

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Consolidated Matter of:

ANAHEIM CITY SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2005100214

ANAHEIM CITY SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N2007020449

DECISION

Administrative Law Judge Judith L. Pasewark, Office of Administrative Hearings, Special Education Division, State of California, heard this matter in the Office of Administrative Hearings, Laguna Hills, California on June 12, 13, 14, 18, and 21, 2007.

Laurie LaFoe and Diane Willis, Esqs., of Lozano Smith, represented Anaheim City School District (District). Sherry Blakely, Director of Special Services, attended the hearing on behalf of the District.

Jennifer Kropke and Michael Herzog, Esqs., of Roberts & Adams, represented Student (Student). Student's mother (Mother) attended the hearing on behalf of Student.

The District filed a request for due process hearing on October 6, 2005. On October

25, 2005, and October 12, 2006, Student filed separate requests for due process hearing. On February 14, 2007, the District filed a second request for due process hearing. OAH consolidated the four cases. Pursuant to the consolidation of the cases, the timeline applicable in Case No. 2007020449 governs this matter. At the prehearing conference on June 4, 2007, Student withdrew both of his due process requests. On June 6, 2007, the District withdrew its issue regarding the 2005 individual educational plan (IEP). On June 12, 2007, Student withdrew his request for an independent expert evaluation (IEE) in the area of occupational therapy. As a result, only two issues remained for adjudication at hearing. The hearing commenced on June 12, 2007. Both parties presented oral and documentary evidence. The parties provided written closing arguments, and the record closed on July 16, 2007.

ISSUES

1. Is the District's psychoeducational assessment dated May 24, 2005, appropriate or is Student entitled to a publicly funded independent educational evaluation (IEE)?
2. Is the District's functional analysis assessment (FAA) dated January 19, 2007, appropriate or is Student entitled to a publicly funded independent FAA?

CONTENTIONS

The District contends that the psychoeducational assessment dated May 24, 2005, is an appropriate assessment which meets all necessary legal and educational requirements, and therefore, Student is not entitled to an IEE at public expense. Student contends that the District failed to assess in all areas of suspected disability and failed to administer the testing protocols in conformity with the publisher's instructions. Student contends he is entitled to an IEE at public expense.

The District contends that the FAA dated January 19, 2007, is an appropriate functional analysis assessment, which meets all legal and educational requirements, and

therefore, Student is not entitled to an independent FAA at public expense. Student contends that the District improperly conducted the FAA and failed to comply with reporting requirements. Student contends he is entitled to an independent FAA at public expense.

FACTUAL FINDINGS

1. Student is a ten year old who resides with his Mother within the boundaries of the District. Student qualifies for special education services under the category of autistic- like behaviors.

2. Once placed, a special education student must be reassessed every three years, or more frequently, if conditions warrant, or if the student's parent or teacher requests a new assessment.

3. The District conducted a triennial psychoeducational assessment of Student in May 2005. The District presented the assessment report, dated May 24, 2005, at Student's IEP meeting in August 2005. Mother disagreed with the assessment and requested an IEE at public expense. The District declined to provide the IEE. At the time of the assessment, Student was eight years, 10 months old, and completing the third grade.

MAY 24, 2005 PSYCHOEDUCATIONAL ASSESSMENT

4. An appropriate reassessment of a special education student requires a school district to follow numerous and specific testing regulations. Testing and assessment materials and procedures must be selected and administered so as not to be racially, culturally, or sexually discriminatory, and must be administered in the student's native language. The tests and assessment materials must be validated for the specific purpose for which they are used and must be administered by trained personnel in conformance with the instructions provided by the producers of the test and materials. A student must be assessed in all areas related to his/her suspected disability. Assessments must also include testing which is tailored to assess specific areas of educational need.

Further, in California, tests of a student's intellectual or emotional functioning must be administered by a credentialed school psychologist.

5. The District's psychologist, Heidi Denissen,¹ prepared the Parent Consent/Evaluation Plan for Student's triennial assessment. Ms. Denissen has known Student since 2002, and is aware that Student is a high functioning child with autism. She based the assessment plan upon Student's needs known to the District at the time. In determining what areas would be assessed, and which tests would be administered, Ms. Denissen consulted with Student's teachers, reviewed Student's educational records and prior assessments, and interviewed Mother by telephone. The assessment plan proposed to assess academic achievement, intellectual development, psychomotor development, language/speech communication development, social and adaptive behavior, development and health. Ms. Denissen demonstrated that she is familiar with Student's disability. The assessment plan meets the requirements that the District assess Student in all areas of suspected disability and tailor the testing to specific areas of Student's educational needs.

6. Ms. Denissen administered assessment testing, and prepared the psychoeducational assessment report (assessment report). She assessed Student over

¹ Ms. Denissen has been a school psychologist in the District for four to five years. As part of her current job duties, Ms. Denissen attends IEPs, conducts psycho-educational assessments, and handles crisis interventions. Ms. Denissen has worked with children with mild to severe autism for six years, and has had special training in autism. She currently is working with 25 children with autism, grades K-6. She has B.A. in Psychology, and an M.A. in Social Work. Ms. Denissen has been a credentialed school psychologist since 2002, and is a member of the National Association of School Psychologists.

three days in May 2005. Additionally, Ms. Denissen observed Student in the classroom, in his speech therapy, and at recess. The assessment report indicates that the assessment materials and procedures were selected to be unbiased with regard to race, gender and culture, and were given in Student's primary language. Further, Ms. Denissen collected information from a variety of sources, including review of Student's records, information from classroom teachers, and Mother. Student raised no objection to these assessment requirements.

7. Ms. Denissen provided a caveat in the assessment report regarding Student's testing results. Student cooperated in the testing sessions; however he required prompting to remain on task. She gave Student several breaks during the sessions, due to his short attention span. Ms. Denissen indicated that due to Student's attention difficulties, his scores might be depressed and might not provide an accurate estimate of his true abilities. The results however, do provide an accurate estimate of Student's present level of functioning in the classroom.

8. Chris A. Davidson, Ed.D.,² Student's expert, is highly experienced and informative regarding psycho-educational assessments. She provided a definition of "best practices" in administering assessments. Much of her testimony in this area matched that of Ms. Denissen. She did believe, however, that the District's assessment fell short in several areas. Primarily Dr. Davidson believed that the discrepancies in test scores were not adequately analyzed or retested, and as a result, several areas of suspected need were overlooked.

9. Ms. Dennisen is a credentialed school psychologist and is qualified to administer intellectual and emotional assessments. Ms. Denissen based Student's social and emotional functioning report upon observations of Mother and Student's teachers. Mother rated Student on the Gilliam Autism Rating Scale (GARS) for the assessment. The GARS is designed to determine the likelihood of autism by comparing Student with a sample of students composed entirely of individuals diagnosed as autistic. Ms. Denissen also used the Connors' Rating Scale to determine characteristics of Attention Deficit

² Dr. Davidson received her B.S. in Elementary Education, M.S. in Counseling, and Ed.D. in Educational Management. She is a licensed educational psychologist. Dr. Davidson has an Administrative Services Credential, Pupil Services Credential, and Multiple Subject Teaching Credential. She has a Teacher of the Handicapped Certificate, Career Guidance Certificate and Computers in Education Certificate. Dr. Davidson has an extensive employment history as a teacher, counselor, school psychologist, Director of Special Education, college faculty member and licensed educational psychologist. Dr. Davidson has a myriad of publications and presentations, honors, and professional activities which are listed in her CV. In her private practice, Dr. Davidson primarily works with children experiencing autism, ADHD, and emotional disturbances. She performs psychoeducational evaluations and FAAs as part of her practice, and works collaboratively with many school districts.

Hyperactivity Disorder (ADHD). The Connors' based Student's scores on the ratings of Mother and Student's teacher.

10. Ms. Denissen assessed Student's adaptive behavior with the Vineland Adaptive Behavior-Scale Survey Form (Vineland). Adaptive behavior involves the performance of daily activities required for personal and social sufficiency. It is age-related, and is defined by the expectations or standards of other people. The Vineland requires a trained interviewer to administer a semi-structured interview to a third party familiar with Student, herein Student's teacher. Ms. Denissen is qualified to administer the Vineland. Ms. Denissen administered the Vineland in three areas or domains, specifically, communication, daily living skills, and socialization.

11. Student contends that Ms. Denissen did not use the adaptive skills portion of the Vineland to determine Student's adaptive skills, and therefore the District did not perform the Vineland in accordance with the publisher's instructions. Ms. Denissen explained that she did not include the adaptive skills portion of the Vineland, as the Occupational Therapy assessment would cover that area. Although not stated in the report, the District prepared an Occupational Therapy assessment in conjunction with the psychoeducational assessment. Further, the Vineland adaptive skills subsection is scored independently and does not affect the other scores. Absent counsel's assumptions regarding the publisher's instructions, there is no evidence to conclude that portions of the Vineland cannot be administered independently or that Ms. Denissen failed to follow the testing manual on those portions of the test administered.

12. Dr. Davidson is familiar with the Vineland and uses it herself in assessments. She reviewed the Vineland and its protocols. Dr. Davidson found significant differences in expressive and receptive skills and personal living skills. As an example, in one area Student scored at the 3-1year age equivalency, when he was 8-9 years old. Dr. Davidson explained the concept of "outliers," which are those scores significantly out of range. It is important to know each sub domain scores within the tests, as one area might be masked

within the total added domain scores, i.e., an extremely high score on one sub domain, would lessen or “mask” the impact of an extremely low score when added together. Further, Student contends that the District’s assessment reported scores only in clusters or groups, thereby making it impossible to note any outliers. Without including the individual sub domain scores, the results could not be compared to determine if a score was an outlier. Without further investigation of outliers, the test result can not be questioned. The inability to detect outliers is contradicted by Student’s own argument in which he claims that Student’s sub domains contained several scores that appeared to be outliers that gave rise to several areas of need. The actual disagreement between the parties is not whether the test was valid, but rather the interpretation of the results. Ms. Denissen opined that the outliers were the result of attention issues. Dr. Davidson believed Student needed additional receptive skills assessing. The validity of testing, however, does not require agreement on inference or conclusions resulting from the test.

13. In the areas of psychomotor, visual, and auditory perceptual skills, Ms. Denissen administered the Berry Developmental Test of Visual Motor Integration (VMI). The VMI measures Student’s ability to deal with spatial relationships and integration of objects. The VMI Test of Visual Perception measures a student’s visual perception without motor requirements. The VMI Developmental Test of Motor Coordination tested Student’s ability to control hand and finger movements.

14. Both parties agreed that Student’s scores fluctuated on the VMI. This fluctuation concerned Dr. Davidson. Ms. Denissen concluded that the fluctuation in scores resulted from Student rushing through the test, his inattentiveness and his lack of motivation on the test. Dr. Davidson indicated that scores usually remain stable, therefore she would have looked to find out why there was a discrepancy. In order to do so, she would have given the test a second time to “test the limits.” The purpose of testing the limits is to verify that the first score is accurate. Dr. Davidson indicated that testing the limits is authorized in the test manual, however she did not indicate that doing so was

required, or that relying on assessor observations was inappropriate.

15. Dr. Davidson noted that Student scored in the third percentile on motor coordination, however the assessment report contains no recommendations on that need. Ms. Denissen indicated that the Occupational Therapy assessment contained a separate report which included recommendations on this need.

16. The Motor-Free Visual Perception Test-3, tested Student's non-motor, nonverbal visual perception skills. Visual perception skills relate to the ability to understand and interpret what the eyes see, and express the meaning of what is seen. Student attained a standard score of 103, which placed his visual processing skills in the average range. At hearing, upon cross-examination, Ms. Dennisen discovered that there was a three-point mathematical error in the calculation of Student's score.

17. Student incorrectly contends that the calculation error invalidated the assessment per se. A school district's failure to conduct an appropriate assessment may constitute a procedural denial of a FAPE. A procedural violation constitutes a denial of a FAPE only if it resulted in the loss of educational opportunity to the student or seriously infringed on the parent's opportunity to participate in the IEP process. In this instance, the District's mathematical error did neither. The error did not change the manner in which the District administered the test or invalidate Student's responses. The protocols were available to review and recalculate. Student scored in the average range. The three point reduction may have impacted Student's standard score, i.e., by changing his score range. This assumption, however, is insufficient to conclude that Student lost any educational opportunity or educational benefit as a result of this score. The miscalculation is harmless error.

18. Ms. Denissen administered the Kaufman Assessment Battery for Children (KABC), which involves a component of short term memory, but is mainly intended to measure a student's ability to solve problems that are dependent on arranging information in a sequential order. Ms. Denissen indicated that Student's scores were low

most likely due to sensory skill problems with his hands.

19. Student contends that Ms. Denissen administered an outdated version of the KABC, which is a violation of the publisher's instructions. In essence, Student argues that when a new test version is issued, the old test is invalidated as the scoring norms may change. Ms. Denissen disagreed, and indicated that the KABC, as given, provided good information about Student's abilities as reported. Student provided no evidence to show that the norm was skewed or the results invalid. Further, Dr. Davidson provided no testimony to support this contention.

20. Ms. Denissen used several tests to measure Student's intellectual and cognitive functioning. Student had previously been assessed using the Weschler Intelligence Scale for Children-fourth edition (WISC-IV). In 2005, the District administered the Leiter-R, which is a non-verbal measure of intellectual ability, often used on student's who cannot be reliably or validly assessed with traditional intelligence tests. Ms. Denissen indicated she found the Leiter-R useful for students with autism. It is administered in a game format which assists in keeping the students' attention. As assessed on the Leiter-R, Student is functioning within the low average range of nonverbal intellectual ability. Ms. Denissen acknowledged that Student's overall intelligence score was lower than previously measured on the WISC-IV. She however did not consider a four point difference "so much lower," and indicated that attention may have been a factor in the current results.

21. Dr. Davidson objected to the use of the Leiter-R as a primary test of cognitive ability. She does not use it. Instead, Dr. Davidson prefers the WISC-IV. Although she agrees with Ms. Denissen that the Leiter-R tests cognitive ability in non-verbal areas, she does not agree that this test holds a child's attention better. Further, Dr. Davidson opined that it would be a better snapshot of Student to reflect the need for prompting while using more appropriate testing. Dr. Davidson also noted that there was a difference in IQ scores between the 2002 and 2005 assessments. Student scored lower on the Leiter-R in 2005, than he did on the Weschler Preschool and Primary Scale of

Intelligence-R (WPPSI-R). The Leiter-R is not compatible for comparison of scores to the WPPSI-R. Dr. Davidson suggested giving the WISC-IV, which is compatible with the WPPSI-R, in order to compare areas of weakness. While Dr. Davidson makes several good points in support of her preferred testing, no evidence was presented to suggest that the Leiter-R is not a valid assessment designed for the purpose of testing Student's cognitive abilities. Further, the Leiter-R was not the only test administered to test Student's cognitive functioning.

22. Ms. Denissen also administered the Raven's Standard Progressive Matrices (Raven's Matrices), which is a language free measurement of abstract/figural problem solving. Student obtained a score in the high average range. Ms. Denissen selected the Raven's Matrices at Mother's request. Student contends that the District administered the Raven's Matrices solely to determine Student's qualification for the GATE program. This contention is unfounded. Although the Raven's Matrices may serve as a qualifying assessment for the GATE program, nothing prevents the District from using the assessment in a psycho-educational assessment; as long as the test is intended for the purpose it is used. Ms. Denissen stated that the Raven's Matrices tested a student's cognitive abilities in problem solving and abstract reasoning. Ms. Denissen used the Raven's Matrices in conjunction with the Leiter-R and the Slosson to measure Student's cognitive ability.

23. Ms. Denissen also administered the Slosson Intelligence Test-R3, which is a screening test of verbal intelligence. Dr. Davidson indicated the Slosson is a brief test, and not as comprehensive as the WISC-IV. She considers the Slosson to be a supplementary test. Nonetheless, the Slosson qualifies as an appropriate test of cognitive abilities, and was not the sole test used to determine Student's cognitive abilities.

24. Linda Castorena,³ a District Resource Specialist Program (RSP) teacher,

³ Ms. Castorena has been employed by the District for eight years. She is currently a Resource Specialist. Her job includes teaching, testing and observing students. She is

assessed Student's academic achievement. She administered the Woodcock-Johnson-III (WJ-III). Ms. Castorena is a credentialed special education teacher with eight years of experience and administers the WJ-III to 60-65 students per year. She is qualified to administer the academic assessment. Ms. Castorena administered the WJ-III to student in a quiet area, in two, 45 minute sessions. Student participated willingly and was attentive through most of the test. Ms. Castorena noted that Student was not interested or motivated in the timed tests, and gave half-efforts on them.

25. Ms. Castorena acknowledged that she had not met Student prior to the assessment, but knew he was a child with autism. She assesses 40-45 students with autism each year. She did not speak with Mother or Student's teacher prior to the assessment. She did speak with Student's aide, only to determine she did not need him present during the assessment. Ms. Castorena indicated that being familiar with Student's unique needs, other than autism, was not necessary as she could not modify the tests or change their validity. Ms. Castorena has sufficient knowledge of Student's disability to appropriately administer the academic testing. Ms. Castorena assessed Student in specific areas of educational need, reading, writing, and mathematics.

26. The broad reading portion of the WJ-III measured reading identification skills and comprehension of short passages. The broad mathematics section measured analysis and solving of practical problems in mathematics. Student's broad written language test measured production of single-word responses and productions of sentences embedded

trained to give assessments, and has presented programs on the Woodcock-Johnson. Ms. Castorena has a B.A. in communicative disorders, and an M.A. in special education. Ms. Castorena has a teaching credential. Approximately 80 percent of her students are ADHD. She also has experience assessing and teaching students with autism. Further, Ms. Castorena has personal experience with autism, as her grandson, who lives with her, is a child with autism.

in context. In all three broad skills, Student performed in the average, 69th percentile. This indicated that Student was functioning within the range expected for his ability level in reading, writing and math.

27. Dr. Davidson noted there was a significant discrepancy in the WJ-III subtests between academic and fluency scores. Student's math fluency and calculations in particular exhibited dramatic differences. Dr. Davidson believes these scores indicate a visual processing issue which was not identified in the assessment report. Both the Math Fluency and Writing Fluency are timed tests, on which Ms. Castorena indicated Student gave less than his full effort. Dr. Davidson opined that timed tests indicate processing difficulties, and Ms. Castorena should have tested the limits to determine if Student was exhibiting an attention or processing speed problem.

28. Ms. Castorena stated that the WJ-III meets statutory requirements and she followed the manual instructions in assessing Student. She indicated that the WJ-III scores are norm based to grade equivalence. Ms. Denissen requested that Student's scores be norm based to age equivalence. Student argues that this score translation does not produce comparable scores. Ms. Castorena indicated that she tested Student according to manual instructions. The protocols are scored pursuant to manual instructions. The test results are accurate and can be measured in age equivalency. Dr. Davidson did not comment on this issue. Ms. Castorena stated that the WJ-III is an appropriate test of Student, which resulted in a good picture of Student's then current abilities, both strengths and weaknesses. Ms. Castorena appropriately administered the WJ-III.

29. Dr. Davidson opined that the psychoeducational evaluation did not appear to be tailored to Student. She did not believe the assessment identified all areas of Student's disability in that it failed to address issues which were related to, among other things, processing and social skills. Interestingly, she identified these various areas of concern from Student's test results in the District's assessment. Dr. Davidson primarily wanted more information and additional testing, much of which would have been testing

the limits of various subtests. According to Dr. Davidson, the assessments and their scores drive the recommendations, which in turn, are designed to assist in improving Student's educational performance. More testing provides more information. Certainly a psychoeducational assessment can be more extensive, contain more protocols, and test or retest specific results. No doubt Dr. Davidson's assessment and analysis of Student would be far more comprehensive than that provided by the District. Nonetheless, Dr. Davidson indicated that she could look at the District's assessment and get a good idea of Student's needs. To provide far more extensive testing is not the District's obligation however. The District is required to meet the legal requirements for assessment, and has done so in this psychoeducational assessment.

JANUARY 19, 2007 FUNCTIONAL ANALYSIS ASSESSMENT

30. Mother described Student's behavior in 2006, as increasingly out of control. She received daily incident reports from school. Student had become violent, primarily kicking and hitting. Student verbally threatened his aide.

31. In June 2006, the District informed Mother that Student had become angry on the school bus and threatened to stab his bus driver on the way home from school. The school bus contained other students, many with severe handicaps. Mother met with the District the next day. The District requested that Mother check Student's backpack daily, and remove sharp objects. The District no longer allowed Student to carry pens or pencils on the school bus. Additionally, in another incident, the District determined that Student, who likes to draw, would no longer be allowed to draw violent weapons, such as army tanks. Mother requested a FAA.

32. A FAA is a creation of California law, developed as part of the state's behavior intervention regulations which supplement federal law and the IDEA. In California, when a student's behavior impedes his or her learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other

strategies to address that behavior. As with a psychoeducational assessment, a school district must follow specific procedural regulations in conducting an FAA.

33. A FAA must be conducted by, or be under the supervision of a person who has documented training in behavior analysis with an emphasis on positive behavioral interventions. Elizabeth Peterson,⁴ a Program Specialist for the District, conducted the FAA and prepared the FAA report dated January 19, 2007. Ms. Peterson is trained in functional analysis and positive intervention. As part of her employment, Ms. Peterson has acted as a behavioral case manager for the District, in which she performs FAAs. Approximately half of the FAAs she has performed related to autistic students. Ms. Peterson has extensive experience with both behavior intervention and autism, and met the legal requirements to perform Student's FAA. Ms. Peterson had assistants collect this

⁴ Ms. Peterson has a B.A. in Psychology and an M.S. in Counseling. She is credentialed in Preliminary Administrative Services, School Psychologist, Pupil Personnel, Community College Instructor and Community College counselor. As part of her employment with the District, Ms. Peterson is responsible for the coordination, planning, and monitoring of special education programs. She provides Behavior Intervention Case Manager services for students with severe behavioral problems. As a Behavior Case Manager, Ms. Peterson has completed FAAs, and provided consultation and coordination of behavioral plans for students for four years. She has also been a member of the District's Autism Focus Committee. Previously, Ms. Peterson was the SELPA Coordinator for North Orange County Special Education Local Plan Area, and was the contact person for the Orange County Department of Education SUCCESS autism program, where she provided consultation and training in teaching students with autism. She has also been the Behavior Intervention Case Manager for La Habra City School District. Ms. Peterson has other significant experience which is contained in her CV which was admitted into evidence.

data for the FAA. The assistants were supervised by Ms. Peterson and their training reviewed prior to Student's assessment.

34. Ms. Peterson understood Student's unique needs associated with autism. She understood Student's history of behaviors, such as difficulties coping, self regulation, and social interactions. She reported that Student had good academics, but tended to not want to do tasks which were difficult for him, such as pencil/paper tasks. Although she vaguely knew of the school bus incident, it was not her understanding that the FAA was driven by this incident. Rather, Ms. Peterson understood that the District was more concerned with educational issues, specifically, Student's behavior in the classroom.

35. Student provided expert testimony from Denise Eckman, Ph.D.⁵ Although Dr. Eckman is experienced with Functional Behavior Analysis, which is similar to Functional Analysis, she has never conducted an FAA. Her description of the FAA process, however, did not dramatically differ from that of Ms. Peterson. Dr. Eckman, as would be expected, provided a more detailed explanation of reporting requirements as they apply to describing behavior.

36. An FAA is required to gather information from three sources: (1) direct observation; (2) interviews with significant others; and (3) review of available data and other individual records. The FAA staff conducted the FAA over the period of September 5, 2006, through December 8, 2006.

37. The FAA observed Student in various settings, at different times, and for different periods of time. The FAA observed Student in his classroom, as well as at recess,

⁵ Dr. Eckman has a B.A. in Psychology, M.A. in Clinical Psychology, and a Ph.D. in Clinical Psychology. She is the Director of Creative Solutions, a non-public ABA program, certified by the state of California. She is licensed in clinical psychology and is a board certified behavior analyst. She has extensive experience with autism as described in her CV which was admitted into evidence.

lunch, the library and at home. The observations ranged from 20 minutes to one and one-half hours, for an estimated total of six to seven hours. Ms. Peterson interviewed significant persons involved with Student: his teacher, aide, and service providers. Ms. Peterson made a home visit to interview Mother; however, she did not observe Student in the home or any social setting outside of school. Further, Ms. Peterson did not observe Student on the school bus.

38. Ms. Peterson interviewed those significant others involved with Student at school. She reported that each person interviewed was asked to describe their perceptions of Student's behavior and their strategies then in place to deal with them. Ms. Peterson did not interview the bus driver.

39. Ms. Peterson reviewed Student's assessment records, IEPs, and grade reports.

40. Although observation of Student in a social setting would have been appropriate, and perhaps desirable, the regulations do not require the District to do so. The District, however, is required to observe Student over a variety of educational settings. The FAA contained information from the three required sources, all of which were confined to the on-campus, educational site. Regardless of Student's threat to the bus driver, Student's school bus experiences are also part of his educational environment. Ms. Peterson's analysis of antecedent data noted that Student's targeted behaviors most frequently occurred at the beginning of the day when he was entering school. The FAA needed to explore Student's behavior during transportation as part of his educational setting.

41. The threat of physical violence on the school bus cannot be easily dismissed. Ms. Denissen indicated the threat was an isolated incident, and therefore did not need to be addressed in the FAA. The evidence does not support this conclusion. Ms. Denissen testified that Student had previously gotten angry on a few occasions prior to getting on the bus. She indicated that the bus driver felt unsafe. The District developed a behavior

plan which involved searching Student's backpack, in order to ensure safety on the bus. All of this is information which should have been presented to Ms. Peterson for analysis. Upon review at hearing, Ms. Peterson stated she should have looked at the transportation/school bus issues. The FAA did not look at Student in all settings, and as a result did not obtain a complete picture of Student's behaviors in the educational setting. This failure permeates the remainder of the FAA analysis.

42. A FAA requires that Student be systematically observed over a period of time to determine the behavior, its antecedents, ecological factors, and consequential events. A systematic observation requires that the observer document (1) frequency—how often does the behavior occur; (2) duration—how long does the behavior occur; and (3) intensity—what is the severity of the behavior. According to Dr. Eckman, the observations must report and define the targeted behaviors in measurable terms in order to develop an appropriate intervention.

43. The FAA report designated three areas of specific undesired target behavior to be decreased: (1) verbal threats of harm to self or others or extreme verbal outbursts which may be accompanied with a physical gesture, screaming, crying, shouting, to the point that Student and other classmates' instruction is interrupted, and may require a physical time-out or staff intervention such as removal from class; (2) inappropriate talking out of short duration, off-topic, but does not stop whole class instruction, nor does it require removal from class or intensive intervention; and (3) crying, whining, and/or mild verbal outbursts usually of short duration which does not stop whole class instruction, which may be for the purpose of protest, information seeking, correction of teacher or commenting to aide. Pursuant to the parent interview, Mother reported concerns about outbursts at school which included crying and screaming, and defiance towards his teacher.

44. Student contends that the FAA fails to adequately describe frequency, duration and intensity of Student's behaviors. The FAA indicates that verbal threats of

harm or other extreme outbursts occurred seven times in 10 weeks. Inappropriate talking occurred on average 4.4 times per week, mild outbursts occurred on average 12.4 times per week over a 10 week period. Student contends that the FAA fails to define which specific behaviors occurred, and which did not, leaving the reader to be unable to determine the actual frequency of the actual behavior. This contention is unfounded. The data logs, which are part of the assessment, contain daily logs of each behavior, the time and frequency of each behavior. The FAA adequately describes frequency of Student's behaviors.

45. Student contends that the FAA failed to include the duration of the targeted behaviors. The description of the targeted behaviors references a time frame of a "short duration." No further time frame is described in the assessment, nor is there any reference for comparisons in time. Ms. Peterson admitted the FAA did not comply with the durational requirement, however she believed the phrase "short duration," which meant three to five seconds to her, was adequate. The term, "short duration" as used in the FAA report, lends itself to multiple and relative definitions. As such, it is unduly vague. The FAA did not adequately define duration of behaviors.

46. Student contends that the FAA failed to include a description of the intensity of Student's targeted behaviors. The targeted behaviors are described in terms of "extreme, moderate, and mild." These words, by definition, define levels of intensity, and provide a means of comparison to adequately describe the intensity of Student's behaviors.

47. A FAA must include systematic observation of the immediate antecedent events associated with each instance of the display of the targeted inappropriate behavior. The FAA report listed three of Student's behavioral antecedents described from least to most severe. The antecedents, however, are connected to only one targeted behavior, rather than to each, individual targeted behavior. The District contends that the data collected for the FAA included information regarding each antecedent, and the data logs

are part of the FAA. Further, as Ms. Peterson stated, behavior is not easily defined. It changes in time. In reviewing the data logs, Ms. Peterson determined that Student's most severe behaviors involved avoidance of doing unwanted tasks. Further, the FAA report notes that "this is a sample of a possible sequence of Student's target behaviors." The targeted behaviors reference Student protesting a request made of him. Dr. Eckman disagreed, indicating that observation of antecedent events need to be reported as individual behaviors rather than as behaviors in clusters. Individual behaviors suggest individual targets. The purpose of the observation of antecedent events is not disputed between the witnesses. Ms. Peterson has more credibility on the reporting of the antecedent events given her experience in actually preparing FAA reports. The antecedent behaviors, however failed to consider whether Student's experiences and behavior on the school bus, constituted an antecedent behavior for the targeted school behaviors.

48. A FAA must include a review of records for health and medical factors which may influence targeted behaviors. Based upon her interview with Mother, Ms. Peterson reported on Student's health and physical factors. Specifically, the report considered Student's vision and hearing, his medications, current sleep pattern, diet, allergies and unusual responses or sensitivities to environmental stimuli. The FAA also contained discussion of Student's June 2006 occupational therapy consult report, which noted that Student could be highly distractible at times. The FAA also reviewed Student's cognitive skills and development factors contained in his doctor's diagnoses, psychoeducational assessments, and educational records.

49. A FAA must include an ecological analysis of the settings in which the behavior occurs most frequently. Factors to consider should include the physical setting, the social setting, the activities and the nature of instruction. The FAA considered many ecological factors which might contribute to Student's targeted behaviors. Ms. Peterson indicated that she based the analysis on observations of Student in relation to the environment and people around him at the time of targeted behaviors. The analysis

however, did not consider the ecological factors of transportation to and from school. The FAA noted that the targeted behaviors occurred most frequently at the beginning of the day, however it failed to address the impact of Student's bus ride to school.

50. A FAA must include systematic observation and analysis of the consequences following the display of the behavior to determine the function the behavior serves for the student. The daily logs recorded the perceived functions of each behavior. The FAA report described consequent events relating to the targeted behavior as "(1) teacher continues monitoring class, aide and teacher wait to determine if Student complies with instruction/direction; (2) aide gives Student verbal prompt/prewarning and restatement of instruction/direction. Document need for prompt; and (3) verbal prompt with restatement of instruction/direction given by aide, as aide moves closer to Student, ready to assist him." Dr. Eckman opined that the analysis of consequential events consists only of what corrective action the teacher/aide is taking. It does not include consequential events for Student nor does it define how long the staff is waiting before moving to the next level of intervention. Dr. Eckman's points have merit. A more in depth description of consequential events in the report would have been beneficial, however, it was not established that a more in depth description was required. On this issue, again, Ms. Peterson's experience provides more credibility in testimony.

51. A FAA must include a review of the history of the behavior which includes the effectiveness of previously used behavioral interventions. Ms. Peterson obtained a history of behavioral interventions used with Student from the significant persons interviewed for the FAA. The FAA report contained discussion of six areas of behavioral interventions used at school, which were generally found to be moderately successful. Mother also provided three examples of moderately successful behavior interventions used at home. The report is unspecific as to when these interventions took place or under what circumstances they were successful, or not successful. Dr. Eckman opined that a more thorough review of prior interventions was needed. The review needed to include

what worked, and why, as well as what didn't work, in order to plan the next level of interventions for Student. Ms. Peterson indicated that prior to the completion of the FAA, data had not been collected regarding the success of behavioral interventions. As a result, she relied on anecdotal information from the significant others interviewed for the FAA. There is no discussion of unsuccessful interventions. Further, Ms. Peterson did not collect data as part of the FAA, therefore more current information and observations of behavior interventions were not included in the analysis. As a result, the history of behavioral interventions is incomplete.

52. The District's FAA is not appropriate. Student's behavioral issues while on the school bus were completely omitted from the FAA. The FAA failed to observe Student in all settings relevant to his education. As a result, the District failed to obtain an accurate picture of perhaps Student's most offensive behaviors. Further, by failing to observe Student in all settings, other requirements must fail as well. Specifically, by omitting observations of Student's transportation to and from school, the FAA failed to address what antecedent behaviors were related to the school bus or what ecological factors the school bus or bus ride represented in Student's targeted behaviors. Lastly, the history and analysis of previous behavioral interventions was incomplete. The combination of these factors renders the District's FAA deficient.

53. A FAA report must meet four requirements as defined in title 5, California Code of Regulations part 3052, subdivisions (b)(2)(A-D). Specifically, a FAA report must include a discussion of the possible functions of the targeted and preceding behaviors. A FAA report must define specific functional behaviors for student to replace the targeted behavior. The FAA report must contain proposed behavioral interventions which include proposed modification of antecedent events and ecological factors. Finally, a FAA report must include recommendations for consideration by the IEP team in the form of a proposed behavioral intervention plan.

54. Student contends that the District failed to meet each of these requirements,

and has presented all-embracing arguments in support of these contentions. Further consideration of the appropriateness of the FAA report, however, is needless. Having determined that the underlying FAA itself is insufficient, it is unnecessary to determine whether the report, which relies on an inappropriate FAA, meets state regulation requirements.

55. When a parent disagrees with an assessment obtained by a district, the parent has the right to an independent educational evaluation (IEE) from a qualified specialist at public expense unless the district demonstrates at a due process hearing that its assessment was appropriate.

56. As stated in Factual Finding 33, Mother requested an FAA. The District complied with this request. The District held an IEP meeting on January 29, 2006, to review the FAA and craft a behavior plan for Student. During the IEP, Mother indicated she did not agree with the FAA, and she requested that the District fund an independent FAA. As determined above, the District did not conduct an appropriate FAA. Student is entitled to an independent FAA at public expense.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49, 126 S.Ct. 528, the party who files the request for due process has the burden of persuasion at the due process hearing. District filed both due process requests and bears the burden of persuasion.

2. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA or the Act) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7,

2005, in response to the IDEIA.⁶ Special education is defined as specially designed instruction at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.)

3. State standards that impose a greater duty to educate handicapped students, if they are not inconsistent with federal standards, are enforceable in federal court under IDEA. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519.)

4. In conducting the assessment or reassessment, testing and assessment materials and procedures used for the purposes of assessment and placement of individuals with exceptional needs must be selected and administered so as not to be racially, culturally, or sexually discriminatory. (Ed. Code, § 56320, subd.(a).) The tests and other assessment materials must also be provided and administered in the student's native language. (34 C.F.R. § 300.19 (2003); Ed. Code, § 56320, subd. (b)(1).)

5. Tests and other assessment materials must have been validated for the specific purpose for which they are used, (Ed. Code, § 56320, subd. (b)(2)), and must be administered by trained personnel in conformance with the instructions provided by the producer of the tests and other assessment materials. Further, individually administered tests of intellectual or emotional functioning must be administered by a credentialed school psychologist. (20 U.S.C. § 1414(b)(3)(A)(i) through (v); Ed Code, § 56320, subd. (b)(3).)

6. Tests and other assessment materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient. (Ed. Code, § 56320, subd.(c).)

⁶ The District completed Student's psychoeducational assessment in May 2005. Subsequent to the assessment, there have been changes in applicable Education Code sections. Therefore, all references to applicable law regarding assessments cite legal authority in effect as of May 24, 2005.

7. In conducting the assessment or reassessment, a district is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent that may assist in determining whether the child is a child with a disability and matters relating to the child's IEP. (20 U.S.C. § 1414(b)(2)(A).)

8. A district may not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.532; Ed. Code, § 56320, subd.(e).)

9. A district is required to ensure that the student is assessed in all areas related to the suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320 (f).)

10. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District*. (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP process. (*W.G. v. Bd. of Trustees of Target Range* (9th Cir. 1992) 960 F.2d 1479, 1484.) These requirements are also found in the IDEA and California Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd.(f)(2).)

11. When a parent disagrees with an assessment obtained by a district, the parent has the right to an independent educational evaluation (IEE) from a qualified specialist at public expense unless the district demonstrates at a due process hearing that its assessment was appropriate. (Ed. Code, §§ 56329 subds. (b), (c), 56506 subd. (c); 34 C.F.R. § 300.502.) If a parent requests an IEE at public expense, a district must, without unnecessary delay, either initiate a due process hearing to show that its assessment is

appropriate, or ensure that an IEE is provided at public expense, unless the district demonstrates in a hearing that the assessment obtained by the parent did not meet educational agency criteria. (34 C.F.R. § 300.502, subd. (b)(2); *Pajaro Valley Unified School District v. J.S.* (N.D. Cal. 2006) 2006 U.S. Dist. Lexis 90840; *Norton v. Orinda Union School District* (9th Cir. 1999) 1999 U.S. App. Lexis 3121.)

12. California has created behavior intervention regulations in the California Code of Regulations parts 3000 et. seq., which are supplemental to the federal laws and regulations involving the IDEA. When a district determines that the instructional and behavioral approaches contained in a student's IEP are not effective, it is required to conduct a functional analysis assessment (FAA). The purpose of the FAA is to assist in designing positive procedures which produce significant improvement in a student's behavior through skill acquisition and the reduction of problematic behavior. These procedures are intended to provide the student with a greater access to a variety of community settings, social contacts, and to ensure the student's right to placement in the least restrictive educational environment as outlined in the student's IEP. (Cal. Code Regs., tit. 5, § 3001, subd. (d).) Additionally, a district must consider conducting a FAA where a serious behavioral problem is demonstrated in which the student's behavior(s) are self-injurious, assaultive, or cause serious property damage. (Cal. Code Regs., tit. 5, § 3052, subd. (i)(7).) Where a student's behavior impedes his or her learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. (Ed. Code, § 56341.1(b)(1).) In order to do so, a district must conduct a functional analysis assessment (FAA).

13. A FAA must be conducted by, or be under the supervision of a person who has documented training in behavior analysis with an emphasis on positive behavioral interventions. A FAA shall occur after instructional/behavioral approaches specified in the student's IEP have been ineffective. (Cal. Code Regs., tit. 5, § 3052, subd. (b).)

14. FAA personnel must gather information from three sources: direct

observation, interviews with significant others, and review of available data such as assessment reports and other individual records. (Cal. Code Regs., tit. 5, § 3052, subd. (b).)

15. A FAA must include a systematic observation of the occurrence of the targeted behavior for an accurate definition and description of its frequency, duration, and intensity. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(A).)

16. A FAA must include systematic observation of the immediate antecedent events associated with each instance of the display of the targeted inappropriate behavior. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(B).)

17. A FAA must include systematic observation and analysis of the consequences following the display of the behavior to determine the function the behavior serves for the student. The communicative intent of the behavior is identified in terms of what the student is either requesting or protesting through the display of the behavior. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(C).)

18. A FAA must include ecological analysis of the settings in which the behavior occurs most frequently. Factors to consider should include the physical setting, the social setting, the activities and the nature of instruction, scheduling, the quality of communication between the student and staff and other students, the degree of independence, the degree of participation, the amount and quality of social interaction, the degree of choice, and the variety of activities. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(D).)

19. A FAA must include a review of records for health and medical factors which may influence behaviors. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(E).)

20. A FAA must include a review of the history of the behavior to include the effectiveness of previously used behavioral interventions. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(F).)

21. Following a FAA, a written report of the assessment shall be prepared, and shall include all of the following:

22. The report must include a description of the nature and severity of the targeted behavior(s) in objective and measurable terms. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(A).)

23. The report must include a description of the targeted behavior(s) that include baseline data and an analysis of the antecedents and consequences that maintain the targeted behavior, and a functional analysis of the behavior across all appropriate settings in which it occurs. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(B).)

24. The report must include a description of the rate of alternative behaviors, their antecedents and consequences. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(C).)

25. The report must include recommendations for consideration by the IEP team which may include a proposed behavioral intervention plan. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(D).)

DETERMINATION OF ISSUES

IS THE DISTRICT'S PSYCHOEDUCATIONAL ASSESSMENT DATED MAY 24, 2005, APPROPRIATE OR IS STUDENT ENTITLED TO A PUBLICLY FUNDED INDEPENDENT EDUCATIONAL ASSESSMENT?

26. Pursuant to Factual Finding 6, and Legal Conclusion 4, the District used testing and assessment materials which were not racially, culturally or sexually discriminatory and were administered in Student's native language.

27. Pursuant to Factual Finding 9, and Legal Conclusion 5, Heidi Denissen is a licensed school psychologist, and qualified to conduct a psychoeducational assessment of Student. Pursuant to Factual Findings 24 and 25, and Legal Conclusion 5, Linda Castorena is qualified to administer the District's academic assessment of Student. Further, both Ms. Denissen and Ms. Castorena are sufficiently knowledgeable of Student's disabilities to assess him.

28. Pursuant to Factual Findings 9, 10, 13, 16, 18, 19, 22, 23 and 24, and Legal Conclusion 5, the assessments were validated for the specific purpose for which they were

used and were conducted in conformance with the instructions provided by the producer of the tests.

29. Pursuant to Factual Findings 9, 10, 11, 12, 13, 16, 18, 19, 22, 23, and 24, and Legal Conclusions 6 and 7, the District tailored the assessment to assess specific areas of Student's education needs and it was not designed to provide a single general intelligence quotient. The assessment tested Student's educational needs, in the areas of reading, written language and mathematics. Ms. Denissen consulted a variety of sources familiar with Student to determine which tests would be administered. Several of the tests were specifically chosen in light of Student's autism and ADHD. The District performed multiple tests to determine cognitive ability and other areas of need.

30. Pursuant to Factual Findings 5, 6, 9, 10, 13, 16, 18, 19, 22, 23, and 24, and Legal Conclusions 7 and 8, the District used a variety of assessment tools to gather information, including information provided by Student's mother.

IS THE DISTRICT'S FUNCTIONAL ANALYSIS ASSESSMENT DATED JANUARY 19, 2007, APPROPRIATE OR IS STUDENT ENTITLED TO A PUBLICLY FUNDED INDEPENDENT FAA?

31. As indicated by both parties, a FAA is an assessment unique to California in which a school district must assess a student's behavior in those instances where it has been determined that the instructional and behavioral approaches contained in the student's IEP are not effective, or where a serious behavioral problem impedes his/her learning or the learning of others. A FAA must meet the regulatory requirements as set forth in title 5, California Code of Regulations, part 3052, subdivision (b)(1). In this instance, the District failed to meet all of the requirements necessary for an appropriate assessment.

32. Pursuant to Factual Finding 33 and Legal Conclusion 13, Ms. Peterson was qualified to conduct the FAA.

33. Pursuant to Legal Conclusion 14, FAA personnel must gather information which includes direct observations of the student, and interviews with significant persons.

Based upon Factual Findings 37, 38, 41 and 42, the FAA failed to observe Student across all educational settings, most importantly on the school bus. Pursuant to Factual Findings 30 and 31, Student's behavior had become increasingly out of control. He kicked an aide, and threatened to stab the school bus driver. The District required Mother to search Student's backpack daily and prevented him from carrying pens and pencils on the school bus. Although the District contends the school bus incident was an isolated incident, it was not treated as a minor behavioral flaw with an insignificant consequence for Student.

34. With the omission of the information in Factual Findings 30 and 31, the District did not adequately monitor or analyze Student's behavior in these areas. As a result, as exhibited in Factual Finding 43, the FAA did not consider Student's behavior during transportation to and from school as a potential targeted behavior. In omitting this, the FAA could not meet the requirements contained in Legal Conclusion 15.

35. Student's valid contentions regarding the reporting requirements of duration as contained in Legal Conclusion 15 and Factual Finding 45, become moot. The District's failure to adequately consider Student's behavior across all settings, and the omission of a substantial negative behavior for consideration as a targeted behavior, skewed the remainder of the assessment.

36. The FAA faces similar problems with Legal Conclusions 16 and 18. By failing to observe Student in all educational settings, the antecedents contained in Factual Finding 47, and the ecological factors described in Factual Finding 49, are insufficient.

37. Pursuant to Factual Finding 51, Ms. Peterson did not collect data on the range of effectiveness of prior intervention strategies. As a result, the history of the Student's behaviors is incomplete and does not comply with the requirements of Legal Conclusion 20.

38. Pursuant to Legal Conclusions 21 through 25, following a FAA, the District is required to complete a written report of the assessment which is required to contain certain elements. As the FAA itself was defective, the information contained in the written

report, regardless of whether it complied with statutory format, must be considered defective as well.

39. Pursuant to Factual Finding 31, and Legal Conclusion 11, Student is entitled to an independent FAA at public expense.

ORDER

1. The psychoeducational assessment prepared by the District, dated May 24, 2005, is appropriate. Student is not entitled to an independent expert evaluation at public expense.

2. The functional analysis assessment prepared by the District, dated January 19, 2007, is not appropriate. Student is entitled to an independent FAA at public expense.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The District has prevailed on issue one. Student has prevailed on issue two.

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. (Ed. Code, § 56505, subd. (k).)

Dated: August 8, 2007



JUDITH L. PASEWARK

Administrative Law Judge

Special Education Division

Office of Administrative Hearings