

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

SWEETWATER UNION HIGH SCHOOL  
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2016090871

PARENTS ON BEHALF OF STUDENT,

v.

SWEETWATER UNION HIGH SCHOOL  
DISTRICT.

OAH Case No. 2016080950

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings on August 22, 2016, naming Sweetwater Union High School District. District filed a due process hearing request on September 26, 2016, naming Student. OAH consolidated the matters on October 4, 2016.

Administrative Law Judge Robert G. Martin heard this matter in Chula Vista, California, on October 25 and 26, 2016.

Matthew Golding, Attorney at Law, and Student's designated representative Amy Langerman represented Student. Mother attended the hearing both days. A Spanish language interpreter assisted Mother during the hearing. Student did not attend the hearing.

Sarah Sutherland and Pamela Townshend, Attorneys at Law, represented District. District's Director of Special Education Ronald Lopez attended the hearing both days.

A continuance was granted for the parties to file written closing arguments and the record remained open until November 4, 2016. The parties timely filed written closing arguments, the record was closed and the matter was submitted for decision on November 4, 2016.

## ISSUES<sup>1</sup>

### Student's Issues

(1) Did District violate the Education Code and Individuals with Disabilities Education Act and deprive Parents of their right to meaningfully participate in the development of Student's individualized education program by denying Parent's August 2, 2016 request for independent educational evaluations in the areas of:

- a. Psychoeducation;
- b. Functional behavior;
- c. Speech and language;
- d. Assistive technology and/or augmentative alternative communication; and
- e. Transition?

### District's Issues

(1) Was District entitled to deny Student's August 2, 2016 request for IEE's without filing a due process hearing request to defend prior District assessments, based

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<sup>1</sup> The issues pleaded in the complaint have been combined, reorganized and rephrased for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

on Parents' waiver of District assessments in December 2014?

(2) May District assess Student pursuant to its August 17, 2016 assessment plan without Parents' consent?

## SUMMARY OF DECISION

Student was a 16-year-old eleventh grader attending a moderate-severe class for students with autism, with a long and escalating history of serious aggressive behavior. He was last formally assessed in most areas of known or suspected disability by his elementary school district when he was 12 years old and in sixth grade. Student contended that District failed in December 2014 to employ required procedures and obtain informed parental consent when it conducted Student's triennial assessment based solely on review of prior data and informal observation, and included no new formal assessments of Student in any areas of known or suspected disability except health and adapted physical education. Student contended that District subsequently failed in 2016 to provide Student independent psychoeducational, speech and language, functional behavior, assistive technology, and transition assessments at public expense when Parents objected to the 2014 assessments and requested the independent evaluations. As a remedy, Student sought independent evaluations in those areas by qualified assessors of Student's choice.

District contended that its 2014 Summary of Special Education Re-evaluation, based only on review and informal input, was not a reassessment under the Education Code or IDEA that Parents could disagree with in order to request IEE's. District also contended that, even if the summary re-evaluation were treated as a reassessment, Parents had consented to the form of the review-only reassessment and had waived any right to disagree with it. Finally, District contended that it had the right to assess Student in numerous areas without Parent's consent because Parents had requested that District assess Student.

Student met his burden of proof on the issues of his right to independent psychoeducational, speech and language, functional behavior assessments. District's review-only triennial reassessment was a reassessment under the Education Code and IDEA, and Parents had the right to disagree with it and request IEE's. District did not provide Parents all the information necessary for them to give informed consent to the review-only reassessments, and therefore even if parental consent to forego formal assessments was construed as a waiver of the right to request IEE's, Parents did not validly waive their right to object to the reassessments. Psychoeducational, speech and language, and functional behavior assessments were all included in the scope of District's 2014 reassessment and were subject to challenge. Student did not meet his burden of proof with respect to his request for independent assistive technology and transition evaluations, because these were not within the scope of District's 2014 reassessment.

District was not entitled to assess Student in any area without Parents' consent, because the evidence established that Parents had not requested that District assess Student, and District did not claim or prove any other basis for conducting assessments.

## FACTUAL FINDINGS

1. Student is a 16-year-old eleventh grader eligible for special education under the category of autism. At all times within two years of the filing of Student's complaint, Student resided with his Parents within the District's boundaries.

### STUDENT'S ASSESSMENTS AND EDUCATIONAL PROGRAM, PRESCHOOL THROUGH ELEMENTARY SCHOOL

2. Student was diagnosed with autism in 2003 at age two, and Chula Vista Elementary School District (Chula Vista) found him eligible for special education in 2004 at age three based on autistic-like behaviors. Student also demonstrated deficits in

cognitive ability, adaptive skills, and language. Chula Vista placed him in intensive needs special day classes for preschool and kindergarten.

3. In 2006, when Student was five, Chula Vista assessed his psychoeducational, speech and language, and occupational therapy needs. Student's communication skills were at the level of a typical child at age 16 months. He had severely delayed speech and language skills, but demonstrated understanding of at least 10 words, could point accurately to at least one body part, imitate sounds immediately after hearing them, and sometimes gesture appropriately to indicate "yes," "no," or "I want." Student's daily living skills were at the two-year, seven-month level. He asked to use the toilet and cared for most of his own toileting needs, and sometimes dressed himself. Student's socialization skills were at the one-year, two-month level. He imitated simple adult movements, could address at least two familiar people by name, and sometimes participated in simple games with others. Student's motor skills were a relative strength. His gross motor skills were solid in all areas at the age three level, with emerging skills up to the age six level. He could climb high play equipment, pedal a tricycle, balance, throw, and catch. His fine motor skills were solid at the age five level, with emerging skills at the age six level. He could produce a product when writing, coloring, or using scissors, but his unrefined hand skills impeded his ability to use a pencil or scissors smoothly. He had difficulty processing the senses of taste and touch, and appeared to seek deep pressure touch to modulate those sensations. He also had difficulty self-regulating and used visual cues, structure, routine and clear expectations as support.

4. For first through sixth grade, fall 2006 through spring 2012, Chula Vista placed Student in special day classes for students with moderate to severe disabilities, with a one-on-one adult assistant, speech and language services, occupational therapy, and autism team support.

#### First Grade 2006: Student Begins Acting Aggressively Towards Others

5. In fall 2006, when Student was six years old and in first grade, he began acting aggressively towards others. He bit and pulled the hair of staff and classmates, and punched and pushed classmates. His teachers and assistants tried various informal classroom interventions attempted during first and second grade, but these were not successful.

#### Second Grade 2007: First Functional Analysis Assessment

6. In 2007, during second grade, Chula Vista conducted a functional analysis assessment of Student and developed and implemented a behavior intervention plan for him.

#### Third Grade 2009: Triennial Reassessment

7. In February 2009, Chula Vista conducted triennial reassessments of Student in the areas of psychoeducation, speech and language, occupational therapy and health. The results were consistent with those of Student's 2006 assessments. Student's areas of deficit and relative strength did not change, and his standardized scores for communication and socialization remained in the low range, although his daily living skills improved from low to moderately low. Student's nonverbal cognitive ability relative to typical children in the same age group measured at the 0.1 percentile, in the very low range.

8. Despite his deficits, Student progressed in his educational program. Student knew all the colors, main body parts, and upper and lower case letters. He could print all the upper and lower case letters of the alphabet and draw a picture to represent the letter, such as an apple for the letter A. Student did very well with visual motor skills by copying all the forms but was inconsistent in discriminating between different symbols and letters out of a field of four. He could rote count to 50, count a group of

objects, write numbers in order up to 100, and complete two digit by single digit addition problems. He did not know how to subtract. Student was not able to give personal data except to answer his full name and age.

#### Fifth Grade 2010: Second Functional Analysis Assessment

9. In fourth grade, 2009-2010, Student bit or attempted to bite staff and classmates one to two times per month. At the start of fifth grade, Student on one occasion kicked staff, but did not initially exhibit biting behavior.

10. In the fall of fifth grade, 2010, Chula Vista conducted its second functional analysis assessment of Student. The assessor concluded that Student reacted to loud noises and negative communication such as a staff reprimand by biting and kicking to communicate his desire for noises to stop, and to express that he did not like getting in trouble.

11. The assessor recommended a behavior intervention plan under which classroom and support staff would, among other things: keep a consistent routine and provide Student visual and verbal prompts of upcoming events; provide Student breaks throughout the day during which he could get sensory input by, for example, using a trampoline, ball, or swing, or applying lotion; limit noise in the classroom; make sure Student was challenged in his work and limit or structure any down time; and reward desired behavior with consistent reinforcement. If Student began to show signs of frustration or agitation, staff was to: redirect him to his task and the reinforcement he was working for; isolate him from others; encourage him to count quietly to de-escalate; move other students away from him if he became visibly upset, and out of the classroom if he became aggressive; use nonviolent crisis intervention restraint procedures as a last resort if Student was hurting himself or others; and give Student space to calm down and remind him "no biting."

12. The assessor recommended that the behavior intervention plan should be in place and not faded out until six months passed without Student biting, scratching, or otherwise hurting others. The assessor also recommended that the plan be modified if Student's behaviors did not decrease after a period of three months.

13. Following the fall 2010 functional analysis assessment, Student on at least seven reported occasions attempted to bite a classmate, his teacher, or his aide. One time, he actually bit and injured a classmate. On each occasion, pursuant to his behavior intervention plan, Student was isolated, held, and redirected for 10 to 30 minutes until he calmed down. The record does not indicate that Student's behavior intervention plan was modified.

#### Sixth Grade 2012: Triennial Reassessments

14. In sixth grade, Student on at least six reported occasions from July through October 2011 attempted to bite a classmate, his teacher, or his aide, succeeding twice in biting a classmate. Once, he calmly walked over to another Student and bit him with no warning. On each occasion, pursuant to his behavior intervention plan, Student was isolated, held, and redirected for 15 to 25 minutes until he calmed down. After a biting incident at the end of October 2011, Student did not have another such incident prior to his February 2012 reassessments.

15. In February 2012, during sixth grade, Chula Vista conducted triennial reassessments of Student in the areas of psychoeducation, speech and language, occupational therapy and health. These assessments were conducted by a school psychologist, speech and language pathologist, occupational therapist, and school nurse, respectively. The results of Student's psychoeducational assessment generally were consistent with those of Student's 2006 and 2009 assessments. Student's standardized scores for communication, socialization and daily living skills were all the low range, and Student's nonverbal cognitive ability scored in the very low range



16. Student had made academic and functional progress since his 2009 triennial reassessments. Student could count, read, and write numbers to 100. He could add and subtract three-digit numbers independently, and count out a corresponding group of objects for numbers to 20 and above. Student used at least 100 words to communicate in class. He could sometimes classify objects with language and use regular plural nouns. He could state his full name and age. Student could write and identify all the letters of the alphabet (lower and upper case), and read all upper and lower case letters in and out of sequence. He could identify the sounds that all 26 letters make, but wrote the letters far more easily than he could verbally express them. Student could consistently blend up to four sounds together to make words, including words with consonant blends and some long vowel sounds. Student could sight read words and passages at a first-grade primer level, and print simple sentences of three or four words.

17. Student could listen to an informational talk (e.g., assembly) for at least 15 minutes. He could sometimes follow three-step directions if within the routine. He could put on his jacket and zip zippers. He sometimes put his own shoes on the correct feet. He was toilet trained at school. Student could use a calculator to solve math problems. He told time by the half hour and quarter-hour. He could state the value of coins, and add sums of coins to 75 cents. He sometimes understood mathematical signs and could solve them. Student could work for more than five minutes near others without becoming distracted or seeking teacher approval, and could clean up after an activity.

18. Student's speech and language assessment found that he could understand basic words, phrases, sentences and simple conversations. He responded to his name on request and could follow routine commands such as hold, go, turn on/off, sit, open/close mouth, hands down, come here, and clap. Student's ability to understand basic concepts was functional. He could identify colors, body parts, shapes, coins, and

emotions. Expressively, Student was a verbal communicator, generally communicating in one- or two-word utterances. When prompted, he could speak in four or five word sentences. Student communicated using vocalizations, speech, writing, and pointing. He could state his first and last name, and his basic needs, preferences and routines. When others had difficulty understanding Student's intended message, he would be prompted to write it.

19. Student's occupational therapy assessment found that his handwriting was legible and functional for academic work. He could use classroom tools, take care of his personal needs at school, and with reminders, verbal praise, and reinforcement, participate in daily routines appropriately. The assessment identified sensory vulnerabilities in vision, hearing, touch, body awareness, planning, socialization, and modulation of sensory input and responses that were possibly affecting Student's performance in school. Student benefitted from positive reinforcement, breaks for movement, and use of chewy tubing to give him sensory input throughout the day.

#### Sixth Grade 2012: Assistive Technology, Augmentative And Alternative Communication Assessment

20. In April 2012, Chula Vista assessed Student's communication skills and potential need for assistive technology or augmentative and alternative communication devices to help him communicate. Student's receptive and expressive language skills were sufficient to give him a functional level of communication and allow him to access his curriculum. Student had access to picture symbols and an iPad to augment his communication at school. He used the iPad to make requests, and then verbally repeated the request. He preferred to use the iPad to play games or go online more than using it as a communication device. The assessor concluded that a communication device, such as an iPad or an iTouch, was not necessary for Student to access his curriculum, but could be a useful and motivating educational tool, in conjunction with

other forms of input, such as visuals, computer programs, and books. She cautioned that it was important that Student should use any communication device for communication only, because use of the device to play games, whether educational or social, would distract from the purpose of supporting Student's communication.

#### SEVENTH AND EIGHTH GRADE 2012-2014: MIDDLE SCHOOL IN DISTRICT

21. In July 2012, Student began seventh grade in a special day class at his school of residence in District. Student's July 19, 2012 transfer individualized education program provided interim services of 1,250 minutes per week of specialized academic instruction, 1,500 minutes per year of speech and language services, 120 minutes per year of occupational therapy, and home-to-school transportation.

22. Student attempted to bite classmates and staff several times per week in his seventh grade class. His seventh grade annual IEP was held in February 2013. District did not conduct any new assessments for Student's seventh grade IEP.

#### Eighth Grade: December 2013 IEP And Behavior Support Plan

23. In eighth grade, 2013-2014, Student continued to attempt to bite classmates and staff, although less often than the prior year. Student's eighth grade IEP dated December 10, 2013, reported in the team meeting notes that Student had engaged in biting behavior four times in four months. District did not conduct any new assessments for Student's December 2013 IEP, but did prepare a new behavior support plan based on observations by Student's teacher and aides.

24. The behavior support plan stated that Student's physically aggressive behavior of attempts to bite staff and to bite or pull down classmates was impeding learning because it disrupted other students' opportunities to learn, required full adult attention, and created fear and an environment where peers were hypervigilant about Student, which interfered with their learning. Aggressive incidents were triggered by

certain pitch noises, disruptions in routines, unexpected changes in routine, and over stimulation. Student's teacher and aides believed the behavior occurred because Student was obsessed with technology, given a task that was unpreferred, given too much work, not given a break, or due to a change of schedule or routine. They believed the function of Student's behavior was to express irritation or discomfort, or difficulty communicating his needs, to avoid an unpreferred activity, for emotional release, or to protest a directive or a change in routine.

25. As a replacement behavior for biting and pulling, Student was to request break periods when feeling irritable and/or participate in staff initiated behavior breaks, transition between activities without incident, and choose a reward to be received for completing an activity selected by staff. To teach Student the replacement behaviors, staff was to provide Student an individual picture schedule for him to mark off to help transition from one activity to another, and tell Student ahead of time if there was to be any change in his routine. Staff was to provide Student a "first, then" chart where staff would pick the activity and Student would choose his reward for completing the activity. Staff was to praise Student when he successfully transitioned between activities or requested a break using vocalization, and give Student his chosen reward when he successfully completed a task.

26. If Student acted aggressively, staff was to exit classmates close to Student, allow Student time to de-escalate before prompting him to request a break, and reward him immediately for making a request. Staff was then to have a positive discussion with Student in a quiet area where he could walk around and relax for 10 minutes.

27. Student's December 2013 IEP provided 1,250 minutes per week of specialized academic instruction, 750 minutes per year of speech and language services, 120 minutes per year of occupational therapy, and home-to-school transportation.

## NINTH GRADE 2014 CHANGE OF PLACEMENT AND TRIENNIAL IEP

28. In a May 1, 2014 amendment IEP, District, with Parents' consent, changed Student's placement from a special day class at his home school to a special day class at East Hills Academy, a District special education school serving middle and high school students with severe learning, emotional, social (autism), or cognitive disabilities. East Hills was to provide Student direct instruction in a functional skills curriculum, delivered in a small-group setting with six students, a teacher, and four instructional healthcare assistants in a moderate/severe special day class.

29. On August 21, 2014, District convened an amendment IEP team meeting. District gave Parent a copy of parental procedural safeguards, and an assessment plan for an initial adapted physical education assessment of Student, which Parent signed. The notes of meeting state, "[Student's] IEP is due in December and we will be completing a review of records at that time." The IEP team did not discuss whether the December 2014 IEP would be a triennial IEP, or whether reassessments might be needed to obtain current data on Student's educational needs.

30. District completed its adapted physical education assessment of Student on October 16, 2014. The assessor used a norm-referenced test to assess Student's fundamental gross motor skills. The test included a locomotor subtest that measured Student's ability to run, gallop, hop, leap, horizontally jump, and slide, and an object control subtest that measured Student's ability to strike a stationary ball, stationary dribble, catch, kick, underhand roll, and overhand throw. Student scored at the three-year age-equivalent level in locomotor skills, and the six-year level in object control, and the assessor recommended that Student receive adapted physical education to improve his gross motor skills and overall health.

31. In fall 2014, Student was restrained on at least five occasions when he bit or attempted to bite his teacher, staff, or classmates. On November 17, 2014, District,

with Parents' consent, amended Student's IEP to increase the safety of other students and staff. The amendment required Student to wear headphones in class whenever other students were in the classroom to reduce noise, which had been a frequent antecedent to Student's aggressive behaviors. Student's classroom was rearranged so that classmates' desks were spread out farther from Student's, and Student's schedule was changed so that he transitioned in and out of the classroom at slightly different times from his classmates and had fewer opportunities to assault them.

32. On November 20, 2014, District gave Parents notice of a triennial IEP team meeting for Student to be held on December 4, 2014. The notice stated that the school psychologist, adapted physical education specialist, speech therapist, and occupational therapist might attend. The notice was silent regarding any reassessments of Student.

33. On December 1, 2014, the school nurse conducted a screening of Student's vision, hearing and health. She found Student in generally good health. He was 5 feet, 9.5 inches tall, and weighed 139 pounds.

#### Ninth Grade December 2014 Triennial IEP Team Meeting And Reevaluation

34. Student's ninth grade triennial IEP team meeting was held on December 4, 2014, when Student was 14 years old. Parents, District school psychologist Adrienne Cornish, Student's special education teacher Dan Smirniotis, Student's adapted physical education teacher and a District representative attended. At the start of the IEP team meeting, Parents consented to District's request to excuse Student's speech and language therapist and occupational therapist as not necessary to the meeting, because, before the meeting, they had submitted written input for the IEP meeting regarding Student's speech and occupational therapy services.<sup>35.</sup> At the IEP team meeting, District gave Parents a copy of the notice of procedural safeguards, an adapted physical education assessment report, a "Summary of Speech-Language Re-evaluation," and a "Summary of Special Education Re-evaluation."

35. The Summary of Speech-Language Re-evaluation prepared by District's speech and language pathologist noted that Student had last been assessed two and one-half years previously, in February 2012. It reported on Student's present levels of performance, his progress on previous goals, and proposed new goals for Student to meet by his next IEP in December 2015. It reported that Student seemed to have equivalent language abilities in Spanish and English. Verbal cues helped him gain and maintain his attention during structured activities. His expressive language was characterized by spontaneous one- to three-word utterances, and by immediate and delayed echolalic speech in which he would repeat what was said to him. Visual cues helped Student expand his expressive language. Receptively, Student understood simple sentences. He responded appropriately to concrete "what" questions about a pictured item but required cueing to appropriately respond to "where" and "who" questions. Student indicated an affirmative by saying "yes" or repeating the word that was the subject of a question ("Do you want to watch a movie" – "Movie."). He responded negatively by saying "no please." Student had difficulty answering abstract questions verbally or in writing. Student had met his 2013 IEP goal of writing and speaking his name, address, phone number, school, and mother's name, and made progress on his goal of identifying a task, behavior, and/or noise that was making him anxious. The speech-language re-evaluation summary proposed as new goals for Student to achieve by December 2015 that he: (1) correctly follow a one-step instruction that included a preposition (on, under, in, next to, etc.), regarding items in his environment; (2) respond by saying, "Hi, [name]" when greeted by familiar staff members; and (3) describe one of 20 previously learned pictures, when shown, using a verb and/or adjective. The summary recommended that no changes be made to Student's existing speech and language services.

36. Ms. Cornish prepared the Summary of Special Education Re-evaluation, based on her review of Student's February 2012 assessment, the speech-language summary, and the recent vision, hearing and health screening and adapted physical education assessment. Mr. Smirniotis provided input and observations. Ms. Cornish did not review Student's April 2012 assistive technology/augmentative and alternative communication assessment. The special education re-evaluation summary explained, "Federal law requires a re-evaluation of all Special Education students every three years (triennially). The purpose of the re-evaluation is to determine whether the student continues to have a disability and to examine his or her present levels of performance, educational needs, and services." It noted that Student was presently receiving occupational therapy, adapted physical education, and speech services. The special education re-evaluation summary incorporated Student's present levels of performance from the Summary of Speech-Language Re-evaluation.

37. The special education re-evaluation summary included classroom observations and additional information from Mr. Smirniotis about Student's present levels of performance. It identified Student's most significant problem behavior as biting staff and students, and the most common antecedents to this behavior as loud noises in the classroom and changes in routine. The re-evaluation summary indicated that additional information about the behavior and interventions could be found in an unspecified behavior intervention plan that was not included in the materials District gave Parents at the IEP meeting.

38. Student's ninth-grade mathematical and reading abilities had not progressed significantly since his sixth grade IEP in February 2012. Student was reported as able to perform double-digit addition and single-digit subtraction, compared to being able to add and subtract three-digit numbers independently in 2012. As in 2012, he could consistently blend up to four sounds together to make words, including words



with consonant blends and some long vowel sounds. His speech remained difficult to understand, but, as in 2012, he could clarify by writing what he was talking about. Student could use a computer or iPad to type internet search requests for most subjects of interest to him, including cities, song titles, restaurants, and food.

39. Ms. Cornish found no significant changes in Student's strengths, interests, and post-high school transition goals. Student could say and write his personal information. He could follow a schedule and tell staff members that he was finished with an activity by saying "Check" (as in checking the box). Student could stack chairs, wipe tables, organize folders, and recycle cans and water bottles. Student could eat independently, including opening containers and using utensils, and use the bathroom independently. He changed in and out of his physical education clothes independently each day.

40. Based on her review of existing information, Ms. Cornish concluded and wrote in the special education re-evaluation summary that there were no significant changes in Student's levels of performance and educational needs from his prior IEP, that Student's current placement and level of services was appropriate, and that no additional testing was recommended to determine Student's eligibility for special education or his educational needs. In particular, Ms. Cornish and Mr. Smirniotis believed that continued informal assessment of Student's behaviors by teacher and staff would be more useful than a formal behavioral assessment.

41. Mother believed that the Summary of Speech-Language Re-evaluation and the Summary of Special Education Re-evaluation was a triennial reassessment of her son. No District representative ever told her that Student did not need a triennial assessment, asked her to waive such an assessment, or explained that the District had determined that additional assessments were unnecessary because no additional data were needed to evaluate Student. Mr. Smirniotis, who attended the December 2014 IEP

team meeting, was unaware of any discussion with Parents at any time as to whether any additional assessments should be done to obtain additional data regarding Student's educational needs. Mother was actively involved in Student's educational program, and was generally familiar with her parental rights. Ms. Cornish did not discuss Student's prior assessments with Parents, and did not discuss with Parents the reasons for her determination that no additional data was needed to evaluate Student, or that Parents could request additional assessments. Thus, District did not advise Parents, before or at the December 4, 2014 IEP team meeting, of the reasons for District's determination that no additional data were needed to determine Student's educational needs, or of their right to request an assessment to determine those needs. Father signed a copy of the Summary of Special Education Re-evaluation next to a checked box stating that he participated in and agreed to all parts of the IEP team's re-evaluation. A second box stating that parent had received a notice of procedural safeguards and understood them, "including the right to request an assessment," was not checked. Mother did not sign the re-evaluation summary.

42. Parents both signed consent to Student's December 4, 2014 IEP. It continued Student's placement at East Hills, his full-time specialized academic instruction, 750 minutes per year of speech and language services, 120 minutes per year of occupational therapy, and home-to-school transportation, and added 50 minutes per day of adapted physical education.

#### DECEMBER 2015 10TH GRADE IEP

43. District conducted no formal assessments of Student for his December 4, 2015 10th grade IEP, when Student was 15 years old. The IEP continued Student's existing placement and services, and added 60 minutes per year of transition service. District also developed a new behavior intervention plan to address Student's continued attempts to bite others. District believed Student engaged in biting behaviors to create

a less noisy environment by attacking classmates who were sources of noise. The reinforcement procedures and reactive strategies were similar to those in Student's fifth grade functional analysis assessment in fall 2010 and eighth grade behavior support plan in December 2013.

#### ELEVENTH GRADE SPRING 2016 BITING INCIDENTS AND IEP TEAM MEETING

44. Student continued to bite classmates and staff. On April 18, 2016, Student's IEP team met to discuss his biting, which was becoming more severe as Student became older, larger, and stronger. The team was concerned that his aggressive behavior would negatively impact Student in his transition program, and thereafter. Student's principal believed that the biting was an outlet for Student when he was upset and needed to protest, and that when he decided to bite it became a compulsion that he had to carry out. She asked whether Student's behavior could be related to attention deficit disorder or anxiety, and whether a psychiatrist could explore the issue.

45. On May 10, 2016, Student lunged at a classmate and was prevented from biting that student, but succeeded in biting an aide. The teacher and staff had to restrain Student. On July 27, 2016, Student bit a classmate. The next day, he arrived in an uneasy state and began staring at a particular classmate. After his teacher and staff evacuated the other students from the classroom, Student bolted toward staff. Staff exited the classroom and went outside, leaving Student alone in the classroom. He screamed, cried, and called for staff. Student opened the classroom window, pushed the screen out, climbed through the window and attempted to bite staff. Teacher and staff restrained Student, pinning him on the ground on his stomach for three to five minutes.

#### PARENTS' AUGUST 2, 2016 REQUEST FOR IEE'S

46. Student's IEP team met on August 2, 2016, to discuss Student's behavior. Parents attended with their representative. At the meeting, Parents disagreed with

District's December 2014 summary triennial assessment and requested IEE's in the areas of psychoeducation, functional behavior, speech, assistive technology, and transition. As a compromise, and without waiving their request for IEE's, Parents offered to allow District to conduct the assistive technology and transition assessments.

47. On August 17, 2016, District Special Services Program Manager Carlos Saucedo, Psy.D., sent prior written notice that District was refusing all of Parents' requested IEE's and offering District assessments in psychoeducation, speech and language, behavior, assistive technology, transition, and occupational therapy. District refused Parents' request for IEE's on grounds that District had never conducted any formal assessments of Student in those areas, and had not had an opportunity to conduct such assessments. District also contended that the "Summary of Special Education Re-evaluation" form presented to and signed by Parents at Student's December 2014 IEP team meeting was not a formal assessment, but was instead an "assessment waiver" by which Parents agreed that formal assessments of Student were not necessary because there was sufficient existing information in December 2014 determine Student's eligibility and educational needs. Additionally, District contended that Student, who was bilingual in English and Spanish, needed to be given bilingual psychoeducational and speech assessments.

48. District included an assessment plan for proposed District assessments, and a notice of procedural safeguards. District's assessment plan did not state that Student's educational or related services needs warranted reassessment. Mr. Smirniotis and Dr. Saucedo did not believe that District needed to formally assess Student in any of the proposed areas to identify his educational needs, but proposed the assessment based solely in response to Parents' concerns and their requests for IEE's.

49. Dr. Saucedo's August 17, 2016 transmittal email suggested that the parties discuss District's formal response to Parents' request for IEE's. However, Student filed his

complaint five days later. District's complaint followed on September 26, 2016.

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>2</sup>

1. 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)<sup>3</sup> 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 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).

2. 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. (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 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

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<sup>2</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>3</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

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).)

3. In *Board of Education of the Hendrick Hudson Central School District 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 pp. 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.)

4. 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).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*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 had the burden of persuasion as to Student's issues, and District had the burden as to District's issues.

#### STUDENT'S ISSUES 1A-C AND DISTRICT'S ISSUE 1: STUDENT'S RIGHT TO IEE'S IN PSYCHOEDUCATION, FUNCTIONAL BEHAVIOR, AND SPEECH AND LANGUAGE

5. Student contends that District's December 2014 Summary of Special Education Re-evaluation was a triennial reassessment to which Parents could, and did, object, and request IEE's. Student argues that District's only options in response to Student's request were either to ensure that Student received an IEE at public expense without unnecessary delay, or file a request for due process to establish that its assessment was appropriate. Student contends that Student is entitled to IEE's in

psychoeducation, speech and language, and functional behavior because District did neither.

6. District does not contend that its assessments were appropriate as a defense to Parents' request for IEE's. To the contrary, District contends that its Summary of Special Education Re-evaluation was not an assessment at all, but was instead an agreement with Parents to use existing data to continue Student's eligibility for special education and determine his educational needs. District contends that Parents' agreement to the summary reevaluation constituted a waiver of Student's right to formal triennial reassessments, and therefore a waiver of any subsequent right to disagree with the summary reevaluation and request IEE's.

#### Applicable Law

#### REASSESSMENTS

7. To ensure that children with disabilities receive an appropriate education tailored to their individual needs, the Education Code and the IDEA require that when a school district has reason to suspect that a student has a disability, it must conduct a full and individual initial assessment<sup>4</sup> that ensures the student is assessed in all areas related to the suspected disability, using a variety of reliable and technically sound instruments. (Ed. Code, § 56320, subd. (f); 20 U.S.C. §§ 1414(a)(1), (b)(2)-(3); *Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1109.) If appropriate, assessments should be conducted in areas including health and development, vision, including low vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and

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<sup>4</sup> In California, the term "assessment" has the same meaning as the term "evaluation" in the IDEA. (Ed. Code, § 56302.5)



vocational abilities and interests, and social and emotional status. (Ed. Code, § 56320, subd. (f).)

8. Following such an initial assessment, if the student is found eligible for special education, he or she must be reassessed at least once every three years, unless the parent and the local educational agency agree, in writing, that a reassessment is unnecessary. (Ed. Code, § 56381, subd. (a)(2).) The student also must be reassessed if the local educational agency determines that the student's educational or related services needs warrant a reassessment, or if the parent or teacher requests a reassessment, provided, however, that a student may not be reassessed more frequently than once a year, unless the parent and the local educational agency agree otherwise. (Ed. Code, § 56381, subds. (a)(1) and (2).)

9. The required three-year "triennial" assessment serves two purposes. First, it examines whether the student remains eligible for special education; second, it determines the student's unique needs which, in turn, could trigger a revision of the student's IEP. (Ed. Code, § 56381, subd. (b)(2).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability is a procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9<sup>th</sup> Cir. 2006) 464 F.3d 1025, 1031-1033.)

10. The triennial reassessment must include a review of existing information and may include additional assessments. Education Code section 56381 provides that, as part of the reassessment, the IEP team and other qualified professionals, as appropriate, must: (1) review existing assessment data on the student, including assessments and information provided by the parents of the student, current classroom-based assessments and observations, and teacher and related services providers' observations; then (2) based on the review of existing data, and input from the parents, identify what additional data, if any, is needed to determine: (A) whether the student continues to

have a disability; (B) the present levels of performance and educational needs of the student; (C) whether the student continues to need special education and related services; and (D) whether any additions or modifications to the special education and related services are needed to enable the student to meet his IEP goals and to participate, as appropriate, in the general curriculum. (Ed. Code, § 56381, subd. (b).)

11. If the IEP team and other qualified professionals determine that additional data is needed, the district must administer the tests and other assessment materials needed to produce the data identified by the IEP team. (Ed. Code, § 56381, subd. (c).)

12. If the IEP team and other qualified professionals determine that no additional data is needed to determine whether the student continues to be an individual with exceptional needs, or to determine the student's educational needs, the district must notify the parents of that determination and the reasons for it. The district must also notify the parents of their right to request an assessment to determine whether the student continues to be an individual with exceptional needs, and to determine the educational needs of the student. Once the district determines that no further data is needed, and properly notifies the parents of the bases for that determination and the parents' right to request assessments, the district is not required to conduct an assessment, unless requested by the parents. (Ed. Code, § 56381, subd. (d).)

#### PARENTAL CONSENT

13. Reassessments require parental consent. (Ed. Code, § 56381, subd. (f)(1); 20 U.S.C. § 1414(c)(3).) To obtain parental consent for a reassessment, the school district must provide proper notice to the parents. (Ed. Code, §§ 56321, subd. (a), 56381, subd. (a); 20 U.S.C. §§ 1414(b)(1), 1415(b)(3) and (c)(1).) The notice consists of the proposed assessment plan and a copy of procedural rights under the IDEA and companion state

law. (Ed. Code, § 56321, subd. (a); (20 U.S.C. §§ 1414(b)(1), 1415(c)(1).) The assessment plan must appear in a language easily understood by the public and in the native language of the parent, explain the assessments that District proposes to conduct, and provide that District will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) District must give parents 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

14. Consent means that the parent has been fully informed of all relevant information regarding the proposed action; the parent understands and agrees in writing to the proposed action; and the parent understands that the granting of consent is voluntary and may be revoked, although any revocation is not retroactive. (Ed. Code, § 56021.1; 34 C.F.R. § 300.9.)

#### PARENT REQUESTS FOR IEE'S

15. If a parent disagrees with a district assessment, the parent may ask the district to pay for an IEE of the student. (Ed. Code, § 56329, subd. (b); 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1).) An IEE is 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).) Following a parent's request, the district must, without unnecessary delay, either ensure that the IEE is provided at public expense, or file a due process complaint to request a hearing to show that its own evaluation was appropriate. (Ed. Code, § 56329, subd. (c); 34 C.F.R. § 300.502(b)(2).) If the district's evaluation is not found to be appropriate, the district may be required to provide the requested independent educational evaluation. (Id.)

16. A district "unnecessarily delays" when it fails to file for due process within 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).) Some delay is reasonable if the school district and the parents are engaged in active attempts to resolve the matter. (*J.P. v. Ripon Unified Sch. Dist.* (E.D. Cal. April 14, 2009, No. 2:07-cv-02084) 2009 WL 1034993.) The determination of “unnecessary delay” is a fact-specific inquiry. (See *Pajaro Valley Unified Sch. Dist v. J.S.* (N.D. Cal. Dec. 15, 2006, No. C06-0380) 2006 WL 3734289, \*3 (a delay of almost three months between parent’s request for an independent evaluation and district’s due process filing was unreasonable where the district offered no explanation or justification for its delay); *J.P. v. Ripon Unified Sch. Dist., supra*, 2009 WL 1034993 (a two-month delay was not unnecessary where the district attempted to negotiate an independent evaluation agreement with parent, and filed for due process less than three weeks after negotiations ended).)

#### Analysis

17. District’s December 2014 Summary of Special Education Re-evaluation was a triennial reassessment conducted in accordance within the provisions of Education Code section 56381, subdivision (b). The summary itself explained, “Federal law requires a re-evaluation of all Special Education students every three years (triennially). The purpose of the re-evaluation is to determine whether the student continues to have a disability and to examine his or her present levels of performance, educational needs, and services.” The summary acknowledged that Student had existing needs in the areas of occupational therapy, speech, and adapted physical education, and was receiving services in those areas. It included information and observations regarding Student’s needs in those areas. It also included information and observation regarding Student’s academic performance and functional behavior that would be part of the data collected in the course of preparing a psychoeducational evaluation. School Psychologist Ms. Cornish reviewed the existing data on Student, including the health and adapted physical education assessment, current classroom-based assessments and

observations, and teacher and related services providers' observations, and concluded that no additional data was needed to determine: (A) whether Student continued to have a disability; (B) Student's present levels of performance and educational needs; (C) whether Student continued to need special education and related services; and (D) whether any additions or modifications to the special education and related services were needed to enable Student to meet his IEP goals and to participate, as appropriate, in the general curriculum.

18. Parents were entitled under Education Code section 56329 to disagree with District's review-based reassessments in psychoeducation, functional behavior, and speech and language, and to request IEE's in those areas.

19. In response to Parents' statutorily permissible request for IEE's, District could have filed a due process complaint to request a hearing to show that its Summary of Special Education Re-evaluation was a review-based triennial reassessment conducted appropriately under the procedures set forth in Education Code section 56381, subdivisions (b) and (d). However, District did not assert this argument in response to Parents' August 2, 2016 request for IEE's, and at the prehearing conference in this matter expressly disavowed the argument that its Summary of Special Education Re-evaluation was an appropriate assessment. Instead, in addition to contending that its summary reevaluation was not an assessment at all, District at the PHC clarified that it was asserting, as a defense to Student's request for IEE's, that Parents at the December 4, 2014 IEP team meeting had waived the right to any triennial reassessments of Student and therefore could not disagree with District's summary reevaluation or seek IEE's based on it. District's assertion of this argument as a defense to Student's claims did not satisfy Education Code section 56329, subdivision (c), which requires that a district file a due process complaint to request a hearing to show that its own evaluation was appropriate.

Student therefore prevails on his argument that district failed to respond as required to Parents' request for IEE's.

20. Even if District had clearly requested a hearing to show that its summary reevaluation was an appropriate assessment, conducted as required under Education Code section 56381, District would not have prevailed on that argument. District failed to demonstrate compliance with Education Code section 56381, subdivision (d). District did not notify Parents, before or at the December 4, 2014 IEP team meeting, of the reasons for District's determination that no additional data was needed to determine Student's educational needs, or of their right to request an assessment to determine those needs, as required. Parents were not fully informed of all relevant information regarding District's proposed decision to conduct no formal assessments of Student to collect additional data. Father did not give informed consent to District's determination that no additional assessments were necessary when he signed off on District's December 2014 Summary of Special Education Re-evaluation, and Father and Mother did not give such consent when they signed Student's December 4, 2014 IEP.

21. Student is entitled to Parent's requested IEE's in psychoeducation, functional behavior, and speech and language.

#### STUDENT'S ISSUES 1D-E: STUDENT'S RIGHT TO IEE'S IN ASSISTIVE TECHNOLOGY AND/OR AUGMENTATIVE ALTERNATIVE COMMUNICATION AND TRANSITION

22. Student contends that he is entitled to IEE's in assistive technology and/or alternative augmentative communication, and transition. Student argues that District had an opportunity to conduct formal triennial reassessments or assessments of Student in those areas in December 2014 and did not, and then failed to defend its review-based triennial reassessments when Student requested IEE's in August 2016. District again contends that the review-based triennial reassessments were not assessments for purposes of an IEE request, and that Parents in any event, by agreeing to forego

additional assessments under section 56381, waived the right to disagree with the District's summary reevaluation.

#### Applicable Law

23. Paragraphs 7 through 16, above are incorporated here by reference. As stated in Paragraph 7 above, if appropriate, assessments should be conducted in areas including communicative status and career and vocational interests and abilities. (Ed. Code, § 56320, subd. (f).)

#### TRANSITION ASSESSMENTS

24. Beginning not later than the first IEP in effect when a student turns 16, or younger if determined appropriate by the student's IEP team, a student's IEP must include appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills. The school district must update the goals annually thereafter. The IEP must also include transition services (including courses of study) needed to assist the student in reaching those goals. Among other things, the transition plan must include exposure to vocational and community experiences, and, if appropriate, training in independent living skills. (Ed. Code, § 56345, subd. (a)(8).)

#### Analysis

25. As of Student's December 2014 triennial reassessment, Student was not receiving transition services, assistive technology services, or augmentative alternative communication services, and those areas had not been identified as areas of need. Student was 14 years old in December 2012, and District was not required to develop a transition plan for Student until fall 2016. When Chula Vista assessed Student's assistive technology needs in April 2012, the assessor found that Student's receptive and

expressive language skills were sufficient to give him a functional level of communication and allow him to access his curriculum. While the assessor found that a communication device, such as an iPad or an iTouch, could be a useful and motivating educational tool, in conjunction with other forms of input, such as visuals, computer programs, and books, she specifically concluded that Student did not require a communication device to access his curriculum, and did not recommend that Student be provided such a device.

26. District was not required to assess Student in all possible areas of need for his 2014 triennial assessment, despite its opportunity to do so, but only in actual areas of identified or suspected disability that might require special education. Student did not establish that District had reason to suspect that Student might require transition services prior to turning 16. Although Student's December 2013 behavior support plan mentioned Student's inability to adequately communicate his needs as one potential cause of his aggressive behaviors, this reference alone was not a sufficient basis to suspect that Student might require assistive technology to communicate his needs or help control his behaviors.

27. Student cited no authority for the proposition that a district must respond to a request for IEE's in an area not assessed by the district, as to which the district had no reason to suspect that Student might have a disability requiring special education. Student is not entitled to IEE's in the areas of transition, assistive technology and/or alternative augmentative communication.

#### DISTRICT'S ISSUE 2: DISTRICT'S RIGHT TO ASSESS STUDENT PURSUANT TO ITS AUGUST 17, 2016 ASSESSMENT PLAN WITHOUT PARENTS' CONSENT

28. District contends that Education Code section 56381, subdivision (a)(1) requires District to conduct psychoeducation, speech and language, behavior, assistive technology, transition, and occupational therapy because on August 2, 2016, Parents



requested a complete reassessment of Student through a combination of independent and District assessors. Student contends that Parents never requested District assessments, but at most offered to allow District to conduct certain assessments as a compromise of Parents' request for IEE's in all areas.

#### Applicable Law

29. As stated above in Legal Conclusions 8-10, a district must reassess a special education student every three years, or if it determines that the educational or related services needs of the student, including improved academic achievement and functional performance, warrant reassessment, or if the student's parents or teacher request an assessment.

30. As stated above in Legal Conclusions 13-14, a district must seek informed parental consent before conducting any reassessment of a special education student. If the parents do not consent to the plan, the district may, but is not required to, pursue the reevaluation by requesting a due process hearing and proving that it needs to reassess the student and is lawfully entitled to do so. (Ed. Code, §§ 56381, subd. (f)(3).) Thus, to proceed with a reassessment over a parent's objection, a district must demonstrate at a due process hearing that: (i) the student's educational or related services needs warrant reassessment, or a triennial reassessment is due, or the student's parent or teacher has requested District reassessment; and (ii) that the district has properly provided parent an appropriate written reassessment plan to which the parent has not consented. (Ed. Code, § 56321, subd. (a).)

31. When a parent requests an independent evaluation based on the contention that a district failed to, but should have, assessed a student in a particular area as part of an initial assessment or reassessment, the district is not entitled to deny the student's request on grounds that the district is entitled to the first assessment in the area. (*Letter to MacDonald*, 20 IDELR 1159 (OSEP 1993).)

## Analysis

32. District's sole basis for proposing District assessments of Student was District's contention that on August 2, 2016, Parents requested a complete reassessment of Student through a combination of independent and District assessors. However, Parents did not request any District assessments. They offered to compromise their demand for IEE's in all areas by allowing District to conduct transition and assistive technology assessments in exchange for IEE's in other areas. District did not accept Parents' compromise. District did not offer any other grounds for its proposed assessments, and specifically denied that Student's educational or related services needs warranted reassessment. District is not entitled to assess Student in any of District's proposed areas of assessment without Parents' consent.

## REMEDIES

1. Student prevailed on Student's Issues 1a, 1b, and 1c. As a remedy with respect to these issues, Student requests an order directing District to fund an independent psychoeducational evaluation of Student by Jill Weckerley, Ph.D., an independent speech and language assessment by Lara Driessen Walls, M.S., CCC-SLP, and an independent functional behavior analysis by Matt Howarth, Ph.D, BCBA-D. Student requests an order directing District to provide Spanish language interpreters, if needed, and an order directing District to pay the independent assessors' customary charges, including charges to attend IEP meetings. If any of these assessors are unavailable, Student requests that Parents be allowed to select another similarly qualified assessor. Student did not present evidence on the reasonableness of fees customarily charged by Student's preferred assessors. District did not assert a position or present any evidence on the issue of remedies.

2. As stated above in Legal Conclusion 15, an independent educational

evaluation is an evaluation conducted by a qualified examiner not employed by the district. A district may impose criteria to ensure that publicly funded independent evaluations are not unreasonably expensive. (*Letter to Wilson*, 16 IDELR 83 (OSEP 1989).) Public agencies are not required to bear the costs of independent evaluations where those costs are clearly unreasonable. (*Letter to Kirby*, 213 IDELR 233 (OSEP 1989).) In order to avoid unreasonable charges for independent evaluations, a district may establish maximum allowable charges for specific tests. (*Id.*) If a district does establish maximum allowable charges for specific tests, the maximum cannot be an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific test. (*Id.*) The maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees. (*Id.*)

3. As discussed above, Student prevailed on Student's Issues 1a-c regarding Student's right to IEE's in psychoeducation, functional behavior, and speech and language. As a remedy, Student is entitled to independent evaluations in those areas by qualified assessors of Student's choice. Student is also entitled to Spanish language interpreters, if needed, to facilitate the assessments.

4. Student did not present evidence of the fees charged by Student's proposed independent evaluators, and District did not present evidence concerning District's existing guidelines, if any, regarding maximum allowable charges for IEE's. District will pay Student's independent evaluators and Spanish language interpreters the lesser of their usual and customary rates, or District's maximum allowable charges for IEE's in psychoeducation, functional behavior, and speech and language, and Spanish language interpretation, if any, in effect as of Parents' August 2, 2016 request for IEE's. Each assessor will be paid to conduct his or her assessment, and to present that assessment at an IEP team meeting.

## ORDER

1. District shall, at public expense, provide Student independent psychoeducational, speech and language, and functional behavior assessments, and Spanish language interpreters, if needed, to facilitate the assessments. Unless the parties agree otherwise in writing: (i) the independent assessors shall be qualified assessors of Student's choosing; (ii) District shall contract with Student's chosen independent assessors not later than 30 calendar days after the date of this decision; (iii) District will pay Student's independent evaluators and Spanish language interpreters the lesser of their usual and customary rates, or District's maximum allowable charges for IEE's in psychoeducation, functional behavior, and speech and language, and Spanish language interpretation, if any, in effect as of Parents' August 2, 2016 request for IEE's; (iv) District's funding of each IEE shall include payment for the independent evaluator to attend one IEP meeting to review the results of the independent educational evaluation; and (v) District shall convene an IEP team meeting within 15 school days of its receipt of the IEE to review the IEE.

2. Student's claims for relief based on Student's issues 1d and 1e are denied.

3. All of District's claims for relief are denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Student's issues 1a, 1b and 1c, and on District's issues 1 and 2. District prevailed on Student's issues 1d and 1e.

## RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: November 21, 2016

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*/s/*

ROBERT G. MARTIN

Administrative Law Judge

Office of Administrative Hearings