

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

VAL VERDE UNIFIED SCHOOL DISTRICT.

OAH Case No. 2013090251

DECISION

Student filed his Due Process Complaint on September 4, 2013. The Office of Administrative Hearings continued the hearing at the parties' request on October 18, 2013.

Kara K. Hatfield, Administrative Law Judge (ALJ) heard this matter in Perris, California, on January 21, 22, 23, and 28, 2014.

Student's mother (Mother) represented Student. Student attended the hearing on January 21, 22, and 23, 2014.

Attorney Constance M. Taylor represented Val Verde Unified School District (District). Troy Knudsvig, District's Director of Special Education, and Jeff Janis, District's Special Education Coordinator, attended all days of the hearing.

On the last day of hearing, the matter was continued at the parties' request until February 11, 2014, so the parties could file and serve written closing arguments. Closing arguments were filed, the record was closed, and the matter was submitted on February 11, 2014.

## ISSUES<sup>1</sup>

1. Whether District denied Student a free appropriate public education (FAPE) by failing to timely and properly<sup>2</sup> assess Student during the 2012-2013 school year;
2. Whether District denied Student a FAPE by failing to assess Student in the areas of orthopedic impairment and speech and language;

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<sup>1</sup> The issues are those presented in Student's complaint and framed in the Order Following Prehearing Conference. The ALJ has reordered and revised the issues without changing their substance, for purposes of organizing this decision and correcting a date to conform to the complaint and the evidence. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) Although both parties presented evidence regarding Mother's request for an independent educational evaluation in the 2013-2014 school year, Mother's request was made after the complaint was filed and therefore no issue regarding the IEE was alleged in the complaint. "[T]he party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under this section, unless the other party agrees otherwise." (Ed. Code, § 56502, subd. (i).) Accordingly, this Decision does not address Mother's request for an independent educational evaluation in the 2013-2014 school year.

<sup>2</sup> Student's evidence and contentions regarding whether the District's assessment was proper were more targeted to and subsumed within Issue 2.

3. Whether District denied Student a FAPE by failing to ensure Student's mother meaningful participation at individualized education program (IEP) meetings held on (i) May 24, 2013, (ii) May 29, 2013, and (iii) August 27, 2013; and

4. Whether District denied Student a FAPE by failing to adequately address his behavior and academic concerns, in IEP's offered on (i) May 24, 2013, (ii) May 29, 2013, and (iii) August 27, 2013.

## SUMMARY OF DECISION

Student contends he was denied a FAPE in the 2012-2013 school year because: District untimely conducted an initial assessment; Student was not assessed in all areas of suspected disability; his mother was not afforded meaningful participation at IEP team meetings; and District's FAPE offer did not adequately address his behavior and academic concerns. District contends Student was not denied a FAPE because: District lacked authority to conduct an initial assessment without the consent of both of Student's parents; Student was assessed in all areas of suspected disability; District afforded Mother the opportunity for meaningful participation in the three IEP team meetings; and because District could address all of Student's needs in the general education environment, he was not eligible for special education and related services.

Student did not meet his burden of demonstrating he was denied a FAPE as to any of the issues considered.

All of Student's requests for relief are denied.

## FACTUAL FINDINGS

### BACKGROUND

1. Student was 11 years and two months old at the time of hearing. At all relevant times, he lived with his father (Father) within District boundaries. Student was not previously eligible for special education. Because of his short stature and other

medical conditions due to having acondroplasia, a disorder of bone growth that causes the most common type of dwarfism, he has received accommodations at school.

2. Student's parents are divorced. The San Bernardino County Superior Court entered the most recent custody order in July 2011. A "corrected" order was issued in August 2013, after Mother sought clarification of the July 2011 order due to aspects of the current dispute with District. Mother and Father "have joint legal custody and joint physical custody of" Student. Specifically, "[t]he parents shall share equally in authority and the responsibility to make decisions regarding the health, education and welfare of" Student. Additionally, the order stated, in relevant part, that the "parents shall confer in making decisions" regarding "[m]ajor decisions regarding education and day care providers, including enrollment [or] termination in attendance from school or day care." The custody order did not require agreement about, or mutual consent for, these issues, but also did not specify how any decision regarding education would be made if, after conferring, the parents did not agree.

#### 2011-2012 SCHOOL YEAR

3. In the 2011-2012 school year, Student attended fourth grade at Manuel L. Real Elementary School (Real). He had some behavior problems, such as not finishing class assignments and not completing his homework. He was occasionally sent to the principal's office and "given a talking to" for these low level issues.

4. In the 2012-2013 school year, Student attended fifth grade at Real. He began the year in James Ruppe's class. In the fall trimester, Student violated the Student Code of Conduct twice. On a daily basis, Student put his head down during assignments and tests relating to math and writing and therefore did not complete classwork. Student also disrupted class daily with behaviors that prevented other students from learning. Student infrequently made verbal threats toward his teacher, such as "I can get you fired." Student's behaviors usually persisted until he was reprimanded or removed

from class. District staff counseled Student, held parent-teacher conferences, and punished Student using time-outs and in-school suspension.

5. Mr. Ruppe believed that Student was capable of learning and learned material presented in class, despite his disruptive behaviors. He occasionally sent Student to Principal Alejandro Alcazar's office when Student did not complete his classwork. Principal Alcazar had Student sit outside his office to work on classwork, which he completed. Principal Alcazar occasionally reported to Mr. Ruppe that Student had scored 100 percent on the work completed at his office. On one occasion, Mother came to Mr. Ruppe's class to observe; Student sat with Mother while he took a test on adding fractions, which Mr. Ruppe described as a complex process, and Student scored 100 percent. Despite Student's occasional demonstrations of his knowledge and capacity to learn, according to Mr. Ruppe, Student "never" turned in his homework during the trimester Student was in his class. Student always had an excuse, forgot, or claimed he did not write down or did not receive the homework.

6. Near the end of the trimester, Student's behavior escalated and became a safety concern for him and other students.

#### DECEMBER 2012 BEHAVIOR PLAN

7. District held a meeting on December 3, 2012, to develop a behavior support plan (behavior plan) for Student. Father attended the meeting and informed school personnel that Student was seeing an outside therapist and had a mentor through Little People of America, Inc. Mother was not notified of the meeting because District purposely held separate meetings to avoid controversy between Student's parents.

8. As part of the behavior plan, Principal Alcazar changed Student's classroom to minimize Student's behaviors. District assigned Student to Melissa Fowler's classroom for small group instruction in reading and language arts and to Rafael

Osaba's classroom for math, science, social studies, and physical education. The behavior plan required his teachers to break assignments into chunks and/or modify assignments. The behavior plan goals were for Student to complete all work assignments and to engage in appropriate attention-seeking behavior.

9. On or about December 5, 2012, Mother received a copy of the December 3, 2012 behavior plan. On December 6, 2012, Mother emailed Principal Alcazar, unaware that Father had attended a meeting about the behavior plan. Mother requested that Student be "tested for learning disabilities [and] behavior issues" and stated that her email was her written notice.

10. On December 7, 2012, Principal Alcazar emailed Mother confirming a meeting with Mother on December 10, 2012. Principal Alcazar also informed Mother that District referred her request to have Student assessed to the school psychologist, Dr. Antoinette Vallejos, who would have assessment paperwork ready for Mother at the December 10, 2012 meeting.

11. Mother discussed the behavior plan with school personnel at a meeting on December 10, 2012. Father did not attend the meeting. Mother informed school personnel that contrary to what Father had reported, Student was not seeing a therapist and did not have a Little People of America, Inc. mentor. The behavior plan was amended to reflect the conflicting reports provided by the parents.

12. Student's teachers prepared weekly progress reports reflecting that Student continued to engage in disruptive behaviors and did not complete classwork and did not turn in homework during the two weeks before the winter break.

#### DECEMBER 2012 ASSESSMENT PLAN AND MOTHER'S CONSENT TO INITIAL ASSESSMENT

13. District prepared an initial assessment plan for a psychoeducational assessment dated December 17, 2012. The assessment areas were selected by Dr.

Vallejos after consulting with other District staff and based on the areas she usually assesses for a student suspected of having a learning disability. The assessment plan included the following areas: academic achievement; social/adaptive/behavioral/emotional; processing; perceptual/motor development; cognitive development; health development; and "other" ("i.e., vocational, orientation/mobility, observation, interview, review of records").

14. District presented the assessment plan to Mother and to Father.

15. On December 21, 2012, Principal Alcazar notified Mother that the school had not received a signed assessment plan from either parent. Father informed District that he did not consent to the assessment, and Principal Alcazar informed Mother that he would ask Father to provide written notification that he did not want Student tested. Principal Alcazar also informed Mother that District did not assess students for eligibility for special education unless both parents agreed to assess the student.

16. Mother signed consent to the initial assessment plan on February 11, 2013. Although Mother had not mentioned concerns about Student's language and speech development in her written request that he be assessed for special education, Mother had lingering concerns in this area because Student had early childhood delays in language and speech development. In addition to signing consent to the assessments, Mother made notations on the form which, when read together, ambiguously suggested that she only wanted District to assess Student in academics and in communication development, including language and speech, which District had not proposed to assess. Mother's notations ambiguously indicated that she did not want Student assessed in the areas of social/emotional, behavior, body movement, or other health issues.

17. School psychologist Dr. Vallejos gave no significance to Mother's notations. She saw that Mother had circled the item for communication development on

the assessment plan; although she did not know what the circle Mother put around that assessment category meant, she did nothing to clarify Mother's intent.

18. Father initially did not consent to Student being assessed. Father did not want Student to be labeled "special needs" or to develop what Father termed "little bus syndrome." District personnel continued to seek Father's consent.

#### MARCH 2013 BEHAVIOR PLAN

19. On March 1, 2013, District revised Student's behavior plan. Student's classroom conduct and willingness to work had somewhat improved. Student's classroom placement was changed and he remained in Mr. Osaba's class throughout the school day. However, he could earn time with Ms. Fowler on Fridays if his behavior was positive during the week, which gave him the opportunity to have 30 minutes on the computer or some other preferred activity.

#### FATHER CONSENTED TO INITIAL ASSESSMENT

20. On March 18, 2013, Father signed consent to the initial assessment plan, without any comments or attempted modifications.

#### 2013 PSYCHOEDUCATIONAL ASSESSMENT

21. In April and May 2013, District assessed Student, the results of which were reported in a May 20, 2013 Multidisciplinary Psychoeducational Report prepared by Dr. Vallejos. The assessment consisted of a variety of instruments, including standardized tests, rating scales completed by Mr. Osaba, Father, and Student, observation, review of records, and interview. The basis for conducting the assessment was a suspected learning disability.

22. Student's nonverbal intelligence quotient was 98, placing his overall nonverbal ability in the average range.



23. Student functioned in the average range in visual motor integration for his chronological age and had no visual perceptual difficulties.

24. Student functioned at the seventh grade level in eye tracking, which is a form of visual information processing, fine motor skills, eye-hand coordination, and attention.

25. Student's phonological processing skills fell within the average range for phonological memory, the high range for phonological awareness, and the superior range for rapid naming from long-term or permanent memory. His scores did not suggest the presence of a psychological processing deficit that could significantly interfere with Student's acquisition and mastery of academic skills.

26. Dr. Vallejos described Student's behavioral functioning as "generally appropriate" as related to the Student Code of Conduct, despite the two documented offenses related to the Student Code of Conduct in October and November 2012. Dr. Vallejos concluded Student's behavior was appropriate because she disregarded the results of the Behavioral Assessment System for Children, Second Edition, Teacher Rating Scale, completed by Mr. Osaba. Dr. Vallejos disregarded the responses provided by Mr. Osaba because internal controls for validity indicated that his responses were excessively negative and not consistent. On another rating instrument, Mr. Osaba reported Student was: resistant; easily distracted; hesitant/unsure; self-critical; impulsive; easily frustrated; withdrawn; slow to respond; and gave up easily. He rated Student as average in his ability to work well in a group and to work independently. Mr. Osaba rated Student's work habits as "regular" in attendance and punctuality, "poor" in having class materials on hand and completion of assignments, and Mr. Osaba invented and interlineated a new category of "almost never" for returning homework. Mr. Osaba reported that Student typically completed 30 percent of classwork, and returned only 1 percent of his homework complete.

27. Based on Dr. Vallejos' interactions with Student during the assessment process, Dr. Vallejos concluded that Student's speech was of normal volume and speed, his response time was average, and he exhibited adequate language proficiency in conversational settings. Student did not appear to have any language or communication deficits that would directly affect Student's ability to benefit from the educational process or warrant further assessment of Student's speech and language.

28. Ms. Fowler, a special education teacher, administered the Woodcock-Johnson Tests of Achievement, Third Edition (WJ-III). Student's scores ranged from low average in reading comprehension, math calculation skills, math reasoning, and academic applications; average in written expression; and high average in basic reading skills. A comparison between standard scores from achievement measures and scores from cognitive measures revealed that Student was functioning at his academic expectancy.

29. Student's scores from the WJ-III reflected that Student was a good reader, scoring at the 7.3 grade level in brief reading and at the 8.8 grade level in basic reading skills, but he was weak in reading comprehension, scoring at the 3.8 grade level. In written expression, Student scored at the 6.1 grade level. Although he was able to do basic math calculation, he scored at the 3.6 grade level in brief math, the 3.7 grade level in broad math, the 4.2 grade level in math calculation skills, and the 4.0 grade level in math reasoning.

30. Student's recent grades were B in science, C in spelling, D in reading, language arts, writing, and mathematics, and F in history/social science.

31. Dr. Vallejos concluded that Student's needs could be met in the general education setting and that Student did not need special education support services. Dr. Vallejos reported that Student did not meet the eligibility criteria for having a

specific learning disability because she did not observe evidence of a severe discrepancy between ability and achievement or of a processing disorder.

#### MAY 2013 MEETING AND IEP TEAM MEETINGS

32. On May 8, 2013, District notified Student's Mother and Father of a one hour IEP meeting on May 20, 2013. On May 9, 2013, Father responded that he would attend the May 20 meeting. On May 12, 2013, Mother responded that she would attend the May 20 meeting.

33. On May 14, 2013, Mother emailed Ms. Fowler, requesting to go over the assessment results prior to the IEP meeting and acknowledging that the IEP meeting might need to be rescheduled. On May 16, 2013, Ms. Fowler emailed Mother and Father that the meeting on May 20 would not be an IEP meeting, but the meeting would be held to discuss the results of Student's assessment. The IEP meeting would be rescheduled.

34. On May 20, 2013, Dr. Vallejos and Ms. Fowler reported to Mother and Father the results of the psychoeducational assessment.

35. At the conclusion of the May 20, 2013 meeting, District gave notice to Mother and Father of a one hour IEP meeting on May 24, 2013. On May 20, 2013, Father returned the notice of the May 24 meeting indicating he would attend. Also on May 20, 2013, Mother returned the notice of the May 24 meeting requesting that the meeting be held on May 23, 29, or 30, 2013.

36. District held an IEP meeting on May 24, 2013. All required District staff, Father, and Father's wife attended. District did not inform Mother that the meeting was going forward as noticed for May 24, and Mother did not attend. District reported that the psychoeducational assessment led District to conclude that Student was not eligible for special education. Father indicated concern that Student was not working on grade level math and behavior. He also was ambiguously concerned about Student's "math in

the middle school setting and [Student] being a little person.” Father agreed that Student did not have a specific learning disability, agreed to all parts of the IEP, and understood and agreed that Student was not eligible for special education.

37. On May 28, 2013, District gave notice to Student’s Mother of a one-hour initial IEP meeting on May 29, 2013. Mother responded by email that she would attend.

38. District held an IEP meeting on May 29, 2013. All required District staff and Mother attended the meeting. Father did not attend.

39. After preliminary issues were addressed at the May 29, 2013 meeting, Mother expressed concerns about the May 24 meeting that had been held without her and asked what information District had audio recorded or documented in writing regarding that meeting. Mother became angry and left the meeting. She put the meeting “on hold” to obtain clarification from the Family Court regarding her rights to make educational decisions for Student.

40. District attempted to schedule another IEP meeting for June 3, 2013, but Mother declined to attend. The 2012-2013 school year ended shortly after the May 29, 2013 IEP meeting.

#### AUGUST 27, 2013 IEP MEETING

41. Student transitioned to middle school and began attending sixth grade at Tomas Rivera Middle School on or about August 12, 2013. The middle school principal, Joshua Workman, placed Student in a college preparatory language arts class. The class used differentiated instruction to provide students material at the level at which they were individually working, gave students unlimited time to take tests, and offered students flexibility in choosing which assignments to turn in. Principal Workman believed that the college preparatory class would be appropriate for Student because he would have more autonomy and control over which assignments he would complete and Principal Workman hoped that Student would then turn in more of his assignments.

42. On August 13, 2013, District sent notice to Mother of a one hour IEP meeting scheduled for August 27, 2013.

43. District held an IEP meeting on August 27, 2013. All required District staff and Mother, Father, and Student attended. The IEP team reviewed the May 2013 assessments. Student's sixth grade language arts teacher, Stephen Matthew Blomberg, reported that Student was completing work in the average range for his current class, but was not turning in all completed work and therefore at that time was failing. Student's sixth grade math teacher, Veronica Rivera, reported that Student was doing well with multiplication but demonstrated some difficulty with multiple digit multiplication and division and was not turning in his homework. The District team members reported that Student had not demonstrated any noticeable negative behaviors at the middle school in the two weeks school had been in session, although Ms. Rivera had redirected him to task a few times in class.

44. One of Student's parents requested that Student not run full laps during physical education class, because his short stature presented challenges with meeting the time and/or distance requirements. District personnel stated a medical note was required if the request was based on a medical need. Mother stated she had documentation at home and would provide it to the school. Dr. Vallejos shared the results and conclusions from her May 2013 assessment report. Dr. Vallejos informed the IEP team that she had concluded that Student did not qualify for special education under the category of specific learning disability. District's Special Education Coordinator, Jeff Janis, and school counselor, Shayla Williams, told Mother that her concerns could be addressed through a Section 504 plan and that a separate meeting would be set for another time for that purpose. Father signed the IEP, again indicating his agreement to all parts of the IEP and his understanding and agreement that Student was not eligible for special education. Mother signed the IEP as "participation only" and

took the IEP home to review, with an agreement to return it to the middle school administration by September 3, 2013.

## 2013-2014 SCHOOL YEAR

45. During the first term of sixth grade, Student performed well in some ways, such as scoring higher than the class average on a cumulative final exam and winning the class spelling bee, but he continued not to turn in assignments and homework. He earned D and F grades. At the time of the due process hearing, Mother continued to suspect that Student had an undiagnosed learning disability.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>3</sup>

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)<sup>4</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are (1) to ensure that all children with disabilities have available to them a 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).)

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

<sup>4</sup> All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

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 (Ninth Circuit) 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; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528]; 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 ONE: TIMELINESS OF ASSESSMENTS

5. In Issue One, Student contends that District denied him a FAPE for the 2012-2013 school year by failing to timely assess him after Mother requested that he be assessed for eligibility for special education. Student argues that District should not have delayed its initial assessments because Mother's consent alone was sufficient for District to assess Student for eligibility for special education. Specifically, Student contends the assessments should have been completed within 60 days of February 11, 2013, when Mother provided written consent, rather than waiting until after Father consented to the assessment on March 18, 2013. Student further contends that the delay resulted in a denial of a FAPE. District contends, in reliance on *Oxnard Union High School District and Ventura Unified School District (Oxnard)*, OAH Case No. 2007040834, that when a student's parents are divorced, the consent of both parents is required before a special education assessment may be conducted. District contends that its assessment of Student in May 2013 was therefore timely and did not deny Student at FAPE.

6. 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.)<sup>5</sup> 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).)

7. When a student is referred for assessment, the school district must provide the student's parent with a written proposed assessment plan. (Ed. Code, § 56321, subd.

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<sup>5</sup> The IDEA uses the term "evaluation," while the California Education Code uses the term "assessment." This decision will use the term "assessment."

(a.) A school district shall make reasonable efforts to obtain informed consent from the parent before conducting an initial assessment. (20 U.S.C. § 1414(a)(1)(D); Ed. Code, § 56321, subd. (c)(1).) The assessment may begin immediately upon receipt of the parent's consent. (Ed. Code, § 56321, subd. (c)(4).) Consent for initial assessment shall not be construed as consent for initial placement or initial provision of special education and related services. (20 U.S.C. § 1414(a)(1)(D)(i)(I); Ed. Code, § 56321, subd. (d).)

8. When a student is referred for assessment, the school district must provide the student's parent with a written proposed assessment plan within 15 days of the referral (with limited exceptions not applicable in this case). (Ed. Code, § 56321, subd. (a).)

(a.) A school district shall make reasonable efforts to obtain informed consent from the parent before conducting an initial assessment. (20 U.S.C. § 1414(a)(1)(D); Ed. Code, § 56321, subd. (c)(1).) The parent shall have at least 15 days from the receipt of the proposed assessment plan to arrive at a decision; the assessment may begin immediately upon receipt of the parent's consent. (Ed. Code, § 56321, subd. (c)(4).) Consent for initial assessment shall not be construed as consent for initial placement or initial provision of special education and related services. (20 U.S.C. § 1414(a)(1)(D)(i)(I); Ed. Code, § 56321, subd. (d).)

9. Once a student has been referred for an initial assessment to determine whether the student has a disability and by reason thereof needs special education and related services, a determination of eligibility and an IEP meeting shall occur within 60 days of receiving parental consent for the assessment. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56302.1, subd. (a).)

10. When a judicial decree or order identifies a specific person or persons as having authority to make educational decisions on behalf of a student, that person is determined to be the parent for purposes of the IDEA. (34 C.F.R. § 300.30(b)(2); Ed. Code, § 56028, subd. (b)(2).) When the parents of a student are divorced, the parental rights

established by the IDEA apply to both parents, unless a court order or state law specifies otherwise. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46568 (August 14, 2006); see also *Letter to Biondi*, OSEP, October 7, 1997, *Letter to Best*, OSEP, January 8, 1998, and *Letter to Serwecki*, OSEP, February 28, 2005.)

11. Although the Ninth Circuit Court of Appeals has not expressly commented on the issue of which of two divorced parents has superior rights in a special education related matter under the IDEA, the Second and Seventh Circuits have addressed the question and determined that “the question of which divorced parent should be allowed to perform parental functions under the IDEA . . . is a matter for State or local divorce courts. Just as these courts deal with matters of custody, they can appropriately deal with matters related to the responsibility for making educational decisions on behalf of the child.” (*Pam Taylor v. Vermont Department of Education et al.* (2nd Cir. 2002) 313 F.3d 768, 780; see also *Navin v. Park Ridge School Dist.* (7th Cir. 2001) 270 F.3d 1147, 1149 [“a divorced parent retains statutory rights [and] nothing in the IDEA overrides states’ allocation of authority as part of a custody determination”].) Consistent with the above, the express language of a custody order has been used to determine which of two divorced parents has decision-making authority regarding education. (See *North Allegheny School District* (Penn. SEA 1997), 26 IDELR 774; *Upper Darby School District* (Penn. SEA 2002), 36 IDELR 285; *L.T. ex rel. C.T. v. Denville Township Board of Education* (N.J. Adm. 2004), 2004 WL 2623606.)

12. In California, joint legal custody means that both parents share the right and the responsibility to make decisions relating the health, education, and welfare of a child. (Fam. Code, § 3003.) When a family court makes an order of joint legal custody, the court must specify the circumstances under which the consent of both parents is required to be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent. If the court does not state that

the consent of both parents is required on an issue, either parent acting alone may exercise legal control of the child. (Fam. Code, § 3083.)

13. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 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.)

14. As an initial matter, Mother is correct that her consent was sufficient to start the timeline for District to complete the initial assessments. Under the terms of the custody order affecting Student at the times relevant to the complaint, both Mother and Father shared equally in authority and the responsibility to make decisions regarding Student's education. Although the order states that Mother and Father must "confer" in making "major decisions regarding education," the order does not require Mother and Father to agree or require consent from both parents. Because the order did not specify the circumstances under which the consent of both parents was required to be obtained in order to exercise legal control of the child, either parent acting alone had authority to consent to the initial assessment of Student for special education and related services. District was required to accept and act upon the consent of either parent to initial assessment of Student.

15. To the extent District relies on the 2008 decision in *Oxnard*, it is not persuasive. (See Cal. Code of Regs., tit. 5, § 3085 [decisions in prior special education

hearings may be persuasive, but are not binding].) District interpreted the 2008 decision in *Oxnard* as standing for the proposition that the consent of both divorced parents is required for the initial assessment of a student. In that case, a disabled student's divorced mother and father shared joint legal custody. The father misrepresented to the district that he had sole rights to make educational decisions for the student and the student was assessed, an IEP team meeting was held, an IEP was developed, and a special education placement was selected, all without any notice to the student's mother. The student's mother was then notified and although she requested a further IEP meeting be held so that she could participate, the school district declined to hold another IEP meeting and the special education placement and services commenced. The mother was later able to have an IEP meeting convened, but the meeting did not provide serious consideration of the mother's concerns. The mother expressly did not consent to the implementation of the IEP (which had already been implemented). An ALJ ruled that the district violated the mother's procedural rights under the IDEA when it failed to provide her prior written notice and failed to obtain her consent prior to conducting assessments, prior to holding the initial IEP team meeting, and prior to implementing the IEP. Because a perfunctory IEP team meeting held three months after the first meeting could not rectify the fact that the student had been assessed for, deemed eligible for, and provided special education and related services without any notice to the mother, all in violation of mother's rights, the ALJ ordered that the student be removed from special education and all assessments of the student conducted by the district be expunged from the student's records.

16. District overemphasizes the lack-of-consent-to-assessment portion of *Oxnard*. The core of the *Oxnard* decision was the lack of notice to the student's mother at all stages of her daughter's entry in special education, and the fact that when the mother finally learned her daughter was going to receive special education and related

services, she expressly did not consent to the provision of special education and related services. Those circumstances and events were very different from Student's case.

17. Here, District responded to Mother's request for assessments for special education eligibility by providing prior written notice and an initial assessment plan to both Mother and Father. Either of Student's parents had legal authority to consent to an initial assessment for special education eligibility. Mother provided the necessary and individually sufficient written consent to the initial assessment of Student on February 11, 2013. District was required to complete the assessment and hold an IEP team meeting within 60 days, on or before April 12, 2013. District did not complete the initial assessment and attempt to hold an IEP team meeting until May 20, 2013, a delay of 38 days. Student met his burden of establishing that District procedurally violated the IDEA by failing to timely assess Student when Mother requested and consented to District's assessment of whether Student was eligible for special education. However, as discussed below, Student did not demonstrate that the delay rose to the level of a denial of a FAPE.

18. Student did not meet his burden of persuasion that District's failure to timely assess Student resulted in a loss of educational opportunity or cause a deprivation of educational benefits. Notwithstanding Mother's ongoing concern that Student may have had a specific learning disability, Student offered no competent evidence to contradict Dr. Vallejos' opinion that Student did not have a specific learning disability or any other qualifying condition and the IEP team's conclusion that Student was not eligible for special education and related services. Accordingly, absent evidence that Student should have been found eligible, District's delay in conducting the initial assessment cannot be said to have caused a loss of educational opportunity or a deprivation of educational benefits.

19. Similarly, Student also did not meet his burden of establishing that District's delay in conducting the initial assessment significantly impeded Mother's opportunity to participate in the decision making process. The barriers to Mother's opportunity to participate in the decision making process were the result of assumptions by Mother and poor communication from District about when the first IEP team meeting would happen. The facts that the assessments were delayed and an IEP team meeting was held approximately six weeks after it was required by law did not cause a significant impact on Mother's ability to participate in the decision making about Student's educational program.

20. In summary, Student failed to carry his burden of proof that District's delay in conducting the initial assessment was a procedural violation that amounted to a denial of FAPE.

#### ISSUE TWO: ASSESSMENT IN ALL AREAS OF SUSPECTED DISABILITY

21. In Issue Two, Student contends that District denied him a FAPE for the 2012-2013 school year by not assessing him in the areas of orthopedic impairment and speech and language. District contends that because Mother's request for assessment specified suspected disability only in the areas of specific learning disability and behavior, and because no District personnel suspected Student had disabilities relating to orthopedic impairment or speech language impairment necessitating special education services, District's psychoeducational assessment assessed Student in all suspected areas of disability.

22. Legal Conclusion 13 is incorporated by reference.

23. The IDEA and California state law require that a school district assess a student in all areas of his or her suspected disability. (20 U.S.C. § 1414(b)(3); Ed. Code, § 56320, subd. (f).) A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the

student. (34 C.F.R. § 300.304(b)(1); see also Ed. Code, § 56320, subd. (b)(1)). The assessment must be sufficiently comprehensive to identify all of the student's special education and related services needs, regardless of whether they are commonly linked to the student's disability category. (34 C.F.R. § 300.304(c)(6).)

24. Student did not meet his burden of persuasion on this issue. District initiated assessments of Student in areas of concern expressed by Mother, and specifically that she was concerned that Student may have a specific learning disability and that his behavior may be interfering with his educational progress. District's assessment plan was developed by the school psychologist and proposed to evaluate Student in the following areas: academic achievement; social/adaptive/behavioral/emotional functioning; processing; perceptual/motor development; cognitive development; health development; and "other" areas, defined to include vocational and orientation/mobility.

25. When she annotated the District's assessment plan, Mother did not clearly and unambiguously inform District that she did not want Student assessed for behavioral concerns, body movement concerns or other health issues. Similarly, Mother did not notify District at the time of her initial request for assessment that she wanted Student assessed for speech and language concerns. Father consented to all assessments proposed in District's plan and did not ask for additional areas of assessment.

26. Student offered no credible evidence that either parent requested an orthopedic assessment or that Student had needs that warranted such an assessment at the time District initially assessed Student in May 2013. Other than some testimony concerning the challenges Student's small stature posed in meeting the time or distance requirements for some physical education class activities, Student did not produce any



evidence establishing that the District was aware of orthopedic issues that necessitated assessment.

27. Similarly, Student offered no credible evidence that Student had a suspected disability in the area of speech and language. Dr. Vallejos reported that Student did not appear to have a language or communication deficit that might affect Student's ability to benefit from the educational process or justify a speech and language assessment. Student offered no evidence to credibly contradict Dr. Vallejos' conclusions.

28. In sum, the evidence showed that based on what was known at the time, and Mother's request, Student was assessed in all areas of suspected disability. Student failed to meet his burden of proof that District denied him a FAPE by failing to assess him in the additional areas of orthopedic impairment and speech and language.

### ISSUE THREE: MOTHER'S OPPORTUNITY FOR MEANINGFUL PARTICIPATION IN IEP MEETINGS

29. In Issue Three, Student contends that District denied him a FAPE for the 2012-2013 school year by denying Mother meaningful participation in IEP meetings conducted on May 24, May 29, and August 27, 2013. District contends that it notified Mother of the three IEP meetings and she chose not to attend the first, abruptly terminated the second, and participated fully in the third. District also contends that it afforded Mother the opportunity for meaningful participation at all IEP meetings and Student therefore was not denied a FAPE.

30. Legal Conclusion 13 is incorporated by reference.

31. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992)

960 F.2d 1474, 1483.) The IDEA establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate. (*Honig v. Doe* (1988) 484 U.S. 305, 311-312 [108 S.Ct. 592] [superseded by statute on other grounds].) The parents of a student with a suspected disability must be afforded an opportunity to participate in meetings regarding the identification, evaluation, and educational placement of the student and the provision of a FAPE to the student. (34 C.F.R. § 300.501(a); Ed. Code, § 56304, subd. (a).) In order to fulfill the goal of parental participation in the IEP process, parents must be afforded an opportunity for meaningful participation in the IEP meetings. (*Target Range, supra*, 960 F.2d at 1485; *Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the student's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 [parent who has opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

32. An IEP team must include, among others, one or both of the pupil's parents, a representative selected by a parent, or both. (Ed. Code, § 56341, subd. (b)(2).)

33. Although District gave Mother and Father notice of an IEP meeting scheduled for May 20, 2013, the meeting was converted at Mother's request into a meeting at which only the school psychologist and special education teacher who administered assessments to Student would meet with the parents to review the results of the District psychoeducational assessment. The May 20, 2013 meeting was not an IEP team meeting. Both Mother and Father attended that meeting. Results of the

assessments were presented to the parents. Mother asked questions, and the meeting was terminated early because the meeting became contentious.

34. Mother assumed that when she requested District to reschedule the May 24, 2013 meeting to any of three other days, no meeting would occur on May 24, 2013. District did not communicate to Mother that the May 24 meeting would go forward.

35. Only Father attended the May 24, 2013 IEP team meeting. The team discussed the results of District's assessment of Student. Based upon the report, the IEP team members present, including Father, determined that Student did not have a specific learning disability and was not eligible for special education and related services.

36. A second IEP team meeting was held on a date Mother had requested, May 29, 2013. Mother attended and District provided her with the opportunity to discuss the assessments and psychoeducational report. However, at that meeting Mother focused her attention on the propriety of the May 24, 2013 meeting District held without her, and she terminated the meeting before any discussion took place regarding Student's eligibility or educational program.

37. District held another IEP team meeting on August 27, 2013. Mother and Father attended. The IEP team reviewed the results of the District assessment, Student's sixth grade teachers provided information about his performance in the first two weeks of the school year, and Mother shared some concerns about Student's needs. District personnel informed Student's parents that Mother's concerns could be addressed through Section 504 and a further meeting would be scheduled for that purpose.

38. Although the IEP team did not find Student eligible for special education and related services, the IEP team considered Mother's input when making its conclusion. District provided Mother at least two opportunities to contribute to the

development of Student's IEP. Mother had the opportunity to meet with the IEP team and fully participate on May 29, 2013, and to provide input that might have led the IEP team to change its mind on eligibility. Similarly, the evidence showed Mother fully participated and gave input at the August 27, 2013 meeting, although the IEP team did not change its conclusion that Student was not eligible. The evidence established that District provided Mother with the opportunity to fully participate in each of the IEP meetings.

39. Student did not meet his burden of proof by establishing by a preponderance of evidence that District denied Mother the opportunity for meaningful participation in the IEP process and specifically in the IEP team meetings on May 24 and 29, 2013, and on August 27, 2013.

#### ISSUE FOUR: ADDRESSING STUDENT'S BEHAVIOR AND ACADEMIC CONCERNS

40. In Issue Four, Student contends that District denied him a FAPE for the 2012-2013 school year by failing adequately to address his behavior and academic concerns. Student asserts that the behavior plan District developed and the academic modifications District implemented were insufficient. District contends that because it determined Student is not eligible for special education, the measures District took to reform Student's behavior and improve his academic performance were appropriate and sufficient because Student was not entitled to a FAPE under the IDEA.

41. Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

42. The evidence established that the IEP team determined that Student's academic and behavioral difficulties could be addressed through the resources of the regular education program. The IEP team reached its conclusions after considering

Student's assessment results in the areas of academics and behavior, and input from Mother, Father, and Student's teachers at multiple IEP meetings. Based upon the information before it, the IEP team concluded that Student was not eligible for special education. Student presented no competent evidence demonstrating that, at the time Student was assessed and found ineligible for special education services, or during any of the IEP meetings District held, District could not address Student's academic and behavioral difficulties through the resources of the regular education program in general education 100 percent of the time.

43. In sum, because Student did not demonstrate he was eligible for special education during the 2012-2103 school year, Student did not meet his burden of proof of establishing by a preponderance of the evidence that District denied him a FAPE by failing to appropriately address his behavioral and academic needs.

## ORDER

All of Student's requests for relief are 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 prevailed on all issues.

## 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).)

DATED: March 10, 2014

/s/

KARA K. HATFIELD

Administrative Law Judge

Office of Administrative Hearings