

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

In the Matter of:

BELLFLOWER UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007080171

DECISION

Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter on October 10, 2007, in Bellflower, California.

Eric Bathen, Attorney at Law, represented Bellflower Unified School District (District), accompanied by his legal assistant Natalie Citro. Victoria Medina, Assistant Superintendent of Special Education, was present on behalf of the District.

No one appeared on behalf of Student. Student's mother and father (Parents) have represented Student's interests in this case prior to hearing, but were not present at the hearing.

On August 7, 2007, the District filed a request for a due process hearing (complaint). A continuance of the hearing was granted on September 4, 2007. At hearing, oral and documentary evidence were received. On the same day, the record was closed and the matter was submitted.

PROCEDURAL MATTERS

A telephonic Prehearing Conference (PHC) was held on September 28, 2007, before ALJ Glynda B. Gomez. Mr. Bathen participated on behalf of the District and Student's father appeared on behalf of Student. Following the conference, ALJ Gomez issued a written

PHC order, in which she ordered Student to file a PHC statement, and ordered both parties to serve final witness and exhibit lists and witness schedules, and to exchange documents by October 3, 2007.

By the beginning of the hearing at 9:30 a.m. on October 10, 2007, Student had not filed a PHC statement with OAH or provided the District with witness and exhibit lists, or exhibits. The ALJ continued the hearing briefly to allow Student's representatives time to appear, and District's staff time to contact Parents. Ms. Medina informed the ALJ that District staff telephoned Student's home at about 9:35 a.m. and spoke with his mother, who indicated that neither Parents nor Student intended to appear at the hearing. Thereafter, the hearing proceeded.

ISSUES

1. Was the District's psychoeducational assessment conducted in June and July 2007 appropriate?
2. Is Student entitled to an independent educational evaluation (IEE) at public expense?

FACTUAL FINDINGS

Background

1. Student is seventeen years old, and resides with Parents within the boundaries of the District. Student began the 2006-2007 school year in the twelfth grade at Mayfair High School (Mayfair) in the District.

2. Prior to May 2007, Student had not been determined eligible for special education and related services under any category of eligibility. However, Student had a low grade point average (GPA) in middle school. Student continued to maintain a low GPA in high school of under two grade points, except when she attended summer school. In May 2007, District informed Student that she was not eligible to graduate from high school due to the lack of five required credits in mathematics and Algebra.

3. In May 2007, Student was referred by Parents for an initial assessment to determine eligibility for special education based on a suspected learning disability, primarily in the area of math. Parents consented to a written assessment plan for a psychoeducational assessment, and District received the signed plan back on June 5, 2007.

Psychoeducational Assessment

4. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of educational needs must be conducted. Assessments must be conducted in all areas related to the suspected disability by persons who are knowledgeable and competent to perform the assessment, as determined by the school district. Tests of psychological and intellectual functioning shall be conducted by a credentialed school psychologist. Tests and assessment materials must be used for purposes for which they are valid and reliable, administered in conformance with the instructions provided by the producer of the tests, and in the language and form most likely to yield accurate information. No single measure can be used as the sole criterion for determining whether a student is eligible or whether a particular special education program is appropriate. An IEP meeting to review the assessment must occur within 60 days of receipt of parental consent for the assessment.

5. David Rubin Avalos, a credentialed school psychologist with the District, conducted Student's psychoeducational assessment in June and July 2007, and issued a report dated July 23, 2007. The results of the report were timely reviewed at an IEP meeting on July 26, 2007.

6. Mr. Avalos has been a school psychologist with the District for about ten years, and was at Mayfair High for the past four years. He obtained a bachelor's degree from California State University, Fullerton, and obtained a master's degree there in Counseling Psychology in 1996. In 1997, he received a master's degree in Educational Psychology from Chapman University. Mr. Avalos obtained a California Educational Psychology license in 2003. He serves as an adjunct faculty member with the School of Psychology at National University, teaching courses on how to conduct psychoeducational assessments of students, and supervising college students training to become school psychologists. Mr. Avalos has education and training in the administration of assessment tests and tools to identify educational disabilities, and to evaluate a student's present levels of psychoeducational functioning and academic achievement, including prior experience assessing pupils with learning disabilities. At Mayfair High, he conducted about one hundred psychoeducational assessments per year.

7. Mr. Avalos's testimony and report established that he assessed Student in all areas of psychoeducational functioning related to Student's suspected disability, including cognitive functioning, academic achievement, visual-motor integration, and auditory processing. Mr. Avalos administered the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III), the Cognitive Assessment System (CAS), the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III), the Kaufman Test of Educational Achievement-Second Edition (KTEA-2), the Test of Auditory Processing Skills (TAPS-3) and the Beery Test of Visual-Motor Integration (VMI). The scope of the evaluation included administration of the above multiple standardized tests, an interview with Student, review of historical and developmental background information from Parents, review of teacher responses, and a review of school records, including report cards, absence and disciplinary records, and

selected exam scores. Student is bilingual and speaks both English and Spanish, as does Mr. Avalos. Mr. Avalos administered the assessment in English, Student's primary daily language. Mr. Avalos attempted to observe Student in classrooms on various days, but Student was absent.

8. The WAIS-III measures general global cognitive functioning. Student's scores on multiple subtests were converted to standardized scores to compare with the scores of her same-age peers nationally. A mean (average) standard score is 100, and one standard deviation is 15 points, indicating the standardized range of average to be from 85 to 115.¹ Student's Full Scale intellectual quotient (IQ) was 95, and reflected global functioning in the average range. Student obtained a Verbal IQ score of 97, and a nonverbal Performance IQ score of 92. On the Verbal Comprehension Index (VCI), a more specific measure of verbal knowledge and reasoning, Student scored a 103, an area of strength also within the average range. The index scores for Perceptual Organization and Working Memory were 91 and 92, in the average range, and the Processing Speed score was 88, which is in the high end of the low average range.

9. The CAS assessment utilizes the PASS theory, which divides human cognitive functioning into four essential activities of Planning, Attention, Simultaneous and Successive Processing. Mr. Avalos administered the Planning and Attention Processing sections of the CAS, the results of which were converted to standard scores. Student earned a score of 97 on the Planning subtests, well in the average range, even though she made some errors in a numbers subtest.² On the Attention subtests, she also had an average score of 97, and was able to sustain her effort and remain focused.

10. The TAPS-3 measures auditory processing skills and is comprised of seven subtests. The memory portion was not given because Student had obtained a Working Memory score of 92 in the average range on the WAIS-III. Student's Word Discrimination skills, Listening Comprehension, and Auditory Reasoning ability were within the average range. Overall, Student showed average auditory skills. In addition, she obtained an Auditory Cohesion score of 100, well within the average range and in the 50th percentile when compared to same-age peers.³

11. The VMI measures visual motor integration functioning, and the tasks required Student to look at and copy geometric designs of increasing difficulty. Student received a standardized score of 76, or below average. This appeared to be an area of

¹ Mr. Avalos testified that the standard margin of error is five points, which would lower the average score on a Bell curve to 95, and adjust other scores accordingly.

² Mr. Avalos noted that the Planning subtest errors suggested that Student had difficulty at times sustaining her effort when processing numbers. However, the average score did not reflect a significant weakness.

³ The Auditory Cohesion skills encompass one's ability to understand and comprehend detailed oral statements and questions, and the ability to use inferences, deductions, and abstractions to understand the meaning of passages.

weakness or deficit for Student. Mr. Avalos opined that the score could also have been influenced by other factors such as level of persistence, and trial-and-error learning.

12. The WJ-III is a standardized test used to measure academic achievement in reading, writing, and math. Student scored in the average range in reading (96), low average in math (83), and average in written language (92). As to math, Student's subtest scores showed her skills for calculation were in the low average range (87), applied problems were in the average range (91), and math fluency skills were very low (67). Mr. Avalos found that Student made some "careless errors" that may have been due to fatigue or lack of concentration, as the math testing was the last of many on one day. He thought that the low fluency score was an underestimate of her ability in that area, and hence, questioned its reliability. Among teacher responses, Student's English teacher reported to Mr. Avalos that, in the area of reading, Student earned B's and C's on essays and vocabulary quizzes.

13. The KTEA-2 is another assessment to measure academic achievement, and Mr. Avalos administered the mathematics portion of the assessment. Student obtained low average scores of 89 in math computation, and 88 in math application. Overall, Student's standard composite math score was an 88, in the high end of the low average range. Mr. Avalos concluded that Student "appeared to have a frustration tolerance with math problems containing multiple steps, like long division and order of operations," as well as multiplication, that lowered her scores.

14. Mr. Avalos reviewed Student's scores on the California High School Exit Exam (CAHSEE). Student took the CAHSEE exam in February 2005 when she was in tenth grade, and obtained a non-passing score of 333 in mathematics and a passing score of 357 in English. In November 2005 Student retook the mathematics portion and passed the exam with a score of 351. Student's scores on most math subtests of the CAHSEE improved the second time, except Algebra I, where both times Student's low score reflected 25 percent correct answers.

15. In connection with the psychoeducational assessment, Mr. Avalos reviewed Student's attendance and disciplinary records from at least seventh through twelfth grade.⁴ Student's disciplinary records did not reflect any serious negative behavioral issues. Mr. Avalos found a significant record of absenteeism in the attendance records, and concluded that Student missed at least 25 percent of school time during her high school years. For example, Student missed the majority of days in her twelfth grade Algebra I class. There was no evidence of any environmental, economic disadvantage, cultural or ethnic differences that could have impacted the assessment.

⁴ Mayfair is a combined middle school and high school, and had Student's records since seventh grade.

16. Mr. Avalos compared Student's cognitive functioning with her academic achievement, and he found that Student's overall academic achievement was consistent with her cognitive abilities. Mr. Avalos concluded that Student did not have a learning disability.⁵

17. Mr. Avalos was well-trained and qualified to administer the psychoeducational assessments and test tools, and used the tests for purposes for which they were valid and reliable. Multiple test tools were utilized and no conclusions relied solely on one test. The tests were not racially, culturally or sexually discriminatory. The psychoeducational assessment was timely and appropriate.

Independent Educational Evaluation

18. If a parent disagrees with an assessment obtained by the public education agency, the parent has the right to obtain an IEE at public expense under specified circumstances. The parent must notify the school district that the parent disagrees with the assessment and request that the district conduct an IEE at public expense. Faced with that request, the school district must file a due process complaint and prove at a hearing that its assessment is appropriate, prove at a hearing that an IEE obtained by the parent did not meet the agency criteria, or ensure that an IEE is provided at public expense.

19. An IEP meeting was held on July 26, 2007, to review the results of District's psychoeducational assessment. Parents and their advocate, Rodney Ford, were present. For the District, Mr. Avalos, the school psychologist, was present along with Adair Teller, Program Administrator, Paul Geddy, a general education teacher for Student's first period government class, and Matthew La Grass, an RSP teacher who was also Student's Algebra I teacher. The IEP team reviewed Mr. Avalos's assessment report, along with reports from teachers as to Student's present levels of functioning. During the IEP meeting, Parents objected to District's psychoeducational assessment and requested an IEE in writing.

20. On August 1, 2007, District gave Parents written notice that it declined to provide an IEE for another psychoeducational assessment at public expense because it found no basis for further assessment, and that it would proceed to file for a due process hearing.

LEGAL CONCLUSIONS

1. Under *Schaffer vs. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who filed the request for due process has the burden of persuasion at the due process hearing. District filed for a due process hearing and bears the burden of persuasion.

⁵ District presented evidence to show that Student is not eligible for special education under the category of specific learning disability (SLD), referred to by the parties as a learning disability. However, District's complaint did not identify eligibility as an issue. Therefore, eligibility for special education is not an issue in this case.

2. Under California law and the federal Individuals with Disabilities in Education Improvement Act (IDEA 2004), children with disabilities have the right to a free, appropriate public education (FAPE). (20 U.S.C. § 1400(d); Ed. Code, § 56000.) FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(a)(26); Ed. Code, § 56363, subd. (a).)

Was the District's psychoeducational assessment conducted in June and July 2007 appropriate?

3. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil's educational needs shall be conducted. (Ed. Code, § 56320.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (Ed. Code, § 56320, subds. (e), (f); 20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b).) Following assessment, an IEP team meeting shall be held within 60 days of receipt of parental consent. (Ed. Code, § 56329.)

4. 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 20 U.S.C. § 1414(b)(3)(A)(iv).) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (Ed. Code, § 56320, subds. (a), (b); 20 U.S.C. § 1414(b)(2), (3).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) Tests and assessment materials must be validated for the specific purposes 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. (Ed. Code, § 56320, subd. (a); 20 U.S.C. § 1414(a)(2), (3).)

5. Based on Factual Findings 3 through 17, District's psychoeducational assessment of Student was appropriate, timely, and in compliance with the law. The assessment tests and tools were standardized and were administered to Student in her primary daily language by a qualified credentialed school psychologist, Mr. Avalos. The tests were validated for the purposes for which they were used, and were not racially, culturally or sexually discriminatory. Student was appropriately assessed in all areas related to the suspected learning disability, and no single measure was used as the sole criterion for determining whether Student has a disability.

If District's assessment was not appropriate, is Student entitled to an independent educational evaluation (IEE) at public expense?

6. Under Education Code section 56329, subdivision (b), if a parent disagrees with an assessment obtained by the public education agency, the parent has the right to obtain, at public expense, an IEE under certain circumstances. (See also 34 C.F.R. § 300.502.) The parent must notify the school district that the parent disagrees with the assessment and request that the district conduct an IEE at public expense. Faced with that request, the school district must: (a) file a due process complaint and prove at a hearing that its assessment is appropriate; (b) prove at a hearing that the IEE obtained by the parent did not meet the agency criteria; or (c) ensure that an IEE is provided at public expense. (Ed Code, § 56329.)

7. Based on Factual Findings 18 through 20, and Legal Conclusions 5, Student is not entitled to an IEE at public expense because District established in this hearing that its psychoeducational assessment was appropriate.

ORDER

1. District's 2007 psychoeducational assessment was appropriate.
2. Student is not entitled to an IEE at public expense.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on both issues for hearing in this case.

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. A party may also bring a civil action in United States District Court. (Ed. Code, § 56505, subd. (k).)

DATED: October 26, 2007



DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings
Special Education Division