BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN BERNARDINO COUNTY SUPERINTENDENT OF SCHOOLS, RIALTO UNIFIED SCHOOL DISTRICT, AND COLTON JOINT UNIFIED SCHOOL DISTRICT.	OAH Case No. 2015060423

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings on May 21, 2015, naming San Bernardino County Superintendent of Schools (San Bernardino), Rialto Unified School District (Rialto), and Colton Joint Unified School District (Colton). On August 28, 2015, Student filed an amended complaint naming the same respondents. The matter was continued for good cause on October 12, 2015.

Administrative Law Judge Robert G. Martin heard this matter in Bloomington, California, on November 30, 2015, and December 1, 2, 3, 8 and 9, 2015.

Attorney Tania L. Whiteleather represented Student. Educational advocate Peter Atwood attended all days of hearing. Mother attended the hearing on November 30, December 3 and December 9, 2015, and testified. Father testified on December 1, 2015. A Spanish language interpreter assisted both parents during the hearing. Student did

not attend the hearing.

Attorney Deborah Cesario represented San Bernardino, Rialto and Colton. Colton Director of Pupil Personnel Services Janet Nickell attended all days of hearing, as did East Valley Special Education Local Plan Area Program Manager Laura Chism, who attended on behalf of San Bernardino, Colton, and Rialto. San Bernardino Principal of Student Services Scott Wyatt attended all days of hearing except December 3, 2015, and Rialto Coordinator of Special Education Julian Gutierrez attended on November 30, 2015.[1]

A continuance was granted for the parties to file written closing arguments and the record remained open until January 19, 2016. The parties timely filed written closing arguments, the record was closed and the matter was submitted for decision on January 19, 2016.

ISSUES[2]

Did San Bernardino and Colton deny Student a free appropriate public education by:

(1) Failing to provide Parents a timely assessment plan, and complete psychoeducational, adapted physical education, speech, and assistive

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[1] On December 8, 2015, Student dismissed all claims against Rialto Unified School District with prejudice. The ALJ ordered the dismissal on the record. The remaining respondents, San Bernardino and Colton are sometimes collectively referred to as Respondents.

[2] The issues pled in the complaint have been combined, reorganized and rephrased 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.)

technology assessments, after agreeing at Student's April 23, 2014 individualized education program team meeting that they would conduct such assessments at the beginning of the 2014-2015 school year; or

(2) Failing to develop a safety plan for Student to address risks that Student would suffer harm and become lost while under Respondent's care?

SUMMARY OF DECISION

Student is a 15-year-old eighth grader who cannot speak, functions at the level of a typical two- to three-year-old, and needs assistance with most daily living skills. Student, through his Parents, contended that San Bernardino and Colton were both equally responsible for Student's educational placement and program, and both functioned as Student's local educational agency. Student contended that San Bernardino and Colton failed to timely conduct assessments of Student, when they agreed to complete and review the assessments by October 2014, but failed to provide Student an assessment plan until February 2015. Student contends that this failure significantly impeded Parents' opportunity to participate in the IEP decision-making process. As a remedy, Student sought independent educational evaluations in the areas of psychoeducation/neuro-psychoeducation, adapted physical education, speech, assistive technology and augmentative adaptive communication. Student also contended that San Bernardino and Colton changed Student's school of attendance for the 2014-2015 school year without giving Parents notice, putting Student at potential risk of harm when Parents could not find him at the end of the first day of the 2014-2015 school year. Student sought a safety plan to ensure that Parents would be able to locate Student in the event of an emergency.

San Bernardino and Colton contended that the assessment plan offered Student in February 2015 was timely because the proposed assessments could have been completed in time for Student's triennial IEP due in April 2015. They further contended

that they should not be liable for failing to timely assess Student because Parents withheld him from school after the first day of the 2014-2015 school year. San Bernardino and Colton also contended that their failure to timely assess Student did not impede Parents' opportunity to participate in the decision-making process, because Student's low performance and slow development meant that Students assessment results would have been the same regardless of the assessment date, and Student in any event was not entitled to the equitable remedy of independent evaluations because Student's chosen independent evaluators did not satisfy Colton's criteria for conducting independent evaluations. Finally, San Bernardino and Colton contended that, even if Parents did not know where Student was and could not locate him, he was under the care of responsible employees of San Bernardino and Colton at all times on the first day of school, and not at risk, and therefore did not need a safety plan.

Student met his burden of proof on both issues. By failing to send Student an assessment plan until February 2015 after agreeing to complete assessments and hold an IEP by October 2014, San Bernardino and Colton deprived Parents of current information regarding their son's needs, delayed Student's IEP process by six months, and significantly impeded Parents' opportunity to participate in decision making regarding the provision of a FAPE to Student. Respondents presented no evidence that Parents' withholding student from school caused the delay. As an equitable remedy, Student is entitled to IEE's in the areas of psychoeducation, adapted physical education, speech, and assistive technology that San Bernardino and Colton failed to timely provide, that are not required to strictly comply with Colton's criteria as long as they are reasonable. By failing to advise Parents of Student's change of school, not providing Parents with contact information for school and transportation personnel overseeing Student, and failing to tell front office personnel at Student's new school that Student was on their campus, San Bernardino and Colton placed Student at an unacceptable risk of harm if his Parents needed to, but could not, find him. As an equitable remedy,

Student is entitled to supports in his IEP to ensure that Parents will be able to locate him at all times.

FACTUAL FINDINGS

JURISDICTION

1. Student was 14 years old at the time of hearing, and had not attended school since August 4, 2014. At all relevant times, Student was eligible for special education under the categories of intellectual disability and autism. He resided with his Parents within the boundaries of Colton, but since 2011 had been referred by Colton for placement in special day classes operated by San Bernardino. Under a memorandum of understanding between San Bernardino and Colton, San Bernardino provided Student's placement, assessments and services, other than transportation to school, which was provided by Colton. Both San Bernardino and Colton participated in the development of Student's IEP.

STUDENT'S 2012 ASSESSMENTS, LEVELS OF PERFORMANCE, AND IEP

2. Student was last assessed in preparation for his triennial IEP team meeting in April 2012, when he was 11 years old and in fourth grade. San Bernardino conducted a health assessment, a psychoeducational assessment, and an academic assessment. Student was not assessed in the areas of adapted physical education, speech, or assistive technology.

3. Student's psychoeducational evaluation and academic assessment report by San Bernardino school psychologist Thomas Ryerson was two pages long. Dr. Ryerson's findings and conclusions were based on his review of Student's records and previous assessment data from April 2009, teacher reports and observations, and teacher ratings of Student on the Vineland Adaptive Behavior scales and the Childhood Autism rating scale. Dr. Ryerson did not observe Student or test his cognitive abilities,

and did not obtain parent ratings for the Vineland Adaptive Behavior scales or the Childhood Autism rating scale.

4. Student had significant cognitive and critical living skill deficits, autistic-like behaviors, and a history of seizures for which he received medication and had a seizure plan at school. Student suffered from orthopedic impairments affecting his balance and causing him to walk on his toes. Student could not read or write, made random sounds but could speak no words, and usually did not recognize his own name. His abilities to communicate, dress himself, feed himself, use the bathroom, and socialize with others, were all at the level of a typical child 24 to 30 months old. Student's native language was Spanish, spoken at home by Parents, although Father also spoke English.

5. Based on Student's assessment results, his IEP team set one-year goals in his April 26, 2012 for Student to: (1) communicate that he wanted more by using a gesture or sign at breakfast and lunch; (2) stop his current activity and turn to someone speaking his name; (3) attend to his teacher counting 1, 2, 3, by clapping in time to the count; (4) push-pull out a chair, sit in it, and remain seated during an activity with verbal prompts; (5) pull his own pants up or down on request when taken to the bathroom and wash his hands independently when finished; and (6) use a spoon to feed himself when verbally prompted.

PARENTS' OCTOBER 2012 AND APRIL 2013 REQUESTS FOR ASSESSMENT

6. On October 29, 2012, Parents asked San Bernardino to assess Student's need for adapted physical education. San Bernardino agreed to conduct the assessment, but no assessment was conducted, for reasons not explained at hearing.

7. Following Student's fourth grade year in 2011-2012, Student skipped fifth grade for reasons not explained at hearing and advanced to sixth grade for 2012-2013.

8. At Student's April 30, 2013 IEP meeting Parents expressed frustration with Student's class placement, and concern that Student's proposed goals did not focus

enough on Student's basic personal needs. Parents believed that Student was showing progress in communication, socialization, and self-help as a result of on one-on-one home applied behavior analysis (ABA) therapy, obtained through Inland Regional Center. Parents thought Student would benefit from placement in a highly structured class that employed ABA, and they requested that Colton place Student in such a class in a non-public school. Parents also requested a current psychoeducational education of Student. The completed IEP stated "the psychoeducational assessment will be completed," and Colton's representative at the IEP agreed that Colton would consider Parents' request for non-public school placement for the 2013-2014 school year. However, neither San Bernardino nor Colton gave parents an assessment plan or conducted the psychoeducational assessment before Student's next IEP in April 2014, and Colton did not offer Student a non-public school placement.

STUDENT'S APRIL 23, 2014 IEP AND PARENTS' CONCERNS AND REQUEST FOR ASSESSMENTS

9. Student's mother attended Student's seventh grade IEP meeting on April 23, 2014. Representatives from San Bernardino and Colton attended, and a Spanish interpreter assisted Mother. Student made progress on all of his annual goals, but had not completed any of them. The IEP team developed new goals for Student. Colton offered the following as FAPE: "within the structured academic instructional setting offered by the county office of education, with 10 minutes per month of [adapted physical education] consult." Student's program supports included "constant supervision and heavy physical assistance," and a requirement that school personnel have "awareness of [Student] and where he is and what he is doing 100% of the time." The IEP team did not discuss changing Student's classroom placement for the 2014-2015 school year.

10. Parents expressed several concerns regarding Student's program. Parents

felt Student should be receiving ABA therapy at school. They were also concerned that Student's teacher, Mr. Williams, arranged seating in his class to restrict Student's movement. Finally, Student had come home several times during the year with scratches on his face, and Mr. Williams was unable to explain how the scratches had occurred.

11. Parents renewed their request that Colton and San Bernardino conduct full assessments to determine Student's current functioning skills and needs by advancing his triennial assessments. The IEP team agreed to conduct a full triennial assessment, specifically agreeing to conduct psychoeducational, adapted physical education, speech, and assistive technology assessments. The team agreed it would start the assessments at the beginning of the 2014-2015 school year, and would hold an IEP to consider the assessments within 60 days from the start of school on August 4, 2014; that is, by October 3, 2014. The IEP team did not give Parents a proposed assessment plan at the April 23, 2014 IEP team meeting, or afterwards until February 20, 2015. Neither Colton nor San Bernardino assessed Student during that time.

CHANGE OF STUDENT'S TEACHER AND SCHOOL FOR THE 2014-2015 SCHOOL YEAR

12. After Student's April 23, 2014 IEP, and before the first day of the 2014-2015 school year, the administration of either San Bernardino or Colton unilaterally decided to change Student's teacher and school for eighth grade from Mr. Williams' class operated by San Bernardino at Rialto's Jehue Middle School to David Whitt's class operated by San Bernardino at Rialto's Rialto High School. Neither Colton nor San Bernardino explained the timing and reasons for this change at hearing. The change did not happen at an IEP meeting with Parents present. Although both of Student's San Bernardino teachers were aware of the change, no one presented evidence that Colton's administration was also aware of the change of teachers and schools, and Student's bus driver, who was employed by Colton, was not aware of the change.

13. No one told Parents verbally or in writing of the change of Student's placement before the start of the 2014-2015 school year. Neither Mr. Williams nor Mr. Whitt spoke with, or wrote to Parents to tell them that Student would have a new teacher and school, and no one offered any persuasive evidence that anyone else communicated this to Parents. San Bernardino offered a generic letter dated July 14, 2014 from San Bernardino to "Dear Parents/Guardians," that indicated that the recipient's child would be attending Mr. Whitt's class at Rialto High School in 2014-2015. The letter stated that Colton transportation would be contacting parents separately to advise them of pick-up and drop-off times. However, District offered no credible evidence establishing that anyone mailed the letter to Parents, that Parents were on a mailing list for the letter, that Parents received the letter, or that Colton transportation contacted Parents to advise them of pick-up and drop-off times for Rialto High School. Parents credibly testified they did not know that Student's placement had changed. As discussed below, the events that occurred on the first day of school in the 2014-2015 school year corroborated their testimony. Additionally, neither San Bernardino nor Colton notified Rialto High School personnel that Student would be attending school at Rialto High School, so that they would be aware of Student, where he was, and what he was doing, as required in Student's IEP.

PARENTS' INABILITY TO FIND STUDENT ON THE FIRST DAY OF SCHOOL, AUGUST 4, 2014

14. On August 4, 2014, Colton bus driver Guadalupe Vasquez picked up Student from his home, as she had during the prior school year. Based on a route slip provided to her by Colton, Ms. Vasquez drove Student to Jehue Middle School. Mr. Williams, who met the bus, realized Student was on the bus, and he told Ms. Vasquez that she should drop Student off at Rialto High School. After verifying those instructions with her supervisor, Ms. Vasquez took Student to Rialto High School. There, Mr. Whitt

met the bus, and took Student to his classroom. That day, Mr. Whitt took photographs of the students in his class, including Student, for the purpose of preparing a list of the students in his class, and their photographs, to give to employees in the front office at Rialto High School so that they would know which students were in Mr. Whitt's special day class and what they looked like. This was Mr. Whitt's usual practice at the beginning of each year, and he typically gave the Rialto High School front office the completed list of students and their photographs approximately two weeks after the start of school, once it became clear who would be in his class for the year. Mr. Whitt did not give the front office a list of his students or their photographs on August 4, 2014, and the Rialto employees in the front office did not know that Student was on the Rialto High School campus.

15. At the end of the day, Mr. Whitt took Student to the bus stop at Rialto High School. In the prior 2013-2014 school year, Ms. Vasquez had not driven Student home in the afternoons, because Parents had decided that the bus ride home took too long. Instead, Student's Mother would meet him each afternoon at school when class finished and take him home. On August 4, 2014, when Ms. Vasquez did not see Student's Mother waiting for him, she concluded that Parents had decided to let Student ride the bus as a test to see how long it would take him to get home. Mr. Whitt helped Student onto Ms. Vasquez's bus, and Ms. Vasquez left, intending to drop Student off at his home after first dropping off two other students.

16. When Mother and Student's Sister arrived at Jehue Middle School at approximately 1:25 p.m., they saw Mr. Williams at the bus stop. Mr. Williams told them Student was not at Jehue, and that he had told Ms. Vasquez to take Student to Rialto High School. Mother and Sister then drove to Rialto High School to find Student. By the time they arrived at approximately 1:35 p.m., Student had left on Ms. Vasquez's bus. Mother and Sister went to Rialto High School's main office, where Mother explained that she was there to pick up her son, who was a special needs student. Mother provided

Student's name, but did not know the name of Student's teacher. Ms. Moreno who worked in the office tried to look up Student, but found no record of Student attending Rialto High School, and told Mother and Sister that she had talked to the special education teacher and, "there's no one by [Student's] name here."

17. Mother and Sister panicked that Student was lost. They called Father and the police. When the police arrived at Rialto High School a short time later, an unidentified woman came out of the school office and said that she thought, but was not sure, that Student had taken a school bus home from Rialto High School. It is unclear how the woman obtained this information, but it was not from Student's teacher, Mr. Whitt, who testified that no one spoke with him about Student until the next day. Mother and Sister called Father, who left work to drive home in hopes of meeting a school bus with Student there.

18. Parent and sister went to the office of Rialto High School Principal Mr. Ayala. Principal Ayala told Mother and Sister that Rialto High School was not responsible for Student, because it was only renting a room to San Bernardino for use as a special day class. Principal Ayala telephoned San Bernardino Principal Scott Wyatt, Ed.D., and put him on a speakerphone so that he could talk with Mother. Mother asked Dr. Wyatt to explain how Student could have been transferred to a new school without Parents first being told of the transfer. Dr. Wyatt laughed and said words to the effect that Mother had probably lost track of Student before, and had possibly had bad experiences with prior principals at San Bernardino. Mother felt that Dr. Wyatt was making fun of her fear for her son's safety, and was further upset. Dr. Wyatt suggested that he meet with Mother, to which she agreed, and he said he would make time on his schedule to meet with her.

19. In the meantime, Ms. Vasquez continued on her school bus route with Student, and arrived at Student's home at approximately 2:30 p.m. Nobody was waiting for the bus, but Father arrived a few minutes later, and the police arrived moments after

that. Father was very angry. He told Ms. Vasquez that no one had told Parents that Student would be going to a new school, and that Student's Mother was crying and thought he had been lost. Father said that Student would never go to that school again.

20. Father took Student into their home, then drove to Rialto High School to pick up Mother, who was feeling ill and unable to drive. When father arrived, Parents went to Principal Ayala's office, and spoke with Principal Ayala and Dr. Wyatt, who was on a speakerphone. Father was still very angry, and said that Student would not be returning to Rialto High School because Parents did not feel that Student would be safe, after which Parents left.

COMMUNICATIONS WITH PARENTS REGARDING THE AUGUST 4, 2014 INCIDENT

21. As a result of San Bernardino's and Colton's failure to inform Parents of Student's change of placement from Jehue Middle School to Rialto High School, and based on the events of August 4, 2014, Parents were emotionally distraught and angry at both San Bernardino and Colton, and feared for Student's safety at Rialto. Student did not return to school on August 5, 2014. When Father received a call from a man that he understood to be a representative of Colton, apologizing for the incident on August 4, 2014, Father asked where Student had been that day. When the man said he didn't know, Father told him not to call again until he could explain where Student had been, and what could be done to prevent similar events in the future.

22. As he had promised Mother on August 4, 2014, Dr. Wyatt made time on his calendar to meet with Mother on August 6, 2014, and he and Mr. Whitt each tried unsuccessfully several times to reach Parents by telephone during the period from August 5 to August 12, 2014 to discuss the August 4, 2014 incident. Their calls were not answered, and Parents did not respond to messages asking them to call back.

23. Mr. Whitt never had any contact with Parents, except to send home a welcome letter with Student on the first day of school. No evidence was presented that

Dr. Wyatt, or any other representative of San Bernardino or Colton, communicated with Parents between August 12, 2014 and December 2, 2014, when Dr. Wyatt responded to an email from Student's advocate. The who, why and when of the decision to transfer Student from Mr. Williams' class to Mr. Whitt's class was not explained at hearing, and Parents did not receive a full explanation of Student's whereabouts on August 4, 2014 until Mr. Williams, Mr. Whitt and Ms. Vasquez testified at hearing. However, after Parents' demands for information on August 4 and 5, 2014, they simply refused to return Student to school based on their stated concerns. Aside from making requests for records that might contain relevant documents, neither Parents, their advocate, nor their counsel attempted to determine how Student had been placed at Rialto or what had happened to him on August 4, 2014. In particular, rather than demanding to meet with Mr. Williams, Mr. Whitt, Ms. Vasquez, and Colton and San Bernardino administrators to discuss these matters, they declined attempts by Mr. Whitt and Dr. Wyatt to arrange such meetings.

NOVEMBER 2014 – JANUARY 2015: STUDENT REQUESTS FOR EDUCATIONAL RECORDS AND IEE'S; SAN BERNARDINO'S REQUESTS TO HOLD MEETINGS AND AN IEP

24. In late October 2014, Parents engaged educational advocate Peter Attwood to assist Parents with Student's educational needs. On November 28, 2014 Mr. Attwood emailed San Bernardino to request Student's educational records, and IEE's for Student at public expense in the areas of psychoeducation, occupational therapy, speech and language, adapted physical education, and assistive technology/augmentative alternative communication, based on San Bernardino's failure to conduct the assessments that were agreed upon at Student's April 23, 2014 IEP team meeting. Dr. Wyatt responded in a December 2, 2014 email, stating that he was the principal of the class in which Student was enrolled and looked forward to getting Student back in school. Dr. Wyatt asked Mr. Attwood to tell him when Parents could

meet with him to have their concerns addressed, and to return a written consent form from Parents authorizing San Bernardino to share Student's records with Mr. Attwood. On December 8 and 12, 2014, Dr. Wyatt emailed Father to tell him that Student's educational records were ready for pick-up, and to request some possible dates for an IEP for Student. Father did not respond to Dr. Wyatt's request to schedule an IEP meeting, but did pick up Student's educational records.

FEBRUARY 6, 2015 EMAIL ADVISES COLTON OF THE AUGUST 4, 2014 INCIDENT AND STUDENT'S REQUEST FOR IEE'S

25. On February 6, 2015, Mr. Attwood emailed Dr. Wyatt and Colton's Director of Pupil Services, Ms. Nickell, requesting approval of Student's request for IEE's without further "unreasonable delay." San Bernardino had not previously informed Colton of the August 4, 2014 incident, or of Student's request for IEE's, and Ms. Nickell learned of them through Mr. Attwood's February 6, 2015 email.

26. After speaking with Dr. Wyatt and Ms. Vasquez's manager in Colton's transportation department, Ms. Nickell believed that Student had not been "lost," but she also believed that Parents' trust in San Bernardino had been damaged. In hopes of rebuilding Student's relationship with San Bernardino and Colton, Ms. Nickell decided to offer Parents assessments to be conducted by Colton, instead of San Bernardino.

FEBRUARY 20, 2015: COLTON AND SAN BERNARDINO DENY STUDENT'S IEE REQUEST AND OFFER COLTON ASSESSMENTS

27. In a February 20, 2015 letter to Parents, Ms. Nickell and Dr. Wyatt jointly responded to Student's request for independent evaluations, denying the request on grounds that it had been more than two years since San Bernardino had last assessed Student, and the statute of limitations had run on Student's statutory right to disagree with those assessments and request independent evaluations.. Colton offered to assess Student in the areas of psychoeducation, speech and language, and adapted physical

education, and to refer Student to San Bernardino's East Valley Special Education Local Plan Area for occupational therapy and assistive technology/augmentative alternative communication assessments. The letter enclosed an assessment plan for district assessments, and requested that Parents respond to the assessment plan by March 9, 2015. The assessment plans proposed that a Colton psychologist assess Student's academic/pre-academic achievement, cognitive development and learning ability, perception/processing/memory, motor development, language and speech development, social/emotional/behavioral development, and self-help/adaptive skills, with a Colton speech and language pathologist and adapted physical education teacher participating in the speech and language and motor development assessments, respectively, and a Colton nurse conducting Student's health assessment.

28. Student rejected Colton's offer to have Colton conduct assessments, and filed Student's initial complaint on behalf of Student in this matter on May 21, 2015.

AUGUST 13, 2015: COLTON'S PROPOSED SAFETY PLAN AND CONDITIONAL OFFER TO FUND IEE'S

29. On August 13, 2015, Colton proposed the following to address Parents' safety concerns: (1) an adult to ensure Student gets off the bus when he arrives at school and on the bus after school; (2) an appropriate means for Student to communicate to others whether at school or in transit; and (3) the name and contact information of a person to serve as Parents' point of contact for communicating concerns and issues pertaining to Student.

30. Colton also offered to fund IEE's in psychoeducation or neuro-psychology, occupational therapy, assistive technology/augmentative alternative communication, adapted physical education, developmental vision, auditory processing, and speech and language. This offer was conditioned on: (1) Student's assessors meeting specified location, qualification and cost criteria specified in an accompanying statement of

Colton's IEE policies and procedures; (2) Colton assessors conducting concurrent assessments of Student at the same time as the independent evaluators; and (3) the independent assessors and Colton assessors agreeing on how the assessments would be conducted. ("For example, the IEE's and Colton's assessors will decide when and where the assessments will take place and which instruments will be administered and by whom.")

Colton's Proposed Location, Qualifications and Cost Criteria for Independent Evaluators

31. Colton's location, qualification and cost criteria for independent assessors were adopted from those of the San Bernardino County East Valley Special Education Local Plan Area to which Colton belonged. For reasons not stated, all assessors were required to be located within 50 miles of Colton. Minimum general qualifications called for each assessor to hold a valid California license in the field related to the disability to be assessed, and to have extensive training in evaluation of the areas of concern and in interpreting the educational implications of assessments. Specific minimum qualifications for the IEE's Colton offered were: (i) multi-disciplinary psychoeducational assessment – credentialed school psychologist, licensed psychologist, or licensed educational psychologist; (ii) neuro-psychological assessment – neuro-psychologist, licensed educational psychologist or credentialed school psychologist with education, training and experience in administering and interpreting neuro-psychological assessments; (iii) occupational therapy-motor assessment – licensed/registered occupational therapist, licensed physical therapist, credentialed adapted physical education specialist; (iv) assistive technology assessment – credentialed or licensed special education provider with appropriate certification in assistive technology; (v) developmental vision assessment – credentialed special education teacher, credentialed school psychologist, licensed educational psychologist, ophthalmologist or optometrist; and (vi) speech and language assessment – credentialed or licensed speech and

language pathologist.

32. Colton's written cost criteria called for Colton to pay independent assessors a "routine and reasonable" fee based on the average of a sampling of fees charged by professionals providing the service within 50 miles of Colton. The routine and reasonable fees applicable to Student's requested IEE's were: (i) multi-disciplinary psychoeducational assessment – $3,500; (ii) neuro-psychological assessment – $4,500; (iii) occupational therapy-motor assessment – $700; (iv) assistive technology assessment – $500; (v) developmental vision assessment – $500; and (vi) speech and language assessment - $750. Colton's cost criteria identified an "excessive fee" was defined as one exceeding the routine and reasonable fee by more than 25 percent. At hearing, Mr. Attwood opined that Colton's minimum evaluator qualifications for certain assessments were too permissive, and by allowing unqualified evaluators depressed the average fee for the assessments, but his opinion on routine and reasonable fees was unsupported by documentary evidence or testimony of other witnesses, and therefore not persuasive.

33. Student identified chosen assessors for neuro-psychology, occupational therapy, assistive technology/augmentative alternative communication, adapted physical education, developmental vision, auditory processing, and speech and language evaluations, but rejected Colton's proposed conditions and criteria for Student's IEE's. On September 29, 2015 Colton declined to pay for any of Student's requested IEE's on grounds that Student's proposed neuro-psychological evaluator, Ann Simun, Psy.D., did not meet Colton's IEE criteria for distance and cost, and Student had not offered any unique circumstances that justified selection of a non-compliant evaluator. Student remained unassessed, either by Respondents or by independent evaluators.

OPINION OF SCHOOL PSYCHOLOGIST CYNTHIA BACHMAN

34. Colton school psychologist Cynthia Bachman had been working in that

capacity for 39 years, and over that time had performed 3,000 to 4,000 triennial assessments of special education students. Dr. Bachman compared information from Student's April 2012 psychoeducational assessment to that contained in a March 2015 report by Student's home ABA provider, California Psychcare. Dr. Bachman admitted that the California Psychcare report was not an educational evaluation and did not include any standardized assessments, but opined that it provided information on Student's self-help capabilities and progress in the home environment. In Dr. Bachman's opinion, the two reports indicated that Student was working on the same skills in 2015 as in 2012, making little progress and continuing to function at a level consistent with a 2- to 2 ½-year-old child. The Psychcare report itself stated that, from October 2014 to January 2015, "[Student] has made great strides with mastery of skills such as eating with the use of a fork, walking down the stairs in his home, PECS level 1, and putting on his pants, to name a few." In Dr. Bachman opinion, Student's low functioning levels and slow progress meant that: (i) cognitive testing of Student would yield no useable results; (ii) a psychoeducational assessor would have obtained the same results whether he assessed Student in fall 2014 or early 2015; and (iii) a delay in assessing Student therefore did not significantly affect Student's educational program.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA[3]

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)[4] et seq.; Ed. Code, § 56000 et seq.; Cal.

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

[4] All subsequent references to the Code of Federal Regulations are to the 2006

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

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

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version.

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].) Here, Student carried the burden of persuasion.

ISSUE 1: FAILURE TO PROVIDE A TIMELY ASSESSMENT PLAN AND COMPLETE ASSESSMENTS

5. Student contends that San Bernardino and Colton denied Student a FAPE by failing to provide Parents a timely assessment plan, and then complete without unreasonable delay the assessments San Bernardino and Colton agreed to conduct at Student's April 23, 2014 IEP team meeting. San Bernardino and Colton contend that their assessment plan provided to Parents on or about February 20, 2015 was timely because it would have allowed assessments to be completed by the April 2015 due date for Student's triennial IEP. San Bernardino and Colton also contend that any delay in assessing Student was not a significant procedural violation because Student's assessment results would have been the same whether Student was assessed in fall 2014 or early 2015, due to his low cognitive levels and slow development. Finally, San Bernardino and Colton contend that any delays in providing Parents an assessment plan or completing the agreed-upon assessments was because Parents kept Student out of school.

Applicable Law

DUTY TO TIMELY REASSESS STUDENT AT PARENTS' REQUEST

6. A child eligible for special education may be reassessed if warranted by the child's educational needs or need for related services, or if reassessment is requested by a child's parent or teacher. (Ed. Code, § 56381, subd. (a)(1); 34 C.F.R. 300.303(a).) Unless the parents and the child's district of residence agree to the contrary, reassessments must not occur more than once a year, or more than three years apart.

(Ed. Code, § 56381, subd. (a)(2); 34 C.F.R. 300.303(b).

7. When a parent requests a reassessment, that district may either agree or refuse to conduct the reassessment. If it agrees, the district must give the parent a written proposed assessment plan describing the assessments to be conducted, within 15 calendar days of the parent's request, unless the parent or guardian agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (a); 56321, subd, (a).)[5] The parent then has at least 15 days to consent in writing to the proposed assessment plan. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c)(4).) When the district receives the parent's written consent, it has 60 calendar days to complete the assessments and develop an IEP required as a result of the assessment, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043, subds. (c) & (f)(1), 56302.1, subd. (a); 56344, subd. (a).)

8. The 60-day time period for completing a reassessment does not apply if the parent of a child repeatedly fails or refuses to produce the child for the assessment. (Ed. Code, § 56302.1, subd. (b)(2).)] As the Supreme Court has noted, the IDEA expects parents and school districts will cooperate in the collaborative IEP process. "The core of the [IDEA] ... is the cooperative process that it establishes between parents and schools. . . . The central vehicle for this collaboration is the IEP process." (*Schaffer v. Weast*, *supra*, 546 U.S. at p. 53.) However, a parent's failure to cooperate in the development of her child's IEP generally does not negate the duties of the district. (*Anchorage Sch. Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055; 20 U.S.C. § 414(d)(2)(A); 34 C.F.R. § 300.323(a).) [School districts "cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents." (Id. at p. 5, citing *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992), 960 F.2d 1479, 1485)].)

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[5] If a district refuses to conduct a reassessment requested by a parent, it must give the parent prior written notice of its reasons for doing so a reasonable time before refusing to initiate the reassessment. (Ed. Code, § 56500.4, subds. (a) and (b).)

9. In *Rowley, supra,* 458 U.S. at pp. 205-06, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. The IDEA's procedural safeguards are intended to protect the informed involvement of parents in the development of an education for their child. (*Winkelman v. Parma City School Dist*. (2007) 550 U.S. 516, 524 [127 S. Ct. 1994, 2000, 167 L.Ed.2d 904].)

10. A district's violation of its obligation to assess a student is a procedural violation of the IDEA and the Education Code *(Park v. Anaheim Union High School Dist., et al*. (9th Cir. 2006) 464 F.3d 1025, 1031-1033). A procedural error, including a failure to assess, does not automatically require a finding that FAPE was denied, but such an error may deny a child a FAPE if it impedes the right of the child to a free appropriate public education, significantly impedes the opportunity of the parents to participate in the decision making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); 20 U.S.C. § 1415(f)(iii)(E)(ii).) *Amanda J. ex rel. Annette J. v. Clark County School Dist*. (9th Cir. 2001) 267 F. 3d 877, 892-895 held that a failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award. In *M.M. v. Lafayette Sch. Dist*. (9th Cir. 2014) 767 F.3d 842, 856, a district's failure to provide parents assessment data showing their child's lack of progress in district's response to intervention program, left the parents, "struggling to decipher his unique deficits, unaware of the extent to which he was not meaningfully benefitting from the ISP [individualized services plan], and thus unable to properly advocate for changes to his IEP." The court concluded that the failure to provide the assessment data prevented the parents from meaningfully participating in the IEP process and denied their child a FAPE. Where a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents.

(*Amanda J., supra,* 267 F. 3d at pp. 892-895; *Target Range, supra,* at pp. 1485-1487 [when parent participation was limited by district's pre-formulated placement decision, parents were awarded reimbursement for private school tuition during time when no procedurally proper IEP was held].)

Analysis

11. Student met his burden on this issue. The evidence showed that San Bernardino and Colton procedurally violated the IDEA by failing to reassess Student after agreeing to do so at Student's April 23, 2014 IEP, which significantly delayed Student's IEP and impeded Parents' opportunity to participate in the IEP decision-making process.

12. When Parents first requested a psychoeducational reassessment of Student at his April 2013 IEP team meeting, they believed that Student's IEP placement and goals were both inappropriate, and they were seeking information to determine whether Student should be placed in a non-public school in a highly structured class that would employ applied behavioral analysis therapy to improve Student's communication, socialization, and self-help skills, and focus more on goals of teaching Student to address his basic personal needs. By failing to provide a psychoeducational reassessment, after agreeing to do so, San Bernardino deprived Parents of information they needed to advocate for their child.

13. This deprivation continued the following year. San Bernardino and Colton representatives agreed at Student's April 23, 2014 IEP that San Bernardino would conduct Student's triennial psychoeducational, adapted physical education, speech, and assistive technology assessments at the beginning of the 2014-2015 school year, and hold an IEP to consider the assessments 60 days from the start of school on August 4, 2014, which would have been October 3, 2014. Having made this agreement without objection or conditions, San Bernardino and Colton were required to comply with the

statutory assessment timelines unless Parents agreed in writing to an extension, which they did not. However, Colton did not give Parents with a proposed assessment plan until February 20, 2015. If Parents had immediately consented to Colton's proposed assessments, the 60-day period to complete the assessments and hold an IEP to review them would not ended until April 21, 2015. This would have been almost seven months after the date on which San Bernardino and Colton had agreed to hold Student's IEP, and near the end, rather than the beginning, of Student's first year on a high school campus.

14. San Bernardino's and Colton's failure to provide the required assessment plan and conduct the assessments by October 3, 2014 was not excused by any failure of Parents. Student was attending class as of May 8, 2014 when San Bernardino's proposed assessment plan was due but not delivered. San Bernardino and Colton presented no evidence that they thereafter asked Parents to produce Student for assessment, or that Parents repeatedly failed or refused to do so. Also, given San Bernardino's previous unexplained failures in October 2012 and April 2013 to conduct agreed-upon adapted physical education and psychoeducational assessments requested by Parents, it would be unreasonable to infer that San Bernardino's failure to conduct reassessments in fall 2014 was caused by Parents keeping Student out of school after the August 4, 2014 incident. After placing numerous phone calls to Parents during the period from August 5 to August 12, 2014 in an attempt to set up a meeting, San Bernardino and Colton simply stopped trying to communicate with Parents until their February 20, 2015 letter denying their request for independent evaluations.

15. As a result of San Bernardino's and Colton's failure to complete Student's reassessments and hold an IEP in October 2014, Parents were deprived from the beginning to the end of his eighth grade year of both the information necessary to understand Student's current needs and the opportunity to advocate at an IEP for changes in his educational program. Respondents' argument that this delay was of no

significance because of Student's low performance and slow progress was not persuasive. Student was a 13.7 year-old adolescent entering eighth grade on a high school campus in Fall 2014. By contrast, he was 11.3 years old and in fourth grade at an elementary school when San Bernardino conducted his last assessments in April 2012. Adolescence would ordinarily be expected to be a time of significant change for a student, and neither Respondents nor Parents had any standardized data on Student's current educational needs. To the extent that information on Student's ability to make progress was available, the March 2015 Psychcare report on Student's progress in his home ABA therapy program indicated that Student had made "great strides" in his basic self-help skills between October 2014 and January 2015. Also, Student's prior 2012 psychoeducational and academic assessment was rudimentary, just two pages long, and based on limited information obtained from a review of Student's records and previous assessment data from April 2009, teacher reports and observations, and teacher ratings of Student on the Vineland Adaptive Behavior scales and the Childhood Autism rating scale. The evaluator had not observed Student, tested his cognitive abilities, or obtained parent ratings for the Vineland Adaptive Behavior scales and the Childhood Autism rating scale. Student had not been assessed at all in 2012 in the areas of adapted physical education, speech, or assistive technology, and it was unclear when, if ever, he had previously been assessed in those areas.

16. Respondent's failure to assess Student and hold an IEP at the beginning of the 2014-2015 school year thus significantly impeded Parents' opportunity to participate in the decision-making process for |Student's educational program by denying Parents current information in the areas of Student's needs, and an opportunity to participate in an IEP team meeting at the beginning of Student's eighth-grade year to develop appropriate placement, services and goals for Student. Student's remedy for this denial of FAPE is discussed below.

ISSUE 2: FAILURE TO HAVE PROCEDURES IN PLACE TO INSURE THAT PARENTS WOULD BE ABLE TO LOCATE STUDENT

17. Student contends San Bernardino and Colton denied Student a FAPE by failing to develop a safety plan for Student to address risks that Student would suffer harm and become lost while under Respondent's care. San Bernardino and Colton contend that Student did not need a safety plan, because he was under the care of responsible employees of San Bernardino and Colton at all times, even if Parents did not know where Student was on August 4, 2014.

Applicable Law

18. The "related services" that a district may be required to provide to assist a child in benefiting from special education include developmental, corrective and supportive services. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) These of necessity must include appropriate measures to ensure the child's safety. Districts have an obligation to consider safety concerns related to the student's qualifying disability when developing and implementing student's IEP (*Lillbask v. Connecticut Dept. of Education* (2d Cir. 2005) 397 F.3d. 77, 93.)

Analysis

19. Student could not speak, and functioned cognitively at approximately the level of a typical two- or three-year-old. Recognizing the obvious safety concerns associated with Student's disabilities, his April 23, 2014 IEP team incorporated program supports of "constant supervision and heavy physical assistance" and a requirement that school personnel have "awareness of [Student] and where he is and what he is doing 100% of the time." His needs did not change through the 2014-2015 school year.

20. In spring 2014, San Bernardino and Colton failed to advise Parents of Student's change of classroom and school and failed to provide them with contact information for the new school and transportation personnel overseeing Student. They

also failed to immediately provide front office personnel at Rialto High School with information concerning Student and his whereabouts. As a result of these lapses: (i) Parents did not know that Student had changed schools and on August 4, 2014 went to the wrong school to pick him up; (ii) Parents did not know who to contact to locate Student once they realized he was not at Jehue Middle School; and (iii) Parents were incorrectly told by the Rialto High School front desk personnel – the persons who logically should have been able to advise Parents where they could find his teacher and classroom – that Student had no teacher or class at Rialto High School.

21. These lapses created a potentially dangerous situation in which a school emergency such as an earthquake or school shooting might have placed Student at great risk, while leaving his Parents unable to locate or assist him. San Bernardino's and Colton's failure to have a plan in place that would keep Parents informed of Student's whereabouts and allow them to quickly locate Student in the event of an emergency raised unacceptable safety concerns and denied Student a FAPE.

REMEDIES

1. Student prevailed on Issues 1 and 2. As a remedy with respect to Issue 1, Student requests that San Bernardino and Colton fund independent evaluations in neuro-psychoeducation, adapted physical education, speech, and assistive technology. San Bernardino and Colton contend that independent evaluations would be an inappropriate remedy for San Bernardino's and Colton's failure to conduct timely assessments, because some of the assessments sought – in particular, cognitive testing by a neuro-psychologist -- would not be considered best practice or useful to conduct because of Student's functioning levels. San Bernardino and Colton also contend that Parents should be denied equitable relief on grounds of unclean hands based on their removing Student from school and failing to reply to San Bernardino's and Colton's attempts to set up meetings to discuss the August 4, 2014 incident.

2. As a remedy with respect to Issue 2, Student requests an order directing San Bernardino and Colton to develop a safety plan to keep Parents informed of Student's whereabouts at all times, including notification in Student's IEP of the Student's school of attendance, creation of emergency contact lists for Parents, and a plan regarding Student's transportation and parental communication. San Bernardino and Colton contend that Student does not require a safety plan because he was never lost or harmed while in their care.

JOINT AND SEVERAL LIABILITY OF COLTON AND SAN BERNARDINO

3. Special education due process hearing procedures extend to the parent or guardian, to the student in certain circumstances, and to "the public agency involved in any decisions regarding a pupil." (Ed. Code, § 56501, subd. (a).) A "public agency" is defined as "a school district, county office of education, special education local plan area, . . . or any other public agency under the auspices of the state or any political subdivisions of the state providing special education or related services to individuals with exceptional needs." (Ed. Code, §§ 56500 and 56028.5.) Under California law, the public agency responsible for providing education to a child between the ages of six and 18 generally is the school district in which the child's parent or legal guardian resides (Ed. Code, §48200), but may also be a county office of education designated in the local plan as the administrative entity. (Ed Code, §56030.)

4. Parents have the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).)

5. Here, Student resided with his Parents within the boundaries of Colton, but since 2011 had been referred by Colton for placement in special day classes operated by San Bernardino. Under a memorandum of understanding between San Bernardino and

Colton, San Bernardino provided Student's placement, assessments and services, other than transportation to school, which was provided by Colton. Both San Bernardino and Colton participated in the development of Student's April 23, 2014 IEP. Thus, both respondents provided special education and related services to Student, each was a "public agency involved in" decisions regarding Student, and there are factual and legal bases for Student's contentions against both Respondents. Additionally, San Bernardino did not inform Colton that San Bernardino had failed to conduct agreed-upon assessments, or that it had failed to notify Parents that Student's school had been changed, which indicates a need for an order directed to San Bernardino as well as Colton to ensure that Student receives a FAPE. Accordingly, San Bernardino and Colton shall be held jointly liable for Student's remedies.[6].

REMEDY FOR ISSUE 1: FAILURE TO PROVIDE A TIMELY ASSESSMENT PLAN AND COMPLETE ASSESSMENTS

Applicable Law

6. When a district has failed to conduct a requested reassessment of a student within the statutory timelines, the student may be equitably entitled to an independent evaluation at public expense. (See, e.g., *M.S. v. Lake Elsinore Unified School District* (C.D. Cal. July 24, 2015); 2015 WL 4511947, at pp. 10-11; (C.D. Cal. 2015); *Los Angeles Unified Sch. Dist. v. D.L.* (C.D.Cal. 2008) 548 F.Supp.2d 815, 821-822.) This equitable remedy is available independently from a student's statutory right to an independent evaluation that may arise where a district has conducted a reassessment, but has done so improperly, either because it failed to employ required procedures or

[6] San Bernardino and Colton did not contend at hearing or in their joint closing brief that liability or remedy for the issues raised in this matter should be apportioned other than jointly and severally between them.

testing methods, or because it failed to assess the student at all in a particular area. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b); *Letter to Baus*, 65 IDELR 81 (OSEP 2015) ("When an evaluation is conducted in accordance with 34 CFR §§300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs.").)

7. An independent educational evaluation is an evaluation conducted by a qualified examiner not employed by the district. (34 C.F.R. § 300.502 (a)(1).) A district may impose criteria to ensure that publicly funded independent evaluations are not unreasonably expensive. (*Letter to Wilson,* 16 IDELR 83 (OSEP October 17, 1989).) Public agencies are not required to bear the costs of independent evaluations where those costs are clearly unreasonable. (*Letter to Kirby*, 213 IDELR 233 (OSEP 1989).) To avoid unreasonable charges for independent evaluations, a district may establish maximum allowable charges for specific tests. (*Id.*) If a district does establish maximum allowable charges for specific tests, the maximum cannot be an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific test. (*Id.*) The maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees. (*Id.*)

Analysis

8. As a remedy for San Bernardino's and Colton's failure to conduct agreed-upon assessments and an IEE team meeting that would have provided Parents up-to-date information of Student's needs and an opportunity to develop an appropriate program for Student as an adolescent entering eighth grade on a high school campus, Student is entitled to appropriate equitable relief. Appropriate relief includes independent evaluations in the areas in which Student originally sought district

assessments; namely, psychoeducation, adapted physical education, speech, and assistive technology. Because Student did not originally request a neuro-psychoeducational assessment, Respondents' delay did not deprive student of such an assessment, and it would be inappropriate to award one as a remedy. Student may select qualified independent evaluators, who may be located in San Bernardino County or any immediately adjacent county, and who shall be free to arrive at their own decisions as to how to conduct their evaluations.

9. Colton's IEE cost criteria for "routine and reasonable" average independent evaluator fees in the Colton area, and "excessive" evaluator fees exceeding those amounts by more than 25 percent, provided objective and useful guidance on the question of reasonable evaluator fees. Student offered no persuasive objective evidence concerning reasonable fees for Student's requested IEE's. Because Colton, in violation of *Letter to Kirby*, *supra* 213 IDELR 233, impermissibly calculated its "routine and reasonable" fee criteria as an average of customary fees, it is appropriate to adjust those fees upward by 25 percent to arrive at a limit for the amount Student may charge San Bernardino and Colton for Student's IEE's.

10. Accordingly, Student is entitled to independent evaluations at the rates as follows: San Bernardino and Colton shall pay Student's independent evaluators the lesser of the independent evaluator's usual fee for the assessments to be conducted, or the following maximums: (i) multi-disciplinary psychoeducational assessment – $4,375; (ii) assistive technology assessment – $625; (iii) speech and language assessment – $937.50; and (iv) adapted physical education specialist (listed in Colton's cost criteria under occupational therapy-motor assessment) –$937.50.

REMEDY FOR ISSUE 2: SAFETY PROCEDURES

11. Parents' inability to locate Student on August 4, 2014 arose from three sources: (1) Respondent's failure to notify Parents of the change in Student's school of

attendance; (2) Respondent's failure to ensure that personnel at the main office of Student's school of attendance knew who he was and where to find him beginning on the first day of school; and (3) Respondent's failure to provide Parents a contact list for Student's transportation and teacher.

12. As an equitable remedy for Colton's and San Bernardino's failure to ensure that Parents knew where Student was at all times, Student is entitled to solutions to these problems by way of amendments to his existing IEP, as ordered below.

ORDER

1. San Bernardino and Colton jointly, or one or the other, if they so agree, shall provide Student independent evaluations at public expense in the areas of psychoeducation, adapted physical education, speech, and assistive technology. District shall contract with qualified independent evaluators of Student's choosing not later than 30 calendar days after the date of this decision. The independent evaluators may be located in San Bernardino County or any immediately adjacent county, and shall be free to arrive at their own decisions as to how to conduct their evaluations. District shall pay the independent evaluators at the lesser of their usual and customary fee or the following respective amounts: (i) multi-disciplinary psychoeducational assessment – $4,375; (ii) assistive technology assessment – $625; (iii) speech and language assessment -- $937.50; and (iv) adapted physical education - $937.50.

2. Within 30 days of the date of this decision, unless alternative terms are agreed-to by Student's IEP team and consented to by Parents in writing, San Bernardino and Colton shall amend Student's IEP to: (1) state that Student's school of attendance may not be changed without prior notice to Parents confirmed by their signed consent to the change in an IEP or amendment IEP; (2) require Student's special education teacher to confirm on or before Student's first day of attendance that the front office of Student's school of attendance possesses a photograph of Student, the name of his

teacher, and his classroom location; and (3) state that Parents shall receive telephone contact information for Student's teacher, bus driver, and personnel at the front office of Student's school of attendance, on or before the first day of school, with the contact information to be updated as needed to remain current.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on all issues.

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: February 12, 2016

/s/

ROBERT G. MARTIN

Administrative Law Judge

Office of Administrative Hearings