

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

VISTA UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017030926

DECISION

Parent on behalf of Student filed a Request for Due Process Hearing with the Office of Administrative Hearings, State of California, on March 15, 2017, naming Vista Unified School District. On May 1, 2017, OAH granted a continuance of the due process hearing for good cause.

Administrative Law Judge Tara Doss heard this matter in Vista, California, on August 22, 2017. Ashok Pathi, Attorney at Law, represented Student. Parent attended on behalf of Student. Sarah Sutherland and Kevin Fannan, Attorneys at Law, represented District. Mayra Helguera, Executive Director of Special Education, attended on behalf of District.

OAH granted a continuance to September 1, 2017, to allow the parties to file written closing briefs. On September 1, 2017, the parties timely submitted their final written closing briefs, the record was closed, and the matter submitted for decision.

ISSUE¹

Was Student denied a free appropriate public education from March 15, 2015 to March 15, 2017, when District failed to appropriately assess Student in all areas of suspected disability and educational need?

SUMMARY OF DECISION

Student proved District denied him a FAPE when it failed to appropriately assess him from January 10, 2016 to March 15, 2017, in the areas of intellectual development, language/speech communication development, motor development, social/emotional, adaptive/behavior, and other health impairment. Specifically, District failed to conduct an appropriate psychoeducational evaluation of Student pursuant to the assessment plan Parent consented to on January 10, 2016, and in compliance with IDEA evaluation requirements. District also failed to conduct an appropriate speech and language evaluation in compliance with IDEA evaluation requirements. District's failure to conduct appropriate assessments of Student deprived the IEP team of sufficient information to make an informed determination regarding Student's special education eligibility, program, and services; which as a result, impeded Student's right to a FAPE and significantly impeded Parent's ability to participate in the IEP and decision-making process regarding the provision of FAPE to Student.

¹ Student withdrew all other issues on the record during the prehearing conference. The single issue remaining has been rephrased for clarity without changing the substance of the issue. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

Student did not prove District failed to appropriately assess him during the time period from March 15, 2015 to January 10, 2016. There was no evidence that triggered District's duty to reevaluate Student during this time period. There was no evidence that conditions warranted a reevaluation or that Parent or any of Student's teachers requested a reevaluation. There was also no evidence that established Student had an area of suspected disability District failed to assess during this time period. District did not have a duty to assess Student until January 10, 2016, when Parent signed the assessment plan in preparation for the March 7, 2016 triennial IEP.

FACTUAL FINDINGS

1. Student was 13 years old and in the eighth grade at the time of the hearing. He resided with his parents within District during all relevant time periods.

2. Student was eligible for special education under the category of specific learning disability. He had a severe discrepancy between intellectual ability and achievement in the areas of reading comprehension, written expression, and basic reading skills. The discrepancy was a result of processing disorders in attention and cognitive ability.

3. Student initially qualified for special education, while in kindergarten, under the eligibility of speech or language impairment. In first grade, District conducted a psychoeducational assessment and issued a report in May 2011. Student's cognitive abilities were in the below average range with a processing deficit in visual memory. He exhibited below average academic performance in all areas and a discrepancy between intellectual ability and achievement. District continued Student's eligibility under speech or language impairment, and recommended additional eligibility under specific learning disability and other health impairment due to a medical diagnosis of attention deficit hyperactivity disorder. In third grade, District conducted a psychoeducational reevaluation of Student and issued a report in March 2013. Student's cognitive abilities

were in the average range with processing deficits in visual-motor integration, attention, and auditory reasoning. He continued to exhibit below average academic performance in all areas, scoring at the first grade level in most skills. Student remained eligible for special education in the areas of specific learning disability, speech or language impairment, and other health impairment.

4. In preparation for Student's triennial reevaluation in sixth grade, District provided Parent with an assessment plan on December 11, 2015. The assessment plan proposed to assess Student in academic achievement, health, intellectual development, language/speech communication development, motor development, social/emotional, and adaptive/behavior. The school psychologist was identified as an assessor for all assessment areas. The speech and language pathologist was identified as an assessor for language/speech communication development. The assessment plan described what each assessment area included. Intellectual development included tests that measured how well Student thinks, remembers, and solves problems. Language/speech communication development included tests that measured Student's ability to understand and use language and speak clearly and appropriately. Motor development included tests that measured how well Student coordinated body movements in small and large muscle activities. Social/emotional and adaptive/behavior, included scales that indicated how Student felt about himself, got along with others, and took care of personal needs at home, school and in the community.

5. Parent consented to the assessment plan on January 10, 2016. Parent expected District to conduct a comprehensive psychoeducational assessment, similar to the psychoeducational assessments District conducted in 2011 and 2013. District conducted a health assessment, speech and language evaluation, academic assessment, and IEP triennial evaluation, which will be referred to as a psychoeducational evaluation in this Decision. District did not conduct any assessments in the areas of intellectual

development, motor development, social/emotional, or adaptive/behavior. A District school nurse completed the health assessment. Student had a history of attention deficit hyperactivity disorder and was prescribed 30 mg of Vyvanse daily.² District speech and language pathologist, Brenda Rockwell, M.A., completed the speech and language evaluation. Student's communication needs were in receptive and expressive language. Ms. Rockwell did not observe Student in the classroom or other school setting, interview Parent, or receive input from any of Student's teachers. The evaluation included standardized assessments and informal observations of Student during testing. Student's receptive and expressive language skills were within the average range. He exhibited some difficulty determining analogies and with pragmatic language responses. He had the most difficulty with providing information and pertinent details. Overall, Student's speech and language skills fell within the average range in comparison to children of the same age/developmental level and he did not demonstrate a speech or language disability. It was unclear whether Ms. Rockwell was Student's speech and language provider or the extent of her interactions with Student prior to the evaluation. Ms. Rockwell's report did not state she was Student's speech and language provider. Ms. Rockwell did not testify at the hearing.

6. Student's case manager and special education teacher completed the academic assessment. The teacher administered the Woodcock-Johnson IV Tests of Achievement, a standardized test administered one-on-one to measure academic achievement. The test included 26 subtests in the areas of reading, writing, math, and academic skills. Based on the age equivalency information, Student was performing approximately three to five years behind same-aged peers in all areas.

² Vyvanse is a prescription medicine used for the treatment of attention deficit hyperactivity disorder in patients six years old and above.

7. District school psychologist, Glenn Bortnick, Psy.D., completed the psychoeducational evaluation. Dr. Bortnick was initially credentialed as a school psychologist in Pennsylvania in 1977 and had worked with special education students since that time. Dr. Bortnick obtained his Doctorate in Clinical Psychology in 1984. He held a Pupil Personnel Services credential which allowed him to work as a school psychologist in California. He was also licensed as a Clinical Psychologist in California. In addition to his duties with District, he occasionally performed independent educational evaluations through his private psychology practice. He had conducted an estimated 1,000 assessments of students and had attended approximately 1,500 IEP team meetings. Dr. Bortnick testified at hearing.

8. Dr. Bortnick's report contained four type-written pages. The psychoeducational evaluation consisted of a review of previous records, a 20 to 30 minute classroom observation in Student's language arts class, and feedback from Student's special education, elective, and physical education teacher through a one-page questionnaire. The top of the report's first page, in bold, indicated "The IEP team determined there [was] not a need for formal, standardized assessment for the 3 yr. evaluation on [Student]." The IEP team made a determination that no additional assessments in the area of intellectual development were necessary based on the following factors: (1) Student's primary disability remained unchanged, (2) no further formal assessment was needed, (3) comprehensive ability measures were utilized during previous assessments, (4) Student was making appropriate progress on goals and objectives, (5) all areas of educational need had been identified, (6) Student was performing consistent with previous assessments, and (7) Student's level of services would continue. Next, the report summarized the findings of Student's psychoeducational evaluations from 2011 and 2013, briefly described his special education eligibility and services, and included notes from the classroom observation

and teacher questionnaires. Finally, Dr. Bortnick recommended Student continue to qualify for special education under the category of specific learning disability. Dr. Bortnick did not consider eligibility for Student under the category of other health impairment.

9. Dr. Bortnick did not interview Parent or Student as part of his evaluation. Dr. Bortnick did not conduct any one-on-one assessments of Student, including standardized or informal assessments, in the areas of intellectual development, motor development, social/emotional, or adaptive/behavior. Dr. Bortnick did not distribute any rating scales to Student's teachers or Parent, or include any discussion regarding Student's motor development, social/emotional functioning, or adaptive/behavior skills in the report. Dr. Bortnick did not make any independent findings regarding Student's intellectual abilities, and did not analyze whether there was a discrepancy between Student's intellectual ability and academic achievement. Further, the report did not discuss or analyze the results of the recent academic assessment or speech and language evaluation.

10. In Dr. Bortnick's opinion, Student did not require formal, standardized testing in intellectual development because his cognitive scores from the previous psychoeducational evaluations in 2011 and 2013 were consistent, and he did not expect Student's cognitive scores to change with new testing. Moreover, he opined Student's attention deficit hyperactivity disorder diagnosis did not trigger the need for additional testing to determine whether he qualified under the category of other health impairment because he was already eligible under the category of specific learning disability due to a processing deficit in attention. According to Dr. Bortnick, students do not typically qualify for special education under both specific learning disability and other health impairment. Moreover, he did not believe Student's attention deficit

hyperactivity disorder impacted him in a way that fell outside of a specific learning disability.

11. District convened an IEP on March 7, 2016 to review the triennial evaluation reports. Dr. Bortnick explained to Parent, for the first time, that he did not conduct any formal, standardized assessments of Student in the area of intellectual development. No IEP team member, including Dr. Bortnick, informed Parent of her right to request additional assessments. Student met four of his five academic goals, but did not meet his receptive/expressive language goal. The IEP team recommended increasing Student's specialized academic instruction from 900 minutes per week to 1,125 minutes per week, and to discontinue speech and language services. The IEP notes were not detailed and did not explain why the team recommended these changes. The IEP team recommended eligibility under the category of specific learning disability based on their finding that a severe discrepancy existed between Student's intellectual ability and achievement based on valid standardized tests. The valid standardized tests the team relied upon were from Student's 2013 psychoeducational evaluation and 2016 academic assessment. The IEP notes did not explain why Student was no longer eligible under the categories of speech or language impairment and other health impairment. Parent did not question the absence of formal, standardized assessments in the area of Student's intellectual development during the IEP team meeting. Parent did not realize Dr. Bortnick's evaluation was not a comprehensive psychoeducational evaluation until after the IEP team meeting, when she compared his report to Student's previous psychoeducational evaluation reports. Parent consented to the IEP.

12. Parent was frustrated with Student's slow academic progress. She did not expect Student to be performing at grade level. She wanted him to function in the "real world" and complete his homework without a computer doing the work for him. Parent

was concerned Student's educational program did not reflect the severity of his academic needs.

13. District did not conduct any assessments of Student in intellectual development, language/speech communication development, motor development, social/emotional, adaptive/behavior, or other health impairment at any time after the March 7, 2016 IEP team meeting.

LEGAL AUTHORITY AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006)⁴; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17)

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

⁴ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

“Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In 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 specifies the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690], 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.)

4. The Supreme Court revisited and clarified the *Rowley* standard in *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. __ [137 S.Ct. 988, 197 L.Ed.2d 335]. It explained *Rowley* held that when a child is fully integrated into a regular classroom, a

FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, Slip Op. at pp. 13-14, citing *Rowley*, *supra*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Endrew F.*, *supra*, Slip Op. at p. 12.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.)

6. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student had the burden of proof on the single issue in the case.

ISSUE: DID DISTRICT APPROPRIATELY ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY

7. Student contended District failed to conduct a comprehensive psychoeducational assessment pursuant to the assessment plan Parent consented to on January 10, 2016. Specifically, Student contended District failed to conduct formal assessments in the areas of intellectual development, social/emotional, adaptive/behavior, and other health impairment as part of Dr. Bortnick's psychoeducational evaluation. Student further contended District failed to comply with IDEA reevaluation requirements when it unilaterally determined no formal testing was necessary as part of Dr. Bortnick's psychoeducational evaluation. Finally, Student

contended Ms. Rockwell's speech and language evaluation was inappropriate because it did not contain input from Parent or observations of Student in a classroom or other school setting.

8. District contended Dr. Bortnick's psychoeducational evaluation was an appropriate and comprehensive reevaluation of Student. District also contended formal, standardized assessments in intellectual development were unnecessary and not required because Student was making progress on all of his goals, Student's teachers were not aware of any new concerns, Student's cognitive and processing abilities did not change over time, and Parent did not request such testing. Further, District contended Ms. Rockwell's speech and language evaluation was appropriate. Finally, District contended that Student's alleged IDEA procedural violations did not constitute a denial of FAPE because they did not impede Student's right to a FAPE, prevent Parent from participating in the development of Student's IEP, or cause Student a deprivation of educational benefits.

Legal Authority

9. School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur throughout the course of the student's educational career. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).)⁵

⁵ Evaluations under IDEA are referred to as "assessments" under California law. (Ed. Code, § 56302.5.) The terms are used interchangeably throughout the Decision.

10. The IDEA provides for reevaluations to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary.⁶ (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) The school district must also conduct a reevaluation if it determines that the educational or related service needs of the child, including improved academic achievement and functional performance, warrant a reevaluation. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) A school district must also conduct a reevaluation upon the request of the child's parent or teacher. (20 U.S.C. § 1414 (a)(2)(A)(ii); 34 C.F.R. § 300.303(a)(2); Ed. Code, § 56381, subd. (a)(1).)

11. A school district must obtain informed consent from the parent before conducting the evaluation. (20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. § 300.300(a).) Specifically, the parent must be given a proposed assessment plan, in writing, within 15 days of the referral for assessment, along with a notice of IDEA procedural safeguards and parent's rights under the Education Code. (Ed. Code, § 56321, subd. (a).) The proposed assessment plan must: (1) be in a language easily understood by the general public; (2) be provided in the native language of the parent or other mode of communication, unless to do so is clearly not feasible; (3) explain the types of assessments to be conducted; and (4) state that no IEP will result from the assessment without parental consent. (Ed. Code, § 56321, subd. (b).) The parent has at least 15 days from receipt of the proposed assessment plan to arrive at a decision and the assessment may begin immediately upon receipt of parental consent. (Ed. Code, § 56321, subd. (c)(4).)

⁶ Three year reevaluations are commonly referred to as triennial evaluations or triennial assessments. The terms are used interchangeably throughout the Decision.

12. In conducting an evaluation, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) The district must not use any single measure or assessment as the sole criterion for determining whether the child is a child with a disability or determining the appropriate educational program for the child. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2).) The district must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).)

13. A child must be assessed in all areas related to suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).) Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304 (c)(6).)

14. A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that particular disability or disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119.) A district cannot circumvent that responsibility by way of informal observations or the subjective opinion of a school employee. (*Ibid.*) Such notice may come in the form of concerns expressed by parents about the child's symptoms, opinions expressed by informed outside experts, or other less formal indicators, such as the child's behavior. (*Id.* at pp. 1120-1121 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796 and *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202].)

15. Assessors must prepare a written report of the assessment results that includes: (1) whether the student may need special education and related services; (2) the basis for that determination; (3) the relevant behavior noted during the observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health and development, and medical findings; (6) for students with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services; (7) a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and (8) the need for specialized services, materials, and equipment for students with low incidence disabilities. (Ed. Code, § 56327.)

16. As part of any reevaluation, the IEP team must review existing evaluation data on the student, including evaluations provided by the parents, current classroom, local or state assessments, and observations by teachers and related service providers. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. § 300.305(a)(1); Ed. Code, § 56381, subd. (b)(1).) Based on the review of existing data, and input from the parents, the IEP team must identify what additional data, if any, is needed to determine whether the student continues to have a disability and the student's educational needs; the present levels of academic achievement and developmental needs; whether the student continues to need special education and related services; and whether any additions or modifications to the special education or related services are needed to enable the student to meet the annual goals and participate, as appropriate, in the general education curriculum. (20 U.S.C. § 1414(c)(1)(B); 34 C.F.R. § 300.305(a)(2); Ed. Code, § 56381, subd. (b)(2).)

17. If the IEP team determines that additional data is not needed to determine whether the student continues to have a disability and to determine the student's educational needs, the school district must notify the parents, including their reasons for

making the determination, and inform them of their right to request an assessment. (20 U.S.C. § 1414(c)(4)(A); 34 C.F.R. § 300.305(d)(1).) Under these circumstances, the school district is only required to conduct a reevaluation if the parents request an assessment. (20 U.S.C. § 1414(c)(4)(B); 34 C.F.R. § 300.305(d)(2).)

18. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1124-1127.) Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless it (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i)-(iii); Ed. Code, § 56505, subd. (f); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)(superseded on other grounds by 20 U.S.C. § 1414(d)(1)(B).) Procedural violations constitute a denial of FAPE when such violations resulted in a loss of educational opportunity to the student or interfered with the parent's opportunity to participate in the IEP formulation process. (Ed. Code, § 56505, subd. (j).)

19. The informed involvement of parents is central to the IEP process. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994].) Protection of parental participation is "[a]mong the most important procedural safeguards" in the IDEA. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) The Ninth Circuit Court of Appeals in *Timothy O.* held a school district's failure to assess Student may result in substantially hindering a parent's ability to participate in a child's educational program, and seriously deprive the child's parents, teachers and district staff of the information necessary to develop an appropriate educational

program with appropriate supports and services for the child. Failure to assess the Student therefore resulted in a denial of FAPE. (*Timothy O., supra*, at pp. 1124-1126.)

Analysis

20. Student met his burden of proving District procedurally violated the IDEA when it failed to appropriately assess him in all areas of suspected disability from January 10, 2016 to March 15, 2017. Specifically, District failed to assess Student in the areas of intellectual development, motor development, social/emotional, and adaptive/behavior pursuant to the assessment plan Parent consented to on January 10, 2016. District also procedurally violated the IDEA when it failed to adhere to IDEA reevaluation requirements in preparation for Student's March 7, 2016 triennial IEP. District's speech and language and psychoeducational evaluations did not meet the applicable legal standards. These procedural violations resulted in a denial of FAPE to Student because the absence of appropriate assessments deprived the IEP team of sufficient information to make an informed determination regarding Student's special education eligibility, program, and services, which as a result, impeded Student's right to a FAPE and significantly impeded Parent's ability to participate in the IEP and decision-making process regarding the provision of FAPE to Student.

21. District conducted a psychoeducational reevaluation of Student in 2013. Pursuant to the IDEA, Student was due for another reevaluation in 2016, unless Parent and District agreed a reevaluation was not necessary. Parent consented to the reevaluation of Student when she signed the assessment plan on January 10, 2016. Parent's consent to the assessment plan triggered District's duty to conduct a reevaluation of Student pursuant to the assessment plan and IDEA requirements.

22. The assessment plan included evaluations in academic achievement, health, intellectual development, language/speech communication development, motor development, social/emotional, and adaptive/behavior. By including these areas in the

assessment plan, District acknowledged they were areas of suspected disability for Student. In addition to these areas, District was on notice Student was diagnosed with attention deficit hyperactivity disorder, for which he was taking medication, and had previously been eligible for special education under the category of other health impairment. Nevertheless, as part of Student's triennial reevaluation, District did not conduct any standardized or informal one-on-one assessments of Student, distribute any rating scales to Student's teachers or Parent, or include any discussion of Student's current abilities, in the areas of intellectual development, motor development, social/emotional, or adaptive/behavior. Moreover, District did not conduct any assessments or consider whether Student was eligible under the category of other health impairment. Instead, District conducted only a health assessment, academic assessment, speech and language evaluation, and a minimal psychoeducational evaluation, which consisted of a review of Student's previous psychoeducational evaluations, a 20 to 30 minute classroom observation, and input from short teacher questionnaires. Parent consented to a comprehensive reevaluation and expected District to conduct formal testing of Student in all of the areas identified on the assessment plan. District inappropriately and unilaterally determined assessments were not needed in intellectual development, motor development, social/emotional, adaptive behavior, and other health impairment. District's failure to appropriately assess Student in all the areas identified on the assessment plan and in the area of other health impairment, procedurally violated the IDEA.

23. In addition to District's duty to follow the assessment plan, District also had a duty to adhere to IDEA reevaluation requirements when conducting its triennial assessments of Student. Ms. Rockwell's speech and language evaluation failed to meet IDEA procedural evaluation requirements when she failed to obtain input from Parent and Student's teachers, and did not observe Student in a classroom or other school

setting. While Ms. Rockwell's evaluation included standardized assessments and informal observations of Student during testing, on its face, the evaluation did not contain sufficient information to allow the IEP team to make an informed determination regarding whether Student continued to benefit from speech and language services. Parental participation is an integral part of the evaluation and IEP process; not only because parents have a right to be involved in their child's education, but also because parents may have information about their child's abilities that the assessor does not have. Similarly, teachers have more interaction with students than do assessors, and may have information about how the student's disability affects classroom performance, that without inquiring, the assessor would not know. Also, it makes sense that Ms. Rockwell needed to observe Student in a classroom or other school setting in order to evaluate how his receptive and expressive language skills affected his ability to access the curriculum. Parental and teacher input, and an observation in a classroom or school setting would have given the IEP team, including Parent, a more complete picture of Student's speech and language needs. Instead, Ms. Rockwell relied on an incomplete evaluation to recommend discontinuing Student's eligibility for speech and language services. District's contention that Ms. Rockwell was not required to observe Student in the classroom setting because she was his speech and language provider over the previous year and was familiar with him in group and one-on-one settings was not persuasive. The evidence did not establish Ms. Rockwell was Student's speech and language provider or that she had any prior contact with him in a group or one-on-one setting.

24. Similarly, Dr. Bortnick's psychoeducational evaluation failed to meet IDEA procedural evaluation requirements when he failed to use a variety of assessment tools, obtain input from Parent, and write an appropriate evaluation report. Dr. Bortnick did not administer any instruments to assess Student's intellectual, motor, social/emotional,

or adaptive/behavior abilities. In fact, Dr. Bortnick did not meet one-on-one with Student at any time during his evaluation. Furthermore, the report did not make any independent findings regarding Student's intellectual abilities or academic achievement, and did not analyze whether there was a discrepancy between Student's intellectual ability and academic achievement, which was required in Student's evaluation because he was identified with a specific learning disability. Further, the report did not discuss or analyze the results of the recent academic assessment or speech and language evaluation. Dr. Bortnick's psychoeducational evaluation did not contain sufficient information to allow the IEP team, including Parent, to make an informed determination regarding Student's eligibility for special education, or whether he required any modifications to his special education program or related services.

25. District's contention that Student did not require formal, standardized testing in the area of intellectual development because his cognitive scores were likely to be consistent with the scores in Student's previous psychoeducational evaluations, was not persuasive. The findings regarding Student's intellectual abilities in the 2011 and 2013 psychoeducational evaluations were different. In the 2011 evaluation, Student's cognitive abilities were in the below average range with a processing deficit in visual memory. In the 2013 evaluation, Student's cognitive abilities were in the average range with processing deficits in visual-motor integration, attention, and auditory reasoning. Thus, Dr. Bortnick's opinion that Student's cognitive scores were likely to be consistent with previous testing was not supported by the documentary evidence. Instead, the evidence established that District, without input from Parent, unilaterally determined that formal, standardized assessments were not required as part of Student's reevaluation. Further, District failed to inform Parent of this determination until the March 2016 IEP team meeting, after the reevaluation had already been completed. Even then, the District IEP team members did not inform Parent of her right

to request additional assessments, as required by IDEA reevaluation procedures. Moreover, Dr. Bortnick's subjective opinion that Student did not require additional testing in intellectual development or to determine whether Student qualified for special education under the category of other health impairment, did not relieve District's obligation to assess. Similarly, District's contention that Parent did not request additional assessments during the March 2016 IEP team meeting or anytime thereafter, did not relieve its obligation to conduct the assessments Parent consented to in the assessment plan or comply with IDEA reevaluation requirements. District did not offer any explanation as to why Dr. Bortnick did not assess Student in the areas of motor development, social/emotional, or adaptive/behavior.

26. District's procedural violations of the IDEA, as discussed above, resulted in a denial of FAPE to Student from January 10, 2016 to March 15, 2017. Specifically, District's failure to conduct appropriate assessments of Student in the areas of intellectual development, language/speech communication development, motor development, social/emotional, and adaptive/behavior, pursuant to the assessment plan Parent consented to on January 10, 2016, and as required by the IDEA, deprived the IEP team, including Parent, of sufficient information to make an informed determination regarding Student's special education eligibility, present levels of performance, and whether he required any modifications to his special education program or related services. Without current information of Student in all areas of educational need, the IEP team did not have the information necessary to offer an educational program reasonably calculated to enable Student to make progress appropriate in light of his circumstances, thereby impeding his right to a FAPE. Similarly, without current information of Student's educational needs, District significantly impeded Parent's ability to participate in the IEP and decision-making process regarding the provision of FAPE to Student.

27. Student did not prove District failed to appropriately assess him during the time period from March 15, 2015 to January 10, 2016. There was no evidence that triggered District's duty to reevaluate Student during this time period. There was no evidence that conditions warranted a reevaluation or that Parent or any of Student's teachers requested a reevaluation. There was also no evidence that established Student had an area of suspected disability that District failed to assess during this time period. District did not have a duty to assess Student until January 10, 2016, when Parent signed the assessment plan in preparation for the March 7, 2016 triennial IEP.

REMEDIES

1. Student prevailed on the single issue in the case. Specifically, that District failed to conduct appropriate assessments of Student in the areas of intellectual development, language/speech communication development, motor development, social/emotional, and adaptive/behavior, as discussed above. As a remedy, Student requested independent educational evaluations in the areas of psychoeducational and speech and language at District's expense.

2. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. §1415(i); see *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].) When school districts fail to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, at pp. 369-370.) Remedies under the IDEA are based on equitable considerations and the evidence established at hearing. (*Id.* at p. 374.)

3. An independent educational evaluation at public expense may be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-823.) An independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student in question. (34 C.F.R. § 300.502(a)(3)(i).) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation. (34 C.F.R. § 300.502(e)(1).) Except for these criteria, the public agency may not impose conditions or timelines related to obtaining the independent educational evaluation at public expense. (34 C.F.R. § 300.502(e)(2).) If the public agency observed the student in conducting its assessment, or if its assessment procedures make it permissible to have in-class observations of the student, the same opportunity must be provided to the independent assessor. (Ed. Code, § 56329, subd. (b).)

4. Staff training can be an appropriate compensatory remedy. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1034 [holding student, who was denied a FAPE due to school district's failure to 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 student involved, or to remedy procedural violations that may benefit other students. (Ibid.; See 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

IEPs]; *Student v. San Diego Unified School Dist.* (Cal. SEA 2005) 42 IDELR 249 [105 LRP 5069] [requiring training regarding student's medical condition and unique needs].)

5. Student established District failed to conduct appropriate assessments in the areas of intellectual development, language/speech communication development, motor development, social/emotional, adaptive/behavior, and other health impairment from January 10, 2016 to March 15, 2017. Therefore, as an equitable remedy, Student is entitled to independent educational evaluations in the areas of psychoeducational and speech and language at District's expense. The independent evaluations shall be in accordance with District's criteria regarding independent educational evaluations, including qualifications of the assessor, as long as the District's criteria does not interfere with Parent's right to obtain such evaluations. District may impose no other conditions with respect to the independent evaluations. District shall allow the independent assessors to observe Student in his current educational setting, consistent with the observation procedures for its own assessors.

6. The facts of this case also supported the need for special education training of District's special education staff, including the special education director, special education case managers, speech and language pathologists, and school psychologists, regarding District's obligation to include parents in the evaluation process, assess in all areas of suspected disability, conduct assessments consistent with assessment plans, and conduct assessments in accordance with IDEA evaluation procedures. Dr. Bortnick's testimony demonstrated that he did not understand the procedural requirements for conducting reevaluations under IDEA, including, receiving input from parents, assessing students consistent with an assessment plan, assessing in all areas of suspected disability, and the IEP team's duty to inform parents when they believe additional testing is not required as part of a reevaluation. Dr. Bortnick's psychoeducational evaluation report also demonstrated that he did not understand the

components IDEA requires assessors to include in assessment reports, including, for students with a specific learning disability, whether there is a discrepancy between intellectual ability and academic achievement. Similarly, Ms. Rockwell's speech and language evaluation report demonstrated that she did not understand the procedural requirements for conducting reevaluations under IDEA, including, receiving input from parents and teachers, and observing students in an appropriate setting. As the individuals who typically generate assessment plans, coordinate the special education evaluation process, and administer IEP team meetings, District's special education case managers would also benefit from training in IDEA evaluation procedures. As the individual who oversees all special education staff and programming, the special education director would also benefit from training in IDEA evaluation procedures. The training of these individuals is an equitable remedy because it will ensure that all students and parents within District who become involved in the special education evaluation process will receive the rights and benefits contemplated by IDEA.

ORDER

1. District shall fund an independent psychoeducational evaluation of Student with an assessor of Parent's choice, who meets District's qualification requirements. The evaluation shall assess Student in areas of intellectual development, motor abilities, social/emotional, and adaptive/behavior. The evaluation shall also consider whether Student qualifies for special education under the category of other health impairment. The evaluation may also assess Student in other areas typically assessed in psychoeducational evaluations, as determined by Parent and the selected assessor. District shall fund the selected assessor's time to conduct the evaluation, including review of records, school observations, and interviews of school staff, Parent, and Student. District shall also fund up to four hours, at the assessor's usual hourly rate, to prepare for and attend, in person or by telephone, an IEP team meeting to present

the evaluation findings, including mileage reimbursement at the State business reimbursement rate.

2. District shall fund an independent speech and language evaluation of Student with an assessor of Parent's choice, who meets District's qualification requirements. District shall fund the selected assessor's time to conduct the evaluation, including review of records, school observations, and interviews of school staff, Parent, and Student. District shall also fund up to four hours, at the assessor's usual hourly rate, to prepare for and attend, in person or by telephone, an IEP team meeting to present the evaluation findings, including mileage reimbursement at the State business reimbursement rate.

3. Within 15 days of this Order, District shall provide Parent with a list of assessors qualified to conduct the independent psychoeducational and speech and language evaluations. Parent may select an assessor from District's list, or another assessor who meets District's qualification requirements. If Parent selects an assessor not included on District's list, District shall contract with Parent's selected assessor within 30 days of receiving notice of Parent's selection.

4. District shall convene an IEP team meeting within 30 days of receipt of the last of the independent educational evaluations ordered by this Decision, to consider the results of both reports, unless District and Parent agree to a different timeline.

5. District shall provide at least six hours of training to the following special education staff: special education director, special education case managers, speech and language pathologists, and school psychologists. The training shall focus on District's obligation to include parents in the evaluation process, assess in all areas of suspected disability, conduct assessments consistent with assessment plans, and conduct assessments in accordance with all IDEA evaluation requirements. The training shall be provided by the Special Education Local Plan Area, an agency contracted with the

Special Education Local Plan Area, or an independent agency not affiliated with District, which specializes in special education training to school districts, and may not be provided by the law firm that represented District in the due process hearing. The training shall be completed by January 1, 2018.

PREVAILING PARTY

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

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: September 26, 2017

_____/s/_____
TARA DOSS
Administrative Law Judge
Office of Administrative Hearings