

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

In the Matter of:

TUSTIN UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007040002

DECISION

Administrative Law Judge (ALJ) Clara L. Slifkin, Office of Administrative Hearings, Special Education Division (OAH), heard the above-captioned matter in Tustin, California on October 25, 2007.

Tustin Unified School District (District) was represented by Jennifer Brown and also present was Dr. Lori Stillings, Associate Superintendent, Special Education.

Student was not present. Student was represented by her Parent.

The District's Due Process Hearing Request was filed on March 30, 2007. A continuance was granted on May 2, 2007. Testimony and documentary evidence were received on October 25, 2007. At the request of the parties, closing briefs were to be filed on November 16, 2007. On November 16, 2007, the District filed its closing brief. Student did not file a closing brief. The record was closed on November 16, 2007.

ISSUES

1. Was the District's vision assessment of Student dated September 1, 2006, appropriate and conducted in accordance with the IDEA and Education Code section 56320?

2. If the District's assessment was inappropriate, is Student entitled to Independent Educational Evaluations (IEE) at public expense?

CONTENTIONS OF THE PARTIES

District contends that Student's vision assessment was in accordance with the IDEA and Education Code section 56320. District seeks an order that the District appropriately assessed Student in the area of visual perceptual processing. Student contends that the vision assessment should have been performed by a Doctor of Optometry, either Dr. Rakov or Dr. Ballinger. Student also contends District's assessor did not have sufficient experience in sensory processing and sensory integration to conduct an appropriate assessment.

FACTUAL FINDINGS

Jurisdiction

1. Student is a sixteen year-old girl, born on September 27, 1991, residing within the boundaries of the Tustin Unified School District. At the time of the assessment, she was 14-years old and in the tenth grade at Tustin High School.

Background

2. Student is eligible for special education and related services as a student with a specific learning disability. In a letter dated May 18, 2006, Parent requested an assessment by the District in the area of visual processing because of her concern about Student's lack of educational progress and failing grades.

3. On June 2, 2006, in response to the request District sent an assessment plan to Parent which included an offer to conduct an assessment of Student in the area of visual processing. On June 8, 2006, Parent provided her consent to the proposed assessment plan. District referred Student to Jane Vogel (Vogel) for a complete vision assessment in the areas of visual processing and ocular motor skills.

4. Vogel conducted the vision assessment of Student September 1, 2006. An IEP meeting was scheduled on October 19, 2006, in order to review the vision assessment. Parent cancelled this meeting and the rescheduled meeting on November 1, 2006. The IEP team including Parent met on November 14, 2006, where Vogel discussed the results of Student's vision assessment. The IEP team's discussion continued at IEP meetings scheduled on November 29, 2006, and December 14, 2006. The December 14, 2006 IEP meeting was continued until March 7, 2007, so that Vogel could again be present to discuss her recommendations and the results of the vision assessment. At the March 7, 2007 IEP meeting, Parent disagreed with District's assessment and requested an Independent Educational Evaluation (IEE) in the area of visual processing and also requested that a

doctor of optometry conduct Student's assessment. In a March 20, 2007 letter, District denied Parent's request, asserting that it had conducted a robust assessment in the area of visual processing.

Vision Assessment

5. Assessments must be conducted by individuals who are knowledgeable about the Student's disability, and competent to perform the assessment. The tests and assessment materials must be validated for the specific purpose for which they are used, must be selected and administered so as not to be racially, culturally or sexually discriminatory, and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. The assessors must use a variety of assessment tools including information provided by the parent.

6. Vogel, a vision specialist, who contracts with District, conducted a vision assessment of Student on September 1, 2006. The assessment occurred in one of the psychologists' office at Tustin High School, Student's neighborhood school.

7. Vogel received a bachelor's degree in history from University of California, Los Angeles, and a master's degree in special education from California State University, Los Angeles. She has six different California life teaching credentials in the following areas: visually impaired, severely handicapped, learning handicapped, physically handicapped, administrative and standard elementary. Vogel has worked in the area of special education since 1970, as a teacher, program coordinator, vision specialist and vision consultant. Her experience includes: teaching visually impaired students (10 years); coordinating programs for severely and physically handicapped students (two years); and consulting with school districts and training teachers in different areas of special education (25 years). During this time, Vogel has conducted hundreds of assessments in the areas of vision impairment, visual processing and/or ocular motor skills. Vogel received her training in conducting these assessments when she obtained her various credentials, attended several courses at the College of Optometry and trained directly with optometrists.

8. In recognition for her extensive work with visually impaired students in California, Vogel was selected to serve on several boards. She served as Chair of the Joint Action Committee of Organizations for the visually impaired. Vogel also was a board member on the California Board of Optometry.

9. Although Vogel did not have a doctorate in optometry, she possessed sufficient experience and expertise to competently conduct Student's assessment. She has the education and professional experience to administer the Snellen Equivalent Acuity for Near Point and Distance Vision (Snellen), the Ishihara Color Vision Test (Ishihara), Piaget Right-Left Awareness Test (Piaget), the Slosson Drawing Coordination Test (Slosson) and The Test of Visual Perceptual Upper Level Revised (TVPS-R-UL). Vogel assessed Student's acuity with the Snellen and color vision with the Ishihara. In order to test Student's eye hand coordination or visual motor integration, Vogel administered the Piaget and the Slosson.

Vogel utilized the TVPS-R-UL because it provides a comprehensive analysis of Student's visual perceptual skills. In addition, Vogel has the experience to assess Student's reading behavior, basic eye functions, ocular alignment, ocular motility and focus.

10. To conduct Student's vision assessment, Vogel reviewed Student's complete records, discussed Student with the school psychologist and one of Student's academic teachers. Vogel conducted Student's assessments in her native language, English. During the testing, Student was cooperative and answered questions without hesitation.

11. Vogel used the Snellen, a standard tool to determine how clearly Student sees at various distances. Student's vision with corrections was in the normal range, 20/20. Vogel administered the Ishihara to Student. Student identified all of the numbers. Thus, Student did not have any deficits in color discrimination. There are no specific qualifications for administering these tests.

12. Vogel assessed Student's visual motor integration skills by administering the Piaget and the Slosson. There are no specific qualifications required in order to give these exams. Student demonstrated age level skills when given the Piaget. Student was able to identify her right and left body parts and those of her assessor.

13. The Slosson required Student to copy forms three times below each model in the space provided. Vogel found that Student worked quickly, without appearing to be concerned as the task became more difficult. However, at the end, Vogel concluded Student stopped trying and appeared to give up. As a result, she did not pass the Slosson Drawing Coordination Test. Vogel did not recommend further testing in this area because the Slosson is comparable to the Beery Visual Motor Integration Test (VMI),¹ which was conducted as part of Student's Psycho-educational Assessment at about the same time, in November 2006. Vogel testified credibly that another assessment in the area of visual motor integration should not be given because the examination tasks would be repeated. She concluded that repetition would skew the test results and not be a valid measure of Student's abilities. However, Student maintained a functional grip on her pencil during drawing and writing activities. Her printing was legible and well spaced.

14. Vogel administered the TVPS-R-UL (non-motor) as part of Student's vision assessment. This test has the following components: Visual Discrimination, Visual Memory, Visual Spatial Relationships, Visual Form Consistency, Visual Sequential-Memory, Visual Figure Ground and Visual Closure. Student had scores in all areas of visual perception that were at or near the lowest level except in the area of visual closure, which was in the low average range. Vogel found that Student's results on the TVPS-R-UL indicated that Student had significant difficulty in identifying abstract forms in most areas of visual perceptual skills.

¹ The Beery VMI is designed to assess the extent to which a student can integrate visual and motor skills.

15. To assess Student's reading behavior, Vogel simulated a reading classroom exercise requiring Student to read aloud from "Island of the Blue Dolphins." Vogel focused on Student's tracking and comprehension in order to determine if Student's vision impacts her ability to read. Vogel testified that she simulated other classroom tasks during the course of this assessment and would only observe Student in the classroom if she had concerns about Student's performance on this task. Vogel did not have any concerns about Student's tracking and comprehension. Vogel assessed Student's basic eye functions by observing Student's response to light and blink response. Student's response to light was normal.

16. Vogel assessed Student's ocular motor skills (motility) using standard procedures that include Student's ability to move her eyes between two stationary objects, find the midline, and follow a moving target without losing her place. Vogel reported that Student was able to maintain a steady gaze toward an object, using both eyes. She was also able to converge both eyes and when her eyes rebounded they moved back to their original position. Student's ability to converge her eyes indicated that Student was able to maintain focus on close objects, such as books. Although Student used her finger when reading, Vogel concluded this strategy increased Student's ability to focus on the material and was not a result of any vision related deficit. Thus, Student did not have an ocular motor deficit.

17. Vogel assessed Student's distance focusing. There are no specific qualifications required in order to conduct this exam. Student had some difficulty with near-far focusing skills, which could impact Student's ability to copy from the board in class. Student lost her place and was not able to identify all the letters after she was half-way through the test. Student indicated that she was confused and confirmed that she gets confused copying from the board. As a result of these findings, Vogel recommended that accommodations be implemented, including preferential seating and providing Student with a copy of class notes.

18. After administering all of these tests, Vogel found that Student had normal acuity (20/20) with glasses in both eyes together. All basic eye functions were normal, including her depth perception visual fields, and peripheral awareness. Vogel reported that Student: had normal eye alignment; passed the cover/uncover test; maintained a steady gaze; and had normal color vision. Her tracking skills were good and her scanning skills were efficient. Vogel recommended that Student's teachers use tactual and verbal cues to help her respond to specific tasks.

19. Vogel testified credibly that the tests she administered to Student were standard tests that address Student's basic eye function and can be administered by an optometrist, a nurse, a doctor or a trained educator. Vogel testified that after performing all of the assessments, there was no reason to conclude that Student required an updated prescription from her optometrist or a referral to an optometrist for any reason. The evidence presented supports Vogel's conclusion.

20. The Ishihara, the Piaget, the Slosson and the TVPS-R-UL have protocols and Vogel followed all instructions and procedures in administering these assessments. Vogel

credibly testified that the instruments utilized were appropriate, the test materials were validated for the purposes for which they were used and that the tests were selected and administered so as not to be racially, culturally or sexually discriminatory. Vogel also credibly testified that the assessment tools, measures and strategies were selected to render comprehensive and accurate results of Student's unique needs in the area of vision. Thus, the measures/assessments used during Student's vision assessment were valid, reliable and administered appropriately.

21. The assessment tools selected by Vogel were appropriate to measure Student's unique needs in vision. Vogel assessed Student in the areas of acuity, color vision, eye hand coordination (visual motor integration), visual form perception, reading behavior, basic eye functions, ocular alignment, and ocular motility and focus. Vogel did not rely on any single assessment as a sole criterion to determine Student's unique needs. Thus, Vogel relied on a number of different measures of Student's vision skills in order to develop a comprehensive understanding of Student's special needs in this area.

22. Vogel was qualified to perform the vision assessment, including the portions which tested sensory processing and integration issues. She had the education, license and professional experience to perform a vision assessment of Student. The instruments utilized were appropriate. The tests and assessment materials were validated for the purposes for which they were used and were selected and administered so as not to be racially, culturally or sexually discriminatory.

23. Student presented no testimony and no documentary evidence to refute District's contentions. District presented credible witnesses and documentary evidence in support of its assertion that the vision assessment conducted by Jane Vogel complied with the requirements of the IDEA and the California Education Code. Therefore, the ALJ finds that the District's vision assessment was appropriate.

If the District's assessment was not appropriate, is Student entitled to an independent vision assessment at public expense?

24. Student is entitled to an IEE at public expense, only if the Student notifies the District in writing that Student disagrees with the District's assessment, and a due process hearing determines that District's questioned assessment was inappropriate. Upon notification of Student's disagreement with the questioned assessment, the school district must either pay for the IEE or request a due process hearing to establish that its assessment was appropriate. Here, the ALJ finds that the District's assessment was appropriate. Therefore, Student is not entitled to an IEE at public expense.

LEGAL CONCLUSIONS

Applicable Law

1. District has the burden of persuasion that its assessment plan was appropriate. (*Schaeffer v. Weast, Superintendent, Montgomery County Public Schools, et al., Weast* (2005) 546 U.S. 49, [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. When a parent disagrees with an assessment by the educational agency, the parent has the right to an 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, subds. (b) & (c), 56506, subd. (c); 34 C.F.R. § 300.502.) An IEE is an evaluation conducted by a qualified examiner not employed by the school district responsible for the child's education. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).)

3. Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (Ed. Code, §§ 56320, subd. (g), 56322; see also 20 U.S.C. § 1414(b)(3).)

4. Assessments must be conducted in accordance with assessment procedures specified in the federal IDEA and state special education law. (Ed. Code, § 56381, subd. (e).) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible; and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b); 34 C.F.R. § 300.532; Ed. Code, § 56320, subds. (a) & (b).) The assessors must use a variety of assessment tools and strategies to gather relevant functional and developmental information about the child including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum, that may assist in determining whether the child is a child with a disability and what the content of the child's IEP should be. (34 C.F.R. § 300.532(b).)

Determination of Issues

Was the District's vision assessment of Student appropriate?

1. Based upon Factual Findings 1 through 23 and Legal Conclusions 1 through 4, the District's vision assessment was appropriate.

If the District's assessment was not appropriate, is Student entitled to an independent vision evaluation at public expense?

2. Based upon Factual Finding 23 and 24 and Legal Conclusion 2, Student is not entitled to an independent educational evaluation at public expense.

ORDER

1. The District's vision assessment was appropriate.
2. Student is not entitled to an independent vision assessment at public expense.

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. The District has 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 ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: December 10, 2007


CLARA L. SLIFKIN
Administrative Law Judge
Special Education Division
Office of Administrative Hearings