelated to any IEP goals. However, goals are not determinative of the appropriateness of the assessment itself, and the assessment was to be used to determine what appropriate IEP goals should be.

16. Parents contend the assessment report itself is clearly inadequate as it describes tasks Student is unable to perform. On review of the report, it describes in much detail what was observed and how Student performed on each particular task in the SFA Part III. For instance, the report included a description of the observation of Student in his APE class:

He went to PE [actually, APE] with his classmates. PE was held on the field and he was transported there in his stroller. When seated in the stroller, he let his right leg dangle over the side. Once on the field, he was able to get up and walk across the grass. It was attempted to get (Student) to engage in ball activities during his PE class. He was only interested in balls for a limited time. . . .When sitting, the ball was rolled to him to see if he would corral it, but he made no attempt to catch or corral it. He required hand over hand assistance to roll it back.

17. When Student was not able to perform a task on the FSA, the assessor scored Student a "1," which was stated as meaning Student "does not perform" that particular task. This scoring allows the outside observer to determine what physical tasks Student can and cannot do, which should allow educational professionals to determine future needs, goals and services will be required for Student.

18. Parents also object to the assessment report itself due to a lack of detail in matters such as the description of curriculum and Student's medical history, as well as lack of a bibliography, and an insufficient description of the equipment used by Student at school. The lack of the detail desired by Parents does not make the assessment report inadequate however, because the report provides the reader enough details about Student to understand Student's background, environment, and functioning.

19. Parents' last concern is that Ms. Carothers-Liske did not speak to them before conducting the assessment. The Parents feel they should have been consulted beforehand in order for Ms. Carothers-Liske to get a baseline level for Student, and to fully appreciate the Parents' concerns. The Parents did have an opportunity to discuss the assessment with Ms. Carothers-Liske after it was completed, at an IEP meeting on November 27, 2007, but they did not take that opportunity to raise their concerns. Instead, the Parents had already decided to reject the assessment as inappropriate and provided the District their objection to the assessment at that meeting.

20. Because the Parents' rejected the assessment on November 27, 2007, they requested an IEE along with a new assessment plan, in the written documents they provided to the District on that date.

CONCLUSIONS OF LAW

1. The petitioning party has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Thus, under *Schaffer*, the District has the burden of proof to show they adequately assessed Student.

2. 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; and must be provided and administered in the student's native language or other mode of communication unless this is clearly not feasible. (Ed. Code, § 56320, subd. (a); 20 U.S.C. § 1414(b)(2), (3); 34 C.F.R. § 300.304(c)(1)(i), (ii).) Tests and other assessment materials shall be provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer. (Ed. Code, § 56320, subd. (b)(1); 34 C.F.R. § 300.304(c)(1)(ii).)

3. Factual findings 5-7 and 9-12 establish that the assessment in this case was based on observation of the Student, along with physical task completion, which is performed the same way by all sexes, races or cultures. The assessment is not biased and was carried out in the form most likely to yield accurate information on what Student can do academically, developmentally, and functionally, within the PT realm.

4. Tests and other assessment materials must be administered by trained and knowledgeable personnel and must be administered in accordance with any instructions provided by the producer of the assessments, except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. (Ed. Code, § 56320, subd. (b)(3); 34 C.F.R. § 300.304(c)(1)(iv), (v).)

5. The assessment of a pupil, including the assessment of a pupil with a suspected low incidence disability, shall be conducted by persons knowledgeable of that disability. (Ed. Code, § 56320, subd. (g).) A disability is defined as mental retardation, hearing impairment (including deafness), speech or language impairment, visual impairment (including blindness), emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairment, or specific learning disability. (34 C.F.R. § 300.8(a)(1).) "Low incidence disability" means a severe disabling condition of hearing impairment, vision impairment, and severe orthopedic impairment, or any combination thereof. (Ed. Code, § 56026.5.)

6. Factual findings 9-14 establish that Ms. Carothers-Liske was knowledgeable of Student's disability and qualified to assess Student even with his low incidence disability. Factual findings 8-13 establish that the assessment in this case was conducted by a highly trained, qualified person, Ms. Carothers-Liske, who did follow the instructions for the FSA.

7. Information provided by the Parents of the student involved, is considered to be a crucial element of any assessment. The evaluator must consider information provided by the parents. (34 C.F.R. § 300.304(b)(1) & 34 C.F.R. § 300.305(a)(1)(i).)

8. Factual findings 9 and 17 establish that some input from the Parents was considered by Ms. Carothers-Liske, but that input was minimal. It would have been helpful for Ms. Carothers-Liske to speak to the Parents about their knowledge of physical tasks they had observed Student to perform and what assistance he required to perform such tasks. If that information had been obtained it could have been compared with the assessment scores in order to better determine Student's functional abilities and needs within the PT realm. Nonetheless there is no minimum amount of input from the parents that is specified in title 34 Code of Federal Regulations parts 300.304 or 300.305, and Ms. Carothers-Liske did review the Parents' written statements of Student's functional levels, strengths, and their areas of concern. Therefore the District complied with the requirement to consider information from Student's parents.

9. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c).) "Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an assessment obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1) & (b)(2).)

10. The provision of an IEE is not automatic. Code of Federal Regulations, title 34, part 300.502(b)(2), provides, in relevant part, that following the student's request for an IEE, the public agency must, without unnecessary delay, either: (i) File a due process complaint to request a hearing to show that its assessment is appropriate; or (ii) Ensure that an independent educational assessment is provided at public expense, unless the agency demonstrates in a hearing pursuant to parts 300.507 through 300.513 that the assessment obtained by the parent did not meet agency criteria. (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].)

11. Factual findings 19-20 and the third introductory paragraph, establish that the District did timely file a request for due process after the Parents requested an IEE, and legal conclusions 1-10 establish that the District has shown the PT assessment was appropriate.

ORDER

The District's assessment was appropriate and Student is not entitled to a physical therapy IEE.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, 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: March 3, 2008



GREGORY P. CLEVELAND
Administrative Law Judge
Office of Administrative Hearings
Special Education Division