

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

PANAMA-BUENA VISTA UNION SCHOOL
DISTRICT.

OAH Case No. 2014100290

DECISION

On October 6, 2014, Student filed a due process complaint naming Panama-Buena Vista Union School District (Panama). On November 24, 2014, Student filed an amended due process hearing request.¹ OAH granted a continuance for good cause in the amended non-expedited matter on December 23, 2014.

Administrative Law Judge Adrienne L. Krikorian heard the non-expedited issues in Bakersfield, California on April 15, 16, and 17, 2015.

Attorney Nicole Hodge Amey represented Student. Advocate Gloria Zepeda and Student's mother (Parent) were present all hearing days. Parent and Ms. Zepeda both testified. The hearing was interpreted into Spanish.

Attorney Stacey Inman represented Panama. Dr. Rita Pierucci, Special Education Director, attended the hearing on behalf of Panama on all hearing days.

¹ The original and amended complaint contained expedited and non-expedited claims. OAH set the expedited and non-expedited claims against Panama for separate hearings. The expedited claims timely proceeded to hearing and the Expedited Decision was issued on January 16, 2015 and, in Spanish, on February 5, 2015.

On April 17, 2015, at the parties' request, the ALJ granted a continuance for the parties to submit written closing arguments. Upon timely receipt of written closing arguments, the record was closed and the matter was submitted for decision on May 4, 2015.

ISSUES²

1. Did Panama violate its obligations under the Individuals with Disabilities Education Act (a) from August 18, 2014 to October 6, 2014, and (b) from October 7, 2014 to November 24, 2014, the date of the filing of the complaint, by failing to identify and assess Student in all areas of suspected need for eligibility for special education placement, supports and services?

2. Did Panama deprive Student's parent of the opportunity to meaningfully participate in the development of Student's educational program under the IDEA by failing to translate disciplinary documents into Spanish?

SUMMARY OF DECISION

Panama failed its Child Find duties to Student from August 18, 2014 until October 6, 2014, because it should have suspected that Student may be a child with a disability requiring special education, and it did not provide Parent with a Consent Form in her native language of Spanish, as required by the IDEA, until October 7, 2014. However,

² On the second day of hearing, Student withdrew his issue relating to records from Panama to Bakersfield City School District (numbered as Issue (b)(2) in the April 3, 2015 prehearing conference order). The remaining issues have been rephrased and reorganized for clarity. 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.)

from and after October 7, 2014, Panama complied with its statutory obligations, and could not assess Student without Parent's written consent, which Parent did not give. Accordingly, Student is entitled to remedies for the time period August 18, 2014 through October 6, 2014.

Panama did not deprive Parent of meaningful participation in the development of Student's educational program by failing to provide disciplinary documents to Parent in Spanish during the time frame involved in this matter because under the IDEA, Panama was not required to do so. Panama was only required to provide Parent with notice in Parent's native language that it intended to initiate an assessment of Student for special education eligibility, which it did on and after October 7, 2014.

FACTUAL FINDINGS³

1. Student is a 12-year-old male and has lived with Parent and her husband within Panama's boundaries since August 2014. At all relevant times Student had an accommodation plan that included provision of a one-to-one shadow aide, under Section 504 of the Rehabilitation Act of 1973 (Section 504) based upon a medical diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) inclusive of inattention and hyperactivity. Student speaks and writes English, but Spanish is the primary language spoken in his home.

2. Parent enrolled Student at Panama's Stonecreek Junior High School (Stonecreek) before the first day of the 2014-2015 school year. Student assisted Parent in filling out enrollment forms. Parent signed a bilingual Home Language Survey dated August 8, 2014, in which she indicated that Spanish was the primary language spoken at home. Parent reported on Student's application for enrollment that he had been

³ The ALJ relied upon evidence from the Expedited Decision in this Decision where appropriate.

“expelled” from Bakersfield City School District (Bakersfield City), his former school district, for sexual battery.

AUGUST 18, 2014 THROUGH OCTOBER 6, 2014

3. On August 18, 2014, the first day of school, Parent gave Panama a Spanish language copy of Student’s most recent Section 504 plan and a behavior support plan from Bakersfield City. She informed Panama that Student had a medical diagnosis of ADHD. From the time she enrolled Student at Panama, Parent asked Panama staff to help her son, believing he had a disability more serious than hyperactivity and he needed more help.

4. On August 21, 2014, English teacher Alene Williams referred Student to the office because he acted in defiance of authority, provoked a fight with another student and was combative. The referral prompted Parent, Student and Stonecreek Vice Principal Patrick Calley to meet to discuss Stonecreek’s rules of conduct and Panama’s expectations of Student’s behavior at school. Mr. Calley met with Parent and Student immediately after this first disciplinary incident, in part because of Parent’s report when she enrolled Student that Student had been disciplined for “sexual battery” at Bakersfield City. Mr. Calley presented and explained a Behavior Contract to Parent and Student. Before Parent and Student left, he asked them to sign it, which they did. Parent did not inform Mr. Calley that Student had any disability that would interfere with his ability to comply with the contract, did not mention Student’s diagnosis of ADHD, and did not ask for a referral for special education. Mr. Calley did not suspect at that meeting that Student presented with behaviors that suggested he should be assessed for special education eligibility, or that Parent did not understand the Behavior Contract.

5. Parent signed Panama’s Request for Cumulative Records on August 21, 2014, although she claimed at hearing she did not know what the document was or why she signed it. On that same day, Panama requested Bakersfield City to supply the

records.

6. On August 27, 2014, Student threatened to injure another student, engaged in habitual profanity, and bullied and intentionally harassed, threatened and intimidated a group of students. Panama suspended Student for two days. On that same day, Panama held a Section 504 team meeting and developed a Section 504 Accommodation Plan for Student. Panama provided a Spanish interpreter at the meeting. School psychologist Brittany Gentry attended and discussed Parent's concerns about Student's impulsive behaviors, and his diagnosis of ADHD. Student's teachers reported that Student exhibited defiance to authority in class, was distracted during lessons, and was antagonistic toward other students. His absences from class affected his grades, but he had opportunities to make up missed work that would have helped improve his grades. Ms. Gentry did not suspect at that time that Student required an assessment for special education eligibility. The team felt that Student's behaviors could be addressed through accommodations in his Section 504 plan. Parent, who was accompanied by educational advocate Grace Cruz, signed and consented to the English Section 504 plan and received a copy of her Section 504 rights.

7. Student's teacher referred him from class to the office on September 3, 2014, for acts of defiance, disobedience, and profanity and he was given a verbal warning. He was referred again for similar behavior on September 4, 2014, and Panama notified Parent. On September 5, 2014, he was given lunch detention for five days for disrespect to other students. On September 11, 2014, Panama intervention counselor Amy Reyes observed Student grab a female student's buttocks. Panama suspended him for three days and scheduled a Section 504 manifestation determination meeting for September 18, 2014.

8. Panama received Student's records from Bakersfield City on September 5, 2014. The records included a history of multiple incidents during the 2013-2014 school year requiring discipline, including suspensions for bad behavior, which on one occasion

involved the touching of a female student. A report dated October 1, 2013, stated that Student's behaviors in the classroom were impeding him or students around him from learning and Student's behaviors disrupted the class daily. These behaviors included attention-seeking, anger, and outbursts for long periods of time. Student's behaviors continued even with accommodations and a behavior accommodation plan as part of his Section 504 plan.

9. On September 15, 2014, Panama received a handwritten letter from Parent requesting that Panama assess Student for eligibility for special education services and supports. Ms. Gentry did not suspect that Student required an assessment before Parent's September 15, 2014 letter.

10. Panama held a Section 504 manifestation meeting on September 18, 2014. Parent attended, along with Ms. Cruz, a Panama-provided Spanish language interpreter, Ms. Gentry, assistant special education director Janet Clark, and other school staff. During the meeting, Parent provided Panama with letters from Kaiser Permanente reporting that Student was experiencing hallucinations and anxiety. Ms. Clark, who is a licensed educational psychologist and a board certified behavior analyst, responded to the letters from Kaiser by explaining to Parent that Panama wanted to assess Student, and explained eligibility categories of other health impaired, emotional disturbance, and specific learning disability. She was not aware at that time of Parent's September 15, 2014 letter. She discussed Parent's options if Parent was concerned for Student's immediate safety. The interpreter communicated with Parent in Spanish throughout the meeting. Parent told staff she thought Student did better with male teachers and counselors. Panama recommended that Student transfer to Thompson Junior High School (Thompson) where he could receive more support from male staff members. Panama did not allow Student to return to Stonecreek because his behaviors, including towards female students had caused other parents to complain about their children's well being.

11. Student began attending Thompson on or about September 19, 2014. Matt Harper, a licensed school psychologist, first met Student after Student transferred to Thompson. Mr. Harper worked with Student regularly at Thompson as the school psychologist. Mr. Harper reviewed Student's records from Bakersfield City after September 21, 2014. Those records, in combination with Student's pattern of defiance toward his teachers at Stonecreek and disruptive behaviors at Thompson, suggested to him that Student might be a student with a disability requiring assessment. In Mr. Harper's opinion, and based upon unspecified assessments conducted by Panama in January and February 2015, if Student had been eligible for special education during the first semester at Panama, Mr. Harper would have recommended that Student receive 60 minutes per month of counseling to address his behaviors; resource support for academics; a referral for mental health services to determine whether he had needs as emotionally disturbed; a behavior plan; and continuation of a one-to-one shadow aide. In Mr. Harper's opinion, Student is very intelligent and capable of performing at or above grade level.

12. Mr. Harper, Ms. Clark and Ms. Gentry met after the September 18, 2014 meeting to discuss the development of an assessment plan for Student. On September 22, 2014, Ms. Gentry generated a Consent Form for special education eligibility. She prepared the Consent Form because Parent requested an assessment, Parent reported Student's hallucinations and extreme anxiety, and because of Mr. Harper's, Ms. Clark's and Ms. Gentry's concerns about the behavior that prompted the September 18, 2014 meeting. Ms. Gentry prepared the Consent Form in English because Ms. Gentry had communicated with Parent in English and she believed Parent understood English. Ms. Clark also believed Parent understood English for the same reasons. The proposed assessment plan included a functional behavioral assessment, and an evaluation for emotional disturbance and specific learning disability, which Ms. Gentry found to be appropriate given Parent's expressed concerns and the numerous defiant and

inappropriate behaviors Student exhibited during the first month of the school year.

13. Panama's special services secretary Gayle Montana mailed the English version of the Consent Form and Notice of Parents Rights to Parent at her address of record on September 22, 2014. Parent did not return a signed copy of the Consent Form and, at hearing, denied receiving the documents mailed on September 22, 2014. Panama did not receive the documents back as undeliverable.

14. On October 2, 2014, Student was suspended from Thompson for three days for making sexual gestures toward a female student.

15. Based upon Panama's calendar for the 2014-2015 school year, 35 school days occurred from the first reported behavior incident on August 21 through October 6, 2015. During that time, Student missed six school days totaling 36 class periods as a result of suspension, and approximately 25 additional hours of class time because of excused and unexcused absences and discipline referrals. He missed two additional days for suspension on October 7 and 8, 2014. He was enrolled in five academic classes, including history, science, English, reading, and math, while at Stonecreek. He missed academic instruction when he was suspended, removed from class, or sent home, which impacted his grades in at least his math and English classes.

16. On his first quarter progress report from Stonecreek, reflecting the period through September 18, 2014, Student had an A in history, a B- in physical education, a C- in math, a D+ in English and Reading, a D in Concert Band, and an F in Science.

OCTOBER 7, 2014 TO NOVEMBER 24, 2014 (DATE OF FILING)

17. Thompson staff held a Section 504 amendment meeting on October 7, 2014. Parent attended and participated. Panama provided a Spanish language interpreter. Mr. Harper and Ms. Clark attended the meeting. Mr. Harper was aware that Ms. Gentry had previously generated an English version of a Consent Form for Parent. He provided a Consent Form in Spanish to Parent. Assisted by the interpreter, Ms. Clark

reviewed the September 22, 2014 Consent Form, point by point, along with Parent's rights. She explained the suspected disabilities of other health impairment and emotional disturbance, and that Panama wanted to conduct a functional behavioral assessment, along with other assessments. Ms. Clark and Mr. Harper explained that Panama needed to assess Student before it could determine what additional supports and services he required. Ms. Clark asked Parent to sign the Consent Form. Parent reported at the meeting that she had signed the English version of the Consent Form sent by Panama prior to the meeting but did not understand that she had to return it to Panama. Mr. Harper encouraged Parent to sign the Consent Form at the meeting so Panama could develop a more comprehensive program for Student. Parent agreed to take the Consent Form home to discuss with her husband and sign and return it the next day. She did not ask questions about the Consent Form.

18. On October 15, 2014, Ms. Montana mailed another Spanish version of the Consent Form and Notice of Parents Rights to Parent's home address. Panama did not receive the envelope back as undeliverable.

19. Dr. Pierucci met with Parent and educational advocate Gloria Zepeda on October 17, 2014. Dr. Pierucci discussed the Consent Form with Parent and asked her to sign and return it so Panama could begin assessing Student. Ms. Zepeda denied that the subject of the Consent Form was discussed at that meeting.

20. On November 14, 2014, Student defied his teachers, failed to follow directives from his teacher and shadow aide, and banged his head against the wall in the principal's office. Thompson school principal Darrell Pope, Dr. Pierucci, Ms. Clark, and Parent, assisted by a Spanish-speaking staff member, met to discuss Student's behaviors. Dr. Pierucci again told Parent that Panama wanted to assess Student for special education eligibility and asked her why she would not sign and return the Consent Form. Parent responded that the matter was in the hands of her attorney. At Dr. Pierucci's direction, a Spanish-speaking staff member called Parent after the meeting

and reiterated for Parent in Spanish what was discussed at the meeting, including a request to sign and return the Consent Form.

21. On November 19, 2014, Panama held a Section 504 manifestation determination team meeting. Panama staff discussed the Consent Form, explained that Panama wanted to assess Student for eligibility for special education, and asked Parent to sign it. During the meeting, Panama asked Parent for input, which Parent declined to offer. Parent and Ms. Zepeda left and Parent did not sign the Consent Form.

22. Panama special education coordinator Cindy Koepp-Romero sent Parent by regular mail an English transmittal letter dated November 19, 2014, Spanish and English versions of the Consent Form and Spanish and English versions of Notice of Procedural Safeguards and Parents' Rights to Parent. At hearing, Parent denied ever receiving the documents from Panama. Panama did not receive the envelope back as undeliverable.

STUDENT'S WITNESSES

23. Parent is fluent in the spoken Spanish language, reads only a few words in Spanish and English, and speaks and understands some conversational English. Panama staff called her three to four times a week regarding Student's behavior and on a few occasions she took him home after disciplinary referral. At hearing, Parent claimed that she signed all documents provided to her by Panama if it was for her son's benefit, if she trusted the person giving the document and if they explained it to her. Parent did not have a consistent or detailed recall of facts from the numerous Section 504 meetings but claimed she did not participate other than to listen to what the staff said. She denied that Ms. Clark ever explained the Consent Form to her. She denied that she received the October 15, 2014, documents by mail or in person. She denied that the interpreter translated the Consent Form for her at the November 19, 2014 meeting and denied that Panama reviewed or provided a Consent Form to her in either English or

Spanish at that meeting. Panama did not provide Parent documents in Spanish that explained the individual reasons why Student was disciplined or suspended numerous times before November 24, 2014.

24. Ms. Zepeda has been employed for over four years by Ms. Amey's law firm, and has received most of her training as an educational advocate on the job from the firm. She was familiar with Student's educational records based upon her own review of those documents. She reviewed Student's records from Panama but did not see a copy of the Consent Form or any transmittal letter in those documents. Ms. Zepeda consistently and strongly denied that Panama provided copies of, or explained the need for a Consent Form at the two meetings she attended with Parent, on October 17, 2014, and November 19, 2014. She denied ever hearing Panama staff explain the Consent Form to Parent, or that she ever saw it until she received it as part of Panama's exhibit binder five days before the beginning of the Expedited Hearing.

25. Student's expert Dr. Delaina Martinez is an experienced licensed school psychologist currently employed by Inglewood Unified School District. She reviewed Student's educational records from Bakersfield City for the 2013-2014 school year. In her opinion, where a student presented with hallucinations and anxiety, or with the history of behaviors she found in Student's Bakersfield City records, she would have considered conducting a social emotional assessment to determine whether Student had social emotional difficulties impacting him at school. Dr. Martinez did not review any records from Panama, and never spoke with or met Student or Parent or Panama staff.

26. At hearing, Student offered reports in English from Sylvan Learning Center based upon assessments by Sylvan conducted in February 2015. The reports were admitted and given the appropriate weight based upon the corroborative testimony offered by Student. Although Parent identified the reports, she was only able to testify as to what she was told by Sylvan as to the areas in which Student was tested

and the number of hours Sylvan recommended for academic tutoring. Parent's inability to read the reports in combination with the absence of any other credible corroborative testimony resulted in minimal weight assigned to the reports for purposes of determining remedies.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁴

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)⁵ 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 free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (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

⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁵ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it

desired to do so.] Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, 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), (f); 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); Ed. Code, § 56505, subd. (l).) 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, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Student is the petitioning party and has the burden of proof on all issues.

ISSUE 1: DID PANAMA VIOLATE CHILD FIND OBLIGATIONS?

5. Student contends that, between August 18, 2014, and the date the complaint was filed, November 24, 2014, Panama had enough knowledge to suspect that he was a child with a disability and, therefore, it failed its Child Find obligations by failing to assess him for special education eligibility.

6. Under the IDEA and California law, a school district has an affirmative, continuing obligation to identify, locate, and evaluate all children with disabilities

residing within its boundaries. (20 U.S.C. § 1412(a)(3); Ed. Code, § 56300 et seq.) The duty is not dependent on any action or inaction by parents; the district must “actively and systematically seek out all individuals with exceptional needs ... who reside in the district.” (Ed. Code, § 56300.) In addition, the district must develop and implement “a practical method” to locate those individuals. (Ed. Code, § 56301.)

7. Before any action is taken with respect to the initial placement of an individual with exceptional needs in special education instruction, an individual assessment of the pupil’s educational needs shall be conducted, by qualified persons in accordance with testing requirements set forth in Education Code section 56320 subds. (a) through (i). (Ed. Code §§ 56320 & 56322.)

8. A local educational agency must provide written prior notice to the parents of a child whenever it proposes to initiate the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. §§ 1415(b)(3), and (c).) The written notice must be given to parents of a child with a disability in written language understandable to the general public, and in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. (34 C.F.R. § 300.503(c)(1).) If the native language or mode of communication of the parent is not a written language, the local educational agency must take steps to ensure that 1) the notice is translated orally or by other means in parent’s native language or mode of communication; 2) parent understands the content of the notice, and 3) written evidence exists that the previous requirements have been met. (34 C.F.R. § 300.503(c)(2).) A school district must make reasonable efforts to and obtain informed written consent from a parent before conducting the initial evaluation of a student to determine whether the child is a child with a disability. (34 C.F.R. §§ 300.9; 34 C.F.R. §§ 300(a)(1)(i), (iii).)

9. A local educational agency must assess a special education student in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304 (c)(4) (2006);

Ed. Code, § 56320, subd. (f).) In order to assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, §56381, subd. (a).) The parent or guardian of the pupil shall be given, in writing, a proposed assessment plan within 15 days of the referral for assessment. The notice consists of the proposed assessment plan and a copy of parental and procedural rights under the IDEA and state law. (20 U.S.C. § 1414(b)(l); Ed. Code, § 56321, subd. (a).) The assessment plan must be written in the parent's native language and understandable to the parent, explain the assessments that the district proposes to conduct, and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(l)-(4).)

10. In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: impeded the right of the child to a FAPE; significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a FAPE to the child; or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) The hearing officer "shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program." (Ed. Code, § 56505, subd. (j).) While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

Issue 1(a) Child Find – August 18, 2014 through October 6, 2014

11. Here, Student met his burden of establishing that Panama had sufficient information between August 18, 2014, and October 6, 2014, to trigger its duty to assess Student for special education eligibility. Panama materially violated the IDEA through October 6, 2014, by failing to give Parent proper and timely written notice in Spanish of its intent to assess and an assessment plan in Spanish.

12. When Parent enrolled Student at Panama, she filled out a Home Language Survey dated August 8, 2014, in which she notified Panama that Spanish was the primary language spoken in the home. She also provided a Spanish version of a 504 Plan and a Behavior Plan from Bakersfield City. Her native language was Spanish.

13. Panama's failure to recognize that Student's behaviors during the first weeks of school should have triggered a suspicion by Panama staff that Student may require special education supports and services was not reasonable. Parent reported on Student's application for enrollment that he had been "expelled" from Bakersfield City for "sexual battery." Student engaged in repeated aggressive and defiant behaviors requiring discipline by his teachers, almost from the first day of school, resulting in multiple absences from class and a total of eight days of suspension. His Stonecreek progress report showed that he was performing unsatisfactorily in three academic classes. In addition to calling Parent to pick Student up from school after disciplinary events, Panama held two meetings with Parent during the first two weeks to address Student's behavior. The second meeting was to develop a Section 504 plan for Student with a behavior accommodation plan, at which a Spanish interpreter assisted Parent. Parent repeatedly expressed concern for Student and asked for help with his behaviors so he could function appropriately in school. When Mr. Calley met with Student to ensure Student understood the rules and consequences regarding bad behavior, he was unaware of Student's past history of behaviors at Bakersfield City. However, he knew

that Student had been disciplined at Bakersfield City at least once for inappropriate conduct involving what Parent described as "sexual battery."

14. At the August 27, 2014 Section 504 meeting, Ms. Gentry's failure to conclude that Student may need to be assessed for special education was not reasonable, and her explanations not persuasive, considering that, during that time, Student was referred for discipline, absent from class, and suspended for two days, in combination with Parent's expressed concerns and requests for help.

15. Panama received Student's records from Bakersfield City on September 5, 2014. The records included more than 20 disciplinary incidents and suspensions in the 2013-2014 school year. The records, in addition to his behavior during the first few weeks of school at Panama, gave Panama a reason to suspect that Student was eligible for special education and required assessment. Both Mr. Harper's and Dr. Martinez's testimony supported Student's contention that the information in Bakersfield City records provided Panama with enough information about Student to trigger its Child Find duties. Dr. Martinez and Mr. Harper credibly testified that, based on a review of Bakersfield City's records alone, they would have considered assessing Student in the area of social emotional deficits given his multiple incidents of discipline.

16. Panama had enough cumulative information from the time Student enrolled, through October 6, 2014, to suspect that he may be a child with a disability and to seek Parent's consent to assess Student in compliance with the procedural requirements of the IDEA. While Ms. Gentry initially generated a Consent Form in English on September 22, 2014, Panama staff only sent an English version to Parent. English was not Parent's native language, and whether or not she could read in either English or Spanish was questionable. Therefore the Consent Form was not in compliance with the procedures required under the IDEA and its enabling regulations. Regardless of whether or not Panama staff perceived that Parent was able to communicate and understand to some degree what Panama was verbally communicating in English,

Panama was on notice from the day Student enrolled that Parent's native language was Spanish. Parent signed the Home Language Declaration, Panama provided a Spanish interpreter for Parent numerous times during the first month of school, and staff personally interacted with her in both English and Spanish.

17. Student met his burden of establishing that Panama materially violated its Child Find obligations under the IDEA for the time period from August 18, 2014 through October 6, 2014. Parent was denied the opportunity to meaningfully participate in the initial assessment process without an offer in Spanish to assess Student. Student's remedies will be discussed below.

Issue 1(b) Child Find – October 7, 2014 through The Date of Filing,
November 24, 2014

18. After October 7, 2014, Panama cannot be faulted for not assessing Student in the absence of parental consent. Panama met its obligation to attempt to assess Student by providing Parent with a Consent Form in Spanish on or after October 7, 2014, and until November 24, 2014, as part of its Child Find obligations. The weight of evidence established that Panama complied with its obligations under the IDEA from and after October 7, 2014.

19. At and after the October 7, 2014 Section 504 amendment meeting, Panama met its Child Find duties by offering in Spanish, in writing and verbally, to conduct assessments including a functional behavioral assessment. It was prevented from doing so without parental consent. The parties' evidence differed significantly on whether or not Parent had the opportunity to give consent to assessments. The weight of the evidence favored Panama in terms of credibility on the issue of whether Panama ever provided an English and Spanish version of the Consent Form to Parent from October 7, 2014 and before November 24, 2014.

20. Parent's testimony that she had never seen the Consent Form or had it

explained to her by anyone from Panama was inconsistent with testimony by Ms. Clark, Dr. Pierucci, Mr. Harper, Ms. Gentry, and Mr. Pope. They consistently and credibly testified that Mr. Harper and Ms. Clark gave Parent the Consent Form in Spanish at the October 7, 2014, and with the assistance of a Spanish interpreter, explained the document line by line at that meeting. The meeting notes are consistent with Mr. Harper's and Ms. Clark's testimony. Student did not credibly refute testimony that those events actually occurred, particularly because Parent did not accurately remember the details of what happened at the October 7, 2014 meeting. Panama mailed copies of documents in English and Spanish to Parent's address of record after that meeting on at least three different occasions without receiving them back as undeliverable. Mother denied ever receiving the documents by mail. Dr. Pierucci and Mr. Pope credibly testified that Dr. Pierucci raised the issue of the Consent Form with Parent at a meeting on October 17, 2014, and Mr. Pope, Ms. Clark and Dr. Pierucci raised it again at the November 14, 2014 meeting. At the November 14, 2014 meeting, Mother responded that the matter was "in the hands of" her attorney.

21. Ms. Clark, Mr. Harper and Mr. Pope credibly testified that they again offered the Consent Form, with the assistance of the Spanish interpreter, on November 19, 2014. Ms. Clark, Mr. Harper, and Dr. Pierucci consistently testified in both hearings that Panama explained the Consent Form to Parent with a Spanish interpreter present, at the November 19, 2014 Section 504 meeting, and asked her to sign it. Ms. Gentry, Mr. Harper, and Ms. Clark consistently and credibly testified at both hearings that they were concerned for Student and wanted and attempted to assess Student, but could not because Parent declined to sign a Consent Form. The November 19, 2014 meeting notes were consistent with Ms. Clark's and Mr. Harper's testimony. When weighed against Parent's testimony, Panama's witnesses were more credible.

22. Ms. Zepeda's testimony contradicted the notes from the November 19, 2014 meeting and testimony from Mr. Pope, Ms. Clark and Mr. Harper regarding what

happened during that meeting. Ms. Zepeda attended all days of the Expedited Hearing, and heard all of the witness testimony at that hearing, including Mr. Pope, Ms. Clark, and Mr. Harper, who testified that at the November 19, 2014 Section 504 meeting Panama gave and explained to Parent a Consent Form. Parent and Ms. Zepeda left before Panama could print and give Parent the Section 504 meeting notes, and Parent did not sign the Consent Form. Student elected not to rebut any of that testimony with Ms. Zepeda's testimony during the Expedited Hearing. Her testimony in this hearing was strongly in support of her client and her client's version of events and very critical of Panama. However, neither Parent nor Ms. Zepeda offered any credible testimony that supported a finding that the notes of the October 7, 2014, and November 19, 2014 Section 504 meetings referencing the Consent Form were falsified by Panama staff, or that Panama's witnesses were consistently untruthful about what occurred at those meetings or regarding the various modes of delivery of the Spanish version of the Consent Form to Parent.

23. The weight of the evidence established that, in compliance with section 300.503(c)(1)(ii) of title 34 of the Code of Federal Regulations, on October 7, 2014, Panama handed Parent a Consent Form in Spanish and then went over it point by point with the assistance of a Spanish interpreter to ensure Parent understood the document, which, presuming Parent could not read sufficiently to understand what was printed, met Panama's obligations under section 300.503(c)(2). In addition to mailing a copy of the Spanish Consent Form to Parent on October 15, 2014, Panama staff offered another copy of the Consent Form translated into Spanish to Parent at the November 19, 2014 Section 504 manifestation determination meeting. Staff again asked Parent to sign the Consent Form and reviewed its content and purpose with her, with the assistance of a Spanish interpreter, and in Ms. Zepeda's presence. Ms. Zepeda's and Parent's testimony denying the Consent Form was discussed at the meeting was not credible, particularly because the notes for that meeting corroborated what happened.

24. Student offered no evidence that explained why neither Parent, nor Ms. Zepeda as her advocate and employed by Parent's attorney, questioned Panama staff at the November 19, 2014 meeting as to why Panama had not yet responded to Parent's September 15, 2014 request for an assessment. Student also offered no evidence that Parent ever attended any meeting or received any document at a meeting where she expressed concern to Panama that she did not understand what was being said, or was declined the assistance of an interpreter.

25. In sum, Parent's contention that she never received and did not know about or understand the necessity for the Consent Form on or after October 7, 2014, was not supported by the evidence. Without parental consent for an assessment, Panama could not determine if Student was eligible for special education and related services. Panama did not violate its Child Find obligations to Student resulting in a denial of FAPE on and after October 7, 2014.

ISSUE 2: FAILURE TO PROVIDE DISCIPLINARY DOCUMENTS IN SPANISH

26. Student contends Panama denied him a FAPE by depriving Parent the opportunity to meaningfully participate in the development of Student's educational program because it failed to provide disciplinary documents in Spanish to Parent. For the reasons set forth below, Student did not meet his burden of establishing that Panama procedurally violated the IDEA, causing Student a denial of FAPE, or materially depriving Parent of meaningful participation, by failing to provide Parent disciplinary documents in Spanish.

27. Legal Conclusions 8, 9, and 10 are incorporated by reference.

28. The IDEA and the Code of Federal Regulations do not require that a school district translate assessments, assessment plans, or IEP documents from English to a parent's native language. Federal and state education law only require that school districts take any action necessary to ensure that the parent or guardian understands

the IEP team meeting proceedings, including arranging for an interpreter if necessary. (34 C.F.R. §§ 300.9, 300.322(e); Ed. Code, § 56341.5, subd. (i).) The Office of Special Education Programs of the United States Department of Education has stated that the IDEA and corresponding Code of Regulations do not require translations of IEP documents, although providing such translations may help demonstrate in some circumstances that non-English speaking parents have been fully informed of the services the IEP offers. (*Letter to Boswell* (OSEP 2007) 49 IDELR 196; *City of Chicago School District 299* (Ill State Educational Agency 2010) 110 LRP 36565; *In re: Student with a Disability* (NM State Educational Agency 2011) 111 LRP 39015.)

29. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist. supra*, 267 F.3d 877, 882.)

30. A parent has meaningfully participated in the development of an IEP when he or she is informed of the child'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 Education* (3rd Cir. 1993) 993 F.2d 1031, 1036 [parent who has an 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].)

31. Contrary to Student's contentions, neither federal nor state statutes required that Panama translate disciplinary documents from Student's cumulative file for

Parent, or provide to Parent written explanations in Spanish for each disciplinary event to ensure her meaningful participation. Under the IDEA, if Student had been eligible for special education, Panama would have been required to ensure that Parent understood what happened at IEP meetings. In the context of these facts, title 34 Code of Federal Regulations section 300.503(c) applies only to prior written notice of Panama's intent to initiate assessments for special education eligibility. It is not applicable to whether Panama failed to provide Section 504 documents or disciplinary records from Student's cumulative file to Parent in Spanish before he was found eligible for special education.

32. The legal standard under the IDEA in determining whether a school district has committed a procedural violation is whether its actions have materially impeded a parent's ability to participate in the IEP process or denied Student a FAPE. In that regard, under the facts of this case, where Parent did not consent to assess Student, Student has not met his burden that Panama materially violated any provision of the IDEA causing Student a denial of FAPE or deprivation of Parent's opportunity to meaningfully participate by failing to provide Parent with disciplinary records in Spanish.

REMEDIES

33. Student prevailed on Issue 1(a) because Panama failed in its Child Find obligations by failing to assess him for special education eligibility for the time period of August 18, 2014 through October 6, 2014. As a remedy, Student requested 100 hours of independent one-to-one tutoring; 50 hours of behavioral support; and 50 hours of family therapy, as well as a return to Stonecreek, his home school.

34. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Ibid.*) An award of compensatory education need not provide a "day-for-day compensation." (*Id.*

at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

35. Here, Student offered very little evidence to support the remedies requested. The only relevant information from the Sylvan reports was that Parent understood that Student was tested in the areas of reading and math, and Sylvan recommended programs consisting of 244 hours in reading and 40 hours in math. Student missed 61 hours of class time, although not all of those classes were in academic subjects. Mr. Harper suggested Student might need one hour of counseling a month if he were found eligible for special education, along with an unspecified amount of resource support, a referral for a educationally related mental health assessment, and continuation of a one-to-one shadow aide. He based his recommendations on unspecified Panama assessments conducted in January and February 2015. Student offered no evidence to support an order that District should return Student to Stonecreek, or provide 50 hours of family therapy.

36. Equitable relief is appropriate in this case because Student missed educational opportunities during the applicable time frame as a result of Panama's failure to timely and appropriately begin the process of assessment for eligibility for special education. His grades in math and reading were unsatisfactory during that time period. Student missed approximately 61 hours of class time during the seven weeks from August 18, 2014, through October 6, 2014, because of suspensions, absences, unexcused absences, and referrals out of class because of inappropriate behavior. The supports offered in his Section 504 plan did not appear to be effective. The evidence

established that Student required psychological counseling because of his consistent behavioral challenges, concerns that he may have more serious emotional issues, and that he needed assistance in academics, particularly in math and English.

37. Based upon his behaviors causing suspension and class absences, and the number of hours of class time he missed, Student is entitled to some equitable relief. The 50 hours of behavioral support requested by Student would amount to more than seven hours per week of compensatory services for each of the seven weeks District failed to assess. Student offered no credible evidence to support his claim for 50 hours of behavioral support. Although Mr. Harper opined that Student might need 60 minutes per month of counseling, based on Student's repeated defiant behavior in class, and his aggressive behavior toward fellow students, the evidence supports an equitable remedy of more than that minimal amount. Weighing the disparity, and striking a balance between the 60 minutes per month on the one hand, and the seven hours per week on the other, an equitable remedy would be seven hours of one-to-one psychological counseling, based upon one 60-minute session per week for the seven weeks.

38. Regarding compensatory education, Sylvan recommended 284 hours of intensive instruction, and Student requested 100 hours. District did not offer any evidence to the contrary. However, 100 hours would amount to more than 14 hours per week for each of the seven weeks District failed to assess. Student's attendance logs and his grade reports offer little evidence to support a finding of 100 hours. The evidence supported a finding that Student's grades were affected in math and reading because of absences, justifying an equitable remedy but less than the 14 hours per week Student requests. Therefore, for the seven weeks between August 18, 2014 and October 6, 2014, Student is entitled to 28 hours, based upon four hours a week for seven weeks, of intensive academic instruction in the areas of math or reading, or a combination of the two, as determined by the provider, through a state-certified non-public agency.

ORDER

1. Panama shall fund seven hours of psychological counseling by a licensed school psychologist employed by Panama or, if none is available, by a state certified non-public agency.
2. Panama shall fund 28 hours of intensive academic instruction in the areas of math or reading, or a combination of the two, as determined by the provider, through a state-certified non-public agency.
3. Student may access the compensatory hours above through December 2015. Any unused hours shall be forfeited if Student fails to access the hours, or misses a session by no fault of the provider.

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. Student prevailed on Issue 1(a). District prevailed on Issue 1(b) and Issue 2.

RIGHT TO APPEAL

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

DATED: June 11, 2015

/s/

ADRIENNE L. KRIKORIAN

Administrative Law Judge

Office of Administrative Hearing