

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021110471

MURRIETA VALLEY UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

JANUARY 13, 2022

On November 16, 2021, Murrieta Valley Unified School District filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Parents on behalf of Student.

Administrative Law Judge, Jennifer Kelly, heard this matter by videoconference on December 7 and 8, 2021.

Attorney Peter Sansom represented Murrieta Valley Unified School District, referred to as Murrieta Valley. Steven Gooch, Psy.D., Assistant Director of Special Education, and Denise Estevez, Assistant Director of Special Education, attended all hearing days on Murrieta Valley's behalf. Zhanda Preston, Executive Director of Special Education, attended part of the hearing on Murrieta Valley's behalf.

Attorney Kelly D. Kaeser represented Parents on behalf of Student. Parents attended all hearing days on Student's behalf.

OAH continued the matter at the parties' request to December 27, 2021, for written closing briefs. Both parties timely submitted closing briefs, the record was closed, and the matter was submitted on December 27, 2021.

ISSUES

1. Is Murrieta Valley entitled to assess Student according to the October 22, 2021 assessment plan without parental consent?
2. Must Student's parents timely complete and return any documents reasonably requested by Murrieta Valley as part of the assessments?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, 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 Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- 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 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 free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; 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]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Murrieta Valley filed the due process complaint and had the burden of proof. 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 13 years old and in eighth grade at the time of the hearing. Student resided with Parents within Murrieta Valley's boundaries, and attended Murrieta Valley schools, at all relevant times.

Student was born with Down Syndrome and Tetralogy of Fallot, a congenital heart condition. Down Syndrome can involve global delays in physical, social, linguistic, and intellectual functioning. Student was also diagnosed with conductive hearing loss in both ears. Student attended kindergarten in the Mountain View Whisman School District. Mountain View Whisman School District assessed Student for special education eligibility in April 2014 and found him for eligible for special education and related services under the categories of other health impairment and speech and language impairment.

Student began attending school within Murrieta Valley during the 2014-2015 academic year as a first grader. Student's educational program included placement in a general education class with supplemental aides, services, and program accommodations and modifications. Student received specialized academic instruction within the general education classroom. Student had a one-to-one aide during the entire school day and received related services in the areas of speech and language, occupational therapy, assistive technology, and deaf and hard of hearing.

ISSUE 1: IS MURRIETA VALLEY ENTITLED TO ASSESS STUDENT ACCORDING TO THE OCTOBER 22, 2021 ASSESSMENT PLAN WITHOUT PARENTAL CONSENT?

On October 26, 2021, Murrieta Valley sent Parents an assessment plan dated October 22, 2021, in the areas of:

- academic achievement,
- social,
- adaptive,
- behavioral,
- emotional functioning,
- processing,
- perceptual motor development,
- communication development,
- cognitive development,
- health and developmental,
- deaf and hard of hearing,
- educationally related mental health services, and
- assistive technology.

Parents signed and returned the consent form on November 15, 2021, agreeing only to assessments in the areas of deaf and hard of hearing and educationally related mental health services. Parents denied consent to assessments in all other areas. At the start of hearing, Murrieta Valley clarified that it sought to assess Student in the areas of psychoeducational, including academics, speech and language, occupational therapy, and assistive technology.

Murrieta Valley contended its October 22, 2021 assessment plan was procedurally compliant, but Parents declined to consent. Murrieta Valley asserted the proposed assessments were necessary to obtain information on Student's

- cognitive,
- social-emotional,
- academics,
- processing,
- fine motor skills,
- communication including articulation and pragmatics,
- behavior and adaptive skills, and
- assistive technology needs,

to have sufficient information to develop an appropriate special education program for Student. Murrieta Valley argued it had not conducted comprehensive assessments of Student utilizing standardized testing methods because Student's Parents had consistently declined consent to prior proposed assessment plans. Murrieta Valley contended it satisfied all criteria for overriding the lack of parental consent.

Student contended the proposed assessment plan did not meet all legal requirements and Murrieta Valley's motives in seeking reassessment were improper.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an individualized education program, known as IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

Assessments are required in order to determine eligibility for special education and the type, frequency, and duration of specialized instruction and related services. In California, the term assessment has the same meaning as the term evaluation under the IDEA. (Ed. Code, § 56302.5.) In evaluating a student for special education eligibility, a school district must assess a student in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).)

A student eligible for special education must be assessed at least once every three years, unless the parent and the agency agree that it is unnecessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A school district must also conduct a reassessment if it "determines that the educational or related service needs of the child, including improved academic achievement and functional performance, of the child warrant a reevaluation," or if the student's parents or teacher request a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) The required three-year assessment serves two purposes. First, it examines whether the student remains eligible for special education. Second, it informs the IEP team of new or ongoing needs resulting from the student's disability that may require revision of the student's IEP. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).)

Reassessments require parental consent. (20 U.S.C. § 1414(a)(2)(b)(i); 34 C.F.R. § 300.304(a); Ed. Code, § 56381, subd. (f)(1).) School districts must develop and propose a reassessment plan which is provided to the parents in writing. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) and (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).)

School districts must give notice of the proposed assessment plan and a copy of parents' procedural safeguards under the IDEA and related state laws. (20 U.S.C. § 1415(c), (d); Ed. Code, § 56321, subd. (a).) They must explain the evaluation procedures and the areas of proposed reassessment. (20 U.S.C. § 1415(c); 20 U.S.C. § 1414(b)(1).)

The assessment plan must be in a language easily understood by the public and in the native language of the parent; explain the types of assessments to be conducted, and state that no IEP will result from the assessment without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4); 20 U.S.C. § 1415(b)(3) & (4); 34 C.F.R. § 300.9(a).) The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

If the parents do not consent to the plan, the district can conduct the reassessment only by showing at a due process hearing that it needs to reassess the student and is lawfully entitled to do so. (34 C.F.R. § 300.300(c)(i)-(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3), 56506, subd. (e).) Accordingly, to proceed with a reassessment over a parent's objection, a school district must demonstrate at a due process hearing: (1) that the parent has been provided an appropriate written assessment plan to which the parent has not consented, and (2) that the educational or related services needs warrant a reassessment, or that the student's parent or teacher has requested reassessment. (Ed. Code, § 56381, subd. (a).)

SEPTEMBER 8, 2020 TRIENNIAL IEP TEAM MEETING

As part of a reassessment of a student, the IEP team is required to review existing data on the child, including information provided by the parent, current classroom-based local, or state assessments, and observations by teachers and related services providers. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. § 300.305(a)(1); Ed. Code, § 53681, subd. (b)(1).) Based upon that review, with input from student's parents, the IEP team must identify what additional data, if any, is needed to determine the following:

1. Whether the student continues to have a disability and the educational needs of the child;
2. The present levels of academic achievement and related developmental needs of the child;
3. Whether the child continues to need special education and related services; and
4. Whether any additions or modifications to the student's special education and related services are needed to enable the student to meet the measurable annual goals set forth in the IEP and to participate, as appropriate, in the general curriculum. (20 U.S.C. § 1414(c)(1)(B); 34 C.F.R. § 300.305(a)(2); Ed. Code, § 56381, subd. (b)(2).)

This review of existing data may be conducted without a meeting. (34 C.F.R. § 300.305(b); Ed. Code, § 56381, subd. (g).) The school district shall administer tests and other assessment materials needed to produce the data identified by the IEP team. (34 C.F.R. § 300.305(c); Ed. Code, § 56381, subd. (c).)

If the student's IEP team determines that it does not need any additional data to determine whether the student continues to be eligible for special education and related services, the school district is required to notify the student's parents of that determination. The district must also inform the student's parents of the reasons for the determination and of the parent's right to request an assessment to determine whether the student continues to have a qualifying disability and to determine the student's educational needs. (20 U.S.C. § 1414(c)(4)(A); 34 C.F.R. § 300.305(d)(1); Ed. Code, § 56381, subd. (d).) The school district is not required to conduct such an assessment unless requested to do so by the student's parents. (20 U.S.C. § 1414(c)(4)(B); 34 C.F.R. § 300.305(d)(2); Ed. Code, § 56381, subd. (d).)

Student's last triennial evaluation was due in March 2020, during the 2019-2020 school year. Murrieta Valley offered Parents an assessment plan on January 31, 2020, in preparation for the 2020 triennial IEP team meeting. The assessment plan proposed to assess Student in the areas of

- academics,
- social,
- adaptive,
- behavioral and emotional functioning,
- processing,
- perceptual motor development,
- communication development, cognitive development,
- health and developmental, and
- orientation and mobility.

The assessments would be conducted by qualified staff and would include classroom observations, rating scales, one-on-one testing interviews, and records review. No change in Student's program would be made without Parents' consent.

Parents provided written consent on February 13, 2020, for Murrieta Valley only to update Student's records through record review, direct observations, classroom assessments, and Parent and teacher interviews. However, Parents did not want Murrieta Valley to use standardized tests, described by Parents as "formalized assessments." Murrieta Valley believed it could fully assess Student without standardized testing and accepted Parents' written consent to assess Student.

On March 13, 2020, Emergency COVID-19 Executive Orders from Governor Gavin Newsom closed school campuses throughout California. The IEP team did not convene in the spring of 2020 to complete Student's three-year evaluation, but instead continued the IEP team meeting to September 8, 2020.

Jennifer Utley Buensuceso, referred to as Utley, was a school psychologist employed by Murrieta Valley. Utley testified at hearing. Utley was a Doctor of Clinical Psychology. Her duties included, among others, conducting psychoeducational assessments for students, providing counseling and mental health services, and consulting with teachers and staff. Based upon Parents' consent and COVID-19 related restrictions, Utley informally assessed Student and prepared an Alternative Triennial Review Report, dated September 8, 2020. The purpose of the report was to provide information for Student's triennial IEP team meeting. The report contained information prepared by Utley, along with Student's special education teacher, the school nurse, and Student's service providers, including the speech and language pathologist and occupational therapist.

Utley explained that the Alternative Triennial Review Report was based upon a review of Student's records, and input from Parents, teachers, and service providers, and did not contain the results from any standardized testing measures. Based upon this review, the IEP team determined that standardized testing was not warranted at that time. Murrieta Valley sent the report to Parents, informing them of their findings and that they could request additional assessments of Student. At hearing Utley testified that at the time she prepared the Alternative Triennial Review Report she believed standardized testing of Student was warranted. However, she did not relay this information to Parents or any member of the IEP team. The preponderance of the evidence proved that at the time of Student's September 8, 2020 triennial IEP team meeting neither Parents or Murrieta Valley believed additional testing was necessary or requested by Parents or any other IEP team member.

The September 8, 2020 IEP team discussed Student's continued eligibility for special education and related services. Student continued to remain eligible under the categories of other health impairment and speech and language impairment, both of which affected his ability to access his educational curriculum. The IEP team reviewed Student's present levels of academic achievement and functional performance. The IEP team discussed Student's assistive technology and social and emotional needs. Student exhibited feelings of frustration, particularly during math class. Student also struggled with feelings of isolation during distance learning. Based upon the information available to it, Student's IEP team determined that it was appropriate to continue Student's program and services as determined in his prior IEP, and to review Student's appropriate placement and services at the next IEP team meeting.

APRIL 8, 2021 IEP TEAM MEETING

Student's next IEP team meeting was held on April 8, 2021, and May 6, 2021. Murrieta Valley made an offer of FAPE following the conclusion of the IEP team meeting. The issue of the appropriateness of the offer of FAPE was not at issue in this proceeding.

The IEP team determined Student could access the general education curriculum with the supports and services and accommodations in his IEP. Student's placement was a general education setting with significant accommodations in all classes and modifications of curriculum. These included, among many others,

- preferential seating,
- visuals to support academic classwork,
- visual supports to cue expected behaviors,
- checking for understanding,
- additional processing time for work completion,
- grading completed work only,
- verbal reminders,
- constant monitoring by staff,
- modification of presentation of math problems,
- a sound field system, and
- access to a tablet or computer.

The IEP team determined Student met or partially met his goals in the areas of math, reading, and reading comprehension. He met or partially met his goals in written language, social norms, asking for help, and self-advocacy. Student made progress in his speech and language goals in the areas of articulation, making inferences, and pragmatic language. He continued to have articulation deficits and receptive and

expressive language delays. Further, he had deficits in social pragmatics, including engaging in inappropriate social behaviors and the inability to understand social inferences. Student would become argumentative, put his head on the desk, or engage in inappropriate outbursts when presented with non-preferred tasks. He sometimes used inappropriate word choices, tone and delivery when offered help from adults.

In the area of fine motor skills, Student had deficits in fine motor control and visual motor integration. These deficits impacted the overall organization and legibility of Student's writing. Student tended to write numbers with exaggerated sizing and spacing, and had difficulty using lined paper.

In the area of social, emotional, and behavioral functioning, Student was happy and vibrant. Student would display withdrawn behavior when presented with a non-preferred task. He exhibited some difficulties taking direction from his one-to-one aide, accepting "no" for an answer and disagreeing appropriately. He had communication difficulties with his peers based on his intelligibility and inability to infer information from interpreting tone or visual cues. He had difficulties monitoring his behaviors in group settings.

Parents expressed concerns that Murrieta Valley's teachers and staff did not understand Student's deficits caused by his Down Syndrome profile and requested teacher training. Parents also believed Student needed more opportunities for developing social skills, such as participating in social groups or clubs. Parents believed Murrieta Valleys' teachers and staff would benefit from the services of a qualified

Inclusion Specialist, a teacher who has specialized knowledge of current principles and techniques of educating children with significant disabilities in a general education classroom.

The April 8, 2021 and May 6, 2021 IEP team did not believe additional testing was necessary to formulate a FAPE offer. There was no recommendation from any IEP team member for assessments to supplement the September 8, 2020 Alternative Triennial Review Report.

OCTOBER 15, 2021 IEP AMENDMENT TEAM MEETING

On October 15, 2021, the IEP team convened an IEP Amendment team meeting to discuss Parents' concerns regarding Student's educational program. Murrieta Valley contended the October 15, 2021 IEP Amendment team discussed Student's areas of need and determined that a comprehensive assessment of Student was warranted. However, a preponderance of evidence failed to support this argument.

For example, the IEP documents failed to reflect that the IEP team members requested additional testing. And Parents persuasively disputed that the IEP team discussed the need to reassess Student. Parents contended that Murrieta Valley advised Parents it would provide them an assessment plan, but there was no substantive discussion by the IEP team regarding a need to reassess Student to offer a FAPE, or in which areas additional testing was warranted.

Student's Mother participated in the October 15, 2021 IEP Amendment team meeting. Mother was concerned about the delivery of Student's speech and language

and occupational therapy services. Mother believed that pulling Student from the classroom to conduct these services caused Student to miss valuable academic instruction, and Mother requested that these services be provided outside of academic instruction. Student had difficulty keeping up with the pace of the academic workload, which resulted in a large amount of uncompleted classwork being sent home for completion. Mother believed the IEP team did not understand how Student processed information and she requested that a qualified Inclusion Specialist be provided to support Student's teachers and service providers. Mother communicated that Student's assistive technology needs had not been adequately assessed. Mother expressed that Student, his teachers, and Parents needed training to help Student utilize assistive technology to access his curriculum

Dr. Steven Gooch, Assistant Director of Special Education, referred to as Dr. Gooch, believed that assessments of Student were warranted. Dr. Gooch testified at hearing. Dr. Gooch was a Doctor of Psychology and held a Clear Administrative Credential. He had substantial experience providing school related psychological services to students with disabilities and providing early academic interventions to struggling students. Dr. Gooch attended many of Student's prior IEP team meetings. Dr. Gooch informed Parents at the October 15, 2021 IEP Amendment team meeting that Murrieta Valley would be proposing an assessment plan for Parents to review. However, Dr. Gooch failed to explain why Murrieta Valley was proposing additional assessments. Following the October 15, 2021 IEP Amendment team meeting, Dr. Gooch instructed Utley to prepare a comprehensive assessment plan for Student.

OCTOBER 22, 2021 ASSESSMENT PLAN

On October 26, 2021, Murrieta Valley sent Parents an assessment plan dated October 22, 2021. The October 22, 2021 assessment plan proposed to assess Student in the following areas, by the following professionals:

- Academic achievement, including reading, spelling, arithmetic, and oral/written language skills and general knowledge, by a special education teacher;
- Social/adaptive/behavioral/emotional, including how Student copes with situations, gets along with other people and takes care of himself, by the school psychologist and a behavior health therapist;
- Processing, including measuring Student's individual strengths and weaknesses in processing information, by the school psychologist;
- Perceptual/motor development, including measuring how well Student coordinates body movements in small and large muscle activities, and is able to visually perceive information, by an occupational therapist;
- Communication development, measuring Student's ability to understand, relate to and use language and speech clearly and appropriately, by a speech language pathologist;
- Cognitive development, including how well Student remembers what has been seen and heard, and how Student uses such information and solves problems, by the school psychologist;
- Health and development, including measuring Student's vision, hearing and current health status, by a nurse and audiologist;

- A deaf and hard of hearing assessment to evaluate Student's functional listening;
- Educationally related mental health services assessment, by a deaf and hard of hearing teacher and a behavior health therapist; and
- Assistive technology assessment by an assistive technology specialist.

The assessment plan was identical to the January 31, 2020 assessment plan for Student's 2020 triennial assessment, with the addition of proposed assessments in the areas of deaf and hard of hearing and educationally related mental health services.

Murrieta Valley's assessment plan was appropriately worded and provided descriptions of the types of assessments to be conducted. The plan also notified Parents that no changes to Student's IEP would be made without their consent. Murrieta Valley provided Parents with the procedural safeguards as required and Parents were given more than the minimum 15 days to review and consent.

Murrieta Valley established that it provided Parents with proper notice requesting consent to the October 22, 2021 assessment plan and provided the required notice of their procedural rights and safeguards. (20 U.S.C. §§ 1414(b)(1); 1415(b)(3), (c)(1); 34 C.F.R. § 300.304(a); Ed. Code, § 56321, subd. (a).) As required, Murrieta Valley's notice to Parents consisted of the proposed assessment plan and a copy of parental procedural rights under the IDEA and state law. (*Id.*)

Murrieta Valley established that it had qualified staff available to conduct the proposed assessments in the areas of cognition, social-emotional, academics, processing, fine motor skills, communication, including articulation and pragmatics, behavior and adaptive skills, and assistive technology needs. Murrieta Valley proved it was prepared to choose well respected instruments that met statutory requirements of

reliability and avoided bias to assess Student in all proposed areas. The assessments proposed were tailored to evaluate only those areas of suspected and established disabilities for which Student may require special education and related services.

CIRCUMSTANCES WARRANTING REASSESSMENT

During hearing, Murrieta Valley contended additional assessments were appropriate for Student because he had complex needs and deficits that had not been assessed by standardized testing. Murrieta Valley contended objective data obtained from standardized tests would determine Student's strengths and weaknesses and provide important information for the IEP team to address those needs.

Parents contended that Murrieta Valley fully assessed Student in connection with the September 2020 triennial IEP, and that circumstances did not warrant new assessments just a year following the triennial IEP.

Generally, a duty to reevaluate is triggered when there is a substantial change to the student's academic performance or disabling condition. (Corona-Norco Unified School Dist. (SEHO 1995) 22 IDELR 469, 22 LRP 3205.) In a similar case, OAH determined that circumstances warranted the school district assessing a child diagnosed with Down Syndrome who had not been evaluated in the area of intellectual development in six years. (Clovis Unified School District v. Student (2014) OAH Case No. 2014060342.) OAH found that the proposed assessments would provide the IEP team necessary data regarding the student's current level of intellectual functioning and present levels of performance in, among other things, processing speed, receptive and expressive language, and social and adaptive skills. Although OAH cases are not binding precedent, they are persuasive. (Cal. Code Regs., tit. 5, § 3085.)

At hearing, all of Murrieta Valley's witnesses expressed the opinion that a reassessment of Student was warranted. Their opinions were credible and uncontroverted. Dr. Gooch opined that reassessment of Student was necessary because Student had not been assessed using standardized assessments since 2014, and those assessments were performed by another school district. Reassessment would clarify Student's current strengths and weaknesses and what Student needed related to his academic performance, which was particularly important given Student's age and his transition into high school the following academic year.

School psychologist Utley opined that a psychoeducational reassessment was warranted because Student had not been assessed in the area of psychoeducation since 2014. Utley's experience as a school psychologist and thoughtful and candid testimony rendered her opinions persuasive. Utley established that the previous assessment data was out of date and insufficient to support informed determinations about Student's current levels of performance and unique needs. Updated assessments would provide current information about Student's cognitive abilities and how Student processes information visually, phonologically, and auditorily. Utley also explained that an adaptive behavior assessment would help the IEP team understand how Student communicates, takes care of his personal needs, and functions socially across different settings. Utley opined that Student's social and emotional functioning was an area of concern. Student was receiving school counseling services, which indicated there might be social, emotional or anxiety concerns that required assessment. An evaluation of Student's behaviors, adaptive skills, and attention was necessary in light of reports of Student's frustration when faced with non-preferred tasks and non-compliance in taking directions from his aide and Parent.

Murrieta Valley's other experts corroborated Dr. Gooch and Utley's opinions. Sherran Zajec had been a special education teacher for 17 years. She held a master's degree in special education and a mild to moderate disabilities teaching credential. She provided resource services, or specialized academic instruction to Student. She also provided push-in collaboration to Student's general education teachers and Student's one-to-one aide to implement Student's accommodations and modify his curriculum. Zajec's testimony was straightforward and credible and thus was given considerable weight.

Zajec opined Student had needs in the areas of reading comprehension, identifying ideas and contextual evidence within passages, writing complete paragraphs, and solving proportions in math. She observed that Student had become increasingly frustrated and engaged in work refusal, asked his aide to complete his work, and said "no" to demands requested of him. She believed the pace of Student's math class was too fast and as a result Student had difficulty completing his classwork, even with the implementation of substantial supports and modifications to the curriculum. Academic assessments would provide data about Student's specific areas of strengths and weaknesses and allow the IEP team to create accommodations to address Student's needs based upon his independent functioning level.

Eduardo Delgado was a speech and language pathologist for Murrieta Valley. Delgado testified at hearing. He held a master's degree in communicative disorders and had been licensed by the State of California as a speech language pathologist since 2016. He provided individual and group speech and language services to Student during the 2021-2022 school year. Delgado established Student had articulation deficits that impacted his overall intelligibility and his ability to interact with his peers. Student had not previously been evaluated in the area of articulation. Delgado opined that

formal assessment measures, such as the Goldman Fristoe Test of Articulation and the Khan-Lewis Phonological Awareness Assessment, would generate objective data about Student's use of words and words in sentences. Student also had needs in the area of expressive language, or how Student uses language socially to communicate with peers and adults, and pragmatic language, the ability to understand and use language in social situations and respond appropriately.

Nicole Soro was an occupational therapist for Murrieta Valley. She held a master's degree in occupational therapy and had been a licensed occupational therapist with the State of California since 2018. Soro provided occupational therapy services to Student during the 2020-2021 school year. Student had not previously been assessed in the areas of fine and gross motor skills and sensory needs. Soro opined Student had deficits in the areas of fine motor skills and visual perception. Student had difficulty organizing his written work product in a legible manner, which impacted Student's ability to correctly answer math problems. Soro persuasively opined an occupational assessment would provide more information about Student's fine motor control, precision of movement and visual perception.

Dustin Punzel was a Senior Program Specialist for Murrieta Valley. He held a master's degree in special education and previously was a certified moderate to severe special education teacher. His responsibilities included conducting assistive technology assessments for students with disabilities and providing training and consulting to students, teachers and parents. Punzel opined that Student required assistive technology to access his curriculum. He explained that a Student Environment Task Tool assessment would provide important data about Student's needs in the area of assistive technology.

Although Parents disagreed that assessments were warranted, they did not offer persuasive evidence refuting the expert testimony by Murrieta Valley's witnesses. Further, the evidence proved Mother expressed concerns at the October 15, 2021 IEP Amendment team meeting about Student's processing abilities, his inability to keep up with the pace of his general education coursework, and the need to evaluate his assistive technology needs. Mother also reiterated her worries about Student's social and behavior functioning and Parents' desire for an Inclusion Specialist to support Student's teachers and service providers. Mother agreed at hearing that Student struggled with pragmatic language, which impacted his ability to interact with his peers.

Parents' main objection to the October 22, 2021 assessment plan was Murrieta Valley's intention to administer standardized assessments. Student's Mother testified at hearing. She was a former credentialed special education teacher. Mother held a bachelor's degree in elementary education and a master's degree in educational administration. She had experience developing assessment plans and participating in IEP team meetings. Mother believed that Murrieta Valley had sufficient information to determine that Student remained eligible for special education and thought standardized assessments of Student would not provide an accurate picture of Student's abilities given some of the deficits caused by his Down Syndrome.

Parents who want their child to receive special education and related services must allow the school district to reassess if conditions warrant it. In *Gregory K. v. Longview School Dist* (9th Cir. 1987) 811 F.2d 1307, 1315, the court stated that "if the parents want [their child] to receive special education under the IDEA, they are obliged to permit such testing." (See, e.g., *Patricia P. v. Board of Educ. of Oak Park and River Forest High School Dist. No. 200* (7th Cir. 2000) 203 F.3d 462, 468; *Johnson v. Duneland School Corp.* (7th Cir. 1996) 92 F.3d 554, 557-58.) In *Andress v. Cleveland Independent*

Sch. Dist. (5th Cir. 1995) 64 F.3d 176, 179, the court concluded: “[T]here is no exception to the rule that a school district has a right to test a student itself in order to evaluate or reevaluate the student’s eligibility under the IDEA.” Further, an evaluation of a child requires procedures used selectively for an individual to meet the child’s present needs. (*Letter to Shaver* (OSERS November 23, 1990).)

As long as the statutory requirements for assessments are satisfied, parents may not put conditions on assessments. “[S]election of particular testing or evaluation instruments is left to the discretion of State and local educational authorities.” (*Letter to Anonymous* (OSEP September 17, 1993).) The right to assess belongs to the school district; parents have no right to insist on particular assessors or on outside assessors. (*Andress v. Cleveland Independent Sch. Dist.*, *supra*, 64 F.3d at p. 179; *G.J. v. Muscogee County Sch. Dist.* (M.D. Ga. 2010 704 F.Supp.2d 1299, 1309, *affd.* (11th Cir. 2012) 668 F.3d 1258, 1264 [parents’ conditions on assessments “vitiating any rights the school district had under the IDEA for the reevaluation process.”].)

Although Parents may have disagreed with the necessity of standardized or norm-referenced assessments, Murrieta Valley had the obligation to draw upon a variety of sources to evaluate Student’s educational needs, including aptitude and achievement tests. (34 C.F.R. § 300.306(c)(1).) Murrieta Valley had the right to select the particular testing or evaluation instruments. (*Letter to Anonymous* (OSEP September 17, 1993).) Each of Murrieta Valley’s witnesses explained the importance of obtaining updated data using standardized or norm-referenced assessments in the areas to be evaluated and how this information would be used to consider Student’s needs and, if necessary, update Student’s goals and modify his program as appropriate.

The weight of the evidence proved by the time of the due process hearing some of the IEP team members believed that Student's educational or related services needs warranted reassessment. (Ed. Code, § 56381, subd. (a).) Student's annual IEP was not due until the spring of 2022. However, Parents had expressed substantive concerns about Student's educational program and had refused consent to the April 8, 2021 IEP. Student had not been assessed using standardized cognitive testing for approximately seven years. Given these factors, Murrieta Valley reasonably proposed to assess Student, particularly in light of the lack of recent standardized data for Student. However, as discussed below, the October 15, 2021 IEP Amendment team did not have a collaborative discussion about Student's need for reassessment. As a result, Parents' input was not solicited or considered.

MURRIETA VALLEY DID NOT MEET ITS BURDEN OF PROVING IT MADE REASONABLE EFFORTS TO OBTAIN PARENTS' INFORMED CONSENT

Based upon the foregoing, witnesses for Murrieta Valley submitted valid reasons during the hearing to support Murrieta Valley's request to reassess Student. However, Murrieta Valley failed to show that these reasons were meaningfully discussed with Parents during an IEP team meeting, or prior to filing its complaint. Meaningful parent participation and informed parental consent is a "core principle" of the IDEA. (*M.M. v. Lafayette Sch. Dist.* (9th Cir. 2014) 767 F.3d 842, 851.) Parents are an integral part of the IEP team that determines both whether the child is a child with a disability and the content of the child's IEP. (*Id.*) A school district must obtain informed parental consent prior to conducting a reevaluation of a child with a disability. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(i)-(ii); Ed. Code, § 56381, subd. (f)(1); (*Letter to Olex* (OSEP February 22, 2019).)

Consent means that the parent has been fully informed of all information relevant to the proposed action, understands and agrees in writing to the carrying out of the activity for which consent is sought, and understands that the granting of consent is voluntary and may be revoked at any time. (34 C.F.R. § 300.9(a) & (b); Ed. Code, § 56021.1; *Letter to Anonymous* (OSEP August 2, 2018).) Education Code section 56381 subdivision (f) further requires the school district to make reasonable efforts to obtain informed consent from the parent for the reassessment in accordance with title 34, Code of Federal Regulations part 300.300(c)(1) and (2). To meet the reasonable efforts requirement, the school district must document its attempts to obtain parental consent, using the procedures in 34 Code of Federal Regulations part 300.322(d). (Ed. Code, § 56381, subd. (f)(2); 34 C.F.R. § 300.300(d)(5).) These procedures consist of keeping a record of its attempts to obtain consent, such as keeping detailed records of telephone calls made or attempted, and the results of those calls; copies of correspondence sent to the parents and any response received; and detailed records of visits made to the parent's home or place of employment and the results of those visits. (34 C.F.R. § 300.322(d)(1) through (4).)

A school district may, but is not required to, override a lack of parental consent if it establishes at a due process hearing that assessment is needed. (34 C.F.R. § 300.300(c)(1)(ii); Ed. Code, § 56381, subd. (f)(3); see also *Schaffer v. Weast, supra*, 546 U.S. 49, 53-43.) The school district must also demonstrate at hearing that it has taken reasonable measures to obtain the consent of the parent, and that the child's parent has failed to respond. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(2)(i)-(ii); Ed. Code, § 56381, subd. (f)(1).)

THE OCTOBER 15, 2021 IEP AMENDMENT TEAM DID NOT DISCUSS THE NEED TO REASSESS STUDENT

Murrieta Valley did not meet its burden of proving it took reasonable efforts to obtain informed consent for the reassessments proposed in the October 22, 2021 assessment plan. The preponderance of the evidence proved that the October 15, 2021 IEP Amendment team did not discuss and agree to the need for reassessments of Student. Rather, Murrieta Valley summarily informed Parents at the October 15, 2021 IEP Amendment team meeting that the district planned to reassess Student and would send Parents an assessment plan. There was no discussion or consensus reached by the IEP team members that assessments of Student were necessary, or in which areas. There was no dialogue about the nature and scope of the proposed assessments, or which qualified assessors would administer them. No questions were posed to Parents about whether they believed reassessments in any areas were important to meet Student's educational or related service needs, or to determine his eligibility for special education.

Although Dr. Gooch told the IEP Amendment team that the district wanted to reassess Student and would be sending Parents an assessment plan, there was no discussion by the team about the areas to be assessed or the basis for the reassessment plan. Student's Mother told the IEP team that Student's assistive technology needs had not been evaluated, and there was a brief dialogue about assessing Student in this area. No other areas of need were mentioned or considered. No input from Parents was solicited. Further, the IEP team did not examine whether Student should be evaluated to determine eligibility for special education in other categories. The weight of the evidence established the October 15, 2021 IEP Amendment team did not meaningfully discuss the need for Student to be comprehensively reassessed.

MURRIETA VALLEY DID NOT DISCUSS THE NEED TO REASSESS STUDENT WITH PARENTS BEFORE OR AFTER ISSUANCE OF THE OCTOBER 22, 2021 ASSESSMENT PLAN

The preponderance of the evidence proved Murrieta Valley did not communicate or confer with Parents about the need to reassess Student at any time between the September 2020 triennial assessment and the date of hearing. None of Murrieta Valley's witnesses testified that they had any discussions with Parents about the need for reassessment of Student at any time, with the exception of Dr. Gooch's statements at the October 15, 2021 IEP Amendment team meeting that an assessment plan would be forthcoming.

Dr. Gooch and Soro attended the April 8, 2021 IEP team meeting. Neither Gooch nor Soro offered testimony that the IEP team discussed the need to assess Student at the April 8, 2021 IEP team meeting.

School Psychologist Utley did not attend the October 15, 2021 IEP Amendment team meeting. She was charged with preparing the October 22, 2021 assessment plan, with input from other IEP team members, at Dr. Gooch's request. Yet, at hearing, Utley conceded she did not have any discussions with Parents about the need for Student's reassessment and believed this generally would have been the appropriate "next step" in the process. Utley exchanged email correspondence with Student's Father and obtained clarification that Parents consented to the assessments in educationally related mental health and deaf and hard of hearing but rejected the rest of the assessment plan. However, Utley did not communicate with Parents to answer any questions or discuss their concerns. Utley mistakenly believed that since Dr. Gooch asked her to generate the assessment plan it was not her role to discuss the plan with Parents.

Murrieta Valley's other witnesses similarly did not have any discussions with Parents about the need to reassess Student. Zajec, Soro, Delgado, and Punzel each confirmed at hearing that they did not have any discussions with Parents about the need to reassess Student at any time, either before or after issuance of the October 22, 2021 assessment plan. Although each witness persuasively opined that reassessment of Student was warranted, they inexplicably did not discuss the need for reassessment with Parents or raise the issue of reassessment at the October 15, 2021 IEP Amendment team meeting. Murrieta Valley's unilateral notice to Parents that it wished to reassess Student did not satisfy the collaborative process under the IDEA that necessitates parental input and informed discussions. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1125-1126[.]) As a result, because the parameters of reevaluation were not discussed at the October 15, 2021 IEP Amendment team meeting or anytime thereafter, Parents did not participate in an informed discussion about the need for reassessment.

MURRIETA VALLEY DID NOT MAKE REASONABLE EFFORTS TO OBTAIN PARENTS' INFORMED CONSENT FOLLOWING RECEIPT OF THE REJECTED ASSESSMENT PLAN ON NOVEMBER 15, 2021

Murrieta Valley had the burden of making reasonable efforts to obtain Parents' informed consent. (20. U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(i)-(ii); Ed. Code, § 56381, subd. (f)(1).) Parents' partial consent to the October 22, 2021 assessment plan was not an acceptance, but rather constituted a rejection of the assessment plan. Although a parent may refuse consent to an entire proposed evaluation, a parent cannot refuse consent to select portions of the proposed evaluation. (*G.J. v. Muscogee County Sch. Dist.*, *supra*, 704 F.Supp.2d 1299, 1309, *aff'd* 668 F.3d 1258, 1284 [where parents attempted to narrow the proposed evaluation by refusing certain proposed testing,

court held that the parents' "purported consent [wa]s not consent at all.") Parents' refusal to execute the assessment plan without conditions was, therefore, a rejection of the plan.

Murrieta Valley did not take any steps to obtain Parents' informed consent to the October 22, 2021 assessment plan after receiving Parents' signed rejection on November 15, 2021. For example, it did not document any telephone calls made or attempted and the results of those calls; copies of any correspondence sent to the parents and any responses received; or detailed records of visits made to Parents' home or place of employment. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c); Ed. Code, § 56381, subd. (f).)

Murrieta Valley argued it notified Parents in the cover letter and copy of procedural rights that accompanied the October 22, 2021 assessment plan to contact the district if they had questions about the plan, but Parents did not follow-up to ask any questions or relay any concerns. Dr. Gooch believed that contacting Parents would have been futile since Parents had declined to consent to any standardized testing measures in the past. However, a school district may not avoid its obligation to obtain informed consent based upon past disagreements over assessments. The obligation to obtain informed consent is central to the IDEA's overall adherence to the principal of parental participation. The burden to obtain informed consent rests with the school district, not the parents. While a school district may override the requirement of informed consent in some circumstances, it cannot do so without demonstrating it made reasonable efforts to obtain such consent. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(i); Ed. Code, § 56381, subd. (f)(1).)

Murrieta Valley further argued that since Parents consented to evaluations in deaf and hard of hearing, and educationally related mental health and did not ask questions about the nature of those assessments, they necessarily understood the basis for reassessment in the other proposed areas. However, Murrieta Valley did not take any steps to understand why Parents did not consent to the entire October 22, 2021 assessment plan or inquire about whether they had questions about the scope of the plan, how and when it would be accomplished and by whom, or why Murrieta Valley believed the assessments were necessary at that time.

Although Mother generally understood the areas of proposed assessment contained in the October 22, 2021 assessment plan when she received it, she did not understand the basis of the request to assess in the area of processing. Processing was described in the October 22, 2021 assessment plan as measuring Student's individual strengths and weaknesses in processing information. The processing assessments would be conducted by the school psychologist.

At hearing, school psychologist Utley described processing as meaning how Student processes information visually and phonologically. Utley described phonological processing as the ability to understand the nature of language, including the ability to process spoken and written language. She opined that assessing Student's awareness of sound structures and his processing speed and memory would provide important information about how Student learns. Visual processing is how the brain processes information visually. Deficits in visual processing can affect how a student recalls visual information over time. No evidence was offered that Utley or any member of the October 15, 2021 IEP Amendment team discussed the reasons for believing assessments of Student's processing was necessary or how it would be measured.

Mother also did not understand how often Student would be pulled from class for the assessments. Mother relayed to the October 15, 2021 IEP Amendment team that Student was struggling to keep up with his classwork. The length of time for completion of the assessments and how and when they would be administered was therefore important to Parents. This information could have been relayed, and the issue likely resolved, had Murrieta Valley communicated with Parents following issuance of the October 22, 2021 assessment plan.

Further, Mother persuasively explained she was open to discussing assessments in the other proposed areas if she understood the reason for the assessments and how they would be administered. In the past, Murrieta Valley had proposed assessment plans in connection with the 2017 and 2020 triennial assessments, and then agreed to limited assessments. For example, prior to the 2017 triennial assessment, Parents advised Murrieta Valley by email correspondence on February 6, 2017, that Parents were generally opposed to standardized testing because these assessments required Student to be evaluated without the accommodations and supports he received during the school day. Parents believed that standardized assessments would not present a true picture of Student's abilities. Parents subsequently agreed to a standardized test in the area of pragmatic language in connection with Student's 2017 triennial evaluation. Consequently, Parents may have agreed to additional standardized testing pursuant to the October 22, 2021 assessment plan had the need for that testing been meaningfully explained and discussed with them.

Mother expressed genuine surprise that Murrieta Valley filed its complaint for due process on November 16, 2021, the day following Parents' return of the signed and

rejected assessment plan. Parents were actively involved in Student's educational program. Although circumstances warranted reassessment, Murrieta Valley neglected to take reasonable steps to follow-up with Parents, answer any questions or concerns and seek their informed consent. This is the antithesis of the cooperative process between parents and schools embodied within the IDEA. (*M.M. v. Lafayette School Dist., supra*, 767 F.3d 842, 851 ["The IDEA provides for a cooperative process between parents and school that culminates in the creation of the [IEP] for every disabled student."].)

In summary, Murrieta Valley failed to meet its burden of proving by a preponderance of the evidence that it took reasonable steps to obtain Parents' informed consent to the October 22, 2021 assessment plan. Accordingly, Murrieta Valley is not entitled to override the informed consent requirement under the IDEA and Education Code to conduct a reassessment of Student in the areas of

- cognitive,
- social-emotional,
- academics,
- processing,
- fine motor skills,
- communication including articulation and pragmatics,
- behavior and adaptive skills, and
- assistive technology

pursuant to the October 22, 2021 assessment plan.

ISSUE 2: MUST STUDENT'S PARENTS TIMELY COMPLETE AND RETURN ANY DOCUMENTS REASONABLY REQUESTED BY MURRIETA VALLEY AS PART OF THE ASSESSMENTS?

Murrieta Valley did not establish it took reasonable steps to obtain Parents' informed consent, and therefore it is not permitted to conduct a reassessment of Student pursuant to the October 22, 2021 assessment plan. As a result, Issue Two is moot. Murrieta Valley did not prevail on Issue Two.

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.

Issue 1:

Murrieta Valley Unified School District is not entitled to assess Student according to the October 22, 2021 assessment plan without parental consent. Murrieta Valley did not prevail on Issue One.

Issue 2:

Student's parents are not required to timely complete and return any documents reasonably requested by Murrieta Valley as part of the October 22, 2021 assessment plan to which they did not consent. Murrieta Valley did not prevail on Issue Two.

ORDER

Murrieta Valley's requests for relief are denied.

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/

Jennifer Kelly

Administrative Law Judge

Office of Administrative Hearings