

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CAMPBELL UNION HIGH SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2018061181

DECISION

Campbell Union High School District filed a due process hearing request with the Office of Administrative Hearings on June 27, 2018, naming Parent on behalf of Student. OAH continued the matter for good cause on July 12, 2018.

Administrative Law Judge Cynthia Fritz heard this matter in San Jose, California on September 11, 12, and 13, 2018.

Jeffery Maisen, Attorney at Law, represented Campbell. He was assisted by Rodney Levin, Attorney at Law, the morning of September 11, 2018, and Kristall Tidwell, Attorney at Law, for the remainder of the hearing. Daron LaFranchi, Director of Special Education, attended each hearing day as Campbell's representative.

James Sibley, Attorney at Law, represented Student. He was assisted by Amanda O'Neal, Attorney at Law. Mother attended each day of the hearing on behalf of Student. Father attended the hearing on September 11, 2018.

At the parties' request, OAH continued this matter to October 8, 2018, to allow written closing arguments. The record closed on October 8, 2018, upon the parties' timely submission of closing arguments, and the matter was submitted for decision.

PRELIMINARY MATTER

On September 10, 2018, Campbell requested a clarification or correction of the issue as stated in the ALJ's prehearing conference order. ALJ Freie defined the issue in the prehearing conference order as "Is Campbell's fall 2017 psychoeducational evaluation of Student legally compliant, such that it is not required to fund an independent psychoeducational evaluation." In a footnote, she explained that the psychoeducational evaluation contained a section with academic results that also had to be considered despite Campbell's previous agreement to fund an academic independent educational assessment.

At the hearing onset, Campbell argued that the only disputed issue was the adequacy of the psychoeducational assessment's psychological testing portion and not the academic testing, because it already agreed to conduct an academic independent educational evaluation. Student argued that the psychological, academic, speech and language, and assistive technology testing was in dispute, pointing to portions of the psychoeducational report addressing psychological testing, prior academic testing results, and references to independent speech and language and assistive technology assessments.

Here, Campbell completed separate speech and language and assistive technology assessment reports. Its Triennial Psychoeducational Assessment Multidisciplinary Report contained psychological testing, previous academic testing results, and referred the reader to the speech and language and assistive technology reports for scores and special education eligibility recommendations in those areas. Because the speech and language and assistive technology assessment reports are independent from the psychoeducational assessment, they will not be analyzed here. The psychoeducational assessment, however, included psychological testing and previous academic testing results which will be considered in determining whether the

psychoeducation evaluation was legally compliant. Campbell's motion for clarification or correction was denied.

ISSUE

Is Campbell's 2017 psychoeducational assessment of Student legally complaint, such that it is not required to fund an independent psychoeducational evaluation?

SUMMARY OF DECISION

This Decision finds that Campbell failed to meet its burden of proving that its psychoeducational assessment met all of the requirements of law. The assessor failed to follow the publisher's instructions on two test measures rendering them unreliable. Further, Campbell failed to meet its burden of proof that another test measure was properly administered according to the publisher's instructions. Moreover, Campbell neither observed Student in a regular education setting, nor included classroom observations in its report. Campbell additionally used unreliable academic information, and failed to explain what data or scores supported its finding of special education eligibility in the report. Thus, Student is entitled to an independent psychoeducational assessment at public expense.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is a 16-year old boy who lives with Parents within Campbell's boundaries. Student was first found eligible for special education on June 10, 2009, under the category of specific learning disability and currently has a diagnosis of dyslexia.

2. Student attended Campbell Union School District from kindergarten until the beginning of eighth grade. At that time, Parents unilaterally placed Student at The

Greenwood School, a boarding school in Vermont. Upon Student's completion of eighth grade, he became the responsibility of the Campbell Union High School District.

AUGUST 1, 2017 IEP TEAM MEETING AND ASSESSMENT PLAN

3. When Student returned home from Greenwood for summer break between eighth and ninth grades, Campbell noticed an IEP team meeting for August 1, 2017, to discuss Student's placement, services, and high school transition. At the meeting, Campbell offered an assessment plan that included an academic achievement assessment and a social/emotional assessment. Mother attended the August 1, 2017 IEP team meeting and consented to the assessment plan.

UNILATERAL PLACEMENT AT THE GREENWOOD SCHOOL

4. Campbell commenced the 2017-2018 school year on August 13, 2017. On August 16, 2017, Mother notified Campbell in writing of the decision to unilaterally place Student at Greenwood, and he left for Vermont at the end of August 2017. Student never attended a Campbell Union High School District school.

CAMPBELL'S PSYCHOEDUCATIONAL ASSESSMENT OF STUDENT

Knowledge and Qualifications of Assessor

5. Elizabeth Lee, Campbell's state-credentialed school psychologist, conducted Student's psychological testing for the psychoeducational assessment. She had previously conducted approximately 500 psychoeducational assessments in her seven-year career. Ms. Lee holds a psychology bachelor's degree and school psychology master's degree, and was trained to administer psychological testing. While Student spent a considerable amount of time during hearing and in his closing brief questioning Ms. Lee's qualifications, he conceded that she met the standards to conduct psychoeducational assessments.

6. For Student's assessment, Ms. Lee completed: a records review; interviews; observations; and psychological testing. Ms. Lee did not know or work with Student prior to assessing him.

Observations

7. Ms. Lee observed Student at Campbell during her testing session but did not observe him in any other learning environment, including in any classroom setting. Ms. Lee believed Student was polite and cooperative during testing, tried his best on the assessment materials, and performed tasks to the utmost of his ability. She did not consider any prior classroom observations but asserted at hearing that she relied for her conclusions on team member Theresa Lopopolo's observations at Greenwood during Student's speech and language assessment. Ms. Lee, however, only mentioned Ms. Lopopolo's speech and language assessment once in her report, as a reference for score information and eligibility under speech and language impairment, not in regard to observations. Further, Ms. Lee failed to incorporate or reference Ms. Lopopolo's observations in the psychoeducational report. Thus, the evidence did not show that she relied on Ms. Lopopolo's observations. If she did, she did not mention that reliance in her report. And even if she had, Ms. Lopopolo also failed to observe Student in a classroom setting.

8. Ms. Lopopolo, a Campbell speech and language pathologist with 37 years of experience, observed Student at Greenwood on September 21 and 22, 2017. Greenwood is a small boarding school that specializes in students with learning disabilities with small classroom student to teacher ratios, tutorials, and additional services for speech and language and occupational therapy. Ms. Lopopolo never met or worked before with Student. Prior to arriving at Greenwood, Ms. Lopopolo contacted Ms. Lee, who requested that Student be observed reading, but did not inform her that she would be relying on the observations at Greenwood for Student's

psychoeducational report. Additionally, little communication between Ms. Lee and Ms. Lopopolo occurred regarding what setting was appropriate for a psychoeducational evaluation in order to attain pertinent classroom information regarding academic performance and behavior in areas of difficulty. Before observing Student, Ms. Lopopolo met with him and they agreed to an observation in a reading tutorial. Student attended classes with other students at Greenwood, but he did not want to be observed in a classroom, and Ms. Lopopolo deferred to that desire.

9. On September 21, 2017, Ms. Lopopolo observed Student from a distance for 30 minutes in the lunch room. He was observed to demonstrate appropriate physical proximity in the group, facial expressions and gestures, eye gaze, alternatively speaking and listening, and shifting when speaking.

10. On September 22, 2017, Ms. Lopopolo observed Student in reading tutorial for 45 minutes. Student sat directly across from the teacher and next to the one other student in the room. The session was focused on reading instruction with students alternating turns, and the tutor collecting data. During the phonemic awareness activity, Student worked with three letter word combinations with good success. He then moved on to a letter and sound recognition drill with teacher assistance. Student then undertook phonetically reading three and four letter words which he succeeding in with some effort. Student's final task was word recognition using high frequency words. Ms. Lopopolo observed Student to be engaged, attentive, and hardworking throughout the session.

11. Ms. Lopopolo testified credibly, however, her observations were problematic because a reading tutorial consisting of two students is not a regular classroom setting. Notably, Ms. Lopopolo allowed Student to dictate the observation environment. Without classroom observations of Student's conduct, Campbell failed to collect data on academic classroom performance and social classroom performance. As

a result, Ms. Lee could not reliably describe any classroom observations, and did not include Ms. Lopopolo's observations in her report.

Test Instrument Administration

12. In addition to the interviews and observations, Ms. Lee also conducted the following tests in cognition, processing, and social emotional behavior: (1) Kaufman Brief Intelligence Test, Second Edition (KBIT-2); (2) Cognitive Assessment System, Second Edition (CAS2); (3) Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition (Beery-VMI); (4) Comprehensive Test of Phonological Processing, Second Edition (CTOPP-2); (5) Behavior Assessment System for Children, Third Edition (BASC-3); (6) Piers-Harris Children's Self-Concept Scale, Second Edition (Piers-Harris 2); and (7) Behavior Rating Inventory of Executive Function (BRIEF) and (BRIEF-2). She also considered academic testing performed by Janet Rulifson, an independent academic assessor, that included the Kaufman Test of Educational Achievement, Third Edition (KTEA-3), and academic testing from a previous school assessment, the Wechsler Individual Achievement Test, Third Edition (WIAT-3).

13. Ms. Lee began testing Student in late August 2017, but testing was terminated early by Mother. Student subsequently left the next day for Greenwood. As a result, Ms. Lee distributed the BRIEF and Piers-Harris 2 to Mother to be administered to Student at Greenwood, and performed the remainder of the CTOPP-2 test via Skype.

Piers-Harris 2 Test Instrument

14. Ms. Lee administered to Student the Piers-Harris 2, a scale utilized to assess self-concept in children and adolescents. The areas included in the rating scale were behavior adjustment, intellectual and school status, physical appearance and attributes, freedom from anxiety, popularity, and happiness and satisfaction. He scored in the average and above average ranges on all scales. The report showed that Student's

inconsistency index was in the average range and the response pattern index was in the very high range. Ms. Lee noted that the response pattern index rating was a typographical error, and it should be rated as average. Because Student fell within the total score in the average range, Ms. Lee believed that the error did not invalidate the rating scale. Ms. Lee concluded that Student generally reported typical behaviors and concerns expected of an adolescent male, and there were no reported areas of significant concern.

15. The Piers-Harris 2 protocol is designed to be administered to students that are at least 7-years-old and at least have a second grade reading level. The latest academic testing of Student from 2016 placed him at a first grade reading level and no further updated academic testing was conducted by Campbell. Ms. Lee explained that Mother was given the rating scale for Student to fill out at a later time. The Piers-Harris 2 directions state that student should read the sentences and answer the questions, and Ms. Lee did not ask anyone to read the questions to Student, or inquire as to how the test was administered to him. Because of this, Ms. Lee failed to administer the Piers-Harris 2 according to the manufacturer instructions, which calls into question the reliability of the results.

Brief Test Instrument

16. Ms. Lee utilized the Behavior Rating Inventory of Executive Function, a questionnaire that helps to assess Student's executive functioning skills. Student, Mother, Father, and two of his current teachers at Greenwood completed the BRIEF. Mr. Ramos, a teacher from his previous middle school completed the BRIEF 2. Ms. Lee explained that the manufacturer does not recommend using two different test versions but it does not invalidate the results. She conceded that she did not explain the use of the two different tests, BRIEF and BRIEF 2, in her report.

17. Additionally, Ms. Lee failed to properly administer the BRIEF to Student

and conceded at hearing that she did not follow the publisher's instructions. Because she ran out of time during testing, she also provided the BRIEF self-rating scale to Mother to complete outside of her testing. Ms. Lee testified that she had no personal knowledge of how it was administered but understood that the BRIEF must be read according to the instructions, to students with a reading level lower than fifth grade, such as the case with Student. She assumed that a Greenwood staff member read Student the BRIEF and administered it to him, but she did not confirm this, give instructions, or inquire how Student completed the BRIEF. As a result, Ms. Lee failed to administer the BRIEF according to the publisher's instructions, which calls into question the validity of its results.

CTOPP-2 Test Instrument

18. The CTOPP-2 assesses phonological awareness, phonological memory, and rapid naming. Ms. Lee administered this test partially in person and partially via Skype. The test had three composites. The phonological awareness composite measured Student's awareness of, and access to, the sound structure of oral language, which he performed in the overall low-average range. Phonological memory represents the ability to code information phonologically for temporary storage in working or short-term memory. Student scored in the poor range. Rapid symbolic naming means Student's ability to retrieve phonological information from long-term or permanent memory and execute a sequence of operations quickly and repeatedly. Student scores in the very low range in this composite.

19. Ms. Lee concluded that Student's area of weakness was rapid naming. Secondly, his phonological memory was low. A deficit in one or more of these kinds of phonological processing abilities is indicative of reading difficulties, and Ms. Lee believed Student presented with deficits in reading and writing.

20. Ms. Lee performed an untimed portion of the CTOPP-2 via Skype because

her testing of Student was cut short. Ms. Lee acknowledged that she neither had performed an assessment via Skype before, nor relayed any training in remote testing. She did, however, contact the test manufacturer for guidance because of her unfamiliarity with the situation. An unnamed employee determined it was appropriate to administer the test via Skype, yet Ms. Lee could not recall the date, whom she spoke with, or anything specific about the discussion. Ms. Lee also consulted with colleagues who believed that remote testing was appropriate but did not indicate any names, dates, or details in those consultations.

21. Further, Ms. Lee disclosed that she had no direct knowledge of how Student was listening to the audio, who else was in the room with him, if distractions were present in the room, and if he was accurately able to hear the audio. Moreover, Campbell failed to present any evidence of the CTOPP-2 instruction manual on administering the test.

22. Campbell further submitted two research articles to support its position that remote testing was appropriate. One article, however, was a summary and incomplete, and both articles related to remote testing by speech pathologists who were trained to conduct it remotely, which was not the case with Ms. Lee. Thus, both articles were unpersuasive in this context.

23. Cheryl Ambler, a neuropsychologist, testified at hearing and was qualified as an expert. She contacted colleagues and received four responses declaring it was not appropriate to administer the CTOPP-2 remotely, however, she also failed to give details of her conversations. She additionally opined that using Skype testing skewed the results because the testing instruction manual specifically states that the assessor must be seated next to the Student when administering this test. Dr. Ambler further concluded that Student's test scores in 2017 were significantly lower than in 2016 when she administered the CTOPP-2 test, supporting her conclusion that the remote testing

negatively influenced the scores. Student's CTOPP-2 scores in 2016 were in the average range. Dr. Ambler believes Student does not have a phonological processing deficit as Dr. Lee noted in her report, and the faulty administration contributed to this misinterpretation.

24. Campbell's contention that the CTOPP-2 administration was correct was inadequate. Hearsay evidence cannot be relied upon without corroboration and Campbell submitted no corroborating evidence regarding the appropriate method of administering the CTOPP-2.

Academic Achievement Data and Specific Learning Disability

25. Campbell's assessment plan called for academic testing but unexplainably Campbell failed to complete it. Because of this, Ms. Lee considered previous academic testing from 2015 and 2016 and information in her records review. Ms. Lee reviewed the KTEA-3, administered in June 2016, in order to look for trends in reading, math, and Student's strengths and weaknesses. The assessment results indicated a significant weakness in basic reading skills, reading comprehension, and written expression. Student's grade equivalency for reading comprehension was six months into first grade, which was in the 0.3 percentile. His grade equivalency for reading fluency was one month into first grade, in the 0.1 percentile.

26. Ms. Lee also reviewed the WIAT-III test scores from Student's January 2015 school assessment. The results indicated a weakness in reading, reading comprehension and fluency, as well as writing.

27. Ms. Lee included in the academic achievement portion of her report the 2015 WIAT-III, and 2016 KTEA-3 academic test results, as well as information from Student's records at Greenwood. Ms. Lee testified that the academic test scores were sufficient for her analysis but Dr. Ambler opined that Campbell could not have

conducted an accurate assessment based upon the academic information that it had at the time.

28. Utilizing a records review and academic testing data approximately one to two-years old is not by itself unreliable or inappropriate. Here, however, Student's educational environment drastically changed in eighth grade. In 2016, Student left his local public middle school for Greenwood, described as having intensive academic instruction, small classroom sizes, tutorial sessions, and related services of speech and language and occupational therapy. Prior to entering Greenwood, Student read at a first grade level. Student's performance in Greenwood could have varied from his previous performance. Information regarding Student's progress or lack of progress at Greenwood could have informed the assessor of his current educational needs, and also informed the IEP team of his current present levels of performance in particular areas, and appropriate accommodations and interventions. Ms. Lee concluded that Student presents with significant deficits in reading and writing, but there is no way to know the extent of the current deficits or if there are any improvements, with the information Campbell had at the time. Additionally, Campbell acknowledged the need for updated academic testing as its assessment plan called for it, yet it failed to complete it. The lack of current academic information undermines the accuracy of the assessor's conclusions about Student's current educational needs and casts doubt on the assessor's opinions and recommendations in the report.

29. During hearing, Campbell argued that it used a different method other than the prior academic testing scores in its specific learning disability analysis, including the Greenwood educational records and trends on strengths and weaknesses from its records review. A school district can use a severe discrepancy model or a response-to-intervention model to determine eligibility in the category of specific learning disability. The severe discrepancy model involves a comparison of cognitive and academic testing

results to determine a severe discrepancy, along with an underlying processing issue in order to identify a specific learning disability. With a response-to-intervention model, no cognitive or academic achievement testing is needed. All that is required is documentation that the student is unable to respond to scientific, research-based interventions within the classroom over a reasonable period of time.

30. The psychoeducational report stated that it used the severe discrepancy model to determine specific learning disability eligibility. Ms. Lee recommended that Student continue to be eligible for special education due to a specific learning disability. She based her recommendation on the existence of a severe discrepancy between intellectual ability and academic achievement in the areas of basic reading skills, reading fluency, reading comprehension, and written expression, with processing disorders in auditory and attention, and included the criteria under the California Code of Regulations and the California Education Code. While the report lists Student's academic test scores from prior test instruments in the academic achievement portion of the report, it failed to interpret the results, calculate the severe discrepancy, or explain the significance of the data in recommending eligibility under a specific learning disorder such that the IEP team could rely on it to develop an appropriate IEP.

31. The report also failed to mention the use of any other method, or the analysis of any other records to support its eligibility recommendation. It referenced Student's Greenwood records under the academic achievement portion of the report but did not describe the significance of it or use in determining a specific learning disability under any method. Moreover, the Greenwood educational documents failed to state whether Greenwood's academic program met California curriculum standards and did not include numerical data showing scores or grade levels, only grades. Thus, the Greenwood academic achievement information was inadequate in determining Student's current academic educational needs and whether he qualified for a specific

learning disability under a severe discrepancy model, and no other method was cited. Because there was no data included in its determination of eligibility, it is unclear what information was used and what analysis was undertaken to make the recommendation.

32. Flaws in Campbell's: (1) observations; (2) Piers-Harris 2 and BRIEF administration; (3) failure to prove appropriate CTOPP-2 administration; (4) use of outdated academic information; (5) lack of alternative information or any data used to support its eligibility determination; and (6) a legally non-compliant report, renders Campbell's psychoeducational assessment unreliable.

STUDENT'S PSYCHOEDUCATIONAL ASSESSMENT REPORT COMPLETION AND PRESENTATION

33. Campbell completed Student's psychoeducational assessment, and reviewed the report at Student's IEP team meetings on October 6, 2017. Parents attended the meeting, and Ms. Lee presented the psychoeducational report. Campbell made minor changes to the report based upon the IEP team meeting discussions, and finalized the psychoeducational report on October 9, 2018.

MOTHER'S REQUEST FOR INDEPENDENT EVALUATION AND CAMPBELL'S FILING FOR DUE PROCESS

34. On May 27, 2018, Mother informed Campbell in writing of her disagreement with its psychoeducational assessment and requested an independent educational evaluation at public expense. In response to Mother's request, on June 11, 2018, Campbell sent Mother written notice denying her request for a psychoeducational assessment in all areas except academics, and informing her that it is obligated to initiate litigation to defend its assessment unless she withdraws the complaint. Campbell requested Mother respond within 10 days if she wished to withdraw the complaint.

Because it received no response, Campbell filed a request for due process request on June 27, 2018, 31 days after Mother's request.

LEGAL AUTHORITY AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA¹

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, 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 that are required to assist the child in benefiting from special education. (20 U.S.C. §

¹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis below.

² All references to the Code of Federal Regulations are to the 2006 version.

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

3. In *Board of Education of the Hendrick Hudson Central School Anaheim 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 educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school Anaheim 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's recent decision in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S.____, 137 S.Ct. 988 reaffirmed that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

BURDEN OF PROOF

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].) Campbell filed the complaint, thus, it had the burden of proof on the sole issue presented.

ISSUE: ADEQUACY OF CAMPBELL'S OCTOBER 2017 TRIENNIAL PSYCHOEDUCATIONAL ASSESSMENT

6. Campbell contends that its psychoeducational assessment met all legal requirements. For that reason, it asserts that Student is not entitled to an independent educational evaluation. Student contends that the assessment is not legally compliant because of: errors, inconsistencies, inaccurate analysis and interpretation; failure to use appropriate test measures; failure to follow assessment instructions; lack of classroom observations; use of outdated academic information; failure to use assessment materials in a way that were validated; errors and misinterpretations in the report; and failure to assess in all areas of suspected disability. Accordingly, Student seeks an independent psychoeducational evaluation at public expense.

General Requirements for Assessments

7. A district's failure to conduct appropriate assessments or to assess in all areas of suspected disability constitutes a procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032-1033.) The failure to obtain critical assessment information about a

student, “render[s] the accomplishment of the IDEA’s goals – and the achievement of a FAPE – impossible.” (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1210 quoting *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 894.)

8. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student’s educational needs shall be conducted. (34 C.F.R § 300.301(a); Ed. Code, § 56320.)³ The district must also ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (c), (f).) Thereafter, a special education student must be reassessed at least once every three years, or more frequently if conditions warrant, or if a parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a).) The same basic requirements as for an initial assessment apply to reassessments such as the three-year triennial assessment. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a); Ed. Code, § 56381, subds. (a)(1) & (e).)

9. Reassessment requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain consent, a school district must develop and propose to the parents a reassessment plan and give proper notice to student and parent. (20 U.S.C. § 1414(b)(1); 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment may begin immediately upon receipt of the parent’s consent. (Ed. Code, § 56321, subd. (c)(4).) The assessment must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school

³ An assessment under California law is equivalent to an evaluation under Federal law. (Ed. Code, § 56303.)

vacations in excess of five school days and other specified days. (20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c); Ed. Code, § 56043, subd. (f)(1), 56302.1, subd. (a), and 56344, subd. (a).)

10. 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 subds. (b)& (c)(5); 34 C.F.R. 300.304(c)(1)(iii); Ed. Code, § 56320, subds. (a) & (b).) 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.)

11. IDEA and California state law explicitly require that student's educational rights holder be part of any IEP team meeting which is charged with developing and implementing a student's IEP. (20 U.S.C. §§1401(14), 1414(d)(1)(B)(i); Ed. Code, § 56342.5.) Special education law places a premium on parental participation in the IEP process. School districts must guarantee that parents have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such

child.” (20 U.S.C. § 1415(b)(1).) The United States Supreme Court has recognized that parental participation in the special education process is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904].) Additionally, California law requires that the assessment report must be provided to the parent at the IEP team meeting regarding the assessment to allow for discussion and explanation. (Ed. Code, § 56329, subd. (a)(1).)

12. Under certain conditions, a parent is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code § 56506, subd. (c) [parent has the right to an individualized education program 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 individualized education program.] “Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

13. 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 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].)

CAMPBELL FAILED TO OBSERVE STUDENT IN A REGULAR CLASSROOM

14. A district must ensure that the child is observed in his learning environment, including a regular classroom setting, to document his academic performance and behavior in the areas of difficulty. (34 C.F.R. § 300.310(a).) Under California law, an assessment report must describe "relevant behavior noted during the observation of the pupil in an appropriate setting." (Ed. Code, § 56327, subd. (c).)

15. Campbell's observations failed to reliably report on Student's academic performance and behavior and did not note any classroom observations in its report. Classroom observations are a necessary component for an assessment, and in particular for a specific learning disability analysis. It documents actual performance on various classroom tasks in order to determine Student's current educational needs for accurate recommendations for eligibility, accommodations, and interventions to the IEP team. Campbell's failure to observe Student in a regular classroom and address it in its report constitutes procedural violations. Because of the lack of classroom observations and report of classroom observations, the psychoeducational assessment failed to generate required information and significantly impeded Parents' opportunity to participate in the decision-making process at the IEP team meeting because it deprived them of adequate information about Student's classroom performance and behavior.

CAMPBELL DID NOT PROPERLY ADMINISTER TEST INSTRUMENTS AND FAILED TO MEET ITS BURDEN OF PROVING THAT ONE TEST INSTRUMENT WAS PROPERLY ADMINISTERED

16 Error by the assessor in the administration of test instruments renders the results invalid. The reliability of the results from a standardized test instrument is dependent on the assessor's following the test manual. Campbell failed to administer the Piers-Harris 2 and BRIEF in compliance with the publishers' instructions, and it failed to meet its burden of showing that the CTOPP-2 administration conformed to the instructions. These errors constituted procedural violations. These violations had serious

consequences; they rendered the test results unreliable and deprived Parent and the rest of the IEP team of adequate information on which to base an IEP.

Assessment Requirements for Specific Learning Disability

17. A specific learning disability is a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities. (34 C.R.F. § 300.8(c)(10); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030(b)(10).) The basic psychological processes include attention, visual processing, auditory processing, phonological processing, sensory-motor skills, and cognitive abilities including association, conceptualization, and expression. (Cal. Code Regs., tit. 5, § 3030(b)(10).)

18. In California, a student is eligible for special education in the category of specific learning disability if, among other things, he exhibits a severe discrepancy between intellectual ability and achievement in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning. (Cal. Code Regs., tit. 5, § 3030(b)(10)(B).) A severe discrepancy exists if, on standardized tests, a student's scores show a standard deviation of 1.5 or more between ability and achievement according to a complex mathematical formula set forth by regulation.⁴ (*Ibid.*) Campbell used the severed discrepancy mode as specified in its report.

19. The determination of whether a student suspected of having a specific

⁴ A school district is not required to use the severe discrepancy model to determine eligibility in the category of specific learning disability; it may use "response to intervention" instead. (Ed. Code, § 56337, subds. (b), (c).)

learning disability is a child with a disability must be made by the student's parents and a team of qualified professionals including the child's teacher and at least one individual qualified to conduct assessments. (34 C.F.R. § 300.308.) The student must be observed in his learning environment to document the student's academic performance and behavior in his areas of difficulty, including in the regular classroom setting. (34 C.F.R. § 300.310(a); Ed. Code § 56341, subd. (c).) In determining whether a student has a specific learning disability, the team must decide to use past classroom observation data or have one team member conduct an observation of the Student's academic classroom performance after the child has been referred for assessment. (34 C.F.R. § 300.310(b).)

CAMPBELL FAILED TO MEET THE REQUIREMENTS FOR SPECIFIC LEARNING DISABILITY WHEN IT FAILED TO OBSERVE STUDENT IN THE CLASSROOM

20. As already determined, Campbell failed to conduct a regular classroom observation and did not use prior regular classroom observations, thus violating the specific requirements for specific learning disability determination, constituting a procedural violation.

CAMPBELL'S USE OF OUTDATED ACADEMIC DATA INVALIDATED THE SPECIFIC LEARNING DISABILITY RECOMMENDATION

21. Further, Campbell failed to establish that the academic testing used was current in order to ensure that the severe discrepancy analysis was accurate. The lack of current academic information undermined the accuracy of the assessor's knowledge of Student's current educational needs. Without accurate current results, Parents could not fully participate at the IEP team meeting and advocate for appropriate placement, programming, interventions, and accommodations.

22. Campbell also failed to show that it utilized any other method in determining specific learning disability eligibility without the use of prior academic test scores. The psychoeducational report is bereft of any explanation of an alternative

method used for eligibility. Thus, Campbell failed to meet its burden that it complied with the requirements for specific learning disability determination.

Assessment Report Requirements

23. Upon completion of an assessment, the district shall provide parents with a copy of the evaluation report and the documentation of determination of eligibility. (20 U.S.C. § 1414(b)(4)(B); 34 C.F.R. § 300.306(a)(2); Ed. Code, § 56329, subd. (a)(3).) The written report includes: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health, development, and medical findings, if any; (6) for students with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services; and (7) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage. (Ed. Code, § 56327, subds. (a), (b).)

THE PSYCHOEDUCATIONAL REPORT FAILED TO MEET LEGAL REQUIREMENTS

24. The assessment report failed to contain all of those components. It did not contain observations of Student in a regular classroom setting and the relationship of that behavior to student's academic and social functioning. Further, the report failed to include any supported basis for the specific learning disability determination because Campbell failed to explain, analyze, or utilize any data or test scores in its severe discrepancy analysis, making it unclear how eligibility was determined. These procedural violations deprived Parents and the IEP team of information as to Student's current educational needs and what he requires in order to make appropriate progress in light of his unique circumstances.

25. The psychoeducational report as a whole was insufficient to provide the IEP team adequate assessment information upon which to develop an appropriate program for Student. The underlying data was not reliable due to inappropriately administered tests, lack of appropriate observations, and outdated academic information. Further, the report contained no required observations data and the eligibility determination was not explained with any support. Campbell's psychoeducational assessment was therefore inappropriate because it did not comply in consequential ways with governing law.

26. Student also contends that Campbell: (1) failed to assess in all areas of suspected disability; (2) failed to use the appropriate assessment tools tailored to assess specific areas of educational need; (3) failed to show that the assessment tools were not discriminatory, provided in a language and form most likely to yield accurate information, and used for the purposes for which the assessments are valid and reliable; (4) misinterpreted testing results; and (5) had errors and misinterpretations in the psychoeducational report. Because of the conclusion reached here, it is unnecessary to decide those issues.

ORDER

1. Campbell is obligated to fund an independent educational evaluation at public expense in the area of psychoeducation. Campbell shall contract with a qualified assessor of Parent's choice who meets the Special Education Local Plan Area guidelines for psychoeducational assessments.

2. The independent assessor shall provide the report directly to Parent. If Parent wishes for Campbell to consider the results of the independent evaluation at an IEP team meeting, they will notify Campbell and provide them with the report. Campbell will convene an IEP team meeting no later than 30 days after receipt of the report.

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. Student prevailed on the sole issue decided.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: October 30, 2018

/s/

CYNTHIA FRITZ,

Administrative Law Judge

Office of Administrative Hearings