

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021040489

PARENT ON BEHALF OF STUDENT,

v.

OAKLAND UNIFIED SCHOOL DISTRICT.

DECISION

NOVEMBER 5, 2021

On April 13, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming Oakland Unified School District. The hearing in the matter was continued on April 28, 2021.

Administrative Law Judge (referred to herein as "ALJ") Brian H. Krikorian heard this matter via videoconference on August 31, September 1 and 2, 2021.

Thomas Douvan, Attorney at Law, represented Student. Parent attended all hearing days on Student's behalf. Elizabeth Schwartz and Lenore Silverman represented Oakland Unified. Cary Kaufman, Special Education Coordinator, attended all hearing days on Oakland's behalf.

At the parties' request the matter was continued to September 27, 2021, for written closing briefs. The record was closed, and the matter was submitted on September 27, 2021.

ISSUES

1. Did Oakland Unified deny Student a free appropriate public education, called a FAPE, from April 2019 to the filing of the complaint, by failing to appropriately assess Student, by failing to conduct any academic achievement assessment or assistive technology assessment, and by failing to conduct an appropriate psychoeducational assessment to determine Student's needs arising from intellectual disability or a specific learning disability?
2. Did Oakland Unified violate Parents' procedural safeguards by failing to provide prior written notice of its refusal to conduct an early triennial Individualized Educational Program, referred to as an IEP, and to conduct psychoeducational, speech, occupational therapy, and assistive technology assessments requested by Parent on February 3, 2021?
3. Did Oakland Unified deny Student a FAPE by failing to offer Student an educational program to meet Student's individual and unique needs, by failing to provide Student adequate speech and language services,

specialized academic instruction in math, and by failing to retain Student in fifth grade for the 2021-2022 school year?

4. Did Oakland Unified violate Student and Parents' procedural rights by failing to provide Parents a full and complete copy of Student's educational records in response to Student's requests for educational records on February 2, 2021, and March 4 and 5, 2021?

JURISDICTION

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is

limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Student 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 11 years, 11 months old and in sixth grade at the time of hearing. Student resided within Oakland Unified's geographic boundaries at all relevant times and was attending Joaquin Miller Elementary School. Student was expected to matriculate to Edna Brewer Middle School for sixth grade. Both schools were within Oakland Unified. Student was eligible for special education under the category of Intellectual Disability and Speech or Language Impairment.

ISSUE 1: DID OAKLAND UNIFIED DENY STUDENT A FAPE, FROM APRIL 2019 TO THE FILING OF THE COMPLAINT, BY FAILING TO APPROPRIATELY ASSESS STUDENT, BY FAILING TO CONDUCT ANY ACADEMIC ACHIEVEMENT ASSESSMENT OR ASSISTIVE TECHNOLOGY ASSESSMENT, AND BY FAILING TO CONDUCT AN APPROPRIATE PSYCHOEDUCATIONAL ASSESSMENT TO DETERMINE STUDENT'S NEEDS ARISING FROM INTELLECTUAL DISABILITY OR A SPECIFIC LEARNING DISABILITY?

Student argued that Oakland Unified failed to properly conduct a psychoeducational assessment of Student and failed to conduct other assessments of Student. Parent, on Student's behalf, claimed that Student is not prepared for transition

to middle school, and that the current psychoeducational assessment did not adequately portray Student's present levels of performance. Parent wanted Student retained in the fifth grade. Parent further contended that she requested additional assessments, and that Oakland Unified refused. Oakland Unified argued that the psychoeducational assessment was conducted as part of Student's 2019 triennial assessments, that Student had not challenged the 2019 psychoeducational assessment within the two-year statute of limitations, and that neither Parent nor Student requested specific assessments or an early triennial reassessment until after the due process complaint was filed, at which point they agreed to do an early triennial assessment.

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

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

Federal law uses the term evaluation instead of the term assessment used by California law, but the two terms have the same meaning and are used interchangeably in this Decision. Assessments are required to determine eligibility for special education,

and the 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 and other evaluation materials used to assess a child are, among other things, administered by trained and knowledgeable personnel and administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b) & (c); Ed. Code, §§ 56320, 56381, subd. (e); 34 C.F.R. § 300.304.) The personnel who assess the student shall prepare a written report. (Ed. Code, § 56327.) A school district's failure to conduct appropriate assessments may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033.)

Each local educational agency shall ensure that a child is assessed in all areas of suspected disability. (20 USC §1414(b)(3)(B)). A reevaluation will be conducted if the local educational agency determines that the educational needs of the child, including improved academic achievement and functional performance, warrant a reevaluation, or if the child's parents or teacher requests a reevaluation. (20 U.S.C. § 1414(a)(2)(A)(i); see also Ed. Code, § 56381, subd. (a)(1).). However, a reevaluation may occur no more than once a year, unless both the district and Parent agree to do otherwise. (20 USC §1414(a)(2); 34 C.F.R. 300.303; Ed. Code § 56329(d).

THE 2019 PSYCHOEDUCATIONAL EVALUATION

Kelley Williams, M.A. assessed Student on November 3, November 30, and December 3, 2018, and on January 10, 2019, as part of Student's triennial evaluation. The purpose of the evaluation was to determine whether Student met the eligibility criteria for a Specific Learning Disorder, and if Student qualified for Educationally

Related Mental Health Services, referred to as ERMHS, to access her instruction. Williams prepared a report dated January 30, 2019 and testified at the hearing.

At the time of the assessment Student was nine years of age, and in third grade. Williams reviewed Student's health history and noted that Student was taking medication on school days for ADHD. Williams reviewed Student's educational history. Student repeated kindergarten for a second year and was now on the "older side for her grade." Student missed 21 days of school and was marked tardy 14 times in the 2017-2018 school year. In the 2018-2019 school year, she had missed nine school days to date, and was marked tardy 30 times. Student achieved "far below" grade level standards in academic subject areas.

Williams interviewed both Parent and the special education teacher for the 2019 assessment. Teacher noted that Student often followed classroom rules of conduct and expectations and completed her homework. Student related to her peers and adults appropriately. Parent described Student as a sweet girl and believed third grade was "way over" Student's head. Williams observed Student in class, and noted she came willingly for testing and easily established and maintained a rapport with Williams. Student appeared age appropriate in dress, mannerisms, and grooming. Her intellectual functioning, insight, and judgment appeared to be far below her age.

Williams administered the Differential Ability Scales – 2nd Edition, Beery Development Test of Visual-Motor Integration – 6th Edition, Behavior Assessment System for Children – 2nd Edition, and Adaptive Behavior Assessment System – 3rd Edition. Student's scores were in the range of low average to average, and borderline and impaired. Williams concluded that Student presented with delayed intellectual skills across the measured areas. Student's cognitive test results indicate that she learned at a

much slower pace than most children her age. Under the Specific Learning Disability category, Student fell below average in general intellectual functioning, with deficits in adaptive behavior. Student did not meet the other criteria of the disability. Student was found eligible for special education services under Intellectual Disability. Williams found that Student did not demonstrate heightened alertness in the classroom setting. Although Student was taking medication for ADHD, she did not present with inattentiveness impacting her schoolwork. Williams found that Student did not meet criteria for ERMHS services.

The statute of limitations for special education claims is two years under both federal and California law. (20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2); Ed. Code, § 56505, subd. (l).) Student's psychoeducational assessment was conducted in November and December of 2018, and the results were reported at an IEP team meeting attended by Parent on January 10, 2019. Student's due process complaint was not filed until April 13, 2021, more than two years after Williams conducted the assessment and reported the results. Student failed to allege an exception to the two-year statute of limitations for this issue. Accordingly, Student's dispute with Oakland's psychoeducational assessment is barred by the statute of limitations.

Notwithstanding the statute of limitations bar, Student did not present any evidence from any witness or expert to support her contention that the January 30, 2019 psychoeducational assessment was inadequate or incorrect in any way. Student did not present any qualified witness or expert to contradict William's testimony that the evaluation was properly completed. To the extent that Student's IEP that was in place beginning in April 2019 was predicated on the January 2019 assessment, Student failed to show that any part of the assessment directly influenced any IEP component and therefore Student failed to show that she was denied a FAPE from April 2019 forward

because of an improper earlier assessment. Accordingly, Oakland Unified appropriately assessed Student for eligibility under the intellectual disability category in January of 2019.

REQUEST FOR OTHER ASSESSMENTS

As discussed in more detail below, the parties held an annual IEP meeting on January 26, 2021. According to the 2020 IEP, Student was placed in a special day class. She was receiving 30 minutes per week of speech and language services, 1500 minutes weekly of specialized academic instruction, and extended school year services. The IEP team recommended Student continue with a special education placement and speech and language services but concluded that she was prepared to move on to middle school in the sixth grade. Parent disagreed. Parent wanted Student retained in the fifth grade. The IEP team explained the negative effects of retention on Student, and that Student was academically progressing and would be prepared to move forward. Parent refused to consent to that portion of the IEP.

On January 28, 2021, Parent emailed Student's special education teacher, Norma Caballero, and inquired as to the "next steps" needed to retain Student in the fifth grade. In that email, she requested that Student receive "re-evaluation/testing in order to confirm she is ready to progress to the 6th grade." The email was copied to the Special Education Executive Director Jennifer Blake.

On January 28, 2021, Blake responded indicating that no tests existed to determine progress from one grade to another, and that this was an IEP team consensus decision. Blake recommended that Parent call another IEP team meeting and request

that a school psychologist also attend. Blake indicated that retention had negative impacts, and Student would be well served to have all parties discuss the plusses and minuses of doing so.

On January 29, 2021, Caballero emailed Parent. Caballero noted that at the January 26, 2021 IEP meeting, the parties had discussed retention and that the IEP team as a whole ultimately makes that decision. Caballero advised Parent she was not aware of any “tests” that would make such a determination. Caballero asked Parent to clarify which tests or evaluations she was requesting. Caballero reminded Parent that Student’s last triennial assessments were in January 2019, and that Student was due for another triennial evaluation in January of 2022. She stressed that Parent was “within [her] rights” to request an early triennial, which might be limited in time due to Covid-19 pandemic issues.

On January 29, 2021, Parent responded to Caballero and Blake, and copied her email to other Oakland Unified representatives. In her email, Parent reiterated her concern about Student matriculating to middle school and requested a copy of the IEP. Parent stated that she would be “contacting specialists outside of the District (sic) for further evaluation. Clearly, there are issues/concerns that need to be addressed.”

As noted above, a reevaluation will be conducted if the local educational agency determines that the educational needs of the child warrant a reevaluation, or if the child’s parents or teacher requests a reevaluation. (20 USC §1414(a)(2); 34 C.F.R. 300.303; Ed. Code § 56329(d). The question here is, did Parent request a new assessment or reevaluation? Oakland contends that there was no evidence that Parent requested academic or assistive technology assessments prior to the filing of Student’s complaint.

At hearing Parent testified that she felt Oakland Unified needed to "reevaluate everything, all across the board." When asked what Parent was referring to regarding contacting "specialists outside of the District (sic)," she testified that she understood Oakland Unified had to evaluate Student first, and then Parent could seek independent evaluations. Although Parent was not specific in her emails about requesting an early triennial, she was requesting additional "tests." Other than the triennial assessments which are addressed in Issue number two, Oakland Unified was minimally obligated to determine for itself if Student needed new assessments.

However, Student did not meet her burden of proof by a preponderance of the evidence that Oakland was aware of specific areas of need for Student other than the possibility of an early triennial assessment. Other than Williams, no other witnesses or experts testified as to Student's deficiencies in other areas such as academic achievement or assistive technology. Oakland did not determine that Student's educational needs warranted a reevaluation, and Parent never requested a reevaluation prior to filing the due process complaint, Oakland had no duty to perform academic or assistive technology assessments.

ISSUE 2: DID OAKLAND UNIFIED VIOLATE PARENTS' PROCEDURAL SAFEGUARDS BY FAILING TO PROVIDE PRIOR WRITTEN NOTICE OF ITS REFUSAL TO CONDUCT AN EARLY TRIENNIAL IEP, AND TO CONDUCT PSYCHOEDUCATIONAL, SPEECH, OCCUPATIONAL THERAPY, AND ASSISTIVE TECHNOLOGY ASSESSMENTS REQUESTED BY PARENT ON FEBRUARY 3, 2021?

Student contends that Parent requested an IEP meeting to discuss moving up Student's triennial evaluations. Oakland denies that such a request was received.

During the hearing there was discussion as to whether Parent, on February 3, 2021, submitted a written request for an IEP meeting to discuss moving up Student's triennial evaluations. The request was made on a form that was filled in. Parent did not testify to the details and circumstances surrounding the February 3, 2021 request, nor did Student present any other evidence that the request was actually submitted to Oakland Unified.

On July 26, 2021, Kaufman emailed Parent, and included a letter to Parent from Blake. In that letter, Blake advised Parent that Oakland Unified had no record of receiving a written request dated February 3, 2021. Treating the complaint as a formal request, however, Oakland Unified agreed to conduct early triennial evaluations and provided prior written notice, safeguards, and an assessment plan on July 26, 2021.

Kaufman testified that he had seen similar "forms" used by other Students, but he could find no record of receiving the February 3, 2021 written request from Parent or Student. Kaufman's testimony was credible. As such, no foundation was laid to

establish that the February 3, 2021 written request for an IEP meeting and early triennial assessments was tendered to Oakland Unified prior to the filing of the due process complaint.

Nonetheless, Caballero mentioned the early triennial in her January 29, 2021 email. This was copied to Blake, the Special Education Executive Director, and another Oakland Unified representative. This was sufficient to put Oakland on notice that Parent was requesting an early triennial and constituted a procedural violation of the IDEA. A hearing officer also shall not base a decision solely on non-substantive procedural errors unless the hearing officer finds that the non-substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian of the pupil to participate in the formulation process of the individualized education program. (Ed. Code, § 56505, subd. (j).)

While Oakland Unified should have acted upon Parent's January 28, 2021 request, Student did not meet her burden of proof, by a preponderance of the evidence, that the failure of Oakland Unified to provide an early triennial assessment plan before July 26, 2021 was a substantive denial of FAPE. Student did not prove that the six-month delay resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian of the pupil to participate in the formulation process of the individualized education program. Therefore, Oakland Unified did not deny Student a FAPE or violate the procedural safeguards by failing to provide prior written notice of its refusal to conduct an early triennial evaluation or IEP meeting prior to July 26, 2021.

ISSUE 3: DID OAKLAND UNIFIED DENY STUDENT A FAPE BY FAILING TO OFFER STUDENT AN EDUCATIONAL PROGRAM TO MEET STUDENT'S INDIVIDUAL AND UNIQUE NEEDS, BY FAILING TO PROVIDE STUDENT ADEQUATE SPEECH AND LANGUAGE SERVICES, SPECIALIZED ACADEMIC INSTRUCTION IN MATH, AND BY FAILING TO RETAIN STUDENT IN FIFTH GRADE FOR THE 2021-2022 SCHOOL YEAR?

Student argued that Oakland Unified failed to provide an adequate educational program, including sufficient speech and language services, to Student. This resulted in Student falling behind in reading. Parent repeatedly raised concerns about Student matriculating to middle school and the sixth grade and advocated to retain Student in the fifth grade. Oakland Unified argued that although Student was reading at a first-grade level, her work product and skills were progressing satisfactorily, and that she was improving. Oakland Unified also argued that retention is a drastic approach that could have negative consequences for Student.

The IEP must include appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved, and a statement of how the student's progress toward the goals will be measured. (*Jessica E. v. Compton Unified School Dist.* (C.D. Cal. 2017, No. CV16-04356-BRO) 2017 WL 2864945; see also Ed. Code, § 56345; 20 U.S.C. § 1414(d)(1)(A)(i).) An examination of the goals in an IEP is central to determining whether a student received a FAPE. "[W]e look to the [IEP] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

The IEP must include a statement of the program modifications or supports that will be provided to the student, to allow the student to advance appropriately toward attaining the annual goals; to be involved in, and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i)-(ii); Ed. Code, § 56345, subds. (a)(4)(A), and (B).)

The purpose of annual goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345, subd. (a).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler* (OSERS 1988) 213 IDELR 118.) The IEP team need not draft IEP goals in a manner that the parents find optimal, if the goals are objectively measurable. (*Bridges v. Spartanburg County School Dist. Two* (D.S.C. 2011, No. 7:10-cv-01873-JMC) 57 IDELR 128 [the use of percentages tied to the completion of discrete tasks was an appropriate way to measure student progress]). The IEP must contain a description of how the child's progress toward meeting the annual goals described will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. 20 U.S.C.A. § 1414(d)(1)(A)(iii).

An IEP team develops an IEP. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R.

§ 300.324 (a).). Whether an IEP offers a student, a FAPE is assessed in light of information available when the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP “is a snapshot, not a retrospective;” it must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.* quoting *Fuhrmann v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031, 1036.)

THE JANUARY 28, 2020 IEP

An IEP meeting was held on January 28, 2020. In attendance were Parent, special education teacher Caballero, Student’s speech therapist, a general education teacher, and the school principal.

Student was making progress on her first speech and language goal but had not met the goal of answering WH questions with minimal prompts four out of five trials with 80% accuracy. Student met her second speech and language goal of being able to tell a story in sequence, with grammatically correct sentences. The third speech and language goal required student to maintain a topic and observe turn-taking rules. Student was making progress but had not met her third goal.

Student had four academic goals. Student met her first goal of correctly sequencing three to five events in a story. Student had one math goal that when given a math reference guide with examples of strategies, Student would choose the appropriate strategy to use to correctly solve one and two digit addition and subtraction problems on four out of five opportunities with 80% accuracy as measured by work samples, observations and teacher-collected data. This goal was essentially a continuation of her 2019 IEP Math goal. The 2020 IEP notes indicated that Student was working adding and subtracting friendly numbers that don’t involve regrouping, finding

appropriate strategies for solving the equation, understanding place value, and geometry (shapes and lines). She demonstrated some challenges in memorization of math facts and understanding of place value. She required prompting with place value, but would utilize place value blocks for support.

Student was making progress but had not met her remaining reading, writing and math goals. The January 28, 2020 IEP provided Student with two new speech and language goals, and the continuation of four academic goals in reading, writing and math. Parent agreed with the goals proposed.

Student was also offered continuation of special day class placement, along with speech services once a week, for 30 minutes, mainstreaming in physical education and social studies, and extended school year services. Parent consented to the IEP on January 28, 2020, and Student did not meet her burden of proof that the goals and services offered in the January 28, 2020 IEP were inadequate or inappropriate.

THE JANUARY 26, 2021 IEP MEETING

The parties held an annual IEP meeting on January 26, 2021. Among those in attendance were Parent, special education teacher Caballero, special education coordinator Kaufman, as well as a general education teacher, a school psychologist, and the principal. Parent, Caballero and Kaufman testified at the hearing.

Student made progress on her speech goals. She actively participated during speech therapy, although she needed some prompting during distance learning. On her first speech goal, Student made progress towards answering WH questions regarding narratives and informational texts. Student averaged 75 percent accuracy towards a goal of 85 percent accuracy. Student met her second goal of participating in a

collaborative discussion with her peers using expected behaviors. The IEP team recommended that Student continue with weekly speech therapy to address her remaining areas of needs.

Caballero reviewed Student's progress on academic levels and her annual goals. Student met her first goal of writing one five-sentence paragraph. Student met her second goal of choosing the correct math strategies with 80 percent accuracy. Student met her third goal of reading at a Fountas and Pinnell, called F&P, independent level H, instructional level I, which was the equivalent of a first grade reading level. Student met her fourth goal by identifying answers in texts with 80 percent accuracy.

Caballero was Student's teacher from Fall of 2019 through the end of the 2020-2021 school year. She taught a special day classroom encompassing the third through fifth grade, where each student received instruction at their individual academic level rather than grade level. Caballero told the IEP team that Student helped in class and got along well with her peers. Student carried out her assignments to completion and asked appropriate questions. The class curriculum was based upon the SPIRE program, which stands for Specialized Program Individualizing Reading Excellence. It was an Orton-Gillingham based multisensory reading approach that allowed Caballero to teach each of her students at their level of reading ability and comprehension.

When Student first started in Caballero's class, she wrote approximately one to two sentences at a time but built confidence with the support of a graphic organizer. Caballero observed tremendous progress from fourth to fifth grade. Student put in her best effort, and with the appropriate supports, became confident and stayed on task. In Caballero's estimation, Student had "skyrocketed." In math, Student was struggling in

the fourth grade and could not get basic concepts down. By the 2021 IEP meeting, Student was meeting her math goals. Caballero did not believe that additional math goals were needed.

Beginning in the fourth grade, Student was shy, and it took some time for her to overcome that. However, by the fifth grade, Student had become comfortable in the classroom, and socialized with the adults and her peers. During virtual instruction, Student logged in every day, eagerly participated, and was often the first one to be involved. Caballero described Student as motivated.

The January 26, 2021 IEP provided three new goals in reading. Student was to receive 30 minutes of speech and language services, once per week and had one goal in receptive and expressive language. Because Student had met the math goals, the team did not feel she needed a new one. Student was to receive 300 minutes of specialized academic instruction in a special day classroom, five times a week. Student was offered extended school year services.

During the meeting Parent agreed to the new goals. Parent did not consent to the IEP at the time of the meeting. Parent testified at the hearing she later consented to the IEP except for placement at Edna Brewer.

An amendment to the IEP was made on February 19, 2021. By agreement of the IEP team, no meeting was held. The February 2021 amendment confirmed the implementation of temporary services to Student to address skill regression related to IEP goals. Oakland Unified offered a virtual intensive one-on-one learning session with

a credentialed special educator for two hours per week until the end of the 2020-2021 school year. Parent signed the amendment to the IEP on February 26, 2021 without exception.

It should be observed that it took Student two years to meet the 2019 and 2020 math goals. However, there was insufficient evidence presented at the hearing whether Student was now achieving grade level math functions, or whether she needed more math instruction and services. Likewise, no persuasive evidence was presented that Student needed additional math instruction goals, or additional services in speech and language. By January of 2021, Student had met her prior math goals and Caballero opined further math emphasis was not needed. The focus at the hearing was primarily on Student's reading and speech. Student did not prove, by a preponderance of the evidence, that the academic and speech and language goals and services offered in the IEPs dated January 28, 2020 and January 26, 2021 IEPs were inadequate or deficient.

RETENTION IN THE FIFTH GRADE

Neither party disputes that Student belongs in a special day class rather than general education. Student's processing abilities range from below average to impaired, and her academic skills are far below grade level, requiring specialized academic instruction in all areas throughout the day. The team reached an impasse over Student's placement and retention. Parent emphatically believed that Student was not prepared to transition to middle school. Oakland Unified contended that Student would adequately progress and improve her skills in the sixth grade, using the recommended January 26, 2021 IEP goals and services. The Oakland Unified IEP team members declined to retain Student in fifth grade, and the January 26, 2021 IEP offered Student placement in a special day class in sixth grade.

In determining the educational placement of a child with a disability, a school district must ensure that:

- The placement decision is made by a group of persons including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment;
- Placement is determined annually, is based on the child's IEP, and is as close as possible to the child's home;
- Unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled;
- In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or the quality of services that he or she needs; and,
- A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

The question is whether Student's cognitive ability and limited academic achievement require Student to be retained in a fifth grade special education classroom for a second year. Although development of an IEP is a team decision, if the team members do not agree, it is the school district that is ultimately responsible for ensuring that a student is offered a FAPE. (*Letter to Richards*, 55 IDELR 107 (OSEP 2010). It is the school district that has an affirmative duty to review and revise, at least annually, an eligible child's IEP. (*Anchorage School District v. M.P.* (9th Cir. 2012) _ F.3d _ [2012 WL 2927758 at p. 5]; 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).)

In addition, for OAH to consider a claim involving a school district's retention or promotion of a student with a disability, the claim must involve the identification, evaluation, or educational placement of the child, or the provision of a FAPE. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.507 (a)(1) and 34 C.F.R. 300.507 (a)(2); Ed. Code, § 5601, subd. (a).) Otherwise, OAH does not have jurisdiction over issues related to promotion and retention. (Letter to Anonymous (OSEP 2000) 35 IDELR 35.) Placement decisions under the IDEA are not synonymous with a school district's policies and practices regarding the promotion and retention of its pupils. (Ibid; Letter to Davis-Wellington (OSEP 2003) 40 IDELR 182.) The promotion or retention decisions for all pupils, including pupils with disabilities, are left to the state or local school district, and are generally not decisions left to the IEP team. (Letter to Anonymous, (OSEP 2000) 35 IDELR 35.) However, the IDEA does not prevent a state or local educational agency from assigning this responsibility to the IEP team. (Letter to Davis-Wellington (OSEP 2003) 40 IDELR 182.)

At the beginning of the 2020-2021 school year, Parent brought up Student's retention in the fifth grade with Caballero. Parent expressed concerns that Student was not ready for the sixth grade because of Student's reading difficulties and her inability to tie her shoes. Caballero told Parent that because it was the beginning of the school year, it was too early to make such a significant decision without seeing how Student progressed throughout fifth grade. In December 2020, Caballero met with Parent and Caballero's mentor to discuss middle school options. Parent was still adamant about Student not going to middle school because Parent felt Student was not ready. Both the mentor and Caballero advised Parent that Student would continue to receive the exact same special education supports in middle school that she was receiving in fifth grade.

Caballero opined that during the January 2021 IEP meeting, Parent's description of Student's weaknesses was substantially incompatible with what Caballero witnessed during school sessions. Caballero and Kaufman, as well as other members of the IEP team, explained to Parent that retention had substantial negative impacts on students, and that retention alone would not increase Student's academic achievement. While Student's progress was slow, it was also steady. Student's academic abilities and social interactions with peers were improving, and Caballero believed student would flourish in middle school. IEP team members believed that it would be detrimental for Student, who was turning 12 years of age in the fall of 2021, to remain in fifth grade where most of the students were in third grade, and several years younger than her. Many of Student's friends and peers in the special day class were moving on to the same type of class at Edna Brewer. The fifth graders would be about one year younger than Student. Caballero opined that retention would foster a negative self-image for Student, and that often, retention leads to depression and dropping out of school. Caballero opined that so long as Student remained in a special day class setting in middle school with the recommended supports, she would improve and thrive.

Ashley Radieve was employed as the director of the Lindamood-Bell center in Berkeley, California, and testified at the hearing. She had a bachelor's degree in psychology and worked as a paraprofessional in a school district for one year after obtaining her degree. She then worked for Lindamood-Bell for 17 years. A separate Lindamood-Bell clinician evaluated Student. Radieve then had a single virtual meeting with Student and Parent in April of 2021. Radieve recommended student be given 80 hours of exploratory services, and then two to three rounds of services, consisting of 240 hours per round. Radieve opined that Student could not access sixth grade level content at the time of the Lindamood-Bell assessment.

Student testified briefly at the hearing. Student wanted to stay at her existing school and wanted to learn to read. Student said she was a little afraid of going to middle school, and that it would be a big change for her. Despite her age and shyness, Student was bright, articulate, understood and was able to answer all questions. Parent testified that she felt the IEP team was glossing over Student's problems and rushing her into middle school. Parent was concerned that Student was going to be lost in middle school and needed retention to improve her skills. Parent testified that she had only allowed Student to participate in graduation ceremonies as practice for the following year. Parent raised concerns that others had assisted Student in completing much of Student's work product, and therefore it did not fairly represent the degree of progress.

In California, school districts adopt their own policies regarding pupil promotion and retention. (Ed. Code, §48070.5). Assembly Bill 104, referred to as AB 104, took effect on July 1, 2021, and supplemented the process for handling retention requests for eligible students. AB 104 defines an "eligible student" for retention as a student that has received deficient grades for at least one-half of the student's coursework in the 2020-2021 academic year. "Deficient grade" means a D, F, a No Pass, or an equivalent as determined by the district. According to guidance from the California Department of Education, referred to as CDE, students with disabilities may be retained. However, careful consideration in the development, implementation, and revision of the student's IEP should prevent student failure in most cases. CDE references research that indicates that neither grade retention nor social promotion, which is the practice of promoting students with their same age-peers although they have not mastered current grade level content, is likely to enhance a child's learning. Rather, research and common sense both indicate that simply having a child repeat a grade is unlikely to address the problems a

child is experiencing. (*Promotion, Retention and Grading*, frequently asked questions from the field regarding the promotion, retention, and grading of students with disabilities (CDE, last reviewed Apr 7, 2020), Question 1).

On July 6, 2021, after the due process complaint had been filed, Parent sent an email to Blake. Citing to recently enacted AB 104, Parent made a written request that Student be retained in fifth grade, and that Oakland Unified conduct a consultation with Parent about retention. On August 4, 2021, Oakland Unified convened a meeting to examine Parent's request, considered input from Parent and Student's teachers, and reviewed academic data and research on retention. On August 9, 2021, Kaufman corresponded to Parent, indicating that Student did not meet the criteria of AB 104 because her grades were all satisfactory. In his letter, Kaufman reiterated that the consensus of the IEP team was that Student should not be retained, that she should be advanced to the sixth grade, and provided appropriate services as set forth in the January 26, 2021 IEP.

The evidence established that Student was progressing in the special day class with appropriate services during the 2019-2020 and 2020-2021 school years. Student made progress on her goals and acquired improved academic and social skills. Although Parent expressed concern that much of Student's work was accomplished with assistance from others, the evidence established that Student made steady academic progress, and would reasonably be expected to continue making progress in sixth grade so long as she had the same supports and services that she was receiving the prior two years. It was undisputed that Student's reading level was at the first grade level, and that Student needed continued services and attention to improve. However, the

testimony of Caballero, as well as evidence of Student's work and progress, established Student could progress in a special day class setting so long as the recommended services and programs continued to be accessed.

While it was understandable that Parent was concerned about Student's ability to read, as well as Student's fear of a big change going from fifth to sixth grade, no persuasive evidence was presented that retention, alone, would improve Student's skills. To the contrary, the research and evidence presented at hearing established that Student would likely be stigmatized by remaining in the fifth-grade class at Joaquin Miller, while many of her peers from the special day class moved on to Edna Brewer. Student witness Radieve opined Student could not "access" sixth grade content. However, she met with Student only once virtually, and did not assess her directly. As such, her testimony had minimal weight and persuasiveness. Parent expressed genuine concern that Student would not be able to keep up in the sixth grade, and that Student could not accomplish her work and goals without assistance. Again, the weight of the remaining evidence did not support Parent's fears. To the contrary, the evidence established with those sufficient supports, Student continued to progress.

Student's evidence did not show that retention in the fifth grade would enhance her reading skills. To the contrary, the teachers and staff at Oakland Unified were attentive to Student's diverse educational needs, addressed those needs, and implemented her IEP. Finally, AB 104 did not apply to Student because her grades were all satisfactory. Despite this, the IEP team still held a meeting in August 2021 to address Parent's concerns. The IEP team's decision to promote Student to sixth grade, with the support of a level of specialized academic instruction and speech therapy that had

enabled Student to make steady progress on goals in the fifth grade, was reasonably calculated to enable Student to make progress in light of her circumstances and offered Student a FAPE going forward to the 2021-2022 year.

Student's placement decision was made by a group of persons knowledgeable about Student, the reports of her abilities and progress, and placement options. The January 26, 2021 IEP team took into account that Student should be educated in the least restrictive environment. The January 26, 2021 and the February 19, 2021 amendment, were a timely annual review of Student's educational program, and she was offered a special day class at Edna Brewer Middle School, which is the school Student would attend if she was not disabled. In determining to offer Student a special day class, the IEP team considered Student's inability to access the curriculum in a general education classroom at grade level, as well as the appropriate environment for individualized education at her instructional level. Most importantly here, the IEP team discussed and considered the potential harmful effects of retention and offered a level of specialized academic instruction and speech services reasonably calculated to allow Student to make progress in light of her circumstances.

Student failed to prove by a preponderance of the evidence that Oakland denied Student a FAPE by failing to retain Student in the fifth grade for the 2021-2022 school year.

ISSUE 4: DID OAKLAND UNIFIED VIOLATE STUDENT AND PARENTS' PROCEDURAL RIGHTS BY FAILING TO PROVIDE PARENTS A FULL AND COMPLETE COPY OF STUDENT'S EDUCATIONAL RECORDS IN RESPONSE TO STUDENT'S REQUESTS FOR EDUCATIONAL RECORDS ON FEBRUARY 2, 2021, AND MARCH 4 AND 5, 2021?

Student made multiple record requests to Oakland Unified at the beginning of 2021. Oakland Unified provided documents in response. In August of 2021, counsel for Oakland Unified provided additional documents to Student's counsel. Student argued that Oakland Unified failed to provide full and complete records to Student as required by law, and this constituted a denial of FAPE. Oakland Unified disputed this contention and argued it had provided all of Student's records.

A Student or Parent may request educational records under California law and the IDEA. (Ed. Code §56504, 20 U.S.C. §1415(b)(1).) The IDEA provides that the school district must provide an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, the provision of a FAPE to such child, and to obtain an independent educational evaluation of the child. (20 U.S.C. §1415(b)(1).)

States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled and that parents are involved in the formulation of the student's educational program. (*Target Range* (9th Cir. 1992) 960 F.2d at 1483. To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP meeting. (*Target*

Range, supra, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

On February 4, 2021, Student submitted two record requests to Oakland Unified, for all of Student's records at Joaquin Miller Elementary School and Bridges Academy. The requests were on the stationary of Student's attorney, and requested 13 different categories of documents, including all:

- evaluations,
- prior written notices,
- health records,
- cumulative records,
- tests results, and
- any other records related to Student's education.

On February 8, 2021, Oakland Unified provided an email containing a file of electronic images of Student's records.

On March 4 and 5, 2021, Student submitted a second, supplemental request for records. This request included all:

- 2017 records,
- grade reports,
- disciplinary records including behavior logs,
- cyber bullying,

- suicide attempts,
- sexual assaults,
- progress reports,
- attendance,
- status logs, and
- any other educationally related records.

On March 5, 2021, Oakland Unified sent an email containing a file of electronic images of Student's records, supplementing the February production.

On August 23, 2021, approximately seven days before the hearing commenced, counsel for Oakland Unified sent an email to Student's counsel and provided additional documents to Student. Oakland Unified's counsel expressed her belief that these documents had already been produced to Student, but in an abundance of caution, was sending them to Student's counsel. Student's counsel denied having ever received the documents before this email. The enclosures included IEP documents from 2017 and progress reports on goals and objectives for the 2015, 2016, 2017, 2018, 2019, 2020 and 2021 school years.

Melissa Rosales-Torres was employed by the law firm that represented Student and Parent. Rosales-Torres was the records clerk for the law firm in February and March of 2021 and testified at the hearing. When the original electronic files were received by the law firm, Rosales-Torres went through the records and indexed them for the law firm. The documents were indexed as a "master file." When Student's counsel received the documents contained in the August 23, 2021 email, Rosales-Torres went through all the documents and cross-referenced them with the master file. Rosales-Torres testified the August 2021 documents were not contained in the master file.

The actual files of electronic images produced by Oakland Unified on February 8 and March 5, 2021 were not submitted into evidence at the hearing. As such there was no way for the ALJ to compare that production to the August 2021 documents to conclusively establish a discrepancy. However, based upon Rosales-Torres' testimony, which was credible, Student proved by a preponderance of the evidence that the August 2021 documents were likely not produced as requested in March and February 2021. This constituted a procedural violation of Parent's and Student's rights.

In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following:

- Impeded the right of the child to a free appropriate public education.
- Significantly impeded the opportunity of the parent to participate in the decision-making process regarding the provision of a free appropriate public education to the child of the parent.
- Caused a deprivation of educational benefits. (20 U.S.C §1415(f)(3)(E); Ed. Code, §56505, subd. (f)(2).)

A hearing officer also shall not base a decision solely on non-substantive procedural errors unless the hearing officer finds that the non-substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian of the pupil to participate in the formulation process of the individualized education program. (Ed. Code, § 56505, subd. (j).)

In this case, the evidence clearly establishes that Parent participated in all facets of Student's educational programming from April 13, 2019 to April 13, 2021. She routinely corresponded with Student's teachers, as well as with the special education

coordinators and administrators, and received responses from Oakland Unified. The evidence established that Parent was regularly provided copies of documents when she requested them. Parent's input was included in the 2019 psychoeducational assessment. Parent's concerns regarding retention were not only heard by the January 26, 2021 IEP team and the Oakland Unified personnel, but a separate meeting was convened in August of 2021, after Student's complaint was filed, to address those concerns. Parent participated in the IEP meetings. No evidence was established that either Parent's opportunity to participate in the process was impeded, that any services were not provided to Student, or that Student was deprived of an educational benefit due to the failure to produce all of the records in February and March of 2021.

In addition, a substantial number of the documents produced by Oakland Unified in August of 2021 related to periods of time not relevant to the issues presented at the hearing. This included the 2017 IEP and progress reports going back to 2015. On the other hand, relevant documents produced in August 2021 and pertaining to the issues raised at the hearing, were introduced, admitted into evidence, and considered by the ALJ. The delay in receiving them did not prejudice Student's ability to present a full and complete case.

Student primarily contends that Parent did not receive progress reports from, as relevant here, April 2019 through April 2021. However, the evidence established that Parent received and consented to Student's IEPs dated January 30, 2019, January 28, 2020, January 26, 2021 and February 19, 2021, each of which contained detailed summaries of Student's present levels of performance, baseline levels for annual goals, and notes on Caballero's reports of Student's progress. This information informed

Parent of Student's progress, in general and specifically on goals. Parent was also intimately involved in Student's daily classroom and homework activities, and had direct experience with Student's academic abilities, during online learning when Oakland schools were closed from March 2020 through July 2020. Parent's testimony that she was unaware of Student's progress because she did not recall receiving periodic reports of Student's progress on goals was not persuasive.

While Student proved that Oakland Unified did not provide the full and complete Student records in early 2021, Student did not prove by a preponderance of the evidence that this failure caused a substantive denial of FAPE by significantly interfering with Parent's opportunity to participate in the development of Student's educational program.

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: Oakland Unified did not deny Student a FAPE, from April 2019 to the filing of the complaint, by failing to appropriately assess Student, by failing to conduct any academic achievement assessment or assistive technology assessment, and by failing to conduct an appropriate psychoeducational assessment to determine Student's needs arising from intellectual disability or a specific learning disability. Oakland Unified prevailed on Issue 1.

Issue 2: Oakland Unified did not violate Parents' procedural safeguards by failing to provide prior written notice of its refusal to conduct an early triennial IEP and to conduct psychoeducational, speech, occupational therapy, and assistive technology assessments requested by Parent on February 3, 2021. Oakland Unified prevailed on Issue 2.

Issue 3: Oakland Unified did not deny Student a FAPE by failing to offer Student an educational program to meet Student's individual and unique needs, by failing to provide Student adequate speech and language services, specialized academic instruction in math, and by failing to retain Student in fifth grade for the 2021-2022 school year. Oakland Unified prevailed on Issue 3.

Issue 4: Oakland Unified failed to provide Parents a full and complete copy of Student's educational records in response to Student's requests for educational records on February 2, 2021, and March 4 and 5, 2021. However, Oakland did not deny Student a FAPE by doing so. Oakland Unified prevailed on Issue 4.

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.

/s/

Brian H. Krikorian

Administrative Law Judge

Office of Administrative Hearings