

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2022110700

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LONG BEACH UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

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DECISION

May 3, 2023

On November 23, 2022, Long Beach Unified School District filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Parents on behalf of Student. On December 7, 2022, OAH granted the parties' joint request to continue the matter. Administrative Law Judge Paul H. Kamoroff heard this matter by videoconference on March 14, 15, 16, and 21, 2023.

Attorneys Meagan M. Kinsey and Alicia A. Arman represented Long Beach Unified School District, called Long Beach. Long Beach's Special Education Administrator Diana Zepeda-McZeal, Ed.D., attended all hearing days on Long

Beach's behalf. Attorney Jane N. DuBovy represented Parents and Student. Parent or Parents attended all hearing days on Student's behalf. Student did not attend the hearing.

At the parties' request, OAH continued the matter to April 10, 2023, for written closing briefs. OAH closed the record and submitted the matter on April 10, 2023.

## ISSUES

The ALJ rephrased and reorganized the issues for clarity. The ALJ has authority to restate a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

1. Is Student entitled to a psychoeducational independent educational evaluation at public expense, when Parents' selected evaluator's fee exceeds Long Beach's cost criteria?
2. Is Student entitled to a transition independent educational evaluation at public expense, when Parents' selected evaluator's fee exceeds Long Beach's cost criteria?

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## JURISDICTION

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; 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).)

Here, Long Beach requested the hearing and 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 17 years old and in 11th grade at the time of hearing. Student resided within Long Beach's geographic boundaries at all relevant times. Student was eligible for special education under other health impairment due to an attention disorder. Student attended Millikan High School, a public school operated by Long Beach, where he participated in regular education classes with resource support. Student was on track to receive a regular high school diploma.

## ISSUE 1: THE PSYCHOEDUCATIONAL INDEPENDENT EDUCATIONAL EVALUATION

Long Beach asserts that Student is not entitled to a psychoeducational independent educational evaluation at public expense because Parents' selected evaluator's fee exceeds Long Beach's cost criteria. Long Beach's cost limit for an independent psychoeducational evaluation was \$5,500 at the time of the hearing.

Student argues that Long Beach's cost limit for an independent psychoeducational evaluation was below industry standards and prevented Student from obtaining an independent psychoeducational evaluation by Parents' selected evaluator, Ann Simun, Psy.D. Dr. Simun charged \$6,800 for an independent psychoeducational evaluation at the time of the hearing, thereby exceeding Long Beach's cost cap.

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, called 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 (2006).)

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. 386, 402 [137 S.Ct. 988, 1000].)

The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c).) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent evaluation. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b)(1) and (b)(2); Ed. Code, §§ 56329, subd. (b) and 56506, subd. (c).)

The provision of an independent evaluation is not automatic. Code of Federal Regulations, title 34, part 300.502(b)(2), provides, in relevant part, that following the student's request for an independent evaluation, the public agency must, without unnecessary delay, either:

- file a due process complaint to request a hearing to show that its evaluation is appropriate; or
- ensure that an independent evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to sections 300.507 through 300.513 of part 300 that an evaluation obtained by the parent did not meet agency criteria.

The agency criteria must be the same criteria the school district considers when initiating an assessment, so long as the criteria are consistent with a parent's right to obtain an independent evaluation at public expense. (34 C.F.R., § 300.502(e)(1).)

Assessment criteria may also include criteria related to cost to ensure independent educational evaluations that are publicly funded are not unreasonably expensive. (*Letter to Wilson*, OSEP, Oct. 17, 1989.) If a maximum cost is established, it must eliminate only independent educational evaluations that are unreasonably expensive. (*Id.*) When enforcing reasonable cost criteria, parents must have the chance to show that unique circumstances justify the use of an independent educational evaluator who does not meet the school district criteria. (*Letter to Kirby*, OSEP, May 4, 1989.)

If a parent elects to obtain an independent evaluation by an evaluator not on the public agency's list of evaluators, the public agency may initiate a due process hearing to demonstrate that the evaluation obtained by the parent did not meet the public

agency criteria applicable for independent evaluations, or to demonstrate there is no justification for selecting an evaluator that does not meet agency criteria. (*Letter to Parker*, OSEP, Feb. 20, 2004).)

A psychoeducational evaluation is a comprehensive assessment of a student's academic, cognitive, and social-emotional functioning. It is used to determine eligibility for special education and, following an eligibility determination, to update present levels of the student's functioning. (20 U.S.C. § 1414(b)(4); Ed. Code, § 56026.). A psychoeducational evaluation is normally conducted by a licensed or credentialed psychologist.

On September 24, 2022, Student's advocate, Kim McClain, sent Long Beach a letter whereby Parents disagreed with an October 20, 2021 psychoeducational assessment conducted by Long Beach, and requested an independent psychoeducational evaluation at public expense. The letter identified Dr. Simun as the independent evaluator selected by Parents.

On October 5, 2022, Long Beach special education administrator, Sherrine Jophryn-Hill, responded in a prior written notice that granted Parents' request for an independent psychoeducational evaluation, but denied Dr. Simun as the evaluator because her fee exceeded Long Beach's cost cap. The notice informed Parents that an independent educational evaluation had to be conducted in accordance with Long Beach's independent educational evaluation procedures and included a non-exhaustive list of approved evaluators. Long Beach agreed to fund an independent psychoeducational evaluation by any qualified assessor that met its cost cap, and requested that Parents provide information regarding any unique circumstance that would warrant an exception to the cost cap.

On November 9, 2022, Jophryn-Hill sent Parents a second prior written notice, reiterating Long Beach's policy, and including a list of additional evaluators approved by Long Beach.

On November 15, 2022, Jophryn-Hill sent Parents a third prior written notice, reiterating the first two notices, and clarifying the cost cap for Long Beach's independent psychoeducational evaluations was \$5,000 at that time, below Dr. Simun's fee of \$6,800 to conduct the evaluation.

On November 23, 2022, Long Beach's attorney sent Parents a fourth prior written notice, reiterating the three prior notices.

On February 28, 2023, Long Beach special education administrator, Dr. Diana Zepeda-McZeal, sent Parents another prior written notice, again informing Parents of Long Beach's cost criteria and that its cost cap for an independent psychoeducational evaluation had increased to \$5,500.

A totality of Long Beach's prior written notices informed Parents of Long Beach's guidelines and cost cap for independent psychoeducational evaluations. The notices also informed Parents of Long Beach's agreement to fund an independent psychoeducational evaluation by any qualified assessor who met its cost criteria and provided a non-exhaustive list of approved evaluators. Each notice explained that if Parents selected an evaluator who did not meet Long Beach's cost criteria, Parents would have to show a unique circumstance that warranted an exception to its cost criteria. Finally, the notices provided contact information, including a specific person and direct telephone number, that Parents could use if they desired additional information regarding the independent educational evaluation.



For these reasons, Long Beach met its obligation to provide Parents information about where an independent educational evaluation may be obtained, and Long Beach's criteria and cost cap for independent psychoeducational evaluations. (34 C.F.R. § 300.502(a)(2).)

In response to the prior written notices, Parents repeated their request for Dr. Simun to conduct the evaluation, but did not provide information showing Student had a unique need, or that Dr. Simun had a unique qualification, that warranted an exception to Long Beach's cost cap. Parents were unwilling to select another evaluator and Long Beach was unwilling to provide an exception to its cost cap without information warranting an exception. Long Beach then filed for a hearing to show that its cost cap was reasonable.

During the hearing, the parties did not dispute that Long Beach agreed to fund the independent psychoeducational evaluation by any qualified assessor who met its costs cap of \$5,500. Long Beach did not attempt to defend its October 20, 2021 psychoeducational assessment, as a basis for denying funding of Dr. Simun's independent educational evaluation. Rather, Long Beach demonstrated that its cost cap was reasonable and there was no justification for selecting an evaluator that exceeded the cost cap.

## THE COST CAP FORMULATION

During the hearing, Dr. Zepeda-McZeal testified regarding the formulation of Long Beach's cost criteria and cap. The cost cap for an independent psychoeducational evaluation was the maximum amount paid for the entire evaluation, which included

testing, interviews, observations, review of records, collateral information such as analyzing rating scales, writing a report, and attendance at an IEP team meeting to review the evaluation, absent a unique circumstance.

Long Beach was a single school district special education local plan area, called SELPA. As its own SELPA, Long Beach was responsible for establishing the criteria for independent educational evaluations. This included determining the qualifications and licensure necessary for each area of assessment, along with establishing a reasonable maximum rate for a publicly funded assessment. Long Beach reviewed and updated its criteria and cap for independent educational evaluations every one to two years.

Dr. Zepeda-McZeal was responsible for reviewing Long Beach's cost criteria and cap for independent educational evaluations in fall 2022. To accomplish this goal, Dr. Zepeda-McZeal reviewed the criteria policies for independent educational evaluations of surrounding SELPA's. With this information, Dr. Zepeda-McZeal generated an independent educational evaluation interest form that requested information regarding an assessor's

- qualifications,
- licensure,
- experience,
- areas of assessment,
- location,
- bilingual abilities, and
- costs.

Dr. Zepeda-McZeal sent this interest form to 120 independent evaluators in and near Long Beach, California. Dr. Zepeda-McZeal diligently made several attempts to obtain this information from as many independent evaluators as possible throughout fall 2022.

By December 2022, Dr. Zepeda-McZeal received 55 responses to Long Beach's independent educational evaluation interest forms. The responses included 30 from assessors who conducted independent psychoeducational evaluations. Of those responses, four assessors requested fees above \$5,500. The remaining 26 responses requested fees at or under \$5,500. As a result of this data, Long Beach increased its cost cap for independent psychoeducational evaluations from \$5,000, as established by Long Beach in March 2021, to \$5,500.

Dr. Zepeda-McZeal persuasively testified that Long Beach's cost cap was determined by contacting various qualified assessors throughout southern California and inquiring what those assessors charged for different types of evaluations. To determine a reasonable cost cap, Long Beach excluded outliers on both the high and low ends of the cost spectrum and did not simply average the rates of the various assessors surveyed. Dr. Zepeda-McZeal further testified that Long Beach updated its assessor and cost information on a regular basis to account for inflation and increased costs associated with the evaluations. Dr. Zepeda-McZeal established that Long Beach engaged in a reasoned, systematic, and regular process to determine cost caps for independent educational evaluations.

As there is no specific methodology required for the development of cost criteria or a maximum allowable cost for a publicly funded assessment, the expertise and the exercise of judgment by school authorities should be given deference where the school district can offer a cogent and responsive explanation for its decisions. (*Endrew F. v.*

*Douglas County School Dist.* RE-1 (2017) 580 U.S. 386, 402 [137 S.Ct. 988, 1000].) Long Beach cogently explained and justified its process of surveying 120 professionals in fall 2022, to determine prevailing rates in the community for independent educational evaluations.

The Federal District Court for the Central District of California upheld an OAH decision that found a similar process for formulating a maximum allowable cost for a publicly funded assessment was reasonable. (*A.A. v. Goleta Union Sch. Dist.* (C.D.Cal. 2017) 2017 WL 700082 (*A.A.*)). In *A.A.*, the SELPA called various professionals and inquired what those assessors charged for various types of evaluations. After obtaining this data, the school district excluded outliers on both the high and low ends of the spectrum but did not simply average the rates of the professionals polled, to determine a cap for independent educational evaluations. (*Id.*) The process used by Long Beach was like the process found reasonable in *A.A.* Student offered no legal authority that superseded *A.A.* Consequently, Long Beach's process for establishing cost criteria for independent educational evaluations was lawful.

## THE AVAILABILITY OF INDEPENDENT EVALUATORS

Evidence also showed there was not a lack of qualified assessors who were willing to conduct independent psychoeducational evaluations at or below the \$5,500 cost cap. Long Beach submitted service contracts with 12 qualified assessors who had contracted with Long Beach to conduct independent psychoeducational evaluations at or below the \$5,500 cost cap.

As of June 2021, Helena Johnson, Ph.D. had an agreement with Long Beach to conduct independent psychoeducational evaluations at \$5,000 per evaluation. As of

June 2021, Dr. Simun had an agreement with Long Beach to conduct independent psychoeducational evaluations at \$4,500 per evaluation. From July 2022, through July 2023, B.J. Freeman, Ph.D., had an agreement with Long Beach to conduct independent psychoeducational evaluations at \$5,000 per evaluation. From September 2022, through September 2023, Dr. Carlos Flores had an individual services agreement with Long Beach to conduct independent psychoeducational evaluations at \$5,000 per evaluation. Dr. Marleen Barbee had a similar agreement, through June 2023, to conduct independent psychoeducational evaluations at \$4,500 per evaluation.

In November 2022, Ioana Pal, Psy.D., agreed to conduct an independent psychoeducational evaluation for Long Beach for \$2,500. From November 2022, through November 2023, Dr. Timothy Gunn had an agreement with Long Beach to conduct independent psychoeducational evaluations at \$5,500 per evaluation. From November 2022, through November 2023, Dr. Pedro Olvera had an agreement with Long Beach to conduct independent psychoeducational evaluations at \$5,000 per evaluation. From October 2022, through October 2023, Dr. Olvera had a separate agreement to conduct independent psychoeducational evaluations with an educationally related mental health services assessment, for \$6,000 per evaluation. While this exceeded Long Beach's cost cap for an independent psychoeducational evaluation, Dr. Zepeda-McZeal persuasively clarified that Long Beach regularly paid more for an independent educational evaluation than what was allowed per its cost cap when there was a unique circumstance, such as when a student had a suspected mental health disorder, or when the assessor had unique expertise in a particular area.

From January 2023, through January 2024, Valerie Browers, Ph.D., agreed to conduct independent psychoeducational evaluations at \$4,500 per evaluation. Scott

Larson, Ph.D., had a similar contract for \$5,500 per evaluation. Beginning January 2023, through May 2023, Dr. Robin Morris agreed to conduct independent psychoeducational evaluations for Long Beach at \$5,500 per evaluation.

Long Beach's criteria for funding an independent psychoeducational evaluation were not limited to assessors it recommended or had contracts with. However, this information highlights the reasonableness of Long Beach's cost cap of \$5,500, as there were sufficient, qualified assessors that fell within Long Beach's cost criteria.

## UNIQUE CIRCUMSTANCES

A parent seeking an independent educational evaluation that exceeds a school district's reasonable cost cap is entitled to demonstrate that unique circumstances warrant charging more than the standard cost limit for an evaluation. (*Letter to Kirby*, OSEP May 4, 1989).

Long Beach special education administrator, Jophryn-Hill, was responsible for sending Parents the prior written notices of October 5, 2022, November 9, and 15, 2022. Prior to sending the notices, Jophryn-Hill reviewed Student's educational file to determine if he met an exception to Long Beach's cost cap. On this basis, Jophryn-Hill found Student did not have a unique circumstance, such as a complex medical, educational, or psychological need, that warranted an evaluation beyond what was normally provided by a regularly qualified psychologist.

Nonetheless, Long Beach's prior written notices requested information from Parents regarding a unique or complex disorder that would justify an increase to its cost cap. Parents did not respond to those requests.

During the hearing, Jophryn-Hill persuasively testified that Student did not demonstrate an area of need that justified an exception to Long Beach's cost cap for an independent psychoeducational evaluation. Student did not require an evaluation solely by Dr. Simun because of a remarkable or complex disorder or because of a unique area of expertise held by Dr. Simun. Jophryn-Hill established that Student could be comprehensively assessed by a psychologist from Long Beach's list of independent evaluators or by a credentialed psychologist not on the list but who still met Long Beach's normal cost limit.

## STUDENT'S WITNESSES

Student called Mother, educational advocate Kim McClain, Long Beach school psychologist Nicole Ngo, and several independent evaluators as witnesses during the hearing. Student's expert witnesses included

- Bruce Gale, Ph.D.,
- Dr. Simun,
- Nicholas Thaler, Ph.D.,
- Nancy Blum, Ph.D., and
- Lauren Stevenson, Psy.D.

Except for Ngo, Student's witnesses attempted to show that Long Beach's cost cap of \$5,500 was below industry standards and would prevent Parents from obtaining an independent psychoeducational evaluation by a qualified assessor. Student's witnesses failed to prove this contention.

First, Student failed to impeach the experience or qualification of any evaluator who met Long Beach's cost cap. Consequently, Student failed to show there was a lack

of qualified evaluators in or near Long Beach who were willing to conduct an independent psychoeducational evaluation within Long Beach's cost cap. To the contrary, a preponderance of evidence showed there were many qualified evaluators in or near Long Beach who were willing and capable of conducting an independent psychoeducational evaluation for Student within Long Beach's cost cap.

Secondly, Student failed to submit any persuasive evidence to show that an exception to Long Beach's cost cap was warranted. None of Student's experts testified that Student demonstrated a complex medical, educational, or psychological condition. Mother testified that she selected Dr. Simun because of a recommendation she received in an online chatroom, not because Student exhibited a unique need. In sum, Student did not demonstrate a complex need that could only be assessed by Dr. Simun, or that required an increase to Long Beach's cost cap.

In addition, Student's experts' testimony did not show that Long Beach's cost cap of \$5,500 was below industry standards for an independent psychoeducational evaluation. Drs. Gale, Thaler, Blum, and Stevenson agreed that an independent psychoeducational evaluation normally took 20 hours to complete. This included

- formal and informal testing,
- observations,
- interviews,
- a records review,
- writing the report,
- attendance at an IEP team meeting, and
- travel time.



These experts agreed that some evaluations took less time, and some took more time, to complete. The time required to complete an assessment was not always correlated to the age of the student. For example, while an older student may have more records to review than a younger student, the younger student may receive more related services than an older student, and therefore require more time for observations and interviews. Moreover, the behavior, communication, and cognitive abilities of the student may also increase or decrease the amount of time necessary to complete the evaluation. Nonetheless, the consensus of these witnesses was that 20 hours was a reasonable amount of time for an independent psychoeducational evaluation.

Drs. Blum and Stevenson testified their rate for conducting an independent psychoeducational evaluation was \$250 an hour. The average time necessary to complete an independent psychoeducational evaluation, 20 hours, at the evaluators' rate of \$250 an hour, equals \$5000, below Long Beach's cost cap of \$5,500. Consequently, Drs. Blum and Stevenson's testimony did not show that Long Beach's cost cap of \$5,500 would prevent qualified assessors from conducting an independent psychoeducational evaluation.

Dr. Gale's preferred rate was \$300 per hour, which would place his cost at \$6,000, above Long Beach's cost cap. However, Dr. Gale testified that he was flexible with his rates and regularly conducted independent psychoeducational evaluations for school districts for \$5,000. Therefore, Dr. Gale's testimony did not show that Long Beach's cost cap of \$5,500 would prevent qualified assessors from conducting an independent psychoeducational evaluation.

Dr. Thaler desired \$7,500 for an independent educational evaluation. However, Dr. Thaler testified that school districts did not pay his desired rate. Rather, Dr. Thaler

routinely conducted independent psychoeducational evaluations for \$5,000. At the time of the hearing, Dr. Thaler accepted one independent psychoeducational evaluation per month at \$5,000, and passed on additional referrals to a qualified associate who also accepted the \$5,000 rate. Consequently, Dr. Thaler's testimony did not show that Long Beach's cost cap of \$5,500 prevented qualified assessors from conducting an independent psychoeducational evaluation.

Dr. Simun was the outlier among Student's expert witnesses. Unlike the other experts, Dr. Simun took 11 to 13 hours to complete an independent psychoeducational evaluation. This included

- an intake interview,
- testing,
- one school site observation,
- a records review,
- time to write the report, and
- up to two hours to attend an IEP team meeting or due process hearing.

Dr. Simun charged a flat rate of \$6,800 for the evaluation, with a desired hourly rate of \$600 per hour for testing and \$500 per hour for other work. At \$6,800, Dr. Simun's hourly rate was \$523.07 for an independent psychoeducational evaluation, far above the rates requested by Student's other experts, who were similarly qualified.

Dr. Simun testified she could not conduct an independent psychoeducational evaluation at a lower rate because of costs associated with her

- office rent,
- supplies,

- staff,
- utilities,
- travel, and
- inflation.

However, the other assessors who testified also had to deal with those costs. Dr. Simun's testimony was inconsistent with her June 2021 agreement with Long Beach to conduct independent psychoeducational evaluations at a total cost of \$4,500 per evaluation. Even with increased travel costs and inflation, a one thousand dollar increase to \$5,500, a 22.22 percent increase in less than two years, was a reasonable fee increase for the evaluation. While the private sector may support higher rates for a psychoeducational evaluation, the evaluation at hand was for a publicly funded assessment and Long Beach, as the trustee of public funds, acted reasonably in rejecting Dr. Simun's fee request.

Consequently, Student's witnesses failed to show that Student was prevented from obtaining an independent psychoeducational evaluation by an experienced and qualified evaluator because of Long Beach's cost cap.

In Student's closing brief, Student argues that Jophryn-Hill's and Dr. Zepeda-McZeal's testimony included inadmissible hearsay. Student also argues Long Beach's independent evaluator contracts constituted hearsay evidence. Hearsay is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Evid. Code, § 1200.) Except as provided by law, hearsay evidence is inadmissible. (*Ibid.*)

Specifically, Student asserts Jophryn-Hill's testimony regarding a statement by her secretary that she included an enclosure, including a copy of Parent's rights, with the prior

written notices, was inadmissible hearsay. Student also asserts that Dr. Zepeda-McZeal's testimony that she reviewed response data from Long Beach's independent educational evaluation surveys was inadmissible hearsay.

However, Student's attorney did not make a hearsay objection to Dr. Zepeda-McZeal's or Jophryn-Hill's testimony during their testimony at hearing. Nor did Student's attorney object to the independent evaluator contracts when they were submitted as evidence during the hearing. Timely objections would have allowed a response by Long Beach and an inquiry by the Administrative Law Judge during the submission of evidence. Consequently, Student waived the hearsay and admissibility arguments presented in his closing brief. (Evidence Code § 353; *People v. Szeto* (1981) 29 Cal.3d 20, 32, 171.)

In sum, a preponderance of evidence showed that Long Beach's cost limit of \$5,500 for an independent psychoeducational evaluation was reasonable and that an exception to that cost cap was not justified in light of Student's circumstances. Student is not entitled to a publicly funded independent psychoeducational evaluation by an evaluator whose fee exceeds Long Beach's cost cap.

## ISSUE 2: THE TRANSITION INDEPENDENT EDUCATIONAL EVALUATION

Long Beach asserts Student is not entitled to a transition independent educational evaluation at public expense because Parents' selected evaluator's fee exceeded Long Beach's cost criteria. At the time of the hearing, Long Beach's cost limit for an independent transition evaluation was \$2,000.

Student argues Long Beach's cost cap for an independent transition evaluation was below industry standards and prevented Student from obtaining the evaluation by their selected evaluator, Dr. Simun. At the time of the hearing, Dr. Simun charged \$3,000 for an independent transition evaluation.

Beginning not later than the first IEP to be in effect when a child with a disability turns 16, and updated annually thereafter, the IEP must include appropriate measurable postsecondary goals related to training, education, employment, and, where appropriate, independent living skills. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(b) (2006); Ed. Code § 56345, subd. (a)(8).) A transition evaluation is a mix of formal and informal assessment tools and data collection to obtain information on a student's needs, preferences, and interests to assist in the development of those goals.

On September 27, 2022, Student's educational advocate McClain sent Long Beach an email requesting an independent educational evaluation in the area of transition. On October 5, 2022, Long Beach administrator Jophryn-Hill responded in a prior written notice that informed Parents Long Beach would fund the independent transition evaluation, but Dr. Simun's fee exceeded Long Beach's cost cap. The notice listed an approved evaluator and informed Parents Long Beach would fund an independent transition evaluation by any qualified assessor that met its cost criteria.

On November 9, 15, and 23, 2022, and February 28, 2023, Long Beach sent Parents similar prior written notices. A totality of Long Beach's prior written notices informed Parents of Long Beach's guidelines and cost cap for an independent transition evaluation.

As of November 15, 2022, Long Beach's cost cap for the transition evaluation was \$1,500. On February 28, 2023, Long Beach increased the cap to \$2,000. Each notice

explained that if Parents selected an evaluator who did not meet Long Beach's cost criteria, Parents would have to show a unique circumstance that would warrant an exception to its cost criteria.

Finally, the notices provided contact information, including a specific person and direct telephone number, that Parents could use if they desired additional information regarding the independent educational evaluation. Based upon these notices, Long Beach met its obligation to provide Parents information about where an independent educational evaluation may be obtained, and Long Beach's criteria and cost cap for an independent transition evaluation. (34 C.F.R. § 300.502(a)(2).)

Parents did not provide information showing a unique circumstance that would warrant an exception to Long Beach's cost cap and continued to request that Dr. Simun conduct the evaluation. Long Beach elected to not deviate from its cost cap and filed for hearing to support its decision to not fund Dr. Simun's independent evaluation.

During the hearing, the parties did not dispute that Long Beach agreed to fund an independent transition evaluation by any qualified assessor who met its cost criteria. Long Beach did not attempt to defend a school district transition assessment. Rather, Long Beach demonstrated that its cost cap was reasonable, and there was no justification for selecting an evaluator that did not meet the cost cap.

Prior to sending the prior written notices, Jophryn-Hill reviewed Student's educational file to determine if he met an exception to Long Beach's cost cap. During the hearing, Jophryn-Hill persuasively testified that Student did not demonstrate an area of unique need that justified an exception to Long Beach's cost cap for an independent transition evaluation. Student did not require an evaluation solely by Dr. Simun because of a complex disorder or because of a unique area of expertise held by Dr. Simun. Rather,

Student could be appropriately assessed by a qualified evaluator who met Long Beach's cost cap of \$2,000. Student failed to present any persuasive evidence or expert testimony that disputed Jophryn-Hill's testimony.

Dr. Zepeda-McZeal undertook the same process to formulate the cost criteria for independent transition evaluations as described in Issue 1 for independent psychoeducational evaluations. As discussed in Issue 1, Long Beach's process for establishing cost criteria for independent educational evaluations was lawful.

By December 2022, Dr. Zepeda-McZeal received 55 responses from the 120 independent evaluators surveyed by Long Beach in Fall 2022. This included five responses from assessors who conducted independent transition evaluations. Of those responses, four assessors requested fees at or below \$2,000. One requested a fee above \$2,000. Based upon these responses and Dr. Zepeda-McZeal's review of Long Beach's past cost criteria and that of surrounding SELPAs, Long Beach increased its cost cap for independent transition evaluations from \$1,500, as established by Long Beach in March 2021, to \$2,000.

Dr. Zepeda-McZeal persuasively testified that Long Beach's cost cap was formulated by contacting various qualified assessors throughout southern California and inquiring what those assessors charged for different types of evaluations. To determine the appropriate cost cap, Long Beach excluded outliers on both the high and low ends of the cost spectrum and did not simply average the rates of the various assessors petitioned. Dr. Zepeda-McZeal further testified that Long Beach updated its assessor and cost information on a regular basis to account for inflation and increased costs associated with the evaluations. Dr. Zepeda-McZeal established that Long Beach's determination of its cost criteria for independent educational evaluations funded by

the school district were reasonable and designed to account for inflation and other increased costs to ensure that students could obtain adequate independent educational evaluation by qualified assessors, including in the area of transition. Dr. Zepeda-McZeal credibly established that Long Beach's development of the cost cap was a reasonable, systematic, and regularly reviewed process.

Student failed to present any persuasive evidence or expert testimony that undermined Dr. Zepeda-McZeal's testimony, or the process Long Beach used to formulate its cost cap for independent educational evaluations. For these reasons, substantial weight was given to Dr. Zepeda McZeal's testimony.

The Federal District Court for the Central District of California found that a similar process for formulating a maximum allowable cost for a publicly funded assessment was reasonable. (*A.A. v. Goleta Union Sch. Dist.* (C.D.Cal. 2017) 2017 WL 700082 (A.A.)) As the process used by Long Beach was like the one found reasonable in *A.A.*, Long Beach's process for establishing cost criteria for the independent transition evaluation was lawful. Student failed to present any legal authority that superseded *A.A.*

Student's witnesses Dr. Gale, Dr. Simun, and Molly Rearick Day testified regarding costs for an independent transition evaluation. Dr. Gale was a Harvard educated psychologist with over 35 years' experience in clinical psychology and neuropsychology. Dr. Gale was Chair of the Los Angeles County Psychology Association, Assessment Group, where he regularly communicated with qualified evaluators regarding methods and costs for various areas of private assessments. He operated a private practice in Encino, California, and had vast experience assessing children with disabilities.



Dr. Gale conducted independent educational evaluations in the area of transition for school districts and was familiar with those types of assessments. Dr. Gale described that formal and informal tools such as rating scales, surveys, and interviews were used to obtain information in major areas of a student's functioning, including vocation preference, vocation skills, and adaptive living. Dr. Gale persuasively testified that an independent transition evaluation was not complex and took three hours to complete. Dr. Gale charged \$300 per hour for assessments, indicating a cost of \$900 for an independent transition evaluation, well within Long Beach's cost cap of \$2,000.

Dr. Simun had a Doctor of Psychology in neuropsychology and had conducted numerous independent educational evaluations, including in the area of transition, since 1998. Dr. Simun was qualified to conduct transition assessments based on her education, training, and experience. Dr. Simun testified that an independent transition evaluation was not complex and took three to four hours to complete. This included

- formal and informal testing,
- review of rating scales,
- interviews,
- writing a report, and
- one hour to attend an IEP team meeting.

Dr. Simun charged a flat rate of \$3,000 for a transition assessment for children, like Student, who could read, and \$3,500 for children who could not read. This fee indicated a rate of \$750 to \$1,000 per hour for an independent transition evaluation, higher than her stated fees of \$600 per hour for testing and \$500 for other work. Given that similarly qualified and experienced independent evaluators charged \$250 to \$300

per hour, Dr. Simun's fees were well above industry standards for a publicly funded evaluation. It was therefore reasonable for Long Beach to deny Parents' request for Dr. Simun to conduct the independent transition evaluation.

Molly K. Rearick Day, Ed.D., also testified on behalf of Student. Dr. Rearick Day was an educational consultant who has privately assessed children in the area of transition since 2015. Rearick Day charged \$3,000 for a transition assessment and an hourly rate of \$150. Unlike Drs. Gale and Simun, Rearick Day testified transition assessments took 20 hours to complete.

There were problems with Rearick Day's testimony. Rearick Day failed to describe what was included in a transition assessment or why it took her substantially longer to complete the assessment than other evaluators. Rearick Day was unfamiliar with other transition evaluators, believed transition evaluations were complex, and that she was uniquely qualified to conduct the evaluation.

However, Drs. Gale and Simun more persuasively established that transition evaluations were not complex and were regularly performed by school and private psychologists. Even doubling the time suggested by Drs. Gale and Simun to six to eight hours, at Rearick Day's hourly rate of \$150, it would cost \$900 to \$1,200 for an independent transition evaluation, well below Long Beach's cost cap of \$2,000. Consequently, Rearick Day's time allotment for an independent transition evaluation was unreasonable and little weight was given to her testimony.

In sum, Student's witnesses failed to show that Long Beach's cost cap for an independent transition evaluation was below industry standards or prevented Student from obtaining an independent transition evaluation by a qualified evaluator.

Long Beach proved by a preponderance of the evidence that Student was not entitled to an independent transition evaluation at public expense because the fee of his chosen evaluator, Dr. Simun, exceeded Long Beach's cost cap and an exception was not warranted.

## 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:

Student is not entitled to a psychoeducational independent educational evaluation at public expense because Parents' selected evaluator's fee exceeds Long Beach's cost criteria.

Long Beach prevailed on Issue 1.

### ISSUE 2:

Student is not entitled to a transition independent educational evaluation at public expense because Parents' selected evaluator's fee exceeds Long Beach's cost criteria.

Long Beach prevailed on Issue 2.

## ORDER

1. Long Beach's cost criteria for psychoeducational independent educational evaluations is reasonable such that Long Beach is not required to fund the independent psychoeducational evaluation by Dr. Simun, as requested by Parents.
2. Long Beach's cost criteria for transition independent educational evaluations is reasonable such that Long Beach is not required to fund the independent transition evaluation by Dr. Simun, as requested by Parents.

## 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.

PAUL H. KAMOROFF

Administrative Law Judge

Office of Administrative Hearings