

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

GOLETA UNION SCHOOL DISTRICT,

OAH Case No. 2014100277

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GOLETA UNION SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

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OAH Case No. 2014080072

DECISION

Goleta Union School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on July 28, 2014. Based upon a showing of good cause, OAH continued the matter on August 18 and October 10, 2014. Parent filed a due process hearing request on Student's behalf on October 7, 2014, naming District. On October 17, 2014, OAH consolidated both cases, continued Student's case and ordered that the timeline for issuance of the decision in the consolidated cases be based on the filing date of Student's case. OAH continued the matter for good cause on December 1, 2014.

Administrative Law Judge Laurie Gorsline heard this matter in Goleta, California, on March 9, 10, 11, 12 and 17, 2015.

Attorney Tania Whiteleather represented Student and was assisted by Advocate Sandra Dixon Shove. Parent and Ms. Shove attended all days of hearing. Student did not attend the hearing. Attorney Melissa Hatch represented District. Margaret A. Saleh, District Assistant Superintendent, attended all days of hearing.

At the close of hearing on March 17, 2015, the ALJ granted a continuance to April 1, 2015, for the parties to file written closing arguments. Upon receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

## ISSUES<sup>1</sup>

### STUDENT'S ISSUE:

Did District deny Student a free appropriate public education by failing to timely provide Student with an independent psychoeducational evaluation following Parent's May 2014 request?<sup>2</sup>

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

<sup>2</sup> Student's due process complaint alleged several other issues, including both non-IDEA claims and other IDEA claims. At the March 2, 2015 Prehearing Conference, Student's counsel represented to the ALJ that Student was withdrawing all other IDEA claims. The ALJ also informed the parties that OAH did not have jurisdiction over Student's non-IDEA claims. Accordingly, all of Student's other claims were dismissed.

## DISTRICT'S ISSUE:

Was Student entitled to an independent psychoeducational or neuropsychological evaluation by an evaluator of Student's choice which exceeded District's cost criteria?

## SUMMARY OF DECISION

Student did not establish that District denied Student a FAPE by failing to timely provide Student with an independent psychoeducational evaluation following Parent's May 2014 request. The preponderance of evidence established that Student rejected District's offer to provide an independent psychoeducational evaluation within District's reasonable cost criteria, after which District timely filed for due process. Student's request for relief is denied.

District established that Student was not entitled to an independent psychoeducational or neuropsychological evaluation by an evaluator of Student's choice which exceeded District's cost criteria. The weight of the evidence established that District's cost criteria was reasonable and that unique circumstances did not exist which justified either an independent psychoeducational or neuropsychological evaluation which exceeded District's cost criteria. District's request for relief is granted.

## FACTUAL FINDINGS

1. Student was a 13-year-old male at the time of the due process hearing. At all relevant times, Student was eligible for special education and related services. Parent is Student's grandmother and adopted Student in 2006. During the relevant time period, Student lived within District with Parent, who is his legal guardian and educational rights holder.

2. Student began living with Parent in 2003. Student had significantly delayed development when Parent attained custody of him. He was most significantly

delayed in language acquisition, but also self-help and social skills. His gross motor skills were delayed and his fine motor skills were severely delayed. Student was diagnosed with autism in preschool and with general developmental delay as a toddler. A 2004 Tri-Counties Regional Center evaluation indicated that Student had prenatal exposure to drugs and was significantly neglected by his biological parents. Parent denied Student was exposed to drugs in utero, however, Parent's denial was based upon limited observations of Mother and uncorroborated conversations with Student's Father.

3. District served students in kindergarten through sixth grade. Student attended District's Kellogg Elementary School during the 2012-2013 school year. At that time, Student's primary category of eligibility for special education was autism, with a secondary eligibility of speech and language impairment.

4. The Santa Barbara County Special Education Local Plan Area provided oversight and governance to the special education departments for 22 local education agencies, including District. District adopted the independent educational evaluation policy developed by the Santa Barbara County SELPA. The SELPA policy contained information on how to obtain an independent evaluation and criteria for conducting such evaluations, including cost, qualifications, and geographic location. District's publicly funded independent evaluations met the same criteria as the evaluation performed by District's assessors. The allowable independent evaluation costs under the SELPA policy included similar tasks undertaken by District assessments, including observation, record review, administration and scoring of tests, report writing, and attendance at an IEP team meeting. The SELPA maintained a list of assessors who satisfied the SELPA's criteria for conducting independent evaluations. The list did not contain all of the assessors in the tri-counties area who met the SELPA's criteria for performing assessments.

5. Jarice Butterfield, Ph.D., was the Santa Barbara County SELPA director. She was responsible for maintaining and updating the SELPA's independent educational evaluation policy and the SELPA's list of independent evaluators. She credibly explained the development of the SELPA's assessor list and cost criteria. The cost criteria was developed by the SELPA through an ongoing process in which evaluators specializing in different disciplines within the tri-counties area, specifically Santa Barbara, Ventura and San Luis Obispo counties, were contacted. Inquiry was made of each of the assessors contacted regarding their fees for evaluations, and their opinions were solicited as to what constituted a reasonable fee for particular assessments. Based upon this information received from the assessors, the SELPA established a reasonable rate for each particular assessment which became the District rate, or cost criteria, for conducting independent evaluations. The cost criteria was not an average of the rates from the assessors contacted, and rates that were too low or too high were disregarded in the determination of the District's independent evaluation cost criteria. The assessors who did not agree to work within the District's cost criteria were not on the SELPA's list of assessors.

6. Periodically, new assessors were contacted to be added to the list. Each year the assessor list was reviewed by the SELPA in order to update the list. Each year the assessors on the list were contacted to determine if they continued to satisfy independent evaluation criteria, including the cost criteria for assessments, and whether they sought to remain on the SELPA assessor list. Inquiry was made of each assessor who did not want to remain on the list and the SELPA contacted those assessors who did not respond to the SELPA's written inquiry. The SELPA's cost criteria for independent assessments increased over time based on feedback from assessors and the SELPA's further evaluation as to a reasonable rate for such assessments. Those assessors who

agreed to the cost limitation set forth in the SELPA policy were added or remained on the list, if they otherwise met the SELPA criteria.

7. Tri-Counties Regional Center provided Student with in-home behavioral services which were delivered through a behavioral services agency, Support and Treatment for Autism Related Disorders.

8. At hearing, Parent claimed that in late 2012, the in-home behaviorist brought to her attention that Student might be having seizures. Parent admitted she took no action in response to this information, and she was inconsistent in describing what response she eventually took. Parent claimed she reported about the seizure concern at the April 2013, December 2013 and May 2014 IEP team meetings, but later denied she reported it during those meetings. Parent also inconsistently claimed she followed up with Student's teacher between April 2013 and September 2013 on discussions she claimed she had with him in December 2013.

9. District conducted assessments of Student between January 2013 and March 2013 in preparation for Student's triennial review, including a psychoeducational assessment. As part of the triennial assessments, Parent completed a questionnaire that asked Parent to update Student's health condition and status. Parent did not list any current health conditions or changes in health status, other than stating that Student followed a homeopathic routine and providing a list of the vitamins, minerals, oils and extracts he took. Parent did not mention suspected seizures.

10. As part of its psychoeducational assessment, District school psychologist Amanda Fox assessed Student in the area of intelligence and reported the results of her assessment in District's triennial assessment report dated April 11, 2013. Ms. Fox has a bachelor's degree in psychology and a master's degree in education in school psychology. She holds a credential and is nationally certified as a school psychologist. She is scheduled to complete her training program to be a school neuropsychologist in

July 2015. She has worked with students in primary and secondary settings, with disabilities ranging from mild-moderate to severe and profound, including autism and intellectual disabilities. Ms. Fox opined that having autism, having intellectual disability, and being primarily non-verbal is not a rare occurrence.

11. During her assessment, Ms. Fox reviewed Student's records, prior assessments and IEPs. Ms. Fox also observed Student and interviewed Parent. Student displayed limited communications skills during the evaluation. He consistently exhibited difficulty sustaining attention during observations, had little independence and appeared to prefer using nonverbal forms of communication over verbal communication. To assess Student's cognition, Ms. Fox attempted the Wechsler Intelligence Scale for Children, 4th edition. However, Student was unable to perform using standardized instruction. Specifically, on 9 of the 10 subtests, he was not able to demonstrate an understanding of the tasks. A nonverbal intellectual assessment, the Comprehensive Test of Nonverbal Intelligence, 2nd edition, was successfully administered. On this test, Student's scores on six subtests were combined to yield a full scale score of 55, which was in the Lower Extreme range of intellectual functioning. The results of testing of Student's adaptive skills were also Low and commensurate with his intellectual scores. At hearing, Ms. Fox opined that Student did not require a neuropsychological evaluation because Student was consistent in his low abilities over the years and many of the instruments used in a neuropsychological evaluation could not be completed or used, in part because of the language load required for those tests. She opined that using neuropsychological instruments to assess cognition would not glean any further useful information which would impact Student's education. She opined that District's report identified all of Student's unique needs.

12. At hearing, Parent admitted she made no report to Ms. Fox about suspected seizures, but initially claimed she could not recall whether she did or not.

13. District's assessment report stated that the results of the Comprehensive Test of Nonverbal Intelligence were the most valid measure of Student's intellectual abilities that could be obtained using a standardized assessment, but were likely an underrepresentation of his abilities, as Student demonstrated difficulty in following standardized procedures. The report concluded that Student met criteria of special education eligibility under the categories of autism, intellectual disability, and speech and language impairment. Ms. Fox recommended that the IEP team consider changing Student's secondary category of eligibility of speech and language impairment to intellectual disability.

14. District convened an IEP team meeting on April 11, 2013, to discuss the results of the District's assessments. Parent was concerned that changing Student's secondary eligibility to intellectual disability would have a negative impact on Student's future program and placement. The IEP team agreed that Student's existing IEP would remain in place without any changes. The notes of the IEP team meeting made no reference to seizures.

15. At hearing, Parent claimed she told Ms. Fox about the possibility of Student having seizures at the IEP team meeting, but contradicted that statement when she claimed she did not mention it until after the IEP during "casual conversation." Parent gave no plausible explanation as to why she did not mention this concern during the IEP team meeting. Parent's claim that she informed the District about the issue of seizures in April 2013 was not credible because of the inconsistencies in her testimony.

16. Student's annual IEP was held on December 19, 2013. The District members of the IEP team recommended that Student's primary category of eligibility be changed to intellectual disability and his secondary category of eligibility be changed to autism. Parent disagreed with Student's primary eligibility designation and stated her



future plan to request an independent educational evaluation to evaluate Student's abilities through nonverbal methods.

17. At hearing, Parent claimed that she told the IEP team about the seizure issue. However, the notes and listed concerns of parent relevant to educational progress make no reference to seizures. The contemporaneous documentary evidence was inconsistent with Parent's testimony, and she testified inconsistently as to when she told the IEP team about the seizures, which undermined her overall credibility.

18. On May 6, 2014, District received a letter from Parent dated May 4, 2014. In the letter, Parent complained that District had unilaterally changed Student's eligibility and requested an independent educational evaluation. Parent's letter stated that Student needed a "comprehensive developmental assessment" to determine his educational needs.

19. After receiving Parent's letter, District's assistant superintendent, Dr. Margaret Saleh, telephoned Parent and left a message for the purpose of discussing Parent's letter and determining specifically what type of assessment Parent sought.

20. On May 13, 2014, Dr. Saleh responded to Parent's May 4, 2014 letter by email. In the email, Dr. Saleh asked Parent to clarify what she meant by a "comprehensive developmental assessment." Dr. Saleh stated she would respond to Parent's request for an independent evaluation by May 21, 2014, and invited Parent to discuss with Dr. Saleh her concerns regarding the District's April 11, 2013 assessment report. As an attachment to her email, Dr. Saleh forwarded to Parent a copy of the SELPA guidelines on independent evaluations and approved assessor list.

21. By email dated May 15, 2014, Parent acknowledged receipt of Dr. Saleh's May 13, 2014 email. Parent stated she did not believe District's assessment captured Student's strengths and needs and requested an independent evaluation that assessed Student in all areas of suspected disability, using appropriate methods and instruments

for a student with limited verbal language. Parent referred to the requested evaluation as a "comprehensive developmental assessment," but gave no further description of the assessment sought.

22. On May 19, 2014, District formally responded to Parent's request for an independent evaluation by a prior written notice letter. In the letter, District agreed to fund an independent psychoeducational assessment in accordance with the assessor qualifications and cost limitations set forth in the SELPA policy attached to the letter. District advised Parent that any assessor selected who was not on the approved SELPA list must meet licensure/credential specifications and the SELPA cost limitations. District also informed Parent that if she chose an assessor not on the list who charged more than permitted by the SELPA guidelines, she must show why an assessor with unique qualifications was necessary. Upon selection of an assessor, Parent was instructed to provide Dr. Saleh with the chosen assessor's contact information. Enclosed with its letter, District sent the SELPA independent evaluation policy, including a 24-page master list of assessors who satisfied SELPA criteria for conducting an independent evaluation, and a copy of Parent's Rights and Procedural Safeguards.

23. The SELPA policy enclosed with the May 19, 2014 letter contained information about a parent's rights and the procedures to obtain an independent evaluation, agency criteria, including cost limitations, and a parent's opportunity to explain student's unique circumstances to justify an evaluator who did not meet agency criteria. The policy itemized the maximum cost for various independent assessments, including but not limited to, cognitive functioning which was listed as a range of between \$1,500 to \$3,000, and neurological assessment which was capped at \$2,500 to \$3,500. The maximum cost for any one assessment was \$3,500.00. The policy also stated other criteria for independent evaluations obtained at public expense, including a location limitation in the tri-counties area unless it could be demonstrated that there

was a unique need and there were no qualified evaluators within the specified area who could appropriately assess the child, and a set of minimum qualifications for evaluators. On the 24-page master list of assessors, 17 different disciplines or categories of assessors were listed with assessors' names and contact information in each category. Nineteen assessors were listed under the heading of Cognitive Functioning and/or Neuropsychological, including both clinical psychologists and neuropsychologists. Of the 19 persons listed, one was a District employee and four others were listed as employees for other school districts.

24. After obtaining District's May 19, 2014 letter, Parent called Sandra Shove and asked her to review the District's list of assessors. Ms. Shove has been a friend to Parent for over 9 years, and for the last 10 years she has been a non-attorney special education advocate. Parent did not contact any of the persons on the District's list. At hearing, Parent claimed that four of the assessors were not appropriate to assess Student because she knew them or knew of them. However, her testimony was vague and she did not adequately explain how she knew them or persuasively explain how her alleged familiarity with them would have a negative impact on their ability to perform an independent evaluation.

25. Ms. Shove conferred with Parent about having Dr. Ann Simun conduct Student's independent evaluation. Dr. Ann Simun was not on District's list of evaluators. Dr. Simun is a clinical psychologist and neuropsychologist. A neuropsychologist is a clinical psychologist who has certain type of specialized training on brain behavior relationships, understanding how the brain, nervous system and body intersect with behavior and emotional functioning. She has a master's degree in school psychology, a doctorate in clinical psychology, and postdoctoral training in neuropsychology. Dr. Simun previously worked as a school psychologist with Fontana Unified School District and Los Angeles Unified School District. She has been in private practice since 2005,

providing neuropsychological and psychoeducational evaluations of children, and has experience working with students who are nonverbal.

26. Ms. Shove had an ongoing professional relationship with Dr. Simun and Dr. Simun receives referrals from Ms. Shove. In May 2014, Ms. Shove had clients who were obtaining evaluations from Dr. Simun and Ms. Shove was working with Dr. Simun on several other cases. Ms. Shove facilitated having Dr. Simun observe Student at school during May 2014.

27. On May 23, 2014, Parent sent an email to District which stated she had selected Dr. Simun to perform Student's independent evaluation and that Dr. Simun had prior success in assessing children who were non-verbal. Parent instructed District to call Dr. Simun's assistant, Mark Stanton, to facilitate execution of an independent evaluation contract between District and Dr. Simun.

28. On May 26, 2014, Dr. Simun performed an observation of Student at school.

29. Student's annual IEP team meeting was held on May 27, 2014. The IEP meeting notes and listed concerns of parent relevant to educational progress are silent about seizures.

30. At hearing, Parent initially claimed she discussed the seizures with the IEP team, including initiation of medical interventions to see if she could get Student tested for seizures. Parent also claimed that her concerns were listed in the IEP notes. Parent then contradicted this claiming she did not discuss it during the IEP team meeting but after the IEP team meeting. Parent implausibly claimed she did not bring up the issue of seizures during the IEP team meeting because she did not want to believe Student was having seizures and Parent was otherwise defensive while testifying on this issue. Parent's testimony was not credible.

31. During communications between Mr. Stanton and Dr. Saleh in May 2014, Mr. Stanton identified Dr. Simun as having two offices in the Los Angeles area.

32. On May 28, 2014, Mr. Stanton emailed to District Dr. Simun's 2014 fee schedule. The schedule itemized Dr. Simun's fee for performing various types of assessments. The fee for a psychoeducational assessment was \$5,500, and included one on-site observation, records review, a written report of findings and one IEP team meeting or three hours of expert time. A basic neuropsychological assessment was \$5,000, and included a medically focused report, but did not include an off-site observation or attendance at an IEP team meeting. A complete neuropsychological assessment, including one on-site observation, records review, a written report of findings and one IEP team meeting or three hours of expert time, was \$6,000.

33. On May 30, 2014, Mr. Stanton sent an email to Dr. Saleh informing District that Dr. Simun would be performing a complete neuropsychological assessment at a cost of \$6,000. Dr. Saleh responded by email the same day. In the email, District informed Mr. Stanton that District did not agree to the \$6,000 fee for the independent evaluation because it exceeded the \$3,500 SELPA cost limitation. Dr. Saleh asked Mr. Stanton to let her know if Dr. Simun was willing to agree to conduct the evaluation for \$3,500.

34. On May 30, 2014, District also sent a prior written notice letter to Parent. The letter informed Parent that District had agreed to fund an independent psychoeducational evaluation at public expense, but it had not contracted with Dr. Simun because her \$6,000 fee exceeded the SELPA cost limitation and Dr. Simun had not agreed to the approved rate. District also informed Parent that Dr. Simun's office was located outside the Santa Barbara area and therefore did not meet the SELPA geographic criteria. District requested that Parent explain Student's unique circumstances which would justify an independent evaluation exceeding the SELPA

criteria, including, by example, whether Student had complex medical, educational, and/or psychological needs such that there were no other qualified assessors who could perform a valid comprehensive assessment. District also informed Parent that, alternatively, she could select an evaluator on the SELPA list, or another qualified evaluator not on the list which met SELPA criteria. District also reiterated its agreement to fund an independent psychoeducational evaluation. With its letter, District provided Parent with the SELPA independent evaluation policy, District's list of approved assessors and a copy of Parent's Rights and Procedural Safeguards.

35. On June 2, 2014, the SELPA'S Joint Powers Agency Board approved an increase in the maximum cost criteria for a single independent evaluation from \$3,500 to \$4,500. In mid-June 2014, the SELPA notified District that it could use the increased cost criteria. The increase in the rate by the SELPA was determined in a manner consistent with the procedures used in establishing the prior policy.

36. On June 4, 2014, Parent emailed to District a letter dated June 2, 2014. In the letter, Parent advised District that Dr. Simun met the SELPA geographic criteria because she regularly conducted work within the SELPA boundaries, had offices in Ventura and was soon to open an office in Thousand Oaks. As to the cost issue, Parent stated that Dr. Simun was uniquely qualified to assess Student because of her broad experience in measuring the IQ of non-verbal and low-speech students, and that she had successfully evaluated students deemed "un-testable" by peer professionals. Parent's letter explained that because Student had classic autism, was virtually non-verbal and used an AAC device to communicate, it was essential that he be evaluated by a professional who understood the neurological, communicative, and behavioral challenges of autism, and could utilize a range of assessment instruments and methodologies. Parent's letter claimed that no other neuropsychologist in the region had the education, training, and experience of Dr. Simun. Parent's letter said nothing

about the suspicion that Student had seizures nor did she take issue with any of the assessors on District's list.

37. At hearing, mostly through a series of leading questions by her counsel, Parent claimed that there were other unique circumstances supporting her request for an independent evaluation by Dr. Simun. Parent's testimony was impeached and was not persuasive. Parent claimed Student was doing things at home which he was not doing at school. For example, Parent claimed that at school Student was not using his computer tablet to make requests and that there was no interaction required of him to speak. Parent also claimed that, at home, Student was capable of physical things like riding a scooter, demonstrating balance and concentration, and that he completed some household routines such as taking out the trash. However, Student's December 2013 IEP stated that Student was using his tablet to make requests and give greetings in a variety of school settings throughout the school day, using it more often and spontaneously using it to communicate his wants and needs. He had increased his ability to spontaneously communicate verbally and he was greeting five peers each morning. With a verbal prompt, Student was able to engage in a two-part verbal exchange with a peer in 8 of 10 opportunities and he was communicating his need to go to the bathroom independently. He had mastered many familiar routines such as going through the cafeteria line. He was able to maintain a strong balance during physical activity, was throwing objects and hitting targets 10 feet away and had done well with his goals on object control and his scooter.

38. On June 17, 2014, District responded to Parent's June 2, 2014 letter by a prior written notice letter. District agreed Dr. Simun satisfied the SELPA guidelines with respect to her location. District reiterated that it agreed to fund an independent psychoeducational evaluation within District criteria. District informed Parent of the increase in the allowable public cost of an independent assessment up to \$4,500, and

that Dr. Simun's fee still exceeded the new cost limitation. District enclosed Dr. Simun's 2014 fee schedule and requested Parent to identify which type of independent evaluation she was requesting from District. District also specifically identified three assessors in the letter, one of whom was not on District's master list of approved providers but who met its cost criteria and was qualified to conduct Student's independent evaluation. District also reminded Parent she could select a person not on District's list if the person met District's cost criteria. District also stated it did not agree Student had unique circumstances such as complex medical, health, or educational needs such that Dr. Simun was the only assessor who could conduct the independent evaluation. District informed Parent that if Parent still preferred to use Dr. Simun, it would reconsider its decision if she provided information as to the circumstances unique to Student that would justify funding an independent evaluation exceeding District cost limitations.

39. District enclosed with its June 17, 2014 letter, the revised SELPA policy on independent evaluations, including agency criteria and a new master list of approved evaluators, and a copy of Parent's Rights and Procedural Safeguards. The cost limit for a full psychoeducational assessment was \$3,500 to \$4,500 with the allowable rate dependent upon the particular components of the assessment, e.g. "academic, adaptive behavior, cognition, social-emotional, neuropsychological, etc." A neuropsychological assessment was also separately listed as limited to a cost of \$2,500 to \$3,500. The policy stated that the independent evaluation costs included observations, record review, administration and scoring of tests, report writing, and attendance in person or by phone at an IEP team meeting. The new master list of approved assessors included 21 evaluators listed under the heading of Cognitive Functioning and/or Neuropsychological, adding two additional private assessors not on the prior list provided to Parent.



40. Parent did not contact any of the persons on the revised list of approved assessors.

41. Dr. Saleh has been District's Assistant Superintendent of Pupil Services since 2012. She holds a master's degree in education and multiple credentials. She has significant teaching and administrative experience working with children with autism, intellectual disabilities, and emotional disturbance, as well as with children who are non-verbal. As the former director of special education at Conejo Valley Unified School District for many years, Dr. Saleh oversaw services in a district serving 22,000 children, which included reviewing the needs of those children and building programs for them. She also had personal experience working with children with traumatic brain injury, autism, intellectual disability and severe behaviors. In Dr. Saleh's credible opinion, Parent failed to demonstrate unique circumstances such that an evaluator who met agency criteria could not assess Student. Based on her experience at District and at Conejo Valley Unified School District, and her work with statistics in those districts, Dr. Saleh estimated the concurrence of intellectual disability, autism and being nonverbal affected 30 percent of the children with special needs. She estimated that 65 to 70 percent of the students with special needs within District have both autism and intellectual disability. District considered several things in determining whether Student had unique circumstances warranting funding of an independent evaluation that exceeded District's cost limitations, including Student's educational records, prior assessments, and District's April 2013 assessment report. In Dr. Saleh's opinion, unique circumstances warranting an independent evaluation exceeding cost criteria might include a situation where no approved assessor speaks the foreign language used by a student, or a student with an unusual medical condition or genetic disorder, a traumatic brain injury, or any condition that created a complex educational picture.

42. On June 23, 2014, Parent responded to District's June 17, 2014 letter, reiterating some of the information in her June 2, 2014 letter. Ms. Shove helped Parent with the letter. Parent advised District that she was requesting a complete neuropsychological independent evaluation at a cost of \$6,000, and did not want a psychoeducational evaluation. Parent stated that because of Student's presentation, an evaluation by a professional with substantial experience working with pre-verbal and non-verbal children who have extensive training in non-verbal assessment tools and methods was essential. The letter stated that Dr. Simun was the only assessor in the region of whom Parent was aware who had broad experience measuring cognitive and intellectual development of nonverbal children with autism, and had more training and experience in this area than any other clinical neuropsychologist she had investigated. As to the three assessors mentioned in District's June 17, 2014 letter, Parent advised District that Parent did not have information about two of them and the third one might not be appropriate because her curriculum vitae indicated her specialty might have the wrong focus. Parent's letter said nothing about any of the other 19 assessors on District's approved list or about the suspicion that Student was having seizures.

43. On July 7, 2014, District responded to Parent's June 23, 2014 letter by prior written notice. District reiterated its agreement to fund an independent psychoeducational evaluation in accordance with the SELPA policy up to a cost of \$4,500, informed Parent that Student was not entitled to an independent neuropsychological evaluation, and stated the reasons for District's position. District stated it did not agree that the reasons offered by Parent justified an independent evaluation by Dr. Simun at a cost of \$6,000. District also provided additional information on the three assessors mentioned in Parent's June 23, 2014 letter. The letter explained again that Parent could select a person not on District's list who met District's cost criteria, and invited Parent to provide an explanation of the circumstances unique to

Student that would justify funding such independent evaluation exceeding District cost limitations. With its letter, District provided Parent with the SELPA policy on independent evaluations, the master list of approved assessors who met District criteria, and a copy of Parent's Rights and Procedural Safeguards.

44. After June 17, 2014, Ms. Shove reviewed the SELPA's master list. Of the 21 approved evaluators listed under the heading of Cognitive Functioning and/or Neuropsychological, and the one new assessor identified in District's prior letter, Ms. Shove contacted no more than four of the assessors. Ms. Shove claimed one of these assessors sent her an email advising her that he had insufficient experience to assess Student. Ms. Shove claimed another assessor told her she was too busy to conduct an evaluation until late November 2014. At hearing, Student failed to produce any of the emails corroborating Ms. Shove's communications with these assessors. As to the other two other assessors, Ms. Shove seemed uncertain as to whether she contacted them or not. The lack of corroboration of Ms. Shove's communications with the assessors and Ms. Shove's uncertainty as to whom she had actually contacted, negatively impacted her credibility.

45. Ms. Shove did not contact 18 of the 21 approved evaluators listed under the heading of Cognitive Functioning and/or Neuropsychological. At hearing, Ms. Shove gave several reasons for not contacting any of these assessors. Excluding the reason for not contacting the assessor who was also a District employee, her reasons were largely vague, unpersuasive or seemed contrived, and in many places conflicted with the testimony of Dr. Butterfield. She claimed that: one assessor was not within the tri-counties area, but she did not specify how she knew this; at least two evaluators were too far away although both were in the tri-counties area; two evaluators had some vague prior association with the SELPA's director years earlier; one assessor worked for District; five others worked for or retired from other school districts; Parent claimed to

know three other assessors (although Parent's alleged relationship with them was vague); and that another evaluator had been listed as a deaf and hard of hearing expert. Ms. Shove did not explain why having a prior association with the SELPA director or being a former school district employee disqualified assessors on the District list, but did not disqualify Dr. Simun who was a former school district employee. Ms. Shove did not contact two other assessors listed based on some prior research she did years earlier, and she admitted she had not recently attempted to determine whether her prior research was accurate. Another assessor was not contacted based on some unspecified research by Ms. Shove, the specifics of which she could not recall.

46. At hearing, Parent was unable to recall why many of the assessors on the list were unacceptable to her and Parent's testimony was otherwise unpersuasive.

47. Dr. Simun met with Parent around July 8, 2014, to discuss the type of assessment she would conduct. In the past, Student had often been unable to respond to standardized assessments and therefore his cognitive level had been assumed to be very low. Parent wanted to know if this was the case. They discussed whether a standard neuropsychological assessment or neurodevelopmental assessment was appropriate. Dr. Simun's original plan was to conduct a neuropsychological evaluation, but Parent wanted a neurodevelopmental assessment. A neurodevelopmental evaluation puts the same kind of areas under examination as a neuropsychological assessment. However, a neurodevelopmental evaluation takes into account a child's developmental level, while a neuropsychological assessment is usually conducted with a comparison to age norms.

48. Parent did not tell Dr. Simun about the possibility of Student having seizures. Parent appeared nervous during her testimony about this issue and her explanation for not communicating this information to Dr. Simun was implausible.

49. On July 14, 2014, Parent acknowledged receipt of District's July 7, 2014 letter. Parent's letter stated she was proceeding with the independent evaluation with

Dr. Simun. Parent's letter said nothing about any of the assessors on District's approved list, or about the suspicion Student was having seizures.

50. Beginning on August 25, 2014, Dr. Simun conducted three days of testing on Student. She administered neuropsychological tests to Student. Student had behavioral, communication and attentional dysfunction that interfered with his ability to respond to standardized assessments. Several times she had to abandon the testing because Student was not responding; he did not comprehend the task demands. She did not record all of the results of her testing in the protocols. At hearing, Dr. Simun asserted that Student completely stopped responding to testing as if he were having a seizure. However, when confronted with the fact that her report said nothing about the suspicion of a seizure, she attempted to minimize her prior testimony, denying Student displayed many of the symptoms of a seizure. Dr. Simun initially claimed she did not mention the suspicion that Student may have had a seizure in her report because the report was for educational purposes, and information about seizures was a medical issue, but then she contradicted that testimony. The inconsistencies in Dr. Simun's testimony diminished her credibility.

51. On September 26, 2014, the third day of testing, Dr. Simun decided she did not have enough information to conduct a neuropsychological assessment because Student had trouble accessing the testing instruments and could not respond in a consistent manner in accordance with standardization. Because Student was unable to respond to a number of elements, Dr. Simun was limited in her ability to draw functional conclusions with regard to brain behavior relationships that are inherent in a neurodevelopmental or neuropsychological evaluation. Dr. Simun described the evaluation she ultimately was able to complete as something in between a psychoeducational evaluation and a neurodevelopmental assessment.

52. In Dr. Simun's opinion, a neuropsychological assessment is different from a psychoeducational assessment, often much broader than a psychoeducational assessment. A psychoeducational assessment is designed to describe the cognitive and educational needs leading to recommendations for educational issues. A psychoeducational assessment generally looks at a number of areas, such as cognitive ability, cognitive processing, academic functioning, adaptive behavior, and social-emotional functioning. A neuropsychological assessment is a battery of instruments conducted by a clinical neuropsychologist focusing on functional behavior as it intersects with brain function. A neuropsychological assessment looks at the same areas as a psychoeducational assessment, but in addition to those areas, looks at areas which are not usually addressed in a psychoeducational evaluation. A neuropsychological assessment looks at things other than educational issues, including the intersection of brain pathology with functional deficits.

53. Dr. Simun completed her written report on November 30, 2014, and sent it to Parent. Dr. Simun amended her written report on December 10, 2014. The report stated Student met eligibility for both intellectual disability and autism, with autism recommended as his primary eligibility. Current testing demonstrated Student had significantly below average cognitive ability even when measured by nonverbal means. Student's cognitive ability and language-based reasoning skills were consistent with the District's April 2013 estimate of Student's cognition using the Comprehensive Test of Nonverbal Intelligence. Dr. Simun estimated Student's cognitive ability was Mildly Impaired, and his language based skills were Severely Impaired. Dr. Simun concluded that Student's scores underestimated his performance because he was not responding consistently during testing. She developed a chart of unitary descriptors to describe Student's performance on the tests she gave during her assessment. Dr. Simun admitted her report contained a mistake regarding her interpretation of Student's scaled scores

on one test. Based upon her assessment, Dr. Simun made recommendations regarding Student's educational program which she claimed were different than what District recommended, and she identified what she believed were Student's unique needs.

54. On December 30, 2014, District received an invoice from Dr. Simun for the sum of \$5,500.00. It listed the description of service as a neuropsychological evaluation.

55. Dana Chidekel is a board certified neuropsychologist. She is based in Los Angeles County and was not on District's approved assessor list. She has both a master's degree and a doctorate degree in clinical psychology. She received her board certification from the American Board of Pediatric Neuropsychology in 2001 and the American Board of Professional Psychologists in 2007. She has been in private practice as a clinical psychologist since 1993, specializing in the evaluation of children. She received her certificate in neuropsychology in 2001. Ninety percent of her practice is dedicated to conducting comprehensive neuropsychological assessments of children between the ages of 5 and 18. She has evaluated children who are entirely non-verbal and non-communicative, and has also conducted assessments for children with autism, who are non-verbal and are intellectually disabled. In her opinion, communication and speech and language needs are one of the defining features of autism, can vary in severity and can be associated with production of language, pragmatics of language, intonation, failure to gesture, as well as other things.

56. Dr. Chidekel did not evaluate Student. She reviewed Dr. Simun's report and all of the records reviewed by Dr. Simun, including District's April 2013 assessment. She also did a limited review of Dr. Simun's testing protocols prior to the hearing. Based upon her review of the records, she offered several opinions at hearing. While testifying, Dr. Chidekel was candid and forthright and her opinions were credible and persuasive.

57. Dr. Chidekel opined that Dr. Simun's assessment was neuropsychological in nature, but Student was unable to respond to many of Dr. Simun's testing

instruments in a purposeful manner. Student did not require a neuropsychologist to evaluate him and he did not present with any condition that required a neuropsychological evaluation, such as a child with a brain injury or severe neurodevelopmental disorder, or a condition with implications for brain-behavior relationships. Student's presentation was not rare, and his disabilities were known to co-occur with frequency. The basic tenets of a psychoeducational evaluation are to determine what is interfering with a student's ability to perform in a particular subject and whether he or she has a disorder relative to that subject, whereas a neuropsychological evaluation asks why those deficits exist. Based on Student's profile, he was likely to be unable to respond to the instruments used in a neuropsychological assessment because it is a more complicated assessment. District's evaluation left no questions that needed to be answered which had not been adequately answered by the evaluations previously conducted by District. Student's presentation was historically consistent across time and consistent with risk factors present in his early childhood. Student's abilities were consistently low, and his ability to profit from his interventions had been limited, which was consistent with his low abilities.

58. Dr. Chidekel credibly explained that the testing conducted by Dr. Simun did not reveal any new information that differed from what the District had determined by its own assessments. Dr. Chidekel was persuasive in explaining that parts of Dr. Simun's report were misleading and that Dr. Simun's interpretation of Student's scores was unreliable and inconsistent. Dr. Chidekel persuasively explained numerous problems with Dr. Simun's report, and concluded that Dr. Simun's findings could not be trusted. For example, Dr. Chidekel pointed out numerous examples where Dr. Simun used inconsistent, confusing and misleading rubric for the terminology she employed and used descriptors which were not in her rubric. Dr. Chidekel credibly explained that Dr. Simun administered certain tests and indicated that Student gave certain responses.



However, Dr. Simun failed to properly record Student's responses on the protocols so it was not possible to test the veracity of her conclusions. Dr. Chidekel also took issue with the fact that Dr. Simun scored Student on certain tests that Dr. Simun abandoned or where Dr. Simun indicated Student did not understand the directions. On the Comprehensive Test of Nonverbal Intelligence, Dr. Simun reported that Student's overall score was in the Borderline Range. Later in her report, however, she records that Student had a score of 58 which was in the Moderately Impaired range. Dr. Chidekel explained that even where Student's answers were all incorrect, Dr. Simun improperly used this as an illustration that Student was performing better than in prior assessments.

59. Student's expert Mitchel Perlman is a forensic clinical psychologist and neuropsychologist based in San Diego. In his opinion, the cost of an independent evaluation depends on the scope of assessment to be conducted. His typical fee for an independent evaluation was usually capped at \$6,000, although he performed many independent evaluations for less than \$6,000, most in the low \$5,000 range. He charged more for assessments for students with emotional disturbance or in a residential treatment centers because of the complexities involved in those cases. He opined that an assessment for a student with intellectual disability, autism, and who was nonverbal would not be simple because most tests were not developed for that type of student. He also opined that a neuropsychological evaluation should be performed when a child is suspected of having seizures and that it was not common for a child to have both autism and intellectual disability.

60. Student's expert Perry Passaro is both a licensed clinical and educational psychologist based in Orange County, California. Dr. Passaro has been in private practice for the last 10 years and the scope of his practice is cognitive behavior therapy and psychoeducational assessments. He has assessed students of all ages with various types of disabilities, primarily in the Orange County area. His fee for a psychoeducational

assessment was \$4,500, which included an interview with parents, record review, observations of student at school, testing, preparation of a written report, travel within Orange County and attendance at student's IEP. His fee was not higher than \$4,500, unless the assessment was outside Orange County or he was required to conduct multiple observations or attend multiple IEP meetings.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>3</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.<sup>4</sup>; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, which meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed.

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<sup>3</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>4</sup> All references to the Code of Federal Regulations are to the 2006 version.

Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an 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); Ed. Code, § 56032.)

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); 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).) 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. 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].) In Student's case, Student, as the complaining party, bears the burden of proof, and in District's case, District bears the burden of proof.

STUDENT'S ISSUE: FAILURE TO TIMELY PROVIDE AN INDEPENDENT  
PSYCHOEDUCATIONAL EVALUATION

DISTRICT'S ISSUE: DISTRICT'S RIGHT TO REFUSE AN EVALUATION EXCEEDING  
DISTRICT'S COST CRITERIA

5. Because the evidence and law relating to both Student's and District's issues are intertwined, the two issues are analyzed together.

6. Student contends that District agreed to fund an independent psychoeducational evaluation, but improperly retracted its agreement after Parent

selected Dr. Ann Simun to conduct the evaluation, causing an unreasonable delay in the assessment process. Student claims his unique circumstances justified an independent educational evaluation by Dr. Simun, notwithstanding the fact that her fees exceeded District's cost criteria.

7. District contends that it promptly and repeatedly offered Student an independent psychoeducational evaluation; that Student sought an independent neuropsychological evaluation to which he was not entitled; that Student selected an independent evaluator who was not on District's approved list of acceptable evaluators; and that Dr. Simun's fee for either an independent psychoeducational or neuropsychological evaluation exceeded District's reasonable cost criteria. District also maintains that Student did not present with unique circumstances which justified public funding of an independent psychoeducational or neuropsychological evaluation beyond District's cost criteria.

8. Before any action is taken to place a student with exceptional needs in a program of special education, an assessment of the student's educational needs must be conducted.<sup>5</sup> (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) An assessment may be initiated by request of a parent, a State educational agency, other State agency, or local educational agency. (20 U.S.C. § 1414(a)(1)(B); Ed. Code, § 56302, 56029, subd. (a), 56506, subd. (b).)

9. The IDEA requires special education students to be reevaluated not more frequently than once a year unless the parents and school district agree otherwise, but at least once every three years unless the parent and District agree a reevaluation is not

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<sup>5</sup> The IDEA uses the term "evaluation," while the California Education Code uses the term "assessment." As used in this decision, the terms "assessment" and "evaluation" mean the same thing and are used interchangeably.

necessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).)

10. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain 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); Ed. Code, § 56506, subd. (c).) "Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent evaluation. (20 U.S.C. 1415(b)(1); 34 C.F.R. § 300.502(b)(1) and (b)(2); Ed. Code §§ 56329(b); 56506(c).)

11. The provision of an independent evaluation is not automatic. Code of Federal Regulations, title 34, part 300.502(b)(2), provides, in relevant part, that following the student's request for an independent evaluation, the public agency must, without unnecessary delay, either: (i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) ensure that an independent evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to parts 300.507 through 300.513 that an evaluation obtained by the parent did not meet agency criteria. If a parent elects to obtain an independent evaluation by an evaluator not on the public agency's list of evaluators, the public agency may initiate a due process hearing to demonstrate that the evaluation obtained by the parent did not meet the public agency criteria applicable for independent evaluations, or there is no justification for selecting an evaluator that does not meet agency criteria. (*Letter to Parker*, 41 IDELR 155 (OSEP 2004).) If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at

private expense, the results of the evaluation may be presented by any party as evidence at a hearing on a due process complaint. (34 C.F.R. § 300.502(c)(2).)

12. The term “unnecessary delay” as used in 34 C.F.R. § 300.502(b)(2) is not defined in the regulations. It permits a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an independent evaluation. (*Letter to Anonymous* 56 IDELR 175 (OSEP 2010).) Some delay in the provision of an independent evaluation is reasonable if the school district and the parents are engaging in active communications, negotiations or other attempts to resolve the matter. (*J.P. v. Ripon Unified Sch. Dist.* (E.D. Cal. April 14, 2009, No. 2:07-cv-02084) 52 IDELR 125.) The determination of “unnecessary delay” is a fact-specific inquiry. (See *Pajaro Valley Unified Sch. Dist v. J.S.* (N.D. Cal. Dec. 15, 2006, No. C06-0380) 47 IDELR 244 (a delay of almost three months between parent’s request for an independent evaluation and district’s due process filing was unreasonable where district offered no explanation or justification for its delay); *J.P. v. Ripon Unified Sch. Dist., supra*, (E.D. Cal. April 14, 2009, No. 2:07-cv-02084) 52 IDELR 125 (two-month delay during which time district attempted to negotiate an independent evaluation agreement with parent and district filed for due process less than three weeks after negotiations came to an impasse was not unnecessary); *L.S. v. Abington School Dist.* (E.D. Pa. Sept. 30, 2007, No. 06-5172) 48 IDELR 244 (district’s 10-week delay in filing a due process request was not a per se violation where there was evidence of ongoing efforts during that time to resolve the matters and district, within 27 days of the independent evaluation request, orally told parents the request would be denied).)

13. A parent is entitled to only one independent educational assessment at public expense each time the public education agency conducts an assessment with which the parent disagrees. (Ed. Code § 56329(b).) If an independent evaluation is at

public expense, the criteria under which the assessment is obtained, including location of the evaluation and qualifications of the examiner, must be the same as the criteria that the school district uses when it initiates an assessment, to the extent those criteria are consistent with the parent's right to an independent evaluation. (34 C.F.R. § 300.502(e)(1).) A district's criteria may not be so narrow as to interfere with a parent's right to obtain an independent evaluation. (*Letter to Petska*, 35 IDELR 191 (OSEP 2001).) If a public educational agency observed the pupil in conducting its assessment, or if its assessment procedures make it permissible to have in-class observation of a pupil, an equivalent opportunity shall apply to an independent educational assessment of pupil in pupil's current educational placement and setting. (Ed. Code § 56329(b).)

14. School districts may also establish criteria to ensure that public funded independent evaluations are not unreasonably expensive. (*Letter to Wilson*, 16 IDELR 83 (OSEP October 17, 1989).) Public agencies should not be expected to bear the costs of independent evaluations where those costs are clearly unreasonable. (*Letter to Kirby*, 213 IDELR 233 (OSEP 1989).) In order to avoid unreasonable charges for independent evaluations, a district may establish maximum allowable charges for specific tests. (*Id.*) If a district does establish maximum allowable charges for specific tests, the maximum cannot be an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific test. (*Id.*) The maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees. (*Id.*)

15. School districts must provide parents with information about where the independent evaluation may be obtained, as well as the school district criteria applicable for independent evaluations. (34 C.F.R. § 300.502(a)(2).) A district may provide parent with a list of pre-approved assessors, but there is no requirement that the parent select an evaluator from the district-created list. (*Letter to Parker, supra*, 41 IDELR 155 (OSEP



2004).) When enforcing independent evaluation criteria, the district must allow parents the opportunity to select a qualified evaluator who is not on the list but who meets the criteria set by the public agency. (*Id.*)

16. When enforcing reasonable cost criteria, the district must allow parents the opportunity to demonstrate that unique circumstances justify an independent evaluation that does not fall within the school district's criteria. (*Letter to Kirby, supra*, 213 IDELR 233 (OSEP 1989).) If an independent evaluation that falls outside the district's criteria is justified by the child's unique circumstances, that evaluation must be publicly funded. (*Id.*) Where the only person qualified to conduct the type of evaluation needed by a child does not meet agency criteria, the public agency must ensure that the parent still has the right to the evaluation at public expense and is informed about where the evaluation may be obtained. (*Letter to Parker, supra*, 41 IDELR 155 (OSEP 2004).)

17. If a school district decides not to take a requested action, including agreement to the independent evaluation requested by parents, the district must provide parents with a prior written notice within a reasonable time period. (34 C.F.R. § 300.503.) The notice must include an explanation of why the agency proposes or refuses to take the action.

18. A district's violation of its obligation to assess a student is a procedural violation of the IDEA and the Education Code. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) Procedural violations of the IDEA only constitute a denial of FAPE if they: (1) impeded the student's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County, Mont.* (9th Cir. 2008) 541 F.3d 1202, 1208, quoting *Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

### Timeliness of Independent Educational Evaluation

19. Student failed to establish by a preponderance of evidence that District denied Student a FAPE by failing to timely provide Student with an independent psychoeducational evaluation following Parent's May 2014 request for an independent educational evaluation. The weight of the evidence established District filed its due process complaint without unnecessary delay after receiving Parent's May 2014 request for an independent educational evaluation.

20. Within 13 days of Parent's May 6, 2014 request, District agreed to publicly fund a psychoeducational evaluation within District criteria, informed Parent of the SELPA independent evaluation policy, and sent the list of qualified assessors who satisfied that criteria, along with the assessors' contact information. When Parent notified District that she had selected Dr. Ann Simun for the independent evaluation, District promptly concluded that Dr. Simun did not satisfy the District's geographic criteria. District also learned that Dr. Simun's fee exceeded District's cost criteria, and immediately notified Parent that Dr. Simun did not meet agency criteria with regard to cost and geography. District asked Parent to explain Student's unique circumstances which would justify an independent evaluation in excess of such criteria. Parent provided District with additional information, which resolved the geographic limitation issue, but the cost issue remained unresolved. After the cost criteria was increased and communications from Dr. Simun's office raised a question as to what kind of assessment Parent was seeking from District, District promptly sent another letter to Parent, informing Parent that the rate for a single independent evaluation had increased and requested clarification as to the type of evaluation sought. When Parent informed District she did not want a psychoeducational evaluation, but was seeking an independent neuropsychological evaluation from Dr. Simun at a cost that exceeded District's cost criteria, District sent prior written notice to Parent within 14 days. District's

letter explained why it believed Student was not entitled to a neuropsychological assessment and informed Parent that she had not demonstrated unique circumstances justifying Dr. Simun's fee. District still agreed to fund an independent psychoeducational evaluation up to its cost criteria of \$4,500, and invited Parent to provide an explanation of the circumstances unique to Student that justified funding an independent evaluation exceeding District cost limitations. Parent, on July 14, 2014, effectively terminated any further negotiations with District about the independent evaluation. District filed for due process within two weeks of receiving Parent's letter.

21. Although almost three months elapsed between District's receipt of Parent's May 2014 independent evaluation request and its due process filing, the weight of the evidence established District filed for due process without unnecessary delay after the parties reached an impasse over the cost and nature of the independent evaluation. The parties were engaged in continuous negotiations about the independent evaluation during those three months, and District repeatedly offered to fund an independent psychoeducational evaluation within District cost limitations, but Parent rejected that offer. District's delay in filing for due process until after the parties reached an impasse through Parent's July 14, 2014 letter was reasonable.

#### District's Cost Criteria

22. The assessment obtained by Parent from Dr. Simun did not meet District's cost criteria. Student did not meet his burden of establishing that District's cost criteria was unreasonable or that the cost criteria was so narrow as to interfere with Parent's right to obtain an independent evaluation.

23. The District adopted the Santa Barbara County SELPA's policy on independent evaluations which contained several written criteria for conducting independent evaluations, including minimum qualifications and geographic location. District's publicly funded independent evaluations met the same criteria as the

evaluations performed by District's assessors. The allowable independent educational evaluation costs under the SELPA policy included similar tasks undertaken by District assessments, including observation, record review, administration and scoring of tests, report writing, and attendance at an IEP team meeting.

24. The SELPA policy also established a maximum allowable charge for specific assessments. The weight of evidence established that the cost criteria in the SELPA policy was reasonable. The Santa Barbara County SELPA director credibly testified that the cost criteria was not based on an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific test, but rather from an ongoing process involving input about rates from numerous assessors in the tri-counties area, eliminating from consideration rates which were unreasonably high or low.

25. The evidence established that the SELPA maintained an updated list of approved assessors who satisfied the SELPA's criteria for conducting independent evaluations, including the cost criteria.

26. District provided Parent with information about where independent evaluations could be obtained, as well as District criteria applicable to such evaluations. On at least four occasions between May 19, 2014, and July 7, 2014, Parent was timely provided with prior written notice and the SELPA's the written policy on independent educational evaluations which included the criteria for such evaluations, along with a list of approved assessors and their contact information, and Parent's Rights and Procedural Safeguards. On each of those occasions, District informed Parent she was permitted to select a qualified evaluator who is not on the list but who met District criteria. District provided Parent with the opportunity to demonstrate unique circumstances to justify an independent evaluation outside of District criteria on multiple occasions.

27. Parent selected Dr. Simun to conduct Student's independent evaluation. Dr. Simun was not on District's list of approved assessors and her charge for conducting independent evaluations exceeded District's cost criteria. Until mid-June 2014, an assessment in the area of cognitive functioning was limited to a cost between \$1,500 and \$3,000, a neuropsychological assessment was limited to a cost between \$2,500 and \$3,500, and the maximum cost of any one assessment under the SELPA policy was limited to \$3,500. On June 2, 2014, the SELPA revised its cost criteria. The cost limitation for a full psychoeducational assessment increased to \$3,500 to \$4,500. A neuropsychological assessment remained limited to a cost of between \$2,500 and \$3,500. In its communications with Parent after June 2, 2014, District informed Parent that District criteria limited the cost of Student's independent evaluation to a maximum of \$4,500.

28. Dr. Simun charged \$5,500 for a psychoeducational evaluation and \$6,000 for a neuropsychological evaluation. Accordingly, as of mid-June 2014, the cost of a psychoeducational assessment by Dr. Simun exceeded District's cost criteria by \$1,000, and the cost of a neuropsychological assessment exceeded District's cost criteria by over \$1,000.

29. District's cost criteria were not so narrow as to interfere with Parent's right to obtain an independent evaluation. The evidence established that Parent could have chosen from at least 21 different assessors to conduct the independent evaluation meeting District's cost criteria. Parent was repeatedly informed that she need not select a person from the list and that she could choose any qualified assessor in the tri-counties area who met District's cost criteria. There was no evidence that Parent was precluded from selecting a qualified assessor in the tri-counties area because District's cost criteria was too low. The evidence did not support Student's argument that all of the assessors on District's list were inappropriate or unavailable.

30. Student presented two experts in addition to Dr. Simun on the cost issue, Dr. Passaro and Dr. Perlman. However, neither established that District's cost criteria was so narrow or unreasonable as to interfere with Parent's right to obtain an independent evaluation. Dr. Passaro's testimony supported District's position. He testified that his typical fee for a psychoeducational assessment was \$4,500, which was identical to the maximum charge in the SELPA policy quoted to Parent in June 2014. Although Dr. Perlman typically capped his psychoeducational or neuropsychological evaluation fee at \$6,000, he admitted he performed many evaluations for less than \$6,000, and there was no evidence he conducted assessments in the tri-counties area.<sup>6</sup>

31. District met its burden of establishing that its cost criteria limit for an independent educational assessment was reasonable absent unique circumstances.

#### Unique Circumstances

32. The preponderance of evidence demonstrated that Student did not have unique circumstances that justified an independent psychoeducational or neuropsychological evaluation exceeding District's cost criteria.

33. Between May 19 and July 14, 2014, Parent was given multiple opportunities to demonstrate that unique circumstances justified Parent's request for an independent assessment which fell outside District's cost criteria.

34. Parent claimed that Student had a unique presentation that required the training and experience of a neuropsychologist, and specifically Dr. Simun. However, the

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<sup>6</sup> In her closing brief, Student argued that Dr. Chidekel charges \$4,800 for a neuropsychological assessment, which does not include travel to and attendance at an IEP. However, Dr. Chidekel is based in Los Angeles County, and Student offered no evidence she assessed children in the tri-counties area. Student's argument was not persuasive.

weight of persuasive evidence was to the contrary. Based upon a review of Student's records, including all of the records reviewed by Dr. Simun, Dr. Chidekel persuasively testified that a neuropsychological assessment was not necessary and that Student did not require an evaluation by a neuropsychologist.<sup>7</sup> Student was likely not going to be able to respond to the instruments used in a neuropsychological assessment, as Dr. Simun ultimately determined on September 26, 2014, and changed the focus of her evaluation. Student did not present with any conditions requiring a neuropsychological evaluation, such as a child with brain injury or severe neurodevelopment disorder, or demonstrate characteristics of variability in functioning or a condition that had implications for brain-behavior relationships.

35. Dr. Chidekel persuasively testified that Student's presentation was not rare and his disabilities were known to co-occur with a level of frequency. Dr. Chidekel's testimony was corroborated by Ms. Fox and Dr. Saleh. Although Dr. Perlman testified that it was not common for a child to have both autism and intellectual disability, more weight was given to District's witnesses, because they reviewed Student's educational records, and the ALJ observed their credible demeanor while testifying. In contrast, Student offered no evidence that Dr. Perlman reviewed Student's educational files or

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<sup>7</sup> During the hearing, Student requested that the ALJ take judicial notice of Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association. As with evidence generally, the matter to be judicially noticed must be relevant to the issues in the case. (*Mozetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578.) Student failed to establish that Dr. Chidekel was a member of the American Psychological Association and the rule upon which Student relied does not apply. Dr. Chidekel testified that her opinions were based upon a review of Student's records. Student's request for judicial notice is denied.

was sufficiently familiar with Student's needs to render opinions as to Student's educational needs. Parent's testimony, primarily through leading questions by her counsel, regarding other unique circumstances related to Student's presentation was impeached and likewise not persuasive.

36. Moreover, District never conducted a neuropsychological assessment of Student, which would have triggered a right by Student to specifically request an independent neuropsychological evaluation if Parent disagreed with the results. The preponderance of evidence at hearing, including the testimony of both Dr. Chidekel and Dr. Simun, established that a psychoeducational assessment and a neuropsychological assessment were different assessments. The evaluation Dr. Simun conducted was not psychoeducational evaluation. Dr. Simun administered neuropsychological tests to Student. The December 2013 invoice sent to District for Dr. Simun's assessment described the assessment performed by Dr. Simun as a neuropsychological assessment. The weight of the evidence established that a psychoeducational assessment and a neuropsychological assessment were different assessments and that Student did not need a neuropsychological assessment. The preponderance of evidence established that Student was not entitled to an independent neuropsychological assessment.

37. Student also claimed at hearing that none of the 22 assessors offered by District to conduct Student's independent educational evaluation were appropriate or available to assess Student. The evidence offered by Student on this issue was not persuasive. Parent never contacted a single assessor on either list provided to her by District. Parent was unable to recall why many of the assessors on the list were unacceptable to her and her testimony on this issue was otherwise unpersuasive. Her testimony with regard to the assessors she claimed to know or know of was vague and she failed to adequately explain how she knew them, or how that would have impacted their ability to perform Student's evaluation. With the exception of one assessor, Parent



never told District that any of the evaluators were inappropriate or unavailable. More than three weeks before Ms. Shove attempted to contact the assessors offered by District, Parent had already selected Dr. Simun, and Dr. Simun had already begun her assessment of Student. Student provided no corroboration of Ms. Shove's alleged email communications with any of the two to four assessors she claimed to have contacted. Excluding the one evaluator on District's list who was also a District employee, the reasons offered by Ms. Shove and Parent for not contacting the other assessors appeared to be largely contrived, invalid, vague or unsubstantiated. In addition, Ms. Shove's testimony was not given as much weight as District's witnesses. She repeatedly went far afield in answering the questions posed to her, and appeared to be more concerned in advocating for Parent rather than answering the questions. This negatively impacted her overall credibility.

38. Student claimed that, because he was suspected of having seizures, he demonstrated unique circumstances to justify an independent evaluation by Dr. Simun outside District's cost criteria. However, Parent never told District that Student was suspected of having seizures, and the evidence from Student's witnesses that he was suspected of having seizures during the 2012-2013 and 2013-2014 school years was not credible. Parent's testimony regarding the seizure issue was inconsistent and implausible which affected Parent's overall credibility. Parent offered no credible explanation as to why she did not discuss her concerns about seizures during the IEP team meetings. None of the District's IEP team meeting notes or the listed concerns of parent relevant to educational progress make reference to seizures. Dr. Saleh specifically asked Parent to explain any medical, health, or educational needs which might justify an evaluation beyond District criteria, but none of Parent's correspondence mentions the seizure issue. Further undermining Parent's credibility was the fact that she admitted she never told Dr. Simun about the suspicion of seizures and had an implausible explanation for failing

to do so. Dr. Simun claimed she specifically asked Parent about Student's history of seizures and whether she had ever observed any behavior consistent with seizures. Furthermore, Student offered no evidence that he had ever been diagnosed with a seizure disorder.

39. Student relied on Dr. Simun's findings and recommendations as evidence that Student demonstrated unique circumstances to justify an independent evaluation outside District's cost criteria. However, the preponderance of evidence established that Dr. Simun's conclusions and recommendations were not reliable because of mistakes, numerous inconsistencies, and other problems with her report. Dr. Chidekel credibly testified that there was nothing new derived from the testing conducted by Dr. Simun which the District had not already determined by its own assessments, that Dr. Simun's interpretation of Student's scores was unreliable and inconsistent, and that Dr. Simun's report was misleading. Dr. Chidekel persuasively explained numerous problems with Dr. Simun's report, including inconsistent, confusing and misleading rubric for the terminology employed, a failure to record Student's responses on the protocols, and scoring Student on uncompleted tests. Dr. Simun's report also contained admitted errors with regard to the interpretation of Student's scaled scores on one test. Dr. Simun unsuccessfully tried to explain away the inconsistencies in the report. Dr. Simun was also inconsistent about observations of Student regarding the seizure issue and the recording of that information in her report. The problems with Dr. Simun's report and inconsistencies in her testimony on the seizure issue undermined her overall credibility.

### Conclusion

40. Student did not meet his burden of persuasion on his issue of the timeliness of District providing an independent psychoeducational assessment following Parent's May 2014 request for an independent evaluation.

41. District met its burden of establishing by a preponderance of evidence that it did not unnecessarily delay in filing for due process, that Student was not entitled to an independent psychoeducational or neuropsychological evaluation by Dr. Simun that exceeded District's cost criteria, and that it did not deny Student a FAPE by refusing to do so.

## ORDER

1. On Student's case, all relief sought by Student is denied.
2. On District's case, all relief sought by District is granted.

## 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, District was the prevailing party on all issues in both cases.

## 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: May 11, 2015

\_\_\_\_\_/s/\_\_\_\_\_  
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LAURIE GORSLINE

Administrative Law Judge

Office of Administrative Hearings