

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CAPISTRANO UNIFIED SCHOOL
DISTRICT,

v.

PARENT on behalf of STUDENT.

OAH CASE NO. 2009010696

DECISION

Administrative Law Judge (ALJ) Susan Ruff, Office of Administrative Hearings (OAH), State of California, heard this matter in San Juan Capistrano, California, on March 26 and 27, 2009, and April 20, 2009.

Caroline Zuk, Esq., represented Capistrano Unified School District (District). Dr. Crystal Bejarano, Program Specialist, appeared on behalf of the District. Claudia Ginsberg-Brown also appeared on behalf of the District for part of the final day of the hearing.

Student's mother represented Student. Student did not appear at the hearing.

The District filed its due process hearing request on January 26, 2009. On February 10, 2009, OAH granted Student's request for a continuance of the case. The case was taken under submission at the close of evidence on April 20, 2009.

ISSUES

The issues at the due process hearing are those alleged in the due process complaint, as clarified by the parties and the ALJ during the Prehearing Conference:

a) Did the District conduct an appropriate speech and language assessment, as documented in the assessment report dated March 26, 2008?

b) Did the District conduct an appropriate occupational therapy assessment, as documented in the assessment report dated March 21, 2008?

As a remedy, the District requests a finding that the two assessments in question were appropriate and a finding that the District is not required to fund an independent educational evaluation (IEE) in the area of speech and language or occupational therapy as requested by Student's parents in December 2008.

FACTUAL FINDINGS

1. Student is a 4-year-old girl who is eligible for special education and related services under the category of autism. Her birth date is March 9, 2005.

2. On February 5, 2008, when Student was approximately two years and eleven months old, Student's mother signed an assessment plan, giving the District permission to conduct an initial assessment of Student to see if she qualified for special education and related services. Student had previously received services through the Regional Center of Orange County (Regional Center) due to her autism. The assessment plan called for an assessment in the areas of academic/pre-academic achievement, speech/language, intellectual development, social/emotional/adaptive behavior, perceptual/processing, health/physical status, and gross/fine motor development. According to the assessment plan, the speech/language assessment would be conducted by a speech and language pathologist (SLP), the perceptual/processing assessment would be conducted by the school psychologist and an occupational therapist, and the gross/fine motor development assessment would be conducted by the school psychologist and occupational therapist.

3. Toward the end of February, the District requested that Student's mother sign an agreement to extend the timelines for completing the assessment and holding the Individualized Education Program (IEP) meeting at which the assessment would be discussed. Student's mother agreed to that extension.

4. As discussed in more detail below, the District's assessment was completed in March 2008, and reviewed by the IEP team. Student's mother made her request for an IEE in the area of speech and language and occupational therapy (OT) at an IEP meeting held on December 5, 2008, approximately nine months after the District's assessments were done. The District denied that request. As required by law, the District then filed the instant case to prove that its assessments were appropriate.

Did the District conduct an appropriate speech and language assessment, as documented in the assessment report dated March 26, 2008?

5. Constance Johnson conducted the speech and language assessment of Student on behalf of the District. Johnson is an SLP who has worked in the field for over 20 years. She obtained her B.S. Degree in Education in 1973 and her M.S. Degree in Communicative Disorders in 1974 from the University of Wisconsin. She has worked as an SLP for the District since 1996, specializing in assessment of and program development for preschool age children (from two years, nine months old, to five years old). She has assessed 180 –

200 children with autism during her time with the District and has taken continuing education classes related to autism.

6. In conducting her assessment, Johnson reviewed Regional Center records for Student and met with the school psychologist Katrina Van Der Wal and SLP Tammi Dushack. Dushack had originally been assigned by the District to conduct the assessment of Student and had conducted an initial observation of Student in Student's home along with Van Der Wal on February 12, 2008. When Johnson took over the speech portion of the assessment, she discussed that observation with Dushack and Van Der Wal. Johnson also personally observed Student in Student's home for about an hour on March 11, 2008, and conducted testing of Student in Johnson's office on March 7, 2008.

7. Student was two years and eleven months old at the time Johnson began her assessment. Therefore, Johnson chose standardized tests and assessment instruments appropriate for a child under three years of age. She administered two standardized tests – the Preschool Language Scale – 4 (PLS-4) and the Bzoch-League Receptive-Expressive Emergent Language Scale – Third Edition (REEL-3).

8. Johnson is very familiar with both the PLS-4 and the REEL-3, and has administered them to children hundreds of times. Johnson testified that both assessment tools are validated for the purposes for which she used them. The PLS-4 tests a child's auditory comprehension and expressive communication. The REEL-3 is a questionnaire completed by the Student's mother.

9. During the hearing, there was a factual dispute as to when Student's mother completed the REEL-3 questionnaire. Johnson did not have a specific recollection of when Student's mother completed the REEL-3. She originally testified that she thought Student's mother had been given the REEL-3 to fill out on or before March 7, 2008. However, she later admitted that she could not remember whether Student's mother had been asked the questions on March 7, 2008, the day Johnson tested Student in her office, or whether Johnson asked Student's mother the questions during a telephone conversation.

10. Student's mother, on the other hand, had a very vivid recollection of the date she completed the REEL-3. Student's mother testified that the District had been unable to conduct the REEL-3 with Student's mother on the date that Johnson assessed Student in Johnson's office because Student became restless and wanted to leave. Johnson told Student's mother that she would call Student's mother on another day to complete it. According to Student's mother, Johnson telephoned her on March 10, 2008, the day after Student's third birthday and asked Student's mother the questions. Johnson and Student's mother were both credible witnesses, but Student's mother's testimony in this regard is stronger because of her more complete memory of the events. The evidence supports a finding that Student's mother answered the questions for the REEL-3 on March 10, 2008, the day after Student's third birthday.

11. In addition to the standardized tests, Johnson also administered informal, criterion referenced tests to Student, including the Pragmatics Profile of the Clinical Evaluation of Language Fundamentals Preschool – 2 (CELF) and the Pragmatic Protocol by Prutting (Prutting). The CELF is a questionnaire completed by Student’s mother. The Pragmatics Profile portion of the CELF was used by Johnson to assess Student’s pragmatic language skills. The Prutting was used to record clinical observations and impressions in five different areas relating to Student’s pragmatic abilities, such as turn taking, verbal utterances and “nonverbal utterance acts.”

12. As part of the assessment, Johnson gathered a language sample of utterances made by Student at various times during the assessment process, and relied on a language sample gathered by Dushack during Dushack’s portion of the assessment. Johnson also assessed Student’s structural-functional ability to perform jaw, tongue and lip movements to form sounds. She determined that Student’s mean length of utterances was advanced for a child of her age and noted in her report that Student’s “[s]tructural-functional integrity is considered intact.”

13. All of Johnson’s assessments were conducted in Student’s primary language (English). In each case, the tests and assessment tools she used were not racially, culturally or sexually discriminatory. With the possible exception of the REEL-3, as discussed below, the tests were administered in accordance with the publisher’s instructions. Johnson believed that she had developed a good rapport with Student and that her test results were valid. Johnson used a variety of tools, tests and observations, and did not rely upon a single procedure in determining Student’s needs.

14. As a result of her assessment, Johnson determined that Student had needs in the area of speech and language. In particular, Student had needs in the area of pragmatic language and social communication. Student was very verbal, but had problems using verbal and non verbal language for appropriate communication. Student would stray off topic, make utterances inappropriate to the situation, and engage in “echolalic” speech, in which she would repeat the question or comment of the person who just spoke with her. She also engaged in video talk (quoting from television or movies) and scripted language. Student had difficulty making eye contact and had difficulty making her needs known. For example, she might say, “I’m stuck,” rather than asking for help.

15. The results of Johnson’s assessment were documented in a report dated March 26, 2008. On that same day, Johnson attended an IEP meeting for Student and discussed her assessment results. After follow up meetings in April 2008, the IEP team agreed to goals for Student related to speech and language, and agreed to a program to address those needs.

16. On July 22, 2008, Laurie Lennon, an SLP working for a business called “For OC Kids” conducted a speech and language assessment of Student at the request of Student’s mother. Lennon administered the Reynell Developmental Language Scales – U.S. Edition (Reynell) and the Social Skills Rating System (SSRS) and relied upon clinical observations in making her assessment. In the Reynell, Student scored below the average range in verbal

comprehension (at the two years, nine months level) and in expressive language skills (at the two years, seven months level). In the SSRS, a questionnaire filled out by a parent, Student's mother rated Student as being far below the average range in social skills for a child of Student's age.

17. Based on her testing and observations, Lennon determined that Student could identify objects and comprehend some verbal directions that involved up to three linguistic elements. Student demonstrated an emerging but inconsistent ability to make predictions and draw basic inferences with social scenarios during structured testing. In expressive language, she had difficulty combining linguistic elements into more complex utterances.

18. Lennon determined that Student was moderately impaired in pragmatic language. Although Student could use language to initiate conversations, she did not use eye gaze to "check in" with her listener to see if the other person was attending. She tended to use delayed echolalia or made utterances that were not relevant to the conversation. Her voice was louder than normal, and she could only engage in conversational exchanges for about two turns. As a result of her assessment, Lennon recommended both one-to-one and group speech-language therapy sessions for Student.

19. During the hearing, Johnson questioned Lennon's use of the Reynell, because it is an older test which was standardized in the 1990's based on a test developed in England in the 1970's. Johnson believes that newer tests are more clinically reliable and valid in assessing preschool age children. Johnson explained that the Reynell has no "basil" or "ceiling" to limit the questions given the child's age or abilities. Therefore a child must complete the entire test to obtain a valid score. If any test items were omitted, it could result in a "false positive" on the test. Without seeing Lennon's protocols for the test, Johnson had no way to determine if there were omissions. Lennon did not testify at the hearing, and her protocols were not placed into evidence.

20. Johnson believed that Lennon's findings regarding Student were very similar to her own – they both noted problems with Student's pragmatic language and functional use of language. Johnson attributed the differences in scores regarding expressive language to the differences between the Reynell and the tests Johnson used, and to the inherent problems with the Reynell.

21. The evidence supports a finding that the District appropriately assessed Student in the area of speech and language as documented in the March 26, 2008 assessment report. As discussed in Legal Conclusions 2 – 5, the District's assessment met the legal requirements for an appropriate assessment. The tests and other assessment instruments were administered by competent and trained personnel, included at least one standardized test which was valid for the purposes used, were not discriminatory, and were administered in Student's native language. With the possible exception of the REEL-3, the remaining tests and assessment instruments were administered in accordance with the publisher's instructions. The District did not rely on a single test to determine Student's needs, but instead relied upon a variety of tests, observations and input from Student's mother.

22. Student's mother objects to the assessment because the REEL-3 was administered the day after Student's third birthday. That would call into question whether the questionnaire was administered in accordance with the publisher's instructions and whether it was valid and reliable for the purposes used. Johnson testified that it is not used for children over three years old. However, Student's mother presented no expert testimony stating that having a parent answer the questions one day after the child's third birthday invalidated the test or violated the publisher's instructions. As a practical matter, since the REEL-3 involved questions answered by a parent based on observed behaviors, it is doubtful that the parent's answers would have changed much if it was completed two days earlier, before Student's third birthday.

23. Further, even if the date of administration invalidated the REEL-3, Johnson's assessment included another parent questionnaire which was validly administered to provide parental input to the assessment. The assessment also included other tests and assessment tools (including another standardized test). Any problems with the REEL-3 would not be sufficient to invalidate the entire assessment.

24. Student's mother also criticized the District's assessment because the District did not use other assessment instruments to assess Student in the area of pragmatic language. There are tests that can be given to children over three years of age to measure pragmatic language which are different from the ones used with a child under three. Student's mother had signed an extension of time for the District to conduct its assessments, so the District could have administered one of those other tests after Student's third birthday. Johnson explained that she did not administer other tests regarding pragmatic language, because she believed she had an accurate picture of Student's performance and unique needs with respect to pragmatic language, so another test was not necessary.

25. The evidence supports a finding that the District had an adequate and accurate picture of Student's abilities and needs with respect to pragmatic language. Johnson's assessment contained a full discussion regarding Student's needs in the area of pragmatic language. Lennon's assessment in July 2008 found the same general types of needs in pragmatic language that the District had found. Student's mother even admitted during her testimony that Johnson was aware of Student's deficits and that pragmatic language had been identified as an area of need for Student. Student's mother explained that her main argument was that the District noted the deficit, "but nothing was done with it." However, the narrow issue in the instant case involves the propriety of the assessments, not whether the District was correct in what it did or did not do with the assessment information.

26. Student's mother believes that the District's assessment did not accurately reflect Student's true abilities. She testified that she showed the District's assessments to the providers who had been working with Student on behalf of the Regional Center. Those providers told her that the District's assessment of Student did not present a true measure of Student's everyday life and abilities. Student's mother explained that although Student knows many words, Student cannot carry on a conversation of more than two exchanges with anyone. Student's mother believes that Lennon's assessment using the Reynell was a much

better measure of Student's true abilities. She also explained that younger children in Student's own neighborhood were far more advanced in language than Student was.

27. None of the speech-language providers working with Regional Center testified at the hearing to explain why they told Student's mother that the District's assessment did not reflect Student's true abilities. Without expert testimony to describe the reasons for the providers' beliefs, their hearsay statements are of limited value in determining this case. The District has met its burden of proving that the District's March 2008 speech and language assessment was appropriate.

28. The evidence supports a finding that there were no circumstances requiring the District to pay for an IEE in December 2008. Although Johnson did not reassess Student between her March 2008 assessment and December 2008, she spoke with Student's general education preschool teacher and the instructor who taught Student in the District's "language builders" program. Both confirmed that Student was performing well in their classes and was making progress on her goals. They did not raise any issues that would indicate a need for a reassessment or an IEE. The District properly denied Student's request for a speech and language IEE in December 2008.

Did the District conduct an appropriate OT assessment, as documented in the assessment report dated March 21, 2008?

29. Lauren English conducted the OT assessment on behalf of the District. English is a licensed occupational therapist who has worked for the District since July 2007. She received her Bachelor of Science in OT from the State University of New York in 2003, and her Master of Arts in OT from the University of Southern California in 2005. She has attended numerous professional development trainings and conferences, some of which focused on issues related to autism.

30. As part of English's assessment, she reviewed Student's records, including the progress reports from the private providers who had been providing services to Student through the Regional Center. She interviewed Student's mother and Karissa Benoit, the occupational therapist providing OT services to Student through Rainbow Kids, a Regional Center provider. Based on her interview with Student's mother and her records review, English determined that she should evaluate Student in the areas of motor skills related to motor planning and sensory processing. She also examined Student in areas related to self-help skills, tone, strength, and range of motion.

31. English also conducted observations of Student as part of her assessment. The first observation was on February 12, 2008, in Student's home, while Student's therapist from the Center for Autism and Related Disorders (CARD) was working with Student. The second was on February 21, 2008, while Student was receiving OT services at Rainbow Kids.

32. English administered two standardized assessment instruments to Student. The first was the Infant/Toddler Sensory Profile (Sensory Profile). This was a questionnaire completed by Student's mother. Student's mother rated Student as having a definite difference from typical children in certain areas, such as auditory processing.

33. The second standardized test was the fine motor portion of the Peabody Developmental Motor Scales, Second Edition (Peabody). Student's scored in the average range in the grasping and visual-motor integration subtests.

34. English did not conduct a standardized test to measure Student's gross motor skills, because Benoit and Rainbow Kids had just administered the gross motor portion of the Peabody to Student in February 2008, shortly before the District's assessment. Benoit had determined that Student was in the average range in gross motor skills.

35. Benoit had also administered the fine motor portion of the Peabody to Student in February 2008. However, when English spoke with Benoit, she learned that Benoit had not administered the fine motor portion of the Peabody in a standardized fashion. Benoit had simply used it informally as a means to get an idea of Student's performance levels. Therefore, English determined that she should administer the fine motor portion of the Peabody in a standardized fashion to gain an accurate picture of Student's levels of performance.

36. There is a rule of thumb among assessors that the same test should not be re-administered to a child within a period of six months. There is a concern that a child will do better on the test the second time because the child has recently been exposed to the test questions. Because Benoit had administered the fine motor portion of the Peabody to Student a month before, English checked to see if there was a problem with administering it to Student again in March.

37. English checked the Peabody test manual and saw no prohibition against administering the test again within a month of the prior administration. She then contacted the test publishers to see if there was a problem with re-administration within such a short time. She was informed there was no problem. Based on this information, English determined that it would be appropriate for her to administer the Peabody fine motor test in a standardized fashion as part of her assessment.

38. English administered the tests and other assessment tools to Student in Student's primary language of English. The tests and assessment tools used were not racially, culturally or sexually discriminatory, and English administered them in accordance with the publisher's guidelines. The assessment tools were valid for the purposes for which English used them, and English did not rely upon a single test instrument in determining Student's needs and present levels of performance. English felt that she developed a good rapport with Student, and that the assessment gave an accurate picture of Student's level of functioning.

39. As a result of her assessment, English determined that Student had needs in the area of OT. In particular, she found needs in the areas of motor planning and praxis¹ for tool use and imitating gestures, and sensory processing. In the area of self-help skills, Student tended to stuff her mouth with food rather than taking small bites. She had to be prompted to eat correctly. Student sat on the floor with her legs in “W” shape rather than sitting cross-legged. Student made limited eye contact and tended to be restless in a chair when seated. She required verbal prompting for non-preferred tasks.

40. English documented her findings in a report dated March 21, 2008. She presented her report and findings at the IEP team meeting on March 26, 2008. The IEP team ultimately agreed that Student should receive 30 minutes of OT services per week. English provided those services until the end of the 2007-2008 school year.

41. Student challenged the District’s OT assessment based, in part, on the testimony of Student’s OT expert Betsy Aasland. Aasland is a licensed occupational therapist who has been practicing OT for 11 years. She is currently the owner and director of a company known as Beach Kids Therapy Center. She received her Bachelor of Science in Psychology from the University of South Dakota in 1995 and her Master of Science in OT from the same university in 1997. She has conducted assessments on behalf of school districts and has helped develop IEP goals.

42. Aasland based her expert opinions of Student’s OT needs and abilities on her contact with Student in April and May 2008. In approximately April 2008, Student’s mother paid Beach Kids Therapy Center to provide OT services to Student because Student’s mother did not believe the amount of OT services provided by the District was sufficient. Aasland provided OT services to Student once a week during approximately April and May 2008, and observed Student during the OT sessions. Aasland did not conduct a formal assessment of Student or administer any standardized testing. She had Student’s mother fill out a caregiver questionnaire called the Sensory Processing Measure.

43. Aasland did not administer the Sensory Processing Measure in a standardized fashion. During the hearing, she could not remember whether that assessment tool had been validated for use with a child of Student’s age or whether it was designed for older children. She explained that it was not necessary for her to know that at the time she administered it, because she simply used it informally as an information gathering tool. She believes that an OT can rely solely on observations to develop a treatment plan for a child in a clinical setting.

¹ English described “praxis” as a combination of ideation (having the idea to complete a motor plan), motor planning (the body’s ability to formulate a way to complete that plan) and execution (being able to carry out the plan).

44. Based on her observations and treatment of Student, Aasland believed that Student had gross motor needs and extremely poor vestibular processing² which affected her balance. For example, Student slipped out of her chair and could not sit on a swing without falling off. Student could not sit at a table to perform fine motor tasks for five minutes. Aasland believes that children with these problems tend to have fine motor deficits, although she did not assess Student in the area of fine motor. During her observations, Aasland noticed that Student had a difficult time playing with other children, was very rigid in play scenarios, did not respect personal space, and did not want to share or take turns. At the time Aasland stopped treating Student, she believed that Student needed two to three hours per week of OT services in a clinical setting. However, she admitted that she could not specifically testify as to Student's needs in an educational environment, because she had never observed her there.

45. Aasland objected to the District's OT assessment for several reasons. First, she believed that it was improper to administer the Peabody fine motor test so soon after the Rainbow Kids testing. She explained that, instead of using the Peabody again, she would have relied on the findings of Rainbow Kids or used a different test. However, she admitted that there was nothing in the Peabody test manual to forbid the administration of the test so soon after the prior administration. She was just going by the general rule of thumb.

46. She also criticized English's use of the Peabody fine motor test because of the way the "grasping" subtest is scored. There are no specific tasks at a 36-month-old level related to a child's ability to grasp objects. The test items contain tasks that younger children should be able to perform and then skip to tasks that a 41-month-old child should be able to perform. Therefore, as long as a 36-month-old child could perform the younger age grasping tasks, the test would show the 36-month-old as having average to above average skills, even though the child might not actually be able to perform at that level. Therefore, Aasland does not use the grasping subtest of the Peabody for a child around 36 months of age.

47. The evidence supports a finding that the District's OT assessment was appropriate despite Aasland's testimony. There is no dispute that the Peabody is a standardized, normed test and that English had administered it in accordance with the publisher's instructions. Aasland's objections to the format of the "grasping" subtest, do not invalidate what has been recognized by the profession as a valid test instrument for a child of Student's age. Likewise, Aasland's objection to the timing of the test based on the general rule of thumb is unpersuasive in light of English's testimony. Both the test manual and the test publishers confirmed that re-administering the test after one month was permissible.

48. Student's mother challenged English's credibility regarding the Peabody based on a conversation Student's mother had with a private OT provider named Jackie. Jackie provides OT services on behalf of Beach City Kids. Student's mother testified that Jackie told Student's mother that English had told Jackie (when discussing a different child) that the

² English described vestibular processing as "movement processing" which is responsible neurologically for a child's balance, tone, postural control, and bilateral coordination.

Peabody should not be given within six months to the same child. Jackie did not testify at the hearing, so there is no way to determine the circumstances under which the statement by English was made to Jackie or the needs of the child who was the subject of the communication between English and Jackie. The double-hearsay statement is not sufficient to undermine English's credibility or refute her testimony regarding her contact with the Peabody publishers.

49. Aasland also disagreed with the District's assessment findings that Student's gross motor skills and range of motion were average. Aasland observed Student to have deficits in these areas during the time she provided OT services to Student.

50. The evidence supports a finding that the District's assessment of Student's gross motor needs was adequate. It was appropriate for English to rely upon the standardized gross motor assessment conducted by Rainbow Kids in February 2008. English testified that Rainbow Kids had administered the Peabody gross motor test in a standardized fashion. Even Aasland admitted when discussing the Peabody fine motor test that it is appropriate for an OT to rely upon a standardized test conducted by a different OT the month before.

51. In addition, Aasland's opinions regarding Student's deficits are not as persuasive as English's opinions. Although Aasland found more areas of deficit for Student than the District did, Aasland was looking at Student in a clinical setting, not an educational setting. Aasland never conducted a full assessment or any standardized testing of Student. She worked with Student for only two months and never saw Student in a public school. English, on the other hand, had personally worked with Student, observed Student in a public school setting, and consulted with her teachers.

52. Further, even if there were problems with English's assessment, other portions of the District's assessment also addressed Student's needs with respect to motor skills. The Vineland Adaptive Behavior Scales (Vineland) administered as part of the District's assessment by school psychologist Van Der Wal included a section on motor skills, showing Student's skills to be within the "adequate" range. Van Der Wal also administered the Beery Visual Motor Integration Test (VMI) to test Student's fine motor skills. There were also portions of the Mullen Scales of Early Learning (Mullen) administered by Van Der Wal that related to fine motor skills. The District's assessment thoroughly covered the area of gross and fine motor skills through its own testing and the reports by Rainbow Kids. The District had ample information to determine Student's needs in the area of OT.

53. Student also criticized the District's use of the Sensory Profile as part of the OT assessment, because it was completed only by Student's mother, not Student's preschool teacher. However, Aasland confirmed that the Sensory Profile for a child under three was designed to be administered to the child's parent, not a preschool teacher.

54. Student's mother also questioned the District's assessment based on a letter written by Teri Book to the Regional Center on May 21, 2008. Book is a Pediatric Nurse Practitioner with For OC Kids who was writing to the Regional Center to request that the

Regional Center reconsider its decision that Student was not substantially impaired and therefore did not require ongoing Regional Center support. In that letter, Book listed areas of self-care and communication in which Book believed Student demonstrated significant delay. For example, Book listed Student's lack of independence with toilet training, her inability to dress herself, and her problems with pragmatic language.

55. Book's letter is of limited persuasive value in this case. Book did not testify at the hearing so the source of the information on which she based her opinion was unclear. English criticized Book's letter, because Book incorrectly listed certain conduct as delayed. For example, English explained that it was age-appropriate for a child of three to be unable to dress herself. Student was not significantly delayed in that regard. The letter was written to the Regional Center, and therefore presumably addressed the Regional Center standards for Student, not her public school educational needs. The letter is not sufficient to challenge the adequacy of the District's assessment.

56. Finally, Student's mother criticized the District's assessment because she believes it did not adequately address Student's skills related to potty training. She reported that Student was still not fully potty trained at the time of the December 2008 IEP meeting. During the hearing, Student's mother explained that the typically developing children in Student's general education preschool class must be potty trained to attend the class. Therefore, she believes that Student's lack of potty training at that time indicated a deficit. She informed the District staff of her concerns regarding potty training on numerous occasions. Student's mother believes there should have been a goal in the IEP to address this issue.

57. English explained during the hearing that potty training is part of the preschool curriculum and the lack of potty training was not an area of deficit for a three-year-old child. English's expert opinion in this regard is persuasive. Even if the lack of potty training was a deficit, the District was well aware of the issue and no further assessment was necessary. The concerns raised by Student's mother really involve her belief that the District should have drafted goals or taken other action regarding the potty training, not whether the District should reassess Student to see if she has needs in the area of potty training. Those concerns are not sufficient to show that the District's assessment was inappropriate.

58. The evidence supports a finding that the District's OT assessment was appropriate and sufficient to determine Student's unique educational needs related to OT.

59. The evidence also supports a finding that there were no circumstances requiring the District to pay for an IEE in December 2008. The IEP meeting notes for October 10, 2008, indicated that Student had met her OT goals. After Student's direct OT services ended, English provided informal consultation to Student's teachers and observed Student on various occasions. Student continued to progress in her classes and there was nothing to indicate a need for further assessment or an IEE.

60. The main concerns of Student's mother seem to involve the lack of direct OT services and the lack of goals related to matters such as potty training. However, the necessity of those goals or services is not at issue in this assessment case. The only issue for this case is the appropriateness of the District's assessment.

61. The evidence supports a finding that the District appropriately assessed Student in the area of OT in March 2008. The evidence also supports a finding that the District properly denied the request by Student's mother for an OT IEE in December 2008.

LEGAL CONCLUSIONS

1. In an administrative proceeding, the burden of proof is on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) The District requested this hearing and therefore bears the burden of proof.

2. 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.)³ 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 determining an appropriate educational program for the student. (Ed. Code, § 56320, subds. (e), (f); 20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b)(2), (c)(4) (2006).)

3. 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 native language or other mode of communication unless this is clearly not feasible. (Ed. Code, § 56320, subd. (a); 20 U.S.C. § 1414(b)(2), (3); 34 C.F.R. § 300.304(c)(1)(i), (ii) (2006).) Tests and other assessment materials shall be provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer. (Ed. Code, § 56320, subd. (b)(1); 34 C.F.R. § 300.304(c)(1)(ii) (2006).)

4. Tests and other assessment materials must be administered by trained and knowledgeable personnel and must be administered in accordance with any instructions provided by the producer of the assessments, except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. (Ed. Code, § 56320, subd. (b)(3); 34 C.F.R. § 300.304(c)(1)(iv), (v) (2006).)

³ Federal law uses the term "evaluation" and California law uses the term "assessment," but the two terms have the same meaning for purposes of this Decision and will be used interchangeably herein.

5. A reassessment of a child shall occur “not more frequently than once a year, unless the parent and the local educational agency agree otherwise, and shall occur at least once every three years....” (Ed. Code, §56381, subd. (a)(2); 34 C.F.R. § 300.303(b) (2006).) A reassessment “shall be conducted if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil’s parents or teacher requests a reassessment.” (Ed. Code, § 56381, subd. (a)(1); 34 C.F.R. §300.303(a) (2006).)

6. The procedural safeguards of the Individuals with Disabilities Education Act (IDEA) provide that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1) (2006); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c).) “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) (2006).) To obtain an IEE, the student must disagree with an assessment obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1), (2) (2006).)

7. The provision of an IEE is not automatic. Code of Federal Regulations, title 34, part 300.502(b)(2), provides, in relevant part, that following the student’s request for an IEE, the public agency must, without unnecessary delay, either: (i) File a due process complaint to request a hearing to show that its assessment is appropriate; or (ii) Ensure that an independent educational assessment is provided at public expense, unless the agency demonstrates in a hearing pursuant to parts 300.507 through 300.513 that the assessment obtained by the parent did not meet agency criteria. (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 District conducted an appropriate speech and language assessment, as documented in the assessment report dated March 26, 2008.

8. As discussed in Factual Findings 1 – 28 above, the District’s speech and language assessment met the requirements of the code. The District assessed Student in all areas related to her suspected disability, and no single procedure was used as the sole criterion for determining whether Student had a disability or determining an appropriate educational program for the Student. The assessment was conducted in Student’s primary language of English. The assessment materials were not racially, culturally or sexually discriminatory. The SLP who administered the tests and assessment materials was trained and knowledgeable regarding the tests and the areas to be assessed.

9. As set forth in Factual Findings 7 – 10 and 22 – 23, the evidence is inconclusive as to whether the REEL-3 was administered in a manner consistent with the test publisher’s instructions and whether it had been validated for the specific purpose used because it was administered one day after Student’s third birthday. However, even if it was not valid or properly administered, that minor error was not sufficient to invalidate the

District's assessment. The REEL-3 is a questionnaire for parents, and it is doubtful that the results would have changed if Student's mother answered the questions two days earlier. Further the District's assessment included other tests and assessment instruments, including another standardized test and a non-standardized parent questionnaire. The District's assessment also included records reviews, language samples and classroom observations. The assessment was sufficient for the District to understand Student's needs in the area of speech and language.

10. The District met its burden of showing that its speech and language assessment was appropriate. The District is not obligated to fund an IEE as requested by Student's parents in December 2008.

The District conducted an appropriate OT assessment, as documented in the assessment report dated March 21, 2008.

11. As set forth in Factual Findings 1 – 4 and 29 – 61 above, the evidence supports a finding that the District's OT assessment met the requirements of the code. The District assessed Student in all areas related to her suspected disability, and no single procedure was used as the sole criterion for determining whether Student had a disability or determining an appropriate educational program for the Student. The assessment was conducted in Student's primary language of English. The assessment materials were not racially, culturally or sexually discriminatory. The occupational therapist who administered the tests and assessment materials was trained and knowledgeable regarding the tests and the areas to be assessed.

12. The standardized testing and other assessment tools were valid for the specific purposes for which they were used and were administered in accordance with the publisher's instructions. In addition to the standardized assessment tools, the District OT conducted observations of Student, interviewed the parent and the treating OT from the Regional Center, and reviewed records. The assessment was appropriate and sufficient to determine Student's unique needs in the area of OT.

13. As discussed in Factual Findings 41 – 51, Aasland's criticisms of the Peabody Fine motor test were not sufficient to show that English's use of the test was improper. The Peabody is a validated, standardized assessment instrument for use on a child of Student's age. Aasland's personal concerns about the grasping subtest do not change that. Likewise, the concerns Aasland raised about re-administering the test after one month are not persuasive in light of the Peabody test manual and publisher's comments to English.

14. The District met its burden of showing that its OT assessment was appropriate and sufficient to determine Student's needs. The District is not obligated to fund an IEE as requested by Student's parents in December 2008.

ORDER

The District's assessments in speech and language and occupational therapy, as documented in the assessment reports issued in March 2008, were appropriate. The District is not obligated to fund independent educational evaluations in the areas of speech and language or occupational therapy as requested by Student's parents in December 2008.

PREVAILING PARTY

Pursuant to 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. In accordance with that section the following finding is made: the District prevailed on all issues in this case.

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 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

Dated: May 13, 2009

/s/

SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings