

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2015050430

v.

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT,

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT,

OAH Case No. 2016010309

v.

PARENT ON BEHALF OF STUDENT.

DECISION

Parent on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on April 30, 2015, naming the Newport-Mesa Unified School District. OAH continued this matter on June 4, 2015. District filed its request for a due process hearing on January 11, 2016, and OAH consolidated Student's and District's matters on January 19, 2016.

Administrative Law Judge Paul H. Kamoroff heard this matter in Costa Mesa, California, on May 4, 5, and 10, 2016.

Richard Isaacs, Attorney at Law, appeared on behalf of Student. Mother attended the hearing. Student did not attend the hearing.

S. Daniel Harbottle, Attorney at Law, appeared on behalf of District. Maureen Cottrell, District's Director of Special Education, attended the hearing.

At the request of the parties, OAH continued this matter for closing briefs. The record closed on May 31, 2016, upon receipt of written closing briefs from the parties.

ISSUES¹

STUDENT'S ISSUES:

1. Whether District denied Student a free appropriate public education during the 2014-2015 and 2015-2016 school years, by failing to identify him as a child with disabilities and provide him with special education and related services?
2. Whether District denied Student a FAPE by failing to provide an appropriate assessment in the areas of psychoeducational and speech and language, pursuant to District's November 2015 Multidisciplinary Evaluation?²

DISTRICT'S ISSUE:

3. Whether the psychoeducational and speech and language components of District's November 2015 Multidisciplinary Evaluation and Evaluation Report were appropriate?

¹ 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.)

² For issues two and three, the parties stipulated during hearing that the only areas of dispute pertaining to District's Multidisciplinary Evaluation and Evaluation Report included the psychoeducational and speech and language components of the report.

SUMMARY OF DECISION

Student had an attention disorder that impacted his ability to access his educational placement and to benefit from instruction. Student also had difficulty communicating, anxiety, sensory seeking, and idiosyncratic behaviors; which resulted in Student being bullied by his peers while at a District school. When provided special education and related services at a private school, Student was able to access and benefit from his educational placement. Accordingly, Student sought special education eligibility from District.

District asserts that, pursuant to its multidisciplinary evaluation, Student failed to qualify for special education.

This Decision finds that District's assessments met statutory requirements. Nonetheless, by November 30, 2015, District had sufficient information to find that Student qualified for special education under other health impairment due to an attention disorder. District's failure to find Student eligible for special education and related services denied him a FAPE. Student is therefore entitled to reimbursement for educational expenses and compensatory education.

FACTUAL FINDINGS

THE STUDENT

1. Student was an 11-year-old boy who resided with his mother within District's boundaries during the applicable time frame. He had not been found eligible for special education by District. He had attended Lincoln Elementary, a District school, for the 2013-2014 school year, and for part of the 2014-2015 school year.

2. On January 27, 2015, Student's mother unilaterally withdrew Student from Lincoln. Mother home-schooled Student for several weeks. She then placed him at Newport Christian School, a private school located in Newport Beach, California, for the

remainder of the 2014-2015 school year. For the 2015-2016 school year, Mother placed Student at Mariners Christian School, a private school located in Costa Mesa, California.

3. Student was bright, but demonstrated attentional and emotional difficulty while at Lincoln. Student was anxious around others, had difficulty communicating, and frequently engaged in sensory seeking behaviors. Student was persistently bullied at school by his classmates.

4. District attempted to address Student's educational problems through accommodations in general education, including utilizing a Student Success Team plan.

EVENTS LEADING UP TO THE INITIAL IEP TEAM MEETING

Dr. Palmer's Assessment

5. On April 20, 2014, Student's mother obtained an independent academic assessment from David Palmer, Ph.D.³ Dr. Palmer administered the Wechsler Intelligence Scale for Children – Fourth Edition. This assessment was used to assess Student's general thinking and reasoning skills. In each of the five areas tested, including verbal comprehension, perceptual reasoning, working memory, and processing speed, Student received scores ranging from average to superior abilities. An exact average score was 100. Student had a full scale intelligence quotient of 115, indicating a high average intelligence. Dr. Palmer also noted signs of dysgraphia. Dysgraphia was a deficiency in the ability to write, including delays in the storing process of written words and finger sequencing. Although dysgraphia was a learning impairment, it does not, by itself, confer special education eligibility. Dr. Palmer did not diagnose Student with a special education disability, recommend special education assessments, or refer Student for special education services. Rather, Dr. Palmer reported that Student was a gifted child who would benefit from an accelerated educational program.

³ Dr. Palmer did not testify during the hearing.

The Student Success Team Meeting

6. To address behavior concerns, District convened a student success team meeting for Student on May 21, 2014. The meeting was held towards the end of the 2013-2014 school year, Student's third grade. Along with Student's mother and other school staff, school psychologist Thi Le attended the SST meeting. District staff was concerned that Student was frequently off-task and required constant intervention from his teacher. It was normal for Student to become emotionally escalated during class, and it required individual intervention to calm him. He had difficulty paying attention, completing assignments, and working with others.

7. The SST provided Student a plan to manage his behavior and anger in the general education classroom. Strategies included breaks, a tool box, success tickets and other positive reinforcements.

8. The SST plan was ineffective and Student declined during the following school year, his fourth grade. Mother, Student's private therapists, and his classroom teachers, all noticed a decline in Student's academic and social functioning, that was compounded by persistent bullying by his peers.

Fourth Grade at Lincoln

9. Leslie Slevin was Student's fourth grade teacher at Lincoln. Ms. Slevin was an experienced teacher, with 30 years of teaching experience. She had taught the general education fourth grade class at Lincoln since 2003. Ms. Slevin persuasively testified that Student had educational problems at Lincoln that were not remediated through the SST plan or other accommodations in the general education classroom. Ms. Slevin's candid testimony was consistent with testimony provided by Mother, who expanded upon Ms. Slevin's comments.

10. As a general education teacher with just under 30 students to teach, Ms. Slevin was frustrated with Student's need for constant, individual attention. Student's

need for individual instruction, repeated instruction, and redirection, detracted from her ability to teach other students. Student was inattentive and distracted during class. He had difficulty focusing on his schoolwork and classroom instruction. Even with Ms. Slevin's individual help, Student did poorly on quizzes and tests, due to attention and memory delays. He did poorly on tests in all academic areas, and did especially poorly in math. Student frequently escalated emotionally during class; which also required Ms. Slevin's individual assistance to calm him, and refocus him to the work at hand.

11. Student struggled with his ability to interact with peers. He had difficulty understanding social cues and making friends, and was often bullied by his peers. He had been teased, locked in a closet, hit, and punched, by his classmates.

12. Student's anxiety grew worse during his time in Ms. Slevin's class. As a result, he was often too anxious or emotional to go to school; he subsequently missed 22 days of school during the four and half months he attended Lincoln during the 2014-2015 school year. Mother reported that, at times, Student was too distraught to leave her car when she dropped him off at school. Mother's testimony coincided with Ms. Slevin's, who described a young boy who was often too emotionally distraught to benefit from classroom instruction.

13. Ms. Slevin testified that Student's conduct was comparable to that which she had observed exhibited by students with individualized education programs. Specifically, Student acted similarly to pupils with IEP's for other health impairment due to attention disorders.

Mother's Request for Assessment

14. On December 11, 2014, Student's mother sent a letter to Ann Huntington, then District's Director of Special Education, requesting that District assess Student for special education eligibility.

15. Mother was a highly educated business professional. The week following

her assessment request, Ms. Huntington presented Mother an assessment plan for section 504 assessments⁴ Mother corresponded with school psychologist Veronique McCarthy during the next several weeks, regarding her assessment request and the section 504 assessment plan. Ms. McCarthy explained to Mother the differences between special education and section 504 assessments. Section 504 assessments were less comprehensive than special education testing, and sought to accommodate a pupil's disability through accommodations in general education. Special education assessments were more comprehensive, and would examine the need for remediation that could exceed general education accommodations. Mother consented to the assessment plan for the section 504 assessment on December 18, 2014. In an email dated January 8, 2015, Mother withdrew her request for special education assessments.

16. District erred in presenting Mother an assessment plan for 504 testing rather than for special education assessments. Although Mother understood the differences between section 504 and special education assessments, the withdrawal of her assessment request did not alleviate District's obligation to assess Student for special education. Rather, District had an affirmative obligation to assess Student for special education at that time, regardless of a parental request for assessment. District's duty to assess Student for special education was triggered by his attention and emotional difficulty in Ms. Slevin's classroom, compounded by the ineffectiveness of the general education accommodations. That put District on notice that Student might need special education services.

⁴ An educational assessment pursuant to section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 701 et seq.)

The Section 504 Testing

17. Ms. McCarthy was charged with conducting the 504 assessment for Student. Ms. McCarthy earned a bachelor of arts in psychology in 2001, a master's in counseling in 2005, and an Educational Specialist degree in school psychology in 2014. Ms. McCarthy was an experienced school psychologist who was responsible for conducting special education and 504 assessments for pupils at Lincoln.

18. Ms. McCarthy began her assessment in January 2015. She was unable to complete her testing because Mother withdrew Student from Lincoln prior to the completion of testing. Ms. McCarthy's preliminary findings mirrored the concerns that had been expressed by Ms. Slevin and Mother. Student struggled socially, had low self-esteem and would quickly escalate behaviorally and emotionally, often appearing defiant to peers and teachers. Although bright, Student did poorly on quizzes and tests due to poor attention. He struggled to pay attention in class. Student struggled in math, and gave up easily during non-preferred tasks. Student frequently required instructions and directions to be repeated. Overall, Student was inattentive, easily distracted, and had difficulty attending to classroom work. He was easily frustrated, often upset, had behavioral problems, and referred to himself as a loser. Student refused to participate in physical education class. Even with classroom accommodations, including preferential seating, Student required lots of individual help throughout the school day.

19. School staff also recognized Student's academic delays and the ineffectiveness of the student success team plan. On January 16, 2015, after consulting with Ms. McCarthy and Ms. Slevin, District special education teacher Michael Waldinger offered to teach Student in a resource specialist class, primarily for math, for one hour daily. Mr. Waldinger's specialized instruction was offered in an email from Ms. McCarthy to Mother, and was never implemented.

20. Ms. McCarthy shared her preliminary findings with Maureen Cottrell,

District's then Director of Special Education Resolutions. Ms. Cottrell was a careful administrator who, based on the information Ms. McCarthy had gathered, correctly determined that 504 testing was insufficient for Student. Rather, Student required special education interventions.

21. On March 16, 2015, Ms. Cottrell appropriately sent Mother a letter requesting her permission for District to assess Student for special education eligibility. Included with her letter was a proposed assessment plan for testing in the following areas: academics; speech/language; intellectual development; social/emotional/adaptive behavior/ perceptual/processing; health; gross/fine motor development; mental health; and sensory motor and occupational therapy.

22. Mother did not immediately consent to District's request to assess Student for special education. By late-January 2015, Mother no longer trusted District and did not want to cooperate with District staff regarding Student's educational program. Mother believed that Lincoln was no longer a tenable placement for Student. She had observed him be pushed and punched by his peers, with no teacher intervention. Student's anxiety had grown increasingly worse, and he often refused to go to school altogether. On January 27, 2015, at the advice of private therapists, Mother stopped sending Student to Lincoln. Mother home-schooled Student for several weeks, before enrolling him at Newport Christian School, for the remainder of the 2014-2015 school year.

23. Following her receipt of the special education assessment plan, Mother contacted Ms. Cottrell to request reimbursement for privately attained services, private school, and other expenses. In addition to the private school, Mother had funded private occupational therapy and counseling services for Student. No agreement was reached by District and Mother regarding her requests.

The Private Occupational Therapy Report

24. On January 27, 2015, Student obtained an independent occupational therapy assessment from Irvine Therapy Services, a nonpublic agency located in Irvine, California. The written report was completed by registered occupational therapist Priya Mohan.⁵ Student was referred to Ms. Mohan by Student's private psychiatrist, who suspected that Student had a sensory processing disorder.

25. Ms. Mohan administered the Sensory Integration and Praxis Tests, which was a comprehensive series of standardized tests that assessed visual perception, tactile, muscle and joint perception, bilateral coordination, and motor planning. Of the 17 subtests utilized, Student was below average in eight domains, and had serious delays in four of those areas, including balance, postural praxis, sequencing praxis, and praxis verbal command (translating verbal directions into action).

26. Ms. Mohan also administered the Sensory Processing Measure, a test consisting of normed rating scales that assessed sensory processing, social participation, and praxis. Per his teacher and mother, Student had delays in the areas of social participation, hearing, planning, and serious delays in touch, body awareness, and balance and motion. At school, Student never worked or played with others; never appropriately shifted between topics; never entered into activities without being disruptive; had poor eye contact; was distressed by being touched; jumped excessively; had poor coordination and motor skills; was disruptive, and had significant difficulties in social situations.

27. Student had sensory processing deficits that impacted his auditory, tactile, vestibular, and proprioceptive sensory systems. Student had an increased sensitivity to tactile information, poor motor planning, and poor fine motor coordination. Student

⁵ Ms. Mohan did not testify during the hearing.

required weekly occupational therapy in a clinic setting to address those deficits.

THE ADHD DIAGNOSIS

28. On February 9, 2015, Student's private psychiatrist Sina Safahieh, M.D. sent a letter to District indicating that he had provided weekly psychotherapy to Student since December 2014.⁶ Dr. Safahieh's treatment included direct cognitive behavior therapy, along with medication management. Dr. Safahieh had diagnosed Student with attention deficit hyperactivity disorder – combined type, depression, anxiety, obsessive compulsive disorder, and sensory processing issues that impacted Student's visual, auditory, tactile, vestibular, and proprioceptive sensory systems. Dr. Safahieh had reviewed Student's progress since Dr. Palmer's April 2014 assessment, and determined that Student had deteriorated socially and academically since then.

DISTRICT'S MULTIDISCIPLINARY EVALUATION

29. Mother consented to District's assessment plan on October 5, 2015, seven months after District had offered to assess Student for special education. Upon its receipt of Mother's consent, District quickly began the assessment process.

30. District selected school psychologist Thi Le to conduct the psychoeducational components of the assessment, and to lead the assessment team. Ms. Le was an experienced assessor who obtained a bachelor of arts degree in psychology in 2003, and a master's of arts degree in educational psychology in 2006. She had also earned an Education Specialist degree and was a nationally certified school psychologist. Ms. Le was selected, rather than Ms. McCarthy who normally assessed students who attended Lincoln, because District considered Student a high profile case. Ms. Le explained that a high profile case was a matter that was in, or headed towards,

⁶ Dr. Safahieh did not testify during the hearing.

litigation. She also testified that her report was not completed until it had been proof-read and approved by District's administration.

31. District timely completed its special education assessments in a written report, entitled Multidisciplinary Evaluation Report. Testing was conducted on October 23, 28, and 30, and November 5, 2015. Along with Ms. Le, education specialist Karen Winter; speech-language pathologist Natalie Gudelman; adapted physical education specialist Kris Dawson; and a school nurse contributed to the development of the assessment report.⁷ There was no evidence presented that impugned the qualifications of any of District's assessors.

32. District's 112 page report was comprehensive. District's report included a review of Student's educational records, informal assessment including observations, interviews and rating scales, and standardized testing. As part of the records review, the report referenced Student's May 2014 SST plan and the problems noted by the classroom teacher. However, during testimony, Ms. Le, Ms. Winter, and Ms. Gudelman were unfamiliar with Ms. Slevin's concerns, Ms. McCarthy's preliminary findings, or the SST plan, including the educational problems referenced in that plan. Ms. Le's lack of familiarity with those concerns was problematic, given that she had attended the SST meeting, which she also could not recall during her testimony.

33. Ms. Le interviewed Ms. Campbell,⁸ who was Student's teacher at Mariners. At Mariners, Student had connected with a peer, but was disengaged during group work. Student was sometimes fidgety and off-task during class, but was responsive to redirection. Student required instructions to be written and given auditorily. Mariners'

⁷ The only parts of the report that were contested by Student were the sections completed by Ms. Li, Ms. Gudelman, and Ms. Winter.

⁸ Ms. Campbell did not testify during the hearing.

classroom accommodations included preferential seating; sensory tools like a rocking chair to allow for movement; brain breaks to allow for movement; checklists for homework and to remind Student to bring books and materials to and from school; small group instruction, and; a separate test environment to minimize distraction. Mariners had provided Student an individualized support plan, which included accommodations and a goal to remediate Student's attention dysfunction. Student was inattentive during class, and Mariner's staff believed that attention was the most significant area of educational concern. In addition to the supports provided by Mariners, Mother privately funded three hours weekly of individual educational therapy, one-to-three hours weekly of occupational therapy, and weekly psychological counseling. Mother reduced some of those services following District's assessment, due to financial constraints.

34. Ms. Le also interviewed Sarah Hussain of One Mind Institute, who had provided Student the private educational therapy. One Mind Institute was a private educational agency located in Irvine, California. In addition to providing Student individual educational therapy three hours weekly, Ms. Hussain collaborated with Mariners' staff regarding Student's needs and educational therapy. Student had delays in reading, writing, math and critical thinking. He had notable difficulty with inferences, and writing a cohesive paragraph. Student demonstrated difficulty in all areas of math. Student struggled with working memory, processing, and verbal comprehension. Student required lots of individual help, including large amounts of scaffolding, preteaching new concepts, and reteaching old concepts.

35. Ms. Le observed Student at Mariners on two occasions, for approximately 30 minutes per observation. Student was off task for 13 percent of the time during Ms. Le's first observation, and 23 percent of the time during her second observation. During testimony, Mr. Le relied on her observations to support her conclusion that Student did

not qualify for special education. Ms. Le defended her conclusion on the basis that Student was able to adequately access his classroom placement during her observations. Student no longer missed school and was no longer bullied by his peers. However, Ms. Le overlooked that, while at Mariners, Student had received significant classroom accommodations and related services. When he attended Mariners, he received de facto special education in the form of an individualized support plan, small class size, smaller group instruction, educational therapy, occupational therapy, counseling, and sensory tools like a rocking chair. Yet, Student still had some difficulty attending. Although Student's ability to attend, and to access instruction, had increased since Lincoln, that progress illustrated that Student was receptive to special education interventions. Ms. Le's inability to consider that Student had benefited from those special education interventions decreased the persuasiveness of her testimony.

36. For the psychoeducational testing, Ms. Le selected the Kaufman Assessment Battery of Children-Second Edition; Comprehensive Test of Phonological Processing-Second Edition; Conners-Third Edition; Behavior Assessment System for Children-Third Edition; Multidimensional Anxiety Scale for Children-Second Edition; Emotional Disturbance Decision Tree, and; the Autism Spectrum Rating Scale. Ms. Le was qualified to administer those assessments; correctly followed the protocols for testing; used valid and properly normed testing material; conducted the testing in a racially unbiased manner, and; administered the testing in English, Student's only language.

37. The Kaufman measured Student's processing and cognitive abilities. Student had average results in each of the five domains tested, including short term memory; visual processing; long term storage/retrieval; fluid reasoning, and; crystallized ability. An exact average score was 100. Student's highest score, 114, was in visual processing. His lowest, 90, was in crystalized ability. Student received an overall exact average score, 100, in the fluid-crystalized index. Ms. Le used this score to determine

that Student did not have a severe discrepancy between his cognitive ability and performance. On this basis, she ruled out Student having a specific learning disorder, an area of special education eligibility.

38. The Comprehensive Test of Phonological Processing measured Student's phonological processing. Testing showed that Student had average abilities in phonological awareness and rapid naming, and low average abilities in phonological memory.

39. The Conners was an assessment inventory completed by Mother and Ms. Campbell that was used to obtain information about Student's behavior and attention in social and school settings. Student's teacher and parent identified that inattention, hyperactivity/impulsivity, and peer relations, were areas of difficulty. Student had a short attention span, trouble concentrating, didn't pay attention to detail, was easily distracted, and had difficulty keeping his mind on work or play for very long. Student was often fidgeting, constantly moving, ran and climbed when he was not supposed to, fidgeted in his seat, was over- reactive, and interrupted others. Student had serious difficulties making friends and interacting with his peers. Ms. Campbell reported that Student's attention problems often seriously affected his functioning in the academic setting.

40. The Behavior Assessment System for Children was a rating scale, completed by Student's teacher and mother that evaluated Student's behavior and self-perceptions. Ms. Campbell identified problems in Student's attention, learning, atypical and odd behaviors, adaptive skills, social skills, and leadership. Mother noted problems in hyperactivity, anxiety, attention, atypicality, withdrawal, and adaptability.

41. The Multidimensional Anxiety Scale was a questionnaire completed by Mother and Student that assessed Student's anxiety. Student received elevated and very elevated scores in the area of social anxiety.

42. Ms. Le determined that the results of the attention, behavior, and anxiety testing did not merit finding Student eligible for special education under other health impairment due to an attention deficit. Although Student had an attention disorder, Ms. Le did not believe that Student's ability to access his education was impacted by that disorder.

43. Results of the Emotional Disturbance Decision Tree, an inventory designed to identify an emotional disturbance in children, revealed that Student had high clinical physical symptoms of fear, and was at risk for having an emotional disturbance. Student presented a high degree of physical symptoms and fears while at school, where Student was frequently overly dependent on adults and never exhibited appropriate independence. Nonetheless, the results of this testing instrument did not rise to the level of identifying Student with a serious emotional disturbance.

44. Ms. Le next administered the Autism Spectrum Rating Scales, inventories completed by Mother and Ms. Campbell, that measured behaviors associated with autism spectrum disorders. Mother reported that Student was elevated, to very elevated, in each of the 11 areas tested. Ms. Campbell found that Student was elevated in three areas, including stereotypy (repeated movements, noises, or behaviors), behavior rigidity, and attention. Ms. Le determined that the results of this test did not qualify Student for special education under autism. Ms. Le also based her opinion upon Student lacking an expressive or receptive language delay.

45. Ms. Winter was responsible for conducting the academic portions of District's Multidisciplinary Evaluation Report. Ms. Winter received a bachelor's degree in education in 1990, and a master's degree in special education in 2014. She had been a special education and general education teacher, and a special education case carrier for District since 2011. Ms. Winter had experience conducting academic assessments and correctly administered the Wechsler Individual Achievement Test-Third Edition, for

Student. The Wechsler measured the achievement of students in the areas of oral language, reading, written expression, and mathematics. Of the 25 sub-areas tested, Student showed average, above average, or superior abilities in each area, with the exception of oral discourse comprehension, where he received a below average score.

46. Natalie Gudelman conducted the speech and language assessment for District's report. Ms. Gudelman was a licensed speech and language pathologist who received her bachelor's degree in speech and hearing science in 2000, and a master's degree in communicative disorders in 2002. She had been a speech and language pathologist for District since 2013. For Student, Ms. Gudelman administered the Comprehensive Assessment of Spoken Language; Test of Problem Solving 3: Elementary; and, the Children's Communication Checklist-2. Ms. Gudelman was qualified to administer those assessments; correctly followed the protocols for testing; used valid and properly normed testing material, and; conducted the testing in English, in a racially unbiased manner.

47. The Comprehensive Assessment of Spoken Language was a testing battery that tested students' oral language. Student received average scores in antonyms, syntax, paragraph comprehension, nonliteral language, and a low average score in pragmatic judgement.

48. The Children's Communication Checklist measured Student's communication skills using response forms completed by Mother and Ms. Campbell. The results yielded by the teacher indicated that Student had a communication profile similar to that of a child diagnosed with autism spectrum disorder. Notwithstanding this finding, Ms. Gudelman testified that she did not believe that Student was autistic. She based this belief on Student lacking an expressive or receptive language delay.

49. The Test of Problem Solving assessed Student's critical thinking abilities. Of the six areas assessed, Student received average scores in each area except

sequencing, where he had below average abilities.

50. Ms. Gudelman informally assessed Student in the areas of articulation and oral motor abilities. Student did not present with any deficits in those areas.

51. Ms. Gudelman did not identify Student with a speech and language impairment.

52. District's multidisciplinary report also assessed Student in the areas of occupational therapy, adapted physical education, and health.⁹

53. District's occupational therapist Karissa Somers assessed Student's fine motor, visual motor, and sensory processing skills. Per the Bruininks-Oseretsky Test of Motor Proficiency - Second Edition, Student had below average fine motor skills. Results of the Beery-Buktenica Test of Visual Motor Integration showed that Student had below average motor coordination. The Sensory Processing Measure identified problems for Student in the areas of social participation, hearing, balance and motion, planning and ideas, and touch. Student was frequently disruptive; frequently hummed or yelled during class; always rocked in his chair during class; frequently fidgeted; and, was always unable to solve problems independently or to complete tasks with multiple steps.

54. District's adapted physical education teacher Kristine Dawson assessed Student's gross motor skills. Per the Bruininks-Oseretsky Test of Motor Proficiency - Second Edition, and the Test of Gross Motor Development - Second, Student did not present with a disorder in the area of gross motor skills.

55. District's school nurse, Andrea Jackson, reported that Student had been diagnosed with anxiety, obsessive compulsive disorder, asthma, a sensory processing

⁹ The occupational therapy, adapted physical education, and health components of District's multidisciplinary report were not at issue for this hearing. The Decision will therefore only briefly review those parts of District's report.

and a memory processing disorder, that may affect his learning.

56. District's Multidisciplinary Evaluation Report concluded that Student did not qualify for special education under any eligibility category.

THE INITIAL IEP TEAM MEETING

57. District convened its initial IEP team meeting for Student on November 30, 2015. The purpose of the IEP team meeting was to review the results of District's Multidisciplinary Evaluation Report, and to determine whether Student qualified for special education. Student was 11 years old and in the fifth grade. The IEP team included Mother; District administrator Bonnie Hinton; Ms. Le; Ms. Jackson; Ms. Cottrell; Ms. Dawson; Ms. Somers; Ms. Gudelman; Ms. Winter; a District special education and regular education teacher; a teacher and a representative from Mariners; and, attorneys for Student and District.

58. The IEP team reviewed District's various assessments. Each assessor efficiently read through their testing. Little information was added during the IEP team meeting, outside of what was included in the report. Based upon District's assessments, District's IEP team concluded that Student did not qualify for special education. District staff pointed out that Student was able to access his educational program at Mariners, and therefore did not require special education eligibility. Mother disagreed with that conclusion. Student had done well at Mariners because of the de facto special education interventions that had been provided there, and because of the independent therapies Mother had funded for Student when he attended Mariners. District staff failed to address Mother's point that Student was performing sufficiently at Mariners because of those interventions.

59. District's IEP team was not familiar with the concerns reported by Ms. Slevin. They also failed to discuss the findings attributable to Ms. McCarthy's preliminary 504 testing. During the meeting, Mother attempted to raise those concerns, including

Student's failing test and quiz scores. District staff improperly disregarded those concerns. District staff believed that information attributable to Ms. Slevin was outdated, and therefore not relevant. District's analysis was incorrect and diminished its fundamental understanding of Student's needs. How Student performed at Lincoln without special education intervention, just 10 months prior, was vital to the IEP team's determination of whether Student required special education and related services to access his educational program. District had the opportunity to compare Student's classroom performance without special education, while at Lincoln, to how Student performed with de facto special education intervention, at Mariners. Student was inattentive and struggled academically, socially and emotionally at Lincoln. He missed instruction and sometimes was unable to attend school. Yet, with the addition of de facto special education services, accommodations, and small group instruction, his ability to benefit from his educational program increased while at Mariners. District wrongly passed over the opportunity to compare this data.

60. The November 2015 IEP team improperly failed to find Student eligible for special education eligibility under other health impairment due to an attention disorder. At that time, Student was medically diagnosed with attention deficit hyperactivity disorder. That disorder impacted his ability to access, and benefit from, his classroom instruction when he was not receiving special education at Lincoln. Although his access to instruction had increased at Mariners, that progress showed that Student was receptive to, and needed, special education and related services.

61. Mother disagreed with District's denial of special education and filed for due process. She continued funding private placement at Mariners, and some private therapy services. She decreased some of the private therapy due to financial reasons. During hearing, Mother presented accurate accountings for the costs she incurred for the private school and private therapies.

DR. DAVIDSON'S ASSESSMENT

62. In Spring 2016, Mother sought out the advice of Christine Davidson, Ed. D., an educational consultant. Dr. Davidson was a licensed educational psychologist. She held various certificates and credentials related to education, including a multiple subject teaching credential and an administrative services credential. In the past, she was employed by the Tustin Unified School District as the Director of Special Education and Assistant Superintendent. She had performed over 1,000 psychoeducational assessments of children.

63. Dr. Davidson conducted an educational assessment of Student over three days in March and April 2016. Her 207 page report comprehensively assessed Student in multiple areas. Dr. Davidson utilized observations, informal testing, and multiple standardized tests. To the extent these observations and tests pertain to dates after the November 2015 IEP team meeting, they are properly considered for the limited purpose of determining the reasonableness of the IEP offer.

64. To test Student's cognitive ability, Dr. Davidson administered the Wechsler Intelligence Scale for Children – Fifth Edition. Student's composite scores for the test were: verbal comprehension 111, visual spatial 119, fluid reasoning 126, working memory 97, and processing speed 111, giving him a full scale intelligence quotient score of 117, in the high average range. However, Dr. Davidson determined that, because of the discrepancy between the composite score for fluid reasoning and working memory, it was appropriate to use the fluid reasoning composite score as a better indicator of Student's cognitive potential.

65. To test Student's academic achievement, Davidson used the Woodcock-Johnson Tests of Achievement-Fourth Edition. Student received average scores on each of the various subtests, including: broad reading 96; basic reading 102; reading comprehension 99; reading fluency 94; math calculation 91; broad mathematics 90;

written expression 98; broad written language 102. His cluster scores were: Academic Skills 101; Academic Fluency 92; academic applications 94, and; broad achievement 95.

66. Based on Dr. Davidson's use of Student's fluid reasoning composite score of 126 as his IQ score, Dr. Davidson found that Student exhibited a severe discrepancy between cognitive ability and achievement in many different academic areas, including broad math, math calculation, math reasoning, written expression, broad reading, reading comprehension, and listening comprehension.

67. To assess Student's attention and behaviors, Dr. Davidson used the Conners Comprehensive Behavior Rating Scales, the Behavior Assessment System for Children – Second Edition, and the Scales for Assessing Emotional Disturbance. These are rating scales comprised of a series of questions answered by an individual who knows the child. For each test, Student's mother and teacher, Ms. Campbell, answered the questions.¹⁰ Student had problems in attention, interacting with others, adapting to changes, completing work, working with others, disrupting others, aggression, and anxiety. Dr. Davidson determined that Student met the criteria for the diagnosis attention deficit hyperactivity disorder, autistic disorder and Asperger's disorder, generalized anxiety disorder, and major depressive disorder.

68. Dr. Davidson administered the Beck Youth Inventories-Second Edition to Student. Student rated himself as having anxiety, depression, anger, and disruptive behaviors while at Lincoln. He rated improved behaviors in every category while at Mariners.

69. To examine whether Student exhibited autism or autistic like characteristics, Dr. Davidson administered the Autism Diagnostic Observation Scale-

¹⁰ Dr. Davidson also administered the Clinical Assessment of Behavior to Student's mother, which yielded similar results.

Second Edition. She also had Student's mother and Ms. Campbell complete the Gilliam Autism Rating Scale – Third Edition. Mother also completed the Gilliam Asperger's Disorder Scale, and the Asperger Syndrome Diagnostic Scale. Student demonstrated difficulties communicating, interpreting conversations, making friends, interacting reciprocally, understanding teasing, using eye contact, respecting personal space, adapting to change, reacting to noise and touch, handwriting, controlling temper, ritualistic behavior, and displaying movements and hand flapping. Dr. Davidson concluded that Student had autism.

70. To test Student's information processing, Dr. Davidson administered the Woodcock-Johnson Tests of Cognitive Ability – Fourth Edition. Student received low average to high average scores in each of the subtests, including the following scaled scores: comprehension 103; fluid reasoning 96; short term working memory 83; cognitive processing speed 99; auditory processing 99; long term retrieval 91; visual processing 110; quantitative reasoning 109; number facility 94, and; perceptual speed 98.

71. Dr. Davidson utilized the Sensory Processing Measure, an inventory completed by Student's mother, to determine that Student had a sensory processing disorder. Student had dysfunctions in touch processing, fine motor, vestibular processing including balance and motion, proprioceptive processing, auditory processing, oral input dysfunction, and self-regulation dysfunction.

72. Dr. Davidson recommended that Student be found eligible for special education under the categories autism, specific learning disability, and other health impairment due to attention deficit hyperactivity disorder.

73. Dr. Davidson's finding that Student qualified under other health impairment due to an attention disorder was consistent with Student's conduct at Lincoln and Mariners, and prior testing. Student had received a medical diagnosis of

attention deficit hyperactivity disorder by Dr. Safahieh in February 2015. Information from Ms. Slevin, Ms. McCarthy, and Ms. Campbell showed that Student's attention disorder impacted his alertness in class. He was easily distracted, required lots of individual attention, and missed classroom instruction due to an attention disorder. This information was available to District at the time the November 2015 IEP was developed. Dr. Davidson's testing, and testimony, helped illustrate that Student had a pervasive attention disorder that adversely affected his educational performance, and heightened his alertness to environmental stimuli, including sensory dysfunctions. Dr. Davidson's additional data, discovered after the November 2015 IEP, provided insight into the Student's condition, and the reasonableness of the District's action, at the earlier date. Given what District knew of Student as of the initial IEP team meeting, it was not reasonable to deny him eligibility under other health impairment.

74. Dr. Davidson's determination that Student qualified for special education under specific learning disability was less persuasive. Ms. Le opined that it was not proper for Dr. Davidson to use Student's area of strength, his fluid reasoning score, as his cognitive ability level. The school psychologist more persuasively testified that cognitive ability was not defined by a single area of strength.

75. In her report, Dr. Davidson defended her use of the fluid reasoning score as Student's cognitive ability score, based on the recommendations in the book "Assessment of Children," by Jerome Sattler. However, Mr. Sattler stated that it was only inappropriate to use the full scale IQ score when a child had a significant verbal-performance split. (Sattler, *Assessment of Children* (3rd ed.) p. 182.) Per the Wechsler Intelligence Scale for Children administered Dr. Davidson, Student received average to high average scores, and a very high score in fluid reasoning. There was no more than a 15 point difference between Student's verbal comprehension and fluid reasoning scores. Moreover, if there were a significant difference, Mr. Sattler still did not recommend

using the fluid reasoning score. Rather, he recommended using the verbal scale or performance scale as additional pieces of information. Sattler stated that “any hypotheses about the validity of the Full Scale IQ, Verbal Scale IQ, or Performance Scale IQ should be developed on the basis of all the available information you have about the child.” (Sattler, *Assessment of Children, supra*, p. 182.) Consequently, Sattler’s text did not validate using the fluid reasoning score as Student’s cognitive ability score. Aside from the high score in fluid reasoning, Student received average to high average scores in all other cognitive areas, with no apparent severe discrepancy.

76. Dr. Davidson’s determination that Student had autism was new information that was not available to District when it convened the initial IEP team meeting. District had assessed Student in the area of autism, and had concluded that Student did not qualify under that condition. No additional information was provided by Student’s mother during the IEP team meeting that warranted finding Student eligible under autism at that time.

77. District had received Dr. Davidson’s report just prior to the due process hearing. Ms. Cottrell testified that District had yet to review Dr. Davidson’s report during an IEP team meeting, and intended to do so within the next month. For these reasons, District did not act unreasonably when it failed to qualify Student for special education under autism or specific learning disability during his initial IEP team meeting.

78. On April 7, 2016, Student’s pediatrician, Alexander Tu, MD, diagnosed Student with autism. Similar to Dr. Davidson’s assessment, District had yet to review Dr. Tu’s diagnosis during an IEP team meeting. Consequently, Dr. Tu’s diagnoses was new information that was not available to the November 2015 IEP team.

79. For the foregoing reasons, evidence showed that District denied Student educational rights when it denied him eligibility for special education under other health impairment due to an attention deficit hyperactivity disorder.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA¹¹

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)¹² et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v.*

¹¹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹² All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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 (*Mercer Island*) [In enacting the IDEA, 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); 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, § 56505, subd. (i).) 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].) In this matter, Student had the burden of proof on his issues, and District had the burden of proof for its issue.

5. The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of the District cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable . . . at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

ASSESSMENT STANDARDS

6. Prior to making a determination of whether a child qualifies for special education services, a school district must assess the child in all areas of suspected disability. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) After the initial assessment, a school district must conduct a reassessment of the special education student not more frequently than once a year, but at least once every three years. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) By this standard, the assessment in dispute in this case, District's 2015 Multidisciplinary Evaluation Report, was an initial assessment of Student.

7. In conducting an assessment, a school district must follow statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor(s). The district must select and administer assessment materials in the student's native language and that are free of racial, cultural, and sexual discrimination. (20 U.S.C. § 1414(b)(3)(A)(i); Ed. Code, § 56320, subd. (a).) The assessment materials must be valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) They must also be sufficiently

comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(C); Ed. Code, § 56320, subd. (c).) Trained, knowledgeable, and competent district personnel must administer special education assessments. (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.)

8. In performing an assessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R., § 300.305; Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the district must identify any additional information that is needed by the IEP team to determine the present levels of academic achievement and related developmental needs of the student, and to decide whether modifications or additions in the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).) In performing an assessment, an educational agency cannot use a single measure or evaluation as the sole criteria for determining whether the pupil is a child with a disability and in preparing the appropriate educational plan for the pupil. (Ed. Code, § 56320, subd. (e); see also 20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2).) Persons who conduct assessments shall prepare a written report, as appropriate, of the results of each assessment. (Ed. Code, § 56327.)

9. Upon completion of the assessment, the determination of whether the child is a child with a disability must be made by a team of qualified professionals and the parent of the child. (20 U.S.C. § 1414(b)(4)(A).) The IEP team, or other qualified professionals must review the existing data regarding the student and determine, with parental input, what additional data is needed to determine questions regarding whether a student is a "child with a disability," the present level of achievement and

related developmental needs of the student, and whether the student needs special education and related services. (20 U.S.C. §§ 1414(c)(1)(A)&(B).

10. A student “whose educational performance is adversely affected by a suspected or diagnosed attention deficit disorder or attention deficit hyperactivity disorder” and who meets the eligibility criteria for other health impairment under Education Code section 56337 and California Code of Regulations, tit. 5, section 3030, subdivision (b)(9), is entitled to special education and related services. (Ed. Code, § 56339, subd. (a).) “Other health impairment” is defined, in relevant part, as “having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that . . . is due to chronic or acute health problems such as . . . attention deficit disorder or attention deficit hyperactivity disorder . . . and [a]dversely affects a child’s educational performance.” (34 C.F.R. § 300.8(c)(9); see also Cal. Code Regs., tit. 5, § 3030, subd. (b)(9).)

11. California Code of Regulations, title 5, section 3030, subdivision (b)(1), describes the criteria for determining whether a child qualifies for special education under the category of autism:

Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, and adversely affecting a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

12. A specific learning disability is a disorder in one or more of the basic

psychological processes involved in understanding or using spoken or written language, which manifests itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. (20 U.S.C. § 1401(30)(A); 34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd.(a).) It also includes disability within the field of vision which results in visual perceptual or visual motor dysfunction. (Ed. Code, § 56337, subd.(a).)

13. A school district shall determine if a child has a specific learning disability using one of two methods: the severe discrepancy method, or the response to intervention method. (20 U.S.C. § 1414(b)(6); 34 C.F.R. §§ 300.307, 300.309(a)(1) & (2); Ed Code, 56337, subds. (b), (c).) The severe discrepancy method requires that a student has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematical calculation, or mathematical reasoning. (20 U.S.C. § 1414(b)(6)(A); Ed. Code, § 56337, subd. (b)[authorizes the continued use of a discrepancy method to determine eligibility for specific learning disability]; Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) The response to intervention method allows a district to assess if the pupil responds to scientific, research-based intervention. (Ed Code, § 56337, subd. (c).)

CHILD FIND

14. Student complains that District should have found him eligible for special education, prior to his initial IEP team meeting of November 30, 2015. Student asserts that District should have found Student eligible for special education as of September 2014, the beginning of the 2014-2015 school year. Student primarily cites to Dr. Palmer's assessment and Student's student success team plan as grounds for District's knowledge that Student had a suspected disability, thereby triggering its child find duty, at that time.

15. School districts have an affirmative, ongoing duty to actively and

systematically seek out, identify, locate, and evaluate all children with disabilities residing within their boundaries who may be in need of special education and related services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, §§ 56171, 56300 et seq.) This ongoing duty to seek and serve children with disabilities is referred to as “child find.” California law specifically incorporates child find in Education Code section 56301. (Ed. Code, § 56301, subds. (a), (b).)

16. A school district’s child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect, a disability and reason to suspect that special education services may be needed to address that disability. (*Timothy O. v. Paso Robles Unified Sch. Dist.* (9th Cir. 2016) ___ F.3d. ___, 2016 WL 2957215, *10-12; *Department of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F. Supp. 2d 1190, 1194 (*Cari Rae S.*)). The threshold for suspecting that a child has a disability is relatively low. (*Cari Rae S.* at p. 1195.) A school district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

17. In April 2014, Dr. Palmer independently assessed Student in five areas, including verbal comprehension, perceptual reasoning, working memory, and processing speed. In each area tested, Student received scores ranging from average to superior ability. Dr. Palmer did not diagnose Student with an attention deficit, autism, or with a severe discrepancy between his cognitive ability and performance. Dr. Palmer did not suggest that Student qualified for special education under any area of disability. Finally, Dr. Palmer did not refer Student for special education services. Rather, Dr. Palmer described Student as an intellectually gifted child who would benefit from an accelerated educational program. Consequently, Dr. Palmer’s assessment did not trigger District’s child find obligation for Student.

18. The May 21, 2014 SST plan did note signs of educational difficulty. Student

had difficulty paying attention, completing assignments, and working with others. However, it is not unreasonable for a school district to attempt to consider, and utilize, resources in the general educational program prior to referring a pupil for special education. (Ed. Code 56303) It was therefore reasonable for District to attempt to remediate Student's problems through a SST plan and classroom accommodations in the general education program during the first 90 days of the 2014-2105 school year.

19. It was not clear that the SST plan and classroom accommodation were ineffective until after District had attempted utilizing those general education accommodations. By December 2014, it was evident to Student's classroom teacher, private therapists, and parent, that Student required special education. Student was inattentive, emotional, anxious, required lots of individual attention, and was persistently bullied. As a result of his disability, he missed classroom instruction.

20. On December 11, 2014, Student's mother sent a letter to Ms. Huntington, requesting that District assess Student for special education eligibility. After discussing her assessment request with Ms. McCarthy, Mother withdrew her assessment request for special education testing and accepted District's offer to conduct 504 testing. District argues that Mother's withdrawal of her assessment request was valid because she was "highly intelligent, highly educated, and highly successful." (District's Closing Brief p. 2) However, District overlooks that its duty to assess Student for special education was not dependent on Mother's request. District's child find duty was not dependent on any request by Student's parent for special education testing or referral for services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, § 56301.) Child find obligations apply to children who are suspected of having a disability and being in need of special education, even if they are advancing from grade to grade, and regardless of the severity of the disability. (*Cari Rae S., supra*, 158 F.Supp.2d at p. 1194; 34 C.F.R. § 300.111(a)(1) & (c)(1).) "[A] child should not have to fail a course or be retained in a

grade in order to be considered for special education and related services.” (71 Fed. Reg. 46580 (Aug. 14, 2006).) In light of the information that was available to District as of December 11, 2014, District had an obligation to assess him for special education at that time. District erred in presenting Mother an assessment plan for 504 testing rather than for special education assessments.

21. District corrected that error in March 2015, when it presented Mother an assessment plan for special education testing. However, Mother failed to consent to that plan for seven months, until October 5, 2015. District then quickly completed its assessments and timely convened Student’s initial IEP team meeting, on November 30, 2015.

22. Assessment requires parental consent to a proposed assessment plan. Upon referral for an assessment, a school district has 15 days to develop the proposed assessment plan, not counting calendar days between the pupil’s regular school sessions or calendar days of school vacation in excess of five school days, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code 56043(a).) A school district must give the parents and/or pupil 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).) By this standard, given the winter break, District should have presented Mother an assessment plan for special education assessments by mid-January 2015.

23. School districts have 60 days from the date it receives the parent’s written consent for assessment, excluding vacation and days when school is not in session, to complete the assessments and develop an initial IEP, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043, subds. (c) & (f), 56302.1.) Therefore, had District timely provided Mother an assessment plan for special education assessments, and had Mother timely consented to such plan, District would have had until mid-march 2015 to complete its assessments. However, Mother unilaterally withdrew Student from Lincoln

on January 27, 2015. At that time, Mother was not cooperating with District, as evidenced by her failure to consent to its March 2015 assessment plan, until October 2015.

24. School districts are not required to file for due process to force parents to consent to reassessments or to assess without parental consent. (34 C.F.R. § 300.300(c)(1)(ii) and (iii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) District therefore did not commit a procedural error by failing to file for due process to force Mother to consent to its assessment plan.

25. Based upon the foregoing, it is not equitable to hold District accountable for denying Student special education eligibility until after it had an opportunity to complete its initial assessments and to review those assessments during the initial IEP team meeting. District's liability therefore arose on November 30, 2015, when it improperly denied Student eligibility for special education.

ISSUE ONE: STUDENT'S ELIGIBILITY FOR SPECIAL EDUCATION

26. Student asserts that he should be found eligible for special education. District avers that its assessments failed to identify Student as a child with a disability that requires special education and related services.

27. A preponderance of evidence established that Student qualifies for special education under other health impairment, due to an attention deficit hyperactivity disorder.

28. On February 9, 2015, child psychiatrist Dr. Safahieh diagnosed Student with attention deficit hyperactivity disorder – combined type, depression, anxiety, obsessive compulsive disorder, and sensory processing issues.

29. Prior to Dr. Safahieh's diagnosis, in May 2014, Student's classroom teacher and District staff were concerned that Student was inattentive, frequently off-task, and required constant intervention from his teacher. Student's attention difficulties impacted

his ability to pay attention in class, complete assignments, and work with others. District attempted to remediate Student's attention disorder through accommodations in a general education placement. The general education accommodations were ineffective and Student declined during the following school 2014-2015 school year, his fourth grade. Mother, Student's private therapists, and his classroom teachers, all noticed a decline in Student's academic and social functioning, that was compounded by persistent bullying by his peers.

30. Student's fourth grade teacher, Ms. Slevin, was frustrated at Student's need for constant, individual attention. Student's need for individual instruction, repeated instruction, and redirection, detracted from her ability to teach other students. Student was inattentive and distracted during class, had difficulty focusing on his schoolwork and classroom instruction, and did poorly on quizzes and tests, due to attention delays.

31. As a result of his attention disorder, Student's was often too anxious or emotional to go to school; he subsequently missed 22 days of school during the four and half months he attended Lincoln during the 2014-2015 school year. Mother and Ms. Slevin each described a young boy who was often too emotionally distraught to benefit from classroom instruction.

32. Ms. Slevin testified that Student's conduct was comparable to that which she had observed exhibited by students with IEP's for other health impairment due to an attention disorder.

33. In January 2015, District psychologist Ms. McCarthy discovered the same attention concerns. Student was inattentive, easily distracted, and had difficulty attending to classroom work. Student's attention disorder impacted his performance on quizzes and tests, to complete assignments, and to develop socially. Even with the SST plan, Student required lots of individual help throughout the school day.

34. School staff also recognized Student's academic delays and the ineffectiveness of the SST plan. On January 16, 2015, after consulting with Ms. McCarthy and Ms. Slevin, District special education teacher Michael Waldinger offered to teach Student in a resource specialist class, for one hour daily.

35. By March 2015, Ms. Cottrell correctly determined that 504 testing, which result in 504 accommodations, was insufficient for Student. She therefore presented Student's mother an assessment plan for special education testing.

36. While at Mariners during the 2015-2016 school year, Student was inattentive during group work, fidgety, and off-task during class. Student required instructions to be written and given auditorily, preferential seating; sensory tools like a rocking chair, movement and brain breaks, small group instruction, checklists and reminders for homework and classwork, and a separate test environment to minimize distraction. Mariners also provided Student an individualized support plan, which included accommodations and a goal to remediate Student's attention dysfunction. Yet, Student's present teacher, Ms. Campbell, reported that Student was still frequently inattentive during class. Mother also privately funded three hours weekly of individual educational therapy, one-to-three hours weekly of occupational therapy, and weekly psychological counseling, while Student attended the private school.

37. Even with those services and accommodations, Ms. Le observed that Student was off task for 23 percent of the time during her second, 30-minute observation.

38. Per rating scales administered by Ms. Le and completed by Ms. Campbell, Student had problems in attention, learning, atypical and odd behaviors, adaptive skills, social skills, and leadership. Mother reported problems in hyperactivity, anxiety, attention, atypicality, withdrawal, and adaptability.

39. District's psychoeducational assessment primarily relied on Ms. Le's

observations at Mariners to determine that Student did not qualify for special education. Ms. Le testified that Student was able to attend sufficiently during her classroom observations. However, Ms. Le overlooked that, while at Mariners, Student had received significant classroom accommodations and related services. Even with an individualized support plan, small class size, smaller group instruction, educational therapy, occupational therapy, counseling, and sensory tools like a rocking chair, Student still had difficulty attending. While his attention and access to instruction had increased when compared to his conduct at Lincoln, that progress showed that Student was receptive to, and needed, special education interventions.

40. District's November 2015 IEP team primarily relied on Ms. Le's recommendation that Student did not qualify for special education. Although District's Multidisciplinary Evaluation Report was properly conducted in alignment with statutory requirements, the determination of whether Student was a child with a disability must be made by the IEP team. (20 U.S.C. § 1414(b)(4)(A)). At the time of the initial IEP team meeting, information of how Student performed at Lincoln existed. It was unreasonable for District's IEP team to ignore Mother's concern that Student was performing adequately at Mariners because of the significant interventions that he had received there.

41. Rather, information attributable to how Student performed in Ms. Slevin's classroom, just 10 months prior to District's psychoeducational report, was relevant and necessary to determine whether Student qualified as a "child with a disability" and needed special education and related services. Student's performance at Lincoln without special education intervention was vital to the IEP team's determination of whether Student required special education intervention to access his educational program. District improperly disregarded the opportunity to compare Student's classroom performance without special education, while at Lincoln, to how Student performed with

de facto special education accommodations and interventions, at Mariners. At Lincoln, without special education intervention, Student was inattentive and struggled academically and socially, and was persistently bullied. He missed instruction and sometimes was unable to attend school. Yet, with the addition of related services, accommodations, and small group instruction, his ability to benefit from his educational program increased while at Mariners. He no longer missed classroom instruction or was bullied by peers.

42. In relying solely on its assessment and disregarding relevant information from the prior school year, District improperly denied Student special education eligibility under other health impairment due to an attention disorder. At that time, Student was medically diagnosed with attention deficit hyperactivity disorder. That disorder impacted his ability to access, and benefit from, his classroom instruction when he was not receiving special education and related services.

43. Dr. Davidson similarly found that Student had a serious attention disorder and met the criteria for attention deficit hyperactivity disorder. Per the Conners, the Behavior Assessment System for Children, and the Scales for Assessing Emotional Disturbance, Student had problems in attention, interacting with others, adapting to changes, completing work, working with others, disrupting others, aggression, and anxiety. Dr. Davidson's finding that Student qualified under other health impairment due to an attention disorder was consistent with Student's conduct at Lincoln and Mariners, and prior testing. Although Dr. Davidson's assessment was not available to District when it convened Student's November 2015 IEP team meeting, Dr. Davidson's findings in this area are properly considered under the "snapshot rule" for the limited purpose of determining the reasonableness of the IEP offer. (*E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist.* (9th Cir. 2011) 652 F.3d 999, 1006 ("[A]dditional data, discovered late in the evaluation process, may provide significant insight into the child's condition, and the

reasonableness of the school district's action, at the earlier date.".)

44. Dr. Davidson's testing, and testimony, helped illustrate that Student had a pervasive attention disorder that adversely affected his educational performance, and heightened his alertness to environmental stimuli, including sensory dysfunctions. Dr. Davidson's additional data, discovered after the November 2015 IEP, provided insight into the Student's condition, and the reasonableness of the District's action, at the earlier date. Given what District knew as of Student's initial IEP team meeting, it was not reasonable to deny him eligibility under other health impairment.

45. Evidence from Mother, Ms. Slevin, Ms. McCarthy, Ms. Campbell, Dr. Safahieh, Dr. Davidson, and Student's SST plan, showed that Student's attention disorder impacted his alertness in class. He was inattentive, frequently distracted, required lots of individual attention, and missed classroom instruction due to an attention disorder. This evidence was more persuasive than Ms. Le's testimony that Student did not require special education for an attention disorder.

46. However, a preponderance of evidence failed to support Student's claim that he was eligible under additional disability categories, including specific learning disability and autism.

47. At the time of the November 30, 2015 IEP team meeting, District did not have sufficient reason to believe that Student had a specific learning disability or autism.

48. Regarding a specific learning disability, Student had obtained a private academic assessment from Dr. Palmer prior to the initial IEP team meeting. However, Dr. Palmer's report failed to identify a specific learning disability, or any disability. Additionally, Ms. Le assessed Student's cognitive abilities and, similar to Dr. Palmer, failed to identify a specific learning disability, or a severe discrepancy between Student's cognitive ability and performance.

49. Student was first diagnosed with a specific learning disorder by Dr.

Davidson in April 2016, more than five months after the initial IEP team meeting. Dr. Davidson determined that Student had a specific learning disability based upon her usage of Student's fluid reasoning composite score, an area of strength, as his cognitive ability level. Dr. Davidson defended using the fluid reasoning score, rather than Student's overall IQ score, based upon the book *Assessment of Children*, by Jerome Sattler. However, Sattler's text did not justify using the fluid reasoning composite score as Student's cognitive ability score. Ms. Le more persuasively testified that cognitive ability was made up of many facets, rather than a single area of strength, as used by Dr. Davidson. Since Dr. Davidson's report was the only information supporting a finding of specific learning disability, and that report had yet to be reviewed at an IEP team meeting, it is unreasonable to confer that information to the November 2015 IEP team.

50. There was some evidence provided that showed that Student had autism prior to the November 2015 IEP team meeting. For example, the Children's Communication Checklist administered by District's speech and language therapist Ms. Gudelman, and completed by Student's teacher, indicated that Student had a communication profile similar to that of a child diagnosed with autism spectrum disorder. However, Ms. Gudelman and Ms. Le each testified that this information did not warrant finding Student eligible under autism because Student lacked an expressive or receptive language delay, delays common in autism. Student failed to present evidence from a speech and language therapist that contradicted this testimony. Overall, District assessors had assessed Student in the area of autism as a suspected disability, and had not found that Student qualified under that condition. No additional information was available at the time of the November 2015 IEP team meeting that warranted finding Student eligible under autism.

51. More information surfaced following the November 2015 IEP team meeting that identified Student with autism. In April 2016, Dr. Davidson and Dr. Tu each

diagnosed Student with autism. This was new information that was not available to District when it convened the initial IEP team meeting. District had received Dr. Davidson's report and Dr. Tu's diagnosis just prior to the due process hearing. Ms. Cottrell testified that District had yet to review Dr. Davidson's report and Dr. Tu's diagnosis during an IEP team meeting, and intended to do so within the next month. Consequently, District did not act unreasonably when it failed to qualify Student for special education under autism or specific learning disability when the November 2015 IEP team meeting was convened.

52. For the foregoing reasons, a preponderance of evidence shows that Student was eligible for special education and related services under other health impairment. Student had a medical diagnosis of attention deficit hyperactivity disorder, and evidence overwhelmingly showed that disorder impacted his ability to access, and benefit from, his educational program. District's denial of special education eligibility under other health impairment due to attention deficit hyperactivity disorder denied Student a FAPE.

ISSUES TWO AND THREE: DISTRICT'S MULTIDISCIPLINARY EVALUATION REPORT

53. Student complains that the psychoeducational and speech and language components of District's 2015 Multidisciplinary Evaluation Report were inappropriate. District argues that its assessments met all statutory requirements.

54. To the extent that District's psychoeducational testing failed to identify student with eligibility for special education under other health impairment, Student's complaint has merit, but is misdirected. Rather, the determination of special education eligibility falls to the IEP team, not solely to the assessor. (20 U.S.C. § 1414(b)(4)(A).) As already found above, District's IEP team erred in failing to find Student eligible for special education. However, that error does not necessarily mean that District's psychoeducational and speech and language assessments were defective. District's

Multidisciplinary Evaluation Report included a review of Student's educational records, including the May 2014 SST plan and the educational problems identified in that plan. The IEP team had the duty to consider that information when determining special education eligibility.

55. Ms. Le was charged with completing the psychoeducational testing. Ms. Le was an experienced assessor who attained a bachelor of arts degree in psychology in 2003, and a masters of arts degree in educational psychology in 2006. She had also earned an Education Specialist degree and was a nationally certified school psychologist.

56. Ms. Le selected the Kaufman Assessment Battery of Children-Second Edition; Comprehensive Test of Phonological Processing-Second Edition; Conners-Third Edition; Behavior Assessment System for Children-Third Edition; Multidimensional Anxiety Scale for Children-Second Edition; Emotional Disturbance Decision Tree, and; the Autism Spectrum Rating Scale. Together, these tests assessed Student's cognitive abilities, phonological processing, behavior, attention, self-perception, anxiety, emotion, and for autism.

57. For the academic component of the psychoeducational testing, Ms. Le properly relied on testing completed by Ms. Winter. Ms. Winter received a bachelor's degree in education in 1990, and a master's degree in special education in 2014. She had been a special education and general education teacher, and had been a special education case carrier for District since 2011. Ms. Winter had experience conducting academic assessments and correctly administered the Wechsler Individual Achievement Test-Third Edition, for Student. The Wechsler measured the achievement of students in the areas of oral language, reading, written expression, and mathematics.

58. Ms. Le did not rely on any single measure for the psychoeducational testing. In addition to the six formal assessment tools utilized, Ms. Le reviewed Student's

records, conducted interviews, and twice observed Student at school.

59. Student failed to present any evidence which impugned Ms. Le or Ms. Winter's qualifications, or that called into question the validity of their assessments.

60. Natalie Gudelman conducted the speech and language component of District's report. Ms. Gudelman was a licensed speech and language pathologist who received her bachelor's in speech and hearing science in 2000, and a master's in communicative disorders in 2002. She had been a speech and language pathologist for District since 2013. For Student, Ms. Gudelman administered the Comprehensive Assessment of Spoken Language; Test of Problem Solving 3: Elementary, and; the Children's Communication Checklist-2. Together, these tests assessed Student's oral language, communication, and critical thinking. She also assessed Student in the areas of articulation and oral motor.

61. Ms. Gudelman did not rely on any single measure for her assessment. Her qualifications, and the validity of her testing, were not called into question by any Student witness. In fact, Student failed to present a speech and language expert witness to contradict or dispute any aspect of Ms. Gudelman's assessment.

62. Ms. Le, Ms. Winter, and Ms. Gudelman were qualified to administer the assessments they selected. Each correctly followed the protocols for testing; used valid and properly normed testing material in a racially unbiased manner, and; conducted the testing in English, Student's only language. The assessors' findings were completed in a written report, District's Multidisciplinary Evaluation Report.

63. Based on the foregoing, District's psychoeducational and speech and language assessments met all necessary statutory requirements. (20 U.S.C. § 1414(b)(3)(A)(i); Ed. Code, § 56320, subd. (a).) (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) (20 U.S.C. § 1414(b)(3)(C); Ed. Code, § 56320, subd. (c).) (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.) (20 U.S.C. § 1414(c)(1)(A); 34

C.F.R., § 300.305; Ed. Code, § 56381, subd. (b)(1).) (Ed. Code, § 56320, subd. (e); see also 20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2).) (Ed. Code, § 56327.)

64. Consequently, a preponderance of evidence showed that District's psychoeducational and speech and language assessments did not deny Student a FAPE. Student is therefore not entitled to a psychoeducational or speech and language independent educational evaluation funded by District.

REMEDIES

65. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad equitable authority extends to an Administrative Law Judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

66. District denied Student a FAPE by failing to find him eligible for special education. Amongst other remedies, Student requested eligibility for special education. A preponderance of evidence established that Student qualifies for special education under other health impairment due to an attention deficit hyperactivity disorder. It is therefore equitable to order District to provide Student an IEP for that disability.

67. Student also requested reimbursement for educational expenses incurred as a result of District's failure to find him eligible for special education. Those costs include private school, occupational therapy, and educational therapy. A preponderance of evidence established that Student benefited from those therapies. Ms. Le, Mother, and Dr. Davidson, each testified that Student was able to access his educational program at Mariners, during a time when he received those services. This evidence

stood in stark contrast to Student's performance at Lincoln, without those services, when he was unable to access his placement. Consequently, it is equitable to order District to reimburse Mother for educational expenses that she incurred as a result of District's failure to find Student eligible for special education.

68. As noted in Legal Conclusion 25, District's liability arose on November 30, 2015. At that time, District had an opportunity to complete its initial assessments, and to hold an initial IEP team meeting to offer special education. During hearing, Mother presented evidence that she had paid \$270.00 for occupational therapy costs; \$2,215.00 for educational therapy, and; \$2,711.07 for placement at Mariners, following the November 30, 2015 IEP meeting. It is therefore equitable to award Student's mother \$5,196.07 for reimbursement for these educational expenses.

69. It is also equitable to order District to provide Student some compensatory services. Mother testified that she had reduced the level of private services following the November 30, 2015 IEP team meeting, due to financial constraints. Based upon the reimbursement evidence Mother provided, she stopped funding counseling services prior to November 2015, and stopped funding occupational therapy after December 2015. Evidence showed that Student benefited from occupational therapy and counseling. Student's independent occupational therapy assessment and District's occupational therapy assessment each identified Student with serious sensory processing delays, warranting weekly occupational therapy. Evidence also supported providing Student weekly counseling services. Mother, Ms. Slevin, and Dr. Davidson, each testified that student was anxious and emotional. The classroom teacher testified that his emotional outbursts interfered with classroom instruction. Consequently, it is equitable for District to provide Student 22 hours of compensatory occupational therapy, representing one hour weekly of occupational therapy from the beginning of January 2016, through the remainder of the school year, and; 24 hours of compensatory

counseling services, representing one hour per week, from the beginning of December 2015, through the end of the school year.

ORDER

1. Within 30 calendar days of this Decision, District shall hold an IEP team meeting to confer special education eligibility for Student under other health impairment due to an attention deficit hyperactivity disorder. The IEP team shall also consider whether Student qualifies for special education under additional handicapping conditions.

2. Within 60 calendar days of this Decision, District shall pay \$5,196.07 to Student's mother. Documents submitted in this hearing constitute adequate proof of payment by Student's mother.

3. District shall provide Student 22 hours of compensatory occupational therapy, by a qualified registered occupational therapist of its choosing. District shall coordinate the delivery of those services with Student's mother so that they are delivered in full within 10 months from the date of this Decision.

4. District shall provide Student 24 hours of compensatory counseling services, by a qualified psychologist of its choosing. District shall coordinate the delivery of those services with Student's mother so that they are delivered in full within 11 months from the date of this Decision.

5. The psychoeducational and speech and language components of District's November 2015 Multidisciplinary Evaluation and Evaluation Report were appropriate and District is therefore not required to fund independent educational evaluations related to these assessments.

6. Student's remaining requests for relief are denied.

PREVAILING PARTY

Pursuant to 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. In accordance with that section the following finding is made: Student prevailed on issue one. District prevailed on issues two and three.

RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56506, 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: July 6, 2016

_____/s/____

PAUL H. KAMOROFF

Administrative Law Judge

Office of Administrative Hearings