

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

In the Matter of:

PAJARO VALLEY UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH No. N 2005080792

DECISION

Administrative Law Judge Steven C. Owyang, State of California, Office of Administrative Hearings, heard this matter in Watsonville, California, on September 15, 2005. Interpreter Raquel de Fernandez provided Spanish-English translation.

Petitioner Pajaro Valley Unified School District (District) was represented by attorney Laurie E. Reynolds of Lozano Smith.

Attorney Luis Angel Alejo of California Rural Legal Assistance represented respondent Student (Student), who was not present. Respondent's mother, Mother, was present.

District's exhibits 1 through 10 and Student's exhibits A through C are in evidence. Post-hearing briefs were due and filed by both parties on September 29, 2005. In addition Student submitted two invoices which have been marked collectively as exhibit D for identification only. The matter was submitted on September 29, 2005.

ISSUES

1. Did the District conduct an appropriate educational assessment of Student?
2. Is Student entitled to an independent educational assessment at public expense?

FACTUAL FINDINGS

1. Student is a 14 year old boy in the Pajaro Valley Unified School District. Student is currently in the eighth grade at E.A. Hall Middle School in Watsonville. Student previously attended Lakeview Middle School.

2. Student's discipline report shows 96 incidents for the period May 15, 2003, through February 4, 2005. The incidents included many instances of Student being disruptive, bringing gum and seeds to class, failing to attend detention, being tardy to class, cutting Saturday school, using profanity, leaving graffiti, shooting rubber bands, and being defiant.

3. Student has had problems at school since the third grade. His grades have been poor, and he has a history of behavior and discipline problems. He has been absent from school at about a 25 percent rate. His grades in the sixth and seventh grades have mostly been F's and D's, with a few C's. His only B's have been in physical education. His grade point average is 0.778. He cannot write in cursive. He is often depressed and wants to be alone in the attic. Student is 14 years old, but does not have friends his own age. He prefers to play with younger children. Student's father is in Mexico and is not involved in his upbringing. Student's mother is Mother, who is a monolingual Spanish speaker. MOTHER is very worried about her son's education and wants the District to address his educational needs. She described her son as intelligent and quick, but also forgetful, easily distracted, and disruptive in the classroom.

4. Student was suspended from school for bringing a multi-tool knife to school on January 21, 2005. Principal O'Brien at Lakeview Middle School recommended that, in view of his prior discipline problems, Student be expelled from school. Expulsion proceedings were started. In August 2005, the District rescinded Student's proposed expulsion and allowed him to return to school at E.A. Hall Middle School.

5. A March 14, 2005, letter from Student's attorney to Ron Kinninger, Director Child Welfare and Attendance, and Carol Lankford, SELPA/Special Education, requested that the District conduct a special education assessment to determine whether Student had unmet special education needs. Student continued to be on suspension at the time of the request.

6. A March 21, 2005, letter from Dea Pretzer, Assistant Director of the District's SELPA Special Services Department, to Student's attorney acknowledged receipt of the March 14 request for a special education assessment of Student and noted that school psychologist Karrie West had an appointment with MOTHER scheduled for "tomorrow, March 21 [sic], 2005." The purpose of the meeting was to explain the proposed assessment plan for Student and to receive MOTHER's written permission to assess. Pretzer's letter also stated that Student would be offered home instruction during the period of assessment, and that home instruction would begin following spring break.

7. MOTHER signed a Spanish language version of the District's Notice of Referral and Proposed Action form on March 22, 2005. The form recites that MOTHER received a copy of her rights and procedural safeguards. Neither the copy of rights and procedural safeguards nor the contents thereof are in evidence.

8. West conducted an informal interview, through an interpreter, with MOTHER to learn about her concerns and to obtain Student's developmental history. MOTHER was concerned about Student's lack of attention, and wanted him assessed to see if his inattentive symptoms were affecting his academic performance. MOTHER also reported that he slept a lot, always had temper tantrums, cried excessively, bit his nails, banged his head, and rocked back and forth. West gave MOTHER the District's proposed assessment plan, which indicated that the District would assess Student's health/development, perceptual/motor ability, general cognitive ability, academic/pre-academic performance, communication development, and social/emotional/behavioral development.

9. MOTHER signed a Spanish language version of the District's special education assessment plan and consent form on March 23, 2005. The form recites that MOTHER received a copy of her rights and procedural safeguards. Neither the copy of rights and procedural safeguards nor the contents thereof are in evidence.

10. In addition to school psychologist West, the District's assessment team included special education teacher Mary Ann Sheehy, speech/language/hearing specialist Veronica Esqueda, and school nurse Judy Schwarze. The individuals on the team were qualified to conduct the assessment.

11. The District considers the testing and assessment materials and procedures used for Student's assessment not to be racially, culturally, or sexually discriminatory, and there was no evidence to the contrary.

12. West reviewed some of Student's records. His California Standards assessment showed him at a basic level in math and language arts. His District fifth grade reading test showed him above grade level, reading at the 6.9 grade level. His CAT6 scores from the sixth grade showed his achievement in the average to low average range in reading, math, and language arts. He had a history of poor attendance at school and after-school programs. Student's mother had inconsistent attendance at scheduled parent-teacher conferences.

13. West conducted Student's psychological testing, including cognitive, perceptual, and social/behavioral tests. West interviewed MOTHER, teachers and a school counselor, and observed Student. She observed Student to be attentive, well-mannered and appropriate. West administered the Cognitive Assessment System (CAS), a standardized test of intelligence. Student's performance on the CASE indicated possible deficits in the area of visual-motor integration, as his scores on paper-pencil tasks appeared to be deflated. Therefore West administered the Universal Nonverbal Intelligence Test (UNIT), which

showed Student's IQ as 101, in the average range. Based on his scores on the UNIT, West concluded that Student did not have a nonverbal learning disability.

14. West gave Student three standardized tests of perceptual skills. He scored well below average on the Beery-Buktenica Developmental Test of Visual Motor Integration Skills (VMI), confirming West's suspicion of a visual motor integration deficit. Student scored in the average range on the Test of Visual Perceptual Skills (TVPS), a test without a motor component; West considered this result an additional confirmation that Student's deficit was in visual motor integration skills. West administered the Test of Auditory Perceptual Skills (TAPS) in Spanish as well. Student did not score well on the TAPS, due to his lack of knowledge of Spanish vocabulary. West did not administer the test again in English, because this area was tested on both the CAS and the Woodcock-Johnson III, in which Student scored in the low average range.

15. West administered three tests in the area of social/emotional and behavioral functioning. She administered a sentence completion test, to obtain information regarding Student's social/emotional status. Student's statements were not overly negative or overly positive, and showed that he misses his father. West administered the Behavior Assessment System for Children (BASC), a survey that was completed by Student, his mother, and four of Student's teachers. Interpreting MOTHER's BASC responses according to its publisher's guidance, West determined that MOTHER's many negative responses had to be interpreted with "extreme caution" and were of doubtful validity. The BASC surveys completed by Student's teachers demonstrated to West that Student's behavior was inconsistent between settings, suggesting that his behaviors were selective, rather than the result of a disability. To follow up on the BASC, West administered the Disruptive Behavior Disorder Rating Scale. The responses showed that Student's behavior varies substantially from setting to setting, including classroom to classroom, again suggesting to West that his behavior is selective, and not the result of a disability. Based on the assessments she had conducted, West concluded that Student did not have Attention Deficit Disorder (ADD), Attention Deficit Hyperactivity Disorder (ADHD), or Pervasive Developmental Disorder (PDD).

16. Licensed speech therapist Veronica Esqueda conducted Student's speech and language assessment on March 24, April 4, and April 18, 2005. Esqueda gave Student the Receptive One Word Picture Vocabulary Test and the Expressive One Word Picture Vocabulary Test. Student scored within the average range on both tests. Esqueda also gave the Clinical Evaluation of Language Fundamentals. Esqueda considered all the scores valid, except for the Recalling Sentences subtest, because Student was distracted by his friends loitering outside the assessment room during the administration of the subtest. Esqueda, in consultation with program specialist Linda Maffei, considered it unnecessary to re-administer the subtest as other tests had covered the same skill and did not show a deficit. Finally, Esqueda gave informal evaluations of Student's voice, fluency, and articulation and found them within normal limits. The results of the speech and language assessments led Esqueda to conclude that Student has no disability in this area. Esqueda left the District before the hearing in this matter.

17. School nurse Judy Schwarze conducted Student's health and development assessment on April 13, 2005. MOTHER reported to Schwarze that Student reached his developmental milestones later than his siblings. He spoke single words at 10 months, and simple sentences at 18 months; both these milestones are considered within normal range. Student had no health issues, and passed vision and hearing screenings. Schwarze gave Student a dental screening, and advised his mother to seek further dental care for Student.

18. Special education teacher Mary Ann Sheehy administered Student's academic assessment on April 29, 2005. Sheehy administered the Woodcock Johnson-Revised and the Woodcock Johnson-III. Student scored at or above grade level in many areas, including reading and spelling. His fluency scores were significantly lower than his content scores. Sheehy considered this a sign of Student's attendance problem, consistent with Student's history of poor attendance.

19. In addition to serving on the assessment team, Sheehy was assigned to provide home instruction to Student during the assessment process and through the end of the school year, a period of about ten weeks. Sheehy found Student cooperative while working with her in the home setting, but noted that he would not finish the homework she assigned to him.

20. In a report dated May 16, 2005, the District's assessment team determined that Student was not eligible for special education services. The assessment team concluded that Student did not qualify for special education services under "Other Health Impaired, Specific Learning Disability, and Speech/Language Impairment." The team noted that no other disabling condition was suspected. The team recommended that Student: be allowed to type his essays; have extended time for testing; have preferential seating; be given make-up assignments when absent from school; attend the after school tutorial program; write homework assignments in a homework planner and have his teacher verify assignments in the planner at least weekly; copy lengthy classroom notes and questions; repeat directions; be verbally praised for following classroom rules; have family counseling at family expense; have bereavement counseling (regarding recent deaths in Student's extended family); and, be referred to the 504 accommodation coordinator regarding his visual motor integration processing disorder.

21. The May 16, 2005, report had signature lines for, and was signed by, assessment team members Karrie West, Mary Ann Sheehy, Veronica Esqueda, and Judy Schwarze. There was no signature line for MOTHER, and MOTHER did not sign the assessment report. Student's post-hearing brief refers to an "evaluation meeting on May 16, 2005" at which MOTHER was informed of the District's "sole determination that [Student] was not eligible for special education services." The evidence did not show that MOTHER (or Student's attorney) were included in the assessment team's determination that Student was not an individual with exceptional needs eligible for special education services. The notice provided to MOTHER about the assessment report, or any meeting regarding the report, is not in evidence.

22. On June 1, 2005, Student's attorney wrote to the District, to the attention of Ron Kinninger and Carol Lankford, to request an independent educational assessment at public expense. Student's attorney also wrote:

In addition, please provide me with notice of any future meetings relating to this case. I was informed by Ron Kinninger that I would get notice about the report on the assessment meeting, but I never received a phone call or letter about it. I only received a copy of the report yesterday via fax after I requested it.

23. In a June 21, 2005, letter from Carol Lankford to Student's attorney, the District denied the request for an independent educational evaluation at public expense, stating:

As you know, our District recently completed a special education evaluation for [Student]. Based upon the results of this evaluation, [Student's] IEP team found that he was not eligible for special education. It is the District's belief that [Student] was assessed by qualified personnel in all areas of suspected disability, using appropriately selected tests, and that all areas required by law were addressed. The assessment was thorough and comprehensive. The conclusions of the assessment team are valid. Therefore, your request for an independent educational evaluation at public expense is denied. As required by law, the District is prepared to go to due process to defend its evaluation.

Lankford's letter did not mention any participation by Student's mother. Instead, her letter indicated that District personnel made the determination regarding Student ("[Student's] IEP team found that he was not eligible for special education." "The assessment was thorough and comprehensive. The conclusions of the assessment team are valid.").

Lankford went on to state that a 504 accommodation plan had been developed for Student on June 10, 2005.

24. In a June 27, 2005, letter to the District, Student's attorney again requested an independent educational assessment for Student at public expense. The letter asserted that the District was required, pursuant to Title 34 Code of Federal Regulations, section 300.502, subdivision (b)(4), to provide Student and MOTHER information regarding where an independent assessment may be obtained, and noted that thus far the District had not provided such information although Student had requested an independent evaluation nearly a month earlier.

Student's attorney again asked to be notified of meetings regarding Student's case:

Lastly, please provide me with notice of any future meetings relating to this case. I was informed by Mr. Ron Kinninger in April that I would get notice about the assessment report meeting, but I never received a phone call or letter about it. I only received a copy of the report on May 31st after I requested it and after the Assessment Report meeting was already held while I was out of state. As the attorney for [Student] and MOTHER, I am again requesting to be properly notified and informed about any such future meetings.

25. The District, through its attorney, replied to the June 27, 2005, letter on August 4, 2005. The District stated that it was prepared to defend its assessment at a due process hearing, and that it would file for hearing shortly. The District provided three sources for independent assessments: David A Tony Hoffman; Developmental Learning Solutions; and, Mark Burdick.

Although it did not refute Student's attorney's assertions that Ron Kinninger had assured him he would be notified about meetings, the District confirmed that it had not notified Student's attorney about meetings in Student's case:

The District has notified your client of all meetings which your client is entitled to attend. It is the District's practice to notify the parent, and not the parent's attorney, of such meetings. The parent may then notify his or her attorney of any meeting or proceeding as the parent deems appropriate. The District will continue this practice in this matter.

26. On August 25, 2005, the District filed for a due process hearing.

27. On September 1, 2005, Student hired Dr. Mark A. Burdick to conduct an independent special education evaluation. Dr. Burdick is a licensed clinical psychologist, licensed educational psychologist, and independent educational consultant.

28. Dr. Burdick met with Student and MOTHER, administered various tests to Student, and reviewed the District's assessment of Student, as well as Student's discipline record. He did not review Student's 504 accommodation plan, and did not recall reviewing Student's academic records. Dr. Burdick did not speak with Student's teachers, but reviewed their observations in the District's assessment. He did not speak with Karrie West or anyone else on the District's assessment team. He was somewhat familiar with the Cognitive Assessment System and unfamiliar with the UNIT.

29. Dr. Burdick felt the District's assessment was deficient in a number of areas. He felt that the District's assessment provided no explanation of Student's lack of success at

school or of delays in Student's speech development. He also felt the District did not fully explore Student's inattention, deficits in executive functioning, and rocking and head banging behaviors. Dr. Burdick felt Student's acting out, rocking and head banging behaviors might indicate Student had a pervasive developmental disorder and that the District should have delved further into the matter. While Dr. Burdick generally agreed that the tests and methodologies employed by the District were appropriate, he felt the District could and should have used additional assessment tools to determine why Student was not succeeding in school. Moreover, based on his assessment of Student, Dr. Burdick questioned Student's social skills. Dr. Burdick felt that Student manifested social inhibition and introversion that might explain Student's attendance issues.

LEGAL CONCLUSIONS

1. When a parent disagrees with an assessment obtained by the public educational agency, the parent has the right to an independent educational assessment (also called an independent educational evaluation or 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, subd. (b), and 56506, subd. (c), 34 C.F.R. § 300.502.) Student requested an IEE at public expense on June 1, 2005, and again on June 27, 2005. The District filed for a due process hearing on August 25, 2005. The District is the moving party and has the burden to demonstrate that its assessment was appropriate.

2. Government Code section 56329 provides, in pertinent part:

As part of the assessment plan given to parents or guardians pursuant to section 56321, the parent or guardian of the pupil shall be provided with a written notice that shall include all of the following information:

(a) Upon completion of the administration of tests and other assessment materials, an individualized education program team meeting, including the parent or guardian and his or her representatives, shall be scheduled, pursuant to section 56341, to determine whether the pupil is an individual with exceptional needs as defined in section 56026, and to discuss the assessment, the educational recommendations, and the reasons for these recommendations. A copy of the assessment report and the documentation of determination of eligibility shall be given to the parent or guardian.

Although MOTHER signed forms reciting that she had received a copy of her rights and procedural safeguards, neither the copy of her rights and procedural safeguards nor the contents thereof are in evidence. The record does not show that the District provided MOTHER the specific written notice required by section 56329.

3. State and federal law contemplates a substantive role for Student's mother and attorney in the assessment process. Student contends the District's assessment was not appropriate because MOTHER was "completely excluded" from the determination whether Student is a child with a disability. Student asserts that the determination was made, contrary to law, solely by school psychologist West, special education teacher Sheehy, speech/language/hearing specialist Esqueda, and school nurse Schwarze.

State law provides:

The parents or guardians of a pupil who has been referred for initial assessment, or of a pupil already identified as an individual with exceptional needs, shall be afforded an opportunity to participate in meetings with respect to the identification, assessment, and educational placement, pursuant to section 56342.5 and subsections (b) and (c) of section 56341.5, of the pupil and with respect to the provision of a free appropriate public education, as provided in section 300.501 of Title 34 of the Code of Federal Regulations. (Ed. Code, § 56304, emphasis added.)

Federal law requires:

Upon completing the administration of tests and other evaluation materials ... [a] group of qualified professionals **and the parent of the child** must **determine** whether the child is a child with a disability, as defined in § 300.7. (34 C.F.R. § 300.534, subd. (a), emphasis added.)

And, as noted in Legal Conclusion 2, Government Code section 56329, subdivision (a), requires that the individualized education program team, "including the parent . . . and . . . her representatives," schedule a meeting "to determine whether the pupil is an individual with exceptional needs" and to discuss "the assessment, the educational recommendations, and the reasons for the recommendations." Finally, the District was obligated to provide a copy of the assessment report and the documentation of eligibility to MOTHER.

Thus the District was obliged to involve MOTHER, after the completion of the administration of tests and other assessment materials, in the determination whether Student is a child with a disability or an individual with exceptional needs. The District has not established that it met this obligation.

The District's May 16, 2005, assessment report determined that Student was not eligible for special education services. It was signed by assessment team members Karrie West, Mary Ann Sheehy, Veronica Esqueda, and Judy Schwarze. There was no signature line for MOTHER, and MOTHER did not sign the assessment report. There is no indication in the report itself, or elsewhere in the evidence, that MOTHER took part, after the

administration of tests and other assessment materials, in that determination. Moreover, while the parties alluded to an assessment meeting, there is scant evidence about any such meeting or MOTHER's participation therein. At most, it appears that the District provided MOTHER (and later, Student's attorney) a copy of the assessment report that had already determined that Student did not qualify for special education services.

Moreover, correspondence in the record between Student's attorney and the District and the District's attorney demonstrates further that the District did not meet its obligation to include Student's representative in a meeting to determine whether Student is a pupil with exceptional needs. (Ed. Code, § 56329, subd. (a).) Letters from Student's attorney to the District repeatedly asserted that the District failed to notify him about the assessment meeting despite assurances from Ron Kinninger that he would be notified. Finally, the District's August 4, 2005, letter confirms the "District's practice to notify the parent, **and not the parent's attorney**, of such meetings." (Emphasis added.)

The District has not demonstrated that its assessment process complied with the state and federal requirements set forth in Education Code sections 56304 and 56329, subdivision (a), and Title 34 Code of Federal Regulations section 300.534, subdivision (a).

4. Education Code section 56320 sets forth additional requirements that must be met in the assessment process. This section requires that the assessment be conducted by qualified persons and not be racially, culturally, or sexually discriminatory. Tests and other assessment materials must be provided and administered in the pupil's native language, must have been validated for the specific purpose for which they are used, must be administered by trained personnel in conformance with the instructions provided by the producer of the tests and other assessment materials, except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. Tests and other assessment materials must include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient. No single procedure may be used as the sole criterion in determining the Student's educational program. The District established that it complied with these requirements.

Additionally, the Student must be assessed in all areas related to the suspected disability. (Ed. Code, § 56320, subd. (f); 34 C.F.R. § 300.532, subd. (g).) The District's assessment plan called for Student's health/development, perceptual/motor ability, general cognitive ability, academic/pre-academic performance, communication development, and social/emotional/behavioral development to be evaluated. Student, citing the testimony of Dr. Burdick, contends the District's assessment was not appropriate. Dr. Burdick felt the District's assessment was deficient in a number of areas. In particular, Dr. Burdick noted that the District's assessment provided no explanation of Student's lack of success at school or of delays in Student's speech development. He also felt the District did not fully explore Student's inattention, deficits in executive functioning, and rocking and head banging behaviors. Dr. Burdick opined that Student's behaviors might indicate a pervasive developmental disorder and that the District should have delved further into the matter.

Additionally, Dr. Burdick felt that Student manifested social inhibition and introversion that might explain Student's attendance and academic problems.

Because an independent educational assessment at public expense will be ordered in this matter, it is not necessary for this decision to determine whether the District adequately or appropriately assessed student in all areas related to his suspected disability. Student, through his mother and representatives, and the District will have the opportunity to discuss and resolve any differences of opinion about his assessment and eligibility for special education services.

5. Pursuant to Legal Conclusions 1, 2, and 3, the District has not shown that its assessment of Student was conducted appropriately. Therefore, Student is entitled to an independent educational assessment at public expense. (Gov. Code, § 56329, subd. (b).)

6. Student is the prevailing party on all issues.

ORDER

1. Student is entitled to an independent educational assessment at public expense. Upon receipt of written proof, the District shall reimburse Student for the cost of that independent educational assessment.

2. The District shall comply with the requirements of Education Code sections 56304 and 56329, subdivision (a), and Title 34 Code of Federal Regulations section 300.534, subdivision (a). This shall include providing MOTHER and Student's attorney notice and opportunity to participate in meetings concerning Student's assessment, educational placement, and eligibility for special education services.

DATED: October 21, 2005

STEVEN C. OWYANG
Administrative Law Judge
Office of Administrative Hearings

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. Or, a party may bring a civil action in United States District Court. (Ed. Code, § 56505, subd. (k).)