

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021010198
CASE NO. 2021020316

THE CONSOLIDATED MATTERS INVOLVING

PARENTS ON BEHALF OF STUDENT, AND

GUADALUPE UNION SCHOOL DISTRICT.

DECISION

APRIL 19, 2021

On January 8, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming the Guadalupe Union School District. On February 8, 2021, OAH received a due process hearing request from Guadalupe Union, naming Parents on behalf of Student. Administrative Law Judge Charles Marson heard this matter on March 2, 3, 4 and 5, 2021, by videoconference.

Andrea M. Marcus, Attorney at Law, represented Student. Student's Mother attended all hearing days on Student's behalf. Jennifer N. Baldassari, Attorney at Law, represented the Guadalupe Union School District. Nathan M. Moreno, Guadalupe

Union's Director of Special Education, attended all hearing days on Guadalupe Union's behalf.

At the parties' request the matter was continued to March 29, 2021, for written closing briefs. The record was closed and the matter was submitted on March 29, 2021.

ISSUES

STUDENT'S ISSUES

Did Guadalupe Union deny Student a free appropriate public education from June 12, 2020, to January 8, 2021, by:

1. Lying to Parents and thereby preventing them from meaningfully participating in decisions concerning Student's educational program by:
 - a. Falsely claiming that Parents had not provided results of Gilliam Autism Rating Scales and Emotional Disturbance Decision Tree questionnaires in time to be included in the triennial assessment in fall 2020;
 - b. Falsely describing in a letter of December 14, 2020, what had happened at an individualized education program, called an IEP, team meeting on October 7, 2020; and
 - c. Falsely claiming that Parents prevented Guadalupe Union from offering or implementing special education services in its October 7, 2020 IEP document, by not signing it that day, as the District did not offer the family an IEP to sign until December 14, 2020;
2. Failing to make a timely annual IEP offer by October 7, 2020; and

3. Failing to provide certain translated IEP documents for the October 7, November 10 and December 1, 2020 IEP team meetings, and by providing inconsistent and inadequate translation services at the November 10, 2020 IEP team meeting?

GUADALUPE UNION'S ISSUE:

Was Guadalupe Union's October 7, 2020 multidisciplinary triennial assessment appropriate, so that Parents are not entitled to an independent educational evaluation at the District's expense?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, referred to as the IDEA, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are to ensure:

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

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, assessment, 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 (2006); Ed. Code,

§ 56501, 56502, and 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii).) In these consolidated matters Student had the burden of proving the claims in his complaint, and Guadalupe Union had the burden of proving the claim in its complaint. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 14 years old and in the eighth grade at the time of hearing. He resided within Guadalupe Union's geographic boundaries at all relevant times. Student was eligible for special education under the categories of other health impaired and specific learning disability.

STUDENT'S ISSUE NO. 1: DID GUADALUPE UNION DENY STUDENT A FAPE FROM JUNE 12, 2020, TO JANUARY 8, 2021, BY LYING TO PARENTS IN THREE RESPECTS AND THEREBY PREVENTING THEM FROM MEANINGFULLY PARTICIPATING IN DECISIONS CONCERNING STUDENTS' EDUCATIONAL PROGRAM?

Student contends that during the IEP process in fall 2020, Guadalupe Union made three false statements which, taken together, denied Parents meaningful participation in the IEP process. Student claims that Guadalupe Union falsely stated that Parents did not return rating scales in time for the triennial assessment, falsely described events as taking place at an October 7, 2020 IEP team meeting that actually took place later, and

falsely claimed that Parents prevented the District from offering or implementing services in its October 7, 2020 IEP by refusing to agree with the offer made at that meeting.

Guadalupe Union contends that its statement about the return of rating scales was accurate and the other two statements were mere errors that Parents understood were incorrect. It also contends that, even if incorrect, the three statements did not prevent Parents from participating meaningfully in the IEP process.

For clarity, Guadalupe Union's computer-generated IEP form first bore the date October 7, 2020, which was the date Student's annual review was due, or close to it. Student's IEP was actually developed over a series of three meetings on October 23, November 10, and December 1, 2020. The IEP will be referred to in this Decision as the December 1 IEP, and all dates referenced from August through December were in 2020.

The informed involvement of parents is central to the IEP process. (*Winkelman v. Parma City Sch. Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904].) Protection of parental participation is among the most important procedural safeguards in the IDEA. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) Federal and State law therefore require that parents of a child with a disability be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (34 C.F.R. § 300.501(c)(1)(2006); Ed. Code, § 56342.5.)

Many requirements of the IDEA and related laws are focused on ensuring that parents have sufficient information to participate in making informed decisions about their child's educational program, and adequate opportunities to communicate their views. Parents must be given an opportunity to examine virtually all the school district's records concerning their child. (20 U.S.C. 1415(d)(2)(D); Ed. Code, sec. 56504.) Concealment of information essential to the decision-making process will likely be held to deny the student a FAPE. (See *Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 881-882.) If parents disagree with a district assessment, they may request an independent educational evaluation of their child. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(a)(1) (2006); Ed. Code, §§ 56329, subd.(b), 56506, subd. (c).)

Parents must be notified in writing of the procedural safeguards available to them under the IDEA (20 U.S.C. § 1415(d)(1)(a)), and must be given written prior notice of any changes to an IEP. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a) (2006); Ed. Code, § 56500.4.) If a district offers an IEP, parents must be given a clear written offer that they can understand. (*Union School Dist. v. Smith* (1994) 15 F.3d 1519, 1526.) The district must obtain the parents' informed consent to a proposed evaluation or educational program, which requires fully informing parents of all information relevant to the activity for which consent is sought. (20 U.S.C. § 1414(a)(1)(d)(i); 34 C.F.R. § 300.9(a)(2008); Ed. Code, § 56021.1, subd. (a).)

A parent participates meaningfully in the IEP process when she is informed of her child's problems, has an opportunity to discuss a proposed IEP and offer changes in it, is able to express her disagreement with it, and has her concerns considered by the IEP team. (*N.L. v. Knox City Schools* (6th Cir. 2003) 315 F.3d 688, 693-695.)

The IDEA contains many guarantees of informed parental participation, and a false statement could be a procedural violation of that mandate in some circumstances. However, a procedural violation of the IDEA does not deny a student a FAPE unless it impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (j).)

ISSUE 1A: DID GUADALUPE UNION FALSELY CLAIM THAT PARENTS HAD NOT PROVIDED RESULTS OF GARS AND EDDT QUESTIONNAIRES IN TIME TO BE INCLUDED IN THE TRIENNIAL ASSESSMENT IN FALL 2020?

The disputed statement about the return of rating scales arose from the triennial assessment Guadalupe Union conducted in preparation for Student's annual IEP team meeting. The review of the assessments took place over three parts of the annual meeting, on October 23, November 10, and December 1, and was preceded by a multidisciplinary assessment report.

Student had been receiving special education and related services from Guadalupe Union for several years. The annual review of his IEP was due on October 7 or 9, though the record does not clearly show which date governed. Student's IEP was also due for a three-year review at the annual meeting. Normally Guadalupe Union would have begun the triennial assessments in the late spring or summer of 2020, but the COVID-19 pandemic and the consequent closure of schools caused many delays. Over the summer, Guadalupe Union's assessors discussed how assessments could be conducted under pandemic conditions, and decided that assessments in person, when possible, would be preferable to assessments online.

Guadalupe Union sent an assessment plan to Parents on August 25, which Parents signed and returned on September 3. On September 14, Mother received an envelope containing rating scales for various assessment measures. She completed the scales, and returned them, or most of them, by September 21. Soon after, she received a call from Guadalupe Union saying one scale was missing, which might have been the scale from the Gilliam Autism Rating Scale – 3d edition, which is called the GARS. The District provided another GARS rating scale. Mother filled that out and testified she thought she returned it, as well as her rating scales from the Emotional Disturbance Decision Tree, called the EDDT, on September 28. Her rating scales are dated that day.

School psychologist Kendall Andrechek conducted the psychoeducational assessment as part of Student's triennial review, and administered several formal measures including the GARS and the EDDT. She concluded her assessment report before receiving Mother's GARS or EDDT scales. As a result, Andrechek wrote in her psychoeducational assessment report that the scales were not available to her when writing her report.

The evidence did not show with any clarity when Mother returned the rating scales to the District. She thought it was on September 28. Andrechek testified that Mother did not return the scales until October 2, a Friday. She remembered receiving a message from Moreno's office saying that Mother had dropped off the scales there, but there was no evidence that the message immediately followed Mother's visit. Whether Mother actually delivered the rating scales on October 2, or whether she delivered them earlier and they languished in Moreno's office, cannot be determined on this record.

Andrechek obtained the rating scales on Monday, October 5, after Director Moreno sent the entire multidisciplinary assessment report out for translation into

Spanish on October 1. Andrechek's statement in her assessment report that Mother's GARS and EDDT responses were unavailable when she wrote her report were therefore true from Andrechek's point of view, though perhaps not from Mother's. The ratings may or may not have been available to the District in time for use in the report, but they were not available to Andrechek, who wrote the report and made the disputed statement. Andrechek's statement meant that the responses were unavailable to her personally for the purpose of writing her assessment, and that was true.

Andrechek's tardy receipt of Mother's GARS and EDDT rating scales did not disadvantage Mother or Student. As soon as Andrechek received Mother's completed scales, she scored them and analyzed them in a separate document. Mother's scale responses were fully considered at the October 23, 2020 meeting according to Andrechek, and at the November or December meeting according to Mother. In any event they were fully considered by the IEP team in evaluating Andrechek's assessment at one of the three sessions during which Student's IEP was developed. In addition, Mother's GARS and EDDT ratings were remarkably consistent with the rating scales of others and with the overall conclusions of Andrechek's assessment report, and their presence or absence in the original assessment report made no difference in Andrechek's analysis or the decisions of the IEP team.

So even if Andrechek's statement in her original assessment report was incorrect, that did not deny Student a FAPE. The statement in the assessment report did not impede Student's right to a FAPE, did not significantly impede Mother's opportunity to participate in the decisionmaking process, and did not cause a deprivation of educational benefits.

ISSUE 1B: DID GUADALUPE UNION FALSELY DESCRIBE IN A LETTER OF DECEMBER 14, 2020, WHAT HAD HAPPENED AT AN OCTOBER 7, 2020 IEP TEAM MEETING?

The IEP offer was not finalized until December 1, the last of the three sessions of the annual meeting. Guadalupe Union sent Parents an English version of the final offer on December 8, and a Spanish translation of it on December 14. Director Moreno also sent Parents a prior written notice on December 14, informing them that Guadalupe Union could not implement the IEP offer until they signed it.

Moreno made a significant mistake in drafting the prior written notice. Instead of referring to the IEP throughout the notice as the IEP of October 23, November 10 and December 1, he repeatedly referred to it as the IEP of October 7, which is how the District's software had first printed it out. The effect of this mistake was to misrepresent the history of the triennial IEP. For example, the notice stated that on October 7, the IEP team, including Parents, considered the assessments, current performance levels, goals and services for Student, and designed an educational program for him.

In fact, there was no meeting on October 7, and the assessments, current performance levels, goals, services and program were developed through all three sessions of the IEP team meeting, on October 23, November 10, and December 1. If Moreno had used all three of those dates together in the notice when referring to the IEP offer, the notice would have been generally accurate. By misstating the date, the notice erroneously portrayed the development of the IEP as occurring entirely on October 7. Moreno admitted the mistake at hearing.

Guadalupe Union did not finalize the FAPE offer until December 1 and Parents did not receive a Spanish version of it until December 14. Therefore, the statement in the letter of December 14, 2020 that Parent's had declined to sign the IEP on October 7 or later was also inaccurate.

Student argues that the erroneous December 14 notice proved Moreno was engaged in an effort to pretend that the IEP offer was timely, that he had back-dated documents for that purpose, and that he testified falsely at hearing in an effort to misrepresent the chronology of the annual IEP process. No evidence supported any of these claims. There were no back-dated documents. Aside from the errors in the notice of December 14, there was no evidence of a scheme to misrepresent the timing of the IEP process. As Moreno knew, the process of organizing and conducting the three IEP team meetings produced extensive paper and digital trails. It also involved more than a dozen eyewitnesses who attended the meetings, including Mother, Father, a representative of Student's attorney, and an outside evaluator. Any attempt to cover up or misdescribe such a process in anticipation of a legal proceeding would have required massive effort, would almost surely have failed, and would certainly have required misrepresentations in more than a single document.

In perceiving the existence of a scheme, Student overlooks the fact that in the same email in which Moreno sent the controversial December 14 notice to Mother, he also sent her a translated version of the final IEP offer, which set forth the timing of the three meetings of the annual process accurately and in detail. It is not plausible that Moreno would have attempted a deception in the December 14 notice and also sent a complete refutation of that deception in the same email. The only reasonable interpretation of the evidence was that Moreno made an error in drafting the December 14 notice.

Moreno's erroneous statements in the December 14 notice about the timing of the three-meeting IEP process were unfortunate, but they did not mislead Parents or anyone else. Parents were fully involved in the triennial assessment review and the IEP process and knew from personal experience what had occurred and when it had occurred. Mother knew when she returned the GARS and EDDT rating scales and that she did so in time for their use in the assessment report. Parents participated in each step of the review of Student's educational program and knew when those steps were taken. Guadalupe Union did not deny Student a FAPE by sending Mother the mistaken notice about the timing of the process.

ISSUE 1C: DID GUADALUPE UNION FALSELY CLAIM THAT PARENTS HAD PREVENTED GUADALUPE UNION FROM IMPLEMENTING THE OCTOBER 7, 2020 IEP BY NOT SIGNING IT THAT DAY, AS THE DISTRICT DID NOT OFFER THE FAMILY AN IEP TO SIGN UNTIL DECEMBER 14, 2020?

Student contends that the mistaken notice destroyed Parents' trust in the District so completely that they were effectively excluded from meaningful participation in the IEP process. Mother was understandably angered by the false statements in the notice. She interpreted the notice as stating that it was her fault that the District has been unable to provide the offered services for her son because she had ignored Guadalupe Union's FAPE offer. She saw the notice as an attempt to cast undeserved blame on Parents. She characterized the notice as a bold lie.

However, Mother was a determined participant in the IEP process despite the arguably false statement in the assessment report about the receipt of the rating scales. The evidence showed that after receiving Andrechek's assessment report in Spanish,

Mother continued to participate fully in the IEP process, including discussions about her GARS and EDDT responses. She was actively engaged in three IEP team meetings after receiving Andrechek's assessment report, so no inaccurate statement in the assessment report prevented her participation in decisions concerning her son. Mother did not receive the December 14 letter until after completion of three IEP team meetings and after the IEP offer was finalized. The only evidence concerning the effect of the letter's error was Mother's testimony that the notice angered her, and that she did not approach Moreno about the notice because she did not think it would be helpful.

There was no evidence that Parents repudiated the entire cooperative process after receiving the December 14 prior written notice. Communications between Mother and Moreno continued. Moreno tried to arrange another IEP team meeting to discuss Parents' concerns, and on December 16, Mother sent Moreno a polite email inquiring why such a meeting would be necessary in light of the fact that the triennial process was over, the District was waiting for Parents' signatures, and Parents had just received the translated offer. A few weeks later, on January 8, 2021, this request for due process was filed and communications between Mother and Moreno ceased.

Parents participated meaningfully in the entire triennial assessment review and IEP process. Mother received Spanish versions of a draft IEP, draft goals and progress reports, and the triennial assessment report well before the first meeting. She attended all three sessions of the review, and Father attended the December session. All required personnel were at the meeting, which typically involved 14 or 15 people including several teachers. During the three-part meeting, Guadalupe Union staff explained the assessments and discussed with Mother the proposed goals and services in the draft document. Mother asked many questions, almost all of which were answered by District team members. Parents were able, particularly in the December meeting, to explain

fully why they thought it was essential that Student have autism as his primary eligibility classification to receive adequate services. Guadalupe Union's unwillingness to change the order of Student's eligibility categories does not establish that it significantly impeded Parent's opportunity to participate in the decisionmaking process.

For these reasons, Student did not prove that Guadalupe Union denied him a FAPE by making any or all of the three statements described in Issue 1. The statements did not mislead Parents, who were aware of and participants in the events the statements addressed. There was no proof that the statements destroyed the relationship between the parties so that Parents could no longer cooperate with the Guadalupe Union in the IEP process, and Parents did actively participate in developing Student's IEP. The statements, though erroneously made, did not prevent Parents from participating meaningfully in the IEP process, and did not deny Student a FAPE.

STUDENT'S ISSUE NO. 2: DID GUADALUPE UNION DENY STUDENT A FAPE FROM MAY 12, 2020, TO JANUARY 8, 2021, BY FAILING TO MAKE A TIMELY ANNUAL IEP OFFER BY OCTOBER 7, 2020?

Student contends that Guadalupe Union denied him a FAPE by its delay in creating and offering the annual IEP. The offer was not finalized and offered to Parents in Spanish until December 14. Student argues that the annual IEP offer was due by October 7, while Guadalupe Union argues it was due by October 9, and the record does not clearly resolve that difference. The difference had no practical consequence because the meeting did not conclude until December 1.

Guadalupe Union argues that it was not late in holding the annual meeting because Mother requested that it be postponed. In the alternative, Guadalupe Union

admits that the annual offer was made late, after the October 7 or 9 statutory deadline, but argues that its procedural violation had no significant consequence for Student or Parent.

A district must review a student's IEP not less than annually, to determine whether the child's annual goals are being achieved, and revise the IEP as appropriate. (20 U.S.C. § 1414(d)(4)(A); 34 C.F.R. § 300.324(b)(2017); Ed. Code, §§ 56043, subd. (d); 56341.1, subd. (d).) A district must also reevaluate a student at least once every three years unless the district and parents agree it would be unnecessary. (20 U.S.C. § 1415(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2) (2006); Ed. Code, §§ 56034, sub. (k); 56381, subd. (a)(2).)

Guadalupe Union originally scheduled the annual meeting for October 7, but Moreno informed Mother that the translation of the multidisciplinary assessment report would not be completed by then. He asked Mother to choose between having an interpreter read the whole document to her in Spanish at an October 7 meeting, or postponing the meeting. She chose the latter, and the first part of the meeting was held on October 23.

Moreno's proposal to have the English-language version of the report read by a Spanish interpreter at an October 7 IEP team meeting was not practical. The multidisciplinary assessment report was 34 pages long, highly technical and statistical, and contained four separate assessments. Mother could not have adequately absorbed it just by listening to an interpreter, rather than also having a copy available at the same time, as English-speaking parents do. At hearing she testified it was important to her to have the translated assessment report so that she could compare what she was hearing at the meeting with what was written in the report. Mother was therefore required by

circumstances to request a later meeting so she could have the translated report, and the tardiness of the annual meeting cannot be attributed to her.

The more obvious cause of the District's lateness was the fact that it did not begin the process by sending Parents an assessment plan until August 25. Parents timely returned it on September 3, leaving just over a month for four assessments, the writing of the multidisciplinary assessment report, and then the translation of that report, if the assessments were to be discussed on October 7.

However, the District argues persuasively that the difference between an offer on October 7 and an offer on December 14 had no practical effect in this case, because Parents and the District fundamentally disagreed on the proper eligibility category for Student, and would not have agreed on an IEP in October, November, December or later. Parents did not agree to the annual IEP offer between December 14 and the hearing, and would not have agreed to it at any time unless it made autism Student's primary eligibility category.

This case is therefore quite like *MM v. School Dist. of Greenville Cty.* (4th Cir. 2002) 303 F.3d 523. There the district had failed to complete an IEP offer, but that procedural violation was held harmless because parents would not have signed any IEP the district would have offered. Throughout the IEP process, Parents had unsuccessfully insisted on an IEP in which the district would reimburse them for a Lovaas autism program. The violation was held harmless because "[T]here is no evidence that [the student's] parents would have accepted any FAPE offered by the District that did not include reimbursement for the Lovaas program." (*Id.* at p. 535; see *T.B. v. Prince George's Cty. Bd. of Educ.* (4th Cir. 2018) 897 F.3d 566, 573-578 (failure to conduct timely evaluation harmless because student would not have attended school in any

event); *Doug C. v. Hawaii Dep't of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1046 ("delays in meeting IEP deadlines do not deny a student a FAPE where they do not deprive a student of any educational benefit," citing *A.M. v. Monrovia* (9th Cir. 2010) 627 F.3d 773, 779; *J.D. v. East Side Union High Sch. Dist.* (N.D. Cal., January 26, 2021, No. 19-cv-04825-BLF) 2021 WL 254263, p. 7 (five month delay in holding triennial review harmless); *Hack v. Deer Valley Unified Sch. Dist.* (D.Ariz., July 14, 2017, No. CV-15-02255-PHX-JJT) 2017 WL 2991970, pp. 3-5 (delay in convening parent-requested IEP team meeting harmless).)

In addition, the lengthy three-meeting process encouraged and facilitated parental involvement. The discussions were full and detailed. The need for Spanish language interpretation slowed the meetings considerably but ensured Parents' understanding. Mother requested the presence of an outside evaluator who was on maternity leave and could not attend before the December 1 meeting, which the evaluator did attend. The District's decision to be thorough rather than timely benefited both Parents and the District, and avoided an attempt to accomplish everything in a single meeting. The Ninth Circuit has emphasized that if a District is faced with the choice of having a timely IEP team meeting or fully fostering parental participation, it should choose the latter. (*Doug C., supra*, 720 F.3d at pp. 1046-1047.) That is what the District did.

For these reasons, Student proved that Guadalupe Union committed a procedural violation of the IDEA by failing to convene an IEP team and make an annual IEP offer within a year of the previous annual offer. However, Student did not prove that the violation impeded his right to a FAPE, significantly impeded Parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE to Student, or caused a deprivation of educational benefits. He therefore did not prove that Guadalupe Union's procedural violation denied him a FAPE.

STUDENT'S ISSUE NO. 3: DID GUADALUPE UNION DENY STUDENT A FAPE, FROM MAY 12, 2020, TO JANUARY 8, 2021, BY FAILING TO PROVIDE CERTAIN TRANSLATED IEP DOCUMENTS FOR THE OCTOBER 23, NOVEMBER 10 AND DECEMBER 1, 2020 IEP TEAM MEETINGS, AND BY PROVIDING INCONSISTENT AND INADEQUATE TRANSLATION SERVICES AT THE NOVEMBER 10, 2020 IEP TEAM MEETING?

Student contends that Guadalupe Union failed to provide to Parents a Spanish translation of the multidisciplinary assessment report, and that Parents, who were monolingual in Spanish, could not understand the triennial assessment report and IEP proceedings without that translated document. Student no longer makes that claim concerning any document other than the assessment report. Guadalupe Union contends that it timely provided all necessary translated documents to Parents, including the assessment report.

GUADALUPE UNION TIMELY PROVIDED TRANSLATED DOCUMENTS

A district must take whatever action is necessary to ensure that parents understand the proceedings of the IEP team, including arranging for an interpreter for parents whose native language is other than English. (34 C.F.R. § 300.322(e)(2018); see also Ed. Code, §§ 56021.1, subd (a); 56506, subd. (a).)

The evidence showed that Mother received Spanish translations of a draft IEP, draft goals and draft progress reports well before the October 23 IEP team meeting. These facts were confirmed at hearing by testimony and copies of emails and are no longer disputed. Before the November 10, 2020, meeting Mother requested another copy of the translated draft IEP, and the District sent it again.

The parties dispute whether Mother ever received a Spanish-language version of the multidisciplinary assessment report. Mother testified that she did not receive a translated copy of the report until January 2021. She also testified that she did not have the translated report at the November 10 meeting and after that meeting, she asked for it so that she could have it for the December meeting but did not get it.

However, Guadalupe Union introduced persuasive evidence that Mother received the translated triennial assessment report on October 14, well before the first of the three sessions of the IEP team meeting. Director Moreno remembered that he sent it out for translation on October 1, and that the translated version arrived back in his office on October 13. The next day an IEP team meeting was scheduled for Student's brother, and Moreno handed Mother the triennial report concerning Student at that meeting.

Moreno's testimony was corroborated by Sylvia Adame, Moreno's administrative assistant. Adame was a 20-year veteran of the District and fluent in Spanish. She had a certificate from a local community group reflecting that after a 40-hour training she was a Professionally Trained Level II Interpreter. Adame routinely translated IEP's, assessment reports and other English documents into Spanish for parents, and was the interpreter at Student's October 23 IEP team meeting. She also translated email between Moreno and Mother, and helped school psychologist Andrechek with her assessment of Student.

Adame was an impressive witness. Her memory was excellent, she testified thoughtfully and carefully, and she was thoroughly familiar with Mother, Student, the assessment report, and all aspects of Student's situation. Nothing that she said was undermined by cross-examination. Since Adame was a credible witness, her testimony is given significant weight here.

Adame established that the translated version of Student's triennial assessment report arrived in her office on October 13. She remembered Moreno saying that day that he was going to give it to Mother the next day at an IEP team meeting for Student's brother. The next day Adame saw Moreno enter that meeting with a sheaf of paper, and assumed he would give Mother the translated report at that time. Her testimony strongly corroborated Moreno's testimony that he handed Mother the translated triennial assessment report on October 14.

Mother was specifically asked at hearing whether Moreno handed her Student's translated assessment report at the brother's meeting on October 14. She responded that she did not recall whether he had or not. This significantly weakened her earlier testimony that she did not receive it until January 2021.

The record does not show any clear complaint by Mother that she had never received the translated assessment report. The notes from the October 23 meeting show that Parent asked for a copy of the report, and Mr. Moreno stated that the report was translated and given to the parent prior to the meeting. According to Moreno and other District staff who attended the meeting, Moreno then shared the Spanish version of the report on his screen so the discussion could continue.

Moreno remembered Mother stating at the October 23 meeting that she did not have a translated copy of the assessment report "with her that she could find." That language more likely reflects that she had the translated report at an earlier point in time but did not have it available at the meeting.

On November 6, in preparation for the second session of the triennial meeting on November 10, Mother sent an email to Moreno making requests for a certified independent interpreter for the November 10 meeting, and for a draft IEP, although

Moreno had sent her one in Spanish on October 6. This email suggests that she may have forgotten or mislaid documents she previously received. Notably, this email did not include any protest that she never received a translated version of the assessment report.

Mother was a diligent participant in the IEP process and sent numerous emails about it before and between meetings. When she learned that the originally scheduled October 7 meeting would occur before the translated assessment report would be received, she asked that the meeting be postponed until she had it. It is unlikely that she would have that degree of concern about the document in early October, but not mention in any later email that she never received it and proceed with three IEP team meetings without it. It is also unlikely that Guadalupe Union, having postponed the scheduled October 7 meeting because the assessment report had not yet been translated, would proceed with the next three meeting sessions without it.

At the November 10 IEP team meeting, Mother once again seemed not to have the translated triennial assessment report with her and requested it. According to the meeting notes, the District confirmed that the report had been sent several weeks before. Again, Moreno shared on his screen the portions of the report, in Spanish, that were being discussed.

Edwin Roque, Student's special day class teacher, attended the November 10 meeting. At hearing he remembered that when a particular reference was made to the translated report, someone gave Mother a page number so she could put it on her screen, and she couldn't "find" it. He also remembered that at one point Mother referred to a specific part of the assessment report. When someone asked her for a

page number, she stated she did not remember where the document was and asked to see another copy.

These exchanges suggest that Mother did not have her translated copy with her, not that she never received it. Nothing in the email exchanges or meeting notes shows a clear complaint by Mother that she never got the translated report.

Mother was a truthful witness and believed what she said. However, she frequently testified inconsistently, demonstrating confusion and poor recall. For example, at one point she stated she had difficulty understanding the interpretation at the October 23 meeting, and at another point stated that she did not. At another point she testified that no one ever gave her any documents about Student by hand after June 2020, and later that someone did.

It was apparent at hearing that Mother's memory was not always accurate. There were many things she did not remember. Among the most important were whether Moreno handed her a translated assessment report on October 14, whether Student's eligibility for special education in the category of autism was discussed at any of the three meetings, whether her attorney's paralegal attended one of the IEP team meetings, and whether the entire multidisciplinary assessment was reviewed at any of the IEP team meetings.

Moreno's memory of handing the translated report to Mother was specific, and was largely corroborated by Adame, and by statements Moreno made in the first two IEP team meetings that Mother had previously received the translated report. Mother did not remember whether she received it on October 14. Her general statement that she did not receive it until January 2021 was undermined by her inconsistent and forgetful testimony. The preponderance of evidence showed that Moreno handed

Mother the Spanish translation of the triennial multidisciplinary assessment report on October 14, well before the October 23 meeting.

Student contends that both Moreno and Adame testified falsely in stating that Moreno handed Mother the translated report on October 14. This claim rests on two baseless arguments. First, at hearing Student offered to prove with recordings that although Moreno testified the translated report was "given" or "handed" to Mother on October 14, in a later IEP team meeting he stated the report had been "sent." The ALJ declined the offer of proof. Recorded evidence was unnecessary because the notes of the IEP team meetings themselves show that on October 23 Moreno referred to the translated assessment report as "given" to Mother, but on December 1 referred to it as "sent." Student now claims that the difference between "given" and "sent" demonstrates conclusively that the translated report was neither given nor sent to Mother, and that Moreno and Adame were knowingly describing under oath an event that did not occur.

That conclusion is unwarranted. As this record illustrates, a special education director's routine work includes giving, sending, or otherwise furnishing documents of all kinds to parents, colleagues, assessors and others. The fact that weeks after the event Moreno referred to the document as sent instead of given is likely to reflect no more than loose diction. The use of the word "sent" was insignificant.

Second, Student misstates the testimony of speech language pathologist Vandenberg, claiming that she testified she met with the assessment team a week before the October 23 IEP team meeting, while the report was still in preparation. From this error Student reasons that the report could not have been sent out for translation on October 1, and therefore Moreno, Adame and Andrechek all testified falsely. What Vandenberg actually said at hearing was that the assessment team met before the

scheduled but later postponed October 7 meeting, not the October 23 meeting. In addition, Moreno stated in an October 2 email that he sent the document out for translation on the previous day. Student's alternative chronology of events was not supported by the evidence.

Finally, Student argues that a comparison of the English version of the assessment report, Student's Exhibit 40, with the Spanish version, allegedly Guadalupe Union's Exhibit 33, shows that so much is missing from the Spanish translation that the translation was inadequate.

However, Guadalupe Union's Exhibit 33 is not the Spanish translation of the assessment report. It is Moreno's December 14 prior written notice, which attached a Spanish translation of the final IEP offer of December 1. That IEP offer quotes extensively from the assessment report to establish Student's present levels of performance, but it is not, and does not purport to be, the translated assessment report. There was no evidence at hearing that there was any difference between the English and Spanish versions of the multidisciplinary assessment report.

Student did not prove that Guadalupe Union failed timely to provide a translated version of the multidisciplinary assessment report or any other important document to Mother.

THE DISTRICT PROVIDED ADEQUATE INTERPRETATION AT THE NOVEMBER 10 MEETING

Student did not prove that there was inconsistent or inadequate interpretation from English to Spanish at the November 10 IEP team meeting. As stated, Adame interpreted at the October 23 meeting, and the quality of her interpretation is not at

issue. On November 6 Mother requested that the District provide a certified and independent interpreter at the November 10 meeting. When asked at hearing why she requested such an interpreter, she stated that she had found out it was her right to do so under a "contract," which probably was a settlement agreement between the parties in May 2020. Mother did not claim at hearing that there was anything wrong with Adame's interpretation on October 23.

At the November 10 meeting, in response to Mother's November 6 request, the District supplied an interpreter from an outside agency. Mother testified at hearing, and the meeting notes confirmed, that early in the teleconference meeting she complained that she could not hear the interpreter well and was having a difficult time understanding what the interpreter was saying. She did not say that the translation was flawed. The interpreter promptly got another interpreter from the same agency on the telephone, and the meeting proceeded without further complaint regarding interpretation. Student produced no evidence beyond the requested change in interpreters to support his claim that interpretation at the meeting was faulty.

The fact that Mother could not hear the interpreter well and was having a difficult time understanding what she was saying does not prove that the interpretation was inconsistent or inadequate. The November 10 meeting was a virtual meeting on Zoom in which the participants were all connected by computer or telephone. Mother's difficulty with the first interpreter proves nothing more than that she could not hear the interpreter well over this technology. Student had a recording of the November 10 meeting available at hearing but did not resort to it in order to prove that anything was translated incorrectly or inconsistently. At hearing, which was also virtual, Mother frequently had to ask the certified interpreter provided by OAH to repeat her interpretations. That did not necessarily indicate any flaw in the interpretations.

For these reasons, Student did not prove that Guadalupe Union failed to provide translated IEP documents for the October 7, November 10, and December 1 meetings. Nor did he prove that the interpreters at the November 10 meeting provided inconsistent or inadequate translation services.

GUADALUPE UNION'S ISSUE: WAS GUADALUPE UNION'S OCTOBER 7, 2020 MULTIDISCIPLINARY TRIENNIAL ASSESSMENT APPROPRIATE, SO THAT PARENTS ARE NOT ENTITLED TO AN INDEPENDENT EDUCATIONAL EVALUATION AT THE DISTRICT'S EXPENSE?

Guadalupe Union's multidisciplinary assessment of October 7 had four integrated components. They addressed Student's psychoeducational status, academics, occupational therapy needs, and speech and language deficits. Guadalupe Union contends that the multidisciplinary assessment and each of its components was appropriate because they complied with all legal requirements. Student contends that the psychoeducational component was flawed for several reasons, particularly because it did not declare him eligible for special education in the category of autism. He does not specifically criticize the academic, occupational therapy, or speech and language components, but Guadalupe Union still had to show that those components were appropriate to sustain its burden of proof.

A district must 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. (f).) The assessment must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the child is classified. (34 C.F.R. § 300.304(c)(6)(2006).)

Assessments must be conducted by individuals who are both knowledgeable of the student's disability and competent to perform the assessment, as determined by the local educational agency. (Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, §56324, subd. (a).)

Tests and assessment materials must be selected and administered so as not to be racially, culturally or sexually discriminatory. They must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

A district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining whether he is eligible for special education, and what the content of his program should be. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1)(2006).) An assessment tool must provide relevant information that directly assists persons in determining the educational needs of the child. (34 C.F.R. § 300.304(c)(7)(2006).)

In selecting assessment tools, the assessor must do more than pick a generally valid instrument. Tests and other assessment materials must be used for purposes for which the assessments or measures are valid and reliable. (20 U.S.C. § 1414(a)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) Assessment tools must be tailored to assess specific

areas of educational need. (Ed. Code, § 56320, subd. (c).) Special attention must be given to the child's unique educational needs. (*Id.*, subd. (g).)

Assessors must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3)(2006.) Technically sound instruments are those shown through research to be valid and reliable. (*Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed.Reg. 46540-46541, 46642 (Aug.14, 2006).)

A district must also ensure that the child is observed in the child's learning environment, including the regular classroom setting, to document academic performance and behavior in areas of difficulty. (34 C.F.R. § 300.310(a)(2006).)

The IEP team, not the assessor, determines whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. §§ 300.305(a)(1)(iii)(A)(2007); 300.306(a)(1)(2017).) To aid the IEP team in determining eligibility, an assessor must produce a written report of each assessment. The report must include eight categories of information. (Ed. Code, §56327.) The report must be given to the parent or guardian, although there is no fixed time limit. (Ed. Code, § 56329, subd. (a)(3).)

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), (b)(2006); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c).)) To obtain an independent educational evaluation, the parent must disagree with an evaluation obtained by the public agency and request the

independent evaluation. (34 C.F.R. § 300.502(b)(1), (2)(2006); Ed. Code, § 56329, subd. (b).)

When a student requests an independent educational evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent evaluation is provided at public expense. (34 C.F.R. § 300.502(b)(2) (2006); Ed. Code, § 56329, subd. (c).)

THE PSYCHOEDUCATIONAL COMPONENT

Kendall Andrechek, who conducted the psychoeducational portion of the multidisciplinary assessment, was a school psychologist with a master's degree in education with an emphasis on school psychology, as well as a pupil personnel services credential. As part of her education, Andrechek took several graduate level courses in the administration and interpretation of assessment measures. She was employed as a school psychologist in California since 2013 and worked for Guadalupe Union from 2015, where her primary duty was conducting assessments. She had administered more than 500 psychoeducational assessments. Andrechek was already familiar with Student because she assessed him for two previous triennial reviews in 2014 and 2017.

Andrechek was careful and restrained in her testimony and familiar with Student's history and records, as well as the multidisciplinary assessment which she supervised. Her testimony was consistent with contemporaneous records and was undamaged on cross-examination. She was a credible witness, and her testimony is given substantial weight here.

Andrechek reviewed Student's educational records in his cumulative file and summarized many of them in her report. She also reviewed his special education records, including previous assessments and IEP's, and an April 2020 independent educational evaluation by a psychologist, Dr. Kimberly Dorsett.

Andrechek then sent rating scales, which are questionnaires, to Mother and to Student's special education teacher Edwin Roque, and to Brenda Arellano, Student's private in-home behaviorist. These scales were for four measures. One was directed to examining Student's behavior relative to his peers and the extent of his emotional and behavioral difficulties. Another assessed Student's self-help and independent living skills. The third, which Andrechek included in order to explore the extent of Student's autism, was the GARS. The fourth, which she gave primarily to test for emotional disturbance, was the EDDT.

Andrechek updated Student's medical information. She also reported on his vision and hearing screenings, which were conducted by the school nurse and the speech and language pathologist.

Andrechek interviewed Student, Mother and Student's teacher. She attempted to interview the private in-home behaviorist, but that provider's employer would not permit it. Andrechek evaluated Student in person in three different sessions on different days and was also able to observe Student in a small classroom setting on the first day of his physical return to school after months of participation in virtual learning during the pandemic-related school closures.

Andrechek administered a variety of formal and informal test measures to Student. She reviewed the instructions from the publishers of the tests and followed

them, except for the use of personal protective equipment made necessary by the COVID-19 pandemic.

Andrechek had a Spanish interpreter available as well as Spanish versions of several instruments, but Student insisted on taking the tests and answering the questions in English, even if questions were asked in Spanish. Student is now fluent in English and speaks Spanish mostly at home.

Andrechek administered a standardized test to determine Student's ability to process information, including association, conceptualization and expression. His sequential processing was below average, and his scores indicated a deficit in cognitive expression. She also administered a test of phonological processing. Student's scores were poor or very poor, suggesting deficits in auditory and phonological processing.

Andrechek administered another standardized test to measure Student's visual and perceptual skills. Student's scores were in the average range, suggesting age-appropriate skills in those areas. Andrechek also tested Student's sensory-motor skills to measure his ability to transfer visual perception into motor output. He rushed through some of these exercises and scored in the low average range.

The GARS rating scales compared Student's behavior to other children Student's age affected by autism. Ratings from Student's teacher described his probability of autism as very likely. The in-home behaviorist also rated his probability of autism as very likely, as did Mother when her GARS scales were scored. Andrechek wrote that these scores meant Student would require substantial support.

For the EDDT, Andrechek obtained scale responses from Student's teacher, Mother and the in-home behaviorist. The instrument grouped 108 responses into four

areas that corresponded to the IDEA's definition of emotional disturbance. The teacher's scores demonstrated a very high clinical concern. The behaviorist's scores fell in the inconsistent range, rendering them invalid. When Mother's responses were scored, they also indicated very high clinical concern in some areas.

Andrechek established at hearing that all of the information she gathered through these processes was consistent with her previous impressions of Student and with his records and previous assessments.

Student contends that the psychoeducational component of the triennial assessment was inappropriate because Andrechek allegedly used only the GARS to assess for autism. This argument overlooks the fact, as Andrechek established in her testimony and report, that some of the other test measures she administered that were not primarily addressed to autism nonetheless produced results pertaining to autism. These included standardized tests that inquired into social and emotional status, social skills and atypicality such as behaviors that are strange or odd. Andrechek based her overall conclusions on those measures as well as the GARS ratings, and in part on her observations and interviews.

Student falsely claims in his brief that Andrechek's assessment "denied [Student] had autism..." To the contrary, Andrechek's assessment report repeatedly recognized that Student had been diagnosed as having autism. Her reluctance to recommend that he be found eligible under that category was not because of any doubt that he was autistic. It was based on the view that there was not yet enough evidence that the degree of his impairment by autism was so substantial that it required special education, at least until he could be carefully observed when he returned to in-person instruction where he would interact with peers and adults. (See Cal. Code Regs., tit. 5, § 3030, 1st

par.) This distinction was repeatedly explained to Mother at the IEP team meetings as well as in Andrechek's triennial assessment report. Student in his brief repeatedly glosses over this distinction.

Student does not explain why additional testing for autism would be necessary when the assessor had already concluded that Student was autistic. As Andrechek noted in her report, previous assessments had also recognized his autism. Andrechek opined that it was not necessary to assess every student for autism who had a diagnosis of autism. In her view, the need for further assessment for autism required a case-by-case judgment that depended on the severity of the student's symptoms and the degree to which they affected the student's education. That opinion was unchallenged. No professional appeared at hearing to support the claim that more testing directed at autism was needed, or that there was any other flaw in Andrechek's assessment. Student did not prove that Andrechek should have conducted additional testing for autism.

Student also contends that Andrechek's psychoeducational assessment was not appropriate because it did not declare Student eligible for special education in the category of autism. The contention is unpersuasive because assessors do not make eligibility decisions. That is the duty of the full IEP team. (Ed. Code, § 56342, subd. (a); Cal.Code Regs., tit. 5, § 3030, 1st par.) Andrechek's assessment report correctly characterized her eligibility findings as recommendations, not decisions. At hearing the ALJ excluded evidence offered by Student to prove that Andrechek actually made the eligibility category decision because the others at the IEP team meeting did not comment on or question her recommendation. Such evidence only would have shown that the District members of the team agreed with her recommendation, not that they delegated their authority to her.

To the extent that Student argues that Andrechek's assessment was not appropriate because it did not recommend eligibility in the category of autism or recommend a functional behavior analysis or a behavior plan, the argument is equally unpersuasive. Student does not address the reason Andrechek gave in her report and testimony for not making that recommendation. Her assessment occurred during a period in which, because of the COVID-19 pandemic, Student was receiving his education virtually at home, where he did not interact in person with peers or adults. Because observing that interaction is an important part of determining the educational impact of Student's autism, Andrechek thought it wise to wait for his return to in-person learning. Then she could gather more data in order to make a final recommendation about the educational impact of autism on his learning. That reasoning is plausible, and no professional appeared at hearing to disagree with it or to opine that Student needed a functional behavior assessment or a behavior plan to address his autism in the school setting.

Student contends, without reference to any authority, that it is impermissible for a district to list autism as one of the conditions supporting eligibility as other health impaired. However, subject to a showing of educational impact, the other health impaired category applies to any student having limited strength, vitality, or alertness that is due to chronic or acute health problems. (Cal. Code Regs. tit. 5, § 3030, subd. (b)(9), (9)(A).) Autism quite possibly could be chronic or acute and lead to limited strength, vitality or alertness. So, there is no reason, based on the language of the eligibility category, that autism could not be the basis for eligibility due to other health impairment. Andrechek's recommendation to list autism under the category of other health impaired was temporary pending further information. As Andrechek pointed out,

inclusion of autism in the other health impaired category served to focus school staff's attention on Student's autism as they provided his supports and services.

Student accuses Andrechek of misrepresenting her own findings because she did not attribute his reported symptoms exclusively to autism, or list all the characteristics of autism that previous assessors had mentioned. However, the previous assessments were correctly summarized in Andrechek's report and were available to the IEP team. There was no evidence that Andrechek was incorrect in noting the overlap of Student's symptoms with possible emotional disturbance or should not have postponed the resolution of that issue until more information could be obtained.

At one point the assessment team, not Andrechek alone, checked a form indicating that Student did not display repetitive activities, stereotyped movement or resistance to environmental change. Student notes that two of the GARS raters indicated that Student did display such symptoms and characterizes this inconsistency as misreporting information. That is not accurate. Since the GARS ratings Student references are described accurately in the assessment itself, they are not misreported. There may be some minor inconsistency between the team's overall conclusions and two GARS rating forms, but Student cannot explain why that is significant. Student did not question any of the assessors about the alleged inconsistency at hearing.

Student's attack on the District's decision not to make autism his primary eligibility category is in essence an argument that the IEP offer of December 1 denied him a FAPE by failing to place him in the correct disability category. However, Student chose not to pursue a claim for failure to offer a FAPE. Instead, Student chose to attack the appropriateness of Andrechek's assessment. Student cites no authority for his assumption that an assessor's failure to recommend a particular eligibility category to an

IEP team can make an assessment inappropriate. In the procedural posture of this case, all Student could obtain from a successful attack on Andrechek's assessment would be an independent educational evaluation, which would do nothing for his grievance about eligibility classification. Attacking an assessment is not an avenue for questioning an IEP team's eligibility decisions.

Finally, Student argues that by taking precautions to prevent the communication of COVID-19, Andrechek violated the statutory requirement that assessment measures be conducted in accordance with the instructions of their publishers. (20 U.S.C. § 1414(b)(3)(A)(v); Ed. Code, §§ 56320, subd. (b)(3).) Andrechek assessed Student through a plexiglass barrier. She and Student both wore cloth face masks. They used hand sanitizer at the beginning of the sessions and wore gloves when they exchanged physical objects. In her report, Andrechek noted that these precautions were not included in the publishers' instructions and suggested that they might have had some effect on the accuracy of some test measures. She used a 95% confidence interval in scoring the tests in order to allow for that possibility. Andrechek's opinion that the results of the measures were still reliable was persuasive and unchallenged. The measures used were valid, despite COVID-19 precautions.

Andrechek's safety precautions, also used by the other assessors, were required by executive order and by guidelines from the California Department of Education. On March 4, 2020, Governor Newsom declared a state of emergency in California due to COVID-19. On March 13, 2020, the Governor issued Executive Order N-26-20, which regulated school district operations during public-health-related school closures. The Order also directed the California Department of Education and the Health and Human Services Agency to jointly develop guidance ensuring that students with disabilities receive a FAPE.

On April 9, 2020, the California Department of Education implemented Executive Order N-26-20 by issuing a Special Education Guidance for COVID-19. The Department advised school districts that in the delivery of in-person special education services such as assessments, they should seek to comply with federal, state, and local health official's guidance related to physical distancing, with the goal of keeping students, teachers and service providers safe and healthy as the primary consideration.

(<https://www.cde.ca.gov/ls/he/hn/specialedcovid19guidance.asp> [as of April 13, 2021].)

The implication of Student's argument is that the multidisciplinary triennial assessment was not appropriate or legally compliant because the assessors took steps required by state law to protect the lives and health of Student and the assessors. However, it is not conceivable that, in requiring that assessments be conducted in accordance with publishers' instructions, Congress and the California Legislature meant that assessors should take that mandate so far as to violate emergency state and local health requirements. Laws are not to be interpreted to produce absurd results. (*Haggar Co. v. Helvering* (1940) 308 U.S. 389, 394 [60 S.Ct. 337, 84 L.Ed. 340]; *National Shooting Sports Foundation, Inc. v. State* (2018) 5 Cal.5th 428, 433 [citations omitted].)

Student makes no effort to argue that there was any significant consequence of the assessors' use of personal protective equipment, and nothing in the record would support such a claim. There was no evidence that, in protecting Student and themselves from the spread of COVID-19, the assessors were anything less than professional and diligent. All four assessors opined without contradiction that their results were valid notwithstanding the use of personal protective equipment. No professional appeared at hearing to disagree, or to criticize any of their assessments or the use of personal protective equipment in conducting them. The use of personal protective equipment did not make any of the assessments inappropriate.

Guadalupe Union proved that its psychoeducational assessment was conducted appropriately.

THE ACADEMIC COMPONENT

Edwin Roque administered the academic portion of the triennial assessment to Student and was qualified to do so. Roque was Student's teacher in his special day class, where he taught Student math and English language arts, and monitored his progress on goals. He was also Student's case manager. Roque had a Master of Science degree in special education. He was bilingual in English and Spanish and had a bilingual bicultural authorization on his preliminary educational specialist teaching credential that allowed him to teach in either English or Spanish. He was a resource teacher and had an authorization to teach children with autism. He had taken three graduate level courses that addressed the administration and interpretation of assessments.

Roque assessed Student in person, using the same COVID protections as Andrechek had used. He administered a standardized test to determine Student's academic levels and skills. He measured Student's oral expression, listening comprehension, basic reading skills, reading comprehension, reading fluency, written expression, math reasoning and math calculation. Student's scores consistently showed performance in the first- to third-grade range. When Roque presented these results at the November 10 portion of the triennial IEP team meeting, Mother had no questions about them. Mother stated that in her view they were accurate.

Guadalupe Union established that the academic component of the multidisciplinary assessment was appropriately conducted.

THE OCCUPATIONAL THERAPY COMPONENT

Allison Baker administered the Occupational Therapy component of the multidisciplinary assessment under a contract with Guadalupe Union. She had been the Director of Goodfellow Occupational Therapy in Salinas since 2015. Baker was a licensed occupational therapist and a member of the American Occupational Therapy Association and the Occupational Therapy Association of California. She had conducted over 400 occupational therapy assessments. Baker was qualified to conduct the occupational therapy portion of Student's triennial assessment.

Baker reviewed Student's records, interviewed his teacher and Mother, and observed him while he was engaged in distance learning. She assessed him in person in two sessions on different days, using the same COVID precautions as the other assessors. She administered a sensory profile, sensory rating scales, a standardized test of visual perception and a test of handwriting skills. She found that Student's gross motor skills were within normal limits, and that his handwriting was legible, functional and in the average range, though in some respects he was slow and had some weaknesses. He preferred to use a computer keyboard and accessed technology easily.

Baker could not observe Student interacting with others because he was engaged in distance learning but found from her interviews that Student had difficulty interacting with peers, making and keeping friends, and was uncomfortable being in close physical proximity to others. His balance and movement were typical, though he tired easily. He was distracted in noisy environments. He was independent in grooming, feeding and toileting at school.

Baker learned from interviews and ratings that Student had difficulty with emotional regulation and engaged in some impulsive or disruptive behavior in class. At those times he was stubborn and uncooperative, had temper tantrums, demonstrated poor frustration tolerance and struggled to pay attention. Baker recommended continuing occupational therapy in an amount and frequency to be determined by the IEP team.

Guadalupe Union proved that the occupational therapy assessment was appropriately conducted.

SPEECH AND LANGUAGE COMPONENT

Deborah Vandenberg conducted the speech and language portion of Student's triennial assessment. She had a Master of Science degree in speech language pathology and was a licensed speech language pathologist with many years of experience in schools and other settings. Vandenberg was also a consultant on assistive technology and alternative communication. She provided speech and language services on contract with several school districts. Vandenberg was qualified to conduct the speech and language component of Student's triennial assessment.

Vandenberg reviewed records, interviewed Mother, and then assessed Student in person. She administered a bilingual test of receptive vocabulary in which Student scored in the fifth percentile among his peers. On a bilingual test of expressive vocabulary, Student scored in the 13th percentile. On a measure of pragmatic language, also known as social language, Student showed strength in discussing abstract concepts but did poorly in recognizing indirect requests or sarcasm.

Vandenberg administered a standardized test of articulation, which measured Student's ability to produce word sounds. Student had a mild prefrontal lisp but his voicing and fluency of speech were within the normal range.

Vandenberg analyzed a language sample, from which she determined that Student's responses were grammatically and syntactically appropriate but less complex than those of his same-age peers. She also administered a scale of oral and written language, but that measure did not produce a valid result because Student was distracted while playing computer games. Vandenberg's results generally showed that Student was not motivated to participate in non-preferred conversational tasks.

Guadalupe Union proved that its speech and language assessment was appropriately conducted.

RECOMMENDATIONS AND ELIGIBILITY OBSERVATIONS

The assessors concluded the multidisciplinary assessment by making a wide variety of recommendations including continued resource and behavior support, continued occupational and speech therapy, and adoption of sixteen specified accommodations. They also made recommendations concerning Student's eligibility for special education in six possible categories.

The assessment team recommended to the IEP team that Student be found eligible in the categories of other health impairment, specific learning disability and language or speech disorder. Because his cognitive scores were largely in the average range, they recommended against eligibility as intellectually disabled. The assessors recommended that the IEP team reserve final judgment on Student's eligibility in the

categories of emotional disturbance and autism, for the reasons explained by Andrechek.

All four assessors believed that their portions of the multidisciplinary assessment complied with all legal requirements and furnished sufficient information to make sound educational decisions. Their testimony, combined with independent examination of the assessment report, confirm that they did. Student was assessed in all areas related to a suspected disability. All assessors were knowledgeable of Student's disabilities and competent to perform their assessments. Each assessor ensured the assessment was not administered in a racially, culturally, or sexually discriminatory way.

Each assessor gathered sufficient relevant information to identify all of Student's special education and related service needs, enough to determine whether Student had a disability and to determine an appropriate educational program for him. Each assessed Student in his primary mode of communication, which for the purposes of the assessments was English. Each assessor was prepared to assess in Spanish, but Student insisted on being assessed in English.

Each assessor used a variety of assessment tools and strategies that were valid and reliable for the purposes for which their assessments were used. The assessment tools used were technically sound instruments which directly assisted the IEP team in determining Student's educational needs. The resulting assessment report addressed all categories of information required in the report.

For the reasons stated, Guadalupe Union's multidisciplinary triennial assessment of Student, dated October 7, 2020, was appropriate and legally compliant in all respects. As a result, Student is not entitled to an independent educational evaluation at public expense.

CONCLUSIONS AND PREVAILING PARTY

As required by 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's Issue 1, subsection a: Guadalupe Union did not deny Student a FAPE by lying to Parents or preventing their meaningful participation in the IEP process by falsely claiming that Parents had not provided results of GARS and EDDT questionnaires in time to be included in the triennial assessment in fall 2020. Guadalupe Union prevailed on this issue.

Student's Issue 1, subsection b: Guadalupe Union did not deny Student a FAPE by lying to Parents or preventing them from meaningfully participating in the IEP process by falsely describing in a letter of December 14, 2020, what had happened at an IEP team meeting on October 7, 2020. Guadalupe Union prevailed on this issue.

Student's Issue 1, subsection c: Guadalupe Union did not deny Student a FAPE by lying to Parents or preventing them from meaningfully participating in the IEP process by falsely claiming that Parents have prevented Guadalupe Union from offering or implementing special education services in its October 7, 2020 IEP document, by not signing it that day. Guadalupe Union prevailed on this issue.

Student's Issue No. 2: Guadalupe Union did not deny Student a FAPE by failing to make a timely annual IEP offer by October 7, 2020. Guadalupe Union prevailed on this issue.

Student's Issue No. 3: Guadalupe Union did not deny Student a FAPE by failing to provide certain translated IEP documents for the October 7, November 10 and December 1, 2020 IEP team meetings, or by providing inconsistent and inadequate translation services at the November 10, 2020 IEP team meeting. Guadalupe Union prevailed on this issue.

Guadalupe Union's Issue: Guadalupe Union's October 7, 2020 multidisciplinary triennial assessment was appropriate, so that Parents are not entitled to an independent psychoeducational evaluation at the District's expense. Guadalupe Union prevailed on this issue.

ORDER

1. All Student's requests for relief are denied.
2. Guadalupe Union need not provide Parents an independent educational evaluation at District expense.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Charles Marson

Administrative Law Judge

Office of Administrative Hearings