

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

In the Matter of:

ORANGE UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2006100003

DECISION

Administrative Law Judge (ALJ) Susan A. Ruff of the Office of Administrative Hearings, Special Education Division, State of California, heard this matter on October 30, 2006, in Orange, California.

Adam J. Newman, Esq., of Atkinson, Andelson, Loya, Ruud & Romo, represented Petitioner Orange Unified School District (District) at the hearing. Dr. William Gee, Director Of Special Education and Pupil Services, and Lynn Gonzales, Special Education Program Coordinator, appeared on behalf of the District.

Hans A. Gillinger, Esq., and Timothy A. Adams, Esq., of Roberts & Adams, represented Respondent (Student). Student's parents were present during the hearing. Student was not present.

The District's due process complaint was filed on September 29, 2006. The Notice of Hearing was served on October 2, 2006, and no continuances were granted. During the hearing on October 30, 2006, the parties requested time to file written closing arguments. The matter was deemed submitted as of November 13, 2006, upon receipt of written closing arguments from the parties.¹

¹ The parties' written closing arguments were marked as exhibits for the purpose of ensuring a complete record. The District's closing argument is marked as Exhibit 16, and the Student's closing argument is marked as Exhibit B.

ISSUE

May the District assess Student pursuant to the District's August 30, 2006, proposed assessment plan?

FACTUAL FINDINGS

1. Student is a 12-year-old girl who has twice been assessed by the District and twice found ineligible for special education services. The issue in this case is whether it is appropriate for the District to assess Student once again. A local education agency is required to reassess a child when the educational and related services needs of the child warrant reassessment or if the child's parents or teacher requests a reassessment. (Ed. Code, § 56381, subd. (a)(1); 20 U.S.C. § 1414(a)(2)(A)(i), (ii).)

2. The first District assessment occurred in 2003, when Student was in the third grade. Student was referred for an assessment at that time because of difficulty in math. The assessment team noted that Student had a weakness in auditory processing, but not a "processing deficit." The assessment results found no evidence of a significant discrepancy between cognition and achievement.

3. On May 19, 2003, an IEP team met to consider the assessment. The team determined that Student did not meet any of the eligibility categories for special education set forth in the law. Student's parents attended that IEP meeting and consented to the IEP team findings.

4. Student continued to struggle in school, particularly with mathematics. In February 2005, Student was once again referred for assessment. Student's mother signed an assessment plan on February 17, 2005, consenting to have Student assessed in the areas of pre-academic/academic achievement, social/emotional behavior, psycho-motor development, intellectual development, health and development, and vocational/prevocational.

5. The 2005 assessment team report was compiled by Kristine Nelson. Nelson is a credentialed school psychologist who has worked for the District for approximately four years. As part of the assessment, Nelson conducted two classroom observations of Student. Each observation lasted approximately 30 to 45 minutes.

6. Nelson also administered the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) to Student. Student's full-scale intelligence quotient (IQ) score was 107, in the average range of cognition. Another district employee administered the Woodcock-Johnson III (WJ-III) achievement test to Student. Nelson compared Student's full scale IQ score to the achievement test scores for Student on the WJ-III and determined that there was not a significant discrepancy between Student's cognitive ability and achievement. Student's scores in the categories of reading comprehension and written expression were higher than her full-scale IQ score.

7. An IEP team meeting was held on March 31, 2005, to discuss the assessment results. The IEP team found that Student was not eligible for special education. Student's parents attended the IEP team meeting and signed the IEP, consenting to the team's findings. However, during the hearing, Student's mother testified that she disagreed with the team's findings and only signed the form because she believed she had no choice. The notes to the IEP stated: "review of parent rights offered – parent waives reading of rights."

8. In April and May, 2006, Student's parents hired Perry D. Passaro, a licensed psychologist and licensed educational psychologist, to perform an independent assessment of Student. Dr. Passaro did not testify at the hearing, but according to his assessment report, he reviewed the previous District assessments and found a "22 point difference between [Student's] WISC-IV Verbal Comprehension and Perceptual Organization." Dr. Passaro opined that the difference was "both clinically and statistically significant." In his opinion, the "magnitude of this difference...speaks to an underlying cognitive processing deficit." Dr. Passaro administered various tests to Student, but did not observe Student in a classroom setting. He concluded that Student "may qualify for Special Education services primarily due to a Specific Learning Disability (Reading and Mathematics)...She may also qualify for Special Education services primarily due to an Other Health Impairment (disorder of attention)..." Dr. Passaro found that Student had "Attention-Deficit/Hyperactivity Disorder, Predominantly Inattentive Type" and "Generalized Anxiety Disorder (including Overanxious Disorder of Childhood)." He also found that Student had a cognitive processing deficit in the domain of memory.

9. On June 9, 2006, counsel for Student sent correspondence to the District. The letter mentioned the independent assessment, but did not attach a copy. The letter requested an immediate IEP meeting to discuss Dr. Passaro's assessment and Student's eligibility for special education.²

10. On July 14, 2006, counsel for the District responded to the letter, requesting a copy of the assessment. Student's counsel sent a copy of the assessment report to the District by letter dated July 14, 2006.

11. Around the end of August 2006, Michelle Bolton, a school psychologist with the District, had two telephone conversations with Student's mother about a new assessment of Student by the District. Bolton and Student's mother testified to slightly different versions of these conversations.

² During the hearing, Student introduced evidence that this IEP meeting had not yet been held and that the District had only recently noticed the meeting for either October 27, 2006 (the Friday before this due process hearing), or October 31, 2006 (the day after this hearing). Because the present proceeding involves only the District's right to assess Student, no findings are made herein regarding the appropriateness of the District's response to the request by Student's parents for the IEP meeting. Student has a separate due process proceeding pending before the Office of Administrative Hearings.

12. According to Bolton, the first conversation occurred prior to August 30, 2006, although Bolton could not recall the specific date. Bolton attempted to set up a meeting with Student's mother to discuss the District's proposal to reassess Student. Student's mother told her that Student's parents would not consent to the assessment, that it was too late and that it was "between the lawyers now." During the second telephone conversation, Bolton and Student's mother discussed logistical arrangements for Student's mother to sign the District's written assessment plan in order to formally refuse the assessment.

13. Student's mother testified that both telephone conversations took place on August 30, 2006, but did not remember any proposal by Bolton for a meeting to discuss the reassessment plan. During the first telephone conversation, Student's mother told Bolton that she would check with her lawyer about the proposed reassessment and call Bolton back. She subsequently called Bolton back on the same day and told Bolton that Student's parents would not consent to the assessment. Student's mother subsequently signed the assessment plan dated August 30, 2006, refusing consent to the District's proposed assessment.

14. Although the two versions of the conversations differ, there is no dispute that conversations took place and that they involved the District's proposed assessment plan. There is no dispute that Bolton telephoned Student's mother to discuss the proposed assessment plan, and there is no dispute that Student's mother told Bolton that the parents would not consent to another District assessment. Although Student's mother could not remember whether Bolton suggested a meeting, it is clear that Student's mother would not have consented to another assessment, whether a meeting was proposed or not.

15. The evidence supports a finding that Bolton telephoned Student's mother in late August 2006, and attempted to set up a meeting to discuss the District's proposed assessment plan, but Student's mother told her that Student's parents would not consent to another assessment by the District.

16. Student's mother believes that further assessment of Student would be harmful to Student. In her opinion, the previous testing of Student made Student feel different from other children and hurt her self-esteem. Student's mother feels the previous assessment conducted by Dr. Passaro was sufficient and that no further tests are necessary. Student did not call Dr. Passaro or any other expert to testify as to possible harm to Student from another assessment.

17. The District witnesses disagreed with Student's mother about the sufficiency of Dr. Passaro's assessment. Dr. William Gee, who has worked in the past as a school psychologist and special education teacher, pointed out that Dr. Passaro did not base his conclusions on any classroom observations of Student. In Dr. Gee's opinion, it would be difficult to make a finding of an attention disorder without comparing a child's conduct in the classroom with the child's conduct in other settings. Bolton explained that Passaro either did not administer the full Kaufman test and subtests to Student or failed to report the scores of the full tests. In particular, Passaro omitted any results for the portion of that test involving reading. In Bolton's opinion that was a significant omission in light of Passaro's

conclusion that Student had a specific learning disability in the area of reading. Dr. Gee explained that because of the discrepancy between Dr. Passaro's assessment and the two prior assessments done by the District, Dr. Passaro's assessment alone would not be sufficient to allow the IEP team to determine Student's eligibility. Instead, a new assessment by the District was required.

18. The evidence supports a finding that the District's request for a new assessment was reasonable in light of the information the District possessed in August 2006. In July 2006, the District received, for the first time, an assessment which concluded that Student might be eligible for special education. The assessment was contrary to two prior assessments conducted by the District more than a year before. The District personnel had concerns about the independent assessor's failure to observe Student in the classroom and had questions about the presentation of some of the results of his testing. Under those circumstances, a new assessment by the District was warranted to help the IEP team determine Student's educational or related services needs.

19. The evidence does not support a finding that there would be any harm done to Student by the new District assessments. No expert testified that Student would suffer any physical or emotional harm from another assessment. The concerns expressed by Student's mother that her daughter might feel "different" if she was singled out for testing again, are not sufficient to prevent the District from assessing Student.

20. Student also contends that the District is not entitled to assess because the District failed to comply with the procedures set forth in 34 Code of Federal Regulations part 300.533(a).³ However, that regulation was not intended to create a formalistic procedure that must be meticulously followed in detail by a District prior to drafting every proposed assessment plan. In fact, the regulation does just the opposite – it envisions a fluid, informal discussion between the parents and the district. The regulation does not even require a formal meeting. (34 C.F.R. § 300.533(b).) In the instant case, in which the need for a new District assessment was obvious given the discrepancies between Dr. Passaro's assessment and the prior District assessments, there was no requirement that the District hold a meeting with the parents to discuss each and every factor set forth in the regulation prior to drafting an assessment plan. Further, the evidence shows that the parents refused to meet with the District regarding the proposed assessment plan or cooperate in the District's attempt to reassess. They cannot complain that there was no meeting when they refused to meet with District personnel.

³ Because this case arose prior to October 2006, Student relies on the former version of that regulation. The current version of the regulation is found at 34 Code of Federal Regulations part 300.305.

LEGAL CONCLUSIONS

Applicable Law

1. A district is required to assess a child in all areas of suspected disability, and no single procedure may be used as the sole criterion for determining whether the child has a disability or for determining an appropriate educational program for the child. (Ed. Code, § 56320, subd. (e), (f); 20 U.S.C. § 1414(b)(2), (3).) A district is required to reassess a child if the district “determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil’s parents or teacher requests a reassessment.” (Ed. Code, § 56381, subd. (a)(1); 20 U.S.C. § 1414(a)(2)(A)(i), (ii).)

2. A District may not perform an assessment without parental consent (Ed. Code, § 56381, subd. (f)), but if the child’s parents refuse to consent to an assessment, the district may bring a special education due process proceeding to compel compliance with the assessment. (Ed. Code, §§ 56501, subd. (a)(3), 56506, subd. (e).) If the parents obtain an independent educational assessment at their own expense, a district must consider the results that assessment with respect to the provision of a free appropriate public education to the child. (Ed. Code, § 56329, subd. (c).)

3. The burden of proof in this proceeding is on the party seeking relief, in this case the District. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

Determination of Issues

4. *The District is Entitled to Assess Student in Accordance with the August 30, 2006, Assessment Plan.*

As set forth in Factual Findings 1 – 20 and Legal Conclusions 1 – 3, the District has met its burden of proving that the District is entitled to assess Student in accordance with the proposed assessment plan dated August 30, 2006.

ORDER

The District’s request to assess Student is hereby granted. If Student’s parents wish to have Student considered for special education services by the District, Student’s parents are ordered to make Student available for assessment by the District, in accordance with the assessment plan dated August 30, 2006.⁴

⁴ In the District’s opening statement during the hearing, the District requested an order of sanctions against Student pursuant to California Code of Regulations, title 5, section 3088, and Government Code section 11455.30, on the basis that Student refused consent to the assessment in bad faith. Sanctions are not appropriate. Student’s parents did nothing more than exercise their due process right to defend themselves in this case and their right to object to a reassessment that they believed would harm their daughter. There is no basis for sanctions.

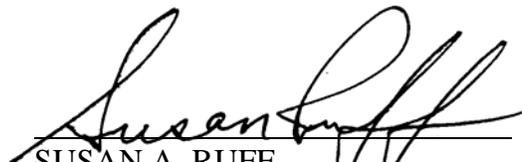
PREVAILING PARTY

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. In accordance with that section the following finding is made: the District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with California Education Code section 56505, subdivision (k).

Dated: November 22, 2006



SUSAN A. RUFF
Administrative Law Judge
Special Education Division
Office of Administrative Hearings