

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019051020

LOS ANGELES UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

DECISION

OCTOBER 7, 2019

On, May 22, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Los Angeles Unified School District, naming Parent on behalf of Student as respondent. Administrative Law Judge, Brian H. Krikorian, heard this matter in Van Nuys, California on September 16 and 17, 2019.

Attorney Patrick Balucan represented Los Angeles Unified. Patrick Johnson attended all hearing days on Los Angeles Unified's behalf. Student was not represented. Parent did not attend the hearing.

At the close of testimony on September 17, 2019, the ALJ granted a continuance to October 7, 2019, for Los Angeles Unified to file and serve written closing arguments, and Parent to file a response, if any. Los Angeles Unified timely filed its brief and Parent did not submit closing arguments. The record was closed, and the matter was submitted for decision on October 7, 2019.

ISSUE

Were Los Angeles Unified's language and speech assessment and the April 16, 2018 report of the evaluation appropriate, such that Student is not entitled to an independent language and speech evaluation at public expense?

DECISION SUMMARY

This Decision holds that Los Angeles Unified proved that the April 16, 2018 assessment in the area of language and speech met the statutory requirements of both the California Education Code and the Individuals with Disabilities Education Act. As a result, Los Angeles Unified is not required to fund an independent language and speech evaluation at public expense.

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. §1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the "IDEA," are to ensure:

- 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 further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. §1400(d)(1); See Ed. Code, §56000, subd. (a).)

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).) Here, Los Angeles Unified

requested the hearing and therefore has the burden of proof on the issues.

FACTUAL FINDINGS AND LEGAL CONCLUSIONS

Student was a kindergarten student at Cabrillo Avenue Elementary School at the time of the hearing and was six years and seven months old. At all times, Student resided within Los Angeles Unified's boundaries. Student was medically diagnosed with autism and was determined to have an intellectual disability, qualifying him for special education services. In April of 2018, Los Angeles Unified reevaluated Student because he was transitioning to kindergarten in the next school year.

ISSUE: WERE LOS ANGELES UNIFIED'S LANGUAGE AND SPEECH ASSESSMENT AND THE APRIL 16, 2018 REPORT OF THE EVALUATION APPROPRIATE, SUCH THAT STUDENT IS NOT ENTITLED TO AN INDEPENDENT LANGUAGE AND SPEECH EVALUATION AT PUBLIC EXPENSE?

Los Angeles Unified contends the April 16, 2018, assessment in the area of language and speech meets the federal and state statutory requirements, and that it is not obligated to fund an independent educational evaluation at public expense.

Assessments are required to determine eligibility for special education, and what type, frequency, and duration of specialized instruction and related services are required. In evaluating a child for special education eligibility and before the development of an individualized education program, referred to as an IEP, a district must assess in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's

educational or related service needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).). A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a free appropriate public education, referred to as FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033.)

Los Angeles Unified's April 16, 2018 Language and Speech Assessment

Jessy George was a licensed speech pathologist employed by Los Angeles Unified. Ms. George conducted a Preschool Language and Speech assessment over three different days and prepared a written assessment report dated April 16, 2018. Ms. George received her bachelor's degree and master's degree in speech pathology at the University of Mysore in India. She received subsequent training in the United States, including training by Los Angeles Unified. Ms. George had 16 years of experience as a speech pathologist. The American Speech-Language-Hearing Association certified Ms. George, and she holds a Certificate of Clinical Competence as well as a certification in the Picture Exchange Communication System, also referred to as PECS. Based on her credentials, training, first-hand knowledge of Student and her experience level, Ms. George was qualified to administer the speech and language assessment. Ms. George testified at the hearing.

At the time of the assessment, Student was five years and two months old. Student was attending a comprehensive preschool class, receiving two hours of speech services from a speech care provider in Torrance, California, 12 hours of applied behavioral analysis therapy, and two hours of occupational therapy at home.

An assessment must be conducted in a way that:

- Uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent;

- Does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and,
- 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:

- Selected and administered so as not to be discriminatory on a racial or cultural basis;
- Provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally;
- Used for purposes for which the assessments are valid and reliable;
- Administered by trained and knowledgeable personnel; and,
- Administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(a)(2), (b) & (c); Ed. Code, §§ 56320, 56381, subd. (e).)

The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where the concern prompting the assessment was reading skills deficit].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).) Assessors must be knowledgeable about the student's suspected disability and must pay attention to student's unique educational needs such as the need for specialized services, materials, and equipment. (Ed. Code, § 56320, subd. (g).) Ms. George conducted a parent interview that established Student did not have any vision or hearing problems. Student was able

to label flashcards and use PECS, along with verbal communication to indicate his needs and motivations. Student lacked consistency in his communication abilities, and could not indicate his needs and emotions. Student was at risk for elopement and occasionally displayed an unawareness of his environment.

Ms. George conducted classroom observations and interviewed Student's teacher, Ms. Carbajal. Ms. Carbajal concluded that Student had difficulty requesting items, commenting on or describing matters, and had trouble initiating or understanding tasks.

Ms. George observed student at least five to six times, both in structured and unstructured settings. Student would sit and attend to an item presented to him, but he needed physical assistance in tabletop activities. He also appeared to go off-task in between instruction. During "circle time," he did not initiate interaction or engage in reciprocal discussions, although Student could label alphabets and count numbers, including engaging in rote number skills. Student engaged in cause and effect tasks such as pushing a button to open a box. He also was using more words with increased frequency over the prior weeks. Student did not initiate responses during group discussions but would use communicative words for subjects he was highly motivated with or wanted. Student had limited "joint attention," which is the shared attention of two individuals on an object. Student did not have age-appropriate cooperative play skills, including waiting his turn and engaging in age-appropriate play skills.

Ms. George gave Student an oral peripheral exam which includes a visual inspection of the oral mechanism and assesses a range of motion, planning, and coordination of movements of speech articulation. Student's motor skills were functional, and he presented with no difficulties. Student's articulation skills were within developmental limits, although Student's vocabulary was limited. Student could articulate age-appropriate speech, and listeners were able to understand his speech

within the context he offered it.

Ms. George administered the Pre School Language Scale - Fifth Edition test, called the PLS-5, to assess Student's receptive and expressive language skills. Ms. George was clinically trained to administer the PLS-5. Ms. George established that the PSL-5 was appropriate for Student, was designed for use with English speaking children from the age of zero to seven years and 11 months, had been standardized, and was not racially or sexually biased. Student spoke English and was from an English-speaking home. Ms. George administered the assessment and testing in English.

Based upon the PLS-5, parent interview, clinical data, and observations, Ms. George established that Student was emerging to be more functional to communicate and request highly motivating items with some adult assistance. Student showed some progress in communication skills and was becoming more spontaneous while requesting motivating items such as juice or toys. Student also showed some progress in understanding language but was inconsistent in his responses. Student was able to follow simple classroom routines such as washing his hands, listening to stories, and labeling common items.

Mother's and Ms. Carbajal's observations were consistent with Ms. George's evaluation. Collectively, the evidence established Student continued to have delays in receptive, expressive, and pragmatic skills, as well as following different directions and responding to "Wh" questions. Most of his challenges were related to vocabulary and syntax, and using the proper noun, verb an adjective at an age-appropriate level. Student exhibited stereotypical behaviors of autism, such as echolalia, which is repeating words and phrases heard from others, making high pitched noises and flapping his hands. Student was unaware of dangers and wandered on the playground.

The language and speech assessment complied with the assessment requirments in title 20, United States Code, section 1414, subdivisions (a)(2), (b), and (c), and

Education Code sections 56320 and 53381, subdivision (e). Specifically, she used multiple, technically sound instruments, administered according to the test instructions. The selected instruments were not discriminatory or racially or culturally biased. Ms. George administered the instruments in the language and form most likely to yield accurate information about Student's academic, developmental, and functional needs. The evidence further established that Ms. George was knowledgeable about Student's suspected disability.

Los Angeles Unified's April 16, 2018 Assessment Report

The personnel who assess the student shall prepare a written report that shall include, without limitation, the following:

- Whether the student may need special education and related services;
- The basis for making that determination;
- The relevant behavior noted during the observation of the student in an appropriate setting;
- The relationship of that behavior to the student's academic and social functioning;
- The educationally relevant health, development, and medical findings, if any;
- If appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and,
- Consistent with superintendent guidelines for low incidence disabilities (those affecting less than one percent of the total statewide enrollment in grades kindergarten through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.)

The April 16, 2018 assessment report included Student's educationally related health and medical findings. Mother was treated for gestational diabetes during pregnancy with Student, which factored into Ms. George's assessment because this

might cause speech and language delays in the child. Student's developmental history was consistent with children his age, although he had delayed speech.

Ms. George's written assessment report recommended that the IEP team consider the following language and speech accommodations:

1. Expand functional communication by providing visual clues;
2. Expand vocabulary and length of utterance;
3. Provide visual cues to expand understanding and verbal skills; and,
4. Check for Student's understanding of those cues and skills.

Ms. George observed Student more than six times, including in the classroom and non-structured settings such as recess and lunch-time. Ms. George reviewed Student's educationally related health and medical history. Ms. George interviewed Parent and Student's teacher, which enabled Ms. George to determine the Student's area of assessment and his possible needs.

Ms. George administered a variety of tests on Student. She employed both an oral peripheral examination as well as examining Student's articulation and pronunciation. The assessments revealed that Student had weak skills in auditory comprehension and expressive communication, for which Ms. George recommended using accommodations and services to increase his comprehension.

Ms. George prepared a legally compliant, comprehensive assessment report. It set forth that Student needed special education and related services and the basis for making that determination. It noted the relevant behavior, in detail, during her observation of the Student in an appropriate setting, as well as the relationship of that behavior to the student's academic and social functioning. The assessment report contained the educationally relevant health, development, and medical findings, along with the record of implementing normed speech and language evaluation tests.

IEP Team Meeting to Present Assessment

Within 60 days of parental consent to the assessment, the assessment report must be provided to the parent (Ed.Code, § 56329, subd. (a)(3)), and an IEP team meeting must be held to consider the assessment. (Ed. Code § 56302.1, subd. (a).) Ms. George attended an IEP meeting on May 16, 2018, as did Parent and Ms. Carbajal. Ms. George presented her written assessment at the IEP and provided Parent with a copy of the report. Accordingly, the assessment report was provided to Parent and discussed during an IEP team meeting within 60 days of parental consent. Ms. George established that Mother agreed with the assessment results during the meeting and did not request an independent assessment at that time.

Los Angeles Unified proved that its April 16, 2018 speech and language assessment met all legal requirements and was appropriate.

Mother's Request for An Independent Educational Evaluation

Fabiola Garcia De Alba was the Assistant Principal, Educational Instruction Specialist at Cabrillo Avenue Elementary School, during the 2018-2019 school year. Ms. De Alba was familiar with Student and Parent and testified at the hearing. Ms. De Alba established that an IEP team meeting was held on November 30, 2018, during which Los Angeles Unified made an IEP offer. Parent did not initially consent. Ms. De Alba followed up with Mother on several occasions to obtain consent.

On April 12, 2019, Mother signed the November 2018 IEP, with the specific exception to the IEP's assessments, eligibility, instructional setting, and services. Mother handwrote that she was "requesting independent assessments of all areas." Mother also attached a typewritten letter to the signed IEP. In her letter, Mother requested that a comprehensive behavior assessment be conducted, as well as independent assessments at public expense in the areas of autism, speech and language, augmentative communications, functional behavior, and occupational therapy. Only the request for a

speech and language evaluation is addressed in this decision.

On May 3, 2019, a representative of Los Angeles Unified corresponded with Mother and declined to provide an independent educational evaluation at public expense. The letter contained the basis for the denial, the procedural safeguards, and provided Parent with information related to the Student's rights under the law. On May 22, 2019, Los Angeles Unified filed for Due Process.

A student may be entitled to an independent educational evaluation if he or she disagrees with an evaluation obtained by the public agency and requests an independent 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 independent evaluation 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 independent evaluation].) In response to a request for an independent evaluation, an educational agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate; or ensure that an independent 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].) The determination of whether a public agency's delay in filing a due process complaint or funding the IEE was "unnecessary" is a "fact-specific inquiry," foreclosing the existence of a strict deadline by which the public agency must respond to satisfy its duties under § 300.502(b)(2). (*C.W. v. Capistrano Unified Sch. Dist.*, 784 F.3d 1237, 1247 (9th Cir. 2015); see also *L.C. v. Alta Loma Sch. Dist.*, 389 F. Supp. 3d 845, 864 (C.D. Cal. 2019)(on appeal).

Upon receiving Mother's April 12, 2019 letter, Los Angeles Unified was legally obligated to either fund an independent educational evaluation or file to defend its assessments without unnecessary delay. Los Angeles Unified sent Mother prior written notice regarding its decision not to fund the requested assessment approximately three weeks after Mother's request. Receiving no response, it then filed for a due process hearing within three weeks thereof. Parent did not challenge the timeliness of Los Angeles Unified's due process filing concerning her request. Under the facts of this case, Los Angeles Unified filed for due process without unnecessary delay. The record established that Ms. George's assessment was thorough and complete and met all of the statutory requirements.

ORDER

1. Los Angeles Unified's April 16, 2018 assessment in the area of language and speech met all legal requirements.
2. Student is not entitled to an independent language and speech evaluation 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. Los Angeles Unified prevailed on the issues heard and decided.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Brian H. Krikorian

Administrative Law Judge

Office of Administrative Hearings