BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. ACALANES UNION HIGH SCHOOL DISTRICT.	OAH CASE NO. 2012080073 ORDER GRANTING STUDENT'S MOTION IN LIMINE

On November 5, 2012, Student filed a Motion in Limine to exclude the report and preclude the testimony of District's expert witness Sherry Burke, Ph.D. Student contends that the report and testimony should be barred because Dr. Burke conducted an evaluation of Student for which the District failed to provide notice by way of an assessment plan and failed to obtain Parental consent. Additionally, Student contends that evidence from Dr. Burke will be duplicative and necessitate an undue consumption of time. On November 7, 2012, the District filed an Opposition to Student's Motion in Limine. The District contends that Dr. Burke did not conduct an evaluation for which parental consent is required; Parent was aware of and implicitly consented to Dr. Burke's observation; Dr. Burke's report and testimony is relevant and not duplicative; and given the factual dispute as to whether Dr. Burke conducted an evaluation and whether Parent provided consent, Student's motion should be denied and the District allowed to develop a factual record at hearing.

APPLICABLE LAW

The term evaluation is defined as "procedures used in accordance with sections 300.304 – 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." (34 C.F.R. § 300.15.) Under California law, the term "assessment" shall have the same meaning as the term "evaluation" in the Individuals with Disabilities Education Act (IDEA). (Ed. Code, § 56302.5.) An evaluation to determine whether services for an individual student should be increased or decreased is generally considered an evaluation under title 34 of the Code of Federal Regulations, section 300.15, and therefore written consent is required. (*Letter to Sarzynski* 51 IDELR 193 (OSEP 2008).)

Parental consent is not required before reviewing existing data as part of an assessment or reassessment or before administering a test or other assessment that is administered to all children, unless prior to administering that test, consent is required of all

parents. (Ed. Code, § 56321, subd. (e); 34 C.F.R. § 300.300(d)(1).) Additionally, the screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services. (20 U.S.C. § 1414(a)(1)(E); 34 C.F.R. § 300.302; Ed. Code, § 56321, subd. (f).) "Screening is typically a relatively simple and quick process that can be used with groups of children." (71 Fed. Reg. 46,639 (2006).)

In order to conduct an initial evaluation to determine if a child qualifies as a child with a disability, the District must obtain informed parental consent. (20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. § 300.300(a)(1).) The District shall provide notice to the parent that describes any evaluation procedures that it proposes to conduct. (20 U.S.C. § 1414(b)(1).) This prior written notice (PWN) is required any time the District proposes to initiate or change, or refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate public education (FAPE). (*Id.*; 20 U.S.C. § 1415(b)(3).). The PWN must contain a description of the action proposed or refused, an explanation of why the agency proposes or refuses the action, and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for its decision; a notice of procedural safeguards; a listing of sources for assistance; a description of other options and why those were reject; and a description of relevant factors. (20 U.S.C. § 1415(c)(1).)

If an assessment is to be conducted, the parent shall be given, in writing, a proposed assessment plan within 15 days of the referral for assessment. A copy of the notice of a parent's rights shall be attached to the assessment plan and a written explanation of all procedural safeguards shall be included in the notice of rights. (Ed Code, § 56321, subd. (a).)

In determining whether an evaluation is required, the IEP team or other qualified professionals, shall review existing evaluation data including evaluations and information provided by the parents, and current classroom based assessments or observations and based on that review, with input from the parent, identify what additional data, if any, are needed to determine: (i) whether the child has a qualifying disability and what her educational needs are; (ii) her present levels of academic achievement and related developmental needs; (iii) whether she needs special education and related services; and (iv) whether any additions or modifications are needed to her services in order to enable her to meet goals and participate in the general education curriculum. (20 U.S.C. § 1414(c)(1)(A) & (B); 34 C.F.R. § 300.305(a).) The District shall administer such assessments or other evaluation measures as may be needed to produce the additional required data. (20 U.S.C. § 1414(c)(2).) If the IEP team determines no additional data is needed, it shall notify the parent of that determination and the reasons for the determination, and the right of parent to request an assessment. (20 U.S.C. § 1414(c)(4)(A).).

"Consent," as provided in Section 300.9 of title 34 of the Code of Federal Regulations, means all of the following:

(a) The parent or guardian has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication.

(b) The parent or guardian understands and agrees in writing to the carrying out of the activity for which his or her consent is sought; and the consent describes that activity and lists the records, if any, that will be released and to whom.

(c) The parent or guardian understands that the granting of consent is voluntary on the part of the parent or guardian and may be revoked at any time. (Ed. Code, § 56021.1.)

DISCUSSION

It is undisputed that Dr. Burke, at the request of the District, reviewed existing data, observed Student at Spring Ridge Academy, and conducted clinical interviews of Student, her teachers, and her therapist over a period of two days in April 2012. According to Dr. Burke's own declaration, the purpose of her visit and interviews was to observe the educational setting, determine how Student was doing, and share with the District her thoughts of whether Student requires additional supports or mental health services.[1] Despite the fact that the District did not ask Dr. Burke to assess Student for eligibility purposes, by Dr. Burke's own descriptions of her acts, she conducted an assessment as defined under the law. Dr. Burke was not merely screening Student for the purposes of instructional strategies for curriculum implementation at her private placement, nor was she merely reviewing existing data in records and based on current observations. Dr. Burke conducted her own observations and created new data. Additionally, she conducted clinical interviews of multiple professionals and Student, reported back to the District on her findings, and prepared a written report which she then presented to the IEP team during two team meetings.

The law clearly supports the District's right and obligation to assess Student. However, there are statutorily required steps to be followed. Here, based upon the complaint and the parties' pleadings, Parent requested, in writing, a special education assessment on June 27, 2011. The District timely provided Parent an assessment plan which Parent signed on July 24, 2011. The District then had Dr. Jacqueline Cheung evaluate Student in August and September of 2011 and present her report and findings at the October 21, 2011 IEP team meeting, wherein the District members of the team found that Student was not eligible for special education. Parent then requested and the District granted an independent educational

[1] Student alleges that according to Dr. Burke's confidential assessment at page 1, the purpose of her visit was "to observe and interview [Student] to determine if her current placement at Spring Ridge Academy is educationally and therapeutically appropriate and if she is succeeding in the program." While Student fails to provide any evidence by way of declaration as to this assertion, Dr. Burke's declaration corroborates this assertion.

evaluation (IEE) and presented Parent with an assessment plan for this IEE on January 23, 2012.

However, the District never presented Parent with an assessment plan for Dr. Burke's evaluation. There is no evidence that the team ever determined, with the Parent's input, there was a need for additional data. The District failed to follow the required procedures for determining that Dr. Burke's assessment was needed and to follow the required procedures for developing an assessment plan, obtaining Parental consent and providing Parent with a copy of her rights and procedural safeguards. The District simply sent another assessor out to gather additional data without Parental consent. In its response to Student's request for due process hearing, the District itself acknowledges that Dr. Burke performed an "assessment." According to the District's response at page 5, footnote 1, "Dr. Sherry Burke of Community Options for Families and Youth, Inc. performed an assessment of [Student] and a record review… She confirmed that [Student] did not qualify for special education services." In this same response, the District identifies Dr. Burke as "another District assessor."[2]

Further, the District argues that Parent "implicitly" provided consent, did not "dissent," and did not avail herself of many opportunities to object to Dr. Burke's planned assessment. The District argument is not persuasive. For good reason, the law requires informed written parental consent to an evaluation. Dr. Burke's telephone call to Parent announcing that she was going out to Spring Ridge to observe Student did not provide the Parent with the required notice of assessment or rights or safeguards. The District never requested parental consent.

The District's argument that it must be allowed an opportunity to develop a factual record at hearing is equally not persuasive. Whether or not Dr. Burke conducted an evaluation of Student is not identified as an issue for hearing and therefore there is no danger of a summary adjudication of a contested issue in granting Student's Motion. The District improperly obtained an assessment of Student without Parental consent. To allow the District to benefit from its transgression will result in prejudice to the Student. Therefore, Student's Motion in Limine is granted.

ORDER

1. Student's request to exclude from the evidentiary record the report of District's Expert Dr. Sherry Burke is granted.

2. District's Expert, Dr. Burke, is precluded from testifying to any matter that is related to her review of Student's records, observations of Student at Spring Ridge Academy, interviews of Student, interviews of Student's treating professionals including teachers, and any portions of her report.

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[2] District's Response to Student's Request for Due Process Hearing, page 6, line 13.

3. If the District intends to call Dr. Burke as a witness, District must provide a detailed offer of proof as to the relevance of her testimony.

IT IS SO ORDERED.

Dated: November 9, 2012

/s/

Adeniyi A. Ayoade
Administrative Law Judge
Office of Administrative Hearings