

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

BELLFLOWER UNIFIED SCHOOL DISTRICT.

OAH Case No. 2018110711

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings on November 19, 2018, naming Bellflower Unified School District.¹

Administrative Law Judge Kara Hatfield heard this matter in Bellflower, California, on January 15, 16, and 24, 2019.

Attorneys Gregory McNair and Rachel Douglas represented Student. Mother attended the hearing briefly on January 15, 2019, and during her testimony on January 24, 2019. Student did not attend the hearing.

Attorney Eric Bathen represented Bellflower. Matthew Adair, Bellflower's Special Education Program Administrator, attended the hearing.

On the last day of hearing, the matter was continued at the parties' request until

¹ Bellflower filed its response to Student's complaint on December 10, 2018, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

February 7, 2019, so the parties could file and serve written closing briefs. Closing arguments were filed, the record was closed, and the matter was submitted on February 7, 2019.

ISSUES

1) Did Bellflower deny Student a free appropriate public education by failing to refer Student for an initial evaluation to determine eligibility for special education services from November 19, 2016, through March 18, 2018?

2) Did Bellflower deny Student a FAPE by failing to develop an appropriate individualized education program on April 23, 2018, by:

- (a) Failing to address needs, through (i) goals or (ii) accommodations, in the areas of (A) reading fluency; (B) visual motor; (C) auditory processing; (D) attention; (E) processing speed; and (F) organization;
- (b) Failing to offer an appropriate (i) English language arts goal, and (ii) vocation goal; and
- (c) Failing to offer related services in counseling?

SUMMARY OF DECISION

Student contends he was denied a FAPE since November 19, 2016, because Bellflower knew since September 2013 Student had a disability, yet failed to identify him as a student with a disability who might need special education and related services and to refer him for assessment for eligibility. Student also contends he was denied a FAPE since April 23, 2018, because Bellflower's offer of special education was not adequate to address his academic needs.

District contends it did not deny Student a FAPE because Student's needs were adequately addressed through a Section 504 accommodations plan through February 2018. At that time, Bellflower argues it assessed Student for eligibility for special

education and then appropriately addressed Student's unique needs through an IEP.

Student met his burden of demonstrating that Bellflower denied him a FAPE due to Bellflower's failure to suspect that Student needed special education and related services and refer him for an assessment for eligibility. Student also met his burden of demonstrating that Bellflower denied him a FAPE due to Bellflower's inadequate offers of goals and accommodations in the April 23, 2018 IEP.

FACTUAL FINDINGS

BACKGROUND

1. Student was 15 years old at the time of the hearing, in tenth grade. At all relevant times, he lived with Parents within the boundaries of Bellflower. Student attended elementary, middle, and high school within Bellflower.

2. Student had a history of difficulties in school going back to elementary school. In first grade in 2010, Bellflower created an academic intervention plan for Student because he was below grade level in reading and writing, and at grade level in math. Bellflower identified Student as at risk of not meeting state standards. Bellflower provided group response to intervention programming for reading, along with other increased general education services to target Student's reading and writing. In third grade in 2012, Student's statewide testing scores indicated he was proficient in science and social science, at the basic level in reading and writing, below basic in math, and still at risk of not meeting state standards. Bellflower suggested retaining Student in third grade but Parents refused. Bellflower provided Student another academic intervention plan, which included general education interventions to support Student.

3. In September 2013, when Student was in fifth grade, Mother informed Bellflower that Student's doctor diagnosed him with attention deficit disorder, inattentive type. Mother requested Bellflower assess Student for eligibility for a plan

under Section 504 of the Rehabilitation Act of 1973. Bellflower created a Section 504 accommodation plan in November 2013. Bellflower reported Student was “intelligent” and “capable” but only approaching or below grade-level standards in some academic areas. He had problems with distractions and his ability to concentrate. Without conducting an assessment for eligibility for special education and related services, Bellflower noted on the Section 504 accommodation plan Bellflower’s conclusion that Student “does not qualify” even for “assessment for special education.” The accommodations were for redirection when necessary, 24 hours of extended deadline for homework, and daily communication by Student recording all classwork, homework, and tests in a planner on a daily basis with the teacher and parent signing off daily.

4. In November 2013, Mother requested that Bellflower assess Student for special education, because Student noticeably increased his effort for difficult tasks, showed difficulty with organization and sustaining attention during tasks and play, often did not listen when spoken to directly, and was often easily distracted. In December 2013, Bellflower provided Parents an assessment plan to evaluate Student for eligibility for special education and related services.

5. Bellflower completed a psychoeducational assessment for Student in February 2014. Bellflower’s psychoeducational assessment report was cursory, with only five pages of content. Bellflower’s school psychologist concluded Student’s cognitive ability was in the low average range with a full scale score of 89, and no significant variation among four different cognitive processes measured by the assessment instrument the school psychologist used. Student’s standard score on a nonverbal ability test was 103, in the average range. On a test of academic functioning and abilities, Student’s scores were varied. In math computations without time limits, Student’s performance was advanced. But it was limited to average on tasks requiring the ability to analyze and solve applied math problems. In one part of the report, the school

psychologist stated Student's scores were average in basic writing, writing fluency, basic reading, and broad reading. However, the school psychologist also stated in the next paragraph that Student's "reading ability is limited Below Average."

6. Student's teacher reported Student demonstrated varied academic ability in the classroom, with advanced oral expression skills, average math calculation skills, and limited reading comprehension and writing skills. He required one-to-one attention more often than most students did, and often failed to pay close attention to details or made careless mistakes in classwork. He completed homework but rarely finished classwork on time. His ability to organize his materials was similar to his peers, but he had difficulty organizing tasks or activities.

7. The school psychologist summarized that Student demonstrated abilities within the age and grade expectancy level with no discrepancy between ability and achievement. The school psychologist concluded Student did not qualify for special education, as his needs could be met with general education modifications.

8. At an IEP team meeting on February 24, 2014, Bellflower concluded Student was not eligible for special education. Parents did not challenge this determination within two years.

9. In December 2015, when Student was in seventh grade at his local middle school, Bellflower held a meeting to review Student's Section 504 accommodation plan. Student was easily distracted, lost focus in the classroom, and forgot to turn in assignments. Student's accommodations continued for redirection when necessary, a 24-hour extension on all deadlines for homework, and daily communication between teacher, Student, and Parents through a planner and email. A new accommodation was added for Student to attend math tutoring as needed before tests.

NOVEMBER 19, 2016, THROUGH JANUARY 2018

10. In January 2017, when Student was in eighth grade at his local middle

school, Bellflower held a meeting to review Student's Section 504 accommodation plan. Three of Student's teachers were given evaluation forms in December 2016. All three teachers reported Student participated in class discussions, and two indicated Student understood ideas well. Other positive comments included that Student was creative and had original ideas, was cooperative, caring and considerate of others, well-liked by peers, and had self-confidence. All three teachers reported Student had a short attention span and slow work speed. Two reported Student was often off task, had missing or late assignments, and needed assistance with directions. One teacher described Student as usually unprepared for class, another said he produced careless and sloppy work, and another said he had difficulty working independently. Student's grades were an A in physical education, B- in English, C+ in history, C in robotics and in science, and D in math. Because of Student's distractibility and loss of focus in the classroom, Bellflower continued Student's Section 504 accommodations for redirection when necessary, and a 24-hour extension on all deadlines for homework and now also class assignments. Bellflower changed the communication accommodation to provide daily communication between teacher, Student, counselor, and Parents "if necessary initiated by parent." The plan offered Student math tutoring after school.

11. Student's final grades for the fall 2016 semester were an A in physical education, B in robotics, B- in English and history, C in science, and D- in math.

12. On state-wide assessments in April 2017, Student did not meet state standards in both English language arts and math.

13. Student's final grades for the spring 2017 semester were a B- in English, C in robotics and in science, D+ in math, and D- in history.

14. Student started ninth grade at Bellflower High School for the 2017-2018 school year. In October 2017, Student's performance was poor. Bellflower convened a student study team meeting on October 12, 2017. Student's ninth grade guidance

counselor Michelle Paredes obtained written input from Student's world geography, Spanish, biology, and English teachers. These teachers described Student as participating in class discussions, understanding ideas well, being cooperative, and working well with other students. Also, Student needed assistance with directions, had a short attention span, slow work speed, difficulty working independently, missing or late assignments, was often off task, talked excessively, and disrupted class frequently. He was failing world geography and Spanish, and had a 78 percent (C+) in English. Teachers reported they were implementing the accommodations from his Section 504 plan such as extending time to turn in work, and also seated him close to the teacher or near quiet, high-achieving students to reduce distractions and provide positive peer models. Student's performance was poor because he failed to turn in assignments and homework, and had low test scores. Student's world geography teacher wrote to Ms. Paredes, who was organizing the student study team meeting, reporting she had "noticed besides that ADD he does have a hard time remembering things like directions, almost like a processing disorder." Bellflower's special education personnel was on notice that in addition to the health/medical condition of attention deficit disorder of which Bellflower was aware, general education teaching staff suspected Student had an additional area of disability in the form of a processing disorder.

15. At the student study team meeting on October 12, 2017, the group, including school psychologist Stephanie Holleran, Psy.D., reviewed the past interventions Bellflower provided, including the response to intervention services in elementary school and Student's Section 504 accommodations plan. Teachers who attended the meeting reported Student was fidgety and very unorganized. Bellflower referred Student to the school's guidance intern for services to address his organization. No changes to Student's Section 504 plan were made. And Bellflower did not propose to assess Student for a processing disorder, despite his teacher's suspicion, documented

in writing and shared with Student's guidance counselor, of a disorder in this area. The next day, Dr. Holleran sent Ms. Paredes a 15-page list of possible accommodations for students with attention deficit disorder. Dr. Holleran proposed adding the three specific accommodations on the list to Student's Section 504 plan, but that did not happen.

16. Through guidance technician Bianca Rodriguez, Student was supposed to receive group counseling in a four-to-six week program called High School 101 to focus on organization and study skills. Student also was to receive four-to-six weeks of individual counseling, every other week, to track Student's progress. At hearing, Ms. Rodriguez could not recall whether Student was scheduled for two or three individual sessions and whether he attended one out of two or two out of three of the sessions. She did not recall how many group counseling sessions Student attended. Student's participation in the group and individual counseling changed Student's homework and assignment completion by a few percentage points, but not enough to improve any of his grades. Ms. Rodriguez emailed Mother that since Ms. Rodriguez's initial meeting with Student on November 9, 2017, his grades had generally decreased. When Ms. Rodriguez observed student in class twice, he was out of his seat and not focused on his classwork.

17. Student finished the fall semester with an A- in physical education, B in biology, C+ in drawing and painting, C- in Spanish, D in English, and F in both world geography and integrated math.

18. Before another student study team meeting was convened, Ms. Paredes knew Mother had called the school and was not happy about Student's progress. Ms. Paredes suspected Mother might want Student assessed for eligibility for special education and related services. Ms. Paredes called Dr. Holleran and told her Bellflower probably needed "to move this one forward" but would hold another student study team meeting. Dr. Holleran told Ms. Paredes if at the follow-up meeting the team

decided “to move it forward,” to note it on the document and give a copy to her “to start the process.” Before the follow-up meeting, Ms. Paredes asked Dr. Holleran to prepare an assessment plan. Dr. Holleran told Ms. Paredes to discuss it at the meeting and if the team wanted to move it forward to write that on the meeting notes and send it to her.

19. On January 25, 2018, Bellflower held a student study team meeting along with a Section 504 accommodation plan annual review. Bellflower added accommodations to the Section 504 plan as suggested by Dr. Holleran in October 2017, to note redirection when necessary using verbal prompting, including point/tap signals; and using color to highlight any areas of academic tasks Student may be overlooking. Bellflower also added that “as needed/available student will work with Guidance Technician/Intern on organizational skills.” Prior accommodations of 24-hour extension on deadlines for homework and class assignments; daily communication between teacher, Student, counselor, and “parent if necessary initiated by parent”; and attending “available after school tutoring” were continued. Bellflower believed the Section 504 plans were appropriate and faithfully implemented. Bellflower noted Student was assessed for special education eligibility in fifth grade and did not meet eligibility criteria. Mother believed Student was struggling with work despite Section 504 plan accommodations, extra tutoring, and assistance from the guidance technician, and requested Student be reassessed for special education services.

APRIL 23, 2018 PSYCHOEDUCATIONAL ASSESSMENT AND IEP

20. In March 2018, Dr. Holleran and school psychologist Suzette Vega conducted a psychoeducational assessment. At the time of the assessment, Student’s grades for the spring 2018 semester were an A- in drawing and painting, B+ in physical education, C in English and biology, and F in Spanish and math.

21. On the Woodcock-Johnson Tests of Achievement, Fourth Edition,

Student's skills varied significantly across academic areas. He displayed relative strengths in math reasoning and basic writing skills, but struggled with reading comprehension and fluency. His standard score was above average in writing samples; average in applied problems and calculation; low average in math fact fluency; at the lower limit of low average in passage comprehension; and borderline, meaning well below average, in sentence reading fluency. Sentence reading fluency measures the speed with which one reads accurately and with automaticity; it was a timed test for which Student read several sentences and responded by circling the appropriate yes or no response within a three-minute time interval. Dr. Holleran summarized by saying Student's reading comprehension and basic reading fluency skills were below his same-age peers. Math fact fluency measures the speed with which one completes simple math facts accurately within a three-minute time interval. Dr. Holleran reported that Student's math reasoning and calculation skills were commensurate with same age peers, but math fluency was below expectancy compared to same-age peers. Student's results on the Woodcock-Johnson Tests of Achievement caused Dr. Holleran to only administer certain subtests of instruments to measure Student's processing because Student did not show difficulty with reading words.

22. Bellflower took the position that "[b]ased on the Larry P. court decision, the use of standardized intelligence or IQ tests are considered to be invalid for students who are of African-American descent under current California State guidelines. As per state and federal guidelines, no instrument to measure intellectual abilities was administered. Under Federal District Court ruling of 1986, the use of standardized intelligence measures with African-American students is prohibited. Alternative assessment methods were utilized to estimate cognitive functioning."

23. Dr. Holleran reported, "Based on information derived from reports, interviews, observations, prior assessments, alternative test and current assessment,

estimated cognitive ability is best described as encompassing the **Average** range [emphasis in original]. . . . This is based on a pattern of strengths and weaknesses from the current assessment as the majority of standardized scores are consistent within this range”

24. Dr. Halloran administered processing assessments to measure aspects of Student’s visual-motor, visual-perceptual, and auditory processing. Auditory processing measures a person’s ability to discriminate, understand, interpret, and express auditory stimuli commonly used for language in academics and everyday activities. Visual processing, including visual-motor processing, measures one’s ability to judge, discriminate, understand, interpret, and express size, shape, ambulation, spatial orientation, and integration of visual stimuli. Visual processing tasks assess both sensory/fine motor and non-motor ability. Overall, processing describes how the brain interprets information via auditory (i.e. listening), visual (i.e. information that is seen), and tactile (i.e. “hands on” methods) channels.

25. Dr. Holleran administered the Test of Auditory-Perceptual Skills, Third Edition, to assess Student’s auditory processing. Although there are four indices for this instrument, Dr. Halloran only administered the auditory memory (including sequencing) and auditory cohesion indices. On the memory index, Student scored in the low average range, meaning he was able to adequately retain and manipulate some sequences of auditory information of increasing length and complexity. Overall Student’s auditory memory composite indicated some variability dependent upon the tasks; he displayed adequate abilities in cognitive flexibility and rote/non-meaningful sequencing tasks of length and complexity, but struggled the most with meaningful verbal sequences of increasing length and complexity. The cohesion index, Student’s ability to understand the spoken/literal language as well as implied meanings, inferences, and logical conclusions information was read aloud to him, was in the average range.

26. On the Motor-Free Visual Perception Test, Fourth Edition, Bellflower assessed Student's non-motor visual perception components including spatial relationships, visual discrimination, figure ground, visual closure, and visual memory. Student's overall visual-perceptual processing skills were in the average range.

27. Bellflower assessed Student's visual-motor integration with the Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition, to evaluate Student's ability to accurately integrate, or coordinate, visual and motor abilities (eye-hand coordination) via pencil-paper administration of varying difficulty. Student's performance was in the borderline range (well below average) compared to same-age peers, meaning that he struggled to integrate visual stimuli and motor output appropriately for his age. Difficulties can be caused by mis-representation of input, poor fine motor output, and/or integrative or processing difficulties. Students who have difficulty on this task often have extreme difficulty copying from the board/text or completing written assignments and often exhibit poor handwriting. Further, it is not uncommon for children diagnosed with attention deficit hyperactivity disorder to exhibit these fine motor difficulties.

28. Dr. Holleran summarized her processing findings by noting that Student struggled most with visual-motor integration tasks. She recommended that when teaching new information to Student, teachers should use a variety of modalities to assist him. For example, they should utilize visual prompts and cues such as charts, lists, pictures, pointing, modeling, gestures, cues, etc., and pair them with clear and concrete auditory directions and explanations "*repeatedly*" (emphasis in original). This would help Student remember, sustain attention, and comprehend information. Dr. Holleran stated that overall, Student's learning style would be maximized when all processing channels were combined into a multiple-modality approach to instruction (visual-auditory-kinesthetic).

29. Dr. Holleran assessed Student's attention deficit disorder and related behaviors using the Conners Rating Scale, Third Edition. There was overall agreement among Student and Mother that Student's inattention, hyperactivity/impulsivity, and learning problems were in the significant range. Dr. Holleran stated the findings indicated Student's attention deficit disorder-related symptoms might impact academic progress in the general education curriculum.

30. Dr. Holleran concluded Student was a capable and intelligent young man who struggled academically due to symptoms of attention deficit disorder, specifically focusing, concentration, processing speed, and organization. He displayed "severe discrepancies in regard to reading fluency, including visual-motor, auditory processing and attention deficits which impedes access to the general education core curriculum." Dr. Holleran analyzed Student's eligibility for special education and related services under the categories of Other Health Impaired and Specific Learning Disability. She concluded Student met eligibility for special education primarily for other health impairment due to symptoms associated with attention deficit hyperactivity disorder, inattentive type, impeding access to the general education core curriculum. She also concluded Student met criteria for specific learning disability due to a severe discrepancy between estimated ability and standardized academic achievement in the area of reading fluency due to concomitant processing deficits in auditory memory, visual-motor integration, and attention. Dr. Holleran did not identify on which scores she relied to conclude there was a severe discrepancy between Student's ability and achievement. At hearing, Dr. Holleran confirmed her testing revealed Student had auditory processing disorder, visual-motor processing disorder, and attention processing disorder. She also confirmed that these disorders did not appear suddenly when they previously did not exist; given that Student had these disorders in basic psychological processes at the time she tested him, it is likely he had these disorders all

along.

31. Dr. Holleran recommended Student receive specialized academic instruction within the general education setting with co-teaching and learning center supports. She identified four areas of need and provided suggestions for accommodations and teaching approaches to address reading fluency (his lowered reading rate), attention, auditory memory (the ability to hold information in mental awareness and use it within a few seconds), and processing speed (the ability to perform relatively simple cognitive tasks automatically – quickly and without conscious deliberation – particularly when under pressure to maintain focused attention). For example, to address Student’s auditory memory, in addition to accommodations such as keeping directions short and simple and ensuring Student understood directions by having him paraphrase, she recommended Student be provided overlearning, review, and repetition, and that providers “teach memory strategies such as chunking, verbal rehearsal, and visual imagery.” To address Student’s reading fluency, in addition to accommodations like extended time on tests involving reading and shortening classroom reading assignments, she recommended guided, repeated oral reading to improve word recognition and fluency, having Student read the same passage several times orally and providing him with systematic and explicit feedback and guidance.

32. On April 23, 2018, Bellflower held an IEP team meeting with Mother, Student, special education teacher and case carrier Gil Castaneda, guidance counselor Paul Aleman, and Dr. Holleran. Mother signed a written form excusing a general education teacher from attending the IEP team meeting. In an IEP team meeting that took one hour and one minute, Bellflower reviewed Dr. Holleran’s report, found Student eligible for special education, offered him a goal in “language arts” and a goal in “vocational,” offered him placement in general education with 55 minutes per day of resource support in a co-taught English class, and all the accommodations he had

before. Mother consented to the IEP. The guidance counselor reported on Student's progress toward graduation and Student required world geography in the summer to make up for failing it in the fall semester. Case carrier Mr. Castaneda committed to send Mother a copy of the IEP within 10 days.

33. The IEP documented that Student's primary eligibility was for other health impairment, and his secondary eligibility was for specific learning disability. On a form captioned "Specific Learning Disability, Team Determination of Eligibility – RTI," the instructions for Section I stated, "Select Option A AND B below." Box A was checked stating, "The pupil does not achieve adequately for the pupil's age or to meet state-approved grade-level standards when provided with learning experiences and instruction appropriate for the pupil's age or state-approved grade level standards." Box B was not checked but stated, "The pupil does not make sufficient progress to meet age or state-approved grade-level standards based on the pupil's response to scientific, research-based intervention." Next, there was a list of eight possible "[a]rea/s in which the pupil meets criteria," and the only box checked was reading fluency. Section II stated, "The specific learning disability identified above is directly related to a processing disorder" and the box for "yes" was checked. Of the six possible options of areas, the boxes for sensory motor skills, auditory processing, and attention were checked. The form noted that "the IEP team considered data that demonstrated that prior to, or as a part of, the referral process, the pupil was provided appropriate instruction in regular education settings, delivered by qualified personnel; and the IEP team considered data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the pupil's parents [emphasis in original]." The boxes for "yes" were checked that the pupil has a specific learning disability and the degree of the pupil's impairment requires special education. Despite Dr. Holleran's psychoeducational assessment report stating

her conclusion that Student had a specific learning disability based upon a severe discrepancy between his estimated ability and his standardized achievement in reading fluency due to auditory, visual-motor, and attention processing disorders, Bellflower instead analyzed whether Student had a specific learning disability and eligibility for special education based upon that specific learning disability using a response to intervention model.

34. Bellflower did not offer Student a goal in each of the four areas of unique need Dr. Holleran identified. Instead, Bellflower offered Student a goal in what it said was an area of need called English language arts. Student's baseline did not identify his actual present level of performance in that "area," but was described only as, "[Student] requires additional support in English Language Arts." The goal was, within one year, "given a text to annotate, [Student] will determine the meaning of at least 2 unknown words using a dictionary, a computer or cell phone, and will annotate for deeper meaning by connecting the text to at least 1 broader concept (of the unit, topic or world at large) with fewer than 2 prompts from the case carrier or teacher per text as measured by student work samples." The other "area of need" for which Bellflower offered a goal was "vocational." Student's baseline was reported as that he required additional time with assignments. The goal was, within one year, "given an assignment requiring more time than the class allotted, [Student] will communicate with the teacher giving the assignment to determine an appropriate deadline for submitting the assignment after the class in at least 3 out of 5 occurrences in which [Student] needs more time as measured by teacher anecdotal records/AERIES Parent Portal print-outs." Neither of the goals were designed to improve Student's abilities in the four areas of unique need Dr. Holleran identified.

35. To meet these two goals, Bellflower offered Student general education classroom instruction for 94 percent of the time, and special education instruction within

the general education classroom on a co-taught model, and six percent of his time outside the regular class for quizzes and tests, as needed.

36. The IEP also offered Student accommodations, most of which were similar to those offered in Student's 504 plan. The accommodations were: provide models/examples; review/rephrase directions; extra time for assignments, tests, and quizzes; preferential seating (in an area to help reduce distractions to student); access to the learning center to receive accommodations for quizzes and tests; cues/prompts/reminders of rules: prompt student and redirect, as necessary; and use of technology to submit assignments, as needed and when appropriate. Bellflower did not offer any program modifications or indicate whether the IEP team had discussed and determined program modifications were not needed in general education classes or other education related settings. Bellflower did not offer any other supports for school personnel, or for Student, or on behalf of Student, or indicate whether the IEP team had discussed and determined other supports for school personnel, or for student, or on behalf of student were not needed.

SPRING 2018 SEMESTER, THE REMAINDER OF NINTH GRADE

37. During the 2017-2018 school year, Student was in Michael Hunter's second period, ninth grade English class all school year, with 33 or 34 students. The class was co-taught with special education teacher Mr. Castaneda. Mr. Castaneda did not work with Student until after the April 23, 2018 IEP. At hearing, Mr. Hunter described methods he used for teaching all students in his class, and accommodations he afforded all students. With respect to Student's goal in English language arts, Mr. Hunter explained that in his class every student used a program called StudySync and looked up two unfamiliar words per text to annotate for deeper meaning. He stated that what was in Student's IEP as his English language arts goal was "something all the kids in my class are doing." He admitted he did not check if Student learned two new words per

text according to work samples, as stated in the goal's measurement method. With respect to Student's vocational goal of asking for extra time for class assignments three out of five times he required additional time, Mr. Hunter knew he had granted requests but did not know the frequency, and his testimony focused on whether or not he might have granted Student's requests three out of five times instead of, as the goal specified, whether Student requested additional time three out of five times that he required additional time to complete a class assignment. Mr. Hunter's testimony did not support Bellflower's argument that Student's goals were targeted to Student's areas of unique need or that Bellflower provided Student special education to address his identified deficit in reading fluency.

38. Dr. Holleran tried to explain at hearing how the goals and accommodations in the April 23, 2018 IEP, implemented during the remainder of the spring semester, were appropriate to support Student accessing the general education curriculum. Dr. Holleran appeared to be purposefully trying not to understand questions from Student's attorney to avoid providing responses. She was evasive unless pressed by the ALJ to provide substantive responses. She had many long pauses before her responses, which did not appear to be thoughtful reflection on how to articulate a complete and organized answer; her pauses connoted difficulty contorting her responses to support Bellflower's position in the case that it had not waited too long to assess Student for eligibility and that it developed and offered an appropriate program of special education for Student in April 2018. She could not explain what Student's English language arts goal addressed and indicated the case carrier should be asked. She unconvincingly stated that Student's vocational goal of asking for more time to complete classwork was to address Student's fluency and his need to be redirected. She unpersuasively characterized "the majority" of the accommodations in the April 2018 IEP as applying to Student's deficit in reading fluency. Her testimony shoehorned each

accommodation into being about some area of need she identified in her assessment, but she could not persuasively articulate how the accommodations that had been in Student's Section 504 plans for years, which did not help with his areas of need in reading comprehension, reading fluency, visual-motor integration, and attention and led to his failing grades in high school, were appropriate to enable Student to learn and successfully complete a high school diploma. For those reasons, Dr. Holleran's testimony in this area was unpersuasive and given little weight.

39. Student's final grades for the spring 2018 semester were an A- in drawing and painting, B in physical education, C in biology, C- in English, D- in health, and F in Spanish, and math. Student attended summer school to re-take world geography due to failing it in the fall semester. He earned a D-, which was sufficient to receive 5 credits toward graduation and fulfill that course requirement. His cumulative academic grade point average was 1.38, and his total grade point average was 1.67.

FALL 2018 SEMESTER, TENTH GRADE

40. Student started the fall semester of tenth grade in a math class that was a repeat of the course he failed the prior fall. His new case carrier for tenth grade was Christine Thiebert, and she pulled him out of class every week or two to check up on him. She was the special education teacher in a co-taught math class, and Student requested to transfer into that co-taught math class with Ms. Thiebert. After Ms. Thiebert discussed Student's request with Mother and Mother agreed to the change, Bellflower switched him into that class a few weeks into the semester, although he was not one of the 10 to 12 special education students to whom Ms. Thiebert taught and attended during that class.

41. On October 19, 2018, Bellflower held an amendment IEP team meeting to review Student's progress in the new school year. Mother, Program Administrator Matthew Adair, Ms. Thiebert, guidance counselor Mr. Aleman, and Student's general

education chemistry teacher Mita Dalal attended. At the time, Student was not passing chemistry, but Ms. Dalal reported Student had started to understand the material and was doing better. Student told Mother he was not receiving the accommodations of his IEP in chemistry and Mother raised the concern at the IEP team meeting, but Bellflower indicated he received his accommodations in all classes. Mother told the IEP team she had worked with Student a lot during the summer and it showed because he was doing well in math class. At hearing, Mother attributed Student's improved performance in math to the fact that it was a class he was repeating because he failed it the year before. Ms. Thiebert suggested Student receive specialized academic instruction in math, in the co-taught class he was attending. Bellflower amended Student's IEP to offer an additional 55 minutes per day of specialized academic instruction in math in the co-taught environment.

42. Mother did not consent to the amended IEP. She believed Student required more than the IEP offered, such as goals regarding organization and to assist his focus in class. Mother did not understand that by not consenting to the October 2018 amendment IEP, Student would not receive additional specialized academic instruction, specifically in math. She thought since Student was in the class with his special education teacher case carrier, he would receive support from her in math.

43. Student finished the fall 2019 semester with an A- in math and in drawing and painting, B in physical education, C+ in English and modern world history, and D- in chemistry. His academic grade point average for the semester was 2.2, and his total grade point average for the semester was 2.5.

OTHER EVIDENCE RELEVANT TO THE ISSUES AND REMEDIES

44. Mr. Adair had been a mild/moderate disabilities special education teacher in another school district for almost eight years, and then became a special education administrator in 2012. He had been employed at Bellflower for a year and a half at the

time of hearing. Mr. Adair reviewed Student's grades and characterized him as doing "well" until the 2017-2018 school year. He noted that the academic concerns teachers raised were after the 2014 assessment for special education. He thought Student demonstrated a marked difference in his performance starting in ninth grade and that Student had not needed to be assessed for special education until then, because he had been successful.

45. Mr. Adair described goals as the mechanism through which a support or service is driven, by labeling an area the student needs to work on, identifying the student's baseline in that area, meaning the level at which the student is performing in that area at the moment, and setting a target for at what level the student will be performing in that area within one year. Mr. Adair explained that to develop a goal, school personnel needed good data on a student's current skills and what would be a stretch for that student in one year. Sometimes school personnel effectively estimated what progress a student could make in that time, and sometimes they overestimated and a student could not reach the goal within one year. Mr. Adair noted that goals needed to be specific, not something vague such as, "student will improve reading comprehension." Some goals needed to identify specific supports the student would use to accomplish the goal, such as by using a calculator, a student would be able to perform some specific math task. He expressed that goals needed to be measurable, and achievable; it is not reasonable to expect a student to go from far behind to achieving at grade level that year.

46. With respect to Student's vocational goal in the April 2018 IEP, Mr. Adair identified it as a goal to address a self-advocacy skill. To measure Student's progress on or achievement of the goal, each teacher would have to keep track of what Student had been assigned, whether he finished it, and whether he asked for more time. Ms. Thiebert would have to communicate with Student's teachers to find out from them if he had an

assignment that was not done, and if Student had come to them asking for more time.

47. Regarding Student's English language arts goal in the April 2018 IEP, Mr. Adair struggled to identify what skill was measured by the goal. He re-read it aloud, then stated it was to get in the habit of getting to an unknown word in a reading passage and looking it up, to build vocabulary and help Student understand more; to not skip what the reader does not know. Ultimately, he admitted that he did not know what skill was measured by the goal and stated he would have preferred the goal to be clearer. Bellflower's attorney tried to rehabilitate Mr. Adair's testimony but only made matters worse by asking leading questions suggesting to the professional educator what the goal "really" meant.

48. Student did not present any witness testimony or documentary evidence that showed what services or strategies Student required to address his unique needs. Further, Student failed to submit any evidence regarding compensatory education recommendations.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA²

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)³ et seq.; Ed. Code, § 56000, et seq.; Cal.

² Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

³ All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [in California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized

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

4. The Supreme Court recently clarified its decision in *Rowley*. In *Endrew F. v. Douglas County School District*, the Court stated that the IDEA guarantees a FAPE to all students with disabilities by means of an IEP, and that the IEP is required to be reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances. (*Endrew F. v. Douglas County School District* (2017) 580 U.S. __ [137 S.Ct. 988] (*Endrew F.*)) The Ninth Circuit recently affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

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

identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, Student, as the complaining party, bears the burden of proof.

ISSUE 1: SUSPECTING STUDENT OF NEEDING SPECIAL EDUCATION UNDER THE IDEA

6. Student contends Bellflower denied him a FAPE from November 19, 2016, through March 18, 2018, the date on which Bellflower completed a psychoeducational assessment, by failing to identify, locate, and evaluate him as a child with a disability. Student argues that Bellflower should not have waited until Mother requested an assessment for eligibility for special education and related services to refer Student for assessment. Specifically, Student asserts that because Bellflower had been providing Student academic intervention plans as far back as first grade, then Section 504 plans after he was diagnosed with attention deficit disorder, inattentive type, and Student's teachers continued to report he had difficulty with attention, work pace, and work completion despite years of accommodation plans, Bellflower should have known by the fall semester of eighth grade that he was not benefitting from the accommodations in his plan and that he might be in need of special education. Bellflower contends Student was assessed for eligibility for special education in early 2014, found not to qualify for

special education, and was doing fine for a student with attention deficit disorder until he declined in the middle of ninth grade, at which time Bellflower re-assessed him.

7. Before any action is taken to place a student with exceptional needs in a program of special education, an assessment of the student's educational needs must be conducted. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.)⁴ An assessment may be initiated by request of a parent, a State educational agency, other State agency, or local educational agency. (20 U.S.C. § 1414(a)(1)(B); Ed. Code, §§ 56302, 56029, subd. (a), 56506, subd. (b).) *Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033 (*Park*.)

8. The IDEA places an affirmative, ongoing duty on the state and school districts to identify, locate, and evaluate all children with disabilities⁵ residing in the state. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); Ed. Code, § 56301, subd. (a).) The obligation extends to children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. (34 C.F.R. § 300.111(c)(1); Ed. Code § 56301(b)(1).) California specifically obligates school districts to actively and systematically seek all individuals with exceptional needs, from birth to 21 years of age, who reside in a school district or are under the jurisdiction of a special education local plan area or a county office of education. (Ed. Code, § 56300.)

⁴ The IDEA uses the term "evaluation," while the California Education Code uses the term "assessment." In this decision the terms mean the same things and are used interchangeably.

⁵ The IDEA defines "child with a disability" as a child with any of 10 categories of disabling conditions, including "other health impairments," who, by reason of the condition(s), needs special education and related services. (20 U.S.C. § 1401(3)(i) and (ii).)

This duty is not dependent on any request by the parent for special education testing or services. (*Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.)

9. Violations of the duty to identify, locate, and evaluate children with disabilities who are in need of special education and related services are procedural violations of the IDEA and of the Education Code. (*Dept. of Education, State of Hawaii, v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1196 (*Cari Rae S.*); *Park, supra*, 464 F.3d at pp. 1031-1033.) Procedural violations of the IDEA only constitute a denial of FAPE if they: (1) impeded the student's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County, Mont.* (9th Cir. 2008) 541 F.3d 1202, 1208, quoting *Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

10. A school district's obligation to identify, locate and evaluate 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. (*Cari Rae S., supra*, 158 F.Supp.2d at p. 1194.)

11. The threshold for suspecting that a child has a disability is relatively low. (*Cari Rae S., supra*, 158 F.Supp.2d 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.*)

12. 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 Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031).)

13. More than two years after it last evaluated Student for eligibility for special education and related services, as part of an annual Section 504 accommodations plan review, Bellflower received reports from Student's teachers indicating that after three years of Section 504 accommodations, Student was a well-liked and cooperative pupil who understood ideas well but continued to have a short attention span and slow work speed, was often off task, had missing or late assignments, needed assistance with directions, was usually unprepared for class, produced careless and sloppy work, and had difficulty working independently. In September 2013, Student was only approaching, or below, grade-level standards in some academic areas, and at the end of the fall 2016 semester Student had a D in math, an area in which he previously had been at grade level.

14. Given the low threshold for suspecting that a student has a disability and the information Bellflower had available that suggested the possibility that Student's failure to complete work and achieve grade-level standards could be connected to his known Section 504 disability, it was not reasonable for Bellflower to wait until Mother requested an assessment in January 2018. Bellflower should have referred Student for evaluation no later than after the third annual Section 504 review in January 2017. Bellflower did not need to wait for Student to fail courses in ninth grade and lose progress towards graduating with a high school diploma to suspect that a student identified as having attention deficit disorder, failing to meet grade-level standards in English language arts and math, and annually reported to be often off task and failing to complete or submit assignments might need special education. Bellflower pre-judged Student as not qualifying for special education in November 2013, conducted a cursory assessment in February 2014 to support that conclusion, and relied on that conclusion despite years of Student making little to no progress in the areas of attention, organization, and work completion, even with the Section 504 plan. Bellflower owed

Student the duty to evaluate him and failed in that duty.

15. Bellflower's failure to identify Student and to refer him for assessment for eligibility for special education and related services resulted in a loss of educational opportunity and/or caused a deprivation of educational benefits. When Student was assessed and an IEP team met to consider the results to determine eligibility, Student was found eligible under the category of Other Health Impairment based on his attention deficit disorder and its effects, and also Specific Learning Disability based on Student's either severe discrepancy between estimated ability and achievement in reading fluency, or Student's failure to respond to interventions, which reflected Student's auditory, visual-motor, and attention processing disorders. These processing disorders had always existed; Bellflower just failed to uncover them before Mother insisted Bellflower assess him again during high school. The IEP team created an individualized program of instruction and accommodations on April 23, 2018. There is no reason to doubt that had Student been assessed sooner by an assessor who did not conduct a cursory assessment in pursuit of a predetermined outcome, he would have been deemed eligible and received a similar program, including specialized academic instruction to address Student's issues with, at a minimum, attention, organization, and work completion. The delay in assessment led to a delay in eligibility and receipt of special education and related services.

16. In summary, Student carried his burden of proof that Bellflower's delay in identifying that Student, who was known to have a disability, might have needed special education and related services was a procedural violation that amounted to a denial of FAPE by denying Student with an educational benefit.

ISSUE 2: DENIAL OF FAPE IN THE APRIL 23, 2018 IEP

17. Student contends Bellflower denied him a FAPE in the April 23, 2018 IEP by (a) failing to offer either (i) goals or (ii) accommodations in the areas of (A) reading

fluency, (B) visual-motor processing, (C) auditory processing, (D) attention, (E) processing speed, and (F) organization; (b) failing to offer an appropriate (i) English language arts goal and (ii) vocational goal; and (c) failing to offer related services in counseling. Bellflower contends it offered Student appropriate goals and services to meet his unique needs and Student therefore was not denied a FAPE.

18. When a student is eligible for special education and related services, an IEP is developed. An IEP must include: a statement of the student's present levels of academic achievement and functional performance, including the manner in which the student's disability affects his involvement and progress in the general education curriculum; a statement of measurable annual goals, including academic and functional goals, that are designed to meet each of the educational needs of the student that result from his disability; a description of how progress towards the goals developed will be measured and reported; a statement of the special education and related services and supplementary aids and services to be provided to the student to enable the student to advance appropriately toward attaining the annual goals; and the frequency, location, and duration of the special education and related services and supplementary aids and services. (Ed. Code, §56345, subd. (a).) The statutory framework for the IEP provides a nearly step-by-step analytical approach to developing an individualized program of instruction and services for a student who requires special education.

19. School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code § 56031.)

20. A school district's determinations regarding special education are based

on what was objectively reasonable for the district to conclude, given the information the district had at the time of making the determination. A district cannot “be judged exclusively in hindsight,” but instead “an IEP must take into account what was, and what was not, objectively reasonable . . . at the time the IEP was drafted.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) However, after-acquired information may be used to assess the reasonableness of a school district’s determinations. (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2009) 652 F.3d 999, 1004.)

21. To determine whether a school district substantively offered a student a FAPE, the focus must be on the adequacy of the district’s proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1313-1314.) If the school district’s program was designed to address the student’s unique educational needs, was reasonably calculated to provide the student with educational benefit appropriate in light of the child’s circumstances, and comported with the student’s IEP, then the school district provided a FAPE, even if the student’s parents preferred another program, and even if the parents’ preferred program would have resulted in greater educational benefit. (*Ibid.*; *Andrew F.*, *supra*, 137 S.Ct. at p. 1002.)

22. At the time of Student’s April 23, 2018 IEP team meeting, Bellflower’s assessment revealed Student’s health issue and processing disorders and Bellflower had formed an idea of how those issues impacted his progress in the general education curriculum. Dr. Holleran identified four areas of need and provided suggestions for accommodations and teaching approaches to address reading fluency, attention, auditory memory, and processing speed. However, Bellflower did not offer Student goals “designed to meet each of the educational needs of the student that result from his disability,” nor did Bellflower include a statement of Student’s “present levels of academic achievement and functional performance” in the two goal areas it did develop.

(Ed. Code, §56345, subd. (a).)

23. The only baseline Bellflower indicated for Student in the area of English language arts was that he “require[d] additional support.” The goal Bellflower offered was not tailored to address or remediate Student’s deficits in reading fluency, but was a task every student in general education ninth grade English worked on every day. It was a task he would have been required to do without a goal in an IEP, and no evidence suggested Student could not look up definitions of two unknown words per text and his ability within one year’s time to do that would have demonstrated growth or progress in an area of deficit.

24. Similarly, the only baseline Bellflower indicated for Student in the area of “vocational” was that he “require[d] additional time with assignments.” The goal Bellflower offered was not tailored to address or remediate Student’s deficits in reading fluency, attention, auditory memory, and processing speed, and it had not been identified that Student had a deficit in self-advocacy. The goal was not based on a showing that Student failed to request and negotiate additional time to complete class assignments and that asking for additional time three out of five times he needed additional time would have demonstrated growth or progress toward an area of deficit. The goal did not address Student’s attention or processing speed, or set a target for improvement of his current rate of being on task, the duration he could sustain attention on tasks, or the rate at which he could complete any specific task, such as correctly answering any particular number of grade-level math problems, vocabulary questions, spelling words, chemistry equations, or other academic content.

25. The April 23, 2018 IEP included accommodations that were previously part of Student’s Section 504 accommodation plans, which led to Student failing classes and continuing to be functioning below grade-level standards despite having average cognitive abilities and being able to demonstrate to teachers that he understood the

content of his academic courses. The evidence produced at hearing established that the accommodations included in Student's April 23, 2018 IEP were not sufficient alone to address the areas of deficit Dr. Holleran identified, specifically reading fluency, attention, auditory memory, and processing speed. Without goals in these areas, and only accommodations that had previously not led to Student being academically successful, Student was not afforded a program of special education that was reasonably calculated to enable him to make progress in the general education curriculum that was appropriate in light of his circumstances.

26. In the fall of 2017, Bellflower had provided Student limited group and individual counseling from a guidance technician to address organization and study skills, and during that time Student's grades actually declined, according to the guidance technician. Bellflower did not offer Student any counseling services in the April 23, 2018 IEP. Student argues Bellflower should have continued to provide Student counseling as a related service after he was identified as being eligible for special education. While it likely would not have harmed Student's educational progress to receive counseling as a related service, Student offered no evidence that counseling was a developmental, corrective, or supportive service Student required to assist him in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

27. The preponderance of the evidence established Bellflower denied Student a FAPE by failing to develop appropriate goals in the areas of need Bellflower's school psychologist, Dr. Holleran, had identified; failing to offer appropriate goals in the areas in which it did develop goals; and failing to offer appropriate accommodations to enable Student to make progress in the general education curriculum that was appropriate in light of his circumstances.

28. Student did not persuasively establish that he required counseling as a related service in the April 23, 2018 IEP.

REMEDIES

29. Student prevailed on Issues 1 and 2. Student proved that Bellflower unreasonably delayed evaluating Student for eligibility for special education and related services from November 19, 2016, until Mother requested assessment on January 25, 2018, and failed to offer Student goals in his areas of unique need, appropriate goals, and appropriate accommodations. As remedies, Student requested: independent educational evaluations in the areas of psychoeducation, occupational therapy, assistive technology, functional behavior, and unspecified other areas in the ALJ's discretion; an IEP team meeting to review and incorporate into Student's IEP the recommendations of the independent evaluations; unspecified appropriate placement; evidence-based instruction to address Student's deficits in reading, writing, and math; and compensatory education of 360 hours of academic instruction plus 88 hours of intensive educational therapy in math, 44 hours of intensive educational therapy in English language arts, and four hours of counseling services, all provided by a nonpublic agency on a direct pay model, with transportation or at a location mutually arranged between Parents and the nonpublic agency, including at Student's home.

30. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad equitable authority extends to an administrative law judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

31. An administrative law judge can award compensatory education as a form of equitable relief. (*Park, supra*, 464 F.3d 1025, 1033.) Compensatory education is a prospective award of educational services designed to catch the student up to where he

should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265; *Orange Unified School Dist. v. C.K.* (C.D.Cal. June 4, 2012, No. SACV 11–1253 JVS(MLGx)) 2012 WL 2478389, *12.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid v. Dist. of Columbia*, supra, 401 F.3d at p. 524.) Compensatory education awards depend upon the needs of the disabled child, and can take different forms. (*R.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1126.) Typically, an award of compensatory education involves extra schooling, in which case “generalized awards” are not appropriate. (*Parents of Student W. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497.) “There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” (*Ibid.*)

32. Student failed to introduce any evidence supporting his request for specific special education services or for compensatory services. No evidence indicated the type, frequency, or duration of services that would be appropriate to enable Student to make progress addressing his unique needs in the areas of alertness, attention, focus, task completion, and organization, or to compensate Student for services he was denied since November 19, 2016. Student relies on the special education program Bellflower offered in April and October 2018, consisting of one class period per day of specialized academic instruction in English language arts, and one class period per day of specialized academic instruction in math, as a basis for requesting two hours per day of compensatory education for the period of time between November 2016 and when he finally started receiving special education in April 2018, and an additional hour per day from April 2018 through hearing because he was only receiving one hour per day when Bellflower ultimately recommended two hours per day. Student argues he should have

had specialized academic instruction in a smaller class size,⁶ instruction more closely tailored to his needs, and some type of evidence-based program to help his reading fluency. While Student proposed prospective and compensatory services, no person qualified to recommend such services testified any of them were appropriate for Student.

33. However, Student's failure to present expert testimony does not mean he should not receive any remedy for the denial of FAPE caused by Bellflower's failure to find and assess him for eligibility for special education and Bellflower's failure to offer appropriate goals and accommodations in the April 23, 2018 IEP. (See *Butler v. District of Columbia* (D.D.C. 2017) 275 F.Supp.3d 1, 5-6.) It is equitable to award Student remedies arising from Bellflower's denial of FAPE. As a remedy for District's failure to assess Student for eligibility for special education between December 2016 and when Mother requested Bellflower assess him in late January 2018, and for the lost special education services during that time, when he had a health impairment and processing disorders that qualified him for special education, Student is entitled to compensatory education for the almost four semesters of school during which he did not receive special education. Student is awarded 200 hours of compensatory individual specialized academic instruction from a credentialed special education teacher, to be provided by a nonpublic agency certified by the California Department of Education, on a year round basis, without regard to whether school is in session. Additionally, Student is entitled to compensatory education for not having goals to address his areas of deficit during the time he was provided with special education. Student is awarded an additional 50 hours

⁶ Student did not allege as an issue in this case that Bellflower denied him a FAPE by failing to offer him an appropriate placement, and this Decision takes no position on that topic.

of compensatory individual specialized academic instruction from a credentialed special education teacher, to be provided by a nonpublic agency certified by the California Department of Education, on a year round basis, without regard to whether school is in session. Student shall have until June 15, 2021, to access this 250 hours of compensatory education. Bellflower shall directly pay the nonpublic agency and either provide Student transportation to the services through monthly public bus passes or reimburse Parents for one round trip via mileage at the current Internal Revenue Service rate for business mileage, at Parents' selection.

34. It is also equitable to order Bellflower to provide Student an independent educational evaluation by a licensed psychologist of Student's choosing, to make specific recommendations for a program of special education to address Student's unique needs related to limited strength, vitality, or alertness as a consequence of attention deficit disorder or attention deficit hyperactivity disorder, and to reconsider whether and in what areas Student has a disorder in the basic psychological processes in understanding or using spoken or written language, either under the severe discrepancy model or the response to intervention model of analysis. Bellflower shall compensate Student's selected assessor up to \$6,000 for the assessment, including a written report and two hours of participation at an IEP team meeting to review the assessor's results. Parents will be responsible to pay their chosen assessor any cost beyond \$6,000. However, there is no evidence in the record to support Student's request for assessments regarding occupational therapy, assistive technology, functional behavior, and unspecified other areas in the ALJ's discretion.

ORDER

1. Within 30 days of this Decision, Bellflower shall contract with a certified nonpublic agency to provide Student 250 hours of compensatory, individual specialized academic instruction from a credentialed special education teacher, on a year round

basis regardless if school is in session or not. Student shall have until June 15, 2021, to access this compensatory education. Any hours not used by that date shall be forfeited.

2. Within 15 business days of this Decision, Parents will provide Bellflower with the name of a licensed psychologist to conduct an independent psychoeducational evaluation. Within 15 business days of its receipt of Parents' selection, Bellflower shall contract with the assessor to perform a psychoeducational assessment. Bellflower shall compensate Student's selected assessor up to \$6,000 for the assessment, including a written report and two hours of participation at an IEP team meeting to review the assessor's results. Parents will be responsible to pay their chosen assessor any cost beyond \$6,000. If Parents fail to timely select an independent assessor, Bellflower may choose an independent, licensed psychologist who has experience assessing students with attentional challenges and specific learning disabilities, to conduct a psychoeducational assessment of Student. If Bellflower chooses the assessor, it shall ensure that the assessment is completed and an IEP team meeting to review the results is convened within 60 calendar days of the date it executes the contract with the assessor.

3. All other relief sought by Student is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on Issues 1, 2(a) and 2(b), and Bellflower prevailed on Issue 2(c) in this case.

RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to

a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATE: February 22, 2019

/s/

KARA HATFIELD

Administrative Law Judge

Office of Administrative Hearings