

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BELLFLOWER UNIFIED SCHOOL DISTRICT.

OAH Case No. 2018070037

DECISION

Student filed an amended due process hearing request with the Office of Administrative Hearings on June 29, 2018, naming Bellflower Unified School District. On August 1, 2018, OAH granted the parties' joint request for a hearing continuance. Administrative Law Judge Sabrina Kong heard this matter in Bellflower, California, on October 9, and 10, 2018.<sup>1</sup>

Attorney Damian Fragoso represented Student. Attorneys Ushma Vyas and Daisy Torres attended the hearing on Student's behalf. Mother attended the hearing. Attorney Eric Bathen represented Bellflower. Bellflower's program administrator, Matt Adair, attended the hearing on Bellflower's behalf.

A continuance was granted for the parties to file written closing arguments and the record remained open until November 16, 2018. The parties timely filed written

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<sup>1</sup> Bellflower filed its response to Student's complaint on August 1, 2018, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir.) 858 F.3d 1189, 1199-1200.)

closing arguments. The record was closed on November 16, 2018, and the matter was submitted for decision.

## ISSUES<sup>2</sup>

1. (a) Was Student entitled to a publicly funded psycho-educational assessment because Bellflower did not fund or file for due process after Student moved out of Bellflower?

(b) Was Bellflower's September 29, 2017 psycho-educational assessment/report inappropriate such that Student is entitled to a publicly funded independent evaluation in that area?

2. (a) Was Student entitled to a publicly funded speech and language assessment because Bellflower did not fund or file for due process after Student moved out of Bellflower?

(b) Was Bellflower's October 4, 2017 speech and language assessment/report inappropriate such that Student is entitled to a publicly funded independent evaluation in that area?

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<sup>2</sup> The parties identified and agreed to issues 1(b) and 2(b) at the PHC. At hearing, on October 9, 2018, Student clarified that a third issue raised in his complaint should have been included: the issue that Bellflower did not timely file for due process after denying his psycho-educational and speech and language independent evaluation requests. Bellflower objected stating that only the two issues defined at the PHC should be issues at hearing. ALJ included and considered the issue of whether Bellflower timely filed for due process at hearing because Bellflower had notice of the issue which was set forth in paragraphs 14 and 16 of Student's complaint.

## SUMMARY OF DECISION

Student did not establish that Bellflower was obligated to file for due process to defend its assessments because Student moved and disenrolled from Bellflower, and enrolled in another school district, within one week after he requested independent evaluations from Bellflower. Further, Student did not prove that Bellflower's psycho-educational or speech and language evaluations<sup>3</sup> were inappropriate. Therefore, Bellflower was not required to fund independent evaluations in those areas. Student was not entitled to any remedy.

## FACTUAL FINDINGS

1. Student was 10 years old, and eligible for special education under the category of specific learning disability while attending Bellflower until his fall 2017 triennial IEP team meeting. At the time of the hearing, Student resided with Mother in Norwalk, California, and was no longer enrolled in Bellflower.

2. Caroline Thompson, a board certified behavior analyst, and Bellflower's behavior intervention specialist since 2014, conducted a functional behavior assessment of Student around March 1, 2017, because Student's behaviors were impeding his and other students' access to the curriculum. Ms. Thompson was qualified to assess Student's functional behavior. She testified at hearing.

3. Student had 22 incidences of inappropriate behaviors, seven of which resulted in disciplinary action, from September 23, 2016 to March 13, 2017. These behaviors included physical aggression, inappropriate and vulgar language use, and

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<sup>3</sup> Federal law uses the term "evaluation" instead of the term "assessment" used by California law, but the two terms have the same meaning and are used interchangeably in this Decision.

non-compliant/disruptive behaviors. Ms. Thompson concluded that while Student was capable of initiating cooperative play, he was unable to resolve conflicts and often argued, fought and made inappropriate comments in class to gain peer attention. Ms. Thompson also concluded that Student required ongoing redirection to remain on task; was impulsive and that his attention seeking behaviors disrupted class. She observed Student on three different days for a total of four to five hours; interviewed Mother and the teacher; reviewed Student's cumulative file; and collected behavioral data to develop a behavior intervention plan for Student.

4. Ms. Thompson opined at hearing that Student did not require another functional behavior assessment during his fall 2017 triennial assessments even though Student exhibited new maladaptive behaviors after the March 2017 functional behavior assessment. Student's new maladaptive behaviors were known as "extinction bursts". Extinction bursts were maladaptive behaviors which worsened before improving that typically resulted from the implementation of a behavior intervention plan. Bellflower properly addressed Student's evolving and escalating maladaptive behaviors by updating Student's behavior intervention plan on April 3, 2017, June 7, 2017 and August 31, 2017, with Ms. Thompson's continued involvement and recommendations. Student injured multiple members of Bellflower's staff including Ms. Thompson who suffered a torn vein, a black eye, a bloody nose and face, and scratches. Student also eloped from the school campus once between March and May 2017. Ms. Thompson found that neither additional data, nor another behavioral assessment would help Student access the curriculum without a change in placement. Ms. Thompson opined that Student could not be educated on a comprehensive general education campus because Student's violence worsened and none of the behavior interventions were successful in helping Student access his education.

5. Student received therapy outside of school at the Community Guidance

Center once a week with therapist, Carla Sully. Student did not exhibit any problematic behaviors outside of school, and met all the social skills goals set by Ms. Sully. Therefore, Ms. Sully stopped therapy and closed Student's file in March 2017.

#### AUGUST 31, 2017 IEP TEAM MEETING

6. Bellflower convened an IEP team meeting on August 31, 2017, to review Student's inappropriate behaviors and specifically his elopement from campus. The IEP team discussed and modified behavioral strategies in his behavior intervention plan.

#### SPEECH AND LANGUAGE ASSESSMENT

7. Victoria Wascher conducted a speech and language assessment of Student in the fall of 2017. She held a bachelor's degree in speech and hearing sciences, was a licensed speech and language pathologist in California, and certified by the American Speech-Language-Hearing Association.

8. Ms. Wascher reviewed Student's records, interviewed teachers and administered standardized testing. She assessed Student with the Clinical Evaluation of Language Fundamentals, Fifth Edition; the Comprehensive Assessment of Spoken Language, Second Edition, pragmatics language subtest; and a language sample. She administered all these standardized tests many times before. She was qualified to assess Student and to interpret all test results. All instruments were reliable and widely accepted assessment tools. All instruments were administered and interpreted consistent with the publisher's protocols and yielded valid results. The standard deviation for both the Comprehensive Assessment of Spoken Language and the Clinical Evaluation of Language Fundamentals was 15. Further, all of Student's scores were above the seventh percentile.

9. Student scored in the average range in the core language score, the receptive language index and the expressive language index of the Clinical Evaluation of

Language Fundamentals. The core language score measured Student's general language ability and included word classes, formulated sentences, recalling sentences and semantic relationships subtest. Student was able to: identify word pairs, with and without picture support; verbalize complete, semantically and grammatically, correct spoken sentences; produce accurate sentences using nouns, pronouns, verbs, adjectives, adverbs; process and recall sentences of varying lengths and complexity without changing the sentence meaning; interpret sentences using comparisons, identifying locations, time relationships, and serial order. Ms. Wascher designated Student's ability as emerging in core language because Student had difficulty formulating sentences using conjunctions. The receptive language index measured Student's general receptive language comprehension and listening skills. Ms. Wascher designated Student's ability to retain verbally presented information and follow complex directions as an area of strength. The expressive language index measured Student's general expressive, oral, language skills. Student could formulate both sentences and questions appropriately.

10. The Comprehensive Assessment of Spoken Language, pragmatics language subtest measured Student's ability to understand and apply rules and expectations that are recognized as appropriate in societal context including non-verbal cues, personal space, facial expressions, and speech volume. Student scored in the average range and demonstrated age appropriate pragmatic language skills including requesting and providing information, appropriate greeting, giving a compliment, conversational turn taking, expressing regret, and polite refusal for help. Student also presented with normal articulation, voice and fluency. In the language sample, Student communicated with complete sentences using proper grammar, verb tense, articles, prepositions, plurals, pronouns, negatives and conjunctions. His average utterances were four to seven words. Student was capable of asking for clarification and getting his needs met. Ms. Washer concluded Student had functional communication skills to

access the academic environment.

11. Sandra Gonzalez assessed Student with the Expressive One-Word Picture Vocabulary Test, Fourth Edition, Spanish Bilingual Edition; and the Receptive One-Word Picture Vocabulary Test, Fourth Edition, Spanish Bilingual Edition to determine Student's language dominance because Student was identified as an English language learner and performed in the average range in both tests. Ms. Gonzalez assessed Student in the Spanish Bilingual edition of two tests because Student was bilingual in Spanish and English. Ms. Gonzalez determined that Student was English dominant, which was not disputed.

12. Both Ms. Wascher and Ms. Gonzalez observed Student in the course of their assessments. Ms. Gonzalez observed Student on one day; Ms. Wascher observed Student on four different days and in three different teachers' classrooms. Teachers shared that Student could differentiate between appropriate and inappropriate language and behaviors, and at times escalated a situation by choosing to use inappropriate language and behaviors. They concluded he had the necessary pragmatics language and social skills, but often chose not to use them.

13. Ms. Wascher left two voicemails for Mother to ask if she could observe at home as part of her assessment because Student began receiving home schooling during her assessment.<sup>4</sup> Ms. Wascher asked Mother to return her call twice. Mother did not return Ms. Wascher's call, but called the school and informed staff that she would not allow Ms. Wascher to assess Student in the home. Ms. Wascher opined that despite not being able to observe Student at home, she had enough information through her

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<sup>4</sup> Neither party provided dates or information of when Student started receiving home instruction services, but at some point, in the fall of 2017 Student was educated in the home.

standardized testing, school observations, teacher input and records review to complete her speech and language assessment and provide a comprehensive report. Although Ms. Wascher did not specifically recall stating in her voicemail that she also sought to interview Mother, it was her practice to interview parent as part of her assessment. Because Mother refused permission for Ms. Wascher to assess Student at home and did not return her call, Ms. Wascher was unable to interview Mother.

14. Ms. Wascher concluded that Student did not qualify for special education under the category of speech and language impairment and recommended his dismissal from speech and language services. She found that Student had age appropriate functional communications skills and did not score below the seventh percentile in any tests, or present any language deficits impacting his educational access. She recorded all of her assessment findings and conclusions in her Speech and Language Assessment Report dated October 4, 2017.

#### SEPTEMBER 29, 2017 PSYCHO-EDUCATIONAL ASSESSMENT

15. Marsha Escalante conducted a psycho-educational assessment as part of Student's triennial assessment. Ms. Escalante held a bachelor's degree in psychology, with a minor in Spanish; a master's degree in educational psychology; and credentialed and licensed in school psychology. She worked as a school psychologist for another school district from 2001 to 2012; and as a director of special education for another school district from 2012-2015; and as an independent consultant conducting evaluations, often in bilingual cases, for Bellflower since 2015.

16. Before assessing Student, Ms. Escalante reviewed Student's cumulative file, and health records; and she interviewed Student, Mother, and teachers from both the 2016-2017, and 2017-2018 school years. Ms. Escalante talked to Ms. Sully about Student's therapy goals and services outside of school. Ms. Sully informed Ms. Escalante



that Student progressed in his goals and that Student did not require her services based on his behaviors outside of school. However, Ms. Sully resumed counseling Student outside of school, after stopping in March 2017, because of Student's school related maladaptive behaviors. Ms. Escalante requested a copy of the updated goals Ms. Sully worked on with Student outside of school, but Ms. Sully never provided them. Ms. Escalante observed Student in his math, science and physical education classes; twice during recess; and during testing. Student informed Ms. Escalante that he did not need help with any subject at school, and found school tiring except during physical education, lunch and recess. Mother shared that Student was social, talkative, energetic, studious, and angered easily. Mother was concerned about his inappropriate language use, and maladaptive behaviors at school, stating that he did not engage in those behaviors at home.

#### Teachers' interviews/reports to ms. escalante

17. Student's homeroom teacher, Ms. Aceves, reported to Ms. Escalante that Student worked better in her class because it was the first class of the day. However, she could not determine Student's abilities because Student was rarely in class, unable to participate in class work, and finished all of his work outside of class. Student struggled with boundaries, did not display safe behavior consistently, was extremely defiant, used foul language and bullied peers in Ms. Aceves' class. Ms. Mora, the resource specialist/special education teacher could not provide instruction in the resource specialist provider room because of Student's volatility and verbal assaults. She set all the tables and chairs against the wall in her classroom to reduce the likelihood of injury when Student engaged in maladaptive behaviors. Mr. Larson, the general education teacher, reported to Ms. Escalante Student was good at soccer; and physically and verbally abusive to teachers and peers, consistently using profanity and threatened Mr. Larson. Ms. Ramirez, Student's third grade English language arts teacher, concluded that

Student had the ability to get along with others; enjoyed attention and distracting others; and that his behaviors interfered with her ability to teach class. Student had only been in Ms. Sochin's, the social studies/science teacher, class three times and did not produce any work. She was concerned with Student's use of vulgar language in front of other students, and concluded that the behavior implementation plan was ineffective. Likewise, Student did not produce any work in Ms. Diehl's, the fourth grade English language arts teacher, class. She was also concerned with Student's use of vulgar language in front of other students, and found that Student was unable to access his education with support and strategies, including the help from the one-to-one aide.

18. In math class, Student provided constant commentary to teacher's instructions during lessons. He engaged in maladaptive behaviors including name calling; gesturing shooting a gun with his fingers at peers; offering money to peers to give him the answers to classwork; making five verbal utterances in four minutes including "what the f--k", and the equivalent vulgar phrase in Spanish; "did you fart"; "I hate..."; spinning in chair until he ended up on the floor; and screaming phrases of non-compliance at his aide. Verbal prompts had little effect to calm Student's heightened activity level or volume. While waiting in line to enter his science class, Student did not observe peers' personal space, and often tripped onto a peer. On one occasion, he darted across the class, and snatched a peer's pencil, but returned it when the peer objected and snatched a pencil from another peer, without using either pencil. When the peer objected, Student responded with several Spanish curse phrases. Attempts by the teacher and aide to de-escalate were unsuccessful, and resulted in Student taunting the African American peer with racist remarks and a middle finger. When asked by the aide to leave the class, Student refused, and ran within the classroom for approximately seven minutes yelling "Don't touch me; Damn it; What's wrong with you; Damn it, I hate you." It was not until the school psychologist and the aide spent another six minutes

coaxing Student to leave the classroom before Student agreed to leave. He returned to class eight minutes later. Student required ongoing verbal and visual prompts to transition from recess to physical education, refusing to put the soccer ball away, and required multiple prompts before participating in warm-up activities. Student also refused to transition to the next physical education activity including not moving, verbalizing his disagreement and refusing to participate for 11 minutes before transitioning, resulting in limited actual physical education class participation. One day during recess, Student held a soccer ball, pointed at sections of the field, directed peers, but because of unresolved differences between Student and peers, the game could not proceed. On another day, during recess Student played soccer for 10 minutes with an aide and a behavior specialist. Student played appropriately because the game was highly adult directed.

#### Standardized testing results from ms. escalante

19. Ms. Escalante administered standardized testing to Student over several days. She was able to establish rapport with Student and he understood test expectations. Student required intermittent breaks and verbal praise during testing, and worked toward breaks using a token economy of preferred items and activity. Student exhibited constant movement, and limited focus especially on non-preferred tasks. An aide accompanied Student during the three days of testing at school. Day three of testing was in the home where Student's behaviors and participation were significantly more compliant. However, Ms. Escalante terminated the home testing after 30 minutes when Mother did not allow Bellflower's nurse to be present during testing. The nurse was required per Bellflower's policy and for supervision for Ms. Escalante's safety because of Student's violent history.

20. Ms. Escalante has administered and was qualified to administer and interpret the results of the following standardized tests: the Woodcock Johnson Test of

Oral Language, Fourth Edition; the Woodcock Johnson Test of Academic Achievement, Form B; the Woodcock Johnson Test of Cognitive Abilities, Fourth Edition; the Beery-Buktenica Developmental Test of Visual Motor Integration, Sixth Edition; the Beery-Buktenica Test of Motor Coordination; the Beery-Buktenica Test of Visual Perception; the Behavior Assessment Scale for Children, Third Edition Parent and Teacher Form; the Connors, Third Edition; and the Scales Assessing Emotional Disturbance, Second Edition. She administered all of these instruments to Student and interpreted the results consistent with the publisher's protocols and yielded valid results. The assessments were not racially, culturally, or sexually biased. All instruments were reliable and widely accepted assessment tools.

21. All assessment tools were administered in Student's primary language of English except for the Woodcock-Johnson Test of Oral Language which was administered in both English and Spanish. Ms. Escalante asked Student to point to objects in pictures after given oral instructions and to listen to a passage and provide the final word to complete the passage. Student scored in the low average range in English, and in the very low range in Spanish. This showed that Student's Spanish was in the limited range, and he did not have strong Spanish academic usage. Student also performed in the low average range in the Woodcock Johnson Test of Cognitive Ability which measured his vocabulary, quantitative reasoning, working memory, perceptual speed, phonological processing, meaningful memory, and visualization abilities. Ms. Escalante concluded that Student did not have a processing deficit. Student scored in the low average range because he was extremely impulsive and raced through the tests which was consistent with his ADHD profile.

22. In the Woodcock Johnson Test of Academic Achievement, Student performed in the average range in all reading areas, except for passage comprehension, where he performed in the low average range. He also performed in the average range

in all areas of writing, except for writing samples where he performed in the high average range. Student performed in the average range in all areas of math, except for calculations where he performed in the low average range. While Student could complete multi-digit addition, subtraction and multi-digit by single digit multiplication, he struggled to maintain focus and attention on tasks he perceived as too hard, including simple division, fractions and subtraction with regrouping. Ms. Escalante concluded that Student's broad academic achievement was in the average range.

23. The Beery-Buktenica Developmental Test of Visual Motor Integration assessed Student's visual-motor integration skills such as eye-hand coordination. Student performed below average. He had difficulty with extended attention to detail and focus needed to replicate drawings presented; rushed through the tasks; and lacked control/stabilization of the writing instrument. Ms. Escalante also administered the Beery-Buktenica Test of Motor Coordination to further assess Student's fine motor coordination by having him trace the forms with a pencil without going outside the double-lined paths. Student performed in the low range because of his limited attention to detail. Ms. Escalante further administered the Beery-Buktenica Test of Visual Perception to assess Student's visual perception when motor requests were removed by asking him to find matching shapes from a selection of choices. Student scored in the average range. Ms. Escalante concluded that Student's visual perception scores were in the low to average range, and commensurate with Student's Woodcock-Johnson Test of Cognitive Ability visual processing results.

24. Ms. Escalante administered the Behavior Assessment Scale for Children to Student, Mother, and two teachers: the general education/physical education teacher, Mr. Larson, and the resource service provider teacher, Ms. Mora. This was a rating scale to assess social-emotional functioning and maladaptive behaviors on the basis of problem externalization, problem internalization, school problems/attention, and

adaptive skills. Student self-reported as experiencing low level of behaviors, no personal or relationship challenges, strength in social and interpersonal skills and parental relationship, and inattention/hyperactivity scores that were lower than his same-aged peers. Ms. Escalante noted that Student's scores on the Behavior Assessment Scale for Children showed that Student could have limited insight on his own behavior, thoughts, and emotions; possessed an idyllic self-view; and in denial of problems to present himself in an overly positive light, known as "faking good".

25. Significant differences in ratings existed between Student's home and school behaviors as reported by Mother, Mr. Larson, and Ms. Mora. In terms of Student's externalization problems, Mother's ratings showed that Student: demonstrated the same level of self-control as peers; was not any more aggressive than peers; and demonstrated no more conduct problems/rule-breaking behavior than peers. In terms of Student's internalization problems, Mother's ratings showed that Student's anxiety and withdrawal symptoms were low; depression, somatization (complaints of health-related problems), atypicality (generally displayed clear/logical thought patterns), and attention levels were average. Mother's ratings of Student's adaptive skills showed that Student: had difficulty with social skills and adapting to change, as both of those ratings were in the at-risk range; and leadership, daily living activities, and functional communication were all in the average range.

26. In terms of Student's externalization problems, Mr. Larson's and Ms. Mora's ratings showed that Student's hyperactivity, aggression, and conduct problems were all in the clinically significant range. In terms of Student's internalization problems: (a) Mr. Larson's ratings showed that Student's anxiety, depression, and somatization were in the average range; and (b) Ms. Mora's ratings showed that Student's anxiety and somatization were in the average range; and depression was in the at-risk range because Student was withdrawn, pessimistic and sad.

27. Mr. Larson's school problem ratings showed that Student had difficulty maintaining attention, engaged in strange/odd behaviors and was disconnected from his surroundings, had difficulty comprehending and completing schoolwork in a variety of academic areas which placed Student in the at-risk range for attention, atypicality, and learning problems. Mr. Larson rated Student's withdrawal symptoms as average because Student was capable of developing and maintaining friendships. Mr. Larson rated Student's adaptive skills as clinically significant because Student took longer to recover from difficult situations, and had extreme difficulty adapting to change. He rated Student's social and leadership skills in the at-risk range because Student had: difficulty complimenting others and making suggestions for improvement in a socially acceptable manner; and difficulty making decisions, lacked creativity, and had difficulty getting others to work together effectively. He rated Student's study and functional communication skills as clinically significant because Student had weak study and poor organization skills; difficulty turning assignments in on time; poor expressive and receptive communication skills; and difficulty finding information by himself.

28. Ms. Mora's school problem ratings showed that Student had significant difficulty maintaining attention, engaged in strange/odd behaviors and was disconnected from his surroundings which placed Student in the clinically significant range for attention and atypicality. Ms. Mora rated Student's learning problems and withdrawal symptoms as average because Student did not have unusual difficulty comprehending and completing schoolwork, and was capable of developing and maintaining friendships. Ms. Mora rated Student's adaptive and social skills as clinically significant because Student took longer to recover from difficult situations, and had extreme difficulty adapting to change. She rated Student's leadership, study and functional communications skills in the at-risk range because Student had: difficulty making decisions, lacked creativity, and had difficulty getting others to work together

effectively; weak study and poor organization skills; difficulty turning assignments in on time; poor expressive and receptive communication skills; and difficulty finding information by himself.

29. Both teachers reported that Student had anger control, bullying, developmental social disorders, emotional self-control, executive functioning difficulties, negative emotionality when dealing with changes in everyday activities/routines, and resiliency (difficulty overcoming stress/adversity) all in the clinically significant range. Ratings of Student by both Mr. Larson and Ms. Mora met clinical markers for oppositional defiant disorder, conduct disorder, and attention deficit/hyperactivity disorder which impacted learning.

30. Ms. Escalante also assessed Student's behaviors and feelings using the Conner rating scale issued to Mother and one teacher, with significant discrepancy in behaviors reported at home and at school. Teacher reported "very elevated" concerns with inattention, executive functioning, defiance/aggression, and peer relations. Both Mother and teacher reported "very elevated" concerns with hyperactivity/impulsivity. Teacher reported "elevated" concerns with learning problems. Mother reported "elevated" concerns in defiance/aggression.

31. Ms. Escalante concluded that Student met the ADHD predominantly inattentive presentation, ADHD predominately hyperactive-impulsive presentation, conduct disorder, and oppositional defiant disorder under the Diagnostic and Statistical Manual of Mental Disorder, Fifth Edition.

32. Mother and Ms. Mora filled out the Scale for Assessing Emotional Disturbance, a rating scale, used to identify students who may be experiencing emotional and/or behavioral difficulties in the educational setting. Mother's and Ms. Mora's ratings showed that Student was below the "indicative" range of an emotional disturbance, but their subscales ratings showed that Student exhibited inappropriate, or



highly maladaptive behaviors.

33. Ms. Escalante concluded that Student did not meet the specific learning disability special education category because he did not have a processing deficit, or a discrepancy or severe gap between his cognitive potential and achievement. Student had average cognitive potential with deficits in long term memory and visual motor integration skills. His highly maladaptive behaviors directly interfered and impacted his education.

34. Ms. Escalante also concluded that Student required significant supports to access his curriculum because of inattention and impulsivity which was symptomatic of ADHD, and that Student met the requirements of an other health impairment special education eligibility. She further concluded that Student met the eligibility requirements of an emotional disturbance because of a history of and continued aggression towards staff and students; required significant support to address his frustration tolerance; and continued displays of a high level of maladaptive behavior impacting access to his education. Although Mother reported that Student used appropriate behaviors and was able to adapt to his home and community with interventions, Student did not display the same appropriate behaviors at school. At school, Student displayed mood difficulties and engaged in inappropriate behavior such as elopement and verbal and physical aggression when upset, or asked to engage in non-preferred activities. He displayed maladaptive behaviors in all settings including large group, unstructured time, and during individual testing. His cursing, name calling, and teasing significantly affected his relationships at school. Although Student could navigate his placement independently, he struggled to follow safety rules and often ran from staff during transitions. He displayed the ability to learn grade level instruction, encountered significant difficulty keeping up with the pace of instruction, which resulted in off-task, negative behaviors. She opined that Student's maladaptive school behaviors did not surface at home or in

the community as severely because school was a more structured environment which required Student to participate in more non-preferred activities; whereas at home and in the community, Student had more flexibility to choose preferred activities.

35. Ms. Escalante recommended that the IEP team review Student's anger control, resiliency/coping, verbal/physical aggression reduction, peer and adult interpersonal skills, prevocational tasks. She also recommended counseling, continued review of behavior intervention plan, supervision during non-structured time by trained staff, and transition to an appropriate placement with high safety measures, behavioral expertise, therapeutic specialization, in a segregated educational setting with a low adult to student ratio that provided appropriate behavioral supports, ensured safety and handled elopement. She suggested that the IEP team explore non-public schools such as Spectrum-Downey, Olive Crest Academy, and Spectrum-Long Beach. She recorded all of her assessment findings and conclusions in her Psycho-educational Assessment dated September 29, 2017.

#### SEPTEMBER 25, 2017 AND OCTOBER 19, 2017 IEP TEAM MEETINGS

36. At the September 25, 2017 and the reconvened October 19, 2017 IEP team meetings, the IEP team discussed the speech and language and psycho-educational assessments, the behavior intervention plan along with Student's maladaptive school behaviors, which the Bellflower IEP team characterized as severe. Mother was present with her attorney, along with all required Bellflower IEP team members. Mother and her attorney asked questions and participated fully in the IEP team meetings. Bellflower's IEP team proposed a primary special education eligibility of other health impairment for Student's ADHD and a secondary special education eligibility of emotional disturbance because ADHD alone did not account for all of Student's characteristics. Emotional disturbance was appropriate and descriptive of Student's needs because of his aggressive response to typical situations; elopement; threatening behaviors; and

emotional volatility. Mother and her attorney disagreed with Bellflower's IEP team about the emotional disturbance eligibility because of an absence of a formal/medical diagnosis in that area and, as a result, described Bellflower's information on Student's function, cause, and strategies to control Student's maladaptive behaviors as speculative.

37. Bellflower's IEP team did not believe general education placement was appropriate for Student because his behaviors required extended removal from classes and precluded any meaningful education. Further, Student's aggression and anger jeopardized his own safety, and the safety of staff and other students, and his needs required the additional support that only a non-public school could provide. Ms. Sully who was present at the IEP meeting offered to provide in-school counseling, but Bellflower's IEP team opined that Student needed therapist support in the classroom, at all times, not just during scheduled therapy sessions. The IEP team discussed a spectrum of placements including special day class, several non-public schools, and home instruction. Mother did not believe Student fit the profile of a non-public school student, and preferred home instruction with slow re-integration into general education environment.

38. On November 28, 2017, Mother requested independent speech and language and psycho-educational evaluations. As of December 5, 2017, Student did not reside within Bellflower's boundaries and disenrolled from Bellflower. As of December 7, 2017, Student had enrolled with ABC Unified School District.

39. On December 12, 2017, after Bellflower ceased to be Student's local educational agency, Bellflower sent a prior written notice denying Mother's speech and language and psycho-educational independent evaluation requests to Mother, by certified mail, with a copy to her attorney. Neither Mother, nor her attorney, responded

to Bellflower's prior written notice. Student filed for due process more than six months later.

#### Mother's Testimony

40. Mother disagreed that Student qualified under the emotionally disturbed special education eligibility category because Student was not medically diagnosed with mental health issues. However, she agreed that Student had difficulty with focus as he was diagnosed with ADHD. While Student had behavioral difficulties, especially with transitions, Mother believed they had improved because Student did not display maladaptive behaviors at home, with friends outside of school, or in religious/catechism class, but just in school. She believed that Bellflower did not provide appropriate services to handle Student's maladaptive behavior and transition difficulties. Mother was displeased with Bellflower's aide because Student was afraid of the aide. Mother was concerned that the aide inappropriately restrained and hurt Student. She was displeased that Student had been removed to the de-escalation room. She was also concerned with Student's processing and communication difficulties and believed that Student had a speech and language impairment and should receive speech and language services. For example, Student could not communicate using appropriate words such as repeating "poopy pants" inappropriately based on reading the book Captain Underpants. She also reported that Student mumbled and had difficulty following multi-step instructions. Mother claimed at hearing that Ms. Thompson never contacted her regarding the speech and language assessment.

41. Student stipulated that Bellflower did not commit any procedural violations in its triennial assessment of Student.

## LEGAL AUTHORITIES AND CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>5</sup>

1. This due process 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 et seq. (2006)<sup>6</sup>; Ed. Code, § 56000, et seq.; and 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 to 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); Ed. Code, § 56000, subd. (a).)

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

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<sup>5</sup> Unless otherwise indicated, the legal citations in this introduction are incorporated by reference into the analysis of each issue decided below.

<sup>6</sup> All subsequent references to the Code of Federal Regulations are to the 2006 edition.

with the participation of parents and school personnel, and which sets forth 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, 200 [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 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, 1000-1001] (*Endrew F.*)). The Supreme Court in *Endrew F.* 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 or 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) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C) & (D); Ed. Code, § 56505, sub. (l).)

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. 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 due process hearings is preponderance of the evidence].) In this case, Student has the burden of proof.

#### ISSUES 1(A) AND 2(A): DUE PROCESS FILING

6. Student contends that Bellflower should have filed for due process when it denied Student's requests for independent assessments. Bellflower contends that it did not need to file for due process and did not file for due process because Student moved and disenrolled from Bellflower a week after he requested independent assessments.

7. When a parent requests an independent evaluation at public expense, the school district must, "without unnecessary delay," either initiate a due process hearing to show that its evaluation is appropriate, or provide the independent evaluation at public expense, unless the school district demonstrates at a due process hearing that the evaluation obtained by the parent did not meet its criteria. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).) If a school district decides not to take a requested action, the district must provide parents with a prior written notice within a reasonable time period. (34 C.F.R. § 300.503.) The notice must include an explanation of why the agency

proposes or refuses to take the action. (*Ibid.*)

8. Whether the length of time that has passed before a district initiates a due process hearing or provides the independent evaluation at public expense constitutes “unnecessary delay” is a question of fact, based upon the circumstances of the particular case. (*J.P. v. Ripon Unified Sch. Dist.* (E.D. Cal., Apr. 15, 2009, No. 207CV02084MCEDAD) 2009 WL 1034993 (*Ripon*)). For example, in *Ripon* the court determined that the school district’s due process request filed more than two months after the request for an independent evaluation was timely, as the parties were communicating regarding the request for the evaluation in the interim, and did not come to an impasse on the issue until less than three weeks before the school district’s filing. (2009 WL 1034993, \*\* 7-8.) In contrast, in *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal., Dec. 15, 2006, No. C 06-0380 PVT) 2006 WL 3734289 (*Pajaro*)), the school district did not file its due process complaint to defend its assessment until approximately 11 weeks after the student’s request for an independent evaluation. The Pajaro school district offered no explanation as to why it delayed for 11 weeks in filing its complaint, or why that delay was “necessary.” The court found that the Pajaro school district’s “unexplained and unnecessary delay in filing for a due process hearing waived its right to contest [s]tudent’s request for an independent educational evaluation at public expense, and by itself warrants entry of judgment in favor of [s]tudent and [parent].” (2006 WL 3734289, \* 3.)

9. The term “unnecessary delay” as used in 34 C.F.R. § 300.502(b)(2) is not defined in the regulations. It permits a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an independent evaluation. (*Letter to Anonymous* (OSEP 2010) 56 IDELR 175.) Some delay in the provision of an independent evaluation is reasonable if the school district and the parents are engaging in active



communications, negotiations or other attempts to resolve the matter. (See *Horne v. Potomac Preparatory P.C.S.* (D.D.C. 2016) 209 F.Supp.3d 146, 153-155.) The determination of “unnecessary delay” is a fact-specific inquiry. The facts of each case are therefore critical. (*Ibid.*)

10. Under the IDEA, a local education agency is charged with “providing for the education of children with disabilities within its jurisdiction.” (20 U.S.C. § 1413(a)(1) .) California law places the primary responsibility for providing special education to eligible children on the local education agency, usually the school district in which the parents of the child reside. (Ed. Code, §§ 56300, 56340, and 56344(c).) The law also contemplates that, when a parent disputes the educational services provided to the special needs child, the proper respondent to the due process hearing request is the local education agency. (See, Ed. Code, § 56502, subd. (d)(2)(B).) As local education agency, school districts have an affirmative, ongoing duty to identify, locate, and evaluate all children with disabilities residing within their boundaries. (20 U.S.C. § 1412(a)(3); Ed. Code, § 56300 et seq.) See, *N.B. v. State of Hawaii, Dept. of Educ.* (D. Hawaii July 21, 2014, Civil No. 13–00439 LEK–BMK.) 2014 WL 3663452.) [The District Court held that the school district’s obligation to provide FAPE was triggered by enrollment.]

11. The IDEA and existing special education law were clear in charging a local education agency, here Bellflower, with finding, assessing and offering a FAPE to a student if the student was enrolled in and/or resided within its jurisdiction. It was undisputed that Student moved and disenrolled from Bellflower on December 5, 2017. As of December 5, 2017, Bellflower was no longer the local education agency for Student; and Student had enrolled in another school district, ABC, which became Student’s new local education agency. Student cited to no statute or legal precedent supporting a finding that a school district’s duty to file for due process continued after a

student stopped living within its boundaries and disenrolled from the school district. Therefore, Bellflower's duty to file for due process against Student, like its duties to find, assess and offer a FAPE, also ceased on December 5, 2017, when Bellflower ceased to be Student's local education agency.

12. Had Congress intended a school district to retain its duty file against a student when it no longer had an obligation to provide a FAPE, and was no longer the local education agency, it would have so provided in its statutes. The IDEA and cases including *Ripon* and *Pajaro*, requiring a local education agency to timely file for due process, were intended to preserve the procedural safeguards of having appropriate assessments for full parental participation so school districts could develop IEPs and offer a FAPE to students within its jurisdiction. (*See, Pajaro, supra*, 2006 WL 3734289, \* 3, citing *Rowley* and *Park*.) Bellflower's obligation to develop an IEP and offer a FAPE to Student stopped on December 5, 2017, along with its duty to file for due process against Student. Requiring Bellflower to file for due process under these facts would fly in the face of the IDEA's intent to preserve parental participation rights in IEP development for students within a local education agency's jurisdiction. It would also have the unintended consequence of increasing litigation and causing unnecessary stress to a family in having to defend litigation from its former local education agency which no longer had any legal obligation to provide a FAPE.

13. Here, Mother requested independent evaluations a week before Student moved and disenrolled from Bellflower. Student had a right to file for due process for FAPE violations and request compensatory relief, including independent evaluations, for the period he was enrolled and lived in Bellflower. In fact, Student would be entitled to independent evaluations had he successfully demonstrated that Bellflower's psycho-educational or speech and language evaluations were inappropriate, which as discussed below, Student did not. (*See* discussion of Issues 1(b) and 2(b) below.) As such, the

relevant discussion for this issue was whether Bellflower unnecessarily delayed in filing for due process between November 28, 2017, the date Mother requested independent evaluations, and December 5, 2017, the date Bellflower ceased to be Student's local education agency. Five school days, or a mere seven calendar days, did not constitute an unnecessary delay for Bellflower to file for due process under present law, be it under *Ripon* or *Pajaro*. Further, Bellflower's December 12, 2017 prior written notice denying Mother's request for independent evaluations was a courtesy and occurred after Bellflower ceased to be Student's local education agency. Bellflower's courtesy did not alter the fact that it ceased to be Student's local education agency through Student's affirmative actions of moving and disenrolling from Bellflower, and enrolling in ABC. Student never re-enrolled, or resided in Bellflower after December 5, 2018. Under the unique facts of this case, Student's due process filing against Bellflower six months after disenrollment alone did not re-trigger, or revive, Bellflower's IDEA duties, including the duty to file for due process against Student.

14. Student did not meet her burden of proving by a preponderance of evidence that Bellflower's duty to file for due process survived beyond his residency termination and disenrollment from Bellflower, or that Bellflower unnecessarily delayed in filing for due process during the period Student resided and was enrolled in Bellflower. Accordingly, Student is not entitled to any independent assessments at the public's expense.

#### ISSUES 1(B) AND 2(B): PSYCHO-EDUCATIONAL AND SPEECH AND LANGUAGE ASSESSMENTS

15. Student contends that Bellflower's psycho-educational and speech and language assessments were inappropriate and that Bellflower should fund independent assessments in those areas. Bellflower contends that it properly conducted its psycho-educational and speech and language assessments.

16. Assessments are required to determine eligibility for special education, and what type, frequency and duration of specialized instruction and related services are required. In evaluating a child for special education eligibility and prior to the development of an IEP, a district must assess him in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related service's needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

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

(N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where the concern prompting the assessment was reading skills deficit].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).) Assessors must be knowledgeable about the student's suspected disability and must pay attention to student's unique educational needs such as the need for specialized services, materials, and equipment. (Ed. Code, § 56320, subd. (g).)

18. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health, development, and medical findings, if any; (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (7) consistent with superintendent guidelines for low incidence disabilities (those affecting less than one percent of the total statewide enrollment in grades kindergarten through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) Within 60 days of parental consent to the assessment, the assessment report must be provided to the parent (Ed. Code, § 56329, subd. (a)(3)), and an IEP team meeting must be held to consider the assessment. (Ed. Code § 56302.1, subd. (a).)

19. The IEP team shall review the pupil's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the pupil are being achieved, and revise the IEP, as appropriate, to address, among other matters, information about the pupil provided to, or by, the parents; the pupil's anticipated needs; or any other relevant matter. (Ed. Code, § 56341.1, subd. (d)(3), (4), and (5).) An

IEP is a “snapshot” and must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

20. A student may be entitled to an independent educational evaluation if a parent disagrees with an evaluation obtained by the public agency and requests an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. §300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an independent evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent evaluation].)

21. A school district’s failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033 (*Park*)). 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 Sch. Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119).

22. A procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 *superseded by statute on other grounds, as stated in R.B. v. Napa Valley Unified Sch. Dist.* (9th Cir.2007) 496 F.3d 932, 939.)

#### Psycho-educational assessment

23. Ms. Escalante appropriately conducted the September 29, 2017 psycho-

educational assessment. She used a variety of tools including personal observation during on multiple days, in multiple environments, including during five days of testing; a variety of interviews with many teachers, Mother, and Student; records review; and multiple standardized tests to assess Student. The assessment resulted in a comprehensive written report about Student's cognitive and functional abilities and behavioral and social emotional presentations. The report included reasoned conclusions that Student was eligible for special education under other health impairment because of his ADHD and emotional disturbance based on his severe social emotional and behavioral presentations at school. It also included recommendations regarding Student's academic needs and placement, including a non-public school placement for the IEP team to consider.

24. Although Student argued that a new functional behavior assessment should have been conducted in the fall of 2017 as part of the psycho-educational assessment to update the functional behavior assessment conducted in March 2017, he did not provide any evidence to support this argument. Ms. Thompson, who conducted the functional behavior assessment, persuasively explained that another functional behavior assessment was not needed especially when Student's behavior intervention plan had been updated on at least three occasions since the March 2017 functional behavior assessment. The IEP team had updated behavioral data on Student. Ms. Thompson persuasively explained that Student needed a non-public school setting and that none of the strategies were successful in the general education environment. Student did not rebut Ms. Thompson's opinion, and did not provide any evidence to support that another functional behavior assessment was necessary. Bellflower had a plethora of behavioral data on Student supporting that Student had severe maladaptive behaviors which could not be controlled in a general education environment to access his curriculum. Equally unpersuasive was Student's argument that Ms. Escalante did not

specifically state that she reviewed the March 2017 functional behavior assessment and did not speak with Ms. Thompson as part of the psycho-educational assessment. Student did not cite to any persuasive legal authority requiring that an assessor speak with all prior assessors when she had already obtained and reviewed prior records and had a plethora of information on Student's behaviors through a variety of sources. Because of Student's evolving maladaptive behaviors, the behavior intervention plan had been updated several times since the March 2017 functional behavior assessment. Ms. Escalante reviewed and included the August 31, 2017 behavioral intervention plan, Student's latest behavior intervention plan, in her psycho-educational assessment and report. Further, Ms. Escalante observed Student on many days in different academic and non-academic school settings as a part of her psycho-educational assessment. Lastly, Ms. Escalante was knowledgeable about Student's behaviors, profile and the challenges impeding Student's access to the curriculum.

25. Student did not present any evidence, expert or otherwise, to show that Ms. Escalante inappropriately selected, administered or scored any of the standardized tests, or that the psycho-educational assessment was otherwise inappropriate. Although Student's counsel argued in the closing brief that Ms. Escalante only administered seven of the ten Woodcock Johnson subtests, Student did not present any expert, or any persuasive evidence, to demonstrate this was deficient. Student had the burden of proof, and did not meet it; instead, he simply argued that Ms. Escalante should have done more without presenting any evidence to support the argument. Bellflower, on the other hand, showed that Ms. Escalante was qualified; and Ms. Escalante persuasively explained, with examples and details, that she had all the information she needed and examined all areas of Student's suspected disabilities when conducting Student's psycho-educational assessment. The only evidence Student presented, other than Student's counsel's arguments, was Mother's disagreement with Ms. Escalante's



conclusion that Student was eligible for special education under the secondary category of emotional disturbance, instead of just the primary category of ADHD. Mother's skepticism about Student's emotional disturbance special education category was because Student exhibited the severe maladaptive behaviors at school, and not at home; Student had not been medically diagnosed as emotionally disturbed; and Student's therapist stopped counseling services in March 2017 because she felt Student did not need them. Because Ms. Escalante was a trained school psychologist who conducted extensive testing and set forth the results in her report and at hearing detailing the basis for her opinions, she was more persuasive on the issue of special education eligibility. Student offered no evidence or authority to support a finding that a medical diagnosis was the necessary prerequisite for a conclusion that Student met the criteria for an emotional disturbance special education eligibility.

26. Further, Student did not cite to any persuasive legal authority requiring that Student's school maladaptive behaviors match his behaviors at home to qualify for an emotional disturbance special education eligibility. Student did not present any evidence that Student's outside therapist, Ms. Sully, observed Student at school. Her conclusion that Student met his social goals and no longer required therapy outside of school did not successfully rebut Ms. Escalante's finding that Student met the special education criteria for emotional disturbance. Student's argument that Ms. Escalante did not have enough information on Student because Ms. Sully had not provided updated goals she worked on with Student outside of school was unpersuasive especially when Ms. Escalante had talked to Ms. Sully about Student's out-of-school behavioral progress as part of the assessment. Ms. Escalante also persuasively explained that the discrepancy between Student's school and home/community behavior was attributed to the more structured and non-preferred activities required from him at school. Student did not offer any evidence to rebut her testimony.

27. Student did not meet her burden of proving by a preponderance of evidence that Bellflower's fall 2017 psycho-educational assessment was inappropriate. Accordingly, Student was not entitled to an independent psycho-educational assessment at the public's expense.

#### Speech and Language Assessment

28. A student is eligible for special education and related services under the category of speech and language impairment if he or she demonstrates difficulty understanding or using spoken language under specified criteria and to such an extent that it adversely affects his or her educational performance, which cannot be corrected without special education. (Ed. Code, § 56333.) The criteria are: (a) Articulation disorder: the child displays reduced intelligibility or an inability to use the speech mechanism which significantly interferes with communication and attracts adverse attention; (b) Abnormal voice: a child has an abnormal voice, which is characterized by persistent, defective voice quality, pitch, or loudness; (c) Fluency Disorders: a child has a fluency disorder when the flow of verbal expression including rate and rhythm adversely affects communication between the pupil and listener; and (d) Language Disorder: the pupil has an expressive or receptive language disorder, in pertinent part, when he or she scores at least 1.5 standard deviations below the mean, or below the seventh percentile, for his or her chronological age or developmental level, on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics. (Ed. Code, § 56333; Cal. Code Regs., tit. 5, § 3030, subd. (b)(11).)

29. The November 1, 2017 speech and language assessment was appropriately conducted. Ms. Wascher used a variety of tools including personal observation on multiple days, in multiple environments, including during four days of testing. She also interviewed teachers; reviewed Student's records review; and

conducted multiple standardized tests to assess Student. Additionally, Ms. Gonzalez evaluated Student's bilingual capabilities and determined appropriately that Student was English dominant, which was undisputed. The report included reasoned conclusions that Student did not meet the criteria and was not eligible for special education under speech and language impairment because he performed mostly in the average range on the assessments and had the necessary pragmatics and functional communication skills to access his curriculum. It also included recommendations that Student terminate speech and language for the IEP team to consider.

30. Student argued that the speech and language assessment was inappropriate because Ms. Wascher did not include Mother's input and should have administered additional pragmatics language profile test. Ms. Wascher persuasively explained that she contacted Mother on multiple occasions, leaving two voicemails, while conducting her speech and language assessment. Mother did not return Ms. Wascher's calls, but informed Bellflower that Ms. Wascher was not allowed to assess Student in the home. Although at hearing Mother did not recall Ms. Wascher ever contacting her for the speech and language assessment, Ms. Wascher's testimony was more persuasive because of her demeanor and the details she provided, including that it was her custom and practice to interview parent for her speech and language assessments. Although Ms. Wascher did not recall whether her voicemails to Mother specifically stated she was seeking Mother's input, her actions showed that she contacted Mother for input, but Mother elected not to return any of Ms. Wascher's calls. Further, Ms. Wascher also persuasively opined that she received all the information and input she needed from a variety of methods of assessments, which Student did not rebut. Although Student's counsel argued in the closing brief that Ms. Wascher should have administered other subtests available under the Clinical Evaluation of Language Fundamentals, Student did not present an expert, or any persuasive evidence, to

demonstrate that the absence of those subtests would render the speech and language assessment inappropriate; Student's counsel's argument was not evidence. Student had the burden of proof, and did not meet it, by simply arguing that Ms. Wascher should have done more without presenting any evidentiary support beyond counsel's argument. Student also did not provide any evidence, expert or otherwise, that Ms. Wascher needed to conduct further pragmatics testing for the speech and language assessment to be complete; or that further pragmatics testing would provide necessary information that Ms. Wascher did not already obtain in her testing. The teachers all opined that Student understood and possessed the pragmatic and functional communications and social skills, but chose to act out instead. The totality of the evidence did not support that Student required speech and language services, but rather required extensive behavioral supports to access his education. Student also did not present any evidence, expert or otherwise, to show that Ms. Wascher inappropriately selected, administered or scored any of the standardized tests, or that the speech and language assessment was otherwise inappropriate.

31. Student did not meet her burden of proving by a preponderance of evidence that Bellflower's fall 2017 speech and assessment was inappropriate. Accordingly, Student was not entitled to an independent speech and language assessment at the public's expense.

## ORDER

All of Student's requests 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, Bellflower was the prevailing party as to 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: December 21, 2018

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

SABRINA KONG

Administrative Law Judge

Office of Administrative Hearings