BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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CASE NO. 2021080657

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PARENTS ON BEHALF OF STUDENT,

v.

CAJON VALLEY UNION SCHOOL DISTRICT.

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# DECISION

NOVEMBER 29, 2021

On August 20, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Cajon Valley Union School District. Administrative Law Judge Laurie Gorsline heard this matter by videoconference on October 12, 13, 14 and 18, 2021.

Attorney Coleman Alguire represented Student, and attorney Constance Zarkowski, from the same law firm, observed three days of hearing. Mother attended all hearing days and Father attended part of the hearing on October 18, 2021,

on Student's behalf. Attorney Pamela Townsend represented Cajon Valley Union. Jeremy Boerner, Cajon Valley Union's Director of Special Education, attended all hearing days on Cajon Valley Union's behalf.

At the parties' request the matter was continued to November 8, 2021, for written closing briefs. The record was closed, and the matter was submitted on November 8, 2021.

## ISSUE

1. Did Cajon Valley Union deny Student a free appropriate public education and deny meaningful parental participation by failing to assess Student for special education eligibility following Parent's request for assessment during the 2020-2021 school year?

## 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 free appropriate public education 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 free appropriate public education, referred to as 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).) As the filing party, Student had the burden of proof in this case. 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 turned three years old on December 7, 2020, and attended a private preschool beginning in August 2021. Student resided within Cajon Valley Union's geographic boundaries at all relevant times, but never enrolled in the school district. At the time of the hearing, Student had not been assessed for eligibility for special education and related services under the IDEA.

## ISSUE 1: DID DISTRICT DENY STUDENT A FAPE AND MEANINGFUL PARENTAL PARTICIPATION BY FAILING TO ASSESS STUDENT FOR SPECIAL EDUCATION ELIGIBILITY FOLLOWING PARENT'S REQUEST FOR ASSESSMENT DURING THE 2020-2021 SCHOOL YEAR?

Student contends in September 2020, Mother requested Cajon Valley Union assess Student for special education eligibility but that it failed to timely send Parents an assessment plan or conduct the requested assessment. Student claims Parent returned the completed registration paperwork no later than early October 2020, but Cajon Valley Union "dropped the ball." Student contends Cajon Valley Union sent Parents an assessment plan only after Student filed this case with OAH in August 2021. Student argues the failure to conduct an initial assessment of Student pursuant to Parent's request denied Student a FAPE. Student contends that had the assessment been timely conducted, Student would have been eligible for special education under the category of autism and that Student required special education and related services, including speech and language services, behavior therapy, and specialized academic instruction. Student argues that Parents obtained private services in the interim, and Student is entitled to compensatory education in addition to the other remedies requested in the complaint.

Cajon Valley Union contends it was ready and willing to assess Student for special education eligibility. Cajon Valley Union contends that following Mother's oral request for assessment in September 2020, it sent Parents an enrollment package, which they were required to return to Cajon Valley Union before it prepared the assessment plan. Cajon Valley Union argues Parents never returned the package or made a written request for assessment. In response to Mother's verbal request to assess Student,

Cajon Valley Union asserts it made multiple efforts to assist Parents in moving forward with the assessment process, but Parents never responded to those efforts. It claims Parents never returned any of the documents requested to enroll Student or to otherwise initiate the assessment process. Cajon Valley Union argues that after Mother's September 2020 request for assessment of Student, the only indication it had that Parents desired an initial assessment of Student was the filing of the due process complaint in August 2021. It argues that after receiving the due process filing, it sent an assessment plan to Parents in September 2021. It contends Parents never enrolled Student in the Cajon Valley Union school district or consented to a special education assessment of Student.

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

In general, a child eligible for special education must be provided access to specialized instruction and related services that 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].)

## CAJON VALLEY UNION COMMITTED A PROCEDURAL VIOLATION BY FAILING TO ASSESS STUDENT FOR SPECIAL EDUCATION

A FAPE is available to all resident children with disabilities between the ages of 3 and 21. (20 U.S.C § 1412(a)(1)(A) and (b); 34 C.F.R. § 300.101(a); see also Ed. Code, §§ 56026, subd. (c)(2)-(4), 56441.11.) A school district's obligation to make FAPE available to each eligible child begins no later than the child's third birthday. (34 C.F.R. § 300.101(b).)

School districts have an affirmative, ongoing duty to actively and systematically seek out, identify, locate, and evaluate all children with disabilities residing within their boundaries who may be in need of special education and related services, including children not enrolled in public school programs. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, §§ 56300, 56301.) This duty extends to children with disabilities who are attending private, including religious, elementary and secondary schools. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(1)(i); Ed. Code § 56301, subd. (a).) This ongoing duty to seek and serve children with disabilities is referred to as "child find." (34 C.F.R. § 300.111.) California law specifically incorporates child find in Education Code section 56301.

A school district's child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect, a disability and reason to suspect that special education services may be needed to address that disability. (*Department of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*) The actions of a

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

Child find does not guarantee eligibility for special education and related services under the IDEA. It is merely a locating and screening process that is used to identify those children who are potentially in need of special education and related services. Once a child is identified as potentially needing specialized instruction and services, the public agency must conduct an initial evaluation to confirm the child's eligibility for special education. (34 C.F.R § 300.301; Ed. Code, § 56302.1.) In most instances, the local educational agency where the parents of a child with a disability reside is responsible for ensuring that the child is identified, located and evaluated. (*Return to School Roadmap: Child Find under Part B of the Individuals with Disabilities Education Act* (OSERS August 24, 2021.) If a parent requests an assessment from the district of residence, rather than the district in which the private school where the student attends school is located, the district of residency may not refuse to conduct the assessment and determine the child's eligibility for FAPE because the child attends a private school in another school district. (*Letter to Eig* (OSEP January 29, 2009); see also *Dist. of Columbia v. Abramson* (D.D.C. 2007) 493 F.Supp.2d 80, 86 ["Just because Connecticut may have child find responsibilities of its own and just because [the student] is currently enrolled in school in Connecticut does not relieve [the district] from having to fulfill its own responsibilities as the [local educational agency] of residence to evaluate the student and make FAPE available."].)

Because a school district's child find obligation is an affirmative one, a parent is not required to request that a school district identify and evaluate a child. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(1); Ed. Code, § 56300 et seq.) The child find process must be completed in a time period comparable to that for students attending public school in the local educational agency. (See, e.g., 20 U.S.C. § 1412(a)(7); 34 C.F.R. § 300.131(e), Ed. Code, § 56302.1, subd. (a).).

Referral for assessment means any written request for assessment to identify an individual with exceptional needs made by a parent, among others. (Ed. Code, § 56029, subd. (a).) All referrals for special education and related services shall initiate the assessment process and shall be documented. (Cal. Code Regs, tit. 5, § 3021, subd. (a).) When a verbal request is made, school district staff shall offer assistance to the individual in making a request in writing and shall assist the individual if the individual requests such assistance. (*Ibid.*) If the local educational agency disagrees with the parent's request and does not suspect the child has a disability, it may refuse to conduct the evaluation. (*Letter to Anonymous* (OSEP October 7, 1992).) Parents must be notified in writing when a school district refuses to evaluate a child, as requested by parents, and provide an explanation for the basis of the refusal. (34 C.F.R. § 300.503(a)(2) & (b).)

When a student is referred for special education assessment, the school district must provide the student's parent with a written proposed assessment plan within 15 days of the referral, not counting days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days from the date of receipt of the referral. (Ed. Code, § 56321, subd. (a).) The parent has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, § 56321, subd. (c)(4).) The district has 60 days from the date it receives the parent's written consent, excluding days between

the pupil's regular school sessions or terms or days of school vacation in excess of five school days, to complete the assessments and develop an initial IEP, unless the parent agrees in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f), 56302.1, subd. (a).) The term "assessment" used in the California Education Code has the same meaning as the term evaluation in the IDEA. (Ed. Code, § 56302.5.)

A school district's failure to assess a child may constitute a procedural violation of the IDEA. (*D.K. v. Abington School Dist.* (3d Cir. 2012) 696 F.3d 233, 249; see also *Park v. Anaheim Union High School Dist., et.al.* (9th Cir. 2006) 464 F.3d 1025, 1032 [A failure to properly assess is a procedural violation of the IDEA.].)

As explained below, Cajon Valley Union procedurally violated the law by failing to timely send Parents an assessment plan and evaluate Student for special education pursuant to Mother's September 2020 request for assessment.

MOTHER'S SEPTEMBER 2020 REQUEST FOR ASSESSMENT

On September 23, 2020, Mother spoke by telephone to Dawn Friesen, a special education and student development coordinator for Cajon Valley Union. They discussed Mother's request for an independent educational evaluation of Student's older sister, who had been attending Cajon Valley Union since kindergarten and was seven years older than Student. Parent also informed Friesen that Student had been diagnosed with autism. Friesen asked Mother if Student had been diagnosed through Sevick, a Cajon Valley Union site where the school district conducted assessments of children who were about to turn three years of age. At Sevick, preschoolers attended a six-week program that included observations in a school setting as part of the assessment.

During this telephone conversation, Mother shared that Student's physician had diagnosed Student with autism and that the Regional Center had advised her to contact Sevick to obtain services for Student. Friesen told Mother about the school district's special education assessment team at Sevick. Mother had questions about the assessment process and appeared to Friesen to be uncertain if she wanted Student assessed at that time. It appeared to Friesen that Mother was in the information-gathering phase. Friesen told Mother she would put Mother in contact with Robin Ancona, the school district's program specialist at that time, so Mother could find out more about the assessment process and get her specific questions answered. Friesen gave Mother Sevick's telephone number.

Following this telephone call, Friesen sent an email to Ancona on September 23, 2020, and copied Mother. The email stated Mother had a daughter diagnosed with autism and Mother wanted to speak to someone about an assessment. In the email Friesen requested that Ancona contact Mother.

Cajon Valley Union program specialist Ancona held an administrative credential and a pupil personnel services credential in school psychology. Ancona's duties as program specialist included coordinating the preschool assessment process and she was responsible for the intake of new students and processing referrals for special education assessments. She was officed at the preschool assessment center at Sevick. In July 2021 she became coordinator for special education at Cajon Valley Union.

On September 23, 2020, Ancona spoke to Mother by telephone. During this telephone call with Ancona, Mother requested Cajon Valley Union assess Student for special education eligibility. Ancona understood Mother was requesting a special education assessment of Student. Ancona got some basic information from Mother,

including Student's name and date of birth, and Mother's phone number and home address. Ancona never told Mother that she needed to make the request in writing. Ancona merely outlined the assessment process during the telephone call with Mother.

## CAJON VALLEY UNION'S SPECIAL EDUCATION ASSESSMENT POLICY AND PROCESS

Cajon Valley Union's general policy and procedure when it received a request for a special education assessment for a preschool-aged child was to obtain some basic information from parents and to send parents an enrollment and registration packet for parents to complete and return. Upon its receipt of the requested documents, Cajon Valley Union determined a student's areas of need and developed an assessment plan.

Cajon Valley Union's assessment timeline was as follows. It typically sent the intake packet out within a day or two of a parent's request for assessment. It prepared the assessment plan and sent it to parents within 15 days of receipt of the information requested in the packet. It was Cajon Valley Union's policy that parents return the intake assessment packet and requested information before an assessment plan was created. It completed the assessment of the student within 60 days from receipt of the assessment plan signed by parent.

Cajon Valley Union required parents to complete and provide the information requested in the intake packet as part of a student's enrollment in and assessment by Cajon Valley Union. The package consisted of a cover letter informing parents that to initiate the referral process for the preschool special education assessment, parents were required to submit two proofs of residency showing their current address, the child's

birth certificate, and immunization record. It also requested that parents complete and return various documents included in the packet, which would be used for the evaluation and determination of subsequent services.

Cajon Valley Union policy generally required parents to submit proof of residency even if a sibling was already enrolled in the school district. The school district required the child's immunization and birth certificate as a condition of attending school and the birth certificate was used to determine a child's age for special education eligibility.

Once Cajon Valley Union sent its intake packet to the parents, it had a process for following up with parents who had not returned the requested documents. Follow-up included, among other things, having one of its staff contact parents by telephone every few weeks to let those parents know Sevick was still looking for the requested documents.

Beginning in October 2020, the person responsible for contacting parents to follow up on the packets Sevick sent was Susan Jupena, a consultant hired by Cajon Valley Union. Periodically, Sevick gave Jupena a list of parents' names and phone numbers to contact. Jupena contacted the parents on her list and documented her attempts to reach them by phone. Jupena's follow-up generally involved at least three attempts to reach parents. She generally informed parents that Sevick had not received their intake paperwork, gave parents Sevick's address, and instructed them to contact Sevick if they had any questions. Jupena sent updates of her follow-up attempts to Sevick staff by email.

Cajon Valley Union also maintained a database where it kept track of the dates it sent intake packets to parents and the subsequent attempts to contact parents who had

not returned the required documents. If Sevick was unsuccessful in its attempts to have a parent return the requested paperwork, the school district had a practice of sending those parents a prior written notice regarding the assessment.

THE ENROLLMENT ASSESSMENT PACKET SENT TO PARENTS

Within a few days after Mother's request for assessment on September 23, 2020, Ancona had her staff to send Parents an assessment intake packet, which included a cover letter informing Parents that to initiate the referral process for the preschool special education assessment, Parents were required to submit two proofs of residency showing their current address, Student's birth certificate, and immunization record. It also requested that Parents complete and return the documents included in the packet, which would be used for the evaluation. The documents enclosed in the packet sent to Parents included a Preschool Assessment Questionnaire, a 33 Month Ages and Stages Questionnaire, a Registration and Permanent Record Card, a Student Health History form, a Home Language Survey, a Proof of Residency form, a Sevick Permission to Publish Preschool Assessment form to reproduce Student's photograph, and a Student Technology/Internet Use Agreement.

At hearing, Mother denied she received a complete copy of the packet. She denied receiving any cover letter, the Student Health History form, the Proof of Residency form, the Permission to Publish form, and the Student Technology/Internet Use Agreement. She also claimed not to recall receiving the Preschool Assessment Questionnaire and the Home Language Survey. Mother's testimony was not believable because she was not a credible witness. Throughout her testimony at hearing, Mother was evasive. Among other things, she feigned ignorance of the call of questions she was asked. She gave nonresponsive answers and did not demonstrate she was a candid

or accurate historian. Mother repeatedly had trouble with recall and often seemed confused, but this appeared to be more of an effort to avoid answering the questions. Some of her testimony was also inconsistent, and contrary to logic and the more persuasive evidence provided by the school district. Mother's evasiveness, the inconsistencies in her testimony, and illogical responses negatively affected her overall credibility.

Parents did not return to Sevick the documents requested in the enrollment and registration packet. Sevick gave Jupena a list of parents who had not returned their intake paperwork, which included Parents. Between November 2020 and January 2021, Jupena made a total of five documented attempts to contact Parents about returning the outstanding paperwork. On November 10, 2020, Jupena called Parents and left a voice mail message. Parents did not respond. On November 18, 2020, Jupena contacted Mother by telephone and informed her that Sevick had not received the intake paperwork. Mother told Jupena she was still interested in getting Student assessed. Mother told Jupena that Student had been diagnosed with autism and she was working on obtaining the immunization record. Jupena told Mother to send in what she had and that if she had any other concerns, Mother could contact Sevick. Jupena told Mother she could bring the birth certificate, immunization record, and proof of residency to the office when Student was assessed.

On December 15, 2020, and January 13, 2021, Jupena left two more voicemails for Parents because they were still on the list of parents who had not returned their assessment intake paperwork. Parents did not respond to the calls. On January 14, 2021, Jupena sent an email to Sevick staff including Ancona, documenting her efforts to contact the parents on her list, including Parents.

On January 26, 2021, Jupena called Parents again because they were still on the list of those parents who had not returned their paperwork. Mother told Jupena she was still interested in getting Student assessed. During this call, Mother confirmed she still had the intake packet in her possession and that she had made a mistake on some of the pages. Jupena told her this was not a problem and to just cross out the wrong information and write the correct information in the margins or contact Sevick and obtain a new packet. Jupena again told Mother she could bring the birth certificate, immunization record, and proofs of residency to the office when Student was assessed. Mother said she had Sevick's phone number. Mother did not contact Sevick about Student's intake paperwork and did not provide to Sevick any of the requested paperwork.

At hearing, Mother unpersuasively claimed she returned the Registration and Permanent Record Card and the 33 Month Ages and Stages Questionnaire by the end of September or beginning of October 2020. Mother also unconvincingly claimed that during her calls with Jupena, Jupena confirmed Sevick had received those two documents, but did not discuss the rest of the documents in the packet. As noted above, Mother was not a credible witness and the weight of evidence established that Mother was not being truthful during her testimony about these issues. Much of Mother's testimony on these issues was nonsensical and at odds with Jupena's testimony and the documentary evidence, which was more persuasive.

Other than Jupena's attempts to contact Mother, Cajon Valley Union never followed up with Parents about Mother's request that Student be assessed for special education until February 5, 2021.

THE FEBRUARY 2021 PRIOR WRITTEN NOTICE

As of February 5, 2021, Parents had not returned the requested intake documents. On February 5, 2021, Ancona sent Mother a letter to her home address. The letter stated that on September 24, 2020, Mother had referred Student for a special education eligibility assessment by Cajon Valley Union. It also stated that numerous unsuccessful attempts were made to contact Mother regarding her concerns and proposed assessment. The letter further stated that prior to conducting the assessment, Mother would need to bring required documentation to the school district office, including Student's birth certificate and immunization record, and proof of residency within Cajon Valley Union boundaries. The letter directed Mother to bring the required documents to the school district office as soon as possible if Mother wished to proceed with the assessment. The letter stated that if Cajon Valley Union did not hear from Mother by February 18, 2021, it would assume that Mother did not wish to proceed with the assessment. It also stated that if Mother wished to have Student considered for special education and related services at any time in the future, Mother could contact her district of residence. The letter enclosed a Notice of Procedural Safeguards. The purpose of the February 2021 letter was to obtain the requested documents so that the school district could proceed with Student's assessment. Neither Parent responded to the February 5, 2021 letter.

At hearing, Mother unpersuasively claimed she did not receive the February 5, 2021 letter. Her testimony was not believable because she demonstrated that she was not a credible witness in other parts of her testimony as discussed in this Decision. In addition, it was not believable that if Mother desired an assessment for Student since September 2020 but heard nothing from Sevick about Student's

assessment for several months, she would not have followed up with them at some point during the 2020-2021 school year, yet she never did. Student did not prove Mother did not receive the February 2021 letter.

## THE SEPTEMBER 2021 ASSESSMENT PLAN

Between the initial phone call with Mother on September 23, 2020, and August 20, 2021, Sevick did not receive any paperwork back from Parents that indicated Parents wanted to proceed with Student's special education assessment. On August 20, 2021, Student served her due process complaint on Cajon Valley Union. It was around this time that Ancona checked Cajon Valley Union's database and confirmed that it had sent the intake packet to Parents, made subsequent phone calls to Parents to follow up, and sent out the February 2021 prior written notice letter.

Based on the due process filing, Ancona determined Parents still wanted Student assessed for special education eligibility. On September 2, 2021, Ancona sent an email to Parents, acknowledging that she understood Parents were interested in a special education assessment for Student. The email also attached a new enrollment package, an assessment plan, and a notice of procedural safeguards. Ancona invited Parents to contact Sevick if there were any specific assessment areas Parents wanted the school district to consider.

At hearing, Mother claimed she responded to the email, then denied she responded to it. She also said she did not read it and at another point said she did not read the attachments. The weight of evidence established Mother received the email from Ancona and sent it on to her attorneys but did not respond to it or sign the attached assessment plan.

CAJON VALLEY UNION PROCURALLY VIOLATED THE IDEA BY FAILING TO SEND PARENT AN ASSESSMENT PLAN, PREVENTING STUDENT FROM BEING EVALUATED FOR SPECIAL EDUCATION

The weight of evidence established that Cajon Valley Union committed a procedural violation of the IDEA by failing to timely assess Student for special education eligibility. This failure began at the outset of the assessment process. Mother made a request for assessment on September 23, 2020, yet it was not until September 2, 2021, almost year later, that Cajon Valley Union finally sent the assessment plan to Parents to sign, after Parents filed for due process. Cajon Valley Union failed to timely send the assessment plan to Parents, which stagnated the assessment process and prevented Student from being timely assessed.

Mother's September 23, 2020 request for assessment triggered Cajon Valley Union's duty to assess Student for eligibility for special education and related services. Mother told Ancona and Friesen that Student had been diagnosed with autism and communicated Student's possible need for special education. Based on Mother's communications with school district personnel, Cajon Valley Union had reason to suspect Student had a disability and that special education services may be needed to address that disability. Cajon Valley Union did not disagree with Mother's request for assessment. It did not send Parents a notice that it was refusing to assess Student. Instead, it sent the registration and enrollment packet to Parents, which was part of its assessment initiation process and impermissible prerequisite to preparation of the assessment plan.

Cajon Valley Union failed to send an assessment plan to Parents because Parents did not return to Sevick the information requested in the registration and enrollment

packet. Cajon Valley Union's failure to timely send Parents an assessment plan was improper. Given the circumstances in this case, Cajon Valley cites no persuasive authority supporting Cajon Valley Union's imposition as a precondition of sending Parents an assessment plan that Student enroll in the district or provide the other paperwork requested in the intake packet.

A school district's affirmative duty to identify, locate and evaluate resident children is not limited to children already enrolled in the public school system. (*Robertson County School System v. King* (6th Cir. 1996, unpublished) 99 F.3d 1139, 1996 WL 593605, at p. *5 ["[I]t is simply not true that a public school system has no responsibility to evaluate students not enrolled in the system"]; *Hawkins ex rel. v. Dist. of Columbia* (D.D.C. 2008) 539 F.Supp.2d 108, 114-115 [the school district was not excused from its child find duty simply because the student was not registered at his local school district]; see also *Woods v. Northport Public School* (6th Cir. 2012) 487 Fed. Appx. 968, 979 ["It is residency, rather than enrollment, that triggers a district's IDEA obligations."].)

Cajon Valley Union did not require proof of Parents' residency before sending an assessment plan for Student to Parents. It knew Parents lived in the school district. Mother gave Ancona her address during the phone call on September 23, 2020 and mentioned that Parents lived close to Sevick where the assessment was to take place. At hearing, Ancona also admitted that Cajon Valley Union could use another student's proof of residency for a sibling enrolled later, depending on the length of time since it was first provided to the school district. When Mother made her September 2020 request for assessment, Student's older sister had been attending school within Cajon Valley Union for several years and the family had been living at the same address and had never moved. Cajon Valley Union had no information that Student's family did not live at the address Mother provided Ancona on September 23, 2020, the same

address it used to correspond with Parents and the same address earlier provided to Cajon Valley Union to enroll Student's older sibling. In addition, Jupena told Mother she could bring in the residency documents when Student was assessed.

Similarly, nothing in the IDEA required Parents to provide Student's immunization record or birth certificate to Sevick as a condition of sending an assessment plan to Parents to begin the assessment process. In fact, Jupena told Mother she could bring those documents to the Sevick office on the day of the assessment. Ancona also admitted at hearing that if Mother had contacted Ancona verbally or in writing after the original September 23, 2020 telephone conversation to inform her that Mother wanted to move forward with the assessment, Ancona would have done so. Ancona did not condition her response on Parent's return of the requested documents.

Notably, Cajon Valley Union eventually sent Parents an assessment plan in September 2021, notwithstanding the fact that Parents never returned the documents requested in the registration and enrollment packet. Ancona was not convincing when she testified she was able to prepare the assessment plan after receiving the due process filing because it contained information she required. The only specific new information Ancona mentioned was that the complaint was a legal document that contained Student's address. As explained above, Cajon Valley Union already had proof of Student's address from her older sibling's enrollment materials. Further, there was no other evidence that Cajon Valley Union lacked the information necessary to prepare an assessment plan for Student in 2020 after Mother made her assessment request. In fact, the February 2021 Cajon Valley Union letter did not condition moving forward with the assessment on Parents' completion on any of the documents in the intake packet.

Parents' failure to return the documents in the registration and enrollment packet did not justify Cajon Valley Union's belated transmission of an assessment plan, and its failure to timely assess Student.

Cajon Valley Union was not relieved of the obligation to assess Student because Parents did not put their request in writing. Although obligated by law to do so, Cajon Valley Union never specifically told Parents that their request for assessment of Student had to be put in writing. Further, the February 2021 letter Cajon Valley Union sent to Mother mentioned nothing about requiring her request for assessment be put in writing. Cajon Valley Union cannot now rely on an "in writing" requirement where it never specifically informed Parents of that condition.

Nor was Ancona persuasive when she stated that the request for assessment would have been "completed" if Parents had returned certain documents requested in the intake packet. Ancona's testimony was obtained through a leading question from Cajon Valley's Union's counsel. Further, even if true, it did not discharge Cajon Valley Union's duty to inform Parents of the "in writing" requirement, given its attempt to now use as a defense Parents' failure to comply with that condition. In any event, because Cajon Valley Union's child find obligation is an affirmative one, it had a duty to assess Student based on Mother's verbal request.

The weight of evidence established that Cajon Valley Union committed a procedural violation by failing to timely assess Student pursuant to Mother's request. (*D.K. v. Abington School Dist.*, *supra,* 696 F.3d at p. 249; *Park v. Anaheim Union High School Dist., et.al., supra,* 464 F.3d at p. 1032).

## STUDENT DID NOT PROVE SHE WAS DENIED A FAPE BECAUSE SHE DID NOT PROVE SHE WAS ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES

A school district's procedural error does not automatically require a finding that a FAPE was denied. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decisionmaking process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2); *W.G., et al. v. Board of Trustees of Target Range School District, etc.* (9th Cir. 1992) 960 F.2d 1479, 1484, *superseded in part by statute on other grounds* ["… procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE."].) Stated another way, a procedural violation "will be 'actionable' only 'if [it] affected the student's substantive rights.'" (*Leggett v. Dist. of Columbia* (D.C. Cir. 2015) 793 F.3d 59, 67, quoting *Lesesne ex rel. B.F. v. Dist. of Columbia* (D.C. Cir. 2006) 447 F.3d 828, 832, 834.)

A district's procedural violation cannot "qualify an otherwise ineligible student for IDEA relief" and constitutes harmless error if a student is substantively ineligible for IDEA

relief. (*R.B. v. Napa Valley Unified School Dist*. (9th Cir. 2007) 496 F.3d 932, 942; see *D.G. v. Flour Bluff Independent School Dist.* (5th Cir. 2012) 481 Fed. Appx. 887, 893, 2012 WL 1992302 [nonpub. opn.] ["IDEA does not penalize school districts for not timely evaluating students who do not need special education."].)

In *T.B., Jr. v. Prince George's County Board of Education* (4th Cir. 2018) 897 F.3d 566, the court upheld the administrative finding that the County Board of Education committed a procedural violation of the IDEA in failing to respond to parents' requests and conduct a timely evaluation of student to determine eligibility for special education and related services. (897 F.3d at pp. 572-573.) Nonetheless, that procedural violation was insufficient to serve as basis for recovery because the student did not establish he was denied a FAPE. (*Id.* at pp. 573-574.) "'[A]n IDEA claim is viable only if th[e] procedural violations affected the student's *substantive* rights.'" (*Id*. at p. 574, quoting *Lesesne ex rel. B.F v. District of Columbia, supra*, 447 F.3d at p. 834 (brackets and italics in original).)

In *Alvin Independent School Dist. v. A.D. ex rel. Patricia F.* (5th Cir. 2007) 503 F.3d 378 (*Alvin*) the court upheld the district court's reversal of the hearing officer's order for an independent educational evaluation because the student failed to prove he was eligible for special education. The court found that although the student had a qualifying disability, he failed to establish that he needed special education and related services, the second prong of the eligibility analysis. (*Id*. at pp. 383-384.) "Because we find that A.D. does not qualify for special education services, we need not reach his final argument regarding [the school district's] alleged procedural errors." (*Id.* at p. 384.)

Relying on *Alvin*, the Fifth Circuit found that a student with a qualifying disability was not entitled to recovery for a statutory violation based on a failure to evaluate him for special education absent a showing that the student needed special education at that time. (*D.G. v. Flour Bluff Independent School Dist., supra,* 481 F.App'x at p. 893 [nonpub. opn.].) A child find violation does not constitute a denial of FAPE if it does not result in substantive harm. (*J.N. ex rel. M.N. v. Jefferson County Board of Education* (11th Cir. 2021) 12 F.4th 1355, 1365-1366 (A parent's inability to show that district's child find violation resulted in substantive harm precluded an award of compensatory education: "[The parent's argument] presumes an equivalency between a procedural violation and a substantive harm, but that one-to-one relationship does not exist under the IDEA.").)

To be eligible for special education, a student must: (1) have a qualifying disability; and (2) because of that disability, need special education. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1) & (b); Ed. Code, § 56026, subds. (a) & (b).) A child with a disability means a child evaluated in accordance with sections 300.304 through 300.311 of title 34 of the Code of Federal Regulations as having a:

- intellectual disability,
- hearing impairment,
- speech or language impairment,
- visual impairment,
- serious emotional disturbance,
- orthopedic impairment,
- autism,
- traumatic brain injury,

- other health impairment,
- specific learning disability,
- deaf-blindness, or
- multiple disabilities, and

who, by reason thereof, needs special education and related services. (34 C.F.R. § 300.8(a)(1); see also 5 Cal. Code Regs. tit 5, § 3030.)

A preschool child, between the ages of three and five years, qualifies as a child who needs early childhood special education services if the child:

(1) Is identified as having one of the disabling conditions as defined in part 300.8 of title 34 of the Code of Federal Regulations, or an established medical disability, as defined in subdivision (d) of Education Code section 56441.11;

(2) Needs specially designed instruction or services as defined in Education Code sections 56441.2 and 56441.3;

(3) Has needs that cannot be met with modification of a regular environment in the home or school, or both, without ongoing monitoring or support as determined by the IEP team; and

(4) Meets eligibility criteria specified in section 3030 of title 5 of the California Code of Regulations. (Ed. Code, § 56441.11, subd. (b)(1)-(4).) An established medical disability means a disabling medical condition or congenital syndrome that the IEP team determines has a high predictability of requiring special education and services. (Ed. Code, § 56441.11, subd. (d).)

Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (34 C.F.R. § 300.8(c)(1)(i); Cal. Code Regs., tit. 5, § 3030, subd. (b)(1).) Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in title 5 California Code of Regulations section 3030, subdivision (b)(4). (Cal. Code Regs., tit. 5, § 3030, subd. (b)(1)(A); see also 34 C.F.R. § 300.8(c)(1)(ii).)

An ALJ has the authority to determine whether a child is eligible for special education and related services under the IDEA. (*Hacienda La Puente Unified School Dist. v. Honig* (9th Cir. 1992) 976 F.2d 487, 492.)

The above authorities make clear there can be no denial of FAPE based on a procedural violation without Student establishing eligibility for special education. More specifically, to prove a denial of FAPE based on Cajon Valley Union's procedural violation in failing to assess her, Student was required to prove a substantive harm. The first step and foundation for demonstrating that substantive harm occurred was proving Student was eligible for special education. Student failed to meet her burden of proof on this issue.

Here, Student contends that had Cajon Valley Union timely assessed her, she would have been eligible for special education and related services under the eligibility category of autism. However, there was insufficient evidence for the ALJ to conclude

that Student qualified for special education under the category of autism or any other eligibility category. Student failed to prove she had a qualifying disability and that because of that disability, she needed special education or specially designed instruction or services.

Student improperly conflates a medical diagnosis of autism with the definition of autism for purposes of IDEA special education eligibility. A medical diagnosis of autism does not itself entitle a student to receive special education and related services. To meet the IDEA and Education Code definition of autism, Student had to prove she had a developmental disability significantly affecting verbal and nonverbal communication and social interaction, and that the disability adversely affected her educational performance. (34 C.F.R. § 300. 8(c)(1)(i); Cal. Code Regs., tit. 5, § 3030, subd. (b)(1); see also *Joint Policy Memorandum* (OSERS September 16, 1991) [A medical diagnosis of attention deficit disorder alone is not sufficient to render a child eligible for special education.].) As explained below, there was a dearth of evidence establishing these fundamental autism eligibility requirements. Although Student did not argue "established medical disability" eligibility under Education Code section 56441.11, the evidence failed to prove she had an established medical disability as defined under that section.

In attempting to prove Student's special education eligibility at hearing, Student relied on three witnesses: Mother, Crystal Barajas of Easter Seals, and Student's expert psychologist Alberto Restori, Ph.D. Their testimony and the documentary evidence admitted at hearing fell far short of proving Student's eligibility for special education.

STUDENT FAILED TO ESTABLISH SHE HAD AN IDEA QUALIFYING DISABILITY AND REQUIRED SPECIAL EDUCATION

According to Mother, Student was unable to fully express herself with language, had difficulty expressing her wants and needs, and had behavioral challenges, including striking another child on one occasion. Mother claimed Student's medical providers diagnosed her with a speech and language delay in 2019 and that Student began receiving private speech services in October 2019. Mother also testified that in January 2020, Student's physician diagnosed her with autism. Mother also admitted Student was never assessed by the Regional Center and Student never received services from the Regional Center.

None of the medical providers who had allegedly diagnosed Student testified at hearing and there was no evidence establishing the basis for their alleged conclusions. There was no documentary evidence establishing Student's diagnosis of autism or a speech and language disorder from those providers who allegedly made these determinations. There was no evidence presented at hearing defining the speech and language disorder with which Mother claimed Student was diagnosed. There was no evidence Student's medical providers evaluated Student under the IDEA criteria or that they used the autism criteria set forth in the regulations implementing the IDEA and California Education Code in reaching their conclusions. (See 34 C.F.R. § 300.8(c)(1)(i); Cal. Code Regs., tit. 5, § 3030, subd. (b)(1).) Specifically, Student failed to prove her medical providers found that she had a developmental disability significantly affecting

verbal and nonverbal communication and social interaction. Likewise, although Mother claimed that Student's private speech provider conducted a speech and language evaluation, the content of that assessment and the criteria used was not established at hearing.

Nor did Student establish that her alleged communication and social interaction issues adversely affected her educational performance within the meaning of subdivision (c)(1)(i) of 34 Code of Federal Regulations part 300.8, and California Code of Regulations, title 5 section 3030, subdivision (b)(1). None of Student's teachers testified and Student did not otherwise offer any adequate evidence of Student's educational performance. Although Mother was a volunteer at Student's private school, she was unable to offer any details regarding Student's program. Mother claimed Student was shy, had difficulty staying on task, and had once hit another child with an open hand. Mother's testimony was too vague and otherwise insufficient to establish the necessary connection between any alleged communication/social interaction difficulties and Student's educational performance.

Student unsuccessfully relied on Barajas' testimony and an Easter Seals Behavior Progress Report she helped prepare as support for Student's position on eligibility. Easter Seals was a nationwide company that provided services to individuals with medically based special needs resulting from a referral from a physician. Barajas was an Easter Seals Clinical Supervisor and board-certified behavior analyst. She held a master's degree in special education curriculum and instruction. She supervised treatment for clients, the behavior interventionists, and the program manager assigned to Student by Easter Seals. She reviewed data and reports, and conducted assessments.

She did not provide services in an educational or clinical setting. She was not a speech-language pathologist and had never conducted an assessment to determine if a student had educationally related needs.

In September 2020, Easter Seals began providing in-home behavior services to Student. According to Barajas, Student was referred for services through her medical provider and Easter Seals made no disability diagnosis of Student. Although Easter Seals apparently conducted some sort of assessment when the referral was made, that assessment was not part of the documentary evidence at hearing, and Barajas did not take part in that initial assessment or determine if Easter Seals services were necessary. There was no evidence that Easter Seals evaluated or considered special education eligibility under the IDEA or the Education Code in its assessment or work with Student.

Barajas did help prepare a behavior progress report regarding Student in June 2021, which consisted of an outline of Student's treatment goals, progress, a recommendation for services and the results of two assessment measures, among other things. One assessment measure was based solely on Parents' input and the other was primarily based on Parents' reports during telehealth settings to "approximate" Student's developmental level, which the team would confirm once face-to-face restrictions were lifted. There was no evidence that in administering these assessment measures, Barajas followed the evaluation procedures in subdivisions (b) and (c) of 34 Code of Federal Regulations part 300.304 or Education Code section 56320. Although Barajas's behavior report contained a single reference to a diagnosis of "autism disorder," she did not know the criteria for the diagnosis listed on her report, which she

claimed would have come from Student's doctor. There was no evidence at hearing that she ever saw Student's medical records from Student's physician. She did not offer any opinion herself on whether Student had autism. Barajas's report noted that neither speech services nor occupational therapy services were being provided to Student by Easter Seals. When she was asked if anything in her report assessed for the impact of Student's disorder on her educational performance, Barajas claimed she was unable to speak to that issue because she had not observed Student in a school setting.

Significantly, at hearing Barajas acknowledged she could not say whether Student was eligible for special education and her report contained no recommendation as to whether behavior services were necessary for Student in an educational setting. She conceded she was not familiar with educationally based behavior therapy. Barajas also readily admitted that Easter Seals did not assess Student for educational needs. None of the information gathered in Barajas's report was obtained in the school setting. In fact, Barajas never observed Student in an instructional group setting. There were no observations in the school setting and Barajas's behavior progress report was not a functional behavior assessment. It did not evaluate for speech and language or occupational therapy services Student might need in an educational environment. According to Barajas, all of the services Easter Seals provided to Student were medically necessary and Easter Seals's assessments evaluated Student's need for initial and continued medically necessary services, as opposed to educational services. In fact, in developing its programs for individuals, Easter Seals specifically excluded incorporating any goals into a client's program that were academically based or school-related because Easter Seals did not address educational needs. Barajas's testimony and her

report were inadequate to establish Student had an IDEA- or Education Code-qualifying disability and needed special education or specially designed instruction or services.

## THE OPINIONS RENDERED BY STUDENT'S EXPERT ABOUT STUDENT'S ELIGIBILITY FOR SPECIAL EDUCATION WERE NOT CREDIBLE

Restori was a professor at California State University Northridge in the Department of Educational Psychology. He was a licensed and credentialed educational psychologist, with a doctorate in school psychology. He had a board-certified behavior analyst credential, which expired in March 2020. Between 1998 and 2002, he was employed as a school psychologist for Long Beach Unified School District, where he conducted about 40 or 50 educational evaluations per year and attended IEP team meetings, around 10 in total for students with autism. Since 1999, he worked as an educational consultant and independent evaluator. Over the last nine years he conducted 150 independent educational evaluations for various school districts, around 75 or 80 for children with autism. He had no training or experience in speech-language pathology or occupational therapy.

At hearing, Restori recommended that Student qualified for special education under the category of autism, but his testimony on the issue of Student's eligibility was not convincing. He never formally assessed Student and he failed to substantiate his conclusions as discussed below. Moreover, although he believed Student "would be eligible" for special education, he also inconsistently admitted that a special education evaluation was necessary to determine if Student would qualify under the IDEA and to determine her needs in a school setting. Restori otherwise failed to establish the validity of his opinions about Student's special education eligibility.

Restori explained that he used the "RIOT model" to determine a student's eligibility for special education, and that it was the method used by most psychologists. RIOT was an acronym for the following: reviewing a student's records, interviewing significant others about the student, observing the student, and testing the student. He claimed that this method gave him "a pretty good picture" of a student's needs for purposes of determining IDEA eligibility. The evidence failed to establish that with respect to Student, Restori complied with the components of the RIOT model he endorsed, and this also undermined his overall credibility.

First, Restori claimed he looked at some records Student's attorney sent to him, but he never clearly identified the records he reviewed, the date of those documents, and none of them appeared to be educational records. Significantly, there was no evidence he looked at any of Student's school records from the private school she had been attending since August 2021. Rather, his opinions were based on some unspecified behavior reports from Easter Seals. He was unaware that Easter Seals did not consider or assess Student's educational needs, and none of the Easter Seals documents he reviewed included a functional behavior assessment. He also claimed to have reviewed an unidentified speech and language report, the content of which was never established. He also asserted that he reviewed one document that contained a diagnosis of autism from a doctor, but he never specifically identified the document or the doctor. Restori did not know if the document was a medical record.

Second, Restori did not interview anyone except Parents, which undermined the credibility of his opinions. In addition to attending private school with other children since August 2021, Student also received private speech services since October 2019 through sometime after March 2020. Also, Student had been receiving medically based

behavior services from Easter Seals since September 2020. Yet, Restori never interviewed Student's teachers or any of her private providers, and he offered no justifiable explanation for this failure. Moreover, there was no evidence he ever interviewed the doctor who allegedly diagnosed Student with autism and admitted he did not know the criteria for the alleged diagnosis. Restori's failure to interview any of these individuals appeared to be a significant departure from the RIOT model he claimed he used to determine special education eligibility.

Third, Restori failed to conduct any proper observation of Student. He admitted he only conducted what he called "a kind of limited observation" of Student the business day before he testified. Restori conducted this limited observation by videoconference while Student was at home and it lasted about 30 minutes. Restori admitted he was unclear and "a little vague" about Student's communications skills because of the virtual nature of the observation. In other words, he could not hear what Student said because she was too far away from the computer/microphone or not facing the device. He admitted it would have been better if his observation had been conducted in an in-person setting.

Restori completely ignored the fourth component of his RIOT model. He failed to conduct any testing or other formal evaluation of Student. As with his other departures from the RIOT framework he recommended, he offered no adequate explanation for his failure to conduct any testing. He tried to explain away his failure to conduct any testing of Student by unpersuasively claiming that it was not that important to do testing for a child with autism. However, when asked if he had ever recommended special education eligibility of a child without conducting an evaluation of that student, he sheepishly admitted that he had not.

Restori's opinions regarding Student's eligibility lacked credibility for many other reasons. Among other things, Restori failed to substantiate any premise that his opinions were founded upon the most basic IDEA and Education Code standards for determining eligibility. (See, e.g., 20 U.S.C. § 1414(b)(2) and (3); 34 C.F.R. §§ 300.8(a)(1), 300.304(b) & (c), 300.305(a) & (c); Ed. Code, § 56320.) For example, he did not evaluate Student for eligibility using standardized measures nor did he conduct any other testing. (E.g., Ed. Code, § 56320.) He did not use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about Student to determine whether Student was a child with a disability or use technically sound instruments to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. (34 C.F.R. § 300.304 (b)(1) & (3).) He did not draw upon information from a variety of sources, including aptitude and achievement tests, and teacher recommendations. (34 C.F.R. § 300.306 (c)(i).) Further, he admitted that none of the documents he reviewed evaluated Student's academic achievement, cognitive functioning or intellectual development, or considered her needs in a school setting. (E.g., 34 C.F.R. §§ 300.304(b), 300.306(c).) There was also no evidence Restori received any input from Student's teachers in formulating his opinions. (E.g., 34 C.F.R. § 300.305(a)(1)(iii).)

Restori made sweeping generalizations about children with autism. He claimed Student qualified for autism eligibility because of her history of tantrum behavior, pinching herself, non-compliance, verbal repetitive behaviors, difficulty transitioning from one activity to another, and her sensory issues regarding loud noises and being a picky eater, and the unspecified progress reports he read. However, he never observed any of the behaviors upon which he based his opinions about children with autism during his 30-minute virtual observation. In fact, he described Student as happy and

well-behaved, and admitted that the only behavior he observed was Student's initial refusal to pick up some toys at Mother's request, claiming that Student started to become upset and would likely have begun to tantrum if he had not asked Mother not to continue to obtain Student's compliance.

Restori never observed Student engage in the relevant behavior upon which his opinions were based in an appropriate setting. (Ed. Code, § 56327.) The provisions of the IDEA make clear that the goal of a special education evaluation is to determine the educational needs of the child. (See 20 U.S.C. § 1414(a)(1)(C)(i)(II) [evaluation procedures must be designed "to determine the educational needs of such child"]; 20 U.S.C. § 1414(c)(1)(B) [evaluation data used to determine the educational needs of the child].) Yet, Restori admitted there was no educational component to his observation.

Student's expert based his characterization of Student's behaviors primarily on Parents' reports and some unspecified documents, including unidentified Easter Seals reports about Student in the home setting. There was insufficient evidence that Student engaged in repetitive activities, had difficulty transitioning, and had unusual responses to sensory experiences. Restori mischaracterized the Easter Seals reports as educationally related when, in fact, Easter Seals never assessed Student in an educational environment or evaluated her educational needs. Even Restori acknowledged the importance of conducting a special education assessment in an educational setting. He volunteered that he generally conducted assessments in the school setting to determine how a student was functioning in an educational setting and had the opportunity to speak to the teachers and observe the student in that environment. Restori offered no explanation for his failure to observe Student in an educational setting.

Restori baldly asserted that the majority of students with autism behaved in the same way across settings but admitted he did not know if this was true for Student. He also claimed that students with autism had socialization issues but was impeached as to this opinion as it related to Student. He conceded that an Easter Seals report he reviewed described Student as very social, greeting everyone at the door, and inviting others to join her in play. He also admitted that his general opinions regarding students with autism were not specific to Student and that a special education assessment was "absolutely needed to really get a better sense of [Student's] specific needs at this time." Student did not prove that her alleged behaviors such being a picky eater, disliking loud noises, non-compliance, or difficulty transitioning from a preferred task to a nonpreferred task was not typical of a three-year-old child and a normal part of child development.

Restori's testimony did not establish Student had a developmental disability significantly affecting verbal and nonverbal communication and social interaction, and which adversely affected her educational performance. (34 C.F.R. § 300.8(c)(1)(i); Cal. Code Regs., tit. 5, § 3030, subd. (b)(1).) Restori admitted he did not know if Student would have communication issues in an educational setting because he was unable to get a clear picture of Student's communication skills during his limited observation. During Restori's observation, Student demonstrated an understanding of everything that Mother said, was able to respond verbally using short phrases, and was well-behaved. In fact, Student's communication skills were better than he anticipated. Again, any problems Restori had in understanding Student seemed to be more a consequence of the virtual observation and technology issues, which made it difficult for him to hear Student. Ultimately, Restori acknowledged that Student's communication skills were a little vague to him and that a speech and language assessment was

necessary to determine her skills. He offered no specific opinion that Student had needs that could not be met with modification of a regular environment in the home or school, or both, without ongoing monitoring or support as determined by the IEP team. (Ed. Code, § 56441.11, subd. (b)(3).)

Overall, Restori was not a credible witness and appeared biased. He admitted he believed he was being paid by Student's attorney for his testimony (as opposed to his time). He was designated as an expert to testify on Student's behalf before he had even talked to Parents or observed Student. In fact, he only conducted a "kind of limited observation" of Student and interviewed Parents the business day before he testified on the last day of hearing, even though he admitted that the observation and parent interview were two of the most important parts of an evaluation of a child with autism. The evidence established he had no real familiarity with Student or Student's needs upon which to base an opinion about eligibility for special education and related services. When confronted with the flaws in reaching his conclusions, he seemed more concerned with defending his unsupported recommendation than in providing candid testimony.

Because Student did not prove she was eligible for special education and related services, she failed to demonstrate that Cajon Valley Union's failure to assess Student pursuant to Mother's request resulted in either a deprivation of educational benefit or that it impeded Student's right to a FAPE. For the same reason, Student failed to establish that Cajon Valley Union significantly impeded Parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE to Student. Parents' participation rights could not be significantly impeded if Student was not eligible for special education. Student failed to prove she was denied a FAPE.

## 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: Cajon Valley Union did not deny Student a FAPE and meaningful parental participation by failing to assess Student for special education eligibility following Parent's request for assessment during the 2020-2021 school year? Cajon Valley Union prevailed on Issue 1.

## ORDER

1. All relief sought by Student is denied.

## 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/

Laurie Gorsline
Administrative Law Judge
Office of Administrative Hearings