

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2023020689

SAN JOSE UNIFIED SCHOOL DISTRICT,

V.

PARENT ON BEHALF OF STUDENT.

DECISION

April 21, 2023

On February 17, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from San Jose Unified School District, naming Student. Administrative Law Judge Rita Defilippis heard this matter on March 14, 15, 16, 20, 22, 23, 24, 27, 28, and 29, 2023.

Attorney Eliza McArthur represented San Jose. Director of Special Education Seth Reddy, or Manager of Special Education Chris Metcalf, attended all hearing days on San Jose's behalf. Attorney Joshua Cruz represented Student. Parent attended all hearing days on Student's behalf. A Spanish language interpreter was provided for Parent.

At the parties' request the matter was continued to April 19, 2023, for written closing briefs. The record was closed, and the matter was submitted on April 19, 2023.

ISSUE

Does San Jose's psychoeducational evaluation conducted between October and December 2021, specifically psychological and academic assessment, meet all legal requirements?

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).) San Jose requested hearing and had the burden of proof on its issue. 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 16 years old and in ninth grade at the time of hearing. Student resided within San Jose's geographic boundaries at all relevant times. Student was eligible for special education under autism and speech and language impairment. Student is classified as an English language learner.

ISSUE: DOES SAN JOSE'S PSYCHOEDUCATIONAL EVALUATION CONDUCTED BETWEEN OCTOBER AND DECEMBER 2021, SPECIFICALLY, PSYCHOLOGICAL AND ACADEMIC ASSESSMENT, MEET ALL LEGAL REQUIREMENTS?

San Jose contends that both its academic and psychological evaluations met all legal requirements. San Jose contends that procedural deficiencies, if any, were harmless.

Student asserts that San Jose's academic and psychological assessments failed to comply with multiple legal requirements, specifically:

- San Jose failed to provide Parent with an assessment plan and procedural safeguards in Parents' native language of Spanish;
- San Jose's psychological and academic assessments failed to determine or consider Student's primary language or primary language proficiency skills;
- San Jose's assessments failed to meet legal requirements for the assessment of English language learners;
- San Jose's academic assessment utilized an assessment tool not normed for bilingual Students;
- San Jose failed to assess Student in the language most likely to yield the most accurate results;
- San Jose utilized assessment tools shown to be racially and culturally biased;
- San Jose's assessors were not appropriately trained and knowledgeable;
- San Jose's assessment report omitted any information regarding Student's prior testing in Spanish and Student's previous assessment qualification under specific learning disability;
- San Jose's triennial assessment report contains multiple errors concerning Student's prior academic, adaptive functioning, and phonological awareness scores;
- San Jose's academic and psychological assessments failed to address all Parent concerns and all areas of suspected disability;

- San Jose's assessments were conducted contrary to test instrument manufacturer instructions; and
- San Jose failed to adequately present the 2021 triennial report to Parent at the December 9, 2021 IEP team meeting.

REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATION

A student may be entitled to an independent educational evaluation if he or she disagrees with an evaluation obtained by the public agency and requests an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an independent evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent evaluation].) In response to a request for an independent evaluation, an educational agency must, without unnecessary delay, either: (1) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (2) ensure that an independent evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(b)(2); see also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

San Jose conducted a multidisciplinary psychoeducational evaluation as part of Student's triennial evaluation, between October and December 9, 2021. On January 9, 2023, Parent requested an independent educational evaluation at public

expense as Parent disagreed with San Jose's psychoeducational assessment. On February 17, 2023, San Jose requested a due process hearing to prove its 2021 psychological and academic assessments were appropriate.

School districts must conduct a full and individual evaluation before the initial provision of special education and related services. (34 C.F.R. § 300.301(a).) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A local agency shall ensure that a reevaluation of each child with a disability is conducted in accordance with IDEA's procedural requirements. (20 U.S.C. § 1414(a)(2)(A) and (b), 34 C.F.R. 300.303(a) 2008 Ed. Code, § 56320.)

The evaluations at issue in this matter were part of Student's triennial re-evaluation. San Jose timely filed a request for due process to prove its assessment was legally compliant without unnecessary delay following Student's request for an independent educational evaluation. San Jose, however, failed to prove that its 2021 academic and psychological assessments complied with all applicable federal and state procedural requirements for assessments. Specifically, San Jose failed to provide parent with an assessment plan in Parent's native language of Spanish.

PARENTAL CONSENT REQUIREMENT FOR ASSESSMENTS

The school district must obtain parental consent before conducting a reevaluation. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1) 2008 Ed. Code, §56381, subd. (f)(1).) A district must give parent an assessment plan within 15 calendar days of referral, not

counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five schooldays, from the date of receipt of referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (a); 56321, subd. (a).) The parent has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c)(4).)

To obtain parental consent for an assessment, the school district must provide proper notice to the student and his or her parent. (20 U.S.C. § 1414(b)(1); 20 U.S.C. § 1415(b)(3) and (4) and (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and related state law. (20 U.S.C. §§ 1414(b)(1), §1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must be in a language easily understood by the public and in the native language of the Parent; explain the assessments that the district proposes to conduct; and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The proposed assessment plan must also indicate the student's primary language and language proficiency in the primary language. (5 C.C.R. 3022; Ed. Code, § 52164.1.)

The undisputed evidence presented at hearing established that Parents' native language is Spanish. Parents speak Spanish when speaking to Student, and Student speaks Spanish when speaking to Parents. Student's individualized education programs, called IEP's, through the years expressly list Student's home language as Spanish. Student's 2016 and 2019 assessment reports expressly stated that Spanish is spoken in the home and utilized Spanish language protocols for parent input. Similarly, San Jose's 2021 psychological evaluation at issue in this case utilized Spanish language protocols and questionnaires for all Parent input. Parent routinely requested Spanish language interpreters for Student's IEP team meetings.

Mr. Maverick Sy, Student's special education teacher, sent Parent an assessment plan for the 2021 triennial evaluation in English with no Spanish translation, as an attachment to an electronic correspondence, called an email, on October 19, 2021. The email was written by Mr. Sy in English. Parent promptly signed the assessment plan and informed Mr. Sy of her consent in her October 19, 2021, email response. Although the email response was in English, Parent utilized the Google Translate application for the English translation. Mr. Sy received the signed assessment plan on October 20, 2021. There was no Spanish translation of the assessment plan offered by San Jose or requested by Parent.

Parent testified at hearing. Parent responded without hesitation to all questions at hearing. Her demeanor and tone conveyed her patient and sincere effort to provide accurate and thoughtful answers and explanations in response to San Jose's multiple and sometimes confusing questions. Accordingly, Parent's testimony was persuasive and was accorded great weight.

Parent established that in 2019, she received an English assessment plan for the 2019 psychoeducational evaluation, which she signed, but did not understand because it was in English. Similarly, when Parent was again provided an English assessment plan on October 19, 2021, she signed her name, understanding generally that her signature would result in Student's assessment. Parent assumed the 2021 assessment would be similar to Student's assessment in 2019. Parent did not understand either the words on the English assessment plan, or the specific nature of the various assessments listed. She just signed it. It was not until Parent received translated documents months after the December 9, 2021, IEP team meeting, that Parent realized that the 2021 assessment

was not the same as the assessment in 2019. Specifically, Parent realized the assessment plan in 2021 did not contain a checked box for assessment of adaptive functioning, which was an area of Parent's concern regarding Student.

Mr. Sy also testified at hearing. Mr. Sy's demeanor at hearing conveyed a cavalier attitude evidenced by his swaying and bopping his head, throughout his testimony. His testimony over the course of three days of hearing was often not credible in light of the significant contrary evidence presented. Instead, Mr. Sy's testimony was self-interested in justifying his personal beliefs and actions. Mr. Sy also spontaneously added unsolicited testimony which addressed specific disputes uncovered in prior witness testimony. His testimony appeared scripted and biased toward the district rather than candid and reliable. Accordingly, Mr. Sy's testimony was given little weight.

Mr. Sy acknowledged giving Parent only an English assessment plan. His justification for such was unpersuasive. Mr. Sy, who does not understand or speak Spanish, justified sending only an English assessment plan to Parent asserting Parent's direct and email communications with him were in English. Mr. Sy did not dispute knowing that Parent's primary language is Spanish. Furthermore, Parent used Google Translate to communicate with Mr. Sy and respond to his email correspondence, rendering his assumption that Parent was capable of reading and understanding English, erroneous. Parent's efforts to communicate with Mr. Sy through email or in the classroom, in English, do not negate San Jose's legal obligation to provide Parent with an assessment plan in Parent's native language.

San Jose referred Parent to English and Spanish language assessment plans at hearing. San Jose repeatedly had Parent compare similar words on both forms in an

obvious but unsuccessful effort to establish that Parent must have understood the English assessment plan based on word similarities. Parent weathered the intense questioning by San Jose and remained calm, consistent, and respectful in her responses. This questioning actually established her lack of understanding of the English assessment plan.

Parent's native language is Spanish. San Jose's failure to provide an assessment plan in Parent's native language of Spanish violated federal and state consent requirements under the IDEA. As San Jose failed to establish that it complied with this threshold requirement, no further analysis of whether San Jose complied with other legal assessment requirements is necessary. This error was particularly significant in this case, as Parent was unaware when she signed the assessment plan that Student's adaptive functioning was not a proposed area of assessment. Parent had specific concerns regarding Student's adaptive functioning. San Jose's providing an English assessment plan denied Parent the opportunity to accept or reject the omission of adaptive functioning as an area of assessment.

San Jose's argument in its closing brief that its failure to provide Parent an assessment plan in Spanish should be viewed as harmless error, due to Parent's "multiple" communications in English with Mr. Sy, is rejected as unpersuasive. San Jose's harmless error argument is rejected, as it assumes Parent actually understood the English assessment plan, which she did not. Similarly, San Jose's closing brief argument that Parent's failure to ask for assistance or translation of the English assessment plan relieved San Jose of its duty to provide an assessment plan in Parent's native language of Spanish is rejected as unreasonable and unpersuasive. Parent's signature on an English assessment plan does not negate San Jose's legal obligation to provide Parent an assessment plan in Parent's native language of Spanish. Lastly,

San Jose's closing brief description of Parent's claim that she did not understand the English assessment plan, as a "well-orchestrated portrayal of Student's Mother as not speaking or understanding English" is insulting to Parent and unsupported by the overwhelming evidence presented at hearing.

The undersigned acknowledges that multiple contentions were litigated and conflicting evidence presented by the parties in this lengthy hearing. However, San Jose's failure to provide Parent with an assessment plan in her native language of Spanish was fatal to San Jose's contention that its assessment was legally compliant. This failure prevented San Jose from obtaining informed parental consent for its assessment. Accordingly, San Jose failed to establish by a preponderance of the evidence that its assessment was legally compliant.

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.

Sole Issue presented at Hearing: San Jose's psychoeducational evaluation conducted between October and December 2021, specifically psychological and academic assessment, failed to meet all legal requirements. Student prevailed on the sole issue at hearing.

REMEDIES

The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an independent evaluation at public expense. (20 U.S.C.

§ 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c).) An independent educational evaluation (IEE) at public expense may also be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. *Los Angeles Unified School District v. D.L.* (C.D.Cal. 2008) 548 F.Supp.2d 815, 822-3.

Student prevailed on the sole issue presented as San Jose failed to establish its psychoeducational evaluation conducted between October and December 2021, specifically, psychological and academic assessment, met all legal requirements. Student is thereby entitled to an independent educational evaluation at San Jose's expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c).)

In this case, although there continues to be disagreement between San Jose and Student regarding Student's primary language, there was sufficient evidence to determine that a bilingual independent educational evaluation is an appropriate remedy. The assessment plan itself, developed by Mr. Sy for the triennial evaluation at issue here, lists Student's language as Spanish. Student's Spring 2021 scores on the English Language Proficiency Assessment for California, called ELPAC, were overall at the "minimally developed" level, which is the lowest of four levels. Additionally, in 2016 and 2019, Student's psychoeducational evaluations listed Student's primary language as Spanish and provided Student the opportunity to use both English and Spanish for assessor prompts and Student's responses on some tests. This resulted in Student achieving higher scores than he would have achieved using English only.

In 2019, Student was administered the Receptive One-Word Picture Vocabulary Test, or ROWPVT. Each item was presented first in English. A Spanish language prompt

was presented for incorrect responses. Student correctly identified 58 items with English prompts, and 20 items with Spanish prompts, achieving a standard score of 114, or 83 percent, in the average range.

In 2016, Student was assessed by two different speech and language pathologists. One assessor, fluent in Spanish and English, administered the Spanish Bilingual Edition of the ROWPVT, and the other assessor administered the English ROWPVT. Student scored a standard score of 83, at the 13th percentile, using the bilingual edition. Student scored a standard score of 51, at the below first percentile, on the English version. This evidence is sufficient to establish that a bilingual independent educational evaluation at San Jose's expense is warranted.

ORDER

San Jose shall fund a bilingual independent psychoeducational evaluation of Student in the areas of psychological and academics, at San Jose's expense.

RIGHT TO APPEAL THIS DECISION

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

RITA DEFILIPPIS

Administrative Law Judge

Office of Administrative Hearings