

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

In the Matter of:

CAPISTRANO UNIFIED SCHOOL  
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent;

OAH Case NO. N 2005090873

AMENDED DECISION<sup>1</sup>

Richard M. Clark, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter on May 17, 18, 19, 22 and 23, 2006, in San Juan Capistrano, California.

Petitioner Capistrano Unified School District (District) was represented by attorney S. Daniel Harbottle. Jennifer Fant, program specialist for District, was present during the hearing.

Respondent (Student) was represented by attorney Paul Roberts. Student's mother and father were present during most of the hearing.

Originally, this matter was consolidated with OAH Case N2005120415, a Student filed complaint against the District raising similar issues. On May 16, 2006, Student

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<sup>1</sup> The Amended Decision corrects only the prevailing party findings. There are no other changes made to the previously issued Decision.

withdrew that complaint. The District made a motion for costs due to Student's late notice of withdrawal of his matter. The request for costs was taken under submission. The ALJ strongly considered issuing an Order to Show Cause regarding costs, but sufficient authority to order costs when a party withdraws a complaint on the eve of hearing was not provided. Therefore, the request for costs is denied.

Oral and documentary evidence were received during the hearing and that portion of the hearing was closed on May 23, 2006. On May 23, 2006, Student offered exhibits 25 (autism evaluation by Kelly McKinnon, August 26, 2005), 28 (autism evaluation by Denise Eckman, October 13, 2005), and 30 (autism evaluation by Kelly McKinnon, February 6, 2006), into evidence based upon testimony from Student's expert witnesses that they reviewed those reports prior to testifying and prior to conducting their own assessments, and the testimony of Student's mother that those are three of the independent evaluations paid for by parents. The District's objection to the documents based upon insufficient foundation was taken under submission. Exhibits 25, 28 and 30, are admitted for the limited purpose of demonstrating that those were the independent evaluations paid for and received by Student's parents. The expert opinion information contained within those exhibits is not received.

The record remained open for the submission of written closing arguments to be received no later than June 2, 2006. Counsel and Student's father waived any time requirements on the condition that a written decision be issued no later than June 30, 2006.<sup>2</sup>

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<sup>2</sup> The 45th day for issuance of the decision is July 12, 2006.

## ISSUE

Were the District's assessments of Student conducted in July 2005 appropriate and in accordance with the assessment plan, or are Student's parents entitled to an independent educational evaluation (IEE) at public expense?<sup>3</sup>

## FACTUAL FINDINGS

1. Student turned three years old on September 8, 2005, and resides with his parents and two sisters within the District. Student is eligible for special education services under the category of autism. Student had an Individualized Family Service Plan (IFSP) through Orange County Regional Center that was developed on August 10, 2004. Student was transitioning from regional center infant services at the Intervention Center for Early Childhood (ICEC) to the preschool program run by the District. ICEC prepared an "Exiting Assessment" report for Student dated June 12, 2005. Student's native language is English.

## INITIAL ASSESSMENT

2. In June 2005, Juanita Dotson and Laurisa Schwer, on behalf of the District, met with Student's parents and developed an assessment plan for Student that was approved by parents on June 27, 2005. The assessment plan lists the following areas of assessment by District personnel: a school psychologist would assess Student in the areas of academic/pre-academic achievement, intellectual development, social, emotional and adaptive behavior, and perceptual/processing; a speech and language pathologist (SLP) would assess Student in the area of speech and language (SL); an occupational therapist would assess Student in the area of gross/fine motor development; a nurse would assess

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<sup>3</sup> At the hearing, the District offered evidence and testimony that addressed the appropriateness of its entire assessment plan. Therefore, the issue was clarified to reflect proof offered at the hearing

Student's health/physical status<sup>4</sup>; and an autism specialist would assess Student in the area of social, emotional and adaptive behavior. In addition, the assessment plan listed specific questions that were to be addressed in each category of assessment and requested that District personnel observe Student in his ICEC program.

3. The District issued a single multi-disciplinary assessment report (MDAR) that contained the psycho-educational and SL assessment report prepared jointly by Juanita Dotson, school psychologist, and Laurisa Schwer, SLP. The report lists the date of testing as July 13, 2005, but does not list the date the report was issued.

#### PSYCHO-EDUCATIONAL ASSESSMENT

4. Ms. Dotson is an educational psychologist working for the District who assessed Student on July 13, 2005. She has worked in the field for over ten years, is credentialed and well qualified for her position. Ms. Dotson used the following assessment tools in her assessment of Student: Mullen Scales of Early Learning (Mullen); Bracken Scale of Basic Concepts (Bracken); Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI); Vineland Adaptive Behavior Scales-Interview Edition (Vineland); Childhood Autism Rating Scale (CARS); and Pervasive Developmental Disorders Screening Test (PDDST). These are standardized tests that are well known and widely used to test students. Ms. Dotson noted in her report that because Student's history does not reflect the life experiences of the normative population for each test, she used the tests diagnostically in combination with alternative means of assessment in order to ensure the most

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<sup>4</sup> There was no testimony from the District or Student about any inadequacies in the nurse's assessment of Student, and it was not listed as an issue for the due process hearing. Therefore, the appropriateness of the nurse's assessment will not be addressed by this decision.

appropriate evaluation of Student. The tests were administered in English and did not use discriminatory criteria.

5. The test protocol documents used by Ms. Dotson included only Student's name, but did not include other information such as date of test and the name of person who administered each test. Student was not able to identify any colors on the Bracken test, but the written report states that Student could receptively identify eleven colors. Ms. Dotson explained that this was a typographical error. When administering the Vineland, Ms. Dotson used "shorthand" and stopped recording scores at a certain point when she was trying to determine Student's basal or baseline scores. Even though the testing protocols do not allow for shorthand, the Vineland scores accurately reflect Student's performance on that test. When administering the VMI, Ms. Dotson did not follow the publisher's protocols but Ms. Dotson was able to understand her notes and score the test appropriately. She did not follow the publisher's directions for scoring the CARS test. Ms. Dotson was "surprised" she gave the research version of the PDDST but did not intend to actually seek a result from the PDDST but used it to gather information about Student. She left PDDST test items blank and did not score it according to the test guidelines; the scores were reported only because once a test is given, the scores must be reported. Ms. Dotson did not give the receptive and expressive language portions of the Mullen test because the SLP would give those tests. While the testimony established that Ms. Dotson did not follow the publisher's directions specifically, the ALJ found Ms. Dotson credible and was persuaded that the errors made by Ms. Dotson were minor errors that did not affect the results of the tests.

6. Dr. Christine Davidson testified as an expert in educational psychology for Student and opined that the District psycho-educational assessment was fraught with errors, including use of outdated versions of the tests and failure to follow testing protocols which led to test results that could not be interpreted properly. Dr. Davidson found the testing errors profoundly affected the test results but was not persuasive in her explanation

of how. Dr. Davidson's testimony was not persuasive in establishing that the testing norms were inappropriate or that the tests used were outdated.

#### SPEECH AND LANGUAGE ASSESSMENT

7. Ms. Schwer is a SLP working for the District and assessed Student in the areas of SL on July 11, 13 and 14, 2005. She has been a SLP for over 6 years but has been in the field for over ten years and is well qualified for her position. Ms. Schwer prepared the SL portion of the MDAR. Ms. Schwer used the following assessment tools during her assessment of Student: Preschool Language Scale-Fourth Edition (PLS-4); Rosetti Infant-Toddler Language Scale (Rosetti); Goldman Fristoe Test of Articulation-2 (GFTA-2); Khan Lewis Phonological Analysis-2 (KLPA-2); Oral Motor Examination; Language Sample; Parent Report; and Observation and data. The standardized tests given are well known and widely used in the evaluation of students for SL deficiencies. The tests were administered in English and did not use discriminatory criteria.

8. Ms. Schwer considered whether Student had verbal apraxia (apraxia). She had diagnosed apraxia in other cases, but there are no standardized tests for apraxia. Ms. Schwer was knowledgeable in the area of apraxia and autism, and discussed the distinction between phonological processing disorders and apraxia. Ms. Schwer noted that Student should be monitored for signs of apraxia as his speech output increased. However, she did not diagnose apraxia because Student's speech output had been so delayed and because Student was able to "imitate" her, an indication that apraxia is not present.

9. Abby Rozenberg testified as an expert in SLP on behalf of Student. Ms. Rozenberg has extensive experience in SLP and is well qualified to render an opinion regarding SL. She conducted an independent assessment of Student on October 26, 2005, and as part of her assessment, reviewed the District assessments, including the SL assessment of Ms. Schwer. Ms. Rozenberg disputed Ms. Schwer's interpretation of the language sample. Ms. Rozenberg diagnosed Student with apraxia and believed that Ms.

Schwer should have as well, particularly after the PLS-4 test was given. The ALJ is not persuaded that this is a defect in the SL assessment by the District, but instead amounts to a difference in professional judgment.

## OCCUPATIONAL THERAPY ASSESSMENT

10. The District issued an occupational therapy (OT) assessment report prepared by Nicole Sadauski, an occupational therapist. The dates of the OT assessment are listed as July 12 and 13, 2005, but the report itself is not dated. Ms. Sadauski did not testify at the due process hearing, but her report was reviewed by her supervisor, Claudia Ginsberg-Brown, and admitted into evidence. Ms. Ginsberg-Brown was involved in the hiring of Ms. Sadauski, who worked for the District from 2003-2005 and left the District on good terms in the summer of 2005. Ms. Sadauski did not have an OT license on the dates she assessed Student, but she had at least three years experience as an OT and her OT license was pending. She now has her OT license. Ms. Ginsberg-Brown was not involved in Student's OT assessment or preparation of the OT report, but offered the opinion that the report met the District's standards for comprehensiveness and that appropriate assessment tests and tools had been utilized by Ms. Sadauski during the assessment. The tests were administered in English and did not use discriminatory criteria.

11. The OT assessment tests included a record review, parent interview, clinical observations, Peabody Developmental Motor Scales-2 Fine Motor Composite (PDMS-2) and a Sensory Profile. The PDMS-2 was given one month earlier by the ICEC but a one month separation between tests did not invalidate the results. The PDMS-2 testing booklet does not list the name of Student, the date the test was administered, or the name of the person giving the test. The Sensory Profile bears only Student's name, birth date and test date, but does not list the name of who completed the profile and other information requested on the front of the test. The Sensory Profile protocols indicate that no questions should be left blank and that the test administrator should discuss blank questions with the

parents, but many questions were left blank. Ms. Ginsberg-Brown “assumed” Ms. Sadauski talked to the Student’s mother but acknowledged it was possible that Ms. Sadauski had not. In addition, the Sensory Profile has “X” marks next to certain questions that do not comport with the publisher’s instructions and there are no explanations for how the “X” marks were interpreted. Ms. Ginsberg-Brown scored the test interpreting the “X” marks at both extremes and found that the final score was not affected. The ALJ finds that the errors and omissions in the testing significantly affected the reliability of the test process and were not explained by testimony from Ms. Sadauski’s supervisor.

12. Susanne Smith-Roley testified as an expert in OT for Student and conducted an independent OT evaluation of Student on October 3, 2005. Ms. Roley-Smith was extremely well-qualified to testify regarding OT. The District’s OT witness, Ms. Ginsberg-Brown, was a former student of hers. Ms. Smith-Roley testified and established that the District’s OT assessment did not directly address and consider the areas of praxis and self regulation, which are two major components of an OT assessment, even though the observations listed in the District report indicate that they are areas of concern. Ms. Smith-Roley acknowledged that there are no standardized tests for three year olds in the area of praxis and self regulation. The Peabody test is not generally given in the area of OT and the Peabody test here only addressed fine motor skills. Gross motor skills are a very important part of an OT assessment, but the report does not directly address or consider gross motor issues. The Peabody test was given one month after the ICEC gave it and came up with divergent scores, yet the District report does not address those discrepancies. The Sensory Profile was not administered appropriately and there is no indication that the test was ever discussed with the parents as required by the publisher’s instructions to explain blank questions and ambiguous answers. It was Ms. Smith-Roley’s opinion that the District assessment did not address Student’s unique needs in the area of OT and how Student could benefit from OT services. The ALJ finds Ms. Smith-Roley very credible and is persuaded by her testimony regarding the inadequacies in the District’s OT assessment.



## AUTISM ASSESSMENT

13. Amy Meyers was the District autism specialist assigned to conduct the assessment of Student. Ms. Meyers has a master's degree in special education with an emphasis in autism, had worked with and taught children with autism since 1999, and had been an autism specialist with the District since September 2004; she is well qualified for her current position. Ms. Meyers became involved in Student's case during the summer of 2005 when Ms. Schwer asked her to participate in an observation of Student. Ms. Meyers does not normally participate in the evaluation of preschool students, and it was her understanding that she was to observe Student but not do a formal assessment. On July 13, 2005, Ms. Meyers went to the ICEC to observe Student with Ms. Dotson and Ms. Schwer. The observation lasted approximately 30 minutes. Ms. Meyers verbally discussed her observations with both Ms. Dotson and Ms. Schwer, but did not take written notes and did not prepare any type of written report.

14. The District asserted that the autism specialist was only required to observe Student, not do a complete assessment. Ms. Schwer took notes during the assessment plan meeting but the notes refer only to information about Student offered by the parents. Student's mother established credibly that a complete assessment by an autism specialist was contemplated at the assessment planning meeting. Her testimony was corroborated by the assessment plan itself which lists the required assessments, including an assessment by an autism specialist. To the extent that there is a conflict in the testimony, the ALJ is persuaded by the mother's testimony.

15. Student's parents received the District's MDAR and the OT assessment reports 2-3 days before an IEP meeting held on July 22, 2005. The District did not provide a report from an autism specialist. The parents had specifically asked that Student not be administered the same tests he had received at the ICEC, but the OT had given the Peabody test which the ICEC had given one month prior. Student's mother was never contacted by

anyone from the District, including Ms. Sadauski, to discuss her written answers on the Sensory Profile test. In a letter sent by Student's attorney on August 9, 2005, Student's parents requested an IEE at public expense. The District sent a letter dated August 30, 2005, requesting an explanation about why the parents were seeking an IEE.<sup>5</sup>

## APPLICABLE LAW

1. Under the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. §1400, et seq.; Ed. Code §56000, et seq.) The term "free appropriate public education" means special education and related services that are available to the student at no cost to the parents, that meet the State educational standards, and that conform to the student's individualized education program (IEP). (20 U.S.C. §1401(9).)

2. The petitioner in a special education administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v Weast* (2005) 546 U.S.\_\_\_\_; [126 S.Ct. 528].)

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 an appropriate educational program for the student. (20 U.S.C. §1414 (a)(2), (3); Ed. Code §56320, subds. (e), (f).) Tests and assessment materials must be administered by trained personnel in conformance with the

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<sup>5</sup> Student requested an IEE on August 9, 2005. IEP meetings were held in late July and August 2005. The District sent a letter to Student dated August 30, 2005, and filed for due process hearing on September 28, 2005. The ALJ finds that an approximately 30-day delay from the last IEP meeting to the District's filing is not an undue delay.

instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); 34 C.F.R. §300.532; Ed. Code §56320, subds. (a), (b).) 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.” (20 U.S.C. §1414(b)(3)(B)(ii); 34 C.F.R. §300.532; Ed. Code §56320, subd. (g), §56322;.) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code §56324.) 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)(2), (3); 34 C.F.R. §300.532; Ed. Code §56320, subds. (a), (b).)

4. When a parent disagrees with an assessment obtained by the public educational agency, the parent has the right to an IEE from qualified specialists at public expense unless the educational agency is able to demonstrate at a due process hearing that its assessments were appropriate. (Ed. Code §56329, subd. (b); 34 C.F.R. §300.502.) If the parent requests an IEE, the District must without unnecessary delay, initiate a due process hearing to show that its assessments were appropriate or ensure that the IEE are provided at public expense. (34 C.F.R. §300.502(b).) If a parent requests an IEE, the public agency may ask for the parent's to explain their objection to the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the IEE at public expense or initiating a due process hearing to defend the public evaluation. (34 C.F.R. §300.502(b)(4).)

## LEGAL CONCLUSIONS

1. The District’s psycho-educational assessment conducted by Juanita Dotson on July 13, 2005, was appropriate. As stated in Factual Findings 4 to 6, and Applicable Law sections 3 and 4, Ms. Dotson did not properly follow the publisher’s testing procedures

when administering certain standardized tests. However, those errors did not ultimately affect the outcome of the tests. Therefore, the District's psycho-educational assessment was appropriate.

2. The District's speech language assessment conducted by Laurisa Schwer on July 13, 2005, was appropriate. As stated in Factual Findings 7 to 9, and Applicable Law sections 3 and 4, Ms. Schwer properly assessed Student for SL impairment. Ms. Schwer appropriately evaluated Student for verbal apraxia and did not rule out that diagnosis but indicated that it should be watched further. Therefore, the District's SL assessment was appropriate.

3. The District's OT assessment conducted by Nicole Sadauski on July 12 and 13, 2005, was not appropriate. As stated in Factual Findings 10 to 12, and 15, and Applicable Law sections 3 and 4, Ms. Sadauski did not testify at the due processing hearing. Her supervisor introduced the OT report but could not persuasively establish that the testing procedures were followed by Ms. Sadauski, particularly as to how Ms. Sadauski administered the Sensory Profile test. Student's mother was not contacted and asked to discuss or interpret the inconclusive or blank answers on the form. The ALJ is not persuaded that the test results were not affected by this error despite the testimony from Ms. Ginsberg- Brown that she scored the test using both extremes and found that the ultimate result was not affected.

As stated in factual finding 12, Ms. Smith-Roley persuasively established that gross motor skills, self regulation and praxis, were appropriate areas to be covered in an OT assessment but the District's OT assessment did not properly evaluate and address those areas of need. Therefore, Student is entitled to an IEE in the area of OT at public expense.

4. The District was required to provide an assessment conducted by an autism specialist. As stated in Factual Findings 2, and 13-15, and Applicable Law sections 3 and 4, the assessment plan for Student required an assessment by an autism specialist, not merely an observation. The District did not conduct an assessment by an autism specialist and did

not prepare any written report by an autism specialist as required by the assessment plan. Therefore, Student is entitled to an IEE conducted by an autism specialist at public expense.

## ORDER

1. Student is not entitled to a psycho-educational or SL assessment at public expense.
2. Student is entitled to an IEE in the area of OT conducted at public expense.
3. Student is entitled to an IEE conducted by an autism specialist 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. There were four assessments at issue. Student prevailed on two assessments. The District prevailed on two assessments. Any award of attorney fees should consider that the District prepared for a hearing that, because of the complaint cross filed by Student, was anticipated to last 12-days. Student withdrew his complaint in the late afternoon the day before the hearing started and offered as an explanation that Student had unspecified witness availability problems. Student did not seek a continuance or otherwise attempt to work out witness availability issues or concerns with the District, and the expense, time and resources utilized by the District preparing for the hearing were to no avail.

## 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 ninety days of receipt of this decision. (Ed. Code §56505, subd. (k).)

DATED: July 11, 2006

A handwritten signature in black ink, appearing to read "Richard M. Clark", written over a horizontal line.

RICHARD M. CLARK

Administrative Law Judge

Special Education Division

Office of Administrative Hearings