

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2018070108

v.

TEMECULA VALLEY UNIFIED SCHOOL
DISTRICT,

TEMECULA VALLEY UNIFIED SCHOOL
DISTRICT,

OAH Case No. 2018081019

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings on June 29, 2018, naming Temecula Valley Unified School District.¹ OAH continued this matter for good cause on July 27, 2018. On August 24, 2018, Temecula Valley filed a complaint naming Student. On September 6, 2018, OAH consolidated Temecula Valley's case with Student's case. Administrative Law Judge Linda Johnson heard this matter in Temecula Valley, California, on September 25, 26, and 27,

¹ Temecula Valley filed its response to Student's complaint on July 12, 2018, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

and October 2, 3, 16, and 17, 2018.

Wendy Housman, Attorney at Law, represented Student, and was assisted by Theresa Sester, educational advocate, and Shannon Peterson. Student's parents attended each day of the hearing on Student's behalf; Student did not attend the hearing.

Sarah Sutherland and Amy Rogers, Attorneys at Law, represented Temecula Valley. Ami Paradise, Temecula Valley's Assistant Director, attended on Temecula Valley's behalf.

At the parties' request, OAH continued this matter to November 14, 2018, for closing briefs. Upon timely submission of written closing briefs, the record was closed and the matter was submitted for decision.

ISSUES

STUDENT'S ISSUES²

1. Did Temecula Valley deny Student a free appropriate public education by failing to properly assess her in all areas of suspected disability in its fall 2017 triennial assessment by inappropriately identifying Student's unique academic, communication, and social and emotional needs and improperly exiting her from special education, specifically:

- a. By failing to properly assess Student during the triennial testing in fall 2017 by using inappropriate and incomplete analyses of the testing data, mis-scoring tests, omitting numerous subtests, failing to properly interpret testing data consistent with the author's instructions and yielding invalid results, failing to

² At the beginning of the hearing Student withdrew her issue regarding IEP implementation.

take into account Student's unsuccessful response to intervention and history of inadequate achievement to inappropriately find that Student no longer qualified for special education services;

- b. By misrepresenting Student's present levels of performance at the November 2, 2017 IEP team meeting by incorrectly reporting that Student was making passing grades therefore able to access grade level curriculum despite having a language based disability including definitive processing deficits;
- c. By failing to timely and/or appropriately assess Student in all areas of suspected disability including the areas of auditory processing and communication, failing to perform requisite follow up testing or reassessment in the area of vision information processing, or assessing in the area of social emotional functioning?

2. Did Temecula Valley deny Student a FAPE during the 2017 triennial individualized education program team meeting when individual IEP team members failed to give independent consideration of Student's eligibility, failing to appropriately weigh all statutory factors as to Student's specific learning disability disabling category, and uncritically adopting the assessor's recommendations to deny Student special education eligibility?

3. Did Temecula Valley deny Student a FAPE by failing to file for due process when Parents did not consent to Student's IEPs between June 2016 through fall 2017?

4. Did Temecula Valley deny Student a FAPE by intentionally or improperly inflating Student's grades to reflect passing grades and determine she did not need special education and related services to be able to access grade level curriculum?

TEMECULA VALLEY'S ISSUE

5. Does Temecula Valley's November 2, 2017 multidisciplinary assessment, that was amended on June 1, 2018, meet all legal requirements such that Student is not

entitled to an independent educational evaluation at public expense?

SUMMARY OF DECISION

Temecula Valley's triennial multidisciplinary assessment of Student did not meet all legal requirements. The academic portion of the assessment was not administered in accordance with the test instructions and the analysis of the psychoeducational portion of the assessment was flawed.

Conversely, Student proved Temecula Valley's recommendation to exit her from special education was based on a flawed assessment and therefore was improper. Additionally, during the triennial IEP team meeting to discuss the assessment report the IEP team did not fully discuss eligibility. Student did not prove that Temecula Valley failed to assess her in all areas of suspected disability or misrepresented her grades or present levels of performance. Student's issue, however, was not if she qualified for special education as a student with a learning disability, but rather if Temecula Valley improperly exited her from special education. Because Student proved Temecula Valley improperly exited her from special education, she is entitled to a remedy as a result of the substantive denial of FAPE that resulted from the decision to exit her from special education.

Student did not prove that she was denied a FAPE because Temecula Valley failed to file for a due process hearing when Parents did not fully consent to Student's IEP between June 2016 and fall 2017. Student continued to make academic progress and meet grade level standards despite not having specialized academic instruction. Additionally, as of February 2017 the only services Temecula Valley offered was special education consultation in the general education classroom. Student did not prove that she required additional services to make academic progress.

FACTUAL FINDINGS

1. At the time of the hearing Student was an 11-year-old female who resided with Parents within Temecula Valley's boundaries. Student first qualified for special education under the eligibility category of specific learning disability on November 10, 2014.

2016-2017 SCHOOL YEAR

2. During the 2016-2017 school year Student was in a fourth grade general education class. Just prior to the start of the school year Parents revoked consent to Student's pull-out specialized academic instruction service. Student's IEP team met eight times during the year to discuss parent concerns, supports, and services.

3. The IEP team met on August 19, 2016, for an amendment IEP team meeting to discuss a new offer of FAPE. The team also discussed vision therapy, Temecula Valley's dyslexia screening report, and a psychoeducational assessment from Big Springs Educational Therapy Center and School. Parents preferred that Student was not pulled out of class for specialized academic instruction. Temecula Valley amended its offer of FAPE; the new offer was placement in a general education classroom with consult and collaboration from a special education staff member for 30 minutes weekly. Parents did not consent to the offer or amendment IEP.

4. The IEP team met again on September 13, 2016, for an amendment IEP team meeting. Dr. Katie Elton, a developmental optometrist, attended the meeting and discussed her vision therapy progress check report. In 2015 Temecula Valley referred Student to California Oaks Vision Center of Optometry for a vision therapy assessment due to Parents' concerns that Student's vision may be impacting her reading fluency. Dr. Elton conducted the assessment and determined that Student had a visual processing disorder and provided her with 12 vision therapy sessions. Dr. Elton conducted a

progress check in June 2016; although Student had made progress Dr. Elton still recommended vision therapy due to errors in tracking and processing. The team continued discussing services and how best to support Student. Parents did not want Student pulled out of class but instead requested tutoring after school. Temecula Valley offered six vision therapy sessions and 120 minutes a week of pull-out specialized academic instruction. Parents consented to the amendment IEP with the exception of the specialized academic instruction in a separate setting.

5. Temecula Valley offered Student an additional six vision therapy sessions on September 29, 2016, through a prior written notice. In that same prior written notice Temecula Valley denied the request for after school tutoring.

6. On October 3, 2016, the IEP team met again for an amendment IEP team meeting. Parents were concerned about the pull out services offered. Parents did not think Student benefited from pull out specialized academic instruction and requested Temecula Valley implement a specific program, Orton-Gillingham, for Student. Temecula Valley did not offer a specific program to support Student; however, it continued to offer Student 120 minutes per week of pull out specialized academic instruction. Parents consented to the amendment IEP with the exception of specialized academic instruction in a separate setting.

7. Between October 11, 2016, and October 19, 2016, Student received four sessions of educational therapy from Big Springs. Parents paid \$50 a session, for a total of \$200 to Big Springs for the educational therapy. Student did not present any evidence if the educational therapy was beneficial, or why she only attended four sessions.

8. The IEP team met on January 9, 2017, for an amendment IEP team meeting. Parents again expressed concern about Student being pulled from class and requested before or after school tutoring by someone trained in Orton-Gillingham.

Temecula Valley reported that Student's grades were between 82 and 92 percent in all classes. Temecula Valley did not make any changes to the offer of FAPE and Parents did not consent to the IEP.

9. Student's annual review IEP team meeting was held on February 2, 2017, and continued to February 9, 2017. Student had three goals from her February 2016 IEP: a reading comprehension goal, a spelling goal, and a writing goal. She met her reading comprehension goal and writing goal and partially met her spelling goal. Student's classroom grades ranged between 75 percent and 96 percent. Parents were still concerned about the qualifications of the special education personnel, but also did not think Student's needs could be addressed in the classroom setting. Parents requested an assistive technology assessment, an auditory assessment, and tutoring outside of the regular school day. Temecula Valley offered three goals, similar supplementary aids and services as previously offered, and 110 minutes weekly of specialized academic instruction in the form of consult and collaboration with special education staff. Parents did not consent to the IEP.

10. Temecula Valley sent a letter to Parents on February 17, 2017, regarding their requests. Temecula Valley agreed to conduct an assistive technology assessment for Student and included an assessment plan. Temecula Valley did not agree to conduct an auditory assessment but asked Parents to share the results of the audiology assessment Rady Children's Hospital conducted. Parents privately requested and funded an audiology assessment from Rady Children's Hospital. Parents did not share the assessment with Temecula Valley. Temecula Valley again denied Parents' request for tutoring outside of the regular school day.

11. On March 13, 2017, the IEP team met for an amendment IEP team meeting to discuss vision therapy. Dr. Elton attended the IEP team meeting and shared her progress report. Dr. Elton concluded that Student had made good progress with vision

therapy and no longer needed vision therapy. Dr. Elton recommended reassessing Student in one year. The IEP team also discussed goals, the assistive technology assessment, and the method that would be used if Student was pulled out of class for specialized academic instruction. Parents did not consent to the IEP.

12. Temecula Valley also sent an assessment plan for Student's triennial assessment on March 13, 2017. On August 18, 2017, Parents returned the assessment plan with several notes asking about eye movement and requesting a meeting to discuss the assessment prior to consenting. Parents ultimately consented to the assessment on September 5, 2017.

13. The IEP team met again on April 20, 2017, to discuss goals. Temecula Valley reiterated that the offer of FAPE was 110 minutes weekly of specialized academic instruction in the form of consult and collaboration with special education staff. Parents did not consent to the IEP.

14. On May 11, 2017, the IEP team met to discuss the assistive technology assessment results. Temecula Valley added five hours of training for Student and staff regarding use of technology. Parents consented to the IEP with the exception of goals and specialized academic instruction services.

15. Over the course of the 2016-2017 school year the IEP team met eight times, seven IEP team amendment meetings and one IEP team annual review meeting. Although Parents did not consent to the pull out specialized academic instruction Temecula Valley offered between September 13, 2016, and February 2, 2017, Student met most of her IEP goals and was passing her fourth grade class. Marie Owen, Student's case carrier checked on Student and spoke with her teacher almost daily. On average Ms. Owen spent 10-15 minutes a day in Student's class. During the times Ms. Owen was in Student's class Student did not have trouble with reading fluency or reading comprehension.

2017-2018 SCHOOL YEAR – FIRST SEMESTER

16. Sharon Constantino was Student's fifth grade teacher for the first semester of the school year. During the first semester Student struggled with independent reading comprehension, copying notes off the board, and spelling.

17. Over the summer of 2017, Ms. Owen participated in Orton-Gillingham training that she paid for herself. Ms. Owen decided to take the training in part because Mother suggested it. Ms. Owen pulled Student out of class three times during the first semester for multidisciplinary phonics instruction as a response to intervention, not an IEP service. During that time Student struggled with learning the process for reading instruction, however, Ms. Owen did not have a chance to really work with Student to determine her needs. Student made spelling errors but Ms. Owen did not notice any errors with fragmented sentences or reading out loud.

18. Student's overall grades for the first semester of the school year showed that she met grade level standards. Although Ms. Constantino did not give Student a grade lower than 50 percent for any assignment she attempted, this grading policy was in alignment with district practices. Ms. Constantino's testimony was straightforward and persuasive.

Ms. Constantino had over 20 years of teaching experience and had worked for Temecula Valley since 2000. Ms. Constantino awarded Student grades based on district policies and established rubrics. Ms. Constantino did not artificially inflate Student's grades to impact her eligibility for special education.

NOVEMBER 2, 2017 TRIENNIAL ASSESSMENT, AMENDED ON JUNE 1, 2018, AND IEP TEAM MEETING

19. Temecula Valley conducted a triennial psychoeducational assessment during fall 2017 and produced a corresponding multidisciplinary team assessment report on November 2, 2017. Katherine Wood, school psychologist, Ashley Nocon,

speech language pathologist, Ms. Owen, and Rodrigo Sanchez, school nurse, all contributed to the report.³ Temecula Valley updated the multidisciplinary team assessment report on June 1, 2018, as a result of two errors found in Ms. Owen's portion of the assessment.

20. Ms. Wood conducted the psychoeducational portion of the report. Ms. Wood has been a school psychologist for 14 years and has conducted between 700 to 900 assessments. Ms. Wood alleged that no one had ever challenged one of her assessments before. Ms. Wood was defensive about her assessment and evasive in answering questions.

21. Ms. Wood reviewed Student's records, observed her in class, and administered several testing instruments. Ms. Wood observed Student in Ms. Constantino's class twice for a total of 70 minutes. Although Student was on task the entire time Ms. Wood observed her, Ms. Wood did not check to see if what Student was working on was accurate or if Student had difficulty with spelling or copying from the board. Ms. Wood also noted in her report that Student was passing her classes, specifically she noted a 78 percent in writing and a 75 percent in reading. However, Ms. Wood did not explain that the writing grade was only based on one assignment and the reading grade was based on two assignments.

22. Ms. Wood also gathered information regarding Student from Ms. Constantino and Ms. Owen. Ms. Wood did not speak to Student's fourth grade teacher to gather any input regarding Student's ability to access the fourth grade curriculum or

³ Student and Temecula Valley stipulated that Student only challenged the psychoeducational portion of the assessment, inclusive of academics. Therefore, this decision does not address the speech and language or health portions of the assessment.

any difficulties she had in fourth grade. Ms. Constantino filled out a one-page form Ms. Wood created. The form asked for strengths, concerns, rating compared to typical peers, and any additional comments. Ms. Wood did not keep copies of the form after she finished the report. Ms. Constantino did not remember filling out the form, however, she did think that she would have noted that Student struggled with independent reading comprehension. Ms. Owen did not recall ever seeing the form. Ms. Wood did not list any academic concerns from either Ms. Constantino or Ms. Owen in the teacher input section of the report.

23. Ms. Wood assessed Student using portions of eight testing instruments and three rating scales. Ms. Wood used the Wechsler Intelligence Scale for Children, Fifth Edition and the Comprehensive Test of Nonverbal Intelligence, Second Edition to determine Student's cognitive ability. Student's cognitive ability was in the average to above average range.

24. Ms. Wood used the Wechsler Intelligence Scale for Children, Fifth Edition; the Comprehensive Test of Nonverbal Intelligence, Second Edition; the Comprehensive Test of Phonological Processing, Second Edition; the Test of Auditory Processing Skills, Third Edition; the Berry-Buktenica Developmental Test of Visual-Motor Integration, Test of Visual Perception, and Test of Motor Coordination, Sixth Edition; and the Test of Visual Perceptual Skills, Third Edition to assess Student for a processing deficit. Ms. Wood determined Student's processing skills were in the average range; however, Student scored below average on four subtests; the elision and rapid symbolic naming on the Comprehensive Test of Phonological Processing and visual memory and spatial relations on the Test of Visual Processing Skills.

25. Ms. Owen assessed Student's academic achievement. Ms. Owen administered the Kaufman Test of Educational Achievement, Third Edition to Student. Ms. Owen did not receive any formal training prior to administering the assessment and

had only administered it approximately 10 times previously. Ms. Owen did not follow the test protocols and continued to ask questions past the ceiling⁴ on one subtest and scored another subtest incorrectly. The subtest Ms. Owen administered incorrectly was phonologic processing. Ms. Owen incorrectly reported a score of 97 that should have been 84. This is a significant change from an average score to a below average score. This change impacted the multidisciplinary assessment report as Ms. Owen reported phonologic processing as a reading subtest and determined Student's reading ability was average. Student also had average abilities in math, oral expression, listening comprehension, and oral fluency. Student's written expression was in the average range. However, her spelling ability was below average.

26. Ms. Wood used both her data and Ms. Owen's data to determine that Student exhibited a severe discrepancy between her cognitive ability and her academic achievement. However, Ms. Wood determined that there were no related processing disorders likely to explain the discrepancy. In addition to analyzing the data herself, Ms. Wood also used a psychological processing analyzer to analyze the data for a pattern of strengths and weaknesses.

27. The psychological processing analyzer is a new program to Temecula Valley. Ms. Wood began trialing the program in January 2017, however, she did not

⁴ When a standardized test lists items or questions of increasing difficulty, basal and ceiling rules act to enhance the efficiency of the test process by administering only the range of items required to obtain an accurate estimate of the individual's ability. The test's "ceiling" is the point where the student has made a predetermined number of errors; once the ceiling is reached, the assessor stops administering remaining items because it is assumed that the student would continue to get the answers wrong. The basal and ceiling protocols are determined by the test manufacturer.

receive the district manual until October 30, 2017. The psychological processing analyzer uses a computer program to analyze assessment scores and identify patterns of strengths and weaknesses to assist in determining if a student has a specific learning disability. Ms. Wood created two reports from the program for Student. One was used in the November 2, 2017 multidisciplinary team assessment report and one was used for the revised June 1, 2018 multidisciplinary team assessment report.

28. The analyzer allows users to select a significance level of either .01 or .05, however, Temecula Valley requires the use of a .05 significance level. Ms. Wood used a .01 significance level for her first report. Ms. Wood testified that although she used a .01 significance level that is actually more likely to identify a specific learning disability than a .05 significance level would. Ms. Wood was hesitant when she testified regarding significance levels; she was not able to clearly explain the difference and appeared to guess at her answer.

29. Dr. Mitchel Perlman, a clinical forensic psychologist who conducted an independent educational evaluation of Student, also explained significance levels. Dr. Perlman was able to explain what a significance level was. A significance level assigns a numerical value to risk. In this case a lower significance level has a lower risk of over identifying students with a learning disability. A .01 significance level is less inclusive than a .05 significance level. In using a .01 significance level Ms. Wood was less likely to identify Student with a learning disability than if she used a .05 significance level.

30. In determining if Student had a specific learning disability Ms. Wood compared Student's cognitive score of 112 to her other scores to look for both an intra-individual weakness as well as a normative weakness – a weakness compared to her same age peers. Ms. Wood required the existence of both to determine that Student had a processing deficit to qualify for special education.

31. Ms. Wood administered three behavior rating scales to determine Student's social and emotional functioning. Ms. Wood used the Behavior Assessment Scales for Children, Third Edition; the Resiliency Scales for Children and Adolescents; and the Behavior Rating Inventory of Executive Function, Second Edition. The Behavior Assessment Scales for Children is composed of a self-report, a parent report, and a teacher report. The Resiliency Scales for Children and Adolescents is a self-report. The Behavior Rating Inventory of Executive Function is a teacher and parent report. Student did not exhibit any concerning social and emotional behaviors. Parents reported concerns with anxiety, somatization, depression, and attention problems; however, neither Ms. Constantino nor Ms. Owen observed those issues at school. Notably, all three raters noted learning problems. Student completed a self-report with 137 statements. Two of Student's responses were concerning. Student marked almost always to getting nervous. Ms. Wood talked to Student about her answer and Student got nervous talking in front of class for presentations and when teachers made her read out loud. Student also marked true to sometimes wanting to hurt herself. Again Ms. Wood talked to Student about her response and determined Student had those thoughts sometimes when mad but it was not a suicidal ideation. Overall Student's social and emotional functioning was in line with her typically developing peers.

32. The IEP team met on November 2, 2017, for a triennial review to discuss the results of the assessment. Parents were present along with Ms. Wood, Ms. Constantino, Ms. Owen, Ms. Nocon, Nicki Lewis, program specialist for Temecula Valley, and Kristin Larson, school principal. Parents reviewed the assessment prior to the meeting and disagreed with the way that the data was analyzed. The meeting was contentious and within 13 minutes the team had a discussion about ending the meeting. Although the meeting did not end Ms. Wood excused herself from the meeting and the team continued with the speech and language portion of the report

and academic achievement portion of the report. The team also reviewed progress on goals, statewide assessments, and classroom grades. Student received a score of 1, standards not met, on the statewide assessments for English language arts, reading, listening, and research and inquiry. Student received a 2, standards nearly met, for all other areas. Ms. Constantino reviewed Student's progress in class. Student was making progress in using technology and asking questions when she did not understand a test question.

33. Before ending the meeting Parents asked for the data in the report reanalyzed. Parents did not ask for Student to be retested, but wanted the sections reanalyzed as they thought the report did not accurately reflect Student's weaknesses. Temecula Valley still wanted Ms. Wood to present her portion of the report to the IEP team before having anyone reanalyze the data. Ms. Wood returned to the meeting to discuss the report and explained to the team that her role was simply to determine if Student qualified for special education services. Ms. Wood was adamant that her job was to determine if Student qualified for special education services, not to holistically come up with recommendations for Student. Ms. Wood reported that Student's cognitive ability was in the average range; Parents disagreed stating the test scores reflected some scores in the average range, some in the high average range, and some on the cusp of the two ranges.

34. In presenting her report to the team, Ms. Wood explained the psychological processing analyzer. Ms. Wood told the IEP team she imputed every test score from her assessments as well as several of the academic tests and speech and language tests into the analyzer. However, this is not what she testified to during the due process hearing. Ms. Wood omitted scores that she considered to be outliers, however, all of the outliers Ms. Wood omitted were Student's low or below average scores. Ms. Wood also reanalyzed Student's previous test scores and alleged that the

previous determination that Student had a visual processing disorder was a mistake. Ms. Wood asserted that before school psychologists had the psychological processing analyzer to use they could arbitrarily determine special education eligibility with one low test score.

35. The IEP team as a whole did not have a discussion about eligibility. Ms. Wood presented her report and stated she found that Student did not qualify for special education as a student with a specific learning disability as she did not find any processing deficits that explain the severe discrepancy between her cognitive ability and academic achievement. In conjunction with eligibility the team did not discuss Student's struggles in the classroom with reading and spelling.

36. After Ms. Wood presented her portion of the report Parents reiterated their desire to have someone reanalyze the data in the report. Temecula Valley ultimately agreed to have Dr. Robert Gregory Nunn review the assessment. Dr. Nunn's four-and-a-half-page report concluded that Student no longer exhibited a pattern of strengths or weaknesses or a discrepancy between ability and achievement that adversely affected her academic progress in the general education setting. Dr. Nunn asserted that the raw data looked like Student had a disability, but when the data was analyzed using the psychological processing analyzer it showed that Student did not have a pattern of strengths and weaknesses associated with a learning disability. However, Dr. Nunn did not reanalyze the data using the psychological processing analyzer. He only reviewed the report Ms. Wood created. Importantly, Dr. Nunn did not verify that Ms. Wood imputed all the data into the psychological processing analyzer nor did he confirm that all the test scores were correct.

37. Parents disagreed with the assessments and requested an independent educational evaluation. Temecula Valley responded by filing a request for due process in January 2018 to defend its assessments. Parents ultimately consented to Student being

exited from special education on January 19, 2018, which resulted in Temecula Valley dismissing its request for due process. Parents did not agree that Student should be exited from special education, however, they were not prepared to participate in a hearing in February 2018. Instead, Parents consented to Student being exited from special education to avoid the hearing and hired Dr. Perlman to conduct an independent educational evaluation.

38. On June 1, 2018, Temecula Valley amended the multidisciplinary report to correct the scoring errors in the Kaufman Test of Educational Achievement. Although Ms. Wood reanalyzed the data using the psychological processing analyzer she removed the incorrect phonological processing score instead of using the correct score. Ms. Wood's explanation, that she had enough scores without the phonological processing score, was unpersuasive as she thought it was necessary to include the score the first time she analyzed the data.

2017-2018 SCHOOL YEAR – SECOND SEMESTER

39. Beth Grant, who was Student's fifth grade teacher for the second semester, observed that Student struggled with writing. Student had difficulty spelling and putting together sentences and paragraphs in an organized way. Student occasionally misused capitalizations and punctuation, and struggled sounding out large words. Although Ms. Grant observed that Student struggled in her class she did not request a student study team meeting because she knew Student was exited from special education earlier in the school year.

40. On February 27, 2018, Dr. Elton conducted another vision assessment; this time as an independent evaluation at Parents' request. Dr. Elton found that Student's solid average scores regressed into the low average range. Although Student's scores were not below average, Dr. Elton was concerned that the scores would continue to change and recommended that eight to 12 sessions of vision therapy might bring the

scores back into the solid average range. Dr. Elton asserted that Student had a visual processing deficit because she struggled processing moving objects.

41. Parents paid \$350 for Dr. Elton's assessment. Parents also provided documentation to show they paid for two vision therapy sessions at \$125 each. In total, Parents provided proof of \$600 paid to California Oaks Vision Center for Dr. Elton's assessment and two vision therapy sessions for Student.

42. Temecula Valley held a Section 504⁵ meeting on May 16, 2018, for Student. Ms. Larson suggested the Section 504 meeting when she noticed a decline in Student's grades. Temecula Valley determined Student was eligible for a Section 504 plan because her mild dyslexia substantially limited her reading and writing ability and her ability to demonstrate knowledge on tests. Temecula Valley offered Student 18 accommodations. Consequently, Parents requested an assessment for special education.

43. On May 25, 2018, Temecula Valley responded to Parents' request for an assessment for special education. Temecula Valley granted the request for an assessment and sent an assessment plan. Neither party presented any evidence that Parents consented to the assessment plan. Had Parents consented to the assessment plan before the end of the 2017-2018 school year, Temecula Valley would have been able to reassess Student and hold an IEP team meeting during the first 30 days of the 2018-2019 school year. Temecula Valley began school for the 2018-2019 school year on August 15, 2018, therefore it could have held an IEP team meeting on or before September 14, 2018.

44. Dr. Perlman observed Student on March 15, 2018, when she was in Ms. Grant's classroom. Ms. Grant did not have much interaction with Dr. Perlman when he

⁵ Section 504 refers to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.)

observed, but she did speak to him over the phone for about 15 minutes approximately six weeks after his observation. Dr. Perlman included information from Ms. Grant in his report. Dr. Perlman reported that Ms. Grant observed Student's independent reading comprehension to be considerably compromised and dysfluent and alleged Ms. Grant would have referred Student for a special education assessment had she not been exited from special education earlier in the year. Dr. Perlman also reported that Ms. Grant gave Student a McLeod Assessment of Reading Comprehension and determined Student to be at the 4.0 grade level, or almost two years behind.

45. Ms. Grant read this information while testifying and denied making the statements. Ms. Grant answered all questions in a straightforward manner while testifying. When asked about these statements Ms. Grant was genuinely confused and upset that her conversation was misrepresented. When reading a paragraph of five or so sentences Student would struggle with about four words; Student would chunk those words to sound them out. Student also showed shockingly different skills in class than on assessments. Student had knowledge that she did not demonstrate on district assessments. Student did not take the California Assessment of Student Performance and Progress for fifth grade as Parents opted her out of the assessments.

46. Student received 96 percent for history and social studies for second semester of fifth grade and 93 percent for science. In mathematics Student received 94 percent. In reading Student received 60 percent, and in writing 59 percent. Both the reading score and writing score indicated Student did not meet grade level standards.

47. On June 15, 2018, Parents sent Temecula Valley a letter of their intent to privately place Student at NewBridge Nonpublic School for Summer 2018 and continuing for the 2018-2019 school year. Parents also included a copy of the independent educational evaluation completed by Dr. Perlman.

48. On August 27, 2018, Temecula Valley offered to convene an IEP team meeting to review Dr. Perlman's assessment, Dr. Elton's vision therapy assessment, and a dyslexia screening report conducted by Dr. Kelli Sandman-Hurley. Temecula Valley offered three different times for the meeting. Parents did not agree to attend a meeting to discuss the assessments.

DR. PERLMAN'S INDEPENDENT EDUCATIONAL EVALUATION

49. Parents hired Dr. Perlman to conduct an independent educational evaluation. Dr. Perlman reviewed Student's records, administered assessments, observed her in class, and spoke to her then current teacher. Dr. Perlman's report was 86 pages, inclusive of four appendices. Dr. Perlman wrote an additional appendix that was nine pages and separately billed. The first 22 pages of Dr. Perlman's report was a comprehensive summary of Student's educational history. Dr. Perlman included notes from previous IEP team meeting discussions and errors he found in previous reports. Dr. Perlman's one-page summary of his classroom observations included misrepresentations from Student's then current classroom teacher, Ms. Grant. Dr. Perlman also listened to a recoding from the November 2, 2017 IEP team meeting and included an analysis of the meeting in his report.

50. Dr. Perlman did not notice any anxiety or work avoidance issues. Although Parents reported their struggles to Dr. Perlman, consistent with her teachers, Dr. Perlman did not observe any issues.

51. Dr. Perlman found that Student had deficits in the three primary processes that underlie classic dyslexia; phonology, naming speed, and orthography. Dr. Perlman administered nine subtests related to orthography; Student had one score in the ninth percentile, one in the 91st percentile, and the other seven ranged from the 25th percentile to the 50th percentile. Dr. Perlman administered eight subtests related to naming speed; Student's scores were lower on those subtests, in the 13th percentile,

16th percentile, 21st percentile, 25th percentile, 37th percentile, 39th percentile, 42d percentile, and 61st percentile. Dr. Perlman administered four subtests related to phonology; those scores were in the 13th percentile, 41st percentile, 75th percentile, and 76th percentile.

52. Dr. Perlman recommended that Student qualified for special education under the category of specific learning disability. Dr. Perlman also recommended an integrative approach that combined programs that target orthography, naming speed, phonology, and reading intervention with specific teaching methods continuously throughout Student's entire school day. Dr. Perlman is not a teacher, nor did he know what teaching methods Temecula Valley employed. However, he opined that school districts were not typically equipped to provide the type and intensity of educational programming Student now required. Dr. Perlman was only aware of three schools in the area surrounding Temecula Valley that offered this type of instruction throughout the entire school day; NewBridge nonpublic school is one of those schools. Dr. Perlman also recommended that before any additional response to intervention or specialized academic instruction was used with Student that the previous programs be thoroughly reviewed to determine why Student had not received the level of benefit the programs were intended to produce. However, Dr. Perlman completely disregarded the fact that Student had not received specialized academic instruction since the end of the 2015-2016 school year.

53. Dr. Perlman's report was thorough and he meticulously explained and compared test results. However, he also reanalyzed Student's report cards to create a regression of skills in reading and writing. Dr. Perlman, although not a teacher or educator, took all the pluses, minuses, and backslashes and added them up and divided by the total number of skills listed in each section to create new percentages of achievement. For example, Student's fourth grade report card lists her overall reading

achievement as 76 percent with nine different standards. Student received two pluses, consistently meeting standards at 80 to 100 percent. Dr. Perlman took those two pluses and divided by nine total reading standards to come up with 22 percent. Dr. Perlman did this with all Student's grades to show she regressed. However, Dr. Perlman did not take into account the minuses, inconsistently meeting standards between 70 and 79 percent and did not take into account how different standards may be weighted differently.

54. Dr. Perlman also spent a considerable amount of time criticizing and analyzing the previous reports Temecula Valley authored. Dr. Perlman's appendix A was Student's mother's letter to the IEP team that she presented at the October 3, 2016 IEP team meeting. Appendix B was two of Student's writing samples. Appendix C was a recital of specific learning disability and Dr. Perlman's analysis of how Ms. Wood erred in applying the severe discrepancy model in the November 2, 2017 multidisciplinary assessment. Appendix D is Dr. Perlman's analysis of how the IEP team uncritically adopted Ms. Wood's recommendations. Appendix E was nine pages of Dr. Perlman's additional concerns regarding the November 2, 2017 triennial multidisciplinary assessment and IEP team meeting. Although Dr. Perlman testified that he was not hired as an expert witness until two weeks prior to the due process hearing, a significant portion of his report was in preparation for testifying as an expert witness and was not necessary to conduct an independent educational evaluation.

55. Parents paid Dr. Perlman a total of \$12,425 for his psychoeducational neuropsychological assessment and report of Student. That amount included \$150 that Dr. Perlman paid to purchase the psychological processing analyzer software and \$2,625 to create appendix E. That amount also included \$375 for Dr. Perlman to use the psychological processing analyzer to reanalyze Ms. Wood's report. Dr. Perlman also charged \$262.50 to listen to the audio recording of the November 2, 2017 IEP team meeting. Dr. Perlman charged \$3,150 for the consultation, file review, testing, scoring,

and school observation. Dr. Perlman charged \$4,987.50 for drafting the initial report and an additional \$875 to complete the report and add additional information from Temecula Valley's amended triennial multidisciplinary assessment on June 1, 2018. Dr. Perlman charged Student significantly more than he typically charges for an independent educational evaluation, which is \$6,500. Additionally, when Dr. Perlman contracted with Temecula Valley he only charged \$4,500 to conduct the independent educational evaluation; the contract states Parents are responsible for any balance.

NEWBRIDGE NONPUBLIC SCHOOL

56. Student began attending NewBridge nonpublic school during summer 2018 and continued on for the 2018-2019 school year. NewBridge is a nonpublic school designed to work with students with language based learning disabilities. Although NewBridge is a nonpublic school, not all of the students who attend have an IEP and not all are placed through a school district.

57. Student had a five-day trial at NewBridge in late spring 2018. Steven Mayo, the owner and director of NewBridge, met Student during that trial visit. Student was initially uncomfortable but began to open up and able to fit in with the other students. Student's reading was choppy and disfluent, she had frequent spelling errors, run-on sentences, fragment sentences, and verb tense irregularities in her writing that were not present in her oral language. Mr. Mayo opined that Student would make good progress in a year, but it would be better if she attended NewBridge for two years to solidify her skills.

58. Parents saw a change in Student's behavior and demeanor soon after she started attending NewBridge. Student was once again excited about going to school and was not having meltdowns in the car after school as she was previously. Both Mr. Mayo and Parents saw an improvement in Student's academic performance after a few months at NewBridge.

59. Parents drove 47 miles each way, for a total of 94 miles a day, to take Student to school. Parents paid \$2,500 to NewBridge for the summer session. Parents paid \$2,500 for the initial tuition deposit and \$1,850 a month for Student's tuition for the 2018-2019 school year.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁶

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁷ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free and appropriate public education 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 individualized education program. (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.

⁶ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁷ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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 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 nondisabled 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] (*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.)

4. The Supreme Court recently clarified and expanded upon its decision in *Rowley*. In *Endrew F. v. Douglas County School Dist.*, the court stated that the IDEA guarantees a FAPE to all students with disabilities by means of an IEP, and that the IEP is required to be reasonably calculated to enable the child to make progress appropriate

in light of his or her circumstances. (*Endrew F. v. Douglas County School Dist.* (March 22, 2017, No. 15-827) 580 U.S.____ [137 S.Ct. 988, 996, 197 L.Ed.2d 335]). The Ninth Circuit recently affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

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.) 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, § 56502, subd. (i).) 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].) By this standard, District had the burden of proof for the issue it alleged in this matter, and Student for the issues he alleged.

ISSUES 1, 4, AND 5: THE NOVEMBER 2, 2017 TRIENNIAL MULTIDISCIPLINARY ASSESSMENT AND TRIENNIAL IEP TEAM MEETING

6. Temecula Valley contends that its November 2, 2017 multidisciplinary assessment that was amended on June 1, 2018, met all legal requirements and that it properly exited Student from special education. Student contends that Temecula Valley's assessment did not meet all legal requirements, that Temecula Valley mis-scored subtests, did not use all subtest scores to determine eligibility, and did not analyze the data correctly. Student also contends Temecula Valley misrepresented her present levels of performance and failed to take into account her lack of response to intervention when determining she no longer qualified for special education services.

Student further alleges Temecula Valley failed to timely and appropriately assess her in the areas of auditory processing, vision therapy, and social and emotional functioning. Finally, Student contends that Temecula Valley inflated Student's grades to determine she passed her classes and did not need special education.

7. Under certain conditions, a student is entitled to obtain an independent educational 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 educational 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 educational evaluation].) "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 child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

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

9. If a district decides to assess a student, it must give the parent a written assessment plan within 15 calendar days of referral, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five schooldays, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (a); 56321, subd. (a).) The

plan must explain, in language easily understood, the types of assessments to be conducted. (Ed. Code, § 56321, subd. (b).) The parent then has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c)(4).)

10. Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) In California, a test must be selected and administered to produce results “that accurately reflect the pupil’s aptitude, achievement level, or any other factors the test purports to measure . . .” (Ed. Code, § 56320, subd. (d).) A district must ensure that a child is assessed “in all areas related to” a suspected disability. (Ed. Code, § 56320, subd. (c), (f); (*Timothy O. v. Paso Robles Unified School Dist.* (9thCir. 2016) 822 F.3d 1105, 1119).)

11. Assessments must be conducted by individuals who are both “knowledgeable of [the student’s] disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).) School districts are required to ensure that the assessment tools and strategies provide relevant information that directly assists persons in determining the educational needs of a child. (34 C.F.R. § 300.304(C)(1)-(7).)

12. Tests and assessment materials must be selected and administered so as not to be racially, culturally, or sexually discriminatory; and must be provided and administered in the student’s primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

13. An assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subds. (a), (b).)

14. Once a student has been referred for a reassessment, a determination of eligibility and an IEP team meeting shall occur within 60 days of receiving parental consent for the assessment. (See 20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56302.1, subd. (a).)

15. Temecula Valley timely filed a request for a due process hearing to show that its assessments were appropriate. Temecula Valley filed for a due process hearing twice to prove its assessments were appropriate. The first time in January of 2018, which resulted in Parents ultimately consenting to Temecula Valley exiting Student from special education. The second time Temecula Valley filed for a due process hearing to defend its assessment was on August 24, 2018, after Student requested reimbursement for an independent psychoeducational evaluation on June 15, 2018. Temecula Valley's filing to defend its assessments within 50 days of Student's request for independent educational evaluations does not constitute an undue delay. (See *J.P. v. Ripon Unified School Dist.* (E.D. Cal., Apr. 15, 2009, No. 207CV02084MCEAD) 2009 WL 1034993.)

16. Temecula Valley established that Ms. Wood was qualified to administer the psychoeducational assessment by virtue of her education and experience. She is a credentialed school psychologist and had performed hundreds of assessments during her career. However, although Ms. Wood used a variety of assessment tools, Temecula Valley did not establish that the test instruments Ms. Wood used were employed for valid and reliable purposes, were not discriminatory, and were administered according to their instructions. Ms. Wood provided no testimony regarding how the assessments were administered.

17. Ms. Owen administered the academic assessments that were used in the psychoeducational evaluation. Ms. Owen did not administer the assessment according

to the instructions. Ms. Owen asked several questions past the ceiling, which she then scored. This error resulted in a significantly higher score on the phonological processing subtest of the Kaufman Test of Educational Achievement, Third Edition. Although Ms. Owen corrected this error when it was pointed out, that correction did not occur until June 1, 2018, well after Temecula Valley presented the multidisciplinary report and determined that Student no longer qualified for special education.

18. Special education eligibility is a team decision and Ms. Wood misrepresented to the IEP team that all of Student's scores had been entered into the psychological processing analyzer. Ms. Wood did not use all of the scores she obtained on her assessments of Student. Ms. Wood did not input Student's low scores into the analyzer to determine a pattern of strengths and weaknesses because she determined that the low scores were outliers. Ms. Wood's testimony regarding her decision to omit the low outliers was not persuasive given her misrepresentation to the IEP team regarding what scores she used and her misunderstanding of significance levels. Additionally, the multidisciplinary assessment report did not discuss any teacher concerns regarding academics.

19. Temecula Valley's multidisciplinary assessment did not meet all legal requirements. The academic portion of the assessment was not administered in accordance to the test manuals. The analysis of the psychoeducational assessment did not include all test scores and the IEP team did not have all of the relevant information to make a determination of eligibility. Because Temecula Valley relied on a flawed multidisciplinary assessment to exit Student, the decision to exit Student from special education was also in error.

20. Student did not prove that Temecula Valley improperly inflated her grades or misrepresented her present levels of performance to conclude she did not need special education services. Although Parents disagreed that Student met grade level

standards, their interpretation of how the grades were calculated was not based on Temecula Valley's grading policies or classroom rubrics.

21. Student also did not prove that Temecula Valley failed to assess her in all suspected areas of disability. Student was assessed by Dr. Elton in March 2017, she was not due for a reassessment until March 2018, after Parents' consented to Student's exit from special education. Parents did not ask Temecula Valley to have Student reassessed for vision therapy before paying for the assessment and they did not have an IEP team meeting to discuss the results so the IEP team could determine if Student required vision therapy.

22. Temecula Valley assessed Student for social and emotional concerns. Although Student rated herself as having some academic concerns, the overall picture showed that Student did not have social and emotional concerns. Ms. Wood used three different rating scales to determine Student's social and emotional functioning. Although Parent reported signs of anxiety and depression at home, none of Student's teachers reported any concerns at school. Student did not prove that Temecula Valley's social and emotional assessment was invalid.

23. Furthermore, Student did not prove that she required a central auditory processing assessment. Temecula Valley's assessment looked at auditory processing as well as hearing. Student therefore did not meet her burden of proof that she required a central auditory processing assessment.

ISSUE 2: NOVEMBER 2, 2017 IEP TEAM MEETING DISCUSSION ON ELIGIBILITY

24. Student contends the IEP team did not give independent consideration of Student's eligibility and did not appropriately weigh all factors in determining Student did not qualify for special education. Temecula Valley disagrees and argued the team considered all input during the IEP team meeting.

25. California Code of Regulations, title 5, section 3030 includes a list of conditions that may qualify a pupil as an individual with exceptional needs and thereby entitle the pupil to special education if required by "the degree of the pupil's impairment."

26. A Specific Learning Disability is a disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language, which manifests itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. (20 U.S.C. § 1401(30)(A); 34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd.(a).) It also includes disability within the field of vision which results in visual perceptual or visual motor dysfunction. (Ed. Code, § 56337, subd.(a).)

27. A school district shall determine if a child has a specific learning disability using one of two methods: the severe discrepancy method, or the response to intervention method. (20 U.S.C. § 1414(b)(6); 34 C.F.R. §§ 300.307, 300.309(a)(1) & (2); Ed Code, 56337, subds. (b), (c).) The severe discrepancy method requires that a student has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematical calculation, or mathematical reasoning. (20 U.S.C. § 1414(b)(6)(A); Ed. Code, § 56337, subd. (b)[authorizes the continued use of a discrepancy method to determine eligibility for specific learning disability]; Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) The response to intervention method allows a district to assess if the pupil responds to scientific, research-based intervention. (Ed Code, § 56337, subd. (c).)

28. It is the duty of the IEP team, not the assessor, to determine whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. §§ 300.305(a)(1) & (2); 300.306(a)(1); Ed. Code, § 56026, subd. (a).)

29. It is well settled that parents who want their children to receive special education services must allow reassessment by the district, with assessors of its choice. (*Johnson v. Duneland Sch. Corp.* (7th Cir. 1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir.1995) 64 F.3d 176, 178-79; *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d; *Dubois v. Connecticut State Bd. of Educ.* (2d Cir. 1984) 727 F.2d 44, 48.)

30. The IEP team met to discuss the results of Temecula Valley's multidisciplinary assessment on November 2, 2017. The meeting was contentious and the team discussed ending the meeting after 13 minutes. Although the meeting ultimately did not end, Ms. Wood left thinking the IEP team agreed to end the meeting. While Ms. Wood was gone from the meeting the IEP team discussed Student's grades, current progress in class, and results of state testing. It was not until Ms. Wood returned and reviewed her portion of the assessment that the eligibility determination was brought up. Ms. Wood told the IEP team that her assessment showed that Student did not have a processing disorder that would explain the severe discrepancy between her cognitive ability and consequently she found that Student did not qualify for special education as a student with a learning disability. Although Student alleged the IEP team uncritically adopted Ms. Wood's findings, she did not provide any legal authority that any member of the IEP team should have challenged Ms. Wood's opinion regarding the findings in her report. However, the IEP team did not discuss Student's struggles in class regarding reading, spelling, or copying from the board when discussing eligibility nor did the team discuss her progress in class or state testing scores in conjunction with eligibility. The IEP team did not have a discussion regarding eligibility aside from Ms. Wood's opinion that Student did not qualify for special education. Neither Ms. Constantino, Ms. Owen, Ms. Nocon, nor Ms. Lewis gave any input regarding eligibility.

Consequently, the IEP team did not determine Student's eligibility for special education, Ms. Wood made the sole determination.

31. Temecula Valley also met in May 2018 for a Section 504 meeting to discuss concerns regarding Student's academic progress and classroom struggles during the second semester of the 2017-2018 school year. Student's grades declined during the second semester of her fifth grade year and ultimately she did not meet grade level standards in reading or writing. At Parent's request Temecula Valley agreed to reassess Student for special education eligibility. However, Parents did not consent to the new assessment plan. Instead, Parents sent Temecula Valley a 10-day notice of intent to privately place Student at NewBridge. With the 10-day notice Parents included Dr. Perlman's independent educational evaluation. Parents did not agree to meet with Temecula Valley when it proposed an IEP team meeting to discuss Dr. Perlman's assessment.

32. Student lost educational benefit after Temecula Valley exited her from special education in January 2018 as evidenced by her end of the year grades and the decline her teacher observed with the end of special education services. However, Temecula Valley proposed an assessment plan in May 2018 and an IEP team meeting in August 2018 to review the results of Dr. Perlman's assessment. Parents did not consent to the assessment plan nor did they agree to an IEP team meeting. Had Parents consented to Temecula Valley's assessment plan, Temecula Valley could have reassessed Student and held an IEP team meeting in the first 30 days of the 2018-2019 school year. Temecula Valley would have either found Student eligible for special education again and made an offer of FAPE that Parents could have agreed to or challenged; or if it continued to find Student not eligible Student could have challenged that determination. We do not know the outcome as Student stopped the process when Parents did not consent to the new assessment plan. Although Student is entitled to a

remedy for a denial of FAPE between January 19, 2018, the date Temecula Valley exited Student from special education, and September 14, 2018, the date Temecula Valley could have held an IEP team meeting to discuss the new assessment, any loss of educational benefit after that point is a result of Parent's failure to consent to the assessment plan and meet with the IEP team.

ISSUE 3: TEMECULA VALLEY'S FAILURE TO FILE FOR DUE PROCESS TO IMPLEMENT THE IEPs BETWEEN JUNE 2016 AND FALL 2017

33. Student contends that she was denied a FAPE because Temecula Valley failed to file for a due process hearing with OAH following Parent's refusal to fully consent to the IEPs between June 2016 and fall 2017. Temecula Valley contends that Student received meaningful educational benefit therefore it was not required to file for a due process hearing.

34. The IDEA provides that if the parent refuses to consent to services offered in an IEP, other than an initial IEP, the school district may initiate a due process hearing. (20 U.S.C. § 1414(a)(1)(D)(ii)(II); 34 C.F.R. § 300.300(b)(3); *I.R. v. Los Angeles Unified Sch. Dist.* (9th Cir. 2015) 805 F.3d 1164, 1167-1168 (*I.R.*)). The California Education Code requires that "as soon as possible following development" of the IEP, "special education and related services shall be made available" to the student in accordance with the IEP. (Ed. Code § 56344(b).) If the parent consents to some, but not all, of the components of an IEP, the school district must determine whether the proposed special education program component is determined to be necessary to provide a FAPE. If the school district "determines that the proposed special education program component to which the parent does not consent is necessary to provide" a FAPE, "a due process hearing shall be initiated." (Ed. Code, § 56346, subd. (f).) The school district cannot opt to hold additional IEP team meetings, or continue the IEP process in lieu of initiating a due process hearing; rather, the school district must initiate a due process hearing

expeditiously. (*I.R., supra*, 805 F.3d at p. 1169.)

35. *I.R.* clarified that Education Code section 56346, subdivision (f), requires a school district to “expeditiously” request a due process hearing when a district determines, for a student who is already receiving special education and related services, any portion of an IEP to which a parent does not consent is necessary to provide the student with a FAPE. (805 F.3d at p. 1169.) The Ninth Circuit explained, “If, in the school district’s judgment, the child is not receiving a FAPE, the district must act with reasonable promptness to correct that problem by adjudicating the differences with the parents. The reason for this urgency is that it is the child who suffers in the meantime.” (*Id.* at p. 1170.)

36. A school district’s failure to comply with a procedural requirement, such as Education Code section 56346, subdivision (f), denies a child a FAPE when the procedural inadequacy results in the loss of educational opportunity or causes a deprivation of educational benefit. (*I.R., supra*, 805 F.3d at p. 1170.) To the extent a student loses an educational opportunity and was deprived of educational benefits for an unreasonably prolonged period, the school district can be held responsible for denying the child a FAPE for that period. (*Ibid.*) In *I.R.*, the school district’s delay of more than a year and a half in requesting a due process hearing following the parent’s failure to consent to a provision of the IEP determined to be necessary to provide the student a FAPE was unreasonable. (*Ibid.*)

37. Here, Student did not prove that she was denied a FAPE as a result of Temecula Valley’s failure to file for a due process hearing when Parents did not fully consent to Student’s IEPs from June 2016 through fall 2017. When Parents revoked consent to Student’s specialized academic services prior to the start of the 2016-2017 school year, Temecula Valley immediately held a meeting to discuss services. Temecula Valley amended its offer of FAPE from pull out specialized academic instruction to 30

minutes weekly of consult or collaboration from special education staff. Although Parent did not immediately consent to the specialized academic instruction consult or collaboration, Parents did consent to that service on November 9, 2016.

38. Between September 19, 2016, and February 1, 2017, Temecula Valley offered 120 minutes once a week of specialized academic instruction in a separate setting. Parents did not consent to that service. However, Student continued to make academic progress and met two of her three IEP goals. At the February 2, 2017 annual IEP team meeting Temecula Valley no longer offered pull out specialized academic instruction. Instead Temecula Valley added an additional 80 minutes weekly of consult or collaboration with special education staff. Again Parents did not consent to this additional service or Student's new goals, but they did not revoke consent to the previous 30 minutes a week of consult or collaboration with special education staff. Moreover, Student continued to make academic progress as evidenced by meeting grade level standards for fourth grade.

39. The evidence showed that Temecula Valley continually met with Parents to address their concerns and attempted to reassess Student six months early for her triennial assessment to gather more information. Additionally, Student made academic progress as evidenced by meeting two of her three IEP goals and meeting grade level standards in fourth grade. Student did not show that she was denied a FAPE or otherwise lost educational opportunity as a result of Temecula Valley's failure to file for a due process hearing between June 2016 and fall 2017. Any loss of educational benefit that Student had occurred when she no longer received special education services when Temecula Valley exited her.

REMEDIES

1. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide

a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*); *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*)).) When a school district fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is “appropriate” in light of the purposes of the IDEA. ALJs have broad latitude to fashion equitable remedies appropriate for a denial of a FAPE. (*Id.* at pp. 369-370; 20 U.S.C. § 1415(i)(2)(C)(3).)

2. The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent Sch. Dist. v. State Bd. of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.) Although the parents’ placement need not be a “state approved” placement, it still must meet certain basic requirements of the IDEA, such as the requirement that the placement address the child’s needs and provide him educational benefit. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14, [114 S.Ct. 361] (*Carter*)).) Parents may receive reimbursement for the unilateral placement if it is appropriate. (34 C.F.R. § 300.148(c); Ed. Code, § 56175; *Carter, supra*, 510 U.S. at pp. 15-16.) The appropriateness of the private placement is governed by equitable considerations. (*Ibid.*) The Ninth Circuit has held that to qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special education service necessary to maximize their child’s potential. (*C.B. v. Garden Grove Unified School District* (9th Cir. 2011) 635 F.3d 1155, at 1159.)

3. Reimbursement may be reduced or denied in a variety of circumstances, including whether a parent acted reasonably with respect to the unilateral private placement. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.) These rules may be equitable in nature, but they are based in statute.

4. Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (*Puyallup, supra*, 31 F.3d at p. 1496.) The purpose of compensatory education is to “ensure that the student is appropriately educated within the meaning of the IDEA.” (*Ibid.*)

5. The remedy of compensatory education depends on a “fact-specific analysis” of the individual circumstances of the case, and the conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup, supra*, 31 F.3d at p. 1497.) There is no obligation to provide day-for-day compensation for time missed. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.)

6. Temecula Valley’s multidisciplinary triennial assessment did not meet all legal requirements therefore Student is entitled to reimbursement for her independent educational evaluation. However, Student is not entitled to the full cost charged by and paid to Dr. Perlman. A significant amount of the work done by Dr. Perlman amounts to expert witness preparation and Student is not entitled to reimbursement for her expert witness. Despite Dr. Perlman’s arrangement with Temecula Valley, his usual fee is \$6,500, therefore, Student is entitled to reimbursement of \$6,500 for Dr. Perlman’s independent educational evaluation.

7. Student is not entitled to reimbursement for Dr. Elton’s vision therapy assessment or the vision therapy services provided. Student did not prove she first requested a new vision therapy assessment from Temecula Valley, nor did she require a reassessment for vision therapy at the time Temecula Valley conducted the multidisciplinary triennial assessment. Moreover, Dr. Elton recommended vision therapy to maintain the status quo and that assessment and recommendation was not discussed

at an IEP team meeting.

8. Student did not prove that she required a central auditory processing assessment therefore she is not entitled to an independent educational evaluation in the area of central auditory processing.

9. Student also did not prove Temecula Valley's social emotional evaluation was deficient therefore she is not entitled to an independent educational evaluation in the area of social emotional functioning.

10. Student did not prove that she was denied a FAPE by Temecula Valley's failure to file for a due process hearing between June 2016 and fall 2017. Therefore, Student is not entitled to reimbursement for educational therapy provided by Big Springs.

11. Temecula Valley's multidisciplinary triennial assessment report was flawed; therefore, the decision to exit Student from special education was inappropriate. Additionally, the IEP team did not fully discuss Student's eligibility for special education at the November 2, 2017 IEP team meeting. Student was denied a FAPE as a result of Temecula Valley's decision to exit her from special education as evidenced by her declining grades and failure to meet grade level standards in reading and writing at the end of her fifth grade year. Although Student did not prove what level of compensatory services she required as a result of a denial of FAPE between January 19, 2018, and the end of the 2017-2018 school year, she did attend a summer program at NewBridge and did receive educational benefit. Parents are therefore entitled to reimbursement of \$2,500 for the summer program at NewBridge as compensatory education for Student. Parents are also entitled mileage reimbursement for one round trip between Student's home and NewBridge nonpublic school daily.

12. Parents did not consent to Temecula Valley's assessment plan it proposed on May 25, 2018 and Parents did not attend an IEP team meeting to discuss the results

of Dr. Perlman's independent educational evaluation. At the time Parents unilaterally placed Student at NewBridge nonpublic school she was not a special education student. Parents' actions in not consenting to Temecula Valley's offer to reassess Student and not attending an IEP team meeting to discuss the results of Dr. Perlman's assessment, were not reasonable. Reimbursement may be reduced or denied if a parent acted reasonably with respect to the unilateral private placement. Here, Temecula Valley offered to reassess Student and offered to hold an IEP team meeting to discuss the results of Dr. Perlman's assessment. Had Parents consented to the reassessment and IEP team meeting then Temecula Valley could have held an IEP team meeting during the first 30 days of the 2018-2019 school year. Temecula Valley was not able to reassess or hold an IEP team meeting as direct result of Parent's actions. Consequently, Parents' reimbursement is limited to September 14, 2018, the date when Temecula Valley could have held an IEP team meeting to discuss the results of the assessment had Parents consented to the new assessment plan. Parents are therefore entitled to reimbursement of \$2,500 for the initial tuition instalment at NewBridge and \$1,850 for the first month of school for the 2018-2019 school year. Parents are also entitled mileage reimbursement for one round trip between Student's home and NewBridge nonpublic school daily.

ORDER

1. Within 45 calendar days of the date of this decision Temecula Valley shall reimburse Parents in the amount of \$6,500 for Dr. Perlman's independent educational evaluation. The documentary evidence of payment provided at hearing is sufficient evidence of costs incurred by Parents and no further documentation is required.

2. Within 45 calendar days of the date of this decision Temecula Valley shall reimburse Parents in the amount of \$6,850 for the summer session at NewBridge nonpublic school, the initial tuition installment, and tuition for the first month of school for the 2018-2019 school year. The documentary evidence of payment provided at

hearing is sufficient evidence of costs incurred by Parents and no further documentation is required.

3. Upon receipt of proof of the number of days Student actually attended NewBridge for the 2018 summer session and the 2018-2019 regular school year through September 14, 2018, Temecula Valley shall reimburse Parents for one round trip daily between Student's home and school, consisting of 94 miles, at the 2018 Internal Revenue Service standard rate of \$.54.5 per mile.

4. All of Student's other 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, Student prevailed on part of Issues 1a, and prevailed on Issue 2, and Issue 5. Temecula Valley prevailed on part of Issues 1a, and prevailed on Issues 1b, 1c, 3, and 4.

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 18, 2018

/s/

LINDA JOHNSON

Administrative Law Judge

Office of Administrative Hearings