

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAKLAND UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2016061310

DECISION

Oakland Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on June 28, 2016, naming Student as respondent.

Administrative Law Judge Dena Coggins heard this matter in Oakland, California, on July 26, 2016.

Attorney David Mishook represented Oakland at the hearing. Andrea Epps, staff attorney for Oakland, attended the hearing.

Attorney Maggie Roberts represented Student at the hearing. Student and Mother attended the hearing.

At the conclusion of the hearing, the matter was continued to August 9, 2016, to afford the parties an opportunity to submit written closing briefs. The record closed with the parties' timely submission of closing briefs and the matter was submitted for decision.

ISSUE

Did Oakland's May 2016 assistive technology assessment meet all legal requirements such that Student is not entitled to an independent educational evaluation at public expense?

SUMMARY OF DECISION

This Decision holds that Oakland's May 12, 2016 assistive technology assessment did not meet all legal requirements. Student is entitled to an independent educational evaluation in the area of assistive technology at public expense.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTION

1. Student is a 14-year-old girl who has been found eligible for special education and related services under the primary eligibility category of specific learning disability and secondary eligibility category of speech language impairment. She has been eligible for special education and related services since 2006. Student resided with her Parents within the educational boundaries of Oakland at all relevant times.

2. During the relevant time period, Student was in the eighth grade at United for Success Academy. Oakland is responsible for special education at United for Success Academy.

FEBRUARY 22, 2016 IEP MEETING

3. On February 22, 2016, Oakland convened Student's annual individualized education program team meeting. Parents; Christopher Arrillaga, an independent licensed clinical psychologist; Isabel Pelayo, Student's case manager and resource specialist; the school principal; Leigh Brown, speech language pathologist; Geri Baskind, legal services director; an independent counselor; a program specialist; Student's

general education math teacher; and a Spanish language interpreter were present at the meeting.

4. The IEP team identified writing, math, and communication development as Student's areas of need. The IEP team proposed goals in the area of social/pragmatic language, expressive language, math, English language development, and reading.

5. During the meeting, Mother shared that Student struggles with notetaking in class. Ms. Pelayo recommended Student receive class notes in advance. Dr. Arrillaga agreed that outlines and notes provided to Student in advance would help support Student in class.

6. Dr. Arrillaga testified at hearing. He is a licensed clinical psychologist, and has been in private practice since July 2012. Also, he has been an assessment supervisor and staff psychologist at WestCoast Children's Clinic since 2010. He received a doctorate in clinical psychology in 2009. He received a master's degree in clinical psychology in 2007 and a bachelor's degree in counseling psychology in 2000. He received his license to practice from the California Board of Psychology. In his practice, Dr. Arrillaga has completed approximately 200 assessments of children under the age of 18, and of those assessments, he has diagnosed approximately 100 students with learning disabilities and approximately 50 students with speech and language disabilities. Dr. Arrillaga conducted an independent psychological assessment of Student in July 2015, and completed a psychological assessment report on September 4, 2015.

7. At the meeting, Dr. Arrillaga discussed his recommendations for accommodations to support Student's access to instruction. His recommendations included access to a laptop for written assignments. Parents requested Student have access to a computer provided by Oakland to support Student with written assignments. At the meeting, Ms. Baskind recommended Student have an assistive technology assessment to determine what tools she may need to access instruction. Mother agreed

with the recommendation for an assistive technology assessment. Oakland proposed an assessment in the area of assistive technology to determine what, if any, accommodations, tools or supports Student may need in the area of assistive technology.

ASSESSMENT PLAN

8. At the February 22, 2016 IEP team meeting, Oakland provided an assessment plan to Parents seeking their written permission to assess Student in the area of assistive technology. The assessment plan specifies that alternative means of assessment would be used by the assistive technology specialist assigned to assess Student. Those alternative means were identified in the assessment plan as a review of records and observation of student in the classroom setting.

9. Mother testified at hearing, with the assistance of an interpreter. Parents' native language is Spanish. Mother does not speak or understand English. Parents received a copy of the assessment plan at the February 22, 2016 IEP meeting, but the assessment plan was in English and not translated into Spanish. Oakland was on notice that Parents' native language is Spanish, as Oakland provided a Spanish language interpreter at the IEP team meeting. The interpreter orally translated some, but not all, of the assessment plan to Parents during the meeting. Oakland should have had the document translated into Spanish during or after the IEP team meeting and before asking Mother to sign and return it. Mother signed the assessment plan at the IEP team meeting, but, at hearing, Mother credibly testified that she did not know what the document said.

MAY 12, 2016 ASSISTIVE TECHNOLOGY ASSESSMENT AND REPORT

10. Stacy Springer, an Oakland assistive technology specialist, assessed Student in the area of assistive technology in May 2016, pursuant to the February 22,

2016 assessment plan. On May 12, 2016, Ms. Springer completed an Assistive Technology Report documenting her assessment of Student. There was no explanation provided at hearing for the delay in completing the assessment.

11. Ms. Springer has been an assistive technology specialist and occupational therapist for Oakland for two years. Prior to her employment with Oakland, Ms. Springer held several positions as an occupational therapist, assistive technology specialist, assistive technology consultant, and assistive technology coordinator since 2004. Ms. Springer received a bachelor's degree in psychology, with a special education concentration, in 2000. She received a master's degree in occupational therapy in 2004. She has a California license in occupational therapy and an assistive technology professional certification from Rehabilitation Engineering and Assistive Technology Society of North America. Ms. Springer's written work in the area of assistive technology and occupational therapy has been published. Ms. Springer was qualified to conduct Student's assistive technology assessment.

12. As part of Student's assessment, Ms. Springer reviewed Student's February 22, 2016 IEP, including Dr. Arrillaga's recommendation that Student have access to a laptop for written assignments; portions of Student's speech and language evaluation administered by Oakland during Student's seventh grade year, including classroom observations and responses from teacher questionnaires and interviews; and a psychological evaluation administered by Oakland in April 2014, including the evaluator's observations of Student. Ms. Springer did not review Dr. Arrillaga's September 4, 2015 psychological assessment report prior to assessing Student even though Dr. Arrillaga's assessment was the most recent psychological assessment of Student. Ms. Springer testified she would not have changed how she assessed Student if she had reviewed the report prior to assessing Student.

13. Ms. Springer emailed three of Student's general education teachers

requesting their input about Student's ability to keep up with notes, handwriting, composing written output, reading, and any difficulty Student had as compared to her same age peers. Ms. Springer also inquired whether Student uses a laptop in class and how that helps Student. Ms. Springer received input from only one of Student's general education teachers — Abel Vera, Student's English teacher. Mr. Vera responded that Student uses a laptop almost daily and that the laptop helps her with spelling. Mr. Vera further commented that the laptop gave him the ability to add digital comments to documents while Student simultaneously worked on a document for tutoring purposes. Mr. Vera did not answer any of the other questions posed by Ms. Springer, and she did not follow up with Mr. Vera for further information. Ms. Springer received no other responses from Student's general education teachers and did not inquire further.

14. Ms. Pelayo testified at hearing. She is a resource teacher at United for Success Academy, and she has been Student's resource teacher since January 2016. She is also a resource teacher at Life Academy, a middle school and high school. This is her second year as a resource teacher. Ms. Pelayo has a provisional permit that allows her to teach students with mild to moderate disabilities. She is currently in a master's program in education at Alliant International University and expects to obtain a teaching credential in one year. She received a bachelor's degree from Sonoma State University in Spanish with a minor in criminal justice. She previously worked for Oakland as an intervention specialist in a classroom serving students with autism. In her current position, she conducts pull-out sessions for her students to ensure they understand their work and are keeping up with their class assignments. She also sets up and attends IEP team meetings, and prepares the IEP document. She communicates with classroom teachers on a weekly basis.

15. In connection with her assessment of Student, Ms. Springer asked Ms. Pelayo if she had any concerns about Student in the area of assistive technology. Ms.

Pelayo testified that she told Ms. Springer she did not have any concerns. However, Ms. Springer testified that Ms. Pelayo communicated her concerns about Student to Ms. Springer, which included difficulty with vocabulary and inferencing information from text. If Ms. Pelayo did, in fact, communicate her concerns to Ms. Springer, this information was not contained in Ms. Springer's assessment report.

16. Although not communicated to Ms. Springer when asked about her concerns, Ms. Pelayo observed Student having difficulty understanding and organizing information when tasked with drafting essays requiring her to use and analyze quotes. Student was also confused when attempting to organize information when writing an essay. Ms. Pelayo established Student had difficulty turning in math and history homework because she was forgetful, misplaced her work or mistakenly believed she had turned in her homework. This information would have been helpful in assessing Student, but was not communicated to Ms. Springer.

17. Ms. Springer never contacted Parents as part of the assessment. Ms. Springer knew she would need a Spanish language interpreter to communicate with Parents. Instead of obtaining an interpreter to speak with Parents directly, Ms. Springer delegated the task to Ms. Pelayo, who speaks Spanish.

18. Ms. Pelayo generally spoke with Mother in person about how Student was doing at least twice a month. Ms. Pelayo contacted Parents to determine their concerns relating to the assistive technology assessment as requested by Ms. Springer. Ms. Pelayo communicated Parents' concerns to Ms. Springer after Ms. Springer had already begun assessing Student. Parents were concerned about Student's ability to write down all of her ideas and believed Student would be better able to complete her work if she was able to type rather than write her work. Ms. Pelayo also communicated Parents' comments about speech-to-text and text-to-speech applications recommended by Dr. Arrillaga. Ms. Pelayo testified that Mother told her Student has difficulty keeping up with

her notes; however, this input did not appear in Ms. Springer's report and may not have been communicated to Ms. Springer. Ms. Pelayo testified she was confused by Mother's position on Student's needs, which is concerning given Ms. Pelayo's responsibility in acting as a liaison between Ms. Springer and Parents regarding Parents' input on Student's needs.

19. Ms. Springer administered the Written Productivity Profile and the Protocol for Reading Accommodations to obtain more detail about Student in the areas of writing and reading. The assessments were culturally and linguistically appropriate for Student. The assessments were valid for the purpose they were being used, and were the only norm-referenced assessments available for assessing Student's assistive technology needs in writing and reading.

20. The Written Productivity Profile compares a student's ability to perform four written tasks by hand and through the use of a keyboard in: (1) writing from rote memory; (2) copying near point; (3) writing from dictation; and (4) composing a sentence independently. In Ms. Springer's report, she documents the letters per minute and words per minute Student wrote and typed during the time allotted and her observations of Student's performance on the tests. Ms. Springer failed to provide any information about the significance of the number of letters per minute and words per minute Student wrote and typed. Ms. Springer reported Student's handwritten errors when Student wrote a sentence that was dictated to her and wrote an independently composed sentence, but Ms. Springer did not report the significance, if any, of Student's errors on the handwritten portion of the test. Ms. Springer's only conclusions as to Student's handwritten work were general statements that Student's handwriting was legible and Student's keyboarding speed was overall equal or faster than her handwriting speed. She did not interpret the results of the test or thoroughly explain how the results of the test impacted Student's need for assistive technology to benefit

from special education.

21. The Protocol for Reading Accommodations uses reading passages to determine what, if any, reading accommodations are needed. After reading the passages, the student then answers a set of comprehension questions related to the passages. Because Student independently reads at grade level and her comprehension scores were in the top quartile, Ms. Springer did not administer additional passages with accommodations. Despite Student's ability to read and comprehend grade level material, Student orally read only 87 words per minute, demonstrating difficulty with reading fluency. The testing protocols indicate that average words per minute for eighth grade students is 130 at the beginning of the year, 140 during the middle of the year, and 150 at the end of the year. Although, Ms. Springer acknowledged that Student has difficulty with reading fluency, she did not make any recommendations or provide any input about whether assistive technology could be used to assist Student in benefitting from special education in connection with her reading fluency.

22. Ms. Springer did not observe Student in any of her general education classrooms or in the resource room. Ms. Springer's observations were only during the assessment. Observations during testing are not the same as observations in the classroom environment. For example, no other students were in the room when Student was being assessed by Ms. Springer. She did not observe Student in class while taking notes, an observation that would have been helpful in assessing whether Student required assistive technology for notetaking and written assignments. And although Ms. Springer reviewed classroom observations by previous teachers and assessors contained in Student's file, Ms. Springer did not report descriptions of those observations in her assessment report.

23. During Student's assessment, Student told Ms. Springer that she has difficulty understanding some words and meanings and that Mother does not believe

Student has been adequately supported since coming to the United States. Ms. Springer did not add this information to her assessment report.

24. At hearing, Ms. Springer testified that assistive technology is to be provided as a tool or support for a student to make progress towards her IEP goals. She testified further that a special education student requires assistive technology if the student would be unable to make progress towards her IEP goals or access her school environment without assistive technology. This statement is not consistent with the law.

25. While Student had goals in the areas of social/pragmatic language, expressive language, math, English language development, and reading, Ms. Springer only administered tests to obtain information about Student's performance in reading and writing. In its closing brief, Oakland asserts that Ms. Springer hypothesized that Student's suspected areas of assistive technology need were in writing and reading. However, Student had other identified areas of need documented in her most recent IEP, which Ms. Springer should have considered in determining if assistive technology was required for Student to benefit from special education.

26. Ms. Springer testified she did not see a need for assistive technology support for Student in the area of social/pragmatic language because Student's social/pragmatic goal was being worked on by a speech language pathologist and the IEP team did not mention this was an area of concern for assistive technology. Neither reason is sufficient. The IEP team's concerns regarding Student's social/pragmatic language needs are evident from the February 22, 2016 IEP. The fact that the a speech language pathologist was working with Student in social pragmatic language did not relieve Ms. Springer of her obligation to assess Student to determine if Student required assistive technology to support her in benefiting from special education relating to her needs in social/pragmatic language.

27. Ms. Springer reviewed Student's math goal, but the goal did not raise a

concern as an area that should be assessed for assistive technology because Ms. Springer considered math to be a strength for Student. However, in Student's February 22, 2016 IEP, the IEP team identified math as an area of need for Student, which she continued to need some assistance. Ms. Springer had an obligation to determine if Student required assistive technology to support her in benefiting from special education relating to her needs in math.

28. Ms. Springer's report contained a Recommendations section, wherein she included recommendations and general observations about Student's writing and reading test results. Ms. Springer concluded Student required access to text-to-speech, word prediction, and vocabulary support while using word processing. Ms. Springer opined that Student required text-to-speech and word prediction to help her correct her errors when typing sentences and word prediction for spelling support when typing. These recommendations, however, were specific to Student's errors while typing. Ms. Springer provided no opinion or recommendation about whether assistive technology was needed to increase, maintain, or improve Student's functional capabilities when completing handwritten writing tasks, even though Student's errors in writing were noted in Ms. Springer's report.

29. Ms. Springer testified that every student who receives special education is eligible for assistive technology, but not every student receiving special education requires assistive technology. In her report, Ms. Springer did not determine whether Student required Bookshare, a program that provides visual digital text and audio feedback and a book repository. Instead, she reported that Student qualifies for access to Bookshare. At hearing, however, Ms. Springer testified that Student needed Bookshare.

30. Ms. Springer testified that she recommends the Google Read and Write toolbar program for Student, a toolbar that works seamlessly with a computer. The

toolbar has a text-to-speech feature that would allow Student to have information read aloud to her and her written information read back to her. Also, the tool bar has a word prediction feature to support Student in spelling. In addition, the tool bar has a vocabulary look-up option to provide Student the ability to highlight a word and have it read aloud along with the definition and a translator so that Student can make connections between English and Spanish. Ms. Springer demonstrated the toolbar to Student, and Ms. Springer believed Student could benefit from using the toolbar. Ms. Springer did not make any findings, recommendations, or conclusions about the Google Read and Write toolbar in her report. And although Ms. Springer stated in her report that Student uses Dictionary.com, an online dictionary, frequently to look up meanings of words, Ms. Springer did not make any recommendation regarding Dictionary.com or determine if Dictionary.com is appropriate for Student. Also, all of these recommendations require a computer for use, an issue she failed to address in her report.

31. The need for an assessment was triggered by Parents' request that Student have access to a district provided computer to support Student with written assignments. Yet, Ms. Springer expressed no opinion or recommendations in her report relating specifically to Parents' request that Oakland provide a computer to Student. Ms. Springer failed to provide any recommendation regarding whether the District should provide Student a laptop or any other pertinent information that would be helpful for an IEP team to consider when determining whether to grant Parents' request that Oakland provide Student with a computer for written assignments.

MAY 16, 2016 IEP AMENDMENT MEETING

32. On May 16, 2016, Oakland convened an IEP team meeting to discuss Parents' concerns and review the assistive technology assessment report completed by Ms. Springer. Parents, an interpreter, Ms. Springer, Ms. Pelayo, a speech pathologist,

program specialist, and the school principal attended the meeting. The IEP team developed an amended IEP at the meeting as a result of the assistive technology assessment. Oakland did not establish that the IEP team meeting, held as a result of the assistive technology assessment, was timely.

33. Ms. Springer did not make a recommendation at the meeting about the frequency Student should use a computer because Student was transitioning to high school the upcoming school year and it was the end of the school year, which meant possibly a new case manager and teachers for Student. The purpose of the assessment was to determine Student's program relating to assistive technology going forward, which Oakland failed to do. Ms. Springer recommended preparing a plan for Student at the beginning of the school year to see what classes she received, what case manager she was assigned, and the school environment to determine the frequency Student should use a laptop. She did not, however, make this recommendation in her assessment report, nor was this plan part of the IEP. Ms. Springer told the IEP team that if Student's high school does not have a computer available for her use, then Assistive Technology will provide one for her. However, the actual assessment report, itself, was not helpful to the IEP team in determining whether Student required a computer. The assessment report did not state whether Student required a computer, the reason Student required a computer, when she should be provided with a computer, or when she should have access to the computer.

34. The IEP amendment notes that the Assistive Technology department was to provide training for Student, her case manager, and Parents on the assistive technology tools she requires. Other than indicating that training for Student and her IEP team will be needed to implement the recommendations in Ms. Springer's report, Ms. Springer does not indicate in her report Student's level of proficiency in using a computer, what type of training should be provided, or what tools Student and the IEP

team needed to be trained on.

35. On May 31, 2016, Parents requested an independent educational evaluation in the area of assistive technology because they disagreed with the assistive technology assessment. Parents believed the assessment report was too brief and narrow to address Student's needs, did not address all of Student's needs related to her disabilities, was not based on a review of all relevant information, and was not designed to provide relevant information to the IEP team with respect to all of Student's needs. The District filed for due process hearing to determine whether Student is entitled to an independent educational evaluation in the area of assistive technology on June 28, 2016.¹

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA.²

1. Jurisdiction over this matter arises 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.³; 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

¹ Oakland alleged in its request for due process hearing that it issued a prior written notice denying Student's request for an IEE. No evidence was provided at hearing to substantiate that allegation. However, Student does not contest Oakland provided a timely prior written notice denying Student's request for an IEE.

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

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

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 further education, employment, and independent living; (2) to ensure that the rights of children with disabilities and their parents are protected; and (3) to assist States, localities, educational service agencies, and Federal agencies in providing for the education of all children with disabilities. (20 U.S.C. § 1400(d)(1)(A); 34 C.F.R. 300.1; Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to a parent or guardian, meets state educational standards, and conforms to the child's IEP. (20 U.S.C. § 1401(9)(A)-(D); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031, subd. (a).) "Related services" means transportation and other developmental, corrective and supportive services required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code § 56363, 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 (*Mercer Island*) [In enacting the IDEA, 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. 950, 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).) At the hearing, the party filing the complaint has the burden of proof by a preponderance of the evidence on all issues in the case. (*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].) Therefore, for this matter, Oakland had the burden of proof on the sole issue raised in its complaint.

THE ASSESSMENT PLAN

5. As noted recently by the Ninth Circuit, “The IDEA and its accompanying regulations contain an extensive set of procedural requirements that are designed to ensure that ...[a]ny subsequent reevaluations . . . achieve[] a complete result that can be reliably used to create an appropriate and individualized educational plan tailored to the needs of the child.” (*Timothy O. v. Paso Robles Unified School District* (9th Cir. 2016) 822

F.3d 1105, 1110.) To obtain parental consent for an assessment, the school district must provide proper notice to the student and his or her parent. (20 U.S.C. § 1414(b)(1); 20 U.S.C. § 1415(b)(3),(c)(1); 34 C.F.R. § 300.304(a); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and related state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must be in a language easily understood by the general public and provided in the native language of the parent or other mode of communication used by the parent unless to do so is clearly not feasible; explain the type of assessments to be conducted; and state that no IEP will result from the assessment without parents' consent. (Ed. Code, § 56321, subd. (b)(1)–(4).)

6. The school district must obtain informed parental consent for assessment of the child prior to conducting any evaluation of a child with a disability. (34 C.F.R. § 300.300(c)(i).) Parental consent exists when the parent has been fully informed of all information relevant to the activity for which consent is sought, in their native language, or other mode of communication; parents understand and agree in writing to the carrying out of the activity for which her consent is sought, and the consent describes that activity and lists any records that will be released and to whom; and parents understand that the granting of consent is voluntary on the part of the parents and may be revoked at any time. (34 C.F.R. § 300.9(a)–(c)(1).) The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (c)(4).)

7. On February 22, 2016, Oakland provided Parents with an assessment plan proposing to assess Student in the area of assistive technology. Assistive technology is “any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the

functional capabilities of a child with a disability.” (34 C.F.R. 300.5.) Assistive technology service is “any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device.” (34 C.F.R. § 300.6.)

8. Oakland proposed an assessment of Student after Parents requested Student have access to a District-provided computer to support her with written assignments. Oakland proposed an assessment in the area of assistive technology to determine what accommodations, tools or supports Student may need in the area of assistive technology.

9. Oakland did not establish providing the assessment plan in Parents’ native language, Spanish, was clearly not feasible. While some of the assessment plan was orally translated to Parents at the meeting, the record did not establish that Parents were fully informed of all information relevant to the activity for which consent was sought. Accordingly, Oakland did not provide proper notice of the assessment to Parents and did not obtain informed consent for the assistive technology assessment. Therefore, on this basis, the assessment did not meet legal requirements and was a procedural violation.

TIMELINESS OF THE DEVELOPMENT OF THE MAY 16, 2016 IEP ADDENDUM

10. A copy of an assessment report must be provided to the student’s parents. (Ed. Code, § 56329, subd. (a)(3)). An IEP required as a result of an assessment of a student must be developed within a total time not to exceed 60 days, not counting days between a student’s regular school sessions, terms, or days of vacation in excess of five schooldays, from the receipt of the parent’s written consent to the assessment, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (f)(1).)

11. Mother signed the assessment plan on February 22, 2016, the day Oakland presented the assessment plan to her. Student was subsequently assessed by Ms. Springer, and the assessment report was provided to Parents at the May 16, 2016 IEP

team meeting. The meeting was convened to discuss the assistive technology assessment. The evidence did not establish that the IEP team meeting was held or the amended IEP was developed within 60 days from the receipt of the signed assessment plan from Mother on February 22, 2016. Consequently, Oakland did not establish that the May 16, 2016 IEP addendum developed as a result of the assistive technology report was developed in a timely manner. This was a procedural violation.

12. These procedural defects, discussed above, significantly impeded Parents opportunity to participate in the decision-making process regarding the provision of a FAPE to Student. Parents were only provided with oral translations of some of the contents of the assessment plan in their native language, which prevented them from being able to participate in the IEP development process. These procedural violations also deprived Student of educational benefit. If the assessment and IEP addendum meeting had been completed in a timely manner, Student could have received assistive technology services during the remainder of the 2015-2016 school year and any dispute regarding assistive technology could have been resolved before Student transitioned to high school. Because Oakland delayed in completing the assessment and convening the addendum IEP meeting, the parties were forced to seek resolution of their assistive technology dispute after the school year ended. Therefore, Oakland did not show that its assessment was legally compliant.

ASSESSMENT STANDARDS

13. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.)⁴ Thereafter, a special education student may be

⁴ The term assessment under California law has the same meaning as the term "evaluation" in the IDEA, as provided in Section 1414 of Title 20 of the United States

reassessed at least once every three years, or more frequently if conditions warrant, or if a parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a)(2).)

14. 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. (20 U.S.C. §§ 1414(b)(2)(A-C).) The assessments used must be: (a) selected and administered so as not to be discriminatory on a racial or cultural basis; (b) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; (c) used for purposes for which the assessments are valid and reliable; (d) administered by trained and knowledgeable personnel; and (e) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b)(2)(C)(3)(A)(i-V) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b).) Assessors must be knowledgeable about the student's suspected disability and must pay attention to the student's unique educational needs such as the need for specialized services, materials, and equipment. (Ed. Code, § 56320, subd. (g).) As part of the assessment, the IEP team and other qualified professionals must review existing evaluation data on the child, including evaluations and information provided by the parent, classroom observations, State assessments, and teacher/provider observations. (20 U.S.C. § 1414(c)(1)(A)(i)-(iii); 34 C.F.R. § 300.305(a)(1)(i)-(iii)(2006); Ed. Code, § 56381, subd. (b)(1).)

15. Ms. Springer used a variety of assessment tools and strategies to gather

Code. (Ed. Code, § 56302.5.)

some relevant functional, developmental, and academic information about Student prior to and during Student's assessment, including reviewing student records, Student's most recent IEP, some assessments, teacher input from one of Student's general education teachers, and parent input received by Ms. Pelayo. She did not, however, review the most recent psychological assessment of Student, completed by Dr. Arrillaga in September 2015.⁵ Ms. Springer did not use a single measure or assessment as the sole criterion for determining whether Student needed assistive technology. The assessments used by Ms. Springer were used for the purpose for which the assessments are valid and reliable. Ms. Springer was qualified to conduct an assistive technology assessment of Student based on her education, training, knowledge, and experience as an assistive technology specialist. She administered the assessments in accordance with the testing protocols.

16. However, Ms. Springer did not receive direct input from Parents specific to their requests for Student to have a District-issued computer, or their concerns and

⁵ Ms. Springer testified that after reviewing Dr. Arrillaga's conclusions, recommendations, and test scores from the September 2015 psychological assessment of Student in preparation for the hearing, the information would not have changed the focus of her assessment of Student. However, even if true, Dr. Arrillaga's report contained the most recent psychological assessment of Student, which contained relevant functional, developmental and academic information that was relevant to her assessment of Student.

She also did not review the independent comprehensive language and social communication evaluation conducted during May, June, and July 2015. But it is unclear from the record whether the evaluation was provided to Oakland or contained in Student's file maintained by Oakland.

input about Student's need for assistive technology. Instead of communicating directly with Parents through an interpreter, Ms. Springer delegated this important responsibility to Ms. Pelayo, a non-credentialed teacher. It is highly questionable whether the feedback provided to Ms. Springer from Ms. Pelayo regarding Parents' input was accurate, as Ms. Pelayo admitted that she was often confused by Mother's comments. The evidence did not establish Ms. Springer sufficiently obtained and used information readily available to her to gather relevant functional, developmental, and academic information to conduct Student's assessment.

17. Persons who assess the student shall prepare a written report, or reports, as appropriate, of the results of each assessment. (Ed. Code, § 56327.) The report shall include, but not be limited to, 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) for students with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services; (7) a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and (8) the need for specialized services, materials, and equipment for pupils with low incidence disabilities, consistent with superintendent guidelines. (Ed. Code, § 56327.)

18. Ms. Springer's report indicated that Student required assistive technology and the basis for making that determination. However, in her report, Ms. Springer did not provide a recommendation or conclusion about whether Student required a District-issued computer to support her specifically with written assignments or notetaking. Additionally, Ms. Springer's observations of Student were limited to observation during

testing despite concerns that Student had difficulty with notetaking in the classroom setting. Oakland acknowledged that an appropriate setting to observe Student was in the classroom, as Oakland expressly provided for observation of Student in the classroom setting as an alternative means of assessment in the February 22, 2016 assessment plan. And while Ms. Springer did document her observations of Student's performance on the tests, Ms. Springer did not document Student's behavior in the testing environment or the relationship of that behavior to Student's academic and social functioning. Ms. Springer only received input from one of Student's general education teachers and the information she received was not completely responsive to the questions she posed. Moreover, Ms. Springer's report provided testing results, but did not provide sufficient conclusions or recommendations to assist the IEP team in determining whether Student needed a District-issued computer or whether Student required Bookshare. Moreover, information provided to Ms. Springer from Ms. Pelayo about Ms. Pelayo's concerns relating to Student was not contained in the assessment report. The report also did not contain the information provided directly to Ms. Springer from Student about Student's own self-assessment of her areas of need.

19. Student's operative IEP contained several goals to address Student's areas of need, and many of those areas of need were not explored by Ms. Springer in her assessment of Student for assistive technology. Contrary to Oakland's assertion in its closing brief, Ms. Springer did not focus on all of Student's functional weaknesses as reflected in Student's goals, assessments and comments to her IEP's. For all these reasons, the assistive technology report did not provide sufficient information to assist the IEP team in determining whether Student required assistive technology devices or services in order to benefit from special education.

INDEPENDENT EDUCATIONAL EVALUATIONS

20. An independent educational evaluation is "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).) A student may be entitled to an independent educational evaluation if he or she disagrees with an assessment obtained by the public agency and requests an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an independent educational evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2)(A) [requiring procedural safeguards notice to parents to include information about obtaining an independent educational evaluation].)

21. 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 pursuant to sections 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(b)(2); see also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].) If the school district prevails in the due process hearing, the parent still has the right to obtain an independent educational evaluation, but not at public expense. (34 C.F.R. § 300.502(b)(3); Ed. Code, § 56329, subd. (c).)

22. In this case, Student disagreed with the May 12, 2016 assistive technology assessment. Student requested an independent educational evaluation in the area of assistive technology on March 31, 2016. Oakland requested a due process hearing to show its assistive technology assessment is appropriate on June 28, 2016.⁶ For the

⁶ Whether Oakland unnecessarily delayed in filing for a request for due process

reasons discussed above, Oakland's assistive technology assessment did not meet all legal requirements. Student is entitled to an independent educational evaluation in the area of assistive technology.

REMEDIES

1. ALJ's have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Com. of the Town of Burlington, Mass. v. Department of Education of the Commonwealth of Mass.* (1985) 471 U.S. 359 at pp. 369, 374 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*)). In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Puyallup, supra*, 31 F.3d at p. 1496.)

2. Oakland did not establish that its assistive technology assessment was appropriate. Therefore, it is equitable to order Oakland to provide Student an independent educational evaluation in the area of assistive technology.

ORDER

1. Within two business days of this Decision, Oakland shall provide parent with the local criteria for an assistive technology assessment in Spanish.

2. Within 10 business days of this Decision, Parents will provide Oakland with the name of the assessor Parents request to conduct an independent educational evaluation of Student in the area of assistive technology.

hearing in the matter is a fact-specific inquiry. No finding is made as to the timeliness of Oakland's request for hearing. The assessment plan and assessment at issue did not meet all legal requirements; therefore, it is not necessary to also determine if Oakland unnecessarily delayed in filing its request for hearing.

3. If the assessor meets local criteria, within 10 days of receipt of Parents' selection, Oakland shall send the assessor a contract to perform the assessment. No assessment plan shall be prepared by Oakland for this assessment. If the assessor does not meet local criteria, Oakland shall inform Parent, and Parent shall choose another assessor.

4. If Parents fail to timely select an independent assessor who meets local criteria, Oakland may choose a qualified independent assessor who has experience assessing students with specific learning disabilities and speech language impairment in the area of assistive technology. This assessor may not work for Oakland.

5. Oakland must enter into a contract with its selected assessor as soon as practicable. Oakland shall ensure that employees under its control cooperate with the assessor. The assessment report shall be shared with Parent who will share the report with Oakland, should they desire Oakland to consider the assessment.

6. If Parent wants Oakland to consider the assessment, they shall notify Oakland, send Oakland a copy of the assessment, and Oakland shall convene an IEP meeting within 30 days of the request. Oakland shall fund the cost of the assessor to attend the IEP team meeting convened to discuss the assessment, up to a maximum of two hours.

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, Student prevailed on the sole issue.

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: August 29, 2016

_____/s/_____

DENA COGGINS

Administrative Law Judge

Office of Administrative Hearings