

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

LOWELL JOINT SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT,

OAH CASE NO. 2015100100

PARENTS ON BEHALF OF STUDENT,

v.

LOWELL JOINT SCHOOL DISTRICT.

OAH CASE NO. 2015100387

DECISION

Lowell Joint School District filed an initial due process hearing request with the Office of Administrative Hearings, State of California, on October 2, 2015, naming Student; designated case number 2015100100. Parents on behalf of Student filed a due process hearing request with OAH on October 9, 2015, naming District; designated case number 2015100387. The cases were consolidated on October 15, 2015. The 45-day timeline for issuance of the decision in the consolidated cases was ordered to be based on the date of the filing of the complaint in OAH Case Number 2015100100, District's Case. District filed an amended due process request on November 23, 2015. The amended due process request reset the 45 day time line to issue a decision in the

consolidated matters.

Administrative Law Judge Marian H. Tully, Office of Administrative Hearings, State of California, heard this matter on April 5, 6, 7, 11 and 15, 2016, in Whittier, California.

Attorneys Jessica Villegas and Jennifer Guze Campbell appeared on behalf of Student. Student's mother and father attended the hearing.

Attorney Adam J. Newman appeared on behalf of Lowell Joint School District. Director of Special Education Laura Richards attended the hearing on behalf of District.

A continuance was granted for the parties to file written closing arguments and the record remained open until May 9, 2016. The parties timely filed written closing arguments, the record was closed and the matter was submitted for decision on May 9, 2016.

ISSUES

STUDENT'S ISSUE

Did District deny Student a free appropriate public education by failing to assess Student for central auditory processing disorder?

DISTRICT'S ISSUES

1. Did District appropriately assess Student in the area of auditory processing through a variety of assessments, such that District is not required to provide an independent educational evaluation for central auditory processing disorder at public expense?
2. Did District offer Student a FAPE in individualized education programs dated April 22, 2015, May 18, 2015, and October 8, 2015?

SUMMARY OF DECISION

Student was eligible for special education under the category of specific learning

disability due to deficits in auditory memory, auditory attention and auditory processing resulting from an auditory processing disorder. Student's disability caused difficulties in sound sequencing and integration, and in the areas of reading, comprehension, writing and memory. The disability also caused deficits in Student's receptive and expressive speech/language. Audiologists assessed Student in 2011 and in 2012. District relied upon the assessments and identified central auditory processing disorder (CAPD) as a basis for finding Student eligible for special education in 2013. Both reports recommended continued monitoring. Student's CAPD continued to cause deficits in all areas. In 2015, Parents made multiple requests for a District CAPD assessment during IEP team meetings and in writing. District committed a substantial procedural violation of the Individuals with Disabilities Education Act by declining Parents' request for CAPD assessment, and by not including a CAPD assessment in Student's May 2015 triennial assessment. This violation denied educational benefit to Student and significantly impeded Parents' opportunity to participate in the decision-making process. Student is entitled to a publically funded independent auditory processing evaluation by an audiologist.

District had an affirmative duty to assess Student's CAPD using reliable methods and standardized testing as the IDEA requires. As the result of District's failure to formally assess Student's primary disability, the April 22, 2015, May 18, 2015, and October 8, 2015 IEP's denied Student a free appropriate public education.

FACTUAL FINDINGS

1. Student was first found eligible for special education under the category of speech and language impairment in 2009 while attending school in Arkansas. Student's family moved from Arkansas to within District boundaries in 2012. At all relevant times, Student resided with his Parents and attended the District elementary school closest to his home. Student was eligible for special education under the primary category of

specific learning disability based upon an auditory processing disorder and a secondary category of speech/language impairment. Student's auditory processing disorder caused unique and significant deficits in the areas of auditory memory, comprehension, and receptive and expressive language, which affected his progress in his general education curriculum.¹

2. Auditory processing refers to how the brain processes sounds by sorting and categorizing information received through the auditory channel, and how it assigns meaning to sounds or sound sequencing. An auditory processing disorder is the inability to perceive and process auditory signals within the central nervous system. This disability often causes difficulty in the academic areas of reading and spelling as the brain does not recognize and sequence oral and written language. An auditory processing evaluation uses a battery of specialized standardized tests and clinical evaluation by an audiologist to assess the brain's ability to process speech and noise signals. The evaluation provides information pertaining to attention, decoding, association, integration, and planning.

3. Student was first diagnosed with an auditory processing disorder at the age of six when the family lived in Arkansas. An audiologist's evaluation conducted on April 8, 2011 demonstrated the central auditory nervous system between the left and right hemispheres of Student's brain was underdeveloped for his age. The report

¹ The terms "auditory processing" and "central auditory processing" as used by audiologists are synonymous. The acronym CAPD was used by the parties to stand for central auditory processing disorder, often to describe an auditory processing evaluation by an audiologist. This Decision uses the acronym as it was used by the parties. This Decision does not distinguish "auditory processing" from "central auditory processing" as it relates to Student's disability and uses those terms interchangeably.

described this as an auditory integration deficit. The audiologist included the results of standardized tests, including Screening Test for Auditory Processing Disorders for Children, and subtests Gap Detection, Auditory Figure-Ground, and Competing Words in her report. The report recommended auditory therapy to address short term auditory memory, auditory sequencing, auditory temporal processing and auditory processing skills and speech/language therapy. The audiologist included suggestions for educational goals. For example: Student will listen to and remember the sequence of up to six unrelated words in a field of 10 with 90 percent accuracy by a given date. The audiologist also included recommended accommodations in her report. For example: where there is a significant difference in the processing skill between a student's two ears, preferential classroom seating should be provided so the student can favor the better ear. She recommended reevaluation in 12 months.

4. Parents obtained a privately-funded reevaluation on December 7, 2012 from Providence Speech and Health Center in Orange, California by Loretta Y. Lee, Aud.D. Student was eight years old and attending second grade within District. Parents gave a copy of Dr. Lee's report to District. The report included the following information: Dr. Lee reviewed the 2011 test results in the Screening Test for Auditory Processing Disorders for Children, and subtests Gap Detection, Auditory Figure-Ground, and Competing Words. She administered the same tests for comparison and additional tests required to evaluate Student's auditory processing abilities. Student's overall auditory processing composite score in the Screening Test placed Student in the seventh percentile for his age group. He had particular deficits in auditory memory, auditory attention and auditory processing. Test results again showed an integration deficit. An integration deficit affects the ability to perform tasks that require inter-sensory or inter-hemispheric communication, and the inability to apply the rules of language to incoming auditory input. Student demonstrated atypical right-ear advantage. Children

with integration deficits have difficulties in reading recognition, spelling, writing skills, integrative tasks, comprehension, and language communication skills.

5. Dr. Lee's report included recommendations to address Student's educational needs. Recommended accommodations included untimed tests in a quiet room, and mnemonic or other devices such as a tape recorder, iPod, or study guides for auditory memory. The report included recommendations to address temporal processing training. For example, the report recommended Student should use "Earobics" 15 minutes daily five days per week, in the home or in school. Dr. Lee recommended reevaluation in three years to monitor neural maturation and auditory processing abilities.

6. District conducted Student's first triennial assessment in February and March 2013. The IEP team met on March 21, 2013 to review the assessment. Rachel Coleman, Student's special education teacher from the time Student entered District in second grade, attended the meeting and prepared the notes. Student's needs were in the areas of written language, reading comprehension, calculation, decoding, memory, and receptive and expressive language. District considered the audiologists' reports from April 8, 2011 and December 7, 2012. The team determined Student was eligible for special education under the primary category of specific learning disability based upon his auditory processing disorder with a secondary category of speech/language impairment. The March 21, 2013 IEP included an FM system in the classroom and seating near the FM speaker. An FM system is used for children with no hearing loss to address educational needs caused by auditory processing disorders.

7. District held Student's next IEP team meeting on March 14, 2014. Ms. Coleman attended the meeting. Mother asked a question about the FM system in the classroom. District informed Parents that the IEP team had agreed the FM system was no longer needed "at the last meeting." Parents were surprised to learn District was not

using the FM system. At hearing, District did not produce evidence of any meeting between March 21, 2013 and March 14, 2014 in which the removal of the FM system was discussed nor any evidence of consent to amend the March 21, 2013 IEP.

8. The March 14, 2014 IEP included placement in a general education classroom with daily specialized academic instruction for 900 minutes per week. The specialized academic instruction was delivered with a combination of "push in" and "pull out" in the general education classroom or in the resource specialist room. The IEP included 75 minutes per week of group speech and language services. The IEP provided for extended school year including 1,200 minutes of specialized academic instruction and 75 minutes of group speech and language service weekly. The program provided 51 percent of Student's time in the regular environment and 49 percent of Student's time outside of the regular environment. The March 14, 2014 IEP did not provide for an FM system. Parents consented to the IEP with the exception of assistive technology. Father wrote on the consent form that District should check their emails about his requests for assistive technology.

9. On March 20, 2014, Father sent Ms. Coleman an email requesting an assistive technology assessment. Father informed her that Student had an auditory processing disorder which limited his ability to understand what was being said and that Student's doctor requested an FM system. Father further informed Ms. Coleman that a specialist would be able to determine what devices would help Student. On March 31, 2014, Ms. Coleman acknowledged that the FM system had been listed as an accommodation in the March 21, 2013 IEP, and that the matter would be brought to the attention of the special education director.

FOURTH GRADE, 2014-2015 SCHOOL YEAR

10. Julie Roth was Student's fourth grade general education teacher. She was

an experienced, skilled and enthusiastic teacher. There were between 31 and 33 students in her class. Student seemed comfortable in her class. Academically he was below average, but able to do more difficult work at the end of the year than he had at the beginning. He had difficulty with memory and reading comprehension.

11. Rachel Coleman provided specialized academic instruction for Student. Student attended Ms. Coleman's small group class for "pull-out" instruction in the resource specialist room. Ms. Coleman provided "push-in" services in Ms. Roth's class. She attended the March 14, 2014 IEP meeting. Student's academic difficulties were reading comprehension, vocabulary, and written language. Ms. Coleman had, at times, used "Earobics" with Student because it was "kid friendly" and a good match for Student. The program helped Student with auditory attention, processing, and sequencing. There was no evidence of how often it was used or over what period of time it was offered.

12. District's assistive technology consultant, Deborah Neuhoff, assessed Student's reading and writing skills in August 2014 and prepared a report dated September 5, 2014. Ms. Neuhoff considered a portable word processor; computer access; text to speech software; access to digital books; and teacher notes and visual supports. She did not consider an FM system, iPod or a tape recorder as previously recommended by audiologists.

13. The IEP team met on September 10, 2014, to consider the results of the assistive technology assessment. Ms. Coleman facilitated the meeting and was responsible for the meeting notes. Ms. Coleman prepared the notes before the meeting.

14. Ms. Neuhoff reviewed her report at the meeting and recommended District provide a portable word processor, computer access, text to speech software, access to digital books, teacher notes and visual supports. The IEP team amended the March 14, 2014 IEP to include the assistive technology she recommended. New

accommodations included staff and Student training to use a portable word processor and a digital book account.

15. District audiologist Louie Interiano attended the September 10, 2014 meeting to "clarify" why no FM system was necessary. Mr. Interiano did not assess Student and did not testify at the hearing. Ms. Coleman's notes state "The IEP team agreed there was no need for an FM system". All 10 people present, including Parents, signed the notes on September 10, 2014.

16. Father understood the purpose of the meeting was to consider the assistive technology assessment and he signed consent to the amendment for the services recommended. He did not notice the sentence regarding the need for the FM system when he signed the amendment. He denied having ever agreed the FM system was not necessary. Ms. Coleman did not remember whether, during the meeting, Parents said they wanted Student to have an FM system. Father's testimony was credible, consistent with the note he wrote on the consent form for the March 14, 2014 IEP, his March 20, 2014 email and with Ms. Coleman's reply.

17. On March 20, 2015, Student, through counsel, sent District a written request for a CAPD assessment. On April 7, 2015, Parents took Student to Dr. Lee for re-evaluation. Dr. Lee administered the same test battery she performed in December 2012. Student's overall auditory processing composite score in the Screening Test placed Student in the third percentile for his age group; with significant left ear weakness in dichotic listening tasks and tasks that required transfer of information. He also had significant difficulty with tasks involving increasing linguistic complexity and sequencing auditory information. The Staggered Spondaic Word Test is a subtest that measures binary integration; in Student's case the separation of the last half of the first word and the first part of the second word. Comparing the Staggered Spondaic Word Test administered in 2012 with the same test administered in 2015 showed Student's

test results dropped from "not-normal" to "abnormal" between second and fourth grade. Parents did not share Dr. Lee's April 7, 2015 reevaluation with District.

APRIL 22, 2015 IEP TEAM MEETING

18. District held Student's annual IEP team meeting near the end of fourth grade on April 22, 2015. All required members of Student's IEP team were present. Student was represented by two advocates. Attorney Adam Newman and Director of Special Education Laura Richards represented District. Ms. Richards prepared the notes of the meeting. The team discussed Student's present levels of performance, progress on goals, and proposed goals.

19. Speech pathologist Samantha Blackler reported Student's progress on his two speech/language goals. He met one goal; he could explain the sequence of a simple task when presented with a three picture sequence of the task with 80 percent accuracy. He did not meet the other goal. The other goal was developed to address Student's limited vocabulary and trouble using words correctly in a sentence when talking or explaining an event. The goal was to state an antonym and homonym when given a word with 80 percent accuracy. Student made progress to 60 percent accuracy on that goal. Of the eight goals used to establish Student's present levels of performance, only that goal could be construed to address auditory processing.

20. The team determined Student continued to be eligible for special education under the categories of specific learning disability and speech/language impairment. No changes were made to Student's March 14, 2014 IEP. Parent and District agreed to conduct Student's second triennial assessment early. The team planned to reconvene in May after the triennial assessment.

2015 TRIENNIAL ASSESSMENT

21. District conducted its triennial assessment in April and May 2015. The

triennial assessment included a psychoeducational assessment and assessed in other areas including hearing, vision, and health; cognitive development; academic achievement; expressive, receptive and pragmatic language; behavior and social emotional development; occupational therapy, speech and language, and assistive technology. The triennial assessment was conducted by District school psychologist Anna Page, special education teacher Ms. Coleman, speech and language specialist Samantha Blackler, occupational therapists Allison Carson and Stephanie Hui, District Nurse Nancy White, and Ms. Neuhoff.

22. Each assessor used a variety of formal and informal assessment tools. Their assessments included record review, observation, standardized testing, rating scales completed by staff and Parent and interviews. Each assessor administered testing in English, Student's primary language. Each assessor administered the tests they used in conformance with testing instructions and each test was valid for the purpose for which the test was intended. Each assessor was qualified, within their professional qualifications, to administer and interpret the results of their testing. The assessment materials were without racial, cultural, or gender discrimination. Student followed verbal instructions and completed assigned tasks during these assessments.

23. Ms. Page performed the psychoeducational assessment and prepared the triennial assessment report dated May 18, 2015. Ms. Page was a nationally certified school psychologist. She held a master of arts degree in educational psychology-educational specialist, and a pupil personnel services credential in school psychology. She began her employment as a school psychologist with District in 2012. Ms. Page's responsibilities included conducting initial and triennial assessments and participating in IEP meetings. Ms. Page had no training or background in audiology.

24. Ms. Page administered the Wechsler Intelligence Scale for Children - Fifth Edition. The Wechsler Intelligence Scale was used to assess general thinking and

reasoning skills. Test results were in the extremely low range in verbal comprehension, visual spatial and fluid reasoning and working memory indexes. Test results in processing speed were in the low average range in one subtest and average in another. Ancillary composite scores in quantitative reasoning, auditory working memory, nonverbal reasoning, general ability, and cognitive proficiency indexes were between the very low and extremely low ranges. In Ms. Page's opinion some subtests of the Wechsler Intelligence Scale assessed auditory processing. In her opinion, the verbal comprehension portion assessed higher order processing skills. Student tested extremely low in this subtest, above only one percent of same age peers.

25. Ms. Page also administered the Test of Auditory Processing Skills - Third Edition and the Test of Visual Perception Skills - Third Edition.² The Auditory Processing test measures auditory attention, basic phonological skills and auditory memory. Ms. Page opined that this test was informative in determining whether a student met the legal requirements for special education eligibility under the category of specific learning disability which includes auditory processing. Student's overall auditory processing abilities fell in the extremely low range; above only one percent of same age peers. The Visual Processing test measures basic visual processing skills, sequential memory and complex visual perception. Student's overall performance in the Visual Processing test was extremely low.

26. Ms. Page also administered other standardized tests and obtained the Behavior Assessment for Children - Second Edition, the Gilliam Autism Ratings Scale -

² In completing the test protocol, Ms. Page checked a box to indicate Student had no known audiological problems. Ms. Page checked the box because Student's hearing was being evaluated by the school nurse. Neither party offered evidence as to whether the checked box affected the validity of the test.

Third Edition, and the Adaptive Behavior Assessment System from Mother; simple questionnaires from Mother, Ms. Coleman and Ms. Roth; and the Conners Teacher Rating Scale, Third Edition.

27. Ms. Page observed Student in the classroom. She saw Student engaged, visually tracking and maintaining eye contact with the teacher. She concluded Student had appropriate auditory access to his instruction.

28. Ms. Page understood the purpose of the psychoeducational assessment was to determine whether Student met the eligibility criteria under the IDEA. She understood eligibility under the category of specific learning disability included auditory processing disorders. Ms. Page's opinion was that a CAPD assessment was not required under the law, and not necessary to determine Student's eligibility under the category of specific learning disability in the area of auditory processing. In her opinion the triennial assessment was similar to what would be done in a CAPD assessment.

29. Ms. Coleman assessed Student's academic skills. Ms. Coleman held a professional clear learning handicapped specialist credential, a professional clear single subject English credential and is a National Board Certified Teacher - Exceptional Needs. She has assessed children for special education and taught special education students since 1995. Ms. Coleman was employed by District for the past 11 years. Her responsibilities included teaching, academic testing, attending IEP meetings for initial and triennial evaluations, and collaboration with general education teachers. Ms. Coleman administered the Gray Oral Reading Test - Fourth Edition and the Woodcock-Johnson Test of Achievement - Fourth Edition, and observed Student in the classroom.

30. The Gray Oral Reading Test measured oral reading rate, accuracy, fluency and comprehension. Student tested in the low average range, which was some improvement from the extremely low range in 2013.

31. The Woodcock Johnson measured academic achievement in reading,

written language and math. Student's results ranged from low average to average in the 15 subtests administered. The results showed some improvement over the same subtest categories in 2013. Ms. Coleman's opinion was the Woodcock Johnson allowed her to evaluate Student's auditory processing because the subtests required Student to use auditory processing skills to respond to verbal directions. For example, in the "applied problems" mathematics subtest, Ms. Coleman would hold up a card with a picture facing Student and read a scripted question printed in her view on the back. The applied problem test provided Ms. Coleman insight into how a student responded to verbal instruction.

32. Ms. Coleman defined an auditory processing disorder as the brain's difficulty with how to process sound and remember what was heard. She understood auditory processing disorders affect language, vocabulary, and other language based skills. Ms. Coleman identified auditory processing as one of Student's weaknesses. She did not refer Student for an auditory processing assessment because Student's auditory processing deficits were not severe; she had seen worse. In over 20 years, 11 years of those years with District, Ms. Coleman never referred a child for an auditory processing assessment, except if a hearing loss was suspected.

33. Ms. Blackler, Student's speech pathologist, assessed Student in the areas of receptive and expressive language. Ms. Blackler is a properly credentialed speech pathologist. She had approximately six years' experience assessing children with communication disorders. Currently employed by District, her responsibilities include evaluating students' skills in the areas of receptive and expressive language, fluency, voice, and pragmatics.

34. Ms. Blackler administered six standardized tests: Clinical Evaluation of Language Fundamentals - Fifth Edition, Comprehensive Assessment of Spoken Language, Peabody Picture Vocabulary Test - Fourth Edition, Social Language

Development Test, Expressive One -Word Test of Pragmatic Language - Second Edition, and Test of Pragmatic Language - Second Edition. The Clinical Evaluation of Language Fundamentals was a clinical tool to diagnosis speech and language disorders. Ms. Blackler selected the Comprehensive Assessment of Spoken Language because it was useful to establish eligibility in the category of speech and language. She administered the Peabody because Parents wanted Student tested in the area of vocabulary. The Expressive One-Word Test, other than the initial directions, did not involve oral information that did not have pictures. The Test of Pragmatic Language was used to assess Student's educational needs related to a medical diagnosis of autism. In Ms. Blackler's opinion, these tests indirectly assess auditory processing in the area of expressive language.

35. Ms. Blackler observed Student in the special education classroom and in a general physical education class. He participated with peers appropriately, played games and was not left out. She concluded Student had needs in the areas of expressive, receptive and pragmatic language.

36. Ms. Blackler believed auditory processing disorder and speech and language disorder were "so intertwined as to be indistinguishable". She believed a speech pathologist and a school psychologist could adequately assess auditory processing. In her opinion, an auditory processing evaluation was not necessary because District's triennial assessment adequately assessed Student's educational needs and District did not require further information to develop a program for him.

37. Ms. Neuhoff assessed Student in the area of assistive technology. Ms. Neuhoff's assessment included observation, interviews, file review, and trials with different devices. The assistive technology she considered included computer access with text to speech software; iPad with text to speech software, co-writer external keyboard, and co-writer touch screen keyboard; and a portable word processor. She did

not consider an FM system. She was not familiar with evaluating FM systems, which in her opinion would have required collaboration with an audiologist. Ms. Neuhoff recommended continued access to a portable word processor, classroom computer, digital books, teacher or peer notes, and visual supports.

38. The triennial assessment also included an occupational therapy assessment by Ms. Carson, and a physical assessment by Nurse White. Ms. Carson used standardized tests, observed Student in school, and interviewed teachers. Ms. Carson concluded occupational therapy was not recommended. Ms. White's health assessment included a physical exam for weight and height, an audiometric screening and a vision test. Ms. White determined Student's hearing and vision were within normal range.

39. Ms. Page, Ms. Coleman, and Ms. Blackler opined the assessments they performed were appropriate to assess Student's educational needs in the area of auditory processing. Each testified that if they thought Student needed to be assessed in the area of auditory processing, they would have referred him for an assessment. Their testimony was not supported by the evidence and was not persuasive. Although these assessors used the tests they administered according to test instructions and the tests were valid for the purpose for which the test was designed, none of the tests were standardized to be used to assess auditory processing. District offered no evidence any of the tests they used were valid for that purpose. Similarly, while they were qualified to administer the tests they chose, none of the assessors were qualified to interpret the test results as an indicator of Student's unique educational needs in the area of auditory processing. Lastly, none of the assessors were qualified to draw a conclusion as to Student's auditory functioning on the basis of short observations of Student in his educational environment.

40. District Director of Special Education Laura Richards was a highly qualified and experienced school psychologist, special education administrator and SELPA

coordinator. She was employed by District as Director of Special Education in 2014. Her responsibilities with District included, among other things, participating in IEP team meetings and responding to assessment requests. Her responsibilities with District did not include student evaluations. She had no background in audiology. She met Student briefly one time after the triennial assessment on September 8, 2015. The meeting was not in an educational setting. In Ms. Richards' opinion the April and May 2015 evaluations were comprehensive and sufficient to address Student's unique needs stemming from his auditory processing disorder. Ms. Richards believed that if District needed to assess Student for auditory processing, District would have conducted the assessment. She felt that District had all the information necessary to address Student's unique needs.

41. Ms. Richards' opinion on this issue was not persuasive. Ms. Richards had no personal knowledge about Student; although she was aware Student had auditory processing needs. She relied upon the triennial assessors' results and concluded the triennial assessment was sufficient to determine Student's needs in the area of auditory processing, in part because Student used auditory processing skills to follow instructions and complete the assessments. Ms. Richards' opinion as to whether the triennial assessment was appropriate to assess Student's auditory processing carried little weight because it was based upon the assessments of others and subject to the same weaknesses.

MAY 18, 2015 IEP TEAM MEETING

42. Student's IEP team met on May 18, 2015. All required District staff attended. In addition, Ms. Richards and Mr. Newman attended on behalf of District. Parents did not attend the meeting because Student was sick. Parents authorized an advocate and an attorney to represent them and asked District to proceed with the IEP in Parents' absence.

43. The assessors presented their findings. Overall, Student continued to demonstrate significant deficits in auditory processing and visual processing. The team discussed Student's strengths and needs and reviewed his present levels of performance. Student met all his goals but one. The team developed new goals in mathematics - fractions, two goals in reading comprehension, paragraph writing, expressive/creative language, and two goals in pragmatic language.

44. Parents' advocate requested a CAPD assessment. District responded that the law only required evaluation of auditory processing, not central auditory processing. Ms. Page responded that auditory processing was appropriately assessed in the triennial assessment.

45. The team determined Student continued to meet eligibility criteria under the categories of specific learning disability and speech and language impairment.

46. The May 18, 2015 IEP included the eight goals. Accommodations included: clarify directions and questions; use portable word processor; access to digital book program; use visual supports and incorporate visuals for comprehension; check for understanding; weekly checks to monitor social/emotional concerns; allow frequent bathroom breaks; administer assessments in small separate room; consultation between special education and general education teachers; and teacher's option to reduce reading level, allow extra time for assignments and tests, shorten work and tests and give reading assignments ahead of time without questions to allow extra time to comprehend. District offered placement in a general education classroom with 120 minutes of specialized academic instruction daily (a reduction from 180 minutes daily in the March 14, 2015 IEP); 60 minutes in the regular classroom and 60 minutes in a separate classroom. The IEP included 200 minutes per month of group speech and language services (a reduction from 75 minutes per week in the March 14, 2015 IEP). Extended school year was not offered (it was included in the March 14, 2015 IEP). The

program offered 81 percent of Student's time in the regular environment (compared to 51 percent) and 19 percent of Student's time outside of the regular environment (compared to 49 percent).

47. In Ms. Roth's opinion, the proposed goals were appropriate, the program was meaningful, and Student could access instruction in the general education environment. On cross examination, Ms. Roth did not recall particulars about Student's reading grade level, written work, or how much academic progress Student made in her class. In Ms. Roth's opinion, the accommodations offered in the May 18, 2015 IEP were appropriate. She regularly used the same kinds of accommodations in her classroom as part of good teaching practices.

48. In Ms. Richards' opinion, the May 18, 2015 IEP offered Student a FAPE because portions of the services and accommodations addressed auditory processing and the IEP overall was designed to provide meaning educational benefit. She believed it was appropriate to reduce his previous levels of specialized instruction, speech and language services and to eliminate extended school year based upon teacher reports and the results of the triennial assessment. Her intent behind the reduction in services was to give Student more exposure to typical peers.

49. On August 3, 2015, Parents consented to the goals, accommodations and assistive technology offered in the May 18, 2015 IEP. Parents did not consent to the level of specialized instruction, the level of speech and language services and the failure to offer extended school year. Parents and District disagreed on the extent to which Students' disability interfered with his ability to access his education.

50. Father believed Student was not doing as well as District staff reported. He worked with Student daily at home with his homework and by reading to him. Father observed Student's auditory processing disorder affected his academic performance in the area of reading, retention, memory, and understanding what was read to him. In

Father's opinion, Student did not understand what he heard, did not know what words meant, did not retain what he heard and had difficulty explaining himself. Father saw these skills declining. He was concerned that Student was not accessing the general education curriculum because District did not understand his needs. Parents asked for a CAPD assessment because District could not address Student's needs without understanding Student's disability. Father disagreed with the reduction in services, the removal of the FM system and the elimination of extended school year without an appropriate assessment.

FIFTH GRADE, 2015-2016 SCHOOL YEAR

51. Student attended fifth grade in Sylvia Hyunjoo Lee's general education class. Ms. Lee obtained a multiple subject credential in June 2015 and a master's degree in arts and teaching in September 2015. The classroom had 36 students, including Student. District implemented the goals, accommodations and assistive technology from the May 18, 2015 IEP. Because Parents had not consented to the May 18, 2015 IEP, District provided the level of services and placement consented to in the March 14, 2014 IEP.

52. On September 11, 2015, Ms. Richards sent prior written notice to Student stating it declined Parents' request for a CAPD assessment. The letter was in response to an order from the California Department of Education issued as the result of a complaint Student filed. The complaint alleged District failed to timely respond to the March 20, 2015 written request for a CAPD assessment. CDE found District out of compliance and ordered District to either agree to the assessment or provide prior written notice.

53. On September 14, 2015, Student sent District a written request for independent educational evaluation in the area of CAPD. On September 25, 2015, Ms. Richards sent Student a letter denying the request for an independent educational evaluation.

OCTOBER 8, 2015 IEP

54. Student's IEP team met on October 8, 2015, to consider two private assessments Parents obtained from Pediatric Minds, and a District assessment of Student's eligibility for transportation. All required members of Student's IEP team were present. In addition, Student was represented by Ms. Villegas and an advocate. District was represented by Mr. Newman and Ms. Richards.

55. Parents obtained privately-funded assessments from Pediatric Minds on June 15, 2015, and August 6, 2015. Parents gave a copy of the reports they obtained from Pediatric Minds to District. No one from Pediatric Minds attended the IEP meeting or testified at the due process hearing. According to the June 15, 2015 report, Student met the diagnostic criteria for autism spectrum disorder. According to the August 6, 2015 report the Pediatric Minds' assessor administered the Wechsler Individual Achievement Test - Third Edition. Student demonstrated very low to low average achievement in listening, speaking, reading, writing and mathematics. According to the report, Student was not able to access his curriculum in his current setting. Pediatric Minds report included a recommendation for additional support, or if not, placement in a non-public school.

56. District's October 8, 2015 IEP offered the same placement contained in the May 18, 2015 IEP. District's offer included the same accommodations as in the May 18, 2015 IEP and added chunking and repetition teacher strategies.

57. In Ms. Lee's opinion, the accommodations District offered in the October 8, 2015 IEP were appropriate. She also opined the placement offered was appropriate because Student would benefit from more time in the general education classroom. Ms. Lee's observations were relevant only as to the time period beginning with the start of the school year through October 8, 2015. Ms. Lee's opinions were based upon the progress Student made in her class with the level of specialized academic instruction

and speech/language therapy provided in the March 14, 2014 IEP, which were substantially higher than the levels specialized academic instruction and speech/language therapy offered in the May 18, 2015 and October 8, 2015 IEP's.

STUDENT'S EXPERT

58. Dr. Maria Abramson, doctor of audiology, testified on Student's behalf. Dr. Abramson held an undergraduate degree in speech and language pathology, a master of science in audiology, and a doctorate in audiology. Her certificates and licenses included: Fellow, American Academy of Audiology; Certificate of Clinical Competence, American Speech-Language Association; License in Audiology, California State Board of Medical Quality Assurance; California Clear Health Services Credential, Educational Audiologist's Association, and others. Dr. Abramson maintained a clinical practice since 1979 through the through the date of her testimony. During that period she also worked as a consultant with numerous southern California school districts and over 20 preschools in Orange County. She consulted with special education professionals; conducted audiological evaluations and independent educational evaluations; participated as a member of IEP teams and was an invited speaker on auditory processing for school districts. She previously qualified as an expert in special education matters. Dr. Abramson was highly qualified to review District's assessments and offer her opinion as to whether District's assessments adequately assessed Student in the area of auditory processing.

59. Dr. Abramson explained that auditory processing encompasses a broad umbrella of deficits in how the brain decodes electrical impulses. Dr. Abramson described CAPD as a central nervous system disorder which affects the brain's ability to decode auditory messages. An evaluation for CAPD looks at temporal order and sequencing, binaural integration, binaural separation, auditory figure ground and auditory closure. In addition to describing the medical and technical aspects of CAPD,

she described how it affects students in the classroom generally and Student in this case. Listening leads to learning. A child needs to have access to a teacher's voice. If a child hears the teacher but his brain does not process the auditory input, the child is not accessing the information.

60. Dr. Abramson explained why a CAPD evaluation was required in order to assess all areas of disability and why District's triennial assessment was not adequate. Psychologists and speech pathologists use the words "auditory processing" to refer to different skills and for different purposes. School psychologists consider auditory processing in the context of Student's cognitive ability, whether the child has the cognitive ability to perform the assigned tasks, and whether a child is a visual or auditory learner. Speech pathologists use the terms in the context of a child's language skills to identify and address speech deficits. Audiologists look at how the ear delivers sound, as electrical stimuli, to the brain and how the brain processes the electrical impulses. Assessing CAPD is outside the scope of practice for a school psychologist or speech pathologist.

61. Dr. Abramson reviewed the audiologists' reports from 2011 and 2012, District's 2015 triennial assessment report including the assistive technology report, and the May 18, 2015 IEP. She recognized significant deficits in auditory processing. In her opinion, Student's deficits resulted from delayed development in binaural integration of auditory information between the left and right hemispheres of the brain. Student's binaural integration was not improving with maturation. She was concerned that Student's nonverbal IQ score dropped from significantly from 2013 to 2015. In her opinion, knowledge of what Student's auditory processing order was and what areas were impacted was important to address Student's deficits.

62. From her experience working with school districts, conducting auditory processing evaluations in the special education environment and participating in IEP

team meetings, she was familiar with the tests District used in the triennial assessment. None of the standardized tests used in the triennial evaluation assessed auditory processing.

63. Dr. Abramson reviewed the goals contained in the May 18, 2015 IEP. In her opinion, none of the goals addressed auditory processing as recognized by an audiologist. She reviewed the notes of the IEP team meeting held May 18, 2015. Dr. Abramson reviewed the accommodations offered. In her opinion, although the accommodations were general and reasonable, the accommodations were not based on a current accurate understanding of Student's needs. She concluded a current CAPD assessment was required so that District could provide accommodations based on Student's unique needs.

64. Dr. Abramson's testimony was persuasive. She was well prepared, unbiased and articulate. She carefully explained how auditory processing works and how Student's disability related to his ongoing educational needs. She used examples. She described what would be done in a comprehensive CAPD assessment and she declined to draw conclusions based solely on the records she reviewed. She identified direct interventions and possible accommodations that are used to address auditory processing disorder, such as in Student's case, the use of an FM system in classroom. She did not, at the time of hearing, recommend an FM system or propose any other specific recommendations for Student because in her opinion Student's needs should first be properly assessed by an audiologist.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

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)⁴ 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.*

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

⁴ 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 [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. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 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).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the

request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) 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] (*Schaffer*); 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 consolidated matter, Student had the burden of proof on Student's issue and District had the burden of proof on District's issues.

STUDENT'S ISSUE AND DISTRICT'S ISSUE 1: ASSESSMENTS AND REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATION⁵

5. Student contends District failed to assess Student in all areas of suspected disability because District did not conduct an assessment for CAPD. District contends its triennial assessment adequately assessed Student's auditory processing through various testing measures employed by District's assessors. Student did, and District did not meet its burden of proof on this issue. Student is entitled to an independent educational evaluation at public expense.

Applicable Law

6. In California, a district assessing a student's eligibility for special education must use tests and other tools tailored to assessing specific areas of educational need, and must ensure that a child is assessed in all areas related to a suspected disability. (Ed. Code, § 56320, subds. (c), (f); see also, 20 U.S.C. § 1414(b)(3)(B).) A school district must conduct assessments in a way that: 1) uses a variety of assessment tools and strategies

⁵ The terms "assessment" and "evaluation" are synonymous. Federal statutes and regulations generally use the term "evaluation." California statutes and regulations generally use the term "assessment." This Decision uses the terms interchangeably.

to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

7. Individuals who are both “knowledgeable of the student’s disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area” must conduct assessments of students’ suspected disabilities. (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) The determination of what tests are required is made based on information known at the time. (*See Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

8. 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).) Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities, including association, conceptualization, and expression. (Cal. Code Regs., tit. 5, § 3030, subd. (j))(1). A specific learning disability includes, among other things, conditions such as perceptual disabilities and minimal brain dysfunction. (20 U.S.C. § 1401(30)(B); 34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd. (a).)

9. After a child has been deemed eligible for special education, reassessments must be performed if warranted by the child's educational or related services needs. (20 U.S.C. § 1414 (a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) Absent an agreement to the contrary between a school district and a student's parents, reassessments must not occur more than once a year, or more than three years apart. (20 U.S.C. § 1414 (a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) Upon parent request, the local educational agency must conduct a reassessment, even when the school determines that no additional data is needed to determine the student's educational needs. (20 U.S.C. § 1415 (a)(2)(A)(ii); Ed. Code, § 56381, subds. (a)(1) & (d); 34 C.F.R. § 300.303 (a)(2).) A parent's request for an assessment initiates the assessment process. (Cal. Code Regs., tit. 5, § 3021(a).)

10. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 Fed. 3rd 1025, 1031-1033.) Procedural violations of the IDEA only constitute a denial of FAPE if the violation: (1) impeded the student's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1208, quoting *Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.) A

procedural violation may be harmless unless it results in a loss of educational opportunity or significantly restricted parental participation. (*L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.) A loss of an educational opportunity is shown if there is a "strong likelihood" that, but for the procedural error, an alternative placement "would have been better considered." (*Doug C. v. Hawaii Department of Education* (9th Cir. 2013) 720 F.3d 1038, 1047 (quoting *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 657 (Gould, J., concurring).)

Analysis

11. From the time Student entered District, District was aware of his auditory processing disorder and that he was a child that required special education. Yet, District never formally assessed Student in the area of auditory processing. Based upon the audiologists' assessments in 2011 and 2012 and District's first triennial assessment in 2013, auditory processing was far more than a "suspected" disability. The 2011 and 2012 evaluations attributed Student's CAPD to an auditory integration deficit due to delayed development of the central nervous system. Both assessors recommended age appropriate reevaluation to monitor development. Dr. Lee, in 2012 particularly recommended reevaluation in three years. Three years later, in 2015, District refused to conduct a CAPD assessment. The failure to perform this assessment was a substantial procedural violation of the IDEA.

12. The 2011 and 2012 CAPD evaluations and Dr. Abramson's testimony demonstrated Student had unique educational needs caused by auditory integration deficits. Student's disability resulted from delayed development in the integration of the left and right hemispheres of the brain which did not improve with maturation. Dr. Abramson noted a significant drop in Student's nonverbal IQ score between 2013 and 2015 and Father believed Student was not doing as well as reported by District.

13. Parents requested a CAPD assessment several times beginning with

Father's email in March 2014, at IEP meetings and by letter on March 20, 2015. A local educational agency must conduct a reassessment upon parent request, even if the district determines that no additional data is needed to determine the student's educational needs. District was required to appropriately assess auditory processing upon Parent's request or as part the 2015 triennial assessment.

14. Dr. Abramson's opinion that the assessment tools and strategies used by District's assessors did not provide relevant information as to Student's auditory processing needs was more persuasive than the testimony of District's assessors. District's assessors relied to great extent on the simple principle that Student understood verbal directions for assessments and completed the assigned tasks, and incidental inferences from assessment tools and strategies designed to assess other areas and valid for other purposes. Ms. Page and Ms. Blackler were qualified in their respective areas and selected testing instruments appropriate to those areas. However, District's psychoeducational assessment and speech and language assessment were not designed to yield accurate information on Student's needs in light of his disability. Dr. Abramson's opinion that District was required to conduct an assessment for auditory processing by a qualified audiologist was uncontroverted.

15. Dr. Abramson persuasively explained why a CAPD evaluation was required in order to assess all areas of disability and why District's triennial assessment was not appropriate. District provided neither legal authority nor expert testimony to support its contention that because Student was meeting goals not designed to address auditory processing and he understood verbal instructions during assessments; District did not need to assess Student in auditory processing.

16. Because District failed to assess Student's CAPD, District impeded Parents' participation in the decision making process by failing to give Parents vital information about Student's disability. For example: An FM system was included in an IEP on March

21, 2013, and unilaterally removed. An FM system had been suggested by audiologists that assessed Student and requested by Student's Parents. District's assistive technology assessor did not assess the need for an FM system because that would have required consultation with an audiologist. District brought an audiologist to retrospectively "clarify" why an FM system was not necessary but he had not assessed Student and he did not testify at the hearing. District had no current information as to whether an FM system would address Student's auditory processing needs. Similarly, Dr. Lee's report recommended the use of "Earobics" 15 minutes daily five days per week, in the home or in school, and Ms. Coleman used the program at times because it was a good match for Student. However, without current assessment, Parents and other members of the IEP team lacked any information about whether or how the program should be included in an IEP. Having failed to properly assess Student, District did not provide Parents with vital information about Student's disability.

17. District's failure to assess Student's CAPD also deprived Student of educational opportunity. As the result of the failure to assess Student's disability, District did not offer goals, accommodations, strategies and assistive technologies to address Student's auditory processing deficits in the educational setting. The failure to assess Student's known disability using compressive reliable methods as the IDEA requires ultimately caused District to recommend a substantial reduction in specialized academic instruction and speech/language services and the elimination of extended school year. In this case, there is a strong inference from evidence that the reduction in Student's specialized academic instruction and speech services and the elimination of extended school year, would have been better considered if District had formally assessed Student. Consistent with Father's testimony that Student was not doing as well as reported by District, Dr. Abramson noted a nonverbal IQ score dropped significantly from 2012 to 2015, which supported the need for a CAPD assessment. There was also an

inference from the evidence that a CAPD assessment would likely have shown that additional services and accommodations "would have been better considered" during a collaborative IEP process.

18. In summary, District's failure to appropriately assess Student's auditory processing deprived Parents and the other members of Student's IEP team of critical information directly related to his primary disability. The lack of a CAPD assessment made it impossible for the IEP team to address Student's unique needs; deprived Student of educational opportunities; and impaired Parents ability to fully participate in the IEP process.

DISTRICT'S ISSUE 2: APRIL 22, 2015, MAY 18, 2015, AND OCTOBER 8, 2015 IEP'S

19. District contends the April 22, 2015, May 18, 2015, and October 8, 2015 IEP's offered Student a FAPE. Student contends District could not have developed an appropriate IEP to address Student's needs in the area of auditory processing without an appropriate assessment to identify his unique needs related to his disability.

Applicable Law

20. When a school district seeks to demonstrate that it offered a FAPE, the legal analysis consists of two parts. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

21. An IEP is a written document for each child with a disability that includes: 1) a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; and 2) a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code § 56345, subd. (a)(7).) The IEP need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code § 56345, subds. (h) & (i).)

22. An IEP is developed by an IEP team. The IEP team must include: 1) one or both of the student's parents or their representative, 2) a regular education teacher if a student is, or may be, participating in the regular education environment, 3) a special education teacher, and 4) a representative of the school district who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum and is knowledgeable about available resources. (34 C.F.R. § 300.321(a).) The IEP team is also

required to include an individual who can interpret the instructional implications of assessment results, and, at the discretion of the parent or school district, include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).) In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).)

23. A school district is required to use those assessment tools necessary to gather relevant functional and developmental information about the child to assist in determining the content of the child's IEP. (34 C.F.R. § 300.304(b)(1)(ii).) The failure to obtain critical assessment information about a student "renders[s] the accomplishment of the IDEA's goals -- and the achievement of a FAPE -- impossible." (*N.B. v. Hellgate Elementary School Dist. supra*, 541 F.3d 1202, 1210 quoting *Amanda J. v. Clark County School Dist. supra*, 267 F.3d 877, 894.) On May 23, 2016, the Ninth Circuit reaffirmed *Hellgate* and *Amanda J.* in *Timothy O. v. Paso Robles Unified School District* on facts similar to those presented in this case. (9th Cir. May 23, 2016) __ Fed.3d __ [D.C. No. 2:12-cv-06385-JGB-JEM] .)

24. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a) Ed. Code, § 56500.4.) Parents cannot meaningfully collaborate with the IEP team without valid reliable information about their child's disability.

25. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314. For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, the

district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment.

(Ibid.)

26. If a parent refuses services in an IEP that was consented to in the past, or the school district determines that the refused services are required to provide a FAPE, the school district shall file a request for a due process hearing. (Ed. Code, § 56346, subds. (d) & (f).) When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204, 206-207.)

Analysis

27. The April 22, 2015, May 18, 2015, and October 8, 2015 IEP's met some but not all procedural requirements. An IEP team developed written IEP's on April 22, 2015, May 18, 2015, and October 8, 2015. The written IEP's stated the special education and related services offered and included start dates, frequency, location and duration of services. The April 22, 2015, May 18, 2015, and October 8, 2015 IEP's did not include a statement as to how Student's disability affected his academic performance because his disability was not adequately assessed. District's team members were not qualified to interpret the instructional implications of their assessment results with regard to auditory processing, and their assessments were not designed to assess Student's primary disability. Lastly, April 22, 2015, May 18, 2015, and October 8, 2015 IEP's proposed reduction in specialized academic instruction and speech language services was not based upon peer-reviewed research applicable to Student's CAPD. These procedural violations were material and, for the reasons stated in Issue 1, deprived Student of educational benefit and impeded Parents' participation in the decision making process.

28. As a result of District's failure to appropriately assess auditory processing, the April 22, 2015, May 18, 2015, and October 8, 2015 IEP's did not include appropriate goals and services to address Student's unique needs caused by his disability. For example: the 2012 auditory processing evaluation determined Student's integration deficit was due, in part, to atypical right ear dominance and recommended preferential seating to allow Student to use his stronger side. There was no evidence preferential seating on the left side of the classroom was considered. Preferential seating in front of the FM system was provided in the March 2013 IEP, which was of little benefit considering that the FM system was unilaterally removed.

29. District was required first to appropriately assess Student to identify all of his disability related needs and then tailor services to meet his needs. District proposed significant reductions in specialized academic instruction and speech/language services, and eliminated extended school year without an appropriate assessment. Therefore, the placement and related services offered in the April 22, 2015, May 18, 2015, and October 8, 2015 IEP's were not objectively reasonable when those IEP's were offered, and denied Student a FAPE.

30. In summary, for the reasons stated in Issue 1, District's substantial procedural violation deprived Student of educational benefit and substantially denied Parents the opportunity to meaningfully participate in the development of Student's IEP's. The evidence further demonstrated the April 22, 2015, May 18, 2015, and October 8, 2015 IEP's were developed without necessary vital information that could only be obtained by a CAPD assessment. Therefore, none of these IEP's were designed to meet Student's unique needs, nor reasonably calculated to enable Student to receive educational benefit. Accordingly, District did not offer Student a FAPE in any of the three IEP's at issue.

REMEDIES

1. Student prevailed on all issues. Student requests an independent educational evaluation for CAPD and an order requiring District to conduct an IEP meeting within 30 days after the completion of the assessment.

2. ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Education* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) In remedying a denial of a FAPE, the student is entitled to relief that is “appropriate” in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, 471 U.S. at p. 374.)

3. Under certain conditions, a student is entitled to obtain an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1) Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an independent evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent evaluation].) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).) A qualified examiner who is not employed by the public agency responsible for the child's education conducts the independent evaluation. (34 C.F.R. § 300.502(a)(3)(i).) An independent evaluation is a tool to determine a child's needs and to provide parents information necessary for the IEP process. (*Schaffer, supra*, 546 U.S. 49, 60-61.)

4. Courts have emphasized the importance of parents’ right to publicly funded independent educational evaluations. The Supreme Court stressed, in *Schaffer*, that parents can use an independent educational evaluation to overcome the school

district's "natural advantage" when there is a dispute regarding a student's educational program. (*Schaffer, supra*, 546 U.S. 49, 60-61.) The Supreme Court in *Schaffer* emphasized parents' right to an independent educational evaluation, not just to challenge the appropriateness of a school district's assessment, but to ensure the appropriateness of the school district's educational program. Parents' right to the independent educational evaluation is an IDEA procedural protection that exists to "ensure that the school bears no unique informational advantage." (*Id.* at 61.)

5. The criteria for an independent educational evaluation at public expense, including the location, limitations for the assessment, minimum qualifications of the examiner, cost limits, and use of approved instruments must be the same as the criteria that the public agency uses when it initiates an assessment, to the extent those criteria are consistent with the parent's right to an independent educational evaluation. (34 C.F.R. § 300.502(e)(1).)

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

7. Here, following District's several refusals to conduct a CAPD assessment, Parents requested an independent educational evaluation, which District declined. District held an advantage in the decision making process by limiting information about Student's needs related to his primary disability to the marginal information provided by the triennial assessment.

8. District denied Student a FAPE by failing to appropriately assess Student for auditory processing and refusing to fund an independent CAPD assessment. A publically funded CAPD assessment is a fact specific appropriate remedy.

ORDER

1. District shall fund an independent educational evaluation of Student's auditory processing disability by a qualified audiologist.
2. District shall convene an IEP team meeting within 30 days after District's receipt of the audiologist's report to consider the CAPD assessment. District shall include the assessor in the IEP team meeting and fund the assessor's attendance at the assessor's customary rate and not to exceed three hours.

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 all issues heard and decided in this case.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

Dated: May 31, 2016

/s/

MARIAN H. TULLY

Administrative Law Judge

Office of Administrative Hearings