

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022060239

BERKELEY UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

DECISION

August 18, 2022

On June 7, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Berkeley Unified School District, called Berkeley, naming Student. Administrative Law Judge Sabrina Kong heard this matter by videoconference on July 6, and 7, 2022.

Attorney David Mishook represented Berkeley. Berkeley's Director of Special Education Shawn Mansanger attended all hearing days on Berkeley's behalf. Parent represented Student and attended all hearing days on Student's behalf.

At the parties' request the matter was continued to August 10, 2022 for written closing briefs. The record was closed, and the matter was submitted on August 10, 2022.

On the first day of hearing Berkeley requested that the Issue be restated, without substantive effect, to reflect its due process complaint instead of the rephrasing the parties had agreed to at the June 24, 2022 Prehearing Conference. Student agreed.

ISSUE

Whether Berkeley's March 21, 2022 psychoeducational assessment and March 2022 academic assessment are appropriate?

JURISDICTION

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the

identification, assessment, or educational placement of the child, or the provision of a FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) In this case, Berkeley has the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 17 years old, and attended Bayhill High School, called Bayhill, located within Berkeley's geographic boundaries. Student graduated and earned a regular high school diploma by the time of hearing. Student resided within the geographic boundaries of Tracy Unified School District, called Tracy, at all relevant times. Parent privately placed Student at Bayhill. Bayhill was both a private school and a non-public school. A non-public school is a private, nonsectarian school certified by the California Department of Education to enroll special education students pursuant to their IEPs. (See, Ed. Code § 56034.) Student did not require a non-public school and attended Bayhill as a private school student.

Berkeley and Tracy were both governed by the special education local plan area, called SELPA, agreement that required Tracy, as the district where Student resided, to assess, develop an IEP, and offer a FAPE if Student qualified for special education. However, Parent expressly requested that Berkeley assess Student. Under the SELPA agreement, Berkeley was responsible to assess Student because Bayhill was located within Berkeley's geographic boundaries. Berkeley had no obligation under the SELPA

agreement, to develop an IEP, or offer a FAPE if Student was found eligible for special education. Tracy, as Student's district of residence, would develop an IEP and offer a FAPE in reliance on Berkeley's assessments if Berkeley found Student eligible for special education.

Student was enrolled in general education with accommodations and did not receive special education services under an IEP in high school. Student did not contend that he needed an IEP at Bayhill. Student earned mostly As and Bs throughout high school. At some point, Student received accommodations at Bayhill under Section 504 of the Rehabilitation Act of 1973, called Section 504. However, neither party presented any evidence of whether Student received general education accommodations, or accommodations under Section 504, during the relevant period. Section 504 requires school districts to provide program modifications and accommodations to individuals who have physical or mental impairments that substantially limit a major life activity such as learning, and who might not qualify for special education under the IDEA. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).)

ISSUE 1: WHETHER BERKELEY'S MARCH 21, 2022 PSYCHOEDUCATIONAL ASSESSMENT AND MARCH 2022 ACADEMIC ASSESSMENT ARE APPROPRIATE?

Berkeley contends that it conducted an appropriate psychoeducational assessment and accompanying academic assessment, and that Student was not entitled to publicly funded independent evaluations in those areas. Berkeley further contends that even if the assessments were inappropriate, Student should not be entitled to independent educational evaluations under the IDEA. Berkeley contends that special education assessments were conducted to determine special education eligibility.

Because Student did not need special education and related services to graduate, and already graduated, he was not entitled to independent assessments to determine special education eligibility.

Student contends that had Berkeley conducted appropriate assessments, it would have found Student eligible for special education. Specifically, Student contends that Berkeley should have conducted additional assessments regarding Student's anxiety, memory, and work/writing avoidance. Student further contends that Berkeley's psychoeducational and academic assessments were inappropriate because the draft reports given to Parent before the IEP team meetings had incorrect and incomplete information. Student also contends that the final psychoeducational and academic assessment reports were inaccurate because they did not include the revisions proposed by Parent.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an individualized education program, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the*

Hendrick Hudson Central School Dist. v. Rowley (1982) 458 U.S. 176, 201-204; *Andrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

BERKELEY TIMELY RESPONDED TO PARENT WITH AN APPROPRIATE NOTICE AND ASSESSMENT PLAN, TIMELY ASSESSED, AND HELD AN IEP TEAM MEETING

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, §56381, subd. (a).) The notice must consist of the proposed assessment plan and a copy of parental and procedural rights under the IDEA and state law. (20 U.S.C. § 1414(b)(l); Ed. Code, § 56321, subd. (a).) The assessment plan must

- be easily understood by parent,
- provided in the native language of the parent,
- explain the assessments that the district proposes to conduct, and
- provide that the district will not implement an IEP without the consent of the parent.

(Ed. Code, § 56321, subd. (b)(l)-(4).) The assessment plan must advise parents that an IEP team meeting will be scheduled to discuss the assessment results and recommendations. (Ed. Code § 56329, subd. (a)(1).) The notice must also explain limitations on eligibility for special education and related services, and that parents will receive a copy of the assessment report and documentation of the determination of eligibility. (Ed. Code, § 56329, subds. (a)(2), (3).) The notice must state that a parent has the right to obtain, at public expense, an independent educational assessment under certain circumstances, and explain the procedure for requesting such an assessment. (Ed. Code, § 56329, subd. (b).) The notice must explain the due process hearing

procedure that a school district may initiate to defend against an independent assessment at public expense, and the rights of a school district to observe a student in a proposed publicly financed nonpublic school placement. (Ed. Code, § 56329, subds. (c), (d).)

A school district must give the parents 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).) The proposed written assessment plan must contain a description of any recent assessments that were conducted, including any available independent assessments and any assessment information the parent requests to be considered, information about the student's primary language and information about the student's language proficiency. (Cal. Code Regs., tit. 5, § 3022.) Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(a)(1)(B)(i); Ed. Code, § 56321, subd. (a)(2).)

The assessment must be completed, and an IEP team meeting held to discuss the results of the assessment, within 60 days of the date the school district receives the signed assessment plan, exclusive of school vacations in excess of five schooldays and other specified days. (20 U.S.C. § 1414(a)(1)(c); 34 C.F.R. § 300.301(c)(1)(i), (ii); Ed. Code, §§ 56043, subds. (c) and (f)(1); 56302.1, subd. (a), and 56344, subd. (a).)

Parent requested that Berkeley assess Student for special education on January 3, 2022. Berkeley timely sent Parent a proposed written assessment plan with a copy of the parental rights and procedural safeguard notice in response to Parent's request for assessment on January 18, 2022. The assessment plan was in Parent's native language of English and stated in a manner which could be easily understood. It explained that Berkeley would conduct assessments and specified that Berkeley would not implement

an IEP without parental consent. Parent understood the assessment plan, the assessments Berkeley would conduct, and which school personnel would be conducting the assessments. The assessment plan specified that:

- the education specialist would conduct the academic achievement assessment;
- the school psychologist would conduct the intellectual development and social emotional/behavior assessments;
- the speech and language pathologist would conduct the speech and language communication development assessments;
- the educational specialist and school psychologist would conduct the post-secondary transition assessment; and
- Student's primary language was English;

Parent signed and returned the assessment plan. Berkeley received Parent's consent on January 26, 2022. Berkeley timely assessed Student in English, in the areas and by the professionals specified in the assessment plan. Berkeley timely completed the assessments and held an IEP team meeting on March 24, 2022, within 60 days of receiving Parent's consent. The IEP team did not complete their review of the assessments during the first meeting, and Berkeley held a second IEP team meeting on April 20, 2022 to finish the review. Berkeley provided Parent with reports, and discussed the reports, assessment findings, and recommendations at the IEP team meetings. Subsequently, Berkeley held a third IEP team meeting on May 19, 2022 at Parent's request to address Parent's additional questions regarding the assessments and Berkeley's findings.

Therefore, Berkeley demonstrated by a preponderance of the evidence it complied with all procedural aspects of proper notice, obtaining parental consent, and timeliness regarding the assessments, and holding an IEP team meeting to discuss the assessment reports and results.

THE PSYCHOEDUCATIONAL AND ACADEMIC ASSESSMENTS WERE APPROPRIATE

Before any action is taken to place a student with exceptional needs in a program of special education, an assessment of the student's educational needs must be conducted. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) The IDEA uses the term "evaluation," while the California Education Code uses the term "assessment." In this Decision the terms mean the same thing and are used interchangeably.

An assessment may be initiated by request of a parent, a State educational agency, other State agency, or local educational agency. (20 U.S.C. § 1414(a)(1)(B); Ed. Code, §§ 56302, 56029, subd. (a), 56506, subd. (b).) *Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) Assessments are required to determine eligibility for special education, and what type, frequency, and duration of specialized instruction and related services are required. (20 U.S.C. § 1414(a); 34 C.F.R. § 300.303; Ed. Code, §§ 56043(k), 56381, subd. (a).)

Each public agency must ensure that assessments are 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.

(20 U.S.C. § 1414(b)(2)(A)-(C); 34 C.F.R. §300.304(b); see Ed. Code, § 56320.) The IDEA and California state law require that a school district assess a student in all areas of his or her suspected disability. (20 U.S.C. § 1414(b)(3); Ed. Code, § 56320, subd. (f).)

The assessments and other evaluation materials used to assess a child must be:

- selected and administered so as not to be discriminatory on a racial, cultural, or sex 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.

(Ed. Code, §§ 56320, subds. (a) & (b), 56322, 56381, subd. (e); see 20 U.S.C. § 1414(b) & (c); 34 C.F.R. § 300.304(c).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).)

The personnel who assess a student must prepare a written report that includes, among other items not applicable to Student's case:

- 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; and
- If appropriate, a determination of the effects of environmental, cultural, or economic disadvantage.

(Ed. Code, § 56327.) The report must be provided to the parent after the assessment. (20 U.S.C. § 1414(b)(4)(B); Ed. Code, § 56329, subd. (a)(3).)

The determination of what tests are required is made based on information known at the time. (See *Vasherese v. Laguna Salada Union School Dist.* (N.D.Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where the concern prompting the assessment was reading skills deficit].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).) 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).) Assessments must be sufficiently

comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304(c)(6).)

The psychoeducational assessment and academic assessment were conducted in English, Student's primary language. The assessment instruments chosen were designed to provide information about Student's special education eligibility, related services, and accommodations. The assessors selected the assessments based on Student's academic, developmental, and functional capabilities. There was no evidence that either assessment was racially, culturally, or sexually biased. The assessment results were valid, reliable, and administered in accordance with the instructions provided by the producer of the assessments. Although Student wore a face mask which covered his nose and mouth because of the COVID-19 pandemic health protocols, the assessors opined, without any contradicting evidence, that the testing conditions under the COVID-19 pandemic health protocols did not negatively impact Student's performance.

Tamara Mieles conducted the psychoeducational assessment. Mieles was a credentialed school psychologist and had the necessary training and knowledge to assess Student. Elissa Eseman conducted the academic evaluation. Eseman was a credentialed education specialist and had the necessary training and knowledge to assess Student. Neither Mieles nor Eseman testified at hearing. Berkeley's Program Supervisor Kristen Hardy testified at hearing after reviewing the psychoeducational and academic assessments. Hardy was a credentialed psychologist for nine years during which she conducted over 400 psychoeducational assessments, and many academic assessments. Hardy held a masters' degree in educational psychology and school

psychology and was experienced in special education. Hardy was a college lecturer and taught classes in lesson planning and design, autism, and assessments to mild to moderate special education teachers in training.

Hardy was familiar with Student's educational profile as she attended and participated in the IEP team meetings held to discuss Student's assessment results. Hardy's education, training and experience, and her familiarity with Student's assessment results, made her opinions on the assessment process, and on Student's cognitive abilities and academic achievement persuasive. Hardy opined that Miele's appropriately conducted the psychoeducational assessment, and Esemán appropriately conducted the academic assessment. Hardy opined that Berkeley assessed all areas of Student's suspected disabilities including specific learning disability, speech and language impairment, and other health impairment—the areas of concerns identified by Parent and discussed in the 2017 assessments conducted by Tracy, and an independent assessor.

Assessors Miele and Esemán used multiple assessments and a variety of assessment tools including observations, interviews with Parent and Student, standardized and non-standardized instruments. Parent provided information regarding Student's background, and educational history including his performance at Bayhill. Both assessors reviewed Student's academic records, history, and past assessments and considered that Student received a medical diagnosis of attention deficit hyperactivity disorder in 2015. They were also aware that in 2017 an independent assessor diagnosed Student with a language disorder, and an unspecified neurodevelopmental disorder with

memory and processing deficits. The 2022 assessment considered all of Student's history including that Tracy had found Student eligible for special education under speech and language impairment and other health impairment in 2017.

Both Mieles and Eseman provided a comprehensive report of their assessments which included

- whether Student required special education and related services;
- the basis upon which their determinations were made;
- noting relevant observations and behaviors;
- noting the relationship of their assessment findings to Student's academic and social functioning;
- noting educationally relevant health, development, and medical findings; and
- determining that the assessment results were not primarily due to environmental, cultural or economic factors.

Mieles, Eseman, and Hardy were experienced and knowledgeable assessors in the assessments administered. Mieles, Eseman's and Hardy's opinions that the assessments were appropriately conducted, and the results accurately reflected Student's academic needs were persuasive because they were also supported by multiple standardized instrument results, and corroborated by teacher input, assessors' observations, and Student's education access and performance.

PSYCHOEDUCATIONAL STANDARDIZED ASSESSMENTS

Miele used the Cross-Battery Assessment System, a specific process using multiple assessments to validate, verify, and analyze assessment results. Miele administered the following standardized tests to Student over two sessions:

- Behavior Rating Inventory of Executive Function, Second Edition;
- Differential Abilities Test, Second Edition;
- Test of Auditory Processing, Fourth Edition;
- Beery Buktenica Test of Visual-Motor Integration, Sixth Edition;
- Wide Range Assessment of Memory and Learning, Second Edition; and
- Comprehensive Test of Phonological Processing, Second Edition.

Student was cooperative, engaged, and task focused during assessment. Miele concluded that the assessment results of the psychoeducational testing were indicative of Student's abilities.

One of Student's teachers at Bayhill filled out the Behavior Rating Inventory of Executive Function but did not return it to Berkeley until after the first IEP team meeting on March 24, 2022. Student scored average and within normal limits in all areas. This behavior inventory measured Student's behaviors related to nine domains of executive function.

1. The inhibit scale measured Student's impulsivity. Student was able to resist impulses and consider consequences.
2. The self-monitor scale measured Student's awareness of his behavior on others, and behavior outcomes. Student was reasonably aware of his behaviors and impact.

3. The shift scale measured Student's ability to transition and alternate attention between tasks, and flexibility. Student was generally flexible, able to transition without difficulty, and accept different ways of solving problems.
4. The emotional control scale measured Student's ability to modulate emotional responses. Student could regulate emotions appropriately without outbursts, sudden or frequent mood changes, or being excessively upset.
5. The initiate scale measured Student's ability to stay on-task, and to independently generate ideas, responses, and problem-solving strategies. Student could initiate tasks, and problem solve appropriately.
6. The working memory scale measured Student's capacity to hold information for task completion, encode information, or generate steps to achieve goals. Student could sustain working memory to be attentive and focused for an appropriate time.
7. The plan/organization scale measured Student's ability to manage current and future tasks. Student could plan, organize, problem solve, and grasp new information for learning and recall.
8. The task/monitoring scale measured Student's ability to assess his own performance. Student was appropriately cautious in his approach to tasks and checked for mistakes.
9. The organization of materials scale measured Student's ability to organize and keep track of and clean up belongings. Student was organized and had materials ready for assignments.

Mieles administered the Differential Abilities Test to measure Student's cognitive and intellectual abilities. Student scored average in word definitions, verbal similarities, and sequential and quantitative reasoning. Student understood and articulated correct word meanings and used induction/deduction to solve math problems. He also scored average in visual-spatial thinking and could engage in puzzle/maze activities, and graph interpretation. Student had average skills for advanced math, and orthographic processing in reading and writing. Student scored above average in induction reasoning, and processing speed. Student scored low average in rapid naming which affected efficient long term memory information retrieval such as the ability to quickly express knowledge. He also scored well below average in recall of digits backward which affected short term memory used to recall the exact information sequence.

Miele noted that while Student had the cognitive ability to access academic reading, writing, and math, he had relative difficulty with concept generalization. She validated her results with other standardized assessments including several subtests from the Test of Auditory Processing which assessed Student's ability to manipulate, remember and understand auditory information. Student scored average in number, word, and sentence memory demonstrating the ability to store and mentally manipulate information. Student scored below average in processing oral directions and auditory comprehension, the areas affecting his attention processing. He also scored below average in crystallized knowledge, measuring his general factual and cultural knowledge based on acquired information and experience. Mieles opined that Student's deficits in crystallized knowledge was related to psychological processing weaknesses in attention and association such as oral processing, auditory processing, working memory, and long-term retrieval.

Miele also administered the Test of Phonological Processing where Student scored average in his phonetic coding and processing abilities such as identifying, isolating, blending, substituting, and analyzing speech sounds associated with reading and spelling. Further, Student scored average in focused attention in the Wide Range Assessment of Memory which assessed Student's memory and learning abilities. Student scored average in the Beery Buktenica which measured Student's sensorimotor processing skills, demonstrating he had the ability to copy from the board, hold a pencil correctly, and produce legible written work.

ACADEMIC STANDARDIZED ASSESSMENT

Eseman administered the Woodcock-Johnson Test of Cognitive Abilities, Fourth Edition during two sessions to measure Student's educational achievement in reading, math, written language, academic skills, fluency, and applications. Student was adaptable, engaged, and worked diligently during the assessment. Student scored average in all areas. Student scored average in all reading subtests, which included

- letter word identification;
- word attack;
- sentence reading fluency;
- oral reading;
- passage comprehension;
- reading fluency;
- basic reading; and
- reading comprehension.

Student also scored average in all math subtests, which included calculation; math facts fluency; applied problems; math calculation; and math problem solving. Student further scored average in all writing subtests, including spelling, writing fluency, and written expression.

TEACHER WRITTEN RESPONSES TO QUESTIONS

Mieles and Eseman sent written questionnaires to each teacher regarding Student's strengths/preferences and any concerns they had about Student's non-preferred academic or social tasks, academic engagement, social/emotional skills, attention and executive function, or present academic levels. They invited Student's teachers to share additional information about Student that had not been specified in the questionnaires. Four of Student's Bayhill teachers responded to the questionnaires and provided similar and detailed information about Student's ability to access the curriculum.

The Bayhill teachers related that Student participated in classes, and liked group work, and discussions. His strengths were math, science, physical education, and hands-on activities. He preferred short writing tasks, and non-fiction reading. Student was serious about academics, organized, completed work, and was prepared for class. Student was not disruptive or disrespectful, adapted well to classroom norms, and could follow concrete multi-step instructions. Student had no social or behavioral issues and did not require any supports in those areas. Student was generally focused and attentive in class, protesting at times when asked to put his phone away.

The English teacher reported while attention and sustained focus were Student's biggest challenges, he could apply laser-focused attention to matters that interested

him. The English teacher explained that at times Student preferred talking with his good friends instead of attending to the lecture, which resulted in the teacher having to repeat instructions or lecture points. The English teacher shared that Student focused more when working with people who were not his good friends.

The English teacher opined that Student's non-preferred task was writing about literature, and that this writing consisted more of a summary than deep analysis. Student did not receive any special education services but received accommodations such as one-to-one essay editing and help from the English teacher to better understand inferences. The English teacher also opined that Student was an excellent reader, with grade-level writing skills, demonstrated by his ability to compose complex and compound sentences, and correct grammatical errors using spelling/grammar checking applications.

The math teacher reported that Student had high math skills and earned A's in both the pre-calculus and physics classes. Student earned all A's in the 2020-2021 school year, except for B's in Chemistry and College Prep classes. In the 2021-2022 school year, Student earned all A's except one B in his second semester English class. None of the teachers opined that Student required special education to access his curriculum.

STUDENT INTERVIEW

Mieles interviewed Student as a part of the psychoeducational assessment. Mieles asked Student about his goals, priorities, and interests. Student was friendly and shared that he wished to travel. During her interview with Student, Miele also administered a structured sentence completion interview to validate the teachers'

reports that Student did not exhibit any social emotional concerns. Student gave age-appropriate responses that led Miele to conclude that Student did not exhibit any social emotional issues and did not require further social emotional testing.

TRANSITION ASSESSMENT

Student completed an online career interest profile assessment, in which he rated his interest level of 30 activities. Student's occupation interests were clustered around the health science and medical area. Student's career interests included environmental restoration planner, orthodontist, surgeon, and forest and conservation technician.

ASSESSORS' OBSERVATIONS

Miele and Eseman observed Student in class at Bayhill, and during standardized testing. Both assessors opined that Student was on task, engaged, and followed teacher instructions in the educational setting, and followed assessor instructions in the testing setting. Miele opined that Student had done research, was prepared, and performed well in his Bayhill classroom presentation of current events regarding luxury goods and car shortages. Eseman observed that Student was calm and quiet, at times engaged with peers, appropriately followed the lecture, and copied materials highlighted by the teacher.

ASSESSORS' CONCLUSIONS AND RECOMMENDATIONS

Miele concluded that Student performed in the average range across all cognitive tasks except for crystallized knowledge. Although Student had crystallized knowledge deficits, Miele opined that Student was at grade level and accessed the curriculum with accommodations at Bayhill. Miele found that Student exhibited a

pattern of strengths and weaknesses in performance and/or achievement, relative to age, state approved grade level standards, or intellectual development. Therefore, Miele concluded that Student presented as having specific learning disability characteristics. Miele also found that Student met the criteria for other health impairment based on his medical diagnosis of attention deficit hyperactivity disorder, and attention weaknesses demonstrated in the assessment results. However, despite Student's learning and attention weaknesses, Student could access the curriculum without special education or related services.

Eseman concluded from standardized testing that Student had high academic fluency, and many academic strengths. Student understood what he was reading, and demonstrated strong math computation skills, and the ability to apply math to real life situations. Even though Student's spelling was on the lower end of the average range, Student wrote with appropriate detail and grammar, and used strong vocabulary in response to writing prompts.

Both assessors recommended accommodations which Student received at Bayhill, such as:

- Preferential seating away from distractions;
- Alternative test taking space;
- Extended time for tests and assignments;
- Breaks, and check-ins with teachers to ensure content comprehension, and test results as needed;
- Instructions provided orally and in writing;
- Access to class notes, ability to type notes, and audio record lectures;

- Access to a calculator for math and science, and computer use for written assignments;
- Supports with organizing and managing materials and assignments to increase understanding, due dates, and reduction/shortened assignments, as needed, and agreed to between Student and teachers; and
- The opportunity to retake tests where Student scored below 60 percent.

Both Mieles and Eseman stated in their reports that an IEP team would review their assessment findings and determine special education eligibility. The psychoeducational and academic assessments provided useful information regarding Student's cognitive abilities, educational strengths and weaknesses, visual-motor abilities, visual-perceptual abilities, visual memory abilities, academic skills, adaptive skills, daily functional abilities, and behaviors for the IEP team's consideration. The assessment results consistently supported that Student exhibited cognitive function in the average range and had slight deficits in attention, processing, and memory.

IEP TEAM MEETINGS

The IEP team met on March 24, 2022 and April 20, 2022 to review the report and results of the psychoeducational assessment and academic assessment, and a speech and language assessment. The speech and language assessment was not at issue in this hearing, and therefore not analyzed in this Decision. The IEP team discussed special education eligibility at the April 20, 2022 IEP team meeting. The IEP team considered the assessment results, and the Berkeley IEP team members concluded that Student was not eligible for special education under specific learning disability or other health impairment, or speech and language impairment. Berkeley provided Parent with a copy of parents' rights and procedural safeguards at the IEP team meetings.

The Berkeley IEP team members agreed that Student exhibited characteristics of specific learning disability including weaknesses in crystalized knowledge and comprehension, auditory processing, and attention issues associated with his medical attention deficit hyperactivity disorder diagnosis. However, Berkeley team members explained to Parent that despite exhibiting specific learning disability and attention deficit characteristics, those deficits did not have a significant educational impact. A student is only eligible for special education if the degree of the student's impairment in an eligibility category requires special education and Student was able to access grade level curriculum without special education. (See, 34 C.F.R. §§ 300.8(a) and 300.306(c)(2); tit. 5, Cal. Code Regs., § 3030(a).)

Student only required minimal accommodations and did not require special education to access his education. The Berkeley IEP team members concluded that standardized testing, classroom observations by the assessors, and input from Student's Bayhill teachers, all corroborated that Student independently applied skills and strategies he acquired in the past to successfully compensate for any weaknesses, which enabled him to access the curriculum and excel academically. Therefore, the Berkeley IEP team members did not find Student eligible for special education and recommended the accommodations that had been available to Student at Bayhill.

Parent disagreed that the assessments were appropriately conducted. Parent concluded that if the assessments were properly conducted Student should have been eligible for special education because he attended Bayhill, a non-public school. Bayhill was both a private school that enrolled parentally placed students, as well as a non-public school that enrolled special education students under an IEP. Berkeley explained at the IEP team meetings, and proved at hearing, that Student was parentally placed at Bayhill, and did not require a non-public school to access his education.

At Parent's request, the IEP team met again on May 19, 2022 to discuss Parent's questions and Parent's proposed revisions to the triennial assessment reports. Parent received drafts of the academic and psychoeducation assessment reports before both the March 24, 2022 and April 20, 2022 IEP team meetings. Parent asked questions and requested changes and additions to both reports, at both IEP team meetings. Berkeley did not make all the changes requested by Parent but did revise clerical and factual errors to the academic and psychoeducation reports at Parent's request. Parent challenged the assessors' professional interpretation of the assessment findings which were personal anecdotal conclusions, and Berkeley reasonably declined to change the assessors' reported conclusions and recommendations. Instead, Berkeley offered to add Parent's unincorporated revisions as an appendix to the IEP document.

Berkeley had all required Berkeley IEP team members at each of the IEP team meetings. Parent specifically requested that Tracy representatives, and Bayhill teachers, not be invited to any IEP team meetings because Parent unequivocally stated to Berkeley that Student did not want any special education or related services from any school district. Parent emphasized that the reason she requested the assessment for Student was to obtain an IEP, and Section 504 accommodations, for college and employment. There was no evidence that Parent was aware that a student who graduated from high school with a regular high school diploma would no longer be eligible for special education and related services offered by an IEP. (See, Ed. Code, § 56026.1, subd. (a).)

STUDENT'S ARGUMENTS WERE UNPERSUASIVE TO REBUT BERKELEY'S SHOWING THAT THE PSYCHOEDUCATIONAL AND ACADEMIC ASSESSMENTS WERE APPROPRIATE

Berkeley met its burden of showing that its psychoeducational and academic assessments were properly conducted and reviewed by the IEP team such that Student was not entitled to public funded independent evaluations in those areas. All assessment results including standardized assessments, assessors' observations, and teachers' reports and input, corroborated and consistently showed that Student performed mostly in the average range. Although the assessments identified Student had some deficits including in crystallized knowledge, Student was capable of accessing his general education curriculum with accommodations. The evidence did not show that any deficits significantly impacted Student's education, or that he required special education and related services to access his last few months of high school before graduation. Student earned mostly A's in the last two years of high school, graduated with a regular high school diploma, and set to attend San Joaquin Delta College. Despite Student's contention to the contrary, Miele, Eseman, and Hardy all opined that no further assessment was required in any area to determine Student's educational needs.

Student did not present any expert opinions or provide any persuasive support to rebut Berkeley's showing that the psychoeducation and academic assessments were appropriate. Student relied solely on Parent's opinions. Although at hearing Parent shared many complaints about the assessments and resulting reports, none of the complaints impacted the integrity, or appropriateness, of the psychoeducational or academic assessments. Parent's unsupported opinions consistently contradicted

evidence of Student's above average school performance without special education services, the opinions of Mieles and Eseman as stated in the assessment reports, and the opinion of Hardy based on the information gathered by Berkeley in the assessments and during the IEP team meeting discussions.

Parent was not trained, knowledgeable, or experienced in administration, scoring, or interpreting psychoeducational and academic assessments. Parent was also not a credentialed educator. Therefore, Parent's opinions regarding assessment results and special education eligibility were unpersuasive, and outweighed by the opinions of Mieles and Eseman, and Hardy—all of whom were credentialed educators and/or psychologists trained to administer and interpret psychoeducational and academic assessments.

Student argued that Berkeley should have found Student eligible for special education had its assessors considered that Student attended a non-public school; had a tutor; and was enrolled in an academic support class in the second semester of the 2021-2022 school year. Student did not present any testimony from Bayhill's teachers, or any educational experts, as evidence that Student was at Bayhill because he required a non-public school to access his education. Student was parentally placed at Bayhill, and was not placed at Bayhill through an IEP, or because he needed a non-public school. All evidence including the standardized assessments results, assessors' observations of Student's performance in class, and teachers' reports showed Student was capable of accessing his education without special education and related services. The evidence did not show that Student required the academic support class, or a tutor, to access his curriculum, as opposed to receiving the services as additional preferred

resources. Further, Berkeley could not have considered the academic support class as Student was not enrolled in the class until the last semester of the senior year, after the triennial assessment concluded.

Student also argued that Eseman's characterization of the academic assessment purpose as determining Student's eligibility for special education and related services rendered the assessment defective because Parent had requested the assessment for post-secondary purposes. Student's argument was unpersuasive because the purpose of assessments conducted under the IDEA is to determine eligibility for special education and related services. (See, 20 U.S.C. § 1414(a); 34 C.F.R. § 300.303; Ed. Code, §§ 56043(k), 56381, subd. (a).) Therefore, Berkeley appropriately stated the purpose of the assessment even though it differed from Parent's personal reason for seeking assessment.

Student's arguments regarding incomplete and inaccurate information in the psychoeducation report were unpersuasive. Student identified errors that were inconsequential to the substance of the assessment findings and report such as not identifying the specific class Student had been observed by the assessors and stating that Student was 14 instead of 17 years-old, in a draft psychoeducational report. Student argued that the incorrect age could have impacted the assessments selected without any supporting evidence beyond mere speculation presented as Parent's opinion. Parent opined that the assessor's statement that she observed Student in a classroom where economics and English were taught was non-specific as to which class Student had been observed. The details of the classroom observation were informative as to Student's function and performance in class notwithstanding the failure to specify the exact location where Student had been observed. Parent also complained that

Berkeley did not include enough historical/background summary information about Student in the reports. Berkeley revised the typographical errors in the final report. Student also did not show that by declining to make all the revisions, and not including all Student's historical/background information, requested by Parent rendered the assessment reports inappropriate.

Student argued that the draft psychoeducational report was incomplete because it did not include the Behavior Rating Inventory and Executive Function results. Berkeley could not have included the Behavior Rating Inventory response in the draft psychoeducational report because the Bayhill teacher had not returned it to Berkeley at the time the draft psychoeducational report was provided to Parent in advance of the March 2022 IEP team meeting. However, Berkeley included the Behavior Rating Inventory results in the final psychoeducational report, and before the psychoeducational report was discussed at the April 2022 IEP team meeting.

Likewise, Student's complaints of contradictory findings in the psychoeducational report were unfounded. For example, Student disputed Mieles' scoring of Student's ability to begin a task under the Initiate Scale of the Behavior Rating Inventory as in the average range. Parent opined that the average range score contradicted the speech and language assessor's statement that Student did not initiate conversation. Parent opined that this perceived contradiction affected Mieles' scoring and impacted the accuracy of the psychoeducational assessment. Further, Parent interpreted that the English teacher's response in a questionnaire that Student preferred to talk to good friends instead of writing/working as work avoidance. Therefore, Parent concluded that Berkeley should have conducted further assessments regarding Student's work avoidance. Parent also opined that Berkeley needed to conduct more assessments in areas where Student scored below average or well below average. Parent's opinions

were based on mistaken and out of context personal conclusions unsupported by any testing protocols, or expert interpretation on assessment results, and therefore unpersuasive.

Berkeley met its burden of proving that the psychoeducational and academic assessments were appropriate. Student did not rebut Berkeley's evidence, provide any expert opinions, or persuasive evidence to support his contention that the assessments were incomplete, contradictory, inaccurate, or otherwise inappropriate. Accordingly, Student is not entitled to independent psychoeducation or academic assessments.

BERKELEY INITIATED A DUE PROCESS HEARING WITHOUT UNNECESSARY DELAY

The procedural safeguards of the IDEA provide that under certain conditions, a parent is entitled to obtain an independent evaluation of a child at public expense. (20 U.S.C. § 1415(b)(1).) An independent evaluation is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i).) A parent has the right to request an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).) When a parent requests an independent evaluation at public expense, the school district must, "without unnecessary delay," either initiate a due process hearing to show that its evaluation is appropriate, or provide the independent evaluation at public expense, unless the school demonstrates at a due process hearing that an independent evaluation already obtained by the parent does not meet its criteria. (34 C.F.R. § 300.502(b)(4); Ed. Code, § 56329, subd. (c).)

Whether the length of time that has passed before a district initiates a due process hearing or provides the independent evaluation at public expense constitutes

unnecessary delay is a question of fact, based upon the circumstances of the particular case. (*J.P. v. Ripon Unified School Dist.* (E.D. Cal., Apr. 15, 2009, No. 207CV02084MCEDAD) 2009 WL 1034993 (*Ripon*)). For example, in *Ripon* the court determined that the school district's 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. (*Ripon*, 2009 WL 1034993, at **7-8.)

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 (*Horne*)). The determination of unnecessary delay is a fact-specific inquiry. The facts of each case are therefore critical. (*Ibid.*)

On April 22, 2022, Parent requested psychoeducational and academic independent evaluations from Berkeley by email. Parent also filed a complaint with the California Department of Education, called CDE, around April 29, 2022. The CDE complaint included five issues alleging that Berkeley's assessments, and subsequent IEP team meetings, were inappropriate, including specifically the issue of whether Berkeley conducted a comprehensive psychoeducation assessment. On May 1, 2022, Berkeley denied Parent's request for the psychoeducational and academic independent

evaluations in an emailed letter to Parent. Berkeley exchanged emails with CDE's personnel on May 9, 23, and June 6, 2022 regarding its investigation into the five issues.

There were no direct negotiations between Parent and Berkeley from May 1, 2022 until June 7, 2022 when Berkeley filed for due process with OAH. However, the evidence showed that Berkeley used the CDE process, communicating with CDE in May 2022, and until June 6, 2022, to resolve parental complaints which included the appropriateness of Berkeley's assessments. The day after the last communication with CDE, Berkeley filed for due process with OAH when it realized that CDE's process and results would not be immediately forthcoming as CDE issued its investigation findings on June 28, 2022. Berkeley's communications with CDE's personnel constituted Berkeley's continued attempt to resolve the matter with Parent by means other than an OAH filing under *Horne*. The totality of evidence did not support that Berkeley unnecessarily delayed in filing for due process, 37 days after denying Parent's request for the psychoeducational and academic independent evaluations.

Berkeley argued that it was not required to fund independent educational evaluations because Student sought the evaluations to obtain accommodations for college and future employment, and not for the purposes contemplated under the IDEA. This Decision found that Berkeley's psychoeducational and academic assessments were appropriate. Therefore, whether independent educational evaluations should be awarded because they were not sought for purposes contemplated under the IDEA need not be decided, as the issue of an appropriate remedy is moot.

CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

ISSUE 1:

The March 21, 2022 psychoeducational assessment and March 2022 academic assessments were appropriately conducted.

Berkeley prevailed on Issue 1.

ORDER

1. Berkeley is not required to fund independent psychoeducation or academic assessments.

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.

Sabrina Kong
Administrative Law Judge
Office of Administrative Hearings