

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

FREMONT UNIFIED SCHOOL DISTRICT,

v.

PARENTS on behalf of STUDENT.

OAH CASE NO. 2009020278

DECISION

Administrative Law Judge (ALJ) Trevor Skarda, Office of Administrative Hearings (OAH), State of California, heard this matter on March 10, 2009, in Fremont, California.

Jack Bannon, Special Education Director, appeared on behalf of Fremont Unified School District (FUSD).

Student's mother (Mother) appeared on behalf of Student. Student was present throughout the hearing.

The request for due process hearing was filed on February 9, 2009. There were no continuances. The hearing convened and concluded on March 10, 2009, at which time the record was closed and the matter was submitted for decision.

ISSUE

Did the District's psychoeducational assessment, as reported at the December 11, 2008 individualized education program (IEP) team meeting, constitute an appropriate assessment pursuant to the legal requirements?

FACTUAL FINDINGS

Background and Jurisdiction

1. Student is 17 years old and is in the 12th grade. She resides with her mother within the geographical boundaries of the District. Student is not currently eligible for

special education and related services. Student was assessed in the Fall of 2008 and found ineligible for services at an IEP team meeting on December 11, 2008.

Mother's Request for an Independent Educational Evaluation (IEE)

2. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an IEE at public expense. In the present case, the results of the initial evaluation were discussed at an IEP team meeting held on December 11, 2008. At the meeting, the District determined that Student was not eligible for special education and related services. On January 16, 2009, Mother wrote a letter to the District in which she indicated that she disagreed with the team's determination and requested that the District fund an IEE.¹ Under applicable law, the District was required to do one of two things: (1) fund an IEE, or (2) request a due process hearing to establish that its assessment was appropriate. The District chose to file a due process hearing request.

District's Psychoeducational Assessment of Student

3. Dr. Nafisa Sekandari is a licensed clinical psychologist and a licensed school psychologist who is employed by the District. She has over 13 years of experience assessing students with disabilities. Dr. Sekandari conducted a comprehensive psychoeducational evaluation of Student beginning in October 2008. Dr. Sekandari administered several assessments of Student, including the Woodcock Johnson Test of Cognitive Abilities-III (WJ-III), the Sentence Completion test, the Child Depression Checklist (CDI), the Behavior Assessment System for Children-Child Rating Scale (BASC), the Bender Gestalt II, the Behavior Assessment for Children- Parent Rating Scale (BASC-Parent), the Multidimensional Anxiety Scale for Children (MASC), the Comprehensive Test of Nonverbal Intelligence (CTONI), the Kinetic Family Drawing, and a Home Assessment Survey. She also interviewed Student, Student's teachers, reviewed Student's educational file, including her report cards, and California High School Exit Exam (CAHSEE) results. Finally, Dr. Sekandari submitted questionnaires to Student's current teachers to obtain information about how Student functioned in the classroom. The evidence established that all of the above tests and other measures were appropriate means to evaluate Student.

4. Robert Astafuroff is a resource specialist program (RSP) teacher employed by the District. He is a credentialed special education teacher with over 17 years' experience teaching and testing disabled students of all types and ages. Mr. Astafuroff also evaluated Student. He administered the Woodcock-Johnson III-R (WJ-III-R), a standardized test of academic achievement, on October 10, 2008.

Assess In All Areas Related To Suspected Disability

5. A pupil must be assessed in all areas related to the suspected disability including, if appropriate, health and development, vision, including low vision, hearing,

¹ The District's only assessment was the psychological assessment conducted in the Fall of 2008.

motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status.

6. Dr. Nafisa Sekandari testified credibly that the psychoeducational assessment she administered, as well as the academic testing Mr. Astafuroff administered, evaluated Student in all areas of suspected disability, and that there was no area that the testing failed to explore. Dr. Sekandari has over 13 years' experience as a school psychologist and as a licensed school psychologist. She was a knowledgeable witness who gave credible, testimony that was not refuted by any other evidence.²

7. Mother conceded that the District's evaluation, as conducted, was appropriate. She contended, however, that the District should have conducted a speech and language evaluation and a test of reading fluency. She explained that Student received speech services for an articulation problem when she was very young and that Student reads slowly. The evidence established that Student's articulation problem resolved when she was in the second grade, and that she was exited from special education services at that point.

8. Speech and/or language were not areas of suspected disability for Student, and the District was not required to assess her in those areas. Dr. Sekandari testified credibly that there was no evidence that speech or language were areas of need; none of Student's teachers expressed concerns about those areas, and neither did Mother. The evidence also established that while Student once had speech needs and received articulation services when she was very young, the articulation problems were resolved and she was exited from special education. In short, there was no evidence that Student has problems with articulation at the present time and as a result, the District was not obligated to assess that area.

9. With regard to reading fluency, according to Dr. Sekandari the assessment did address the area of reading. Mr. Astafuroff administered the WJ III-R, which tests all aspects of reading, including letter-word identification, word attack and reading comprehension.

Other Assessment Requirements

10. Testing, assessment materials, and procedures used for the purposes of assessment must be selected and administered so as not to be racially, culturally, or sexually discriminatory. Dr. Sekandari's testimony established, and Student conceded, that the District's assessment met this legal requirement.

11. Materials and procedures shall be provided in the pupil's native language or mode of communication, unless it is clearly not feasible to do so. Tests and other assessment materials shall be provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer. Dr. Sekandari's

² Student called no expert witnesses.

testimony established, and Student conceded, that the District's assessment met this legal requirement.

12. The assessment of a pupil, including the assessment of a pupil with a suspected low incidence disability, shall be conducted by persons knowledgeable of that disability. A disability is defined as mental retardation, hearing impairment (including deafness), speech or language impairment, visual impairment (including blindness), emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairment, or specific learning disability. Dr. Sekandari's testimony established, and Student conceded, that the District's assessment met this legal requirement. As discussed above, both Dr. Sekandari and Mr. Atafuroff were very experienced, qualified assessors.

13. Tests and other assessment materials shall be administered in accordance with any instructions provided by the producer of the assessments. Dr. Sekandari's testimony established, and Student conceded, that the District's assessment met this legal requirement.

LEGAL CONCLUSIONS

1. In an administrative proceeding, the burden of proof is on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) District requested the hearing and therefore bears the burden of proof.

Did the District's psychoeducational assessment, as reported at the December 11, 2008 IEP team meeting, constitute an appropriate assessment pursuant to the legal requirements?

2. 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)(2), (c)(4)(2006).)

3. 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 native language or other mode of communication unless this is clearly not feasible. (Ed. Code, § 56320, subd. (a); 20 U.S.C. § 1414(b)(2), (3); 34 C.F.R. § 300.304(c)(1)(i), (ii) (2006).) Tests and other assessment materials shall be provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer. (Ed. Code, § 56320, subd. (b)(1); 34 C.F.R. § 300.304(c)(1)(ii) (2006).)

4. Tests and other assessment materials must be administered by trained and knowledgeable personnel and must be administered in accordance with any instructions provided by the producer of the assessments, except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. (Ed. Code, § 56320, subd. (b)(3); 34 C.F.R. § 300.304(c)(1)(iv), (v) (2006).)

5. The assessment of a pupil, including the assessment of a pupil with a suspected low incidence disability, shall be conducted by persons knowledgeable of that disability. (Ed. Code, § 56320, subd. (g).) A disability is defined as mental retardation, hearing impairment (including deafness), speech or language impairment, visual impairment (including blindness), emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairment, or specific learning disability. (34 C.F.R. § 300.8(a)(1) (2006).) “Low incidence disability” includes, among other conditions, hearing impairment, vision impairment, and severe orthopedic impairment, or any combination thereof. (Ed. Code, § 56026.5.)

6. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1) (2006); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c).) “Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i) (2006).) To obtain an IEE, the student must disagree with an assessment obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1) & (b)(2) (2006).)

7. The provision of an IEE is not automatic. Code of Federal Regulations, title 34, part 300.502(b)(2), provides, in relevant part, that following the student’s request for an IEE, the public agency must, without unnecessary delay, either: (i) File a due process complaint to request a hearing to show that its assessment is appropriate; or (ii) Ensure that an independent educational assessment is provided at public expense, unless the agency demonstrates in a hearing pursuant to parts 300.507 through 300.513 that the assessment obtained by the parent did not meet agency criteria. (See also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

8. Based on Factual Findings 2 through 13, the District conducted an appropriate psychoeducational assessment in all areas of suspected disability. The tests and other assessment materials were validated for the specific purpose for which they were used, were not racially, sexually, or culturally discriminatory, and were provided and administered in the language and form most likely to yield accurate information. The psychoeducational assessment was conducted by assessors trained and knowledgeable about disabilities. The tests and other assessment materials were administered in accordance with the instructions provided by the producers of the assessments.

