

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

GARDEN GROVE UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2016040019

DECISION

Student, by and through her Parents, filed a Due Process Hearing Request on March 29, 2016, with the Office of Administrative Hearings, State of California, naming Garden Grove Unified School District. On May 11, 2016, OAH granted the parties request for a continuance of the hearing date.

Administrative Law Judge Clifford H. Woosley heard this matter in Garden Grove, California, on September 20 and 21, 2016, and telephonically on September 23, 2016.

Attorney Tania L. Whiteleather appeared on Student's behalf. Mother and advocate Peter Attwood attended the entire hearing. Attorney Alefia E. Mithaiwala represented District. Assistant Superintendent Lorraine Rae attended on District's behalf.

On the last day of hearing, a continuance was granted for the parties to file written closing arguments and the record remained open until October 17, 2016. Upon timely receipt of written closing arguments, the record was closed and the matter submitted for decision on October 17, 2016.

ISSUE

Is Student entitled to an independent educational evaluation for visual processing because District failed to timely fund, or file a due process request, when Student's Parents requested an independent educational evaluation in the area of visual processing?

SUMMARY OF DECISION

Student contended District was obligated to fund an independent educational evaluation in visual processing because District did not appropriately assess Student's visual processing in its February 2014 triennial assessment. Student did not prove she was entitled to an independent educational evaluation in visual processing at public expense. District's February 2014 triennial assessment evaluated Student's visual processing. When Parents disagreed with the triennial assessment, District timely funded a January 2015 psychoeducational independent educational evaluation by Student's chosen assessor, Dr. Perry Passaro, which evaluated visual processing. Parents again disagreed with the February 2014 triennial assessment and requested another independent evaluation at public expense. District was not obligated to request a due process hearing, to show its triennial visual processing evaluation was appropriate, or fund the requested evaluation. The applicable special education law limits Parents to only one independent educational evaluation at public expense each time District conducts an evaluation with which Parents disagree. Parents were not entitled to request District to fund a second independent educational evaluation by again disagreeing with the February 2014 triennial.

Student contended District did not assess Student in all areas of suspected disability because her visual processing was not evaluated by a developmental optometrist or ophthalmologist. However, Student did not demonstrate that Student's

visual processing was an area of suspected disability. The evidence established that District's triennial assessment evaluated visual processing and was not an area of suspected disability. Dr. Passaro's psychoeducational independent educational evaluation properly and appropriately evaluated visual processing, found visual processing to be in the average range and an area of strength, and again was not an area of suspected disability. Although a developmental optometrist might use unique testing instruments or methods in evaluating Student's visual processing, the evidence demonstrated that any such visual processing deficits would have affected and appeared as an area of suspected disability on the District's and Dr. Passaro's visual processing evaluations. The evidence establishes that District evaluated Student's visual processing, which was appropriately found not to be an area of suspected disability.

All of Student's requests for relief are denied.

FACTUAL FINDINGS

1. Student was an 18-year-old high school senior who was eligible for special education services as a student with autism from three years of age. District reevaluations in November 2002, February 2005, April 2008, and March 2011, and an independent evaluation in October 2011, confirmed that Student met the criteria for autism eligibility.

DISTRICT'S 2014 TRIENNIAL MULTIDISCIPLINARY ASSESSMENT REPORT.

2. In January 2014, District began evaluations and assessments for Student's February 2014 triennial individualized education program meeting. School psychologist Lauri Eberhard prepared a February 12, 2014 multidisciplinary assessment report, assisted by speech and language pathologist Lindsey Padgett, special education teacher Chris Takach, and school nurse Stephanie Kovats. Student passed vision and hearing screenings and participated in five testing sessions in January and February 2014. At the

time, Student was in the 10th grade at Garden Grove High School. Her placement was a special day class, mild to moderate, with speech and language services, behavior intervention services, and travel training.

3. The assessment team administered the Wechsler Intelligence Scale for Children – IV, the Woodcock-Johnson Tests of Achievement – III, the Gilliam Asperger’s Disorder Scale, and the Adaptive Behavior Inventory. Ms. Eberhard measured Student’s skills, capabilities, and disabilities by using various assessment tools and procedures, including: Goldman Fristoe Test of Articulation-2; Clinical Evaluation of Language Fundamental - Fourth Edition; The Listening Comprehension Test Adolescent; Expressive One-Word Vocabulary; Receptive One-Word Picture Vocabulary Test; Language Processing Test – 3 Elementary; The Listening Test; Comprehensive Assessment of Spoken Language – Selected; and Test of Pragmatic Language – Second Edition (subtests). Ms. Eberhard interviewed Student and observed Student in her classroom and speech therapy. Student’s teacher and Mother completed Observational Rating Scales.

4. District’s school psychologist Mai B. Van credibly testified at the hearing. She held a bachelor of arts in psychology and sociology and a doctorate in education, with an emphasis in school psychology. Dr. Van has worked for District since 2000, had a pupil personnel services credential, was a certified school psychologist, and lectured at the graduate School of Education, University of California, Riverside. Dr. Van’s District duties included conducting psychological assessments to identify students’ needs, consulting with parents and teachers, and mentoring District’s first-year school psychologists.

5. Dr. Van assessed students on a daily basis and regularly reviewed independent educational evaluations to assure assessment in all areas of suspected disability. Her education, training, and experience qualified her to provide expert

testimony regarding the areas in which a psychologist evaluates a student and the instruments used in such evaluation. Dr. Van conducted a multidisciplinary psychoeducational assessment and report of Student, dated September 1, 2016. She reviewed Student's prior assessments by District and a January 2015 independent educational evaluation. Dr. Van's testimony regarding school psychologists' assessments of Student's visual processing in the psychoeducational or multidisciplinary assessments was knowledgeable, credible, and persuasive. She demonstrated detailed knowledge of visual processing and how the various standardized tests and observations properly and comprehensively evaluated Student's visual processing.

6. School psychologists always assess a student's visual processing in a psychoeducational or multidisciplinary evaluation. Visual processing has a number of components, which were measured and evaluated by various standardized instruments that were typically administered in psychoeducational assessments. For example, the Wechsler Index scores discriminated between verbal and nonverbal tasks. The nonverbal cognitive testing evaluated cognitive ability related to visual perceptual and processing skills.

7. District's February 2014 triennial assessment reported that Student scored in the extremely low range in verbal comprehension, working memory, and processing speed indexes on the Wechsler. However, Student scored in the borderline average range on the perceptual reasoning index, which was significantly stronger than the other indexes. This disparity with the other indexes rendered the Wechsler full scale score to be an unreliable summary of Student's overall intellectual functioning. However, the perceptual reasoning index score indicated the Student's visual processing was within the average range and that visual processing was an area of strength for Student.

8. Visual and working memory is a component of visual processing. In District's September 2014 triennial report, Ms. Eberhard concluded that Student had

excellent visual memory. Visual supports, such as scaffolding, greatly assisted Student in completing activities in her speech and language therapy. Student relied on visual prompts to understand information, remember details, formulate sentences, define words, and express word relationships.

9. The educational psychologists were trained and qualified to evaluate visual processing as part of a psychoeducational assessment. If the psychologist suspected visual processing deficits, the psychologist was obligated to conduct or refer for further visual processing testing. Here, District's February 2014 triennial assessment did not recommend further assessment of Student's visual processing because the assessor determined Student's visual processing was in the average range and a relative strength upon which Student relied.

DR. PASSARO'S PSYCHOEDUCATIONAL INDEPENDENT EDUCATIONAL EVALUATION.

10. Parents disagreed with District's February 2014 evaluation and requested a publicly funded psychoeducational independent educational evaluation at a September 3, 2014 IEP. District granted the request and, on October 8, 2014, contracted with Parents' preferred independent assessor, Perry D. Passaro, Ph.D., to conduct a comprehensive psychoeducational independent educational evaluation of Student.

11. Dr. Passaro completed the independent psychoeducational assessment of Student, providing a 63-page report in January 2015. Dr. Passaro was a licensed psychologist, educational psychologist, and a credentialed school psychologist. He had testified in numerous special education hearings before OAH, and had been found highly qualified in his field. Dr. Passaro has worked in public education for over 20 years with students with a wide range of disabilities, including autism. His education, training, professional experience, and comprehensive assessment of Student qualified Dr. Passaro to provide expert testimony regarding the areas in which a psychologist evaluates students, the instruments and tools used to evaluate visual processing, and Student's

visual processing.¹

12. Dr. Passaro talked to Parents, who told him that Student had recently been seen by an optometrist or ophthalmologist and Student's vision was normal or near normal, with corrective lenses. Dr. Passaro then evaluated Student in multiple areas of actual and suspected disabilities, including Student's visual processing. Dr. Passaro evaluated Student's visual perception, visual motor integration, visual memory, and visual-spatial.² He used standardized tests and observations in determining that Student's visual processing was an area of strength and Student did not require further visual processing testing.

13. Dr. Passaro administered the Stanford-Binet Intelligence Scales, Fifth Edition, which includes testing of the visual, spatial, and fluid reasoning components of visual processing. Student's nonverbal and verbal cognitive scores were differentiated by three scaled scores, which indicated that the full scale score of 54 was not a valid indicator of Student's cognitive potential. Student's nonverbal scores were generally higher. Student's nonverbal fluid reasoning was significantly and practically higher than the average of Student's other subtests, indicating Student possessed relative strength in the ability to solve abstract problems involving pictured sequences and patterns. Similarly, Student's nonverbal visual-spatial processing was significantly and practically higher, demonstrating an area of relative strength in Student's ability to see patterns, relationships and spatial orientation of visual material. Such strengths suggested

¹ Neither party listed Dr. Passaro as a witness. However, Student called Dr. Passaro as a rebuttal witness; he testified on the last day of hearing.

² Visual-spatial pertains to the perception of the spatial relationships between objects in one's field of vision; also called "visuospatial."

Student's preferred learning style.

14. Student took the Bender Gestalt, Second Edition, which measured visual-motor integration with multiple subtests. These subtests measured Student's visual recognition, ability to accurately replicate drawings (visual copy), motor (fine motor), visual perception (matching of visual prompts), and visual recall (memory). On the visual recall, Student scored average; on visual copy, Student was in the high average range.

15. Dr. Passaro credibly opined that Student's visual processing was an area of strength, which Student used to assist in areas of weakness. Student's visual perception, visual motor, visual memory, and non-verbal visual spatial ability were within the average range. Many of Dr. Passaro's suggested accommodations -- such as flash cards, creating mental pictures, and studying visuals -- were based on Student's demonstrated relatively strong visual processing. Dr. Passaro's independent educational evaluation did not recommend further testing of Student's visual processing because her visual processing was not an area of suspected disability.

16. Mother had observed Student use her finger to track as she read. Therefore, she felt that Student's visual processing needed to be further assessed. However, Dr. Van and Dr. Passaro did not observe Student use her finger to track while reading. Dr. Passaro described "tracking" as the ability of eyes to move across the page when reading with appropriate neurological motor control to look at, decode or recognize words. Student's strong scores on the Stanford-Binet and the Bender established that Student could adequately track. Dr. Passaro and Dr. Van opined if Student was using her finger to track while reading, she was using it as a coping skill to read and stay on track. This was a beginning reading skill used by many students to pay attention and was related to Student's struggles with her ability to remain attentive. Student struggled with attention issues, as indicated by low attention processing scores in all of her assessments. Student's attention processing deficits were different from

visual processing, which was consistently determined to be in the average range. Dr. Passaro's and Dr. Van's opinions regarding Student's use of her finger while reading was persuasive, demonstrating insightful knowledge of Student's attention deficits gathered from their psychoeducational assessments.

17. Dr. Passaro acknowledged that an optometrist might test for issues related to convergence. Convergence is the ability to use both eyes in binocular vision and appropriately process the visual information to the visual cortex. His observations found that Student did not have problems with visual tasks, such as drawing a two dimensional object based upon a three dimensional model. Dr. Passaro assessed Student's visual perception and visual spatial abilities as average, indicating Student did not have deficits in three-dimensional perception related to convergence.

18. Dr. Passaro and Dr. Van disagreed with the suggestion that a developmental optometrist could find visual processing deficits that otherwise would not be detected in District's and Dr. Passaro's psychoeducational assessments. In Dr. Passaro's opinion, an optometrist might conduct different tests, relevant to tracking or convergence for example, to measure a student's ability to acquire visual information. However, any visual processing deficits, identified by an optometrist, would have been detected by District's and Dr. Passaro's assessments. Deficits in properly acquiring visual information are identified in the visual processing testing components of a psychoeducational assessment. If such deficits were found, Dr. Passaro would have conducted further visual processing assessment or referred Student for further visual processing evaluation, perhaps by an optometrist.

19. The tests and assessment materials used by District and Dr. Passaro were validated for the purpose for which they were used and were selected and administered so as not to be racially, culturally, or sexually discriminatory.

PARENTS' REQUEST FOR ANOTHER PUBLICLY FUNDED EVALUATION

20. On June 11, 2015, Mother sent District program supervisor Jennifer Morris a one sentence email: "I believe [Student] needs to have an assessment for her problems with her visual processing."

21. By letter dated June 29, 2015, Ms. Morris sent Parents a prior written notice letter. She noted that Student's visual processing had twice been evaluated within the prior 18 months, by the District's February 2014 triennial assessment and Dr. Passaro's January 2015 independent educational evaluation. She listed the standardized tests and observations used in the assessments, noting Student's visual processing was found to be in the average range. District declined to conduct further assessment because both District's and Dr. Passaro's psychoeducational assessments found Student's visual processing not to be an area of suspected disability.³ District invited Parents to notify District if they believe it had not addressed or misinterpreted any of their requests.

22. On November 9, 2015, Mother sent an email, the text of which Parents' advocate Mr. Attwood wrote, to Ms. Morris and Garden Grove High School principal Steve Osborne, with copies to District assistant superintendent Lorraine Rae. The email asserted District had not assessed Student's visual processing; it was an area of suspected disability because Student used her finger to track when reading; visual processing was a well-known problem for autistic children; and District's February 2014 triennial assessment stated Student had problems with "visual discrimination and visual-motor processing." Mother and her advocate stated, for the first time, that District's

³ District also addressed parental requests for a central auditory processing disorder evaluation and a functional behavior assessment, which are not relevant to the issue in this hearing.

failure to assess entitled Student to an independent educational evaluation in visual processing.⁴

23. District's attorney replied to Student's request for a publicly funded independent educational evaluation for visual processing with a November 10, 2015, prior written notice letter. The letter informed Parents that Student's visual processing had been assessed in District's triennial evaluation. After Parents disagreed with District's triennial, District provided a publicly funded independent evaluation by Dr. Passaro including an assessment of visual processing. The letter explained the legal basis for why District declined to fund another independent educational evaluation, informing Parents that they were entitled to only one publicly funded evaluation for each evaluation with which they disagreed. District attached a copy of its June 2015 prior written notice and invited Parents to notify District if they believe it had not addressed or misinterpreted any of their requests. District copied Mr. Attwood with the prior written notice.

24. Mr. Attwood sent District a March 16, 2016 email inquiring as to the status of a visual processing assessment. Mr. Attwood claimed he was unaware of any response to the prior requests for a publicly funded independent evaluation in developmental optometry. The March 2016 email was District's first notice that Parents were requesting further visual processing by a developmental optometrist.

25. District responded to Mr. Attwood with a March 21, 2016 prior written notice letter, and emailed a copy to Mother. District referred to its two prior written notices of June 2015 and November 2015, addressing Parents' request for a visual processing assessment. District repeated that visual processing was assessed in the

⁴ The email discusses other matters, which are not relevant to the issue in this hearing.

February 2014 triennial review. Parents disagreed with the District triennial and District granted their request for a publicly funded psychoeducational independent educational evaluation by their preferred assessor, Dr. Passaro. District again noted that Parents were entitled to one publicly funded independent evaluation from a District evaluation with which they disagreed. Parents were not entitled to another publicly funded independent educational evaluation because the District's triennial and Dr. Passaro's psychoeducational both assessed Student's visual processing.

26. District also reviewed how the District's February 2014 triennial and Dr. Passaro's evaluation had assessed Student's visual process, referring to the instruments and results, noting that school psychologists were able to appropriately assess visual processing in the course of a psychoeducational evaluations. Student's visual processing was within the average range and was an area of strength. Student's visual processing was not an area of suspected disability and, therefore, District was not obligated to further assess. District attached copies of its June 2015 and November 2015 prior written notices and invited Mr. Attwood to notify District if he believes it had not addressed or misinterpreted any of his requests.

LEGAL AUTHORITIES AND ANALYSIS

ISSUE: STUDENT'S RIGHT TO AN INDEPENDENT EVALUATION

1. Student contends she is entitled to a publicly funded visual processing independent educational evaluation because the District did not request a due process hearing to show its visual processing evaluation was appropriate, or fund the requested evaluation, without unnecessary delay. District contends it evaluated Student's visual processing in Student's February 2014 triennial assessment, that Parents disagreed with the triennial evaluation and requested an independent educational evaluation. District granted the request and contracted with Student's preferred assessor Dr. Passaro. Dr.

Passaro again assessed Student's visual processing in his January 2015 independent psychoeducational evaluation. Student already obtained an independent educational evaluation from the District's triennial assessment, with which Parents disagreed. District therefore argues Student is not entitled to ask for a second publicly funded evaluation.

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁵

2. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁶ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

3. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are

⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁶ All subsequent references to the Code of Federal Regulations are to the 2006 version.

transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. § 1401(14), 1414(d)(1)(A); Ed. Code, § 56032, 56345, subd. (a).)

4. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at p. 200, 203–204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it

desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

5. A district’s determinations regarding special education are based on what was objectively reasonable for the district to conclude given the information the district had at the time of making the determination. A district is not held to a standard based on “hindsight.” (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

6. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, § 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).)

BURDEN OF PROOF

7. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer ex rel. Schaffer v. Weast* (2005) 546 U.S. 49, 56–62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student carries the burden of persuasion and proving the essential elements of her claim. (*Schaffer, supra*, 546 U.S. at p. 62.)

ASSESSMENTS

8. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320; Ed. Code, § 56381, subd. (a).) Special education law provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and District agree otherwise, but at least once every three years unless the parent and District agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

9. For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasherresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157–1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).)

10. A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is eligible for special education services. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304 (b)(1).) The assessment must use technically sound instruments that assess the relative contribution of cognitive, behavioral, physical, and developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) Assessment materials must be used for purposes for which they are valid and reliable. (20 U.S.C. § 1414(b)(3)(A)(iii); 34 C.F.R. § 300.304(c)(1)(iii); Ed. Code, § 56320, subd. (b)(2).)

11. Tests and assessment materials must be administered by trained personnel in conformance with the test instructions and provide relevant, accurate, information as to Student's unique needs, and in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); 34 C.F.R. § 300.304(c)(7); Ed. Code, § 56320, subd. (b)(2), (3); Ed. Code, § 56320, subd. (d); Ed. Code, § 56320, subd. (c), (f).) Assessments must be conducted by individuals who are both "knowledgeable of [the student's] disability" and "competent to perform the assessment." (Ed. Code, § 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).)

12. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low-incidence disabilities (those affecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

NOTICE

13. Under Ed. Code, § 56500.4, subdivision (a), a district is required to give parents of a child with exceptional needs prior written notice a reasonable time before the district proposes to initiate or change, or refuses to initiate or change, the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education to the child. The prior written notice must contain: (1)

a description of the action proposed or refused by the agency; (2) an explanation for the action; and (3) a description of the assessment procedure or report which is the basis of the action. (Ed. Code, § 56500.4, subd. (b).) The procedures relating to prior written notice “are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions.” (*C.H. v. Cape Henlopen School Dist.* (3d Cir. 2010) 606 F.3d 59, 70.)

INDEPENDENT EDUCATIONAL EVALUATION

14. Under certain conditions, a student is entitled to obtain an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an independent evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent evaluation].)

“Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

15. When a student requests an independent evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent evaluation is provided at public expense (often referred to as “file or fund”). (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

16. The term “unnecessary delay” as used in title 34 Code of Federal Regulations part 300.502(b)(2) is not defined in the regulations. It permits a reasonably flexible, though normally brief, period of time that could accommodate good faith

discussions and negotiations between the parties over the need for, and arrangements for, an independent evaluation. (*Letter to Anonymous*, 56 IDELR 175 (OSEP 2010).)

17. The right to request a publicly funded independent educational evaluation is limited. A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees. (34 C.F.R. § 300.502(b)(5).)

Analysis

18. Student failed to meet her burden of proof that District was obligated to request a due process hearing to find its visual processing evaluation to be legally appropriate or to otherwise publicly fund an independent educational evaluation.

DUTY TO FUND INDEPENDENT EVALUATION AFTER INITIAL REQUEST

19. District conducted a February 2014 triennial multidisciplinary evaluation. The triennial assessment was comprehensive and evaluated Student in all areas of suspected disability, including visual processing. The triennial assessment evaluated the various components of Student's visual processing. For example, the Wechsler demonstrated strength in Student's nonverbal score for Perceptual Reasoning, while scoring extremely low range in the verbal indexes. The triennial assessment properly reported and interpreted the scores, in accordance with the test's protocols. Student's perceptual reasoning index scores were substantively higher than the other three nonverbal index scores. As a result, Ms. Eberhard cautioned that the Wechsler full scale IQ score was an unreliable summary of Student's overall intellectual functioning. Ms. Eberhard also found that Student had excellent visual memory, as confirmed by Student's use of visual supports to support her speech therapy and to understand information, and to remember details. District's triennial assessment assessed, discussed, and evaluated Student visual processing.

20. District's February 2014 triennial assessment was conducted by trained and competent personnel, who were knowledgeable of Student's disability. School psychologists are qualified to evaluate visual processing as part of a psychoeducational assessment. Dr. Van and Dr. Passaro, competent and experienced assessors, both emphasized that school psychologists assess visual processing in every psychoeducational evaluation. Further, if visual processing deficits are suspected, the school psychologist is professionally bound to conduct or refer for further visual processing testing. In District's triennial assessment, Ms. Eberhard found Student's visual processing to be in the average range and a relative area of strength upon which Student relied. The triennial assessment did not recommend further evaluation of Student's visual processing. Student's visual processing was not an area of suspected disability.

21. Parents disagreed with District's triennial assessment and, at a September 3, 2014 individual education program meeting, requested a publicly funded independent education evaluation. This triggered District's obligation to take one of two steps, without unnecessary delay. District could either file a request for a due process hearing to show that its evaluation is appropriate or District could ensure that an independent public evaluation is provided at public expense. (34 C.F.R. § 300.502 (b)(2)(i) and (ii).) Here, District chose to publicly fund the requested independent evaluation and properly informed Parents in a September 10, 2014 prior written statement letter. (Ed. Code, § 56500.4). Without unnecessary delay, District contracted with Dr. Passaro, who was Parents preferred assessor for the independent educational evaluation.

22. Dr. Passaro conducted his independent educational evaluation and produced a 63-page psychoeducational report dated January 26, 2015. He assessed Student in all areas of actual and suspected disability, including Student's visual processing. Dr. Passaro utilized a variety of assessment tools and strategies and found

Student's visual processing to be in the average range. He reviewed Student's assessment results, discussed their significance, and why he found Student's visual processing to be average. Student's visual processing was an area of strength that Student used to assist in areas of weakness. Dr. Passaro crafted various accommodations and modifications for Student, which took advantage of Student's strong visual processing abilities.

23. Dr. Passaro persuasively testified he was qualified to assess visual processing, as are all credentialed educational psychologists. Dr. Passaro demonstrated substantive and extensive experience in visual processing assessment and lucidly explained how Student's independent educational evaluation properly determined Student's visual processing to be an area of strength. If Dr. Passaro had found visual processing deficits, he would have conducted or recommended further assessment. Here, Student's visual processing was average, not an area of suspected disability, and therefore not in need of further assessment. Dr. Passaro presented his psychoeducational independent educational evaluation at an IEP team meeting.

24. In summary, District timely met its obligation to publicly fund an independent evaluation at public expense after Parent's disagreed with its triennial assessment. District complied with the legal requirements regarding parents' right to seek a publicly funded independent educational evaluation.

DUTY TO PROVIDE SECOND INDEPENDENT EVALUATION OR FILE

25. Mother sent a June 11, 2015 email to District asking that Student's visual processing be further assessed; she did not request a publicly funded independent educational evaluation. District responded with a June 29, 2015 prior written notice letter. District stated that Student's visual processing had been assessed in District's February 2014 triennial assessment and in Dr. Passaro's January 2015 independent psychoeducational evaluation. Both reports found Student's visual processing to be in

the average range and a relative area of strength. Therefore, Student's visual processing was not a suspected disability that required further assessment. District declined Mother's request. District responded within a reasonable time and addressed all statutorily required elements.

26. On November 9, 2015, Mother sent an email to District and, for the first time, requested a publicly funded visual processing independent educational evaluation, referring to the District's triennial. District responded with a prior written notice, the next day, again referring to District's and Dr. Passaro's assessments that found Student's visual process to be average and not in need of further assessment. Also, District stated that it had already funded an independent education evaluation when Parents previously disagreed with the February 2014 triennial. Therefore, District informed Mother that Student was not entitled to ask for another publicly funded independent education evaluation. District responded within a reasonable time and addressed all statutorily required elements.

27. On March 16, 2016, Mr. Attwood again demanded a publicly funded independent education evaluation of Student's visual processing; this time, by a developmental optometrist. Mr. Attwood's email clearly referred to the prior demand, from the District's February 2014 triennial. District responded with a March 21, 2016 prior written notice, similarly citing the prior assessments finding that visual processing was not an area of suspected disability and, further, that Student was not entitled to a second publicly funded independent educational assessment. District did not thereafter have to "file or fund." District responded within a reasonable time and addressed all statutorily required elements.

28. Parents' request for a second publicly funded independent educational evaluation did not trigger any requirement by District to publicly fund another independent educational evaluation or file a complaint for due process hearing to show

that its assessment was appropriate. Once Parents received an independent educational evaluation at public expense from District's triennial assessment, with which they disagreed, Parents had no right to request a second publicly funded independent evaluation. To interpret the law differently – requiring a district to file or fund even if parents are seeking a second public funding from the same district assessment -- would render the statutory limitation meaningless.

29. Student argues that District's February 2014 triennial did not evaluate Student in all areas of suspected disability, which denied Student a FAPE. Student also argues that the school psychologist evaluated only certain elements of Student's visual processing. A developmental optometrist or ophthalmologist would utilize other instruments and tests to evaluate other elements of visual processing. The argument was unpersuasive.

30. Student did not offer evidence that Student's visual processing was an area of suspected disability. Dr. Passaro, Dr. Van, and other District witnesses acknowledged that an optometrist could be expected to use tests different than those used by school psychologists. However, Student presented no evidence that testing by a developmental optometrist was needed to evaluate Student's visual processing. District's triennial assessment found visual processing to be in the average range and an area of strength. This was confirmed by Student's chosen expert Dr. Passaro.

31. Further, Dr. Passaro and Dr. Van convincingly testified that any visual processing deficits an optometrist or ophthalmologist might uncover would be detected in a psychoeducational assessment by a school psychologist. If a student's tracking or convergence affected visual processing, the school psychologist would have detected visual processing deficits in her testing. Though a school psychologist may not have been able to determine the exact cause, the psychologist would have found visual processing to be a suspected area of disability. Then, the psychologist would be

professionally bound to further assess or refer to another professional – like an optometrist – to better identify the basis of the visual processing deficit. Here, Student did not present evidence that a developmental optometrist was necessary to evaluate Student’s visual processing.

32. District properly evaluated Student’s visual processing and found visual processing not to be an area of suspected disability; Parents’ preferred assessor Dr. Passaro confirmed these findings. As a result, District did not deny Student a FAPE and had no further obligation to file for due process, or fund an independent evaluation, as discussed above.

33. Student has failed to meet her burden of proving, by a preponderance of the evidence, that District must fund a visual processing independent educational evaluation because District did not file a complaint seeking a due process hearing to show its triennial evaluation to be appropriate, or by refusing to fund an independent educational evaluation for visual processing, without unnecessary delay. District funded an independent educational evaluation when Parents disagreed with the District’s triennial assessment. District was not required to “file or fund” when Parents asked for a second publicly funded independent educational evaluation by disagreeing with the same District assessment.

ORDER

Student’s request for relief is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on the single issue.

RIGHT TO APPEAL THIS DECISION

This was a final administrative Decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

DATED: November 9, 2016

/s/

CLIFFORD H. WOOSLEY

Administrative Law Judge

Office of Administrative Hearings