

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019120845

MONTEREY PENINSULA UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

DECISION

MARCH 30, 2020

On December 20, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Monterey Peninsula Unified School District, naming Student as respondent. On January 6, 2020, OAH granted a joint request to continue. Administrative Law Judge Marlo Nisperos heard this matter in Monterey on February 11, and 12, 2020.

Elizabeth Rho-Ng, attorney at law, represented Monterey and was assisted by Denise Lee, attorney. Katie Rivera, Monterey's Senior Director of Special Education Services attended all hearing days on Monterey's behalf. Parent briefly appeared and

represented Student on the first day of hearing accompanied by Megan Williams. Student did not attend.

Before the parties made their opening statements, Parent and Williams decided to leave. The ALJ informed Parent the hearing would proceed in their absence if they chose to leave. The ALJ encouraged Parent to participate in the proceedings and advised they were welcome to return to the hearing at any time. Parent did not return for the remainder of the due process hearing.

At Monterey's request, the matter was continued to March 3, 2020, for a written closing brief. Monterey timely submitted its closing brief and the record closed on March 3, 2020.

ISSUE

Was Monterey's October 30, 2019 psychoeducational assessment appropriate, such that Student is not entitled to an independent educational evaluation at Monterey's 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).)

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, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Monterey filed the request for due process hearing and has the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

At the beginning of the hearing, Parent made an oral motion to disqualify the ALJ. Parent stated the reason for the challenge was because they were uncomfortable and did not trust anyone. California Government Code § 11425.40, subdivision (a) states, "The presiding officer is subject to disqualification for bias, prejudice, or interest in the proceeding." The ALJ denied Parent's motion for disqualification because the presiding officer could be fair and impartial and had no personal interest in the proceeding.

Student resided with Parent within Monterey's geographic boundaries at all relevant times. Student was 16 years old and in the 11th grade at the time of hearing. Student was initially deemed eligible for special education and related services in fall 2019 under the category other health impairment.

ISSUE: WAS MONTEREY'S OCTOBER 30, 2019 PSYCHOEDUCATIONAL ASSESSMENT APPROPRIATE, SUCH THAT STUDENT IS NOT ENTITLED TO AN INDEPENDENT EDUCATIONAL EVALUATION AT MONTEREY'S EXPENSE?

Monterey contends the psychoeducational assessment met all legal requirements such that Student is not entitled to an independent educational evaluation at public expense. For the reasons discussed below, Monterey failed to meet its burden establishing that its psychoeducational assessment was legally compliant. Accordingly, Student is entitled to an independent psychoeducational evaluation at public expense.

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

Parents and school personnel develop an individualized education program, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363, subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

ASSESSMENT PLAN

Parental consent is required prior to conducting an initial evaluation to determine if a child qualifies for special education and related services as a child with a disability. (20 U.S.C § 1414(a)(1)(D)(i)(I); Ed. Code, § 56043, subd. (b).) A proposed assessment plan shall be developed within 15 calendar days of the referral for assessment. (Ed. Code, § 56043, subd. (a).)

The assessment plan Parent signed on September 6, 2019 identified assessments necessary to determine, among other things, whether Student met the criteria for specific learning disability. The plan listed areas to be assessed and the individual responsible for administering each test. A special education teacher was designated to conduct the pre-academic and academic performance assessments. The school psychologist was assigned assessments in the area of cognition.

ASSESSMENTS MUST BE CONDUCTED BY QUALIFIED INDIVIDUALS

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 local educational agency.” (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).)

Eugenie Adams was employed by Monterey as a credentialed school psychologist since July 2012. While at Monterey, Adams conducted between 60 and 70 psychoeducational assessments per year and was qualified to assess in the eligibility categories of: autism, other health impairment, specific learning disability, and

emotional disturbance. Adams was competent to perform the psychological assessment component of the psychoeducational evaluation in this case. Adams was knowledgeable of Student's suspected disabilities, specifically, other health impairment based on attention deficit hyperactivity disorder-like behavior and specific learning disability.

Kevin O'Haire conducted Student's academic testing and authored an academic assessment report. O'Haire's academic testing results were included in Adams' psychoeducational report in the analysis of Student's eligibility under specific learning disability.

O'Haire did not testify at the due process hearing. Monterey offered no evidence regarding O'Haire's education, background, training, or experience. Monterey did not establish that O'Haire was knowledgeable of Student's suspected disabilities.

O'Haire was a special education teacher but it is unknown what licenses or credentials O'Haire possessed to qualify for that position, and what training and experience O'Haire had in conducting standardized academic testing. Therefore, Monterey did not establish that O'Haire was competent to perform the Woodcock-Johnson Tests of Achievement, Fourth Edition forming the basis for the academic assessment report.

Adams relied on O'Haire's Woodcock-Johnson test results when concluding Student did not have a severe discrepancy between cognitive ability and academic achievement, as commonly done to determine eligibility under the category of specific learning disability. A specific learning disability is a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or

written, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. (20 USC § 1401(30); 5 CCR § 3030(b)(10); 34 CFR § 300.8(c)(10); Ed. Code, § 56337, subd. (a).) To find eligibility under specific learning disability, a local educational agency may consider whether a student has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning. (Ed. Code, § 56337, subd. (b).) The assessment plan demonstrated Monterey's intent to evaluate Student for specific learning disability by comparing O'Haire's academic achievement assessment and Adams' cognition assessment results.

Adams explained Student did not exhibit a discrepancy between cognitive functioning, as determined during the psychological testing, and academic achievement, as determined by O'Haire's testing. O'Haire's academic assessment was a necessary component of Adam's psychoeducational assessment report. Monterey failed to meet its burden to establish O'Haire was competent to perform the academic assessment that Adams relied upon and incorporated by reference into the psychoeducational report.

ASSESSMENT TOOLS

A district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining whether he is eligible for special education, and what the content of his program should be. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) 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 selecting assessment tools, the assessor must do more than pick a generally valid instrument. Tests and other assessment materials must be used “for purposes for which the assessments or measures are valid and reliable.” (20 U.S.C. § 1414(a)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) Assessment tools must be “tailored to assess specific areas of educational need . . .” (Ed. Code, § 56320, subd. (c).) “Special attention shall be given to the [child’s] unique educational needs . . .” (*Id.*, subd. (g).)

Assessors must use “technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.” (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3).) ‘Technically sound instruments’ generally refers to assessments that have been shown through research to be valid and reliable.” (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540-46541, 46642 (Aug.14,2006).)

Tests and assessment materials 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).) Assessments and other evaluation materials must be administered by trained and knowledgeable personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iv) &(v); 34 C.F.R. § 300.304(c)(iv) & (v); Ed. Code § 56320, subd. (b)(3).)

Adams gathered relevant functional, developmental, behavioral, and academic information in preparing the psychoeducational assessment report. Adams reviewed school records, interviewed current and former teachers, and observed Student in the

classroom. Adams interviewed Student and Parent to learn of Student's medical, family, and developmental history. Adams selected a variety of technically sound tools that assessed Student's cognitive, behavior, physical, and developmental factors. These strategies helped determine if Student was eligible for special education and the content of the IEP. The evidence established that all tests Adams administered were in conformance with instructions provided by the producer. The instruments selected generated results that reflected Student's current aptitude and achievement.

Student immigrated to the United States when they were four years old and English was not their native language. By 2016, Monterey re-designated Student from English language learner to fluent English proficient. The evidence established that by the time of the assessment, Student's primary language was English. Therefore, it was proper to conduct the assessments in English since it is Student's primary language.

To measure Student's cognitive ability, Adams chose to administer the Kaufman Assessment Battery for Children, Second Edition, because it was linguistically and culturally sensitive. By design, the mental processing and nonverbal processing indexes removed cultural bias and were selected so the resulting intelligence quotient, or IQ, scores were accurate and valid considering Student's immigration history. This assessment tool generated valid results that accurately reflected Student's cognitive abilities and IQ.

Unlike Adam's testing, Monterey did not present evidence regarding whether the Woodcock-Johnson test administered by O'Haire was used for purposes for which the test is valid and reliable. Monterey did not establish that the tool was tailored to assess specific areas of educational need or whether special attention was given to Student's

unique needs when selecting this tool. There was no evidence demonstrating that O'Haire's selected instruments were technically sound and not racially, culturally or sexually discriminatory. Additionally, there was no evidence that the test was administered by a trained individual or in conformance with test instructions. Monterey did not meet its burden to prove the instrument administered for the academic assessment was legally compliant.

Adams reported there was no discrepancy between Student's academic achievement on the Woodcock-Johnson test and the cognitive functioning scores seen on the Kauffman Assessment Battery for Children. After considering both test results, Adams opined Student did not meet eligibility criteria. Academic testing performed by O'Haire was an essential part of the evaluation for specific learning disability. O'Haire's academic assessment was inextricably intertwined with Adams' psychoeducational assessment.

At hearing, Monterey focused on Adam's cognitive evaluation. At issue, however, is the legal compliance of the psychoeducational assessment, not merely Adams' testing and conclusions. Adams authored the report. The report, however, relies on both Adam's testing and that conducted by O'Haire. The Woodcock-Johnson test results were required for the analysis of specific learning disability eligibility. However, Monterey did not demonstrate the academic assessment met legal requirements. As a result, Monterey has failed to meet its burden of proving the psychoeducational assessment complied with state and federal legal requirements.

CONCLUSIONS AND PREVAILING PARTY

As required by 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.

1. Monterey's October 30, 2019 psychoeducational assessment was not legally compliant.
2. Student is entitled to an independent psychoeducational evaluation at Monterey's expense.
3. Student prevailed on the sole issue 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 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Marlo Nisperos

Administrative Law Judge

Office of Administrative Hearings