

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. 2011030307

DECISION

Administrative Law Judge Robert F. Helfand (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter in San Juan Capistrano, California, on April 18, 2011.

James G. Campbell, Advocate who is associated with the Special Education Law Firm, represented Student's mother and Student (Student). Student's mother (Mother) was present for part of the hearing. Jennifer Guze Campbell, Esq., an attorney with the Special Education Law Firm, was also present.

Ernest Bell, Esq., of Dannis Woliver Kelley, represented the Capistrano Unified School District (District). Dr. Crystal Bejarano, Informal Dispute Resolution Specialist for the District, was also present. Kimberly Gaither, a special education legal specialist with the District, was also present.

The District filed its due process request (complaint) on March 7, 2011. On March 10, 2010, Student filed a response to the District's complaint.

At the hearing, the ALJ received oral and documentary evidence. The following witnesses testified at the hearing: Anthony Bogle, Terry Wellbaum, and Rebecca Shea Hirschag.

At the request of the parties, the record remained open for the submission of written closing and rebuttal arguments. The parties filed their closing briefs on April 28, 2011. Rebuttal briefs were submitted on May 2, 2011, when the matter was submitted.

ISSUE

The sole issue to be determined in this matter is: Whether the District's January 5, 2011 occupational therapy (OT) assessment was appropriate?

PROCEDURAL MATTERS

On April 4, 2011, Student filed a motion in limine to preclude the admission into evidence of the OT assessment report on grounds that the District failed to produce copies of the test manuals as part of Student's education records. The District filed its opposition on April 11, 2011. The ALJ denied Student's motion on the first day of the hearing on grounds that test manuals are not educational records citing *Letter to Shuster*, 108 LRP 2302 (OSEP 2007).

Student then orally moved for the issuance of a subpoena duces tecum (SDT) to compel the production of the test manuals. After hearing oral arguments, the ALJ, taking into account the factors of the fair-use doctrine and balancing the equities, granted the motion for issuance of an SDT subject to a protective order.¹ The protective order limited the use of the manuals to the hearing room only, prevented either side from copying any portion of the manuals, and restricted use of the manuals to the instant matter. The District then produced the manuals, which were reviewed by Student's counsel and advocate.

CONTENTIONS OF THE PARTIES

The District contends that the OT assessment was appropriate as (1) the assessor was competent and knowledgeable, (2) the assessment was comprehensive and tailored to evaluate a specific area of educational need, and (3) conducted appropriately.

Student avers that the OT assessment was not appropriate because the assessor failed to administer one of the standard tests according to instructions contained in the test manuals.² Student alleges that the assessor used gender neutral data, in lieu of gender specific data, in scoring the tests, failed to calculate confidence intervals and age equivalency, and failed to conduct a cross analysis. Student also contends that the written report failed to comply with statutory requirements as the report omits whether the assessor found that Student required special education services with an explanation of that conclusion.

¹ The ALJ cited on the record *Newport-Mesa Unified School District v. State of California Department of Education* (C.D. Cal. 2005) 371 F.Supp.2d 1170 as authority.

² Although Student, in her closing brief, makes the argument in general terms, Student did not contest the scoring of the second of the two standardized tests during the hearing.

Student also alleges as an affirmative defense that the District must provide an Independent Education Evaluation (IEE) because the District failed to timely file its request for due process hearing.

FACTUAL FINDINGS

1. Student is an 11-year-old girl who resides with Mother, her twin sister, and her grandparents within the geographical boundaries of the District. Student has been and continues to be eligible for special education under the primary eligibility category of Other Health Impairment (OHI) as Student has cerebral palsy, a ventriculoperitoneal shunt,³ and a heart murmur. Additionally, she also has low cognitive ability. All of these affect her ability to access the academic curriculum. Student was and continues to be placed in a special day class (SDC) at Crown Valley Elementary School (Crown Valley).

October 22, 2010 Multidisciplinary Assessment

2. The District conducted an early triennial assessment by a multidisciplinary team. On October 22, 2010, a District multidisciplinary assessment report was prepared. The assessment was conducted on June 14; July 6; September 14, 16, 20 through 24, and 27; and October 14, and 21, 2010. The team comprised Tracey Artlinger, a school psychologist; Gwen Manganiello, Student's SDC teacher; Billye Williams, a speech pathologist; and District Nurse Nancy Harman. The team's findings included that Student's general intelligence ability fell in the very low range and that higher level thinking skills was an area of weakness. Additionally, Student was given the Beery VMI Development Test on October 12, 2010. The team recommended that Student continue to be eligible for special education and related services under the category of OHI as she "has limited strength, vitality, or alertness due to chronic or acute health problems."

September 22, 2010 Assessment Plan and Mother's Consent

3. On September 22, 2010, Anthony Bogle, the principal of Crown Valley, forwarded a letter to Mother along with a statement of rights and an assessment plan dated September 22, 2010, to permit the District to assess Student in the areas of gross/fine motor development so as to address whether "possible fine motor and/or visual motor or gross motor skill delays impact [Student's] ability to access her individualized educational curriculum/program" as well as the effect of gross motor skills in physical education activities. The assessment would be conducted by specialists in Adaptive Physical Education (APE), Occupational Therapy (OT), and Physical Therapy (PT). Bogle did not receive a response to his letter prior to the scheduled IEP team meeting of October 27, 2010.

³ At birth, Student suffered from hydrocephalus, which is a condition where there is an excessive accumulation of cerebrospinal fluid causing pressure on the brain. (The ALJ takes official notice of the decision in *Parent on behalf of Student v. Capistrano Unified School District*, OAH case no. 2010050368, which involved Student.)

4. Following the IEP team meeting on October 27, 2010, Mother consented to the proposed APE/OT/PT assessment plan by letter from her attorney, Jennifer Guze Campbell on October 29, 2010.

The OT Assessment

5. The OT assessment was conducted by Rebecca Shea Hirschag, a licensed occupational therapist who is employed with District. Hirschag received a B.S. in occupational therapy from San Jose State University in 2003. She received her certification in November 2003. From January 2004 through April 2006, Hirschag was an occupational therapist with the Evanston Skokie School District 65 in Illinois. She worked from April 2006 through January 2008 as an occupational therapist with an Irvine firm, Wertheimer-Gale and Associates, which provided OT services under contract with school districts. In January 2008, she began her employment with the District. Hirschag is the main therapist at Crown Valley and has worked with Student there. Hirschag has conducted approximately 500 OT assessments in her career. Based on her education and professional experience, Hirschag is a trained, knowledgeable, and competent to conduct the assessment.

6. In conducting the assessment, Hirschag conducted a records review, teacher and parent interviews, observations of Student in clinical and educational settings, and standardized testing. The standardized tests administered were the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2); Beery Buktenika Development Test of Visual Motor Integration, Fifth Edition (VMI); Sensory Profile School Companion (SPSC); Sensory Processing Measure Home (SPM-H); and the Sensory Processing Measure Main Classroom (SPM-MC). The VMI had been administered by Hirschag on October 12, 2010, as part of the multidisciplinary assessment conducted for Student's triennial assessment. The standardized tests were administered using the standard protocol outlined in the test manuals.

7. Hirschag testified that she administered the tests in Student's native language, English, and that the tests are free of racial, cultural and sexual discrimination. The standardized tests utilized are valid and reliable for the purposes for which the assessments are used. Student offered no evidence to contradict Hirschag's testimony.

Records Review and Parent Interview

8. Hirschag reviewed psychoeducational evaluations conducted in 2004, 2007, and 2010. She noted that Student's academic abilities were in the low range and that she had a full scale IQ of 80 in 2004, 70 in 2007 and a general intellectual ability score of 62 in 2010. The evaluations showed that Student had strengths in the areas of spatial thinking, auditory processing and phonemic awareness.

9. Hirschag interviewed Mother as to her perceptions of Student's strengths and weaknesses. Mother completed a questionnaire and reported that she does not see Student having any areas of strength and that Student "is considerably behind her peers in all areas." Mother also observed that Student cannot hold a pencil or pen correctly which hindered her

ability to write and perform tasks. Mother also reported that Student is performing at the kindergarten level in reading and math.

Observations

10. Student had been observed in her SDC class by Hirschag. She independently transitioned during center time. She demonstrated organizational skills by clearing her workstation and gathered items needed to perform a reading task. She was on task and followed directions and was observed assisting a peer to find the correct page in the book. Student appeared motivated and paid attention to the goings on in class.

11. Hirschag also observed Student in her weekly sensory group. She participated appropriately and properly raised her hand to gain the attention of the teacher. Although peers talked out of turn, Student stayed on task and did not talk out of turn. She maintained personal space and an upright position during the 30 minute session. Student demonstrated each of the sensory activities presented, and she was able to maintain prone flexion and sitting position on a large therapy ball.

12. During the assessment, Student was cooperative and able to complete all tasks without frustration. She maintained constant eye contact with Hirschag and was able to follow directions.

Fine Motor and Visual Motor Processing

13. The BOT-2 is an individually administered test that assesses the motor functioning of persons between the ages of four and a half and 21. The fine manual control subtests measure control and coordination of hands and fingers for grasping, writing and drawing. The manual coordination subtests involve skills in the control and coordination of the arms and hands for object manipulation. The BOT-2 considers a scaled score of five or less as “well below average range,” six through 10 as “below average,” 11 through 19 as “average,” 20 through 24 as “above average” and 25 and above as “above average.”

14. Student received scaled scores of 11 in fine motor precision and nine in fine motor integration. Her fine manual control composite scaled score equaled a standard score of 39 in the below average range. She received a standard score of 33 in the manual coordination composite which was also in the below average range. Her subtest scores were six in manual dexterity and nine in upper limb coordination. She also received a 13 in bilateral coordination, which was in the average range.

15. Student contends that Hirschag failed to administer the BOT-2 according to the test manual because she used a gender neutral table in lieu of a gender specific table in measuring Student’s scores.⁴ The BOT-2 manual recommends that a gender specific table be

⁴ A gender specific table relies on data from either just males or females, while a gender neutral table reflects data combining both boys and girls.

utilized, but it does not require the assessor to use it. The manual clearly states that it is in the discretion of the assessor to utilize either the gender neutral table or the gender specific table in calculating scores. Hirschag, based on her experience, believes that the gender neutral table is more reflective of a child's levels at this age. Hirschag testified that using the gender specific table would not have led to a significant change in Student's scores, if at all. Hirschag is a qualified professional who was credible. Student failed to offer any evidence to refute Hirschag.

16. Student also contends that Hirschag failed to follow the test manual when she did not calculate the confidence interval, age equivalency or conduct a cross analysis to ensure that Student's scores were accurate. Hirschag did not compute the confidence interval nor the cross analysis as the test has a confidence interval of 90 to 95 percent accuracy. Since Student's scores fell within the ranges, Hirschag felt it was unnecessary to make this computation. Additionally, Hirschag had worked with Student for a considerable time and was familiar with her abilities. She felt that the BOT-2 scores reflected Student's abilities based on her knowledge of Student. Hirschag demonstrated that she is qualified and was credible. Student offered no evidence to contradict the testimony of Hirschag.

Fine Motor and Visual Motor Skills

17. The VMI is a standardized test that measures visual motor integration, visual perception, and fine motor coordination skills. Visual motor integration is the degree to which visual perception and finger hand movements are coordinated. Student obtained a raw score of 20 which is a standard score of 77 and in the below average range. The VMI was administered by Hirschag on October 12, 2010, as part of the multidisciplinary assessment. In the multidisciplinary assessment report of October 22, 2010, Student's VMI scores were also reported. In that report, Student's 77 standard score was reported to place her in the sixth percentile and in a "low" classification.

18. Hirschag noted that Student was left-handed and used a functional tripod grasp with open web space. She used her right hand to stabilize her paper effectively. Student was observed while using scissors. Student demonstrated correct position and utilized bimanual skills to manipulate the paper while cutting with her right hand. Student was able to cut complex shapes with age-appropriate accuracy. She copied a circle, square, overlapping circles and a wavy line with perfect accuracy. Student's score was adversely affected when she drew a six sided star instead of a five sided one.

19. Student exhibited an upright posture at her desk when writing. She used a left tripod grasp and exerted appropriate pressure on the paper with appropriate paper placement. She also stabilized the paper with her right hand 100 percent of the time. Her writing size was 100 percent consistent and her spacing was within 88 percent consistent. Hirschag noted that Student often misspelled words.

Sensory Processing

20. Sensory processing refers to the ability to receive, organize and interpret sensory information from the environment and from one's body and to demonstrate an adaptive response. Using sensory information effectively permits a person to interact in the world around him or her.

SPSC

21. The SPSC is a standardized assessment tool which measures a student's sensory abilities and their effect on the student's functional performance in the classroom. The SPSC is a questionnaire which was completed by Student's SDC teacher, Manganiello. The importance of understanding a student's unique sensory needs and challenges guides the occupational therapist in determining the strategies that can be utilized most effectively. The SPSC is analyzed in quadrant scores, school factors and environmental factors.

22. In environmental factors, Student obtained scores in the "typical" range in all areas. These areas were auditory – response to things heard; visual – response to things seen; movement – response to sensations of movement; touch – response to touch stimuli; and behavior – sensory responses.

23. Student also scored "typical" in school factors which included need for external supports; awareness and attention; tolerance for sensory input (i.e., tolerating changes in routine); and availability for learning. Students who are "typical" in all four factors are either functioning well in the classroom, or if troubles are noted, it may be that school factors are not the cause for the performance.

24. The quadrant scores are in the areas of registration, seeking, sensitivity, and avoiding. Registration measures a student's awareness of all types of sensations. Student received a "probable performance," which means that Student may notice things less than others and may not be bothered by things that bother others. Student scored "typical" in seeking, which is interest in and pleasure with all types of sensations, and avoiding, which refers to the student's need for controlling the amount and type of sensations available. In the area of sensitivity, which measures a student's ability to notice all types of sensation, Student scored in the "probable performance" range which means she has a sensitivity pattern which is that she has a high ability to notice all types of sensations. The result is that these students tend to be distractible, display hyperactivity, and direct their attention to the latest stimuli that presents itself.

SPM-MC

25. The SPM-MC assesses children in kindergarten through the sixth grade relating to a child's sensory processing, social participation, and praxis.⁵ The SPM-MC is a questionnaire which was filled out by Student's teacher, Manganiello. Student scored "typical" in all areas – social participation, vision, hearing, touch, body awareness, balance and motion, and planning and ideas. Student's overall score was "typical."

SPM-H

26. The SPM-H is a questionnaire which was filled out by Mother. The SPM-H covers the same areas as the SPM-MC but as to the home environment. Mother rated Student as "typical" in the areas social participation, vision, touch, and body awareness. Mother rated Student in the "some problem" range in the areas of hearing, balance and motion, and planning and ideas. Hirchag pointed out in her report that Student's scores in the area of balance and motion may result from Student's cerebral palsy. Hirchag cites as an example, Mother stating that Student frequently avoids balance activities.

Sensory Observations

27 In her written report, Hirchag devoted approximately a page and a half to a section entitled "Sensory Observations." In this section, Hirchag compiled the information from the assessment tools to summarize her findings as to Student's strengths and weaknesses in eight areas: organization of behavior, vestibular processing, proprioceptive processing, tactile, visual, auditory, praxis, and tone/strength/range of motion.

28. Organization of behavior relates to a child's activity level, attention, self-initiation, complexity and creativity of play, and response to change. During testing, Student was able to complete all tasks without frustration, appropriately used items, and engaged in all activities. Student was observed in her classroom to work independently and remain attentive.

29 Vestibular processing is the perception of one's own movement and gravity, and includes muscle tone, balance, equilibrium, and postural control. Student exhibited adequate balance and postural control while seated during testing. During class, Student was observed to maintain an upright seated position which demonstrates adequate balance and equilibrium for academic tasks. She showed age appropriate bimanual skills as evidenced by her using both hands to cut and stabilize the paper. Mother, in her responses on the SPM-H reported poor coordination and that Student was "clumsy." Hirchag noted that Student's cerebral palsy may be the cause of Mother's observations.

⁵ Praxis is the ability to interact successfully with the physical environment, to plan, organize, and carry out a sequence of unfamiliar actions, and to do what one intends. (Whitney, Rondadlyn, "Definitions of Sensory Terms," www.spdbayarea.org.)

30. Proprioceptive Processing refers to the messages that one receives at the joints to adjust muscle tension in response to motoric movement. Proprioceptive processing provides the ability to automatically adjust in order to complete motor tasks accurately. Student was able to engage appropriately with utensils while writing, drawing and cutting. She was also observed to adequately navigate the school environment safely.

31. Tactile refers to information input regarding light touch, pain and temperature. Student demonstrated typicality in this area.

32. Visual processing is the ability to make sense of information taken in through the eyes. Mother noted in the SPM-H that light occasionally bothers Student and that she has had trouble finding an object when it is part of a group.

33. Auditory processing is related to the ability to filter salient information from sound. Student was able to navigate during the one-to-one testing where there is minimum background noise. In the school setting, she did not exhibit any problems as she participated even when there was maximal background noise and distractions.

34. Praxis consists of ideation, motor planning and execution of novel motor movements. Student was observed to navigate through a novel area without bumping into stationary items. She also engaged in various physical activities, such as jumping jacks and eye-hand coordination ball activities, without functional coordination problems.

35. In tone/strength/range of motion, Student presented with average tone, adequate strength and range of motion for school related tasks.

Hirchag's Summary and Impressions

36. Hirchags's report contained a section entitled "Summary/Impressions," which read:

[Student] is a 11 year old girl. Her IEP goals focus on math, reading, communication, and written expression. Her handwriting in the classroom is legible, however it is noted that misspellings impact readability, please see accommodations below for suggestions. She is able to complete written tasks in a timely and efficient manner. Her teacher does note that desk organization often impacts her ability to get started with writing assignments and projects. Assessment revealed fine motor precision and bilateral integration skills in the average range when compared to typically developing peers her same age. Scores for fine motor integration and upper limb coordination were slightly below average however in alignment with her academic ability. Manual dexterity scores were impacted by time. Please see accommodations in the chart below to assist [Student] in the classroom. With regards to sensory assessment, [Student's] performance in the classroom and at home are very similar with typical scores across all

environments with the exception of a “probable difference” score in hearing, balance and planning subsections at home. Scores in the balance and planning subsections may be elevated due to [Student’s] medical diagnosis of CP [cerebral palsy]. In the classroom, she is focused and attentive, she is processing sensory information with regards to her access of educational environment.

37. Following the summary portion, Hirschag lists Student’s strengths as fine motor precision in the average range; bilateral coordination skills in the average range, functional grasp; age appropriate bimanual skills; fine motor foundational skills secured; legible handwriting in the classroom; good attention and focus in the classroom; and follows directions well.

Hirschag’s Recommendations

38. The report included a chart which lists Student’s five unique needs and the related goal, modification, or accommodation that Hirschag was recommending. The first unique need listed is “manual dexterity.” Hirschag recommended that Student be given additional time for projects, tasks, written work assignments, and tests. For registration and sensitivity, Hirschag recommended enhancing features of tasks and providing contextual cues; increasing contrast of stimuli; decreasing predictability to routines; and making all experiences more concentrated with sensory information. Student’s third area of need was difficulty with remembering content during written language assignments. Hirschag recommended that Student be permitted to dictate her thoughts to an adult and then be allowed to copy it. She also recommended that Student be allowed to dictate her test answers. The fourth area was Student’s misspellings which decrease the readability of her written work. Hirschag recommended that Student be encouraged to edit her work multiple times, and that she use a computer to type her work and utilize spell-check. The last area of need was desk organization. Hirschag recommended that organizational strategies be used per that specific goal of Student’s IEP.

January 12, 2011 IEP Meeting and Request for IEE

39 Student’s IEP team met on January 12, 2011. The purpose of the meeting was to review assessments in OT, Adapted Physical Education, and Physical Therapy. Mother attended with her advocate from the Special Education Law Firm, Wiley Campbell. District attendees were Bogle, as administrator; Manganiello; Hirschag; a general education teacher; two speech pathologists; two school psychologists; an APE teacher; two school nurses; physical therapist; and a literacy specialist. Hirschag presented orally her assessment report. Prior to the meeting, Hirschag provided Mother with a written report.⁶ Following Hirschag’s

⁶ Following the meeting, Hirschag amended her report to correct a typo which appeared on page four of the report. Hirschag changed the word “shape” to “shapes” in the section on Fine Motor and Visual Motor Skills. The reason for the change was that Student had cut more than one complex shape.

presentation, Mother called her assessment “stupid.” The only comment Mother made was that Student holds her scissors in an incorrect manner.

40. On January 25, 2011, Mother, through her attorney, Jennifer Guze Campbell, sent a letter to Bogle. Campbell stated that Mother consents to the January 12, 2011 IEP portions of eligibility, placement and goals; but that Mother does not consent to the “[a]ccommodations, specifically the Capistrano Unified School District’s failure to include in [Student’s] January 2011 IEP all the occupational therapy report’s accommodations for [Student].” Campbell then concludes:

On behalf of [Mother], we hereby disagree with the occupational therapy report presented at the IEP team meeting on January 12, 2011. On behalf of [Mother], we hereby request an independent educational evaluation for occupational therapy for [Student].

The District’s Filing of the Due Process Complaint

41. Bogle received the January 25, 2011 letter on January 26, 2011. Bogle notified Dr. Crystal Bejarano, the Informal Dispute Resolution Specialist for the District and others who were involved with Student. Bogle attempted to gather information to determine whether the OT assessment was appropriately done. On February 23, 2011, Bogle wrote to Mother that her request was denied as the OT assessment had been “complete and thorough.” The District filed its complaint on March 7, 2011.

LEGAL CONCLUSIONS

Applicable Law

1. The District, as the party filing this case, has the burden of proof in the proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)
2. Prior to making a determination of whether a child qualifies for special education services, a school district must assess the child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) The request for an initial assessment to see if a child qualifies for special education and related services may be made by a parent of the child or by a state or local educational agency. (20 U.S.C. § 1414(a)(1)(B).) After the initial assessment, a school district must conduct a reassessment of the special education student not more frequently than once a year, but at least once every three years. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).)
3. In conducting an initial assessment or reassessment, a school district must follow statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor(s). The district must select and administer assessment materials in the student’s native language and that are free of racial, cultural and sexual discrimination.

(20 U.S.C. § 1414(b)(3)(A)(i); Ed. Code, § 56320, subd. (a).) The assessment materials must be valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) They must also be sufficiently comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(C); Ed. Code, § 56320, subd. (c).) Trained, knowledgeable and competent district personnel must administer special education assessments. (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.)

4. In performing a reassessment, such as a triennial assessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R., § 300.305; Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the district must identify any additional information that is needed by the IEP team to determine the present levels of academic achievement and related developmental needs of the student and to decide whether modifications or additions in the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).) An IEP meeting to review the results of an assessment must be held within 60 days, not counting days between a pupil's regular school sessions, terms, or days of vacation in excess of five school days, from the receipt of the parent's written consent to the assessment, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (f)(1).) A reassessment must follow procedures for assessments set forth in Education Code sections 56320 – 56331. (Ed. Code, § 56381, subd. (e).)

5. Persons who conduct assessments shall prepare a written report, as appropriate, of the results of each assessment. The report shall, but not be limited to, include: (a) whether the pupil needs special education and related services; (b) the basis for that determination; (c) the relevant behavior noted during the observation of the pupil; (d) the relationship of that behavior to the pupil's academic and social functioning; (e) educationally relevant health and development and medical findings; (f) for pupils with learning disabilities, the discrepancy between achievement and ability that cannot be corrected without special education services; (g) a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and (h) the need for specialized services, materials, and equipment for pupils with low incidence disabilities. (Ed. Code, § 56327.)

6. A parent has the right to obtain an IEE if the parent disagrees with a district's assessment. (Ed. Code, § 56329, subd. (b).) When a parent makes a request for an IEE, a district must either fund the IEE at public expense or file for a due process hearing to show that its assessments were appropriate. (Ed. Code, § 56329, subd. (c).) If the district prevails in the due process hearing, the parent still has the right to obtain an IEE, but not at public expense. (*Ibid.*)

7. If a parent requests an IEE at public expense, the education agency must, without unnecessary delay, file a due process hearing request to demonstrate that its assessment is appropriate, or ensure that an IEE is provided at public expense. (34 C.F.R., § 300.502(b)(2).)

Determination of Issue

8. The OT assessment was administered so as not to be discriminatory in a racial, cultural, or sexual basis' and was administered in Student's native language. The materials were validated and reliable for the purposes for which the assessments were used. The assessment tools used were sufficiently comprehensive and tailored to evaluate specific areas of education need, and the assessment was administered by a trained and knowledgeable person.⁷ (Factual Findings 5 through 38.)

9. Based on Factual Findings 5 through 16, Student's contention that the assessor failed to follow the test manual for the BOT-2 is without merit. Student bases her contention on the manual suggesting that the assessor utilize gender specific tables rather than the gender neutral table. The manual clearly stated that it was in the discretion of the assessor as to whether the gender neutral or gender specific table is used. Hirschag, based on her experience, used the gender neutral table. This was within the manual's instructions. Student also contends that Hirschag failed to calculate confidence levels or conduct a cross check. Hirschag testified that she felt these were not needed as the test's confidence level was between 90 and 95 percent and the scores obtained were consistent with her knowledge of Student as her OT provider. Student never requested that the assessor score these areas, which could easily have been accomplished. Hirschag was a credible witness whose testimony was not contradicted.

10. Student's contention that Hirschag's written report failed to meet statutory requirements is without merit. The assessment was part of a multidisciplinary triennial assessment and should be read in connection with the October 21, 2010 assessment report. Student had long been eligible for special education and the purpose of the assessments was to evaluate her present levels and to assist the IEP team in developing an IEP rather than determine eligibility. Here, Hirschag noted Student's relevant health, development and medical information; her behavior during testing and observations; parent and teacher perceptions of Student; test results; and a review of Student's sensory needs based on the testing; observations and Hirschag's work with Student. Additionally, Hirschag made recommendations for modifications, accommodations and goals. Although the report fails to specifically recommend that Student is eligible for special education, it can be assumed that it does since Student's eligibility was not in disagreement. Thus, the written report meets the requirements of Education Code section 56327. (Factual Findings 5 through 38.)

⁷ In her closing brief, Student admits that the District met four of the five statutory criteria. (Student's Closing Brief dated April 28, 2011, p. 4.)

11. Based upon Factual Findings 39 through 41, the District did not delay filing its due process hearing request. Student's mother never voiced the reasons for her dissatisfaction with the OT assessment. Because of the lack of information as to the basis of Mother's IEE request other than she "disagrees" with Hirsch's assessment, the District had a right to review the appropriateness of the assessment before determining whether to grant Mother's IEE request. Additionally, Student cites to *Pajaro Valley Unified School District v. J.S.* (N.D. Cal. 2006) 2006 WL 3734289, 47 IDELR 12, 106 LRP 72283, to demonstrate that the burden of proof is on the District to prove that it acted without unnecessary delay in filing for due process. The *Pajaro* court held that three months was considered unnecessary delay coupled with the actions of the District to force parents to refile their IEE demand. A two month delay has been held to not be an unnecessary delay. (*J.P. v. Ripon Unified School District* (E.D. Cal. 2009) 2009 WL 1034993, 52 IDELR 125, 109 LRP 22025.) Since the delay was forty days, slightly more than a month, the District did not take undue time in filing its due process request.

ORDER

1. The District's January 5, 2011 Occupational Therapy assessment was appropriate.
2. The District is not required to fund an Independent Educational Evaluation in Occupational Therapy.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, the District prevailed on the single issue heard in this matter.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: May 10, 2011

/s/
ROBERT HELFAND
Administrative Law Judge
Office of Administrative Hearings