

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

OAKLAND UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

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OAH Case No. 2017030950

DECISION

On March 16, 2017, Oakland Unified School District filed with the Office of Administrative Hearings a request for due process hearing naming Parent on behalf of Student. On April 28, 2017, Student filed a complaint against Oakland in OAH Case Number 2017050146. On May 26, 2017, OAH granted Oakland's motion to consolidate the two cases and designated Student's case as the lead matter. On June 23, 2017, OAH granted Oakland's motion to amend its complaint; scheduled the case as a dual matter with both expedited and non-expedited issues; re-designated Oakland's case as the lead matter; and continued the dates for the non-expedited issues.<sup>1</sup>

Administrative Law Judge Theresa Ravandi heard this matter on October 17, 2017, in Oakland, California.

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<sup>1</sup> The expedited issue was heard during July and August 2017, and an expedited decision was issued on August 23, 2017. Part two of the expedited hearing was conducted in September 2017, and a second expedited decision was issued on September 21, 2017.

David Mishook, Attorney at Law, represented Oakland. Geri Baskind, Oakland's Director of Legal Support Services for Programs for Exceptional Children attended as Oakland's representative. Parent and Student did not appear.<sup>2</sup>

At the start of the hearing, the ALJ granted Oakland's request to dismiss Student's case because of Parent's failure to appear and participate, as memorialized in an order dated October 18, 2017. The evidentiary record closed on October 17, 2017, and the matter was continued at Oakland's request to October 27, 2017, for the submission of a written closing brief. Oakland timely filed its closing brief, and the matter was submitted for decision on October 27, 2017.

## ISSUE

Is Oakland's fall 2016 psycho-educational evaluation of Student legally compliant such that Student is not entitled to a publicly funded independent psycho-educational evaluation?

## SUMMARY OF DECISION

This Decision finds that Student is not entitled to a publicly funded independent psycho-educational evaluation. Oakland did commit a procedural error by failing to timely present the results of its psycho-educational evaluation at an individualized education program team meeting within 60 days of receiving Parent's consent to assess. However, reviewing the evaluation at an IEP team meeting convened approximately two

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<sup>2</sup> The hearing was scheduled to begin at 9:30 a.m. OAH staff unsuccessfully attempted to reach Parent by telephone at approximately 9:45 a.m. The ALJ delayed the start of the hearing for approximately one hour and again tried unsuccessfully to reach Parent telephonically from the hearing room at 10:30 a.m. The hearing proceeded in Parent's absence.

weeks later than required, did not result in the loss of an educational opportunity for Student nor impede Parent's participation in developing Student's IEP.

## FACTUAL FINDINGS

### JURISDICTION AND PROCEDURAL BACKGROUND

1. Student is an intelligent, energetic, soon to be 10-year-old girl who resided with Parent within Oakland's jurisdictional boundaries during the relevant time frame. In December 2014, Student became eligible for special education under the category of other health impairment because of weaknesses in attention and executive functioning. Student transferred to Oakland during the summer of 2016. She attended second grade in a general education classroom at Oakland's Sequoia Elementary School for the 2016-2017 school year.

### FALL 2016 ASSESSMENT PLANS

2. At Student's IEP team meeting on September 12, 2016, Parent asked Oakland to assess Student for autism. On September 23, 2016, Oakland prepared an assessment plan pursuant to Parent's request, proposing to have a school psychologist assess Student in the area of social-emotional functioning. The assessment plan noted that a Notice of Procedural Safeguards was enclosed and referred Parent to the school psychologist for further information about her rights or the assessment. Parent signed consent to this assessment plan on September 27, 2016, and noted that she understood that special education services would not be provided to Student without her written consent. Oakland received Parent's consent on September 29, 2016.

3. Shortly after Parent signed the September 2016 assessment plan, she requested a full assessment of Student.<sup>3</sup> Oakland agreed to advance Student's triennial assessment which was slated for the beginning of the 2017-2018 school year, and prepared an October 4, 2016 triennial assessment plan. The October 2016 assessment plan proposed the following assessments: academic achievement by the resource specialist; health by the nurse; motor development by the occupational therapist; and intellectual development and social-emotional functioning by the school psychologist.

4. Both assessment plans were in Parent's native language of English and written in a manner that could be easily understood. The plans explained that the assessments might include classroom observations, rating scales, interviews, record review, and one-on-one testing, and described what the tests for each specified area were designed to measure. For example, the October 2016 triennial assessment plan noted that the intellectual development assessments measure how well a student thinks, remembers, and solves problems. Both plans explained that social-emotional testing is designed to measure how a student feels about herself, gets along with others, and takes care of personal needs at home, school, and in the community.

5. The October 2016 assessment plan also highlighted that a Notice of Procedural Safeguards was enclosed, and referred Parent to the resource specialist for further information about her rights or the assessments. Parent checked the box indicating that she consented to the assessment and understood that no special education services would be provided to Student without her written consent. Parent specifically handwrote on the October 2016 triennial assessment plan that she did not

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<sup>3</sup> In California, the term "assessment" has the same meaning as the term "evaluation" in the Individuals with Disabilities Education Act. (Ed. Code, § 56302.5.) These terms are used interchangeably throughout this Decision.

consent to the health assessment. Parent signed the triennial assessment plan with exception on October 4, 2016. Oakland received this signed assessment plan the following day on October 5, 2016.

#### FAILURE TO TIMELY PRESENT STUDENT'S PSYCHO-EDUCATIONAL EVALUATION

6. School psychologists Nina Garrovillo and Karin Laursen conducted Student's psycho-educational evaluation in October and November 2016. Both assessors testified at hearing. Ms. Garrovillo completed the final assessment report and signed it on November 13, 2016. She titled her report "Psychology Evaluation."<sup>4</sup> This report included the results of her testing in the areas of intellectual functioning, processing, and social-emotional functioning, as well as an autism assessment conducted by both assessors. The social-emotional testing was conducted pursuant to Parent's written consent to both the September and October 2016 assessment plans.

7. The assessment report specified that Resource Specialist Mason McKinley completed a separate academic assessment of Student.<sup>5</sup> Ms. Garrovillo's assessment report listed Student's academic testing scores and percentile ratings but referred the reader to Mr. McKinley's separate academic assessment report for full information. She noted in her report that Student's academic scores were generally in the average range. Oakland also conducted a separate occupational therapy assessment of Student, documented in a separate written report.<sup>6</sup>

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<sup>4</sup> Oakland interchangeably used the terms "psychological evaluation" and "psycho-educational evaluation" when referencing Ms. Garrovillo's assessment and report.

<sup>5</sup> Student's academic assessment was not at issue in this hearing.

<sup>6</sup> Student's occupational therapy assessment was not at issue in this hearing.

8. On December 14, 2016, Oakland convened an IEP team meeting to review the results of Student's triennial assessments, including her autism assessment. Ms. Garrovillo presented the results of her psycho-educational evaluation and report to Student's IEP team which included Parent. At this meeting, Parent received a copy of the November 13, 2016 psycho-educational assessment report. Oakland convened Student's IEP team meeting 76 calendar days after receiving Parent's consent to its first assessment plan on September 29, 2016, and 70 days after receiving her consent to the triennial assessment plan on October 5, 2016. Oakland schools were closed the week of Thanksgiving from Monday, November 21, 2016, through Friday, November 25, 2016. There were no intervening school vacations in excess of five school days between the date Oakland received the signed assessment plans, and the December 14, 2016 IEP team meeting.

#### OAKLAND'S PSYCHO-EDUCATIONAL EVALUATION OF STUDENT

9. For Student's psycho-educational evaluation, Ms. Garrovillo conducted a record review which included Student's prior assessments; interviewed Parent, Student, and Student's second grade teacher Melissa Catalano; conducted observations of Student; administered rating scales and testing instruments; and consulted and collaborated with Ms. Laursen. Ms. Garrovillo is a credentialed school psychologist and has worked for Oakland in this capacity since August of 2014.<sup>7</sup> She generally completes approximately 70 psycho-educational assessments for Oakland students each academic

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<sup>7</sup> In 2013, Ms. Garrovillo received her master's degree in education, school psychology, and holds an education specialist degree and pupil personnel services credential.

year.<sup>8</sup> Most of these assessments include screenings for mental health services. Ms. Garrovillo was familiar with Student, as Sequoia was one of the schools she served. She was qualified to conduct Student's evaluation, and completed a thorough, comprehensive assessment of Student as detailed below.

#### Record Review

10. Past assessment results informed Oakland's determination of Student's areas of suspected disability. Student's September 2014 initial special education assessment concluded that Student met the eligibility criteria for other health impairment based on her attention deficit hyperactivity disorder, which resulted in impulsive behavior, emotional dysregulation, problems with work completion, and self-monitoring deficits. This initial assessment did not identify any weaknesses in Student's cognitive abilities and ruled out a specific learning disability. The assessor recommended additional testing to determine if Student met the eligibility criteria for autism.

11. One year after Student's initial assessment, pediatric neuropsychologist Kristin Gross completed an independent educational evaluation of Student in October 2015. Her assessment results corresponded with the 2014 testing results. Dr. Gross found Student's cognitive functioning to be intact with Student scoring in the average to high average range, and identified Student as having significant deficits in sustaining attention and in self-regulation. Dr. Gross additionally identified Student as presenting with great mood lability, in excess of that associated with her attention deficit hyperactivity diagnosis. She opined that Student's frequently changing temperament could be part of a mood or affective disorder. Dr. Gross concluded that Student required

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<sup>8</sup> Pursuant to the October 9, 2017 order regarding evidence, the undersigned ALJ considered the prior testimony of Ms. Garrovillo during part one of the expedited hearing, specifically regarding her experience conducting assessments.

direct psychological services and recommended an educationally-related mental health services evaluation.

12. Based on Parent concerns and Student's past assessments, Ms. Garrovillo reasonably identified Student's areas of suspected disability to be other health impairment given Student's attentional deficits; autism; and emotional disturbance, based on her long-standing behavioral challenges and emotional dysregulation. She found Dr. Gross' opinion that Student's emotional and behavioral presentation may be part of a mood or affective disorder to be particularly concerning given Student's young age. In Ms. Garrovillo's experience of working with children with emotional disturbances, diagnoses of potential mood disorders are rare.

#### Interviews and Observations

13. Ms. Garrovillo gained important information from her interviews with Student and Parent which guided her assessment and informed her conclusions. Student presented as friendly, readily engaged in conversation, and shared detailed and responsive information, though she became uncooperative near the end of her interview. Student reported that she did not have any friends and that she heard and saw things that might not be there. Parent also reported that Student heard things that were not there. Parent shared her concerns that Student had challenging behaviors, was anxious about school, and struggled with peer interactions. Parent described Student as a sensitive child who internalized and engaged in negative self-talk the more she struggled at school. She noted that Student's self-esteem had decreased.

14. Ms. Garrovillo conducted a class observation of Student in the morning as recess ended. Student initially refused to return to class and ran off. Once in class, she struggled to remain on task and did not participate with her classmates in spelling and math lessons. Student required significant prompting and rewards from her one-to-one behavior aide to complete minimal work. At times she laid on the floor, crawled, and



played with pillows. Her teacher reported that this was a particularly good day for Student, who usually remained outside, refused to work, or disrupted the class. Ms. Garrovillo conducted a second observation of Student during recess. Student presented as socially immature and unable to join in play activities with peers.

15. Ms. Garrovillo spent more than three hours assessing Student over multiple sessions. Student was particularly challenging to assess and required a high level of structure. She was easily frustrated even when presented with basic tasks, and required significant prompting and rewards during the testing sessions. She typically remained on task for no more than five minutes. At times, Student refused to enter the testing room and preferred to run around the playground. Student's mood was variable and labile, moving from extremes at a quick rate. She hopped around the room, became emotionally dysregulated, repeatedly yelled and slammed the door, refused tasks, cried, took off her shoes, ran around on all fours, and eloped. Ms. Garrovillo took Student's behaviors and limited attention to task into account during her assessment, and noted in her report when she determined that testing scores did not accurately reflect Student's ability.

#### Administration of Testing Instruments

16. Ms. Garrovillo utilized technically sound, standardized assessment tools which she was qualified to use and had experience using. She selected and administered all test instruments in a manner free from racial, sexual, or cultural discrimination. All tools were validated for the purpose for which they were utilized, and were designed to provide relevant information that would assist in determining Student's educational needs. All tests were administered in Student's native language of English. Ms. Garrovillo administered and scored all instruments in accord with the test publishers' instructions. Test protocols from the social-emotional rating scales and autism testing were introduced into evidence and corresponded to the results Ms. Garrovillo reported. Ms.

Garrovillo and Ms. Laursen were both knowledgeable as to Student's identified disability in the area of other health impairment and her suspected disabilities in the areas of autism and emotional disturbance, and were competent to assess in these areas.

#### Intellectual Functioning and Processing

17. Ms. Garrovillo administered the Differential Ability Scales, Second Edition, to measure Student's overall cognitive functioning. This instrument is a standardized assessment that measures a student's verbal, nonverbal, and spatial abilities. Although the Differential Ability Scales can be used to generate an overall general conceptual ability score, Ms. Garrovillo chose not to calculate this score. Ms. Garrovillo did not use this instrument to derive an intelligence quotient for Student. The Differential Ability Scale was an acceptable test to administer to Student, who is an African-American child.<sup>9</sup> This instrument was previously administered as part of Student's initial assessment in 2014.

18. Student's overall cognitive functioning fell within the average range, with nonverbal reasoning being a relative strength. Student scored in the deficient range on the Recall of Designs subtest of the Spatial Ability Cluster. Ms. Garrovillo testified that Student was afraid of drawing the wrong figure and did not put forth her best effort. In light of past assessment results that confirmed Student's cognitive abilities were at or above the expected level for her age, and given Student's testing challenges, Ms. Garrovillo reasonably concluded that this one low score on one subtest did not indicate

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<sup>9</sup> In *Larry P. v. Riles (I)* (9th Cir. 1974) 502 F.2d 963, and *Larry P. v. Riles (II)* (9th Cir. 1984) 793 F.2d 969, the Ninth Circuit Court of Appeals upheld district court injunctions preventing California schools from using standardized intelligence tests for the purpose of identifying African-American students for special education and services. (See also *Crawford v. Riles* (9th Cir. 1994) 37 F.3d 485, 486.)

a need for additional testing. Student's scores on the Differential Ability Scale were lower than her 2014 scores on this same measure. Ms. Garrovillo attributed this decline to Student's attentional variations. Her testimony was persuasive and unrefuted.

19. To measure Student's processing abilities, Ms. Garrovillo administered diagnostic subtests of the Working Memory and Processing Speed Clusters from the Differential Ability Scales. Student's processing abilities fell within the average range. Ms. Garrovillo administered the Social Perception and Attention and Executive Function Domains of the Developmental Neuropsychological Assessment, Second Edition, to further measure Student's processing skills in the areas of attention and social interactions. The publisher's manual allows assessors to choose which subtests to administer. Based on the subtests administered, Student showed deficits in identifying and comparing facial expressions and in understanding social contexts and perspective taking. Student performed at the expected level for her age on two attention subtests. On two other attention subtests, she performed in the borderline and well below expected ranges. Student's behaviors during the testing negatively impacted these results. She was resistant to participate, showed low frustration tolerance, and engaged in tantrum behavior.

#### Social-Emotional Functioning

20. To assess Student's social-emotional functioning, Ms. Garrovillo administered the Behavior Assessment System for Children, Second and Third Editions. There was no evidence that the combined use of scales from the second and third editions was inappropriate. The Behavior System is a comprehensive set of rating scales designed to assist in identifying a variety of emotional and behavioral disorders, based on the frequency of observed behaviors and emotions in the home and school setting. Parent completed the Parent Rating Scales from the second edition. Ms. Garrovillo asked Student's one-to-one aide to complete the third edition of the Teacher Rating Scales.

She reasonably determined that Student's aide had more knowledge of Student's functioning than the teacher, as the aide spent more time with Student. The results of the Parent Rating Scales were valid and reliable. The Teacher Rating Scales needed to be interpreted with extreme caution given the excessively negative ratings.

21. On the Behavior System, scores in the clinically significant range suggest a high level of maladjustment. Scores in the at-risk range may indicate a significant problem not requiring formal treatment, or the potential of developing a problem that needs careful monitoring. Parent rated Student in the clinically significant range in the areas of hyperactivity and attention problems. Parent rated Student as at-risk in several areas including conduct problems, withdrawal, adaptability, daily living skills, functional communication, and externalizing problems. Conversely, in the area of social skills, Parent rated Student as average, a rating generally inconsistent for a student on the autism spectrum.

22. Ms. Garrovillo also administered the Beck Youth Inventory, Second Edition, which consists of five self-report inventories completed by a student and used to assess symptoms of depression, anxiety, anger, disruptive behavior, and self-concept. Student's responses were extremely elevated in the areas of depression, anxiety, and anger, and moderately elevated in behavior. Student's responses also reflected a much lower than average self-concept. Over her career, Ms. Garrovillo had administered this tool to many students who had an established emotional disturbance. She found Student's elevated levels to be very unusual and especially concerning given her young age. Therefore, she administered an additional projective measure called the Guess Why Game, which consists of a series of open-ended questions about a fictional girl. Ms. Garrovillo established that students generally end up answering in relation to themselves, which provides additional information as to their own perspective on their social and emotional wellbeing. Student's responses reflected challenging relationships, negative

perceptions of how she was treated, and negative self-perceptions. Her responses on the projective measure and the Beck Inventory were consistent.

#### Autism Assessment

23. Ms. Garrovillo administered the Social Communication Questionnaire to Parent and Ms. Catalano, Student's teacher. This instrument screens for symptoms commonly associated with an autism spectrum disorder. There are 40 items that look at social communication, verbal and non-verbal skills, social behavior, restrictive behaviors, and sensory responses. The threshold for determining whether a student should be referred for further autism testing is a score of 15 or higher. Based on Parent's responses, Student scored an 11. Student received a score of 18 based on Ms. Catalano's responses. Due to the inconsistent reports, Ms. Garrovillo consulted with Ms. Laursen to administer a further autism measure.

24. Ms. Laursen has been a school psychologist with Oakland for over 13 years, and has served as its autism consultant for the past nine years.<sup>10</sup> Oakland's school psychologists refer students to Ms. Laursen when autism is suspected. She has particular expertise administering the Autism Diagnostic Observation Schedule (ADOS), a semi-structured, standardized assessment of communication, social interaction, and imaginative use of materials, in its second edition at the time Student was assessed. Beginning in 1999, Ms. Laursen worked at an autism research center at the University of Washington for four years, where she received extensive training and supervision in the administration of the ADOS and evaluated approximately 300 children. In 2002, she also completed a two-day training on the ADOS presented by Western Psychological Services. Over the course of her career, Ms. Laursen had administered the ADOS

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<sup>10</sup> In 2004, Ms. Laursen received her master's degree in education, school psychology, and her pupil personnel services credential.

approximately 900 times. She regularly conducts reliability checks with colleagues in her use and scoring of the ADOS. Ms. Laursen was well-qualified to administer the ADOS-2.

25. In accordance with the publisher's instructions, Ms. Laursen administered module three of the ADOS-2 based on Student's age, verbal skills, and developmental stage. This was a culturally appropriate instrument that was selected and administered in a non-discriminatory manner, for the purpose for which it was intended, and in accordance with the publisher's manual. Ms. Garrovillo observed and independently took notes. Ms. Laursen provided detailed testimony as to each of the 14 coded events wherein Student was asked to do tasks such as putting together a puzzle, engaging in make-believe play, demonstrating how to brush her teeth, telling a story, and answering questions. During each task, the assessor looks for and notes specific behaviors and responses.

26. During the administration of the ADOS-2, Student was animated, spoke clearly and in complete sentences, and frequently and spontaneously offered information about herself and inquired about Ms. Laursen's feelings and experiences. Student expressed a sense of shared enjoyment in interacting and was able to take turns. She did not demonstrate unusual sensory interests or behaviors or show an excessive interest in or make reference to unusual topics. Student displayed appropriate play and imagination skills and invited Ms. Laursen to join her. Her eye contact was initially appropriate but became avoidant as the session progressed. She was resistant to discussing her own emotions and friendships, and shared she did not have any friends. Student became emotionally dysregulated when presented with questions she found uncomfortable, and demonstrated a lack self-regulation skills to cope with difficult situations. During the approximately 60-minute administration, there is a scheduled break. At that time, Ms. Laursen entered preliminary scores.

27. As required by the publisher, Ms. Laursen calculated Student's final score immediately following the administration. The ratings are organized into five main groupings: language and communication; reciprocal social interaction; imagination; stereotypical behaviors and restricted interests; and other abnormal behaviors. According to the ADOS-2 publisher, a final compiled score of "7" is the cut-off for suspecting the presence of an autism spectrum disorder, and a score of "9" is the cut-off for suspecting autism. The test protocols for Student's ADOS-2 were entered into evidence and showed that her final score was changed from a "7" to a "6." Ms. Laursen testified regarding this change. On the scoring sheet in the category labeled, "D4 Excessive Interest in or Reference to Unusual or Highly Specific Topics or Objects or Repetitive Behaviors," Ms. Laursen entered her score as "0/1." She credibly explained that after reviewing her notes, consulting with Ms. Garrovillo, and carefully considering Student's presentation throughout the duration of the test, as required, she determined Student's score in this category to be a "0." This resulted in Student's final score being a "6" which is below the cut-offs for suspecting an autism spectrum disorder and autism.

28. Ms. Laursen established that the ADOS-2 cannot be relied upon exclusively to establish that a child has autism, and that this instrument often results in false positives. It was Ms. Laursen's clinical judgment that if Student received a score of "7" or even a "9" on the ADOS-2, this would have been a false positive based on Student's emotional dysregulation during testing, and she would have recommended additional testing to rule out autism. Ms. Laursen persuasively testified that a final determination of autism had to be based on several critical components including the results from several observations, a thorough developmental history, interviews, cognitive assessments, and social-emotional rating scales, and ruling out an emotional disturbance.

#### Eligibility Determination

29. Based on Student's entire psycho-educational evaluation, Ms. Laursen and Ms. Garrovillo both concluded that Student did not meet the eligibility criteria for autism, especially in light of the assessment results supporting the presence of an emotional disturbance.<sup>11</sup> Both assessors determined that Student met the eligibility criteria for emotional disturbance due to an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; display of inappropriate types of behavior or feelings under normal circumstances exhibited in several situations; and a tendency to develop physical symptoms or fears associated with personal or school problems. Ms. Garrovillo concluded that Student's attention challenges continued to support eligibility under the category of other health impairment. However, she determined that Student's emotional challenges were the main cause of her school problems, such that her primary eligibility should be emotional disturbance, with other health impairment as a secondary eligibility category.

#### OAKLAND'S PSYCHO-EDUCATIONAL ASSESSMENT REPORT

30. Ms. Garrovillo prepared a detailed, written assessment report. The report highlighted Student's developmental, health, and school history, and discussed the conclusions and recommendations from Student's past assessments. The report described relevant classroom and playground observations of Student's academic participation and social interactions as well as testing behaviors, and included important information gathered from Student and Parent interviews. In her report, Ms. Garrovillo described each test instrument administered, Student's scores, and the significance of

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<sup>11</sup> If a student's education is adversely affected primarily because of an emotional disturbance, then the student is not considered eligible under the category of autism. (Cal. Code Regs., tit. 5, § 3030(b)(1)(A).) An eligibility determination is not required in order to determine the sole issue for hearing and no such finding is made herein.



her results in a manner that was easy to understand. She cautioned the reader regarding Student's testing behaviors and where they might have impacted the results. She also explained that the aide's responses on the Behavior System's Teacher Rating Scales needed to be interpreted with caution. Her report included a detailed, written summary of the ADOS-2 and Student's results which Ms. Laursen prepared.

31. Ms. Garrovillo's assessment report identified Student's individual strengths and weaknesses, and the impact of her deficits on her ability to access her education. Her report noted that Student's scores from her separate academic assessment were commensurate with her cognitive ability. Ms. Garrovillo included her determination that Student met the eligibility criteria under the primary category of emotional disturbance and the secondary category of other health impairment and the basis for her determination. Finally, the report provided recommendations to the IEP team regarding Student's placement, services, and supports, including Ms. Garrovillo's determination that Student would benefit from educationally related mental health services.

#### PARENT REQUEST FOR INDEPENDENT EVALUATION

32. In February 2017, Parent requested an independent educational evaluation at public expense from Oakland. Geri Baskind reviewed Parent's request and could not determine which of Oakland's assessments Parent disagreed with, or the type of evaluation she was requesting. Through a series of emails, Parent clarified that she was seeking an independent psycho-educational evaluation. Upon receiving this clarification, Ms. Baskind directed her staff to ask Parent if she would be interested in Oakland referring Student to the Northern California Diagnostic Center, in Fremont, for an assessment. Parent did not respond to this inquiry. On or about March 7, 2017, Ms. Baskind sent Parent a prior written notice denying her request for an independent psycho-educational evaluation, and informing Parent that Oakland would be requesting

a due process hearing to defend its assessment. On March 16, 2017, Oakland filed this request for hearing to defend its psycho-educational evaluation.

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>12</sup>

1. This due process hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);<sup>13</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 to prepare them for further education, 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); 34 C.F.R. § 300.1; See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible student at no charge to the parent, meet state educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed Code, § 56031, subd. (a).) "Related services" are transportation and other developmental, corrective, and supportive services that are

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<sup>12</sup> Unless otherwise stated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

<sup>13</sup> All subsequent references to the Code of Federal Regulations are to the 2006 edition.

required to assist the student to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(a); Ed. Code, §§ 56032, 56345, subd. (a).)

3. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 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 due process hearings is preponderance of the evidence].) In this matter, Oakland bears the burden of proof as to the sole issue for hearing.

## LEGAL ADEQUACY OF OAKLAND'S PSYCHO-EDUCATIONAL EVALUATION

### Oakland Complied with Notice but not Timeline Requirements

4. In order to meet the continuing duty to maintain an appropriate educational program, the school district must reassess the educational needs of a student with a disability. A district is required to reassess a student if it determines that

the student's educational or related services needs warrant a reassessment or upon parent or teacher request. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a); Ed. Code, § 56381, subd. (a)(1).) A reassessment of a student who is receiving special education and related services must occur at least once every three years unless the parent and the school district agree that such a reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) The same basic requirements for an initial assessment apply to reassessments. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a); Ed. Code, § 56381, subds. (a)(1) & (e).)

5. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1)(i); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent for a reassessment, the school district must provide proper notice to the parent. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); 34 C.F.R. § 300.300 (c); Ed. Code, §§ 56321, subd. (a), 56329.) The notice consists of a proposed written assessment plan describing any evaluation procedures the district proposes to utilize and a copy of the procedural safeguards under the IDEA and state law. (20 U.S.C. § 1414(b)(1); 34 C.F.R. § 300.304(a); Ed. Code, § 56321, subd. (a).) The district must provide the parent a proposed assessment plan within 15 days of the referral for assessment. (Ed. Code, § 56321, subd. (a).) The proposed assessment plan must be written in a manner that is easily understood and in the parent's native language. (Ed. Code, § 56321, subd. (b)(1) & (2).) It shall explain the types of assessments to be conducted and state that the assessment will not result in an IEP without parental consent. (Ed. Code, 56321, subd. (b) (3) & (4).)

6. The assessment must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school vacations in excess of five school days, unless the parent consents in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c); Ed. Code, §§ 56043, subds. (f)(1), 56302.1, subd. (a), and 56344, subd. (a).) The 60-day requirement does not apply if the student transfers to a new district during

the assessment period, or if the parent repeatedly fails or refuses to produce the student for the assessment. (Ed. Code § 56302.1, subd. (b).)

7. Oakland timely provided Parent with a proposed assessment plan within 15 days of her requests for an autism assessment and for a full assessment of Student. Oakland's September 23, 2016 assessment plan and its October 4, 2016 triennial assessment plan were written in English, easily understood, explained the evaluation procedures and proposed assessments, and indicated that any special education placement would require additional consent. Oakland enclosed a Notice of Procedural Safeguards with the plans. On September 27, 2016, Parent provided written consent to the first assessment plan which called for social-emotional testing. On October 4, 2016, Parent provided written consent to the triennial assessment plan, with exception to the proposed health assessment. Oakland met its notice requirements and its assessment plans were legally compliant.

8. However, Oakland was required to complete its assessment of Student's social-emotional functioning and its full psycho-educational assessment and review the results at an IEP team meeting within 60 days of receiving Parent's consent to conduct each assessment. Oakland failed to do so. None of the exceptions to the 60-day requirement were applicable in this case. Oakland combined Student's intellectual development and social-emotional and autism testing into one psycho-educational evaluation and report. Therefore, it was required to adhere to the time frame triggered by Parent's consent to the earlier assessment plan. Oakland first received consent to conduct its social-emotional assessment on September 29, 2016. It was legally required to complete the psycho-educational evaluation and review the results within 60 days, on or before November 28, 2016. Oakland did not convene an IEP team meeting to review

Student's psycho-educational assessment, which included its autism assessment, until December 14, 2016. This delay constitutes a procedural error.<sup>14</sup>

### Analyzing a Procedural Violation

9. Not all procedural violations are of legal consequence. A due process decision shall be based on substantive grounds based on whether a child received a FAPE. (20 U.S.C. § 1415 (f)(3)(E)(i); Ed. Code, § 56505, subd. (j) [decision cannot be based solely on a non-substantive error unless the error resulted in the loss of an educational opportunity or interfered with parental participation in the IEP process].) A district's failure to conduct appropriate assessments or to assess in all areas of suspected disability constitutes a procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032-1033.) The failure to obtain critical assessment information about a student, "render[s] the accomplishment of the IDEA's goals -- and the achievement of a FAPE -- impossible." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1210 quoting *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 894.)

10. A procedural violation results in a denial of a FAPE only if the violation impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision making process; or caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subds. (f)(2) & (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, superseded on other grounds by statute; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.) The Ninth Circuit has held that a

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<sup>14</sup> Even if the date Oakland received Parent's consent to the triennial assessment plan, October 5, 2016, is used to count the 60-day time requirement, Oakland was out of compliance as this would have required an IEP team meeting by December 4, 2016.

procedural error that causes a loss of an educational opportunity denies a student a FAPE. (*Doug. C. v. Hawaii Depart. of Education* (9th Cir. 2013) 720 F.3d 1038, 1047.) "A procedural error results in the denial of an educational opportunity where, absent the error, there is a 'strong likelihood' that alternative educational possibilities for the student 'would have been better considered.'" (*Id.* at p. 1047, quoting concurring opinion of Judge Gould in *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 657.)

11. Ms. Garrovillo reviewed the results of her psycho-educational evaluation, which included Student's autism testing, with Student's IEP team, including Parent, on December 14, 2016. While there was no evidence why Oakland did not timely convene Student's IEP team, a delay of 16 days in presenting the assessment results to the IEP team did not result in a denial of FAPE. There was no evidence that alternative educational possibilities for Student would have been better considered if the IEP team reviewed Student's assessment results by November 28, 2016. Convening Student's IEP team to review the psycho-educational evaluation 76 days after receiving Parent's consent to assess Student's social-emotional functioning and 70 days after receiving consent to the triennial assessment plan, did not impede Student's right to a FAPE, or deny her of an educational opportunity or benefit, or significantly impede Parent's opportunity to participate in the decision-making process.

#### Timely Denial of Independent Evaluation and Request for Hearing

12. The procedural safeguards of the IDEA provide that under certain conditions, a parent is entitled to obtain an independent evaluation of her child at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(a) & (b); Ed. Code, § 56329, subd. (b).) An independent evaluation is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i).) A parent has the right to request an independent evaluation at public expense if the parent disagrees

with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).) When a parent requests a publicly funded, independent evaluation, the school district must, "without unnecessary delay," either initiate a due process hearing to show that its evaluation is appropriate, or provide the independent evaluation at public expense. (34 C.F.R. § 300.502(b)(2); see Ed. Code, § 56329, subd. (c).)

13. The term "unnecessary delay" as used in title 34 of the Code of Federal Regulations part 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 educational evaluation]." (*Letter to Anonymous* (OSEP Aug. 13, 2010) 56 IDELR 175.) The determination of "unnecessary delay" is a fact-specific inquiry. (*Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, No. C 06-0380 PVT) 2006 WL 3734289, p. 3 [three months unnecessary delay]; *M.M. v. Lafayette School Dist.* (N.D.Cal. Aug. 8, 2012, CV 09-4624, 10-04223) 2012 WL 3257662 [waiting 74 days constituted unnecessary delay]; *J.B. v. San Jose Unified School Dist.* (N.D.Cal. May 6, 2013, No. C 12-06358 SI) 2013 WL 1891398, p.4 [seven month delay unnecessary].)

14. Some delay in the provision of an independent evaluation, or in filing for a due process hearing after declining to fund an independent evaluation, is reasonable if the school district and the parent are engaging in active communications, negotiations, or other attempts to resolve the matter. (*J.P. v. Ripon Unified School Dist.* (E.D. Cal. April 15, 2009, No. 2:07-cv-02084-MCE-DAD) 2009 WL 1034993, p.7-8 [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.



28, 2007, No. 06-5172) 2007 WL 2851268, p.10 [six-week delay in filing for due process not a per se violation given ongoing efforts to resolve the matter].)

15. Parent requested an independent educational evaluation in February 2017. Oakland had completed several assessments of Student and was not clear as to the type of evaluation that Parent was seeking. Therefore, Oakland sought further clarification from Parent. Once Oakland understood that Parent was seeking an independent psycho-educational evaluation, Oakland asked Parent if she would be interested in a referral to the Northern California Diagnostic Center for an assessment. Oakland's communications with Parent to better understand her request and attempt to resolve the matter did not cause Oakland to unduly delay in filing to defend its assessment. On March 16, 2017, within six weeks of Parent's request for an independent evaluation, Oakland filed for a due process hearing. Oakland was procedurally compliant in timely filing for hearing to defend its assessment.

#### The Psycho-Educational Assessment was Sufficiently Comprehensive

16. The purpose of a special education assessment is to identify a student's unique and individualized needs. The IDEA and California state law require that a school district assess a student in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); see 34 C.F.R. § 300.304(c)(4) and Ed. Code, § 56320, subd. (f) [child must be assessed in all areas related to the suspected disability].) Children who may be eligible for special education "must be evaluated and assessed for all suspected disabilities so that the school district can begin the process of determining what special education and related services will address the child's individual needs." (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1110, cert. den. (Apr. 17, 2017, No. 16-672) 137 S.Ct. 1578 [2017 WL 1366731] (*Timothy O.*).

17. Given the importance of assessments, the IDEA and accompanying regulations set forth an extensive set of procedural safeguards to ensure that

evaluations 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., supra*, 822 F.3d 1105, 1110.) A district must, therefore, ensure that the evaluation is sufficiently comprehensive to identify all of the child’s needs for special education and related services, whether or not commonly linked to the identified disability category. (34 C.F.R. § 300.304(c)(6).) A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1); see also Ed. Code, § 56320, subd. (b)(1).)

18. In accordance with the October 2016 triennial assessment plan, Ms. Garrovillo comprehensively assessed Student in the area of intellectual development, including cognitive functioning, processing abilities, and attentional deficits. Pursuant to both the October and September 2016 assessment plans, Ms. Garrovillo assessed Student in the area of social-emotional functioning, including autism and mental health needs. Oakland’s psycho-educational evaluation did not include academic testing as this was completed as part of a separate academic assessment. Ms. Laursen administered an additional autism measure to Student to ensure a more complete picture of Student’s needs and determine the most appropriate eligibility category. Oakland’s assessors utilized multiple tools such as a record review, observations, interviews, and administration of standardized and projective measures and rating scales. Ms. Garrovillo gathered information directly from Student and sought out Parent’s input at the assessment planning stage and during her interview. Oakland’s psycho-educational assessment was sufficiently comprehensive to ensure a complete result.

#### Qualified Assessors Administered Proper Tools Appropriately

19. Assessments must be conducted by individuals who are both “knowledgeable of the student’s disability” and “competent to perform the assessment,

as determined by the local educational agency.” (Ed. Code, §§ 56320, subd. (g), 56322.) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, §§ 56324, subd. (a), 56320, subd. (b)(3) [tests of intelligence and emotional functioning shall be administered by a credentialed school psychologist].) Assessments and other evaluation materials must be administered by trained and knowledgeable personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iv) & (v); 34 C.F.R. § 300.304(c)(iv) & (v); Ed. Code, § 56320, subd. (b)(3).)

20. No single measure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) Rather, the assessor must use a variety of technically sound instruments. (20 U.S.C. § 1414 (b)(2)(A); 34 C.F.R. § 300.304(b)(1) & (2).) The selected instruments are to also assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) An assessment tool must “provide relevant information that directly assists persons in determining the educational needs of the child.” (34 C.F.R. § 300.304(c)(7).) A school district is required to use those assessment tools necessary to gather relevant functional and developmental information about the child to assist in determining the content of the child’s IEP. (34 C.F.R. § 300.304(b)(1)(ii).)

21. Tests and assessment materials must be selected and administered so as not to be racially, culturally, or sexually discriminatory; must be provided and administered in the student’s primary language or other mode of communication unless this is clearly not feasible and in the form most likely to yield accurate information on the student’s functioning; and must be used for the purposes for which the assessment or measures are valid and reliable. (20 U.S.C. § 1414(b)(3)(A)(i), (ii) & (iii); 34 C.F.R. §

300.304 (c)(1); Ed. Code, § 56320, subds. (a), (b)(1) & (2).) If the evaluation procedures required by law are met, the selection of particular testing or evaluation instruments is at the discretion of the school district. (*Letter to Anonymous* (OSEP Sept. 17, 1993) 20 IDELR 542.)

22. Ms. Garrovillo and Ms. Laursen are credentialed school psychologists and were qualified to conduct Student's psycho-educational assessment. They were knowledgeable of Student's disability and experienced and trained in administering the tools they utilized. Ms. Garrovillo had completed approximately 150 psycho-educational assessments including mental health screenings at the time of conducting Student's assessment. Ms. Laursen had administered the ADOS more than 900 times. The assessment consisted of multiple standardized assessment tools which were administered to Student in her native language of English, and selected and used in a non-discriminatory manner and for the purposes for which they were valid and reliable. Oakland's psycho-educational assessment of Student relied upon a variety of technically sound measures, designed to gather relevant information that would assist in determining Student's eligibility, individual strengths and weaknesses, and her educational needs.

23. The reliability of the testing results is dependent on the assessor following the publisher's instruction manual with regards to the correct administration and scoring of the test instrument. Oakland met its burden to show that its assessors administered and scored each test instrument in accordance with the publisher's instructions. Ms. Garrovillo was present during Ms. Laursen's administration of the ADOS-2 and took detailed notes. This served as a further reliability check as the two assessors compared notes of Student's behaviors and responses when Ms. Laursen completed the scoring.

OAKLAND'S PSYCHO-EDUCATIONAL ASSESSMENT REPORT WAS LEGALLY  
COMPLIANT

24. It is the duty of the IEP team, not the assessor, to determine whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. § 300.306(a)(1); Ed. Code, § 56329, subd. (a)(1).) However, in order to aid the IEP team in determining eligibility, an assessor must produce a written report that includes information about whether the student may need special education and related services, along with the basis for that determination. (Ed. Code, § 56327, subds. (a) & (b).)

25. Upon completion of an assessment, the district shall provide parents with a copy of the evaluation report and the documentation of determination of eligibility. (20 U.S.C. § 1414(b)(4)(B); 34 C.F.R. § 300.306(a)(2); Ed. Code, § 56329, subd. (a)(3).) The personnel who assess a student must prepare a written report that includes: (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; and (7) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage. (Ed. Code, § 56327.)

26. Ms. Garrovillo's written report thoroughly discussed each element of her assessment in an easy-to-understand manner. She included relevant information from Student's developmental, health, and school history, and prior assessment results. Oakland's assessment report built on and incorporated these past assessment findings.

27. The assessment report included relevant information from Ms. Garrovillo's observations of Student and her struggles to stay on task and appropriately engage with peers. The report explained each test instrument utilized; described Student's testing behaviors including a detailed summary of her performance on the ADOS-2; provided

Student's scores and indicated when the results needed to be interpreted with caution; and analyzed the data so the reader could understand the results. Ms. Garrovillo's report identified Student's individual strengths and weaknesses and provided the IEP team with relevant assessment information upon which to develop an educational program for Student that would allow her to make appropriate progress in light of her circumstances.<sup>15</sup>

28. Ms. Garrovillo included in her report the legal eligibility criteria for the special education categories of other health impairment, autism, and emotional disturbance. She included her opinions, and the basis for her opinions, that Student continued to qualify under the category of other health impairment; that Student did not appear to qualify for special education as a child with autism; and that Student appeared to qualify as a student with an emotional disturbance.<sup>16</sup> Ms. Garrovillo's assessment report provided recommendations to the IEP team regarding placement and services. Oakland's psycho-educational assessment report contained all required components and was legally compliant.

29. The law does not specify when an assessment report must be provided to Parent other than "upon completion." Oakland complied with this legal requirement by providing Parent a copy of its November 13, 2016 psycho-educational assessment report at the December 14, 2016 IEP team meeting. Oakland erred in not timely convening an IEP team meeting to review the assessment results as determined above. However, this procedural violation did not impede Parent's ability to meaningfully

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<sup>15</sup> The appropriateness of Student's resultant IEP was not at issue in this hearing and no findings are made in that regard.

<sup>16</sup> No determination is made herein as to Student's eligibility for special education pursuant to any particular category.

participate in the decision-making process or result in a loss of educational benefit to Student. Therefore, Student is not entitled to a publicly funded independent psycho-educational evaluation.

## ORDER

Oakland's fall 2016 psycho-educational assessment of Student is legally appropriate such that Oakland is not required to fund an independent psycho-educational evaluation of Student.

## 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, Oakland prevailed on the sole issue presented.

## 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: December 7, 2017

\_\_\_\_\_/s/\_\_\_\_\_  
THERESA RAVANDI  
Administrative Law Judge  
Office of Administrative Hearings