

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

v.

CALIFORNIA SCHOOL FOR THE DEAF
RIVERSIDE AND MORENO VALLEY
UNIFIED SCHOOL DISTRICT.

OAH Case No. 2014040069

DECISION

On March 27, 2014, Student filed a request for a due process hearing with the Office of Administrative Hearings, naming the California School for the Deaf, Riverside (School for the Deaf), and the Moreno Valley Unified School District as defendants.¹ OAH granted a continuance for good cause on May 2, 2014.

Administrative Law Judge Darrell Lepkowsky heard this matter in Riverside, California, on October 1, 2, 21, 22, 30, 31, and November 20, 2014.

Attorneys Tania L. Whiteleather and Punam P. Grewal, represented Student. Student was present for the entire hearing. Student's mother also attended the entire hearing. American Sign Language interpreters and Certified Deaf Interpreters² were

¹ Both local educational agencies are collectively referred to herein as "District".

² Certified Deaf Interpreters are deaf individuals trained to interpret American Sign Language into a more complex and nuanced sign language for other deaf

present each day of the hearing to assist Student. Student had a personally provided American Sign Language interpreter with her each day of the hearing as well. A Spanish Language Interpreter was present each day of the hearing to assist Student's mother.

Cynthia D. Vargas, Attorney at Law, represented Moreno Valley. Attorney Jose Mendoza accompanied her occasionally. Pamela Bender, Executive Director for the Moreno Valley Special Education Local Plan Area, was present for the entire hearing.

Len Garfinkel, Attorney at Law, represented the School for the Deaf. Jennie Machado, the Director of Pupil Services for the California School for the Deaf, was present for the entire hearing.

At the conclusion of the hearing, the matter was continued to December 11, 2014, at the parties' request to file written closing briefs. The record was closed on December 11, 2014, when the parties timely filed closing briefs and the matter was submitted for decision.³

individuals. Student required the additional support from Certified Deaf Interpreters to understand the complexities of the hearing process.

³ Simultaneous to filing her closing brief, Student filed a motion for official notice of the State Superintendent's Programs for Deaf and Hard of Hearing Students, mandated by California Education Code, section 56136. At hearing, Student did not address any of the information found in these programs, which she now references in her closing brief.

Student's motion for official notice is granted. However, the information cited by Student does not change the analysis of Student's issues or the Decision in this case.

ISSUE^{4/5}

Did District deny Student a free appropriate public education during the two-year period prior to her filing for due process by failing to conduct a triennial evaluation⁶ in the area of speech and language, including vocabulary?

⁴ The issue was framed in the September 16, 2014 Order Following Prehearing Conference. The ALJ has rephrased and reorganized the issue for clarity, and based upon what Student argued at hearing and in her closing brief. 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.)

⁵ Student's complaint originally contained numerous issues alleging procedural violations of District's duty to assess and hold individualized education program meetings to review her alleged lack of educational progress. Student also alleged District substantively denied her a FAPE by failing to provide her with an adequate placement and related services, and failed to place her in the least restrictive environment. At the prehearing conference in this matter, Student withdrew all issues other than her allegation that District failed to place her in the least restrictive environment and the allegation listed as the issue for hearing above. On the first day of hearing, at the conclusion of her opening statement, Student withdrew her allegation concerning the least restrictive environment. The hearing therefore proceeded on the sole issue identified in this Decision.

⁶ In California, the terms "evaluation" and "assessment" mean the same thing. They are used interchangeably in this Decision.

SUMMARY OF DECISION

This Decision holds that Student failed to meet her burden of persuasion that District did not conduct legally adequate assessments of her in the areas of speech and language or vocabulary. The evidence showed that while District did not conduct a formal triennial assessment in October 2012 when Student's triennial was due, the assessments District did conduct over the course of 2012 addressed her needs. Further, Student failed to demonstrate that the triennial assessment conducted by District in 2013 was legally inadequate. Finally, even if District had committed any procedural violations with the manner in which it conducted Student's assessments in 2012 and 2013, Student failed to meet her burden of proof that any such failure constituted a substantive violation of her right to a FAPE.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student was 19 years old at the time of the hearing and eligible for special education and related services as a person who is deaf. Student was born with profound hearing loss in one ear and severe to profound hearing loss in the other ear. She lived with her parents and siblings within Moreno Valley's boundaries. Student assumed her educational rights when she turned 18.

2. Student communicated primarily through American Sign Language although Spanish was the primary language spoken in her home. Student's parents did not have communication abilities in American Sign Language, though one of Student's brothers learned basic American Sign Language.

3. Moreno Valley placed Student at the School for the Deaf in 2001, when she was about six years old. She has attended school there since that time. District placed Student in its special needs program rather than in general education based on

Student's delays in the area of communication, daily living skills, socialization, and motor skills.

4. District testing of Student throughout her earlier years indicated that in addition to academic delays, Student had low average non-verbal reasoning, problem solving, and reasoning ability skills. Based on those results, District maintained Student in the special needs program.

ASSESSMENTS IN WINTER AND SPRING 2012

5. In February 2012, a District special needs multidisciplinary team referred Student for re-assessment to determine appropriate academic programming for her. Student was just over 17 years old at the time. The assessment consisted of a review of records, observations of Student, and questionnaires completed by Student's parents and school staff. District also administered two standardized tests: the Developmental Test of Visual-Motor Integration and the Wechsler Adult Intelligence Scale – Fourth Edition (Wechsler). Except for the vocabulary portion of the test, which was administered in written English, the Wechsler was administered in American Sign Language since that was Student's mode of communication. Student's non-written responses were in American Sign Language. Student was able to understand the test directions and participate in the testing process.

6. The Wechsler was a cognitive test. It contained both perceptual reasoning and verbal comprehension components. The latter component evaluated English language receptive and expressive abilities. It measured a student's ability to answer questions for factual knowledge, word meaning, reasoning, and the ability to express ideas. The assessment included a vocabulary subtest that required Student to apply abilities in basic decoding, word recognition, and word identification in English. The similarities subtest measured Student's ability to place objects and events together in a

meaningful group or category. The comprehension subtest measured Student's ability to apply practical information to unique situations.

7. Student's composite score on the verbal comprehension component of the Wechsler was 76, indicating a borderline ability to problem solve using language. Rachel Mingo, the District school psychologist who administered the Wechsler to Student, determined that Student's low composite score on the verbal comprehension component indicated that Student needed to continue working on her English vocabulary skills, including her ability to recognize and identify English words in print. Student's poor language abilities were somewhat attributable to her being deaf because her ability to benefit from incidental learning was limited.

8. Student's results on the perceptual reasoning component of the Wechsler indicated that her perceptual reasoning skills had increased to the average range. Student's higher scores in perceptual reasoning indicated that Student's ability to use reason and logic to solve problems, as well as her ability to use visual information to identify commonalities, was much better developed than her language skills. Ms. Mingo noted that growth in cognitive scores, while uncommon, had been observed in deaf children who receive appropriate interventions.

9. The February 2012 assessment was supposed to include an academic testing component. However, Student's absences from school during this testing period delayed academic testing of Student until May 2012, when District administered two academic assessments. The first was the Measure of Academic Progress, which was a standardized assessment that District administered yearly to all pupils at the School for the Deaf. The Measure of Academic Progress assessed three areas: language, reading, and mathematics. The language section tested the areas of writing strategies; writing applications; sentences and grammar; and punctuation, capitalization, and spelling. The reading section tested word analysis and vocabulary; informational structure and

critique; comprehension and analysis; and literary response and analysis. Student scored in the low range on all subsections of the Measure, with the exception of writing strategies, where she scored in the average range.

10. District also administered the Woodcock-Johnson III Update Tests of Achievement (Woodcock-Johnson) as part of Student's May 2012 academic assessment. District administered the broad reading, brief writing, and math calculation skills components of this assessment.

11. The broad reading component measured reading achievement in the areas of reading decoding, ability to comprehend connected discourse while reading, and reading rate. This component consisted of three subtests: letter-word identification, passage comprehension, and reading fluency. The passage comprehension subtest specifically tested a student's ability to read a short passage and identify missing key words that would make sense in the context of the passage. Student had difficulty with passages that contained vocabulary words with which she was not familiar. Her overall broad reading ability was in the very low range.

12. The brief writing component of the Woodcock-Johnson included production of written text, including spelling ability and quality of written expression. The Woodcock-Johnson included taking a writing sample from the student. Overall, Student scored in the very low range on this component.

13. Based upon Student's performance on the Measure of Academic Progress and the Woodcock-Johnson, District determined that Student was performing in the very low range in English language abilities. Because the testing was administered partially in American Sign Language, District was also able to determine that Student needed to improve her American Sign Language skills, which would give her a foundation to work on her proficiency in English. In the assessment report, District

included recommendations for how Student could improve her American Sign Language skills.

14. Three District school psychologists testified at hearing: Dr. Natasha Kordus, Rachel Mingo, and Rachel Yingst. The latter two psychologists are themselves deaf. All three testified that the Wechsler, Woodcock-Johnson, and Measure of Academic Progress assessments, when combined, fully assessed Student's language skills, including her ability in American Sign Language. Student provided no documentary evidence or testimony to the contrary.

MAY 13, 2013 IEP TEAM MEETING

15. At the request of Student's family, District convened an IEP team meeting on March 13, 2012. In addition to discussing Student's February 2012 assessments, Student's IEP team discussed changing Student to a general education, diploma track program. The team did not change Student's placement immediately. However, sometime after the March 2012 IEP team meeting and before Student's annual IEP team meeting, Student transferred from District's special needs program into District's general education, diploma track program.

16. District convened Student's annual IEP team meeting on May 13, 2012. The IEP team reviewed Student's present levels of performance in all areas, including speech. Student's present speech levels were based upon progress reports from her speech and language therapist. Based upon District's recent assessments of Student, reports from Student's teachers, and a review of Student's records and past assessments, Student's IEP team determined Student's present levels of performance and what unique needs her IEP should address.

17. The information available to the IEP team indicated that Student had deficits in reading, including vocabulary, because she was only reading at a first grade level. Based upon this information, Student's IEP team developed three goals for her in

reading to address Student's deficits in reading comprehension, vocabulary, and ability to analyze the content of what Student had read.

18. The IEP team recognized that Student had significant deficits in writing since the assessments showed her writing strategies and grammar were only at a beginning second grade level. To address these deficits Student's IEP team developed two goals. The objective of the first goal was to increase Student's writing abilities to a third grade level. The second goal focused on improving Student's ability to write sentences using proper grammar.

19. Based upon prior assessments, Student's IEP team understood Student had difficulties with the production of English speech sounds. The team developed a speech goal with the objective of improving Student's oral speech.

20. To address Student's need to improve her communication skills in American Sign Language, Student's IEP team assigned her to the first level American Sign Language class. This class, discussed more fully below, does not focus on teaching American Sign Language skills. Rather, the purpose of the class is to instruct the students in analytical communication skills in American Sign Language. Student's IEP team was aware that Student had difficulty communicating complex concepts in American Sign Language. This class focused on those deficits.

21. Based upon all the information available to it, Student's IEP team was well aware of her strengths and deficits. Student's IEP team reaffirmed Student's transfer to the diploma track program and determined that her classes for the upcoming 2012-2013 school year would consist of communication (American Sign Language), language, math, work skills, community exploration, health and life science, and physical education, if needed. This program addressed all of Student's unique needs.

22. Student's parents agreed with Student's transfer to the diploma track program, and agreed to the goals developed at the May 13, 2012 IEP team meeting.

They did not agree, however, that District's program offered Student a FAPE because they did not believe Student was making adequate progress.

OCTOBER 2012 TRIENNIAL SUMMARY

23. Student's triennial IEP was due in October 2012. District members of Student's triennial assessment team included Student's teachers, speech and language therapist, school psychologists, and an audiologist. The District team reviewed Student's IEP, audiological reports, her progress in school, and her previous assessments, including the cognitive and academic assessments conducted in February and May 2012. The team determined that Student was making expected progress on her IEP goals. The team therefore determined that academic and cognitive reassessment of Student was neither necessary nor warranted.

24. District sent a copy of its determination that a triennial re-assessment was not warranted, along with its triennial summary, to Student's parents. Student's parents did not dispute District's decision and, at the time, did not exercise their right to request further assessment of Student.

OCTOBER 2012 SPEECH AND LANGUAGE ASSESSMENT

25. Although District determined that a full re-assessment of Student was not necessary in October 2012, it did conduct a speech assessment of Student. District speech and language pathologist Wendy Keedy administered the assessment.

26. Generally, the School for the Deaf gives school psychologists responsibility for administering language assessments to its students in the form of cognitive and academic testing. Speech and language pathologists therefore only administer assessments in the area of speech. At the hearing, Student and District stipulated that

Ms. Keedy's speech assessment was consistent with the independent educational evaluation later conducted by Student's expert Dr. Jean Maki in September 2014.⁷

27. Ms. Keedy administered three assessments to Student to test her speech abilities, including Student's ability to produce sounds in English and to produce one-syllable English words. District had administered the same three tests to Student in 2010. Student demonstrated marked improvement in all areas with the exception of her ability to produce intelligible one-syllable words independently.

28. Student provided no evidence that Ms. Keedy's assessment was deficient. While Dr. Maki testified that she would have administered an additional testing instrument to Student in addition to those instruments utilized by Ms. Keedy, she did not testify that Ms. Keedy's assessment was insufficient or improperly administered. There is no evidence that Ms. Keedy's assessment failed to identify Student's deficits in speech.

NOVEMBER 26, 2012 TRIENNIAL IEP TEAM MEETING

29. Student's IEP team met on November 26, 2012, to discuss her triennial summary review, Ms. Keedy's speech and language assessment, and placement and service recommendations. Neither Student's parents nor their educational advocate, who attended the meeting, indicated that they believed Student required additional testing at that time. Although Student asserts that District should have conducted a full re-assessment at this time because the February and May 2012 assessments were outdated, she presented no evidence in support of this contention. There is no evidence in the record that Student's present levels of performance or her unique needs had changed in the five to eight months between the time the assessments were done and

⁷ Dr. Maki's qualifications and subsequent evaluation are discussed further below.

Student's October 2012 triennial summary review. There is no evidence that Student had unique needs of which District was unaware due to lack of assessment.

30. Nor did Student present any evidence to contradict the determination of District's assessors in October 2012 that Student was making expected progress on her IEP goals. Student is correct that the evidence indicates she has significant deficits in many areas, including reading, writing, speech, and communication. Student contends that she was not making adequate progress, but presented no evidence in support of that contention. She also failed to present any evidence of what type of progress she believes she should have been making at the time.

31. Based upon the information it had, Student's IEP team determined that it was appropriate to continue Student's program and services as determined at her annual IEP team meeting the previous May. Student presented no persuasive evidence that her placement, services, or other supports, would have been different had District conducted a full triennial assessment in October 2012.

OCTOBER 2013 TRIENNIAL ASSESSMENT AND TRIENNIAL IEP TEAM MEETINGS

32. District administered its yearly Measure of Academic Progress to all pupils, including Student, in September 2013. This test again assessed Student's written English language abilities. It again assessed Student's writing strategies, writing applications, and the mechanics of grammar, capitalization, word analysis, and vocabulary development. It was a thorough assessment that covered most areas of written English language development for Student.

33. District convened an annual IEP team meeting for Student on October 22, 2013.⁸ The meeting was continued on January 31, 2014, February 11, 2014, February 24,

⁸ For unknown reasons that are not relevant to this case, Student's annual IEP date was changed from May to October as of the October 22, 2013 IEP team meeting.

2014, and March 20, 2014. Subsequent to October 22, 2013, it was identified as a triennial IEP team meeting as well as an annual IEP team meeting.

34. At the October 22, 2013 IEP team meeting, Student's teachers discussed her present levels of performance. Student's reading and writing levels, including her ability to understand vocabulary, were determined through assessments based on the California English-Language Arts content standards and the Measures of Academic Progress, the latter of which District administered in September 2013. Student was reading with comprehension at an approximate beginning third grade level and writing at a beginning second grade level as of the time of this meeting. Student's teachers were also able to discuss her ability to communicate in American Sign Language based on Student's ability to respond to teacher instruction and to express her ideas appropriately using that mode of communication.

35. At the October 22, 2013 IEP team meeting, Student's full IEP team determined that further assessment of Student was warranted. It proposed administering a full battery of assessments, including academic achievement, cognitive development, and speech. District considered this a special request triennial assessment. Student's parents agreed to the assessments.

36. Ms. Keedy administered a new speech assessment to Student in December 2013 as part of this triennial assessment. She administered the same assessments that she had in October 2012, with the addition of a word intelligibility assessment for two-syllable words in addition to one-syllable words. Student's auditory ability to identify words had significantly decreased. Her ability to make sounds in English independently significantly increased, but her ability to make sounds when cued significantly decreased. Student's ability intelligibly to produce one-syllable words independently increased significantly, but her ability to do so when cued decreased. Student's ability to

produce two-syllable words, assessed for the first time, demonstrated that she could do so more often when cued than when asked to produce the words independently.

37. Dr. Kordus again administered cognitive assessment to Student using the Wechsler. Because Ms. Keedy's assessment did not include a language component, in addition to the perceptual reasoning index components, Dr. Kordus again administered the subtests from the verbal comprehension component of the Wechsler to assess Student's functional English language abilities. Parts of the tests were administered using American Sign Language. Ms. Kordus was therefore able to attain an understanding of Student's abilities to understand and communicate using American Sign Language.

38. To test Student's level of linguistic functioning, Dr. Kordus again administered the comprehension and similarities subtest of the Wechsler. The similarities subtest assessed her ability to conceptualize two different objects and identify what was similar about them. A student's score will be higher where her answer reflected a higher level of thinking. For example, when asked to identify similarities between a dog and a hamster, a student would receive a higher score for saying they were similar because they are both mammals, rather than saying both had two eyes. Student's score on this subtest was in the average range, reflecting improvement in her scores from previous testing on the same assessment.

39. The comprehension subtest assessed Student's ability to use verbal reasoning and judgment to demonstrate an understanding of practical information based on experiences. Dr. Kordus's December 2013 administration of the Wechsler therefore again assessed Student's vocabulary, both in English and American Sign Language, and English decoding, word recognition and identification, and word knowledge.

40. District presented and discussed the December 2013 special request triennial assessment results over the course of Student's continued IEP team meetings on January 31, February 11, and February 24, 2014. The majority of the discussion at those meetings was on whether Student had a specific learning disability and whether she had emotional issues that District needed to address, which are not at issue in the instant hearing.

41. Student did not contend at this IEP team meeting, at hearing, or in her closing brief, that the speech assessments conducted by Ms. Keedy were inadequate, or failed to address Student's strengths and weaknesses.

42. The information available to Student's IEP team came from the most recent assessments of Student; past assessments; input on Student's progress from her teachers, strengths and weaknesses identified by her teachers; input from Student and her parents; and observations of Student.

43. Based upon this information, over the course of the four meetings, Student's IEP team developed 16 goals. The assessments indicated that Student's reading comprehension and knowledge of vocabulary had increased to a third grade level. This was still far behind grade level. At the time of these IEP team meetings, Student was 17 to 18 years old and a high school sophomore. To address her delays in reading, Student's IEP team developed four goals. The first focused on increasing Student's comprehension of what she was reading. The second goal focused on increasing Student's ability to retell what she had read using American Sign Language. The objective of the third goal was to increase Student's ability to make inferences and predictions from what she was reading. The objective of the fourth goal was to increase Student's reading level, including use of vocabulary and grammar, to a fourth grade level.

44. Student's scores on the triennial assessments and input from her teachers indicated Student's ability to write was still at a beginning second grade level. Her IEP team developed three writing goals to address her deficits in that area. The first goal focused on teaching Student to write interrogative sentences when given writing prompts. The objective of the second goal was to increase Student's writing strategy abilities to an end of second grade level. The objective of the third goal was to increase Student's vocabulary and spelling skills.

45. Based on Student's difficulties communicating in American Sign Language, her IEP team developed a communication goal that focused on increasing Student's ability to sign and understand concepts that are more complex.

46. Student continued to have difficulties producing speech sounds. Her IEP team developed two goals to address Student's deficits in speech.

47. Neither Student nor any of her representatives informed District during any of the IEP team meetings that they believed that the District assessments were deficient, that District should have done other additional or different tests, or that District should have done specific testing in the area of American Sign Language.

48. Based upon its assessments, Student's progress in class, and input from her teachers, District had full and complete knowledge of Student's strengths, weaknesses, and unique needs. Student provided no evidence at hearing that District was unaware of her needs, underestimated her needs, or had incorrectly determined Student's present levels of performance.

ALLEGED LACK OF VOCABULARY TESTING AND WRITING SAMPLE

49. The Measure of Academic Progress did not include taking a writing sample from Student. Nor did District administer the Woodcock-Johnson to Student again as part of the December 2013 special request triennial assessments. As stated above, the Woodcock-Johnson included a subtest where pupils were required to produce a writing

sample. District did not believe that it was necessary to obtain another writing sample from Student at the time of the December 2013 assessments.

50. Student contends that District's assessment in the area of written language and vocabulary was deficient because the 2012 and 2013 triennial assessments did not contain vocabulary testing and a written language sample. Student failed, however, to provide any support for her contention that District should have repeated the writing sample portion of the Woodcock-Johnson. Nor did Student provide any evidence of what type of additional vocabulary testing District should have done.

51. In September 2014, District agreed to provide Student with an independent educational evaluation in the area of speech and language. Student and District agreed that Dr. Maki, a doctorate level speech and language pathologist, would conduct the assessment. Dr. Maki worked at the School for the Deaf in Riverside from 1999 to 2010, when she left to open a private practice. In addition to speech assessments similar to those administered by Ms. Keedy, Dr. Maki assessed Student's English language skills. Her assessment included a very brief writing assessment to get an idea of Student's English writing skills. However, she also did not conduct a formal writing sample assessment.

52. The language tests Dr. Maki administered were similar to those administered by District through the Woodcock-Johnson and the Measure of Academic Performance. The results Dr. Maki obtained on her assessments were similar to the results obtained by District. For example, Dr. Maki also found that Student was reading and writing at approximately the third grade level. Dr. Maki's assessments did not identify any new areas of need of which District had been previously unaware. Dr. Maki's assessment did not point to any deficits in District's assessment process. Dr. Maki did not review District's assessments of Student as part of her own assessment process. Nor did Student ask Dr. Maki to review the assessments in preparation for her testimony at

hearing. Dr. Maki did not testify to the inadequacy of any of the academic or cognitive assessments District administered to Student.

53. Neither Dr. Maki nor any other witness at hearing stated that District's assessments were insufficient or that District needed to repeat the writing sample portion of the Woodcock-Johnson. Student offered no evidence that her abilities or needs had changed to such an extent that additional testing of her writing samples was warranted at the time. Nor did any witness address what information District was lacking because it did not repeat the writing sample.

54. Student also contends that the lack of more in-depth vocabulary assessments and the lack of a newer writing sample prevented her IEP team from identifying her needs and creating appropriate goals for her. She also contends her IEP team was not able to identify necessary services based upon this lack of information.

55. However, Student did not provide any testimony in support of these contentions. All District assessors who testified agreed that District's assessments were appropriate. The only non-District witness presented by Student with any expertise in the area of language was Dr. Maki. Significantly, Dr. Maki did not state that District's assessments were deficient or that District had failed to identify Student's needs. Neither Dr. Maki nor any other witness was asked to review and/or provide a critique of Student's IEP goals, services, or placement. There was simply no discussion at hearing of the components of Student's IEP or of how those components would have been different if District had done additional or different assessments of Student.

56. Dr. Maki's assessment report contained recommendations for Student. However, she did not testify that any alleged deficiencies in District's assessments resulted in a denial of FAPE, or that District needed to implement her recommendations in order for Student to receive a FAPE.

LACK OF AMERICAN SIGN LANGUAGE ASSESSMENT

57. Student contends that District failed to conduct an appropriate assessment of Student's needs in American Sign Language. However, it is unclear exactly what Student believes should have been done.

58. All District employees who testified at hearing, as well as Dr. Maki, acknowledged that there were no standardized instruments available to assess American Sign Language communication, although such tests are currently being developed.

59. Niel Thompson was Student's teacher for her American Sign Language class. He was her American Sign Language teacher for the 2014-2015 school year and her teacher during the 2012-2013 school year when Student entered District's diploma track program. Student was in the third level of American Sign Language during the 2014-2015 school year.

60. The purpose of Mr. Thompson's American Sign Language class was not to teach basic American Sign Language. Rather, Mr. Thompson, who is himself deaf, taught critical thinking in American Sign Language, which was necessary for students to become fluent in the language and to be able to understand and express higher-level concepts. As of the hearing, Student had a concrete ability to use American Sign Language abilities at a conversational level, but was still unable to understand or express more sophisticated or complex concepts.

61. Mr. Thompson regularly tested his students. One of the instruments he used to test his class was a rubric developed by an organization in Washington D.C. that measured a student's fluency in American Sign Language. It was an informal, non-standardized testing tool.

62. Student asserts in her closing brief that District was remiss, and therefore denied her a FAPE, because Mr. Thompson's informal testing was not part of Student's IEP process. Mr. Thompson did not regularly attend Student's IEP team meetings.

Therefore, he did not regularly present the results he obtained from Student using the rubric to her IEP team.

63. Student did not raise this failure to discuss informal testing results at her IEP meetings as an issue for this hearing. However, even assuming that the issue is subsumed in the issue Student did present, Student failed to present any persuasive evidence that a school district is required to present a teacher's informal testing to a student's IEP team. Nor did Student present any evidence that Mr. Thompson's informal test results would have provided any new or different information than what the other assessment information established to Student's IEP team that would have changed her IEP goals, placement, or services.

64. Student and her IEP team were aware of her needs in American Sign Language based upon the test results from the various administrations of the Woodcock-Johnson and the Wechsler. Additionally, Student and her IEP team were aware of the grades she was receiving in her American Sign Language class. Student passed the class each year with at least a satisfactory grade. She was promoted each year to the next class level. There is no evidence in the record of the hearing that Student's programming or services would have changed had Mr. Thompson formally presented his informal test results to Student's IEP team.

65. Nor is there any evidence that Student's parents or Student herself were somehow prevented from participating in the process to develop Student's IEP's because Mr. Thompson did not formally present his test results to the IEP team. Although Student's mother was present each day of the hearing, she did not testify.

66. Student did testify at the hearing. She was an eloquent and believable witness. However, her testimony focused on the difficulties she had with expressive and receptive language and her frustration at being so far behind academically. Student did not address any substantive aspect of her IEP's or any alleged procedural deficiencies in

the development of her IEP's. In any case, Student was aware of her results on the American Sign Language rubrics because Mr. Thompson discussed them with her in the normal course of class instruction. Student attended her IEP meetings and could have brought up any concerns she had about her difficulties with sign language at that time. Therefore, any contention that the failure to discuss Mr. Thompson's assessment results at Student's IEP meetings somehow prevented Student from participating in her IEP process is pure speculation.

67. For the reasons discussed in this Decision, Student did not establish that District failed to assess her appropriately in the areas of speech and language, including vocabulary and/or American Sign Language.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁹

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)¹⁰ 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, further education, and independent living, and (2) to ensure that the

⁹ Unless otherwise indicated, the legal citations in the Introduction section are incorporated by reference into the analysis of each issue decided below.

¹⁰ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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.) "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 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 and academic and functional goals related to those needs. It contains a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining goals, making progress in the general education curriculum, and participating in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. 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].) Here, Student bears the burden of persuasion by a preponderance of the evidence.

ISSUE: ADEQUACY OF DISTRICT'S OCTOBER 2012 AND DECEMBER 2013 TRIENNIAL ASSESSMENTS

Procedural and Substantive Requirements of Reassessments

4. Assessments are required in order to determine eligibility for special education and the type, frequency and duration of specialized instruction and related services a student requires. In California, the term "assessment" has the same meaning as the term "evaluation" in the IDEA. (Ed. Code, § 56302.5) In evaluating a child for special education eligibility and prior to the development of an IEP, a school district must assess her in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

5. A triennial assessment serves two separate but related purposes. First, it examines whether the student remains eligible for special education. Second, it determines the student's unique needs, which, in turn, could trigger a revision of her IEP. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The triennial consists of a review of existing information and may include additional assessments. (34 C.F.R. § 300.305 (a)(2).) A school district may also be required to reassess a student if warranted by the student's educational or related services needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability is a procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

6. As part of any reevaluation, the IEP Team, as appropriate, is required to review existing data on the student including evaluations and information provided by her parents, current classroom-based, local, or state assessments, and observations by teachers and related services providers. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. §300.305(a)(1); Ed. Code, § 56381(b)(1).) Based upon that review, with input from the student's parents, the IEP team is charged with identifying what additional data, if any, is needed to determine the following: (i) whether the student continues to have a disability and related educational needs; (ii) the present levels of academic achievement and related developmental needs of the student; (iii) whether the student continues to need special education and related services; and (iv) whether any additions or modifications to the special education and related services are needed to enable the student to meet the measurable annual goals set out in the IEP and to participate, as appropriate, in the general education curriculum. (20 U.S.C. § 1414 (c)(1)(B); 34 C.F.R. § 300.305(a)(2); Ed. Code, § 56381, subd. (b)(2).) This review of existing data may be conducted without a meeting. (34 C.F.R. § 300.305(b); Ed. Code, § 56381, subd. (g).)

7. If the student's IEP team determines that it does not need any additional data to determine whether the student continues to be eligible for special education and related services, the school district is required to notify the student's parents of that determination. The district must also inform the student's parents of the reasons for the determination, and notify them of their right to request an assessment to determine whether the student continues to have a qualifying disability and to determine the student's educational needs. (20 U.S.C. § 1414(c)(4)(A); 34 C.F.R. § 300.305 (d)(1); Ed. Code, § 56381, subd. (d).) The school district is not required to conduct such an assessment unless requested to do so by the student's parents. (20 U.S.C. §1414(c)(4)(B); 34 C.F.R. § 300.305(d)(2); Ed. Code, § 56381(d).)

8. Student contends that District failed to conduct a triennial assessment of her, which was due in October 2012, resulting in her loss of educational benefits. District contends first that it followed the procedures required of it under the IDEA and properly determined that a full reassessment of Student was not warranted at the time because Student was making the progress expected of her. District alternatively contends that the assessments it did administer to Student were legally adequate.

9. The evidence supports District's position that it properly followed the law and determined that full assessment of Student was not necessary in October 2012. Three District psychologists testified at the hearing: Dr. Kordus, Ms. Mingo, and Ms. Yingst. All stated that Student's IEP team did a thorough review of Student's records, including past assessments of her, discussions with her teachers, and review of her progress at school. Based upon this thorough review, the team determined that full assessment was not warranted. Dr. Kordus then prepared a report with these findings. District sent the report to Student's parents, informing them of their findings and informing them that they could request assessments if Parents disagreed with District. District then convened a triennial IEP team meeting to discuss the summary review and develop a new IEP for Student. Neither Parents nor Ms. Baca, their educational advocate, requested a full reassessment in 2012.

10. Student presented no evidence whatsoever that District failed to follow correct procedures in determining that it was unnecessary for it to fully reassess Student in October 2012. There is no evidence that District failed to send its triennial assessment summary to Student's parents, along with its recommendation that a full assessment was not necessary. Nor is there any evidence that Student's parents disagreed at the time with District's decision to forego full assessment, or that they requested District to administer a full triennial instead of proceeding just with the triennial assessment summary.

11. Nor did Student present any persuasive evidence that she was not making the progress expected of her. Student eloquently testified to the struggles she has both academically and with communication. Student was 19 years old at the time of the hearing and a junior in High School. She only reads and writes at the second to third grade level. Although she has strong capabilities in conversational American Sign Language, her ability to understand and express complex analytical thoughts is much more limited.

12. District fully acknowledges Student's deficits and struggles. The glaring deficiency in Student's case is that she failed to provide any evidence that the progress she was making in 2012 and 2013 was insufficient based upon her skills, abilities, and educational level at the time. Not one witness, including Student's expert Dr. Maki, testified that Student should have been making more progress than she was, that the District should have been aware of that, and that District should therefore have administered a full triennial reassessment to Student. Student's case and arguments are based on speculation, conjecture, and inference: she is significantly behind grade level academically and in her ability to communicate. Therefore, she argues, District should have reassessed her. Student, however, provided no evidence in support of this contention. It is entirely unknown based on the evidence presented at this hearing why Student is so far behind academically and in her communication skills. No witness addressed those issues. Nor is there any evidence that Student, who in October 2012 had just recently transferred from a full time special education program to District's general education diploma track High School program, should have made more progress than she was making. No witness addressed Student's progress, or lack of it, since she transferred to the diploma track program. The fact that Student has academic and communication deficits and struggles in school does not mean automatically that Student was not progressing at an appropriate rate. It was Student's burden to present

persuasive evidence that she was not making expected progress. This she failed to do. Student has therefore failed to meet her burden of persuasion that District was required to administer a full triennial reassessment to her in October 2012 or October 2013.

Adequacy of District's Assessments

13. Further, Student has failed to demonstrate that the assessments District did administer to her in 2012 and 2013 were inadequate.

14. Trained and knowledgeable personnel must administer the assessments and do so in accordance with any instructions provided by the author of the assessment tools. (20 U.S.C. § 1414(b)(3)(A)(iv), (v); 34 C.F.R. § 300.304(c)(1)(iv), (v); Ed. Code, §§ 56320, subd. (b)(3) [tests of intellectual or emotional functioning must be administered by a credentialed school psychologist], 56322 [assessment shall be conducted by persons competent to perform the assessment, as determined by the school district, county office, or special education local plan area]; 56324 [a psychological assessment shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed].) Persons knowledgeable of the student's disability shall conduct assessments. (Ed. Code, § 56320, subd. (g).)

15. If the evaluation procedures required by law are met, the selection of particular testing or evaluation instruments is at the discretion of the school district. Once selected, the instrument must be administered in accordance with the instructions provided by the producer, including use of composite scores if called for by the instructions. (Off. of Special Education Programs interpretative letter *Letter to Anonymous* (September 17, 1993), 20 IDELR 542; cited approvingly in OAH case *Student v. Manteca Unified School Dist.* (December 13, 2011) Cal.Offc.Admin.Hrngs. Case Nos. 2011060184, 2011050574, and 2011050289, p. 20.) The personnel who assess the

student must prepare a written report of the results of each assessment, and provide a copy of the report to the parent. (Ed. Code, §§ 56327 and 56329.)

16. District administered several assessments to Student during the winter and spring of 2012, and, upon request of Student's IEP team, in December 2013. The assessments included academic testing using the Woodcock-Johnson and the Measures of Academic Progress and cognitive testing using the Wechsler. These are all standardized tests. District also administered a speech assessment to Student in December 2013. Student presented no evidence that the assessors were not qualified to administer the tests, that the assessors did not administer the tests correctly, or that the tests were not appropriate for Student.

17. Student contends that the assessments did not cover vocabulary and writing, both areas in which Student had significant deficits. However, Student failed to provide persuasive evidence that those areas were not addressed in the multitude of assessments District administered. The Woodcock-Johnson includes a subtest in which Student was required to produce a writing sample. That test includes several subtests addressing all aspects of receptive and expressive written expression in English, including vocabulary, as does the Wechsler. The Measures of Academic Progress, a standardized test that District administers yearly to all its students in general education classes, is an intensive test that addresses all aspects of written expression, including vocabulary and grammar, and writing strategies and conventions.

18. Although Student argues that these tests were not adequate to determine her deficits in vocabulary and writing, Student again presented no evidence to support her contention. Not one witness, including Student expert Dr. Maki, testified that these assessments failed to produce an adequate picture of Student's deficits. To the contrary, the only witnesses who addressed the assessments were District school psychologists

Dr. Kordus, Ms. Mingo, and Ms. Yingst. All three testified that the assessments adequately addressed Student's deficits.

19. Nor did Student present any evidence of what other testing District should have administered to Student. Dr. Maki testified that only a standardized writing assessment would adequately determine Student's deficits, but she herself failed to administer a standardized writing assessment during her independent assessment of Student. Significantly, Dr. Maki did not review any of the academic or cognitive assessments District had administered to Student. She therefore was not asked whether those tests were adequate. Since she did not review them, she would not have been able to comment on the adequacy of the tests.

20. Student therefore failed to meet her burden of proof that District failed to assess her adequately in the areas of writing and vocabulary.

21. Student also contends that District failed to assess her adequately in the area of American Sign Language. The evidence presented by District indicated that no standardized assessments for expressive or receptive American Sign Language existed during 2012 or 2013. Student presented no evidence to the contrary. Mr. Thompson, Student's teacher for analytical American Sign Language, explained that he only had informal testing instruments available to him, including a rubric developed by an institute located outside California. Mr. Thompson used the rubric as a method for determining Student's progress in his class. He discussed the results with Student, as he did with all his students. Using Student's results Mr. Thompson was able to determine a grade for her. Student passed her American Sign Language class every year she has taken it.

22. Therefore, contrary to Student's contention, District has assessed Student in American Sign Language using the only testing instruments available at the time.

Student has not met her burden of persuasion that District failed to assess her in American Sign Language.

Procedural Violations

23. Even assuming that District failed to assess Student adequately in 2012 and/or 2013, Student has failed to persuasively prove that the failure amounted to a procedural violation of Student's rights under the IDEA or state law.

24. 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 Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) In matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural violations impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

25. Student presented no evidence that any failure to assess her in the areas of vocabulary, writing, or American Sign Language impeded her parents' rights to participate in the process of developing Student's IEP's or impeded her own rights of participation once she turned 18 and assumed her own educational rights. Neither of Student's parents testified at the hearing. Student never addressed the issue during her testimony of whether or how her rights might have been impacted by any failure to assess her.

26. Student also has presented only speculation as to how District's alleged failure to assess her in writing, vocabulary, and American Sign Language impeded her right to a FAPE or caused her an educational deficit. Not a single witness, including Student, testified as to what tests should have been done, what that testing would have

shown, or how Student's programming and services should have been modified based upon additional or different assessments.

27. Student argues vigorously in her closing brief that she is significantly behind grade level and that District has failed to address her academic and communication deficits. However, Student presented no evidence that her academic deficits or her failure to perform at grade level are the result of District's alleged failure to assess her, the only remaining issue. Student's arguments are based on pure speculation rather than persuasive evidence. No witness, including the only expert Student presented at hearing, testified that any of Student's deficits are the result of any alleged failure to assess, or failure to assess Student properly. Neither do any of the documents presented as evidence support that contention.

28. Despite having withdrawn such issues prior to hearing, Student argues in her closing brief that her educational placement and services are inadequate to meet her needs. She failed to provide any evidence of a nexus between that contention and District's alleged failure to assess her. In any case, the failure to provide an appropriate placement or related services was not at issue in this case because prior to hearing Student withdrew all contentions regarding District's alleged failure to provide her with a FAPE.

29. Student has therefore failed to meet her burden of proof that any alleged failure to assess her impeded her right to a FAPE or caused her a loss of educational benefits. Student has therefore failed to meet her burden of persuasion as to all allegations at issue in this hearing.

ORDER

All relief requested by Student is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision 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 is a final administrative Decision, and all parties are bound by this Decision. The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).)

DATE: January 12, 2015

/s/

DARRELL LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings