

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2016070290

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT,

CAPISTRANO UNIFIED SCHOOL DISTRICT,

OAH Case No. 2016041030

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

Capistrano Unified School District filed a Request for Due Process Hearing with the Office of Administrative Hearings, State of California, on April 25, 2016, naming Student. Student filed a Request for Due Process Hearing with OAH on July 11, 2016, naming District. On July 14, 2016, OAH consolidated both cases, and determined that the Decision timeline was based on the filing of the complaint in Student's case. OAH granted Student's motion to amend his complaint and deemed the amended complaint filed on August 22, 2016. On October 13, 2016, OAH granted Student's motion for continuance.

Administrative Law Judge Vernon Bogy heard this matter in San Juan Capistrano, California, on October 19 and 20, 2016, and November 15 and 16, 2016. The matter was heard telephonically in Van Nuys, California on December 5, 2016.

Tania Whiteleather, Attorney at Law, represented Student. Parents and Christopher Russell, Student's Advocate, attended the hearing on October 19 and 20, 2016, and November 15 and 16, 2016. Mother attended on December 5, 2016. Student did not attend the hearing.

S. Daniel Harbottle, Attorney at Law, represented District. Kim Gaither, District Legal Specialist, attended the hearing on October 19 and 20, 2016, and November 15 and 16, 2016.

At the conclusion of the hearing, the matter was continued until December 27, 2016, to allow the parties to file and serve written closing arguments. Upon timely receipt of written closing arguments, the record was closed and the matter submitted for decision on December 27, 2016.

ISSUES¹

STUDENT'S ISSUES:

1. Did District deny Student a free appropriate public education from July 11, 2014² to March 9, 2016, by failing to identify, locate, and evaluate Student as a child with a disability?

¹ The issues are those presented in Student's amended complaint and framed in the Order Following Prehearing Conference. The ALJ rephrased and reorganized the issues 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. Did District deny Student a FAPE by failing to appropriately assess Student in the area of speech and language in February 2016?
3. Did District deny Student a FAPE by failing to provide specific educational records in response to Parents' January 6, 2016 request?
4. Did District deny Student a FAPE since March 9, 2016, by failing to provide educational records pertaining to past response to intervention services, thereby denying Parents meaningful participation in the educational decision making process?

DISTRICT'S ISSUE:

Was District's March 9, 2016 multidisciplinary report appropriate,³ such that Student is not entitled to an independent educational evaluation at public expense?

² At the prehearing conference held in this matter on October 10, 2016, Student's counsel mistakenly identified October 5, 2016 as the date Student filed the complaint. In fact, Student filed his complaint for due process hearing on July 11, 2016. Thus, any claims by Student prior to July 11, 2014 are time-barred. 20 U.S.C. §1415(f)(3)(C).

³ District refers in various pleadings to the multidisciplinary assessment and assessment report. The March 9, 2016 document is formally identified as a "multidisciplinary report" and includes assessment reports. Except as otherwise indicated, the terms multidisciplinary assessment, multidisciplinary report and assessment report, when referring to the March 9, 2016 document, shall be used interchangeably.

SUMMARY OF DECISION

This Decision finds that District had reason to suspect that Student had a disability, and might be in need of special education services to address that disability, yet took no steps to formally assess him in the area of language and speech, or to determine whether he might be eligible for special education services until February 2016. District violated its child find obligation, which deprived Student of educational benefit during the 2014-2015 and 2015-2016 school years, beginning November 4, 2014.⁴

District's March 9, 2016 speech-language assessment was not properly conducted, and Student is entitled to an independent educational evaluation at public expense.

District denied Student a FAPE since March 9, 2016, through the present, by failing to provide educational records pertaining to past response to intervention services, thereby denying Parents meaningful participation in the educational decision making process.

Also, District did not deny Student a free appropriate public education after January 6, 2016, by failing to provide his educational records regarding a non-existent individualized education program.

⁴ Student filed his complaint for due process hearing on July 11, 2016. Here, taking into account the first day of school of the 2014-2015 school year (September 4, 2014, (www.cuea.org/a_version_03/calendars/2014-15_schoolcal.pdf)), and the 60-day IEP team meeting period required under Education Code section 56043(c), the earliest the IEP team meeting could have occurred was November 4, 2014.

FACTUAL FINDINGS

BACKGROUND

1. Student was a ten-year-old boy who at all relevant times resided with Parents within the geographical boundaries of the District and attended Las Palmas Elementary School in the Spanish immersion program. At the time of hearing, Student was in fourth grade.

2. On March 9, 2016, District found Student eligible for special education services under the category of speech language impairment in the area of fluency. District proposed speech therapy services two times a week for 30 minutes per session in a small group setting. Parents did not contest the finding of eligibility, but because Parents did not believe they had adequate information to determine whether the proposed services were appropriate, they did not consent to the offered services.

STUDENT'S HISTORY OF STUTTERING

3. Student was first observed by Parents to have "slower, mechanical fluency" while in kindergarten. In the fall of 2012, while in first grade, Parents first observed Student to stutter.

4. During the fall of 2013, while Student was in second grade, his stuttering began to worsen, which resulted in Student being teased and mimicked by at least one peer. On June 2, 2014, Mother sent an email to Student's second grade teacher, Andrea Brannam, advising the teacher that Student's stuttering was worsening, especially when he was speaking English rather than Spanish. Mother requested that a "speech person" observe him in Math class when he was speaking English. The teacher responded by email that same date, acknowledging that she had observed that Student would begin to stutter, but would hide it well and push through, and therefore he seemed to be "[hiding] it well."

INITIAL SCREENING OF STUDENT

5. As a result of Parents' concerns, a student study team meeting was conducted on June 4, 2014, and an elementary intervention plan was created. Mother consented in writing to the plan at the meeting on June 4, 2014, and she received a copy of the elementary intervention plan on June 6, 2014. The plan recommended interventions including having Student observed by an unfamiliar listener, monitoring his rate of speech, having Student speak more slowly, and having Student screened by a speech-language pathologist. The interventions were to be monitored by a general education teacher and Parents on a daily basis.

6. On June 6, 2014, as called for in the elementary intervention plan, Traci Terpstra, District speech-language pathologist, performed a screening of Student. Ms. Terpstra worked for District since August 2012 as a speech-language pathologist. In 1988, she received her bachelor of arts degree in Spanish from Trinity University, and at the time of hearing was fluent in Spanish. Ms. Terpstra received a master of arts degree in communicative disorders from California State University at Fullerton in 2009. During her tenure with District, she worked with students between three and 14 years old, with speech and language impairments including articulation and phonology, apraxia, voice disorders, fluency, selective mutism, cleft palate, Down syndrome, autism and pragmatics disorders, and hearing impairment. At all relevant times, Ms. Terpstra was a member of the American Speech-Language-Hearing Association and the California Speech-Language-Hearing Association.

7. During her screening of Student, Ms. Terpstra observed that he stuttered, and recommended a general education response to intervention speech improvement program for Student, consisting of speech therapy for 30 minutes, one time each week. District gave Parents a form called "Permission to Enroll in an RTI (Response to Intervention) Speech Improvement Program," which included speech and language

lesson plans. Parents consented to Student's participation in the intervention services on June 10, 2014. Mother, who was unfamiliar with the special education process, mistakenly believed Student had been formally assessed regarding a speech or language impairment and that an IEP had been developed.

INTERVENTION SERVICES

8. From June 13, 2014 through October 9, 2015, Student attended a total of 28 speech therapy sessions with Ms. Terpstra, primarily in a group setting.⁵ Student was pulled out of his general education class to attend the speech therapy sessions.

9. Ms. Terpstra did not do any assessments prior to the speech therapy sessions to establish a baseline, and to determine Student's ongoing progress after she provided therapy sessions. She made notes of the sessions, but did not prepare formal progress reports for District or Parents with respect to the speech services Student received through the response to intervention program. The only document regarding Student's speech therapy sessions, other than Ms. Terpstra's notes, was a log of the dates of service. Sometime after October 9, 2015, Ms. Terpstra's notes regarding Student's intervention services were lost in a move from one location to another. District offered no further details regarding when or how Student's intervention services notes were lost.

CESSATION OF INTERVENTION SERVICES

10. Student's intervention services ended in October 2015. Ms. Terpstra believed Student made progress with respect to his stuttering. She spoke with Paola Paz Soldan, his fourth grade teacher, who told Ms. Terpstra that while Student continued to

⁵ Student did not attend the 2014 extended school year. After attending the first session on June 13, 2014, Student did not attend again until September 19, 2014.

show signs of stuttering, his conversational skills had improved and he was actively participating and functioning in class. Also, Student was embarrassed at being pulled out of class to attend the sessions, and he wished to stop the intervention services as well.

11. During the speech therapy sessions, Parents never requested any assessments of Student's progress, nor was Ms. Terpstra aware of any concerns which Parents may have had. She therefore felt comfortable releasing Student from the speech therapy sessions. Ms. Terpstra did not meet with Parents prior to the termination of the speech therapy sessions.

STUDENT'S CONTINUING AND WORSENING STUTTER AND REFERRAL TO A PRIVATE SPEECH-LANGUAGE THERAPIST

12. On December 30, 2015, Mother emailed Ms. Paz Soldan to advise her that Student's stutter had worsened significantly in recent weeks; she asked Ms. Paz Soldan to relay that information to Ms. Terpstra, because Ms. Terpstra had previously told Mother that she might be able to provide a referral to an outside source to assist Student with his stuttering.

13. On January 4, 2016, Ms. Terpstra emailed Mother, suggesting the California State University at Fullerton Center for Children Who Stutter as a possible source for help for Student. Later that same day, she emailed Mother again to advise that she had spoken with two other speech-language pathologists who worked for District, and that both had recommended a private speech-language therapist, Loryn McGill, who might be able to assist Student.

INITIAL STEPS TOWARDS ASSESSMENT AND INDIVIDUALIZED EDUCATION PROGRAM; STUDENT'S INITIAL REQUEST FOR RECORDS AND INDEPENDENT EDUCATIONAL EVALUATION

14. On January 5, 2016, Mother spoke with Ms. Terpstra by telephone. Ms. Terpstra told Mother that District might be able to conduct an assessment of Student, and hold a student success team meeting, or develop an individualized education program, or a Section 504 plan, as needed.⁶ Mother was confused by this information, because she was under the impression that Student had previously been formally assessed, and that an IEP was already in place.

15. That same day, Mother and Student had an initial consultation with Loryn McGill, the private speech-language pathologist recommended by Ms. Terpstra. During the consultation, Ms. McGill expressed her surprise to Mother that Student apparently did not have an IEP, as she did not understand how a student could be pulled out of class for language and speech therapy without an IEP in place.

16. On January 6, 2016, Mother met with Kristen Nelson, Principal of Las Palmas Elementary School. During that meeting, Ms. Nelson told her that there was no IEP for Student, because he had been placed in the response to intervention speech improvement program with Ms. Terpstra. Ms. Nelson told Mother that the paperwork to have an IEP could be started, but the process could take up to 60 days.

⁶ A 504 plan is an accommodation plan created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning.

17. That same day, Mother emailed Sara Young, District's Director of Formal Dispute Resolution, requesting copies of Student's IEP, and any formal assessments, goals or progress. She also requested that District fund an independent educational evaluation of Student, to be performed by Ms. McGill. In response, Ms. Young sent Mother District's IEE Parent Procedures and Procedural Safeguards manuals. She did not provide Parents with copies of any documents related to Student's intervention services, as District had lost them.

18. On January 7, 2016, Ms. Young sent Mother an initial assessment plan, a parent permission for release of information, and another copy of the procedural safeguards manual. Mother signed and returned the assessment plan and the permission for release of information on January 8, 2016. The assessment plan identified the areas to be assessed as academic/pre-academic achievement; speech/language; intellectual development; social/emotional/adaptive behavior; perceptual/processing; health/physical status; gross/fine motor development; and career/vocational.

DISTRICT'S ASSESSMENT

19. An academic assessment was administered by Eryn Connors. A speech-language assessment was administered by Audra Sickler. District's nurse performed a health assessment.⁷

20. Ms. Connors worked for District beginning in 2001, first as an independent facilitator for a student with autism from September 2001 through June 2002, then as a special day class teacher from August 2002 through June 2013, then as an education specialist beginning September 2013. She received a bachelor of arts degree in speech communications from California Polytechnic State University at San Luis Obispo in 2000,

⁷ Student's health assessment concluded that apart from a history of headaches beginning when he was three-years-old, there were no other health concerns.

and a special education teaching credential K-12 in 2002, from California State University at San Marcos. She received a master of arts degree in special education in 2008, also from California State University at San Marcos.

21. Over the course of several days in February 2016, Ms. Connors administered a Woodcock-Johnson Test of Academic Achievement, Fourth Edition. Standard scores in the range of 90 to 110 under this test were considered to be in the average range. Percentile scores in the range of 25 to 75 were considered to be in the average range.

22. Student scored in the average range, both in standard scores and percentile scores, in the areas of reading fluency, oral reading, sentence reading fluency, reading comprehension, and passage comprehension. In the areas of letter-word identification, word attack, and reading recall, he scored in the above average range in both standard scores and percentile scores.

23. During this test, Student stuttered on numerous words including morning, could, garden, point, brought, jewel, contrary, breathes, the "br" sound in the word library, tooth, wings, store, bathing suit, eat, camping, and ride. He also stuttered on the sounds "tiff," "zoot," "blighten," "wreet," "baunted," and "quade." Ms. Connors also observed numerous errors in mispronunciation of words, omission of words, insertion of words and repetition of words.

24. In math calculation and math problem solving, Student scored in the average range in the area of calculation, and in the above-average range in the areas of math facts fluency, applied problems, and numbers matrices. Ms. Connors observed that while he generally solved problems quickly, he stuttered on some numbers which began with the "tw" sound.

25. In written expression, he scored in the above-average range in the areas of writing samples and sentence writing fluency. Ms. Connors observed that Student wrote

sentences which were both complex and detailed, and that he did so with “remarkable” ease and fluency.

26. In the Test of Oral Accuracy, Student scored in the average range in the areas of understanding directions, and sentence repetition. In the areas of oral comprehension and picture vocabulary, he scored in the above-average range. In this part of the test, he stuttered on the words earth, globe, play, green, mail and sport.

27. The remainder of the speech-language assessment was administered by Audra Sickler. On February 4, 2016, and again on February 26, 2016, Ms. Sickler performed an assessment of Student. Her observations on those days were audio-recorded, but not video-recorded.

28. Ms. Sickler worked for District as a speech-language pathologist beginning in 2007. She received her bachelor of arts degree in communicative disorders from the California State University at Fullerton in 2004, and her master of arts degree in communicative disorders in 2007, also from the California State University at Fullerton. Ms. Sickler held a certificate of clinical competence in speech language pathology, a speech language pathology services credential, and a California state license as a speech language pathologist. Her duties at District included providing speech and language assessments and services to preschool and elementary school students. Beginning in 2009, she provided initial intake programs to preschool parent referrals, developed home programs and provided consultations to parents, scheduled follow up meetings and conducted speech only assessments. Beginning in 2012, she provided speech and language assessments and services to preschool students as a language builder speech and language pathologist. In 2007, as a graduate assistant, and from 2009 to 2011, as a speech-language pathologist, she worked at the Center for Children who Stutter at California State University at Fullerton, where she planned and provided therapy for preschool to high school age students who stutter. Ms. Sickler performed approximately

20 to 25 assessments while working at the Center for Children who Stutter. Ms. Sickler last took continuing education classes in the field of stuttering in 2009.

29. As part of her assessment, Ms. Sickler sent Parents a questionnaire and rating scale. Parents completed and returned them to her. Ms. Sickler reviewed and considered Parents' responses.

30. Ms. Sickler observed Student in his fourth grade classroom on February 4, 2016. She concluded that Student was engaged and participated appropriately in all group activities, which included a project and a robotics team activity, and was able to answer questions from the teacher and his peers, ask questions, and make appropriate comments. She reported that she observed only minimal stuttering events, which included reduced eye contact with the teacher, rocking back and forth in his chair as he made a presentation, a single occurrence of hesitation in speaking and some eye squinting. In her observation of Student on February 26, 2016, she found that Student related well with her, was cooperative and willing to participate throughout the assessment, and able to respond to open-ended questions and maintain a conversation. She observed that Student pressed his fingers against the table when speaking, and was inconsistent in maintaining eye contact with her.

31. The assessment also included teacher input from Student's fourth grade teacher, Ms. Paz Soldan. Ms. Paz Soldan reported that Student's speech was easy to understand, that he actively participated in group activities, spoke "more than average" in the classroom with little sign of frustration, and performed at an average-to-above-average level academically. She observed, however, that when Student began a

sentence, Student had sound repetitions, prolongations and speech “blocks.”⁸She also reported that he was most disfluent when speaking to someone new, or when he was “put on the spot,” although when experiencing speech difficulties, he continued to try and speak. Ms. Paz Soldan did not believe that his speech interfered with his attempts to communicate, or his ability to lead, participate or get his point across.

32. Ms. Paz Soldan was first employed by District in 1998 as a dual language (Spanish and English) immersion program teacher. She received her bachelor of arts degree in child development with a minor in special education in 1998 from San Jose State University. Her duties for District included teaching multi-subject and multi-aged classes with 30 to 36 students, with a curriculum consisting of social studies, science, technology, engineering and math. She did not have an expertise in stuttering or disfluencies caused by stuttering.

33. As part of the assessment, Ms. Sickler also administered a Stuttering Severity Instrument, Fourth Edition. She observed some reduced eye contact and eye squinting, which she considered to be a secondary behavior related to stuttering. This instrument resulted in a finding of moderate stuttering by Student. Ms. Sickler also observed interjections such as “um” or “like” in his speech as well as some hesitation where he appeared to be avoiding specific words or sounds, but she did not consider these behaviors to constitute stuttering.

34. Ms. Sickler administered the Oral Motor Assessment Scale to measure Student’s oral motor coordination ability. This test showed moderate oral motor discoordination in the areas of even speech flow, sequencing errors and rate of speech.

⁸ A prolongation occurs when a stutterer struggles to say a word with strained or little sound. A word block occurs when a stutterer struggles with visible tension when attempting to say a word.

35. Ms. Sickler also completed an A-19 Scale For Children Who Stutter (Guitar and Grimes, 1977), which assessed attitudes about speaking in children between kindergarten and fourth grade levels. In this test, Student reported that although he did not find it difficult to talk to his teacher or answer questions when called upon when he knew the correct answer, he became nervous when called upon, had trouble controlling his voice when speaking, and became upset when he was interrupted. He reported that he was reluctant to approach new students in class, or to tell stories to his peers. He expressed regret that he could not express himself as clearly as his peers. This test revealed that Student had negative attitudes about his speech.

36. Ms. Sickler administered an "Adolescent Situational Checklist" to identify Student's level of stuttering in various situations. Although Student at the time was only 10 years old and pre-adolescent when the test was administered, Ms. Sickler used that tool because she believed Student was sufficiently aware of his disfluencies to participate in a meaningful manner, and she used the test informally as a structured way of identifying some situations that Student might be avoiding. The results of this test showed that Student had a moderate fluency disorder characterized by part-word repetitions, revisions, phrase repetitions, whole-word repetitions, prolongations and hesitations, and moderate oral motor discoordination. The test further showed that he had inconsistent eye contact and eye squinting secondary to stuttering, and had developed avoidance behaviors and negative feelings and attitudes as a result of his stuttering.

37. Ms. Sickler did not, as part of her assessment, review any records or documents relating to the intervention services provided to Student by Ms. Terpstra over the course of 28 separate speech therapy sessions between June 13, 2014 and October 9, 2015, because Ms. Terpstra's notes had already been lost. Ms. Sickler did not

attempt to speak with or obtain any information from Ms. Terpstra regarding Student's intervention services, goals or progress.

38. Based on the speech and language assessment, Ms. Sickler found that Student met special education eligibility criteria as a student with a speech/language impairment in the area of fluency,⁹ and that his fluency impairment adversely affected communication between Student and listeners, such that he required special education services to access instruction and make educational progress. She concluded that Student would benefit from an instructional setting in which his disfluencies, negative attitudes toward his speech and avoidance behaviors could be addressed, and that the most appropriate placement and special education services would be left to the IEP team to determine.

39. A draft of the speech-language assessment was provided to Parents on March 7, 2016. The results of this assessment were summarized in District's multidisciplinary report dated March 9, 2016.

THE MARCH 9, 2016 IEP TEAM MEETING AND STUDENT'S REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATION

40. Student's IEP team met on March 9, 2016. The participants included Parents; Student's grandfather; Ms. Paz Soldan; Ms. Nelson; Allison Jacobs, a program specialist for District; Chris Russell, a student advocate representing Student; Laura Hanaford, District's lead speech-language pathologist; Ms. Sickler; and Ms. Connors. During the meeting, District found Student eligible for special education and related services and offered Student speech services two times a week for 30 minutes per

⁹ The assessment did not consider other areas of eligibility because there were no other areas of concern noted before or during the assessment.

session, conducted in a small group outside of Student's general education classroom setting.

41. District's March 9, 2016 multidisciplinary report, which included the academic functioning and speech and language assessment, was presented, reviewed and discussed by the team, and goals and objectives were proposed by District in the areas of fluency enhancing techniques, speech mechanism, feelings and attitudes, and communication skills. Parents disagreed with the proposed goals and objectives because they felt that the goals were no different than those previously offered with respect to the intervention services provided by Ms. Terpstra. Parents also expressed concern because no records or documentation regarding the intervention services were provided or available at the IEP team meeting, and Ms. Terpstra was not present at the meeting to discuss those services. Parents believed that without input or documentation regarding the intervention services, they could not participate in the IEP in a meaningful way. Ms. Connors, the program specialist, told Parents that District was willing to consider requests for additional goals and revisions to the goals proposed at the meeting, and Parents stated that they believed Student needed a specialist in stuttering. Student's advocate expressed an additional concern that Student's speech-language assessment was not videotaped, and Parents could not agree with the assessment. The advocate requested an independent educational evaluation. Because of Parents' concerns, they disagreed with the speech/language element of the multidisciplinary assessment, and refused to consent to the IEP proposed goals and services.

42. On March 17, 2016, Student's advocate emailed District's program specialist, and requested that District fund an independent speech-language educational evaluation with Loryn McGill.

43. On March 18, 2016, District responded to that request, acknowledging the request for an IEE, and proposing a revised offer of speech-language services, one time

per week for 30 minutes of group instruction, and one time per week for 30 minutes of individual instruction.

44. On March 29, 2016, District wrote Parents, formally denying the request for an IEE, and advising Parents that District intended to file a Request for Due Process Hearing to defend District's speech-language assessment.

SPEECH-LANGUAGE EVALUATION BY LORYN MCGILL

45. Loryn McGill, the private speech-language pathologist who initially consulted with Student and Parents in early January 2016, formally evaluated Student on May 12 and 16, 2016.

46. Ms. McGill received a bachelor of arts degree in speech pathology and audiology in 2003 from California State University at Chico. She received a master of arts degree in 2005 in communicative sciences and disorders with emphasis in speech and language pathology from California State University at San Francisco. She worked as a speech and language pathologist in private practice since 2005.

47. Ms. McGill was an adjunct faculty member at Chapman University since 2014, as a professor of fluency disorders, clinical policies and procedures, diagnostics and assessment, and as a supervisor in early intervention and programs and adult clinics, specializing in treatment and assessment of stuttering. Since 2014 she was on staff at Chapman's Center for Medical Treatment of Stuttering. Ms. McGill authored or co-authored several publications and made numerous presentations and guest lectures on the treatment of stuttering, including presentations in 2015 and 2016 at the annual California Speech-Language-Hearing Association conference, and in 2016 at the Swedish Conference on Fluency Disorders.

48. She completed approximately 70 to 100 hours of continuing education courses each year, all related to stuttering. In her private practice, she provided stuttering therapy to approximately 18 children per week, and also performed several

assessments each week related to stuttering. At all relevant times, Ms. McGill was a member of the American Speech-Language-Hearing Association and the California Speech-Language-Hearing Association.

49. Ms. McGill initially observed Student in his general education fourth grade classroom on May 12, 2016, for approximately one hour. He was participating in a class project which involved building a motor. She noted that Student spoke very quietly, and she needed to sit very close to him so she could hear his speech. She observed that he had primary stuttering characteristics of part-word and sound repetitions as well as prolongations. He also displayed secondary characteristics including fixed articulatory posture, eye gaze avoidance, nasal flaring, excessive hand movements, blocks and hard eye blinks. He generally spoke in two-to-three word sentences, although when speaking in front of the class spoke in six-to-twelve word sentences. Ms. McGill observed that Student stuttered consistently during her observation.

50. On May 16, 2016, Ms. McGill performed a fluency evaluation of Student in her clinic. Initially, she performed an informal assessment of his oral mechanisms to rule out any physical deficits which might cause stuttering. She ruled out any such deficits as a cause of his stuttering.

51. She also administered the Stuttering Severity Instrument, Fourth Edition, which provided a standardized means of assessing his degree of stuttering in the areas of frequency (i.e. the average percentage of syllables stuttered), duration (i.e. the average length of his three longest stuttering events), physical concomitants (i.e. distracting sounds, facial grimaces, head movements, and movement of extremities), and speech naturalness. With Parents' consent, the testing was videotaped (with audio). Ms. McGill observed speech disfluency behaviors including part-word and sound repetitions; prolongations; interjections and fillers, such as "um, um" and "you know"; silent pauses of abnormal length between words; broken words, with pauses between

syllables of words; and word blocks. Student's overall performance on this test placed him in the severe category of stuttering.

52. Ms. McGill administered the Overall Assessment of the Speaker's Experience of Stuttering test, which is designed to provide a comprehensive assessment of a speaker's individualized experience of stuttering. The test included impact scores and ratings in the areas of general information, the speaker's reactions to stuttering, communications in daily situations, and quality of life. Student scored in the moderate range for all areas tested, except in the area of quality of life, where he scored mild/moderate. His overall score was in the moderate range.

53. Ms. McGill conducted an assessment of associated motor behaviors, and she found numerous behaviors associated with stuttering, including eye movements such as blinking, shutting and shifting from left to right; flaring of his nostrils; wrinkling of his forehead; clenching, rubbing and excessive movement of his hands and fingers; tapping of his legs; pursing of his lips; raising of his eyebrows; poor overall eye contact; and leaning forward.

54. Ms. McGill's assessment of Student's physiological factors associated with stuttering found behaviors including hard glottal stops, prolonged sound production, and excessive and atypical stressing.

55. In addition to her assessment of Student, Ms. McGill reviewed the speech-language assessment administered by Audra Sickler on February 4 and 26, 2016. That assessment caused her concerns for several reasons.

56. Ms. McGill was concerned about District's assessment for several reasons. Although the assessment was audio-recorded, it was not video-recorded. In her professional experience, observation of secondary characteristics such as word blocks and physical motions such as eye movement, tapping, and excessive hand or body

movements, through videotaping is crucial, because it allows the assessor to evaluate the severity of stuttering.

57. She also was concerned because one of the assessments by Ms. Sickler was made in a classroom setting with other children present. That concerned Ms. McGill because in her professional experience, in a group setting, it is difficult to hear or observe the student string together 150 fluid syllables, which is necessary to perform a valid assessment.

58. Ms. McGill also found it troubling that Student had been assessed using the "Adolescent Situational Checklist," because he was not adolescent at the time of testing and therefore that tool was not appropriate to test the severity of his stuttering. Ms. McGill believed that to establish a baseline of Student's stuttering, better diagnostics tests were available and should have been used.

59. Ms. McGill was also concerned in general about the use of response to intervention services to treat Student's stuttering. In her professional experience, stuttering was a life-long condition which must be adequately and timely identified and treated to avoid the harmful long term effects of stuttering, including the fear, shame and avoidance which can occur with severe stuttering, as well as the ultimate inability to perform normal life functions such as working and making telephone calls. She believed that such services for stuttering were not appropriate for Student, because intervention services are primarily used for general non-identifiable short-term articulation issues, and because stuttering was an identifiable diagnosis, intervention services were not appropriate. Ms. McGill reached this conclusion based on her own professional background, training and experience, as well as position papers published and issued by the American Speech-Language Hearing Association, which found that response to intervention services for school age children who stutter were not appropriate. The American Speech-Language Hearing Association was the licensing and governing body

for speech–language pathologists, audiologists, and speech, language, and hearing scientists in the United States.

60. Ms. McGill’s overall impression of Student, based on her evaluation, was that he was a persistent and severe stutterer, who was affected with feelings of embarrassment, frustration and fear, which made it difficult for him to give presentations or talk in front of his class. She found that stuttering therapy was necessary because he functioned below the average range for fluency, and his stuttering impeded his academic progress in terms of communication with his teachers and classmates, making it difficult for him to engage in important discussions, oral reading and speaking at school.

61. Because communication with teachers and classmates was part of Student’s core curriculum, Ms. McGill recommended that Student receive language and speech therapy for two hours weekly of individual fluency therapy designed and implemented by a licensed and certified speech-language pathologist with certification of clinical competence, a current California speech-language pathologist license, and familiarity and experience in treating people who stutter.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA¹⁰

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.¹¹; Ed. Code, § 56000, et seq.; Cal.

¹⁰ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis below.

¹¹ All references to the Code of Federal Regulations are to the 2006 version.

Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education 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; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access

to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 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]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In Student's case, Student, as the complaining party, bears the burden of proof, and in District's case, District bears the burden of proof.

5. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

STUDENT'S ISSUE ONE: FAILURE TO IDENTIFY, LOCATE, AND EVALUATE STUDENT UNTIL FEBRUARY 2016

Legal Authority

6. There are two parts to the legal analysis of a school district's compliance with the IDEA. 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 was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

7. 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.)

8. A school district has an affirmative, continuing obligation to identify, locate, and evaluate all children with disabilities residing within its boundaries. (20 U.S.C. § 1412(a)(3).) This duty is commonly referred to as "child find." The duty is not dependent on any action or inaction by parents. The district must actively and systematically seek out all individuals with exceptional needs who reside in the district. (Ed. Code, § 56300) In addition, the district must develop and implement a practical method to locate those individuals. (Ed. Code, § 56301.) This "child find" obligation applies to, among others, "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade." (34 C.F.R. § 300.111(a).) A student shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.)

9. A district's child find obligation toward a specific child is triggered where there is knowledge of or reason to suspect a disability and reason to suspect that a student may need special education services to address that disability. (*Dept. of Educ. 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. (*Id.*, at p. 1195.) A district's

appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

10. The suspicion that a student may have an impairment that is affecting the student's educational performance, and requires special education, is sufficient to trigger a need for assessment. (See, e.g., *Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1032, citing Ed. Code, § 56320.) A parent's request for an assessment initiates the assessment process. (Cal. Code Regs., tit. 5, § 3021(a).) If the parent's request is verbal, the district must offer to assist the parent in preparing a written request. (*Ibid.*)

11. Under both California law and the IDEA, a child is eligible for special education if the child needs special education and related services by reason of a speech or language impairment. (20 U.S.C. § 1401 (3)(A)(i) and (ii); Cal.CodeRegs., tit. 5, § 3030.) For a child with a qualifying disability to be eligible for special education, the child must also, as a result of the child's impairment, require instruction and services that cannot be provided with modification of the regular school program. (Ed. Code, § 56026, subd. (b); *Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099-1107-1108, 1110, [a child may have a qualifying disability, yet not be found eligible for special education, because the child's needs can be met with modification of the general education classroom].)

12. A failure to properly assess is a procedural violation of the IDEA. (*Cari Rae S., supra*, 158 F.Supp. at p. 1196; *Park v. Anaheim, supra*, 464 F.3d at p. 1032.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child'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); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2) & (j); *Target*

Range, supra, 960 F.2d at p. 1484 [“ . . . procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents’ opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE.”].) The hearing officer “shall not base a decision solely on non substantive procedural errors, unless the hearing officer finds that the non substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian of the pupil to participate in the formulation process of the individualized education program.” (Ed. Code, § 56505, subd. (j).) While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.*, *supra*, 267 F.3d at p. 892.)

13. A student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b)(2), (c)(4); Ed. Code, § 56320, subds. (e), (f).)

14. A district may not delay its assessment of a student with a suspected disability on the basis that it is utilizing a response to intervention approach to accommodate the student in the regular education program. (*Memorandum to State Directors of Special Education*, Office of Special Education Programs (OSEP, January 21, 2011) 56 IDELR 50.)

Analysis

15. Student has demonstrated that District failed to meet its child find obligations to Student from July 11, 2014 through January 7, 2016, when District sent Parents an assessment plan.

16. As early as kindergarten, Student displayed behaviors which should have triggered a suspicion that he may have had fluency issues. In first grade, he began to stutter. In second grade his stutter worsened.¹² Significantly, in June 2014, Mother advised Student's second grade teacher that his stuttering was worsening, and requested that a "speech person" observe Student in the classroom. Although Mother's email may not have been a formal "request for assessment," nevertheless, as of June 4, 2014, District had knowledge, or at the very least had reason to suspect, that Student had a disability which might require special education services to address the disability. Although District then convened a student study team meeting and created an elementary intervention plan, and then had a District speech-language pathologist screen Student, District did not conduct a formal assessment of Student to determine whether he might require special education services.

17. Ms. McGill established that District's use of response to intervention services to address Student's stuttering and possible need for special education services was not proper. Ms. McGill set forth in credible detail why response to intervention services are not appropriate, especially based on recommendations from the American Speech-Language Hearing Association, and Student should have been assessed as of June 4, 2014. District could not demonstrate why response to intervention services, instead of assessing Student, was an appropriate general education intervention for stuttering.

¹² While Student's kindergarten and first grade years were before the 2014-2015 school year, his behaviors in those years are instructive as to the foundational issue whether District had a reason to suspect that Student might be in need of special education services as he progressed through the 2014-2015 and 2015-2016 school years.

18. An assessment and IEP team meeting did not occur. Rather, based on her screening of Student, the speech-language pathologist recommended that he receive response to intervention services, on a pull-out basis, for 30 minutes one time per week. Throughout the 28 sessions, the speech-language pathologist did not perform a formal assessment of Student, did not provide regular reports of Student's progress, if any, or the therapy he was receiving, and did not advise Parents that their son might be eligible for special education services. The intervention services were stopped primarily because Student was embarrassed at being pulled out of class for the sessions and therefore wanted to end the services, and because the speech-language pathologist believed that his stuttering had improved, even though Student's general education teacher told her that he continued to show signs, albeit less severe in her opinion, of stuttering.

19. It was not until after December 2015, when Student's stuttering careened out of control and Mother contacted District to seek help, that Mother learned that Student had never been assessed or found eligible for special education services, that an IEP team meeting had never been held, and that the intervention services he had received were not, in fact, special education services.

20. A speech-language assessment of Student was conducted in February 2016, and it was after that assessment, and the March 9, 2016 IEP team meeting, that he was found eligible for special education services under the category of speech language impairment.

21. Student has established, by a preponderance of the evidence, that District had reason to suspect, by at least June 4, 2014, that Student had a disability, and might be in need of special education services to address that disability, yet took no steps to formally assess him in the area of language and speech, or determine whether he might be eligible for special education and related services. Accordingly, District violated its

child find obligation by failing to identify, locate, and evaluate Student for a suspected speech-language disability from July 11, 2014 to January 7, 2016.

STUDENT'S ISSUE TWO: APPROPRIATENESS OF DISTRICT'S FEBRUARY 2016 SPEECH AND LANGUAGE ASSESSMENT

Legal Authority

22. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.)¹³ No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

23. An assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies 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

¹³ An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

producer of such assessments. (20 U.S.C. § 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School District* (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].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

24. An assessment shall be conducted by someone competent to perform the assessment. (Ed. Code, § 56322.) Language and speech development and remediation shall be provided only by personnel who possess either a license in Speech-Language Pathology issued by a licensing agency within the Department of Consumer Affairs, or a credential authorizing language or speech services. (Cal. Code Regs., tit. 5, § 3051.1, subd (c).) In general, assessors must be knowledgeable about the student's suspected disability and must pay attention to the student's unique educational needs such as the need for specialized services, materials and equipment. (Ed. Code, § 56320, subd. (g).)

25. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low-incidence disabilities (those affecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed.

Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

26. As part of an initial evaluation, the IEP team and other qualified professionals, as appropriate, must review existing evaluation data on the student, including evaluations and information provided by the parents of the child; current classroom-based observations; and teacher observations. On the basis of that review and input from the student's parents, the IEP team must identify what additional data is needed to determine whether the student has a disability which affects his educational needs. (34 C.F.R. § 300.305)

Analysis

27. Here, Student demonstrated by a preponderance of the evidence that District's March 9, 2016 speech-language assessment was not properly conducted and was therefore inappropriate, because it failed to adequately involve Parents and disregarded critical findings regarding Student's speech-language impairment.

28. While the assessment was conducted using a variety of assessment tools and strategies, there were several areas in which the assessment was not appropriately conducted.

29. The speech-language pathologist observed Student in a classroom setting with several of Student's classmates, and the noise and sounds from a group assemblage could have made it difficult to hear his speech to evaluate the severity of his stuttering.

30. While Ms. Sickler's observations were audio-recorded, they were not video-recorded, and a video-recording would be the best manner in which to determine, by direct visual observation, when Student exhibited a secondary characteristic of stuttering, for example, word blocks, physical movements and tension, among others. Such secondary characteristics would not be evident on an audiotape.

31. Although Student received 28 separate speech therapy sessions in the intervention program, Ms. Sickler did not review any notes, documentation or progress reports from those sessions. She did not do so because any such notes, documentation or progress reports did not exist, but in the absence of such documentation, Ms. Sickler could have spoken to Ms. Terpstra and attempted to gather information about those sessions, yet she did not do so. District offered no explanation why Ms. Terpstra was not present at the IEP team meeting to discuss her sessions with Student or to offer insight into his speech-language impairment, or any progress he might have made in those sessions. The information regarding the intervention sessions must necessarily have included extremely relevant functional and developmental information about Student's stuttering.

32. Ms. Sickler utilized the Adolescent Situational Checklist, which was specifically designed for an age and developmental range to which Student did not belong. At 10 years old, Student definitely was not an adolescent at the time of testing, and accordingly that test was inappropriate to establish a valid fluency baseline for Student. There was some conflict in the evidence as to the reason Ms. Sickler used this particular test. During hearing, she testified that she used the test "informally" as a means of identifying some situations which Student might be avoiding because of his stuttering. However, the District's March 9, 2016 multidisciplinary report and Ms. Sickler's speech-language assessment reflects that the test was indeed administered on a formal basis, resulting in formal results which were, in significant part, used to determine District's offer of speech therapy to Student.

33. The defects in Ms. Sickler's speech-language assessment seriously impeded Parents' participation in the IEP team meeting. The failure to gather any information regarding his 28 intervention sessions or present any information at the meeting deprived Parents of the opportunity to know or even consider whether the

intervention sessions were effective, whether Student's speech-language impairment actually improved as a result of the intervention services, or whether the speech-language services offered at the IEP meeting, which were essentially identical to the intervention services, were appropriate. The failure to video-record the observations of Student prevented Parents from understanding fully the extent of Student's secondary characteristics related to his stuttering. The inappropriate use of and reliance on an adolescent test with a clearly pre-adolescent boy prevented Parents from fully evaluating and understanding the degree and effects of Student's stuttering.

STUDENT'S ISSUES THREE AND FOUR: FAILURE TO PROVIDE PARENTS WITH EDUCATIONAL RECORDS

Legal Authority

34. To guarantee parents the ability to make informed decisions about their child's education, the IDEA grants parents of a child with a disability the right to examine all relevant records in relation to their child's special education identification, evaluation, educational placement and receipt of a FAPE. (20 U.S.C. §1415(b)(1); 34 C.F.R. § 300.501(a); Ed. Code, §§ 56501(b)(3) & 56504.) A district must permit parents to inspect and review any education records relating to their child that are collected, maintained, or used by the district. (34 C.F.R. §300.613(a).) The agency must comply with a request without unnecessary delay. (*Ibid.*) While federal regulations require that educational records be provided within 45 days of request, California law affords parents the right to receive copies of all school records within 5 business days of the request. (*Ibid.*; Ed. Code, § 56504.) The right to inspect and review education records includes the right receive an explanation and interpretation of the records; the right to receive copies of the records if failure to provide copies would effectively prevent the parent from exercising the right to inspect and review the records; and the right to have a representative inspect and review the records. (34 C.F.R. §300.613(b).)

35. The IDEA does not have a separate definition of educational records, and adopts the Family Educational Rights and Privacy Act definition of education records by reference. (34 C.F.R. § 300.611 (b).) In general, educational records are defined as those records which are personally identifiable to the student and maintained by an educational agency. (20 U.S.C § 1232g(a)(4)(A); 34 C.F.R. §§ 99.3; Ed. Code, § 49061, subd. (b) [similarly defines pupil record].) The United States Supreme Court, after conducting an analysis of FERPA provisions related to education records, defined the word “maintained” in this context by its ordinary meaning of “preserve” or “retain.” (*Owasso Independent School Dist.No.I-011 v. Falvo* (2002) 534 U.S. 426, 434 [122 S. Ct. 934, 151 L.Ed.2d 896].)

36. Education records do not include records “which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.” (20 U.S.C. § 1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b).) Federal regulations further clarify that for a record to qualify under the “sole possession of the maker” exclusion, that record must be used only as a personal memory aid. (34 C.F.R. § 99.3(b)(1).) The Family Policy Compliance Office within the United States Department of Education, in finding that a district had violated FERPA, determined that this exception was not intended to exclude detailed notes that record direct observations or evaluations of student behavior. (*Letter to Baker*(Office of Innovation and Improvement, Complaint No. 1251, December 28, 2005 [comprehensive notes of observations and evaluations by a speech therapist, though kept in the sole possession of the maker, were not used solely as a memory aid and therefore were educational records subject to disclosure].)“School officials may not unilaterally remove records from the protections of FERPA through administrative decisions about where certain records are maintained or how they are categorized.” (*Ibid.*)

37. Test protocols such as test questions, student answers, evaluator calculation or scoring sheets, and administration instructions, to the extent these are personally identifiable to the student, are educational records that must be provided to parents if requested. (*Newport-Mesa Unified School Dist. v. State of Cal. Dept. of Educ.* (C.D.Cal. 2005) 371 F.Supp.2d 1170 at pp. 1175, 1179 [providing parents copies of their children’s test protocols constitutes a permissible “fair use” pursuant to federal copyright law]; *Letter to Price* (OSEP Oct. 13, 2010) 57 IDELR 50 [test protocols with a student’s personally identifiable information are educational records and if copyright law conflicts with IDEA’s requirement to provide educational records, districts should seek ways to facilitate inspection including contacting the copyright holder].) Parents have the right to inspect instructional materials and assessments including teacher’s manuals. (Ed. Code, § 49091.10, subd. (a).)

38. Parents are an integral part of the IEP process, and part of the cooperative team that determines the IEP contents. (*I.R. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164, 1170, citing *M.M. v. Lafayette School Dist.* (9th Cir. 2014) 767 F.3d 842, 851 (*Lafayette*).)

39. The failure to provide a parent information related to the assessment of his or her child may significantly impede the parent’s opportunity to participate in the decision-making process and result in liability. In *Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F. 3d 877, 892-895, the Ninth Circuit held that a failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents’ right to participate in the IEP process, resulting in compensatory education award. In *Lafayette, supra*, at pp. 855-856, a district’s failure to provide parents assessment data showing their child’s lack of progress in district’s response to intervention program left the parents “struggling to decipher his unique deficits, unaware of the extent to which he was not meaningfully benefitting from the

[individualized services plan], and thus unable to properly advocate for changes to his IEP.” The court concluded that the failure to provide the assessment data prevented the parents from meaningfully participating in the IEP process and denied their child a FAPE.

Analysis

40. On January 6, 2016, Parents requested copies of Student’s IEP, any formal assessments, goals, and progress reports. Parents were not provided with any records, assessments, goals or progress reports, because District had never performed any formal assessments, developed any goals, or prepared any progress reports. There had never been an IEP team meeting and there was no IEP.

41. At the March 9, 2016 IEP team meeting, Parents requested copies of documents related to the intervention services Student received from Ms. Terpstra. While Ms. Terpstra did make notes regarding Student’s intervention services, those notes were lost in a move from one location to another, and District was unable to provide Parents with any documentation related to the intervention services. Because Ms. Terpstra was not present at the March 9, 2016 meeting, her notes would have been the only information available to the IEP team about the intervention services.

42. Here, Student failed to establish that District inappropriately failed to timely produce an IEP, and any formal assessments, goals, and progress reports, and accordingly there was no procedural violation when District failed to provide those non-existent educational records.

43. With respect to the intervention service records, however, the fact that District did not and could not provide any documents with respect to Student’s intervention services significantly impeded Parents’ right to meaningfully participate in the IEP process. Ms. Terpstra, who provided the intervention services to Student, was not present at the IEP team, meeting, and Ms. Sickler made no efforts prior to the meeting to speak with Ms. Terpstra prior to the meeting to determine Student’s goals or

progress in the intervention sessions. Because no documents were available, and because Ms. Terpstra was not present at the meeting, her notes about how Student responded to her intervention services would have been the only means of allowing Parents to determine whether the speech-language goals and services offered in the IEP team meeting were appropriate. Accordingly, District's failure to provide documentation regarding the intervention services was a procedural violation and a denial of FAPE.

DISTRICT'S ISSUE ONE: APPROPRIATENESS OF DISTRICT'S MARCH 9, 2016 MULTIDISCIPLINARY ASSESSMENT

Legal Authority

44. A student may be entitled to an independent educational evaluation if he or she disagrees with an evaluation obtained by the public agency and requests 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 IEE 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 educational evaluation].) In response to a request for an independent educational evaluation, an educational agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate, or ensure that an independent educational evaluation is provided at public expense (34 C.F.R. § 300.502(b)(2); see also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

Analysis

45. As set forth in Legal Conclusions 22 through 32, Student demonstrated by a preponderance of the evidence that District's March 9, 2016 speech-language

assessment was inappropriate. For the same reasons that the speech-language assessment was inappropriate, District's March 9, 2019 multidisciplinary report, which was based on that assessment, was not appropriate, and Student is entitled to an independent educational evaluation in the area of language and speech at public expense.

REMEDIES

46. Federal law provides that a court that hears a civil action taken from a special education administrative due process hearing "shall grant such relief as the court deems appropriate." (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3)(2006).) The United States Supreme Court has held that this authority "confers broad discretion on the court" to grant relief that is appropriate in light of the purpose of the IDEA. (*School Committee of the Town of Burlington, Massachusetts v. Department of Education* (1985) 471 U.S. 359, 369[105 S.Ct. 1996, 85 L.Ed.2d 385].) The broad authority to grant relief extends to the administrative law judges and hearing officers who preside at administrative special education due process proceedings. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230 [129 S.Ct. 2484, 2494, ; 174 L.Ed.2d 168].)

47. An ALJ can award compensatory education as a form of equitable relief. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.) "Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE." (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265.) Compensatory education awards depend upon the needs of the disabled child, and can take different forms. (*R.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1126.) Typically, an award of compensatory education involves extra schooling, in which case "generalized awards" are not appropriate. (*Parents of Student W. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497.) "There is no obligation to provide a day-

for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Ibid.*)

48. Student is entitled to compensatory education. District denied him a FAPE beginning November 4, 2014 when it failed to identify, locate or evaluate Student, and further denied Student FAPE when it failed to provide response to intervention records to allow Parents to meaningfully participate in the IEP team meeting on March 9, 2016. The evidence from both Student's and District's speech and language assessments established that if District assessed Student at the start of the 2014-2015 school year that District would have found Student eligible for special education services under the category of language and speech due to his stuttering. Ms. McGill, who performed the speech-language evaluation of Student on May 12 and 16, 2016, recommended that Student receive individual speech-language therapy two hours weekly. Beginning the week of November 4, 2014¹⁴ through the date of this decision, for a total of 88 school weeks,¹⁵ Student is entitled to 176 hours of compensatory education in the area of speech and language.

¹⁴ Because Student filed his complaint for due process hearing on July 11, 2016, taking into account the first day of school of the 2014-2015 school year and the 60-day IEP team meeting period required under Education Code section 56043(c), the IEP team meeting could have occurred as early as November 4, 2014, but did not. See footnote 4, *ante*, page 3.

¹⁵ This figure does not include extended school year summer sessions, or scheduled school holidays for Thanksgiving, Winter Recess, or Spring Recess.

ORDER

1. District shall reimburse Parents for the cost of an independent language and speech evaluation performed by Loryn McGill, in an amount not to exceed District's guidelines for cost of independent language and speech evaluation. District shall reimburse Parents within 45 business days after receipt of appropriate documentation.

2. District shall convene a new IEP team meeting within 30 calendar days of the date District receives the independent speech-language evaluation report.

3. District shall reimburse Parents for the cost of 176 hours of compensatory speech-language therapy with Loryn McGill, in an amount not to exceed District's guidelines for cost of speech-language therapy with a certified nonpublic agency, plus round-trip transportation costs from Student's home to Ms. McGill's office in an amount not to exceed the Internal Revenue Service mileage reimbursement rate. Student shall have until June 7, 2018, to access this compensatory education. Any hours not used by that date shall be forfeited.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on Student's issues one, two and four. Student prevailed on District's issue. District prevailed on Student's issue three.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by 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. (Ed. Code, § 56505, subd. (k).)

DATE: January 6, 2017

/s/

VERNON BOGY

Administrative Law Judge

Office of Administrative Hearings