

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021110193

PARENT ON BEHALF OF STUDENT,

v.

WILLIAM S. HART UNION HIGH SCHOOL DISTRICT.

DECISION

June 29, 2022

On November 5, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming William S. Hart Union High School District as respondent. Student filed an amended complaint which OAH deemed filed as of December 20, 2021. Administrative Law Judge June R. Lehrman heard this matter via videoconference on May 10, 11, 12 and 13, 2022.

Attorney Diana Maltz represented Student. Parent attended all hearing days on Student's behalf. Attorneys Jayme Duque and Daniel Gonzalez represented Hart. Director of Special Education Joanna White attended all hearing days on Hart's behalf.

At the parties' request the matter was continued to May 31, 2022, for written closing briefs. The record was closed, and the matter was submitted on May 31, 2022.

ISSUES

1. Did District deny Student a free and appropriate public education, or FAPE, in the November 7, 2019, triennial assessments by failing to assess in all areas of suspected disability?
2. Was the November 7, 2019, psychoeducational assessment inappropriate, thereby denying Student a FAPE?
3. Was the November 7, 2019, speech and language assessment inappropriate, thereby denying Student a FAPE?

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).) Student had the burden of proof on all issues. 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 21 years old at the time of hearing. Student was eligible for special education services under the category of “multiple disabilities” due to Autism, microcephaly, impulse control disorder, anxiety, and pervasive developmental disorder, all of which adversely affected her educational performance. When Student’s 2019 triennial assessments were conducted, Student was enrolled pursuant to an individualized education plan, or IEP, at Devereaux Advanced Behavioral Health, a residential treatment center located in Victoria, Texas. Student is referred to in this Decision as “she,” in accordance with all parties’ consistent references to her in the hearing and briefs, despite some evidence that Student, at inconsistent times periodically, sometimes preferred different gender pronouns.

LEGAL FRAMEWORK

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, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see 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].)

ISSUE 1: DID DISTRICT DENY STUDENT A FAPE BY FAILING TO ASSESS IN ALL AREAS OF SUSPECTED DISABILITY IN NOVEMBER 7, 2019 TRIENNIAL ASSESSMENTS?

Student contends that when District conducted a November 7, 2019 triennial assessment, Student was not assessed in all areas of suspected disability, specifically, behaviors and mental health. More specifically, Student contends that District should have conducted a functional behavioral assessment and an educationally related mental health assessment, and that the failure to conduct these two assessments denied Student a FAPE. District contends that it appropriately assessed Student.

A school district must ensure that reevaluations of a child's needs are conducted if the district determines that the educational or related services needs of a child with special needs, including improved academic achievement and functional performance, warrant a reevaluation; or if the parent or teacher request a reevaluation. Reevaluations must be conducted in accordance with the procedural requirements of the IDEA. (20 U.S.C. 1414 (a)(2)(A); 34 C.F.R. § 300.303.) Reevaluations must be conducted at least every three years and may not be performed more frequently than once a year unless both the district and the parents agree. (20 U.S.C. § 1414 (a)(2)(B).)

A local educational agency must assess a special education student in all areas of suspected disability, including if appropriate,

- health and development,
- vision,
- hearing,
- motor abilities,
- language function,
- general intelligence,
- academic performance,
- communicative status,
- self-help,
- orientation and mobility skills,
- career and vocational abilities and interests, and
- social and emotional status.

(20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304 (c)(4); Ed. Code, § 56320, subd. (f).) A local educational agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. (20 U.S.C. § 1414(b)(2)(A).). No single measure or assessment shall be the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304 (c)(6).) The local educational agency must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3); Ed. Code, § 56320, subds. (e) & (f).) 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 school district, county office, or special education local plan area." (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (g), 56322.)

FUNCTIONAL BEHAVIOR ASSESSMENT

Student argues that because behavior was an area of suspected disability, Hart was obligated to conduct an assessment known as a functional behavior assessment. A functional behavior assessment is an assessment that evaluates a Student's maladaptive behaviors to determine the antecedents and functions, or what the Student achieves from the maladaptive behaviors, and then proposes a plan to retrain Student to meet those needs in an alternative way. It requires direct observation of the

behaviors to gather data concerning their occurrence, frequency, triggers and the like. The fact that Hart did not conduct a functional behavior assessment is undisputed. The issue is whether Hart was legally obligated to do so.

Student cites no authority under either the IDEA or California law requiring that this particular assessment tool be used to assess a student's behavioral challenges. Recently, the Ninth Circuit held that a functional behavior analysis is only required when a child is removed from a current placement due to behavioral issues. (*Butte School District No. 1 v. C.S.* (9th Cir. 2020) 817 Fed.Appx. 321 (*Butte*),) As *Butte* stated: "Our concern is whether the IEP and its underlying behavioral analysis was reasonable, not whether it was ideal " (*Ibid.*) Furthermore, as long as statutory requirements for assessments are satisfied, the U.S. Department of Education, Office of Special Education Programs, has advised that selection of particular testing or evaluation instruments is left to the discretion of State and local educational authorities. (*Letter to Anonymous* (OSEP Sept. 17, 1993) 20 IDELR 542; *M.W. v. Poway Unified School District* (S.D. Cal. Aug. 14, 2013) 2013 WL 4401673.)

In November of 2019, Hart's school psychologist, Shazia Shah-Allibhoy, conducted Student's triennial psychoeducational assessment. While the psychoeducational assessment failed to meet legal requirements as to Student's academic and cognitive function, which is discussed in detail in Issue 2, it appropriately assessed Student's behavior needs.

Shah-Allibhoy conducted a review of records, a Health and Developmental History Questionnaire, the Gilliam Autism Rating Scales, Third Edition, the Scales of Independent Behavior, Revised – Parent form, the Vineland Adaptive Behavior Scales- Third Edition - Teacher Form, and interviews or consultation with Parent and Student's

special education teacher. The assessment report recounted Student's history of severe abuse and neglect, removal from her biological parents at the age of three, fostering and adoption in 2007 by Parents, history of physical aggression, severe temper tantrums, self-injury, suicidal ideation and threats to others both in and out of school, hospitalizations and residential treatments. Student displayed aggressive and violent behavior toward staff and students. She tried to kill her sister twice, once by drowning, once by smothering with a pillow. She also had a history of visual and auditory hallucinations.

Shah-Allibhoy interviewed Mother, who noted that that Student encountered difficulty with aggression, focus and implementing change in her behaviors. She often blamed others, overstepped boundaries and did not understand social cues. Student was removed from the home and placed in residential treatment for physical aggression towards family members and household pets, physical aggression and suicidal ideation expressed in school. The home was equipped with safety alarms, videos, and locks to keep family members safe from Student. Student's challenging behaviors include physical and verbal aggression, throwing feces, disrobing, and difficulty managing her anger. Mother shared that Student had always struggled with suicidal ideation and emotional dysregulation. Shah-Allibhoy also reviewed the Devereaux Services Plan, which contained an overview of Student's areas of need, her diagnoses and medication, her problem areas, treatment goals, services and supports and who the service providers were. Shah-Allibhoy reviewed progress notes from Devereaux therapy sessions which noted Student

- yelling,
- cussing,
- name-calling, and making homicidal threats,

- displaying incoherent thoughts,
- dominating,
- appearing mentally unstable, and
- using the therapy to describe homicidal threats, hallucination, and delusions.

The therapist attempted to focus the sessions on addressing safety concerns, conflict management skills, self-calming skills, emotional regulation and distress tolerance using Dialectic Behavior techniques.

Shah-Allibhoy administered the Gilliam Autism Rating Scale, Third Edition, a rating scale, to Student's lead Special Education teacher, Michelle Dearth. This instrument is used for the assessment of individuals between the ages of three through 22 who have behaviors that may be indicative of Autism, one of Student's diagnoses. The scale can be completed by parents and educators who know the individual well. Behaviors are rated using objective frequency-based ratings. The items are separated into six subscales in the areas of Restricted/Repetitive Behaviors, Social Interaction, Social Communication, Emotional Responses, Cognitive Style and Maladaptive Speech. On the basis of Dearth's responses, Shah-Allibhoy computed an Autism Index by summing the scaled scores of the subscales and converting the sum into an index score. Dearth rated Student's behaviors on the Autism Index in the Probable range.

Shah-Allibhoy also administered the Scales of Independent Behavior, Revised Edition (Short Form), a rating scale, to Mother to discern information concerning Student's

- self-care,
- communication,
- daily living skills,

- problem behaviors,
- internalizing and externalizing,
- social skills and difficulties and
- maladaptive behaviors.

According to parent ratings, Student's adaptive functioning was equivalent to that of a child age one year five months. Among other maladaptive behaviors, Mother noted, for example that Student had difficulty accepting criticism without showing anger.

To further discern overall adaptive functioning and also maladaptive behaviors and social emotional functioning, Shah-Allibhoy administered the Vineland Adaptive Behavior Scales, Third Edition administered to Dearth. The Vineland-3 is a standardized measure of adaptive behavior, which described Student's overall level of adaptive functioning on the Adaptive Behavior Composite, comprised of three adaptive behavior domains Communication, Daily Living Skills, and Socialization. According to Dearth's ratings, Student's overall level of adaptive functioning fell within the moderately low range.

The Vineland also rated Student's Maladaptive Behavior domain, providing a brief assessment of problem behaviors and internalizing (i.e., emotional) or externalizing (i.e., acting out) behaviors. Student's Internalizing and Externalizing behaviors fell within the clinically significant range. Examples of behaviors noted included

- temper tantrums,
- disobedience,
- lying,
- cheating,
- stealing,

- aggression,
- stubbornness,
- argumentativeness,
- verbal abuse,
- hallucinations, and
- threats.

As the law requires, these instruments were “technically sound” and demonstrated the effect that behavioral factors had on the functioning of the student. (20 U.S.C. §1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3); Ed. Code, § 56320, subds. (e) & (f).)

Student argues that Shah-Allibhoy did not directly observe Student, directly interview her, or administer any assessment instruments directly to her. While these contentions are true and undisputed, they do not lead to the legal conclusion that Hart failed to assess Student in all areas of suspected disability, specifically behaviors or mental health. Shah-Allibhoy credibly opined that she used both formal and informal assessment tools, and gathered relevant data using informal measures, such as recounting the observations of others who were already in regular contact with Student, interviewing Mother, caregivers, and staff. The rating scales she administered were formal tools, although not directly administered to Student herself. No statute or regulation requires a particular assessment or assessment method, and Student cites no law to that effect. In fact, the two regulations Student cites as support for the contention that the assessor him or herself must directly observe the student, rather than relying on the observations of others, actually serve to undermine that argument. The federal regulations Student relies on, Parts 300.310 and 300.305(a)(1) of the Regulations of the Offices of the Department of Education (34 C.F.R. 2006), require only

that an assessor review existing data, including observations by teachers and related services providers. Shah-Allibhoy did so. Another federal regulation cited by Student states only that an assessment "must ensure that the child is observed in the child's learning environment" (34 C.F.R. § 300.310) which Student was, by Dearth, as recounted in Shah-Allibhoy's report. Moreover, Student cites that regulation out of context here, as it relates solely to requirements to assess for specific learning disabilities and is by its very terms limited to assessments concerning that sole eligibility category. In any event, Hart complied. Student failed to establish that Shah-Allibhoy's reliance on the observations of others who had direct contact with Student, specifically Mother, Dearth, and Student's therapist, were inappropriate.

Even had Student established that a functional behavior assessment should have been completed, which Student did not, Student failed to prove a FAPE denial. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031.) In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: impeded the right of the child to a FAPE; significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a free appropriate public education to the child of the parents; or caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E); Ed. Code, § 56505, subd. (f).) The hearing officer

"shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered

with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program.” (Ed. Code, § 56505, subd. (j).)

Here, there was no question that Student was subject to severe and debilitating behavioral and mental health challenges. She had been placed in and out of residential treatment center placements for long portions of her schooling. She exhibited violent outbursts, attacks on staff and family members, homicidal and suicidal threats and attempts, and hallucinations. The severity of Student’s emotional and mental health needs was evident from Student’s records and was known to Hart.

At the time of the assessment, Student was placed in a Transitional Living Program therapeutic program at Deveraux. She also received individual therapy for a minimum of 60 minutes weekly. She was also able to participate in small skills groups to address hygiene, self-care, and activities of daily living. In addition, she was offered group therapy for 60 minutes per week to address social-emotional skills using cognitive behavioral therapy and dialectical behavioral therapy; and family therapy for 60 minutes, twice per month to address family dynamics. Treatment areas included her suicidal and self-injurious behaviors, physical aggression, and social skills. The Deveraux plan contained

- target behaviors,
- a hypothesized function of the behaviors,
- antecedents or triggers to the behaviors,
- desired replacement behaviors and
- a list of antecedents and consequences.

Devereaux also addressed clinical needs. They had various levels of supervision for safety. Behavioral and therapeutic supports were embedded in their program. Student was enrolled in a functional skills program that had a behavioral component, a medical team, a psychiatrist, medication monitoring and management, and individual therapy. A behavioral support program called LAUNCH was embedded, with different levels of supervision for safety, and behavior goals embedded in the program.

In sum, the IEP team had adequate information to determine the nature of Student's behaviors and consider whether changes in services were necessary.

Shah-Allibhoy had a Master's degree and held a credential in school psychology. Her graduate program included training in assessing behavior. Shah-Allibhoy left Hart in 2022 and was, at the time of hearing, in private practice as a psychologist. During her tenure with Hart, from 2011 to 2022 she conducted 15-60 psychoeducational assessments each year. Shah-Allibhoy's testimony was forthright and comprehensive. She amply justified the decisions she made as to which assessment tools she used to assess Student's behavioral and mental health challenges. Shah-Allibhoy used a variety of assessment tools and strategies in these areas of need, to gather relevant information, including rating scales, interviews and records review. (20 U.S.C. § 1414(b)(2)(A)). She did not rely on a single measure or assessment as the sole criterion for determining Student's needs. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) The assessments were sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304 (c)(6).) Hart used technically sound testing instruments that demonstrated the effect that behavioral, factors had on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3); Ed. Code, § 56320, subds. (e) & (f).)

The assessment was conducted by individuals who were both knowledgeable and competent. (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (g), 56322.)

For these reasons, Student failed to meet the burden of establishing that Hart was obligated to conduct a functional behavior assessment as part of the November 7, 2019 Triennial assessment or that the failure to conduct the assessment denied Student a FAPE.

EDUCATIONALLY RELATED MENTAL HEALTH ASSESSMENT

For the same reasons, Student failed to establish her contention that Hart was required to conduct an “educationally related mental health assessment” in order to assess her in all areas of suspected disability.

Unlike the functional behavioral assessment described above, no evidence established what an “educationally related mental health assessment” is. This terminology was not defined by any evidence or expert testimony and is not legally defined. Therefore, the issue is simply whether Student was appropriately assessed as to her mental health needs in the educational setting. She was. No particular form of such an assessment is legally required nor established by the evidence as having been required here.

As stated above, Student’s emotional and mental health needs were evident from Student’s records and known to Hart. The ongoing nature and severity of these were established by the interviews conducted as part of this assessment from Mother, Dearth and Student’s Deveraux therapist. The Scales of Independent Behavior discerned information concerning Student’s internalizing and externalizing maladaptive behaviors. As stated above, the Vineland rated Student’s Maladaptive Behavior domain concerning

her internalizing (i.e., emotional) or externalizing (i.e., acting out) behaviors, which fell within the clinically significant range. These instruments were technically sound. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3); Ed. Code, § 56320, subds. (e) & (f).)

To address Student's suicidal ideation expressed in school, physical and verbal aggression, the Devereaux Services Plan therapeutic program included individual therapy, group therapy and family therapy. Her program included a medical team, a psychiatrist, and medication monitoring and management. As a result, Shah-Allibhoy reviewed progress notes from Devereaux therapy sessions which noted Student's

- homicidal threats,
- incoherent thoughts,
- dominating,
- appearing mentally unstable,
- hallucination, and
- delusions.

In sum, the IEP team had adequate information to determine the nature of Student's emotional and mental health challenges. Shah-Allibhoy did not rely on a single measure or assessment as the sole criterion for determining Student's needs. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) The assessments were sufficiently comprehensive to identify Student's special education and related service needs. (34 C.F.R. § 300.304 (c)(6).) Hart used technically sound testing instruments. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3); Ed. Code, § 56320, subds. (e) & (f).) For these reasons, Student did not prove that Hart failed to assess her in the area of mental health, or that the failure to conduct the assessment denied Student a FAPE. For all these reasons, Student failed to meet the burden of proof on Issue 1.

ISSUES 2 AND 3: WERE THE NOVEMBER 7, 2019, PSYCHOEDUCATIONAL ASSESSMENT AND SPEECH AND LANGUAGE ASSESSMENTS APPROPRIATE?

Student contends that the psychoeducational assessment failed to appropriately assess Student's cognition, academics and needs in the area of language and speech. Hart contends all its assessments were appropriate.

"A local educational agency must assess a special education student in language function, general intelligence [and] academic performance." (Ed. Code, § 56320, subd. (f); see also 34 C.F.R. § 300.304 (c)(4).) The educational agency must "use technically sound instruments that may assess the relative contribution of cognitive factors." (§ 1414(b)(2)(C).)

A school district must ensure that reevaluations of a child's needs are conducted if the district determines that the educational or related services needs of a child with special needs, including improved academic achievement and functional performance, warrant a reevaluation; or if the parent or teacher request a reevaluation. Reevaluations must be conducted in accordance with the procedural requirements of the IDEA. (20 U.S.C. 1414 (a)(2)(A); 34 C.F.R. § 300.303.) As part of any reevaluation, the IEP team and other qualified professionals must identify what additional data, if any, are needed to determine the child's educational needs and present levels, and whether any additions or modifications to the special education and related services are needed. The public agency must administer such assessments and other evaluation measures as may be needed to produce this data. (34 CFR §§ 300.305 (a) and (c).)

The IDEA explicitly provides, at 20 United States Code, section 1414, subdivision (c)(4), a process for circumstances where the IEP team or other qualified professionals determine that no additional data are needed to determine the child's educational needs. Hart did not avail itself of that process. That process would require Hart to notify parent of the determination and the reasons for it, and to notify the parent of their right to request an assessment. Thus, if the IEP team and other qualified professionals, determine that no additional data are needed to determine the child's educational needs, the public agency must notify the child's parents of that determination and why; and must tell the parents they have the right to request an assessment anyway. (34 CFR § 300.305 (a) and (c).) In this case, Hart determined that assessments were necessary and gave Student an assessment plan. Hart cannot then rely on a review of records only as a substitute for following assessment procedures once an assessment is undertaken.

COGNITIVE ASSESSMENT

Shah-Allibhoy did no investigation of any kind concerning Student's current cognitive levels, other than to review a prior assessment tool that had been administered to Student in 2016. Shah-Allibhoy undertook no efforts to update this information or ensure it was current. Thus, Hart failed to reevaluate Student accordance with the procedural requirements of the IDEA. (20 U.S.C. 1414 (a)(2)(A); 34 C.F.R. § 300.303.) The IEP team did not identify the additional data that were needed to determine Student's present levels in the area of cognitive development. Hart did not administer such assessments and other evaluation measures as might be needed to produce this data. (34 CFR § 300.305 (a) and (c).)

According to Shah-Allibhoy, direct assessment of cognitive functioning would not be necessary in certain circumstances. If, for example, a student had had multiple prior comprehensive assessments, containing results that could be currently useful, or if the student's functioning had already been securely established by prior assessments, direct assessment might not be indicated. This was most often the case with older students and/or where the parent agreed that direct assessments were no longer indicated.

However, none of these circumstances was the case here. Although Student was, at the time of the 2019 assessment in question, 18 years old, there were not multiple prior comprehensive assessments that clearly established Student's cognitive functioning. Given Student's history of instability, she did not have an established, reliable cognitive profile that made it reasonable to determine that prior cognitive domain information was still reliable. Hart failed to provide any legal authority that relieved it of the responsibility for conducting a thorough cognition assessment. Hart had the burden of proof to establish its own affirmative defenses. (Evid. Code § 500. [Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.])

Shah-Allibhoy relied upon the 2016 cognitive domain testing results because, in her opinion, Student's cognition was unlikely to change as an adult. However, not only did reliance on the prior assessment result fail to meet legal requirements, the 2016 assessment noted multiple factors that might undermine the reliability of those testing results, including Student's aggressive outbursts and agitation during testing.

Hart was obligated to use technically sound instruments to re-assess Student's cognition, to ensure that the IEP team had accurate information, regardless of

Shah-Allibhoy's opinion that testing would not yield different results. (*D.O. v. Escondido Union School District* (S.D. Cal. 2018) No. 3-17-CV-2400-BEN-MDD, 2018 WL 6653271 at *11; *Timothy O., supra*, 822 F.3d at 1119,1120-21.)

Hart relies on language it inserted into the assessment plan stating that the "assessment of intellectual development will be a review of records." Shah-Allibhoy insisted that this would have been discussed with Mother, and that the need for current cognitive testing would have been a matter of discussion. Parent recalled no such discussion. Parent's recollection was more credible. It was supported by email correspondence that established Hart presented the assessment plan to Mother already filled out, without explanation or discussion.

Hart's reliance on the language of the assessment plan is not persuasive, in that Hart seeks to create a parental waiver as to the legal requirements pertaining to the manner in which assessments shall be conducted. Even if such an explicit understanding had been established, which here it was not, Hart cites no law that that would absolve it of the legal requirements for conducting assessments.

The IDEA established what Hart should have done if the IEP team or other qualified professionals had determined, as Shah-Alliboy indicated they had, that "no additional data were needed to determine" Student's educational needs in the area of cognitive development. The explicit procedure in such a case would require Hart to notify the parent of that determination and the reasons for it. Hart did not so notify Parent here. Further, the explicitly-stated procedure in such a case would have required Hart to notify the Parent of her right to request an assessment. Hart did not so notify Parent here. Instead, Hart presented Parent with an assessment plan, then produced a

legally noncompliant assessment that did not administer such assessments and other evaluation measures as might have been needed to produce the legally required data. (34 CFR § 300.305 (a) and (c).)

For all these reasons, the psychoeducational assessment did not assess Student's cognitive development, and Student meets the burden of proof on Issue 2.

ACADEMIC ASSESSMENT

Hart's assessment of Student's academics also failed to meet legal requirements. Shah-Allibhoy administered no academic assessment instruments to Student of any kind. Shah-Allibhoy relied entirely on a record review of Student's grades, and on Dearth's recitation of Student's areas of relative strength and weakness which included only one math test score. Hart did not use a variety of assessment tools and strategies to gather relevant academic information. (20 U.S.C. § 1414(b)(2)(A).). The academic assessment was not comprehensive (34 C.F.R. § 300.304 (c)(6).) It did not use technically sound testing instruments. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3); Ed. Code, § 56320, subds. (e) & (f).)

For these reasons, because Hart administered no assessment instruments of any kind in the areas of cognition and academics, Student prevails on Issue 2.

SPEECH AND LANGUAGE ASSESSMENT

With regard to Issue 3, concerning the November 7, 2019, speech and language assessment, Student also prevails. Speech pathologist Heidi Boyette conducted a

"Speech and Language Triennial Review of Records." The purpose of the review was to evaluate Student's current levels of performance and to monitor her progress, in order to determine eligibility for language and speech services.

The records review was cursory in the extreme. Boyette, who had been a speech language pathologist with Hart for 16 years and had conducted on average ten-15 assessments each year, was unable at hearing to describe, and the report did not list, the records she had reviewed. Her only recollection was that she reviewed past IEP's and "the paperwork in the file," but other than IEP's, she could not recall what if any paperwork that may have been. The only information her report recounted was IEP notes, of what other speech language pathologists had stated at Student's prior IEP's.

Boyette was unable to unambiguously recall whether she had reviewed any of Student's past language and speech evaluations, nor when Student's last speech and language evaluation had occurred. If she had reviewed any, her assessment report did not list them, nor provide any of the information or data they may have contained.

Boyette at hearing appeared evasive about what a "records review" assessment is. As discussed above, Hart provided no legal authority that justified its conducting anything less than a legally compliant assessment. Boyette appeared evasive about the difference between a "records review" and a "full evaluation," and about what factors go into the determination of which type of process is appropriate. When questioned as to why her assessment was limited to a review of records, as opposed to conducting a full assessment, she explained that "it depends on the Student," but she could not state what it was about this Student that made a records review appropriate. She specified that the determination might depend on a student's age, or parental consent, or the student's ability to comply with an assessment process, or whether the student had

already been evaluated in the past. The ALJ infers that the determination here, to do a records review only, was made because of Student's age, her location in Texas and her significant maladaptive behaviors, but Boyette did not acknowledge this to be the case.

Student had been offered speech and language services since at least 2015. Her 2015 and 2016 IEP's recommended speech and language therapy services delivered in either one individual or co-treatment with a social worker or group session per week. Her 2017 IEP recommended that she receive monthly consultative services. Her 2018 IEP stated that speech services were 30 minutes a week, and that a language and speech goal had been added for Student to use language appropriately with peers and with adults when requesting, commenting or conversing. An IEP amendment from June 2019 stated that Student had been refusing to do direct speech therapy and that Deveraux had been providing speech therapy via consult in the classroom.

However, solely on the basis of the cursory review described above, or other undisclosed information not specified in the report, Boyette's report concluded that Student's receptive and expressive language skills "have improved and appear commensurate with her current academic program." Additionally, she reported that Student did "not appear to be motivated to focus on this area on a regular basis." Boyette concluded that Student's pragmatic skills deficits resulted not from an inability to use these skills due to a lack of understanding, but from a conscious choice not to do so. Finally, according to the review of records, Boyette concluded that "receptive and expressive language skills are not an area of concern at this time." There is no information stated in the report, and none elucidated via testimony at hearing, explaining what this conclusion may have been based on.

Boyette concluded that Student “does not clearly qualify” for language and speech services. On the basis of this, Boyette recommended dismissing Student from language and speech services.

As discussed above, a school district’s failure to conduct appropriate assessments may constitute a procedural denial of a FAPE. (See *Park v. Anaheim Union High School District*, supra, 464 F.3d at p. 1031.) The failure to obtain critical assessment information about a student, renders the accomplishment of the IDEA’s goals, and the achievement of a FAPE, impossible. (*N.B. v. Hellgate Elementary School District* (9th Cir. 2008) 541 F.3d 1202, 1210 [quoting *Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 894].) Here, the IEP team was clearly without any critical evaluative information concerning Student’s needs in the area of language and speech. That deprivation made it impossible for the IEP team to evaluate the recommendation that Student was no longer eligible for services, or to if she was eligible, to consider and recommend appropriate services necessary to address Student’s needs. Mother was thus substantially impaired in her ability to fully participate in the collaborative IEP process. (*Timothy O. v. Paso Robles Unified School District*, supra, 822 F.3d 1105, 1120 21.) For this reason, Student prevails on Issue 3.

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:

District did not deny Student a free and appropriate public education in the November 7, 2019 triennial assessments by failing to assess in all areas of suspected disability.

Hart prevailed on Issue 1.

ISSUE 2:

The November 7, 2019 psychoeducational assessment was inappropriate, thereby denying Student a FAPE.

Student prevailed on Issue 2.

ISSUE 3:

The November 7, 2019 speech and language assessment was inappropriate, thereby denying Student a FAPE.

Student prevailed on Issue 3.

REMEDIES

Hart argues that Student's complaint requests only compensatory education as a remedy. Hart asserts that Student offered no evidence establishing compensatory education is an appropriate remedy in these circumstances. Hart further argues that since Student did not request an independent educational evaluation as a remedy, such a remedy cannot be ordered here. (34 C.F.R. 34 C.F.R. § 300.502.) However, remedies under the IDEA are based on equitable considerations and the evidence established at

hearing. (*Burlington v. Department of Education* (1985) 471 U.S. 359, 374.) Courts may craft appropriate relief for a party. Student is entitled to an appropriate remedy for District's failure to assess Student's needs in the area of cognitive development, academics, and speech and language.

Hart is ordered to fund two independent educational evaluations: one in the area of speech and language, and the other to assess in both cognitive development and academics. Under the time limits set forth in the Order below, Hart shall contract with independent assessor(s) of Student's choice and shall pay the independent assessor(s) directly to perform and prepare assessment reports. District shall pay for the independent assessor(s) to attend IEP team meetings to review their assessment reports.

The law provides that if an independent educational evaluation is at public expense, the criteria under which the assessment is obtained, including the location, limitations for the assessment, minimum qualifications of the examiner, cost limits, and use of approved instruments must be the same as the criteria that the public agency uses when it initiates an assessment, unless those criteria are inconsistent with the parent's right to an independent educational evaluation. (34 C.F.R. § 300.502(e)(1).)

Following the independent educational evaluations, Hart shall, convene an IEP team meeting to address Student's special education and related service needs in the areas of intellectual development, academics, and speech and language.

ORDER

1. Hart shall fund two independent educational evaluations. One shall be in the area of speech and language. The other shall be in the areas of cognitive development and academics. Parent shall choose the

assessor(s), who shall conform to Hart's assessment criteria. Hart shall provide Student with agency criteria for conducting the assessments within 10 days of this Decision.

2. Within 10 days of receipt of notification of Parent's selected assessment provider(s), Hart shall contact the provider(s) to arrange for direct contract billing.
3. Hart shall convene an IEP team meeting to address Student's special education and related service needs. Hart shall fund the attendance of the independent educational evaluation assessor(s) at an IEP, at a rate of payment consistent with existing District policy.

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/

June R. Lehrman

Administrative Law Judge

Office of Administrative Hearings