

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2011010957

DECISION

Administrative Law Judge (ALJ) Rebecca Freie, Office of Administrative Hearings (OAH), State of California, heard this matter on April 25, and 26, 2011, in Los Angeles, California.

Patrick Balucan, Attorney at Law, represented the Los Angeles Unified School District (District). Joyce Kantor, Special Education Due Process Hearing Specialist, was present for most of the hearing as the District representative.

Student was represented by James Campbell, Advocate, and Jennifer Guze Campbell, Attorney at Law. Parent¹ was present throughout the hearing. A Spanish-language interpreter interpreted the proceedings for Parent each day of hearing. Student was not present at the hearing.

On January 31, 2011, the District filed a request for a due process hearing. The matter was continued on February 23, 2011. At hearing on April 25, and 26, 2011, oral and documentary evidence were received. The matter was then continued to permit the parties to submit written closing arguments, which were due by close of business on May 10, 2011.

¹ Student's mother was the only parent present at the hearing, and the evidence established that it was she who interacted with the District and attended IEP meetings on behalf of Student, although the notice of appearance by both the Advocate and Attorney states that they are representing both Student's mother and father. Accordingly, Parent, as used in this decision, refers to Student's mother.

Closing arguments were timely received, and the record was closed and the matter submitted for decision on May 10, 2011.²

ISSUE³

Were the District's vision and hearing assessments conducted in the fall of 2010, and considered at an individualized education program (IEP) team meeting on December 9, 2010, appropriate, such that Student is not entitled to an independent educational evaluation (IEE) at public expense?

Student's affirmative defense: Did the District unnecessarily delay filing its request for a due process hearing following Parent's request for an IEE, such that Student is entitled to an IEE at public expense?

FACTUAL FINDINGS

Background

1. Student is seven years old, and resides with Parent within the jurisdictional boundaries of the District. Student attends Wadsworth Elementary School (Wadsworth) in the District, and is in a special day class (SDC) for moderately to severely disabled children.

2. Student is eligible for special education services under the primary disability category of autistic-like behaviors. His triennial IEP testing in 2010, revealed that he functions in most areas in the one to two-year-old range. For example, although he can feed himself, he is not toilet-trained, and is non-verbal. Student also suffers from hypothyroidism, although there was no evidence that this condition impacts him educationally. Spanish is the language used in Student's home, and English is used in his classroom.

2010 Vision and Hearing Assessments

3. When a student is suspected of having a disability, a school district is obligated to have him assessed. Testing, assessment materials, and procedures used for the purposes of assessment must be selected and administered so as not to be racially, culturally, or sexually discriminatory. The assessment of the student is to be conducted by persons who

² For the record, the District's closing argument is designated as District's Exhibit D-14, and Student's closing argument is designated as Student's Exhibit S-9.

³ The Issue and Student's Affirmative Defense have been reworded for clarity. No substantive changes have been made.

are competent and have knowledge of that disability. 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. 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. If standardized test instruments cannot be used to assess a child, alternative means may be used.

4. If a parent disagrees with a school district's assessment of a student, she may request a publicly funded IEE. If the district is unwilling to fund such an IEE, it must, within a reasonable time, file a request for due process to establish the appropriateness of its assessment. If a district unnecessarily delays in filing a request for due process because it does not want to fund an IEE, it may be liable for funding an IEE, even if its own assessment was appropriate. If the assessment is found to be appropriate, i.e., it complies with all state and federal requirements for assessments pursuant to the Individuals with Disabilities Education Act (IDEA), the district will not be required to fund an IEE.

5. In January 2010, Student filed a request for due process (complaint) with OAH naming the District. In April 2010, Student and the District negotiated a settlement and executed a formal written settlement agreement. Among the terms of the agreement was a provision that the District would conduct an audiological evaluation.

6. In early May 2010, Parent had contact with the District's Audiologic Resource Unit (ARU). She told ARU personnel that Student was going to be scheduled to have an auditory brainstem response test (ABR) conducted by his medical provider. However, Student had fluid in his ears, and the testing could not be done until the ears cleared.⁴ Parent was to provide the results of the ABR to the District when the testing was completed.

7. Parent subsequently decided not to have the ABR testing completed because it would be necessary to sedate Student for the testing. It was unclear if Student returned to ARU for hearing testing in subsequent months.

8. On August 30, 2010, Student filed another complaint with OAH, again naming the District. The parties resolved this dispute with another settlement agreement that was executed on October 5, 2010. This agreement contained provisions that the District was to conduct a vision and an audiological assessment of Student.

⁴ An ABR is conducted by an audiologist with the assistance of a medical doctor because the patient must be sedated for the testing. The test measures the function of the auditory nerve using inserted ear phones and electrodes.

9. Mother testified that she believed Student had a hearing problem because sometimes he would not respond when she spoke to him. It was unclear why she suspected Student had a vision problem.

10. Student's teacher, Crystal Perez, testified persuasively about Student's functioning in her class. Ms. Perez has been with the District for 10 years. She has an intern credential for teaching moderately to severely disabled children. She has an associate's degree from Los Angeles City College, and earned her bachelor's degree at California State University at Los Angeles. She is currently working on her master's degree in special education at the same institution, and should obtain that within a year, which will result in her having a clear special education teaching credential. She is also related to a child with autism.

11. Ms. Perez monitors the students in her class to determine whether they have deficits that would impact their ability to access the curriculum, and if a student appeared to have vision or hearing problems, she would refer that student for assessment.

12. Ms. Perez has not had any indication that Student has vision problems. For example, he is able to sort objects by color, shape and size, imitate gestures that are made when the class is singing, and catch a ball. Although Student may close both eyes, or squint or shut one eye in response to distractions, this is typical behavior for a child with autism, according to Ms. Perez.

13. Student does not demonstrate problems with hearing in Ms. Perez's classroom. He is able to follow instructions and responds to his name even if the person speaking is behind him. He appears to hear equally well from both ears, and will cover his ears in response to annoying sounds. Student is able to access the curriculum in Ms. Perez's classroom.

Vision Assessment

14. The District's vision assessment was conducted by Apolonia Tolentino. She is a special education resource nurse, and has been for seven years. She has been employed by the District for 15 years. She received her bachelor's degree in science at De La Salle University in the Philippines, and associate's degree in nursing from Long Beach City College. She holds a nursing services credential issued by the California Commission on Teacher Credentialing. Ms. Tolentino's job duties require her to assist school nurses in complicated IEP situations, and also to mentor and train school nurses.

15. Ms. Tolentino is experienced in conducting vision testing and health assessments of children who are autistic. Ms. Tolentino conducted her vision assessment of Student in November 2010. She was assisted by another nurse who had more experience using one of the testing instruments, the Welch-Allyn SureSight Screener. Ms. Tolentino gave Student instructions in English, and a Spanish interpreter was present and translated

Ms. Tolentino's English instructions into Spanish for Student. Because Spanish is spoken in his home, and English in his classroom, the use of an interpreter provided additional assurance that Student could understand the instructions. In addition, expected behavior for some tests was modeled for him.

16. The Welch-Allyn Suresight Screener (Suresight Screener) is a machine that measures the amount of correction a person with vision problems requires and provides a refraction reading, which is the equivalent of a prescription for eyeglasses. The person being tested sits 14 inches away from the machine and must then focus on a light and sound emitted by the machine for five to 10 seconds for the machine to give a proper reading. Student could not be conditioned to be tested using this machine, because he could not focus for the required length of time.

17. Ms. Tolentino then tried to test Student using the Goodlite LEA Symbol Test.⁵ This test uses picture cards and the testing subject must match the cards to pictures on a chart. Again, Student could not be conditioned because he did not understand what he was to do, in spite of instruction and demonstration.

18. Because Student could not be conditioned to be tested using the Suresight Screener and the Goodlite LEA Symbol Test, Ms. Tolentino had to consider other ways to assess Student's vision. Student was instructed to place his hand on the nurse's palm when it was held 12 inches from his face and he was able to do so. He responded to a light source moving at his side, which demonstrated that he had peripheral vision. Student could track an object with his eyes during the testing attempts, and perceived light. He did not bump into objects when walking.

19. Ms. Tolentino also conducted formal observations of Student. Ms. Tolentino observed Student in his classroom, the lunchroom, and on the playground. He was able to pick up a single Cheerio, which was used as a reinforcer in the classroom. He found his chair when directed to do so, and also found his place in line without being prompted when he went to recess. Ms. Tolentino observed Student looking at pictures, and putting an object away on a shelf when directed to do so. On the playground, Ms. Tolentino saw Student catch a ball that his adaptive physical education (APE) teacher threw to him from a six to eight foot distance. In the lunchroom, Student was able to pick up his lunch tray and easily walk to the table where his classmates sat.

20. Ms. Tolentino also interviewed Ms. Perez, classroom aides, and Student's APE teacher. They all reported that he was able to visually access the curriculum, and did not demonstrate any vision problems, although his visual acuity could not be measured.

⁵ LEA is not an acronym.

21. Although Ms. Tolentino was unable to assess Student's vision with the commonly used SureSight Screener, and the Goodlite LEA Symbol Test, because he could not be conditioned for these tests, she utilized several other valid means of assessing him, and there was no indication that Student's vision interfered with his ability to access the curriculum. Student's vision and hearing assessments were discussed at an IEP team meeting on December 9, 2010. Following this meeting, Ms. Tolentino received a medical report from Student's pediatrician, from the prior school year, indicating that Student had "normal" vision.

22. The District's vision assessment was appropriate in that it was conducted by qualified individuals, was not discriminatory, was administered to Student using both English and Spanish, as well as demonstration, and standard vision assessment tools were used. However, when Student could not be conditioned to respond to the standard assessments, appropriate alternative means were used to assess his vision. Because the vision assessment was properly conducted, Student is not, therefore, entitled to a vision IEE.

Hearing Assessment

23. Stacy Moore, an educational audiologist with the District, assessed Student's hearing in October 2010. Dr. Moore received her doctoral degree in audiology in 2010, from A. T. Still University. She also has a bachelor's degree from the University of Southern California with a major in psychology, and a master's degree in audiology from California State University of Los Angeles. Dr. Moore holds a state license in audiology, and also has a California Rehabilitative Services credential in audiology. She has worked for the District for 14 years as an educational audiologist. Prior to that time, she worked for two to three years as a substitute speech and language therapist. She also has previous work experience with the Los Angeles County Office of Education. As an educational audiologist, Dr. Moore assesses students, and attends IEP meetings, as well as providing other services to deaf and hard-of-hearing students in the District. Dr. Moore has experience in testing children with autism.

24. There were two reasons why Dr. Moore assessed Student. One was due to the settlement agreement, and the other was because he was unable to complete the District's standard hearing screening because he could not be conditioned. Dr. Moore explained that this meant he was not responding to the test modality. One way the District conducts hearing screenings is to have a child put on headphones and then give a response when he hears a sound. Another method is to screen a student using an Otoacoustic Emissions Screener. This test is performed by placing a probe in the testing subject's ear and then a sound is made. A computer measures the motion of hairs in the ears that is exhibited in response to a sound.

25. Dr. Moore was assisted in her assessment of Student by another audiologist, Mallorie Evans. Dr. Moore attempted to test Student using an assessment tool that measures

air conduction (also referred to as pure tone audiometry), as well as conducting speech testing, an otoscopy and a tympanometry test.

26. Air conduction testing uses headphones or a sound field. In sound field testing, the sound is transmitted through speakers. The subject's response, such as shifting the eyes, turning the head, startling or becoming still, is then measured. Student could not be tested using headphones, because he did not want anything placed on his head. Dr. Moore and Ms. Evans then tried to gauge Student's response to sound coming from speakers. Ms. Evans modeled responses to sounds for Student by looking towards the sound and reported the results to Dr. Moore, who was monitoring equipment from behind a barrier in another part of the room. Because some of the children ARU tests are deaf or hard of hearing, it is not feasible to use spoken instructions. Although Student did demonstrate some response to the sounds that were made, he did not do so consistently. This attempt at testing Student lasted more than 30 minutes.

27. The audiologists then tried to do speech testing. This test consists of use of a microphone to call the subject's name at various volumes, and then gauging his response. Student did not respond to his name in the assessment setting.

28. Dr. Moore used an otoscope to look in Student's ears. There were no obstructions or wax buildup.

29. The audiologists then used a tympanometer to measure the mobility of the eardrums. With this instrument, a probe is placed in the ear, and then air is blown in and the mobility is measured. The right eardrum had normal mobility, although it was shallow. The left eardrum was normal. No further testing could be done because Student could not tolerate the probe.

30. Dr. Moore attempted to test Student's hearing using instruments that audiologists commonly use for such testing.⁶ She has successfully tested children with autism using these instruments. However, Student could not be conditioned to complete some of the tests Dr. Moore attempted to administer due to his developmental delays. This is not uncommon with autistic children. Because she could not complete all of the standard testing with Student, Dr. Moore was unable to rule out whether Student has a hearing loss.

31. Dr. Moore testified that the only way Student's hearing could be tested was by conducting an ABR. However, this is a medical procedure because the subject needs to be sedated before the audiologist can conduct the test. Student's medical provider had previously offered an ABR for Student, but Parent told Dr. Moore at the time of the hearing

⁶ Dr. Moore credibly testified that an audiologist conducting an IEE would use the same tests she used.

assessment that she had refused to have an ABR performed earlier in the year because she did not want Student sedated.

32. After receiving Dr. Moore's report, Ms. Tolentino interviewed Student's teacher, and also observed Student. She found that he would look at a person calling his name, and followed simple verbal commands. There was no indication that he had a hearing loss. The medical report from Student's pediatrician that was completed the previous school year reflected that Student's hearing was "normal."

33. The evidence established that the District's hearing assessment of Student was not discriminatory, was appropriately conducted using standard testing instruments, was conducted by competent, qualified professionals who were experienced in testing children who are autistic, as is Student. Because the evidence established that the hearing assessment was properly conducted, Student is not entitled to an IEE at public expense.

34. In his closing argument, Student complains that he was not provided with written reports of the vision and hearing assessments. Student further contends that even if the written summary of Ms. Tolentino's verbal report at the December 9, 2010 IEP team meeting was found to be adequate, this still rendered the assessments invalid, and accordingly he is entitled to an IEE. However, this is not a component to be considered in determining whether a school district's assessment is appropriate when deciding whether a student is entitled to an IEE. Rather, it is a procedural violation. A procedural violation may be actionable if it denied a student a FAPE, or educational opportunity, or denied his parents meaningful participation in the IEP process.⁷ However, the evidence established that Parent did receive the written report prepared by Dr. Moore concerning the hearing assessment, and detailed notes were taken of Ms. Tolentino's verbal report concerning both assessments at the December 9, 2010 IEP team meeting, and these notes were incorporated into Student's IEP. There was no evidence that Parent did not receive a copy of the IEP, nor was there evidence that the District's procedural violation denied Student a FAPE, or educational opportunity, or denied Parent meaningful participation at the IEP team meeting on December 9, 2011, when the assessments were discussed.

Timeliness of the District's Due Process Complaint

35. During the December 9, 2010 IEP team meeting, the District presented its vision and hearing assessments. After the assessments were presented, an advocate representing Parent asked that the District fund vision and hearing IEEs. The District's winter break began December 17, 2010, and school did not resume until January 10, 2011. After the request for the IEE was made, the District needed to determine whether its assessments were appropriate, and if so, whether it wanted to file a request for due process.

⁷ 20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.

The evidence established that very few District employees were allowed to work during winter break. On January 27, 2011, the District sent Student's attorney a letter refusing to fund an IEE. The District filed its complaint in this matter on January 31, 2011.

36. A school district may not unnecessarily delay the filing of a due process hearing request to validate the appropriateness of its assessment. The question of whether a school district unnecessarily delayed filing such a complaint is fact-specific as the IDEA does not specify the number of days after an IEE request is made for a school district to file a due process complaint.

37. In this matter, the District filed its complaint 53 days after Parent's advocate requested an IEE. However, school was not in session for 24 of those 53 days due to winter break. By analogy, the IDEA recognizes that most schools close for two or more weeks during the winter, and two or more months during the summer. Accordingly, there are several provisions in the IDEA and California's special education statutes and regulations that suspend timelines during these periods. Taking into account the 24-day winter break, the District did not unnecessarily delay the filing of the complaint in this matter, since school was in session when school personnel were working for only 29 days between the request for an IEE, and the filing of the complaint in this matter.

LEGAL CONCLUSIONS

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387], the party who filed the request for due process has the burden of persuasion at the due process hearing. The District filed for a due process hearing and bears the burden of persuasion.

2. A school district's assessments shall be conducted by trained and knowledgeable personnel, except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. (Ed. Code, § 56320, subd. (b)(3).) In conducting an assessment, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student. This may include information provided by the parent that may assist in determining whether the student is a child with a disability, and the content of the student's IEP, including information related to enabling the child to be involved and progress in the general education curriculum. (34 C.F.R. § 300.304(b)(1)(i), (ii) (2006).⁸) No single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or for determining an appropriate educational program for the student. (34 C.F.R. § 300.304 (b)(2).) Tests and assessment materials must be validated

⁸ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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).) If a child cannot be assessed using standard assessment tools, alternative means of assessing the child may be used. (*K.S. v. Fremont Unified School District* (N.D.Cal.,2009) 679 F.Supp.2d 1046, 1051 and 1059-60.)

3. The procedural safeguards of the 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); 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 assessment means an assessment 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 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), (b)(2).)

4. When a student requests an IEE, 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 independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).) The public agency may ask for the parent's reason why he or she objects to the public assessment, but may not require an explanation, and the public agency may not unreasonably delay either providing the independent educational assessment at public expense or initiating a due process hearing. (34 C.F.R. § 300.502(b)(4).) Neither federal or California special education laws or regulations set a specific number of days for a school district to file a due process hearing request after a parent requests an IEE.

Issue: Were the District's vision and hearing assessments conducted in the fall of 2010, and considered at an IEP team meeting on December 9, 2010, appropriate, such that Student is not entitled to an IEE at public expense?

5. Based on Factual Findings 1-34, and Legal Conclusions 1-4, the evidence established that the District conducted appropriate vision and hearing assessments of Student during the fall of 2010. There was no question that Ms. Tolentino and Dr. Moore were respectively qualified to conduct vision and hearing assessments of Student. Both have proper licenses, credentials and degrees to do so. Both were unsuccessful in assessing Student using commonly used assessment tools, because Student's disabilities prevented them from conditioning him to be tested. As a result, the District was forced to resort to alternative assessments. The information gathered by alternative means, such as Ms. Tolentino's observations of Student and interviews with his teacher and staff, validated Ms.

Tolentino's conclusion that Student does not have vision or hearing impairments that affect his ability to access his program.

6. Whether an LEA files a due process complaint without unnecessary delay is a fact-specific inquiry. In *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. 2006,) 2006 WL 3734289, 47 IDELR 12, 106 LRP 72283, the court determined that the school district unnecessarily delayed filing its due process request. The school district first waited three weeks and then demanded that the pupil reiterate its request, warning the pupil that it was "prepared" to go to due process to defend its assessments. After the pupil complied with the district's demands, the district then waited another eight weeks, without explanation, before filing its request. In total, the school district waited three months after the pupil first requested an IEE at public expense to file its request. The court held that the school district had thereby waived its right to contest the IEE.

7. In another recent case, the court held that a school district's 10-week delay in filing a due process request was not a per se violation.⁹ (*L.S. v. Abington Sch. Dist.* (E.D. Pa. 2007) 2007 WL 2851268; 48 IDELR 244.) The court emphasized that there was evidence of ongoing efforts during that time to resolve the matter. In addition, assuming there was a procedural violation due to the delay, the court found it did not result in a denial of a FAPE to justify ordering the school district to pay for an IEE.

8. California special education law contains provisions that allow some timelines to be suspended when school is not in session. For example, Education Code section 56043, subdivision (a) extends the 15-day time limit for a school district to develop an assessment plan, after a parent has requested an assessment, when school is not in session between terms, or when school vacations exceed five days. A recent court decision took into account the fact that a parent's request for an IEE was made during the winter break when school was not in session, and that in part ameliorated the school district's delay in filing a request for due process. (*J.P. ex rel., E.P. v. Ripon Unified School Dist.* (E.D. Cal. 2009) 2009 WL 1084993.)

9. Legal Conclusions 6-8 and Factual Findings 35-37, support a finding that the District did not unnecessarily delay filing its complaint after Student requested an IEE. Although there are no provisions that specifically suspend the timelines for a school district to file a request for due process after a parent requests an IEE, the District's 24-day winter break, when very few employees were permitted to work, certainly impacted its ability to file a request for due process sooner than it did. The facts in this case support a finding that the District did not unnecessarily delay filing its request for due process regarding the appropriateness of the assessments.

⁹ The court found a net six-week delay in filing, after an initial 30-day negotiation or informal "resolution" period following the parents' request for an IEE.

ORDER

The District's vision and hearing assessments complied with legal requirements. The District did not unnecessarily delay the filing of the complaint. Therefore, Student is not entitled to an IEE at public expense.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed on the only issue for hearing that was decided in this case.

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: May 24, 2011

/s/

REBECCA FREIE

Administrative Law Judge

Office of Administrative Hearings