

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

RIVERSIDE UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2017020006

CORRECTED DECISION<sup>1</sup>

Riverside Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on January 31, 2017, naming Student. The matter was continued for good cause on February 27, 2017.

Administrative Law Judge Linda Johnson heard this matter in Riverside, California, on April 18, 19, and 20, 2017.

Cathy S. Holmes, Attorney at Law, represented District. Dr. Charity Plaxton-Hennings, District's Director of Psychological Services, attended all days of the hearing on behalf of District.

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<sup>1</sup>This Decision, originally issued on May 23, 2017, has been corrected to address an error in the name of Student's attorney, Grace Nguyen, who was incorrectly identified as Grace Wynn, on page one of the original Decision.

Grace Nguyen, Attorney at Law, and Theresa Sester, Advocate, represented Student. Mother attended all days of the hearing<sup>2</sup>. Student did not attend the hearing.

On April 20, 2017, OAH granted the parties' request for a continuance to allow the parties to file closing briefs. On May 10, 2017, the parties timely submitted their written closing briefs; the record was closed and the matter submitted for decision.

### ISSUES<sup>3</sup>

1. Did District's December 8, 2015 psycho educational assessment comply with all legal requirements such that Student is not entitled to a psycho educational independent educational evaluation at public expense?

2. Did District's February 22, 2016 speech and language assessment comply with all legal requirements such that Student is not entitled to a speech and language IEE at public expense?

### SUMMARY OF DECISION

Parents asked District to fund IEEs after District conducted a psycho educational assessment and speech and language assessment of Student. District filed this action to obtain a determination that each of the assessments met all legal requirements, and therefore it did not need to fund IEEs in these areas.

District established that its psycho educational assessment met all legal requirements. However, District did not establish that its speech and language

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<sup>2</sup>A Spanish language interpreter was present for all hearing days.

<sup>3</sup>The issues have been rephrased and reorganized 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.)

assessment met all legal requirements. Both assessments were complete and properly administered by sufficiently trained individuals. The assessments were not racially, culturally or sexually discriminatory. The assessments were also properly administered in Spanish – Student’s primary language and the language spoken at home. All of the testing was administered according to the test publisher’s directions to the extent necessary to produce valid results. The assessors used a variety of tools and strategies to gather relevant information, and no single procedure was the sole criterion for determining eligibility. Each of the assessors who evaluated Student produced a written report. However, the speech and language report was not timely, and as a result District waited more than 150 days after the assessment plan was signed to hold an individualized education program team meeting to discuss the results of the assessments. Therefore, District did not meet its burden of demonstrating that its speech and language assessment of Student was legally compliant. Student is entitled to an independent educational evaluation in the area of speech and language at public expense.

## FACTUAL FINDINGS

### BACKGROUND AND JURISDICTIONAL MATTERS

1. Student is a four-year-old girl who attends preschool at Longfellow Elementary School within the District. Student has resided with Parents in the District at all relevant times.

2. Student received early intervention services from Inland Regional Center due to a communication delay.<sup>4</sup> Student was referred for an assessment for special

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<sup>4</sup>Regional Centers operate under authority of the Lanterman Developmental Disabilities Act (Welf. & Inst. Code, § 4500 et seq.), and provide daily living services and supports to persons with developmental disabilities. Under the IDEA (20 U.S.C. § 1400

education in fall 2015 by Inland Regional Center when she transitioned from an infant program to a preschool program.

3. District created an assessment plan on October 27, 2015, to assess Student in health and development, cognition, perceptual motor ability, speech and language development, pre-academic performance, social emotional and behavioral development, and self-help and adaptive skills. Parent signed the assessment plan on December 5, 2015.

4. District assessed Student in December of 2015, and February and March of 2016. District held an IEP team meeting on June 3, 2016, to discuss the results of the assessments.

#### PSYCHO EDUCATIONAL ASSESSMENT

5. Ines Anderson, school psychologist, conducted the psycho educational evaluation in December 2015, and completed the report on January 6, 2016. There was a typographical error on the front page of the report that incorrectly listed the date of the report as December 6, 2016. Ms. Anderson has a bachelor of arts degree in English from University of California, Riverside and a master of arts degree with a counseling option from California State University, San Bernardino. Ms. Anderson holds a school psychologist credential, a pupil personnel services credential, a single subject credential, a multiple subjects credential, and a bilingual certificate of competence. Ms. Anderson is fluent in Spanish.

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et. seq.), states can receive funding to provide IDEA part C "early start" services to enhance the development of infants and toddlers up to three years old who have disabilities. Regional Centers provide such services, but the "early start" services do not correspond to those required for provision of a FAPE to children older than three.

6. Ms. Anderson has been a school psychologist since January 1999 and has conducted thousands of assessments, of which roughly 80 percent have been conducted in Spanish. Ms. Anderson is currently assigned to Sunshine Early Childhood Center and conducts bilingual evaluations. Ms. Anderson is knowledgeable about, and trained in, administering standardized assessment instruments. She was qualified to administer the assessment based on her education, training, credentials, and experience.

7. For the assessment, Ms. Anderson reviewed Student's records from Inland Regional Center and utilized three standardized tests. Prior to meeting with Student, Ms. Anderson reviewed the referral information from Inland Regional Center, which included Student's early start individualized family service plan. Ms. Anderson ascertained that the suspected disability was a communication delay as Student did not speak much and was not always understood. Ms. Anderson also learned Student's native language was Spanish and there was a concern about her vision. The early start plan explained Student failed a vision screening and has low vision in her left eye. Ms. Anderson confirmed this information with Parent.

8. Ms. Anderson assessed Student at Sunshine Early Childhood Center. Student, Parent<sup>5</sup>, and the in-home teacher from Inland Regional Center were all present during the assessment. Ms. Anderson's observation of Student was limited to the lobby of the school, in the hallway walking to the assessment, and during the assessment, as Student was not currently attending preschool or daycare. Student acknowledged Ms. Anderson when she greeted her and came willingly to the testing room. Student was able to navigate appropriately through the hallways and did not run away from Ms.

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<sup>5</sup> Neither Student nor District raised an issue with Parent being present for the assessment.

Anderson. Student was responsive to Ms. Anderson during the assessment. Student did not appear to have any difficulty seeing the assessment materials.

9. District called Dr. Charity Plaxton-Hennings, Director of Psychological Services and Mental Health, as an expert. Dr. Plaxton-Hennings has a bachelor of arts degree in communication and psychology from Point Loma Nazarene University, a master of arts degree in psychology, a master of public health, and a doctorate of psychology from Loma Linda University. Dr. Plaxton-Hennings holds a clinical psychologist license and a pupil personnel services credential – school psychology. Dr. Plaxton-Hennings is responsible for the primary oversight and coordination of District’s school psychologists. Dr. Plaxton-Hennings also trains school psychologists on assessments.

10. Dr. Plaxton-Hennings opined that observations in the home can be very difficult and the results are often not reliable because of distractions in the home. She also opined that placing Student in a classroom to observe for purposes of assessment would not be appropriate because it would not give reliable results because it was an artificial environment.

11. Ms. Anderson used the Developmental Profile 3, Caregiver Interview Form, with Parent. The Developmental Profile is a questionnaire that is administered to the parent or caregiver; it is a comprehensive assessment that assesses cognitive and communication delays while also giving a global picture of other areas of need. Ms. Anderson chose the Developmental Profile because she has used it many times, parents are able to understand the questions, and it touches on all developmental areas.

12. Ms. Anderson administered four subtests and started each with the appropriate section of questions that corresponded to Student’s age. Ms. Anderson asked Parent questions in Spanish then recorded the answers on the interview form. The form Ms. Anderson used was in English, however, Parent recalled seeing questions listed

in both English and Spanish. Ms. Anderson followed the testing protocol to establish a basal and ceiling<sup>6</sup>. Student scored in the average range on all four subtests: physical, adaptive behavior, social-emotional, and cognitive.

13. Although Ms. Anderson calculated the scores on the Developmental Profile correctly, she neglected to tally the scores at the end of each subtest. There are two different spots on the developmental profile to tally scores. At the bottom of the individual subtest there is a blank line next to a backslash with a number listing the total questions that can be asked. That blank indicates the assessor is supposed to tally the number of yeses there. There is also a place to tally the scores on the score sheet. The number of yeses was tallied on the score sheet, but not at the end of each subtest. However, the number on the score sheet accurately reflected the number of answers Parent answered yes to.

14. Dr. Imari Nicoloff testified as an expert for Student. Dr. Nicoloff has a bachelor of arts degree in social science and a master's degree in special education from Chapman University and doctor of education in counseling psychology from Argosy University. Dr. Nicoloff is a field examiner for Pearson Education where she conducts

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<sup>6</sup>When an assessment test lists items or questions of increasing difficulty, basal and ceiling rules act to enhance the efficiency of the test process by administering only the range of items required to obtain an accurate estimate of the individual's ability. The test's "basal" is the starting point, or the level of mastery of a task below which the student would correctly answer all items on a test. The basal is often determined by a student's age. The test's "ceiling" is the point where the student has made a predetermined number of errors; administering remaining items stop because it is assumed that the student would continue to get the answers wrong. The basal and ceiling protocols are determined by test manufacturer.

assessments when there is a new version of an assessment to assist in the norming process. Dr. Nicoloff has never administered the Developmental Profile. Dr. Nicoloff opined that the omission of totals on the bottom of the subtests for the Developmental Profile called into the question the validity of the entire assessment. However, Dr. Nicoloff did not explain how a slight omission could call into question the validity of an assessment when the totals were correctly added on the score sheet.

15. Dr. Nicoloff has been trained to administer the Vineland Adaptive Behavior Scale, the Wide Range Achievement Test, and the Wechsler Intelligence Scale for Children. Dr. Nicoloff has administered approximately 300 assessments; however, she has never administered any of the assessments given to Student. Prior to working for Pearson, Dr. Nicoloff worked for Palo Verde Unified School District as a behavior support specialist. During that time Dr. Nicoloff conducted 20 to 30 psycho educational evaluations. Dr. Nicoloff does not have a school psychology credential.

16. Ms. Anderson also asked several questions on the Developmental Profile after reaching the ceiling. Ms. Anderson explained she did this to determine if Student had additional skills. Ms. Anderson also sometimes asks questions past the ceiling to alleviate some of the pressure parents feel if they are answering a lot of questions no. Ms. Anderson explained this by saying if a parent says the student cannot walk on her tiptoes then she may skip the higher level question that asks about jumping on tiptoes and instead ask the next question. However, Ms. Anderson does not score any question after the ceiling has been established.

17. Dr. Nicoloff opined that there would never be a reason to ask questions after reaching the ceiling.

18. Dr. Plaxton-Hennings has administered the English version of the Developmental Profile 3. Dr. Plaxton-Hennings explained the concept of testing the limits. Sometimes when there is a scatter of scores, especially with preschoolers,



assessors will ask additional questions to see if there are additional abilities beyond the ceiling. Although additional questions may be asked, those answers would not be scored. Testing the limits does not invalidate the test or assessment results.

19. On the Developmental Profile, Ms. Anderson also neglected to fill out the front cover page with Student's name and the assessor's name. However, both names were filled out on the score sheet.

20. Although Dr. Nicoloff explained how important it was for the cover sheet to be filled out because the score sheet is perforated and could be separated from the assessment making it difficult to know who the results belong to, there is no indication the score sheet was actually separated from the test booklet.

21. Ms. Anderson also administered the Beery-Buktenica Developmental Test of Visual-Motor Integration. This test was designed to determine Student's visual-motor integration ability. The test is administered by showing Student pictures and asking Student to copy them. There are six boxes on each page, three boxes have images and three are blank for Student to draw the images. Student attempted nine drawings; she was given credit for six of those drawings. However, Student was also given three additional points because she was able to imitate drawings. The test manual lets the assessor assume that if the student can imitate drawings the student would also be able to scribble, which is the first tasks worth three points. If Student was not able to imitate the drawings she would not be given credit for the scribbling unless she completed that task. Ms. Anderson scored the test by writing either a zero or one at the bottom of each drawing Student made and tallying the total on the summary. Student scored a total of nine points, six for the imitated drawings and three for the assumed scribbles. The score on the summary sheet was nine. This result indicates that Student's visual motor ability was in the average range.

22. In addition to the score summary sheet there is also a recording and scoring sheet. That sheet has spaces for the score on each particular drawing as well as a place for comments. Ms. Anderson does not usually fill out the recording and scoring sheet; she simply flips through the test and adds up the correct answers. If there is something to note, such as student switched hands or brought the paper close to her face, Ms. Anderson would write it in the comment section. Ms. Anderson did not notice anything with Student that she needed to comment on.

23. Dr. Nicoloff opined that the score reporting form was the most important part of the Visual-Motor Integration test. However, Dr. Nicoloff has never administered the Visual-Motor Integration test and was not able to point to the section in the manual that states the score reporting form must be filled out for the assessment to be valid.

24. The third test Ms. Anderson administered was the Bayley Scales of Infant and Toddler Development, third edition. The Bayley is a play based assessment to determine developmental and cognitive functioning. Ms. Anderson conducted the assessment in Spanish. Student scored in the average range on the assessment. Throughout the assessment Ms. Anderson was seated across the table from Student. Ms. Anderson started the assessment with the section that corresponded to Student's age. During the questions that required a stopwatch, Ms. Anderson held the stopwatch in her lap. Parent raised a concern that more time was given than allowed, however, Parent did not recall if Ms. Anderson used a stopwatch, nor was she familiar with the time allowed for each question.

25. There were several questions on the Bayley that asked Student to identify multiple objects. If Student could identify all objects then Ms. Anderson did not make a mark on the question, however, if Student was not able to identify all objects, Ms. Anderson placed checkmarks by the objects correctly identified and X's by the objects Student could not identify.

26. Dr. Nicoloff explained that when she observed the Bayley being administered when there was a question that asked if a student could identify multiple objects, that assessor checked the box that correlated to the object the student could identify. Because of that observation, Dr. Nicoloff opined that it was important to check the boxes when a student is able to identify an object. However, it is noteworthy that in the example Dr. Nicoloff gave, that student was not able to identify all the objects, Dr. Nicoloff did not discuss an example where a student was able to identify all the objects.

27. Dr. Plaxton-Hennings has administered the Bayley and she explained the protocols for administering the Bayley. Although there are check boxes provided for some questions, the protocols do not require the boxes to be checked. The protocols also do not require the time students take to answer the questions to be listed on any of the timed questions Student was administered.

28. Ms. Anderson produced a written assessment report that was completed on January 6, 2016. All of the tests given by Ms. Anderson are validated and were appropriate for the purpose used. None of the tests were racially, culturally or sexually biased, nor were they administered in a manner that was racially, culturally or sexually biased. All of the tests were administered in Spanish, Student's native language.

#### SPEECH AND LANGUAGE ASSESSMENT

29. Mayra Barahona-Williams, speech and language pathologist, conducted a speech and language assessment at Patricia Baily Elementary School. Ms. Barahona-Williams has a bachelor of arts and master of science degree in communicative disorders from University of Redlands. Ms. Barahona-Williams holds a speech and language services credential, is a member of the American Speech-Language-Hearing Association, and is fluent in Spanish. Ms. Barahona-Williams has been a speech language pathologist since August 2012 and has conducted over 300 assessments; at least 150 of the assessments have been conducted in Spanish. Ms. Barahona-Williams is

currently responsible for conducting bilingual speech and language assessments and working with children between the ages of 3 and 15. Ms. Barahona-Williams is knowledgeable about, and trained in, administering standardized assessment instruments. She was qualified to administer the assessment based on her education, training, credentials, and experience.

30. Ms. Barahona-Williams conducted all of the assessments in Spanish, and her testing occurred in February 2016. Ms. Barahona-Williams met with Student three times; all three times Mother was present, Father was present for one session. Mother remembers all of the testing sessions occurred in February, specifically February 3, 2016, February 19, 2016, and February 22, 2016. Ms. Barahona-Williams's report lists testing dates of February 3, 2016, and February 22, 2016. Ms. Barahona-Williams testified that her report was complete on February 25, 2016; however, because there was not an IEP team meeting scheduled, she met with Student on March 18, 2016, for one more session of informal testing.

31. Ms. Barahona-Williams also reviewed the referral information from Inland Regional Center, including Student's early start individualized family service plan. Ms. Barahona-Williams understood the suspected disability to be a communication delay, and confirmed that Parent was concerned with expressive language, overall language, and articulation.

32. Although Ms. Barahona-Williams was only able to observe Student during the testing sessions, she observed how Student spoke and interacted with Parent. Student made eye contact with Ms. Barahona-Williams when greeting her, responded to questions, and had normal speech production. Student did not exhibit any repetitive behaviors or socially inappropriate behaviors such as hitting or kicking. Ms. Barahona-Williams observed Student walking through the halls appropriately. Student only

needed very minimal redirection during testing and was able to point out bubbles she saw and wanted to play with.

33. Ms. Barahona-Williams assessed Student with the Preschool Language Scale, Fifth Edition, Spanish version. This is a play based assessment that measures a student's overall language skills, auditory comprehension and oral expression, vocabulary, ability to use grammar, and sentence structure. Student was able to produce age appropriate words and sounds in Spanish and was intelligible 80 percent of the time. She scored in the average range on both the auditory comprehension and expressive communication subtests.

34. Ms. Barahona-Williams also administered the Expressive and Receptive One Word Picture Vocabulary test in Spanish. The Receptive test measures the ability to understand single word vocabulary, and the Expressive test measures the ability to use single word vocabulary. Ms. Barahona-Williams started with the first question in each test and continued until a ceiling had been established. Student scored in the average range on both assessments. Parent believed Ms. Barahona-Williams may have excessively prompted Student during the assessment, but again was not familiar with the test protocols, questions, or time allowed.

35. Dr. Plaxton-Hennings explained the basal with the One Word Picture tests<sup>7</sup>. With both tests if a basal cannot be established by eight correct answers in a row, then the basal becomes the first question of the assessment.

36. Ms. Barahona-Williams administered the Bilingual English-Spanish Assessment, even though it is not normed for students under the age of four. Ms.

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<sup>7</sup>Dr. Plaxton-Hennings has previously administered the One Word Picture Test, mostly in her role as a clinical neuropsychologist. Dr. Plaxton-Hennings is also qualified to train individuals in the use of the assessment.

Barahona-Williams used the Bilingual Assessment informally to gather more information about Student's morph syntax abilities. Ms. Barahona-Williams chose the Bilingual Assessment because she was not aware of a similar test that is normed for students under age four, and she wanted to gather more information as Student's scores on the Preschool Language Scale were higher than expected. Ms. Barahona-Williams did not use the results of the Bilingual Assessment to determine eligibility.

37. Ms. Barahona-Williams signed her report on April 13, 2016, when she had it translated into Spanish for Parents. The report was given to Parents before the IEP team meeting on June 3, 2016.

#### IEP TEAM MEETING

38. Parent was invited to attend a January 11, 2016, IEP team meeting, however, Parent told Ms. Anderson she was not going to attend because the speech and language report was not complete. On March 18, 2016, Parent discussed the IEP team meeting with Ms. Anderson; Parent renewed her request to have both Ms. Anderson and Ms. Barahona-Williams present at the IEP team meeting, and asked for the reports in Spanish. Parent was invited to an IEP team meeting on April 18, 2016; however Parent refused to attend because she had not yet received the reports in Spanish. On June 3, 2016, District convened an IEP team meeting to discuss the assessment results. Both Ms. Anderson and Ms. Barahona-Williams attended and presented the results of their assessments.

#### REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATIONS

39. Parent requested independent educational evaluations on December 22, 2016. District responded by filing this action on January 31, 2017.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA

1. This hearing was held under the 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>8</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 free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, 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 free and appropriate public education 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.) "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 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

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<sup>8</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

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.)

4. The Ninth Circuit Court of Appeals had 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 were applied to define the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)



5. The Supreme Court's recent decision in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S.\_\_\_\_, 137 S.Ct. 988 (2017 WL 1066260) reaffirmed that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. The Ninth Circuit further refined the standard in *M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir 2017) 852 F.3d 840, stating that that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so as to enable progress commensurate with non-disabled peers, taking into account the child's potential.

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).) 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] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) District filed the complaint, therefore, it had the burden of proving the essential elements of its claim.

#### ISSUE 1: DISTRICT'S PSYCHO EDUCATIONAL ASSESSMENT

7. District contends that its psycho educational was appropriately administered by qualified assessors and met all statutory requirements. For that reason, District asserts that it is not obligated to fund an independent psycho educational assessment of Student. Student contends the assessment was not appropriate because

district failed to assess in all areas of suspected disability, the assessors failed to follow the test protocols and observe her outside the testing environment, and the assessment was not timely.

#### Independent Educational Evaluations

8. Under certain conditions, a student is entitled to obtain an independent educational 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 IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) "Independent educational 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 educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

9. When a student requests an independent educational 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 IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

#### Requirement for Assessments

10. 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.)<sup>9</sup> Thereafter, a special education student must be reassessed at least once every three years, or more frequently if conditions warrant, or if a parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a).) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

11. If a district decides to assess a student, it must give the parent a written assessment plan within 15 calendar days of referral, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five schooldays, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (a) ; 56321, subd. (a).) The plan must explain, in language easily understood, the types of assessments to be conducted. (Ed. Code, § 56321, subd. (b).) The parent then has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c)(4).)

12. Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) In California, a test must be selected and administered to produce results "that accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure . . ." (Ed. Code, § 56320, subd. (d).) A district must ensure that a child is assessed "in all areas related to" a suspected disability. (Ed. Code § 56320, subd. (c), (f).)

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<sup>9</sup> An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

13. Assessments must be conducted by individuals who are both “knowledgeable of [the student’s] disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).) School districts are required to ensure that the assessment tools and strategies provide relevant information that directly assists persons in determining the educational needs of a child. (34 C.F.R. § 300.304(C)(1)-(7).)

14. Tests and assessment materials must be selected and administered so as not to be racially, culturally, or sexually discriminatory; and must be provided and administered in the student’s primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

15. An assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subds. (a), (b).)

16. Once a student has been referred for a reassessment, a determination of eligibility and an IEP team meeting shall occur within 60 days of receiving parental consent for the assessment. (See 20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56302.1, subd. (a).)

#### Analysis

17. District timely filed a request for due process hearing to show that its assessments were appropriate. Parent requested independent psycho educational and speech and language evaluations on December 22, 2016. District responded to this request by filing a due process hearing request on January 31, 2017. District’s filing to defend its assessments within 40 days of Student’s request for independent educational evaluations does not constitute an undue delay.

18. District established that Ms. Anderson is a qualified to administer the psycho educational assessment by virtue of her education and experience. She is a credentialed school psychologist and had performed assessments of many students.

19. Ms. Anderson used the Developmental Profile – parent interview, Test of Visual-Motor Integration, Bayley Scales of Infant Toddler Development, records review, and observation for her assessment; she did not rely on any one procedure as the sole criteria for determining Student's eligibility for services. The test instruments she used were employed for valid and reliable purposes, were not discriminatory, and were administered according to their instructions.

20. Student argued the testing protocols were not followed because the scores on the Developmental Profile were not tallied at the end of each subtest and questions were asked beyond the ceiling. Although the scores were not tallied at the end of each subtest, they were correctly tallied on the score sheet. Failing to tally the scores at the end of the subtest does not invalidate the assessments results. Nor does testing the limits invalidate the results, as nothing beyond the ceiling was factored into the score.

21. Student claims that Developmental Profile was invalid because Ms. Anderson did not complete the cover page of the test protocol listing Student's name and the examiner's name. However, the score sheet with the same information on it was filled out and no indication the score sheet was separated from the test booklet. Moreover, not writing the student's or assessor's name on the cover sheet does not invalidate the test results.

22. Student contends that when the questions on the Bayley called for a stopwatch the time was not recorded, however, the test did not require the time be recorded on those questions. Student further contends Parent did not recall seeing Ms. Anderson use a stopwatch during the testing, and believed Student was given more

time than should have been allowed. However, Ms. Anderson persuasively testified regarding her experience with the tests and protocols and that she followed the protocols, whereas Parent is not familiar with the tests, or the proper procedure for administering the tests. Moreover, Ms. Anderson was holding the stopwatch on her lap, therefore it is entirely possible that Parent simply did not see the stopwatch.

23. Student contends that Ms. Anderson should have referred Student for a vision assessment because she was aware that Student's eyesight was a concern. Ms. Anderson observed Student during the assessment and did not notice any vision issues that would impair Student's ability to complete the assessments. Ms. Anderson could have referred Student for a vision assessment, but the fact that she did not does not make the resulting psycho educational assessment inappropriate. Moreover, Ms. Anderson was not qualified to perform a vision assessment therefore it would not be part of a psycho educational assessment<sup>10</sup>.

24. In addition to the assessments Ms. Anderson administered, she also observed Student during the testing session. Ms. Anderson observed Student in the lobby of Sunshine Early Childhood Center, in the hallway walking to the assessment, and in the classroom during the assessment. Ms. Anderson was able to observe Student waiting patiently in the lobby, walk through the hallways without running or opening doors, and follow directions. Ms. Anderson also observed Student's demeanor; Student seemed calm during the assessment even though she was in an unfamiliar environment. Student maintained good attention during the assessment and did not exhibit any problematic behaviors. Student argues that students must be observed in a general

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<sup>10</sup>Student did not ask for a vision IEE, nor did District file for due process to defend a vision assessment, therefore, this decision does not address the appropriateness of a vision assessment or any need for a vision assessment.

education setting, however, this misstates the law. For assessments where the suspected disability is a specific learning disability an observation in the learning environment, not necessarily a general education setting, is required. Here, there is nothing to suspect that Student had a learning disability. The referral for assessment from Inland Regional Center listed a communication concern and parent confirmed that her concern was Student's limited communication. Although there is a family history of learning disabilities, nothing indicated that was a concern for Student. Moreover, Student argues Ms. Anderson could have observed Student in the home or at a community setting, however, Dr. Plaxton-Hennings explained why observing Student in the home or a temporary setting would not elicit valid results.

25. Student contends the assessment was not timely. Parent signed the assessment plan on December 5, 2015, Ms. Anderson assessed Student on December 8, 2015, and completed her report on January 6, 2016. Ms. Anderson's report was complete and contained all necessary information. Ms. Anderson attempted to hold an IEP team meeting with Parent on January 11, 2016, however, Parent wanted to wait to hold the IEP team meeting until both the psycho educational and speech and language reports were complete. Although it took District until June 3, 2016, to hold an IEP team meeting to discuss the results of both assessments, that delay is not attributed to Ms. Anderson's psycho educational report.

26. Student's many objections to the psycho educational assessment have all been considered and are discussed above. However, notwithstanding those objections, District met its burden of proving that the psycho educational assessment was legally compliant.

## ISSUE 2: SPEECH AND LANGUAGE ASSESSMENT

27. District contends that its speech and language assessment was appropriately administered by qualified assessors and met all statutory requirements.

For that reason, District asserts that it is not obligated to fund an independent psycho educational assessment of Student. Student contends the assessment was not appropriate because district failed to assess in all areas of suspected disability, the assessors failed to follow the test protocols and observe her outside the testing environment, and the assessment was not timely.

28. District established that Ms. Barahona-Williams was qualified to administer the speech and language assessment by virtue of her education and experience. She is a credentialed speech and language pathologist and has performed assessments of many students.

29. Ms. Barahona-Williams spent over three and a half hours assessing Student. She used the Expressive and Receptive One Word Picture Vocabulary Test and the Preschool Language Scale to formally assess Student. She also reviewed the Inland Regional Center records, observed Student, and used the Bilingual English-Spanish Assessment to gather more information. Ms. Barahona-Williams did not rely on any one procedure as the sole criteria for determining Student's eligibility for services. The test instruments she used were employed for valid and reliable purposes, were not discriminatory, and administered according to their instructions.

30. Student contends Ms. Barahona-Williams excessively prompted Student while administering the Expressive and Receptive One Word Picture test and Preschool Language Scale. Ms. Barahona-Williams persuasively testified as to her experience conducting assessments and following the protocols. Ms. Barahona-Williams adhered to the time restraints and test prompts. Parent was concerned that Ms. Barahona-Williams was giving Student the answers. Parent remembered one specific example about a picture of a dog eating; when Student could not answer the question Parent remembers Ms. Barahona-Williams showing Student a toy that looked like a strawberry. However, Parent does not know if Student was given credit for the answer, or if the test manual



allowed for follow up questions. It is understandable that Parent may have been uncomfortable watching Student struggle to answer questions. However, given that Parent could only remember one question that she thought Ms. Barahona-Williams prompted Student on, her testimony was not persuasive.

31. Student further contends it was inappropriate for Ms. Barahona-Williams to administer the Bilingual English-Spanish Assessment. Although the Bilingual English-Spanish Assessment is not normed for Student's age group, Ms. Barahona-Williams used the assessment as an informal information gathering tool, not part of the formal assessment. She used it because the results of Preschool Language Scale were surprising because Student's scores were higher than expected. The informal use of the Bilingual English-Spanish Assessment does not invalidate the speech and language assessment.

32. After completing the assessments, Ms. Barahona-Williams created a written report. The report was comprehensive, it discussed the assessments and results, observations and behaviors noted during testing, and the reasons why Student did not qualify as a student with a speech and language disability. However, the assessment was not timely. Parent signed the assessment plan on December 5, 2015, excluding breaks of five days or more, the assessment should have been completed and presented to Parent in an IEP meeting by February 19, 2016. Ms. Barahona-Williams was not finished with testing, much less her report, by February 19, 2016. Ms. Barahona-Williams may have been able to complete the report by February 25, 2016, however, she did not. Because she did not believe there was a date set for the IEP team meeting, Ms. Barahona-Williams continued to assess Student into March of 2016. Moreover, Ms. Barahona-Williams did not submit her report for translation until April 13, 2016, even though Parent requested a copy translated into Spanish on March 18, 2016. As a result, the IEP team did not meet to discuss the assessment reports until June 3, 2016, 156 days after Parent signed the assessment plan.

33. On these facts, the District has not met its burden that the speech and language assessment was legally compliant. Therefore; Student is entitled to a speech and language independent educational evaluation.

## ORDER

1. District's December 8, 2015 psycho educational assessment met all legal requirements. Therefore, Student is not entitled to a psycho educational independent educational evaluation at public expense.

2. District's February 22, 2016 speech and language assessment does not meet all legal requirements. Therefore, Student is entitled to a speech and language independent educational evaluation at public expense.

## 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 Issue 1 and Student prevailed on Issue 2.

## RIGHT TO APPEAL

This is 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 90 days of receipt.

Dated: May 31, 2017

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LINDA JOHNSON

Administrative Law Judge

Office of Administrative Hearings