

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

EAST WHITTIER CITY SCHOOL
DISTRICT,

v.

PARENT on behalf of STUDENT.

OAH CASE NO. 2010020014

DECISION

Administrative Law Judge Adeniyi A. Ayoade, Office of Administrative Hearings, State of California, heard this matter on March 17, 2010, in Whittier, California.

Darin W. Barber, Attorney at Law, represented East Whittier City School District (District). Elisa Yasutomi, Director of Special Education for District, was present on behalf of District.

Jennifer Guze Campbell, Attorney at Law, accompanied by James Campbell, represented Student, and both parents (Parents) were present at the hearing. Student did not appear.

On January 28, 2010, District filed a request for a due process hearing (complaint). A continuance of the hearing was granted on February 22, 2010. At hearing, oral and documentary evidence were received. At the end of the hearing, a continuance was granted until March 31, 2010, to allow parties time to file closing briefs. Each party submitted its closing brief within the time allowed, and the record was closed on March 31, 2010.

ISSUE

Were District's September 24, 2009 adaptive physical education (APE) assessment and October 20, 2009 occupational therapy (OT) assessment appropriate such that Student is not entitled to Independent Educational Evaluations (IEEs) at public expense?

FACTUAL FINDINGS

Background

1. Student is a nine-year-old female who is in a general education fourth grade classroom at Ocean View Elementary School. At all relevant times, Student resided with Parents within the boundaries of District, and has been eligible for special education and related services as a child with a speech and language impairment.

2. Due to concerns regarding Student's gross and fine motor skills, sensory processing and motor planning, Parents requested District to perform OT and APE assessments to determine whether Student requires additional services to access her education. District sent Parents the assessment plans in September 2009. Parents signed and returned the plans to District on or about September 27, 2009. District conducted the APE and OT assessments of Student in September and October 2009, respectively. An individualized education program (IEP) meeting was held on January 6, 2010, to review the results of the assessments. The IEP team reviewed the assessments' reports and found that Student did not require OT and APE services.

OT Assessment

3. Assessments must be conducted by persons who are knowledgeable and competent to perform the assessment, as determined by the school district. 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.

4. Leslie Grayson, an occupational therapist employed by Gallagher Pediatric Therapy (Gallagher), conducted the OT assessment of Student on behalf of District. Gallagher works with several school districts as a provider of student OT assessments and services. District has maintained a contract with Gallagher to provide OT assessments and services for about 20 years.

5. Ms. Grayson began working for Gallagher about 12 years ago. She is an occupational therapist and supervisor. She conducts assessments, provides direct OT services, prepares reports, and consults with IEP teams, teachers and parents. Ms. Grayson received a Bachelor of Science degree in OT from the University of Southern California. She has a National Board Certification in OT and is licensed by the California Board of Occupational Therapists. She is a member of the American Occupational Therapy Association and Occupational Therapy Association of California. She has performed between 700 and 800 OT assessments on a diverse population of students with disabilities, including those with speech-language impairments.

6. As part of the assessment, Ms. Grayson administered sub-tests of the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2), which were designed to measure fine motor skills and visual motor integration. The BOT-2 was designed for use with children and young people ages four through 21. The assessment was conducted in English, Student's primary language. Ms. Grayson conducted the BOT-2 according to the test instructions and manual. Using the BOT-2, Ms. Grayson assessed Student's fine motor precision, fine motor integration, manual dexterity, and bilateral coordination. Ms. Grayson has experience performing the BOT-2 sub-tests and has conducted the sub-tests about 500 times. It is undisputed that the BOT-2 was not racially or culturally biased.

7. Ms. Grayson also administered the Beery and Buktenica Developmental Test of Visual Motor Integration, Fifth Edition (Beery VMI) to evaluate Student's visual perception and motor coordination, organization of behavior, play skills, neuromuscular status, sensory processing, vestibular processing, somatosensory processing, motor planning, gross motor skills, fine motor skills, visual motor skills and self-care. Finally, Ms. Grayson assessed Student using the Wold Sentence Copying Test (WOLD), in order to determine if Student has the ability to rapidly and accurately copy a sentence from the top of the page to the bottom. Ms. Grayson has experience performing both the Beery VMI and the WOLD tests. She has conducted at least 800 of the Beery VMI tests and 100 WOLD tests. It is undisputed that both the WOLD and the Beery VMI tests were not racially or culturally biased.

8. Student scored above average, for Student's grade level and age on the BOT-2 sub-tests, in fine motor precision, average in fine motor integration and manual dexterity, and below average in bilateral coordination. Student's overall score on the Beery VMI was average; she had an above average score in visual perception and a below average score in motor coordination. Student successfully completed the WOLD test. She accurately copied the sentence without error at a rate of 67.1 letters per minute. Student scored above average for a child in the fourth grade. In explaining Student's below average score in motor coordination on the Beery VMI, Ms. Grayson testified that the test had a "timed element" to it, and that if Student were provided more time she would have scored better. Ms. Grayson explained that the test was administered "strictly," explaining that Student was very meticulous, "wanting to get everything right." As a result, Student failed to finish some of the questions. It is undisputed that the WOLD was not racially or culturally biased.

9. Ms. Grayson concluded that Student demonstrated the overall functional skills required for her continued participation in her current general education placement without OT as a related service. Student is able to access and use classroom materials, as well as playground equipment, and can navigate the school environment without difficulty. Ms. Grayson recommended that OT services were not necessary or appropriate for Student. Ms. Grayson presented and explained her report and the results of her evaluation to members of the IEP team at its meeting on January 6, 2010.

10. Ms. Grayson admitted during cross-examination that she did not observe Student at school and relied instead on teachers' and Parents' accounts. It is not unusual to rely upon third party observations or accounts in assessments. Some of the BOT-2 sub-tests were not performed. Ms. Grayson credibly explained that tests are chosen and administered according to students' particular deficits or needs. Not all sub-tests are administered for each student. Ms. Grayson admitted making a mistake scoring Student's jumping jacks. She credited Student with all five jumping jacks she successfully performed, instead of awarding only three – the maximum recommended by the test instruction. The mistake did not make Student look higher functioning than she actually was. Student would have remained at the same level of functioning if only three of her jumping jacks had been scored rather than all five. The mistake did not make the assessment invalid. Student's overall level of functioning determined whether Student qualifies for services rather than one individual test or score.

11. Ms. Grayson testified credibly that she followed the tests' instructions. She utilized a combination of clinical observation, interactive activities with Student, interviews, records reviews and standardized testing as her assessment tools. Ms. Grayson spent over three hours conducting her OT assessment of Student. She conducted clinical observation of Student for over an hour, spent about 30 minutes reviewing Student's school records. She spent about 30 minutes talking to teachers and about 30 minutes interviewing Parent. Mother testified that her interview with Ms. Grayson lasted only about 10 minutes. Despite this discrepancy, Ms. Grayson established that her observation of Student was long enough to gather useful information from Parent and to assess all areas of concern. The time she spent conducting Student's assessment exceeded the usual time she spends conducting similar assessments, which usually last about two hours.

12. Both parents testified. Both disagreed with the results of the OT and APE assessments. Mother testified that Student is awkward at throwing, walking, jumping, and has difficulty walking in a straight line. Student's classmates called Student "clumsy," according to Mother, and Student's self-esteem suffered as a result. Mother believed that Student needed OT and APE services. Much of Mother's testimony was focused on her belief that Student needed these services, and not on the appropriateness of District's assessments, which is the subject of this hearing. Mother believed that she was informed that the pre-assessment questionnaire provided by Gallagher was designed for a person younger than Student, and that Ms. Grayson ran out of time and could not complete the tests. Ms. Grayson disputed Mother's account and credibly testified that the tests were conducted according to protocols and instructions. The questionnaire and tests were appropriate for Student's age and suspected deficits. Ms. Grayson persuasively explained that she was able to gather useful information and was able to assess all areas of concern.

13. Parent offered into evidence a copy of an Occupational Therapy report dated January 22, 2010, from the Children's Hospital of Orange County Department of Rehabilitation Services. The report was written by Nancy Olsen, whose qualification was listed on the report as "OTR/L," following Ms. Olsen's evaluation of Student on January 4, 2010. The report was not presented at the January 6, 2010 IEP meeting and Ms. Olsen was

not called as a witness in this due process hearing. Ms. Olsen's resume or curriculum vitae was not provided at the hearing. No evidence was offered to corroborate Ms. Olsen's report. As a result, the report is not given any weight.

14. Though Ms. Grayson admitted not observing Student at school, Ms. Grayson conducted clinical observation of Student, interactive activities with Student, Parent and teacher interviews, and records reviews. There is no legal requirement that Ms. Grayson personally observe Student at school, and there is no evidence showing that the failure to personally observe Student at school made the OT assessment inappropriate or invalid. Student criticized the assessment due to District's failure to provide the school nursing logs to Ms. Grayson. Ms. Grayson persuasively testified that she spoke with Parent and teachers and obtained adequate and useful information before the assessment. Ms. Grayson established that the time spent observing Student was sufficient and that she was able to assess in all areas of concern. Further, the evidence did not support Student's assertion that Ms. Grayson used untrained personnel to conduct the sub-tests.

15. Weighing all the evidence, Ms. Grayson's OT assessment complied with all requirements and was appropriate. Ms. Grayson was well trained and qualified to administer the OT assessment 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 OT assessment was timely and appropriate.

APE Assessment

16. On September 24, 2009, Mitsuko Igawa Sanchez, an APE Specialist for District, conducted an APE assessment of Student, and issued a report dated November 4, 2009.

17. Ms. Sanchez received a Bachelor of Arts degree in physical education teaching from the California State University, Los Angeles, and a Master of Arts degree in athletic coaching and administration from Concordia University. She has a Single Subject Preliminary Credential and APE Specialist Credential. She has worked as the APE Specialist for 19 years and as a general education physical education teacher in the first two years of her career with District. Ms. Sanchez has performed about 900 to 1,000 APE assessments.

18. The APE assessment and sub-tests were conducted in English, Student's primary language. The tests were appropriate to assess Student's suspected disabilities, and were not racially, culturally or sexually discriminatory. The tests were conducted according to protocols and instructions provided by the tests' producers. The tests were appropriate for Student's age and suspected deficits. The results of the tests were valid and reliable.

19. For her assessment, Ms. Sanchez performed a review of records, observed Student at school twice, each for about 20 minutes, and obtained relevant information from teachers. She conducted interactive activities with Student to obtain information to

supplement the findings obtained through the standardized testing. Ms. Sanchez administered the sub-tests of the Test of Gross Motor Development, Second Edition (TGMD-2) and the Adapted Physical Education Assessment Scale (APEAS). The sub-tests were conducted according to the instructions. Ms. Sanchez has extensive experience conducting both sub-tests.

20. Using the APEAS sub-test, Ms. Sanchez assessed Student in several areas of motor performance, including motor development, motor achievement, perceptual motor function, posture and physical fitness, ocular control, motor planning, kinesthetic awareness, bilateral control, and balancing skills. For the TGMD-2, Ms. Sanchez evaluated Student's locomotor skills, including running, galloping, leaping, horizontal jumping and sliding. She also evaluated Student's object control skills, such as striking a stationary ball, stationary dribbling, catching, kicking, overhand throwing and underhand rolling of a ball.

21. Ms. Sanchez found that Student demonstrates strength in locomotor skills and presents weakness in object control. Student performs at an average range in locomotor skills, and a below average range in object control. Based on the TGMD-2, Student is performing in the average range for her age. Even though Ms. Sanchez concluded that Student was performing in the average range based on the APEAS, she did not recommend APE services for Student as a related service, as it is not needed.

22. The report and the results of the assessment were timely reviewed and extensively discussed at the IEP meeting on January 6, 2010. Ms. Sanchez was present at the IEP meeting and presented her report.

23. Student argues that Ms. Sanchez failed to request information from Parents. Apart from the information relating to Student's taking gymnastics, which Ms. Sanchez was not aware of, the evidence did not show that Ms. Sanchez's failure to have this information, or any other information, affected the conduct, the validity or appropriateness of the APE assessment. Ms. Sanchez credibly testified that she obtained adequate relevant information about Student by performing a review of records, interacting and observing Student at school twice, and interviewing teachers. Student was cooperative and attentive throughout the testing. She was "quite verbal and inquisitive." She seemed wanting to please, and was competitive with other students present. Ms. Sanchez noted no social or emotional deficits in Student.

24. Weighing the evidence, and based on the foregoing, the APE assessment was timely, appropriate and complied with all legal requirements. District established that Ms. Sanchez was well trained and qualified to administer the APE assessment and test tools. She used the tests for purposes for which they were valid and reliable, and utilized multiple test tools. No conclusion was reached solely on one test. The tests were not racially, culturally or sexually discriminatory.

IEE

25. If a parent disagrees with an assessment obtained by a public educational 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 school district conduct an IEE at public expense. The school district must either file a due process complaint to show that its assessment is appropriate, or provide an IEE at public expense.

26. On or about January 11, 2010, Parents objected in writing to results of District's assessments and requested IEEs. District declined to provide IEEs for OT and APE at public expense because it contends that its OT and APE assessments were appropriate under state and federal law. On January 28, 2010, District filed a request for a due process hearing in this matter.

LEGAL CONCLUSIONS

1. As the petitioning party, District has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) The party who filed the request for due process has the burden of persuasion at the due process hearing.

Were District's September 2009 APE assessment and October 2009 OT assessment appropriate?

2. Special education students must be reassessed every three years or more frequently, if conditions warrant, or if the pupil's parent or teacher requests a new assessment and that a new IEP be developed. (20 U.S.C. § 1414(a)(2); Ed. Code § 56381.) 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)(2006?)).) Following the assessment, an IEP team meeting shall be held within 60 days of receipt of parental consent. (Ed. Code, § 56329.)

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 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).) 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).)

4. A procedural violation of the IDEA and related laws results in a denial of a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); That rule applies to flaws in an assessment. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn. 3; *San Ramon Valley Unified School Dist. v. Student* (2009) Cal.Offc. Admin.Hrngs. Case No. 2009061134; *Capistrano Unified School Dist. v. Student* (2006)(amended decision) Cal.Offc.Admin.Hrngs. Case No. 2005090873.)

5. Based on Factual Findings 1-24, and Legal Conclusions 1-4, District demonstrated by a preponderance of the evidence that the September 2009 APE assessment and the October 2009 OT assessment were appropriate. Qualified assessors conducted the assessments. Each of the assessors had performed hundreds of assessments using the same instruments. In each assessment, Student was assessed using a variety of assessment instruments. The assessment instruments were used for purposes for which the assessments are valid and reliable. No single measure was relied upon solely. The assessments were not racially or culturally biased. The assessments resulted in comprehensive written reports that included observations, interviews, and interactive activities with Student. The reports included assessment results, consideration of Student's needs, and reasoned recommendations that Student did not require OT and APE services. The assessments were discussed with Parents at an IEP team meeting on January 6, 2010, as required by law. In sum, the September 2009 APE assessment and October 2009 OT assessment were appropriate.

IEE

6. Under Education Code section 56329, subdivision (b), if a parent disagrees with an assessment obtained by the public educational agency, the parent has the right to obtain, at public expense, an IEE under certain circumstances. (See also 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56506, subd. (c).) 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 either file a due process complaint and prove that its assessment is appropriate, or provide an IEE at public expense. (Ed Code, § 56329.)

7. Based on Factual Findings 2-26, and Legal Conclusions 5 and 6, Student is not entitled to an IEE at public expense because District demonstrated that its APE and OT assessments were appropriate.

ORDER

1. District's September 24, 2009 adaptive physical education assessment and October 20, 2009 occupational therapy assessment were appropriate.
2. Student is not entitled to an IEE at public expense.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on the only issue that was heard and decided in this case.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: April 19, 2010

/s/

ADENIYI AYOADE
Administrative Law Judge
Office of Administrative Hearings