

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

CAPISTRANO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2010050368

DECISION

Administrative Law Judge Robert F. Helfand, Office of Administrative Hearings, State of California, heard this matter in San Juan Capistrano, California, on July 6 and 16, 2010.

Jennifer Guze Campbell, Esq., of the Special Education Law Firm, represented Student's mother and Student (Student). Student's mother (Mother) was present during the hearing. James G. Campbell, an advocate with the Special Education Law Firm, was also present.

Ernest Bell, Esq., of Dannis Woliver Kelley, represented the Capistrano Unified School District (District). Dr. Crystal Bejarano, Informal Dispute Resolution Specialist for the District, was present on July 6, 2010, and part of July 16, 2010; and Kimberly Gaither, a special education legal specialist, was present on July 16, 2010.

Student filed her due process request on May 11, 2010. On May 21, 2010, the District filed its response. On May 27, 2010, the District filed a Notice of Insufficiency. On June 1, 2010, OAH issued an order determining the due process request sufficient.

At the hearing, the ALJ received oral and documentary evidence. The following witnesses testified at the hearing: Mother, James Wiley Campbell, Jill Bierman, Dr. Crystal Bejarano, Anna Seftel, Gwen Manganiello, and Anthony Bogle.

At the request of the parties, the record remained open for the submission of written closing and rebuttal arguments. The parties filed their closing briefs on July 27, 2010. The District filed a rebuttal brief on July 30, 2010, when the matter was deemed submitted. The parties stipulated that the decision would be due 30 days after the case was submitted.

ISSUE

The sole issue to be determined in this matter is whether the District denied Student a free and appropriate public education (FAPE) during the 2009-2010 school year by failing to assess Student for dyslexia, after a request from Student's parents (Parents), resulting in a denial of educational benefit and parental participation in the Individualized Education Program (IEP) process?

PROPOSED RESOLUTION

Student's proposed resolution is that the District fund an Independent Educational Evaluation in the area of dyslexia by a specialist designated by Mother, and to provide compensatory education to Student with 200 hours of services by a dyslexia specialist on a one-to-one basis for reading, writing, and mathematics.

PROCEDURAL MATTERS

On July 6, 2010, the District objected to the introduction of evidence involving statements made by District personnel at the May 26, 2010 Resolution Session pursuant to Evidence Code section 1152, subdivision (a) (hereafter "section 1152") which makes inadmissible as evidence statements made during settlement discussions. The ALJ overruled the objection without prejudice. On July 14, 2010, the District filed a motion to strike all testimony regarding the May 26, 2010 Resolution Session pursuant to section 1152. Student filed her opposition on July 15, 2010. On July 15, 2010, the ALJ issued a written order denying the District's motion.

At the close of evidence on July 16, 2010, the ALJ, acting on his own motion, struck Student's proposed resolution for 200 hours of compensatory education services because Student failed to produce any evidence to support this proposed remedy.

FACTUAL FINDINGS

1. Student is 10-and-a-half-year-old girl who resides with Mother and her twin sister within the geographical boundaries of the District. On December 19, 2000, Student was found eligible for special education under the primary eligibility category of Other Health Impairment (OHI) as Student's medical conditions weaken her immune system and lower her strength, and she has weak adaptive skills which affect her ability to access the academic curriculum. Student was placed in a special day class (SDC) at Crown Valley Elementary School (Crown Valley).

2. Student was born prematurely on January 8, 2002, weighing one pound and 13 ounces. Student required assistance breathing and spent time in neonatal intensive care. At

birth, Student suffered from hydrocephalus, which is a condition where there is an excessive accumulation of cerebrospinal fluid causing pressure on the brain.¹ Student received a ventriculoperitoneal shunt to relieve the pressure. Student was also diagnosed with cerebral palsy. Student's developmental milestones were delayed. In April 2002, she was found to have a heart murmur and clogged stomach.²

3. Dyslexia is a specific learning disability that is neurobiological in origin. It is characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities. These difficulties typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities. Secondary consequences may include problems in reading comprehension and reduced reading experience that can impede growth of vocabulary and background knowledge. By itself, dyslexia is a medical diagnosis, not an educational need.³

December 2002 Initial Assessment

4. On December 19, 2002, the District presented to Parents its initial psychoeducational evaluation report. At the time of the assessment, Student was two years, 10 months old. The assessors, Ida Rose Heckard, a school psychologist, and Jodie Tokatlian, a speech and language pathologist, concluded that Student "presents with receptive language and fine motor skills within age expectations and expressive language delays; and delays in visual reception skills."

5. Student's cognitive development was measured by the Mullen Scales of Early Learning which assesses infants and preschool children across four primary domains. Student's standard score on the early learning composite was 77 which placed her in the seventh percentile and the below-average range. Her domain "T" scores⁴ were 28 in visual reception (which is in the second percentile with an age-equivalent (A-E) of 25 months and within the very-low range); 45 in fine motor (31st percentile, A-E of 33 months and within the average range); 49 in receptive language (46th percentile, A-E of 34 months and within the average range); and 31 in expressive language (third percentile, A-E of 24 months and within the below-average range). Student received a standard score on the composite of the Vineland Adaptive Behavior Scale of 66 which was in the first percentile. On the Peabody Picture Vocabulary Test, Third Edition (PPVT-III), Student scored in the fourth percentile with a standard score of 74. On the Khan-Lewis Phonological Analysis, Second Edition, Student was within the fourth percentile with a standard score of 71.

¹ National Institute of Neurological Disorders and Stroke, "Hydrocephalus Fact Sheet" (June 1, 2010) www.nih.gov/disorders/hydrocephalus/detail_hydrocephalus.htm.

² Student's twin sister was born weighing two pounds, eight ounces. The twin did not have hydrocephalus although she too has similar health problems.

³ *Student v. Manteca Union School District* (2006) OAH Case No. 2006010033

⁴ "T" scores between 40 and 60 fall within the average range.

November 2007 Triennial Assessment

6. In November 2007, the District conducted a triennial assessment of Student. As part of the assessment, Lisa Aronow, a District school psychologist, administered the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), the Leiter International Performance Scale-Revised (LIPS-R), and the Kaufman Assessment Battery for Children, Second Edition (KABC-II).

7. Student's full-scale standard score of 70 on the WISC-IV placed her in the second percentile. Student's percentile scores in the individual scales were first percentile in verbal comprehension, 12th in perceptual reasoning, ninth in working memory, and seventh in processing speed. Aronow summarized that the WISC-IV scores "indicated [Student's] verbal comprehension abilities to fall in the very low range, perceptual reasoning and working memory abilities fell in the low average range and processing speed abilities within the borderline range."

8. The LIPS-R is a non-verbal test designed to assess a child's cognitive functioning. Student received standard scores of 75 on the fluid reasoning composite and 76 on the visualization and reasoning battery, which "places her ability in the borderline range with tasks in the area of non-verbal abilities which include sequencing, being able to follow visual patterns and visual problem solving."

9. On the KABC-II, Student scored in the sixth percentile in sequential processing index with a standard score of 77 and in the tenth percentile with a standard score of 81 in the knowledge index. Student scored at the 0.1 percentile on the simultaneous index with a standard score of 55. Student's other index scores were in the first percentile with standard scores of 67 on the learning index, 67 on the planning index, and 63 on the fluid crystallized index (which is a composite).

10. Aronow found that the test results "indicate her cognitive functioning to be in the borderline to low range."

December 8, 2008 IEP Meeting

11. During school year 2008-2009, Student was in Marinell Darmody's SDC at Crown Valley. In the December 8, 2008 IEP, Student was reported to have made progress but had not met her previous reading goal which required her to read a first-grade-level passage with a fluency rate of 50 correct words per minute with 75 percent accuracy in three out of four consecutive trials. Student was reported to be able to read a first-grade-level passage with a fluency rate of 16 to 25 words per minute. Student was reported to meet her previous goal of being able to read 80 out of 100 sight words. The IEP team adopted a reading goal that "[w]hen given a second-grade passage, [Student] will read aloud, with fluency, at a rate of 40 correct words per minute with 75% accuracy in 3 out of 4 trials."

Student's Performance During the 2009-2010 School Year

12. Student was assigned to the fourth-fifth grade SDC taught by Gwen Manganiello. Manganiello graduated from San Diego State University with a B.A. and a clear multiple subject credential in 1985. In 2006, she received her special education credential from California State University, San Marcos. Manganiello had been a general education teacher and from 2000 to 2005, a special education assistant. Since 2006, she has been a special education teacher with the District.

13. Manganiello described Student as being at the kindergarten level when the 2009-2010 school year began. She described Student as having low cognitive functioning which causes her to struggle with integration of concepts and difficulty with rote learning. Manganiello attributes Student's learning difficulties to her medical condition. Manganiello has seen Student make educational progress through the school year which is consistent with her cognitive abilities. She opined that Student is making progress on meeting all seven of her annual goals established at the December 8, 2008 IEP meeting. In reading, Student is presently able to read a second-grade passage with a fluency rate of 20 words per minute with 75 percent accuracy.

14. Mother felt that Student was making little or no academic progress. Based on observations made while assisting Student with homework, Mother believed that Student was only at the first-grade level in reading and mathematics. She believed that Student had been improperly assessed as Student possesses average intelligence although she does experience cognitive delays caused by her various medical conditions. Mother feels that Student academically should be operating at the third-grade level as is her twin who was placed in general education with pull-out resource support.

December 8, 2009 IEP Meeting

15. Prior to December 2009, Mother took a special education course at Saddleback College. As part of that course, Mother attended a seminar at a local library on dyslexia. Mother was accompanied by her friend, Jill Bierman. Because Mother had observed Student writing some letters and numbers backwards plus being told by Darmody that Student had a processing problem in April 2009, Mother believed that Student's reading and mathematic difficulties could be a result of dyslexia.

16. On December 8, 2009, the IEP team convened for an annual meeting. Attending on behalf of the District was Anna Seftel, assistant principal at Crown Valley; Teresa Brooks, a general education teacher; Janice Collings, adapted physical education teacher; and Manganiello, Student's then and present teacher. Mother was also present and was accompanied by Bierman. Mother expressed concerns that Student was not making good progress as she was not close to grade levels academically. Mother questioned the accuracy of the proposed baselines being recommended as to multi-syllable words (Student could read 120 sight words, most of which were one syllable) and synonyms/antonyms (Student was confused between synonyms and antonyms) and that Student's reading level

was still at that of a first grader. Mother related that she had attended a seminar which led her to believe that Student may be dyslexic. Mother then inquired whether it was possible that Student may have dyslexia. Manganiello did not feel that Student has dyslexia and that her problems in reading stem from her difficulty with short-term memory. Manganiello and the IEP team proposed baselines for fluency that Student was “currently reading in a first-grade book and struggles with decoding and remembering sight words.” Manganiello also recommended that the fluency goal be reduced to having Student read a second-grade passage at a rate of 20 words per minute from the former goal of 60 words per minute because of Student’s present level of performance. The IEP meeting notes state: “Mom asked if [Student] can be assessed for Dyslexia, she wants [Student] to be identified as to what is causing her learning difficulties in school.”

17. Student contends that Mother specifically requested that the District conduct an assessment to determine whether Student does or does not have dyslexia. The District contends that Mother never made a clear request and that the IEP team discussed dyslexia as a possible cause for Student’s reading problems.

18. Mother testified that during the discussion about dyslexia she asked the IEP team, “Can’t she be tested for dyslexia?” Manganiello did not reply. Mother was unable to recall the discussions at the IEP meeting in any detail. Bierman also testified to what was said at the December 8, 2010 IEP meeting. Bierman recalls that Mother requested a dyslexia assessment and that District members were “positive” to that suggestion. Bierman had no recall of specifics of the meeting including the actual discussion involving dyslexia. Bierman stated that she and Mother left the meeting feeling that Student would be assessed for dyslexia by the District.

19. Seftel acted as the administrative designee and note-taker at the meeting. She recalls Mother being agitated during discussion of goals and asking if the District had considered whether Student may have dyslexia. Manganiello discussed why she believed that Student did not have dyslexia. The team then went on to other topics including Mother requesting the addition of a toileting goal which was adopted. Seftel did not believe that Mother was requesting an assessment at the meeting. Manganiello also testified that Mother was agitated over Student’s academic levels. She recalls that Mother brought up dyslexia and that there was a discussion where Manganiello opined that Student’s issues were because of her medical condition and resulting processing problems. Manganiello recalls Mother asking whether there was an assessment for dyslexia. Manganiello did not believe that Mother made a specific request for an assessment for dyslexia.

20. Anthony Bogle, the Crown Valley principal, regularly conducts a weekly meeting with special education staff where staff would discuss calendaring matters regarding IEP meetings, notices, scheduling assessments and follow-up IEP meetings as well as the preparation of assessment plans. At the weekly staff meeting following the December 8, 2009 IEP team meeting, no one mentioned that there was a request from Mother for an assessment. Later, Bogle spoke to members of the team who all informed him that no request for an assessment was made at the IEP meeting.

21. Bierman described Mother as someone who speaks her mind and is very active in advocating for her children. Mother had almost daily contact with Manganiello as well as frequent contact with the Crown Valley principal, Bogle, for six months and never broached the subject of a dyslexia assessment. Mother admitted that, following the December 8, 2009 IEP meeting, she never once inquired about the status of the dyslexia assessment.

May 26, 2010 Resolution Session

22. Additionally, Student contends that a District representative, Bogle, made an admission at the May 26, 2010 Resolution Session that the District acted improperly by not conducting the dyslexia assessment requested by Mother. The District contends that no such admission was made.

23. Present at the Resolution Session on behalf of Student was Mother, who was accompanied by two advocates from the Special Education Law Firm, James G. Campbell and James Wiley Campbell (Wiley Campbell).⁵ Dr. Crystal Bejarano, Internal Dispute Resolution Specialist, and Bogle attended on behalf of the District. The District presented a confidentiality agreement which Mother and her advocates refused to sign. Wiley Campbell insisted that the meeting proceed with everything being “on the record.” The District agreed to proceed with the meeting.

24. Wiley Campbell testified that he attends IEP meetings and resolution sessions for the purpose of testifying at later hearings. Wiley Campbell recalled that Bogle assured Mother that “the mistake” would not happen again. Wiley Campbell assumed the “mistake” referred to the failure to forward an assessment plan following the IEP meeting. Mother testified that she complained that the IEP team members did not listen to what she had to say, and that Bogle apologized and would “correct” this by speaking to his staff. Mother also stated that Bogle “seemed” to state that the District should have assessed for dyslexia. When asked for specifics of what Bogle said, Mother could not recall.

25. Bogle recalls stating that he would instruct his staff to listen to Mother’s concerns since she complained that she felt that her concerns were not heard. He denies that he stated in any form that his staff failed to act on a request by Mother for a dyslexia assessment. Bejarano denied that Bogle made an admission that Mother had made a request for assessment that was failed to be followed up by the District or its IEP team members. She did not recall if Bogle apologized to Mother or stated that the IEP team members should be more respectful to Mother’s opinions.

26. The ALJ finds that no admission was made by Bogle. Mother’s testimony that she complained about the IEP team failing to take her opinions seriously corroborates Bogle’s testimony. Mother failed to corroborate James Wiley Campbell’s testimony that Bogle had made an admission. It would be expected that such an admission would have been easily remembered by Mother had it, in fact, been made.

⁵ Wiley Campbell is the son of Student’s counsel and James G. Campbell.

May 10, 2010 Request for Assessment

27. On May 10, 2010, Student's attorney, Jennifer Guze Campbell, forwarded an 11-page letter to Bogle requesting the District to conduct a comprehensive assessment in Student's areas of suspected disability which included: "anxiety, ADHD, *dyslexia*, developmental delays, cognitive function, executive function, gross motor, fine motor, speech, language, auditory processing, hearing, sensory, sensory integration, visual processing, vision, reading, mathematics, writing, social interaction, hand and eye coordination, health problems, toileting problems, and working memory." (Emphasis added.)

28. On May 11, 2010, Student, in a manner of gamesmanship, filed with OAH and served on Bogle her due process complaint without permitting the District reasonable time to respond to the request for a comprehensive assessment.

29. On May 21, 2010, the District presented an assessment plan to assess Student in the areas of academic achievement, speech/language, intellectual development, social/emotional/adaptive behavior, perceptual processing, and health/physical status. Bejarano, a school psychologist,⁶ opined that each of the areas listed in the May 10, 2010 letter would be covered by the planned evaluations. This opinion went uncontroverted by Student.

30. Mother consented to the assessment plan on May 31, 2010. Currently, the District is in the process of conducting the comprehensive assessment.

LEGAL CONCLUSIONS

1. Student contends that the District committed a procedural violation of the Individuals with Disabilities Education Act (IDEA) when the District failed to conduct an assessment for dyslexia after Mother made such a request at the December 8, 2009 IEP team meeting. Student further alleges that District's IDEA violation resulted in Student suffering a loss of educational benefit and that Mother was deprived of her right to participate in the IEP process.

Burden of Proof

2. The petitioner in a special education administrative hearing has the burden to prove his or her contentions at a due process hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S. Ct. 528, 163 L.Ed.2d 387].) Accordingly, Student has the burden of proof as to all issues.

⁶ Bejarano received a B.A. in physical education in 1999, an M.S. in school psychology in 2003 and a Psy.D. in 2007. She has worked as a school psychologist since August 2003. She is also an adjunct professor at Alliant International University in education psychology.

*Assessments*⁷

3. After a child has been deemed eligible for special education, reassessments must be performed if warranted by the child's educational or related services needs. (20 U.S.C. § 1414 (a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) Absent an agreement to the contrary between a school district and a student's parents, reassessments must not occur more than once a year, or more than three years apart. (20 U.S.C. § 1414 (a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) Upon parent request, the local educational agency must conduct a reassessment, even when the school determines that no additional data is needed to determine the student's educational needs. (20 U.S.C. § 1415 (a)(2)(A)(ii); 34 C.F.R. § 300.303 (a)(2); Ed. Code, § 56381, subd. (a)(1) & (d).)

4. A local educational agency must assess a special education student in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304 (c)(4); Ed. Code, § 56320, subd. (f).) A local educational agency must use a variety of assessment tools and strategies to gather relevant information, (20 U.S.C. § 1414(b)(2)(A)), and shall not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2)). Assessments must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304 (c)(6).) The school district must use technically sound testing instruments. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3).) The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services. (20 U.S.C. § 1414 (a)(1)(E); 34 C.F.R. § 300.302.)

Procedural Violations and Denial of a FAPE

5. Notwithstanding these detailed procedural requirements for assessments and reassessments, the decision of a due process hearing officer shall be made on substantive grounds based on a determination of whether the child received a FAPE. (20 U.S.C. § 1415 (f)(3)(E); Ed. Code, § 56505, subd. (f)(1).) In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: impeded the right of the child to a FAPE; significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a free appropriate public education to the child of the parents; or caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E); Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) Recent Ninth Circuit cases have confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High School Dist.*

⁷ The IDEA refers to "evaluations" where California law and regulations refer to "assessments." Except when quoting federal statutes and regulations, this Decision will use the term "assessments."

(9th Cir. 2006) 464 F.3d 1025, 1033, fn. 3; *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.)

6. The hearing officer “shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program.” (Ed. Code, § 56505, subd. (j).)

Determination of Issue

Mootness

7. Mootness describes the doctrine under which courts decline to hear a case because it fails to present an existing controversy. (see *Wilson v. Los Angeles County Civil Service Comm.* (1952) 112 Cal.App.2d 450, 453.) Here, Mother, through her counsel, made a written request for the District to conduct a comprehensive assessment which includes assessing for dyslexia. (Factual Finding 27.) The District presented an assessment plan and Mother gave her consent on May 21, 2010. The District is currently in the process of conducting that assessment. (Factual Findings 29 and 30.) Here, Student is requesting that the District be ordered to conduct an assessment for dyslexia which is already in the process of being conducted. Thus, this matter is moot since the District is already assessing Student for dyslexia and there is no relief that the ALJ can grant.

Student Failed to Meet Her Burden that Mother Made a Request for a Dyslexia Assessment at the December 8, 2009 IEP Meeting

8. In order to prevail on the merits, Student has the burden to prove that (1) an actual request for a dyslexia assessment was made by Mother at the December 8, 2009 IEP team meeting, and either that (2) Student suffered a loss of educational benefit because of the District’s failure to conduct the requested assessment, or (3) the District’s failure to conduct the requested assessment resulted in a deprivation of Mother’s right to meaningful participate in the IEP decision-making process.

9. Student failed to meet her burden of proof that Mother did make a specific request for a dyslexia assessment at the December 8, 2009 IEP team meeting. Mother and her witness, Bierman, were unable to specifically recall the discussion regarding dyslexia. Mother did recall asking, “Can’t she be tested for dyslexia?” But she was unable to place this in context to the discussion. On the other hand, District IEP team members, Seftel and Manganiello, recalled that there was a discussion about dyslexia and Student and that no specific request was understood to have been made by Mother. In fact, Manganiello specifically recalled explaining the reasons that she did not think dyslexia was applicable to Student’s reading and math learning problems. The fact that the District team members did not feel an assessment request was made is corroborated by the fact that no mention of a request was related to Bogle at the weekly meeting following the December 8, 2009 IEP

