

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS ON
BEHALF OF STUDENT,
v.

OAH Case No. 2018010512

TUSTIN UNIFIED SCHOOL DISTRICT,

TUSTIN UNIFIED SCHOOL DISTRICT,

OAH Case No. 2018010057

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

Tustin Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings on January 3, 2018, naming Parents on behalf of Student. On January 16, 2018, Student filed a complaint naming District. On January 19, 2018, OAH consolidated District's case with Student's case.

Administrative Law Judge Linda Johnson heard this matter in Tustin, California, on March 13, 14, and 15, 2018.

Damian Fragoso and Ushma Vyas, Attorneys at Law, represented Student. Student's mother attended all three days of the hearing. Student's father attended part of each day. Student did not attend the hearing.

Melissa Hatch, Attorney at Law, represented District. Dr. Amy Lambert, District's Assistant Superintendent of Special Education, attended on behalf of District.

At the parties' request, OAH continued this matter to April 9, 2018, for closing briefs. Upon timely submission of written closing briefs, the record was closed and the matter was submitted for decision.

ISSUES

STUDENT'S ISSUES

1. Did District deny Student a free appropriate public education by failing to appropriately assess Student in the areas of psychoeducation, including academic achievement, in its November 30, 2017 multi-disciplinary assessment of Student?
2. Did District deny Student a FAPE in its November 30, 2017 individualized education program by failing to make an appropriate offer of goals and placement?

DISTRICT'S ISSUE

3. Did District's November 30, 2017 multi-disciplinary assessment of Student appropriately assess Student, so that Student is not entitled to an independent educational evaluation at public expense.

SUMMARY OF DECISION

District proved that its November 30, 2017 multidisciplinary assessment complied with the procedural requirements for appropriate assessments under the Individuals with Disabilities Education Act. The assessors were qualified; they used valid test instruments and obtained valid results; they documented their assessment results in written reports; and they presented their findings to Student's IEP team. Parents had the opportunity to, and did, participate at the IEP team meeting. The evidence established the assessments results were appropriate and valid. Therefore, Student was not entitled to independent educational evaluations at public expense.

Student did not prove that District denied him a FAPE by failing to make an appropriate offer of goals and placement. District developed goals in all areas of suspected disability. Student did not present any evidence that the goals were inappropriate. District's offer of placement was in the least restrictive environment and allowed Student to make meaningful educational progress. Student did not offer any credible or persuasive evidence that he required a nonpublic school placement to make appropriate academic progress.

FACTUAL FINDINGS

1. At the time of the hearing Student was a nine-year-old male who resided with his parents within District's boundaries. Student was eligible for special education under the categories of autism and speech or language impairment.

2. Parents requested an early triennial assessment of Student on September 18, 2017. They requested assessments in the areas of academic achievement; cognitive ability; speech and language; auditory skills, including central auditory processing and an audiological assessment; Attention Deficit/Hyperactivity Disorder testing; visual skills, including eyesight; fine motor skills; gross motor skills; social emotional and behavioral functioning; and functional behavioral assessment. On September 22, 2017, District created an assessment plan to assess Student in the areas of academic achievement; health, including vision and hearing; intellectual development; speech and language communication; motor development; social and emotional; adaptive behavior; and a functional behavioral assessment.¹ Parents consented to the assessment plan on October 2, 2017.

¹ District conducted a health assessment and an adaptive physical education assessment; however, neither party offered testimony regarding those assessments.

OCTOBER 26, 2017 IEP AND TEAM MEETING

3. On October 26, 2017, District held an annual IEP team meeting for Student. Parents and their attorney attended the meeting along with Stephanie Barnes, Special Education Coordinator; Christine Nagano, occupational therapist; Rena Fairchild, Principal; Meghan Carder, Student's general education teacher; Kendra DeBoer, speech and language Pathologist; Erin Keith, specialized academic instructor; and Melissa Hatch, District's attorney. The assessments had not yet been completed.

Progress on Prior Goals and Present Levels of Performance

4. The IEP team discussed present levels of performance, progress on goals, new goals, and services and supports. Student had four academic goals, two speech and language goals, and one occupational therapy goal.

5. Student met his occupational therapy goal, to use a checklist to maintain a clean and orderly work space. Ms. Nagano worked with Student for three years and observed Student make progress; he no longer needed noise canceling headphones, a slant board, or an adaptive pencil grip. Organization was one of Student's strengths. However, Student's writing was inconsistent, his spacing and legibility in his classroom work samples did not match what he did in therapy.

6. Student met both his speech and language goals. When given a picture prompt, Student could describe why characters thought, felt, or acted in a particular manner using salient context features. Student could also create an appropriately sequenced story, including four storyelements, when given a single picture prompt with visual and or written cues. Ms. DeBoer also saw an improvement in Student's abilities. Although Student still struggled with narrative development, Ms. DeBoer saw an improvement in the year and a half she worked with him.

7. Student did not meet all four of his academic goals. Student could accurately read a text at the end of first grade level, answer comprehension questions,

adequately retell the story, and name characters. Student could add and subtract two and three-digit numbers without regrouping. However, the numbers were carefully crafted to give student numbers he could add and subtract in his head and boxes were placed over the tens and hundreds column when he needed to regroup. Student could set up equations for story problems but not consistently manipulate the problem to solve it. Student could not compose a five- sentence paragraph with beginning capitalization and ending punctuation; although he could write five sentences in paragraph form when referring to a word and phrase bank developed by an adult. Although Student met three of his four academic goals, Student received significant support to meet the goals.

New Goals, Services, and Placement

8. Student's October 26, 2017 IEP team developed 11 new goals, five academic goals, one behavior goal, three speech and language goals, and two occupational therapy goals. Student's goals were designed for him to make progress academically. However, he was not performing at grade level and his goals were not written as grade level goals.

9. Student's reading comprehension goal was to answer three of four comprehension questions after reading a mid-second grade text. Student's written expression goal was to compose a paragraph of at least nine sentences on a topic of interest with a word and phrase bank. Student's writing conventions goal was to use proper conventions, beginning capitals and ending punctuation, when writing five sentences from dictation; Student would have visual support but no verbal prompts. Student's IEP team separated the writing conventions into its own goal because Student struggled with both the volume of his writing as well as using correct conventions.

10. Student had two math goals, a number sense goal to rearrange out of order numbers within 50 from least to greatest, and a math reasoning goal to

independently solve one step story problems. District also created an on-task behavior goal to address Student's behavior concerns.

11. Mother expressed concerned at the IEP team meeting that Student had not fully mastered the previous goals, and only met the goals with significant prompting. However, at hearing she did not express any concern with the new goals.

NOVEMBER 30, 2017 MULTIDISCIPLINARY ASSESSMENT REPORT

Academic Achievement

12. Ms. Keith conducted the academic achievement portion of the multidisciplinary assessment. She has a bachelor's degree from California State University, Long Beach; a multiple subject preliminary credential; a learning handicapped credential; and has been a teacher for 19 years. She has taught special education at Student's school for the last four years. She develops and implements IEPs, provides specialized academic instruction to students, and supervises instructional aides. Ms. Keith provided specialized academic instruction to Student since he was in first grade. Ms. Keith had the experience and credentials necessary to conduct academic achievement assessments for Student.

13. Ms. Keith observed Student during testing, during direct services, and in the general education class. During Student's general education music class he was attentive, followed directions, participated, and appeared to enjoy the class. Ms. Keith also observed Student during a writing workshop. The classroom aide assisted Student in getting started on his assignment and redirected him and assisted with his task several times. Although Student needed some prompting and assistance, he was compliant and followed directions.

14. Ms. Keith administered the Kaufman Test of Educational Achievement, Third Edition to Student to assess his academic achievement. She administered the assessment in Student's native language of English, and the assessment was not racially,

culturally, or sexually biased. Ms. Keith was straightforward in her testimony regarding the administration of the assessment, including the sections in which she tested Student using lower levels and the one section she administered outside of testing protocols. Ms. Keith's testimony regarding testing Student at a lower level was persuasive and undisputed. Ms. Keith started testing Student at the level required based on his age and grade level. However, an examiner is allowed to halt the test and go back to a lower level if a student does not answer a certain number of questions correctly. Ms. Keith assessed Student using a lower level test for reading comprehension, math concepts and applications, written expression, and listening comprehension. In each of those subtests Ms. Keith made the determination to use the score from the lower level as that better described Student's abilities. Ms. Keith administered the writing fluency subtest outside of the testing protocol. Student understood the directions for the writing fluency subtest. However, after he started the test he protested both verbally and through his body language. Although stopping the test and resuming it on a later date was outside of the testing protocols, Ms. Keith concluded the result was consistent with Student's abilities and she therefore did not invalidate the test. Based upon her experience and professional judgment, her conclusion was credible. Student offered no evidence to the contrary.

15. In addition to the Kaufman Test of Educational Achievement, Ms. Keith administered a number of informal assessments to prepare for Student's October 26, 2017 annual IEP team meeting. She knew Student well and was knowledgeable about his academic strengths and weaknesses. She tracked his academic performance and progress on goals as well as created new goals for him over the years she knew him. Based upon her knowledge of and experience working with Student, Ms. Keith testified persuasively that the results of the assessment she administered confirmed what she already knew about Student's academic profile. Student struggled with reading

comprehension and vocabulary, oral language, comprehension, written expression, oral expression, writing fluency, and math fluency.

Intellectual Development

16. Ms. Ho conducted the intellectual development portion of the multidisciplinary report. Ms. Ho has a Bachelor of Arts in Psychology; a Master of Arts in Educational Psychology; a pupil personal services credential in school psychology; and seven years of experience as a credentialed school psychologist, five of which have been at District. Ms. Ho had the experience and credentials necessary to conduct intellectual development and cognitive assessments of Student.

17. In conducting the intellectual development portion of the multidisciplinary assessment, Ms. Ho reviewed Student's records; observed Student; considered Student, parental, and teacher input; and conducted assessments. She administered the Kaufman Assessment Battery for Children, Second Edition; the Comprehensive Test of Phonological Processing, Second Edition; and the Wide Range Assessment of Memory and Learning, Second Edition. All instruments were reliable and widely accepted assessment tools. She administered all instruments and interpreted them consistent with the publisher's protocols. The assessments yielded valid results. Ms. Ho administered the assessments in Student's native language of English, and the assessments were not racially, culturally, or sexually biased.

18. Ms. Ho observed Student during the testing as well as in the general education setting. During testing Student was occasionally uncooperative and needed breaks and reinforcements to finish the assessments. He was also eager to return to his classroom. Ms. Ho observed Student in music class. He followed directions, participated, and engaged in a conversation with a peer. Ms. Ho also observed student in the general education classroom during math and reading. Student received assistance on his math worksheet from two peers and followed classroom instructions. Student sat quietly

during a reading instruction, followed directions, and transitioned to working on an assignment.

19. Ms. Ho administered the Kaufman Assessment Battery for Children because it was normed for students with disabilities and eliminated the bias of acquired knowledge for students with autism that many other tests do not account for. Ms. Ho had administered this assessment approximately 150 times and had done so in accordance with the testing manual. Student's fluid crystallized index of 77 placed him in the below average range for cognitive processing. Student's nonverbal index, which looked at cognitive ability removing the linguistically loaded questions, was a 69. Ms. Ho used the fluid crystallized index to compare to the Kaufman Test of Educational Achievement results to determine if Student had a specific learning disability. Using the scores Student achieved on the lower level assessments, Student did not exhibit a 22-point difference in ability and achievement, which would have suggested he had a specific learning disability.

20. Ms. Ho did not include an analysis of intellectual disability in the multidisciplinary report. She discussed including such an analysis in the report with other IEP team members but ultimately decided against it because intellectual disability had never been a concern raised in connection with Student. Her assessments addressed Student's cognitive ability and the multidisciplinary assessment looked at Student as a whole. Ms. Ho's testimony that the assessment did not fail to address any areas of suspected need for Student was persuasive and undisputed by Student.

21. Ms. Ho administered the Comprehensive Test of Phonological Processing to assess Student's processing abilities. She has administered this assessment at least 200 times and administered it in accordance with the testing manual. She also administered the Wide Range Assessment of Memory and Learning to determine Student's memory and learning ability. She used the Comprehensive Test of Phonological Processing instead of the Test of Auditory Processing Skills because

although both test similar areas, the Comprehensive Test of Phonological Processing assessed for a reading disability with more specificity. Both tests assessed auditory processing; the only area that the Test of Auditory Processing Skills covers that the Comprehensive Test of Phonological Processing does not is the auditory cohesion index, which tests in more detail memory ability as to reading comprehension. Ms. Ho's findings showed that even though Student's auditory processing abilities were low, they were commensurate with his cognitive abilities. She would have been concerned about Student's auditory processing abilities if they were lower than his cognitive ability; those results might have indicated a specific learning disability or an auditory processing disability. Ms. Ho was aware that there are additional assessments that an audiologist could perform to assess for a central auditory processing disorder. However, based on her assessment and the previous triennial assessment, central auditory processing was not an area of concern for Student. Student's previous assessment showed lower scores in auditory cohesion, that test looked at information related to reading comprehension, an academic skill, versus an auditory processing disorder. Ms. Ho's testimony was persuasive and undisputed by Student that, because Student's auditory processing skills were commensurate with his cognitive abilities, she did not need to further assess for a central auditory processing disorder.

Speech and Language

22. Ms. DeBoer conducted the speech and language portion of the multidisciplinary report. Ms. DeBoer has a Bachelor of Arts in Psychology; a Master of Arts in Communicative Disorders; a speech language pathology services credential; a California speech language pathology state license; an American Speech Language Hearing Association certificate of clinical competence; and four years of experience as a credentialed speech language pathologist. Ms. DeBoer administers assessments to students, collaborates with general education teachers, and provides direct speech and

language services to students. Ms. DeBoer had the experience and credentials necessary to conduct speech and language assessments.

23. Ms. DeBoer was professional in demeanor at hearing, and demonstrated a genuine interest in Student and Student's ability to communicate. In addition to assessing Student, Ms. DeBoer also provided direct speech and language services to Student. Ms. DeBoer began working with Student in the fall of 2016 and provided 28 hours of group speech therapy to Student between October 2016 and October 2017; consequently, she was very familiar with Student. Her opinions regarding Student's speech and language needs and the educational program to meet those needs were persuasive and given significant weight. No other speech and language pathologist was called to contradict Ms. DeBoer's opinions.

24. Ms. DeBoer observed Student for 25 minutes during lunch recess and for 30 minutes while in the general education classroom. She administered the Peabody Picture Vocabulary Test, Fourth Edition; the Expressive Vocabulary Test, Second Edition; the Receptive Expressive Social Communication Assessment; the Test of Narrative Language; the Test of Oral Language Development, Intermediate; and the Goldman-Fristoe Test of Articulation. She administered the assessments in Student's native language, and the assessments were not racially, culturally, or sexually biased. Ms. DeBoer also interviewed Student using the Garcia-Winner Reciprocal Interview and interviewed his parent and teacher.

25. Ms. DeBoer used six different assessment tools, along with observations and interviews, to determine Student's semantic, syntax and morphology, pragmatic, and articulation abilities. Ms. DeBoer followed the protocols for each assessment. Student had deficits in semantics; these deficits may have impacted his reading comprehension as well as understanding and following directions and responding appropriately. Student also had deficits in the area of pragmatics which may have impacted Student's ability to understand what is expected in class. Student continued to

need speech and language services. Ms. DeBoer's assessments and corresponding report were comprehensive and no evidence was provided to contradict her findings.

Occupational Therapy

26. Ms. Nagano conducted the occupational therapy portion of the multidisciplinary report. Ms. Nagano has a Bachelor of Science in Occupational Therapy; a Master of Arts in Occupational Therapy; a California Board of Occupational Therapy license; and ten years of experience as an occupational therapist, three of which has been with District. Ms. Nagano conducts assessments, consults with other staff, manages the field work students, and provides direct services to students. Ms. Nagano conducted over 400 assessments during her career and at least 50 during 2017-2018 school year. Ms. Nagano had the experience and credentials necessary to conduct occupational therapy assessments.

27. Ms. Nagano's testimony at the hearing was professional and her answers were straightforward. Ms. Nagano provided occupational therapy to Student for three years and knew him well. Ms. Nagano tracked Student's progress and was able to describe the gains he made. Ms. Nagano's opinions regarding Student's fine motor, visual motor, and sensory processing needs, and the educational program to meet those needs, were persuasive and accorded significant weight. No other occupational therapist was called to offer a differing opinion.

28. In preparation for Student's triennial multidisciplinary assessment Ms. Nagano reviewed Student's previous IEPs and assessment. She conducted her assessment over two 25 minute sessions. She assessed Student using the Beery-Buktenica Developmental Test of Visual-Motor Integration; the Bruininks-Oseretsky Test of Motor Proficiency; the Developmental Test of Visual Perception, Third Edition; Bebbow's observation of hand skills; and the Sensory Processing Measure. She administered the assessments in Student's native language, and the assessments were

not racially, culturally, or sexually biased. In addition to the assessments Ms. Nagano observed Student during testing, during physical education for 35 minutes, while he was in the general education classroom for 30 minutes, interviewed school staff, and reviewed Student's work samples.

29. Ms. Nagano used multiple measures to determine Student's visual motor, fine motor, and sensory processing needs. Student has made significant gains in the three years Ms. Nagano had worked with him. Student's scores on the test of visual motor integration increased from the last time the test was administered in October 2015. Student still exhibited some inconsistencies with writing legibly. Although he could write legibly while in therapy, his classroom writing was not always legible. Student did not have any fine motor deficits. Student still had sensory processing deficits, but could react appropriately during a fire alarm and was easily redirected when engaging in repetitive behavior such as clearing his throat. Ms. Nagano's assessments and corresponding report were comprehensive and no evidence was provided to contradict her findings.

Social-Emotional Behavior

30. Ms. Ho also assessed Student's social emotional behavior and adaptive functioning. Ms. Ho administered the Adaptive Behavior Assessment System, Third Edition; the Behavior Assessment System for Children; the Conners Three; the Gilliam Autism Rating Scale, Second Edition; and the Childhood Autism Rating Scale, Second Edition. She administered the assessments in Student's native language, and the assessments were not racially, culturally, or sexually biased.

31. Both Ms. Carder² and Mother filled out multiple behavior rating scales. On the behavior assessment Mother's responses were flagged for possibly being overly negative and Ms. Carder's responses flagged a caution report that her responses may be overly negative. Both Mother and Ms. Carder were concerned with hyperactivity, social skills, and leadership, however, Ms. Carder noted that Student does not avoid social situations and appears capable of making friends. On the Conners scales both Ms. Carder and Mother reported elevated and very elevated scores in inattention, defiance and aggression, and peer relations. On the autism rating scale both Ms. Carder and Mother reported very likely scores regarding the probability of autism.

32. Based on Ms. Ho's assessment the IEP team agreed Student met the eligibility categories for autism and other health impairment for attention deficit/hyperactivity disorder, and he did not meet the eligibility category for emotional disturbance.

Functional Behavioral Assessment Report

33. Ms. Ho conducted a functional behavioral assessment to address Student's behaviors of noncompliance and tantrums. Ms. Ho reviewed records, interviewed school staff and Parents, and conducted observations to obtain the necessary information. Ms. Ho looked at the antecedents of the behavior, the occurrences of incidents, what the possible functions or targets of the behavior were, and what strategies were currently in place. Ms. Ho, Ms. Keith, and Ms. Carder all testified in the same manner regarding Student's behavior. Student attended the first week of school and was nervous as most students were, however, Student missed the second week of school due to surgery and

² Ms. Carder has a bachelor's degree in psychology; a Master of Arts in Education; a multiple subject teaching credential; and 12 years of experience as a teacher, all of which has been at Student's school.

could not participate in recess for a while when he returned. Student was also pulled out of class for testing for the multidisciplinary assessment beginning in October. During the first part of the school year Student exhibited some behaviors such as noncompliance, arguing with teachers, and being bossy to other students. Student also had three incidents of tantrums that Ms. Carder or the classroom aide had to call Ms. Keith to deescalate Student. However, Student's behavior improved significantly after the IEP team met and Student's token economy and first/then reward system were put in place.

34. Ms. Ho's conclusion that a behavior intervention plan was not necessary because the severity and frequency of Student's behavior did not warrant a plan was persuasive. Ms. Carder corroborated Ms. Ho's findings that Student's behaviors had decreased and he was not a disruption to the class or significantly impeding his own learning. Student still exhibited some off task or avoidance behavior, however, that was addressed in a behavior goal. Student did not offer any evidence contradicting the bases for or their conclusions.

NOVEMBER 30, 2017 IEP AND TEAM MEETING

35. Student's IEP team met on November 30, 2017, to review the results of the triennial multidisciplinary assessment as well as to make any necessary changes to Student's IEP. Parents and their attorney attended the meeting along with Ms. Barnes; Ms. Nagano; Ms. Fairchild; Ms. Carder; Ms. DeBoer; Ms. Keith; Ms. Ho; Jose Cervantes, adaptive physical education teacher; and Tamra Kaufman, Attorney for District.

36. The IEP team updated Student's present levels of performance and goal baselines. The team did not make any revisions to the annual goals from the October 26, 2017 IEP; District IEP team members concluded the goals were still appropriate based upon the assessment data. Mother was concerned that Student was not making sufficient progress. However, Student did not provide any evidence that the goals were inappropriate to address his needs, or established that he disagreed with the goals.

37. Although the IEP team meeting notes state that the team discussed a continuum of placement options, no one could recall any specifics of that conversation. Mother's testimony that the IEP team did not discuss a special day class placement or a nonpublic school setting for Student was credible. Mother had some general information about alternative programs at Student's school and within District; however, she gathered that information from outside sources, not during an IEP team meeting. Mother was conflicted about Student's placement; she had mixed feelings about him being in a general education classroom but did not believe a classroom with moderate to severe students would be appropriate because Student was mentally aware that he was not as significantly impaired.

38. Ms. Barnes attended both the October and November 2017 IEP team meetings as an administrative designee. Ms. Barnes has a Bachelor of Arts in Political Science; a Master of Science in School Psychology; a Master of Arts in Organizational Leadership; a pupil personal services credential in school psychology and school counseling; a tier one and tier two administrative services credential; and seven years of experience as a school psychologist or special education administrator. Ms. Barnes never met Student and her role at the IEP team meeting was to take notes, move the meeting along, and provide general information about the continuum of placement options. Ms. Barnes's testimony was professional and straightforward. She did not recall the exact discussion about the continuum of placement opportunities nor did she remember offering an opinion regarding Student's placement. However, Ms. Barnes did provide the same testimony as Mother, that the IEP team did not discuss placing Student in a special day class or any placement outside Student's current school.

39. Conversely, Ms. Ho and Ms. Keith provided persuasive testimony that Student's placement in general education with specialized academic instruction support was appropriate for Student. Ms. Keith worked with Student since he was in first grade and saw the benefit of group learning. Student was making academic progress as

evidenced by meeting most of his IEP goals. Although Student was not performing at grade level standards, he was exposed to some grade level material in the general education class. Student also enjoyed being in the general education class. Both Ms. Keith and Ms. Nagano observed that Student was eager to return to class when they pulled him out for services.

40. Although Ms. Carder could not definitively assess Student's friendships, as she did not observe Student at recess; in class Student appeared to have friends as he worked in groups with other Students. Choosing groups was reciprocal, sometimes Student would seek out other students to work with and other times Student would seek out Student. Ms. DeBoer, on the other hand, observed Student on the playground at recess. Student did have friends and he played with other students.

41. The IEP team discussed Student's current placement, a general education classroom with pullout specialized academic instruction, speech and language therapy, and occupational therapy. Student also received aide support. Although Student did not have a one to one aide, an aide was assigned to Student's general education classroom and Student was the aide's primary focus. The aide was a special education aide supervised by Ms. Keith. In response to Parents' concerns about Student's reading ability, District offered an additional 40 minutes a week of specialized academic instruction. The new service was provided twice a week for 20 minutes each and was push in reading support.

42. After the IEP team meetings Parents contacted several nonpublic schools and set up visits. Parents ruled out two of the schools as not a good fit for Student. However, Parents thought New Vista would be appropriate. Student also visited New Vista, spent a day at the school, and introduced himself to the class. New Vista is a nonpublic school set up for sixth to twelfth grade students; however, it may take a student in grades lower than sixth. Mother explained that New Vista conducted an assessment on Student and determined he would be a good fit; she also explained that

New Vista would have Student participate in classes in the morning and receive one to one instruction in the afternoon. However, no one from New Vista testified, and Student did not provide the assessment results.

INDEPENDENT EDUCATIONAL EVALUATION REQUEST

43. On December 7, 2017, Parents, through their attorney, requested a psychoeducational independent educational evaluation because they disagreed with District's recommendations. District responded in writing to Parents' request for an independent educational evaluation on December 21, 2017. District denied Parents' request and informed them it would file for a due process hearing.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

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

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

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (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 that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and nondisabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.)

4. The Supreme Court recently clarified and expanded upon its decision in *Rowley*. In *Endrew F. v. Douglas County School Dist.*, the court stated that the IDEA guarantees a FAPE to all students with disabilities by means of an IEP, and that the IEP is required to be reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances. (*Endrew F. v. Douglas County School Dist.* (March 22, 2017, No. 15-827) 580 U.S. ____ [137 S.Ct. 988, 996, 197 L.Ed.2d 335]). The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. Feb. 14, 2018, No. 15-56452) ____ Fed.Appx. __, 2018 WL 847744.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; *see* 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) By this standard, District had the burden of proof for the issues it alleged in this matter, and Student for the issue he alleged.

STUDENT'S ISSUE ONE & DISTRICT'S ISSUE THREE: ASSESSMENTS

6. Student contended that District denied him a FAPE by failing to appropriately assess him in all areas of suspected disability in its November 30, 2017 multi-disciplinary assessment. Student argued District's observations of Student were not adequate, that District failed to include comprehensive auditory processing assessments, that District should have analyzed Student's eligibility under intellectual

disability, that District's specific learning disability analysis was flawed, and that District's functional behavioral assessment report was not proper. District disagreed and contended that its assessments were appropriate, and Student was not entitled to independent educational evaluations.

Legal Authority

7. When conducting assessments, a local educational agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) No single measure or assessment shall be the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304(c)(6).) The local educational agency must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) The IEP team must consider the assessments in determining the child's educational program. (34 C.F.R. § 300.324(a)(1)(iii).)

8. 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).)

9. Individuals who are both “knowledgeable of the student’s disability” and competent to perform the assessment, must conduct assessments of students’ suspected disabilities. (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

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 effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

Analysis

11. District’s November 30, 2017 multidisciplinary assessment was appropriate and properly conducted. All District personnel involved were qualified to conduct the assessments. Student was assessed using a variety of assessment instruments, ranging from standardized tests to observation to determine his unique needs. The assessment

instruments were appropriate given Student's history of attention deficits, anxiety, and autism. The assessments were not racially, sexually, or culturally biased, were given in Student's primary language of English, and were valid for the purpose for which they were used. The assessment instruments were completed by Student, and the scores obtained were valid. Parents were provided with a comprehensive report that explained all of the assessments and included recommendations for Student's education. The reports were reviewed by the assessors at an IEP team meeting that was attended by all necessary people, and at which Parents fully participated.

12. District's evidence concerning the qualifications of its assessors, their assessment methods and instruments, and the results of the assessments was persuasive. The IEP team looked at all of the assessment reports, and no single measure or assessment was used as the sole criterion for determining an appropriate educational program for Student.

13. Student's argument that District did not adequately observe Student was not persuasive. District's assessors observed Student multiple times in a variety of settings. Moreover, most of the assessors knew Student well and provided direct services to him. District's observations were appropriate and noted the relevant behavior and how it might impact Student's academic and social functioning.

14. Ms. Ho's testimony that she assessed in all areas of suspected disability was persuasive and undisputed. Based on her review of previous assessments, the current test results, and discussions with the other assessors, neither intellectual disability nor a central auditory processing disorder needed further testing or discussion.

15. Student's argument that District's specific learning disability analysis was flawed was not persuasive. District appropriately used a severe discrepancy model to determine Student did not have a specific learning disability. Although Ms. Keith tested Student on different levels for several subtests, her testimony that the testing manuals allowed for that methodology of testing was persuasive and undisputed. Furthermore,

Student offered no evidence that using any other analysis to determine if Student had a specific learning disability would have produced a different result.

16. Student's argument that the functional behavioral assessment report was not proper was also not persuasive. Ms. Ho conducted a comprehensive functional behavioral assessment report that found Student's behavior was not severely impacting his access to his education nor was his behavior interfering with the classroom as any serious behavioral difficulties were temporary. Ms. Carder provided similar testimony that since the IEP team meeting Student's behavior had improved. Student did not provide any evidence that Student had more significant behaviors that required a behavior intervention plan.

17. The weight of the evidence established that the November 30, 2017 multidisciplinary assessment was accurate, reliable and sufficiently comprehensive. District met its burden that the assessment was appropriate, and Student failed to meet his burden of proof that District failed to appropriately assess Student in the areas of psychoeducation, including academic achievement. District prevailed on Student's Issue One and District's Issue Three.

STUDENT'S ISSUE TWO: GOALS

18. Student alleged that District that denied him a FAPE by failing to develop appropriate goals to address Student's needs. District contended that the IEP goals were designed to address Student's unique needs at the time of the IEP.

Legal Authority

19. An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's

disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (Letter to Butler, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

20. In addition, the IEP must include "appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved," and a statement of how the student's progress toward the goals will be measured. (Ed. Code, § 56345, subd. (7), (9); 20 U.S.C. § 1414(d)(1)(A)(i)(III).) An examination of an IEP's goals is central to the determination of whether a student has received a FAPE. In *Adams v. State of Oregon*, (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), the Ninth Circuit Court of Appeal stated: "[W]e look to the [IEP] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer a meaningful benefit." (*Id.*)

21. A school district's determinations regarding special education are based on what was objectively reasonable for the district to conclude given the information the district had at the time of making the determination. A district cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable...at the time the IEP was drafted." (*Adams, supra*, 195 F.3d at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

Analysis

22. District developed measurable annual goals in all of Student's areas of need resulting from his disabilities to enable Student to be involved, and make progress, in the general curriculum. Student's present levels of performance and progress on prior annual goals identified weaknesses in the academic areas of reading comprehension;

math reasoning; number sense; written expression – both the volume of writing and the conventions; on task behavior; pragmatics; expressive language; fine and visual motor; and self-regulation.

23. Student did not present any evidence that District failed to write goals in any area of need. Student did not present any evidence that the goals developed by the IEP team on November 30, 2017, were inappropriate or failed to enable Student to make progress. Student failed to meet his burden of proving by a preponderance of the evidence that District failed to develop and offer appropriate goals in the November 30, 2017 IEP.

STUDENT'S ISSUE TWO: PLACEMENT

24. Student contended that District denied him a FAPE by failing to offer an appropriate placement in the November 30, 2017 IEP. Specifically, Student contended that District failed to discuss the continuum of alternative placements and failed to offer a placement that met Student's exceptional needs. Student further contended placement in a general education class failed to provide Student with meaningful educational benefit. District asserted that placement in the general education classroom with special education services and supports was appropriate.

Legal Authority

25. In determining the educational placement of a child with a disability, a school district must ensure that: (1) the placement decision is made by a group of persons, including the parents, knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment; (2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; (3) unless the IEP specifies otherwise, the child attends the school that he or she would if

non-disabled; (4) in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and (5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

26. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that (1) children with disabilities are educated with non-disabled peers; and that (2) special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student has on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of general education was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].) If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum

of program options.⁵ (*Daniel R.R.*, *supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

27. If a child with a disability is not fully integrated into a regular classroom, the special education and related services in the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Endrew*, *supra*, 137 S.Ct. at p. 1001.)

28. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (458 U.S. at pp 205-206.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.)

⁵ "Mainstreaming" is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.)

Analysis

29. District properly crafted an offer of placement designed to meet Student's unique needs in the least restrictive environment. Although the IEP team did not discuss placing Student in a special day class or options outside of Student's current school, Student did not provide any evidence that his current placement, a general education classroom with pullout specialized academic instruction and push in reading support, was not appropriate.

30. Student seeks a more restrictive placement, specifically a nonpublic school. Placement at a nonpublic school would remove Student completely from regular education and prohibit him from interacting with typical peers at school. Student benefited from his placement in the general education classroom. Student met six of his seven annual goals, in speech and language, occupational therapy, reading, and mathematics, and made progress towards his writing goal. Student followed classroom routines and school procedures. He followed directions well in a large group and worked well with his peers. Student benefited from socialization, turn taking, negotiating, and exposure to grade level curriculum in the general education classroom.

31. Student received academic instruction at his level in the specialized academic instruction classroom with Ms. Keith. Student made academic progress and met three of his four academic goals.

32. Ms. Keith, Ms. Ho, and Ms. Barnes persuasively testified that an education program consisting of general education with specialized academic instruction, speech and language, and occupational therapy, delivered with accommodations and aide support in small, special education classes, along with general education classes, was appropriate and the least restrictive environment to meet Student's individual needs. Student benefited academically and non-academically in general education and the small group classes offered by District. Although there were a few incidents when

Student would get upset and need to leave the classroom, he was not overly disruptive.⁶

33. In contrast, Student did not provide any evidence that he required a more restrictive placement. Mother thought New Vista was an appropriate program. However, Student did not offer any credible testimony that Student *required* such a restrictive setting to make meaningful educational progress under *Endrew, supra*, 137 S.Ct. at p. 1001.

34. Student had friends in his classroom, Student played with his peers at recess and sat with them at lunch. Although Mother was concerned that Student exhibited parallel play, District's testimony that Student had friends at school who he initiated interactions with and whom initiated interactions with him, was persuasive and undisputed.

35. As to any concern about Student's contention that District failed to discuss a continuum of placement options, Student did not meet his burden of persuasion as Student did not establish any loss of educational benefit as District's offer provided Student a FAPE. Further, Student did not establish that District's actions significantly impeded Parents from meaningfully participating in the IEP team process as Student did not present any persuasive evidence about Student possibly needing a more restrictive placement that the IEP team, including Parents, needed to discuss.

36. Student did not meet his burden of proof that the goals or placement in the November 30, 2017 IEP were inappropriate, that he required a nonpublic school setting, or any procedural violation. District prevailed on Student's Issue Two.

⁶ Neither party presented any evidence or made any argument concerning the fourth *Rachel H.* factor, the cost of the proposed placement, so that factor is not addressed here.

ORDER

1. All of Student's claims are denied.
2. District's November 30, 2017 multidisciplinary assessment was appropriate and District is not required to fund an independent 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, District prevailed on all issues heard and decided.

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: April 26, 2018

_____/s/_____

LINDA JOHNSON

Administrative Law Judge

Office of Administrative Hearings