

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

HUNTINGTON BEACH CITY SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2015110012

DECISION

Huntington Beach City School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on October 30, 2015, naming Student. Student subsequently filed a due process complaint and accompanying Motion to Consolidate on January 5, 2016. The two cases were consolidated on January 8, 2016, and the Order adopted the Student's case's timeline and dates for mediation, prehearing conference, and hearing, while vacating the dates associated with District's case.

On February 22, 2016, ALJ Ted Mann held a telephonic prehearing conference. Both Student and District were represented by counsel at the prehearing conference. The due process hearing dates were confirmed at the prehearing conference. Subsequently, on the evening of February 29, 2016, after the close of business, and less than one day before the first day of hearing on March 1, 2016, Student's attorney faxed a withdrawal of Student's request for hearing, along with Student's attorney's own withdrawal as attorney of record for Student. Student's mother also faxed

correspondence to the Office of Administrative Hearings that same evening, acknowledging the withdrawal of Student's attorney, the start of the hearing the following day, and her unavailability to attend the hearing. She also included a request to submit an opposition to District's case after the hearing.

Administrative Law Judge Ted Mann heard this matter in Huntington Beach, California, on March 1, 2016.

Ernest Bell, Attorney at Law, represented District. Cathy Cornwall, Student Services Director, attended the hearing on behalf of District. Anne Delfosse, Executive Director, attended the hearing on behalf of the West Orange County SELPA.

There was no appearance by Student, Student's Parents, or any representative on her behalf.

A continuance was granted for District and Student to file written closing arguments and the record remained open until Monday, March 21, 2016.¹ Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES²

- 1) Did District's offer of placement, program, and services in Student's
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¹ On March 8, 2016, District submitted a Motion to Supplement the record and add testimony of four witnesses who were not called to testify at hearing. Good cause for District's Motion is not found, and the supplemental materials were not considered in reaching the instant decision.

² The 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.)

September 22, 2015 individualized education program constitute an offer of a free appropriate public education in the least restrictive environment?

2) Was District's 2015 psychoeducational assessment of Student appropriate and did it meet the applicable federal and state requirements?

SUMMARY OF DECISION

District met its burden of proof on the issue of whether the September 22, 2015 IEP offer constituted a FAPE in the least restrictive environment as District established at hearing that the IEP offer met the appropriate legal requirements.

District also met its burden of proof on the assessment issue by showing District's psychoeducational assessment met all legal requirements. Accordingly District is not required to fund a psychoeducational independent educational evaluation for Student at public expense.

FACTUAL FINDINGS

JURISDICTION

1. At the time of the hearing, Student was a thirteen-year-old girl who resided within District's boundaries at all relevant times, and was eligible for special education under the primary category of other health impairment.

BACKGROUND

2. Student was first diagnosed with Attention Deficit Hyperactivity Disorder as a five-year-old. She has been on medication for ADHD since she was six years old. She attended pre-school, kindergarten, and began elementary school in northern California until she moved to Huntington Beach in the fourth grade and began attending District's Smith Elementary School.

3. In March 2014, Student was evaluated for an accommodation plan

pursuant to Section 504 of the Rehabilitation Act of 1973, due to her inattention, school anxiety, and issues with work completion. A Section 504 plan was instituted for Student based on her diagnosis of ADHD. It was designed to provide classroom support to Student, who had not qualified for special education.

4. Student lived with her mother, step-father, a younger brother, and a younger step-brother. She had a difficult relationship with her step-father, and had witnessed him physically abuse her mother on at least one occasion. She saw her biological father approximately two times per month. Student's biological parents divorced approximately eight years prior, and she continued to be profoundly affected by their divorce.

5. Student was privately assessed by Dr. Kimberly Palmiotto in late 2012 and early 2013. Dr. Palmiotto found that Student had high average to superior cognitive abilities, and was generally performing academically in that same range in reading and writing, but was only in the average to high average range in math. Dr. Palmiotto reaffirmed Student's previous diagnosis of ADHD. She also diagnosed Student with an Adjustment Disorder with mixed anxiety and depression that she attributed to Student still having difficulty adjusting to her parents' divorce. Dr. Palmiotto reviewed eligibility criteria for special education related to possible eligibilities for Student in Specific Learning Disability, Other Health Impairment, and Emotional Disturbance. Although noting a discrepancy between Student's ability and her performance in math, Dr. Palmiotto was not of the opinion that Student met the criteria for eligibility in any of the three areas. She endorsed the idea of continuing Student in a Section 504 plan and noted concerns about Student's social awareness and the potential impact on a special education placement.

6. Student reported continuing somatic complaints such as stomach ache or headache in sixth and seventh grade leading to 37 days of absences in sixth grade

(2013-2014 school year) and at least 32 days of absences in seventh grade (2014-2015 school year). Student had typically taken a combination of a stimulant (such as Adderall) and mood stabilizer (Prozac, Concerta) over the last several years to treat her ADHD, and had taken melatonin as a sleep aid.

7. Student was an enthusiastic participant in local theater productions. She had significant or leading roles in musical stage productions during the 2013-2014 and 2014-2015 school years. She typically had several rehearsals a week. A significant number of Student's school absences were related to her performance in local theater.

8. Student had great difficulty during the 2013-2014 and 2014-2015 school years completing assignments and submitting homework.

9. In the spring of 2015, Student had an incident of self-injury (cutting) that she attributed to seeking attention from others. Student also had a single incident of setting paper on fire that she similarly attributed to seeking attention.

10. Student was admitted to the University of California, Irvine on an involuntary 72-hour hold on April 4, 2015. She stayed at UC Irvine for six days and then was released. She thereafter received a clinical assessment at Centers for Discovery and qualified for their intensive outpatient program. She attended the program four days a week for four hours a day for approximately four weeks and then finally transitioned to a three hour, three day per week program. She subsequently completed the program.

11. On February 27, 2015, Student was referred for assessment for special education eligibility by her mother and District's Student Study Team. District prepared a proposed assessment plan, and received consent to the assessment plan from Student's mother on March 17, 2015. The assessment plan included evaluations of Student in the areas of academic achievement, health, intellectual development, and social/emotional.

2015 ASSESSMENT OF STUDENT BY DISTRICT

12. District's 2015 assessment team was led by school psychologist Lisa Endelman. Ms. Endelman received a bachelor of arts degree in psychology from Chapman University in 1995. In 1998, she received master of arts degrees from Chapman University in both educational psychology and counseling. She obtained her Pupil Personnel Services credentials in school psychology, school counseling, and child welfare and attendance in 1998. She also received her Behavior Intervention Case Management certification in 1998.

13. Ms. Endelman has worked as a school psychologist and behavior intervention case manager for District since 2004. She has regularly conducted psychoeducational assessments of students and estimated to have undertaken more than one thousand such assessments in the course of her career. She has performed assessments in the areas of cognition, social/emotional, processing, and behavior. She has also routinely and regularly participated in IEP meetings, SST teams, Section 504 assessments, student counseling, and on the School Attendance Review Board panel. She was well acquainted with Student.

14., The assessment of Student utilized the following components: Attention Deficit Hyperactivity Disorder Test; Behavior Assessment System for Children-Second Edition; Conners Rating Scale; Kaufman Test of Educational Achievement-Second Edition; Scales for Assessing Emotional Disturbance-Second Edition; Beery-Buktenica Developmental Test of Visual-Motor Integration-Sixth Edition; Wechsler Intelligence Scale for Children-Fifth Edition; Health Assessment; Nurse Assessment. District also conducted a review of Student's file and an interview of Student and Parents, interviews/consultations with District/SELPA personnel, and observed Student in the school setting. District also administered the: Draw-A-Person: Screening Procedure for Special Education; Beck Youth Inventories-Second Edition; Sentence Completion;

Childhood Trust Events Survey; Personality Assessment Inventory-Adolescent; School Refusal Assessment Scale-Revised (Parent Form); CRAFT Screening; Parent Relationship Questionnaire; Scales for Assessing Emotional Disturbance-Second Edition; Developmental/Educational Questionnaire; and Stress Index of Parents of Adolescents. The assessors also reviewed independent educational evaluations, diagnostic reports, and medical reports disclosed by parent, including a February 20, 2013 neuropsychoevaluational evaluation conducted by Coastal Educational Services.

15. District's assessors also reviewed the April 9, 2015 UC Irvine discharge instructions following Student's hospitalization in 2015, and a September 7, 2009 report by Dr. Deborah Sedberry, M.D., which including treatment notes. Dr. Sedberry was one of Student's outside medical providers when Student lived in Northern California. Dr. Sedberry had evaluated Student and prescribed a medication plan for Student.

16. Student worked hard at completing her assigned tasks during the assessments, and put forth a consistent good effort. She was consistently fidgety nonetheless and frequently found something to do with her hands such as making origami or playing with pens or pencils. She was aware that she was being observed in the classroom and activity portions of her behavioral observations.

17. The Wechsler Intelligence Scale is an individually administered, comprehensive clinical instrument for assessing the intelligence of children from six through 16 years of age. On the Wechsler, Student had a full scale score of 121 which was the 92d percentile and in the "very high" range. She scored in the "very high" or "high average" ranges in verbal comprehension, fluid reasoning, working memory, and processing speed. In visual spatial, she had a score of 97 which was the 42d percentile and the "average" range. Although still in the average range, Student's Visual Spatial Index score indicated that she had a relative weakness in this area as opposed to other areas of the test where she scored quite high.

18. Nancy Serafano, a specialized academic instruction teacher at Districts Dwyer Middle School since 2004, conducted the academic assessment. She has bachelor of arts from Pepperdine. In 2003, she earned her master of arts degree from California State University at Long Beach in Special Education. She also holds credentials as an educational specialist, and as an autism specialist.

19. Ms. Serafano initially attempted to use the Woodcock-Johnson-IV Tests of Achievement as an assessment tool, but learned after she began using the assessment that Student had recently been assessed using the same assessment tool by Dr. Palmiotto. Use of the Woodcock-Johnson was discontinued. She instead administered the Kaufman Educational Achievement Test-3. The Kaufman included nine composites in the standard battery, and included measurements of key academic skills in reading, math, written language, and oral language. The test average is 100, and scores from 85 to 115 are considered in the average range. Student obtained a comprehensive composite score of 118 which is in the 88th percentile. Her scores in reading composite (132), reading fluency (141), sound symbol composite (127), and decoding composite (125) were all above average or high scores. Her scores in math composite (104) and written language composite (111) were in the average range.

20. Robyn Moses, the Director of Mental Health Services for the Huntington Beach Union High School District since June of 2012, conducted the social-emotional assessment. Ms. Moses was formerly the special education program director for the West Orange County Consortium for Special Education for approximately six years. She has been an adjunct professor at National University, and currently is a lecturer at California State University, Long Beach in graduate level education and psychology classes. She is a licensed educational psychologist and a licensed professional clinical counselor. She estimated that she performs about 100 mental health assessments per year. She has particular expertise in the subject of "school refusal." School refusal

involves the psychological reasons underlying school avoidance by a student. Her testimony and analysis of Student's social -emotional status was very believable and credible due to her strong professional credentials and her straight-forward, reasonable testimony at hearing, and was therefore accorded great weight.

21. Ms. Moses was very familiar with Student. She oversaw the administration of the social-emotional rating scales to teachers, Student, and Student's mother, and analyzed and interpreted the results. She also administered the Personality Inventory assessment to Student. She conducted an interview with Student. Ms. Moses also interviewed Student's mother. She collaborated with Ms. Endelman in preparing District's assessment of Student, and in drafting the report's conclusions.

22. The Beery-Buktenica Developmental Test of Visual-Motor Integration-Sixth Edition is a measure of visual perception, fine motor control, and hand-eye coordination. The test was administered to Student to assess her visual and sensory-motor processing abilities. Scores from 90 to 110 are considered in the average range, and Student scored a 103 which was in the 58th percentile and in the average range.

23. The Attention Deficit Hyperactivity Disorder Test is a standardized, norm-referenced test that contributes to a diagnosis of ADHD. The test's rating scales were given to two of Student's teachers and her mother. The teachers' overall responses indicated that the likelihood of Student exhibiting behaviors consistent with ADHD was average. The rating scale completed by Student's mother indicated that the likelihood of Student exhibiting behaviors consistent with ADHD was above average.

24. The Conners Third Edition is used to identify children who are "at risk" for having ADHD or attentional difficulties by rating them on 14 different scales that illustrate ADHD behaviors. The Conners-3 Teacher Assessment rating scales were completed by Student's teachers Mr. Slutsky and Ms. Bhagat. Both teachers generally indicated very elevated scores in ADHD symptoms, consistent with Student's continuing

ADHD diagnosis.

25. The Behavior Assessment Scales for Children-Second Edition consists of parallel assessments of a child's behaviors at home, school, and community settings. The assessment scales were completed by three of Student's teachers and her mother. Student also completed a self-assessment scale. Each of the adult assessors found at least several areas that were deemed clinically significant. Mr. Slutsky rated Student to have clinically significant behaviors in nine areas, but Mr. Slutsky's caution index for excessively negative scores was rated extreme caution due to his score on the F caution index, and thus his ratings were strongly suspect and largely discounted. Student's own self-assessment was remarkable for only one ranking above average when Student rated herself at risk for hyperactivity.

26. Student was assessed by Ms. Moses using the Draw-A-Person Screening Procedure. The Draw-A-Person screening is evaluated for the inclusion of elements that may indicate a likelihood of emotional disturbance and whether further assessment of emotional disturbance is warranted. A score of less than 55 indicates that no further assessment is warranted. Student received a score of 43 on the assessment.

27. Student was assessed by Ms. Moses using the Beck Youth Inventories-Second Edition. The Beck Inventories are five self-report scales that may be used separately or in combination to assess a child's experience of depression, anxiety, anger, disruptive behavior and self-concept. Scores are reported using a T-score format where an average score is 50 with a standard deviation of five, meaning that a score of 55 or less is considered average. For the self-concept scale, the scoring is reversed with scores between 45 and 55 being average, and a higher score indicative of a heightened self-concept. Student had average scores in depression (43), anxiety (40), anger (36), and disruptive behavior (41), and had a heightened or above average score of 61 on self-concept. Overall, her scores fell in the average range with a strong level of self-concept.

There were no indications that Student was experiencing any significant symptomology beyond that typical of girls her age.

28. Student was assessed by Ms. Moses using the Personality Assessment Inventory-Adolescent. The Personality Inventory is an objective personality assessment for use with adolescents. The Personality Inventory is presented at a fourth grade reading level. The assessment items include four validity scales, 11 clinical scales, five treatment consideration scales, and two interpersonal scales, all designed to assist in the identification of mental disorders. Student's scores on the Personality Inventory were within normal limits and indicated that she responded consistently and by interpreting, comprehending, and attending appropriately. It was found to be unlikely that Student tried to influence the assessment results and the validity scales indicated Student's responses were genuine, and represented a valid measure of her perceptions of her own behavioral functioning, thoughts, and emotions.

29. Student was assessed by Ms. Moses using the Revised Children's Manifest Anxiety Scale-2-Short Form. The Anxiety Scale is a self-rating scale that assesses the level and nature of anxiety experienced by a student. Scores are reported as T-scores with a mean of 50 and a standard deviation of 10. T-scores below 40 indicate that the respondent is usually anxiety-free and scores above 60 suggest that the respondent has at least some difficulties with anxiety. Scores of 65 or above are significant. Student's score on the Anxiety Scale was 38, and was consistent with average levels of anxiety on two other assessment measures, the Beck Inventories and the Personality Inventories. The consistency is a strong endorsement of the validity of Student's Anxiety Scales score.

30. Three of student's teachers completed the Scales for Assessing Emotional Disturbance rating scale. The Emotional Disturbance rating scales are a teacher evaluation of Student's behaviors typically associated with emotional disturbance. The

teacher ratings showed that Student's behaviors differed greatly among her teachers, classrooms, and class subjects. The teachers' ratings of the adverse impact of Student's behaviors on her educational performance ranged from low to moderate. None of the teachers rated Student as adversely impacting her educational performance to a considerable, severe, or extreme extent.

31. District's assessment found that Student met the eligibility criteria for Other Health Impairment due to her ADHD. District's assessment did not find that Student met the eligibility criteria for special education under the categories of emotional disturbance or specific learning disability. For emotional disturbance, District's assessment did not find that Student exhibited one or more of the five characteristics³ over a long period of time and to a marked degree, and adversely affecting Student's educational performance. For specific learning disability, District's assessment did not find that Student exhibited a severe discrepancy between her intellectual ability and her academic achievement.

32. Ms. Moses concurred in the conclusion of District's assessment that Student met the eligibility criteria for other health impairment due to Student's ADHD. She did not find evidence to support the conclusion that Student met the eligibility criteria for emotional disturbance. Her conclusion was that Student did have some problem behaviors, but the behaviors were not the result of emotional disturbance. She

³ Under Cal. Code Regs., tit. 5, § 3030(b)(4) the five characteristics include: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors; (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) Inappropriate types of behavior or feelings under normal circumstances; (D) A general pervasive mood of unhappiness or depression; (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

did not believe that Student was more emotionally dysfunctional than Student's average peer. She also did not find a basis in the evidence to support the conclusion that Student met the eligibility criteria for specific learning disability. Ms. Moses attributed Student's school avoidance to Student's aversion to the pressure to complete homework, noting that Student's attendance improved greatly once pressure to complete homework was removed.

33. District assessed Student in all areas related to her suspected disability using a variety of assessment tools and measures. Tests and other assessment materials were administered by trained personnel in conformance with instructions. The assessors and other reporters were knowledgeable of Student's disability and competent to perform the assessment or provide input. Assessment materials were validated for the specific purpose for which they were used, and were selected and administered so as not to be racially, culturally, or sexually discriminatory. The assessments were provided and administered in Student's primary language, English.

34. Input was obtained from special education and general education teachers, Student's mother, outside providers, and trained District personnel. Student and her mother were intensively interviewed by District's assessors. Relevant functional, developmental, academic, and medical information was obtained for Student. Environmental factors were considered and eliminated as a basis for assessment bias. During assessment there was a considerable effort put forth by Student to complete the testing, and Student was not observed to be anxious or non-compliant. The data obtained accurately represented Student's abilities and capabilities. District obtained data that was sufficient, valid and reliable data, and did not rely on any single measure.

SCHEDULING THE IEP MEETING

35. District sought to schedule an IEP team meeting for Student to occur by May 15, 2015, within 60 days of receiving approval of the assessment plan by Parent.

District repeatedly tried to schedule the IEP meeting both before and after 60 days had elapsed, but Parent and/or her attorney did not make themselves available and the IEP meeting was not held until September 22, 2015.

36. District sent a notice of meeting for an initial IEP team meeting for Student to Student's parent on April 30, 2015, proposing a May 15, 2015 date for the meeting. On April 30, 2015, Student's mother refused the proposed date and requested a different time and/or place for the IEP meeting, indicating that District should contact Student's attorney to make the arrangements.

37. District next sent a notice of meeting for an initial IEP team meeting for Student to Student's parent on April 30, 2015, proposing a June 10, 2015 date for the meeting. On May 4, 2015, Student's mother agreed to the meeting date and indicated in writing she would attend the meeting. On June 9, 2015, Student's attorney sent an e-mail to Nancy Serafano, Cathy Cornwall, and Lisa Endelman indicating that neither he nor Student's parent would attend the IEP team meeting the following day and that the meeting date would need to be postponed.

38. Ms. Endelman then offered an additional IEP meeting day, June 15, 2015, in a return e-mail, but that meeting day was rejected by Student's attorney, as well. Student's attorney acknowledged that his rejection of the IEP team meeting date meant that the IEP would not be held until the next school year. The last day of school for the 2014-2015 school year was June 19, 2015. On June 19, 2015, Ms. Endelman sent a notice of meeting for the initial IEP to Student's parent proposing the IEP meeting be held September 22, 2015. On September 4, 2015, Katrina Handel, a Dwyer Middle School special education teacher, sent Student's parent a reminder notice for the September 22, 2015 IEP meeting.

SEPTEMBER 22, 2015 IEP MEETING

39. The September 22, 2015 IEP meeting was attended by the following

individuals: Amy Motsinger, District Program Specialist; Nancy Finch-Heuerman, WOCCSE SELPA Director; Robyn Moses, District Director of Mental Health Services; Katrina Handel, District Special Education Teacher; Mr. Slutsky, District General Education Teacher; Ms. Serafano, District Special Education Teacher; Ms. Endelman, District School Psychologist; Shannon Cronin-Miller, School Vice Principal; Student's mother; Student's step -father; Edward Siebel, Student's Attorney; Cynthia Siebel, Student's Advocate; and Dr. Palmiotto, Student's consulting psychologist. The IEP team was comprised of all legally required participants.

40. Student's parents were offered a copy of procedural safeguards and had no questions regarding parent rights. Parents, their attorney, their advocate, and their consulting psychologist all had the opportunity to be informed of Student's problems, attend the IEP meeting, express disagreement regarding the IEP team's conclusions, and request revisions in the IEP. The IEP team discussed Parents' concerns, as expressed by their attorney, that Student's psychiatric problems were not considered in District's assessment. The IEP team also addressed Parents' concerns that Student continued to not want to attend school and had difficulty with mathematics.

41. Student's consulting psychologist raised questions about the validity of Student's assessment scores and the discrepancy between Student's intellectual ability and academic achievement. The IEP team addressed the issue, and discussed validity measures in District's assessments and the eligibility requirements for specific learning disability.

42. The IEP team discussed Student's academic achievement, assessment results, present levels of performance, and health information leading to the creation of written proposed goals in task completion, time on task, and attendance. The proposed goals included baseline data, and measurable one-year goals. The IEP team discussed proposed goals for Student, and Student's Advocate expressed concern regarding

details of the proposed goals. The IEP team discussed the proposed goals and made modifications to the goals.

43. The IEP team discussed placement, services, accommodations, and supports, and discussed a continuum of service options for Student, taking into account Student's unique needs. The IEP team proposed Specialized Academic Instruction in a regular classroom utilizing a collaborative model for two classes (English Language Arts and Math) for 228 minutes each per week. The IEP team also proposed individual counseling for Student for 30 minutes once per week. Student was to spend 100 percent of her time in the general education setting.

44. The IEP team proposed specific accommodations and supports tailored to Student's unique needs including: extended time on tests, up to one and a half times on the testing day; frequent checks for understanding; use of a fidget item; frequent silent prompts to attend; preferential seating near the focus of instruction; reduced length of assignment up to 50 percent when it did not take away from the standard being taught; adult support for history for 228 minutes per week in history class provided by District personnel; and an adult to initial work system provided by District personnel. At the IEP meeting, Student's parents did not consent to the IEP team's offer of placement and services for Student.

45. The rationale for the program, services, and accommodations offered by the IEP team was to allow Student to access her education without stigmatizing a highly capable, highly socially-conscious teen-aged girl by placing her in a special education class. The collaborative (or colab) model was selected to allow Student to have support by a special education teacher in a regular classroom in two classes in which it was concluded Student needed support: English Language Arts and Math. The colab classes were slightly smaller classes with one general education teacher and one special education teacher co-teaching the class. The classes taught the California standard,

keeping Student on a diploma track, but at a slightly slower pace. The class structure was geared to providing students with time to attempt and complete class assignments and homework in class. District team members felt that this element was a key component in reducing pressure on Student to complete assignments outside of class as that pressure had the effect of causing Student to engage in school avoidance and absenteeism. Without the negative pressure of homework, Student's primary reason for school avoidance behavior would be eliminated. The placement in the colab classes was designed to be the least restrictive environment for Student as she was able to receive services and supports in a general education setting and have her unique needs addressed at the same time.

46. The initial IEP offer also included weekly counseling and guidance services designed to assist Student in getting to school and completing tasks. The weekly counseling time would also allow Student to learn strategies to use when distracted.

47. The supports and accommodations offered in the initial IEP were calculated to provide Student with means to access her education while addressing Student's unique needs. The accommodations and supports were focused on keeping Student on task and redirecting her as needed, as well as providing an outlet (fidget item) for her excess energy. Additionally, the accommodations and supports allowed Student extra time to complete tests and a reduced amount of homework.

POST-INITIAL IEP EVENTS

48. Following the initial IEP team meeting of September 22, 2015, District received correspondence from Student's new attorneys, Adams & Associates. In correspondence dated September 30, 2015, attorney Timothy Adams indicated that Student's mother, on behalf of Student, was disputing the IEP offer and indicated that she did not believe the IEP offer constituted a FAPE, and that she reserved her rights to privately place Student. Attorney Adams also indicated that Student's mother disagreed

with the accuracy of District's psychoeducational assessment and was requesting an IEE at public expense.

49. District's Director of Student Services, Cathy Cornwall, responded to attorney Adams' correspondence in a letter dated October 23, 2015. In her letter, Ms. Cornwall denied Student's request for reimbursement for private placement and the request for a publicly funded psychoeducational IEE. Ms. Cornwall's correspondence included appropriate information regarding Student's due process rights and included enclosures regarding procedural safeguards and IEE guidelines. District subsequently filed the instant due process complaint on October 30, 2015.

LEGAL CONCLUSIONS

INTRODUCTION - LEGAL FRAMEWORK UNDER THE IDEA⁴

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

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

⁵ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) Special education "is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) Related services "are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(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. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (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. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, because District filed the complaint and requested the hearing, District has the burden of proof.

5. In resolving the question of whether a school district has offered a FAPE,

the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

6. If the parent or guardian of a child who is an individual with exceptional needs refuses all services in the IEP after having consented to those services in the past, the local educational agency shall file a request for a due process hearing. (Ed. Code, § 56346, subd. (d).) *I.R. v. Los Angeles Unified Sch. Dist.* (9th Cir. 2015) 805 F.3d 1164.

ISSUE 1: DID DISTRICT'S OFFER OF PLACEMENT, PROGRAM, AND SERVICES IN STUDENT'S SEPTEMBER 22, 2015 INDIVIDUALIZED EDUCATION PROGRAM CONSTITUTE AN OFFER OF A FREE APPROPRIATE PUBLIC EDUCATION IN THE LEAST RESTRICTIVE ENVIRONMENT?

7. District contends that its offer of placement, program, and services in Student's September 22, 2015 individualized education program constituted an offer of a free appropriate public education in the least restrictive environment both procedurally and substantively. Student disputes District's contention.

8. Procedurally, an IEP meeting to review the results of an assessment must be held within 60 days from the receipt of parent's written consent to the assessment,

with certain exceptions for vacation days, school breaks, and other circumstances. Parent may also agree, in writing, to an extension of the 60-day time period. (Ed. Code §§ 56043 and 56344.)

9. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a) Ed. Code, § 56500.4.) 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 team meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d 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].)

10. The IEP team is required to include one or both of the student's parents or their representative, a regular education teacher if a student is, or may be, participating in the regular education environment, a special education teacher, a representative of the school district who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum and is knowledgeable about available resources. (34 C.F.R. § 300.321(a).) The IEP team is also required to include an individual who can interpret the instructional implications of assessment results, and, at the discretion of the parent or school district, include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).) Finally, whenever appropriate, the child with the disability should be present. (34 C.F.R. § 300.321(a).)

11. An IEP is a written document for each child with a disability that includes: a statement of the child's present levels of academic achievement and functional

performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; and a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) When appropriate, the IEP should include short-term objectives that are based on the child's present levels of academic achievement and functional performance, a description of how the child's progress toward meeting the annual goals will be measured, when periodic reports of the child's progress will be issued to the parent, and a statement of the special education and related services to be provided to the child. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(iii); Ed. Code, § 56345, subd. (a)(3).) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code § 56345, subd. (a)(7).) An IEP must include a post-secondary transition plan during the school year in which the child turns 16 years old. (Ed. Code, § 56043, subd. (g)(1).) The IEP need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code § 56345, subds. (h) and (i).)

12. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the

most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).)

13. Federal and state laws require school districts to provide a program in the least restrictive environment) to each special education student. (Ed. Code, §§56031; 56033.5; 34 C.F.R. § 300.114.) A special education student must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class," 2) "the non-academic benefits of such placement," 3) the effect [the student] had on the teacher and children in the regular class," and 4) "the costs of mainstreaming [the student]."(*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's syndrome].) If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools;

state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

14. Here, District conducted thorough and complete assessments of Student as a predicate to conducting the IEP process. As further discussed below, District's assessment met the applicable legal standards and provided reliable and complete information on Student's psychoeducational status. The initial IEP team meeting was held within applicable timelines as District offered the meeting within 60 days of receiving approval of the assessment plan from Student's parent. The delay in convening the meeting from May 15, 2015, until September 22, 2015, arose solely from Student's parents' unavailability to attend the IEP team meeting, and was extended by their (or their attorneys) written agreement. Also, the initial IEP team meeting was properly noticed and District's attendees fulfilled the statutory requirements in the breadth of personnel in attendance. Student's parents, as well as variously their attorney, their advocate, and their consulting psychologist, were afforded the opportunity to participate in the initial IEP meeting, and they did, in fact, meaningfully participate in the IEP meeting by asking questions, raising concerns and issues, and challenging District's analysis and assessment report. The IEP team appropriately considered Student's strengths and weaknesses, parents' concerns, results of District's most recent assessments, and the Student's unique academic, developmental, and functional needs.

15. The IEP document itself consisted of the statutorily appropriate items including, but not limited to: present levels of academic achievement and functional performance for Student; an analysis of how Student's disability affects her involvement and progress in the general education curriculum; a statement of three measurable annual goals designed to meet Student's unique needs arising from her disability and

make progress in her education; a statement of how Student's performance on her goals will be measured and reported to Parents; a statement of special education and services to be provided to Student, along with projected start dates and duration, frequency, and location of services, supports, and accommodations.

16. District's offer of placement, program, and services in Student's September 22, 2015 individualized education program met the applicable substantive requirements and constituted an offer of a free appropriate public education in the least restrictive environment. The offer of placement in two colab classes addressed Student's need for additional support in the classroom while not stigmatizing her as a special education student. The use of a co-teaching general education classroom with reduced homework and expanded class time to complete assignments directly addressed the root causes of Student's school avoidance, meeting Student's unique needs and allowing Student to progress in her education. Accommodations were similarly tailored to Student's unique needs as they allowed for Student's proximity to instruction, extra time, careful prompting and redirection, and reduction of assignment completion stress. The counseling services offered by District also supported Student in her acquisition of focusing skills, improved attendance, and psychological support. The goals included in the IEP were tailored to Student's unique needs and focused on her issues with task completion, time on task, and attendance.

17. The IEP offer was also calculated to constitute the least restrictive environment for Student by having her in a general education setting for 100 percent of the school day. The supports, services, and accommodations, with the exception of the proposed counseling services, were all designed to take place in the general education classroom with a minimum negative impact to Student's access to general education and her education generally.

18. Following Student's parents' rejection of the IEP offer of September 22,

2015, District moved promptly to respond to parents' demands, and then promptly filed for due process.

19. In sum, District has met its burden of proof in establishing that it complied with all procedural and substantive requirements in its offer of a FAPE in the least restrictive environment to Student.

ISSUE 2: WAS DISTRICT'S 2015 PSYCHOEDUCATIONAL ASSESSMENT OF STUDENT APPROPRIATE AND DID THE ASSESSMENT MEET THE APPLICABLE FEDERAL AND STATE REQUIREMENTS?

20. District contends that its psychoeducational assessment of Student complied with all legal requirements, and that Student is not entitled to an IEE at public expense. Student disputes District's contentions.

21. Under certain conditions, a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329].) To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1).)

22. When a student requests an IEE, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate, or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

23. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (34 C.F.R. § 300.301(a); Ed. Code, § 56320.)⁶ No single procedure may be

⁶ An assessment under California law is equivalent to an evaluation under Federal

used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2)(B); Ed. Code, § 56320, subd. (e).)

24. A district must ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) Assessments must be conducted by individuals who are both knowledgeable of [the student's] disability"and "competent to perform the assessment, as determined by the local educational agency."(Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).)

25. Tests and assessment materials must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

26. The assessment must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the child is classified. (34 C.F.R. § 300.304(c)(6).)

27. A district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining whether he is eligible for special education, and what the content of his program should be. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) An assessment tool must provide relevant information that directly assists persons in determining the educational needs of the child."(34 C.F.R. § 300.304(c)(7).)

28. In selecting assessment tools, the assessor must do more than pick a

law. (Ed. Code, § 56303.)

generally valid instrument. Tests and other assessment materials must be used for purposes for which the assessments or measures are valid and reliable.”(20 U.S.C. § 1414(a)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) Assessment tools must be tailored to assess specific areas of educational need . . .”(Ed. Code, § 56320, subd. (c).) Special attention shall be given to the [child’s] unique educational needs . . .”(*Id.*, subd. (g).)

29. Assessors must use "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3).) Technically sound instruments' generally refers to assessments that have been shown through research to be valid and reliable.”(Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540-46541, 46642 (Aug.14, 2006).)

30. A district must ensure that the child is observed in her learning environment (including the regular classroom setting) to document her academic performance and behavior in the areas of difficulty. (34 C.F.R. § 300.310(a).)

31. It is the duty of the IEP team, not the assessor, to determine whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. §§ 300.305(a)(iii)(A); 300.306(a)(1). To aid the IEP team in determining eligibility, an assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subds. (a), (b).) The report must be given to the parent or guardian, though that duty has no fixed time limit. (Ed. Code, § 56329, subd. (c).) Normally, an assessment must be completed within 60 days of the receipt of parental consent for it. (34 C.F.R. § 300.301(c)(1)(i), (ii); see Educ. Code, § 56302.1(a).)

32. Here, District has met its burden of proof in establishing that it met the procedural and substantive requirements necessary for its assessment of Student to be

found legally sufficient, and to deny Student an IEE at public expense.

33. Following Student's parents' request for assessment of Student for potential special education eligibility, District timely proffered an assessment plan. Upon receiving parents' signed agreement to the assessment plan, District timely completed the assessments.

Once Student challenged District's assessment, District promptly and timely responded to Student's concerns, and thereafter timely filed its request for a due process review of the assessment's sufficiency.

34. Student was assessed in all areas of suspected disability, including academic achievement, health, intellectual development, and social/emotional. A broad variety of assessment tools and methods were utilized to obtain comprehensive, valid, meaningful data on Student's academic, developmental, and functional abilities, capabilities, and difficulties. Assessments included, but were not limited to: review of education, medical, and assessment records; interviews with parent and Student; objective assessment tools; the use of assessment scales completed by Student, Parent, and Student's teachers; and observations of Student in the classroom and other educational settings.

35. The assessments were selected and administered so as not to be racially, culturally, or sexually discriminatory, and were provided and administered in Student's primary language of English. The assessments were also selected and used for the purposes for which the assessments or measures were valid and reliable, were tailored to Student's specific areas of educational need, and were technically sound and reliable. The test assessors were highly qualified, trained, and experienced in administering the assessments utilized, and were knowledgeable about Student and her suspected disabilities.

36. The judgment and recommendations of the assessors, as related in the

assessment report, were logical, well-considered, and evaluative. The assessors considered the wealth of information they assembled in reaching reasonable conclusions regarding Student's potential eligibility for special education under the category of other health impairments, and in concluding that Student did not meet the eligibility requirements for emotional disturbance or specific learning disability.

37. In sum, District established by a preponderance of the evidence that it met all the procedural and substantive requirements for establishing the legal sufficiency of its assessment. As District has met the applicable legal requirements, and timely moved for a due process review of the sufficiency of the assessment, Student is not entitled to an IEE at public expense.

ORDER

1. District's requests for relief are granted.
2. The IEP offer of September 22, 2015 provided Student a FAPE in the least restrictive environment.
3. District's assessment of Student is legally sufficient, such that Student is not entitled to an IEE at public expense.

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. District prevailed on all issues presented.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DATED: April 8, 2016

/s/

TED MANN

Administrative Law Judge

Office of Administrative Hearing