

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

OXNARD SCHOOL DISTRICT.

OAH Case No. 2016100009

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on September 22, 2016, naming Oxnard School District.

Administrative Law Judge Adrienne L. Krikorian heard this matter in Oxnard, California, on March 14, 15, 16, 21, 22 and 28, 2017.

Attorneys Shawna Parks and Janeen Steel represented Student. Mother attended all hearing dates except March 22, 2017, testified on the last hearing day, and was assisted by a Spanish interpreter. Attorney Lawrence Joe represented District. Amelia Sugden, Director of Special Education Services, attended the hearing on behalf of District and testified.

A continuance was granted for the parties to file written closing arguments and the record remained open until May 3, 2017. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES

(1) Did District deny Student a free appropriate public education since November 2012, by failing to meet its child find obligations by not evaluating Student in all areas of suspected disability, and not finding Student eligible for special education placement and related services?

(2) Did District deny Student a FAPE since November 2012 by failing to offer Student an individualized education program that met Student's unique needs?

(3) Did District deny Student a FAPE since November 2012 by failing to offer an IEP that was reasonably calculated to offer educational benefit to the Student?

(4) Did District deny Student a FAPE since November 2012 by committing procedural violations that significantly impeded Parents' opportunity to participate in the decision-making process, by:

(a) Not providing Parents' with a copy of special education procedural safeguards; and/or

(b) Failing to inform Parents of District's obligation to offer assessments or provide an assessment plan if a need for special education services was suspected?

SUMMARY OF DECISION

Student contends District failed its obligations under the Individuals with Disabilities Education Act from the fall of 2012 through the date she filed her complaint, denying her a FAPE and depriving Parents of the ability to participate in a meaningful way in developing her educational program. Student contends District first failed to identify her as a child with a suspected disability despite ample evidence to the contrary, and then later inappropriately assessed her and failed to find her eligible for special

education. District contends that it used the “student study team” process, and implemented appropriate “responses to intervention” for Student. District further contends that Student demonstrated no needs requiring assessment after it completed its initial assessment in May 2013, and until it offered to assess her in March 2016.

Student proved that, because of applicable exceptions to the two-year statute of limitations, she had viable claims as of November 13, 2013. For the reasons discussed below, District’s arguments that Student’s claims after March 2016 should be barred based upon Parents’ refusal to consent to assessment until November 2016, were not persuasive.

This Decision additionally finds that Student met her burden of proof on all issues, except for her contention that District violated its statutory “child find” duties, which was time-barred and moot.

FACTUAL FINDINGS

1. Student was a ten-year-old girl at the time of hearing. She resided at all relevant times in District’s boundaries with Parents, a twin sister, and a brother. Student was developmentally delayed as a toddler. She did not walk or speak until age two. Her primary language at home and school was Spanish. She attended a private preschool until she was four years old. District did not find her eligible for special education before she filed her complaint on September 22, 2016.

KINDERGARTEN- SPECIAL EDUCATION ASSESSMENT

2. Parents enrolled Student in a dual immersion language kindergarten program at District’s Juan Lagunas Soria School at the beginning of the 2012-2013 school year. The class consisted of 50 percent English speaking and 50 percent Spanish speaking students. Teachers delivered instruction 90 percent in Spanish and 10 percent

in English. The class was co-taught by general education kindergarten teachers Ms. Carrillo and Aracely Martinez until Ms. Martinez went on leave toward the end of the school year.

3. In early fall 2012, Mother expressed concerns to Ms. Martinez that Student might have autism, based on family history. Mother also reported Student might have attention deficit hyperactivity disorder, might have dyslexia because of her tendency to reverse words, that she could not hold a pencil, and that she had aggressive behaviors at home. Mother verbally requested that District fully assess Student.

4. Ms. Martinez observed that Student was performing low academically. However, she attributed the low performance to the fact that Student had just started kindergarten and came without any formal academic instruction from pre-school. She did not observe the behavioral concerns in the classroom that Mother reported seeing at home. On November 8, 2012, Ms. Martinez filled out a Coordination of Services Team referral form and provided it to District's outreach specialist Maria Magana. Ms. Martinez's COST referral form reported low academic performance and Mother's concerns about autism and attention deficit's. Martinez noted on the referral form that she did not think Student had either condition. The form did not refer to Student's inability to hold a pencil or Mother's concern about dyslexia/reversing words.

5. Ms. Magana's role was to facilitate communications and meetings with parents and district staff. She regularly communicated with Mother regarding Student, and was aware of Mother's concerns about Student's academic difficulties and behaviors. She coordinated referral of the COST form to the District COST team responsible for evaluating those referrals.

6. District's COST referral process was the preliminary step after a parent or teacher raised concerns about a student's progress or health issues. The COST team included a school psychologist, the school principal, an educator, and an administrative

representative. It met weekly to discuss all students' progress, including addressing specific referrals from teachers. When a parent or teacher requested or recommended assessments for special education, the COST team scheduled a student study team meeting, which included parents, to discuss the child's progress and all reported concerns. District treated verbal requests for assessments as if they were written. Decisions made by the student study team were documented in the notes from the meeting. If a student study team decided not to refer for assessments, District discussed that decision at the meeting and documented it in the notes. It did not provide prior written notice under special education procedures.

7. Ms. Magana coordinated and District held a student study team meeting for Student on December 11, 2012. The team included Parents, Ms. Martinez, a school administrator, District school psychologist Steve Tobey, a Spanish interpreter, and Ms. Magana. Mother expressed her multiple concerns about Student's behaviors at home and difficulties in learning at school. The team reviewed Student's academic progress, including benchmark testing, for the first semester of the school year. Student was unable to recognize sounds or vowels on the literacy tests. She had difficulty retaining information. She did not return homework. The team discussed Student's multiple tardiness and absences, and dynamics between Student and her siblings in the home environment. The team recommended multiple interventions for Student in the classroom, requested Mother to sign a release for medical information, and recommended a special education evaluation by Mr. Tobey.

8. On January 22, 2013, Mr. Tobey sent Parents a Notice of Special Education Referral and an Assessment Plan in Spanish and English. Mother signed and returned the Spanish version on January 25, 2013, along with the release for medical information. Also on January 25, 2013, District referred Student to the City Impact Counseling Center for emotional and behavior concerns related by Mother to Ms. Martinez and Ms.

Magana. The referral form marked high risk characteristics including defiance, temper tantrums, lack of concentration and inattentiveness, unable to sit still, and difficulty following instructions.

9. The January 2013 Assessment Plan identified the following areas of assessment: pre-academic/academic achievement; social emotional behavior; motor skills development; intellectual development; and health. The Assessment Plan did not identify assessments for autism, ADHD, fine motor, central auditory processing disorder, or any other area of suspected concern.

10. Mr. Tobey was a licensed educational psychologist with a master's degree in educational psychology. He was employed with District as a school psychologist for 25 years. He developed the referral question for assessment based on his evaluation of concerns expressed by the student study team and the COST referral. He did not speak Spanish. He assessed Student in English, with occasional assistance from a Spanish interpreter, for possible disabilities in the areas of specific learning disability and emotional disturbance. Mr. Tobey did not administer specific assessment tools for autism, attention deficit hyperactivity/attention deficit disorder, or speech and language deficits, because they were not part of the referral question. He did not tell Parents that he was limiting the assessment to specific learning disability and emotional disturbance.

11. As part of his assessment, Mr. Tobey reviewed Student's records, and observed Student in the classroom, finding her to be on-task 80 percent of the time. The 20 percent of the time Student was off-task was due solely to her inattention. Mr. Tobey considered whether concerns expressed by Mother and Ms. Martinez during the assessments were the result of problems "intrinsic to Student" or other extrinsic factors that would be exclusionary factors for special education eligibility. In his opinion, consideration of extrinsic factors, including tardiness, absences, and environmental

factors, were an important part of ruling out whether those factors impacted a child's performance at school.

12. Mr. Tobey administered the Kaufman Assessment Battery for Children, Second Edition; LA Preschool Test III; and Parent and Teacher Rating Forms on Connors Behavior Rating Scales. On the Kaufman II, Student's non-verbal cognitive abilities were in the below average range in comparison to her peers. Mr. Tobey administered Kaufman II subtests with low to moderate cognitive demands in Spanish with the assistance of a bilingual interpreter. Student's scores in visual processing and short term memory were below average, consistent with her other scores on the Kaufman II. The LA Preschool Test was a play-based assessment of cognitive functioning for children ages two through six. Her overall cognitive ability was five years and one month, approximately one year lower than her age. On the Connors Rating Scales for behavior Mother expressed significantly more concerns and rated Student lower than did Ms. Martinez. Mother's scores suggested that Student was significantly impaired and had profound disciplinary problems. Ms. Martinez's scores did not reflect the same intensity as Mother's. Mr. Tobey concluded Mother's descriptions of Student's behaviors did not reflect Student's behaviors at school.

13. Resource teacher Kathy Russell administered pre/academic and academic tests, including the standardized English version of the Brigance Comprehensive Inventory of Basic Skills, and a dominant language screening. Student performed at or above 60 percent accuracy on the Essential Literacy Skills for Spanish. Test results revealed that Student performed at a higher level in Spanish than English, and struggled learning concepts of "most" and "least," learning vowel and consonant sounds, and producing rhyming words in response to a prompt.

14. On May 6, 2013, Student's teachers developed a student study team information sheet, which included Student's present levels of performance and

classroom modifications used by the teachers. Those modifications included daily small group instruction, preferential seating, a tablet for support with letter and sound identification and segmenting and blending words, and homework with materials provided by the teachers.

15. Mr. Tobey included the results of the multidisciplinary assessment in a report dated May 21, 2013. District held an IEP team meeting on May 21, 2013. Mother and all required District staff, including a general education and special education teacher, attended the meeting. Mother's primary language was Spanish. She understood some spoken words in English, but did not read or write in English. A District interpreter assisted Mother throughout the meeting. The IEP team reviewed Mr. Tobey's assessment report. The District IEP team members did not find Student eligible for special education. District therefore did not develop an IEP for her.

16. Mother never received the assessment report translated into Spanish. Mr. Tobey did not recall explaining to Mother at the meeting his reasoning about which areas of need he excluded from assessments. The school principal told Mother after the meeting that "nothing was wrong with" her daughter, some children's brains develop later than others, and Student's delays were less than two years below her age, which reflected the process of the brain maturing. Mother understood at the end of the meeting that District did not find Student eligible for special education services.

17. Mother signed the English version of the IEP confirming her attendance, initialed confirming her receipt of the IEP and assessment reports in English, initialed her request for the IEP document in Spanish, and that she asked for and received interpretation in Spanish. Mother also acknowledged her agreement with the IEP team's eligibility findings and receiving her procedural rights and safeguards by initialing the IEP that she had received them. She initialed the English version of the IEP where she was told to. The interpreter did not interpret each initialed line word for word, and no

one explained to her in detail what she was initialing. However, District provided Mother with the Spanish version of the IEP at the end of the meeting. Mother admitted she did not read the lines written in Spanish that corresponded to the lines she initialed in the English version. Although Mother testified that the interpreter did not accurately interpret all parts of the meeting, her testimony on this point was not entirely credible in part because the meeting was more than four years earlier than the hearing, and she never informed anyone at the meeting that she did not understand what happened at the meeting, or what she signed.

18. Student's kindergarten co-teacher, Ms. Carrillo, recommended at the meeting to retain Student in kindergarten. On May 29, 2013, Parents declined to retain Student and informed District they would seek private tutoring for Student. Student promoted to first grade.

FIRST GRADE – 2013-2014 SCHOOL YEAR

19. Student attended first grade at District's Elm Elementary School. Teacher Blanca Rodriguez had a multiple subject bilingual teaching credential and taught for District for 15 years. She received no District-provided training in special education, including special education assessment referrals. Student remained in the dual immersion Spanish program, which in first grade focused instruction 80 percent in Spanish and 20 percent in English. She was sweet, sociable, and had friends at school.

20. District held a student study team meeting on November 13, 2013. Ms. Rodriguez learned for the first time that District had assessed Student for special education earlier that year. The student study team discussed Student's performance during the first semester of school, reviewed kindergarten interventions and modifications, and considered Mother's current concerns that Student was still struggling. Student had been late to school several times and had several absences. She was struggling with reading comprehension, fluency, retention of information, and was

low in all academic areas. Ms. Rodriguez suggested the student study team consider retaining Student in the first grade. She opined at hearing that Student's difficulty in memory retention was "probably" a disability. The team recommended community-based counseling for Student, based upon family issues.

21. School psychologist Lupe Morales attended the meeting, along with school principal Leticia Ramos. Mother requested at the meeting that District assess Student for special education. No one assisted Mother with putting her request in writing. However, her request was documented in handwriting on the student study team notes. Ms. Morales advised Mother that, because Student had recently been assessed, assessing again would be too soon. Consistent with her general practice, she recommended Mother to wait to see if the tiered general education interventions recommended by District staff worked for Student.

22. Ms. Ramos explained to Parents that Student was "like a flower" and in the spring "she would bloom." She warned Mother if District did another assessment, Student would be "labeled" as "disabled." She would not be able to have a normal life in school. Relying upon the representations by Ms. Morales and Ms. Ramos, Parents withdrew their request for assessment at the meeting, which the team recorded in handwriting on the notes.

23. The student study team recommended continuing with current modifications, including repetition, differentiated instruction, educational games, challenging materials that allowed for success, providing meaningful concrete rather than abstract activities, sitting close to the teacher, one on one with teacher, practicing syllables at home daily, and parental help with homework.

24. No one during the meeting or afterwards informed Parents that they were still entitled to ask for an independent educational evaluation if they disagreed with Mr. Tobey's earlier assessment. No one explained to Mother at that meeting that District

had not assessed Student to rule out autism, ADHD or fine motor needs based on Mother's initial concerns expressed to Ms. Martinez. District did not provide Parents with prior written notice that it was declining to assess Student in response to Parents' request. No one gave Parents a copy of their procedural safeguards at or after the student study team meeting, or after Parents withdrew their request for assessment. Parents left the meeting believing that District was serving Student's needs through the student study team process with recommended tiered interventions.

25. The student study team met again on March 27, 2014. Mother continued to express concerns about Student's lack of progress. Student made minimal progress academically based upon her scores from informal testing. She was still at risk for retention. She was tardy or absent several times during the year. Student resisted getting ready for school in the morning, and her resistance often resulted in her tardiness. She did not like going to school because she found school difficult and began to understand she was not performing at the level of her peers. Student also left school for medical appointments, resulting in her absence for all or part of the school day. Ms. Rodriguez reported Student was not turning in daily homework; her homework looked like someone else had completed it. The team recommended continuing tiered interventions in the general education classroom and considered retention in first grade. It added color-coded vowels to remind of vowel sounds, timely arrival at school, and homework completed by Student. District recommended another student study team meeting for May 2014, but it did not hold another meeting until the following school year. No District staff recommended in first grade that Student should be assessed for special education or provided procedural safeguards to Parents.

26. Student's first grade year-end progress report showed that she was performing at below basic level and needed improvement in all aspects of language arts, and three out of five areas of math. Her skills in vocabulary recognition, spelling

and language were minimal. She needed improvement in homework completion. She performed relatively better when instructed in Spanish. District promoted Student to second grade at the end of the 2013-2014 school year.

SECOND GRADE – 2014-2015 SCHOOL YEAR

27. Veronica Gonzalez was Student's second grade teacher. Ms. Gonzalez had a bilingual multiple subject credential, a master's degree in education, and had been employed by District for 11 years at the time of hearing. She was personally familiar with special education as a parent, but received no formal training from District on the IDEA or special education procedures. Ms. Gonzalez attended District training in behavior modifications, what to look for when children with special needs misbehaved, and received a list of strategies for behavior and academics. She was not familiar with the IDEA requirements for "child find," and had no training from District on referrals for special education assessments.

28. Ms. Gonzalez knew Student had been assessed for special education at the end of kindergarten. She was familiar with her cumulative records. She knew Student had a history of tardiness and absences, and that she was performing one year behind other students. Ms. Gonzalez monitored Student's progress to see if she understood the curriculum because she knew Student did not qualify for special education based on Mr. Tobey's assessment.

29. Student was a sweet child in second grade, well-behaved, tried her best in class, made friends and was very sociable. The classroom had 21-25 students, and instruction was 70 percent in Spanish. Most of the students were English language learners. Ms. Rodriguez taught all subjects in Spanish except for one hour a day of English language, where the students worked with sight words and phonics books in English.

30. District held a student study team meeting for Student on September 25, 2014. Parents attended along with District staff, including psychologist Ms. Morales, Ms. Ramos, and special education resource teacher Heather Jue. Ms. Jue had a master's degree in special education and an education specialist instruction credential. She was familiar with the requirements for referral for special education assessments. She worked most of her day with special education students. She attended the meeting to listen to concerns expressed by Student's teacher and Parents.

31. Student's oral fluency scores on statewide standard tests were low; she was unable to recall words. She was not reading fluently, paused frequently between words, and did not retain correct vowel sounds. She was not spelling words correctly. She required the use of manipulatives or drawings in math, but still struggled with adding simple one digit numbers. She sought peer or adult assistance in math. Her behavior was on task and she followed rules.

32. Mother reported Student had been medically diagnosed with attention deficit disorder, and possible dyslexia, but did not provide anything in writing to the team documenting those diagnoses. Ms. Gonzalez did not see any signs of dyslexia in the classroom which would have prompted her to follow up on Mother's concerns. Ms. Morales opined at hearing that a diagnosis of attention deficit disorder was not enough to refer a child for an assessment, even though she acknowledged that Student was making slow progress in second grade. She opined that if a child is not eligible for special education based on a diagnosis of attention deficit disorder, the student study team considers the impact of the diagnosis on the child's education, discusses interventions with the parents, and documents the findings in the student study team notes. Ms. Ramos opined that Mother's report of attention deficit disorder did not trigger the need for an assessment, in part because Mother did not provide a note from the doctor which documented the diagnosis and outlined whether Student required

medication management. However, District staff knew Student was taking Ritalin at home. In Ms. Ramos's opinion, family dynamics at home were impacting Student's attendance and performance at school.

33. With Ms. Jue's input, the student study team recommended that previous modifications and interventions continue. The team added classroom modifications and interventions including small group instruction and modified work in class and homework. It recommended Student work at home practicing syllables and, again, recommended family counseling, which Mother had rejected in first grade. The team encouraged Parents to bring Student to school on time. They recommended to Parents to follow up with an optometrist because Mother reported Student saw "color balls" in the air. Ms. Jue saw no red flags based on the information she heard at the meeting suggesting Student should be assessed for special education eligibility. No one suggested District assess Student for special education.

34. District held another student study team meeting on February 9, 2015. Ms. Gonzalez provided a progress report from the first trimester. Student's scores on standardized tests were at the beginning level. She misspelled all words on spelling tests, which had been modified for her. She read eight words per minute on standardized tests, which was significantly below where she should have been. She paused frequently between words with unfamiliar text. She recognized only 38 out of 100 sight words in Spanish. She mixed up vowel sounds and did not retain correct vowel sounds. Although she understood the concept of adding single digit numbers, while using manipulatives (physical objects), she was not progressing to the level of adding two-digit numbers, which is the level at which she should have been performing.

35. Ms. Gonzalez noticed Student appeared more confused and uncertain about routines, but was unsure of the cause. District had arranged for after-school program support services, but Student only attended for a short time because Mother

felt the day was too long for her. The team recommended continued small group instruction with adult support and decodable books. Parents provided private tutoring for English language after school. Mother expressed no questions or concerns with Student's progress at the February 2015 meeting.

36. On May 28, 2015, District held a third student study team meeting to discuss Student's second grade progress. Parents attended along with District staff, including Ms. Jue and Ms. Morales. Ms. Gonzalez reported Student continued to struggle academically with reading fluency, reversing letters, spelling, math homework, and addition. Although Student showed some progress, she was performing significantly below second grade level.

37. The team discussed Father's request to retain Student in second grade. The team also discussed possibly assessing Student for special education. The team concluded that, instead of assessing Student, District would matriculate Student to third grade, and transfer her out of the dual immersion program and into an English only classroom. Parents agreed that Student was not successful in the dual immersion program and a single language program might be better for Student. Student was still resisting going to school causing her to often be late. District did not provide Parents with anything in writing confirming that it was deferring assessments, or declining to assess, in lieu of changing Student's educational program. The team also suggested that, as a general education intervention, Student work with a speech and language therapist in English language development, and specifically vocabulary. This service was more intense, structured, and designed to address to her individual needs. No one suggested Student should be assessed for special education eligibility in speech and language, or any other suspected disability.

38. To support her transition to the new program, the team recommended that Student immediately begin attending Ms. Jue's special education resource class as a

“guest” for English Language Arts and English development. To qualify for this service, District’s general education students must be performing two years below grade level. Student was scheduled to attend for 20-30 minutes a day, five days a week. The class met at the beginning of the school day. However, because Student was often late to school she did not regularly attend the class. By the end of second grade, Student had made little progress at school.

39. Ms. Gonzalez opined that a child in the District should be performing two years below grade level before District staff considered assessing the child for special education. If a child had a student study team, the team developed responses to intervention based on three tiers, the third tier being the most intensive. She understood that if a parent asked for an assessment, the request would go straight to assessment. However, she contradicted herself by stating the assessment request would first go through the COST team, then a student study team, before District initiated an assessment plan. She did not demonstrate a clear understanding of the process for special education assessment referrals.

40. District knew Parents were very concerned that Student was struggling with academics, had attention deficit disorder, and was making very little educational progress. Mother attended a school board meeting during Student’s second grade, along with parents of other children. Mother expressed concern to the Board that District was not helping Student make progress in school. She asked for help, although her testimony was unclear as to what specific help she asked for or what response she received at the meeting. Ms. Gonzalez did not recall that Mother ever asked for an assessment for Student during second grade, and she never referred Student for assessments. In contrast, Mother credibly testified she regularly expressed her concerns about Student’s lack of progress and struggles at school to Ms. Gonzalez and the

student study team. Student matriculated to third grade without any referral by District for special education eligibility.

THIRD GRADE – 2015-2016 SCHOOL YEAR

41. Parents requested a student study team meeting at the beginning of third grade. The team met on August 20, 2015. Ms. Morales, Ms. Jue and Ms. Ramos were among District staff who attended the meeting. Student’s teacher, Sara Cervantes, did not attend.

42. Parents expressed concern that Student had low self-esteem, and that she was low in all academic areas and was regressing. Mother felt Student was “playing catch up” instead of learning new concepts. Student reversed letters without realizing she was doing so; she put her shoes on the wrong feet. Student continued to resist going to school because she felt she could not do the work. Student received private tutoring outside of school, and Mother observed some improvement in reading as a result. The District team members reported Student made little progress in the resource class, except for some improvement in English language. The team recommended a “Tier 3” action plan, including continuing the “guest” special education resource class, school counselor support, additional time for interventions, and additional language development support by Ms. Jue.

43. Ms. Cervantes had a multiple subject teaching credential and a master’s degree in education. She had no specific training in special education, other than what she received during her credential program. She did not know at the beginning of the school year that Student had been diagnosed with attention deficit disorder. She delivered instruction during class in English. She was aware of the student study team interventions recommended for Student, and implemented them. Student performed at the level of an average early first-grader. She was best served by using materials at the pre-kindergarten level. Ms. Cervantes opined at hearing that, during third grade,

Student required urgent intervention. She was not performing at third grade level. She was in the first percentile for reading and math. She needed improvement staying on task, organizing her desk, and in penmanship. She needed frequent redirection, which was serious enough to impede her learning. Ms. Cervantes did not understand why Student's scores were so low, other than because Student came from a dual immersion program and was in the first year of the English-only program. She did not refer Student for special education assessments. If she suspected a child had a disability, her practice was to talk to the school psychologist, principal and parent to see what should happen next. In Student's case, Ms. Cervantes did not suspect during the early part of the 2015-2016 school year Student had a disability requiring assessments for eligibility.

44. District staff met to discuss Student's progress in the latter half of the fall 2015 semester. Parents were not included in the meeting. Ms. Morales, Ms. Cervantes, Ms. Jue and Ms. Ramos agreed Student was not making as much progress as they had hoped for. Ms. Cervantes did not see improvement in Student's foundational phonic skills, and changed her mind regarding the need for assessing Student. The District team members acknowledged Student's previous assessment was three years old and District needed updated information. The team decided it would offer Parents a special education assessment plan for Student at the next student study team meeting. District did not provide Parents with a proposed assessment plan before February 25, 2016.

45. On February 25, 2016, District held another student study team meeting. Mother called in the morning of the meeting to inform District she could not attend because her son was ill. Father did not attend. Instead, Student's private tutor attended the meeting. District's primary purpose for calling the meeting was to offer an assessment for special education. District did not present an assessment plan to Student's tutor at this meeting because the tutor did not hold Student's educational rights.

46. Mother, who was concerned about Student's continued lack of progress, called District's superintendent, Dr. Morales, in March 2016 and requested a meeting. She participated in a telephonic meeting with Dr. Morales during the first week of March 2016. Special education manager Nadia Villapadua participated in the telephonic meeting. Mother expressed her concerns about Student's lack of progress at school. After the meeting, at Dr. Morales' direction, Ms. Villapadua developed a comprehensive assessment plan for Student. She met with Mother on March 8, 2016, and reviewed the details of the plan with her. She also provided Mother with procedural safeguards in Spanish, prepared by the Ventura County Special Education Local Plan Area, and discussed timelines and parents' rights. Mother took the assessment plan to review with Father and her outside consultant.

47. Parents retained counsel in the spring of 2016, and did not return the signed assessment plan until November 2016, after Parents filed their due process complaint in September 2016. District followed up with Parents in May 2016 to obtain their signatures on the proposed assessment plan. Mother explained that she was considering the assessment plan but wanted to talk to her private consultant and Dr. Morales. Mother told Ms. Villapadua that Student was receiving private tutoring. District provided Parents with prior written notice in May 2016 in a letter documenting District's attempts to obtain their consent to assess Student, and attached another copy of the assessment plan and procedural safeguards. Ms. Villapadua understood Mother wanted to meet with the consultant and superintendent, prepared a packet of information for the meeting, but no meeting occurred.

2016-2017 SCHOOL YEAR

48. Student attended fourth grade in general education teacher Corina Saturnino-Wright's English-only classroom. Ms. Wright, who had a multiple subject bilingual, cross-cultural, language and academic development credential, had 20 years

of teaching experience with District. The classroom had 30 students. Ms. Wright had no training in special education. She talked to Ms. Cervantes, knew Student was involved in the student study team process, and that her performance was historically low in all areas. She knew Student was constantly not focused and off-task. Ms. Wright had a conference in the fall 2016-2017 semester with Father. She informally met with Mother later in the semester. Mother did not bring up any concerns about suspected disabilities or behavioral concerns. Ms. Wright did not see Student engage in any self-injurious behavior, although she was aware that Student had begun to do so at home. Ms. Wright was concerned about Student's academic deficiencies.

49. District amended the March 2016 assessment plan to include assistive technology in October 2016, which Parents signed and returned through their attorney on November 7, 2016. District began a comprehensive multi-disciplinary assessment of Student in November 2016, utilizing the amended version of the March 2016 assessment plan. A variety of standardized assessment tools were utilized. School psychologist Gabriela Dena Roman conducted the assessment in collaboration with other District staff, including Ms. Wright, and testified at hearing. Ms. Roman had a pupil personnel services teaching credential, a master's degree in counseling with a specialty in school psychology, worked as a bilingual educator and literacy coach and, for the past 10 years, was a school psychologist for District. She assessed Student in 2016, including reviewing her cumulative file, such that she had knowledge of Student's educational history at District. Her experience and credentials qualified her to offer expert opinions regarding Student's needs based on her assessment results.

50. The assessments were conducted primarily in Spanish by bilingual assessors. Not all assessments were completed, and the multi-disciplinary assessment report was not final at the time of hearing, although the parties agreed that the March 9, 2017 version of the assessment report was sufficiently complete for purposes of the

hearing. Student had significant deficits and needs that justified finding her eligible for special education under the categories of other health impaired and language and speech disorder. Ms. Roman opined Student had signs of intellectual disability, which she recommended should be monitored for possible eligibility. Student did not test above "well below" or "limited" in any area. She was extremely limited in Spanish broad oral language and oral comprehension. Her auditory comprehension was very low. She had extreme difficulty capturing instructional delivery. She frequently responded to questions during assessment with "I don't know" and appeared anxious. She struggled to sustain attention. She had difficulty with visual activities, remembering and sound correspondence. Student had significant difficulty with multitasking and attention. In Ms. Roman's opinion, Student did not qualify under the category of specific learning disability. She did not demonstrate the discrepancies required for eligibility under that category. Ms. Roman recommended Student should receive instruction in a self-contained classroom with a teacher who had a credential specific for language impairment. In her opinion, delivering appropriate supports and services to Student in a general education classroom would be difficult.

51. Special Education Director Ms. Sugden testified at hearing.¹District was working with the Lindamood-Bell Learning Processes Program, a learning approach to help students with reading and other learning issues, based in Santa Barbara, California

¹Student's IEP team met at least twice during this hearing to review assessments, and considered District's multi-disciplinary assessment report based on information it had. The parties in their post-closing briefs stipulated that after the last day of hearing, the IEP team found Student eligible for special education under the eligibility categories of other health impairment and speech and language.

to provide contracted services as a non-public agency for District students on District campuses. However, neither party offered any evidence that, at the time of hearing, District had offered Student Lindamood-Bell services in any area of need.

52. District's regular school year consisted of 180 school days, or 36 weeks. School was in session from the middle of August until the middle of June during the 2013-2014, 2014-2015, and 2015-2016 regular school years.

Expert Opinions

53. Karen Schnee was a licensed speech pathologist and a certified education specialist. She had master's degrees in special education/learning reading disorders, and in communication disorders. She had worked in private practice for 16 years as a consultant and diagnostician for children and adults with specific learning disabilities and developmental delays. Prior to her private practice, she worked in private institutions as a diagnostician and speech pathologist, and as a special education teacher. She has had training and experience in administering assessments in cognition, memory, achievement, auditory processing and speech and language. She frequently attended IEP meetings and received referrals for independent educational evaluations from school districts, parents and special education attorneys. Ms. Schnee was qualified to offer expert opinions on Student's behalf.

54. Ms. Schnee assessed Student in February 2017, when Student was 10 years old. She reviewed Student's cumulative file including Mr. Tobey's 2013 assessment; District's recent multidisciplinary assessment reports; interviewed Mother; and administered selected assessment tools to supplement District's testing for a more thorough picture of Student's needs. Ms. Schnee reported her findings in a report dated March 1, 2017. At the time she testified, she did not know that District had recently found Student eligible for special education under the eligibility categories of other health impaired and speech and language.

55. Ms. Schnee concluded that the nature and extent of Student's educational challenges were not secondary to English being her second language, as District staff had concluded over the years. Instead, Ms. Schnee opined Student's challenges were secondary to severe cognitive and language processing disorders, unrelated to a diagnosis of attention deficit disorder, impacting her ability to access the core curriculum at school. She was critical of District's conclusions over the years that Student could access the curriculum in a general education classroom, because Student's records showed she struggled as early as kindergarten. In her opinion, if District had done a language assessment in 2013 or thereafter, including a thorough questionnaire of Mother's concerns at that time, District should have discovered that Student's language development in Spanish was abnormal.

56. Ms. Schnee opined that Student's historic disabilities had a "disastrous" impact on her over the years because of the lack of appropriate interventions. Sitting in a general education classroom caused her to become frustrated and tired because she could not process the information she was receiving. Student had extremely severe phonological processing problems, could not decode, had visual perceptive processing issues, and had difficulty with numbers.

57. Ms. Schnee opined Student should have been eligible for special education in kindergarten based on testing results at that time. Student was one of the most impacted children she had ever assessed at Student's age. Enough red flags existed in the 2013 assessment that District should have looked at whether Student was eligible as other health impaired when it concluded she did not have a specific learning disability. District should have considered Mother's reports that Student had been diagnosed with attention deficit disorder and followed up by assessing Student under that eligibility category. In her opinion, the fact that District was using the highest level of tiered interventions, including making Student a "guest" in the special education

resource support program, should have been a red flag for District to consider finding her eligible for special education.

58. Ms. Schnee offered several recommendations: 60 minutes daily of speech therapy by a licensed speech therapist; intensive reading and math instruction in programs such as Lindamood-Bell Learning Processes Program or On Cloud 9, the intensity and duration of which should be determined by screening by Lindamood-Bell; an occupational therapy evaluation with follow up services to address fine-motor development weaknesses; direct academic instruction one hour daily by a special education teacher using a graphic organizer to stimulate sentence construction; and a physical therapy evaluation with follow- up services to address gross motor development weaknesses. Ms. Schnee opined that Student should receive compensatory services to address District's failure to identify and treat Student's language disorder. She was unable at hearing to specifically opine on the type or duration of either compensatory services or the Lindamood-Bell type services, due to the severity of Student's needs. In her opinion, she was not certain that Student could ever recover to grade level even with the interventions and programming she recommended. Ms. Schnee charged Parents through their attorney \$4,050 for her evaluation of Student.

59. Ms. Villapadua, Ms. Roman, and District speech therapist Diane Dominguez concurred at hearing with Ms. Schnee that Student was eligible for special education, that she required an IEP and specialized academic instruction, and that she had limited language ability requiring speech and language therapy. None of the four professionals disagreed as to the general nature of Student's disabilities, or that her difficulties were historic rather than recently developed. Her levels of performance were consistently 99.9 percent below those of children at the same age. None of the professionals disagreed that Student should be eligible for special education and

required intensive interventions and services to help her make the appropriate level of progress toward her IEP goals when developed.

60. Ms. Villapadua opined Student, at the time of hearing, was at kindergarten level in reading, and first grade in math. She had auditory memory deficits. Ms. Villapadua was unable to opine on how many years Student would need to reach grade level in her academic studies. Ms. Villapadua opined that bilingual students like Student should be assessed in Spanish, and that the 2016-2017 assessments were appropriately conducted in Student's native language where necessary. She also opined that providing Student compensatory hours after school, given Student's limited vitality, mental alertness and stamina, would be too much for her. She agreed with Ms. Schnee that District could provide a blended program, which could include providing compensatory education hours during the school day.

61. Ms. Dominguez opined, based upon her 2016 speech and language assessment results, Student would benefit from daily reading intervention, and speech and language services during the summer. Student was moderate to severe in auditory comprehension. Ms. Dominguez disagreed with Ms. Schnee's recommendation of speech and language therapy 60 minutes daily. In her opinion, Student could make progress toward her goals with speech and language services three times a week for 30 minute sessions. Pulling her out of class every day for one hour, as recommended by Ms. Schnee, would deprive Student of participation in other academic and social activities and would be too much for Student given her attention deficits and other needs. While Ms. Schnee's overall testimony was credible, her estimate of five hours a week for speech and language services was less persuasive than Ms. Dominguez's recommendations, considering Student's significant learning deficits, lack of attention and memory deficits. However, neither witness testified unequivocally whether any of

the time they were recommending was for the regular school day, or as compensatory services.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA²

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)³et 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 free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are

²Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

³All citations to the Code of Federal Regulations are to the 2006 edition.

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 Dist. 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.) In a recent unanimous decision, the United States Supreme Court also declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court's analysis, and clarified FAPE as "markedly more demanding than the 'merely more than the de minimus test'..." (*Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. ____ [137 S. Ct. 988] (2017 WL 1066260)) (*Endrew*). The Supreme Court in *Endrew* stated that school districts needed to "offer a cogent and responsive explanation for

their decisions...” and articulated FAPE as that which is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstance.” *Id.*

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).)

5. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here Student is the filing party and therefore bears the burden of proof.

THRESHOLD ISSUE: STATUTE OF LIMITATIONS

6. Student contends the facts support a finding that exceptions to the two-year statute of limitations apply, relating back to November 2012. District contends Parents knew or should have known they had a claim against District in May 2013, after the May 21, 2013 IEP meeting and Mr. Tobey’s assessment. District argues Student should have filed a claim no later than two years after May 2013. Because Student did not file until September 22, 2016, District argues her claims before September 22, 2014, were time-barred.

Legal Authority

7. The statute of limitations in California is two years, consistent with federal law. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) A request for a due

process hearing “shall 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.” (*Id.*) The statute of limitations for due process complaints precludes claims that occurred more than two years before the date of filing the request for due process. (Ed. Code § 56505(l); 20 U.S.C. § 1415(f)(3)(c); *M.M. v. Lafayette School District, et al* (9th Cir. 2014) 767 F.3d 842, 859 (*M.M.*))

8. In *G.L. v. Ligonier Valley School Dist. Authority* (3rd Cir.2015) 802 F.3d 601 (*G.L.*) the Court concluded that sections 1415(f)(3)(C) and 1415(b)(6)(B) of the IDEA function together “as a filing deadline that runs from the date of reasonable discovery, not as a cap on a child’s remedy for timely-filed claims that happen to date back more than two years before the complaint is filed.” (*G.L., supra*, 802 F.3d at p. 616.) The Court explained that the IDEA’s statute of limitations does, practically, curtail remedies in some cases: once a violation of the IDEA is reasonably discovered by a parent, any claim for that violation, however far back it dates, must be filed within two years of the “knew or should have known” date; “[i]f it is not, all but the most recent two years before the filing of the complaint will be time-barred; but if it is timely filed, then, upon a finding of liability, the entire period of the violation should be remedied.” (*Id.* at pp. 620-621.) The Ninth Circuit Court of Appeals recently affirmed the “knew or should have known” approach in *G.L. (Avila v. Spokane School District 81* (9th Cir. 2017) 852 F.3d 936, 2017 WL 1173700.)

9. A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate. (*M.D. v. Southington Board of Education* (2d Cir. 2003) 334 F.3d 217, 221.) In other words, the statute of limitations begins to run when a party is aware of the facts that would support a legal claim, not when a party learns that it has a legal claim. (See *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039.)

10. The “knowledge of facts” requirement does not demand that a party know the specific legal theory or even the specific facts of the relevant claim. Instead, the party must have known or reasonably should have known the facts underlying the supposed disability and their IDEA rights. (*Miller v. San Mateo-Foster City Unified School Dist.* (N.D. Cal. 2004) 318 F.Supp.2d 851, 861 [citing *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111]).

11. In *Miller, supra*, 318 F.Supp.2d at p. 862, the child’s parents became aware that the child may have a specific learning disability, but that the school district assessed him otherwise. The Court concluded the parents knew or should have known the facts that would have given them the required “suspicion of wrongdoing.” The Court explained the IDEA does not contain any provision requiring educational authorities or school districts to apprise parents of what types of disabilities trigger the school district's requirement to provide a FAPE.

12. Title 20 United States Code section 1415(f)(3)(D) and Education Code section 56505, subdivision (l), establish exceptions to the statute of limitations in cases where the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational agency withheld information from the parent that was statutorily required to be provided to the parent. (*M.M., supra*, 767 F.3d at p. 859.)

13. A notice of procedural safeguards must be given by a school district to a parent of a child with a disability a minimum of once a year and or: 1) upon initial referral for assessment or parent request for assessment; 2) upon filing a request for a due process hearing; or 3) upon parent request. (20 U.S.C. § 1415(d) (1)(A); 34 C.F.R. § 300.504(a).)

14. Prior written notice must be given when the school district proposes or refuses to initiate a change in the identification, assessment, or educational placement of a child with special needs or the provision of a FAPE. (20 USC §1415(b)(3) & (4); §1415(c)(1), §1414(b)(1); 34 CFR §300.503; Educ. Code §§ 56329 and 56506(a).)

15. The procedures relating to prior written notice "are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions." (*C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 70.) Prior written notice must be sent "a reasonable time" before the public agency proposes or refuses to initiate or change the identification, evaluation, educational placement or provision of FAPE to the child. (34 C.F.R. § 300.503(a)(1); Ed. Code, § 56500.4, subd. (a).) This is to ensure that "parents have enough time to assess the change and voice their objections or otherwise respond before the change takes effect." (*Letter to Chandler*, 59 IDELR 110 (OSEP April 26, 2012).)

16. A prior written notice must include (1) a description of the action proposed or refused by the agency; (2) an explanation for the action; (3) a description of each evaluation procedure, assessment, record, or report which is the basis of the action; (4) a statement that the parents of an individual with exceptional needs have protection under the procedural safeguards, and the means by which a copy of the procedural safeguards can be obtained; (5) sources for parents to contact to obtain assistance; (6) a description of the other options the IEP considered and the reasons why those options were rejected; and (7) a description of other factors relevant to the proposal or refusal of the agency. (20 U.S.C. 1415(b)(3) and (c)(1); 34 C.F.R. § 300.503(a) and (b); Ed. Code, § 56500.4, subd. (a) and (b); see also Ed. Code, § 56500.5 [requiring "reasonable written prior notice" that a student "will be graduating from high school with a regular high school diploma . . ."].) The notice is required even if the change is being proposed by the parent. (*Letter to Lieberman*, 52 IDELR 18 (OSEP 2008).)

17. When a violation of such procedures does not actually impair parental knowledge or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*C.H. v. Cape Henlopen School Dist.*, *supra*, 606 F.3d at p. 70.)

Analysis

CLAIMS THROUGH NOVEMBER 12, 2013

18. Mother claimed at hearing she did not know in 2013 in what areas District was assessing Student, and did not understand that District did not assess in the areas of concern she expressed, including autism, ADHD, and fine motor. District did not provide Parents with their procedural rights or prior written notice in January 2013 explaining why it was not assessing Student in autism, ADHD, or fine motor. However, Parents received and signed the January 2013 proposed assessment plan in Spanish and it identified the areas in which District intended to assess Student. Mother offered no credible or persuasive testimony that she questioned the content of the assessment plan at any time before the May 2013 IEP meeting, or asked for additional testing between January 2013 and May 2013. She knew or had reason to know in what areas District planned to assess, Parents consented to the proposed assessments, and District did nothing to prevent Parents from challenging the January 2013 assessment plan or asking for additional assessments.

19. Mother attended the May 2013 IEP meeting, had assistance from a Spanish interpreter, participated in discussions about the assessment results, had the opportunity to ask questions, and acknowledged on the English version of the IEP document her receipt of procedural safeguards. Mother learned for the first time at the May 2013 IEP meeting that District did not find Student eligible for special education, including finding needs in any of the areas in which she voiced concern to Ms. Martinez in late 2012. She understood from the school principal that, based upon Student's young age, the IEP team recommended interventions through student study team

meetings, instead of special education eligibility, to allow Student time to mature. Although Mother denied at hearing that District informed her of her right to an independent assessment, her testimony on this issue was not entirely credible. First, Mother was understandably confused during her testimony about events that occurred almost four years before hearing. She frequently referred to "the girls," meaning Student and her twin sister, during her testimony and had to be redirected to focus only on Student. Mother's testimony regarding what she knew about Student's claims back in spring 2013 suggested she was not always clear regarding which daughter she was referring to at this hearing. Although no one offered into evidence a copy of the procedural safeguards provided to Mother at the May 2013 meeting, Mr. Tobey credibly testified District gave them to Parents, and Mother admitted she received them, and signed her initials acknowledging her receipt, notwithstanding her claim at hearing that the interpreter did not accurately interpret the meeting. Mother knew or should have known at the May 2013 IEP that she had procedural rights, including the right to pursue an independent assessment or a due process hearing, if she disagreed with District's decision regarding eligibility or the appropriateness of the multi-disciplinary assessment.

20. Student offered no persuasive evidence that either exception applied to the statute of limitations for claims arising on or before May 13, 2013. Student did not prove that anything anyone from District said to Mother at the IEP meeting would have prevented Parents from pursuing their rights if they disagreed with the assessment results or the IEP team's decision on eligibility. Student's claims on and before May 13, 2013, are therefore time-barred.

21. Mother communicated her concerns about Student's progress with Student's teachers at the beginning of the 2013-2014 school year. However, she knew or should have known from May 2013 until November 13, 2013 that she had the right to challenge District's May 2013 assessment and IEP findings. Student offered no evidence

of any procedural violations or misrepresentations by District from May 2013 until November 13, 2013 that would have invoked either exception to the statute of limitations. Student did not prove District prevented Parents from pursuing their claims, known to them in May 2013, until the November 13, 2013 student study team meeting. Claims between May 2013 and November 13, 2013 are also time-barred.

CLAIMS FROM NOVEMBER 13, 2013, THROUGH SEPTEMBER 22, 2014

22. District's conduct at the November 13, 2013 meeting, and thereafter, prevented Parents from pursuing legal rights, and therefore Student's claims are not time barred from and after November 13, 2013. School psychologist Ms. Morales credibly testified that one of the reasons the student study team met on November 13, 2013, was because at the beginning of the 2013-2014 school year, Mother verbally expressed her continued concerns to first grade teacher Ms. Rodriguez about Student, including that Student had a diagnosis of attention deficit disorder. Mother asked for another assessment. Mother did not think Student's continued struggles and her ineligibility for special education supports and services was logical. Handwritten notes included in the study team report document Mother's request for an assessment. Ms. Rodriguez reported to the team that Student continued to perform low in all academic areas. She had difficulty retaining information, which Ms. Rodriguez opined might be a disability. Student's scores on testing during the first semester were well below average. She scored very low when asked to identify high frequency words and in fluency.

23. However, in response to Mother's verbal request for an assessment, Ms. Morales told Mother at the meeting that assessing Student at that time was too soon after the kindergarten assessment. Elm Street principal Ms. Ramos told Mother that District staff were providing help at school, would give her more support, would take her out of first grade and send her to a kindergarten educational team to see if she could learn, and would modify her work by giving her kindergarten work. Mother would

take her to the library to work on her homework. Mother credibly and persuasively testified that Ms. Ramos convinced Parents that Student would be “labeled” as “disabled” if District assessed her. The student study team notes reflect in a handwritten note that Parents withdrew their request for assessment at the meeting.

24. Mother’s testimony established that Parents relied on Ms. Ramos’s and Ms. Morales’s representations, causing them to believe District had resolved their concerns with the solutions offered at that meeting. No one rebutted Mother’s testimony that Ms. Ramos warned Parents that assessing Student would effectively stigmatize her at school. Notwithstanding that they had received procedural safeguards in May 2013, Parents reasonably relied on those misrepresentations at the November 13, 2013 meeting, and as a result they withdrew their assessment request.

25. District also omitted important and valuable information for Parents by failing to provide Parents with prior written notice at or after the November 2013 student study team meeting in response to Parents’ requests for an assessment. District did not inform Parents in writing, or in the student study team notes, that instead of asking District for another assessment, they continued to have the right to challenge Mr. Tobey’s assessment by asking for an independent educational evaluation. Nor did District inform Parents that they could challenge, through due process, the findings of the May 2013 IEP team, or the November 2013 student study team’s decision that Student did not need an assessment for special education. No one explained parental rights under the IDEA to parents, in part because none of the student study team members, except school psychologist Ms. Morales, had any training in special education procedures.

26. District’s misrepresentations that the problem had been solved through student study team interventions, and its failure to give prior written notice or procedural safeguards, caused Parents to withdraw their request for assessments and

not pursue claims and rights on Student's behalf until at least February or March 2016, when Mother contacted a private consultant for help. District's misrepresentations in November 2013 met one of the two exceptions to the statute of limitations. Its failure to provide prior written notice or another copy of procedural safeguards met the second exception.

27. Student's Issues 1 through 4, dating back to November 13, 2013, are not barred by the statute of limitations.

ISSUE 1: CHILD FIND AND DUTY TO ASSESS

28. Student contends District failed its "child find" obligation by failing to appropriately assess her and failing to find her eligible for special education under the eligibility categories of other health impairment, language or speech disorder, or specific learning disability during the relevant statutory period. District contends it offered to assess in March 2016 and Parents declined to consent until after they filed for due process, arguing her claims should therefore be limited to before March 2016.

Legal Authority

29. The legal conclusions reached under the discussion of the statute of limitations are incorporated by reference.

30. Under the IDEA and California law, 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); Ed. Code, § 56300 et seq.) 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.)

31. A local educational agency shall provide for the identification and assessment of the exceptional needs of an individual, and the planning of an instructional program to meet the assessed needs. Identification procedures shall include systematic methods of utilizing referrals of pupils from teachers, parents, agencies, appropriate professional persons, and from other members of the public. Identification procedures shall be coordinated with school site procedures for referral of pupils with needs that cannot be met with modification of the regular instructional program. (Ed. Code § 56302.)

32. Before any action is taken with respect to the initial placement of an individual with exceptional needs in special education instruction, an individual assessment of the pupil's educational needs shall be conducted, by qualified persons in accordance with testing requirements set forth in Education Code section 56320 subds. (a) through (i). (Ed. Code §§ 56320 & 56322.)

33. All referrals for special education and related services shall initiate the assessment process and shall be documented. (20 C.C.R. § 3021.) A local educational agency must assess a special education student in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304 (c)(4); Ed. Code, § 56320, subd. (f).) To assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under the IDEA and state law. (20 U.S.C. § 1414(b)(l); Ed. Code, § 56321, subd. (a).) The assessment plan must be understandable to the student, explain the assessments that the district proposes to conduct, and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(l)-(4).) The proposed written assessment plan must contain a description of any recent assessments that were conducted, including any available independent assessments and any assessment

information the parent requests to be considered, information about the student's primary language and information about the student's language proficiency. (Cal. Code Regs., tit. 5, § 3022.)

34. A pupil 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.)

35. The parents or guardians of a pupil who has been referred for initial assessment, or of a pupil identified as an individual with exceptional needs, shall be afforded an opportunity to participate in meetings with respect to the identification, assessment, and educational placement and the provision of a FAPE. (34 CFR § 300.501; Ed. Code § 56304.)

Analysis

KINDERGARTEN THROUGH NOVEMBER 2013

36. The statute of limitations barred this claim before November 2013. The statutory bar discussed above precludes any entitlement by Parents or Student to any remedies for that time. The procedural violations that existed prior to November 2013 are discussed here solely as background to the remedies ordered below.

37. Student met her burden of proof that District never assessed her in *all* areas of suspected need before she filed her complaint. Although outside the statutory period, District did not assess Student in all areas of suspected need in spring 2013. Mr. Tobey designed the referral questions without considering that Mother had expressed concern about attention deficit disorder, autism, and fine motor skills. He administered assessments looking only at specific learning disability and emotional disturbance as possible bases for eligibility, disregarding the referral data on the COST form. He also considered whether circumstances at home and outside of school impacted Student at school. Although District assessed in academics, it did not assess in any of the areas of

Mother's concern. Ms. Schnee credibly opined that Student's deficits as she saw them in 2017 were historic and profound, and had District fully assessed Student in all areas of need in May 2013, Student should have been found eligible, even though she was young, based upon developmental factors.

38. The evidence established that, while Student was in kindergarten and during the first semester of first grade, District procedurally violated the IDEA by failing to assess her in all areas of suspected need. Because of its failure, District deprived Parents of all necessary information for the decision-making process at the May 2013 IEP meeting. District's failure to fully assess in May 2013 also deprived Student of educational benefit and denied her a FAPE because she did not receive, during the fall semester of first grade, educational instruction in an appropriate setting from a special education teacher, or needed services such as speech and language therapy.

39. However, District complied with the statutory "child find" obligation to actively and systematically seek out individuals with special needs. District timely responded to Mother's verbal request for an assessment, referred her request to the COST team, held a student study team meeting in December 2012 with Parents, generated an assessment plan which Mother signed, and assessed Student in the spring of 2013. It held an IEP meeting in May 2013 and provided Parents with the appropriate procedural safeguards. District met its statutory "child find" duties as contemplated under Education Code sections 56300 and 56301.

NOVEMBER 2013 THROUGH SEPTEMBER 2016

40. From November 2013 until at least September 22, 2016, District procedurally violated the IDEA by failing to refer Student for assessments and failing to assess Student in all areas of suspected need. Student proved all three prongs of the analysis for procedural violations applied.

41. First, under *Rowley, supra*, 458 U.S. at p. 201, and *Endrew, supra*, 137 S.Ct. at p. 999, District's failure to assess Student denied her a FAPE and any progress appropriate based upon her circumstance. District should have at least reassessed Student for eligibility from and after November 2013, based on her lack of any appropriate academic progress, Parents' report that Student had been diagnosed with attention deficit disorder, and Mother's concerns of possible autism and deficits in fine motor skills. Ms. Morales compared Student to a blooming flower, instead of acknowledging Student had increasing needs and deficits that should have been assessed. District should have also assessed Student's language and speech disorders based upon her consistent low scores in vocabulary and poor language development, in the first, second and third grades. She consistently had low memory retention, struggled with numbers and spelling, but District did not assess her in academics. She struggled with fine motor skills, such as holding a pencil, but District did not consider assessing her in occupational therapy. In second grade, District acknowledged her ongoing struggles at school. District expressed concerns about her tardiness, attributing her poor performance in part to absences and lateness. The team added interventions to her program in the form of special education services as a "guest" at the end of second grade in May 2015. The student study team justified the additional interventions as an alternative to assessing Student, hoping that doing so would help Student transition successfully to an English-only program. The team, which included special education resource teacher Ms. Jue, deferred assessments with a "wait and see" mindset. Those advanced interventions, to the extent Student accessed them, did not help Student make any progress. Student was progressively falling behind, which impacted her emotionally and caused her to avoid school, because she could not keep up with her classmates. District recommended outside counseling, but did not offer to assess.

42. The evidence was overwhelming that District had enough information from November 2013 and through third grade to trigger its duty under the IDEA to reassess Student for special education eligibility. Instead, District relied instead on its practice of using the student study team process to address Student's growing needs, which proved to be disastrous for Student. While it was not unreasonable for District to try using some interventions through the student study team during first grade, the persistent reliance on the student study team process, as opposed to assessing in all areas of suspected need, denied Student a FAPE. With proper assessments, she should have been found eligible for special education as early as fall 2013. She would have received specialized academic instruction from a special education teacher in a smaller classroom. She would have received speech therapy and possibly other related services from licensed providers trained to work with children with special needs. She would have had the benefit of an IEP team knowledgeable in special education procedures to evaluate her progress, establish goals, and monitor and report on her progress. Student received none of those benefits through the time of hearing.

43. During the first grade in 2013-14, Student was performing at below basic level and needed improvement in all aspects of language arts, and three out of five areas of math. Her skills in vocabulary recognition, spelling and language were minimal. She needed improvement in homework completion. She performed relatively better when instructed in Spanish. Student's first grade teacher did not know that Student had been assessed until the November 2013 student study team meeting. No one from District considered assessing Student for special education eligibility in any of the areas of suspected need evident to the student study team, and Parents. Ms. Morales and Ms. Ramos persuaded Parents to withdraw their request for assessments at the November 2013 student study team meeting, even though Student's records included the

December 2012 COST referral which clearly noted Mother's concerns that Student had attention deficit hyperactivity disorder, autism and dyslexia.

44. During the second grade in 2014-15, Student continued to struggle. Mother attended a school board meeting during the 2014-2015 school year to express her concerns. The student study team met three times. By the end of the school year, the team had implemented interventions and supports that included providing Student with special education services in speech therapy, and resource support as a general education student. Yet, even though District considered assessing Student at the May 2015 meeting, District deferred assessing Student, instead changing her program to an English-only program. District did not start assessments of Student until 18 months later, in November 2016. Ms Schnee, Ms. Dominguez, Ms. Villapadua, and Ms. Roman credibly testified that Student had significant learning deficits in reading, writing, language processing, and fine motor, which were documented throughout Student's cumulative records, justifying the need for assessments from at least the time Student was in first grade.

45. Student's third grade teachers in 2015-16 noted Student's deficits in vowel and consonant identification, number identification, language processing, and fine motor skills; her testing scores were consistently low in most areas. The student study team created and modified tiered interventions that became more intensive as Student's deficits became more noticeable. Her deficits did not occur over a short period of time; the deficits were historic and pervasive. Ms. Cervantes was concerned at the beginning of third grade that Student performed well below expected performances levels, prompting her to talk with Ms. Morales, Ms. Jue, and Ms. Ramos about assessing Student.

46. Parents regularly asked Student's teachers and other District staff to help Student with her delays in learning before and throughout third grade. Mother

contacted the school superintendent for help in March 2016. Parents were genuinely and legitimately concerned about Student's lack of progress and regularly expressed those concerns to District staff.

47. Student's fourth grade teacher, Ms. Wright, became concerned in the fall of 2016 that Student was not making progress at school. At that point, Student was performing at early first grade level in most areas.

48. Following the reasoning in the Ninth Circuit Court of Appeals in *Timothy O. v Paso Robles Unified School Dist.*(9th Cir. 2016) 822 F.3d 1105, 1124-1125, District's failure to assess Student from and after November 2013 substantially hindered Parents ability to participate in Student's educational program, and seriously deprived Parents, Student's teachers and District staff of the information necessary to develop an appropriate educational program with appropriate supports and services for Student. The outcome of the 2016-2017 District assessments, in combination with Ms. Schnee's, Ms. Dominguez's, Ms. Wright's and Ms. Roman's assessment reports and testimony, further proves this point. District found Student eligible for special education as other health impaired based upon her attention deficit disorder, and language and speech disorder based on her significant language processing deficits. Her levels of performance were 99.9 percent below those of children at the same age. Ms. Roman, Ms. Schnee and Ms. Cervantes credibly testified, and the student study team notes reflected, that Student historically demonstrated the same types of deficits as those found in District's multidisciplinary assessments. District should have found Student eligible as far back as November 2013. Its failure to do so deprived Parents of the opportunity to participate in an informed and meaningful way in her academic program from November 2013 through the time of hearing.

49. Student met her burden of proving by the preponderance of evidence that, from November 13, 2013 through at least March 2016, when District offered

Parents an assessment plan, District procedurally violated the IDEA by 1) failing to refer Student for reassessments for special education eligibility from and after November 13, 2013, 2) declining to assess based on Parents' requests without providing appropriate procedural safeguards or prior written notice, and 3) failing follow up in attempting to have Parents sign the March 2016 assessment plan in a timely manner. The procedural violations resulted in 1) Student not being eligible for special education, 2) denied her a FAPE and the opportunity to acquire educational benefit from and after November 2013, and 3) deprived Parents of necessary information to allow them to participate in a meaningful way at an IEP meeting. Remedies will be discussed below.

ISSUES 2 AND 3: FAILURE TO OFFER STUDENT AN APPROPRIATE IEP

50. Student contends in Issue 2 that District denied a FAPE because it failed to offer Student an appropriate IEP during the statutory period that met her unique needs in academics and language. In Issue 3 Student contends District denied Student a FAPE because it failed to offer Student an IEP that was reasonably calculated to offer her educational benefit. District contends on both issues that Student demonstrated some progress through the second grade with student study team interventions, and that any liability for denial of FAPE should be limited to before March 2016 when District offered to assess Student. The two issues will be analyzed together.

52. Legal authorities and conclusions discussed in the preliminary issue and Issue 1 are incorporated by reference.

53. Whether 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 (*Adams*), citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)⁴

54. District's 2017 multidisciplinary assessment and Ms. Schnee's assessment report, which was generated after Parents filed their due process complaint, and Ms. Schnee's, Ms. Dominguez's, Ms. Wright's and Ms. Ramon's opinions revealed Student's historic educational needs and applied to what District should have known about Student's needs from November 2013 until September 22, 2016. Both Ms. Schnee's and District's assessments confirmed that Student had disabilities that historically and significantly impacted her access to her education. The 2017 assessment confirmed that Student had historic and ongoing deficits in reading, language processing, attention, fine motor and social emotional skills that impacted her ability to access her education beginning in first grade and continuing through the time of hearing. District witnesses who assessed Student in 2017 agreed that Student required an IEP with comprehensive goals and related services to address those needs, and additional assessments. Those disabilities should have qualified her for special education in 2013 under the eligibility categories of other health impairment related to her attention deficit disorder, and

⁴In *E.M. v Pajaro Valley Unified School Dist., et al.* (9th Cir. 2011) 652 F.3d 999, 1006, the Ninth Circuit Court of Appeals held that the district court erred by not considering whether a report generated three years after the due process hearing was otherwise admissible and relevant to the determination of whether the district met its obligations to the student under the IDEA several years earlier. (*E.M., supra*, 652 F.3d at p. 1006.) The holding in *E.M.* does not abrogate the general principle articulated in *Adams, supra*, 195 F.3d at p.1149, that the actions of school districts cannot be judged exclusively in hindsight.

speech and language impairment related to her language processing deficits. During this hearing, Student's IEP team found her eligible for special education. Student's needs were the same from first grade until the 2017 assessments, establishing that Student should have been found eligible for special education as early as May 2013.

55. Student met her burden of proof on Issues 2 and 3, proving by a preponderance of evidence that 1) District denied Student a FAPE by failing to offer or provide Student an IEP from November 2013 until September 22, 2016, that addressed all her unique needs in academics and language development, and 2) District failed to offer or provide an IEP that was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstance, which was known to District staff from as early the first semester of first grade.

56. District argued its liability should be limited because it had attempted since March 2016 to assess Student without receiving cooperation from Parents. The argument was not persuasive. Failed attempts to obtain consent did not abrogate District's duty to act proactively to ensure Student's needs were identified and addressed. Under *I.R. v Los Angeles Unified School Dist.* (2015) 805 F.3d 1164, District could have filed for due process at any time during spring 2016, or after, to obtain an order granting it permission to assess Student without parental consent, and it did not do so.

57. In summary, District's failure to assess Student in all areas of need at any time on or after November 13, 2013, through September 22, 2016, meant she was not eligible for special education services and supports. She did not have an IEP with goals and related services designed to address her unique needs. District deprived her of an educational benefit, as evidenced by her significant lack of progress up to the time of hearing. Additionally, District's failure to assess and develop an appropriate IEP in a timely manner deprived Parents and school staff of the opportunity to have enough

information to participate in a meaningful way to develop an appropriate educational program for Student.

ISSUE 4: PROCEDURAL VIOLATIONS

58. Student contends District procedurally violated the IDEA by a) failing to provide Parents with a copy of special education procedural safeguards; and b) failing to inform Parents of District's obligation to offer assessments or provide an assessment plan if a need for special education services was suspected. As a result, Student contends Parents were deprived of the opportunity to participate in a meaningful way in the development of Student's educational program.

59. District contended that its practice was to provide parents with information during student study team meetings, occasionally conduct those meetings in the parents' native language, or provide an interpreter, and it provided ongoing training to the school principals and assistant principals on child find and special education assessment referrals. District also contended that, although many of the general education teachers were not familiar with child find and assessment referrals, they participated in the COST referral process and student study team meetings.

Legal Authority

60. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has participated in the development of an IEP in a meaningful way when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d at p. 1036 [parent who has an

opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

61. In matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural violations impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*)). 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 to participate in the formulation process of the individualized education program." (Ed. Code, § 56505, subd. (j).)

62. Procedural violations that interfere with parental participation in the development of the IEP "undermine the very essence of the IDEA." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.) An IEP cannot address the child's unique needs if the people most familiar with the child's needs are not involved or fully informed. (*Ibid.*) A school district cannot independently develop an IEP without input or participation from the parents and other required members of the IEP team. (*Target Range, supra*, 960 F. 2nd at p. 1484.)

63. A notice of procedural safeguards must be given by a school district to a parent of a child with a disability a minimum of once a year and/or: 1) upon initial referral for assessment or parent request for assessment; 2) upon filing a request for a due process hearing; or 3) upon parent request. (20 U.S.C. § 1415(d)(1)(A); 34 C.F.R. § 300.504(a).)

Analysis

64. The legal authorities and conclusions from the preliminary issue of the statute of limitations, and Issues 1 through 3 are incorporated by reference.

65. District committed procedural violations of the IDEA by failing to provide prior written notice of its refusal at student study team meetings to assess, and failing to inform Parent of District's obligation to offer assessments or provide an assessment plan. Those violations met each of the three procedural analytical prongs discussed above.

66. For example, District's standard policy was not to proceed straight to the special education assessment process under the IDEA when requested, but instead to go through the COST referral and student study team process, using the response to intervention strategy in lieu of assessments. However, an RTI process does not replace the need for a comprehensive evaluation. A public agency must use a variety of data gathering tools and strategies even if an RTI process is used. The results of an RTI process may be one component of the information reviewed as part of the evaluation procedures. An evaluation must include a variety of assessment tools and strategies and cannot rely on any single procedure as the sole criterion for determining eligibility for special education and related services. (71 Fed. Reg. 46648 (Aug. 14, 2006).) Therefore, response to intervention is not intended to be used as a substitute for the assessment process under the IDEA.

67. Ms. Ramos's statements to Parents at the November 13, 2013 meeting, warning that Student might be stigmatized by assessments, effectively misrepresented what the IDEA requires a District to do when a Parent asks for an assessment. It also demonstrated lack of knowledge at that time by a school administrator as to the proper procedures for referring a child with a suspected disability for special education assessments, or for providing the required procedural safeguards to parents.

68. As another example, in response to Father's request to retain Student at the May 2015 student study team meeting, although team members agreed an assessment might be appropriate for Student, they recommended deferring assessing Student and to try instead a "wait and see" intervention by changing her program to an English language immersion program, with special education "guest" support. Yet, at no time during the meeting did District expressly offer to assess Student or to provide Parents with an assessment plan, giving them the opportunity to consent to assessments or reject them. District failed to clearly explain to Parents, in writing, that they had a right to request an assessment for Student at that time, and District had an obligation to provide them an explanation in writing why it declined to do so. Instead, Parents concluded they had no other option but to agree with District's proposal to "wait and see" hoping the change in program would help Student succeed in school. The student study team notes from that meeting made no reference to the subject of special education assessments, or the compromise arrangement District made with Parents.

69. The procedural violations significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE. Although Parents participated at and asked questions at student study team meetings, expressed concerns to District staff and participated in the development of the interventions, Parents' participation was not fully informed by the assessment information they should have had, had assessments been conducted. District's failure to timely offer Parents an assessment plan and pursue assessments of Student, or provide procedural safeguards, from and after November 2013, was a substantial procedural violation that deprived Parents of the opportunity to participate in a meaningful way, denied Student educational benefit, and Student a FAPE.

REMEDIES

1. Student prevailed on all issues from November 13, 2013, through September 22, 2016. Student requested several remedies in her complaint, including a finding of eligibility, compensatory education, independent educational evaluations and training of District staff. However, after the complaint was filed, District conducted multidisciplinary assessments, and Student obtained Ms. Schnee's private assessment. The parties stipulated after hearing that Student was eligible for special education. Therefore, the remedies discussed below take into consideration the evidence the parties offered at hearing, their stipulation, and their closing arguments relating to currently appropriate remedies.

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1497.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

3. Here, Student first seeks an order finding Student eligible for special education under the eligibility categories of other health impairment and speech and language impairment. The parties' stipulation renders the requested remedy moot.

4. Next, Student seeks four years of compensatory academic instruction from Lindamood-Bell or another similar program. Ms. Schnee recommended a blended program for Student, suggesting Lindamood-Bell was appropriate. Ms. Sugden testified District was in the process of contracting with Lindamood-Bell to provide services to the District. She acknowledged that a blended program for Student, incorporating compensatory educational hours with services, supports and other specialized academic instruction was feasible for Student. However, at the time of hearing, no witness credibly testified as to what was the appropriate number of hours of compensatory education for Student. Nevertheless, because the evidence unequivocally established that, during the applicable statutory period, Student was deprived of almost three years of educational benefit by District's failure to find her eligible for special education in November 2013, its failure to offer to or assess her in all areas of suspected disability between November 2013 and September 2016, and its failure to provide special education instruction, services and supports through the date Student filed her due process complaint, Student is equitably entitled to compensatory educational services to address her needs in academics.

5. Therefore, District shall fund a comprehensive independent educational evaluation of Student by a licensed educational therapist or anon public agency of Parents' choosing. The evaluator shall consider Student's academic needs both during the regular and extended school year, and during school breaks. District shall hold an IEP meeting not later than 30 calendar days after it receives the private evaluation report and recommendations, unless mutually agreed otherwise by District and Parents. The IEP team shall discuss the educational evaluation and develop an appropriate

educational program for Student considering the evaluator's recommendations, including any recommendations for educational therapy after school hours or during breaks to compensate Student for missed specialized academic instruction from November 13, 2013 until September 22, 2016. District shall also fund up to four hours at the evaluator's usual hourly rate to prepare for and attend the IEP meeting.

6. In the interim, until the assessment and IEP team meeting are completed, Student is entitled to compensatory education. Considering the evidence of Student's attentional issues and her severe learning deficits, providing hour for hour compensatory services is not practical. District shall fund a block of 72 hours, based upon three hours a week for six months, of compensatory academic instruction. These services are intended to provide Student with compensatory education until the educational evaluation is completed and the IEP team meets. The services shall be provided by a licensed educational therapist or non-public agency of Parents' choosing. The services shall be provided at a site that is convenient to Parents; if no site is available within the District's boundaries, District shall reimburse Parents for the cost of round trip transportation to the nearest location available to Student for the services based on the then current Federal rate. The block of hours may be used regardless if school is in session. The block of hours shall be available to Student through March 31, 2018. Student shall forfeit any unused hours ordered by this Decision after that date. The compensatory education hours ordered by this Decision shall not be Student's "stay put" under title 20 United States Code section 1415(j), unless the IEP team decides otherwise with parental consent. This remedy is in addition to any reasonable number of compensatory hours recommended by the independent evaluator and agreed to by the IEP team, including Parents. This remedy does not impact Student's right to challenge the resulting IEP through due process.

7. Student requests independent educational evaluations in autism, occupational therapy, physical therapy, and vision therapy based on her assertion that District never assessed Student before September 22, 2016. Student is equitably entitled to a publicly funded independent educational evaluation focused on whether she demonstrates needs attributable to autistic-like characteristics by a qualified provider chosen by Parents. District shall fund the assessment within 90 calendar days of this Decision in accordance with District policies for independent assessments. However, because District administered testing for autism in its 2016-2017 multi-disciplinary assessment, the publicly funded evaluation ordered by this Decision shall satisfy Student's right to an independent assessment in autism if she challenges District's 2016-2017 assessments.

8. Although Mother expressed concerns to Student's teachers and the student study team from and after November 2013 that Student struggled with grasping a pen and other fine motor skills, District did not assess her in occupational therapy before September 22, 2016. Accordingly, Student is equitably entitled to a publicly funded independent occupational therapy evaluation by a qualified provider chosen by Parents. District shall fund the assessment in accordance with District policies for independent assessments. District shall fund the assessment within 90 calendar days of the date of this Order, and hold an IEP meeting within 30 days after its receipt of the assessment report, unless otherwise agreed by District and Parents. The evidence was not conclusive that District assessed Student in occupational therapy in 2016-2017. If it did so, the publicly funded evaluation ordered by this Decision shall satisfy Student's right to an independent assessment in occupational therapy if she challenges District's 2016-2017 occupational therapy assessment. This remedy does not impact Student's right to challenge the resulting IEP through due process.

9. Student seeks an independent educational evaluation regarding vision therapy. Student did not meet her burden of proof. She offered no credible expert testimony or other evidence that Student exhibited deficits in vision before September 22, 2016, that should have prompted District to assess in that area during the statutory period. The student study team members recommended Parents have Student medically evaluated in vision based on Mother's report at the September 2014 student study team meeting. Student offered no evidence that the condition impacted her at school. Ms. Roman noted at hearing that Student failed a vision exam, but did not opine that vision was a historic area of need based upon her review of Student's cumulative records. Ms. Schnee's opinions regarding vision therapy were equivocal, rendering them not persuasive as to the issues in this matter. Student is not entitled to an independent educational evaluation at public expense in vision as a remedy for claims in this matter.

10. Similarly, Student offered no evidence or expert testimony that supports a finding that District should have assessed Student in physical therapy before September 22, 2016. Student is not entitled to an independent educational evaluation at public expense in physical therapy as a remedy for the claims raised in this matter.

11. Next, Ms. Schnee and Ms. Dominguez agreed, and the evidence established, Student required speech and language therapy. Student had significant and historic language processing and memory issues. She required extensive interventions and supports to help her gradually acquire the language skills she had not received from first grade until September 2016. But, Ms. Schnee's recommendation of speech therapy 60 minutes daily five days a week, when considered in the context of Student's disabilities and unique needs, including what would be a far more intensive academic program than she had previously received, was excessive. Ms. Schnee's testimony and recommendations in her report were not clear as to whether her recommendations were focused on Student's daily program at school, or for compensatory purposes, or both.

Ms. Dominguez's recommendation of 30 minutes two to three times a week was more plausible for Student's daily academic program given her unique needs. However, Ms. Dominguez's testimony was not clear as to whether she recommended those services as part of Student's IEP, or as compensatory services, or both.

12. Based on the evidence of Student's delays in language development, her attention span, and her memory deficits, Student is entitled to publicly-funded compensatory services in speech and language. Student received some speech therapy during second grade although neither party offered evidence as to the details of that service or for how long it was provided. Considering Ms. Schnee's recommendation of five hours a week of speech therapy, and Ms. Dominguez's recommendation of 30 minutes two or three times a week, Student is equitably entitled to a block of 120 hours of speech and language therapy, based upon 60 minutes a week for 40 weeks a year, including four weeks for summer, from November 13, 2013 until September 22, 2016, when District failed to assess Student. The services shall be provided by a nonpublic agency or licensed speech therapist chosen by Parents, focusing on Student's IEP goals developed by her IEP team. The service provider shall determine whether the compensatory services will be delivered individually or in a small group setting, based on Student's IEP goals. District shall reimburse Parents for the cost of round trip transportation to the nearest location available to Student for the services based on the then current Federal rate. The compensatory services may be used regardless of whether school is in session, including during breaks and summer. The block of hours shall be available to Student through December 31, 2019. Student shall forfeit any unused hours after that date.

13. Because District failed several times to assess Student in speech and language development, and based on Student's notable language deficits during the

statutory period, Parents are equitably entitled to reimbursement for Ms. Schnee's assessment in an amount not to exceed \$4,050.

14. In addition, staff training is an appropriate compensatory remedy under these facts. The IDEA does not require compensatory education services to be awarded directly to a student. Staff training can be an appropriate compensatory remedy, and is appropriate in this case. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025,1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Appropriate relief considering the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Ibid.* Also, e.g., *Student v. Reed Union School Dist.*, (Cal. SEA 2008) Cal. Ofc. Admin. Hrngs. Case No. 2008080580] [requiring training on predetermination and parental participation in IEP's]; *Student v. San Diego Unified School Dist.* (Cal. SEA 2005) 42 IDELR 249 [105 LRP 5069] [requiring training regarding pupil's medical condition and unique needs].)

15. District acknowledged that it trains school principals and vice principals in special education referrals. But it also admitted that general education teaching staff did not receive training, but instead used the COST and student study team process to address children who needed help.

16. Student's kindergarten, first, second, third and fourth grade general education teachers had no District training on the appropriate procedures under the IDEA for referring a child who is suspected of having a disability that may qualify that child for special education services. Although this occurred prior to the statutory period, District staff at Juan L. Soria School did not directly commence assessments of Student when Mother expressed concerns. Instead, they first met privately as part of a COST

team, and then held a student study team meeting to discuss whether to assess. They did not assist Mother in putting her request in writing. Mr. Tobey's assessment excluded areas of concern voiced by Mother, and documented by Ms. Martinez. The May 2013 IEP team did not fully explain, if at all, to Parents why they excluded areas of concern Mother reported to Ms. Martinez.

17. Testimony from Elm school principal Ms. Ramos and school psychologist Ms. Morales demonstrated they also did not understand the appropriate procedural requirements under the IDEA for referring children for special education assessments. District staff persuaded Parents to withdraw their request for assessments in November 2013, claiming assessing was too soon and would stigmatize Student. They neglected to provide Parents with procedural rights and prior written notice after doing so. In May 2015, the student study team deferred assessments, and instead made a change in Student's program, with a "wait and see" mindset. Several of District's witnesses confirmed that District's standard process when a parent asked for an assessment, particularly of a child as young as Student was in 2013, was to refer the request, whether verbal or in writing, to the COST team, which then determined without any parental participation whether to hold a student study team to discuss a possible referral for assessment. No one assisted Parents in documenting their assessment requests in writing, as required by the IDEA.

18. While some early intervention for Student before another assessment may have been appropriate after her initial assessment in kindergarten, the District did not procedurally comply with the IDEA when Parents asked for another assessment in November 2013. Additionally, District staff relied on responses to intervention over the span of seven student study team meetings, instead of assessing Student after she consistently failed to make any notable progress.

19. Therefore, to ensure that all students and parents within District receive the benefits contemplated under the IDEA, staff training in special education and IDEA procedures, including the proper process for referral for assessments and child find obligations is an appropriate remedy.

ORDER

1. Student is entitled to no remedies for Student's claims before November 13, 2013 because they are time-barred. Therefore those claims are dismissed.

2. District shall, within 120 days of this Decision, fund a comprehensive independent educational evaluation of Student by a licensed educational therapist or comparable agency of Parents' choosing. The assessor shall evaluate Student's academic needs at school and determine a reasonable number of compensatory hours needed to assist her in making progress toward grade level, based on her claims from November 2013 until September 22, 2016, when she received no special education instruction. District shall hold an IEP meeting not later than 30 calendar days after it receives the private evaluation report and recommendations, unless mutually agreed otherwise by District and Parents. The IEP team shall discuss the evaluation and, considering the evaluator's recommendations, develop an appropriate educational program, including a reasonable number of compensatory hours, for Student. District shall fund up to four hours at the evaluator's usual hourly rate to prepare for and attend the IEP meeting.

3. District shall fund a block of 72 hours, based upon three hours a week for six months, of compensatory academic instruction. The services shall be provided by a licensed educational therapist or non-public agency of Parents' choosing. The services shall be provided at a site that is convenient to Parents; if no site is available within the District's boundaries, District shall reimburse Parents for the cost of round trip transportation to the nearest location available to Student for the services based on the

then current Federal rate. The block of hours may be used regardless if school is in session. The block of hours shall be available to Student through March 31, 2018. Student shall forfeit any unused hours after that date. The compensatory education hours shall not be Student's "stay put" under title 20 United States Code section 1415(j), unless the IEP team decides otherwise with parental consent. This remedy is in addition to any reasonable number of compensatory hours recommended by the independent evaluator and agreed to by the IEP team, including Parents. This remedy does not impact Student's right to challenge the resulting IEP through due process.

4. District shall within 30 days of this Decision fund independent educational evaluations in autism, and occupational therapy, including fine and gross motor, by qualified providers of Parents' choosing. District shall hold an IEP meeting not later than 30 calendar days after it receives the last of the two assessment reports and recommendations, unless mutually agreed otherwise by District and Parents, to discuss the evaluations and incorporate agreed upon recommended services into Student's IEP. These independent evaluations shall satisfy Student's right to independent evaluations if Student challenges District's 2016-2017 multidisciplinary assessments of Student in the areas of autism and occupational therapy.

5. District shall reimburse Parents within 45 days of this Decision, in an amount not to exceed \$4,050, for the cost of Karen Schnee's January 2017 independent evaluation. If Parents have not paid Ms. Schnee directly, District may reimburse Parents through their attorneys upon receipt of proof of payment to Ms. Schnee.

6. District shall fund a block of 120 hours of speech and language therapy. The services shall be provided by a nonpublic agency or licensed speech therapist chosen by Parents, focusing on Student's IEP goals developed by her IEP team. The service provider shall determine whether the compensatory services should be delivered individually or in a small group setting, based on Student's IEP goals. The compensatory

services may be used regardless of whether school is in session, including during breaks and summer. The block of hours shall be available to Student through December 31, 2019. Student shall forfeit any unused hours after that date.

7. District shall, no later than two months after the start of the 2017-2018 school year, provide six hours of training to its staff at Elm Elementary School and Juan L. Soria School. Trainees shall include all general education teaching staff and paraprofessionals or aides, student study team members, school administrators including principals and vice principals, service providers including school psychologists, occupational and speech and language therapists, and any other staff who work with parents and students, regardless of eligibility, on students' educational programs. The training shall focus on the general principles of the IDEA, including child find procedures, the special education assessment process under the IDEA, the statutory requirements for providing parents with prior written notice and procedural, safeguards, and the rights of parents to participate in a meaningful way in developing a child's educational program during the assessment process and at IEP meetings including determining whether the child is eligible for special education. The training shall be provided by qualified professionals who are either employed by or contracted with the Ventura County Special Educational Local Plan Area, or a private provider selected by District. This Order does not preclude District from offering this training to staff at other District schools.

8. All other claims for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on

each issue heard and decided. Here, Student was the prevailing party on all issues.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: May 25, 2017

/s/

ADRIENNE L. KRIKORIAN

Administrative Law Judge

Office of Administrative Hearings