

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ROSEVILLE CITY SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2010050211

CORRECTED DECISION¹

Deborah Myers-Cregar, Administrative Law Judge, Office of Administrative Hearings (OAH) heard this matter on June 8 and June 17, 2010, in Roseville, California.

Roseville City School District (District) was represented by Joe Spector, Attorney at Law, who was assisted by Stacy Power, law clerk. Tim Robota, Student Services Director, was present for both days of hearing. Student and his parents (Parents) were represented by Marilyn Scott, advocate. Parents were present both days of hearing. Gregory Olsen, godparent, was present on the second day of hearing.

District filed its amended Due Process Request on May 11, 2010. No continuances were granted. On June 8, 2010, the matter was continued to June 17, 2010, for the second day of hearing. Testimonial and documentary evidence were received. At the conclusion of the hearing, the parties requested a continuance to file written closing briefs. The parties were ordered to file and serve simultaneous closing briefs by July 14, 2010, at 5:00 p.m. The briefs were timely received and marked for identification as S-2, Student's, and D-12, District's. The matter was submitted and the record closed on July 15, 2010. Because reply briefs were not ordered, District's reply to Student's closing brief received on July 19, 2010, was not considered.

¹ The only change in the Decision is the deletion of the appearance of a party who was listed in error.

ISSUE

May District deny Student an independent educational evaluation (IEE) in occupational therapy (OT) because its February 25, 2010 OT assessment was properly conducted?²

FACTUAL FINDINGS

1. Student is a 13-year-old boy in seventh grade. He has resided within the jurisdictional boundaries of District at all relevant times. Student re-enrolled in District in December 2009, after a five-year private school placement. Student currently receives special education services from District for attention deficit hyperactivity disorder, speech and language impairment, and a specific learning disability.

2. After Student re-enrolled, District held several Individualized Education Program (IEP) meetings. At the January 25, 2010 IEP meeting, Student's parents requested an occupational therapy (OT) assessment, and District agreed. They signed the OT assessment plan that day and scheduled another IEP meeting to review the results.

3. On February 25, 2010, Brandy Leggett (Ms. Leggett) conducted Student's initial OT assessment to determine whether he qualified for OT-related services. Ms. Leggett is certified, licensed and registered by the American Occupational Therapy Association and the California Board of Occupational Therapy. Ms. Leggett earned a bachelor of science degree in occupational therapy from San Jose State University in 2005. She worked as an occupational therapist at the Baylor Institute of Rehabilitation in Dallas on the brain injury and spinal injury team for two years. Ms. Leggett has worked at District as an occupational therapist for two years. She is responsible for providing assessments and treatment to students at 11 District school sites. She has participated in 250 IEPs. Ms. Leggett provides staff workshops for Special Day Class (SDC) teachers. She is certified to teach Handwriting Without Tears.

4. Ms. Leggett used assessment tools in English to determine Student's gross motor, fine motor, and sensory processing skills as they impacted his ability to access his educational curriculum. To assess Student, Ms. Leggett observed Student, administered the Bruininks Oseretsky Test of Motor Proficiency, Second Edition (BOT-2), reviewed records, examined classroom handwriting samples and interviewed Hillary Gruber (Ms. Gruber), his SDC teacher and Lisa Schrieder (Ms. Schrieder), his general education science teacher. His teachers agreed that Student was able to access all of his written assignments in class. While Student's misspelled words made his writing more difficult to read, his SDC and science

² District withdrew its second issue at hearing when the parents signed the requested assessment plan.

teachers were able to read his handwriting, and he was earning “A”s and “B”s in their classes. Ms. Leggett did not speak with Parents, but she exchanged telephone messages regarding their concerns. Because of the narrow focus of the assessment and Student’s handwriting samples provided by Ms. Gruber, Ms. Leggett determined it was not necessary to interview Parents.

5. Ms. Leggett wrote a report of her OT assessment, which included her observations of Student’s sensory processing, fine and gross motor skills and the BOT-2 results. Student’s fine motor skills demonstrated that he used his right hand as the dominant hand for using school tools, and used his left hand as a helper hand. Student was able to use both hands together and to cross his mid-line to perform tasks such as cutting with scissors, stringing beads, zipping and buttoning. He had a pincer grasp, and was able to pick up small items. Using a pincer grasp, Student could form letters and numbers with the proper formation and legibility. His handwriting was often messy, but his science and SDC teachers were able to read it.

6. As part of the assessment, Ms. Leggett administered subtests of the BOT-2, designed to measure fine motor skills and visual motor integration. Ms. Leggett followed the standardized testing protocols for the BOT-2 and observed Student’s performance of body movements, such as jumping jacks and push ups. The test was not racially or culturally biased because it did not involve subjective evaluations. The test was validly administered.

7. Student’s scores on the BOT-2 fell within the average range in fine motor precision (tasks such as coloring within lines, folding, or cutting), dexterity, fine motor integration (tasks involving drawing or copying in response to visual stimulæ), and average overall in the area of fine manual control. Student performed in the above-average range in upper-limb coordination. He performed in the average range in all other measures of his manual control, body coordination, and strength and agility. No results were below average. Ms. Leggett noted that Student’s sensory processing appeared intact based on her observations of his responsiveness and ability to follow her directions. She found him able to transition from subject to subject without much redirection. Ms. Leggett believed his sensory processing appeared age-appropriate.

8. Based on the BOT-2, her observations, teacher interviews, and handwriting samples review, Ms. Leggett concluded that Student demonstrated the necessary fine motor skills needed to allow him to access his educational curriculum and that he did not require school-based OT to receive a free appropriate public education (FAPE). She deferred making recommendations for school-based OT until she discussed her findings with the IEP team.

9. Ms. Leggett persuasively testified in support of her OT assessment. On the BOT-2, Student’s fine and gross motor skills fell within the average to above-average ranges. Student did not require OT to address his handwriting issues, as he had the foundation to form legible handwriting. Ms. Leggett observed Student’s grip, and he did not have a weak grasp. Ms. Leggett could read all his letters, and observed spacing between his letters and

his words. When presented with copies of Student's science logs at hearing, Ms. Leggett could read his letters but not his misspelled words. She believed those samples looked rushed as compared with the samples of his good handwriting she had seen. She recommended an accommodation of special lined paper, and Handwriting Without Tears as a good accommodation for any student. Ms. Leggett believed Student's handwriting fell within the average range for a general education student his age.

10. On March 1, 2010, an IEP meeting was held to discuss the results of the OT assessment. The parents received a copy of the assessment and had an opportunity to express their concerns and to ask questions at the IEP. The IEP team discussed Parents' concerns about the quality of Student's handwriting. The IEP team discussed the results of Ms. Leggett's OT assessment which recommended no school-based OT for his handwriting issues. The IEP team discussed Student's accommodations and modifications with representatives from his prior private school. Student's testing accommodations allowed him extra time, frequent breaks, and small groups. The SDC teacher and the family discussed possible handwriting goals, modifications and accommodations of lined paper and a thinner writing utensil. The District determined, consistent with Student's OT assessment, that Student had no OT deficits that required educationally-based OT. To date, no IEP goals as to handwriting have been agreed upon.

11. At hearing, Student's parents expressed their opinions that Student required OT services because his handwriting was too illegible to be understood and to make progress in his educational curriculum. Student's parents disagreed with the February 25, 2010 OT assessment because not enough OT assessments were conducted. Student presented no expert testimony to support what other assessments should have been conducted, or that the results of the standardized BOT-2 tests were invalid.

12. Student's mother believed that the OT assessment was not complete because she was not interviewed. Student's parents were familiar with the handwriting standards from his previous private school, and believed that District's standards were too lax. Student's parents wanted Ms. Leggett to interview them about their observations of Student's handwriting and his messy science 'Question of the Day' logs.

13. At hearing, those handwriting samples were authenticated and reviewed by Ms. Gruber and Ms. Leggett who had used them to help form their opinions as to whether Student's handwriting impacted his educational curriculum. They agreed that Student's handwriting samples were messy; that his spelling made it difficult to read his words; but that his handwriting was still legible. Student's numbers on his math worksheets were legible. Student's timed science assignments, which he copied from the board in draft form, were messy but were not representative of his typical work. Student's handwriting appeared average for a seventh grade general education student. Ms. Leggett's failure to interview Parents and to review additional handwriting samples did not invalidate the OT evaluation. She reviewed records and used a variety of assessment tools which showed that Student tested in the average range across multiple OT subtests.

14. Ms. Gruber has been Student's SDC teacher for one math class and two language arts classes daily between December 2009 and June 2010. She has attended his mainstream classes, including his science class. Ms. Gruber understood Parents' concern as to his handwriting legibility, spacing, and staying on the lines. She had reviewed and selected Student's handwriting samples for her interview for Ms. Leggett's OT assessment. Ms. Gruber had observed Student writing the messy entries into his science 'Question of the Day' logs, including the five-page samples admitted at hearing. She explained that the science 'Questions of the Day' logs were conducted as a one-to-two-minute timed draft assignment, and that she had seen him produce much better work in final drafts when he was given more time. Ms. Gruber observed Student having difficulty copying the 'Question of the Day' from the board when he was given time pressures. Ms. Gruber explained that Student's writing sample was also affected by the use of small columns he was given to write in. Student was able to skip a line appropriately, match up the Question and Answer on the same line, and complete the assignment on time. Student has completed writing assignments, projects, tests and lab reports which were legible. Student's numbers on his math assignments and tests were legible. His three-paragraph sentence-writing assignments were legible. Ms. Gruber and Ms. Schrieder were able to read his written assignments. Student was able to access all his written work in class.

15. Ms. Gruber has six years of experience in special education as an SDC teacher. She has a bachelor of arts degree, an educational specialist teaching credential for students with mild-to-moderate disabilities, and has completed the coursework for her master's degree. Ms. Gruber is qualified to help students with written language and handwriting issues. She provides accommodations to all her students, which includes special paper and special writing utensils with different thicknesses. Student writes more legibly with a thinner writing instrument, lined paper, and more time. While Student's handwriting was often messy and imperfect, it was still legible. She believed the messy entries in the science logs were due to his ADHD and impulsivity, not due to fine motor deficits or motor weakness. Student had an adequate grip, line-spacing, pencil pressure, had the ability to write on lines and had the ability to access his curriculum. Ms. Gruber described his handwriting as "99 percent legible," typical and average for a seventh grade general education student, and very good for a SDC student. Ms. Gruber agreed that the OT assessment presented an accurate picture of Student's present levels of performance as to his handwriting.

LEGAL CONCLUSIONS

1. District contends that its February 25, 2010 OT assessment of Student was appropriate, such that District need not provide an IEE at public expense. Student contends that the District's OT assessment was not appropriate because not enough standardized tests were conducted, his parents were not interviewed, and because his handwriting is illegible and impedes him from accessing his educational curriculum. As discussed below, the District met its burden of proving by a preponderance of the evidence that the February 25, 2010 OT assessment was appropriate.

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

3. In order to assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, §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 *Vasherese 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 therapists are required to have graduated from an accredited school and must currently be registered with the American Occupational Therapy Association. (Cal. Code Regs., tit. 5, § 3051.6, subd (b).) 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 IEE if he or she disagrees with an evaluation obtained by the public agency and requests an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006)³; 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 IEE].) In response to a request for an IEE, 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. Here, District demonstrated by a preponderance of the evidence that the February 25, 2010 OT assessment had been properly conducted, as discussed below. Student's parents do not dispute they received proper notice of their assessment rights. At the January 25, 2010 IEP, they requested an OT evaluation, to which District agreed, and they signed District's proposed OT assessment plan at that IEP meeting.

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

10. OT assessor Ms. Leggett used a variety of assessment tools and instruments designed to gather relevant functional, developmental and academic information to assess Student's specific area of need by reviewing handwriting samples, interviewing teachers, conducting standardized testing, and observation. She used technically sound instruments, such as the BOT-2, a standardized test for sensory motor processing and integration. It established that Student had average fine motor skills and average handwriting for a seventh grade general education student. The assessment was not racially or culturally biased, because it consisted primarily of interviews and observation, coupled with standardized tests that required Student to repeat fine and gross motor movements, such as handwriting, tracing, performing jumping jacks and push-ups. The assessment was conducted in Student's native language and in a form most likely to yield accurate information. The assessment was used for purposes for which the assessment was valid and reliable. The assessment was administered by trained and knowledgeable personnel in accordance with testing instructions.

11. The OT assessment was conducted by a qualified, trained and knowledgeable OT assessor, who consulted with a qualified SDC teacher. The assessment instruments were appropriate, valid and tailored to determine Student's performance on sensory processing and fine motor and visual motor tasks in school.

12. The assessment resulted in a comprehensive written report that included all observations, test results, consideration of Student's functional levels at school, and a reasoned determination that Student did not require OT services to access his educational curriculum. The report noted Student's relevant behavior during observation, and the relationship of that behavior to his academic functioning. On March 1, 2010, the written report was provided to Student's parents, who had the opportunity to discuss the assessment with Ms. Leggett at that IEP meeting. The IEP team reviewed Student's existing evaluation data, reviewed information provided by Parents, and discussed the observations made by Ms. Leggett and SDC teacher Ms. Gruber. On the basis of that review, and from Student's parents' input, District identified that no additional data was needed to determine whether Student qualified for school-based OT services.

13. Although Student's parents disagreed with the OT recommendation, they did not produce evidence at hearing demonstrating that the assessment failed to comply with the IDEA and State law. Despite Student's criticisms that not enough standardized tests were performed, the assessment tools and methods used were appropriate to give valid results concerning his OT needs at school. There was no evidence that a specific OT test was not performed.

14. The OT assessment and its recommendations are not invalid due to a failure to interview Parents, because the OT assessment was narrowly focused and included a variety of assessment tools, such as standardized testing, teacher interviews and handwriting samples from the classroom and in clinical settings. All of Student's handwriting samples were reviewed, selected and authenticated by Ms. Gruber, who was interviewed by Ms. Leggett. While Student's parents were very familiar with his handwriting, Ms. Gruber was most

