

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ELK GROVE UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2018060213

DECISION

Elk Grove Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on June 5, 2018, naming Parents on behalf of Student. OAH granted Elk Grove's request for a continuance on June 25, 2018.

Administrative Law Judge Alexa J. Hohensee heard this matter in the City of Elk Grove, California on July 24 and 25, 2018.

Epiphany Owen and Cathy Holmes, Attorneys at Law, appeared on behalf of Elk Grove. Jennifer Lipsky, Program Specialist at Elk Grove, and Douglas Phillips, the Director of Special Education for Elk Grove, attended the hearing on behalf of Elk Grove.

No one appeared on behalf of Student on either day.¹

At Elk Grove's request, OAH granted a continuance until August 16, 2018, for the parties to file written closing arguments. Parents were notified of the continuance by written order. Upon timely receipt of written closing arguments from Mother and Elk Grove, the record was closed and the matter submitted for decision.

ISSUES

1. Was Elk Grove's functional behavior assessment appropriate such that Student is not entitled to an independent functional behavior educational evaluation at public expense?²

2. Was Elk Grove's occupational therapy assessment appropriate such that Student is not entitled to an independent occupational therapy educational evaluation at public expense?

3. Was Elk Grove's speech and language assessment appropriate such that Student is not entitled to an independent speech and language educational evaluation at public expense?

¹ OAH attempted to contact both Parents by telephone on July 24, 2018, before the start of the hearing. Mother was reached, and stated that she would not attend the hearing. OAH was unable to reach Father, and left messages and a number to contact. The hearing was trailed until 2:00 p.m., but Father did not appear or contact OAH.

² Federal law uses the term "evaluation," and California law uses the term "assessment" for the process of measuring students' educationally-related abilities and performance. The two terms have the same meaning and are used interchangeably in this Decision.

SUMMARY OF DECISION

Elk Grove's functional behavior, occupational therapy and speech and language assessments of Student were appropriately completed. Elk Grove obtained parental consent to the assessments, properly conducted comprehensive assessments with qualified and competent assessors, prepared and provided Parents with copies of complete assessment reports, and reviewed the assessment results with Parents at an individualized education program team meeting for Student. Accordingly, Student is not entitled to independent educational evaluations at public expense.

FACTUAL FINDINGS

1. At the time of the hearing, Student was a twelve-year-old young man. Student resided with his parents within Elk Grove's boundaries, and eligible for special education and related services under the categories of autism and intellectual disability at all relevant times.

2. Pursuant to a February 18, 2016 IEP from a previous school district, Student was placed at the beginning of the 2017-2018 school year in Stephani Davis' sixth grade general education classroom for four hours per day and Amy Roberts' special education autism classroom for two hours a day. He was accompanied by a one-on-one paraeducator throughout the school day. Student also received occupational therapy at school and speech therapy with a nonpublic agency off-campus. Student had a very limited vocabulary and primarily used a communication device to communicate.

3. On October 12, 2017, Elk Grove sent Mother an assessment plan proposing assessments for Student's three-year, or triennial, educational program review. The assessment plan proposed assessments in school and classroom behavior, language and speech, and occupational therapy, among others.

4. Mother consented to the October 12, 2017 assessment plan in writing on

November 24, 2017, and requested additional assessments not at issue in this matter.

FUNCTIONAL BEHAVIOR ASSESSMENT

5. The functional behavior assessment of Student was conducted in December 2017 and January 2018, by Lauren Stewart, an autism behavior support specialist at Elk Grove, who was well-qualified to conduct a functional behavior assessment of Student. Ms. Stewart had a master's degree in child development, and extensive education and training in applied behavior analysis and evidence-based strategies and techniques for working with children in a classroom setting. Prior to joining Elk Grove in 2016, she had worked in clinical settings with children with autism, providing individual behavior programming, training parents, running social skills programs for children, conducting functional behavior analyses, and developing behavior intervention plans. Ms. Stewart was familiar with autism and its effects on behavior in the classroom. Ms. Stewart's demeanor at hearing was professional, and her testimony was informative and persuasive.

6. Ms. Stewart conducted the assessment in collaboration with Charles Hill, a well-qualified board certified behavior analyst with Elk Grove. Ms. Stewart was scheduled to go on leave after completing the assessment, and Mr. Hill was needed to report on the assessment results at an IEP team meeting, assist in the development of a behavior support plan, and train staff members on any behavior plan developed. Mr. Hill had a professional demeanor at hearing, and clearly held Ms. Stewart and her assessment skills in high regard. His opinions regarding Student's functional behavior assessment were persuasive, and he credibly testified regarding the review of the assessment at an IEP team meeting with Parents.

7. Ms. Stewart used multiple measures of Student's behaviors in relationship to the school setting. She gathered indirect information by reviewing Student's educational records, including IEPs and psychoeducational assessments, and interviewed

Student's teachers, one-on-one paraeducators, and Father.³ She had Student's teachers complete a behavioral questionnaire targeting two behaviors identified as problem areas for Student: aggression and non-compliance. Student's teachers reported that Student was generally compliant when asked to complete assignments at his academic level, but when presented with difficult tasks, particularly in the general education classroom, Student would become aggressive by throwing objects, pushing over his desk, pinching, grabbing, poking others and attempting to gouge others' eyes. Student also engaged in work refusal and attempted to leave his workspace. Student's behavior was worse at the beginning of the year, and subsided when Student was given curriculum at his own academic level by his one-on-one paraeducator in a separate area of the general education classroom. Father reported that at home and in the community, Student was generally happy and compliant unless he was hungry, tired, or had to wait for access to something he wanted. Student enjoyed outdoor activity and access to video games as rewards, both at school and at home.

8. Ms. Stewart observed Student in a variety of school settings. She observed Student on two occasions for 45 minutes each in Ms. Roberts' special education classroom, where he worked well with a one-on-one paraeducator, completed assignments, transitioned between learning stations, and interacted with peers with prompting. However, on a day when he was tired, he refused to complete work after returning from an off-campus speech therapy lesson.

9. Ms. Stewart observed Student in the general education setting over three days, for a total of over four hours, accompanied once by Mr. Hill. Student participated

³ Ms. Stewart and Mr. Hill made numerous attempts to contact Mother for information on Student. Mother refused to complete questionnaires over the phone, but also failed to return the written questionnaires sent to her.

in a fast-paced, noisy game in the gym during physical education with the help of his one-on-one paraeducator, although his participation lagged when the paraeducator attempted to fade support. Student followed the physical education teacher's instructions independently only 20 percent of the time, and did not respond to peer requests without prompting. Student could line up to return to class independently, however, back in the general education classroom he was frequently off-task until prompted by his paraeducator. During academics, Student was dependent upon his one-on-one paraeducator to follow his visual schedule and complete his work, which was at the kindergarten/first grade level rather than the sixth grade level of his general education classroom. He did not follow any directions given by Ms. Davis, but followed 100 percent of directions given by his one-on-one paraeducator. During one observation, Ms. Davis allowed two of Student's peers to teach Student how to play four-square outside, and Student responded to his peers during that activity one-third of the time. Later, during a tetherball game, Student was observed to respond to his peers independently almost 40 percent of the time. All of Student's responses to his peers were non-vocal, as Student could not use his communication device while simultaneously engaging in physical activities. His responses consisted of interactive gestures, such as high-fives or fist-bumps. During lunch, Student responded to questions about his lunch, answering that he had "strawberries" and wanted "vegetables."

10. Ms. Stewart had Student's one-on-one paraeducators gather data on aggression (attempt or act of pinching, scratching, hitting, or head-butting) and non-compliance (continuation with current activity after second presentation of new instruction) for approximately six weeks. Student had 53 events of aggression, with two to three per day on average. Student exhibited only three events of non-compliance, but the paraeducators and classroom staff reported that Student engaged in a higher rate of

noncompliance when unsure of activities or when working with unfamiliar staff. Ms. Davis had placed Student in his own section of the general education classroom and provided his one-on-one paraeducator with a binder of materials at Student's academic level, which reduced the aggression and non-compliance seen at the beginning of the school year. Student's one-on-one paraeducator also took Student outside the classroom, which Student enjoyed, whenever he was disruptive to the general education classroom.

11. Ms. Stewart analyzed the data she collected in light of her observations. She concluded that when Student was presented with an unfamiliar task, an unknown staff member, or was unable to keep up with academic expectations, he attempted to turn away or elope from the situation. When that did not work, Student became aggressive. She concluded that noncompliance occurred when Student was asked to transition to a non-preferred activity and he instead turned away, attempted to access preferred items or tasks, or sought attention from staff in inappropriate ways such as pinching. If Student continued to be asked to engage in the non-preferred activity, or was not given the item he preferred, he would elope, throw items, or take items. Ms. Stewart hypothesized that Student's behaviors were a function of escape/avoidance and attention seeking.

12. In the functional behavior assessment report, dated January 31, 2018, both Ms. Stewart and Mr. Hill concluded that Student had minimal interaction with general education staff and students during classroom time, and was highly prompt-dependent upon his one-on-one paraeducator to initiate, sustain and complete assigned tasks. The then-current consequences of Student's behavior were to reduce demands by giving him his own space and curriculum, or to take him outside the classroom, and to give him the attention of the on-on-one paraeducator, who was providing individualized instruction without regard for the general education lessons or interaction with the

teacher or peers. However, in the special education autism classroom, Student followed familiar routines, participated in small group instruction with his peers, interacted with his peers minimally and followed a majority of the teacher's instructions, because the academic work was appropriate to Student's skill level and he could complete his work with a higher level of independence. Ms. Stewart and Mr. Hill noted Student's diagnoses of autism and intellectual disability, and summarized Father's report that other than a gluten-free diet and medication for attention, there were no health, developmental or medical findings of concern.

13. Ms. Stewart and Mr. Hill concluded that Student was not accessing the general education curriculum, and should be placed in Ms. Robert's special education autism classroom, where he could receive instruction at his level and be given opportunities to independently and effectively gain educational benefit. They made a number of recommendations for accommodations and modifications in the classroom, such as visual schedules, planned transitions and shorter instruction periods. They also concluded that Student required implementation of a behavior intervention plan of proactive and reactive strategies to address problem behavior, and proposed a draft behavior intervention plan.

OCCUPATIONAL THERAPY ASSESSMENT

14. In December 2017 and January 2018, Natalie MacNeill conducted an occupational therapy assessment. Ms. MacNeill is a licensed occupational therapist with over 20 years of experience. For 12 of those years, she had assessed students and provided school-based occupational therapy services. She regularly took continuing education courses on autism and its effects on sensory processing and motor function. Ms. MacNeill had conducted over 1,350 occupational therapy assessments on students with a wide variety of disabilities. She was knowledgeable about autism and well qualified to conduct the occupational therapy assessment of Student. Ms. MacNeill had

assessed Student in 2012 as an independent contractor. Ms. MacNeill had a professional demeanor at hearing, and convincingly testified that she obtained sufficient information to assess Student in the area of occupational therapy, and that the assessment results were valid representations of Student's visual motor abilities, fine motor skills and sensory processing

15. Ms. MacNeill spoke to Student's general education and special education teachers about how Student functioned during a typical school day, and they had no motor control or sensory concerns. She interviewed Student's occupational therapy provider about interventions that worked for Student, which included raised-line graph paper for letter spacing and movement breaks, a movement cushion, and a brush for Student to run over his fingers for sensory input. Ms. MacNeill reviewed prior occupational therapy reports, prior IEP's, and prior psychoeducational reports. She sent multiple written requests to each Parent for feedback about Student's response to sensory information in the home. However, neither Parent responded.

16. Ms. MacNeill used standardized instruments to test Student's visual perception, visual motor integration, fine motor skills, and graphomotor skills. She was trained in the administration of each of these tests and scales and had used them hundreds of times. Each of the instruments was designed to assess students with disabilities, including autism, in Student's age group. The tests given were non-discriminatory, Ms. MacNeill administered the tests in accordance with the instructions, and she obtained valid results. The instruments she selected to provide information on Student's motor skills addressed Student's ability to pull information from background materials, to complete incomplete visual pictures, and to recognize differences in similar visual forms (such as the same letters in different fonts). Student's one-on-one paraeducator was present during testing, but just observed Student without assisting him. Ms. MacNeill had concerns that Student might not understand the tasks involved in

one visual perception test, and administered multiple visual perception tests to ensure that she had accurate information. Student's results on those tests were consistently in the very low range, and she believed the test results to be valid.

17. Ms. MacNeill obtained non-standardized handwriting samples to review Student's letter formation, orientation and spacing, and observed Student while he was writing to determine his range of motion, bilateral coordination, grasp, wrist strength and stabilization. She also administered a standardized measure of fine motor skills, such as the ability to color within spaces, draw lines, connect dots, cut paper, copy shapes, string beads, sort cards and other manual dexterity skills, and Student scored well below average.

18. Ms. MacNeill also assessed Student's sensory processing abilities because Student had needed a sensory diet in the past and sensory processing deficits were common in children with autism. The assessment included observations of Student in the general education classroom during physical education and math, in Ms. Davis' autism classroom, and in an occupational therapy session. She observed that Student could catch a basketball, complete writing tasks, and use a laptop, scissors, and tweezers. During general education, Student was playing tetherball, was very coordinated, and enjoyed the game. Student tolerated bright lights, loud playground noise and moderate classroom noise. He navigated the classroom and playground without crashing into things, did not use excessive force, and had no excessive movement or rocking. Student's ability to process proprioceptive and vestibular information appeared well-regulated. He liked to play tetherball at recess, which provided him with sensory input, and he bounced when excited, but Ms. MacNeill did not observe any sensory dysfunction. This indicated to her that Student tolerated tactile input and background noise.

19. Ms. MacNeill's occupational therapy assessment was one part of an

interdisciplinary assessment, and she drafted the motor development and sensory processing components of that report. The report included a health component that provided educationally relevant health, development and medical findings. It reported that Student's hearing could not be assessed, but he had passed his vision screening. The interdisciplinary team did not find that environmental, cultural, or economic factors had disadvantaged Student during assessment, and noted that Student used a specialized communication device to communicate.

20. With regard to Student's motor development and sensory processing, Ms. MacNeill reported that his visual perception was well below that of his peers, and that Student's difficulty with visual perceptual skills impacted his ability to demonstrate consistent baseline orientation, size of letters, and spacing between words. However, although Student's fine motor skills were below average, she concluded that they were very functional in the classroom, as he had a good pencil grip, the ability to use both hands together, and the ability to hold and manipulate scissors. As to sensory processing, Ms. MacNeill reported that Student exhibited no sensory seeking or sensory avoidance behaviors, demonstrating the ability to process environmental sensory information without difficulty. She recommended accommodations such as lined graph paper for written tasks, continued use of movement breaks and sensory tools, and consultation between an occupational therapist and Student's teachers, to support his fine motor and sensory needs.

SPEECH AND LANGUAGE ASSESSMENT

21. Afeefa Mikbel, an Elk Grove speech pathologist, conducted Student's speech and language assessment in December 2017 and January 2018. Ms. Mikbel held a master's degree in speech pathology and audiology, was a licensed speech language pathologist, and had received her certificate of clinical competence in speech-language pathology from the American Speech-Language-Hearing Association. Ms. Mikbel had

conducted over 90 assessments of students, from preschool through high school, with a range of disabilities including autism, Down syndrome, apraxia and intellectual disability. She was familiar with Student from before she worked for Elk Grove, as she had been Student's treating speech pathologist from August 2014 through October 2015 while working at another school district. Her demeanor at hearing was calm and professional, and she testified persuasively regarding the appropriateness of her assessment.

22. Ms. Mikbel gathered information on Student's speech and language from multiple sources. She reviewed Student's prior speech and language assessments. She spoke to Student's current speech pathologist twice, who reported that Student required verbal models 100 percent of the time to label pictures or verbalize short phrases, and was learning to ask "I want" and "I see" on his communication device. Ms. Mikbel spoke with Mother, who was concerned that Student's speech volume had decreased, that his echolalia had increased, and that Student was not pointing or using his communication device. Ms. Roberts told her that Student struggled with language and had insufficient language to get his social needs met. Ms. Mikbel observed Student for two to three hours in the school setting, and saw that Student depended heavily on the prompting of his paraeducator to participate in any social communication, even to wave or high-five. Student could not follow general instructions independently, for example, during a snack break he needed his paraeducator to tell him to eat the snack in front of him before he would eat it.

23. Ms. Mikbel assessed Student at the school site and the clinic where Student received nonpublic agency speech services. She performed the assessment in English, Student's primary language and the one spoken in his home, and chose appropriate assessment tools in light of his limited speech production. Ms. Mikbel assessed in all areas, including vocabulary, articulation, receptive language, expressive language, pragmatic language, and overall functional communication skills. Ms. Mikbel

chose assessment instruments designed to assess Students with disabilities, including autism, in Student's age group, and was not culturally discriminatory. She was qualified to administer the tests she chose, and she had previously used them 40 to 90 times, depending on the test. She administered all tests according to the publisher's instructions.

24. Ms. Mikbel chose a test instrument that looked at receptive and expressive language skills at the one-word level, but Student struggled to label one-word items. Although Student had increased his vocabulary from previous years, his scores in both receptive and expressive language were very low, which meant that it would be difficult for him to get his wants and needs met. Ms. Mikbel attempted to administer a standardized test to look at language processing skills, including pragmatic (social) language. However, she discontinued that test as not a fair measure of Student's language skills, because he did not appear to understand the test questions.

25. Ms. Mikbel administered a functional communication test to look at Student's means of communication, including sensory/motor skills, attentiveness, receptive and expressive language, pragmatics, speech, voice, oral abilities (mouth movements), fluency and non-oral communication. Student's one-on-one paraeducator assisted him during this test to the extent permitted by the test, and the results provided Ms. Mikbel with information on Student's communication skills. Student demonstrated echolalia, needed assistance with self-help skills, but imitated motor actions with prompting and accepted being physically guided. Receptively, Student responded to his name, and to some verbal commands and gestures with prompting. Expressively, he used his communication device for "I want" and could differentiate between icons for preferred items. Student could communicate verbally with heavy prompting, limited primarily to social greetings ("hi" and "goodbye"), social niceties ("please" and "thank you") and requested items or activities ("cookies" and "tetherball").

Pragmatically, Student did not initiate communication, answer “wh” questions, ask questions, take turns during conversation, maintain a conversation, or share personal information.

26. Student’s general education teacher, Ms. Roberts, completed a questionnaire regarding Student’s pragmatic communication, and reported that Student never participated in unstructured activities, asked for clarification, or initiated conversations. He sometimes greeted others and made eye contact.

27. Ms. Mikbel administered a standardized test of articulation and the ability to make sounds in certain positions, such as at the beginning or ending of a word. She found that although Student’s ability to label items had increased over time, he was making more articulation errors as the words contained more complex sounds (such as the consonant blend “tr” in truck). Student’s fluency could not be assessed due to his limited verbal expression.

28. Ms. Mikbel did not observe Student using language in the school setting, although the school psychologist reported that Student could utter simple phrases, such as “I want breakfast,” “all done,” and “need help, please.” Instead, Student used his communication device to express what he wanted, such as asking his paraeducator if he could play tetherball. Although Student could make sounds, he was at the early developmental stage and his voice volume was low, which affected his intelligibility. Ms. Mikbel did not hear any spontaneous language, and Student scored in the severely delayed range for receptive, expressive and pragmatic language across standardized testing.

29. Ms. Mikbel completed her assessment report on February 5, 2018, and it was included in the interdisciplinary assessment report. In addition to reciting test scores, Ms. Mikbel reported that Student had a fair attention span and was cooperative with some prompts. He did not engage in any behaviors that interfered with testing. She

concluded that there needed to be a focus on Student's pragmatic skills, increasing his flexibility in play and life skills, increasing eye contact, and improving social exchanges. She recommended that Student receive integrated speech therapy services in a classroom with language activities, monitored by a speech therapist and implemented by the classroom staff. She noted that functional vocabulary could be embedded into a special education English Arts curriculum at Student's level, and recommended that the IEP team develop goals for functional language to include personal data recall and recognition of safety signs.

ATTEMPTS TO SCHEDULE AN IEP TEAM MEETING TO REVIEW ASSESSMENTS

30. On January 2, 2018, Elk Grove administrator Jennifer Lipsky spoke to Mother about scheduling an IEP team meeting to review assessments. Mother promised to email proposed dates.

31. By January 3, 2018, Ms. Lipsky had not received an email from Mother, so she sent Mother and Father an email (Parents' preferred means of contact) asking about Parents' availability for the week of February 5, 2018, to discuss the triennial assessments. Parents did not respond, so Ms. Lipsky mailed each Parent two IEP team meeting notices, for February 5 and February 6, 2018, and asked them to notify Elk Grove if either date worked. Neither Parent responded to the mailed notices for the IEP team meeting.

32. On January 29, 2018, Ms. Lipsky emailed Parents again to confirm either February 5 or February 6, 2018 as the IEP team meeting date. Neither Parent responded to the email.

33. On January 31, 2018, Ms. Lipsky emailed each Parent revised notices for February 5 and February 6, to advise Parents that Elk Grove had arranged the attendance at the meeting of Ms. MacNeill (who had inadvertently been left off the prior notice), Student's nonpublic agency speech pathologist, and representatives from

Student's nonpublic agency behavior service.

34. One of Student's teachers informed Ms. Lipsky that Mother had told her she would attend the IEP on February 6, 2018, and Elk Grove convened an IEP team meeting on that day. However, Parents did not appear, and the meeting adjourned without discussion or action.

35. On February 14, 2018, Ms. Lipsky emailed Parents an agenda and meeting notices proposing IEP team meetings at various times on February 20 and February 27, 2018.

36. On February 15, 2018, Mother contacted Ms. Lipsky to tell her that she was not available on the proposed dates, and to request a draft IEP team meeting agenda and copies of the assessment reports in advance of the meeting. Ms. Lipsky promptly mailed Parents copies of the functional behavior and interdisciplinary assessment reports.

37. Also on February 15, 2018, Ms. Lipsky emailed parents notices of meeting for the following dates: March 7, March 16, March 20, or March 21, 2018. She asked them to please let her know if any of those dates were acceptable.

38. Parents responded that they would attend the meeting on March 20, 2018.

MARCH 20, 2018 IEP TEAM MEETING

39. Elk Grove convened an IEP team meeting on March 20, 2018. Attendees included Father, Mother (by telephone), the nonpublic agency board certified behavior analyst supervising Student's one-on-one paraeducator, general education teacher Ms. Davis, special education teacher Ms. Roberts, Ms. Stewart, Mr. Hill, Ms. MacNeill, Ms. Mikbel, and a variety of other Elk Grove representatives and program providers.

40. Mr. Hill presented the functional behavior assessment report to the IEP team. Upon Mother's inquiry, he confirmed that the assessment report was the same one that she had received in February 2018. Mr. Hill then summarized the report's

finding that Student used aggressive behavior and noncompliance when presented with an unfamiliar or nonpreferred task as a means of escape from the demand or to gain attention. Mr. Hill reported that Student was prompt dependent, but could demonstrate a higher level of independence and reduced behaviors in the special education autism classroom where the curriculum was at his cognitive ability and skill level. Mr. Hill also reviewed the proposed behavior intervention plan, which included strategies for staff to support Student by helping Student to be clear on what was asked of him, providing him with motivation to earn something desirable and learning to intervene before an escalation in behavior. Father did not have any questions or concerns. Mother initially said that she had returned the behavior questionnaire sent to her, but when presented with multiple emails requesting her responses, realized that she had not and had no further questions or comments on the report.

41. Ms. MacNeill reviewed the results of her occupational therapy assessment. She commented that impulsivity may have impacted some of the standardized testing scores. She reported Student's difficulty with visual perception, but noted that his fine motor skills were functional in the classroom. She concluded that Student had sensory preferences, but exhibited no sensory seeking or sensory avoidance behaviors and could process environmental sensory information without difficulty. She recommended that Student's graphomotor needs be met through consultation between an occupational therapist and Student's teachers, and for the occupational therapist to monitor Student's sensory needs and consult with the teachers on classroom accommodations and modifications.

42. Mother told the team that she had observed increased sensory seeking behavior by Student at home. Ms. MacNeill requested that Mother and Father complete the sensory checklists to provide additional information on Student's sensory needs across settings. Neither Mother nor Father had any further questions regarding Ms.

MacNeill's report.

43. Ms. Mikbel presented the results of the speech and language assessment. She noted that Student made small gains in receptive vocabulary, but had severe impairment in receptive language, expressive language, pragmatics language and speech, and was prompt dependent with regard to communication. She told the team that there should be a focus on Student's pragmatic skills, including social exchanges, flexibility during play, and life skills, and on articulation and vocal volume to increase intelligibility. Ms. Mikbel recommended integrated speech services be provided by classroom staff, targeting functional language and monitored by a speech therapist. Mother disagreed with any reduction in direct speech services. Ms. Mikbel explained that Student was prompt dependent, and needed support in the classroom and not on a one-on-one basis for that reason. Parents had no further questions or comments about the speech and language assessment.

44. After review of the assessments, the IEP team agreed to reconvene to review present levels of performance and progress on annual goals, and to develop new goals, a behavior plan, and an offer of placement and services. The meeting was adjourned with agreement to reconvene at a time convenient to Parents.

45. Ms. MacNeill received Father's sensory checklists, and the interdisciplinary assessment report was updated to incorporate his concerns and responses. He did not report any significant or unusual areas of hypersensitivity (Student would jump at loud, unexpected noises) or under-responsivity (Student not bothered by messy hands or face). Father's input did not change Ms. MacNeill's opinions regarding Student's educationally-related sensory needs or her recommendations.

46. The IEP team reconvened on April 30, 2018. During that meeting, Mother requested an independent educational evaluation in occupational therapy, and told the team that she would request other independent evaluations that she did not specify at

that time.

47. Elk Grove corresponded with Mother over the following month to get clarification of her request for independent educational evaluations, and to schedule an IEP team meeting to discuss her concerns.

48. On May 29, 2018, Elk Grove convened an IEP team meeting, at which Mother requested independent educational evaluations “in all areas.”

49. On June 6, 2018, Elk Grove filed this due process request to defend its functional behavior analysis, and the occupational therapy and the speech and language portions of its multidisciplinary assessment.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA⁴

1. This hearing was held under the Individuals with Disabilities Education Act, 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) et seq.;⁵ Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education 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).)

⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁵ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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 IEP. (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 general, an individualized education program 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. The Supreme Court revisited and clarified the *Rowley* standard in *Endrew F. v. Douglas County School Dist.* (March 22, 2017) 580 U.S. __ [137 S.Ct. 988] (*Endrew F.*). It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, 137 S.Ct. at pp. 1000-1001, citing *Rowley*, 458 U.S. at p. 204.)

As applied to a student who was not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Endrew F.*, 137 S.Ct. at p. 1001.) The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

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).) 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. 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].) In this matter, Student had the burden of proof on the issue decided.

ASSESSMENTS

5. If a child with a disability has been found eligible for special education, a school district must ensure that reevaluations of that child are conducted if warranted by the child's educational or related service needs, or if requested by a parent or teacher. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(a)(1)(B)(i); Ed. Code, § 56321, subd. (a)(2).)

6. Individuals who are both "knowledgeable of the student's disability" and competent to perform the assessment must conduct assessments of students' suspected disabilities. (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. §

1414(b)(3)(B)(ii).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

7. School district assessors must review existing evaluation data on the child, including (i) information provided by the parents, (ii) current classroom based, local or State assessments, and classroom-based observations, and (iii) observations by teachers and related service providers. (20 U.S.C. § 1414(c)(1); 34 C.F.R. §300.305(a)(1).)

8. When conducting assessments, assessors must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) No single measure or assessment shall be the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304(c)(6).) The assessor must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).)

9. The assessments used must be: (1) selected and administered so as not to be discriminatory on a racial or cultural basis; (2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; (3) used for purposes for which the assessments are valid and reliable; (4) administered by trained and knowledgeable personnel; and (5)

administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

10. Assessments must be selected and administered so as to best ensure that, if the child has impaired sensory, manual or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual or speaking skills (unless those skills are the factors the test purports to measure.) (34 C.F.R. §300.304(c)(3); Ed. Code, § 56320(d).) Assessment tools and strategies must provide relevant information that directly assists persons in determining the educational needs of the child. (20 U.S.C. § 1414(b)(4); 34 C.F.R. §300.304(c)(7); see also Ed. Code, § 56320, subd. (b)(1).)

11. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health, development and medical findings, if any; (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327; see also 34 C.F.R. § 300.305(1) and (2).) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).) The IEP team must consider the assessments in determining the child's educational program. (34 C.F.R. § 300.324(a)(1)(iii).)

PUBLICLY FUNDED INDEPENDENT EDUCATIONAL EVALUATIONS

12. A student may be entitled to an independent educational evaluation if he or she disagrees with an evaluation obtained by the school district and requests an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. §300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an independent evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent evaluation].) If a parent requests an independent educational evaluation, the school district must either fund the evaluation at public expense, or file a due process complaint and obtain a final decision that its evaluation was appropriate. (34 C.F.R. § 300.502(2); Ed. Code, § 56329, subd. (c).)

ANALYSIS COMMON TO ALL ASSESSMENTS AT ISSUE

13. Student, in a closing brief filed by Mother, contends that Mother requested independent educational evaluations because: she did not agree with Elk Grove's offer of occupational therapy and speech consultation services for the 2018-2019 school year, the assessments lacked specific service recommendations; and she believes that the service recommendations made by the assessors were predetermined. The only one of those contentions at issue in this district-filed proceeding is whether the assessments appropriately contain recommendations on whether or not Student required special education and related services. Elk Grove contends that its assessments were appropriately conducted by qualified and competent assessors.

14. Mother consented to Elk Grove assessing Student in the areas of functional behavior, occupational therapy, and speech and language on November 27,

2018. Elk Grove did not begin its assessments until December 2017. Accordingly, Elk Grove properly obtained parental consent prior to conducting its assessments.

15. All of Elk Grove's assessors were qualified to conduct the assessments. Ms. Stewart, Mr. Hill, Ms. MacNeill, and Ms. Mikbel were each properly credentialed and had the necessary experience to conduct assessments in their respective areas of expertise. Each of Elk Grove's assessors was familiar with Student's disabilities of autism and intellectual disability, and had experience assessing children with these disabilities.

16. The assessors used multiple assessments and a variety of assessment tools including observation, interview, and standardized and non-standardized instruments to evaluate Student in the areas of functional behavior, occupational therapy, and speech and language. The assessment instruments chosen were designed to provide information about Student's special education eligibility, related services, and accommodations in his IEP. Each assessor was aware of Student's history of speech and language delay, and chose assessment instruments or strategies appropriate in light of Student's disabilities.

17. The assessments were not racially, sexually, or culturally biased, were given in Student's primary language of English, and were valid for the purpose for which they were used. Student's one-on-one paraeducator was present to support Student during the occupational therapy and speech and language assessments, but did not interfere with the administration of standardized instruments. Each assessor identified which assessments could not be completed, or were presented in such a manner that the scores were not obtained or were not valid, and indicated the limited purposes for which such test results could be used.

18. The assessment results were valid, and provided useful information regarding Student's behavior problems, visual-motor abilities, visual-perceptual abilities, sensory perception, speech abilities, and communication. The assessment results

demonstrated that Student engaged in aggression and noncompliance to escape demands and gain attention, and had difficulties with graphomotor skills, mild sensory processing deficits, and speech and language deficits, all of which adversely affected Student's educational progress and performance.

19. The functional behavior assessment report and the interdisciplinary assessment report both included: (1) the assessor's conclusions that Student needed special education and related services; (2) their basis for making that determination; (3) that Student's attention was fair, with prompting when permitted by the test, and that no behaviors interfered with the assessment results; (4) the relationship of Student's behavior to his academic and social functioning; and (5) educationally relevant health, development and medical findings, particularly Student's diagnoses of autism and intellectual disability, and his failure to pass the hearing screening. Parents reported no history of abuse or trauma, and the assessments reported no concerns with environmental, cultural, or economic disadvantage. Student did not have a low incidence disability.

20. At or before the March 20, 2018 IEP team meeting, Parents were provided with comprehensive functional behavior and interdisciplinary assessment reports that explained all of the assessments, the results, and which included recommendations for Student's education. The reports were discussed at an IEP team meeting that was attended by all necessary people and in which Parents fully participated.

21. Student put on no evidence to contradict the results of Elk Grove's assessments, or to persuasively criticize the assessment instruments or methods utilized.

FUNCTIONAL BEHAVIOR ASSESSMENT

22. Both Ms. Stewart and Mr. Hill were well-qualified to conduct Student's functional behavior analysis. Ms. Stewart had degrees in child development and years of experience working with students with autism, intellectual disability and speech

language impairment. Mr. Hill was a board certified behavior analyst, although both testified persuasively that such board certification was not necessary to qualify to conduct a functional behavior assessment. Ms. Stewart and Mr. Hill were knowledgeable about Student's range of disabilities, had conducted functional behavior assessments on students with autism, intellectual disability and speech impairment, and were competent to perform a functional behavior assessment of Student.

23. Ms. Stewart conducted the functional behavior assessment based on information known about Student at the time, and gathered that information through multiple sources. She used indirect measures such as reviewing educational records and prior assessments, and interviewing Student's teachers and paraeducators. Both Ms. Stewart and Mr. Hill attempted to interview Parents by telephone and obtain Parents' responses to behavioral and sensory questionnaires. Mr. Hill was ultimately able to interview Father by telephone and incorporate Father's information into the assessment report. Ms. Stewart opined persuasively that Mother's input about Student's behaviors in Mother's home, had Mother provided it, was just one piece of the large total of information gathered, and would not have made a significant difference in the assessment report regarding Student's behaviors in the school setting. Ms. Stewart observed Student on five different occasions, in different settings, for up to three hours at a time. There are no standardized measures for a functional behavior assessment, but Ms. Stewart was experienced at collecting data on student behavior, and collected data on Student's behavior in the classroom and playground settings, as well as peer data for comparison. The data was collected over two months. Mr. Hill collaborated with Ms. Stewart in analyzing the data and other information, and joined her for one of the observations. Ms. Stewart and Mr. Hill did not rely on information from any one source in performing the assessment.

24. Ms. Stewart and Mr. Hill considered all functions of Student's behavior,

whether or not linked to his disability. They took into account Student's cognitive, speech, and communication impairments in determining the antecedents and consequences of Student's behavior and determining its function. Information gathered from Student's general education teacher, special education teacher, and paraeducators consistently identified Student's problem behaviors as aggression and noncompliance across school settings, and the data was collected on the frequency and duration of the problem behaviors. Ms. Stewart and Mr. Hill were able to discern patterns of behavior and identify a chain of behavior that began with presentation of an unfamiliar or demanding task, or with transition from a preferred activity to a non-preferred activity, which resulted in aggression or noncompliance. They recommended classroom supports and implementation of a proposed behavior intervention plan they had developed.

25. Mother and Father had copies of the functional behavior assessment, attended the IEP team meeting when Mr. Hill presented that assessment, and had an opportunity to ask questions of Mr. Hill and participate in review of that assessment.

26. Elk Grove met its burden of proving by a preponderance of the evidence that Elk Grove's functional behavior assessment was appropriately conducted. Therefore, Student is not entitled to a functional behavior assessment at public expense.

OCCUPATIONAL THERAPY ASSESSMENT

27. Ms. MacNeill was well-qualified and competent to conduct an assessment of Student for the need for occupational therapy services. She had been an occupational therapist for over 20 years and had administered the test instruments used hundreds of times. She had conducted over 1,000 assessments of students with disabilities, including autism, intellectual disability and speech language impairment. In addition, Ms. MacNeill was not only familiar with Student's range of disabilities, but had also conducted a prior occupational therapy assessment of Student in 2012.

28. For the current assessment, Ms. MacNeill gathered information about

Student's motor skills and sensory processing from multiple sources, including review of prior testing and IEP's. She interviewed Student's teachers about his performance in the general education and special education classrooms, and inquired about interventions that had helped Student. She obtained responses to a sensory checklist from Ms. Davis and Ms. Roberts. Father did not complete a sensory checklist until after the March 20, 2018 IEP team meeting, but Ms. MacNeill revised the report to include his input, which was consistent with that of Student's teachers and her own observations, and did not change her conclusions or recommendations. Ms. MacNeill observed Student on different days in the general education and special education classrooms, on the playground, and during occupational therapy. She administered a variety of standardized tests to assess Student's visual perception, visual motor, fine motor, graphomotor, and sensory processing skills. She considered Student's cognitive and communication impairments, and in particular selected and administered multiple tests of visual perception to ensure that Student understood the standardized instructions. Ms. MacNeill also looked at non-standardized handwriting samples, interviewed Student's occupational therapy provider, and analyzed Student's fine motor control during written tasks. She did not rely on information from any one source in performing the assessment.

29. Ms. MacNeill considered all of Student's motor and sensory needs, whether or not linked to his disabilities, by conducting comprehensive testing in the areas of visual perception, visual motor, fine motor, graphomotor, and sensory processing skills. Each of the measures taken were relevant to Student's educational needs, and designed to provide Student's IEP team with information on how his motor and sensory needs impacted his ability to learn. Ms. MacNeill found that Student's motor and sensory processing skills were functional in the classroom. Ms. MacNeill recommended that, with consultation from an occupational therapist, the type of

accommodations and modifications provided in Ms. Davis' classroom could address Student's skill deficits in the areas of graphomotor legibility, and that movement breaks would address his sensory processing needs.

30. The interdisciplinary assessment report, with a detailed occupational therapy component, addressed the behaviors that interfered with Student's access to the curriculum, and which were related to Student's academic and social functioning. Ms. MacNeill was present at the IEP team meeting to provide insight and clarification. Parents had copies of the report, and an opportunity to ask questions and participate in review of the occupational therapy assessment.

31. Elk Grove met its burden of proving by a preponderance of the evidence that Elk Grove's occupational therapy assessment was appropriately conducted. Therefore, Student is not entitled to an occupational therapy assessment at public expense.

SPEECH AND LANGUAGE ASSESSMENT

32. Ms. Mikbel was well-qualified and competent to conduct an assessment of Student in the areas of speech and language. She was licensed, ASHA certified in clinical competence, and had experience working with children with various disabilities, including speech disorders and autism. Ms. Mikbel was particularly familiar with Student and his disabilities, as she had been his treating speech therapist a few years earlier.

33. Ms. Mikbel gathered information on Student's speech and language needs and abilities from a variety of sources, and did not rely on any one measure. Ms. Mikbel reviewed Student's existing assessments, spoke to Mother about her concerns, obtained responses from Ms. Roberts with a pragmatics profile, and twice spoke with Student's treating speech therapist about Student's present levels and progress. Ms. Mikbel observed Student during speech therapy and at school, during structured and unstructured activities, in the classroom, at the library and on the playground. She

assessed for all of Student's speech and language needs, whether or not related to his disability, by administering a variety of standardized instruments to test Student in the areas of speech, voice, fluency, receptive vocabulary, expressive vocabulary, receptive and expressive language, and pragmatics. Ms. Mikbel took Student's language impairments into consideration, for example, by using a receptive and expressive vocabulary test at the one-word level, and discontinuing a test that sought to measure Student's language processing skills when Student did not demonstrate understanding of that test. She reported that Student's fluency could not be fully assessed due to his limited verbal expression and lack of spontaneous language.

34. Ms. Mikbel used measures relevant to Student's educational needs, and designed to provide Student's IEP team with information on how his speech and language needs impacted his education in relation to his academic and social functioning. Ms. Mikbel recommended that Student receive speech services for functional language and social pragmatic skills, as support for other skills such as increased vocabulary and fluency was already embedded in the special day classroom.

35. The interdisciplinary assessment report contained a detailed speech and language component, including Student's scores on standardized measures. Each Parent had a copy of the report and was present when the March 20, 2018 IEP team discussed its results. Both Parents had an opportunity to ask Ms. Mikbel questions and participate in review of the speech and language assessment, and presented no concerns regarding the assessment beyond Mother's objection to Ms. Mikbel's service recommendation, which was addressed by Ms. Mikbel.

36. Elk Grove met its burden of proving by a preponderance of the evidence that Elk Grove's speech and language assessment was appropriately conducted. Therefore, Student is not entitled to an independent speech and language assessment at public expense.

ORDER

Elk Grove's assessments and reports in the areas of functional behavior, occupational therapy, and speech and language were appropriate such that Student is not entitled to independent educational evaluations at public expense.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Elk Grove prevailed on all three issues decided.

RIGHT TO APPEAL THIS DECISION

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: September 7, 2018

/s/

ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings