

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

POWAY UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2015030732

**DECISION**

Poway Unified School District filed a due process hearing request with the Office of Administrative Hearings, on March 13, 2015, naming Parents on behalf of Student. The matter was continued for good cause on March 24, 2015.

Administrative Law Judge Chris Butchko heard this matter in Poway, California, on May 13, 2015, and telephonically on May 15, 2015.

Justin R. Shinnfield, Attorney at Law, represented District. Kathleen Purcell, Director of Special Education for District, attended each day of the hearing.

Student's father represented Student. Student did not attend the hearing.

On May 15, 2015, the hearing was completed by telephonic closing argument, the record closed, and the matter was submitted for decision.

## ISSUES<sup>1</sup>

1. Was District's April 23, 2014, psychoeducational assessment appropriately conducted?
2. Was District's April 11, 2014, academic skills assessment appropriately conducted?

## SUMMARY OF DECISION

District met its burden of proof by showing its psychoeducational and academic assessments were administered by trained and knowledgeable persons, using a variety of appropriate technically sound, valid, and reliable instruments, tools and strategies, and met all legal requirements. Accordingly, Student is not entitled to independent educational evaluations at public expense.

## FACTUAL FINDINGS

### *Jurisdiction and Background*

1. Student was a 10-year-old male who at all relevant times resided with his parents within District's boundaries. Student has been and continues to be eligible for special education under the eligibility categories of Multiple Disabilities and Autism. Student has severe limitations in receptive and expressive language.

### *The April 23, 2014 Individualized Education Program*

2. District sent to Parents an evaluation plan as part of the preparation for Student's Triennial Evaluation. Student's special education teacher was given responsibility for conducting testing of Student's academic skills. District's psychologist was assigned to conduct Intellectual Development and Social/Emotional/Adaptive Behavioral testing. District used the results of these tests to create Student's April 23, 2014 individualized education program.

3. Pursuant to the April 23, 2014 IEP, District offered Student placement in a special day class for specialized academic instruction, along with related services in language and speech, occupational therapy, physical therapy, and adapted physical education.

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<sup>1</sup> The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

4. Parents became concerned in the 2014-2015 school year that Student was not progressing academically and was regressing to earlier behaviors. They informed District of their concerns. Parents believed that the assessments used in formulating the April 23, 2014, Education Plan were defective because of Student's subsequent lack of educational progress, and requested independent educational evaluations in psychoeducational functioning and academic skills.

5. On January 26, 2015, Parents sent an e-mail to District requesting independent educational evaluations in the areas of psychoeducational and academic testing. On March 6, 2015, District sent a prior written notice letter wherein it declined to fund the requested independent evaluations.

6. When a student requests an independent educational evaluation, the school district must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent educational evaluation is provided at public expense. Here, District opted to defend its April 2014 psychoeducational and academic evaluations, and timely filed its complaint for due process within 46 days of Student's request.

#### *District's Psychoeducational Evaluation*

7. Michelle K. Klock was District's school psychologist who completed its April 2014 psychoeducational evaluation. Ms. Klock had a bachelor of arts degree in economics from the University of New Hampshire, and a master of arts in psychology from Chapman University. She received a pupil personnel services credential in 2007 in school psychology, which qualified her to work as a school psychologist.

8. Ms. Klock had worked for District since receipt of her 2007 credential. Her duties have included performing assessments, collaborating with staff, participating in IEP meetings, being part of intervention assistance teams, preparing behavior plans, counseling pupils, and pupil suicide prevention and intervention.

9. Ms. Klock conducted between 50 and 70 student evaluations per year. At the time of Student's 2014 assessment, she would have conducted between 300 to about 500 assessments.

10. Ms. Klock was knowledgeable about and trained in administering standardized assessment instruments. She was qualified to administer the assessment based on her education, training, credentials, and experience.

11. Ms. Klock assessed Student through the use of records review, caregiver interviews, direct observation, and standardized testing.

12. Before conducting the assessment, Ms. Klock reviewed Student's educational records, including prior assessment reports, to understand Student's case history.

13. Ms. Klock reviewed Student's health history report and a health update, both which were prepared by District's nurse, Gayle Cohen. Ms. Klock did not contact Student's doctor or neurologist for additional medical information because of patient privacy rules. Ms. Klock did not believe that it was necessary for her to do so because she had sufficient information on student's condition from the Health Report for her purposes. She was able to report on Student's present levels of performance and establish his eligibility without additional medical input.

14. Student's testing records were extensive. He had been assessed five times between 2008 and 2013, a number Ms. Klock described as "more than average." Ms. Klock reviewed a 2007 psychoeducational evaluation by S. Ann Corrington, Ph.D., a 2009 psychoeducational assessment by Angela Kilman, Ph.D., a 2012 psychoeducational assessment by Toulia McCarley, a school psychologist, and a 2013 psychological assessment by Rienzi Haytasingh, Ph.D.

15. Dr. Corrington and Dr. Kilman both administered the Wechsler Preschool and Primary Scale of Intelligence, Third Edition. Dr. McCarley gave Student the Wechsler Intelligence Scale for Children, Fourth Edition. Dr. Haytasingh tested Student using both the Autism Diagnostic Observation Schedule, Module 2, and the Brigance Intervention of Early Development II.

16. Ms. Klock reviewed the prior assessments and employed them as "a tool to determine how to move forward" with Student's assessment. They influenced her decisions, but they did not predetermine the outcome.

17. Ms. Klock met with Student's teacher Ms. Lauren Felker, Student's instructional aide, Student's speech pathologist, and other staff who had regular contact with Student to gather information about his behavior and functioning. Ms. Klock was informed that Student had language delays. He could speak, but was generally limited to one and two-word responses. He could not form sentences.

18. Student's behavior had improved significantly over the course of his time in Ms. Felker's class. He would stay on-task for longer periods, had decreased the incidents of dropping to the floor during transitions and non-desired activities, and was less invasive of others' personal space. He would still loudly exclaim when asked to do non-preferred tasks. Student also had issues with personal safety and falls.

19. Ms. Klock observed Student on three occasions for a total of at least 90 minutes. The observations took place in Ms. Felker's classroom. Student was approximately nine years and two months old at the time of observation.

20. Ms. Klock characterized Student from her observation as a "fun, happy boy" who interacted best with adults, but who required assistance to do academic work. She did not observe Student flapping his arms or engaging in stereotypical autistic behaviors. She observed him go to a trampoline, which was an avoidance behavior, but he was redirected to

classroom activities. He worked on letter sounds with an aide in one observation, and participated in art and music activities in another.

21. Ms. Klock observed Student sliding out of his chair when his aide was switching letter sets, in an attempt to elope to the trampoline. He returned to work after “verbal and physical prompting.” He tried later to leave the chair again, but remained after the aide told him to stay. Ms. Klock did not see Student collapse to the floor, which had been a misbehavior of concern to Ms. Felker.

22. For the psychoeducational assessment, Ms. Klock employed the following tools: the Kauffman Assessment Battery for Children, Second Edition; the Gilliam Autism Rating Scale, Third Edition; the Social Responsiveness Scale; the Adaptive Behavior Assessment System, Second Edition; and the Achenbach System of Empirically Based Assessment Child Behavior Checklist and Teacher’s Report Form. Of these, only the Kauffman was a test directly administered to Student.

23. The Kauffman had five subparts, all of which call for nonverbal responses. Ms. Klock was aware from her consultation with Ms. Felker and her review of Student’s records that he had “limited expressive language.” She also was aware that he had scored below the second percentile when he had been given the Wechsler Intelligence Scale for Children. She did not administer that test because it had been given to Student in 2012 and because she believed it was not recommended for children with language limitations because it required too many verbal responses.

24. Ms. Klock chose the Kauffman over the Comprehensive Test of Nonverbal Intelligence because it gave the child manipulatives to work with in testing, which she believed was better for testing than having the child just point to pictures. She believed the manipulatives were a better measure of his ability because they were more “interactive” with Student. In addition, she believed the Kaufman was particularly low in cultural bias.

25. Before beginning the test, Ms. Klock took time to establish some rapport with Student. He already knew her from her classroom observation, and he was quickly comfortable with her. Student’s Instructional Aide accompanied him in the testing, as was permitted by the testing protocol, which added to Student’s degree of comfort.

26. In administering the test, Ms. Klock found that Student had “significant difficulty” understanding the directions. The instructions for the test did not permit her to add to or alter the directions. Student was not able to understand the directions or answer correctly in any of the subparts of the Kauffman.

27. At that point, Ms. Klock opted to “test the limits, which means breaking standardization in order to learn more about the student.” To obtain meaningful responses from Student, Ms. Klock gave the instructions in familiar language from his classes, such as pointing to her and his shapes and telling him “make same.” She gave instructions in pantomime, and praised him when he moved the manipulables in any way.

28. The Kauffman allows the tester to break standardization in that way for purposes of reporting information about a student, but any resulting score would not be valid. Ms. Klock conducted the test in this manner so that she could obtain information that could be provided to the IEP team “in order to develop goals and determine Student’s present levels of functioning.”

29. Ms. Klock determined from the Kauffman that Student “does have skills,” and that he would try to respond. Student has personality and had fun working with her. However, she was unable to score his subtests and generate a nonverbal index composite score. This result was “commensurate” with his earlier test results, including the Wechsler, which had placed him in the lower extreme range. Ms. Klock noted that Student’s scores reflected a slight decline because the earlier tests placed lesser demands on Student’s linguistic abilities.

30. The remainder of assessments were compiled through questionnaires and rating scales given to parents, teachers, and caregivers. All of these were administered in full compliance with the standardized instructions.

31. Ms. Klock distributed the Gilliam Autism Rating Scale, Third Edition, to Student’s mother and Ms. Felker. Mother and teacher reported scores for Student’s behaviors, responses, fixated interests, and verbal communication. Ms. Klock correctly scored and totaled these scales, and both responses indicated that the probability of autism was very likely. Mother’s scaled score was higher than that given by Ms. Felker, but both scores gave the same result. The results indicated Student was impacted in all six areas of assessment and had particular difficulties with social communication and personal interaction.

32. Ms. Klock also utilized the Social Responsiveness Scale in her assessment. Questionnaires were again given to Mother and to Ms. Felker. They reported their observations of Student’s social awareness, cognition, communication, and motivation, and his autistic mannerisms.

33. Ms. Felker’s responses resulted in a scoring that placed Student in the mildly to moderately autistic range, whereas Mother’s scored responses put him in the severely autistic range. Ms. Felker noted that the natures of the environments at school and home accounted for the differences. Students may have expressed autistic behaviors at home that he did not demonstrate at school because of the different environment. Ms. Klock was not concerned by the disparity between teacher-reported and parent-reported results on the Social Responsiveness Scale because such divergences were commonplace.

34. Ms. Klock next assessed Student’s responsiveness to his environment using the Adaptive Behavior Assessment System, Second Edition. She gave the behavior checklists to Mother and Ms. Felker. Responses were sought regarding Student’s academic, communication, interpersonal, social competence, and daily and independent living skills. Both sets of scored responses placed Student below the first percentile in adaptive skills and

were generally harmonious. Ms. Klock concluded that Student continued to have a high need for adult assistance with functional skills for daily living.

35. The final tool employed by Ms. Klock was the Achenbach Child Behavior Checklist and Teacher's Report Form. This module evaluates the child's internalizing and externalizing behaviors. Responses from Mother and Ms. Felker were scored and scaled to report on Student's attentional difficulties, anxiety or depression, social problems, and conduct-related misbehaviors.

36. Mother's responses were significantly different from those given by Ms. Felker. Mother's scaled scores classed Student's behavior as normal in two categories, borderline in one, and clinical in six. Ms. Felker's scores depicted Student as normal in all areas but social problems. Overall, Ms. Felker's responses put Student in the borderline category, while Mother's responses put him in the clinical category. Ms. Klock noted that Student manifested more problematic behaviors at home, particularly inattentiveness. She concluded that Student struggles with social problems, as both rating scales put him in the clinical range for social problems.

37. After consideration of Student's education records, prior assessments, and health history, a teacher interview, direct observation of Student, and the administration of five assessment tools, Ms. Klock prepared a written report. The report, dated April 23, 2014, recounted her assessment protocol and provided her professional opinion regarding whether Student met the state standards for five categories of disability.

38. Ms. Klock concluded that Student qualified for special education and related services under the category of intellectual disability because of below-average intellectual functioning and deficits in adaptive behavior that adversely affected his educational performance.

39. Ms. Klock also found Student eligible under the handicapping condition of autism because he displayed a large number of autistic-like behaviors that appeared to be having a "high impact" on his academic performance and social interactions.

40. Although not directly part of her assessment duties, Ms. Klock reported that Student appeared to qualify under the Other Health Impaired and Multiple Disabilities categories. She referred the issue of whether Student qualified under Speech and Language Impaired to the report by the speech and language pathologist.

41. Ms. Klock's report was provided to Student's parents and given to the IEP team. The report was reviewed by the team during the April 23, 2014 IEP meeting. Ms. Klock was present at and participated in this IEP team meeting.

42. Ms. Klock conducted a thorough assessment of Student's behavioral, social-emotional, and executive functioning deficits. She considered all the prior information provided by Parents in her assessment and assessed Student's skills and needs in all assigned

areas related to his suspected disability. Ms. Klock properly administered the test instruments and questionnaires and was qualified to administer these instruments. The assessment tools were properly normed and not racially, culturally, or sexually biased. The information in Ms. Klock's psychoeducational report assessment was internally consistent and accurate.

#### *District's Academic Assessment*

43. Lauren Felker was Student's teacher at Sundance Elementary School, and was responsible for the academic testing included in Student's triennial evaluation of April 2014. Ms. Felker received a bachelor of arts degree in liberal arts from San Diego State University in 2006. She was credentialed as an educational specialist for students with moderate to severe disabilities in 2007. She received a master of arts degree in education from San Diego State University in 2011. Ms. Felker was assigned to conduct the academic skills assessment of Student as part of the 2014 Triennial Evaluation.

44. Ms. Felker had eight years' experience as a teacher of students with moderate to severe disabilities. She had Student for an extended school year class at Highland Ranch Elementary in 2013, and then taught him in his third grade at Sundance for the 2013-2014 school year.

45. During her tenure with District, Ms. Felker had conducted approximately 25 academic assessments of children.

46. Ms. Felker was knowledgeable about and trained in administering standardized assessment instruments, including the Brigance Early Inventory. She was qualified to administer the assessment based on her education, training, credentials, and experience.

47. Ms. Felker assessed Student through the use of record review, caregiver interviews, direct observation, and standardized testing. Before conducting the assessment, Ms. Felker reviewed Student's educational records and evaluated his progress over his tenure in her class.

48. Ms. Felker met with Student's parents and with school psychologist Ms. Klock, Student's occupational therapist, his speech therapist, his physical therapist, and his adaptive physical education teacher to gain further information about Student's academic skills.

49. Ms. Felker chose the Brigance Early Inventory to assess Student. She chose that test because it contained subparts that aligned with the curriculum she employed in her classroom. She considered but did not employ a standardized test such as the Woodcock Johnson Tests of Cognitive Ability or the Wechsler Individual Achievement Test because, based upon her knowledge of Student and her working relationship with him, she did not

believe those tests “would have provided any useful information about what he was capable of doing.” Student would not have been able to respond to those tests.

50. Ms. Felker had experience giving the Brigance. She had administered it approximately 15 to 20 times. She had given the test with modifications and adaptations approximately 13 of those times. She administered the Brigance to Student with adaptations and modifications because he “could not access the standardized assessment” due to his language limitations.

51. Ms. Felker knew of no standardized assessment that Student would be able to access without modifications or adaptations because of his language limitations. The Brigance had flexibility to allow her, as an educator, to make modifications that would give Student the best ability to answer the questions posed. In addition, the Brigance aligned with the instructional curriculum she followed with Student.

52. The Brigance may be scored on a standardized basis or interpreted narratively from the results of and observation from the testing sessions. Ms. Felker chose to do a narrative interpretation of the Brigance testing because she knew from her experience with Student that he “could not access the standardized assessment.”

53. The Brigance is a lengthy test and not meant to be administered in a single sitting. Ms. Felker gave Student the test over the course of three to four weeks, in a total of approximately 20 sittings. Ms. Felker chose to administer the test on days when Student appeared likely to give her the “best product.”

54. Multiple modules compose the Brigance Early Inventory. Ms. Felker administered portions of the academic/cognitive literacy and math subtests.

55. Student’s literacy assessment tested his responses to books, recognition of common signs, abilities with syllables, identification of vowel and consonant sounds, recognition of lower-and upper-case letters, his understanding of words and word-parts, and his inventory of common words. In her report, Ms. Felker described Student’s performance in each section of the assessment, giving specific examples of what he could and could not accomplish, and set out her testing accommodations. She found that he had areas of strength, which she described as “splinter skills,”<sup>2</sup> but that he required visual inputs and was frequently unable to give expressive responses.

56. A similar report was given of Student’s testing in math. Ms. Felker reported Student’s understanding of numeracy, shapes, numerals, ordinality, sequencing, and coins. Student was unable to answer any parts of the subtests asking him to do operations involving word problems, addition, or subtraction. Ms. Felker described Student’s performance in each section of the assessment, giving specific examples of what he could and could not

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<sup>2</sup> "Splinter skills" refers to an ability to do a specific task that does not generalize to other tasks. Such skills are not an integral part of the normal orderly sequential development.

accomplish, and set out her testing accommodations. His results were similar to the outcome of his literacy testing.

57. Ms. Felker also used the Brigance to assess Student's daily living skills. The module called for observation of Student's abilities in self-care, including feeding, clothing, toileting, bathing, grooming, reacting to events, seeking assistance, and obtaining services. Ms. Felker evaluated Student's abilities in each appropriate subtest area and reported on his strengths and weaknesses. She reported on her testing accommodations, which included narrowing the field of choices and allowing him to answer receptively instead of expressively.

58. Lastly, Ms. Felker gave the Brigance's assessment for social and emotional development. She assessed Student's relationships with adults and peers, his motivation and self-confidence, and his prosocial skills and behaviors. She noted his areas of strength and of weakness, finding numerous areas for improvement in those skills.

59. Ms. Felker found that Student's performance was in some ways divergent from his ability as displayed in her classroom. For example, in taking the Brigance he was unable to match the first six letters of the alphabet in upper case, which he had done in class. Ms. Felker attributed the differences to day-to-day variance in Student's performance. Despite these disparities, the test was overall an accurate and sound representation of Student's abilities.

60. Ms. Felker's report included a summary and set of recommendations. She concluded that he had areas of relative strength and weakness and reported on the conditions under which he performed best. She recommended that the IEP team work out a program that supported "his learning strengths and preferences so [Student may] access the learning environment and materials."

61. As Student's regular special education teacher, Ms. Felker was knowledgeable about Student and his abilities and deficits. She consulted others who were familiar with him, including Student's parents, prior to conducting her assessment. She did not rely on any single measure or solely upon past testing results in assessing Student.

62. Ms. Felker believed that the Brigance testing produced an accurate depiction of Student's strengths and weaknesses. She was qualified by her education, training, and experience to administer the Brigance. Ms. Felker explained the necessity of deviation from the testing protocol and described how the Brigance allowed its use through narrative interpretation. The test was a proper tool for the purpose and administered in compliance with the instructions. It was given in Student's language and appropriate given Student's racial, cultural, and individual needs. The test was not racially or culturally discriminatory and is normed on a diverse population. The test results were internally consistent, thorough, and accurate.

63. Similar to Ms. Klock's evaluation, Ms. Felker's report was given to parents and reviewed by the individualized education program team.

64. Finally, Student did not present evidence that indicated in any manner that information that the assessors obtained was not correct at the time the assessors conducted their assessments. While Student raised concerns about the tests performed, Student did not overcome District's evidence that the tests given were appropriate and no further testing required. Concerns that Student's Parents had about Student's progress during the 2014-2015 school year did not show that the District psychoeducational and academic assessments were not properly conducted.

## LEGAL CONCLUSIONS

### *Introduction – Legal Framework under the IDEA<sup>3</sup>*

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>4</sup> et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related

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<sup>3</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>4</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. 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, evaluation, 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, 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. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, District had the burden of proof on all issues.

#### *Issues: District’s Psychoeducational and Academic Evaluations*

5. District contends that its April 2014 assessments were lawfully administered by qualified assessors. For these reasons, District asserts that it is not obligated to fund independent psychoeducational and academic evaluations for Student.

## REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATIONS

6. Under certain conditions, a student is entitled to obtain an independent educational evaluations at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); 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 IEE 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 IEE].) “Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

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

8. Based upon the foregoing authority, District timely filed a request for due process hearing to show that its assessments were appropriate. Father sent a letter to District on January 26, 2015, requesting independent psychoeducational and academic evaluations. On March 13, 2015, District responded to this request by filing the complaint for this matter. District’s filing to defend its assessments within 46 days of Student’s request for independent educational evaluations does not constitute an undue delay.

## REQUIREMENT FOR ASSESSMENTS

9. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student’s educational needs shall be conducted. (Ed. Code, § 56320.)<sup>5</sup> Thereafter, a special education student must be reassessed at least once every three years, or more frequently if conditions warrant, or if a parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a).) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).) The instant matter involves reassessment of Student, as he had been previously assessed and found eligible for special education.

10. Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) Under federal law, an assessment tool must “provide

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<sup>5</sup> An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

relevant information that directly assists persons in determining the educational needs of the child.” (34 C.F.R. § 300.304(c)(7).) In California, a test must be selected and administered to produce results “that accurately reflect the pupil’s aptitude, achievement level, or any other factors the test purports to measure...” (Ed. Code, § 56320, subd. (d).) A district must ensure that a child is assessed “in all areas related to” a suspected disability. (Ed. Code § 56320, subd. (c), (f).)

11. Assessments must be conducted by individuals who are both “knowledgeable of [the student’s] disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).) In assessing a possible language or speech disorder, a student’s “difficulty in understanding or using spoken language shall be assessed by a language, speech, and hearing specialist ...” (Ed. Code, § 56333.)

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

13. An assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subs. (a), (b).)

#### *The Psychoeducational Assessment*

14. District’s April 23, 2014, psychoeducational assessment was appropriate. Responding to Parents’ request for assessment, the District cooperated with Parents, prepared an agreed-upon assessment plan, and conducted a comprehensive and thorough assessment that assessed Student in all areas related to suspected disability. The assessment was performed by a licensed school psychologist. As to all the assessment instruments used in the psychoeducational assessment, District established that the test instruments were properly normed, not racially, culturally, or sexually biased. Ms. Klock used the instruments for the purposes that they were designed; she was qualified to administer the assessment tools, and properly did so. Ms. Klock prepared a report summarizing her findings and making recommendations, which was shared with parents and the IEP team and discussed at the IEP meeting. Accordingly, District’s psychoeducational assessment was appropriate.

#### *The Academic Skills Assessment*

15. District’s April 11, 2014 academic assessment was appropriate. District established that Ms. Felker was qualified to administer the assessment, that she properly administered it, and that the results were accurate. As to all the assessment instruments used

in the academic skills assessment, District established that the test instruments were properly normed, not racially, culturally, or sexually biased, used the instruments for the purposes that they were designed, and that she was qualified to administer the assessment tools and did so properly. Ms. Felker prepared a report summarizing her findings and making recommendations, which was shared with parents and the IEP team and discussed at the IEP meeting. Therefore, District's academic assessment was appropriate so that the District need not fund an IEE.

16. Student's Father did not raise specific objections to the testing process. The most significant irregularity in testing was the deviation from the standard protocols, described by the witnesses as "testing the limits." Although both assessor's decisions to introduce accommodations and modifications to the testing protocols rendered any standardized scoring invalid, their assessment reports did not present and rely upon standardized scores. District's witnesses persuasively explained their reasons for deviating from standard protocols, justifying the decision as the only means by which they could gain any insight into Student's abilities and functioning given his language limitations. Father presented as an involved and concerned parent who is seeking answers for his child's lack of progress in the 2014-2015 school year. Yet, the answer to that question does not lie in any purported defect in the challenged assessments.

#### ORDER

District's April 23, 2014, Psychoeducational Assessment and April 11, 2014, Academic Skills Assessment were appropriate and District is therefore not required to fund independent educational evaluations related to these assessments.

#### PREVAILING PARTY

Pursuant to 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. Here, District was the prevailing party on all issues presented.

## RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: June 11, 2015

\_\_\_\_\_/s/\_\_\_\_\_  
CHRIS BUTCHKO  
Administrative Law Judge  
Office of Administrative Hearings