

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2017010601

DECISION

Los Angeles Unified School District filed a Due Process Hearing Request (complaint) with the Office of Administrative Hearings on January 19, 2017. On February 8, 2017, OAH granted Parents' request for a continuance. The prehearing conference was held on April 14, 2017, with both District and Parent in attendance.

Administrative Law Judge Chris Butchko heard this matter in Van Nuys, California, on April 25, 2017.

Patrick Balucan, Attorney at Law, represented District. Francine Metcalf, Litigation Coordinator, attended the hearing on behalf of District.

No appearances were made on behalf of Student at hearing. The start of hearing was delayed to allow additional time for Parents to appear. After approximately 30 minutes, the hearing was commenced.¹

¹Parent called OAH at 7:22 a.m. on the day of the hearing and told the calendar staff for this matter that he had talked with District's counsel and the ALJ and told them he would not be attending the hearing. No such call occurred with the ALJ.

At the request of District, OAH continued the matter for preparation of closing briefing. On May 8, 2017, after receipt of District's closing brief, the record closed, and the matter was submitted for decision. Parents did not submit a closing brief.

ISSUE²

Did District appropriately assess Student in its August 2016 psycho educational report such that student is not entitled to independent psycho educational and academic evaluations at public expense?

SUMMARY OF DECISION

District met its burden of proof by showing its psycho educational assessment was administered by trained and knowledgeable persons, using a variety of appropriate technically sound, valid, and reliable instruments, tools and strategies, and met all legal requirements. Accordingly, Student is not entitled to independent psycho educational and academic evaluations at public expense.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student was an 11-year-old female who at all relevant times resided with her Parents within District's boundaries. At the time of the assessment at issue, Student had no eligibility for special education services. Following an individualized educational program team meeting on September 19, 2016, to review the assessment results,

²The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

Student was found eligible under the categories of specific learning disability and other health impairment.

2. Student was not enrolled as a pupil in District at the time of the assessment in August 2016. At that time, Parents had unilaterally placed Student at Willows Community School, a non-public school. Student's home school was Westwood Charter School.

ASSESSMENT REQUEST

3. Late in the 2015-2016 school year, Parents and Willows Community School jointly requested that Student be assessed by District. Parents had concerns because Student was having academic difficulties. The referral form cited Student's difficulties in reading decoding and comprehension, math computation and application, and written expression, including spelling.

DISTRICT'S PSYCHO EDUCATIONAL ASSESSORS

1. Stacy Silber

4. Stacy Silber is credentialed as a school psychologist, having received her pupil personnel services credential in 1998. She received a bachelor of arts degree in psychology in 1990 from the University of California, Los Angeles, a master of arts degree in marriage and family therapy in 1995 from Cal State University, Northridge, and a master of arts degree in psychology in 1998 from Loyola Marymount University.

5. Ms. Silber has worked for approximately 20 years as a school psychologist in District. She has conducted approximately 1,000 assessments of students in her time with District. She has extensive experience administering the main battery of tests comprising her assessments, which are the Beery-Buktenica Test of Visual Motor Integration, the Cognitive Assessment System, the Test of Auditory-Perceptual Skills, and the Test of Visual-Perceptual Skills. Ms. Silber has scored results from the Behavior

Assessment System for Children and the Connors short form assessment about 500 times each.

6. Ms. Silber is trained and experienced in administering standardized assessment instruments. Ms. Silber's education, training, knowledge, and experience as a school psychologist qualified her to assess Student's psycho educational functioning, including the use of informal assessment tools and the administration of standardized instruments.

7. Ms. Silber was assigned to do Student's assessment, even though Student's home school was not a school at which Ms. Silber worked, because the assessment took place prior to the start of the school year. During that time, District staff would work outside of their regular assignment areas as needed. Ms. Silber shared responsibility for Student's assessment with the school psychologist assigned to Student's home school.

8. Ms. Silber contributed to Student's assessment by conducting record review, conducting caregiver interviews, and administration of standardized tests. She reviewed Student's educational records, including her grade reports. She interviewed Parent on August 3, 2016. Student was well-behaved and had a good work ethic, but her academics were affected by her inability to sustain attention and some hyperactive behaviors.

9. Ms. Silber administered her testing battery to Student on August 10, 2016, and interviewed Student prior to testing. Student reported that she enjoyed school overall, had many interests, and enjoyed reading but found it challenging at times. Ms. Silber established a rapport with Student.

10. To assess Student, Ms. Silber primarily used the Beery-Buktenica Test of Visual Motor Integration, the Cognitive Assessment System, Second Edition, the Test of

Auditory-Perceptual Skills, Third Edition, and the Test of Visual-Perceptual Skills, Third Edition.

11. The Beery-Buktenica Test of Visual Motor Integration was given to evaluate Student's ability to connect what she sees to what she puts on paper. Testing disclosed that Student performed in the average range, and there were no processing deficits.

12. Ms. Silber administered the Cognitive Assessment System to evaluate Student's reasoning abilities. Student displayed average cognition in all areas.

13. The Test of Auditory-Perceptual Skills examines a child's phonological skills and abilities in auditory memory, reasoning, and comprehension. After administering and scoring the test, Ms. Silber found that Student's abilities were in the average range overall.

14. Ms. Silber assessed Student's visual processing skills through the Test of Visual-Perceptual Skills. The test evaluates how children take in information visually, process it, and then express it. Student's abilities were found to be average overall.

15. In June 2016, prior to Ms. Silber's involvement in the assessment, Mr. Jeremy Kaplan, the school psychologist assigned to Westwood Charter School, distributed rating scales for the Behavior Assessment System for Children, Second Edition, and the Connors short form assessment to Parents and Student's teachers. Ms. Silber scored the assessments and interpreted the results.

16. The results of the Behavior Assessment System for Children were mixed. Ms. Silber found that Parent reported substantially more severe issues with Student's attention, ability to focus, level of anxiety and learning problems than did Student's teacher, who found Student typical of children her age. Ms. Silber noted the discrepancy but was unable to resolve it.

17. Ms. Silber also scored and interpreted the Connors short form assessment. The Connors was used by her to complement the Behavior Assessment System for Children, as the Connors hones in on issues with hyperactivity, impulse control, and attention. Her interpretation of the Connors was more internally consistent and raised areas of concern in inattention, hyperactivity/impulsivity, and learning problems.

18. Ms. Silber used the most current version of all assessment instruments when she administered them to Student. All instruments were administered in English, which was Student's primary language. All instruments were reliable and widely accepted assessment tools. The instruments were not racially, culturally, or sexually discriminatory in selection or administration. All instruments were administered and interpreted consistent with the publisher's protocols and yielded valid results. Ms. Silber did not rely on any single measure, tool, or score in contributing her recommendations to the assessment report.

2. Mr. Kaplan

19. Mr. Kaplan, Westwood Charter School's school psychologist, received his required pupil personnel services credential in 2005. He earned a bachelor of arts degree in psychology in 1995 from the University of California, Los Angeles, and a master of arts degree in educational psychology in 2005 from California State University, Long Beach.

20. Mr. Kaplan has worked for approximately 11 years as a school psychologist in District. He has conducted approximately 35 to 40 psycho educational assessments per year, for a total of between 350 and 450 assessments. Mr. Silber had responsibility for Student during the school year, and assumed responsibility for Student's assessment upon the start of the 2016-2017 school year.

21. He assisted Ms. Silber in drafting the assessment and prepared the Behavioral Observations section of the assessment report. He conducted observations of

Student at Willows Community School in the classroom and during unstructured time in the school yard. He also distributed the ratings scales interpreted by Ms. Silber and directed the administration of Student's academic testing by Student's private school teacher. Mr. Kaplan conducted interviews of Student's teachers.

22. During his observations, Mr. Kaplan focused on Student's ability to sustain focus and attention and her ability to participate in interactions with her teacher and peers. He found Student's attention to be variable, and noted that she had difficulty making eye contact with her teacher and would fidget in class. However, he did not find that her behavior was inappropriate. Student's socialization in unstructured time was age-appropriate.

23. Mr. Kaplan also directed Student's public school resource teacher in administering the Woodcock-Johnson Tests of Achievement, Third Edition, to Student in late August or early September 2016. Student scored in the low average range, with displayed strength in story recall.

24. Student was administered the most current version of the Woodcock-Johnson Tests of Achievement. They were administered in English, which was Student's primary language. They are reliable and widely accepted assessment tools, and are not racially, culturally, or sexually discriminatory. They were administered and interpreted consistent with the publisher's protocols and yielded valid results.

THE ASSESSMENT REPORT

25. Ms. Silber and Mr. Kaplan collaborated in drafting the psycho educational assessment report dated August 4, 2016. The report was shared with the individualized educational program team and provided to Parents at an IEP team meeting on September 19, 2016. Parents and all required IEP team members attended the meeting. Although Ms. Silber was the primary author of the report and was its signatory, Mr. Kaplan attended the meeting and presented the report. The report summarized the

assessors' findings and included recommendations about Student's eligibility and required services. The IEP team found that Student qualified for special education services under the categories of other health impairment and specific learning disability.

26. Parent disagreed with the findings of the report and requested an independent educational evaluation at public expense. Parent sent a letter to District dated December 6, 2016, requesting independent assessments. Following winter recess, District filed this action on January 19, 2017.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁴ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational

³Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁴All subsequent references to the Code of Federal Regulations are to the 2006 version.

standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.)

"Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.)

4. The Ninth Circuit Court of Appeals had held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the

definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the Rowley standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases were applied to define the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

5. The Supreme Court’s recent decision in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S.____, 137 S.Ct. 988 reaffirmed that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. The Ninth Circuit further refined the standard in *M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir 2017) 852 F.3d 840, stating that that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so as to enable progress commensurate with non-disabled peers, taking into account the child’s potential.

6. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing

the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, District had the burden of proof on the issue presented.

ISSUES: DISTRICT'S PSYCHO EDUCATIONAL AND ACADEMIC EVALUATIONS

7. District contends that its assessments were lawfully and properly administered by qualified assessors. For these reasons, District asserts that it is not obligated to fund independent psycho educational and academic evaluations for Student.

Request For Independent Educational Evaluations

8. Under certain conditions, a student is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(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) [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).) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

9. When a student requests an independent educational evaluation, 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); Ed. Code, § 56329, subd. (c).)

10. Based upon the foregoing authority, District timely filed a request for due process hearing to show that its assessments were appropriate. Parents sent a letter to District on December 6, 2016, requesting independent psycho educational and academic evaluations. On January 19, 2017, District responded to this request by filing the complaint for this matter. District's filing to defend its assessments within 44 days of Student's request for independent educational evaluations does not constitute an undue delay.

Requirement for Assessments

11. 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.)⁵ 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).)

12. A school district must make reasonable efforts to and obtain informed written consent from a parent before conducting the initial evaluation of a student to determine whether the child is a child with a disability. (34 C.F.R. §§ 300. 9; 34 C.F.R. §§ 300(a)(1)(i), (iii).) A local educational agency must provide written prior notice to the parents of a child whenever it proposes to initiate the identification, evaluation, or

⁵An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. §§ 1415(b)(3), and (c).)

13. 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 level, or any other factors the test purports to measure....” (Ed. Code, § 56320, subd. (d).)

14. 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).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).)

15. 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).)

16. 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).)

17. District has not included a copy of the assessment plan signed by Parents as an exhibit to this matter. However, District demonstrated through testimony that Parents did consent to and sign the assessment plan. Although District has the burden of proof as to all elements of its case, Parents have declined to appear at hearing and contest District's proof. Accordingly, as the testimony that Parents consented to District's assessment plan is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs and it is corroborated by evidence of further proceedings connected with the assessments, District has met its burden of proof.

18. District's psycho educational assessment was appropriate. Responding to Parents' request for assessment, the District cooperated with Parents, prepared an agreed-upon assessment plan, and conducted a comprehensive and thorough assessment⁶ that assessed Student in all areas related to suspected disability. The assessment was performed by licensed school psychologists. As to all the assessment instruments used in the psycho educational assessment, District established that the test instruments were validated, properly normed, not racially, culturally, or sexually biased. The assessors used the instruments for the purposes that they were designed, they were qualified to administer the assessment tools, they properly did so, and their results were accurate. Ms. Silber and Mr. Kaplan prepared a report summarizing their findings and making recommendations, which was shared with parents and the IEP team and

⁶ Ms. Silber's and Mr. Kaplan's testimonies conflicted over which assessor interviewed Student's teachers. Because Mr. Kaplan visited Student's school to conduct the observation, it is more likely to have been he who conducted the interviews. As teacher interviews were performed and are recounted in the assessment report, the conflict in testimony is immaterial and need not be resolved.

discussed at the IEP meeting. Accordingly, District's psycho educational assessment was appropriate.

ORDER

District's August 4, 2016, psycho educational assessment was appropriate and District is therefore not required to fund independent educational evaluations related to that assessment.

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. Here, District was the prevailing party on the sole issue presented.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd.(k).)

DATE: June 5, 2017

/s/

CHRIS BUTCHKO

Administrative Law Judge

Office of Administrative Hearings