

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SULFUR SPRINGS SCHOOL DISTRICT.

OAH Case No. 2013100027

DECISION

Parent, on behalf of Student (Student) filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on September 30, 2013, naming Sulfur Springs School District (District). OAH continued the matter for good cause on November 18, 2013.

Administrative Law Judge Laurie Gorsline (ALJ) heard this matter in Canyon Country, California, on December 11, 12, and 16, 2013.

Attorney Andréa Marcus represented Student. Student's mother (Mother) attended the hearing on December 11 and 12, 2013. Student did not attend the hearing. Attorney Lyndsy B. Rodgers represented District. Paul Frisina, Director of Special Education, attended the hearing on behalf of District.

At the close of hearing on December 16, 2013, the ALJ granted a continuance to January 6, 2014 for the parties to file written closing arguments. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUE

Did District deny Student a free appropriate public education (FAPE) by failing to provide an independent educational evaluation (IEE) in response to Student's September 2013 request?

SUMMARY OF DECISION

Student requested an IEE from District on September 13, 2013, based on Student's disagreement with District's March 2011 Triennial Psycho-educational Assessment Report (Triennial Report). Student contends he was denied a FAPE when District refused his request to fund an IEE at public expense or to file a due process complaint to defend its assessment. Student claims he was not aware of the existence of the Triennial Report until September 2013 and, at the hearing, contended it was not prepared until September 2013. District contends: Student's IEE request was untimely because it was made more than two years after Student knew or should have known about the facts necessary for Student to exercise his IEE rights; the triennial psycho-educational assessment was completed in March 2011 and Student not only received a copy of the Triennial Report in 2011, but Student's IEP team reviewed the report with Mother at the April 12, 2011 IEP meeting; and a two-year statute of limitations applies to Student's 2013 IEE request. District argues Student's statute of limitations accrued on April 12, 2011, but no later than May 30, 2011, 60 days after District received Mother's signed consent to the assessment plan for the triennial psycho-educational assessment.

For the reasons set forth below, Student failed to meet his burden of demonstrating that Student was denied a FAPE by District not providing an IEE in response to Student's September 2013 request. Student's request for an IEE was barred by the two-year statute of limitations. Student had knowledge of the facts underlying the 2011 triennial assessments at least as early as April 12, 2011, and at the very latest,

by May 30, 2011. Accordingly, Student was required to file a due process complaint against District regarding the 2011 triennial assessments no later than May 30, 2013. Student failed to establish by any credible evidence the applicability of either of the two narrow statutory exceptions to the two-year statute of limitations. District appropriately denied the IEE request and was not required to fund the IEE at public expense or file a due process complaint to defend its 2011 triennial assessments.

Student's request for relief is denied.

FACTUAL FINDINGS

1. Student was a 14-year-old male at the time of the due process hearing. At all relevant times Student was eligible for special education services. During the 2010-2011 school year, Student was in the sixth-grade, attended Fair Oaks Ranch Elementary School (Fair Oaks Elementary School), and resided with his parents (Parents) within District. In the fall of 2011, Student matriculated to the William S. Hart Union High School District (Hart School District).

2. Parents had two children eligible for special education, Student and his 17-year-old sister (Sister). Sister was initially referred to District for assessment by Parents around 2004. After District conducted an assessment of Sister, Parents requested an IEE and District provided it. Mother participated in several Individualized Education Program (IEP) team meetings over the course of several years for both children. Mother signed at least three assessment plans for Student between March 2008 and March 2011 and attended nine IEP team meetings for Student while he attended District schools.

3. In 2008, Student was referred for initial assessment by the Student Study Team at the request of Parents. On March 11, 2008, Mother signed an assessment plan, authorizing an initial assessment of Student in the following areas: academic/pre-academic achievement, social and emotional development, motor ability, language/speech communication, general ability, health and developmental, and

career/vocational ability. Student was evaluated in April and May 2008. Following these evaluations, the District's school psychologist at the time, Danette Cua, prepared an Initial Psycho-educational Assessment Report.

4. Student's initial IEP team meeting was held on May 14, 2008. Parents attended the IEP team meeting. Based on the results of the Initial Psycho-educational Assessment Report, Student was found eligible for special education as a student with a Specific Learning Disability and Other Health Impairment.

5. District sent a Triennial Assessment Plan (Assessment Plan) dated March 15, 2011, to Mother, to determine Student's continued eligibility for special education services. The Assessment Plan consisted of District assessments in the areas of academic/pre-academic achievement, social and emotional development, motor ability, general ability, and health and developmental. The Assessment Plan specified that the school psychologist would be involved in some of the assessments. Mother signed the Assessment Plan on March 28, 2011 and District received it on March 30, 2011.

6. On March 17, 2011 and March 24, 2011, a triennial psycho-educational assessment of the Student was performed by the District. District school psychologist, Ada N. Ocasio, M.A. LEP, BICM conducted a comprehensive psycho-educational assessment assisted by school psychologist intern, Jennifer Martinez. The assessment included standardized tests. Mother completed parent-rating scales as part of the psycho-educational assessment. At hearing, Mother expressed her belief she did not fill out the parent rating scales, explaining she was "not very fond of these things you have to fill out." Mother's attempts at hearing to deny she filled out the parent rating scales in March 2011 were not persuasive or credible. Ms. Ocasio prepared a Triennial Report, which included the evaluation procedures, background information, previous testing, grades/report cards, behavioral observations, scores and results of the tests used in the

psycho-educational assessment, an interpretation of those results, a summary, and recommendations.

7. Brenda Sparks (also known as Brenda Watkins) was Student's special education teacher and case carrier for the 2010-2011 school year. Ms. Sparks was part of the Student's multi-disciplinary triennial assessment team. She was employed with District for twelve years and had a good relationship with Mother. She left District at the end of the 2012-2013 school year in order to relocate to Oregon. While employed with District, she had between 8-13 students in her class each school year. She performed assessments for all of her students once a year for their annual and triennial IEPs. As part of Student's March 2011 triennial assessment, Ms. Sparks administered the Woodcock-Johnson Revised Tests of Achievement -Third Edition (WJ-III) and completed the teacher rating scales. The results were incorporated into the psycho-educational assessment report prepared by Ms. Ocasio.

8. District held Student's triennial IEP team meeting on April 12, 2011. The IEP team included Mother, Ms. Ocasio, Ms. Sparks, District Representative and Fair Oaks Elementary School Principal Mayeleh (Marie) Stump, Occupational Therapist Karyl K. Babyova, and Ms. Martinez. Mother was offered a written copy and a verbal explanation of her parental rights and procedural safeguards.

9. During the April 12, 2011 IEP meeting, the IEP team members reviewed the IEP and the Triennial Report. Some of the information from the Triennial Report was set forth verbatim in the IEP. Some of the results of the triennial assessments were summarized in the IEP. The "present levels of academic achievement and functional performance" section of the IEP also incorporated assessment results. The IEP team also distributed an occupational therapy evaluation (OT Report) which the IEP team discussed. The OT Report specifies that the standard test results for the Berry-Buktenica

Developmental Test of Visual-Motor Integration (Beery VMI) were “provided by the school psychologist.”

10. District customarily created a draft IEP prior to an IEP team meeting and distributed the draft at the meeting. At the IEP team meeting, the IEP team would review each entry in the IEP in detail and make any necessary changes before it was signed by the IEP team members. District practice was to have psychologists present their assessments at the IEP team meetings and to have at least a draft of the psycho-educational assessment report at the IEP team meeting where it was reviewed simultaneously with the IEP. Ms. Ocasio’s customary practice was to provide a copy of her assessment report at every IEP she attended. Ms. Ocasio had a record of completing psycho-educational assessment reports in a timely fashion.

11. In her twelve years with District, Ms. Sparks attended approximately 120 annual and triennial IEP team meetings, of which 40 were triennial IEP team meetings. A school psychologist led all triennial IEP team meetings she attended. A hard copy of a psycho-educational assessment was distributed and reviewed at every triennial IEP team meeting Ms. Sparks attended and was the document upon which the IEP team relied to determine the course of the meeting. Ms. Sparks worked with Ms. Ocasio for approximately eight or nine years and always found her to be well prepared. Ms. Ocasio performed the psycho-educational assessments for Ms. Spark’s students in the 2010-2011 school year. At every triennial IEP team meeting Ms. Sparks attended with Ms. Ocasio, Ms. Ocasio led the meeting and always had at least a draft copy of her psycho-educational assessment report for the triennial IEP team members. The box on Student’s April 2011 IEP next to “see attached Psycho educational report” was checked, leading Ms. Sparks to conclude the IEP team had a copy of the Triennial Report at the April 12, 2011 triennial IEP team meeting, and the team would have referred to the report where referenced in the IEP. District’s Special Education Director Paul Frisina confirmed that if a

copy of the assessment report was present and distributed at an IEP team meeting, District psychologists were instructed to check this box on the IEP.

12. Principal Stump corroborated Ms. Sparks' testimony. Principal Stump has worked for District for over 23 years and attended more than 300 IEP team meetings. In Principal Stump's experience at District, each element of the IEP was individually reviewed with parents at the IEP team meetings. If the box on the IEP next to "see attached Psycho educational report" was checked, the psycho-educational assessment report was present at the IEP team meeting and it was reviewed with the parent prior to the parent signing the IEP.

13. Student's April 12, 2011 IEP included repeated references to "data," "the results of the current assessment," and, in two places, a box was checked next to "see attached psycho educational report." The IEP also referred to the results of some of the tests performed as part of the Student's triennial assessment, including Student's scores from the Beery VMI and WJ-III, and discrepancy data relating to his average cognitive ability and written language skills. The IEP also referred to "data" which "is much more reflective of [Student's] ADHD, OCD, and social/emotional behaviors."

14. When questioned at hearing by her own attorney as to whether she was handed a copy of the Triennial Report at the IEP team meeting on April 12, 2011, Mother admitted she was not certain whether she received it or not.

15. Mother received and signed the IEP on April 12, 2011, agreeing to all parts of the IEP. Mother did not always read every page of Student's IEP's before she signed them. Mother's general practice for both of her children was to read IEPs at home after the IEP team meetings. Mother had an accordion filing system at home where she stored her children's educational records. She did not place documents directly into the file after she received them. Instead, she placed the documents she received in her bedroom and "eventually" put them in the file after she read them.

16. After the April 12, 2011 IEP team meeting, Ms. Ocasio gave a copy of the Triennial Report to District's special education secretary, Sandra Gonzalez. The District's typical practice was to mail psycho-educational assessment reports to parents through Ms. Gonzalez after the IEP team meetings, and to place a copy of the assessment report in the Student's cumulative file.

17. Ms. Gonzalez worked for District for five years. When she first began her employment with District, District instructed her to always mail a copy of the psycho-educational assessment report to students' families. During her tenure with District, her routine practice was to mail a copy of all psycho-educational assessment reports to students' parents after an IEP team meeting at which the report was presented.

18. As part of her duties in 2010-2011, Ms. Gonzalez kept a computerized timeline chart of all assessment plans generated for Ms. Ocasio for the 2010-2011 school year (Chart). On the Chart, Ms. Gonzalez kept track of the date an assessment plan was sent to parents and returned to District, the type of assessment to be performed, the date of the IEP, and the date on the assessment report she received from Ms. Ocasio. Each line on the Chart referred to a particular student. After completing all tasks pertaining to a particular student, Ms. Gonzalez' practice was to change all of the entries for that student from black to blue. Changing the entries from black to blue meant Ms. Gonzalez had, 1) received the signed assessment plan and IEP, 2) copied and mailed to the parents a copy of Ms. Ocasio's psycho-educational assessment report regarding that student, and 3) placed a copy of the report in student's cumulative file.

19. At the end of the 2010-2011 school year, Ms. Gonzalez generated the Chart. Line 55 on the Chart referred to Student and was blue. The Chart indicated Student's Assessment Plan had been sent to Parents on March 15, 2011, had been received by District on March 30, 2011, and an IEP team meeting had been held on April 12, 2011. The Chart also recorded the date of March 24, 2011, which corresponded to

the date on the Triennial Report that the psycho-educational assessment had been completed. The Triennial Report was finalized at, and after, the IEP team meeting at which it was discussed. Ms. Gonzalez mailed a copy of the Triennial Report to Parents prior to the end of the 2010-2011 school year.

20. Student matriculated to Hart School District in the fall of 2011. District sent Student's educational records to the Hart School District. When a District special education student matriculates, standard procedure was to send student's cumulative file and special education file to Hart School District.

21. Hart School District's system of receiving files for students matriculating from District included making certain there was a file for each student, and the student was age-appropriate and attending the appropriate junior high school. Hart School District's system did not include checking dates of the last assessment. Some student records from District were received electronically and some documents were received in hard copy form.

22. An IEP team meeting was held in January 2012 by the Hart School District regarding Student. Those in attendance included Mother and Director of Special Education for the Hart School District, Sharon Amrhein. Ms. Amrhein discussed with Mother parts of the April 12, 2011 triennial IEP and the assessments performed by District as part of the Student's triennial IEP. Ms. Amrhein understood the April 12, 2011 IEP referred to a corresponding triennial assessment report. Social emotional issues were discussed at the January 2012 IEP.

23. On February 14, 2013, Ms. Amrhein received a written email request from Student's attorney for a complete copy of Student's educational records. Everything in Student's file with Hart School District was provided. Ms. Amrhein did not recall seeing a copy of the Triennial Report in the file.

24. In September 2013, Ms. Amrhein of the Hart School District sent an email to District's Special Education Coordinator Anita Obrien, requesting a copy of the Triennial Report. On September 9, 2013, at 9:07 a.m., Ms. Obrien sent an email to District staff advising them Hart School District had requested a copy of the Triennial Report, and she needed a copy so she could provide it to Hart School District. At 9:13 a.m. on September 9, 2013, Ms. Ocasio sent an email to Ms. Obrien attaching a copy of the Triennial Report, which Ms. Ocasio stated she found on her computer but was not certain if it had been proofed. The cover email contains the notation "259 KB." At 9:24. a.m., on September 9, 2013, Ms. Ocasio sent another email to Ms. Obrien, attaching another copy of the Triennial Report, advising Ms. Obrien to use this copy because the earlier one did not have certain things in it which she added. The cover email contains the notation "354 KB." Ms. Obrien compared the two versions of the Triennial Report attached to Ms. Ocasio's September 9, 2013 emails. She saw no substantive differences between the two documents. The only differences between the two documents were spacing and pagination. Ms. Obrien was not concerned with the authenticity of the Triennial Report. Ms. Obrien offered no explanation for the notations "259 KB" and "354 KB," on the emails.

25. Ms. Obrien has been a licensed school psychologist for fourteen years. As a school psychologist, she administered all of the same tests performed as part of Student's 2011 triennial psycho-educational assessment. In Ms. Obrien's credible opinion, creating the Triennial Report in the ten minutes between Hart School District's request and when District sent it to Hart School District was not feasible, because the person who administered the tests had to score the tests and interpret the results before reporting them in a written report.

26. On September 13, 2013, Student's counsel made a written request to Mr. Frisina, Ms. Ocasio, and Ms. Obrien that District fund an IEE psycho-educational assessment based upon Parents' disagreement with the Triennial Report.

27. On September 24, 2013, Mr. Frisina responded by letter to Parents, denying Parents' request for an IEE. In the letter, Mr. Frisina explained the triennial assessments had been reviewed at the IEP team meeting on April 12, 2011 and because they were over two years old, the two-year statute of limitations applied to the Parents' IEE request. He informed Parents that District was not obliged to fund an IEE or file for due process to defend its own assessment when a parent's request for an IEE is based on disagreement with a District assessment which falls outside the two-year statute of limitations. He enclosed a copy of Parents' Rights and Procedural Safeguards.

28. District's practice was to provide to parents a notice of Parent's Rights and Procedural Safeguards at the time assessment plans were signed and then again at all IEP team meetings. Student offered no evidence District failed to provide Parents with a copy of their Parents' Rights and Procedural Safeguards on any occasion when District was required to provide such notice. There was no evidence Parents requested Student's pupil records from District.

29. Mother claimed at hearing she never saw the Triennial Report until sometime in the fall of 2013 in connection with a due process hearing against Hart School District involving Student.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA¹

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), 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) et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a 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 (2006); 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 (2006); 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 (2006); 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

¹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

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

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511 (2006); Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, 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. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, Student, as the complaining party, bears the burden of proof.

ISSUE: INDEPENDENT EDUCATIONAL EVALUATIONS AND THE STATUTE OF LIMITATIONS

5. Student contends District denied him a FAPE by not providing an IEE in response to Student's September 2013 request. Student argues he first became aware Ms. Ocasio had prepared the Triennial Report in September 2013. Student contends the Triennial Report was not prepared until the fall of 2013 and he did not receive a copy of the report until September 2013. Student argues because he was not aware of the Triennial Report until September 2013, his September 13, 2013 request for an IEE was timely, and District was required either to fund the IEE or file a due process complaint to defend its assessment. District contends Student's IEE request was untimely because it was made more than two years after the triennial assessments were conducted and the Triennial Report was completed. District argues Student knew at least as early as April

12, 2011, a psycho-educational assessment had been performed and the Triennial Report had been prepared because Mother signed the Assessment Plan in March 2011 and the IEP team reviewed the Triennial Report at the triennial IEP team meeting on April 12, 2011. District also contends because District received the Assessment Plan on March 30, 2011, Student's ability to challenge the triennial assessments accrued no later than May 30, 2011. District argues because Student's request for an IEE was made outside the applicable two-year statute of limitations, District was neither required to fund an IEE, nor file a due process complaint to defend its assessment.

6. The IDEA requires special education students to be reevaluated not more frequently than once a year unless the parents and school district agree otherwise, but at least once every three years unless the parent and District agree a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) A school district is required to conduct an assessment and convene an IEP team meeting within 60 days of receiving parental consent to assessment. (20 U.S.C. § 1414(a)(C)(I); Ed. Code, § 56344.)

7. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c).) "Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i)(2006).) To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1) and (b)(2)(2006).)

8. The provision of an IEE is not automatic. Code of Federal Regulations, title 34, part 300.502(b)(2)(2006), provides, in relevant part, that following the student's

request for an IEE, the public agency must, without unnecessary delay, either: (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing pursuant to parts 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. (See also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

9. A request for a due process hearing “shall 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.” (Ed. Code, § 56505, sub. (l).) The two-year limitations period does not apply to a parent if the parent was prevented from requesting the due process hearing due to either: 1) Specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or 2) The withholding of information by the local educational agency from the parent that was required to be provided to the parent under special education law. (*Ibid.*, see 20 U.S.C. § 1415(f)(3)(D).) Common law or equitable exceptions to the statute of limitations do not apply to IDEA cases. (*P.P. ex rel. Michael P. v. West Chester Area School Dist.* (E.D. Pa. 2008) 557 F.Supp.2d 648, 661, 662.) A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate. (*M.D. v. Southington Board of Education* (2d Cir. 2003) 334 F.3d 217, 221.) In other words, the statute of limitations begins to run when a party is aware of the facts that would support a legal claim, not when a party learns that it has a legal claim. (See *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039.)

10. Congress intended to obtain timely and appropriate education for special needs children. Congress did not intend to authorize the filing of claims under the IDEA

many years after the alleged wrongdoing occurred. (*Vacaville Unified Sch. Dist.* (SEA Calif. 2004) 43 IDELR 210, p. 4, 105 LRP 2671, quoting *Alexopoulos v. San Francisco Unified Sch. Dist.* (9th Cir. 1987) 817 F.2d 551, 555.) "[A] cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or has reason to know of the injury which is the basis of his action." (*Miller v. San Mateo-Foster City Unified School Dist.* (N.D. Cal. 2004) 318 F.Supp.2d 851, 861(quoting *Alexopoulos, supra*, 817 F.2d at p. 554).)

11. The "'knowledge of facts' requirement does not demand that the [party] know the specific legal theory or even the specific facts of the relevant claim; rather the [party] must have known or reasonably should have known the facts underlying the supposed learning disability and their IDEA rights." (*Miller, supra*, 318 F.Supp.2d at p. 861 (citing *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111).)

12. A parent may forfeit the right to an IEE at public expense by waiting too long to request an IEE from the school district. (See *Atlanta Public Schools* (SEA Georgia 2008) 51 IDELR 29, 108 LRP 52644 [where evaluation occurred more than three years earlier, student's request for an IEE was barred by the two-year statute of limitations].)

13. A public agency is not required to initiate a hearing where the IEE request was made concerning a district assessment more than two years old. (*Letter to Thorne (Thorne)* (OSEP 1990) 16 IDELR 606, 16 LRP 838.) The issue of the applicability of the statute of limitations to IEE requests was examined in *Placentia-Yorba Linda Unified School Dist. (Placentia-Yorba Linda)* (2012) OAH Case No. 2012051153. Relying on *Thorne*, *Placentia-Yorba Linda* held that the two-year statute of limitations applied to IEE requests and when an IEE request is made outside the statute of limitations, the school district is not required to fund the IEE or file for due process to defend the appropriateness of its assessment. The ALJ in that case reasoned since the purpose of an IEE is to permit a parent to challenge test results and recommendations "on *present*

district assessment findings," it would "serve no purpose to challenge an assessment so old it no longer applied to a child because it no longer addressed the child's present abilities and unique needs." (*Id.*) The ALJ further concluded no practical reason or public policy justification existed permitting a parent to request an IEE more than two years after a district presented its assessment, and to hold otherwise would lead to absurd results. Districts might be forced to litigate the appropriateness of assessments decades old and long since superseded by more recent assessments. (*Id.*; see also *Student v. Fullerton School Dist.* (2012) OAH Case No. 2011061318 [there is no "statutory or regulatory time limit for requesting an IEE after a school district has conducted an assessment, other than the two year statute of limitations imposed by California law for the filing of a due process complaint."].)

14. Because the two-year statute of limitations applies to Student's IEE request, Student had the burden of establishing his claim was not barred by the statute of limitations, including whether exceptions to the statute applied. Here, the weight of the evidence established by the preponderance of the evidence Student knew or had reason to know of the facts triggering his right to an IEE as of April 12, 2011, and at the very latest by May 30, 2011. Mother did not establish by any credible evidence any exceptions applied. Accordingly, Student's claim was time-barred.

15. Student attempted to establish at hearing Mother did not know the Triennial Report existed before September 2013. However, the weight of the evidence established Mother had knowledge of the assessment in March 2011 and of the Triennial Report as early as April 2011. Mother's testimony claiming she was not aware Student had been assessed by Ms. Ocasio was not credible. The weight of the evidence established District provided Mother with Student's Assessment Plan, which Mother admitted she signed in March 2011. The Assessment Plan clearly stated assessments would be conducted in the areas of academic/pre-academic achievement, social and

emotional development, motor ability, general ability, and health and developmental, and the school psychologist would be performing some of the assessments. The Assessment Plan stated the results of the assessments would be shared at the IEP team meeting. Accordingly, Mother knew or should have known District was required to assess Student pursuant to the Assessment Plan and to hold an IEP team meeting to discuss the results of the triennial assessments within 60 days of receiving parental consent.

16. District presented compelling evidence establishing the various components of the triennial psycho-educational assessment were administered, Mother knew they had been administered, and after the triennial assessments were completed a copy of the Triennial Report was prepared and presented at the triennial IEP team meeting on April 12, 2011. The assessment results were contained in the Triennial Report and portions of the Triennial Report were included verbatim or summarized in the April 12, 2011 IEP. Ms. Ocasio testified credibly she prepared the Triennial Report after the assessments were completed. Furthermore, Ms. Sparks credibly confirmed information in the IEP came from the tests she administered as part of the triennial psycho-educational assessment of Student. Even Mother testified she recalled a discussion of some of the triennial assessment results, specifically the academic testing and occupational therapy. The evidence also established Mother completed the questionnaires for three standardized assessments as part of the triennial assessment. Notably, the Triennial Report includes the detailed results of Mother's rating scales and Mother offered no credible explanation as to why she would not have filled them out.

17. Ms. Ocasio, Mr. Frisina, Ms. Sparks, and Ms. Obrien, all testified credibly that District's practice was for District psychologists to bring a copy of the psycho-educational assessment to the IEP team meeting where the assessment was discussed and reviewed with the parent prior signing the IEP. Ms. Sparks and Principal Stump

credibly testified that District's practice was to check the box on the IEP next to "see attached Psycho educational report," if the psycho-educational assessment report was present at the IEP team meeting. In Student's case, the box on the IEP was checked, establishing that the Triennial Report was considered at the April 12, 2011 IEP team meeting.

18. Ms. Sparks was a particularly credible witness on these key issues and her responses were candid and believable. She had a friendly relationship with Mother and had voluntarily left her employment with District. As such, Ms. Sparks demonstrated no apparent bias. Ms. Sparks testified that some of the assessment information in the IEP was her work product. She was also adamant a school psychologist led all triennial IEP team meetings she attended in her twelve years at District, a copy of the psycho-educational assessment report was passed out at every triennial IEP team meeting Ms. Sparks attended and the report was the document determining the course of the triennial IEP team meetings. Ms. Sparks also credibly testified that Ms. Ocasio was always well prepared at the IEP team meetings and she presented a copy of her psycho-educational assessment report at every triennial IEP team meeting Ms. Sparks attended.

19. During the hearing, Mother conceded that she was not certain she had not received a copy of the Triennial Report in April 2011. Student's education records typically remained loose in Mother's bedroom for some unspecified amount of time before they were filed away. During that time, they could have been lost, misplaced, or thrown away. As such, the fact that Mother did not find a copy of the Triennial Report in her accordion file at home was not convincing evidence that she had not received it. Mother's testimony that she never saw the Triennial Report before the fall of 2013 was not credible. District offered strong and persuasive evidence through extensive documentation and corroborating testimony of District employees establishing that Mother had signed the Assessment Plan on March 28, 2011, an IEP team meeting had

been held in April 2011 at which the assessments were discussed, and a copy of the IEP and Triennial Report had been provided to Mother in the regular course of business by District no later than the end of the 2010-2011 school year.

20. In contrast to Mother's uncertainty about her receipt of the Triennial Report, District presented contemporaneous evidence in the form of Ms. Gonzalez' color-coded Chart establishing conclusively the Triennial Report had been mailed to Parents as of the end of the 2010-2011 school year. Ms. Gonzalez not only specifically recalled seeing the Triennial Report in 2011, but Line 55 on the Chart pertaining to Student was blue. The evidence established Line 55 would only be blue if Gonzalez had mailed a copy of the Triennial Report to Parents. Accordingly, the weight of the evidence demonstrated that District had provided Mother with a copy of the Triennial Report, both in draft form at the April 12, 2011 IEP team meeting and a final copy later by mail.

21. The April 12, 2011 IEP itself put Mother on notice assessments had been performed and a psycho-educational report had been prepared. The IEP makes repeated references to the Triennial Report and to the data from the current assessments and instructs the reader to "See attached Psycho educational report." Some of the assessment results are actually contained in or summarized in the IEP, giving Student ample notice triennial assessments had taken place. Notably, Mother not only admitted she received a copy of the April 12, 2011 IEP, but her usual practice was to read the IEP before she placed it in her file at home. The issue of the 2011 triennial assessments came up again at the Hart School District January 2012 IEP team meeting which Mother attended, further establishing Mother had notice of the March 2011 assessments well before September 2013.

22. Student also unsuccessfully attempted to establish the Triennial Report did not exist by presenting evidence that Hart School District did not have a copy of the Triennial Report in its files when Student requested a copy of his educational records

from the Hart School District. Whether Hart School District may or may not have had the Triennial Report in its files was not conclusive proof the Triennial Report did not exist prior to September 2013. At most, the evidence presented left open the possibility that the Triennial Report was lost or misplaced by Hart School District sometime between 2011 and 2013, after it received Student's files.

23. The fact that District had more than one version of the Triennial Report in September 2013 also did nothing to detract from the weight of the evidence establishing Mother knew in April 2011 about the triennial assessments, the results of those assessments, and the existence of the Triennial Report. Ms. Ocasio testified she prepared the Triennial Report in 2011, located a copy of the Triennial Report on her computer in 2013, and sent it to Ms. Obrien within ten minutes of first being requested to provide her with a copy. While the evidence did not clarify exactly what changes were made between the two versions in that ten-minute time period, neither party offered any evidence of substantive differences between the two versions of the Triennial Report. All of the same assessment information was in both versions. No inference can be drawn from the notations "259 KB" and "354 KB" on the two cover emails except the file sizes might have been different.

24. Student's first request for IEE from District in relationship to the March 2011 Triennial Report was unequivocally September 13, 2013. The IEE request was made more than two years after the triennial psycho-educational assessment was conducted, the Triennial Report was prepared, and the April 12, 2011 IEP team meeting where the Triennial Report was reviewed occurred. Student's time to request an IEE for that assessment had expired.

25. Student failed to establish by the preponderance of the evidence an exception to the statute of limitations applied. As to the first exception, it was not applicable to these facts. Student offered no credible evidence District made any specific

misrepresentations claiming it had solved the problem forming the basis of the due process hearing request, which deterred Student from filing a request for due process within the statutory period. The evidence established that District clearly communicated the reasons for its rejection of Student's request for an IEE to Student in September 2013, and Student offered no evidence he had ever requested an IEE relating to the 2011 triennial assessments before September 2013. In addition, Student failed to establish by any credible evidence District withheld information from him preventing him from filing a due process request. The weight of the evidence established that Mother was familiar with the special education process. She had two children in special education, attended multiple IEP team meetings, and previously exercised her right to request an IEE with regard to Sister. Student offered no evidence that Parents did not understand their rights, or District failed to provide them with a copy of the notice of Parents' Rights and Procedural Safeguards on any occasion which required District to do so, or that District failed to comply with a request for pupil records. The evidence conclusively established Student knew or should have known that he could have requested an IEE from District, or filed a due process complaint to challenge any aspect of the triennial process at any time between April 11, 2011 and May 30, 2013, and he did not do so.

26. In conclusion, Student failed to meet his burden of demonstrating Student was denied a FAPE by District by not providing an IEE in response to Student's September 2013 request. Student's September 2013 request was barred by the two-year statute of limitations and neither of the two exceptions applied. District appropriately denied the IEE request and was not required to fund the IEE at public expense or file a due process complaint to defend its 2011 triennial assessments.

ORDER

All relief sought by Student is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District was the prevailing party on the only issue presented.

RIGHT TO APPEAL

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

DATED: January 28, 2014

/s/

LAURIE GORSLINE

Administrative Law Judge

Office of Administrative Hearings