

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

GARVEY SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT

OAH Case No. 2017070426

DECISION

Garvey Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings on July 12, 2017, naming Parent on behalf of Student. On July 25, 2017, OAH granted the parties' joint request for a hearing continuance.

Administrative Law Judge Sabrina Kong heard this matter in Rosemead, California, on October 3, and 4, 2017.

Attorney Sharon Watt represented District. District's special education director Alma R. Ulloa attended the hearing on District's behalf. Mother represented Student, and attended the hearing on both days.

A continuance was granted for the parties to file written closing arguments and the record remained open until October 19, 2017. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision on October 19, 2017.

ISSUES¹

1. Was District's 2017 triennial psychoeducational assessment appropriate such that Student is not entitled to an independent psychoeducational assessment at public expense?
2. Was District's 2017 triennial speech and language assessment appropriate such that Student is not entitled to a speech and language assessment at public expense?
3. Was District's 2017 triennial occupational therapy assessment appropriate such that Student is not entitled to an independent occupational therapy assessment at public expense?

SUMMARY OF DECISION

District proved that its psychoeducational, and speech and language assessments were appropriate. Therefore, Student was not entitled to independent assessments in these two areas. District did not prove that its occupational therapy assessment was appropriate. The assessor did not evaluate and report on a number of skills that were a part of Student's school day which were essential to accessing her education. Therefore, Student is entitled to an independent occupational therapy assessment.

FACTUAL FINDINGS

1. Student was 13-years old, and resided within District at all relevant periods. She was medically diagnosed with Down syndrome, and qualified for special education under the intellectual disability category. Student was enrolled as a seventh

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

grader in special education teacher Roy Crummitt's Severe Disability classroom in Fremont Elementary School, in Alhambra, in the 2016-2017 school year. Student had a full time one-to-one aide.

2. On November 28, 2016, District sent an assessment plan and a copy of Procedural Rights and Safeguards to Parents for permission to assess Student in the areas of academic achievement, health, intellectual development, language/speech communication development, motor development, social/emotional, and adaptive behavior because her triennial assessments were due in the spring of 2017. Mother signed the assessment plan on December 13, 2016. District conducted psychoeducational, speech and language, and occupational therapy assessments, along with other assessments not at issue in this hearing.

PSYCHOEDUCATIONAL ASSESSMENT

3. School psychologist Claudia Bahamonde conducted a psychoeducational assessment of Student on January 4, 2017. She held a bachelor's degree in psychology, and an education specialist degree² in school psychology; and had been Alhambra Unified School District's school psychologist for approximately 15 years where her duties included conducting psychoeducational assessments. Although she did not specify the number of psychoeducational assessments she conducted, she had been conducting psychoeducational assessments since 1999 when she worked for other school districts as their school psychologist. She was a certified behavior intervention case manager and nationally certified as a school psychologist, and a licensed educational psychologist. She reviewed Student's educational history, prior assessments and background information; observed Student in the classroom, on the playground, in the cafeteria and

² The educational specialist degree was an advanced master's degree, above a master's level and below a doctorate level degree.

during testing; and spoke with Mr. Crummitt, Student's one-to-one aide, and Mother as part of the assessment. She was qualified to conduct a psychoeducational assessment of Student. She selected the assessments based on Student's academic, developmental and functional abilities; and administered them using English, Student's primary language. She did not select or administer any of the assessments in a racially or culturally discriminatory basis.

Observations

4. Ms. Bahamonde observed Student in the cafeteria for 40 minutes. Student stood in the lunch line; selected lunch; signed "thank you"; carried her tray to her seat; and sat down after the aide pulled out her chair. The aide prompted and modeled in sign language a request to open the apple sauce and ketchup. When Student complied, the aide opened the apple sauce and the ketchup for Student. The aide prompted Student to take one bite at a time, and prompted Student to push her own chair in before throwing her own tray away after lunch. Student complied with all of the aide's prompts. Student expressed excitement by smiling with raised hands and shoulders shrugging. Ms. Bahamonde observed Student on two different days on the playground for 15 minutes each day. Student liked the swings, and got on them on both days. Student complied with the aide's request to wear socks and shoes before getting on the swing. She required prompting to lift her feet, did not pump her feet, but could touch the ground and propelled off the floor. When the bell rang, Student got off the swing, and walked towards her aide who then took her to the bathroom.

5. Ms. Bahamonde also observed Student in the classroom with seven students, five instructional aides, and one teacher for 35 minutes. Student worked on functional academic skills in different "stations," spending 10 minutes at each station; cleaned up when the aide sang the clean-up song, and transitioned easily to another station with the aide's prompting. Student used a picture exchange communication

system for transition as a visual schedule to inform what station was next. At the first station, and with the aide's prompting and modeling, Student found and placed letters in alphabetical order slots which had the name and sound of the letter. Student made sound approximations of the letters "A, B, M, O, P, R and S" with the aide's prompting and modeling. Student worked on a computer at the second station. With the aide placing her hand over Student's hand, Student typed her first and last name, and days of the school week when shown one letter at a time. At the third station, when Student did not choose a book after the aide prompted her to do so, the aide chose an insect book for Student. Student flipped the pages and looked at the pictures; when finished, she chose Disney's Pocahontas to look through until recess. Student complied with the aide's verbal and sign language prompts to put the book away before lining up for recess.

6. Student communicated by gesturing sign approximations because she could not sign with complete accuracy. Student was limited in her sign language abilities, and her gestures were unrecognizable to individuals unfamiliar with her. Student only signed "please" and "thank you" accurately. Student rarely gestured without prompting, followed by modeling; and both needed to be repeated several times before Student gestured. Student also communicated by grunting; laughing; and responding to verbal prompts of "break," "all done," and "thank you."

7. Ms. Bahamonde used dolls and food to motivate Student's engagement during testing. Student demonstrated social reciprocity, and eye contact, and was easily redirected during testing. Student enjoyed verbal praise and smiled when complimented; gave Ms. Bahamonde a thumbs-up; and laughed with raised hands and shoulders shrugged when excited. Ms. Bahamonde concluded that Student was fatigued when Student placed the cards in her mouth when asked to identify objects on the cards by pointing to them. Ms. Bahamonde stopped testing, and completed it the next day

when Student was well rested. Student was cooperative during testing, and Ms. Bahamonde persuasively opined that her findings accurately reflected Student's abilities.

Test of Nonverbal Intelligence and Southern California Ordinal Scales of Development

8. Because of Student's global language and motor delays, Ms. Bahamonde selected the Test of Nonverbal Intelligence, Fourth Edition, to obtain information on Student's intellectual function. The Test of Nonverbal Intelligence was a standardized test that was a widely accepted and reliable assessment which yielded valid results. She had administered all editions of this test approximately 35 times. She stopped administering the test to Student because she had limited abilities and was unable to respond to the questions. Ms. Bahamonde then administered the Southern California Ordinal Scales of Development to measure Student's cognitive and intellectual function. The Southern California Ordinal Scales of Development was a standardized test that was a widely accepted and reliable assessment which yielded valid results. Ms. Bahamonde administered this test approximately 30 times, and she interpreted the test consistent with the publisher's protocols.

9. Ms. Bahamonde opined that Student functioned independently in the 12 to 18-month range, with splinter skills in the 18 to 24-month range and two to four-year range. Ms. Bahamonde concluded Student functioned independently and consistently at the 12 to 18-month range because Student was able to complete 100 percent of the tasks at this level. Some of Student's 12 to 18-month range skills included object awareness, imitation, and discovering new ways of problem solving. Ms. Bahamonde concluded that Student's functional instructional level was in the 18 to 24-month range because Student was able to complete 70 percent of the tasks at this level. Some of Student's 18 to 24-month range skills included: recognizing a mechanically operated toy; maintaining an image of an object when it was out of her view; and playing representatively *e.g.* placing and rocking a doll in a car seat; placing and laying a

doll on a bed; and opening a toy dresser drawer. Student was unable to demonstrate the following 18 to 24-month range skills: symbolic play *e.g.* using a banana as a telephone; finding sequentially hidden objects; using a rake to obtain an object without demonstration; and imitating an unfamiliar activity after delay showing memory and retention ability. Ms. Bahamonde concluded that Student's highest level of function was in the two to four-year range because Student was only able to complete 29 percent of the tasks at this level. Some of Student's two to four-year range skills included the ability to discriminate quantity and match colors, shapes, and objects. Student was unable to demonstrate the two to four-year range skills of classifying/sorting when it required the need to discriminate by size; or maintaining spatial relationships *e.g.* copying a cross; or using three blocks to build a bridge.

Developmental Profile-3

10. Ms. Bahamonde administered the Developmental Profile-3, a rating scale to evaluate Student's physical, cognitive, communication, social and adaptive skills, by giving the questionnaire to Mother to complete. The Developmental Profile-3 was a standardized test that was a widely accepted and reliable assessment which yielded valid results. Ms. Bahamonde administered and interpreted the rating scale consistent with the publisher's protocols. Mother's responses showed that Student: could identify at least two colors correctly; understood the concept of "one more"; could count to 15; distinguished between living and nonliving things; engaged in parallel play; was aware of other's feelings; wanted to play with same aged children; was unable to work for 30 minutes on a single task; did not engage in group games such as tag; used the internet; played video games; could urinate in the toilet without help, but did not consistently request the bathroom; understood four verbal gestures; communicate at least 50 different words; and knew grandparents' names. The Developmental Profile-3 results showed that Student was overall developmentally delayed. Specifically, Student's

communication and cognitive profile was at the two-year and 10- months level; social/emotional profile was at the one-year and 11-months level; adaptive behavior profile was at the four-year and one-month level; and physical profile was at the three-year and nine-month level.

Adaptive Behavior Assessment Scales

11. Ms. Bahamonde administered the Adaptive Behavior Assessment Scales, Second Edition, by providing the questionnaire to Mother and Mr. Crummitt to complete. The Adaptive Behavior Assessment Scales was a standardized test that was a widely accepted and reliable assessment which yielded valid results. Ms. Bahamonde administered and interpreted the test consistent with the publisher's protocols. Mother's responses showed that Student had good relationships with adults and could: read her own printed name; find the dairy aisle in a store; buckle her own seat belt; wipe spills at home; look at pictures; listen to music; participate in a fun activity; clean/brush herself when dirty; laugh at a funny comment; and look at people when spoken to. Mr. Crummitt's responses showed that Student: respected school authority and property; had good relationships with adults in class; was well-liked by others; came to school prepared; and, sometimes, followed verbal instructions. Mr. Crummitt's responses also showed that Student could: place her lunch tray and other items in the trash; work quietly without disturbing others; follow safety rules; participate regularly in a fun activity; wait her turn in games and activities; use a fork; eat a variety of foods; and control her temper/regulate her emotions. Per Mr. Crummitt, Student was unable to tie her shoes. Both Mother's and Mr. Crummitt's responses demonstrated that Student functioned in the extremely low range in all of the following adaptive behaviors: communication, functional academics, self-direction, leisure, social, community use, school living, health and safety, and self-care.

Behavior Assessment System For Children And The Gilliam Autism Rating Scale

12. Ms. Bahamonde administered the Behavior Assessment System for Children, Third Edition, and the Gilliam Autism Rating Scale, Third Edition, by giving the questionnaires to Mr. Crummitt to evaluate Student's social emotional development; behavior; and the likelihood of autism impacting her education. They were both standardized tests that were widely accepted and reliable assessments which yielded valid results. Ms. Bahamonde administered and interpreted the tests consistent with the publisher's protocols. Mr. Crummitt's responses in the Behavior Assessment System for Children showed that Student adapted well to a variety of situations; was uninterested in others; and had difficulty finding information on her own; and demonstrated unusually poor receptive and expressive skills. Mr. Crummitt's responses to the Behavior Assessment System for Children also showed that Student fell in the clinically significant range in social skills and functional communication; and in the at-risk range in other adaptive skills. Mr. Crummitt reported in the Gilliam Autism Rating Scale that Student could regulate her emotions; did not engage in repetitive behaviors; did not initiate conversations; did not pay attention to peers' activities; was reluctant to interact with others; had difficulty understanding jokes/slangs, and predicting probable social consequences. Mr. Crummitt's responses to the Gilliam Autism Rating Scale showed that Student was in the very likely range to have autism, but that many of the behaviors reported were also characteristics of intellectual disability. The Gilliam Autism Rating Scale could be provided to Parents or anyone working with Student. Not every instrument need to be provided to all individuals working with Student. Ms. Bahamonde exercised her professional judgment and did not ask Mother to complete the Gilliam Autism Rating Scale because she already interviewed Mother, and received Mother's input from the Developmental Profile-3 and the Adaptive Behavior Assessment Scales regarding Student's home behaviors and functions.

Other Considerations

13. Ms. Bahamonde explained that she, Mr. Crummitt and Mother all observed some autistic characteristics in Student, because the characteristics of intellectual disability overlapped those of autism. However, Student did not exhibit the hallmarks of autism such as: excessive repetitive and/or self-stimulatory behaviors; change resistance; excessive unusual responses to the environment; and excessive tantrums. Student was emotionally self-regulated; had joint attention; had eye contact; engaged in social reciprocity; transitioned easily; and had communicative intent. Although Student engaged in self-stimulatory autistic behaviors, they were brief, and not excessive. Ms. Bahamonde opined that Student consistently exhibited the characteristics of a severely intellectually disabled individual, and not an individual with autism, on any point on the autism spectrum.

14. Ms. Bahamonde also interviewed Student's one-to-one aide. The aide reported that Student wore diapers to school which were removed upon arrival, and replaced with underwear. Student was placed on a toileting schedule, without accidents. Student wiped herself, and the aide wiped again when Student did not wipe completely.

15. Ms. Bahamonde considered Maria Rubalcaba's speech and language assessment which found that Student had significant delays in receptive and expressive language, and included them in her psychoeducational report. Although she did not have Mr. Crummitt's academic report available when Ms. Bahamonde prepared the psychoeducational report, she considered Mr. Crummitt's opinion of Student's abilities and function based on the rating scales he completed and included them in her psychoeducational report. Ms. Bahamonde concluded that Student was eligible for special education under the category of intellectual disability, in the severe range because: Student was functioning cognitively significantly below her chronological age; Mr. Crummitt and Mother reported significant social-emotional and adaptive behavior delays; and Ms. Rubalcaba's findings of significant language delays. Ms. Bahamonde

concluded that Student was not autistic because she demonstrated joint attention, social reciprocity, and communicative intent in her gestures, or sign approximations, and grunting. She opined that while Student exhibited characteristics of autism, it was her severe intellectual disability, not autism that impacted Student's education.

Mother's Opinion Of The Psychoeducational Assessment

16. Mother was a legal secretary with a high school education and one year of business college education. She did not have any education or training in administering psychoeducational assessments, and was not a school psychologist. Her criticisms and opinions of the psychoeducational assessments were based on her personal experience with Student; and research on Web M.D., healthychildren.org., and Center for Disease Control and Prevention, including their lists of developmental, cognitive, social emotional, movement/physical, and language and communication milestones for two and three-year olds. Because Mother found that Student's development satisfied most of the items in the two and three-year old checklists, she concluded that the scores placing Student in a lower range resulted from inappropriate administration, scoring and/or interpretation of various assessments. Mother did not understand that standardized testing required the assessor to administer and score the assessments in accordance with the publisher's protocols; and supplanted her own standards to Ms. Bahamonde's testing results in concluding that the psychoeducational assessment was inappropriate.

17. Mother opined that the assessment was not appropriately conducted because she disagreed with the scores and the outcome which found that Student was eligible for special education under intellectual disability. Mother disagreed with Student's special education eligibility of intellectual disability, and opined that Student should also qualify under autism. Mother opined that Student required support throughout the school day because she was autistic, and that Student's hands raised

and shrugging motions were self-stimulatory behaviors of an autistic child. Student required repeated promptings to perform tasks at school because Student did not want to, not because she could not perform the tasks. Likewise, Mother opined that Student did not complete the Test of Nonverbal Intelligence not because of limited abilities, but because she was autistic and had inappropriate behaviors which Ms. Bahamonde should have addressed at the time of the assessment. She disagreed with Ms. Bahamonde that Student fatigued easily, and attributed Student's failure to respond during assessment to autism, behavioral issues, opposition/defiant disorder, and lack of motivation.

18. Mother opined that Ms. Bahamonde should have asked Mother to complete the Gilliam Autism Rating Scale. Mother reasoned that her responses on the Gilliam Autism Rating Scale would accurately reflect Student's autistic characteristics, resulting in District finding Student eligible for special education under autism. Mother further opined that Ms. Bahamonde's test scores underestimated Student's abilities and were inaccurate. Specifically, Mother disagreed with Ms. Bahamonde's finding that Student's categorization skills were merely emerging, because Mother observed Student categorizing cars as items Student disliked, and categorizing balloons by colors. She disagreed with Ms. Bahamonde that Student's ability to identify an object by its function as not developed. Mother opined that Ms. Bahamonde was wrong because in February 2017, Student met the IEP goal involving the ability to sort and identify the items' function with verbal, gestural, and visual prompts with 70 percent accuracy, four out of five trials. Mother incorrectly equated the measures for meeting IEP goals to assessment standards and protocols used by Ms. Bahamonde in the standardized tests. Mother also opined that Ms. Bahamonde's, Ms. Rubalcaba's, and Mr. Crummitt's assessment scores were inconsistent and inappropriate because each concluded that Student functioned in slightly different developmental ranges.

19. Mother's opinions were unpersuasive because she was not qualified to opine on the administration, scoring, and interpretation of psychoeducational

assessments. Student did not present any experts to rebut District's evidence that its psychoeducational assessment was appropriate.

SPEECH AND LANGUAGE ASSESSMENT

20. Ms. Rubalcaba conducted a speech and language assessment of Student in January and February of 2017. She held a bachelor's degree and a master's degree in communicative disorders; was certified in speech and language pathology by the American Speech Language Hearing Association; and was a licensed speech and language pathologist in California. She was Alhambra Unified School District's speech and language pathologist for approximately 18 years where her duties included conducting speech and language assessments and providing speech and language services to students. She also taught courses in speech and language assessment and therapy to graduate students at the California State University in Los Angeles. She reviewed Student's educational records including prior assessments and IEPs; spoke with Mr. Crummitt and classroom staff; and observed Student in the classroom, during testing and during speech and language therapy. Ms. Rubalcaba also provided speech and language therapy to Student twice a week, for 45 minutes each session, in the 2015-2016 school year. She was qualified to conduct a speech and language assessment of Student. She selected the assessments based on Student's academic, developmental and functional abilities; and administered them using English, Student's primary language. She did not select or administer any of the assessments in a racially or culturally discriminatory basis.

21. She selected the Evaluating Acquired Skills in Communication and the Functional Communication Profile to assess Student because they were appropriate to Student's speech and language and developmental level. Ms. Rubalcaba could not assess Student with standardized assessments because they required verbal responses and Student was non-verbal.

Evaluating Acquired Skills In Communication-3

22. Ms. Rubalcaba assessed Student for five days because Student fatigued easily. She administered the Evaluating Acquired Skills in Communication-3 to measure Student's semantics, syntax, morphology and pragmatic abilities. The Evaluating Acquired Skills in Communication-3 was a non-standardized test, widely accepted and reliable and which yielded valid results. She had administered this test on approximately 12 occasions. This test was typically used to assess the communication skills of children with cognitive abilities under six years old. Ms. Rubalcaba administered and interpreted the test consistent with the publisher's protocols.

23. The Evaluating Acquired Skills in Communication-3 stated the age range of each of Student's 67 abilities and characterized the ability level as accomplished, emerging, or not developed for the age range. Based on Student's receptive and expressive results from the Evaluating Acquired Skills in Communication-3, Ms. Rubalcaba concluded that Student consistently functioned in the 18 to 24-month age range.

24. Ms. Rubalcaba evaluated Student's receptive skills and found that Student understood nouns and responded to one step commands, short phrases, and functional vocabulary for school, home, and self-help. Student understood "pick up the pencil", but had difficulty with multi-step directions such as "pick up the pencil, and scissors," and needed verbal and gestural prompting before completing the multi-step directions. She identified body parts such as head, nose, hands, knees, but had difficulty pointing to eyelashes, wrists, and elbows without prompting. She identified objects accurately, but could not identify functions of the objects. For example, she pointed to a dog, doll, or bed; but could not point to "what do you sleep in," or "something you eat." She did not understand prepositional noun locations such as "put the apple next to the basket," "point to the dog on the chair"; and either was unresponsive and did not participate, or required significant prompting and modeling before responding when asked to

complete a task with prepositional noun locations. She categorized items by color independently, but needed verbal and gestural prompts to categorize food and clothing items. She had difficulty with size, textural and color attributes used with an item.

25. Ms. Rubalcaba evaluated Student's expressive skills and found that Student was nonverbal; used gestures, and a voice operated iPad to communicate. Ms. Rubalcaba characterized Student's sign language skills as gestures because they were more approximations of signs and looked like clapping to individuals unfamiliar with Student. Student had significant difficulty with "who, what and where" questions. For example, when given the sentence "Johnny ate the chocolate," Student could not respond to "Who ate the chocolate?". While she recognized her teacher, her speech and language therapist, her classroom aide, and Mother, Student could not express herself when asked "Who is this?", or "Show me your teacher." Student expressed happiness with a smile, raised hands and shrugging shoulders. She maintained eye contact when interested, but not when uninterested or fatigued; and could not initiate conversation.

Functional Communication Profile

26. Ms. Rubalcaba also administered the Functional Communication Profile, a non-standardized test, widely accepted and reliable and which yielded valid results. She had administered this test on approximately 12 occasions. This test was typically used to assess communication skills of individuals across all age ranges with developmental and acquired delays. Ms. Rubalcaba administered and interpreted the test consistent with the publisher's protocols. She assessed Student's sensory, motor, behavior, attentiveness, receptive and expressive language, pragmatic/social, speech, voice, oral and fluency by interacting and observing Student in the classroom.

27. Ms. Rubalcaba's findings as to Student's sensory, motor, behavior, and attention skills were: Student's current hearing ability could not be assessed because she had limited understanding of the tasks required to take the hearing test; and Student

did not pass her vision screening. Ms. Rubalcaba found that Student had glasses, but refused to wear them because she did not like things on her face. Student was able to track items visually left to right, but did not do so consistently. Student was compliant and did not have any disruptive behavioral issues; responded well to a positive behavioral chart; fatigued easily both during assessment and in therapy. She had attention difficulties, attending more during preferred activities; had an average attention span of two to six minutes without prompting; and had severe delays in response rate to stimulus. Student's limited stamina and limited attention negatively impacted her ability to communicate, engage in therapy and access the curriculum.

28. Ms. Rubalcaba's findings as to Student's receptive, expressive and pragmatic/social language skills were: Student's primary language was English, but was a nonverbal communicator using gestures, sign approximations, limited eye gaze, visuals and physical manipulations such as taking someone by hand and leading them to where she wanted to go. She had limited receptive and expressive language skills; comprehending basic concepts relating to home, health, self, school and safety; understanding short phrases and single sentences with direct requests. She required significant auditory, visual and tactile prompting, modeling, repetition, and one-to-one assistance to complete functional tasks such as waving for "hello" and "high-five" after task completion; and used manual and alternative, augmentative communication to convey basic functional language. Ms. Rubalcaba tried to conduct a formal oral peripheral examination of Student, but was unsuccessful because Student did not comply. Instead, Ms. Rubalcaba informally observed Student and found anatomical and physiological oral mechanism consistent with a Down syndrome diagnosis such as a small, narrow upper jaw, high palatal arch, low muscle tone, weak oral/facial muscles, limited tongue speed, coordination, dissociation and motion range; all of which resulted in Student's open-mouthed posture, tongue protrusion, and labored/heavy breathing.

29. Ms. Rubalcaba's findings as to Student's speech, voice, and fluency skills were: Student had limited speech production and did not babble, engage in unintelligible jargon, utter phonemes or single words in spontaneous speech; but she spontaneously laughed at things she found funny and imitated Ms. Rubalcaba's productions of "b" and "p" sounds in isolation.

30. Ms. Rubalcaba concluded that Student had severe speech, expressive and receptive language developmental delays, presenting language skills in the 18 to 24-month range with emerging skills from the 36 to 48-month range. While she did not include specific recommendations section in her speech and language report, she provided helpful information to the IEP team about Student's educational and functional needs.

Mother's Opinions Of The Speech And Language Assessment

31. Mother opined that the speech and language assessment was inaccurate because it did not explicitly state that Student's receptive language skills were higher than her expressive language skills; and the results were not reflective Student's abilities because Student had not been given for credit for tasks that Mother had observed Student perform on occasions. Specifically, Mother disagreed with Ms. Rubalcaba's finding that Student could not answer "who, what, and where" questions because Student was capable of directing Mother to get a toy pig from the car; and Student met two IEP goals in February 2017. One IEP goal involved the ability to answer "who, what, and where" questions with verbal and gestural prompts with 70 percent accuracy in three out of five trials; and the second IEP goal involved the ability to answer questions about 10 settings of "where" questions such as "where do you eat" with verbal, gestural and visual prompts with 70 percent accuracy in four out of five trials. Mother incorrectly equated the measures for meeting IEP goals to assessment standards and protocols

used in the Evaluating Acquired Skills in Communication-3 and the Functional Communication Profile.

32. Mother opined that the speech and language assessment was also inappropriate because Ms. Rubalcaba did not interview her. Ms. Rubalcaba persuasively explained that she wanted to conduct a “blind” assessment (an assessment uninfluenced by what Parents thought Student was capable); and that an assessor could exercise her professional discretion in deciding whether to interview parents. She disagreed also with Ms. Rubalcaba’s findings that Student’s primary communication mode was sign approximations, eye gaze, and gestures; and with Ms. Rubalcaba’s suggestion that Student continue using a tablet and/or picture exchange communication system for communication. Because the home-caretakers understood Student’s sign language, Mother opined that Student could sign effectively. Mother disputed the assessment results that Student’s language skills were in the 18 to 24- month range with emerging skills from the 36 to 48-month range; characterizing Ms. Rubalcaba’s results as “slanderous” and interfered with Student’s ability to learn, by pigeonholing Student in the 18 to 24-month range.

33. Mother did not have any education or training in administering speech and language assessments, and was not a speech and language pathologist. Her criticisms and opinions of the speech and language assessment were based on her personal research and experience with Student. She supplanted her own standards as to items she opined Ms. Rubalcaba’s should have given Student “credit”. Mother’s opinions were unpersuasive because she was not qualified to opine on the administration, scoring, and interpretation of speech and language assessments. Student did not present any expert to rebut District’s evidence that its speech and language assessment was appropriate.

ACADEMIC READINESS ASSESSMENT

34. Mr. Crummitt assessed Student's academic readiness over a four-day period, 45-minutes each day in January 2017. He was a certified teacher and held mild to moderate, and moderate to severe special education teaching credentials. He taught Student in the severe disabilities classroom in the 2016-2017 school year. He reviewed Student's educational records, observed Student, and administered the Brigance Inventory of Early Development, Third Edition to Student. The Brigance Inventory of Early Development was a criterion referenced test, widely accepted and reliable and which yielded valid results. Mr. Crummitt administered and interpreted the test consistent with the publisher's protocols. He was qualified to administer this test and Student's academic readiness assessment. He selected the Brigance Inventory of Early Development based on Student's academic, developmental and functional abilities; and administered it using English, Student's primary language. He did not select or administer it in a racially or culturally discriminatory basis.

35. Mr. Crummitt found that Student required verbal prompting to perform all tasks; was able to remain seated while working on a classroom activity but required redirection when distracted; preferred independent play, specifically the swings, during recess and lunch breaks. Student participated 20-minutes at a time with a two-minute break during the assessment.

36. Student's academic skills ranged from one to five-year level, with most skills at the two to three-year level; and had moderate to severe delays in all areas assessed including language, literacy, math and science, physical, daily living, social/emotional development, and motivation/self-confidence. Student was non-verbal and had difficulty communicating her needs with receptive and expressive language skills at the one-year level. Her language development skills were at the three to five-year range. She used a four-picture device to communicate her needs and desires with verbal prompting. She understood "no" and "give me" and followed simple, one-step

directions; identified body parts such as eyes, nose, mouth, hair feet, ears, head, tongue, teeth, legs, fingers, arms and toes. Her only four- year and nine-month level, language development skill was her ability to identify pictures including common signs such as the "Stop" sign. Her only five-year level, language development skill was her ability to point to colors. Student's literacy was in the one to three-year range. While she looked, pointed to, and held a book, identifying the front and back correctly; turned the pages one at a time; and looked and pointed to pictures, her response or understanding of a book was only at the one-year and six-month level. Student's math and science skills were in the two to three-year range. She identified numbers up to ten; pointed to the circle, square, diamond and star shapes; and understood number concepts of one, and one more.

37. Her gross motor skills were in the one to four-year range; and her fine motor skills were in the two to five-year range. Her only five-year level, fine motor skill was the ability to build a 12-block tower. Student had the gross motor skills to access the educational environment and playground. For example, she walked up and down the stairs while holding the handrail; played on the playground independently; and attended to toileting needs with minimal assistance, requiring help to achieve a clean wipe. Student's fine motor skills included the ability to grasp and release objects easily and automatically. She independently held a pencil, crayon, or marker and scribbled on paper; typed her name using a keyboard; cut with modified safety scissors, but not in a straight line; built a 12-block tower.

38. Her daily living skills were in the two to three-year range. She used a fork; carried her lunch tray; wiped her nose; and turned on/off a water faucet independently. She washed, applied soap, and dried her hands with prompting; brushed her teeth; cut food with help using a butter knife; and opened a water bottle and poured liquid into a cup.

39. Student's social/emotional skills were in the two to four-year range. Her two year-level skills were in peer relationships such as engaging in a small group activity and parallel playing during lunch and recess. Her two-year and six-month pro-social level skills included cleaning up and putting items away after activity completion. Her only four-year level skill was her ability to demonstrate warmth and engagement for up to five-minutes in adult relationships. Her motivation/self-confidence was at the one-year level, smiling when happy, and grabbing a preferred object when it was presented.

40. Mr. Crummitt did not work for the Alhambra Unified School District at the time of the hearing; he did not testify at hearing. Kendra Pierce replaced Mr. Crummitt, and was Student's extended school year 2017 and 2017-2018 school year teacher. Ms. Pierce held a master's degree in education and school counseling, a mild to moderate, and moderate to severe teaching credential. She taught special day classes since 1990, and administered the Brigance Inventory of Early Development approximately 10 times. Ms. Pierce reviewed Mr. Crummitt's academic assessment of Student, and was qualified to opine on the quality of Mr. Crummitt's academic assessment based on her background and experience, and as Student's teacher. Ms. Pierce opined at hearing that the academic results were consistent with her observations from working with Student, with a few exceptions. For example, she did not opine on Student's ability to build a tower with blocks because she had not observed Student engaging in that activity. She did not opine on Student's ability to understand qualitative concepts because she had not tested Student in that area. She opined that certain of Student's abilities were a bit higher and/or lower, by a few months since Mr. Crummitt's assessment. For example, Ms. Pierce characterized Student's receptive language skills as a bit higher than the one year level than what Mr. Crummitt found in January 2017. She observed that Student needed help to open containers during lunch, and could not fasten/unfasten a zipper or button independently; and that those were skills Student worked on during the 2017-2018 school year. The differences in what Mr. Crummitt and Ms. Pierce observed were

consistent with the five months that elapsed between his January 2017 academic assessment, and June 2017, when Ms. Pierce first taught and observed Student's academic readiness abilities.

OCCUPATIONAL THERAPY ASSESSMENT

41. Marina Toranian conducted the occupational therapy assessment of Student on in December 2016. She held a master's degree in occupational therapy; was a licensed occupational therapist in California; had been District's occupational therapist for approximately two years; worked at various non-public agencies for four years conducting occupational therapy assessments and providing occupational therapy services. By December 2016, she had been providing Student with occupational therapy for four months. She was qualified to assess Student in the area of occupational therapy. She selected the assessments based on Student's academic, developmental and functional abilities; and administered them using English, Student's primary language. She did not select or administer any of the assessments in a racially or culturally discriminatory basis. She interviewed Mother; observed Student on the playground, at lunch, in the classroom on two separate days; and reviewed Student's two occupational therapy goals as part of the assessment. She observed that Student required prompts to take turns and used sign language; enjoyed using the tablet and technology; required help to open packages such as milk cartons, toileting, washing/drying hands, and managing her personal belongings. During the assessment, Student did not communicate unless prompted, but was cooperative and happy, giggling at times. Student walked around the playground and enjoyed using the swing during recess.

Bruininks-Oseretsky Test Of Motor Proficiency

42. Ms. Toranian administered the Bruininks-Oseretsky Test of Motor Proficiency, a standardized test, to measure Student's motor function. Student was unable to follow standardized instructions, or complete various tasks within the set time,

despite extra promptings. Student did not have the visual integrating and motor control skills to copy various geometric shapes as Student also did not have the manual dexterity or coordination to perform goal-directed activities of reaching and grasping small objects during timed trials. Student could not complete the fine and visual motor skills tests involving writing, drawing, cutting and folding. For example, when asked to color inside a circle, Student only scribbled. When instructed to color within a star, with additional visual cues provided to her, Student was still unable to do so; she only scribbled and marked through the star. When instructed to draw within a curved path, Student could not trace the path even with additional promptings. Therefore, Ms. Toranian discontinued the standardized test because of Student's limited abilities.

Sensory Profile School Companion 2

43. She administered the Sensory Profile School Companion 2 teacher's questionnaire, a standardized test that was a widely accepted and reliable assessment which yielded valid results, to measure Student's sensory processing abilities and their functional performance in the school environment. Mr. Crummitt filled out the Sensory Profile School Companion evaluating the frequency of Student's responses to various sensory experiences. Mr. Crummitt responded that Student's responses to auditory, visual, movement and touch were typical and she had fewer inappropriate behaviors than others. Mr. Crummitt also rated Student's response to tactile stimuli under three categories: typical, less than others, or more than others. Mr. Crummitt's responses showed: the degree to which Student sought sensory input and degree to which she registered sensory input were typical to that of other students; and the degree to which she avoided/was bothered by sensory input and degree to which she was sensitive to/detected sensory input were less than other students.

44. Ms. Toranian evaluated Student's sensory modulation and discrimination abilities including the tactile system (sense of touch on the skin), the vestibular system

(head position in relation to gravity and movements), the proprioceptive system (sensations from the muscles and joints), the visual and auditory processing system (visual attention and tolerance of visual and auditory information), and activity/arousal/engagement level. Student had no aversion to tactile media such as dirt on the face and hands, paint, putty or shaving cream. Student had good balance, could navigate around her classroom and school, bend and stoop to reach for toys, and sit upright at her desk. Her muscle tone and strength and range of motion were functional. She did not exhibit any sensory seeking behaviors (such as fidgeting, spinning, jumping, hopping and running), and was adequately engaged during assessment. Student was easily distracted visually in the classroom, had some difficulty tolerating sounds in the classroom, often covering her ears in noisy situations. She followed single-step instructions, class routine and her visual schedule to transition with adult assistance. She used a stylus pen with a tripod, right-handed grasp to access her tablet; matched shapes and colors with minimal prompts on her tablet; located moving objects against a busy tablet background; visually scanned and located objects; picked up small objects using an efficient tip to tip pinch; and cut with adaptive scissors. Student demonstrated: two-hand coordination when cutting, stringing five to seven beads, and carrying her lunch tray; in-hand manipulation skills when opening a water bottle cap; and improved hand strength with daily thera-putty use.

45. Ms. Toranian recommended occupational therapy services of 60 minutes per month. Student needed to work on: typing Student's name instead of writing; improving writing and tracing skills; using an adaptive keyboard; and visual motor skills. Ms. Toranian proposed a visual motor goal in keyboarding competency for Student: typing name, address, and phone number, with one to two verbal prompts and adult supervision, one letter and number at a time. She also recommended using soft music and nature sounds to deal with a noisy classroom; and a flashlight tag to help Student find the letters on the classroom wall to assist with visual processing.

Mother's Opinion Of The Occupational Therapy Assessment

46. Mother opined that the occupational therapy report was inappropriate because it did not completely evaluate Student's functional skills. For example, Ms. Toranian was unaware that Student could pour liquids into containers; she did not know whether Student could open the protective wrapping on straws; and was unaware whether Student wore glasses in school, and that Student did not like to wear them. Further, while Ms. Toranian shared at hearing that she was aware that Student could button a large button and zip the zipper on a jacket once the zipper was aligned, she did not include those skills in her report because those skills were not academically/school related, but home-related skills. Mother opined that Student's inability to open ketchup packets and apple sauce containers; and Student's inability to tie shoelaces should also have been included in the occupational therapy assessment as areas of deficit.

47. Ms. Toranian explained she did not evaluate Student's ability to open various containers including condiment packets, straws and pour liquids into containers because Student had a one-to-one aide to perform those tasks. Ms. Toranian conceded that those were skills necessary for Student's access to education and to establish independence, even though they were not academically related. She explained that when she observed Student in the cafeteria, Ms. Toranian focused on Student's overall cafeteria functions such as her ability to feed herself, and hold a tray; and not the ability to open condiment packets because Ms. Toranian also had difficulty opening condiment packets. Ms. Toranian further explained that tying shoelaces, typically a six-year old skill, was too advanced for Student. Ms. Toranian did not administer the Bruininks-Oseretsky Test of Motor Proficiency subtest involving upper-body limb which dealt with the ability to tie shoelaces because she had to terminate the test when Student was unable to perform simpler tasks.

48. Mother did not have any education or training in administering occupational therapy assessments, and was not an occupational therapist. Student did not present any expert to rebut District's evidence that its occupational therapy assessment was appropriate. However, Mother objected that Ms. Toranian simply did not assess in certain functional areas that were part of Student's school day. This was credible and an expert's explanation was unnecessary. Mother's opinions in this particular area of the occupational therapy assessment were persuasive, especially since Student's school instruction focused on functional skills because of her intellectual disability.

49. On February 6, 2017, with Mother's consent, District convened an IEP team meeting; and at Mother's request, continued the IEP team meeting to March 10, 2017. District provided Parents with all of the assessment reports before the March 10, 2017 IEP team meeting.

MARCH 10, 2017 TRIENNIAL IEP TEAM MEETING

50. Ms. Bahamonde, Ms. Rubalcaba, and Ms. Toranian provided their assessment findings to the IEP team. District provided Parents an opportunity to ask questions and express their concerns including about the assessments, the goals, the special education eligibility, and did so. Mother expressed her disagreement with various assessment results, the goals, and the special educational eligibility. District IEP team members responded to Mother's questions and concerns. District IEP team members found Student eligible for special education under the category of intellectual disability because it impacted her ability to access her education. Mother disagreed and shared with the IEP team that Student exhibited characteristics more in line with autism based on Mother's internet research and her experience with Student. Because District's personnel availability limited the IEP team meeting to two hours, District continued the

March 10, 2017 IEP team meeting several times to address Student's needs and parental concerns.

51. Mother requested independent assessments in the areas of psychoeducation, speech and language, and occupational therapy. District disagreed with the need for independent assessments, and filed for due process on July 12, 2017.

52. Parents described at hearing that Student had higher receptive than expressive language skills; had a clever sense of humor; enjoyed YouTube videos, often selecting her preferred videos; was defiant--sometimes deliberately producing the wrong response to questions to obtain adult reaction. Mother opined that because of autism, Student presented to assessors as less intelligent than Student actually was. Although Father and Student's home caretakers provided information on their personal observations of Student, their observations were inapplicable to the standards and protocols that Ms. Bahamonde, Ms. Rubalcaba and Ms. Toranian used in their assessments. Further, neither Father, nor the home caretakers opined on whether the psychoeducation, speech and language, or occupational therapy assessments were appropriate. Neither Father, nor the home caretakers were qualified to opine on the appropriateness of the psychoeducation, speech and language, or occupational therapy assessments.

LEGAL AUTHORITY AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

1. This due process hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.;

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

34 C.F.R. § 300.1 et seq. (2006)⁴; Ed. Code, § 56000, et seq.; and 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 FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's 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.) "Related services" are transportation and other developmental, corrective, and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel, and which sets forth the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme

⁴ All subsequent references to the Code of Federal Regulations are to the 2006 edition.

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.) In a recent unanimous decision, the United States Supreme Court also declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court’s analysis, and clarified FAPE as “markedly more demanding than the ‘merely more than the de minimus test’...” (*Endrew F. v. Douglas School Dist. RE-1* (2017) 580 U.S. _____ [137 S.Ct. 988, 1000-1001] (*Endrew F.*)). The Supreme Court in *Endrew F.* stated that school districts must “offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” (*Id.* at p. 1002.)

4. The IDEA affords parents or 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) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C) & (D); Ed. Code, § 56505, sub. (l).)

5. 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 case, District has the burden of proof.

LEGAL AUTHORITY APPLICABLE TO ALL ASSESSMENTS

6. District contends its psychoeducational, speech and language, and occupational therapy assessments were appropriate such that Student was not entitled to publicly funded independent assessments in those areas. Student contends that District's assessments inappropriately concluded that Student was intellectually disabled and functioned at a lower level than what Mother perceived based on her observations, experience and internet research.

7. Assessments are required to determine eligibility for special education, and what type, frequency and duration of specialized instruction and related services are required. In evaluating a child for special education eligibility and prior to the development of an IEP, a district must assess him in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related service's needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

8. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033.) To assess or

reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, §56381, subd. (a).) Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(a)(1)(B)(i); Ed. Code, § 56321, subd. (a)(2).)

9. The assessment must be conducted in a way that: (1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; (2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and (3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: (1) selected and administered so as not to be discriminatory on a racial or cultural basis; (2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; (3) used for purposes for which the assessments are valid and reliable; (4) administered by trained and knowledgeable personnel; and (5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) The determination of what tests are required is made based on information known at the time. (See *Vasherese v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where the concern prompting the assessment was reading skills deficit].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).) Assessors must be knowledgeable about the student's suspected disability and must pay attention to student's unique educational needs such as the need for specialized services, materials, and equipment. (Ed. Code, § 56320, subd. (g).)

10. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health, development, and medical findings, if any; (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (7) consistent with superintendent guidelines for low incidence disabilities (those affecting less than one percent of the total statewide enrollment in grades kindergarten through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) Within 60 days of parental consent to the assessment, the assessment report must be provided to the parent (Ed. Code, § 56329, subd. (a)(3)), and an IEP team meeting must be held to consider the assessment. (Ed. Code § 56302.1, subd. (a).)

11. A student may be entitled to an independent educational evaluation⁵ if he or she disagrees with an evaluation obtained by the public agency and requests an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. §300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an independent evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent evaluation].) In response to a request for an independent evaluation, an educational agency must, without unnecessary delay, either: (1) file a due process complaint to request a hearing

⁵ Federal law uses the term "evaluation" instead of the term "assessment" used by California law, but the two terms have the same meaning and are used interchangeably in this Decision.

to show that its evaluation is appropriate; or (2) ensure that an independent evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(b)(2); see also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

12. A procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 *superseded by statute on other grounds, as stated in R.B. v. Napa Valley Unified School Dist.* (9th Cir.2007) 496 F.3d 932, 939.)

Analysis Common to all three Assessments Issues 1, 2 and 3

13. District's psychoeducational, speech and language, and occupational therapy assessors were properly credentialed and had the necessary experience to conduct their assessments. All assessments were conducted in English, Student's primary language. The assessors used multiple assessments and a variety of assessment tools including observations, interviews of Mother, Mr. Crummitt, classroom staff, and standardized and non-standardized instruments such as the Test of Nonverbal Intelligence; Southern California Ordinal Scales of Development; Developmental Profile-3; Adaptive Behavior Assessment Scales; Behavior Assessment System for Children; Gilliam Autism Rating Scale; Evaluating Acquired Skills in Communication -3; Functional Communication Profile; Brigance Inventory of Early Development; Bruininks-Oseretsky Test of Motor Proficiency; and Sensory Profile School Companion-2; to evaluate Student

in the areas of psychoeducation, speech and language, and occupational therapy. The assessment instruments chosen were designed to provide information about Student's special education eligibility, related services, and accommodations in her IEP. Ms. Bahamonde, Ms. Rubalcaba, Mr. Crummitt, and Ms. Toranian selected the assessments based on Student's academic, developmental and functional capabilities; and there was no evidence that any of the assessments were racially, culturally, or sexually biased. The assessment results were valid and provided useful information regarding Student's cognitive abilities, visual-motor abilities, visual-perceptual abilities, visual memory abilities, academic difficulties, adaptive skills, daily functional abilities, and behaviors for the IEP team's consideration. The assessment results consistently supported that Student exhibited cognitive function and deficits well below her chronological age.

14. All the assessors provided a comprehensive report of their assessments (as discussed below in the analysis specific to each of the psychoeducational speech and language, and occupational therapy assessments) which included the basis upon which their determinations were made; noting relevant observations and behaviors; noting the relationship of their assessment findings to Student's academic and social functioning; noting educationally relevant health, development and medical findings; and determining that the assessment results were not primarily due to environmental, cultural or economic factors.

15. District proved it procedurally complied with notice and due process filing requirements. Parents had appropriate notice of District's intent to assess Student, and consented to the assessments by signing the assessment plan on December 13, 2016. District timely convened the triennial IEP team meeting on February 6, 2017, continuing it to March 10, 2017, at Mother's request, and held additional IEP team meetings to fully consider Student's needs and parental concerns. After the triennial IEP team meeting concluded, and upon rejecting Student's request for independent assessments, District timely filed a request for due process hearing on July 12, 2017. Student did not present

any evidence rebutting that District complied with notice and due process filing requirements.

Analysis Specific to Issue 1 – Psycho-Educational Assessment

16. District demonstrated by a preponderance of the evidence its psychoeducational assessment was properly conducted and the resulting report was appropriate. The assessment was performed to address Student's intellectual, processing, functional, and social/emotional needs. Ms. Bahamonde used a variety of tools to assess Student including standardized tests including: The Test of Nonverbal Intelligence; the Southern California Ordinal Scales of Development; and rating scales and questionnaires including the Developmental Profile-3 to Mother; the Adaptive Behavior Assessment Scales to both Mother and Mr. Crummitt; the Behavior Assessment System for Children and the Gilliam Autism Rating Scale to Mr. Crummitt regarding their observations of Student. The test results were valid and reported in her March 10, 2017 final psychoeducational report. Ms. Bahamonde persuasively explained that she did not ask Mother to complete the Gilliam Autism Rating Scale because Mother had already provided input to the Developmental Profile-3 and the Adaptive Behavior Assessment Scales. Even though Ms. Bahamonde was unable to complete administering the Test of Nonverbal Intelligence, this did not affect Ms. Bahamonde's ability to accurately complete her psychoeducational assessment because she used other means to confirm her findings.

17. Ms. Bahamonde observed Student in multiple settings, conducted a records review, reviewed Ms. Rubalcaba's speech and language assessment, and Mr. Crummitt's interview as a part of her comprehensive psychoeducational assessment. Ms. Rubalcaba's findings that Student had significant receptive and expressive language delays confirmed Ms. Bahamonde's findings of overall delays. Even though Ms. Bahamonde did not have Mr. Crummitt's academic assessment report when she

prepared her psychoeducational report, she received input about Student from Mr. Crummitt by speaking with him and having him complete standardized questionnaires and profiles. Both Mr. Crummitt and Mother agreed that Student exhibited significant social-emotional and adaptive behavior delays. Both Ms. Rubalcaba's and Mr. Crummitt's assessment findings validated Ms. Bahamonde's findings of Student's significant deficits and special needs.

18. Although Mother complained that Ms. Bahamonde's, Ms. Rubalcaba's, and Mr. Crummitt's assessments were inconsistent, she did not provide any persuasive support for her complaints beyond her personal opinions. Mother neither had the education or training to opine about the administration, scoring, and interpretation of any of the instruments used in the psychoeducational assessment.

19. Ms. Bahamonde opined that Student functioned primarily at the 12 to 18-month range, with splinter skills in the 18 to 24-month range which impacted her ability to access her education. Although she was 13-years old, Student's highest ability level was in the two to four-year range where Student completed only 29 percent of the tasks that two to four-years were able to complete. Student communicated consistently in the 18 to 24-month range, with emerging skills from the 36 to 48-month range. Mr. Crummitt's conclusions were supported by his assessment findings and opinions of Ms. Pierce who testified at hearing that Mr. Crummitt's conclusions were appropriate and consistent with her observations of Student. All evidence persuasively showed that Student's academic skills ranged from one to five-year level (specifically, receptive and expressive language at the one-year level; literacy at the one to three-year range; math and science at the two to three year-range; gross motor skills in the one to four-year range; and fine motor skills in the two to five-year range) with most skills at the two to three-year level. Although these assessment results depicted some overlapping ranges and levels of function, this was because each assessor evaluated specific areas of Student's abilities and function in accordance with the standards and protocols of each

testing instrument, and not because of inappropriate administration, scoring, or interpretation of results by the assessors. All assessment results from Ms. Bahamonde, Ms. Rubalcaba, and Mr. Crummitt were consistent and reflective of Student's overall severe delays in all areas of function.

20. Mother was not qualified to render expert opinions that Ms. Bahamonde's, Ms. Rubalcaba's, and Mr. Crummitt's assessment results were inaccurate or inappropriate. Further, Mother argued unpersuasively that because Student met an IEP goal involving the ability to sort and identify the items' function, Ms. Bahamonde's characterization of Student's skills level in that area was wrong. Mother mistakenly and inappropriately equated inapplicable measures for meeting an IEP goal to the standards and protocols used in the assessments.

21. Mother's opinion that Student had autism and the assessors did not properly give Student credit for what Parents and home caretakers witnessed Student capable of performing was also unpersuasive. Mother did not understand the administration, scoring, and interpretation of standardized tests, and that assessment results were interpreted as a whole, rather than by an individual score in a vacuum. Further, Ms. Bahamonde credibly and persuasively explained that despite exhibiting autistic characteristics, Student did not show the hallmarks of autism. For example, although Student engaged in self-stimulatory autistic behaviors, they were brief, and not excessive. Ms. Bahamonde had the experience and professional discretion to select to whom the Gilliam Autism Rating Scale should be provided. Her decision not to request Mother's input on that particular instrument did not render the psychoeducational assessment incomplete, or inappropriate. The psychoeducational assessment yielded information about Student that was useful and sufficient for the IEP team to develop an IEP for Student. The speech and language and occupational therapy assessment results also confirmed the psychoeducational assessment results that Student did not have disruptive or sensory seeking behaviors, or social and/or communication issues

associated with autism. Student was emotionally self-regulated, exhibited communicative intent with eye contact and social reciprocity, and easily redirected and transitioned. Student did not present any testimony from qualified experts that supported a finding that District improperly administered, scored or interpreted any of the instruments District used in its psychoeducational assessment.

22. The psychoeducation assessment results provided useful information regarding Student's cognitive abilities, academic difficulties, adaptive skills, daily functional abilities, behavior, and a reasoned conclusion that Student qualified for special education services under the category of intellectual disability. The assessment results consistently supported that Student had severe delays in cognitive function and deficits which adversely affected Student's educational access. The IEP team considered all of the psychoeducational assessment results in developing Student's IEP.

23. District met its burden of proving by a preponderance of the evidence that its psychoeducation assessment was appropriate. Student did not provide any persuasive evidence, or any psychoeducational expert, to rebut District's evidence that its psychoeducational assessment was appropriate. Accordingly, Student is not entitled to an independent psychoeducational assessment at the public's expense.

Analysis Specific to Issue 2 - Speech and Language Assessment

24. District demonstrated by a preponderance of the evidence that its speech and language assessment was properly conducted and the resulting report was appropriate. The assessment was performed to address Student's communication, and speech and language needs. Ms. Rubalcaba used a variety of tools to assess Student including observing her in multiple settings; interviewing Mr. Crummitt and the classroom staff; reviewing records; and conducting non-standardized tests such as the Evaluating Acquired Skills in Communication- 3, and the Functional Communications Profile. Ms. Rubalcaba had the qualifications to exercise professional discretion in

deciding whether she needed to seek Mother's input on Student's speech and language abilities as a part of her assessment. Her decision to not seek Mother's input did not render the speech and language assessment incomplete, or inappropriate. Likewise, her decision to administer non-standardized tests to Student was appropriate. Student was nonverbal and could not complete standardized tests because they required verbal responses. The non-standardized tests selected by Ms. Rubalcaba were appropriate to Student's speech and language and developmental level. Her decision to assess Student for five days was reasonable because Student fatigued easily. The speech and language assessment showed that Student had severe speech, expressive and receptive language developmental delays; had language skills in the 18 to 24-month range, and emerging language skills in the 36 to 48-month range.

25. Mother opined Ms. Rubalcaba did not properly credit Student for what Parents and home caretakers witnessed Student capable of performing was unsupported and unpersuasive. She did not understand that Ms. Rubalcaba was required to administer and score the assessments in accordance with the publisher's standards and protocols. Mother supplanted her own standards to evaluate Ms. Rubalcaba's testing results in concluding that the speech and language assessment was inappropriate. Mother did not have the education or training to opine about the administration, scoring, and interpretation of any of the instruments Ms. Rubalcaba used in assessment. Mother's conclusion that Student's sign language was effective because the home-caretakers understood Student's sign language was misplaced. Both Ms. Rubalcaba and Ms. Bahamonde found that Student's sign language consisted of sign approximations, incomprehensible to those unfamiliar with Student. The home-caretakers understood Student because they were familiar with Student and not because she signed effectively; which corroborated Ms. Rubalcaba and Ms. Bahamonde's findings. Further, Mother unpersuasively argued that because Student met two IEP goals of answering "who, what, and where" with verbal, gestural, and visual

prompts, Ms. Rubalcaba's speech and language findings that Student had difficulty answering "who, what, and where" questions were inaccurate and inappropriate. Mother was simply wrong because she equated inapplicable measures for meeting an IEP goal to the standards and protocols used in the assessments.

26. Mother also opined that the speech and language report was inappropriate because Ms. Rubalcaba did not make specific speech and language recommendations. Ms. Rubalcaba provided detailed information about Student's speech, language and communicative needs including methods which could help Student access her education such as: significant auditory, visual, and tactile prompts; repetitions; teacher, aide, and therapist assistance; and use of alternative, augmentative communication. The speech and language assessment results consistently supported that Student exhibited severe receptive and expressive communication delays which adversely affected Student's educational access, and provided information to the IEP team about the appropriate type of speech and language services that would help Student access her education.

27. District met its burden of proving by a preponderance of the evidence that its speech and language assessment was appropriate. Student did not present any persuasive evidence, or a qualified speech and language expert, to rebut any of District's evidence that Ms. Rubalcaba's speech and language assessment was appropriate. Accordingly, Student is not entitled to an independent speech and language assessment at the public's expense.

Analysis Specific to Issue 3 – Occupational Therapy Assessment

28. District did not demonstrate by a preponderance of the evidence its occupational assessment was properly conducted and the resulting report was appropriate.

29. Ms. Toranian did not thoroughly evaluate or provide a comprehensive report on Student's non-academic, functional skills. Although Ms. Toranian was required to follow the standards and protocols of the Bruininks-Oseretsky Test of Motor Proficiency, and the Sensory-Profile School Companion Second Edition, unmodified and without deviation, nothing prevented Ms. Toranian from observing and evaluating basic functional and daily- living skills, and providing a complete report based on her professional observations. Ms. Toranian was unaware that Student refused to wear eyeglasses, an issue that a thorough evaluation should have found, and noted in the occupational therapy report. Ms. Toranian would have uncovered Student's aversion to items on her face either through observations, a review of the health report which reported that Student failed her vision test, and/or when she evaluated Student's sensory modulation and discrimination abilities of the tactile or visual and auditory systems. Student's ability to see was important, and directly affected Student's educational access such that Ms. Toranian's failure to assess Student's eyeglasses aversion directly affected Student's right to a FAPE.

30. Ms. Toranian also failed to assess and report on other functional skills that were a part of Student's school day such as whether she could: use a zipper on garments; pour liquids into containers; open various food containers, including straw wrappers and condiment packets. Ms. Toranian's explanation that using a zipper on garments was home related, and not an academic/school related skill was unpersuasive. Ms. Toranian's explanation that she did not evaluate Student's ability to pour liquids into containers, or open various food containers because Student had a one-to-one aide to perform these tasks for Student was also unpersuasive. Equally unpersuasive was Ms. Toranian's implication that she only focused on big picture items such as Student's ability to feed herself instead of other functions such as opening condiment packets because Ms. Toranian had difficulties doing so herself. A comprehensive occupational therapy assessment required assessing all of Student's functional abilities that were part

of the school day regardless of whether they were strictly academic/school related and regardless of whether the assessor had difficulty performing them herself. All three skills were observed by other assessors because Student was confronted with the need to employ them during her school day; and were directly related to achieving functional independence at school such that Ms. Toranian's failure to assess in these areas directly affected Student's right to a FAPE. Because Student's education was focused on functional academics and skills, the occupational therapy assessment should have fully evaluated all of Student's functional skills so that appropriate goals and services could be developed at the IEP.

31. Mother persuasively opined that Ms. Toranian should have reported on Student's aversion to wearing eyeglasses, Student's ability to pour liquids into containers, and open various food containers/packages because all of these functional skills were required in Student's school day. These basic functional skills were part of Student's educational environment; and should have been assessed. The ability to see and achieve functional independence was extremely important and necessary based on Student's significant delays in all areas. The assessment was incomplete as to non-academic, functional skills that were part of Student's school day, and therefore insufficient for the IEP team to consider all of Student's occupational therapy abilities and deficits when crafting Student's goals and related services.

32. Although portions of District's assessment were appropriate, those were not sufficient to conclude that the entire assessment met the legal requirements under the IDEA. For example, District performed the assessment to address the visual and motor skills Student needed to access her education. Ms. Toranian used a variety of assessment tools including observation, interviewing Mother, reviewing Student's past occupational therapy goals, and standardized tests such as the Bruininks-Oseretsky Test of Motor Proficiency, and the Sensory-Profile School Companion 2, which Mr. Crummitt completed. The assessment instruments chosen were designed to provide information

about whether Student required occupational therapy as a related service in her IEP. Ms. Toranian evaluated whether Student could perform different types of motor movements needed to participate in a classroom, navigate a campus, and assessed Student's strength, range of motion, writing/copying abilities, and sensory needs. When Student was unable to perform tasks required in the Bruininks-Oseretsky standardized test, Ms. Toranian appropriately terminated the test and never got to evaluate Student's ability to tie shoelaces. Therefore, Ms. Toranian's explanation that tying shoelaces was too advanced for Student was persuasive because that particular skill was part of a higher-level subtest of the Bruininks- Oseretsky Test of Motor Proficiency that Student never got to when Student was unable to pass lower level subtests.

33. However, District did not meet its burden of proving by a preponderance of the evidence that its occupational therapy assessment was sufficiently comprehensive to address all of Student's suspected needs. Accordingly, Student is entitled to an independent occupational therapy assessment at public expense.

ORDER

1. District's assessments and reports in the areas of psychoeducational, and speech and language were appropriately completed. District is not required to fund independent assessments in these two areas.

2. District's occupational therapy assessment was incomplete and therefore inappropriate. District shall fund an independent occupational therapy assessment in accordance with District's guidelines for independent occupational therapy assessments.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District was the prevailing party as to issues one and two; and Student was the prevailing party as to issue three.

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: November 20, 2017

_____/s/_____
SABRINA KONG
Administrative Law Judge
Office of Administrative Hearings