

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

THE CONSOLIDATED MATTERS INVOLVING:  
PARENTS ON BEHALF OF STUDENT, AND  
SAN DIEGO UNIFIED SCHOOL DISTRICT.

CASE NO. 2024040252

CASE NO. 2024020608

DECISION

July 22, 2024

On February 16, 2024, the Office of Administrative Hearings, called OAH, received a due process hearing request from San Diego Unified School District, naming Student, which is called District's Case. On April 4, 2024, OAH received a due process hearing request from Student, naming San Diego Unified School District, which is called Student's Case. On April 16, 2024, OAH consolidated District's Case with Student's Case, and ordered that the 45-day timeline for issuance of the decision in the consolidated matter be based on the date of the filing of the complaint in Student's Case. San Diego Unified School District is referred to San Diego Unified or District.

Administrative Law Judge Laurie Gorsline heard this matter by videoconference on May 21, 22, 28 and 29, 2024. An Administrative Law Judge is called an ALJ.

Attorneys Megan Nunez and Patrice Darlin Mulvaney represented Student. One or both Parents attended all hearing days on Student's behalf. Student did not attend the hearing. Attorney Edward Southcott represented San Diego Unified. Royal Lord, Ed.D., San Diego Unified Program Specialist, attended all hearing days on its behalf.

At the parties' request, OAH continued the matter to June 26, 2024, for written closing briefs. The record was closed, and the matter was submitted on June 26, 2024.

## ISSUES

### DISTRICT'S ISSUE

Is San Diego Unified's May 2, 2023 psychoeducational assessment appropriate such that it is not required to fund an independent psychoeducational evaluation for Student at public expense?

### STUDENT'S ISSUE

Did San Diego Unified deny Student a free appropriate public education by failing to either agree to fund the independent educational speech and language evaluation requested by Parent on January 17, 2024, or file for due process to prove that its own evaluation was appropriately conducted?

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## 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.) All subsequent references to the Code of Federal Regulations are to the 2006 version. 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, called a 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] (*Schaffer*); and see 20 U.S.C. § 1415(i)(2)(C)(iii).)

Student had the burden of proof on Student's Issue and San Diego Unified had the burden of proof on District's Issue. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 11 years old and in sixth grade at the time of hearing. Student resided within San Diego Unified geographic boundaries at all relevant times. Student has been eligible for special education in the category specific learning disability since 2019.

Student attended District's Miller Elementary until he completed fourth grade at the end of the 2021-2022 school year. Parents unilaterally privately placed him at New Bridge School for fifth grade for the 2022-2023 school year, where he continued to attend school for sixth grade during the 2023-2024 school year. New Bridge School was not a public school.

**DISTRICT'S ISSUE: IS DISTRICT'S MAY 2, 2023 PSYCHOEDUCATIONAL ASSESSMENT APPROPRIATE SUCH THAT IT IS NOT REQUIRED TO FUND AN INDEPENDENT PSYCHOEDUCATIONAL EVALUATION FOR STUDENT AT PUBLIC EXPENSE?**

San Diego Unified contends that it filed to defend the only assessment it conducted, a May 2023 psychoeducational assessment, without unnecessary delay and that its evaluation was appropriately conducted. It asserts it evaluated Student in all areas of suspected disability as part of the psychoeducational assessment. It argues that as part of a settlement agreement dated October 28, 2022, District conducted the agreed to psychoeducation and academics evaluations. San Diego Unified contends

that speech and language was not an area of suspected disability to be assessed in May 2023. It asserts that Student qualified for special education based on speech or language impairment eligibility at three years old but was exited from special education with Parent's consent over five years ago. It argues that except for one email sent in fall 2022, Parents never requested a speech and language evaluation or identified speech and language as an area of suspected disability until January 2024.

San Diego Unified argues the results of academic testing and observation were consistent with Student having a phonological processing deficit, and not an expressive or receptive communication weakness that warranted further assessment in speech and language. San Diego Unified contends that when tested by the school psychologist, Student's scores were consistent with a student with a phonological processing disorder, and Student did not demonstrate, nor did anyone report, that Student had communication issues. It argues Student was adequately assessed in the area of anxiety as part of the psychoeducational evaluation, and nothing warranted further assessment in that area. San Diego Unified contends neither of Student's experts offered persuasive testimony and Parents never expressed any disagreement with District's February 2023 assessment plan and waited eight months to disagree with the psychoeducational evaluation.

Student contends the psychoeducational evaluation was not legally sufficient because it failed to include evaluation in all areas of suspected disability, specifically speech and language, attention, and mental health based on early childhood delays, other evaluations, and express Parent concerns. Student argues that the 2022 settlement agreement required San Diego Unified to conduct a comprehensive reevaluation of Student in all areas of suspected disability, not just a psychoeducational evaluation.

Student asserts San Diego Unified failed to sufficiently gather relevant information from Parents, administer a necessary test of phonological processing, or test Student's oral language. Student claims District's May 2023 reevaluation was not sufficiently comprehensive to accurately identify Student's needs which was demonstrated by the poor recommendations in the May 2023 evaluation report. Student contends the failure of San Diego Unified to conduct a legally sufficient reevaluation denied Parents the opportunity to meaningfully participate in the development of Student's educational program because it lacked substantive information on Student's needs.

Student argues that by requesting that OAH determine the appropriateness of its psychoeducational assessment, it is seeking a determination that its May 2023 reevaluation was appropriate. Student argues that District's May 2023 evaluation was intended to be a full reevaluation, and that the psychoeducational and speech-language independent educational evaluations requested by Parent were well within the scope of the reevaluation District was supposed to conduct pursuant to the Parties' 2022 settlement agreement. Relying on opinion letters issued by the United States Department of Education, Student argues that a parent has a right to an independent educational evaluation in areas of suspected disability that should have been evaluated but were not where parent's disagreement is that the public agency's evaluation did not assess the child in all areas of suspected disability. Student asserts that independent evaluations have been denied by courts where the independent assessment was outside the scope of what the prior evaluation was meant to assess. However, where the requested independent evaluation was in response to a full reevaluation, the independent assessment was found to be within the scope of the comprehensive nature of such reevaluation.

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 IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363, subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, 402 [137 S.Ct. 988, 1000].)

An IEP is a written document for each child with a disability that includes a statement of the child's present levels of academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a)(1); Ed. Code, § 56345 subd. (a)(1).) An IEP must contain a statement of the special education and related services and supplementary aids and services to be provided to the pupil, or on behalf of the pupil, and a statement of the program modifications or supports for school personnel that will be provided to enable the student to

- advance appropriately toward attaining the annual goals and be involved in and make progress in the regular education curriculum and participate in nonacademic activities, and

- be educated and participate with other individuals with exceptional needs and nondisabled pupils. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).)

In developing the IEP, the IEP team must consider

- the strengths of the child,
  - the concerns of the parents for enhancing the education of their child,
  - the results of the initial evaluation or most recent evaluation of the child and
  - the academic, functional, and developmental needs of the child.
- (20 U.S.C. § 1414(d)(3)(A).)

For each area in which a special education student has an identified need, the IEP team must develop annual goals that are based upon the child's present levels of academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2); *Letter to Butler, United States Department of Education Office of Special Education and Rehabilitative Services* (OSERS) March 25, 1988.)

The IEP team is required to review a child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revise the IEP as appropriate to address

- the lack of progress toward the annual goals,
- the results of any reevaluation,



- information provided to or by the parents,
- the child's anticipated needs, or
- other matters. (20 U.S.C. § 1414(d)(4)(A); 34 C.F.R. § 300.324(b).)

To determine the contents of an IEP, a student eligible for special education under the IDEA must be assessed in all areas related to the student's suspected disability including, if appropriate,

- health and development,
- vision,
- hearing,
- motor abilities,
- language function,
- general intelligence,
- academic performance,
- communicative status,
- self-help,
- orientation and mobility skills,
- career and vocational abilities and interests, and
- social and emotional status. (20 U.S.C. § 1414 (a)(2) & (b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).)

School district evaluations of students eligible for special education under the IDEA help IEP teams identify the special education and related services the student requires. (20 U.S.C. § 1414(c)(2) & (d)(3)(A); 34 C.F.R. §§ 300.303, 300.305(c), 300.306, 300.324(a)(1); Ed. Code, §§ 56341.1, 56381, subd. (c).)

A disability is “suspected,” and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1109 (*Timothy O.*)). Such notice may come in the form of concerns expressed by parents about a child’s symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child’s behavior. (*Id.* at p. 1120 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796, 802, and *N.B. v. Hellgate Elementary School District* (9th Cir. 2008) 541 F.3d 1202, 1205-1206].)

An assessment must be sufficiently comprehensive to identify all the student’s special education and related service needs, whether or not commonly linked to the disability category in which the child is classified. (20 U.S.C. § 1414(b) & (c)(1)(B); 34 C.F.R. § 300.304(c)(6), Ed. Code, § 56320, subd. (c).) A student’s unique educational needs are to be broadly construed to include

- academic,
- social,
- health,
- emotional,
- communicative,
- physical, and
- vocational needs. (*Seattle School Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, abrogated in part on other grounds by *Schaffer, supra*, 546 U.S. at pp. 56-58; see also, Ed. Code, § 56320, subd. (f).)

Educational benefit to be provided to a student requiring special education is not limited to addressing the student's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.)

The actions of a school district with respect to whether it had knowledge of, or reason to suspect a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (*See Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

School district evaluations of students with disabilities under the IDEA serve two purposes:

1. identifying students who need specialized instruction and related services because of an IDEA-eligible disability; and
2. helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301, 300.303, 300.304(b)(1) and 300.305(a).)

The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur throughout the course of the student's educational career. (See 71 Fed. Reg. 46640 (Aug. 14, 2006).)

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The IDEA provides for reevaluations, referred to as reassessments in California, to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, §§ 56302.5, 56381, subd. (a)(2).)

Assessments must be conducted in a way that:

- uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent;
- does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and
- uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

The assessments used must be:

- selected and administered so as not to be discriminatory on a racial or cultural basis;
- provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally;
- used for purposes for which the assessments are valid and reliable;
- administered by trained and knowledgeable personnel; and

- administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b); 34 C.F.R. § 300.304(b) & (c); Ed. Code, §§ 56320, 56381, subd. (e).)

As part of an initial evaluation or any reevaluation, the IEP team, and other qualified professionals, as appropriate, must review existing data on the pupil, including evaluations and information from parents, current classroom-based assessments and observations, and identify what additional data, if any, is necessary to determine:

- if the student continues to have a qualifying disability and the student's educational needs;
- the present levels of performance;
- whether the student continues to need special education and related services; and
- whether any additions or modifications to the special education and related services are needed to enable the student to meet the student's annual goals and participate in the general education curriculum. (20 U.S.C. § 1414(c)(1)(A) & (B); 34 C.F.R. § 300.305(a) & (b); Ed. Code, § 56381, subd. (b).)

The local educational agency is required to administer such assessments and other evaluation measures as may be needed to produce the data identified by the IEP team. (20 U.S.C. § 1414(c)(2); 34 C.F.R. § 300.305(c); Ed. Code, § 56381, subd. (c).)

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The determination of what tests are required is made based on information known at the time. (See *Adams, supra*, 195 F.3d at p. 1149.) Assessors must be knowledgeable about the student's suspected disability and must pay attention to student's unique educational needs such as the need for specialized services, materials, and equipment. (Ed. Code, § 56320, subd. (g).)

In interpreting evaluation data, each public agency must:

- draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
- ensure that information obtained from all of these sources is documented and carefully considered. (34 C.F.R. § 300.306(c)(1).)

The personnel who assess a student are required to prepare a written report that includes, without limitation, the following:

- whether the student may need special education and related services;
- the basis for making that determination;
- the relevant behavior noted during observation of the student in an appropriate setting;
- the relationship of that behavior to the student's academic and social functioning;

- the educationally relevant health, development, and medical findings, if any;
- if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and
- consistent with superintendent guidelines for low incidence disabilities, which are those affecting less than one percent of the total statewide enrollment in grades kindergarten through 12, the need for specialized services, materials, and equipment. (Ed. Code, § 56327.)

Within 60 days of parental consent to the assessment, the assessment report must be provided to the parent, and an IEP team meeting must be held to consider the assessment. (Ed. Code §§ 56302.1, subd. (a), 56329, subd. (a)(3), 56344, subd. (a).)

A student may be entitled to an independent educational evaluation if he or she disagrees with an evaluation obtained by the public agency and requests an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1), (b)(1) & (2); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an independent evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent evaluation].)

“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).) A parent is entitled to

only one independent educational assessment at public expense each time the public education agency conducts an assessment with which the parent disagrees. (34 C.F.R. § 300.502(b)(5); Ed. Code, § 56329, subd. (b).)

## BACKGROUND

### STUDENT'S INITIAL SPECIAL EDUCATION ELIGIBILITY

Student was first eligible for special education and related services in June 2015 at three years of age. He attended an early childhood classroom at Miller Elementary. Student functioned within the average range of cognitive ability and met eligibility criteria under speech or language impairment because of his significant impairments in receptive and expressive language and highly unintelligible speech.

Student was reevaluated for special education and related services in June 2018 when he was six years old and in kindergarten. His learning ability fell within normal limits for his age and his overall level of cognitive functioning was in the average range. On academic assessments he was average in all areas. He did not demonstrate a processing deficit. In speech and language, Student demonstrated average to above average receptive and expressive language skills including social interaction and social communication skills. He exhibited a mild delay in speech production skills; however, they were all within normal developmental expectations. Student no longer met criteria for speech and language services and was exited from special education in June 2018.

Between June 2018, when Student was exited from special education in kindergarten, and the 2022-2023 school year, Student received speech and language services outside of school paid by Parent's private insurance.



## SUBSEQUENT 2019 REELIGIBILITY

A student support team meeting took place in December 2018 and February 2019 of Student's first grade year to discuss his progress. Student had made slow progress and was a year behind in reading skills. His teacher reported he knew all his letters but was still missing a few sounds. He was reading at a mid-kindergarten level in December 2018 and remained at a kindergarten level in February 2019. He was reported to be friendly, determined, and a great self-advocate. He had no known diagnosis at that time and did not exhibit any behaviors at school or at home. He had trouble with one-to-one correspondence, rhyming, and sight words. He was not consistent with his work and had trouble getting started with writing. He received individual and small group reading support through a program called SOAR.

In February 2019, Student was assessed by private assessor Rada West, Ph.D. of Neurobehavioral Services. In that assessment, Student demonstrated overall average cognitive functioning. He had a relative strength in verbal comprehension and auditory and visual memory. He had relative weaknesses in auditory attention, motor persistence, and what was described as visuoconstructional skills. He struggled with reading development, specifically phonological processing, and struggled emotionally. Student was reported to appear to understand his challenges, but did not know how to access support. West diagnosed Student with specific learning disability with impairment in reading and written language, and an adjustment disorder with depressed mood.

At hearing, Parent testified Student was first diagnosed with dyslexia, dysgraphia, and dyscalculia around this time, but provided no details on who made the diagnoses or if the diagnoses were reported to San Diego Unified prior to 2022.

San Diego Unified evaluated Student for special education and related services in June 2019 at the end of Student's first grade year. In that assessment, Student's learning ability was estimated to fall within normal limits for his age, with his overall level of cognitive functioning estimated to fall in the low average range. He demonstrated relative cognitive strength in visual processing skills and relative weakness in auditory processing, specifically phonological processing. Student was below grade level expectation in reading in the classroom, classroom assessment, standardized assessment, and in work samples. San Diego Unified found Student eligible for special education and related services under the category of specific learning disability because of the severe discrepancy between Student's ability and achievement in reading due to his processing deficit.

Due to the COVID-19 pandemic which began in mid-March 2020, District instituted remote learning from Spring 2020 to March 2021. Student's teacher provided ongoing virtual learning opportunities throughout the in-person school closures.

#### STUDENT'S 2021-2022 FOURTH GRADE SCHOOL YEAR AT MILLER ELEMENTARY

During the 2021-2022 school year, Student was nine years old and in fourth grade, and returned to attending Miller Elementary. He was placed in educational specialist Kelly Finn's class for part of each school day.

Finn was employed as an education specialist for San Diego Unified since 2006. She worked for two years as an education specialist in a special day class for fifth and sixth graders at another school district before she was employed at San Diego Unified. Finn held a master's degree in special education and a mild/moderate educational

specialist credential which allowed her to teach children in kindergarten through grade 12. At San Diego Unified, Finn provided special education instruction to fourth and fifth graders by providing small group direct instruction on English language arts and math. This included teaching common core curriculum and working with students on reading and writing skills, comprehension, phonics, and fluency. Finn also conducted academic skills assessments at least 30 times per year, with standardized testing between 10 and 20 times per year.

In Finn's class, Student was polite and respectful. Finn observed that Student

- was always happy,
- followed directions,
- participated in group work,
- had friends, and
- socialized.

Although he struggled in reading, he had a great attitude about learning, was a hard worker, and wanted to do well. Finn observed Student participate in reading comprehension discussions in class and that he was able to state his thinking and use evidence from the text. At hearing, Finn described Student as a typical fourth grader. She did not observe any speech and language issues. Finn observed that Student was able to communicate and have conversations. She saw no articulation or pronunciation issues. In her opinion, Student was easily understood, and he did not display social language processing issues.

In October 2021, Parent contacted the school counselor to report that Student was having issues with anxiety about school, was seeing a psychiatrist, and had a therapist. Parent told the school counselor Student started having anxiety in January

2021, and experienced headaches and stomachaches when playing with other children. Parent reported Student started Prozac and had been doing well on it, and that Parent thought Student was overwhelmed because his fourth-grade class was split between two teachers. Parent reported to the counselor that Student asked to switch to a different class to be with a good friend. Parent told the school counselor Student did not feel like he fit in with the kids and was a social outcast.

Student continued seeing a therapist and a psychiatrist and taking daily medication to address anxiety through the date of hearing. Parent continued to have concerns about Student's anxiety through the hearing.

### STUDENT'S MAY 2022 THREE-YEAR REEVALUATION

District conducted a three-year reevaluation of Student in May 2022, near the end of Student's fourth grade year. This was not the assessment at issue at hearing but provides important background information for discussing the May 2023 reevaluation at issue. The same assessors performed reevaluations of Student in May 2022 and May 2023.

The May 2022 reevaluation was performed by school psychologist Aamna Hassan and education specialist Finn. The 2022 reevaluation was documented in a written report dated May 5, 2022. At the time of this reassessment, Student was in a general

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education classroom, supplemented with 80 minutes per week of specialized academic instruction in the general education classroom and 500 minutes per week of specialized academic instruction in a separate setting. The assessment procedures included

- records review,
- teacher input,
- an interview of Student,
- observations, and
- three standardized measures, including a comprehensive test of phonological processing, a standardized academic achievement test, and a standardized cognitive test.

Finn administered the academic portion of the assessment. Academically, Student's overall scores varied from two scores in the average range to mostly very low range scores. His scores were significantly low because his reading skills greatly impacted his overall academic development and progress. Finn determined that Student's oral comprehension and expression were areas of strength which helped him access grade level curriculum.

Student's overall reading scores were significantly below average. He needed support when he worked on reading assignments to fully understand the concepts the class was working on. His attention and focus also impacted his reading development. His lack of phonetic skills greatly impacted his ability to understand the text. He did not have the ability to break apart sounds by blending or chunking together consonant or vowel blends. Due to Student's reading/decoding difficulties he was not able to give an accurate answer retelling what he could recall from short passages he read.

In contrast, Student's oral comprehension was an area of strength. If passages were read aloud to him, he was able to retell more accurately what was read aloud. In small group instruction, Student was usually the one who participated when the group worked on literacy responses. He was able to use his prior knowledge and critical thinking skills to answer inferential questions. He used specific examples or evidence from the text to support his thinking. However, when asked to read aloud, he usually declined because he was not confident in his reading skills, although he was willing to make an effort.

In writing, Student scored within the low average range. His writing skills were not at grade level, and he required additional support on writing assignments in the classroom. Student received adult support when he was working independently on writing assignments. Accommodations such as a word bank and speech to text were also beneficial to him. Student could form his letters, but because his reading skills were very low, it affected his ability to spell and recall basic phonetic sounds. He struggled to sound out words he wanted to write and often guessed which letters to use. He was usually able to read what he wrote, but sometimes struggled. He had great ideas and was able to orally express himself or use academic language, but the paper and pencil task of writing affected his ability to demonstrate higher level vocabulary when writing.

For both reading and writing, Finn recommended assistive technology to allow Student to access grade level reading materials and assignments and to correctly spell the words he wanted to write on paper.

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Student's math skills were in the low average range. Math was an area of strength for Student, but he needed specialized academic instruction support to keep up with pacing and understand complex grade level math concepts. He needed word problems read out loud to him. He usually gave his insight on how to go about solving problems.

School psychologist Hassan performed the psychoeducational portion of the May 2022 reevaluation. Hassan was a San Diego Unified school psychologist since 2015. She had a master's degree in education with an emphasis in counseling and an education specialist degree in school psychology, along with a pupil personnel services credential which permitted her to provide services to children, including counseling and administration of psychoeducational evaluations. On average, Hassan administered 60 assessments per year or about 500 over the course of her career.

Hassan's cognitive testing showed that, compared to his peers, Student had low average cognitive skills, with a phonological processing weakness. Phonological processing entailed how an individual processes individual letter sounds and phonemes, a skill important to reading, writing, and spelling. The major components of phonological deficits involved phonemic awareness, which was one's understanding of and access to the sound structure of language, sound-symbolic relationships, and storage and retrieval of phonological information in memory.

Hassan administered a comprehensive test on phonological processing to obtain more information about Student's awareness of and access to the sound structure of his oral language. Students with well-developed phonological awareness learned to read more easily than those with poorly developed phonological awareness. Student

demonstrated average range skills when blending sounds together to form words. He demonstrated challenges and below average performance when asked to segment parts of words and blend remaining sounds to form new words or to identify parts of words. In the classroom, this skill was seen during reading and spelling.

This test also assessed the functioning of the part of memory called the phonological loop, which provided a brief, verbatim storage of auditory information. Student performed in the average range on tasks that required him to recall numbers in sequential order and repeat non-words.

Another portion of this test, which included tasks that required Student to visually scan and quickly recall letters and numbers, Student performed in the below to low average range. Student demonstrated a weakness in recalling letters. Student did not make any errors, but it took him longer to recall the names of the letters. In the classroom, this skill was seen when writing sentences or completing math problems because Student had to recall information he learned previously.

In social emotional and behavioral functioning, Hassan conducted an observation, interviewed Student, and obtained input from his teacher. The May 2022 evaluation report noted that Parent input was not available at the time of writing the report and there was no evidence at hearing explaining that note.

During the classroom observation, Student sat next to a peer and as they typed on their Chromebooks, looked and chatted with each other. Overall, Student appeared engaged in his work, but was chatty and distractible. When interviewed, Student told the assessor his favorite subject was lunch and his least favorite was all the rest, but he thought reading and writing were the hardest.



Student's teacher said he had certain strengths in that he was helpful and kind and shared ideas during shared reading. He had trouble spelling words and needed to sound out words phonetically. He demonstrated some anxiety related to a sibling's health. His rule compliance, relationships, attention, focus, time on task, participation, help-seeking, effort, attendance, responsibility, and class work completion were good. Student struggled in reading. He was well below the average reading level of his peers and was below grade level in writing. The May 2022 evaluation report stated that Student was getting 1s in reading and writing and 2s in math.

At hearing, Parent explained that Student had siblings, all of whom had autism, mood disorders, intellectual disability, and epilepsy. Parent described Student as a very shy child and kind of quiet. However, Student was generally calm, and he tried to comfort his siblings when their behavior escalated.

The May 2022 evaluation report concluded that Student continued to meet eligibility criteria for specific learning disability. Student demonstrated overall average cognitive skills. He demonstrated average long-term retrieval and short-term auditory processing skills, and low average fluid reasoning skills, but below average phonological processing skills. This deficit impacted his ability to make academic progress in reading and writing.

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## PARENT'S AUGUST 2022 REQUEST FOR SPEECH AND NEUROPSYCHOLOGICAL EVALUATIONS OF STUDENT

On August 2, 2022, Parent sent Finn an email requesting a "Speech and Neuropsychological Eval" for Student.

On August 24, 2022, Finn responded by asking for clarification regarding the evaluations Parent was requesting.

On September 1, 2022, Parent clarified that she was seeking both an independent educational speech evaluation and an independent educational neuropsychological evaluation. Parent stated that Student had not made a lot of progress last year as demonstrated by his report card with all "1s" and she believed Student could do better and wanted to give him the tools he needed to be successful.

## STUDENT'S ENROLLMENT AT NEW BRIDGE

Prior to fall 2022, Student had been working with a tutor twice a week. Parent understood the tutor had specialized knowledge about dyslexia. Student was not making progress working with the tutor only twice a week, so the tutor recommended Student go to school at New Bridge to get daily remediation.

In fall 2022, Parent unilaterally privately placed Student at New Bridge. It was small school. There were eight children in Student's classroom, and Student received a lot of one-to-one assistance.

## THE NOVEMBER 2022 SETTLEMENT OF STUDENT'S CLAIMS

On September 20, 2022, Student filed a due process hearing request with OAH, alleging that San Diego Unified denied Student a FAPE during the 2020-2021 school year by, among other things, failing to conduct an appropriate three-year reevaluation.

In November 2022, Student and San Diego Unified entered into settlement agreement dated October 28, 2022. The November 2022 settlement agreement required San Diego Unified to reimburse Parents for New Bridge tuition for the 2022-2023 regular school year. The parties agreed Student was a parentally privately placed Student at New Bridge through extended school year 2023, and San Diego Unified was absolved from all obligations under the IDEA and related state law except for assessments to be performed pursuant to the November 2022 settlement agreement and the IEP team meeting to review the assessments.

The parties agreed San Diego Unified would present Parents with an assessment plan by February 28, 2023, "to assess in all areas of suspected disability, including psycho-education and academics" to be conducted by District personnel. The parties agreed to convene an IEP team meeting as Student's "Triennial review" to review the results of the assessments within statutory timelines but no later than May 5, 2023. Student waived all claims through the end of the 2022-2023 school year except for the evaluations and IEP required by the November 2022 settlement agreement and agreed to dismiss his due process hearing request.

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## SAN DIEGO UNIFIED'S 2023 REEVALUATION

### THE MAY 2023 REEVALUATION AND MAY 2023 EVALUATION REPORT

San Diego Unified conducted Student's reevaluation in spring 2023, while Student was in fifth grade and attending New Bridge. This reevaluation is called the May 2023 reevaluation. The May 2023 reevaluation was performed by school psychologist Hassan, and education specialist Finn. The May 2023 reevaluation was documented in a written evaluation report dated May 2, 2023, called the May 2023 evaluation report. The assessment procedures included a records review, a list of questions sent to Parent, and a list of questions sent to Student's New Bridge teacher, observations, and four standardized measures in (1) achievement, (2) cognitive ability, (3) visual motor integration, and (4) behavior.

The assessors did not send Parent a health and developmental questionnaire to fill out as part of the May 2023 reevaluation. The health and development section of the May 2023 evaluation report was identical to the May 2022 evaluation report, except for one line that acknowledged Parent reported Student had been diagnosed with dyslexia, dysgraphia, dyscalculia, and attention deficit disorder.

Education specialist Finn administered academic testing using instruments she was trained on and qualified to administer and interpret. Student's overall academic scores varied, but there was not a significant change within his overall academic performance. He showed improvement in some areas, while he maintained or regressed in others. Student continued to need support in reading, particularly

phonics, which could have impacted all core curriculum subject areas. Student showed some improvement in approximately half of the academic categories charted, but his scores declined in about a third of the categories. Approximately two-thirds of his scores were in the very low to low range, including

- reading,
- broad reading,
- basic reading skills,
- reading comprehension,
- reading fluency,
- reading rate,
- written language,
- broad written language,
- academic skills,
- academic fluency,
- brief and broad achievement,
- phoneme-grapheme knowledge,
- letter word identification,
- passage comprehension,
- word attack,
- oral reading,
- word reading and sentence reading fluency,
- spelling of sounds,
- spelling, and
- sentence writing fluency.

On the reading subtests, Student's phonetic skills greatly impacted his ability to decode and comprehend a passage, especially without picture support. Student orally read sentences at a slow pace and often had to go back and reread the sentences which impacted his fluency levels. In reading recall, Student's ability to remember the text decreased as the passages became more complex and more difficult to decode. Student's overall writing skills were greatly impacted by his reading skills. In school, text-to-speech software was a great tool for Student when he worked on writing assignments. Student was able to solve both basic and complex math word problems because the subtest was read to him.

The May 2023 reevaluation included the results of three informal reading assessments and an informal math assessment. One reading assessment measured Student's recognition of words out of context. Student's ability to recognize instructional primer/first grade words was 80 percent, but second grade words was only 50 percent. Another assessment measured phonics and phonics-related skills for beginning reading. Student's scores varied, but assessment of multisyllabic words was discontinued because Student could not read five out of eight words. Another informal reading measure evaluated Student's instructional reading level was at mid-first grade, and he showed challenges in fluency and accuracy.

The May 2023 evaluation report included Student's academic present levels of performance as reported by New Bridge. Student scored at a pre-primer 0.7 grade level on a sight word assessment, pre primer frustration on a reading inventory and 2.3 grade level on a spelling inventory. By the end of the second trimester at New Bridge, Student's spelling inventory score had not changed. Student's scores on the sight word assessment were at a 1.1 grade level and he was at the pre-primer instructional level on

the reading inventory. Student's teacher reported Student was producing paragraphs as part of his writing class, and in math he was learning to multiply and divide two-to-three-digit numbers. Student participated in daily math fact work and used his math strategy book for computation and word problems.

School psychologist Hassan administered the tests on cognition, visual motor integration and behavior, using instruments she was trained on and qualified to administer and interpret. Hassan concluded Student had average cognitive skills compared to his peers. Student scored in the average or above average range on a variety of processing assessments, except for a low average score on a short-term working memory subtest and a below average score on an auditory processing subtest for phonological processing. Hassan did not administer any testing on Student's oral language, although there are some oral language tests that school psychologists are qualified to administer.

Auditory processing encompassed phonological processing and phonemic awareness abilities and was frequently discussed in relation to reading. Deficits in auditory processing can impact acquisition of language and the development of basic reading, writing, and math skills. Hassan administered three subtests for phonological processing, but the results for each of the subtests were not listed in the May 2023 evaluation report. In the narrative regarding these subtests, the May 2023 evaluation report only said Student "demonstrates relative and normative phonological processing weaknesses."

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Student's ability to see designs and copy them was examined by a visual-motor subtest that required him to reproduce designs using a pencil and paper. Student's visual motor-skills and ability to copy designs presented to him fell in the average range.

Education specialist Finn observed Student during her academic testing which was conducted at Miller Elementary. Finn and Hassan both observed Student at New Bridge for about 20 minutes during reading instruction. New Bridge only allowed one observation of 20 minutes in the classroom. Both observations were described in the May 2023 evaluation report.

Finn observed that Student was focused during the academic testing she administered, and he needed minimal redirection even when the task became difficult. He was given several opportunities to take a break, which he did not want. He was friendly and cooperative and used strategies during challenging tasks.

During the observation at New Bridge, there were eight students in the classroom. The teacher read rhyming words and prompted the students to repeat the words, spell them, write them, and count the syllables in each word. Student touched his chin as he said the syllables and wrote the number on his paper. The students transitioned into a blending words activity, breaking apart the words. Student blended the separate sounds to form the word accurately. The students then began a suffixes exercise. Student appeared engaged and participated throughout the observation.

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As part of May 2023 reevaluation, school psychologist Hassan sent Parent an email with some questions for Parent to answer. Hassan also sent New Bridge a list questions for Student's teacher to answer. As discussed more fully below, the evidence failed to establish what specific questions Hassan posed to Parent and Student's teacher or that Hassan's inquiries were sufficient to adequately inform the May 2023 reevaluation. The information provided by Parent and Student's New Bridge teacher in response to Hassan's inquiries was included in the May 2023 evaluation report under "Parent Input" and "Teacher Input."

Parent reported Student always tried hard and enjoyed playing with Legos. Parent's concerns were with reading and math. Parent also reported Student had a great group of friends at New Bridge and "was coming out of his shell more."

Student's New Bridge teacher reported Student was a kind and compassionate learner and always tried his best. At first, Student required almost immediate validation he was doing things correctly throughout the day. He was reluctant to work independently. The teacher reported Student now understood his regulation and academic needs. He willingly used the tools he learned, was more self-aware of his needs, and willingly took on academic tasks. The teacher reported Student made growth in using learned strategies to become an independent learner and was developing strategies to work through academic tasks that were challenging. The teacher reported Student was using structured literacy daily, which included

- kinesthetic and multi-modal strategies,
- strategy sheets during math,
- sensory strategies to assist with regulation,

- assistive technology across all subject matters,
- handwriting and typing practice,
- pre-reading and active reading strategies, and
- social emotional strategies.

Socially and emotionally, Student was a delight to teachers and peers.

Hassan interviewed Student in person and included a summary in the May 2023 evaluation report. Student said reading was his favorite subject and identified the books he read. His least favorite subject was math. Student said he enjoyed playing with friends at school and wanted to be a mechanic when he grew up. His hobbies included collecting vintage toys.

As part of a standardized behavioral assessment, Hassan obtained rating scales from Parent, Student's New Bridge teacher and Student. That assessment tool evaluated the behavior and self-perception of children and young adults. A clinically significant range suggested a high level of maladjustment. An at-risk range identified a significant problem that might not be severe enough to require formal treatment or might identify the potential of developing a problem that needed monitoring.

Parent rated Student clinically significant in the areas of

- anxiety,
- depression,
- withdrawal,
- attention problems,
- activities of daily living skills, and
- leadership.

#### Parent reported Student

- frequently displayed behaviors stemming from worry, nervousness, and/or fear;
- was withdrawn, pessimistic and/or sad;
- was generally alone, had difficulty making friends, and/or was unwilling to join group activities;
- had significant difficulty maintaining necessary levels of attention which was likely interfering with academic performance and functioning in other areas;
- had difficulty making decisions;
- lacked creativity and/or had difficulty getting others to work together effectively; and
- had difficulty performing simple tasks in a safe and efficient manner.

Student's New Bridge teacher rated Student in the average range in all areas, except for learning problems which was at-risk and social skills which she rated high. Student was kind and gentle, and quick to compliment a peer's effort. Student worked diligently and was becoming more independent as he saw his success level increase but struggled with self-confidence overall. Student was much more aware of when he lacked focus and responded appropriately to re-direction back to task. The teacher reported Student had difficulty comprehending and completing academic schoolwork.

Student rated himself in the average range in all areas except self-reliance, which was the confidence in one's ability to solve problems, a belief in one's personal dependability and decisiveness. Student reported a low confidence level in his ability to make decisions, solve problems or be dependable compared to others his age.

The May 2023 evaluation report concluded Student continued to meet eligibility criteria for specific learning disability. Student demonstrated overall average range cognitive skills. He demonstrated average

- comprehension/knowledge,
- fluid reasoning,
- short-term working memory,
- long-term retrieval,
- visual motor integration, and
- visual processing skills.

He demonstrated below average phonological processing skills.

At the end of the May 2023 evaluation report Hassan and Finn made 13 recommendations by bullet points, including

- using blocks with letters on them for Student to physically move when saying or reading a word,
- using multimedia sources for phonological awareness instruction such as "board games, Leap Frog DVDs, computer games – [www.starfall.com](http://www.starfall.com),"

- using Dr. Seuss books, as well as
- recommendations for segmenting words, blending words, and creating new words, among others.

## THE MAY 2, 2023 IEP TEAM MEETING

On May 2, 2023, San Diego Unified convened an IEP team meeting to review the May 2023 evaluation report. The purpose of the meeting was listed on the IEP as "Triennial Evaluation." Parent was provided a copy of the May 2023 evaluation report at the IEP team meeting.

The May 2023 IEP present levels of performance in health stated there were no health concerns and immunizations were up to date and that Student was not receiving any health and wellness services. The May 2023 IEP also included present levels of performance regarding academics, but it did not include any present levels of performance in any other area including specifically

- social emotional functioning and behavior,
- language/speech communication development,
- motor skills and
- accessibility or adaptive/self-help skills.

The May 2023 IEP offered four academic goals: two in reading, one in math and one in writing. The IEP stated Student required assistive technology across all core subjects, and he was able to use applications for speech to text and/or text to speech. It

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also offered placement at a District school with a combination of specialized academic instruction in the regular classroom and outside the regular classroom. The May 2023 IEP offered a host of accommodations, including

- preferential seating,
- visual schedules,
- extra time for assignments and tests,
- speech to text, and text to speech for all core subjects,
- shortened assignments,
- writing checklists,
- frequent check-ins, and a
- peer writing buddy.

Parent believed some of the recommendations in the May 2023 evaluation report seemed to be made for children younger than Student, including the recommendations regarding Leap Frog DVDs and Dr. Seuss books. A few days after the May 2023 IEP team meeting, Parent googled the recommendations in the May 2023 evaluation report and became concerned because it appeared that San Diego Unified had copied and pasted some of the recommendations from internet websites into the May 2023 evaluation report. Some of the recommendations in the May 2023 evaluation report were word-for-word identical to what was listed on teacher resource websites Parent found on the internet.

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## THE EVENTS FOLLOWING THE MAY 2023 REEVALAUTION AND MAY 2023 IEP TEAM MEETING

### PARENT'S UNILATERAL PLACEMENT OF STUDENT AT NEW BRIDGE FOR THE 2023-2024 SCHOOL YEAR AND THE OAH FILING

On August 8, 2023, Parent sent San Diego Unified an email stating Parent did not believe the placement offered to Student in his May 2023 IEP could meet his needs. Parents stated they planned to unilaterally place Student at New Bridge and were requesting reimbursement from San Diego Unified.

On August 9, 2023, San Diego Unified sent a letter to Parents that it was not required to pay for special education and related services at New Bridge because it had offered FAPE in the May 2023 IEP.

On September 22, 2023, Student filed a due process hearing request with OAH, alleging, among other things, that the May 2023 IEP offer of special education and related services was not a FAPE. It did not assert any claims regarding District's May 2023 reevaluation. It sought reimbursement for Student's continued placement at a nonpublic school. On January 8, 2024, the day before the hearing was scheduled to begin, Student dismissed the due process hearing request.

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## PARENT'S REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATIONS

On January 17, 2024, Parents sent San Diego Unified an email disagreeing with the evaluations documented in the May 2023 evaluation report. Parents requested independent educational evaluations in the areas of psychoeducation and speech and language.

On January 22, 2024, San Diego Unified asked Parents to clarify their request regarding the speech and language evaluation. On January 25, 2024, Parent sent an email stating that Parent disagreed with the psychoeducational evaluation and that District had not conducted a speech and language evaluation. Parent stated dyslexia was a language-based disorder, so speech and language was an area of suspected disability for Student and asked why a speech and language evaluation had not been done.

On January 30, 2024, San Diego Unified sent a letter dated January 29, 2024, to Parents, denying the request for independent educational evaluations in psychoeducation and speech and language. District explained it was denying the independent psychoeducational evaluation because it believed its own assessment was legally compliant. It also explained that because District had not conducted a speech and language evaluation for Parents to disagree with, Student was not entitled to an independent assessment in that area. San Diego Unified offered to conduct a speech and language evaluation and included an assessment plan for Parent to sign, along with a copy of parent's procedural safeguards. The January 30, 2024 assessment plan proposed to assess Student in "Language/Speech Communication Development" by a



speech-language pathologist. District gave Parents until February 2, 2024 to withdraw the request for the independent psychoeducational evaluation, otherwise it would file to defend its assessment.

On February 1, 2024, Parents sent an email agreeing District could assess Student in speech and language but refused to agree to withdraw the request for an independent educational speech and language evaluation. Parents stated they were not withdrawing the request for the independent educational speech and language evaluation because that was an area of suspected disability and should have been assessed earlier. Parent never withdrew the request for an independent psychoeducational evaluation.

## THE SUBSEQUENT OAH DUE PROCESS FILINGS

On February 16, 2024, San Diego filed this action, District's Case, to defend its May 2023 psychoeducational assessment. Because Parents had not signed the January 30, 2024 assessment plan for the speech and language evaluation, District's Case also included a separate second issue which sought permission for District to assess Student in speech and language.

On April 4, 2024, District received the January 30, 2024 assessment plan for District's proposed speech and language evaluation that was signed by Parent.

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The same day, Student filed his own action, Student's Case, which is the other part of this consolidated matter, asserting that San Diego Unified denied Student a FAPE by failing to agree to fund the independent educational speech and language evaluation requested by Parents in January 2024 or file for due process to prove its own evaluation was appropriately conducted.

Because Parent signed the January 30, 2024 assessment plan for District's speech and language evaluation, on April 5, 2024, District dismissed the second issue in District's Case which sought permission for District to assess Student in speech and language.

#### THE SCOPE OF DISTRICT'S ISSUE INCLUDES PARENT'S CHALLENGE REGARDING THE FAILURE TO CONDUCT A SPEECH AND LANGUAGE ASSESSMENT

According to guidance issued by the United States Office of Special Education Programs, called OSEP, if a parent disagrees with an evaluation because a child was not assessed in a particular area of suspected disability, the parent has a right to request an independent educational evaluation in that area. (*Letter to Baus* (OSEP) February 23, 2015); see also, *Letter to Carroll* (OSEP) October 22, 2016.) OSEP's interpretation is that the IDEA affords parents the right to an independent educational evaluation at public expense if an evaluation does not assess in all areas of suspected disabilities, and that right is not conditioned on the public agency first having an opportunity to cure the defects of its evaluation. (*Ibid.*) Per OSEP, it would be inconsistent with the provisions

of 34 Code of Federal Regulations part 300.502 to allow the public agency to conduct an assessment in an area that was not part of the initial evaluation or reevaluation before either granting the parent's request for an independent educational evaluation at public expense or filing for due process complaint to show its evaluation was appropriate. (*Letter to Carroll, supra.*) OSEP *Letters* are not binding authority and their application is limited. (See *Csutoras v. Paradise High School* (9th Cir. 2021) 12 F.4th 960, 967, 967-968 [rejecting the claim that guidance letters issued by the Department of Education are binding authority].) However, OSEP *Letters* nonetheless provide guidance in the interpretation of the IDEA and its implementing regulations.

Some courts have considered the same issue. In *D.S. v. Trumbell Board of Education* (D.Conn. 2019) 357 F.Supp.3d 166 (*Trumbell 1*), the district court held that a parent's disagreement with a functional behavior assessment, conducted between the student's more comprehensive three-year reevaluations, did not entitle parents to publicly funded independent educational evaluations beyond the limited scope of the behavior assessment with which parents disagreed. (*Id.*, at pp. 170, 175-179.) The district court affirmed the hearing officer's decision to deny a litany of other independent educational assessments requested by parents, including speech and language, assistive technology, physical therapy, occupational therapy, because those assessments went beyond the intended scope of the functional behavior assessment with which the parents disagreed. (*Id.*, at pp. 174-179.) However, the court also made clear that had parents timely disagreed with the earlier 2014 "triennial evaluation," the range of independent testing proposed by parents would have been permitted because it was within the scope of a "triennial evaluation" considering the very comprehensive nature of such an evaluation. (*Id.*, at pp. 178-179.)

The Second Circuit reversed and remanded *Trumbull 1*, finding that the underlying functional behavior assessment was not an evaluation as that term was employed in the IDEA, so parents did not have the right to an independent educational evaluation at public expense based on their disagreement with that assessment. (*D.S. v. Trumbull Board of Education* (2nd Cir. 2020) 975 F.3d. 152, 167 (*Trumbull 2*)). *Trumbull 2* held that the only evaluations that triggered a right to an independent educational evaluation at public expense were the initial evaluation and periodic reevaluations it referred to as “triennial reevaluations.” The court stated that because such evaluations were meant to be comprehensive, “a parent is free to disagree with an evaluation based on its deficient scope.” (*Id.*, at pp. 165, 169.) The court reasoned that nothing in the statute or regulations suggested that a parent could not challenge an evaluation on the ground it was too limited. (*Id.*, at p. 165.) If a parent disagreed with an evaluation and requested an independent educational evaluation at public expense, the regulations did not circumscribe the scope of that independent evaluation. (*Ibid.*) *Trumbull 2* explained that once a parent disagrees with an evaluation, the burden automatically shifts to the school to either file to show its evaluation was appropriate or fund the requested independent evaluation. At no point, did a parent need to file a due process complaint to obtain an independent evaluation, unless the school district failed to fund the evaluation or file to defend its own its own evaluation. (*Id.*, at pp. 168-169; Cf. *MP v. Parkland School Dist.* (E.D.Penn., August 25, 2021, 5:20-cv-04447) 2021 WL 3771814, \*18-19 (*MP*) [A school district cannot benefit from its failure to file an action to defend its assessment, inappropriately placing the burden on the parents to file a due process complaint to vindicate their rights.])

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*Trumbell 1* was discussed in *Thurman G. v. Sweetwater Independent School District* (N.D.Tex., July 26, 2021, 1:19-CV-102-H) 2021 WL 3144840, \*13. (*Thurman*.) There, the court relied on language in *Trumbell 1* to support its conclusion that parents did not have a right to an independent evaluation in an area where the school district had not first assessed the student as part of an earlier evaluation. However, *Thurman* did not address the language in *Trumbell 1* or *Trumbell 2*, that where a reevaluation was intended to be comprehensive that a parent could seek an independent evaluation because the prior evaluation was deficient in scope. (*Ibid.*)

The same issued was addressed in *L.D. v. Anne Arundel County Public Schools* (D. Md., November 20, 2019, CCB-18-1637) 2019 WL 6173818 (*L.D.*.) In that case, the local educational agency conducted a reevaluation of the student in certain areas in preparation for his "triennial review." Parents disagreed with the reevaluation because it was not broad enough and requested independent evaluations to cover areas in which the student had not been assessed. The school requested a due process hearing to defend its assessment. (*Id.*, at \*1.) The ALJ limited the scope of the hearing and excluded certain evidence which went beyond examination of the assessments that were conducted. (*Id.*, at \*2, fn. 4.) In remanding the case back to the ALJ, the district court held the ALJ "took an unduly narrow view" of what evaluation the parents challenged – which was to the "triennial evaluation as a whole." *L.D.* held that the ALJ's attempt to limit the claim to the assessments actually performed by the school was at odds with the scope of the parent's disagreement with the reevaluation, specifically calling out the language in *Trumbell 1* that a "triennial evaluation" was meant to be comprehensive. (*Id.*, at \*4.)

San Diego Unified claims Student was not entitled to an independent educational speech and language evaluation because it had not yet conducted its own speech and language evaluation. San Diego Unified relies on *Los Angeles Unified School District v. D.L.* (C.D.Cal. 2008) 548 F.Supp.2d 815. However, that case is inapposite. There, the school district had not conducted any assessment at all. Thus, the parent failed to establish the foundational condition for requesting an independent educational evaluation – disagreement with an extant evaluation. (34 C.F.R. § 300.502(b)(1).) Notably, San Diego Unified does not address any of the cases or authorities upon which Student relies or otherwise point to any cases addressing the circumstances at issue here.

Here, the May 2023 reevaluation by San Diego Unified was intended to be a comprehensive reevaluation, not a limited evaluation in a specific area as in *Trumbell 1*. Although a three-year reevaluation of Student was conducted in May 2022, in the November 2022 settlement agreement, the parties agreed to conduct another comprehensive reevaluation prior to May 5, 2023. The November 2022 settlement agreement expressly stated the reevaluation would include assessment “in all areas of suspected disability” and that the IEP team meeting held to review the assessment would be a “Triennial review.” The February 2023 assessment plan generated in accordance with the November 2022 settlement agreement referred to the type of assessment proposed as a “Triennial” and the May 2023 IEP labeled the IEP team meeting type as “Triennial Evaluation.” Thus, the parties agreed that San Diego Unified

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would conduct a comprehensive reevaluation, and OSEP guidance and some courts have found parents have a right to request a publicly funded independent education evaluation in areas that should have been assessed, but were not, as part of a comprehensive evaluation.

There is no dispute that Parent specifically disagreed with the psychoeducational evaluation. However, the evidence is clear that Parents also disagreed with the District's May 2023 reevaluation as a whole because it did not include a speech and language evaluation. The January 25, 2024 email Parent wrote to District specifically states Parent disagreed with the psychoeducational evaluation and the fact that District did not conduct a speech and language evaluation because language was an area of suspected disability.

Although the District's Issue is framed to defend only a "psychoeducational evaluation," it is clear from the pleading filed by District, the applicable legal authority and OSEP guidance, the way this case was litigated, and the admissions made by counsel during the hearing and the arguments in the closing briefs, that the parties sought to have OAH determine that the May 2023 reevaluation as a whole was appropriate, that is, that Student was assessed in all areas of suspected disability. (See *M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196 [issued tried by express or implied consent must be treated in all respects as if raised in the pleadings].) The intent and agreement of the parties was that San Diego Unified conduct a comprehensive reevaluation by May 5, 2023. Therefore, whether District's

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May 2023 reevaluation was appropriate necessarily includes an analysis of whether the reevaluation assessed Student in all areas of suspected disability and is not limited to determining whether the psychoeducational evaluation was appropriate.

## DISTRICT FILED ITS REQUEST FOR A DUE PROCESS HEARING TO DEFEND ITS ASSESSMENT WITHOUT UNNECESSARY DELAY

In response to a request by a parent for an independent educational evaluation, an educational 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 that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(b)(2); see also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

The term “unnecessary delay” as used in 34 Code of Federal Regulations part 300.502(b)(2) is not defined in the regulations. It permits a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an independent evaluation. (*Letter to Anonymous* (OSEP) August 13, 2010.)



Some delay in the provision of an independent evaluation is reasonable if the school district and the parents are engaging in active communications, negotiations, or other attempts to resolve the matter. (See *Horne v. Potomac Preparatory P.C.S.* (D.D.C. 2016) 209 F.Supp.3d 146, 153-155.) The determination of “unnecessary delay” is a fact-specific inquiry. (*Ibid.*; see e.g., *J.P. v. Ripon Unified School Dist.* (E.D.Cal., Apr. 15, 2009, No. 2:07-CV-02084-MCE-DAD) 2009 WL 1034993, \*7-8 [due process request filed more than two months after the request for an independent evaluation was timely, as the parties were communicating regarding the request for the evaluation in the interim, and did not come to an impasse on the issue until less than three weeks before the school district’s filing]; *Pajaro Valley Unified School Dist. v. J.S.* (N.D.Cal., Dec. 15, 2006, No. C 06-0380 PVT) 2006 WL 3734289, \*3 [school district waived right to contest student’s request for an independent educational evaluation by its unexplained 11-week delay in filing for due process]; *L.S. v. Abington School Dist.* (E.D.Pa., Sept. 28, 2007, No. 06-5172) 2007 WL 2851268, \*3, 7, 10 [district’s 10-week delay in filing a due process request was not a per se violation where there was evidence of ongoing efforts during that time to resolve the matters and district, and within 28 days of the independent evaluation request, the district orally told parents the request would be denied].)

If a school district decides not to take a requested action, the district must provide parents with a prior written notice within a reasonable period. (34 C.F.R. § 300.503.) The notice must include an explanation of why the agency proposes or refuses to take the action. (*Ibid.*)

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Here, the weight of evidence demonstrated that San Diego Unified did not unnecessarily delay in filing its due process complaint to demonstrate the appropriateness of its May 2023 reevaluation. On January 17, 2024 Parents requested independent educational evaluations in psychoeducation and speech and language, based on Parents' disagreement with the assessments documented in the May 2023 evaluation report. On January 25, 2024, Parent reiterated that they disagreed with District's psychoeducational evaluation and clarified that they also disagreed with the May 2023 reevaluation because it did not include a speech and language assessment, which Parents claimed was an area of suspected disability because Student had dyslexia.

A few days later, on January 30, 2024, San Diego Unified responded to Parents' demand, explaining why it was refusing to agree to fund the requested independent evaluations and gave Parents until February 2, 2024 to withdraw the request for the independent psychoeducational evaluation. On February 1, 2024, Parents responded, stating San Diego Unified could assess Student in speech and language but refused to withdraw the request for an independent educational evaluation in that area. Parents never withdrew their request for an independent psychoeducational evaluation. On February 16, 2024, only 30 days after Parent's January 17, 2024 request for independent educational evaluations, San Diego Unified filed its due process complaint with OAH to defend its May 2023 reevaluation.

The evidence established that San Diego Unified quickly responded to Parent's request for independent educational evaluations, and reasonably gave Parents time to consider their position and an opportunity to withdraw their request before filing a

due process hearing request. Only two weeks after the February 2, 2024 deadline passed, San Diego Unified promptly filed District's Case with OAH to defend the appropriateness of its May 2023 reevaluation. Student offered no evidence or argument that the 30-day delay between the January 17, 2024 request and the February 16, 2024 filing of District's Case was unnecessary.

Accordingly, San Diego Unified did not unnecessarily delay in filing to defend its reevaluation. San Diego Unified met its burden of proof on this element of its claim.

## PARENT CONSENTED TO THE MAY 2023 REEVALUATION CONDUCTED BY SAN DIEGO UNIFIED

To assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321.) Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1)(i); Ed. Code, § 56381, subd. (f)(1).) The proposed assessment plan is required to contain certain information, including but not limited to, an explanation of the types of assessments to be conducted. (Ed. Code, § 56321, subd. (b).) The assessment may begin immediately upon receipt of the parent's consent but must be completed within 60 days. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f), 56302.1, subd. (a), 56321, subd. (c)(4).)

In February 2023, San Diego Unified prepared an assessment plan and prior written notice dated February 26, 2023 and sent it to Parent along with a copy of parent's procedural safeguards. On the first page of the plan, it stated that a

"triennial" assessment was being conducted pursuant to the November 2022 settlement agreement between the parties and described the areas to be evaluated as: "Academic, Psychoeducational, Social/Emotional/Behavior." On the second page of the assessment plan the boxes were checked for "Academic Achievement," to be assessed by a mild/moderate education specialist, as well as "Intellectual Development/Processing," and "Social/Emotional/Behavior," to be evaluated by the school psychologist.

On March 13, 2023, District received the assessment plan hand signed by Parent on March 8, 2023. On that form, Parent acknowledged that all areas of suspected disability were addressed by the assessment plan, that Parent had no prior assessments completed within the last year, and that District sent Parent procedural safeguards with the plan. It was education specialist Finn's practice and procedure to type into San Diego Unified's computer system the information on any assessment plan forms filled out and signed by the parents. The evidence established that Finn followed this practice regarding the February 26, 2023 assessment plan signed and returned by Parent.

The February 26, 2023 assessment plan offered into evidence at hearing was not the actual assessment plan signed by Parent, but the computer-generated version of the form containing the same information on the assessment plan hand signed by Parent. At hearing, Parent claimed she could not recall signing the February 26, 2023 assessment plan, and offered reasons why she believed she did not sign it through questions posed by Student's counsel meant to illicit that testimony. Parent's position was mystifying because it was inconsistent with her claim to publicly funded independent educational

evaluations. Parents may forfeit their right to an independent evaluation by failing to give consent for a district assessment or revoking consent for the assessment. (See, e.g., *G.J. v. Muscogee County School Dist.* (11th Cir. 2012) 668 F.3d 1258, 1266; *S.S. v. Hillsborough Township Public School Dist.* (3d Cir. 2019) 793 Fed.Appx. 91, 93.)

Nonetheless, Parent's testimony was not convincing to establish she had not signed the assessment plan given the weight of other evidence establishing she had signed it. For example, Parent did not specifically and clearly deny she signed the assessment plan, and she offered no persuasive reason why she would not have signed it. She understood District needed her consent to the assessment plan for the negotiated "triennial" reevaluation to take place. In addition, Parent overall was not a credible witness. When questioned by San Diego Unified's attorney, Parent repeatedly avoided providing substantive responses by unpersuasively asserting she could not remember. Parent did not have the same issues with her memory when questioned by Student's attorney. All of this negatively impacted the weight given Parent's testimony. The preponderance of evidence established that on March 13, 2023, Parent provided her consent to San Diego Unified for the assessments it timely conducted for the May 2023 reevaluation.

San Diego Unified met its burden of proving this requirement for the May 2023 reevaluation.

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## THE MAY 2023 REEVALUATION WAS NOT LEGALLY COMPLIANT

### DISTRICT FAILED TO PROVE IT APPROPRIATELY SOUGHT

### PARENT INPUT

Assessments must be conducted in a way that uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, "including information provided by the parent" that may assist in determining whether the student is a child with a disability and the content of the student's IEP. (20 U.S.C. § 1414(b)(2); see also, 34 C.F.R. § 300.306(c)(1).) "Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882; see also, *Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840, 858 ["Participation must be more than mere form; it must be meaningful."].)

Here, the only input school psychologist Hassan obtained from Parent for the May 2023 reevaluation was through one email and the behavior assessment rating scale completed by Parent. District failed to prove that in this case, these nominal efforts were sufficient to satisfy San Diego Unified's obligation to obtain any critical information that Parents had to inform the May 2023 reevaluation.

San Diego Unified failed to prove it took the steps necessary to properly obtain Parent input for the May 2023 reevaluation. Parent input was critical to a proper evaluation because District's May 2022 reevaluation contained no input from Parent and Student had not attended a District school since June 2022. Parent was an

important resource for information on Student's academic performance and functional performance outside of school, such as when doing homework and socializing in the community, yet the May 2023 evaluation report contained only three lines under the heading of "Parent Input." The source of this Parent input was not identified in the May 2023 evaluation report, but Hassan testified it was the information Parent provided in response to an email Hassan wrote Parent. Hassan never spoke to Parent.

Hassan's testimony demonstrated District's failure to prove it properly obtained input from Parent for the May 2023 reevaluation. At hearing, school psychologist Hassan said all the information Parent provided in response to her email was set forth in three lines in the May 2023 evaluation report. Hassan was examined about the substance of her email to Parent that generated so little information for the May 2023 evaluation report. However, Hassan's recall of the specific questions she asked Parent in her email was unreliable. At first, she could not remember the questions she asked Parent. When she was further questioned, Hassan still claimed not to recall all the questions. At one point, Hassan asserted there were six questions she asked Parent but could not recall all of them. She described some of the questions she thought she asked, but her testimony was not convincing. San Diego Unified did not offer Hassan's email or Parent's response into evidence at hearing, so San Diego Unified failed to establish the scope of Hassan's inquiry and that it was appropriate in the circumstances of this case. Hassan did not follow up with Parent to ask questions about the concerns Parent raised or to probe whether Student had other issues not covered by the six questions Hassan she may have asked Parent. Hassan testified Parent did not express any concerns about language deficits, however, there was no persuasive evidence Hassan asked questions that would have elicited concerns about speech and language

issues. Parent had raised speech and language concerns by her emails to San Diego Unified in August and September 2022, and this should have been a specific area of inquiry during the May 2023 reevaluation.

Hassan admitted she was unaware of whether Student received speech and language services at New Bridge and that she had not inquired about that. She also could not recall if she had asked Parents whether Student was receiving any services outside of school at the time of the 2023 reevaluation. She was also unaware Student had been getting speech services outside of school when she did her evaluation in 2022. She could not recall asking Parent if Student was getting speech services outside of school or seeing a therapist as part of her 2022 evaluation.

As part of the May 2023 reevaluation, Hassan admitted she had not asked whether Student was taking any medication in her email to Parent. Hassan acknowledged it was important to know what medications a student was taking when conducting a psychoeducational evaluation. When the ALJ asked Hassan why she did not ask about Student's medications for the May 2023 reevaluation, she again claimed not to recall the questions she had written in her email to Parent, but asserted she usually received this information through questions about updates to the health and development questionnaire. Hassan's fluctuating recall had a negative impact on her credibility.

Although District's 2023 evaluation was supposed to be a comprehensive "triennial" evaluation, Hassan did not send Parents a questionnaire to update Student's health and development information. Hassan was unaware Student was seeing mental health professionals or taking medication when she conducted the May



2023 reevaluation. Although Hassan initially testified she did not see Student's social emotional functioning as a "significant" area of concern warranting further assessment, she admitted had she known Student was seeing a therapist and psychiatrist and was taking medication in 2023 to address anxiety, she might have done further testing. Thus, District failed to prove that it appropriately assessed Student in social emotional functioning.

As discussed above, the only new information in the health development section of the report was that Student had dyslexia, dysgraphia, dyscalculia, and attention deficit disorder. At hearing, Hassan claimed the dyslexia diagnosis was not new information, but she did not know whether the diagnosis was new when she wrote the May 2023 evaluation report. At one point, she testified she obtained these diagnoses from Parent, but did not know where Parent got this information. When Hassan was asked if she followed up with Parent about the diagnosis of attention deficit disorder, she claimed she could not recall. There was no persuasive evidence Hassan asked Parent any specific questions about these various diagnoses or where they came from.

The evidence established that Hassan's attempt to include Parent input in the May 2023 reevaluation was perfunctory, and therefore inadequate. The information in Parent's behavior rating scale, did not fill in all the missing pieces that a proper Parent interview could have accomplished. San Diego Unified failed to establish that it made a case specific attempt to obtain the information from Parent about Student necessary for an appropriate reevaluation in May 2023.

San Diego Unified failed to meet its burden of prove on this element.

## DISTRICT FAILED TO PROVE IT APPROPRIATELY SOUGHT INPUT FROM NEW BRIDGE

San Diego Unified failed to prove it took the steps necessary to properly obtain input from New Bridge for the May 2023 reevaluation. Other than conducting Student's evaluation in May 2023, there was no evidence that Hassan or Finn had worked with Student since he left Miller Elementary at the end of fourth grade. Therefore, they were dependent on Student's teachers at New Bridge for information about Student's current day-to-day functioning in a school setting after June 2022.

As part of her effort to obtain teacher input, Hassan sent the New Bridge director a list of questions for Student's teacher to answer. The evidence failed to establish how many or what questions Hassan asked the teacher. Hassan never spoke to the teacher and there was no evidence she sent any follow-up questions to New Bridge. No one from New Bridge testified at hearing.

School psychologist Hassan testified she usually determined whether a student with a reading deficit needed to be assessed in oral language by consulting with the people who worked with that student. Yet, she could recall if she ever asked or consulted with anyone about whether Student had issues in oral language at the time she conducted her May 2023 evaluation.

Although the May 2023 reevaluation was intended to be a comprehensive reevaluation, the report lacked any discussion about Student's expressive and receptive language skills. In fact, the evidence failed to establish that San Diego Unified sought

information from New Bridge about Student's present levels functioning outside of academics. The May 2023 IEP developed on review of the 2023 reevaluation contained no present levels in the areas of

- social emotional functioning and behavior,
- language or speech communication development,
- motor skills and
- accessibility or adaptive/self-help skills.

San Diego Unified not only failed to establish it properly sought teacher input during the May 2023 reevaluation, but it also failed to demonstrate it followed the required protocols for determining the scope of the May 2023 reevaluation, including whether it sought the necessary information from New Bridge or Parent to determine whether additional data or testing was needed to identify Student's educational needs. (See 20 U.S.C. § 1414(c)(1)(A) & (B), & (c)(2); 34 C.F.R. § 300.305(a) & (b); Ed. Code, § 56381, subd. (b) & (c).) District did not prove Hassan asked the necessary questions of Student's teachers to determine whether additional testing was necessary for the May 2023 reevaluation. There was no persuasive evidence that the teacher's behavior rating scale and the unspecified questions Hassan asked Student's teacher to answer was sufficient to obtain all the information necessary to determine the proper scope of the May 2023 reevaluation or adequate to properly inform the May 2023 reevaluation of Student.

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San Diego Unified failed to establish that it made a case specific attempt to obtain the information from New Bridge about Student necessary for an appropriate reevaluation in May 2023.

San Diego Unified failed to meet its burden of prove on this element.

### DISTRICT'S MAY 2023 EVALUATION REPORT WAS DEFICIENT

Education Code section 56327 does not contain an exhaustive list of items required to be in a school district's assessment report. Here, the May 2023 evaluation report was defective for at least three reasons.

First, the May 2023 evaluation report contains recommendations not individualized to Student and San Diego Unified failed to prove they were all appropriate for Student. Some of the recommendations in the May 2023 evaluation report appeared to have been cut-and-pasted or copied from teacher resource websites without regard to whether they were appropriate for Student. At hearing, school psychologist Hassan claimed she wrote some of the recommendations and education specialist Finn wrote some of the recommendations. However, when asked by Student's attorney how she determined the recommendations, she did not remember, but denied they were copied from a website. Hassan could not recall if she made the recommendations regarding Leap Frog DVDs or the starfall.com website and had no opinion about the appropriateness of those specific recommendations.

In direct contradiction of Hassan's testimony, Finn said Hassan wrote all the recommendations in the May 2023 evaluation report. When Hassan was later questioned by District's attorney about the recommendations in the May 2023

evaluation report, Hassan explained she had a library of resources categorized by need or processing area, and that she reviewed them and determined which seemed appropriate for students. However, Hassan later admitted she was unfamiliar with Leap Frog DVDs and starfall.com and did not know the age range of students who should use it. When asked if she thought Dr. Seuss books were appropriate for students about to turn 11 years old, Hassan agreed it was "not the best example." When Hassan was asked if the recommendation for using blocks was appropriate for a child soon entering sixth grade, Hassan was defensive.

Second, unlike the cognitive and behavior portions of the May 2023 evaluation report, the academic achievement chart failed to contain a legend for interpreting the classifications and range of standard scores for academic achievement testing. The reader was without assistance interpreting the scores, including determining how many "classifications" there were for this test, the range of scores pertaining to each classification, or how the classifications compared to one another. In other words, the descriptions of Student's performance as related to his same age typical peers was inadequate without a legend to understand it. The academic achievement results also contained columns of information with undefined headings, specifically, the abbreviations "RPI" and "PR." This basic information necessary to understand the academic testing should have been included to make it accessible to the IEP team, including Parent.

Third, the only processing area where Student scored in the below average range was in phonological processing, which was a subtest of the auditory processing cluster of tests. The phonological processing subtest was comprised of three subtests. Although the report described what each of these three subtests measured, it did not

clearly state Student's scores on each of these subtests. This information should have been included in the report rather than leaving the reader to speculate as to how the assessor determined Student's performance on the phonological processing subtests, particularly as phonological processing deficits were the basis of Student's eligibility for special education.

## DISTRICT'S MAY 2023 REEVALAUTION WAS NOT SUFFICIENTLY COMPREHENSIVE

San Diego Unified failed to prove speech and language was not an area of suspected disability requiring San Diego Unified to assess Student in that area as part of its May 2023 reevaluation.

At the time San Diego Unified sent Parent the February 2023 assessment plan, it was aware Student had previously been eligible for special education under the category of speech or language impairment. Student was still demonstrating mild delays in speech production skills when he was exited from special education in June 2018. In August and September 2022, Parents requested both independent speech and neuropsychological evaluations. The academic testing done as part of the May 2023 reevaluation demonstrated that Student had made little academic improvement and according to Finn had regressed in some areas. Student's lack of academic progress after receiving special education and related services since 2019 suggested the possibility of unidentified disabilities.

Significantly, in its own due process complaint, San Diego Unified conceded that Parents' January 2024 request for an independent educational speech and language evaluation triggered its obligation to do a speech and language evaluation. District's

complaint states, "Parents' request for a speech and language evaluation IEE not only triggers a requirement for the District to assess based on parent request pursuant to California Education Code, Section 56381, but it also puts the District on notice that Parents suspect speech and language is a suspect area of disability ..."

Allegations in a complaint are considered judicial admissions. (*Hakopian v. Mukasey* (9th Cir. 2008) 551 F.3d 843, 846.) It is well settled law that a party is bound by what it states in its pleadings. (See *Moran v. Calumet City* (7th Cir. 2022) 54 F.4th 483, 494 [An allegation in a complaint is a judicial admission that can used against the plaintiff.]) "A judicial admission trumps evidence." (*Ibid.*, quoting *Murrey v. United States* (7th Cir. 1996) 73 F.3d 1448, 1455.)

Given this concession, Parents' August 2 and September 1, 2022 requests for an independent speech evaluation put District on notice that speech was area of suspected disability at that time. There was no evidence District conducted a speech and language assessment in response to Parents' August and September 2022 requests. However, as part of the November 2022 settlement agreement, District agreed to assess Student in all areas of suspected disability. Given Parents' August and September 2022 requests for a speech and language independent assessment, District should have sought Parent's consent to assess in the area of language and speech communication development and conducted a speech and language evaluation as part of the May 2023 reevaluation. The May 2023 reevaluation did not include any oral language measures.

While it is true the February 2023 assessment plan signed by Parent acknowledged the only areas of suspected disability were those addressed on the form, in this case, that did not negate the other evidence together with the admission made by San Diego

Unified in its due process complaint. Any assertion by District to the contrary, improperly shifts the burden onto Parents to tell District what assessments needed to be conducted. The IDEA squarely places that burden on San Diego Unified, requiring school districts to "make 'a full and individual evaluation of the child's educational needs.'" (See *Noyes v. Grossmont Union High School Dist.* (S.D.Cal., 2004) 331 F.Supp.2d 1233, 1246, revd. on other grounds (9th Cir. 2006) 197 Fed.Appx. 648; see also, *Union School Dist v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1523.)

At hearing, both Hassan and Finn took the position that a formal assessment of Student's language and speech development was unwarranted because Student demonstrated no issues in that area based on their observations and that no one reported such concerns. However, "[s]chool districts cannot circumvent th[eir] responsibility [to assess children in all areas of a suspected disability] by way of informal observations, nor can the subjective opinion of a staff member dispel such reported suspicion." (*Timothy O., supra*, 822 F.3d at p. 1119.) Student had not attended a District school since June 2022 and Hassan's and Finn's observation at New Bridge for the May 2023 evaluation was only for 20 minutes during reading instruction. San Diego Unified failed to establish that Finn's testing observation at Miller Elementary was adequate to inform her regarding Student's communication development. Moreover, as discussed above, San Diego Unified failed to prove it ever made the appropriate inquiries of Parent or Student's New Bridge teacher regarding Student's speech or communication development. San Diego Unified's failure to properly obtain input from Parent that Student had been receiving speech services outside of school after he was exited from special education in 2018 would have alerted Hassan and Finn that speech and language was an area of suspected disability.



For these reasons, San Diego Unified failed to establish that the May 2023 reevaluation, including the psychoeducational and academic assessments, was appropriate. Having failed to meet its burden of proof in establishing that the May 2023 reevaluation was appropriate regarding the components addressed above, it is unnecessary to determine whether District proved legal compliance regarding the other parts of the May 2023 reevaluation.

STUDENT'S ISSUE: DID DISTRICT DENY STUDENT A FAPE BY FAILING TO EITHER AGREE TO FUND THE INDEPENDENT EDUCATIONAL SPEECH AND LANGUAGE EVALUATION REQUESTED BY PARENT ON JANUARY 17, 2024, OR FILE FOR DUE PROCESS TO PROVE THAT ITS OWN EVALUATION WAS APPROPRIATELY CONDUCTED?

Student contends that if OAH determines that District's Issue was inclusive of its failure to conduct a speech and language evaluation as part of the May 2023 reevaluation, then San Diego Unified met its "fund or file" obligation, and Student concedes on this issue.

San Diego Unified contends that it filed without unnecessary delay to defend the only assessment it conducted, its May 2023 psychoeducational evaluation, which included all the areas of suspected disability. It argues that if Student was entitled to request an independent speech and language evaluation following Parent's disagreement with the psychoeducational evaluation, it filed without unnecessary delay.

If a public agency files a due process complaint to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense. (34 C.F.R. § 300.502(b)(3).) The import of this language is clear: To benefit from a finding that the agency's evaluation was appropriate, the agency itself must have filed the due process complaint. (*MP, supra*, 2021 WL 3771814, \*18.) A school district cannot benefit from its failure to file an action to defend its assessment. If this were the case, no agency would have an incentive to initiate a due process complaint to defend its evaluation because the preferred course of action for the agency would be one of inaction, inappropriately placing the burden on the parents to file a due process complaint to vindicate their rights. (*Id.*, at \*19.)

As more fully discussed above, because the May 2023 reevaluation was intended to be a comprehensive reevaluation, District's Issue to prove up the appropriateness of its May 2023 psychoeducational evaluation necessarily included defending its failure to conduct a speech and language evaluation as part of that May 2023 reevaluation. As concluded above, and for the reasons stated in the analysis of District's Issue, San Diego Unified timely filed to defend its May 2023 reevaluation following Parent's January 2024 request for an independent educational speech and language evaluation.

District satisfied its obligation to "fund or file" pursuant to 34 Code of Federal Regulations part 300.502(b)(2).

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## 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.

### DISTRICT'S ISSUE:

San Diego Unified School District's May 2, 2023 psychoeducational evaluation was not appropriate. It is required to fund both a psychoeducational independent evaluation which includes an academic assessment and an independent educational speech and language evaluation for Student, at public expense.

Student prevailed on District's Issue.

### STUDENT'S ISSUE:

San Diego Unified School District did not deny Student a FAPE by failing to either agree to fund the speech and language independent educational evaluation requested by Parent on January 17, 2024, or file for due process to prove that its own evaluation was appropriately conducted.

San Diego Unified prevailed on Student's Issue.

## REMEDIES

Student prevailed on District's Issue.

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(2)(C)(iii); see also *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A* (2009) 557 U.S. 230, 243, fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].) Remedies under the IDEA are based on equitable considerations and the evidence established at hearing. (*Burlington, supra*, 471 U.S. at p. 374.) An independent evaluation at public expense may also be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L., supra*, 548 F.Supp.2d at pp. 822-823.) If a school district files to defend its evaluation and fails to establish the evaluation was legally compliant, the parent has the right to an independent educational evaluation at public expense. (34 C.F.R. § 300.502(b).)

On District's Issue, Parent disagreed with San Diego Unified's May 2023 reevaluation because the psychoeducational portion was inappropriate and because it failed to include a speech and language evaluation. Parent requested an independent psychoeducational evaluation and an independent educational speech and language evaluation. San Diego Unified timely filed District's Case to defend its May 2023 reevaluation, but it failed to prove its May 2023 reevaluation was legally compliant. Among other things, San Diego Unified failed to conduct an appropriate psychoeducational and academic assessment. San Diego Unified failed to prove the May 2023 reevaluation comprehensively assessed in all areas of suspected disability because it did not assess Student's speech and language skills.

Student is entitled to have San Diego Unified fund an independent psychoeducational evaluation with an academic component and an independent educational speech and language evaluation.

The independent educational evaluations ordered in this Decision must not be conducted by Student's experts Jill Weckerly or Christy Hemstreet or anyone affiliated with either of them. Both Weckerly and Hemstreet testified at hearing, offering opinions on the appropriateness of District's May 2023 reevaluation.

Weckerly was a clinical psychologist in private practice. Her work included administration of psychoeducational and neuropsychological evaluations primarily for children ages five through 18. She held doctorate degrees in clinical psychology, and cognitive science and linguistics. She never worked as a school psychologist or special education teacher or in a special education classroom. At hearing, Weckerly was evasive in some of her answers. For example, when questioned about the discrepancy on the behavior assessment rating scales between Parent's clinically significant scores and his teacher's average scores, Weckerly explained many children feel more comfortable in a smaller class setting like New Bridge rather than in a larger class size of 26 to 30 students. Weckerly's answer was telling, and she never answered the question posed. Student was referred to Weckerly for assessment about three or four months prior to the hearing, after Student's attorney spoke to Weckerly about Student. Weckerly was first designated as an expert in Student's prehearing conference statement on May 7, 2024. Weckerly estimated she first reviewed Student's records between May 9 and May 14, 2024. She assessed Student on May 15, 2024, and prior to that had never spoken to Student. Weckerly receives 15 to 20 referrals for assessments from Student's attorney per year. Weckerly charged \$175 per hour, so her assessments

generally cost between approximately \$2,600 to \$3,200 per evaluation. Weckerly testified Parent was paying Weckerly for her testimony at hearing at double her regular hourly rate, at \$350 per hour.

Himstreet was a licensed speech-language pathologist. She held a master's degree in speech and language pathology. She was the president of a non-public agency providing independent educational evaluations regarding communication issues. She never spoke to Student or assessed him, but claimed she would have "loved to have evaluated him." When asked how she became aware of Student, Himstreet sheepishly admitted Student's attorney contacted her. Himstreet never spoke to Parent. When asked if Student's attorney had discussed Himstreet assessing Student, Himstreet's answers were evasive. She eventually claimed she did not remember if they discussed it, but that they could have. Himstreet was first designated as an expert in Student's prehearing conference statement on May 7, 2024. Himstreet claimed she only formed an opinion about San Diego Unified's May 2023 reevaluation after she looked at the documents which had been uploaded into OAH's exhibit portal, called Case Center. The documents were not uploaded by the parties into Case Center until after the May 10, 2024 prehearing conference. Himstreet conducted about 100 evaluations per year, and she estimated she received about 25 referrals for evaluation per year from Student's attorney. Himstreet charged between \$2,250 to \$2,500 for each evaluation she conducted. Himstreet testified Parent was paying her for her testimony.

Neither Weckerly nor Himstreet demonstrated they would be reliable independent educational evaluators. The weight of evidence established they were likely advocates for Student's position, rather than unbiased neutral expert assessors. This conclusion is supported by Student's attorney designating Himstreet and Weckerly

as expert witnesses for Student before they had even looked at Student's records or the May 2023 evaluation at issue. In addition, Student's counsel was a significant referral and income source for each of them, which further demonstrated their bias. Weckerly and Himstreet both appeared biased during their testimony by giving evasive and uninformative responses which negatively impacted their credibility. Some of their answers were elicited through leading questions from Student's counsel which adversely impacted the credibility of their opinions. Finally, some of their testimony was confusing and not adequately supported. Himstreet often spoke in generalities that appeared to have little application to Student. Weckerly voiced many general opinions about students' functioning and offered statistical information, but the basis for many of her statements was not established.

## ORDER

1. San Diego Unified shall fund an independent psychoeducational evaluation, which shall include an academic assessment, and an independent educational speech and language evaluation by assessors of Parents' choice, who meet the criteria under the applicable San Diego Unified or SELPA guidelines for independent educational evaluations in those areas.
2. Notwithstanding the foregoing, the independent educational evaluations ordered in this Decision shall not be conducted by Jill Weckerly or Christy Hemstreet or anyone affiliated with either of them.

3. Parents shall have 90 calendar days from the date of this Decision to provide San Diego Unified with the names of qualified evaluators to conduct the independent educational evaluations ordered in this Decision.
4. Within 15 business days of its receipt of Parents' respective selections of qualified assessors, San Diego Unified shall contract with the selected assessors to perform the independent educational evaluations ordered in this Decision.

## 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.

Laurie Gorsline  
Administrative Law Judge  
Office of Administrative Hearings