

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH CASE NO. 2011040352

SANTA RITA UNION ELEMENTARY
SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

Administrative Law Judge (ALJ) Charles Marson, Office of Administrative Hearings (OAH), State of California, heard this matter in Salinas, California, on August 18, 2011, and by telephone in Oakland, California, on September 7, 2011.

Damara L. Moore, Attorney at Law, represented the Santa Rita Union Elementary School District (District). Debbie Bradford, the District's Director of Student Services, was present throughout the hearing.

Pablo A. Tagre, Attorney at Law, represented Student. Student's Parents were present throughout the hearing. Student was not present. Lucia Aguilar-Navarro, a qualified Spanish interpreter, provided Spanish interpretation services to Parents on August 18, 2011. On September 7, 2011, Jesus Mata, a Spanish interpreter, provided interpretation services through the first half of the oral argument, but then disqualified himself due to difficulties with technical terminology. After consulting Mr. Tagre, who is bilingual, Parents waived the presence of an interpreter for the rest of the argument.

On April 11, 2011, the District filed its request for a due process hearing. The matter was continued on May 3, 2011. At hearing on August 18, 2011, oral and documentary

evidence was received and the matter was continued to September 7, 2011 for further proceedings. On that day, the record was closed and the matter was submitted.

ISSUE

Was the District's speech and language assessment of Student, presented at the January 11, 2011 individualized education program (IEP) team meeting, appropriate such that Student is not entitled to an independent educational evaluation (IEE) at public expense?

BACKGROUND AND JURISDICTION

1. Student is an 11-year-old girl who resides with Parents within the geographical boundaries of the District. She is eligible for, and has been receiving, special education and related services due primarily to a specific learning disorder and secondarily for a language impairment. Her primary language is Spanish, which she speaks at home. She is acquiring English, which she speaks at school.

2. Student's most recent IEPs, agreed to by Parents, have placed her in general education classes at the District's Santa Rita Elementary School with 90 minutes a day of pull-out resource support and weekly speech and language therapy. She is beginning the fifth grade.

3. In December 2010, the District's speech and language (S/L) pathologist Melissa DiPasquale conducted a supplemental S/L assessment of Student, which she presented at an IEP team meeting on January 11, 2011. At an addendum meeting on April 7, 2011, Parents disagreed with Ms. DiPasquale's supplemental assessment and requested an IEE. The District declined to provide an IEE and requested this due process hearing instead.

SCOPE OF THE S/L ASSESSMENT

4. Assessments upon which a special education determination is based must comply with numerous legal requirements. They must, for example, occur at least every three years, or more frequently if circumstances require it, or if a parent or teacher requests it. They must not be based on a single procedure or criterion; must be used for purposes for which they are valid and reliable; must be properly administered by trained personnel; must accurately reflect the pupil's aptitude, achievement level and other relevant factors; 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 not feasible. Assessments for educational need must be done in all areas related to any suspected disability the student may have.

5. The central dispute between the parties is whether the appropriateness of Ms. DiPasquale's assessment should be measured by the standards applicable to a full S/L assessment conducted to determine eligibility for S/L services, or by standards appropriate to a much more limited assessment. Resolution of that dispute is dispositive here.

The Whitman S/L Assessment in October 2009

6. In October 2009, while Student was receiving special education and related services due to her specific learning disability, District S/L pathologist Katie Whitman assessed Student. Ms. Whitman determined that while Student did not technically qualify for special education services under the numerical criteria for a speech and language impairment, she should nonetheless be declared eligible for S/L services because she had a significant language difficulty and would benefit from S/L therapy to address her weakness in the area of inference. Student's IEP team decided to add speech and language impairment to her IEP as a secondary eligibility category and added an annual goal in that

area. Student began to receive S/L therapy from Ms. Whitman and made good progress toward her goal.

The Moleski Psychoeducational Assessment in Spring 2010

7. In spring 2010 Parents, concerned that Student might be autistic or have other disabilities, obtained an independent psychological and neuropsychological assessment from Dr. Maria Moleski, a licensed educational psychologist and credentialed school psychologist. Dr. Moleski assessed Student on three occasions in April and June 2010. Student's scores on numerous measures were very low. While Dr. Moleski did not find that Student was autistic, she did conclude that Student has a severe mixed receptive/expressive language disorder that had "very significantly impacted her academic and social skills." Dr. Moleski recommended that Student be placed in a special day class for students with severe communications disorders.

8. Dr. Moleski mistakenly believed that Student's primary language was English and administered all her assessment instruments to Student in English only. The evidence showed, and the parties agree, that Dr. Moleski's assessment only in English of a student whose primary language is not English fell below professional norms and rendered her assessment professionally deficient and legally inappropriate. In addition, special education law requires that a student be assessed in her primary language if that is feasible. Assessment in Spanish is feasible and common. Dr. Moleski was scheduled to testify at hearing, and requested and received leave to testify by telephone, but withdrew as a witness shortly before hearing.

The Origin of Ms. DiPasquale's Supplemental Assessment

9. Student's IEP team met on November 12, 2010, to consider Dr. Moleski's assessment and recommendations. Neither Parents and their attorney nor the District members of the IEP team were convinced that placing Student in the restrictive

environment of a special class for the communications-impaired was necessary or appropriate. The team recognized that Dr. Moleski's English-only assessment was by itself inadequate. The team, including Parents and their attorney, agreed that conducting further assessment of Student in Spanish to verify or contradict Dr. Moleski's test results was appropriate. Parents signed an assessment plan for a further S/L assessment.

10. S/L pathologists distinguish between a language disorder, which is a disabling condition that affects a bilingual child's performance in both her languages, and a language difference, which is the temporary product of the child's incomplete acquisition of her second language. The November 12, 2010 IEP team decided it needed to know whether Student's difficulties stemmed from a language disorder or a language difference.

11. The assessment plan Parents signed does not specifically describe the scope of the proposed assessment. However, it is clear from the notes of the IEP meeting that the team did not contemplate a full S/L assessment, but instead merely wanted to determine whether Dr. Moleski's test results would have been different if she had conducted the tests in Spanish. The notes of the November 12, 2010 IEP meeting repeatedly describe the limited scope of the further S/L assessment the team contemplated:

District staff reiterated the need to further assess in primary language to confirm SDL disability or to secure data that indicates English language acquisition is the causative factor for English assessment scores. The rationale [sic] for assessing both in English and Spanish was further explained. It is best practice when ruling in or ruling out a disability with students who speak two languagesThe District team explained the unwillingness to place the student in a more restrictive setting without assessment in Spanish to corroborate [Dr. Moleski's] recommendations.

Parents and their attorney requested additional S/L therapy “while further Spanish SL assessment was completed” but District members of the IEP team insisted on deferring Parents’ request until the additional assessment results were received.

Ms. DiPasquale’s Supplemental Assessment

12. The District selected its Spanish bilingual S/L pathologist Melissa DiPasquale to conduct the further assessment in Spanish sought by Student’s IEP team. Ms. DiPasquale was well qualified for that task. She has a bachelor’s degree in Spanish from Ohio State University. She also has a master’s degree in Spanish translation from the Monterey Institute of International Studies. She is now completing coursework for her master’s degree in communication disorders and sciences at California State University at Northridge. Ms. DiPasquale is now responsible for case management, assessment and treatment of native Spanish- and English-speaking elementary school students in the District. For two previous years, she was employed by the Gonzales Unified School District, where she assessed and treated more than 65 native Spanish- and English-speaking students with speech difficulties, and was frequently called upon to determine whether those difficulties stemmed from language disorders or language differences.

13. Ms. DiPasquale assessed Student during four days in December 2010. She examined Student under the supervision of Carrie Rockoff, her supervising S/L pathologist, in compliance with applicable licensing requirements. In addition, Student’s S/L therapist Ms. Whitman, whose presence was not required by licensing rules, nonetheless was present throughout Ms. DiPasquale’s assessment because Student was comfortable with her. Both S/L pathologists testified that Student behaved appropriately during the assessment and did her best. At the beginning of the hearing, Student challenged Ms. DiPasquale’s qualifications to do the assessment but withdrew that challenge at the end of hearing.

14. Ms. DiPasquale testified that she understood her task in further assessing Student was limited to conducting in Spanish, where feasible, the same tests that Dr. Moleski had conducted in English, so that the results could be compared and the team could determine whether Student’s language delays reflect a language disorder or a language difference. She therefore administered the Spanish-language equivalents of the tests conducted by Dr. Moleski if those equivalents existed for Student’s age group. Mirroring Dr. Moleski’s testing, Ms. DiPasquale administered the Clinical Evaluation of Language Fundamentals (Spanish) - Fourth Edition (CELF-4 Spanish); the Test de Vocabulario en Imágenes Peabody (TVIP); and the Spanish Expressive Vocabulary Test (SEVT).

15. Ms. DiPasquale testified that Spanish-language equivalents were not available for some of the tests conducted by Dr. Moleski. For example, Ms. DiPasquale did not administer the phonological awareness subtest of the Spanish-language CELF-4 because the test instructions limited that subtest to children nine years old or younger. Student was 10 years and 9 months old when Ms. DiPasquale assessed her.

16. Ms. DiPasquale found that, for the most part, Student achieved significantly higher scores on Spanish-language tests than on their English equivalents. Her assessment directly compared Student’s Spanish-language CELF-4 scores with the English-language scores obtained by Dr. Moleski on that same test:

CELF-4	English	English	Spanish	Spanish
	Standard Score	Percentile Rank	Standard Score	Percentile Rank
Core Language	50	<0.1	77	6
Receptive Language	61	0.5	82	12
Expressive Language	57	0.2	80	9
Language Memory	48	<0.1	73	4

17. To test Student’s receptive language, Dr. Moleski had administered the Peabody Picture Vocabulary Test - Fourth Edition(PPVT-4). Ms. DiPasquale therefore administered the TVIP, the equivalent receptive vocabulary assessment in Spanish. Again she found that Student’s performance was significantly better in Spanish:

	PPVT-4 (English)	TVIP (Spanish)
Standard Score	81	95
Percentile Rank	10	37

18. Dr. Moleski had also administered the Expressive Vocabulary Test - Second Edition)(EVT-2) to Student. Ms. DiPasquale administered its equivalent, the Spanish Expressive Vocabulary Test (SEVT). Student’s performance on the test in Spanish was vastly better than on its English equivalent:

	EVT-2 (English)	SEVT (Spanish)
Standard Score	80	113
Percentile Rank	9	81

Ms. DiPasquale concluded as follows:

... [Student’s] performance in Spanish far exceeds her performance on similar tasks in all of the English Language domains. In particular, her receptive and expressive language skills in Spanish fall within the low average range. [Student’s] performance on core language and language memory tasks fell below average range.

Ms. DiPasquale’s Eligibility Conclusion

19. Student contends that because Ms. Moleski expressed the opinion in her assessment that Student was not separately eligible for special education due to language impairment, that expression converted the narrowly conceived assessment into a full assessment of speech and language eligibility that should be held to the standards appropriate to such a full assessment. Ms. DiPasquale’s assessment states that Student was referred “to determine whether she continues to qualify for Special Education services

as a student with a Speech and/or Language Disorder ... and to determine whether her language difficulties in English may be due to language *difference* or language *disorder*." (Emphasis in original.) Ms. DiPasquale concluded that Student "does not qualify at this time under state/federal criteria for speech/language services."

20. Ms. DiPasquale's expression of opinion did not convert her limited-purpose assessment into a full S/L eligibility assessment. State law requires for every assessment a written report that includes whether the student may need special education and related services and the basis for making that determination. If Student's contention were correct, the inclusion of that required information would convert every limited-purpose assessment to a full assessment to be measured by all applicable requirements, and essentially defeat the purpose of a narrowly targeted supplemental assessment.

21. Ms. DiPasquale's assessment as a whole makes it clear that its purpose was limited to replicating Dr. Moleski's S/L test results in Spanish where feasible. The assessment states that it was merely "part of a supplemental evaluation to determine continued eligibility services" and that Ms. DiPasquale's opinion was based only on the testing she did, and not on the substantial other information her assessment supplemented.

22. No one who participated in the IEP or assessment process was misled by Ms. DiPasquale's conclusion into believing that her assessment was more than it was intended to be. The evidence showed that Parents and their attorney, in particular, were well aware of the limits of Ms. Pasquale's assignment when they authorized the assessment. Parents did not testify at hearing and made no claim that they thought the assessment was anything more than a way to reproduce Dr. Moleski's English-only testing results in Spanish where feasible.

23. Ms. DiPasquale's opinion has had no practical consequence. The District has not attempted to change Student's secondary eligibility category. Student remains eligible

for S/L services due to a language impairment and continues to receive those services. Moreover, the services required in an IEP are determined on the basis of individual need, not disability category. It makes no difference to the District's legal obligation to address Student's S/L difficulties whether she is separately eligible in that category or not.

24. For the reasons stated above, the evidence showed that Ms. DiPasquale's assessment was limited to replicating Dr. Moleski's English-only S/L testing results in Spanish where feasible, and had no larger purpose. Its appropriateness should therefore be measured in light of its limited scope.

THE APPROPRIATENESS OF THE SUPPLEMENTAL ASSESSMENT

25. At hearing a number of potential issues were eliminated by stipulation. Student does not argue that Ms. DiPasquale failed to follow the publisher's instructions in administering her assessment tools, that her numerical scores were inaccurate, or that her scores were not accurately reported. Nor does she challenge the assessment results that relate to hearing and voice fluency resonance, or argue that Student behaved in any way inappropriately during the assessment. Student's central argument is that Ms. DiPasquale's assessment is incomplete because it failed to utilize additional tools and strategies, especially to inquire adequately into Student's difficulties with pragmatic language, and was not therefore based on complete and accurate information and is invalid as a result.

26. If the scope of the assessment had not been limited as described above, Student's contention would have merit. Student's expert Carol Murphy, an experienced S/L pathologist, testified that a full assessment for S/L eligibility should contain additional information beyond that presented by Ms. DiPasquale. Ms. DiPasquale agreed; she testified that if she had set out to conduct a full assessment she would have used additional tools and reported on additional considerations. However, the assessment was

not designed to address those additional matters, and Ms. Murphy did not mention what a more narrowly conceived assessment should contain.

27. Student emphasizes that Ms. DiPasquale failed to address pragmatic language in her assessment report; failed to observe Student in class, on the playground, or at home to evaluate her pragmatic language; and failed to interview her teachers or Parents, or take a language sample.¹ Parents reported to Dr. Moleski that Student does not interact socially and has no friends. The District argues that it has ample information about Student's pragmatic language from staff reports and previous assessments by Ms. Whitman in 2009, and by school psychiatrist Michael Xavier in 2010, who examined Student's social interactions as part of an assessment for autism. This information led the District to believe that Student does not have a pragmatic language problem at school, and enjoys normal relationships with her peers. Ms. DiPasquale also established that pragmatic speech is not particularly a bilingual concern; it does not vary much from language to language.

28. It is unnecessary to resolve the parties' dispute about the state of Student's pragmatic language because inquiring into it was not part of Ms. DiPasquale's assignment. Dr. Moleski simply tested Student; she did not observe her in class, on the playground, or at home, or take a language sample. Nor did Dr. Moleski directly address Student's pragmatics; she reported only that Student received a very low grade on the pragmatic judgment subtest of the Comprehensive Assessment of Spoken Language (CASL). Ms. DiPasquale looked diligently for a Spanish language equivalent of that instrument that she

¹ Pragmatic language concerns the use of functional and appropriate language with others.

could administer to Student, but after consulting the American Speech-Language-Hearing Association and a network of other schools, she learned that no such equivalent existed.

29. The evidence showed that the District properly assessed Student in accordance with statutory requirements and the limited terms of the supplemental assessment. Ms. DiPasquale administered to Student every Spanish-language equivalent of the S/L tests conducted by Dr. Moleski that were appropriate to Student's age group. She used more than one procedure in her determination, was properly trained and supervised, properly administered the tests, and produced relevant and accurate results. She did not administer any test in a racially, culturally, or sexually discriminatory manner. She administered her tests in Student's primary language. Therefore, the resulting assessment was appropriate.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. The District, as petitioner, has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 56, 62 [163 L.Ed.2d 387].)

INDEPENDENT EDUCATIONAL EVALUATION

2. 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) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) "Independent educational evaluation means an evaluation 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 evaluation obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1), (b)(2)(2006).)

3. When a student requests an IEE, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2)(2006); Ed. Code, § 56329, subd. (c).)

REQUIREMENTS FOR ASSESSMENTS

4. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.)² Thereafter, a special education student must be reassessed at least once every three years, or more frequently if conditions warrant, or if a parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a).) 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. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

5. Tests and assessment materials must be used for the purposes for which they are valid and reliable, 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)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) Under federal law, an assessment tool must "provide relevant information that directly assists persons in determining the educational needs of the child." (34 C.F.R. § 300.304(c)(7).) In California, a test must be selected and administered to produce results "that accurately reflect the pupil's aptitude, achievement

² An assessment under California law is equivalent to an evaluation under Federal law. (Ed. Code, § 56303.)

level, or any other factors the test purports to measure" (Ed. Code, § 56320, subd. (d).) A district must ensure that a child is assessed "in all areas related to" a suspected disability. (Ed. Code § 56320, subd. (c), (f).)

6. 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).) In assessing a possible language or speech disorder, a student's "difficulty in understanding or using spoken language shall be assessed by a language, speech, and hearing specialist ..." (Ed. Code, § 56333.)

7. 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. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

8. An assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subds. (a), (b).)

ELIGIBILITY CATEGORIES AND IEPs

9. A student is eligible for special education and related services due to a language disorder if she scores at least 1.5 standard deviations below the mean, or below the 7th percentile, for her chronological age or developmental level on two or more of certain standardized tests. In the alternative, the student is eligible if she achieves such a score on one such standardized test and, in addition, displays inappropriate or inadequate usage of expressive or receptive language as measured by a representative spontaneous

or elicited language sample of a minimum of fifty utterances. (Cal. Code Regs., tit. 5, § 3030, subd.(c)(4).)

10. A properly crafted IEP addresses a student's individual needs regardless of her eligibility category. (20 U.S.C. § 1412(a)(3)(B); see *Fort Osage R-1 School Dist. v. Sims* (8th Cir. 2011) 641 F.3d 996, 1004 (category "substantively immaterial"); *Heather S. v. Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1055; *Hailey M. v. Matayoshi* (D. Hawaii, Sept. 11, 2011 (10-00733) 2011 WL 3957206, p. 3). "The purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself." (*Pohorecki v. Anthony Wayne Local School Dist.*, 637 F.Supp.2d 547, 557 (N.D. Ohio 2009).

ISSUE: WAS THE DISTRICT'S SPEECH AND LANGUAGE ASSESSMENT OF STUDENT, PRESENTED AT THE JANUARY 11, 2011 IEP TEAM MEETING, APPROPRIATE SUCH THAT STUDENT IS NOT ENTITLED TO AN IEE AT PUBLIC EXPENSE?

11. Based on Factual Findings 1 and 4 through 29, and Legal Conclusions 1 through 10, Ms. DiPasquale's supplemental assessment, presented at the January 11, 2011 IEP meeting, was appropriate. A district may seek an additional assessment for the purpose of arriving at an appropriate IEP when it is reasonably dissatisfied with the information in an IEE provided by a parent. (*Shelby S. v. Conroe Independent School Dist.* (5th Cir. 2006) 454 F.3d 450, 454.) Here the District was reasonably dissatisfied with Dr. Moleski's assessment because she did not conduct it in Student's primary language. It thus had good reason to replicate Dr. Moleski's results in Spanish where feasible. Ms. DiPasquale's assessment accomplished that goal. Everyone involved knew that her assessment was limited to that goal. Student cites nothing in special education law that would require such an assessment to be broader in scope than it was intended to be, and had Ms. DiPasquale gone beyond Parents' understanding of the assessment she would arguably have acted without their consent. Since Student does not challenge the accuracy

of Ms. DiPasquale's assessment results, repeating those results at public expense would be pointless and beyond the purpose of the statute providing for IEEs.

12. Based on Factual Findings 1 and 25 through 29, and Legal Conclusions 1 through 10, the District did not, as Student contends, fail to assess her in all areas of suspected disability. To the extent that Student's contention is addressed to Ms. DiPasquale's supplemental assessment, it is incorrect for the reasons set forth above. To the extent it is addressed to other assessments that the District conducted or should have conducted is not an issue posed by the instant complaint and thus cannot be decided here. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Parents remain free to request that the District conduct a full S/L eligibility assessment, to obtain such an assessment on their own, and to challenge any perceived shortcoming in the S/L services Student continues to receive. The only issue posed by the instant complaint is whether Ms. DiPasquale's assessment was appropriate.

ORDER

Ms. DiPasquale's supplemental speech and language assessment of Student was appropriate, and the District is not required to fund an IEE related to it.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires this decision to indicate the extent to which each party prevailed on each issue heard and decided. The District 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 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: September 28, 2011

A handwritten signature in black ink, appearing to read 'C. Marson', with a long horizontal flourish extending to the right.

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings