

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ROWLAND UNIFIED SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2009120407

DECISION

Administrative Law Judge Richard T. Breen, Office of Administrative Hearings (OAH), State of California, heard this matter in Rowland Heights, California, on February 18, 2010.

Attorney Ricardo Silva represented Rowland Unified School District (District). Program Specialist/School Psychologist designee Leonard McLaren attended for District. Student was present and represented by his mother (Mother). Certified court interpreter Marcela Sandoval interpreted the proceedings into Spanish for Mother.

District's request for a Due Process Hearing was filed on December 8, 2009. The matter was continued for good cause on January 5, 2010. The record was closed and the matter was submitted at the close of hearing on February 18, 2010.

ISSUE

May the District deny Student an independent educational evaluation (IEE) in occupational therapy (OT) because its July 10, 2009 assessment was properly conducted?

FACTUAL FINDINGS

1. Student was fifteen years old at the time of hearing. At all relevant times, Student lived within the boundaries of the District and was eligible for special education under the category of orthopedic impairment.

2. Student was diagnosed with cerebral palsy/spastic triplexia. His condition caused him to have some weakness in his left arm. To walk, Student required ankle foot orthoses on both feet and forearm crutches on both arms.

3. Mother requested an OT assessment on June 11, 2009. An assessment plan was provided to her that same day in her native language of Spanish. Mother's main concern was whether Student's fine motor skills were sufficient; in particular, Mother was concerned with the pace of Student's writing. Mother also had some concern for Student's movement and balance. The assessment plan noted that the purpose of the assessment was to determine if Student needed OT. The assessment plan noted that Student's primary language was Spanish, but that an interpreter was not needed.

4. Sandra Pinedo (Pinedo) received a bachelor's degree in OT from the University of Southern California in 2002 and was licensed by the State of California as an occupational therapist. Since 2002, she was employed by Gallagher Pediatric Therapy, a non-public agency that provided OT assessments and therapy to special education students. Pinedo had performed approximately 120 OT assessments, 30 of which involved children with cerebral palsy.

5. Pinedo assessed Student in school on July 10, 2009. Pinedo understood that the purpose of the assessment was to determine whether Student required OT in order to access the school environment, the curriculum, and other educationally related experiences. As part of the assessment, Pinedo reviewed Student's last four individualized education programs (IEPs), and a district OT assessment dated February 15, 2008. Pinedo interviewed Student's summer school teacher and observed him in

class. Pinedo observed Student complete a journal writing assignment, which Student completed without fatigue and with “wonderful” penmanship. Student was capable of copying from the board and demonstrated bilateral coordination despite a weakness in his left arm. Although Student did not have equal ability in both arms, he was fully functional, using his left hand to stabilize while cutting or writing with his right hand. Student did not report any problems with toileting or feeding at school. The teacher had no concerns about Student’s ability to access the educational environment, particularly in the areas of motor skills and attention. Pinedo determined from talking to the teacher and Student that the assessment could be done in English, as all instruction was in English and Student could easily converse in English.

6. As part of the assessment, Pinedo administered subtests 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 twenty-one. Because the BOT-2 was standardized and consisted of Student performing tasks such as drawing, cutting or folding, it was not racially or culturally biased. The BOT-2 was given in a quiet room without distractions. Pinedo had the BOT-2 test manual with her and followed the instructions.

7. Pinedo interviewed Mother by telephone as part of the assessment. Mother reported that at home Student was independent with dressing, toileting and feeding, but needed help putting on his shoes and ankle foot orthoses.

8. Pinedo wrote a report of her assessment. The report included Student’s scores on the BOT-2, which showed that Student was just below average in fine motor precision (tasks such as coloring within lines, folding, or cutting) and average in fine motor integration (tasks involving drawing or copying in response to visual stimulus). The BOT-2 results were consistent with BOT-2 results from the February 15, 2008 District OT assessment. The report also listed the school-related fine motor and visual motor

skills Student demonstrated in the assessment. In addition, Pinedo detailed her observations of Student's behavioral organizational skills, as demonstrated by his ability to attend to, transition between, and complete tasks during the 90-minute assessment. Based on the BOT-2, her observations, interviews, and record review, Pinedo concluded that Student had adequate fine motor skills for participation in his educational placement and did not require school-based OT to receive a free appropriate public education (FAPE). Pinedo persuasively testified that her conclusion was based on the requirements of education law and was not a medical conclusion regarding the need for OT. In other words, a doctor might recommend OT to address physical limitations caused by Student's cerebral palsy, but the same physical limitations do not necessarily mean that Student would require OT to benefit from special education.

9. At hearing, Mother explained that she disagreed with the July 10, 2009 assessment because she felt that Student's writing was too slow for him to progress in his education. In addition, Mother believed that Student lacked the attention span to be assessed for 90 minutes as reported by Pinedo. Mother's concern was that Student was not equally functional with both arms and was not fully independent.

10. Mother produced two prescriptions at hearing, from a neurologist and an orthopedic doctor, dated August 21, 2009 and January 6, 2010. Because the prescriptions post-dated the assessment, they could not have been considered by Pinedo. Both prescriptions referred Student for an OT evaluation and treatment without specifying whether it was for school-based OT as part of an IEP, or medical OT. Neither doctor testified at hearing. Even if authentic, the prescriptions on their face cannot be read as expressing an opinion about whether the July 10, 2009 OT assessment by Pinedo was appropriate.

11. Student testified in English, consistent with Pinedo's determination that Student could properly be assessed in English. Student did not have handwriting assignments in school that were longer than one page. Student also used an Alphasmart

(a keyboard with a memory) on a daily basis to keep logs of his school reading. Student reported that he did not think he could handwrite a long paper because he would get tired and that he did not use his left hand as much as his right hand when using the Alphasmart.

12. Linda Spencer (Spencer) was Student's special education teacher for the 2008-2009 and 2009-2010 school years. Spencer had 32 years of experience in education, half as a classroom aide in special education classes, and half as a credentialed special education teacher. Spencer explained that Student did not take much longer than other Students on writing assignments and, even so, it was because Student did not like it when his written work contained mistakes. Overall, consistent with Pinedo's observations and those of the 2009 summer school teacher, Spencer did not see anything Student was unable to do in class because of fine motor limitations. Although Spencer has referred other students for assessments in the past, she saw no reason to refer Student for an OT assessment.

LEGAL CONCLUSIONS

1. District contends that its July 10, 2009 occupational therapy assessment of Student was appropriate, such that it need not fund an IEE in OT at public expense. Student contends that the District's OT assessment was not appropriate because: Mother believes that Student's ADHD would have interfered with the assessment; Student's medical doctors provided Mother with prescriptions for occupational therapy assessments and treatment; and Mother disagrees with the conclusion that Student does not require OT to benefit from special education. As discussed below, the District met its burden of proving by a preponderance of the evidence that the July 10, 2009 OT assessment was appropriate.

2. 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].)

3. In order to assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, §56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under the IDEA and state law. (20 U.S.C. § 1414(b)(l); Ed. Code, § 56321, subd. (a).) The assessment plan must be understandable to the student, explain the assessments that the district proposes to conduct, and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(l)-(4).) A school district must give the parents and/or the student 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).) The proposed written assessment plan must contain a description of any recent assessments that were conducted, including any available independent assessments and any assessment information the parent requests to be considered, information about the student's primary language and information about the student's language proficiency. (Cal. Code Regs., tit. 5, § 3022.)

4. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds.

(a) & (b), 56381, subd. (h).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

5. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

6. A student may be entitled to an IEE if he or she disagrees with an evaluation obtained by the public agency and requests an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006)¹; 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)

¹ All subsequent references to the Code of Federal Regulations are to the 2006 version.

[requiring procedural safeguards notice to parents to include information about obtaining an IEE.]) In response to a request for an IEE, an educational agency must, without unnecessary delay, either: 1) File a due process complaint to request a hearing to show that its evaluation is appropriate; or 2) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(b)(2); 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].)

7. Here, the District demonstrated by a preponderance of the evidence that the July 10, 2009 OT assessment had been properly conducted. The assessment had been requested by Mother mainly because of a concern that Student required occupational therapy for fine motor skills such as writing. Mother was promptly provided with an assessment plan in her native language that described the nature of the assessment and Student's language abilities. The assessment was conducted by a highly qualified assessor from an outside agency. The assessor was familiar with cerebral palsy and had assessed approximately 30 other children with the condition. Student was assessed using a variety of assessment instruments, ranging from record review, interviews, standardized tests, and observation. The assessment instruments were appropriate and valid to determine Student's performance on fine motor and visual motor tasks such as writing. The assessment was not racially or culturally biased, because it consisted primarily of interviews and observation, coupled with a standardized test that required Student to repeat motor movements, such as drawing. Although the assessment plan stated that Student's primary language was Spanish, the assessor established that Student's primary language was English based on a teacher interview and an interview of Student. Student's primary language being English was corroborated by his testimony in English without the need for an interpreter. The

assessment resulted in a comprehensive written report that included all observations, assessment results, consideration of Student's functional needs at school, and a reasoned recommendation that Student did not require OT to access his education. Although Mother disagreed with the recommendation, Mother did not produce evidence at hearing demonstrating that the assessment failed to comply with the IDEA and state law. The July 10, 2009 assessment was properly conducted. (Factual Findings 1-12; Legal Conclusions 2-7.)

ORDER

District's July 10, 2009 OT assessment was properly conducted. District does not have to provide Student with an IEE at public expense.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed on the sole issue presented.

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: February 25, 2010

RICHARD T. BREEN

Administrative Law Judge

Office of Administrative Hearings