

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

BUENA PARK SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2015010467

DECISION

Buena Park School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on January 13, 2015, naming Student. The matter was continued for good cause on February 9, 2015.

Administrative Law Judge Marian H. Tully heard this matter on March 16, 2015, May 6, 2015, and June 2, 3, 4, 8, 16, and 19, 2015, in Buena Park, California.

Student was represented by his mother on each hearing day. Student's father attended, and participated in, the hearing on May 6, 2015, and June 2, 3, 4, 8, and 16, 2015. Student was present the morning of June 3, 2015.

Attorney Carlos Gonzalez appeared on behalf of Buena Park School District (District). Michelle Mukanos, Director of Special Services, attended the hearing on behalf of District.

A continuance was granted for the parties to file written closing arguments and for Romanian translation of District's closing argument and English translation of Student's closing argument. The parties timely filed closing arguments on July 13, 2015, at which time OAH ordered translation of the closing arguments. OAH provided the

translations of the closing arguments to the parties and the matter was submitted for decision on July 17, 2014.

ISSUES

1. Were District's October 11, 2013 multidisciplinary and February 26, 2014 occupational therapy assessments appropriate?

2. Does District have the right to reassess Student without Parents' consent as set forth in assessment plans dated March 6, 2014, and May 27, 2014?

SUMMARY OF DECISION

District failed to meet its burden of proof on either issue. Relative to both issues, Parents' native language was Romanian. District was required to provide assessment plans in Parents' native language. District did not do so, and failed to prove that doing so was not feasible. District's multidisciplinary assessment and occupational therapy assessment met most but not all legal requirements. Qualified personnel who prepared technically correct written reports properly conducted the assessments. However, District failed to offer Parents assessment plans in Romanian, failed to provide Parents the assessment reports in their native language once Parents informed District they needed Romanian interpretation, and failed to convene individualized education plan team meetings to discuss the assessments in such a way as to ensure Parents understood the proceedings. District is entitled to no relief.

FACTUAL FINDINGS

1. Student was, at the time of filing, eight years old and resided with his Parents within District boundaries at all relevant times. Student was born with Down's syndrome. District first found Student eligible for special education on April 23, 2009, under the primary category of intellectual disability and a secondary category of speech

and language impairment.

2. Student attended pre-school within District from April 27, 2009, until September 2, 2010. He did not attend school within District from September 2010 until September 11, 2013, because the family was out of the country.

3. On September 13, 2013, District school psychologist Melody Anton prepared, and Mother signed, an assessment plan to determine Student's eligibility for special education. The assessment plan was in English. The proposed assessments included academic achievement, health, intellectual development, language/speech communication development, social/emotional, and adaptive behavior. The assessment plan states Student's primary language was Romanian and identified Student as an English Language Learner.

MULTIDISCIPLINARY ASSESSMENT

4. District conducted a multidisciplinary assessment and produced a report dated October 11, 2013. The individuals contributing to the report were Ms. Anton, Student's special education teacher Esther Kang, speech/language specialist Hanna Baldelli, school nurse Kathleen Tedone, and Parents. Ms. Anton prepared the October 11, 2013 multidisciplinary assessment report (Assessment Report).

5. Ms. Anton was an experienced, well-qualified school psychologist. She had a bachelor's and master's degrees in psychology, and a Pupil Personnel Services Credential in School Psychology. She was employed by District as a school psychologist for 16 years. Ms. Anton's responsibilities with District included conducting initial and triennial assessments and participating in IEP meetings. Before her employment with District she was employed as a school psychologist by other districts and in non-public school settings. Based upon Ms. Anton's education and experience, she was qualified to conduct and interpret the results of the multidisciplinary assessment and prepare the Assessment Report.

6. Ms. Anton's assessment included classroom observations; standardized and informal testing; Parent and teacher input; and she reviewed school records and the reports prepared by other assessors. Ms. Anton also considered a Health and Developmental History Update form Mother completed and provided to Ms. Anton on September 13, 2013. Mother indicated on the form that Student's "first language" was "English and Romansh" and that adults in the home spoke both languages.

7. Ms. Anton administered the Wechsler Non-Verbal Scale of Ability to Student. Ms. Anton used modeling and gestures consistent with testing protocols to administer the test. The Wechsler Non-Verbal Scale of Ability was normed to peers of the same age and grade and was used to test non-verbal general thinking and reasoning skills. She used the Wechsler Non-Verbal Scale of Ability because the test is administered using visual and other non-verbal directions and did not require verbal response from Student. Student's cognitive ability was in the extremely low range.

8. Ms. Anton observed Student while she administered the Wechsler Non-Verbal Scale of Ability to him for approximately one hour in Ms. Kang's classroom. Ms. Anton's multidisciplinary assessment also included the Adaptive Behavior Assessment System 2nd Edition and the Social Skills Improvement System, both completed by Ms. Kang and Mother.

9. Ms. Anton reported the results of the test, the rating scales provided by Mother and Ms. Kang, and her observations, conclusions, and recommendations in the Assessment Report.

10. Ms. Kang was Student's special day class teacher and assessed Student in the area of academics. Ms. Kang was a qualified and experienced special education teacher. She held a bachelor's degree in history, a master's degree in education, a teaching credential and a Clear Cross-Cultural Language and Academic Certificate. Ms. Kang was certified to teach English Language Learners and had extensive experience

working with English Language Learners. She was employed by District to teach special education for more than ten years. Based upon Ms. Kang's education and experience, she was qualified to conduct and interpret the results of the academic portion of the multidisciplinary assessment.

11. Ms. Kang's assessment included review of school records, classroom observation, and review of standardized and informal testing. Ms. Kang administered the Woodcock-Johnson Test of Achievement - Third Edition; Kaufman Test of Educational Achievement, 2nd Edition; and the Slosson Oral Reading Test with the assistance of a Romanian interpreter. She also assessed Student based on the Brigance Diagnostic Comprehensive Inventory of Basic Skills, Slosson Oral Reading Test, informal and teacher made tests, Student's work samples, and her observations of Student during testing and in her class. Ms. Kang concluded Student's academic skills were in the extremely low range and below kindergarten level. Ms. Kang prepared a written summary of her assessment. Ms. Anton included Ms. Kang's summary in the Assessment Report.

12. Ms. Baldelli assessed Student in the area of speech and language. She was a qualified and experienced speech pathologist with a bachelor's degree in English, master's degrees in teaching and speech and language pathology, a Single Subject English Language Arts Teaching Credential with a Clear Cross-Cultural Language and Academic Certificate, and a Speech and Language Pathology Services Credential. Ms. Baldelli was certified to teach English Language Learners with more than ten years of experience teaching English and providing clinical speech and language services to students.

13. Ms. Baldelli reviewed Student's records and previous assessments, observed Student in the classroom, conducted an oral and motor exam, interviewed Student's teacher, reviewed Student's Health Update, and conducted informal and

clinical observations of Student's verbal pragmatics, articulation, voice, and fluency and used a variety of assessment tools. Ms. Baldelli used a Romanian interpreter during her assessment. She selected assessment tools based upon Student's language classification, chronological age and developmental age, including the Comprehensive Assessment for Spoken Language, Goldman-Fristoe Test of Articulation-2, and the Pre-school Language Scale-4. Ms. Baldelli concluded Student had severe delays in all areas of speech and language but that his delays were consistent with his developmental level. In her opinion, Student met the criteria for speech and language services. Ms. Baldelli prepared a written summary of her assessment. Ms. Anton included Ms. Baldelli's summary in the Assessment Report.

14. The assessment materials for intellectual, academic and language/speech development administered by Ms. Anton, Ms. Kang and Ms. Baldelli were selected and administered without racial, cultural, or gender discrimination. The tests were used in conformance with testing instructions and each test was valid for the purpose for which the test was used. No single test or procedure was used to determine Student's eligibility for special education or to determine his educational program.

15. Ms. Tedone completed a health assessment and produced a medical update which Ms. Anton included in the Assessment Report. Ms. Tedone was a Registered Nurse and held a Clear School Nurse Credential. She had been employed by District as Director of Health Services since 1998. Ms. Tedone used a variety of standardized methods to check Student's vision and hearing. She noted Student's prescribed medications, requested Student's medical records from Children's Hospital of Orange County. (CHOC), and discussed Student's medical history with Mother.

16. District prepared a 27 page draft Assessment Report, which included Ms. Anton's assessment and incorporated separate sections provided to Ms. Anton by Nurse Tedone, Ms. Kang, and Ms. Baldelli. The Assessment Report contained narratives by each

of the assessors; described assessment processes; and described by name (frequently by acronym) more than 25 formal and informal assessment methods used by the assessors. It included more than a dozen charts and graphs reporting subtest scores and scaled scores; full scale scores with percentile rank and classification; composite scores with standard scores; scaled scores and classification; comparisons between teacher and parent ratings in 13 separate areas; grade equivalency with standard scores and percentile rank in 15 academic areas; and raw data results in the areas of picture vocabulary and letter identification.

17. Ms. Anton, Ms. Kang, Ms. Baldelli and Ms. Tedone recommended that Student qualified for special education under the eligibility category of intellectual disability. They concluded he did not meet the eligibility standards for a secondary eligibility of speech/language impairment but that the IEP team should consider his needs in that area.

OCTOBER 11, 2013 IEP TEAM MEETING

18. District sent Parents a notice scheduling an IEP team meeting at 7:30 a.m. on October 11, 2013, to review the assessments and determine Student's eligibility for special education. Mother signed the notice on October 9, 2015. The form contained a box for a parent to check if the parent required the assistance of an interpreter. Mother did not check the box.

19. District sent the draft Assessment Report, in English, home with Student; Mother received it on October 10, 2013.

20. The IEP team met as scheduled on October 11, 2013. Ms. Anton, Ms. Tedone, Ms. Baldelli, Ms. Kang, Parents, North Orange County SELPA Program Coordinator Laura Beach, a general education teacher, the school principal and both Parents attended the meeting. The IEP document stated Romanian as Student's native language.

21. District gave Parent a 24 page document entitled "Parents' Rights" and a 21 page draft IEP at the meeting. Both documents were in English. The draft IEP states Parents' Rights were "reviewed" and Parents had no questions. The IEP notes reflected that the sum total of any discussion of the assessments, recommendations and the reasons for the recommendations, were verbal summaries presented by Ms. Tedone, Ms. Anton, Ms. Kang, and Ms. Baldelli. The team agreed Student was eligible for special education under the category of intellectual disability. The team discussed District's placement recommendations. District arranged for Parents to visit the recommended special day class on October 17, 2013. The team agreed to reconvene, if needed, after the visit.

22. On November 15, 2013, Parents wrote a letter to District. The letter informed District that Parents had tried to communicate with the school, and "if effective communication is not possible" they would need someone to advocate for their son. They reported they received the Assessment Report the day before the meeting, did not have enough time to read the 27 page report, the meeting was too short, and they were unable to ask many of the questions they had.

23. On November 21, 2013, District gave Parents notice the October 11, 2013 IEP team meeting would reconvene on December 10, 2013. Mother signed and returned the notice. Mother checked the box to indicate she required an interpreter and handwrote "Romania" on the line for language.

DECEMBER 10, 2013 IEP MEETING

24. The IEP team meeting reconvened on December 10, 2013. Both Parents attended. District did not provide an interpreter. The IEP notes stated that a copy of Parent's Rights was provided to Parents in their native language, Romanian. The notes also stated that Parents had no questions as to their rights. When questioned by Mother during the hearing, Ms. Beach admitted that Parent's Rights were not provided in

Romanian, and the note was not accurate. She explained that the note was incorrect due to the inclusion of boilerplate language in a draft prepared before the IEP meeting was held.

25. The team continued to discuss District's recommended placement. District agreed to Parents' request for an occupational therapy assessment and to reconvene an IEP team meeting to determine whether Student required occupational therapy. Parents later signed an occupational therapy assessment plan on January 10, 2014. The assessment plan was in English. It stated that Student's primary language was Romanian. Mother wrote "English" under the portion of the form that stated Romanian as Student's primary language. Mother intended to indicate that Student spoke both English and Romanian.

JANUARY 30, 2014 IEP MEETING

26. On January 30, 2014, the IEP team met to discuss Student's placement and related services. Mother attended the meeting. There was no interpreter. District offered specialized academic instruction in a separate classroom at Gilbert Elementary School and group speech and language services for the regular and extended school year. Mother signed consent to all parts of the IEP.

OCCUPATIONAL THERAPY ASSESSMENT

27. Occupational therapist Lisa Colburn conducted a School-Based

Occupational Therapy Evaluation¹ in February 2014, and prepared a report dated February 26, 2014. Ms. Colburn was first employed as an occupational therapist by Long Beach Unified School District in September 2010, and was, at the time of hearing, employed as an occupational therapist by West Orange County Consortium for Special Education. She held a bachelor of arts in psychology and a master of science in occupational therapy.

28. Ms. Colburn was familiar with Student. She provided weekly occupational therapy sessions in Student's classroom. Ms. Colburn observed Student in the classroom and during testing. She obtained information from Student's teachers, reviewed Student's records, and administered a variety of assessment tools. Ms. Colburn was qualified to administer and interpret the results of her testing. She administered the Bruininks-Oseretsky Test of Motor Proficiency, 2nd Ed.; Sensory Processing Measure - Classroom Form; School Function Assessment; and Benbow Observation of Hand Skills. Ms. Colburn concluded that Student's sensory profile, fine motor skills, and visual perception were sufficient for Student to participate in the classroom and to make progress on his goals in class.

29. She prepared a six-page, single spaced report in English, containing numerous anatomical and medical descriptors, other highly specialized vocabulary, technical explanations of test results and comparisons of raw scores, T-Scores, and performance levels on school form scales.

¹ The terms "evaluation" and "assessment" have the same legal meaning in this Decision and are used interchangeably, consistent with the terminology used by the parties, the witnesses and documentary evidence. (See 20 U.S.C. § 1414(b); Ed. Code, § 56302.5.)

MARCH 6, 2014 IEP TEAM MEETING AND ASSESSMENT PLAN

30. The IEP team met on March 6, 2014, to review the occupational therapy assessment. Mother attended the meeting. District did not provide an interpreter. District gave Mother a copy of Ms. Colburn's Occupational Therapy assessment report in English at the meeting.

31. Ms. Colburn summarized the report. Mother explained that her own observations of Student's ability to eat independently and his sensitivity to loud noises were different from Ms. Colburn's observations. Mother requested a change in placement from the special day class at Gilbert to a full inclusion program at Corey School and requested an increase in speech and language services.

32. District offered to reassess Student in order to obtain current information to determine whether the change in placement and services requested was appropriate. District gave Mother an assessment plan, in English, to reassess Student in the areas of academic achievement and language/speech communication to Mother. Mother took the assessment plan home. Parents did not consent to the assessment plan.

33. On March 10, 2014, Mother gave District a note from Student's physician recommending home schooling for three months. District then placed Student on home/hospital instruction.

34. On April 29, 2014, Parents wrote to Ms. Mukanos and to the Superintendent of Buena Park School District. The stated purpose of the letter was to "follow up on our previous request" for translations and interpretation services, specifically requesting, among other things, assessment reports, and an interpreter at meetings.

MAY 12, 2014 IEP TEAM MEETING

35. At Parents' request, the IEP team met on May 12, 2014. Mother attended

the meeting. District provided a Romanian interpreter. The team again discussed Mother's request to change Student's placement to a full inclusion program, Parents' disagreement with the placement and services provided in the current IEP, and District's desire to reassess Student. District met with Mother and the interpreter after the meeting to discuss parental rights and procedural safeguards.

MAY 27, 2014 ASSESSMENT PLAN

36. On May 21, 2014, an attorney wrote to District informing District that Mother retained her to represent Student. The letter asked District to assess Student in 10 separate areas including comprehensive pre-academic and academic evaluation; learning potential and developmental evaluation; language skills; auditory skills; visual skills; fine motor skills; gross motor skills; social emotional behavior; functional behavior; eyesight; assistive technology; and recreation skills. The letter contained a detailed description of the assessment tools, methods and subtests to be used in each category, the conditions under which Student would be assessed and the information to be included in an assessment plan. According to the letter, if District did not wish to reassess Student on the attorney's conditions, Mother requested an independent educational evaluation based upon Mother's disagreement with the October 11, 2013 Multidisciplinary Assessment.

37. District responded by letter directly to Parents on May 27, 2014, and enclosed a revised assessment plan. The revised assessment plan included assessments for academic achievement, health, intellectual development, language/speech communication, social/emotional development, adaptive behavior and occupational therapy. The assessment plan was in English. A Romanian translation, and an English copy, of Parents' Rights and Procedural Safeguards were enclosed.

38. Mother's attorney responded to District by letter dated May 29, 2014. The attorney wrote, "on behalf of" Mother "we consent" to the May 27, 2014 assessment

plan and asked that her assessment information in the May 21, 2014 letter "be considered." She enclosed an unsigned copy of the assessment plan. Ms. Mukanos wrote to Student's attorney on June 2, 2014, asking for clarification of her May 29, 2014 letter. Student's attorney and Ms. Mukanos exchanged letters on June 4 and 9, 2014 but failed to agree upon the scope of the assessment. After the correspondence in June and before September 2014, District learned the attorney no longer represented Student.

39. The IEP team met on October 30, 2014. District provided an interpreter. The team discussed reassessing Student including the location and the conditions for assessment. IEP notes from the October 30, 2014 meeting indicate that Parents asked questions about their options, the District Program Coordinator answered their questions, including due process, and there was an extensive discussion about proposed assessments. Father signed an assessment plan dated October 30, 2014, written in English, which provided for assessment in the areas of academic achievement, and language/speech communication development. The team agreed to reconvene on November 12, 2014.

40. The IEP team met on November 12, 2014. A Romanian interpreter translated the meeting. IEP notes from the November 12, 2014 IEP team meeting reflected a lengthy discussion about District's assessments. Parents did not agree with District's assessments. Father expressed his concerns about the speech/language assessment and Mother wanted assessments conducted in Romanian. Parents asked if Student's home schoolteacher could assess Student. District explained that teacher input is considered but that the teacher was not the primary evaluator. Mother asked if District considered Parents' opinions. The school psychologist asked if Parents might be confused about what constitutes an assessment. She then described how a comprehensive evaluation is conducted including input from specialists and information about reasoning, thinking, language, behavior, and socialization. Mother wanted

documents, including those that required a Parent's signature, to be in Romanian. Parents asked questions about their rights. The District Program Director, with the interpreter, reviewed and explained Parents' rights during and after the meeting. Father withdrew his consent to the October 30, 2014 assessment plan. Parents requested an independent educational evaluation during the meeting. After the meeting, District wrote to Parents on November 26, 2014, asking for clarification as to what type of independent educational evaluation Parents requested.

41. The IEP team met on January 28, 2015. A Romanian interpreter translated the meeting. The IEP team reviewed private assessment reports from Providence Speech and Hearing Center and a private occupational therapy assessment. The team also discussed further plans for District to assess Student. There was no agreement as to any further assessments by District and there was no evidence of any further discussions about an independent educational evaluation.

DISTRICT WITNESSES

42. In addition to Ms. Anton, Ms. Kang, Ms. Baldelli, Ms. Colborn , Ms Tedone, and Ms. Beach, School Psychologist Judy Lemen, and Director of Special Services Michelle Mukanos testified at the hearing. District witnesses confirmed that Parents' native language was Romanian and that District never provided an assessment plan to Parents in their native language. District witnesses uniformly testified that they conversed with Parents in English, uniformly opined that Parents understood documents provided in English and that Parents were able to understand English with sufficient proficiency to participate in IEP meetings. All District witnesses testified that Parents did not have any unanswered questions or concerns about District's assessments at the IEP meetings when there was no interpreter present. District witnesses, with the exception of Ms. Mukanos, either denied, or could not recall, whether or when Parents requested an interpreter or translated documents. Ms. Mukanos acknowledged she received

Parents' April 29, 2014 letter in which Parents wrote to inform her that they were following up on previous requests for translation and interpretation services.

MOTHER'S TESTIMONY

43. Mother obtained the Assessment Report from Student's backpack the afternoon before the early-morning meeting on October 11, 2013. Mother did not have time to read the Assessment Report and although she speaks, reads, and writes some English, she did not understand complicated documents written in English. Mother did not ask questions about Parent's Rights or the Assessment Report during the October 11, 2013 IEP meeting because she was unable to read the Assessment Report before the meeting and she could not have understood it.

44. Mother acknowledged that she did not check the box requesting an interpreter on the notice for the October 11, 2013 meeting and she checked the box requesting an interpreter for the December 10, 2013 meeting. She explained that she decided after the October 11, 2013 meeting that she needed help. She did not always check the box requesting an interpreter in later notices because she had requested an interpreter for the December 10, 2013 meeting but District did not provide one. She did not think she needed to continue to make a request that District had failed to accommodate; District was aware her native language was Romanian; and she did not know she had a right to an interpreter.

45. Mother refused to consent to the March 6, 2014 and May 27, 2014 assessment plans. Parents thought District's 2013 assessments were not properly conducted because Student was not assessed using the Romanian language, and in their opinion, District was not entitled to reassess Student so soon after District's previous assessments.

LEGAL CONCLUSIONS

INTRODUCTION : LEGAL FRAMEWORK UNDER THE IDEA²

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)³ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called

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

³ All subsequent references to the Code of Federal Regulations are to the 2006 version.

designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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

individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56502, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) District is the petitioning party and has the burden of proof on all issues.

ISSUE 1: DISTRICT'S MULTIDISCIPLINARY AND OCCUPATIONAL THERAPY ASSESSMENTS

5. District contends that the multidisciplinary assessment dated October 11, 2013, and the occupational therapy assessment dated February 26, 2014, were appropriate. Student contends District did not properly assess Student in his primary language, did not provide the assessment plans or reports to Parents in their native language and did not provide an interpreter at IEP meetings.

APPLICABLE LAW

6. Before any action is taken with respect to the initial placement of an

individual with exceptional needs in special education instruction, an individual assessment of the pupil's educational needs shall be conducted, by qualified persons in accordance with testing requirements set forth in Education Code section 56320 subds. (a) through (i). (Ed. Code §§ 56320 & 56322.)

7. A school district must make reasonable efforts to and obtain informed written consent from a parent before conducting the initial evaluation of a student to determine whether the child is a child with a disability. (34 C.F.R. §§ 300. 9; 34 C.F.R. §§ 300(a)(1)(i), (iii).) A local educational agency must provide written prior notice to the parents of a child whenever it proposes to initiate the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. §§ 1415(b)(3), and (c).) The written notice must be given to parents of a child with a disability in written language understandable to the general public, and in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. (34 C.F.R. § 300.503(c)(1).) If the native language or mode of communication of the parent is not a written language, the local educational agency must take steps to ensure that 1) the notice is translated orally or by other means in parent's native language or mode of communication; 2) parent understands the content of the notice, and 3) written evidence exists that the previous requirements have been met. (34 C.F.R. § 300.503(c)(2).)

8. 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(b) (c)(5); Ed. Code, §§ 56320, subds. (a) and (b), 56381, subd. (h).) 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].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) and (e).)

9. 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.)

10. Education Code section 56329 subdivision (a)(1) requires the local educational agency to schedule an IEP meeting upon completion of an assessment to discuss the assessment, the educational recommendations, and the reason for the

recommendations. An assessment report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).) This rule enables parents to understand their child's needs so that they can give informed consent for their child's IEP. "Consent," as defined in Section 300.9 subpart (a) of title 34 of the Code of Federal Regulations, means the parent has been fully informed, in parent's native language, of all information relevant to the activity for which consent is sought.

11. Local educational agencies "shall take any action necessary to ensure that the parent or guardian understands the proceedings at [an IEP team] meeting, including arranging for an interpreter for parents or guardians . . . whose native language is other than English." (Ed.Code, § 56341.5, subd. (i); see also 34 C.F.R. § 300.322(e).) The Supreme Court has recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. at pp. 205-06.) While the *Rowley* case involved the provision of FAPE for a Student and does not involve the procedures for assessing a student for special education, *Rowley* illustrates the importance of this requirement.

12. In response to a request for an independent educational 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 educational evaluation is provided at public expense, unless the agency demonstrates in a hearing 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).)

Analysis

13. District offered Student a multidisciplinary assessment in October 2013 and an occupational therapy assessment in February 2014. District gave Parents assessment plans only in English. The evidence established that District knew that

Parents' native language was Romanian, and that both Parents understood conversational English, and read and wrote some English. However, the weight of the evidence demonstrated Parents did not understand technical or complicated documents in English. District offered no evidence that translating the assessment plans into Romanian or having someone interpret the assessment plans for Parents before asking them to sign them was not feasible. District should have offered assessment plans translated or interpreted into Romanian before proceeding with assessments. (34 C.F.R. § 300.503(c)(1).)

14. The mechanics of District's multidisciplinary and occupational therapy assessments were appropriate. District assessors had the necessary qualifications and experience to conduct and interpret the assessments each performed. Each assessor used a variety of assessment tools including observation across educational settings, health and educational records review, Student classroom and clinical observation, Parent and teacher input, as well as informal and standardized testing. They gathered relevant functional, developmental, and academic information. District assessors used assessment instruments designed to provide cognitive information, and to consider behavioral and developmental factors. The assessment instruments were technically sound, used for valid and reliable purposes, and were not racially or culturally discriminatory. The assessors were trained and knowledgeable and administered tests according to the proper instructions. The two language-based academic assessments and the speech and language assessment were administered in English and in Student's primary language of Romanian.

15. Ms. Anton's Assessment Report was comprehensive, fully described her findings, incorporated the other written reports from other assessors including behavior, educationally relevant health, developmental and medical findings, and recommended special education and related services based upon Student's global developmental

delays due to intellectual disability. However, the evidence established that Parents received the Assessment Report, in English, at 2:30 p.m. for an IEP scheduled to review the report and determine Student's eligibility at 7:30 the next morning. The Assessment Report was long, technical and complicated and Parents did not have the time, or ability, to read and understand the report before the IEP meeting.

16. Ms. Colburn's Occupational Therapy Evaluation fully described her findings and the reasons for her conclusion that Student did not need individual occupational therapy because Student's sensory profile, fine motor skills, and visual perception were sufficient for Student to participate in his educational environment. Parents received Ms. Colburn's report, in English, at the IEP meeting. While Ms. Colburn's six page report was not as long as the Assessment Report, the report contained highly specialized vocabulary and technical explanations of test results.

17. District was aware that Parents' native language was Romanian; District assessed Student using Romanian interpreters when appropriate; the October 11, 2013 IEP document stated that Romanian was Student's native language; on the notice District sent to reconvene the IEP team meeting on December 10, 2013, Mother checked the box to indicate she required an interpreter and handwrote "Romania" on the line for language; at the December 10, 2013 IEP the notes erroneously stated that a copy of Parents' Rights was provided to Parents in their native language, Romanian; and the occupational therapy assessment plan from January 10, 2014, stated that Student's primary language was Romanian. While District witnesses were consistent in their testimony and belief that Parents could speak and read sufficient English to converse with staff, participate in IEP team meetings, understand Student's assessments and his IEP, and understand their rights, District was on notice of a language barrier, and District witnesses' opinions about what Parents understood are speculative at best. Mother convincingly testified that she did not understand complex documents written in English

and she required an interpreter at the IEP team meetings in order to understand the proceedings. The letters she wrote, forms she submitted, and notes contained in Student's IEP's corroborated her testimony. The credible testimony of one witness when weighed against speculation by any number of witnesses is sufficient.

18. Parents were not sufficiently proficient in English to read and understand the assessment plans, the Assessment Report, or the Occupational Therapy Evaluation such that they could meaningfully discuss the assessments, recommendations and the reasons for the recommendations at the IEP meetings without the assistance of an interpreter at the meeting.

19. Parents' November 15, 2013 letter and Mother's subsequent request for an interpreter for the reconvened IEP meeting unequivocally established that Mother did not fully understand the Multidisciplinary Assessment report at the October 11, 2013 meeting. In particular, at the meetings on October 11, 2013, December 10, 2013, and March 6, 2014, when District presented the assessments without an interpreter present, District witnesses and IEP notes reported little or no questions from Parents about District's assessments. On the other hand, with an interpreter was provided at the November 12, 2014 meeting, the IEP notes described Parents' disagreement with District's assessments, Parents' questions about the assessment process, and District's response. The note including erroneous boilerplate language about Romanian translation of Parent's Rights from the December 10, 2013 meeting raises an inference that District was aware Parents did not understand the proceedings.

20. While the evidence established that District's multidisciplinary and occupational therapy assessments met the technical requirements of the IDEA, District failed to establish that District completed the assessment process by properly providing the assessment reports to Parents for discussion at an IEP team meeting as required by state and Federal law. Appropriate assessments are the foundation upon which the IEP

team develops a FAPE. Parents were entitled to understand the assessments. District did not meet its burden of proof that the assessments were appropriate because 1) the assessment plans were not in Parents' native language which deprived Parents of the full understanding of the extent of the assessments, and 2) District did not provide the assessment reports in a language Parents could understand, or translate or interpret the reports at the IEP meeting where the assessments were discussed. It defeats the purpose of the requirements for written assessment reports and the principle of informed consent to require parents with limited understanding of the written reports, because their native language is not English, to rely solely on verbal summaries of assessment results offered by staff at IEP meetings without an interpreter. To hold the IEP meeting to discuss the reports without an interpreter is inconsistent with Education Code section 56341.5 subdivision (i), and renders the assessments inappropriate.

ISSUE 2: MARCH 6, 2014, AND MAY 27, 2014 ASSESSMENT PLANS

21. District requests an order allowing District to reassess Student without parental consent according to assessment plans dated March 6, 2014, and May 27, 2014, based upon Parents' March 6, 2014 request to change Student's placement. Parents contend they were entitled to receive assessment plans in their native language, and they refused to allow District to reassess Student so soon after District's previous assessments.

Applicable Law

22. Paragraphs 7, 10, and 11 above are incorporated by this reference.

Analysis

23. The evidence established that Parents' native language is Romanian and that District never provided any assessment plans to Parents in their native language. In

particular, District did not provide the March 6, 2014, and May 27, 2014 proposed assessment plans to Parents in Romanian. As discussed above, Parents had a right to receive the assessment plans in their native language so they could fully understand the extent to which District proposed to reassess Student. Therefore, District did not meet its burden to prove it is entitled to assess Student without parental consent pursuant to the English versions of the March 6, 2014 and May 27, 2014 assessment plans.

24. The nature of the complaint filed by District does not give the ALJ jurisdiction to make any orders other than denying District's requested relief.

ORDER

All District's requests for relief are denied.

PREVAILING PARTY

Pursuant to 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. In accordance with that section, the following finding is made: Student prevailed on all issues heard and decided in this case.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

Dated: July 24, 2015

/s/

MARIAN H. TULLY

Administrative Law Judge

Office of Administrative Hearings