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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

K.S.N., a minor, by and through her
parents, JOHN NAGEL and
MICHELLE SHORT-NAGEL; JOHN
NAGEL and MICHELLE SHORT-
NAGEL, on their own behalf,

Plaintiff,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT; LOS ANGELES UNIFIED
SCHOOL DISTRICT SPECIAL
EDUCATION LOCAL PLAN AREA,
and DOES 1 to 10,

Defendants.

No. CV 11-3270 CBM (MANx)

ORDER REVERSING THE DECISION
OF THE CALIFORNIA OFFICE OF
ADMINISTRATIVE HEARINGS AND
ORDERING DEFENDANTS TO FUND
AN INDEPENDENT EDUCATIONAL
EVALUATION

The matter before the Court is a review of the administrative record and
decision of the California Office of Administrative Hearings. [Docket Nos. 23,
24, 25.]

I. JURISDICTION

This Court has jurisdiction pursuant to 20 U.S.C. § 1415 *et seq.*, and 28
U.S.C. §§ 1331, 1343, and 1367.

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II. PROCEDURAL AND FACTUAL OVERVIEW

During the 2008-09 school year, when Plaintiff K.S.N. (“Student”) was in the first grade, her school convened a student study team (“SST”) meeting to discuss concerns Plaintiff Michelle Short-Nagel (“Mother”) and Student’s teachers had about Student’s academic progress. (Administrative Record OAH Case No. 2010100865 [“AR”] at 220.) The SST recommended modifications, including being provided with a one-on-one classroom aide for assistance, and an action plan. (*Id.*) During the 2010-11 school year, when Student was in second grade, the SST members implemented the recommendations. (AR at 221.) At a follow-up meeting on February 17, 2010, the SST determined that Student continued to struggle in the school setting and referred Student for an initial special education assessment. (*Id.*) Parents consented to the assessment. (*Id.*)

In March 2010, for the first part of the assessment, special education teacher Barbara Zafran administered standardized tests of academic achievement to Student, finding that student scored at grade level in Reading, below grade level in Oral Language, at grade level in Mathematics, and “slightly above grade level” in Written Language Skills. (*Id.* at 266-269.) Also in March 2010, for the second part of the assessment, District psychologist Karen Menzie performed a psychoeducational assessment and prepared a comprehensive report. (AR at 252-265.) This assessment consisted of interviews with Student, Mother, and Student’s teacher, Randi Lieber; brief observation of Student playing a game in class; a full review of Student’s educational file and history; and the administration of a variety of standardized and norm-referenced assessments to measure Student’s processing abilities. (*Id.*) The report concluded that Student may be eligible for special educational services due to a visual processing disorder:

There appears to be a severe discrepancy between her intellectual ability and academic achievement in the

1 classroom in reading, writing, and mathematics
2 applications. She has deficits in visual processing,
3 specifically in the area of complex visual processes. It
4 appears that she meets the criteria for a student with a
5 specific learning disability and may be eligible for
6 special educational services.

7 (*Id.* at 259.)

8 An Individualized Education Program (“IEP”) Team met on April 29, 2010
9 with Mother, Student’s teacher, Ms. Zafran, and Ms. Menzie. (AR at 286.) The
10 IEP Team considered the possibility of both attention deficit disorder and specific
11 learning disability. (AR at 279.) The IEP Team determined that Student was
12 eligible for special education as a pupil with a specific learning disability due to
13 deficits in oral and visual processing. (*Id.*) On September 27, 2010, another IEP
14 Team meeting took place, at which Mother registered her disagreement with the
15 psychoeducational assessment report, contending that the results of the assessment
16 were inconclusive. (AR at 306.) Mother then served the District with a written
17 request for an Independent Educational Evaluation (“IEE”) at public expense.
18 (*Id.* at 312.) The District declined the request for an IEE and instead filed on
19 October 19, 2010, a due process hearing request seeking a determination that Ms.
20 Menzie’s psychoeducational assessment was appropriate. (*Id.* at 353-358.)¹

21 The due process hearing was held on December 15 and 16, 2010 before
22 Eileen M. Cohn, Administrative Law Judge (“ALJ”) with the California Office of
23 Administrative Hearings. (AR at 313.) The sole issue for adjudication was
24 whether the psychoeducational assessment conducted by the District in March of
25 2010 was appropriate, such that Student is not entitled to an independent
26 educational evaluation (IEE) at public expense. (AR at 314.) The ALJ issued a
27 decision on February 3, 2011, finding that the District’s psychoeducational
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¹ The District was required to either provide the IEE or initiate a due process hearing “without unnecessary delay” pursuant to its obligations under the IDEA and California special education law. *See* 20 U.S.C. § 1400 *et seq.*, 34 C.F.R. § 300.502(b)(4), Cal. Educ. Code § 56000, *et seq.* If the public agency requests a hearing and prevails at the hearing, the parents still have a right to an IEE, but not at public expense. 34 C.F.R. § 300.502(b)(3)(2006).

1 assessment was appropriate and Student is not entitled to an IEE at public
2 expense. (AR at 337.)

3 Plaintiffs Student, John Nagel (“Father”), and Mother filed a Complaint on
4 April 18, 2011 to appeal the ALJ’s ruling seeking a reversal. [Docket Nos. 1, 3.]
5 On November 17, 2011, based on a stipulation from the parties, the Court ordered
6 Plaintiffs to lodge the Administrative Record on or before November 15, 2011 and
7 set a sequential briefing schedule, waiving the Pre-Trial Conference and filing of
8 the Findings of Facts and Conclusions of Law. [Docket Nos. 17, 19.] Plaintiffs’
9 opening brief notes that Plaintiffs seek an order reversing the ALJ decision and
10 awarding appropriate relief under the Individuals with Disabilities Act (“IDEA”)
11 including attorneys fees and costs. (Plaintiffs’ Amended Opening Brief [“Pls.’
12 Opening”] at 1:2-6.) [Docket No. 20.]

13 III. STANDARDS OF LAW

14 A. Standard of Review for the District Court

15 In an action challenging a due process hearing under the IDEA “the court
16 shall receive the records of the administrative proceedings[,] shall hear additional
17 evidence at the request of a party[,] and, basing its decision on the preponderance
18 of the evidence, shall grant such relief as the court determines is appropriate.”
19 20 U.S.C § 1415(i). The District Court proceeding “under the IDEA is a hybrid,
20 akin to trial de novo.” *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir.
21 1994). “Thus, judicial review in IDEA cases differs substantially from judicial
22 review of other agency actions, in which courts generally are confined to the
23 administrative record and are held to a highly deferential standard of review.”
24 *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1471 (9th Cir. 1993); *Seattle Sch.*
25 *Dist., No. 1 v. B.S.*, 82 F.3d 1493, 1499 (9th Cir. 1996) (“The Ninth Circuit has
26 interpreted this [20 U.S.C. § 1415(i)] as calling for de novo review.”).

27 Although the District Court is required to give “due weight” to the decision
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1 of the Administrative Law Judge (ALJ), the “court must ultimately reach an
2 independent decision based on a preponderance of the evidence.” *Bd. of Educ. v.*
3 *Rowley*, 458 U.S. 176, 205. Exactly how much weight a court gives a hearing
4 officer’s findings is a matter for the discretion of the court. *Gregory K. v.*
5 *Longview Sch. Dist.*, 811 F.2d 1307, 1311 (9th Cir. 1987).

6 **B. Standard of Review of the Psychoeducational Assessment**

7 In an administrative proceeding, the burden of proof is on the party
8 requesting the hearing. *Schaffer v. Weast*, 546 U.S. 49 (2005). Here, the District
9 requested the hearing and therefore bore the burden of proof. The District must
10 show by a preponderance of the evidence that the assessment was legally
11 appropriate.

12 California Education Code Section 56320 provides certain requirements for
13 legally appropriate assessments, including that the tests be administered in
14 conformance with test instructions and that the tests and other assessment
15 materials be tailored to assess specific areas of educational need. *See* Cal. Educ.
16 Code § 56320. Personnel who assess the pupil must prepare a written report of the
17 results of each assessment, and provide a copy of the report to the parent. Cal.
18 Educ. Code §§ 56327 & 56329. The student must be assessed in all areas related
19 to his or her suspected disability including, where appropriate, health and
20 development, vision, hearing, motor abilities, language function, general
21 intelligence, academic performance, communicative status, social and emotional
22 status. 20 U.S.C. § 1414 (a)(2),(3); Cal. Educ. Code § 56320, subd. (f). The
23 assessment must be sufficiently comprehensive to identify all of the child’s special
24 education and related services needs, regardless of whether they are commonly
25 linked to the child’s disability category. 34 C.F.R. § 300.306 (2006).

26 **IV. DISCUSSION**

27 The record is clear that a number of irregularities took place during the
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1 District’s psychoeducational assessment. The ALJ acknowledged these
2 irregularities, but found that none of them rendered the District’s assessment
3 inappropriate. After conducting an independent review of the record, the Court
4 finds that the District has not shown by a preponderance of the evidence that the
5 assessment was legally appropriate. Instead, the totality of the irregularities is
6 sufficient to merit a District-funded Independent Education Examination. The
7 irregularities are discussed in turn.

8 **A. The District’s Failure to Produce All of Student’s Records**

9 The parties and ALJ agree that certain records were missing from Student’s
10 file:

11 Student’s assessment file did not include the [Cognitive
12 Assessment System (“CAS”)] response book containing
13 the raw data for some of the subtests administered,
14 matching numbers, planned codes, and number
15 detection. Student’s file did not contain the CAS record
16 form where Ms. Menzie was required to record her
17 observations of Student’s test-taking strategies. Also
18 missing from Student’s file was the answer book
19 containing the raw data for the VMI assessment and the
20 teacher’s handwritten BASC-2 rating scale.

21 (AR at 327, ¶ 64.) LAUSD contends that these files were “inadvertently lost when
22 the District attempted to centralize these records.” (Def.’s Response at 26:27-
23 27:1; Hearing Transcript, 53:5-56:8, Dec. 16, 2010.)

24 Federal law requires that parents be given the opportunity to access “all
25 records” related to their child. 20 U.S.C. § 1415(b)(1). Under state law, parents
26 have the right to examine “all school records of his or her child and to receive
27 copies . . . within five business days after the request is made by the parent, either
28 orally or in writing.” Cal. Educ. Code § 56504. “[T]he public agency shall
comply with a request for school records without unnecessary delay before any
meeting regarding an individualized education program or any hearing pursuant to
Section 300.121, 300.301, 300.304, or 300.507 of Title 34 of the Code of Federal

1 Regulations” Cal. Educ. Code § 56504. Where evidence was willfully
2 suppressed, the trier of fact can draw inferences that lost evidence was damaging.
3 *Bihun v. AT&T Info. Sys., Inc.*, 13 Cal. App. 4th 976 (1993).

4 It is not clear to the Court whether a school district violates the law when it
5 has simply lost the files and not intentionally withheld the files. Neither side has
6 presented, and the Court has not found, a case analogous to this in which the
7 reason records were not produced was because they were lost and no longer in the
8 District’s possession. Nevertheless, the Court does find that the missing files
9 weigh in favor of the District funding an Independent Educational Examination.
10 This is especially so given Dr. Blum’s testimony that the missing subtest from the
11 CAS would have also been important in determining whether the assessments
12 were “administered in accordance with any instructions provided by the producer
13 of the assessments” as required by 34 C.F.R. § 300.304 (c)(1)(v), which is at issue.
14 (Hearing Transcript, Dec. 16, 2011, pp. 172:25-174:8.) *See, infra*, Section IV, C.

15 **B. Ms. Menzie’s Insufficient Classroom Observation**

16 The parties agree that Ms. Menzie observed Student in the classroom only
17 once, while Student was playing a game called Sparkle that does not assess or
18 document a student’s reading, writing, or math comprehension ability. (Pls.’
19 Opening at 14:13-17, 15:4-5; Hearing Transcript, 169:15-172:1, Dec. 15, 2010;
20 Hearing Transcript, 121:9-12, 13-17, 18-20, 207:16-21, Dec. 16, 2010.)

21 Under 34 C.F.R. § 300.311(a), when a student is suspected of having a
22 specific learning disability, specific documentation is necessary and must contain
23 a statement of the “relevant behavior, if any, noted during the observation of the
24 child and the relationship of that behavior to the child’s academic functioning.”
25 School districts are required to ensure that the assessment tools and strategies
26 provide relevant information that directly assists persons in determining the
27 educational needs of the child. 34 C.F.R. § 300.304(C)(1)-(7). The California
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1 Education Code requires that “[t]he personnel who assess the pupil shall prepare a
2 written report, or reports, as appropriate, of the results of each assessment. The
3 report shall include, but not be limited to . . . the relevant behavior noted during the
4 observation of the pupil in an appropriate setting.” Cal. Educ. Code § 56327(c).

5 The Court finds that the classroom observation of Student’s behavior and
6 the relationship of that behavior to Student’s academic functioning was
7 insufficient. This is especially true in light of the fact that “the classroom was
8 where K.S.N. was exhibiting difficulty with inconsistency in work performance,
9 problems with attention span and concentration (loss of focus) during individual
10 work, following multistep directions, and having difficulty with comprehension.”
11 (Pls.’ Opening at 13:18-21.) The insufficient classroom observation weighs in
12 favor of the District funding an Independent Educational Examination.

13 **C. Ms. Menzie’s Failure to Assess Student in Accordance With the**
14 **Instructions Provided by the Producers of the Assessments**

15 California law requires that “[e]ach public agency must ensure that . . .
16 [a]ssessments and other evaluation materials used to assess a child under this part .
17 . . [a]re administered in accordance with any instructions provided by the producer
18 of the assessments.” 34 C.F.R. § 300.304 (c)(1)(v). Two different assessments
19 were administered with irregularities.

20 As to the Behavior Assessment Scales for Children, Second Edition
21 (“BASC-2”), Ms. Menzie obtained only one parent’s ratings (in the form of an
22 interview questionnaire), and did so telephonically while the parent was shopping
23 at the mall. (Hearing Transcript, 15:7-17:5, Dec. 16, 2010.) The assessment
24 instructions state that “it is desirable to obtain ratings from both parents if
25 possible,” and that the interview be conducted in a “controlled setting such as the
26 clinician’s office to avoid distractions.” (Pls.’ Opening at 20:1-6, quoting AR at
27 251.) Ms. Menzie also interviewed only one of the teachers familiar with
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1 Student's work. (Hearing Transcript, 167:25-169:8, Dec. 15, 2010.)

2 As to the Cognitive Assessment System ("CAS"), Ms. Menzie deviated
3 twice from test instructions, first because Ms. Menzie demonstrated to Student
4 how to cross out a wrong answer even though the instruction did not provide for
5 crossing out a wrong answer, and second because *Ms. Menzie* placed "XX" under
6 a header on the answer sheet while the instructions state that the *student* should
7 write the "XX" under the header. (AR at 109-110, ¶ 49, 50.)

8 The Court finds the uncontrolled and distracted nature of the BASC-2
9 interview with Mother to be improper, weighing in favor of the District funding an
10 Independent Educational Examination. This is especially true in light of Mother's
11 testimony that Mother's answers recorded by Ms. Menzie differed somewhat from
12 Mother's recollection of her answers. (Hearing Transcript, 15:7-17:5, Dec. 16,
13 2010.) While the Court finds that the CAS irregularities are not as problematic as
14 the uncontrolled and distracted nature of the BASC-2 interview with Mother, these
15 too weigh in favor of the District funding an Independent Educational
16 Examination.

17 **D. Additional Alleged Irregularities That the Court Finds Less Persuasive**

18 Plaintiffs alleged additional irregularities in Ms. Menzie's assessment that
19 the Court finds less persuasive.

20 First, the Court disagrees that "[t]he ALJ's decision to 'weigh' Ms.
21 Menzie's report and testimony 'against' Dr. Blum's analysis was based on a
22 misapplication of evidentiary standards." (Pls.' Opening at 11:22-24.) Plaintiffs
23 contend that "Dr. Blum's testimony and Ms. Menzie's testimony should not have
24 been *weighed* by the ALJ to determine which was more persuasive. In doing so
25 the ALJ again artificially shifted the burden of Student who was the Respondent in
26 the administrative hearing." (*Id.* at 12:20-23.)

27 On this point, the Court agrees with Defendant that "as the trier of fact in
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1 the due process hearing, the ALJ was entitled to make credibility determinations
2 regarding the witnesses and their testimony.” (Def.’s Response at 28:22-24.) *See*
3 *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (“When findings are based
4 on determinations regarding the credibility of witnesses, Rule 52(a) demands even
5 greater deference to the [trier of fact’s] findings; for only the [trier of fact] can be
6 aware of the variations in demeanor and tone of voice that bear so heavily on the
7 listener’s understanding of and belief in what is said.”) Defendant correctly notes
8 that “Dr. Blum and Ms. Menzie both testified to the essential issue in the due
9 process hearing, that is, whether the District’s psychoeducational assessment is
10 appropriate.” (Def.’s Response at 28:25-27.) “The essential function of the ALJ,
11 as a trier of fact, is to resolve that disputed issue through a weighing of each of the
12 witnesses’ credibility.” (*Id.* at 29:3-4.)

13 Second, the Court disagrees with Plaintiffs’ contention that Defendant
14 conducted the Behavior Assessment Scales for Children, Second Edition (“BASC-
15 2”) test in a sexually discriminatory manner because Ms. Menzie interviewed
16 Student’s Mother but not Student’s Father. The California Education Code
17 requires that “testing and assessment materials and procedures used for the
18 purposes of assessment and placement of individuals with exceptional needs [be]
19 selected and administered so as not to be racially, culturally, or sexually
20 discriminatory.” Cal. Educ. Code § 56320(a). Plaintiffs argue that the “failing to
21 provide the BASC-2 to Mr. Nagel was indefensible, leaving one to conclude that
22 Ms. Menzie did not provide the Parent Rating Scale to Mr. Nagel solely because
23 of her prejudicial attitude towards men.” (Pls.’ Opening at 18:19-21.) The record
24 contains no evidence from which the Court could conclude that Ms. Menzie’s
25 actions reflect any type of discriminatory intent or action.

26 Third, Plaintiffs contend that the District did not assess Student in all areas
27 of suspected disability. Specifically, Plaintiffs note that “in their two reports, the
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1 Student Success Team (SST), consisting of K.S.N.’s teacher, District Resource
2 Teacher, [school] administrators, and K.S.N.’s mother, documented that attention
3 and focus were major areas of concern they had for K.S.N. during her first and
4 second grades.” (*Id.* at 30:4-7.) Plaintiffs also contend that Ms. Menzie did not
5 conduct an adequate assessment of Student’s reading comprehension, math
6 reasoning, and school anxiety. (*Id.* at 30:1-3.)

7 The IDEA requires that “[i]n evaluating each child with a disability under
8 §§300.304 through 300.306, the evaluation is sufficiently comprehensive to
9 identify all of the child’s special education and related services needs, whether or
10 not commonly linked to the disability category in which the child has been
11 classified.” 34 C.F.R. § 300.304(6). Here, while it appears that the District did
12 evaluate Student in all possible areas, there are areas in which the District spent an
13 insufficient amount of resources. (*See* AR at 110, ¶ 47 [ALJ acknowledging that
14 Ms. Menzie was “...dismissive of the concerns of the SST with Student’s attention
15 . . . ,” but that “Ms. Menzie explained that when Student appeared to be unfocused
16 or inattentive, she was suffering from cognitive fatigue” and not attentional
17 issues.].) While the Court is not persuaded that Defendant violated any law in this
18 regard, an independent assessment would provide a more complete basis for
19 evaluating Student.

20 V. CONCLUSION

21 While no single irregularity in Student’s assessment is determinative of the
22 Court’s outcome, the Court finds after an independent review of the record that
23 that the ALJ erred in not properly considering the totality of the irregularities. The
24 Court reverses the Office of Administrative Hearing’s order and finds that the
25 totality of the irregularities in Student’s assessment warrants a new, District-
26 funded Independent Educational Evaluation of K.S.N. pursuant to 34 C.F.R.
27 300.502. Upon consideration of the totality of these irregularities, the Court finds
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1 the District has not shown by a preponderance of the evidence that the assessment
2 was legally appropriate.

3 District courts have considerable discretion in awarding appropriate relief
4 under the IDEA. *See Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ.*
5 *of Mass.*, 471 U.S. 359, 369-370 (1985) (“The statute directs the court to ‘grant
6 such relief as [it] determines is appropriate.’ The ordinary meaning of these words
7 confers broad discretion on the court. The type of relief is not further specified,
8 except that it must be ‘appropriate.’”)

9 **IT IS HEREBY ORDERED** that the decision of the California Office of
10 Administrative Hearings (“OAH”) Case Number 201100865 dated February 2,
11 2011 is reversed.

12 **IT IS HEREBY ORDERED** that Defendants jointly and severally shall
13 fund a reasonable Independent Educational Examination of K.S.N. pursuant to
14 34 C.F.R. 300.502 within 30 days of the administering of the independent
15 assessment. The Court ORDERS, because it is in K.S.N.’s best interests, that
16 K.S.N.’s independent evaluation commence within 30 days of this Order and be
17 completed as soon as possible so that results from the assessment may be used to
18 formulate an appropriate Individualized Education Program to be used during the
19 2012-2013 school year.

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21 **IT IS SO ORDERED.**

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23 DATED: March 20, 2012

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By _____
25 CONSUELO B. MARSHALL
26 UNITED STATES DISTRICT JUDGE
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