

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

LANCASTER UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

CASE NO. 2023110700

DECISION

MARCH 5, 2024

On November 21, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from the Lancaster School District naming Student. On December 4, 2023, the matter was continued at Student's request. Administrative Law Judge Charles Marson heard this matter by videoconference on January 9, 10, 11, 17 and 18, 2024.

Attorneys Dee Anna Hassenpour and Emily Goldberg represented Lancaster. Rosemary Napoleon, Lancaster's Director of Special Education, attended all hearing days on Lancaster's behalf. Parent represented Student. One or both Parents attended all hearing days on Student's behalf. Student did not attend.

At the parties' request, the matter was continued to February 12, 2024, for written closing briefs. The record was closed, and the matter was submitted on February 12, 2024.

## ISSUE

Were Lancaster's August and September 2023 functional behavior assessment and October 2, 2023, assistive technology assessment appropriate, such that Lancaster is not required to fund independent educational evaluations in those areas?

## 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 Parent are protected.  
(20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords Parent 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(2006); Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see also 20 U.S.C. § 1415(i)(2)(C)(iii).) Lancaster filed for the due process hearing and bore the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was seven years old and in second grade at the time of hearing. He resided within Lancaster's geographic boundaries at all relevant times. Student was eligible for special education under the category of Other Health Impairment.

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ISSUE: WERE LANCASTER'S AUGUST AND SEPTEMBER 2023, FUNCTIONAL BEHAVIOR ASSESSMENT AND OCTOBER 2, 2023, ASSISTIVE TECHNOLOGY ASSESSMENT APPROPRIATE, SUCH THAT LANCASTER IS NOT REQUIRED TO FUND INDEPENDENT EDUCATIONAL EVALUATIONS IN THOSE AREAS?

Lancaster contends that the two assessments at issue were appropriate because they were conducted and reported in compliance with all special education laws governing assessments. Accordingly, Lancaster concludes that it need not fund the individualized educational assessments in the areas of assistive technology and behavior that Parents have requested.

Parents disagreed with the assessments and now argue that each assessment is inappropriate for a wide variety of reasons. Parent argues, among other things, that the assessments

- were inaccurate,
- did not provide adequate data to assist in Student's educational programming,
- did not assess in all areas of suspected disability,
- tested Student with materials above his grade level,
- proposed a text-to-speech program that required supplying Student a new Chromebook,
- failed to consider Student's diagnosis of ADHD and the medications he took for ADHD,
- conducted unreliable classroom observations,
- proposed a previous but reworded behavioral goal, and
- reported on an unauthorized counseling session.

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) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an independent educational evaluation as set forth in Ed. Code, § 56329].) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1) (2006).)

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

Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (34 C.F.R. § 300.301(a) (2007); Ed. Code, § 56320.) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

A district must ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) Assessments must be conducted by individuals who are both "knowledgeable of [the students] disability" and "competent to perform the assessment, as determined by the local educational agency." (Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).)

Tests and assessment materials must be selected and administered so as not to be racially, culturally or sexually discriminatory, and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

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

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

In selecting assessment tools, the assessor must do more than pick a generally valid instrument. Tests and other assessment materials must be used "for purposes for which the assessments or measures are valid and reliable." (20 U.S.C. § 1414(a)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) Assessment tools must be "tailored to assess specific areas of educational need ...." (Ed. Code, § 56320, subd. (c).) "Special attention shall be given to the [child's] unique educational needs ...." (*Id.*, subd. (g).)

Assessors must use "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3)(2006).)

"Technically sound instruments" generally refers to assessments that have been shown

through research to be valid and reliable. (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540-46541, 46642 (Aug. 14, 2006).)

A district must ensure that the child is observed in the child's learning environment, including the regular classroom setting, to document the child's academic performance and behavior in the areas of difficulty.

(34 C.F.R. § 300.310(a)(2006).)

It is the duty of the IEP team, not the assessor, to determine whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. §§ 300.305(a)(iii)(A)(2006); 300.306(a)(1)(2017). To aid the IEP team in determining eligibility, an assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subds. (a), (b).) The report must be given to the parent or guardian. (Ed. Code, § 56329, subd. (c).) Normally, an assessment must be completed within 60 days of the receipt of parental consent for it. (34 C.F.R. § 300.301(c)(1)(i), (ii) (2007); see Ed. Code, § 56302.1(a).)

Federal and State law require that the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.)

A parent has meaningfully participated in the development of an IEP when she

- is informed of her child's problems,
- attends the IEP team meeting,
- expresses her disagreement with the IEP team's conclusions, and
- requests revisions in the IEP. (*N.L. v. Knox Cty. Schools* (6th Cir. 2003) 315 F.3d 688, 693.)

A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP development process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

## BACKGROUND

Student and Parent moved into the District in January 2021. Student already had an IEP from the Los Angeles Unified School District which made him eligible for special education and related services in the category of Other Health Impairment. Student's Los Angeles IEP team chose that category because Student engaged in behaviors consistent with attention deficit hyperactivity disorder, called ADHD.

Lancaster conducted an IEP team meeting for Student on May 21, 2021. Lancaster team members did not think that Student was eligible for special education and proposed to exit Student. Parent disagreed, and Student remained eligible for special education and related services.



On May 25, 2022, the parties executed an agreement settling a due process hearing request brought by Parents. The parties agreed that Lancaster would implement an IEP offer it had made on February 26, 2021, but Parents had previously declined.

On January 25, 2023, Lancaster conducted an IEP team meeting for Student and offered him a new IEP that continued his eligibility under Other Health Impairment and would have placed him in a mild-to-moderate special day class. Parents did not agree to the IEP. However, at the meeting the parties agreed that assessments should be conducted. The IEP offer was later amended on February 15, March 13, and November 8, 2023. Parents did not agree to any version of it.

On January 27, 2023, Lancaster provided assessment plans to Parents for assessments in the areas of assistive technology, functional behavior, and occupational therapy. Parents consented to the assessments on August 10, 2023. The three assessments were conducted, and Parents disagreed with two of them.

## THE ASSISTIVE TECHNOLOGY ASSESSMENT

Tyler Heckathorn conducted the assistive technology assessment. Heckathorn obtained certification from the Assistive Technology Certificate Program at California State University Northridge in 2019, where he had previously obtained a master's degree in communications disorders. Heckathorn also held a national certification as an assistive technology professional from the Rehabilitation and Engineering Society of North America. Heckathorn had worked as an assistive technology specialist for Lancaster since July 2021.

Heckathorn was also a credentialed speech-language pathologist for Lancaster from July 2016 to June 2021. He had a national certificate of clinical competency from the American Speech-Language-Hearing Association. As both an assistive technology specialist and a speech-language pathologist, Heckathorn acquired considerable experience in evaluating the needs of students for technological support, including students with ADHD. Heckathorn was qualified to conduct the assistive technology assessment.

Heckathorn was an impressive witness at hearing. He understood Student's needs in detail and was thoughtful in discussing how they might be met. He spoke carefully, did not exceed the areas of his expertise, and was able to admit a mistake. His testimony was not damaged on cross-examination. Heckathorn was a credible witness, and his testimony is given substantial weight here.

Heckathorn was aware of Student's ADHD diagnosis and kept it in mind during the assessment. The purpose of the assessment was to understand Student's needs and whether assistive technology supports might be able to help support those needs.

Heckathorn reviewed Student's health and developmental records and his cumulative record. He also reviewed:

- an independent psychoeducational assessment conducted by Janice Casteel, an independent assessor, in October 2022,
- an academic assessment conducted by district resource teacher Jody Barton in November 2022, and
- another psychoeducational assessment by school psychologist Jessica Aldaco in January 2023.

Heckathorn separately interviewed Student's Mother, Student's special day class teacher Lisa Klee, and Student. Student was happy and excited about school, and was able to describe his needs for support, which included reading and math.

Heckathorn observed Student in his classroom on one occasion for 20 minutes and on another for more than an hour. He studied samples of Student's writing. He administered the following assessment measures:

- the Wisconsin Assistive Technology Initiative (WATI) Student Information Guide,
- the Protocol for Accommodations in Reading (PAR),
- the DeCoste Writing Protocol (DWP), and
- the Student Environment Task Tools (SETT) Framework.

Heckathorn obtained from classroom teacher Klee some of Student's writing and work samples, photographed them, and included them in his assessment report. These samples showed that, contrary to Parents' claim, Student could write his name.

Heckathorn was informed that Student was working at the kindergarten level in all subjects. However, he found that Student could write or copy words, short phrases, and basic sentences. Student had difficulty with phonological skills, text, and math concepts. When given an adult reader and a text reader, however, he was able to understand second-grade material.

When Heckathorn administered the Protocol for Accommodations in Reading, Student was unable to articulate more than the first word in the Student Oral Reading

section of the measure. The publisher's instructions were to skip the section if the test subject was reading below the second-grade level or found the reading exceptionally slow and arduous. Accordingly, Heckathorn skipped to a different section.

When Heckathorn administered the DeCoste Writing Protocol, he did not administer three of its subtests because Student had too much difficulty with earlier subtests. Heckathorn established at hearing that skipping those subtests was, in those circumstances, consistent with the instructions of the publisher of the Protocol.

Heckathorn wrote an extensive report on his assessment, which he presented to Parents and the IEP team on October 2 and November 11, 2023. In his report, Heckathorn identified three areas in which Student needed support, which were reading, writing, and math. He concluded that Student could benefit from additional tools such as text-to-speech and speech-to-text, to support him in reading and writing. He also recommended the use of digital math supports. Finally, he recommended some accommodations for Student's IEP.

The report was labeled a draft because Parents had asked to see a copy before the IEP team meeting. Heckathorn provided it to Rachel Holmes, the District's lead speech-language pathologist, who gave it to Parents five days before the October 2, 2023, meeting. By Heckathorn's standard practice, the draft was unsigned. Lancaster's policy was that an assessment was not complete until the end of the IEP team meeting at which it was discussed. Heckathorn completed the report at or just after the October 2, 2023 IEP team meeting and furnished a signed copy of the final version to Parents the next day. Parents attended both parts of the IEP team meeting called to consider the assessments, which were on October 2 and November 8, 2023. At both sessions of the meeting, Parents participated extensively in discussions of the assessment.

Heckathorn demonstrated in his report and confirmed in his testimony that he complied with several additional requirements for an appropriate assessment:

- He was knowledgeable of Student's disability,
- He selected tools and administered the assistive technology assessment in Student's native language, English, so as not to be racially, culturally or sexually discriminatory,
- His assessment was sufficiently comprehensive to identify all of Student's special education and related service needs,
- He used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about Student, including information from Parents,
- His assessment tools were used for purposes for which the tools were valid and reliable,
- He used technically sound instruments that could assess the relative contribution of cognitive, behavioral, physical, and developmental factors,
- He did not use a single procedure as the sole criterion for determining whether Student had a disability or in determining an appropriate program for him,
- He observed Student in his educational environment,

- He provided and administered assessment tools in the language and form most likely to produce accurate information on what Student knew and could do academically, developmentally, and functionally,
- He administered the assessment tools pursuant to their publishers' instructions, and
- He produced a written report of the assessment that was given to Parents and that addressed whether Student needed special education and related services. The report was given to Parents within 60 days of their approval of the assessment and was also discussed at an IEP team meeting within 60 days of their approval of the assessment.

Taken together, Heckathorn's assessment report and testimony established that his assistive technology assessment of October 2, 2023, was appropriate and complied with legal requirements.

## THE FUNCTIONAL BEHAVIOR ASSESSMENT

James Boury, a Lancaster school psychologist and Board-Certified Behavior Analyst, conducted the Functional Behavior Assessment. Boury obtained a bachelor's degree in human development and psychology from California State University at Long Beach, and a master's degree in school psychology and a pupil personnel services credential at National University. Boury also held a credential as a Board-Certified Behavior Analyst and was a trainer in non-crisis intervention. Boury conducted between 15 and 20 functional behavior assessments every school year. Between 25 and 50

percent of those students had ADHD. Boury served an average of five to 10 students with ADHD every school year. Boury was knowledgeable of ADHD and was qualified to conduct the functional behavior assessment.

Boury's testimony at hearing was careful and detailed, and showed great familiarity with Student in his educational setting. Boury was able to admit to small errors when they occurred, and his testimony was not effectively challenged on cross-examination. Boury was a credible witness, and his testimony is given substantial weight here.

Boury assessed Student to identify his behavioral challenges in the school setting and to determine effective interventions for them. Boury conducted his assessment over seven days between August 30 and September 27, 2023.

Boury reviewed Student's IEP, previous assessment reports, and attendance records. He also reviewed the entries in a weekly behavior/academic communication log between Student's teacher and Parents. Boury interviewed Student's Mother, Student's teacher, a district psychologist, and Student. Boury administered two assessment measures, the Questions about Behavioral Functions and the Functional Analysis Observation Form.

Boury observed Student in his classroom environment six times, for a total of 5.18 hours. Each time he wrote an extensive description of Student's behavior and included the descriptions in his assessment report.

As a result of these efforts, Boury was able to isolate and describe three areas of maladaptive behaviors by Student that served as target areas. They were refusal behaviors, tantrum behaviors, and eloping. However, Boury did not observe any

tantrum behaviors or eloping in any of his six observations, and Lancaster staff did not report any of those behaviors. Boury observed refusal behavior, but Student's engagement in those behaviors was infrequent and mild, and occurred in only one of the six observations. In Klee's special day class on September 27, 2023, Student's shoe was off during a small group session, and staff told him to put it on. He kicked it toward his table before he put it back on, and Boury interpreted this as 43 seconds of refusal. Student also waited for 62 seconds before following an instruction to call up the i-Ready computer program on his Chromebook. In addition, Student continued for 77 seconds to play a computer game on the Chromebook after being instructed to close it and get ready for recess.

Boury was aware of Student's diagnosis of ADHD, and reported it as part of Student's health, medical, and developmental history. During two of his classroom observations, Boury used momentary time sampling procedures to collect data on Student's on-task and off-task behaviors, taking data every 20 seconds. In a class on September 19, 2023, Student was on task 73 percent of the time, while his male peers were on task only 52 percent of the time. In a class on September 27, 2023, Student was on task 70 percent of the time, while a randomly chosen male peer was on task 73 percent of the time.

Overall, Boury learned that all of Student's refusals were in response to adult instructions. When that occurred, Student was able to self-correct in 67 percent of those incidents and had to be prompted in the other 33 percent. All incidences of refusal were related to escape or task avoidance.

Boury interviewed Student's Mother on September 14, 2023, for approximately thirty minutes. Assistive technology specialist Heckathorn was also on the call because



the two assessors wanted to respect Mother's time by not interviewing her separately. Mother expressed several concerns about the district, and about Student's behavior in the home setting. Boury established at hearing that the interview helped him substantially in identifying Student's target behaviors.

Boury also interviewed classroom teacher Klee to gather current information on Student's needs and challenges. He learned from Klee that Student was generally doing well in her class, although he sometimes struggled with reading. He also learned that Klee kept a daily communication log to communicate with Parents, and was able to see from the log that Student did sometimes shut down or engage in refusal behaviors. However, these behaviors were infrequent and lessening, and Student would recover from them.

Boury interviewed Student, who responded appropriately, and listed his likes and dislikes. He favored the school's slides but wished his class level had swings. He identified a friend with whom he played.

Based on all the assessment data he had gathered, Boury recommended additional positive behavior supports, goals, and services. These included warnings of upcoming changes to the schedule or routines, reminders of expected behaviors prior to transitions, a daily check-in and check-out routine, and a seating arrangement with fewer distractions. Boury also wrote and proposed a social skills goal. Finally, Boury recommended that Student receive 60 minutes a month of counseling and guidance to implement his social and emotional goals.

Boury established that in assessing Student's functional behavior, he also complied with numerous other requirements for an appropriate assessment. He established that:

- He used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about Student, including information from Parents,
- He did not use a single procedure as the sole criterion for determining whether Student had a disability or in determining an appropriate program for him,
- He used technically sound instruments that could assess the relative contribution of cognitive, behavioral, physical, and developmental factors,
- He provided and administered assessment tools in the language and form most likely to produce accurate information on what Student knew and could do academically, developmentally, and functionally,
- He selected tools and administered the assistive technology assessment in Student's native language, English, so as not to be racially, culturally or sexually discriminatory, and
- His assessment tools were used for purposes for which the tools were valid and reliable.

Boury's assessment report was timely furnished to Parents and timely discussed at the IEP team meeting of October 2 and November 11, 2023. Parents participated extensively in the discussion. Taken together, Boury's assessment report and testimony established that his functional behavior assessment of September and October 2023 was appropriate and complied with legal requirements.

## PARENTS' CONTENTIONS

### ASSISTIVE TECHNOLOGY ASSESSMENT

Heckathorn tested Student's reading comprehension by having Student use an adult reader and a text reader and using second grade reading material. Parents contend that Heckathorn should have used kindergarten-level material, to be consistent with test results and teacher reports saying that he was working at the kindergarten level in all subjects. Neither Parent claimed to have any special experience or training concerning educational assessments, or educational matters in general. No professional opinion supported this claim. Heckathorn was not measuring Student's normal reading level. He was adding assistive technology to see if it helped Student in achieving higher comprehension, and it did. With the adult reader and text reader, Student was able to comprehend material at his grade level, which was second grade. Heckathorn recommended that Lancaster supply Student with both readers.

Parents fault Heckathorn for not ensuring that Student finished all the subtests of the Protocol for Accommodations in Reading and the DeCoste Writing Protocol. Parents assert, without support from any professional, that if Heckathorn had allowed Student to finish the two measures, Parents would have had a clear understanding of his difficulties in writing. As noted above, though, Student was unable to complete some of

the tests because of their level of difficulty, so Heckathorn skipped them. This was consistent with the publisher's instructions. Parent is now insisting that Heckathorn should somehow have ensured that Student finished portions of the tests that were beyond his abilities. Heckathorn had no such duty.

Parents accuse Heckathorn of "tampering" with his assessment report, but the conduct they criticize was routine editing to convert the draft report to a final report. Heckathorn converted his draft to a final version just before and after the October 2, 2023 IEP team meeting. He added a graphic to the final report that represented data already described in the draft report. He added a sentence suggesting calling an IEP team meeting if unexpected behaviors occurred. He also added a description of a student intervention matching system, which was a series of questions to help identify further suggestions for supporting Student. The additions did not alter the analysis already presented in the draft report.

Parents do not identify any adverse consequence from this alleged tampering, and the record shows there was none. The day after the October 2, 2023 IEP team meeting, Lancaster sent Parents a copy of Heckathorn's final version of his assessment report. The second half of the IEP team meeting convened to discuss Heckathorn's report did not occur until November 8, 2023, allowing Parents more than a month to adjust to any changes between the draft and final reports and to ask any questions about them at the second half of the IEP team meeting. There was no evidence that the changes in the functional behavior assessment between the draft and final versions made any difference to anyone's consideration of Student's educational programming.

Heckathorn proposed that Student use a text-to-speech add-on program based in Google Documents, a software extension which he established is compatible with the

Chromebook Student already had. Parents argue that the program is incompatible with Student 's current Chromebook and cannot be used until Student is given another laptop. Parents had no apparent expertise to support this claim, and no other witness addressed it. Heckathorn's statement that the extension was compatible with Student's current Chromebook was more reliable in light of his greater expertise and experience with assistive technology devices and programs.

Heckathorn admitted at hearing that he made an error in his final report, in a section entitled Educationally Relevant Health, Developmental and Medical Information. That section contained two paragraphs, the first of which addressed Student's health information taken from the present levels of performance in his then-current IEP. Both paragraphs were accurate.

However, in the final version of Heckathorn's report, the first paragraph of the Educationally Relevant Health, Developmental and Medical Information Section was not accurate. It presented health information concerning a different student. At hearing, Heckathorn admitted the error and explained that in converting his draft to a final document, he accidentally cut and pasted the health history paragraph from his assessment of another student into his final report on Student, instead of cutting and pasting the accurate paragraph from his draft report concerning Student. The error occurred after he had presented the draft report at the October 2, 2023 IEP team meeting. The erroneously included paragraph appeared in Heckathorn's final report.

Parents argue that this error, by itself, made Heckathorn's assessment inappropriate, and entitles her to a new and independent assistive technology evaluation at Lancaster's expense. However, a special education assessment does not have to be perfect to be appropriate under the IDEA for purposes of relieving a district

from funding an independent educational evaluation. In *B.G. v. Board of Educ., City of Chicago* (7th Cir. 2018) 901 F.3d 903, for example, district assessors made several mistakes, but the Court of Appeal agreed with the hearing officer that they were harmless and held that the assessments involved were appropriate.

The district in *B.G., supra*, admitted errors in the administration of two standardized test measures during a psychoeducational evaluation. Those errors included providing only minimal Spanish translation, failure to explain “f scores” on one measure, failure to consider results in a previous assessment, and the loss of testing protocols after the IEP team meeting held to discuss the assessment. (*B.G. v. Board of Educ., supra*, 901 F.3d at pp. 912, 916-917.) In addition, a physical therapy assessor mistakenly ruled out pain as a cause of some of the student’s physical difficulties. (*Id.* At p. 916.) But the Court of Appeal agreed with the hearing officer that all of these mistakes were harmless and did not invalidate the assessments.

The mistake made by Heckathorn in this case was far less significant than those held harmless in *B.G., supra*. Heckathorn’s inclusion of a paragraph concerning the health history of another student occurred after the IEP team meeting of October 2, 2023, in which he and the team discussed the correct draft report. The health history of the other student was very different from Student’s, as anyone familiar with Student would immediately see. No educational programming decision was made based on the inaccurate information. Heckathorn established at hearing that he used the draft report to form his opinions and recommendations, and that the October 2, 2023 IEP team considered the draft report, not the final. Heckathorn’s error was harmless and did not invalidate his assessment.

## FUNCTIONAL BEHAVIOR ASSESSMENT

Parents assert that behaviorist Boury was unable to identify the target behaviors that trigger Student's maladaptive behaviors. This claim is refuted by the record. Boury devoted a section of his assessment to the target behaviors, identifying refusals, tantrums, and eloping as the three targets. Boury did not further address either Student's tantrums or eloping because neither he nor other Lancaster staff had seen Student engaging in those behaviors at school. Boury noted that Student does not have a history of entries in the school's disciplinary log for this school year.

Parents argues that in describing the behaviors that trigger student's maladaptive behavior, Boury did not take into consideration Student's diagnosis of ADHD or the medications he takes for it. However, there was no evidence at hearing that Student's diagnosis and medication were related to his triggers. Student's off-and-on attention may have been related to his refusal behavior, but Boury thoroughly considered that. Boury also mentioned that Student took Adderall at home for his ADHD.

Parents argue that it was unlawful for Boury to attend and report on 15 minutes of a counseling session conducted with Student by Lancaster school psychologist Brenda Garcia, because the session should not have been occurring at all. The January 25, 2023 IEP offer proposed that Student receive 60 minutes a month of counseling. Parents did not agree to the offer. Someone working for Lancaster told Garcia that the sessions had been approved, and Garcia conducted four of them before learning that they were not authorized. Garcia ceased the sessions and apologized for the error.

During one of these unauthorized counseling sessions, Boury joined Student and Garcia for about 15 minutes. The event is reported in Boury's assessment as an observation. During those 15 minutes, Student invited Boury to play Jenga, and Boury joined the game. Boury asked Student a few questions about his likes and dislikes, including what if anything scared or angered him. Student responded that he had been scared by angry bananas he found under his bed and angered when his German Shepard bit him. Boury observed that Student was polite, interacted with the adults appropriately, obeyed instructions to put the game pieces away, and seemed to enjoy the session.

Parents contend that the unauthorized counseling sessions violated the IDEA because she had not agreed to them. (See, *Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 826 (material variation from IEP can deny FAPE).) But Boury was authorized by the signed assessment plan to observe Student's behavior in his educational setting, which at the time included counseling. If either of the school psychologists lacked authority to be in that session, it was Garcia, not Boury. In his assessment report, Boury noted that it was Student who invited him into the session. Boury interacted with Student for 15 minutes and reported the interaction in one paragraph of his assessment. The interaction Boury described was innocuous, and Parents do not argue that Boury's summary of his observation was inaccurate or damaging to Student in any way.

Parents assert that Boury's attendance at the unauthorized counseling session may have violated Student's privacy under the Family Educational Rights and Privacy Act, known as FERPA. However, they make no reference to any specific provision of that Act. It is not obvious why two school psychologists employed by the same entity could not discuss a student whom one of them was authorized to assess. In any event, FERPA



is enforced by an administrative agency. OAH has no jurisdiction over violations of that Act. Boury's report of the unauthorized counseling session had no effect on the appropriateness of Boury's assessment.

Boury also made a minor mistake in his assessment report. He stated that Student had no siblings, though in fact he has two. The parties dispute whether this incorrect information was conveyed in Boury's interview of Mother, but that does not matter here. The error, if any, was insignificant. Certainly, Parents were not misled, and there was no apparent relationship between the number of Student's siblings and his educational programming. Boury's error was harmless and did not invalidate his assessment.

Parents make two arguments about Boury's assessment report that are not explained enough to be evaluated or to be persuasive. Parents assert that Boury's proposed supports for Student are inappropriate and would be ineffective but does not explain that claim. Parents also contend that the new goal proposed by Boury to the IEP team was merely a rewording of a previous goal. However, they do not identify that previous goal, or state that Student had or had not met it. Accordingly, Student did not persuasively show that the assessments were invalid based on these unproven contentions.

## BOTH ASSESSMENTS

Parents assert that the Lancaster took "forever" to respond to her request for independent educational evaluations. The record shows otherwise. Parents requested

the independent assessments on October 5, 2023. Lancaster sent Parents a prior written notice on October 16, 2023, denying her requests for independent assistive technology and functional behavior assessments.

Parents assert that the assessors were incompetent because, during cross-examination at hearing, they could not define some of the many technical terms Mother asked them to define. There was no evidence that these terms related to the fields in which the assessments were conducted or posed a fair test of anything. Nor was there evidence that Mother had any special expertise that would equip her to select a set of technical terms that would adequately test the assessors' qualifications. As noted above, both assessors were qualified by training, experience, and licensure.

Parent also accuses one of the assessors, who is unnamed, of lying about his education at a particular school, but gives no details that would allow the contention to be fairly considered. They claim that the assessors missed many protocols but do not identify what they might have been.

Parents contend that the two assessors should not have interviewed Mother in the same phone call. However, they fail to identify any professional standard that might have violated or any harm resulting from that choice.

The two assessors administered test measures to Student on the same school day. Parents claim that this overwhelmed Student, and explained why he did not finish some subtests of two of the test instruments. Since Parents were not present, the source of their information was not identified, and their contention is therefore not persuasive. The assessors did not perceive or report that Student was overwhelmed.

Parents assert that the assessors could not have gotten accurate information through their classroom observations because the other students were modeling bad behavior. Parent does not explain how she could know this. There was no evidence that this occurred during the observations, and neither assessment report mentions misbehavior by other students in the class.

Parents fault both assessors for not supplying new suggestions and insights, and instead relied too much on previous reports. For example, they state that the text-to-speech suggestion made by Heckathorn was earlier made by their independent assessor Janice Casteel. This may only have meant that Heckathorn agreed with Casteel and that the previous reports were valid and useful. Since Parents had not agreed to a recent IEP, many of those proposals were still current. The assessors were required by law to consider previous assessments and evaluation data. (34 C.F.R. § 300.305(a)(2007).) They had no obligation to provide proposals or interventions that were new or not addressed in previous assessments.

A district must ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) Parents assert that the two assessments did not assess Student in all areas of suspected disability, as required by federal and state law. However, assessing in every area of suspected disability is the responsibility of the school district as a whole, not of each individual assessor. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) The record contains references to several other assessments that are not at issue here. The assessments as a whole failed to assess Student in all areas of suspected disability. There is therefore no way to tell whether Lancaster assessed Student in all areas of disability. Nothing in the IDEA or state law requires every single assessment to assess a student in all areas of suspected disability.

In a related argument, Parents contend that Lancaster failed to assess Student for ADHD. This is incorrect because ADHD is not a separate area of disability. It is part of the disability category of Other Health Impairment, and Lancaster has consistently treated it that way. Parents do not assert that there is a separate assessment for ADHD that Lancaster should have conducted. Both assessors were aware of Student's ADHD diagnosis. Boury even produced and reported data concerning Student's on-task and off-task behaviors in segments of 20 seconds, over more than five hours of observations.

Mother contended at hearing that the information produced by the assessments was inaccurate because "my son cannot read, write or form words by memory." The assessments showed that to be incorrect. Student could read, write, and produce words. Klee gave Heckathorn some work samples from Student in which he had done so, and Heckathorn photographed them and included them in his assessment report.

Parents assert that some of the information in the goals, report cards, grades, communication log, and i-Ready reports which the assessors obtained from classroom teacher Klee were not accurate. However, Parents offered no evidence at hearing other than Mother's conclusory testimony to establish this claim. Parents do not identify any authority that suggests an assessor must independently verify the facts reported in earlier documents. The law does not impose that burden.

Parents state that the two assessments did not provide adequate data to assist in Student's educational programming but does not explain her argument. The assessment reports refute that argument. Heckathorn reported data from four assessment measures, more than an hour of classroom observation, and opinions from Student, his teacher, and his Mother. Heckathorn identified the three areas in which Student needed support,

recommended technical supports, and proposed additional accommodations for Student's IEP. These data would be useful to an IEP team for numerous reasons, including showing how Student's kindergarten-level reading can be substantially improved by technology.

Boury identified three target behaviors of concern, reported on more than five hours of classroom observation, and directly addressed the extent to which Student was or was not off-task by a series of measurements taken every 20 seconds. These data would be useful to an IEP team for numerous reasons, including resolving the dispute between the parties as to whether Student's IEP or behavior plan should address eloping and tantruming in the educational setting.

Parents contend that the methods used by the two assessors did not provide information about Student's learning abilities. That was not the purpose of either assessment. Heckathorn's assistive technology assessment was intended to help Student's IEP team decide whether he needed assistive technology, and if so, what technology would help him. Boury's functional behavior assessment was conducted in order to determine what behavioral challenges Student had in the school setting, find the causes of Student's maladaptive behavior, and recommend effective behavioral interventions. Neither assessment sought to describe Student's learning abilities in general, and there is no legal requirement that they should have. That is the duty of the district as a whole, not each individual assessor.

As mentioned earlier, the two assessments at issue here are not the only recent assessments of Student. The record mentions in passing the existence of at least two psychoeducational assessments conducted in 2023, one by Lancaster and one by an independent expert selected by Parents. It also mentions an academic assessment

conducted in 2023. Whether or not those other assessments provided adequate information about Student's learning abilities, when supplemented by the views of his teachers and providers, is beyond the scope of this decision.

Several of Parents' arguments concern perceived unfairness to them during the assessment process. These arguments relate to actions Lancaster failed to take. However, the law did not require Lancaster to take them. Lancaster was not required, for example, to:

- Notify Parents in advance when assessment activities would occur at school;
- Modify the behavioral assessment plan by adding that it must be done by someone who was not only a school psychologist but also a Board-Certified Behavior Analyst;
- Supply the assessors' credentials to Parents in advance of assessment;
- Post all test protocols and information about independent educational evaluations on the school's website; or
- Assess Student a year earlier than it did.

In her closing brief, Parent also make many arguments that bear on matters other than the appropriateness of the assistive technology and functional behavior assessments at issue. They include claims that:

- Lancaster does not offer Student an appropriate program because it does not have enough federal or state money to hire adequate staff,
- that it routinely falsifies documents,

- that it has not complied with a previous settlement agreement, and
- that it did not give Parents's private assessor sufficient time to observe Student.

These arguments are irrelevant to the issues pled in this case and are not addressed here.

Lancaster met its burden of proof that the assistive technology and functional behavior assessments were appropriate and 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.

### ISSUE:

Lancaster's August and September 2023, functional behavior assessment and October 2, 2023, assistive technology assessment were appropriate, such that Lancaster is not required to fund independent educational evaluations in those areas.

Lancaster prevailed on this issue.

## REMEDIES

Federal courts have broad latitude to fashion appropriate equitable remedies for violation of the IDEA. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S. Ct. 1996, 85 L. Ed. 2d 385]; *Parents of Student W. v. Puyallup Sch.*

*Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The authority to order such relief extends to hearing officers. (*Forest Grove Sch. Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, fn. 11 [129 S.Ct. 2484; 174 L.Ed.2d 168].) Normally remedies are issued to redress denials of FAPE. Hearing officers do have, however, authority to remedy purely procedural violations of the Act. (See 20 U.S.C. § 1415(f)(3)(E)(iii) (“Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.”)).

Equitable relief is granted here to make sure that the error in the Educationally Relevant Health, Developmental and Medical Information section of the final version of the assistive technology assessment does not lead to future procedural violations of the IDEA by the distribution of incorrect information.

## ORDER

1. Lancaster’s assistive technology and functional behavior assessments were appropriate, and Lancaster need not fund independent educational evaluations in those areas.
2. Lancaster shall take all reasonable steps to ensure that the final version of assistive technology specialist Heckathorn’s assessment is not distributed to anyone while still containing the erroneous reference to another student in the Educationally Relevant Health, Developmental and Medical Information section. Lancaster shall produce a final version of Heckathorn’s assessment that removes the reference to another student and contains the correct information about Student as set forth in the same section in his draft assessment. Lancaster shall enter that



corrected assessment in the Special Education Information System or other special education filing or reporting system. Lancaster shall recall and destroy all copies of the final assessment containing the erroneous information in its possession or control and shall ensure that no copy of the final assessment containing the inaccurate information is maintained in the Special Education Information System or other special education filing or reporting system.

3. Lancaster shall not provide the final assessment report containing the erroneous information to any other school district or to anyone requesting information about Student.

## 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.

Charles Marson

Administrative Law Judge

Office of Administrative Hearings