

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

SAN LEANDRO UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2019020613

DECISION

San Leandro Unified School District filed a request for due process hearing on February 15, 2019, naming Parent on behalf of Student. Administrative Law Judge Rita Defilippis heard the matter in San Leandro, California, on March 19 and 20, 2019.

Leah Smith and Conor Kennedy, Attorneys at Law, represented San Leandro throughout the hearing. Katy Duffy-Sherr, San Leandro's Assistant Director of Special Education, attended the hearing on San Leandro's behalf.

Parent and Student did not attend the hearing.

A continuance was granted at the request of San Leandro for the submission of written closing argument and the record remained open until April 9, 2019. Upon timely receipt of the written closing argument, the record was closed and the matter was submitted for decision.

ISSUE¹

1. Did Student's psychoeducational, functional behavior, and occupational therapy assessments conducted by San Leandro from November 2018 to January 2019, meet all the legal requirements such that Student is not entitled to an independent educational evaluation in those areas at public expense?

SUMMARY OF DECISION

San Leandro proved by a preponderance of the evidence that each of these assessments were legally compliant, because each assessment met all legal requirements. Accordingly, this decision holds that Student is not entitled to independent educational evaluations in the requested areas at public expense.

FACTUAL FINDINGS

1. Student is 10 years old and in fourth grade. He lives within the San Leandro Unified School District boundaries. He was initially deemed eligible for special education and related services, at three years old, as a child with a traumatic brain injury and a speech and language impairment. He has continued to receive services in San Leandro since that time under the same eligibility categories.

2. Student's triennial assessment was not due until December 2019. However, at the beginning of the 2018-2019 school year, Parent raised concerns to Student's special education teacher, Ms. Alejandra Madera regarding Student's

¹ On March 1, 2019, San Leandro withdrew its request to determine the legal sufficiency of its academic assessment, included in its original complaint, due to resolving the issue by granting Parents' request for an academic independent educational evaluation.

behavioral and occupational therapy needs.

3. In response to Parent's concerns, San Leandro developed an assessment plan proposing to conduct an early triennial assessment and provided it to Parent with an attached copy of procedural safeguards. The areas to be assessed, and the examiners responsible for assessment included: academic achievement (special education teacher); health (nurse); intellectual development (school psychologist); language, speech, and communication development (speech therapist); motor development (occupational therapist); social-emotional/behavior (school psychologist and behavior specialist); and adaptive behavior (school psychologist). Parent consented to the assessment plan on October 19, 2018.

4. San Leandro was not in session November 16, 2018, through November 23, 2018, due to poor air quality caused by local fires and Thanksgiving break; and from December 21, 2018, through January 4, 2019, for winter recess.

PSYCHOEDUCATIONAL, FUNCTIONAL BEHAVIOR, AND OCCUPATIONAL THERAPY ASSESSMENTS

5. All assessors were trained and qualified to assess Student. Student is a monolingual English speaker of African American and Hispanic descent. All standardized assessments administered to Student pursuant to the assessment plan were administered in his native language of English, according to the publishers' instructions and were chosen and administered in a manner so as not to be racially, culturally, or sexually discriminatory. Assessments were discontinued at any point that the publisher's instructions could not be followed. All assessments were valid and reliable for the purpose in which they were used and included multiple measures. All assessors included input from teacher and Parent. The assessment team conducted classroom observations in formal and informal settings. All assessors were aware of Parent's concerns underlying Student's need for assessment.

Psychoeducational Assessment

6. School psychologist, Dr. Natasha Limones, conducted the triennial psychoeducational assessment of Student. She received a Ph.D. in Education with emphasis in School Psychology in 2013, a Masters of Arts in Education in 2012, and a Bachelor of Arts in Psychology and Music in 2009, each from the University of California, Berkeley. Dr. Limones received her Pupil Personnel Services Credential in School Psychology in 2013, and she is a California licensed School Psychologist. From October 2016 to present, Dr. Limones has been in private practice where she conducts evaluations, including psychoeducational and mental health assessments. She provides consultation and training to school districts on psychoeducational assessment practices and learning differences and conducts workshops for parents on learning differences, promoting school readiness skills, and individual student needs. Before going into private practice, Dr. Limones was a school psychologist for San Francisco Unified and Moreland School Districts. She has conducted over 300 psychoeducational assessments to determine eligibility for special education services for K-12 students.

7. Dr. Limones testified telephonically at hearing regarding Student's psychoeducational assessment. The assessment included a developmental and health history and a thorough review of Student's records. She conducted over two hours of observations in both formal and informal settings, obtained Parent and teacher input, and administered a variety of test instruments, including the Developmental Neuropsychological Assessment, Second Edition; the Beery-Buktenica Test of Visual-Motor Integration, Sixth Edition; the Connors Comprehensive Behavior Rating Scale; the Autism Spectrum Rating Scales; and the Vineland Adaptive Behavior Scales, Third Edition. She attempted standardized testing using the Developmental Neurological Assessment and Beery-Buktenica Visual Test of Motor Integration, but discontinued the test due to Student's inability to understand and follow directions. She measured his

skills through informal assessment. All test scores were consistent with the raw data on all testing protocols admitted as evidence at hearing. Dr. Limones' assessment was comprehensive and her testimony regarding the assessment and her conclusions was thoughtful and well-reasoned. Her testimony and opinions were given great weight.

Health History

8. Dr. Limones conducted a thorough review of Student's school and available medical records. She interviewed Parent and obtained an extensive health history. The health history included specific information regarding a fall he sustained at two months of age, which resulted in a skull fracture requiring surgery and Student's resulting delayed milestones. Dr. Limones also learned that Student was diagnosed with cerebral palsy in 2010, a diagnosis that was called into question in 2018. In 2018, doctors at Lucille Packard Children's Hospital Stanford diagnosed Student with Autism Spectrum Disorder and an intellectual disability. Dr. Limones explained the Stanford assessors felt strongly that Student did not have cerebral palsy and should not be regarded as such. She surmised that the early cerebral palsy and traumatic brain injury diagnoses may have colored subsequent assessors' evaluations resulting in a delayed autism diagnosis. After conducting a thorough assessment, as described more fully below, Dr. Limones concurred with Student's Autism Spectrum Disorder diagnosis.

OBSERVATIONS

9. Dr. Limones conducted over two hours of observation of Student including during his arrival to school; classroom morning routine; snack; physical education in the classroom; whole group instruction, and mainstream physical education. She collected data during her observation regarding, among other things, Student's ability to transition between activities, his peer interaction, and his need for and frequency of redirection. She observed no maladaptive behavioral concerns, such as elopement or

aggression. She did observe Student frequently demonstrating echolalia, fleeting eye contact, and difficulty with reciprocal conversation, which she concluded was consistent with autism.

INTELLECTUAL DEVELOPMENT

10. Student was unable to complete the Developmental Neuropsychological Assessment and the Beery-Buktenica Test of Visual-Motor Integration. Student was unable to complete these standardized assessments, because he could not follow directions and complete the requested tasks. Rather than stop, Dr. Limones informally assessed Student's cognitive skills using tasks contained in the Developmental Assessment of Children, Second Edition, to inform her informal assessment. The evidence established utilizing these informal measures was appropriate to determine Student's intellectual development. The assessments confirmed that overall, Student's intellectual development is significantly delayed with reasoning skills at the preschool level.

SOCIAL EMOTIONAL

11. Dr. Limones assessed Student's social emotional functioning. She administered the Connors Comprehensive Behavioral Rating Scales to gain information about Student's social emotional development and behavior, based on rating scales given to Student's teacher and Parent. Both teacher and Parent ratings raise significant concerns about Student's academic skills, hyperactivity, and impulsivity. Student's teacher raised concerns in the area of behavior and social interactions. Parent raised slight concerns about perfectionistic and compulsive behaviors.

12. Dr. Limones also administered the Autism Spectrum Rating Scales to assess the presence of Student's symptoms, behaviors, or features of Autism Spectrum Disorders in children aged two to 18, as this is an area of suspected disability, due to

Student's recent autism diagnosis. Overall, both teacher and Parent ratings indicate that Student exhibits many behavioral characteristics similar to youth diagnosed with Autism Spectrum Disorder and symptoms directly related to the Diagnostic and Statistical Manual-5 Criteria for Autism Spectrum Disorder.

ADAPTIVE BEHAVIOR

13. Dr. Limones administered the Vineland Adaptive Behavior Scales to measure Student's adaptive behavior skills. This test instrument measures what an individual actually does in real life as opposed to what an individual can do in a testing situation, based on rating scales which were completed by Student's teacher and Parent. Student's adaptive skills are significantly below the expected level for his age. Dr. Limones listed a multitude of skills in the areas of communication, daily living skills, socialization and motor skills; organized as to whether Student consistently demonstrates them or inconsistently or never demonstrates them.

14. Dr. Limones prepared an assessment report, which was provided to parent and discussed during the IEP team meeting conducted on January 10, 2019. After carefully considering the documents she reviewed, and the assessments conducted, Dr. Limone opined Student was eligible for special education under autism and traumatic brain injury. Dr. Limones' opinions were consistent with the evidence. Specifically, Student's teacher, Ms. Alejandra Madera, testified at hearing. Her observations of Student's functioning were generally consistent with Dr. Limones' assessment results. No evidence contradicting her findings was presented at hearing.

15. The evidence established that Dr. Limones was well qualified to the conduct Student's psychoeducational assessment. She used a variety of test instruments that were technically sound. The test instruments were not discriminatory and were administered consistent with the instructions.

Functional Behavior Assessment

16. Ms. Turbin conducted Student's functional behavior assessment. Ms. Turbin received her Master's in Special Education in 2012, and her Bachelor of Arts in Psychology in 2004, both from San Francisco State University. She received her Behavior Analyst Board Certification from Southern Illinois State University in 2014. Ms. Turbin has been a behavior specialist with San Leandro Unified School District since January 2016. She provides behavior consultation, conducts crisis intervention trainings, and functional behavior assessments. She currently provides direct intensive behavior services to 27 Students and oversees behavior interventions for students in San Leandro's mild to moderate special day classes. Ms. Turbin also provides behavior intervention services for a company called Understanding Behavior, Inc., including consultation, training, and development of behavior intervention plans for children and adults with autism in day programs, residential facilities, private schools, and in-home settings. Prior to that, Ms. Turbin provided advocacy, needs assessments, and relevant training and supports for clients of Regional Center of the East Bay. From 2006 to 2013, Ms. Turbin was a special day class, special education teacher for K-12 students in Oakland Unified School District and a co-teacher at Spectrum Center, a nonpublic school in Oakland, California. Ms. Turbin has conducted several hundred functional behavior assessments of students.

17. Ms. Turbin became acquainted with Student in October 2018. Contemporaneously with parent signing the assessment plan at issue in this case, Student's IEP team amended his then current IEP to include behavioral supports. Specifically, Ms. Turbin has been providing 120 minutes of consultation per month for Student and has been supervising the registered behavior technician, who has been providing Student with one-to-one applied behavior analysis services in his special day classroom for 90 minutes a week.

18. In addition to the services discussed above, Ms. Turbin conducted Student's functional behavior assessment. The assessment included a review of Student's teacher-developed behavior intervention plan; five hours of direct observations; input from Student's teacher, ABA provider, and Parent; analysis of classroom data gathered from classroom staff; and her own direct data tracking. Ms. Turbin's testimony regarding her comprehensive assessment and her recommendations for Student was supported by the completed interview forms and behavior analysis data sheets, referred to in her testimony and admitted at hearing. Her testimony was confident and thorough and evidenced her extensive experience and training in behavior analysis and her particular knowledge of Student. Her testimony regarding her behavior analysis of Student was therefore credible and was given great weight.

19. Ms. Turbin did not use standardized tests but used research-based principles of behavior analysis. Ms. Turbin obtained classroom data using functional behavior interview forms, which were completed by Ms. Taryn Frazer, Student's ABA provider and Ms. Alex Madera, Student's classroom teacher. Parent completed an interview form regarding Student's behavior at home and in the community. The interview forms elicit specific information about concerning behaviors, including what the behavior looks like; when it occurs; who does the behavior occur around most; when the behavior never happens; why the observer thinks the behavior happens; what makes the behavior stop; how often the behavior occurs; and when the behavior last occurred. For each behavior of concern, Ms. Turbin required the person completing the interview to complete a checklist with options to check as to when the behavior occurs and what works to stop or redirect the behavior. The person completing the interview form lists Student's strengths, preferred items or reinforcers, as well as, non-preferred items and situations. Ms. Turbin conducted over five hours of direct observations of Student at school on five different days. During her observations she documented Student's

specific behavior, including the antecedents and consequences of that behavior, to enable an analysis of the supportive and unsupportive variables of Student's behaviors on all days of observation. Ms. Turbin also analyzed the specific data collected by Student's classroom ABA provider.

20. Ms. Turbin authored a report which was provided to Parent on January 10, 2019. The evidence established that Ms. Turbin was well qualified to conduct Student's functional behavior assessment. The assessment used methods that were comprehensive and technically sound. The test instruments were not discriminatory. Ms. Turbin identified the antecedents to student's concerning behaviors, established his then behavior needs, and established the appropriate replacement behaviors. Additionally, based on her evaluation Ms. Turbin was able to propose a behavior plan that included replacement behaviors. The evidence established that Ms. Turbin's functional behavior assessment was thorough and captured Student's behaviors that presented in the school environment.

Occupational Therapy Assessment

21. Ms. Trisha Davis conducted Student's occupational therapy assessment. Ms. Davis received her Masters of Arts in Occupational Therapy from the University of Southern California in August 2017. She received her Bachelor of Arts from Long Beach State University in Human Development. She is currently employed by Ascend Rehabilitation Services, Inc., which contracts with school districts in the East Bay, including San Leandro, to provide school based occupational therapy services. Her responsibilities include conducting occupational therapy evaluations and providing direct occupational therapy for students aged three through 22. Prior to that, Ms. Davis conducted Level II fieldwork at Cornerstone Therapies, Pediatrics, where she evaluated and provided treatment for pediatric clients through regional center, school districts, and private insurance. Her clients included those with conditions including autism

spectrum disorders, cerebral palsy, and down syndrome. She has conducted approximately 38 occupational therapy assessments. Ms. Davis is licensed with the California Board of Occupational Therapy and is certified by the National Board for Certification in Occupational Therapy.

22. Ms. Davis has served as Student's occupational therapist since the beginning of the 2018-2019 school year, and has seen him in both a small group setting and individually. Ms. Davis conducted Student's occupational therapy assessment. Ms. Davis' assessment of Student included a review of Student's developmental history and prior eligibility for special education and consideration of Parent's occupational therapy concerns, based on email correspondence from Parent in the beginning of the school year, including his ability to write with a pencil, correctly use scissors, draw, turn knobs, button buttons, tie shoe laces, open his lunch box, and access his snack inside. Ms. Davis conducted a direct classroom observation of Student, interviewed Student's teacher, and administered standardized tests. Ms. Davis testified about her assessment, which was comprehensive and thorough, and her conclusions and recommendations were supported by her test results and the test protocols referred to during her testimony and admitted at hearing. Her testimony was therefore credible and given great weight.

23. Ms. Davis observed Student during art in the fourth and fifth grade moderate to severe special day class next door to Student's classroom.

24. Ms. Davis administered, but could not obtain standardized scores using the Bruininks-Oseretsky Test of Motor Proficiency, due to Student's difficulty understanding the given instructions. The test, which she administered on two different dates, measures fine motor precision, fine motor integration, and manual dexterity. Student was presented with the fine motor precision and fine motor integrations sections of the test. After completing some of the items, Ms. Davis discontinued the test, because she could not comply with the publisher's instructions required for this

standardized test which do not permit any prompts beyond the initial instruction for the task. Without the additional prompts, Student was not able to perform the tasks requested. For example, when instructed to copy various shapes within an indicated perimeter, Student would instead trace the indicated perimeter or color the shape he was supposed to copy. Rather than terminating her assessment, Ms. Davis informally tested Student by presenting him with a variety of fine and visual motor activities, including stringing blocks and beads, sorting cards, cutting with scissors, placing pegs on a pegboard, and tracing and copying pre-writing lines, all giving prompting as needed. The evidence established this was appropriate given his inability to complete the standardized assessment consistent with the test instructions.

25. Student's teacher completed the Sensory Processing Measure-Classroom/Home Form. This questionnaire assesses sensory processing issues, praxis, and social participation in school-aged children and provides norm-referenced indexes of function in the visual, auditory, tactile, proprioceptive, and vestibular sensory systems as well as praxis and social participation.

26. Student demonstrates the ability to manage his clothing, use the bathroom, and zip open his backpack and lunchbox. He is able to open some snack packages on his own and request help for opening his juice box.

27. The evidence established that Ms. Davis' was well qualified to conduct Student's occupational assessment. She used a variety of test instruments that were technically sound. The test instruments were not discriminatory and were administered consistent with the instructions. The evidence established Ms. Davis' assessment regarding Student's occupational therapy needs was comprehensive. She identified his then current occupational therapy needs. The areas she determined were areas of need, were consistent with those identified by Ms. Madera, his teacher.

28. Considering all of the assessments as a whole, the findings and

conclusions of each of the assessors, in terms of Student's presentation and struggles, were very consistent with each other. The information obtained from the assessments explained the disability related reasons that Student requires special education services and gave very detailed areas of Student's needed skill development.

IEP TEAM MEETINGS TO DISCUSS TRIENNIAL ASSESSMENTS

29. On January 10, 2019, an IEP team meeting was held to review Student's assessments. Katy Duffy-Sherr, Assistant Director of Special Education and administrative designee; Alejandra Madera, Special Education Teacher; Dr. Natasha Limones, School Psychologist; Lang Luong, Assistant Principal; Michelle Turbin, Behavior Specialist; Trisha Davis, Occupational Therapist; Shelby Whittington, Speech Language Pathologist; Sarrita Adams, Parent Advocate; and Parent attended the meeting. Dr. Limones reviewed her psychoeducational assessment results, behavior observations, and recommendations. The IEP team provided Parent with a copy of the psychoeducational assessment report. Parent communicated her specific concerns regarding some language in the assessment report, and Dr. Limones agreed to amend her assessment report in response to Parent's expressed concerns regarding the terminology. Ms. Turbin reviewed her functional behavior analysis of Student and her proposed goals and behavior intervention plan. Parent and advocate had questions and comments regarding the behavior goals, which were discussed by the IEP team. Parent was provided with a copy of the behavior assessment and behavior intervention plan. Lastly, Ms. Davis shared a copy of her occupational therapy report with Parent. The meeting was scheduled to continue on January 23, 2019, due to insufficient time to complete the IEP process.

30. On January 23, 2019, the IEP team reconvened. In attendance were Parent, Ms. Adams, Ms. Whittington, Ms. Turbin, Ms. Madera, Ms. Duffy-Sherr, and Ms. Davis. Parent signed consent to the excusal of a general education teacher from the IEP team.

Ms. Davis reviewed her occupational therapy assessment report, which had been shared with Parent at the prior meeting. Ms. Davis discussed her proposed occupational therapy goals and recommendations for Student. Parent and Ms. Adams communicated specific concerns regarding Student's motor-related self-help skills and Student's functioning in the home environment. Ms. Whittington reviewed her speech and language assessment results and recommendations. At the end of the IEP team meeting, Parent provided San Leandro with a formal, typed request for independent educational evaluations.

PARENT REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATIONS AND SAN LEANDRO'S RESPONSE

31. The letter provided by Parent, dated January 23, 2019, requested independent educational evaluations in seven areas, including: 1) academics, for reading, writing, spelling, and math; 2) speech and language, for phonemic awareness and problem solving; 3) social skills; 4) occupational therapy; 5) functional behavior assessment; 6) psychological assessment for cognitive, behavior, and attention; and 7) neuropsychological evaluation. Parent asserted that San Leandro's assessments were not comprehensive or appropriate and used "non-medical jargon", specifically the term "attention seeking", which discriminated against Student's disability and ignored his inherent impairment in communicating his needs.

32. San Leandro provided prior written notice in response to Parent's request for independent educational evaluations in letters dated February 8, and February 27, 2019, each attaching a copy of procedural safeguards. In the February 8, 2019 letter, San Leandro informed Parent that it conducted a thorough review of all of the triennial assessments. San Leandro agreed to fund independent educational evaluations in the area of speech and language, to include social communications and pragmatics, and denied Parent's request for independent educational evaluations in the areas of

academics, psychoeducational, behavior, occupational therapy, and neuropsychological, asserting that San Leandro's assessments were sufficient, appropriate, thorough, and legally compliant. The letter set forth detailed support for its position on each assessment. In the February 27, 2019 prior written notice, San Leandro reconsidered and granted Parent's request for an academic independent educational evaluation, originally denied in the February 8, 2019 prior written notice.

33. As found below, the psychoeducational, functional behavior analysis, and occupational therapy assessments were legally compliant. Parents were provided an assessment plan and provided consent for San Leandro to assess Student. Each assessor was eminently qualified to conduct the assessments within their area of expertise. The evidence established that the assessments were thorough and captured Students then present unique needs.

LEGAL CONCLUSIONS

LEGAL FRAMEWORK UNDER THE IDEA²

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 et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for higher education, employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20

² Unless otherwise indicated, the legal citations in this section are incorporated by reference into the analysis of each issue decided below.

U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to a parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9)(A-D); 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, subd. (a).) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel, that describes the child's needs, academic and functional goals related to those needs, and specifies 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. In *Endrew F. ex rel., Joseph F. v. Douglas County School Dist.* (2017) 580 U.S. __ [137 S.Ct. 988, 996], the Supreme Court clarified that “for children receiving instruction in the regular classroom, [the IDEA’s guarantee of a substantively adequate program of education to all eligible children] would generally require an IEP ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” Put another way, “[f]or a child fully integrated in the regular classroom, an IEP typically should, as Rowley put it, be ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” (*Id.* at 999 (citing *Rowley, supra*, 458 U.S. at pp. 203-204).) The Court went on to say that the Rowley opinion did not “need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level.” (*Id.* at 1000.) For a case in which the student cannot be reasonably expected to “progress[] smoothly through the regular curriculum,” the child’s educational program must be “appropriately ambitious in light of [the child’s] circumstances .” (*Ibid.*) The IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at 1001.) Importantly, “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” (*Ibid.*)

5. 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); 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, § 56505, subd. (i).) Subject to limited exceptions, a request for a

due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) 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].)

PROCEDURAL REQUIREMENTS FOR ASSESSMENTS

6. A district must give parent an 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 referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (a); 56321, subd. (a).) The parent has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c)(4).)

7. An IEP program required as a result of an assessment of a pupil must be developed within a total time not to exceed 60 calendar days, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the Parent's or guardian's written consent for assessment, unless the parent or guardian agrees in writing to an extension. (Ed. Code § 56043(f)(1).)

8. To obtain parental consent for an assessment, the school district must provide proper notice to the student and his or her parent. (20 U.S.C. § 1414(b)(1); 20 U.S.C. § 1415(b)(3) and (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and related state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must be in a language easily understood by the public and the native language of the student; explain the assessments that the district

proposes to conduct; and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).)

9. The purpose of an initial comprehensive psychoeducational assessment is to determine whether a child is a child with a disability, as defined by 20 U.S.C. § 1401 (3), and the educational needs of the child. (20 U.S.C. § 1414(c)(1)(B)(i).)

10. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 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 subds. (b)& (c)(5); Ed. Code, § 56320, subds. (a) & (b).)

11. IDEA and California state law explicitly require that student's educational rights holder be part of any IEP team meeting which is charged with developing and implementing a student's IEP. (20 U.S.C. §§1401(14), 1414(d)(1)(B)(i); Ed. Code, § 56342.5.) Special education law places a premium on parental participation in the IEP process. School districts must guarantee that parents have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such

child.” (20 U.S.C. § 1415(b)(1).) The United States Supreme Court has recognized that parental participation in the special education process is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904].) Additionally, California law requires that the assessment report must be provided to the parent at the IEP team meeting regarding the assessment to allow for discussion and explanation. (Ed. Code, § 56329, subd. (a)(1).)

12. A student may be entitled to an independent educational evaluation³ if he or she disagrees with an evaluation obtained by the public agency 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].) In response to a request for an independent evaluation, an educational agency must, without unnecessary delay, either: (1) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (2) ensure that an independent evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(b)(2); see also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

³ Federal law uses the term “evaluation” instead of the term “assessment” used by California law, but the two terms have the same meaning and are used interchangeably in this Decision.

SAN LEANDRO'S COMPLIANCE WITH PROCEDURAL TIMELINES FOR ASSESSMENTS

13. On October 15, 2018, Student was referred for early triennial assessments by San Leandro, due to Parent's communications that she felt Student needed more services. San Leandro provided a legally compliant assessment plan to Parent detailing the assessments proposed, the title of the person responsible for each assessment, and informing Parent that no special education services will be provided to Student without Parent's written consent. Parent signed her consent to the triennial assessment plan within 15 days, on October 19, 2019.

14. San Leandro held an IEP team meeting on January 10, 2019, within the required 60-day timeline, to review the results of the assessments.⁴ San Leandro continued the triennial review to another date at an IEP team meeting on January 23, 2019, to finish reviewing the triennial assessments.

15. San Leandro provided Parent a copy of all of the assessment reports and provided procedural safeguards with the assessment plan. All assessors presented their assessment reports and discussed their conclusions and recommendations. Parent asked questions and provided feedback regarding the assessments. Following Parents' request for independent educational evaluations at the January 23, 2019 IEP team meeting, San Leandro responded within a reasonable time on February 8, 2019, denying the request with a detailed prior written notice, and filed for due process to defend its assessments without undue delay on February 19, 2019.

⁴ Considering that the 2018 Thanksgiving break was in excess of five school days, because of the additional day off due to local fires and poor air quality, as well as the winter break in excess of five days, the IEP team meeting to review the assessments at issue in this case was timely.

ISSUE: DID SAN LEANDRO'S NOVEMBER 2018, TO JANUARY 2019 PSYCHOEDUCATIONAL, FUNCTIONAL BEHAVIOR, AND OCCUPATIONAL THERAPY ASSESSMENTS OF STUDENT MEET ALL THE LEGAL REQUIREMENTS SUCH THAT STUDENT IS NOT ENTITLED TO AN INDEPENDENT EDUCATIONAL EVALUATION IN THOSE AREAS AT PUBLIC EXPENSE?

16. San Leandro filed for due process to defend its assessments, has the burden of proof on this issue, and contends that the psychoeducational, functional behavior, and occupational therapy assessments comply with all legal assessment requirements.

17. The only evidence presented regarding Parent's contentions was her request for independent educational evaluations on January 23, 2019, due to the fact that Parent was not present for hearing. In her request, Parent contends that the assessments were not appropriate or comprehensive. Specifically, Parent alleged that the term "attention seeking" was non-medical jargon, which Parent asserted ignored Student's impairment in communicating his needs. As specified in more detail below, contrary to Parent's assertion, the assessments were appropriate and comprehensive.

Psychoeducational Assessment

18. Dr. Limones conducted the psychoeducational assessment. She is a qualified assessor, based on her credentials, knowledge and experience conducting psychoeducational assessments. Dr. Limones thoroughly assessed Student in areas that were indicated as suspected disabilities. She is knowledgeable about the legal requirements for assessing African-American students and chose valid, reliable, and appropriate assessments to determine whether Student has a disability requiring specialized educational services. The assessments were conducted in Student's native language of English, in accordance with the publisher's instructions and in a manner so as not to be racially, culturally, or sexually discriminatory. Dr. Limones gathered

information from Parent and teacher and conducted over two hours of observations in structured and unstructured settings. She produced a written report of her assessment, detailing the basis of her findings and her analysis of Student's suspected disabilities and areas of educational need and reviewed her report with the IEP team, including Parent. Parent was provided with a written copy of her report.

19. To determine if Student was a child with a disability, Dr. Limones considered Student under two eligibility categories, including: autism and traumatic brain injury. She set forth the legal eligibility criteria for each category and in light of her assessment, concluded that Student qualified for special education under both categories. She used a variety of valid assessment tools, including standardized tests and informal assessment to support her determinations of eligibility.

20. San Leandro established by the preponderance of the evidence that the psychoeducational assessment by Dr. Limones complied with all legal requirements.

Functional Behavior Assessment

21. Ms. Michelle Turbin conducted the functional behavior assessment. Her training and experience qualify her to conduct behavior assessments. Ms. Turbin used valid research-based principles of behavior analysis in assessing Student's behavior needs. Her assessment consisted of a review of Student's educational records; over five hours of direct observations of Student; collection and analysis of behavior data during her observations; and analysis of information and data obtained from Student's teacher, applied behavior analysis provider, and Parent. Ms. Turbin's behavior assessment was comprehensive as it analyzed behavior data collected throughout Student's school day and considered information from Parent regarding Student at home and in the community. Based on her behavior analysis of all information and data collected, Ms. Turbin determined that Student's behavior was interfering with his learning and the learning of his peers. Her behavior analysis determined likely causes or functions of

Student's concerning behavior. She identified Student's educationally related behavior needs. Ms. Turbin developed specific recommendations, proposed goals, and a behavior intervention plan. Her assessment report and behavior intervention plan was reviewed and provided to Parent at the January 10, 2019 IEP team meeting. All data and behavior analysis of the data admitted at hearing was consistent with her findings and recommendations. The results were therefore valid.

22. San Leandro sustained its burden of proof, by a preponderance of the evidence, that Ms. Turbin's functional behavior assessment complied with all legal requirements.

Occupational Therapy Assessment

23. Ms. Trisha Davis conducted Student's occupational therapy assessment. Her educational degrees, experience, and California license to practice occupational therapy qualify her to conduct the assessment. The assessments were administered in Student's native language of English. The assessments were chosen and administered in a manner so as not to be racially, culturally, or sexually discriminatory. Standardized measures were reliable and valid for the purpose in which they were used. Informal assessments were comprehensive and directly related to the occupational therapy skills required to access his educational curriculum and services.

24. Based on Ms. Davis' assessment of Student, which included a variety of assessment tools, including classroom observations, standardized measures, informal assessments, and input from Student's teacher and Parent, Student continues to qualify for occupational therapy services to address his fine and visual motor needs, which interfere with his educational progress. Ms. Davis provided Parent with her assessment report and reviewed her assessment at the IEP team meeting on January 23, 2019. Ms. Davis recommended specific goals and direct occupational therapy services and supports to assist Student to make educational progress. Ms. Davis' assessment and

recommendations were consistent with and supported by the test protocol admitted at hearing.

25. San Leandro proved by a preponderance of the evidence that the occupational therapy assessment complied with all legal requirements for assessments.

26. Overall, the findings and conclusions of each of the assessors, in terms of Student's presentation and struggles, were very consistent with each other. The information obtained from the assessments explained the disability related reasons that Student requires special education services and gave very detailed areas of Student's needed skill development. Therefore, San Leandro's assessments reviewed in this decision, fulfill the purpose of comprehensive assessments to determine whether Student is a child with a disability and to identify his educational needs. (20 U.S.C. § 1414(c)(1)(B)(i).)

ORDER

1. San Leandro's psychoeducational, functional behavior, and occupational therapy assessments were legally appropriate in that they met all legal requirements.

2. Student is not entitled to independent educational evaluations at public expense in these areas.

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, San Leandro prevailed on all issues heard and decided.

RIGHT TO APPEAL

This decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to

a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, 56505, subd. (k).)

DATED: April 24, 2019

/s/

RITA DEFILIPPIS

Administrative Law Judge

Office of Administrative Hearings