

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

CHULA VISTA ELEMENTARY SCHOOL
DISTRICT.

OAH Case No. 2017030569

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on March 7, 2017, naming Chula Vista Elementary School District.

Administrative Law Judge Ted Mann heard this matter in Chula Vista, California, on October 3, 4, and 5, 2017, and November 16, 2017.

Meagan Nunez and Jennifer Varga, Attorneys at Law, appeared on behalf of Student. Student's mother attended each day of the hearing. Pamela Townsend and Sarah Sutherland, Attorneys at Law, represented District. District's Director of Student Services Sharon Casey attended each day of the hearing on behalf of District.

At the request of the parties, OAH continued this matter until December 11, 2017, for written closing arguments. Upon timely receipt of written closing arguments, the record was closed and the matter submitted for decision on December 11, 2017.

ISSUES¹

- 1) Did District deny Student a free appropriate public education for the 2014-

¹ At the prehearing conference on September 25, 2017, Student withdrew the following issues: 1) failure to assess Student in the area of speech during all school years at issue; 2) failure to conduct an assessment to determine if a one-to-one aide was necessary and failing to provide an aide pursuant to Student's IEP; 3) developing goals that were compound, not measurable, and not tailored to Student's unique needs or reasonably calculated to provide her with educational benefit; 4) failure to materially implement the specialized academic instruction required by Student's IEP; 5) failure to make a clear offer of FAPE as it related to the provision of specialized academic instruction to Student and the amount of time she would spend in general education; and 6) failure to provide Student with specialized academic instruction, thereby materially failing to implement her IEP. In her Request to Rephrase Issues dated September 27, 2017, Student withdrew her allegations that District failed to assess her in the area of occupational therapy during the 2015-2016 and 2016-2017 school years. Thereafter, Student withdrew issues pertaining to (1) failing to develop an individualized education program on May 27, 2016, to address all of Student's unique needs and provide her with educational benefit because her IEP did not provide Student with necessary pull-out specialized academic instruction; (2) substantively and procedurally denying Student a FAPE for the 2016-2017 school year because District denied Parent the right to meaningfully participate in Student's education and denied Student educational opportunities, by (a) failing to assess her in the area of attention deficit hyperactivity disorder; and (b) failing to provide her with services and supports tailored to her unique needs or reasonably calculated to provide her with educational benefit by failing to provide her with sufficient small group instruction with a special education teacher. The parties confirmed the issues at the

2015 school year, by violating its child find obligation to her when it failed to assess her for special education eligibility although it had reason to suspect she might be a child with a disability?

2) Did District deny Student a FAPE during the 2014-2015 school year because it prevented Parent from meaningfully participating in Student's education and denied Student educational opportunities by:

a. Failing to provide an assessment plan to assess Student for special education eligibility after Parent requested one on February 11, 2015; and

b. Failing to provide Parent with prior written notice of its refusal to assess Student after Parent's request for assessment on February 11, 2015?

3) Did District substantively and procedurally deny Student a FAPE during the 2015-2016 school year because it prevented Parent from meaningfully participating in Student's education and denied Student educational opportunities by:

a. Failing to assess her in all areas of suspected disability, including but not limited to attention deficit hyperactivity disorder; and

b. Failing to find Student eligible for special education and related services after assessing her in September 2015?

SUMMARY OF DECISION

Student contended that District denied her a FAPE both procedurally and

commencement of the hearing. The issues have been rephrased and reorganized for clarity to reflect the issues withdrawn during the PHC, Student's written request to rephrase issues, and as agreed upon by the parties on the record at the beginning of the hearing. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. ex rel. J.E.W.v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

substantively by failing to identify her as in need of assessment, failing to adequately assess her when assessment was finally undertaken by District, and failing to find Student eligible for special education following her assessment. District contended that Student did not display sufficient indications of difficulty accessing her education to require assessment, that once undertaken the assessment adequately looked at all areas of suspected disability, and that once assessed Student did not qualify for special education.

District's failure to assess Student prior to September of 2015, along with its failure to adequately assess in all areas of disability, particularly those related to attentional disorders, constitutes a denial of FAPE to Student that significantly impeded Mother's participation in the development of Student's educational program, and ultimately resulted in a substantive denial of FAPE to Student. Similarly, District's failure to find Student eligible for special education at the September 14, 2015 IEP denied Student a FAPE.

Student also contended that District denied her a FAPE by failing to either tender an assessment plan or send prior written notice following Mother's request for an assessment of Student on February 11, 2015. District contended that Mother's request fell outside the applicable statute of limitations, and even if not, was negated by Mother's withdrawal of the assessment request. Student failed to meet her burden of establishing an exception to the two-year statute of limitations. Accordingly, Student's claim concerning the February 11, 2015 assessment request was barred by the statute of limitations.

FACTUAL FINDINGS

1. At the time of the hearing, Student was a 10 year-old girl eligible for special education under the primary category of other health impairment. Student resided within District's boundaries at all relevant times.

2. Student had attended Arroyo Vista Charter School since kindergarten, and

had been in the school's Spanish/English dual-immersion program since that time. At the time of hearing, Student was almost halfway through her fifth grade year at Arroyo Vista.

STUDENT'S PERFORMANCE DURING THE 2014-2015 SCHOOL YEAR

3. Student was in the second grade at Arroyo Vista during the 2014-2015 school year. Her teacher was Magaly Lawson². Ms. Lawson had been a teacher since 2001, and had taught in the dual-immersion program at Arroyo Vista since 2005. She held a multiple subject teaching credential. She did not hold a special education credential. The dual-immersion program consisted of 80 percent Spanish and 20 percent English for the second grade year. Student received quarterly grades and effort ratings during the year.

4. District used numerical grades on report cards using numbers one through four. A grade of one represented minimal mastery of standards, and indicated little, if any, progress toward meeting a standard. Two represented that a student was progressing toward mastery of standards, but encompassed a wide range of progress from barely more than minimal mastery to performance approaching proficiency. Three represented proficient mastery of standards. Four represented performance that exceeded mastery of standards. Overall, Student received grades of mostly twos and threes on her report card for second grade. She received a one for use of accents.

5. Student was also rated on effort for a series of aspects of her responsibility for learning and behavior. A student's effort was rated either as "C", consistently demonstrates, "U", usually demonstrates, or "I" inconsistently demonstrates. For the second quarter, Student was rated as "I" for four categories: stays on task and uses time efficiently, listens and follows directions, actively participates in class, and produces quality

² Ms. Lawson was also known as Elah McRay. This decision will refer to Student's second grade teacher as Ms. Lawson, which is consistent with the record at hearing and as identified by that name in District documents.

work. Those ratings improved to "U" by the fourth quarter of second grade. Otherwise, Student's effort was rated as "U" or "C" for all other categories.

6. Ms. Lawson wrote comments for each quarter in addition to the grades and ratings. For the fourth quarter, she noted that Student did not meet expectations for end of the year math assessment, and that Student was approaching expectations on local measures of Spanish and English writing. Ms. Lawson indicated that the lexile goal for the year was 420, and Student's lexile score was 90, indicating she was a beginning reader, and that she was far below expectations in this area.

INITIATION OF STUDENT STUDY TEAM PROCESS BY MS. LAWSON

7. Ms. Lawson initiated the student study team process in January of 2015, near the beginning of the third quarter. The student study team process was designed to address concerns about a student's school performance, and to bring concerns about a student's performance to light to allow the teachers, administrators, and possibly parents and others to address the concerns. The student study team process had three tiers, designated 1, 2 and 3. The first level was student study team 1 and was often initiated by a student's classroom teacher. When a teacher was concerned about a student's classroom performance, the teacher filled out a form labeled student study team 1 that provided a summary of a student's school profile. The concerns would then be addressed at a meeting among the teachers for that grade.

8. Ms. Lawson filled out the student study team 1 form on January 19, 2015 by checking a series of descriptive statements regarding Student's academic skills, basic learning processes, speech and language, and behavioral and emotional performance. She listed significant problems for Student with written language, spelling and math. She also listed problems for Student with basic learning processes including: poor discrimination of visual similarities and differences; difficulty maintaining auditory focus (easily distracted by noises); difficulty following oral directions (especially more than one); poor visual memory;

poor auditory memory; difficulty copying designs, letters, numbers, and with penmanship; very short attention span compared to class/age peers; requires frequent reminders to stay on task or complete work; and appears easily distracted by noise, movement, self, or others. Under the heading of receptive and expressive language, Ms. Lawson listed Student as continuing to have difficulty with basic skills in letters after significant exposure. Ms. Lawson listed problems with behavioral and emotional issues, specifically with work habits, including: frequently off task; seldom completes task assigned; disorganized with work, materials, and time; and difficult time beginning an assignment. Ms. Lawson did not list any behavioral or emotional problems under the categories of classroom and playground behavior, reaction to frustration or discipline, or personal and social skills.

REQUEST FOR ASSESSMENT BY MOTHER - FEBRUARY 11, 2015

9. The second level was student study team 2 and was triggered by a request for assessment. District would immediately schedule a student study team 2 meeting when it received an assessment request. Mother delivered a request for assessment to District by way of school principal Patricia Roth on February 11, 2015. District immediately scheduled a student study team 2 meeting when it received Mother's assessment request. A student study team 2 meeting was promptly scheduled for February 17, 2015 by District, to allow time for the preparation of an assessment plan within the 15-day timeline, if needed. A student study team 2 meeting typically involved the parent, student's classroom teacher, and other school administrators. District typically used the student study team 2 process once a request for an assessment was made by a parent, and often held off on assessment until after proceeding through the 3-stage student study team process completely.

STUDENT STUDY TEAM MEETING - FEBRUARY 17, 2015

10. The student study team met on February 17, 2015. Mother, Ms. Roth, Ms. Lawson, a school psychologist, a resource teacher, and an associate principal attended. The student study team noted Mother's concerns with reading, and Student's reversal of letters and numbers. The team also noted Ms. Lawson's concerns with Student's performance in math, Student's need for constant prompting, difficulty following multi-step problems or directions, inconsistent performance, and attentional issues. The team collectively discussed the question of whether Student's attentional issues were impacting her education. The team noted that Student had classroom modifications, including: small group in math; tutoring after school; seat in proximity to teacher; biweekly home tutoring; literature support; and computer usage. The team agreed to hold another student study team meeting in May 2015 to assess Student's progress in light of the ongoing interventions. Mother agreed to withdraw the request for assessment, pending further student study team action³. District did not send Mother prior written notice regarding the request for assessment because Mother withdrew the request during the team meeting.

STUDENT STUDY TEAM MEETING - JUNE 2, 2015

11. The student study team met on June 2, 2015. Mother, Ms. Roth, school

³ Mother worked for San Diego Unified School District during the time period at issue in this matter. She was a trained marriage and family therapist working with SDUSD's juvenile youth. She also had another daughter assessed by District prior to the events at issue in this matter. District witnesses, Ms. Roth and Ms. Gaudet, testified credibly that Mother was advised by them that she had the option to proceed with an assessment, rather than follow the student study team process.

psychologist Yolanda Gaudet, a resource teacher, and Ms. Lawson attended. Student continued to struggle at school despite largely obtaining a mix of twos and threes for her final grades on her second grade report card. The team continued to have concerns about whether Student's attentional issues were impacting her education. The team agreed to have the school psychologist make a referral for a psychoeducational assessment of Student.

PSYCHOEDUCATIONAL TEAM ASSESSMENT REPORT - SEPTEMBER 2015

12. Following the referral by Ms. Gaudet, and the resultant assessment plan by District, Student was assessed in August and September of 2015, and District documented its findings in a psychoeducational team assessment report dated September 14, 2015.

13. Ms. Gaudet was qualified to conduct a psychoeducational assessment and to testify as an expert based upon her education, training, and experience. She held a bachelor of arts in psychology and a master of science in school psychology and counseling. She had been the lead school psychologist for District since 1995. She had conducted approximately 40 to 50 assessments each year for the last 20 years, and regularly participated in IEP meetings. She had known Student for four to five years and had frequent interactions with Mother over the same time period.

14. Ms. Gaudet reviewed school records; pupil developmental summary completed by Parent; health screening report completed by the school nurse; vision and hearing screening conducted by the school nurse; and reviewed Student's medical history. She conducted interviews and observations.

15. Ms. Gaudet provided a few sentences of brief background information on Student's family history, her health and development history, her hearing and vision screening, her language background, and her educational history. Ms. Gaudet did not interview Mother for the assessment. The information provided was unremarkable except that Ms. Lawson had initiated the student study team process to address academic

concerns, and that Student had received accommodations and interventions in the classroom.

16. Ms. Gaudet obtained a completed classroom teacher report from Student's third grade classroom teacher Yvonne Dawson⁴ dated August 1, 2015. Ms. Dawson had Student in her class for approximately five days at the time she completed the report. Ms. Dawson described Student's work study skills by stating: "[Student] is distracted easily and as a result falls behind on activities/assignments. She often doesn't realized (sic) when the rest of the class has transitioned." Regarding recall of information, Ms. Dawson indicated that Student was not able to recall or apply information presented the day before even if she had worked one-on-one with the teacher.

17. Ms. Gaudet observed Student during testing and noted that she presented as restless, frequently changing her position and/or standing up while working on a task. She also noted that Student appeared to lack confidence in her responses and often did not consider all her choices in answering a question or responding to an assessment task.

18. Ms. Gaudet also observed Student in the classroom on one occasion during a written language lesson. Student was observed selecting a book for a writing assignment and then returning to her desk and beginning the assignment by taking out a pencil, writing her name on a piece of paper, and flipping through the pages of the book. The summary of the observation consists of four sentences. No information was provided in the report about the date or duration of the assignment or whether Student appeared on-task, off-task, or any other information regarding any potential attentional issues or lack thereof.

⁴ Ms. Dawson had been a teacher since 2008, and had taught in the dual-immersion program with District since 2009. She held a master of education degree and a multiple subject teaching credential. She did not hold a special education credential.

19. Ms. Gaudet administered the Kaufmann Assessment Battery for Children-II; Beery-Buktenica Developmental Test of Visual-Motor Integration-Sixth Edition; Motor-Free Visual Perceptual Test-Third Edition; Wide Range of Memory and Learning-Second Edition; Comprehensive Test of Phonological Processing-Second Edition; Test of Auditory Processing Skills-Third Edition; Behavior Assessment System for Children-Second Edition; Wechsler Individual Achievement Test-III; and the Bateria III Woodcock-Johnson.

20. Ms. Gaudet administered the Kaufman standardized assessment to Student on September 10, 2015. The assessment is a test of cognitive functioning which measures a child's thinking and reasoning ability in sequential and simultaneous areas. Student obtained a score of 89 on the fluid crystalized index summarizing the assessment's overall results. That score was in the 23rd percentile and fell in the average range. Student's subtest scores ranged from the 50th percentile to the 19th percentile, clustering in the 20th and 30th percentile range, and fell in the average range.

21. Ms. Gaudet reported average scores for Student on the Wechsler Achievement test, a standardized test of academic achievement. The assessment was administered by Lynn Barker, a District resource specialist, on September 3, 2015. The report noted that Student had a subtest score of 59 in spelling, but the significance or percentile rank of that score was not presented or discussed.

22. Ms. Gaudet administered the Bateria III standardized assessment to Student on a date incorrectly listed as October 11, 2015. The assessment was a test of academic achievement that was administered in Spanish. Student's scores were listed, but not reviewed or analyzed. Student scored in the average range on four subtests and in the above- average range on one subtest.

23. Ms. Gaudet administered the Beery Developmental standardized assessment to Student on September 1, 2015. The assessment was a test of eye-hand coordination. Student obtained a score of 91 that fell in the 27th percentile and represented a score in the average range. There was no analysis or explanation of the

significance of the testing results.

24. Ms. Gaudet administered the Motor-Free Perception assessment to Student on September 1, 2015. The assessment was a test of visual perceptual skills using a non-motor format. Student obtained a score of 115 that fell in the 84th percentile and was considered an average score. There was no analysis or explanation of the significance of the testing results.

25. Ms. Gaudet administered the Wide Range assessment to Student on September 9, 2015. The assessment was a test of memory ability. In the general memory index, Student obtained a score of 94 that fell in the 34th percentile and was considered an average score. There was no analysis or explanation of the significance of the testing results or the different sub-score areas.

26. Ms. Gaudet administered the Phonological Processing assessment to Student on September 2, 2015. The assessment was a test of Student's phonological skills. Student's scores on the subtests fell in the average range. There was no analysis or explanation of the significance of the testing results or the different sub-score areas.

27. Ms. Gaudet reported the results of the behavioral assessment rating scales obtained from Student's teachers, Ms. Lawson and Ms. Dawson, and Mother. The behavioral scales were a measure of social emotional adjustment across a wide range of possible problems. Both teachers rated Student as clinically significant in school problems and learning problems. In attention problems, Ms. Lawson rated Student at-risk and Ms. Dawson rated Student clinically significant. Ms. Lawson also rated Student as at-risk in 8 internalizing problems. In all other areas, Mr. Lawson and Ms. Dawson rated Student as average. Mother rated Student as average in attention problems, and did not rate Student on the other areas flagged by the teachers.

28. Generally, behavioral assessment scores in the clinically significant range suggested a high level of maladjustment, while scores in the at-risk range identified either a significant problem that may not be severe enough to require formal treatment or a

potential of developing a problem that needs careful monitoring. For school problems, scores in the at-risk range should be noted and investigated, while scores in the clinically significant range were usually associated with severe problems with schooling and within the school environment. There was no explanation or discussion of the significance of clinically significant ratings of Student by both teachers in learning problems and school problems. For internalizing problems, scores in the at-risk range should be evaluated thoroughly. For inattention/hyperactivity, either at-risk or clinically significant ratings may warrant further consideration of an attention deficit hyperactivity disorder diagnosis.

29. Ms. Gaudet included a section in the report entitled "summary and eligibility". The section referred to Mother's concerns about Student's reversal of letters and numbers, and increased frustration with math, but made no mention of the study team's concerns about attentional issues, nor those raised by Ms. Lawson in her student study team 1 form. Ms. Gaudet indicated that assessment results showed Student to have average cognitive ability, and average academic achievement. The report states that: "[R]esults on behavioral rating scales do not indicate a significant area of concern, however, inconsistencies were noted between parent and teacher's (sic) ratings in the area of attention". The report summary failed to mention the clinically significant ratings by both teachers for school problems and learning problems. The report noted that in Ms. Gaudet's opinion, Student did not meet the criteria for any of the primary disabilities under the Education Code. The report did not analyze any of the assessment data relative to any of the potential eligibility categories, nor did the report list or explain the criteria for eligibility, or how the assessor reached her conclusions.

INDIVIDUALIZED EDUCATION PROGRAM MEETING - SEPTEMBER 14, 2015

30. District held Student's initial IEP team meeting on September 14, 2015 to review District's assessments and discuss Student's eligibility for special education. Ms. Roth; Ms. Landers, a speech/language pathologist; Student's third grade classroom

teacher Ms. Dawson; Ms. Gaudet; resource specialist Ms. Barker; and Mother attended. Student was approximately seven years and eleven months old at the time of the IEP team meeting, in third grade at Arroyo Vista.

31. The IEP team discussed Student's present levels of performance. She required numerous prompts to stay on task during both independent and whole group work. When asked to respond to questions in English, she would often respond in Spanish. Her English reading Qualitative Reading Index scores were: 46 cwpm at 92 percent accuracy with a 105 cwpm target; four out of eight reading comprehension with a target of six out of eight. In Spanish her QRI assessment scores were: 42 cwpm at 98 percent accuracy with a 105 cwpm target; three out of four reading comprehension with a target of six out of eight. Student's assessments in language arts averaged 30 percent in English and 60 percent in Spanish.

32. Ms. Dawson reported that Student frequently made mistakes because she did not understand the instructions, her responses did not match the question asked, and she generally had attentional issues. Student also generally struggled with math. When provided with one-to-one help or small group instruction, Student performed significantly better. Writing was an area of strength for Student, and she was better able to write narratives in Spanish than English. Student had difficulty completing homework, she lacked organizational skills and often forgot to take homework home or took home the wrong homework.

33. The IEP team discussed District's assessments including the psychoeducational assessment. Ms. Gaudet indicated that Student's cognition was average and broadly matched her parallel average academic skills. Based on the assessment results, Mother was informed that Student did not meet criteria for any disability and therefore did not qualify for special education services at that time. Mother indicated that she believed that Student had a disability related to attention and/or anxiety, and as a result disagreed with District's failure to find Student eligible for special

education.

STUDENT'S PERFORMANCE DURING THE 2015-2016 SCHOOL YEAR

34. Student was in the third grade at Arroyo Vista during the 2015-2016 school year. Her teacher was Yvonne Dawson. Student received quarterly grades and effort ratings during the year.

35. Overall, Student received final grades of minimal mastery in 15 areas, progressing toward mastery in 15 areas and mastery in 13 areas on her report card for third grade. In ratings for responsibility for learning and behavior, Student received year-end ratings of "inconsistently demonstrates" for listens and follows directions, produces quality work, and demonstrates organizational skills.

36. In the second quarter, Ms. Dawson's teacher comments indicated that Student continued to struggle with basic math concepts and was unable to meet any math standards that quarter. By teacher comment, Student's math struggles continued through the third and fourth quarters.

ATTENTION DEFICIT HYPERACTIVITY DISORDER DIAGNOSIS – MARCH 2, 2016

37. On March 2, 2016, Mother obtained a diagnosis from Dr. Emily Fletcher, M.D., of the Children's Primary Care Medical Group, finding that Student had attention deficit hyperactivity disorder, inattentive type. She forwarded the diagnosis to District with a request for re-assessment and review of Student's special education eligibility.

ADDENDUM TO PSYCHOEDUCATIONAL TEAM ASSESSMENT REPORT – MAY 26, 2016

38. District reassessed Student, and Ms. Gaudet prepared a report documenting the reassessment dated May 26, 2016.

39. Ms. Gaudet administered the Attention Deficit Disorder Evaluation Scales-Fourth Edition School Version assessment to Student on May 25, 2016. The assessment enabled educators, school and private psychologists, pediatricians, and other medical

personnel to evaluate and diagnose attention deficit hyperactivity disorder in children and youth from input received by primary observers of student's behavior. The school version of the scale was completed by Ms. Dawson. For the subtype of attention deficit hyperactivity disorder described as inattentive, Student registered a standard score of five with a classification of likely for that subtype of attention deficit hyperactivity disorder.

40. Ms. Gaudet reported the results of the administration of the Bateria III standardized assessment to Student on May 13, 2016 by resource specialist Nahomi Rosas. The assessment was a test of academic achievement that was administered in Spanish. Student's scores were listed. Student scored in the average range on seven subtests and in the below-average range on one subtest.

41. Ms. Gaudet reported the results of the administration of the Wide Range Achievement Test assessment to Student on May 4, 2016 by resource specialist Ms. Rosas. The assessment was a test of academic achievement that was administered in English. Student's scores were listed. Student scored in the average range on three subtests and in the below-average range on two subtests.

42. Ms. Gaudet summarized the results of the assessment by concluding, without any analysis of the assessment data, that Student's challenges with sustaining attention had a negative impact on academic achievement. She went on to conclude that Student met the criteria for other health impairment under Education Code Title 5, Section 3030(a) and (b)(9).

INDIVIDUALIZED EDUCATION PROGRAM MEETING – MAY 27, 2016

43. District held an IEP team meeting on May 27, 2016 to review District's reassessments and discuss Student's eligibility for special education. Ms. Roth, Ms. Landers, Ms. Dawson, a fourth grade general education teacher, school psychologist/counselor Mr. Tandy, Ms. Rosas, and Mother attended. Student was approximately eight years and seven months old at the time of the IEP team meeting, in

third grade at Arroyo Vista.

44. The IEP team found Student eligible under the eligibility of other health impairment based upon her attention deficit hyperactivity disorder adversely affecting her academic achievement. There were approximately four days left in the 2015-2016 school year following the IEP meeting. Five goals were drafted for Student and she was provided with 480 minutes of group specialized academic instruction served weekly.

PRIVATE ASSESSMENT BY DR. JILL WECKERLY – OCTOBER 2016

45. Mother obtained a private neuropsychological evaluation by Dr. Jill Weckerly, Ph.D. in October 2016. Dr. Weckerly prepared a comprehensive report documenting her findings, conclusions, and recommendations. Dr. Weckerly held a Ph.D. in cognitive sciences and linguistics and a Ph.D. in clinical psychology. Dr. Weckerly was qualified to conduct a neuropsychological assessment and to testify as an expert based on her education, training and experience. Dr. Weckerly administered Conner's Rating Scales-Third Edition in order to assess Student's attention deficit hyperactivity disorder. She concurred with Dr. Fletcher's diagnosis of attention deficit hyperactivity disorder, inattentive subtype. Dr. Weckerly recommended that Student receive an intensive, comprehensive program for children with learning disabilities, which addressed both reading and written language skills in order to remediate Student's academic deficiencies.

MEANS OF ASSESSING FOR ATTENTIONAL ISSUES

46. The Behavior Assessment System for Children rating scales were a broad test of attentional problems in that they included both scales and composites that assess a child's attention as well as assessing other areas of behavior. There were a number of narrow measures that specifically looked at attentional issues in children, including: the Conners, the Attention Deficit Disorder Evaluation Scales, the Brown scales, and the

Vanderbilt assessment.

COMPENSATORY EDUCATION

47. Dr. Weckerly testified that Student should receive compensatory education in the form of an intensive reading program from a reading specialist such as a special education teacher or a non-public agency provider. Dr. Weckerly's opinion was that Student should receive a four-week program that would provide one and one-half hours of intensive reading instruction per day for the four-week period. She recommended the four-week program be provided over a school break or a summer break to allow Student to focus on the instruction. Dr. Weckerly recommended one hour per week until such time a four-week program could be implemented, and then one hour per week for several months following the intensive four-week program to solidify Student's expected gains.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION - LEGAL FRAMEWORK UNDER THE IDEA⁵

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.⁶; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living,

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

⁶ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(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.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.) The Supreme Court’s recent decision in *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, ____ L.Ed.2d ____ (2017 WL 1066260)] held that a local educational agency must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (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).) 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, subd. (j).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is

preponderance of the evidence].) In this matter, Student, as the complaining party, bears the burden of proof.

5. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 .) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

ISSUE 1: CHILD FIND

6. Student contended that District denied her a FAPE by failing to identify her as a Student in need of assessment for special education during the 2014 – 2015 school year. District contended that Student did not display sufficient indications of need for an assessment to trigger child find, and that the school had embarked on the student study team process in lieu of assessing Student.

Applicable Law

7. A school district is required to actively and systematically seek out, identify, locate, and evaluate all children with disabilities, including homeless children, wards of the state, and children attending private schools, who are in need of special education and

related services, regardless of the severity of the disability, including those individuals advancing from grade to grade. (20 U.S.C. §1412(a)(3)(A); Ed. Code, §§ 56171, 56301, subds. (a) and (b).) This duty to seek and serve children with disabilities is known as “child find.” “The purpose of the child-find evaluation is to provide access to special education.” (*Fitzgerald v. Camdenton R-III School Dist.* (8th Cir. 2006) 439 F.3d 773, 776.) A district’s child find obligation toward a specific child is triggered when there is reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Rae* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

8. A disability is “suspected,” and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-21 .) That notice may come in the form of concerns expressed by parents about a child’s symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child’s behavior. (*Id.* at p. 13 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796, and *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202].)

9. The child-find obligations apply to children who are suspected of having a disability and being in need of special education, even if they are advancing from grade to grade. (34 C.F.R. § 300.125(a)(2)(ii).) Concomitantly, failing grades alone do not necessarily establish that a district has failed in its child find obligation or that it failed to provide an educational benefit to a student. (See *Sherman v. Mamaroneck Union Free School Dist.* (2nd Cir. 2003) 340 F.3d 87, 93; *Mather v. Hartford School. Dist.* (D. Vt. 1996) 928 F.Supp. 437, 446.)

10. A request for an initial evaluation to determine whether a student is a child

with a disability in need of special education and services can be made by either the parent or a public agency. (34 C.F.R. § 300.301(b).) Further, the IDEA requires that parents be provided with a copy of the procedural safeguards upon the initial referral for evaluation. (34 C.F.R. § 300.504(a)(1); Ed. Code, § 56301 subd. (d)(2)(A).)

11. Violations of child find, and of the obligation to assess a student, are procedural violations of the IDEA and the Education Code. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1196. *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031.)

12. 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 School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) The hearing officer "shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian of the pupil to participate in the formulation process of the individualized education program." (Ed. Code, § 56505, subd. (j).) While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

Analysis

13. Here, District was on notice that Student had issues with attention that affected her at school beginning, at least, with the student study team 1 form completed by Ms. Lawson on January 19, 2015. That information was underscored during the first

student study team 2 meeting held on February 17, 2015, following Mother's request for an assessment. During that meeting, the SST team noted that Student, based upon her classroom teacher's reported concerns, needed constant prompting, had problems following multi-step problems and directions, was inconsistent with performance and exhibited problems with attention. The team was concerned whether Student's attentional issues were impacting her education. At this stage, District had enough information to trigger the child find requirements of the IDEA, as delineated above, and proceed with an assessment of Student, and District's failure to do so is found to constitute a procedural denial of FAPE to the Student.

14. If District had complied with its child find obligations, it would have proceeded to conduct an initial assessment of Student to consider eligibility for special education and related services at an IEP team meeting. There, Parent would have had the opportunity to consider relevant information, consult with team members, and come to an informed decision regarding Student's educational needs. Given Student's attentional difficulties, the IEP team might have considered and provided intensive academic instruction in reading or other services specifically addressing Student's attentional issues. Therefore, the failure to conduct an initial assessment impeded Student's right to a FAPE, significantly impeded Parent's right to participate in the decision-making process, and caused a deprivation of educational benefits. District deprived Student of educational benefit and denied her a FAPE from March 7, 2015 to September 14, 2015.

ISSUE 3A: FAILURE TO ASSESS IN ALL AREAS

15. Student contended that District denied her a FAPE by failing to assess her in all areas of suspected disability, including attentional issues, during the 2015-16 school year thereby preventing Parent from meaningfully participating in Student's education and denying Student educational opportunities. District contended that Student was assessed adequately in all areas of suspected disability.

Applicable Law

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).) 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, ex rel. Park v. Anaheim Union High School Dist.*, *supra*, 464 F.3d at pp. 1032-1033; *Timothy O.*, *supra*, 822 F. 3d at pp. 1120-1124.)

17. The legal citations above in paragraphs 8 and 12 are incorporated by reference into the analysis of this issue.

Analysis

18. Here, District's initial assessment of Student glaringly failed to assess the nature and extent of Student's apparent problems with attention. Although Ms. Lawson's student study team 1 form and both student study team meetings had flagged attentional issues, and detailed concerns about the extent to which Student's attentional issues were impacting her education, only a general screening assessment, the Behavioral Assessment System, was conducted for attentional issues. Significantly, the results from the Behavioral Assessment System screening showed both reporting teachers having major concerns about Student's attentional issues. Ms. Lawson rated Student "at risk" for attention problems, and Ms. Dawson rated Student "clinically significant" for attention problems. Both teachers also rated Student "clinically significant" for both learning problems and school problems, potentially indicating that attentional issues were impacting Student's education.

19. Nonetheless, despite the existence of multiple other measures to assess attentional disabilities such as the Conners, the Attention Deficit Disorder Evaluation

Scales, the Brown scales, or the Vanderbilt assessment, no further standardized assessment of Student's attentional issues was undertaken. Dr. Weckerly's testimony was compelling on the point that other more specific measures were available to District's assessor, and that the Behavioral Assessment System results raised red flags about Student's attentional issues that demanded further inquiry. Testimony by Ms. Gaudet, District's school psychologist, was not given great weight as she explained that she had found inconsistencies in the existence of attentional issues that led her to not undertake further assessment in this area. It seems clear from the subsequent diagnosis of Student with attention deficit hyperactivity disorder and the subsequent qualification of Student under the category of other health impaired by reason of her attention deficit hyperactivity disorder that a more thorough and adequate assessment of Student's attentional issues at the beginning of the 2015 – 2016 school year would have reached the same conclusion nine months earlier. As such, it is found that District's assessment of Student was not adequate, and District's failure to adequately assess Student is found to constitute a procedural denial of FAPE to the Student.

20. If District had complied with its obligation to adequately assess Student, it would have thoroughly assessed Student's attentional issues prior to the IEP meeting. Parent and all team members would then have had the opportunity to consider additional, relevant information, and come to an informed decision regarding Student's educational needs. Given Student's attentional difficulties, the IEP team might have considered and provided intensive academic instruction in reading or other services specifically addressing Student's attentional issues. Therefore, the failure to adequately assess Student during the initial assessment impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, and caused a deprivation of educational benefits. District deprived Student of educational benefit and denied her a FAPE from March 7, 2015 to May 27, 2016.

ISSUE 3B: FAILURE TO FIND ELIGIBLE

21. Student contended that District denied her a FAPE by failing to find her eligible for special education under the eligibility category of other health impaired arising from Student's attention deficit hyperactivity disorder after assessing her in September 2015. District contended that Student was not eligible for special education based on the information known to District at the time of the initial IEP meeting on September 14, 2015.

Applicable Law

22. Under both California law and the IDEA, a child is eligible for special education if the child needs special education and related services by reason of the following disabilities: mental retardation, hearing impairments, speech or language impairments, visual impairments, severe emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairment, or specific learning disabilities. (20 U.S.C. §1401 (3)(A)(i) and (ii); Cal.Code Regs., tit. 5, §3030.) Attention deficit hyperactivity disorder is not, by itself, a specified disability that qualifies a child for special education. However, a child with attention deficit hyperactivity disorder can be eligible for special education if it so affects the child that the child meets the criteria for severe emotional disturbance, other health impairment, or specific learning disabilities. (Ed. Code § 56339, subd. (a).)

23. A student meets eligibility as a student with other health impairment if he has limited strength, vitality, or alertness, due to chronic or acute health problems. (Cal. Code Regs., tit. 5, § 3030, subd. (f).) A student can qualify for eligibility as other health impairment if he has attention deficit hyperactivity disorder, because his disability-related distractibility can cause him to have limited alertness with respect to his educational environment, which can then demonstrate a need for special education and related services. (34 C.F.R. §300.8(c)(9); Ed. Code, § 56026, subd. (e).)

24. The Ninth Circuit has held that a district's decisions in writing an IEP cannot

be judged exclusively in hindsight, since an IEP is a snapshot, not a retrospective. (*Adams v. State of Oregon*, *supra*, 195 F.3d 1141, 1149.) However, after-acquired evidence may shed light on the objective reasonableness of a school district's actions at the time the school district rendered its decision. (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1004 [citing *Adams*, *supra*, 195 F.3d at 1149].)

Analysis

25. Here, District failed to find Student eligible for special education due to its own flawed psychoeducational assessment of Student. In this instance, District's psychoeducational assessment failed to investigate the extent of Student's attentional issues, despite those issues having been raised by Student's second grade teacher mid-year, and having been further highlighted during District's SST process. Specifically, the results of the behavioral assessment scales for Student clearly indicated significant issues with attention, school problems, and learning problems. Nonetheless, the assessor failed to follow-up on these red flags by examining Student's attentional issues with a more focused assessment. Had she done so, Student would likely have been found to meet the eligibility criteria for other health impairment in September of 2015, due to the impact of her diagnosed attention deficit hyperactivity disorder, inattentive subtype on her ability to access her education. The later testing by both Dr. Fletcher and during District's reassessment of Student in May 2016, underscore this reality. (See *E.M. v. Pajaro Valley Unified School Dist.* *supra*, 652 F.3d 999, 1004.) District should have found Student eligible under the category of other health impaired in September 2015, rather than May 2016, as was ultimately the case, and District's failure to do so is found to constitute a procedural denial of FAPE to the Student.

26. By failing to find Student eligible for special education at the September 14, 2015 IEP meeting, Student was denied a FAPE as no special education programs or services were considered for Student, Parent was denied the opportunity to participate in

the decision making process for Student's educational plan, and Student was deprived of an educational benefit for essentially her entire third grade year, as she continued to struggle academically and showed notable declines in her academic performance. Given Student's attentional difficulties, the IEP team might have considered and provided intensive academic instruction in reading or other services specifically addressing Student's attentional issues. As such, District deprived Student of educational benefit and denied her a FAPE from September 14, 2015 to May 27, 2016.

ISSUE 2A,B: FEBRUARY 11, 2015 ASSESSMENT REQUEST BY MOTHER AND DISTRICT RESPONSE

27. Student contended that District denied Student a FAPE during the 2014-2015 school year because it prevented Parent from meaningfully participating in Student's education and denied Student educational opportunities by failing to provide an assessment plan to assess Student for special education eligibility after Parent requested one on February 11, 2015; and by failing to provide Parent with prior written notice of its refusal to assess Student after Parent's request for assessment on February 11, 2015. Because Student did not file this due process complaint until March 7, 2017, more than two years after the events of February 11, 2015, Student contended that the statute of limitations should be extended for three weeks due to District withholding information from Mother regarding the availability of an assessment for Student. District contended that it did not withhold information from Mother, and that as a result no exception to the statute of limitations was triggered.

APPLICABLE LAW

28. A due process complaint: "must allege a violation that occurred not more than two years before the date the parent or public agency *knew or should have known about the alleged action* that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the

time allowed by that State law.” (34 C.F.R. § 300.507(a)(2) (emphasis added).)

29. California implements the IDEA through its special education implementing statutes. (*Miller v. San Mateo-Foster City Unified School Dist.* (N.D. Cal. 2004) 318 F.Supp.2d 851, 860 (*Miller*).) Similar to the federal statute, Education Code section 56505, subdivision (f) provides that any request for a due process hearing shall be filed within two years from the date the party initiating the request *knew or had reason to know of the facts underlying* the basis for the request.

30. A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., *when the parent knows that the education provided is inadequate.* (*M.M. & E.M. v. Lafayette School Dist.* (N.D.Cal., Feb. 7, 2012 Nos. CV 09– 4624, 10–04223 SI) 2012 WL 398773, ** 17 – 19 (emphasis added) (*M.M.*), *affd.* in part and *revd.* in part on other grounds by *M.M. v. Lafayette School Dist.t, et al* (9th Cir. 2014) 767 F.3d 842, 859; see also, *M.D. v. Southington Board of Education* (2d Cir. 2003) 334 F.3d 217, 221.) In *M.M.*, the District Court made an evidentiary finding that “parents had sufficient knowledge of the educational goings-on inside and outside of the classroom to be put on notice of their underlying claims.” (*M.M.*, *supra*, at *18) In other words, the statute of limitations begins to run when a party is aware of the underlying facts that would support a legal claim, not when a party learns that the action was wrong. (*M.M. supra*, at *18; see also *Bell v. Board Of Education of the Albuquerque Pub. Schools* (D.N.M.2008) 2008 WL 4104070, at *17.)

31. In California, the “‘knowledge of facts’ requirement does not demand that the [party] know the specific legal theory or even the specific facts of the relevant claim; rather the [party] must have known or reasonably should have known the facts underlying the supposed learning disability and their IDEA rights.” (*Miller, supra*, 318 F.Supp.2d at p. 861 (citing *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111); *Ashlee R. ex rel. Russell v. Oakland Unified School Dist. Financing Corp.* (N.D. Cal., Aug. 23, 2004, No. C 03-5802 MEJ) 2004 WL 1878214, at *5.)

32. It does not matter if the parent understood that the inadequacy was a legal claim, what is material is the fact that parents had knowledge of the problem. (*Student v. Brea Olinda Unified School Dist.* (November 24, 2009) Cal.Ofc.Admin.Hrngs. Case No. 2009050815, quoting *Alexopoulos v. San Francisco Unified School Dist.* (9th Cir. 1987) 817 F.2d 551, 555.) “[A] cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or has reason to know of the injury which is the basis of his action.” (*Miller, supra*, 318 F.Supp.2d at p. 861(quoting *Alexopoulos, supra*, 817 F.2d at p. 554).)

33. Title 20 United States Code section 1415(f)(3)(D) and Education Code section 56505, subdivision (j), establish exceptions to the two year statute of limitations in cases in which the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational agency’s withholding of information from the parent that was required to be provided to the parent.

Analysis

34. The evidence demonstrated Mother was aware of her right to request assessment, she exercised that right by requesting assessment and she withdrew her request pending further action by the student study team. District did not withhold information from Mother, and did not misrepresent information to her that resulted in her not being aware of potential claims. Mother, a family therapist working with San Diego Unified School District had previous experience with District in the assessment process, knowingly withdrew her request for assessment of Student during or soon after the February 17, 2015 initial student study team meeting. As a result, no prior written notice was required.

REMEDIES

1. Student prevailed on Issues 1, and 3a and 3b, by proving by a

preponderance of the evidence that District failed to identify Student as in need of assessment for special education, failed to properly assess Student, and failed to find Student eligible for special education on September 14, 2015.

2. As a remedy, Student requested that District fund 150 hours of compensatory education by a non-public agency in the area of academics; reimburse Student for the privately funded psychoeducational assessment by Dr. Weckerly; and fund five hours of training for District staff on their child find obligations.

3. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i); see *School Committee of Town of Burlington, Mass. v. Department of Education of Mass.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 244, n. 11.) 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); *Burlington, supra*, 471 U.S. at pp. 369-371.) When 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 369-370; *Forest Grove School Dist. v. T.A., supra*, 557 U.S. at 244, n. 11.)

4. Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Park, supra*, 464 F.3d at p. 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].)

5. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain 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); Ed. Code, § 56506, subd. (c).) An independent educational evaluation (IEE) at public expense may also be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. *Los Angeles Unified School Dist. v. D.L.* (C.D.Cal. 2008) 548 F.Supp.2d 815, 822-3.

Analysis

6. Here, Student failed to establish that she was entitled to any remedy or reimbursement before March 7, 2015, when the two-year statute of limitations accrued. After that date, and continuing up until the time of Student's filing of the instant complaint, District denied Student a FAPE and significantly deprived Parents of an opportunity to participate in her educational program because it failed to identify, assess or otherwise address Student's attentional issues, specifically her attention deficit hyperactivity disorder, inattentive subtype, during the periods from March 7, 2015 to September 14, 2015 and September 14, 2015 to May 27, 2016.

7. As a remedy for District's failure to identify Student as in need of assessment for special education, failing to adequately assess her, and failing to find her eligible for special education, and the attendant procedural FAPE violations that, in turn, led to a substantive FAPE denial to Student, it is found that Student is entitled to compensatory education in the form of an intensive reading program, provided by a non-public agency, and comprised of a total of 60 hours, including a 30-hour block to allow an intensive one and one-half hour per day program for a four-week period during the summer break, 20 hours at one hour per week until the summer break, and 10 hours at one hour per week once the four- week intensive program is concluded.

8. Here, Parents are not entitled to a publicly funded independent educational evaluation because the reimbursement for Dr. Weckerly's report of October 2016 is well

after the May 27, 2016 IEP meeting at which Student was found eligible for special education. In particular, as a result of District finding Student eligible under the eligibility of other health impaired due to her attentional issues at the May 27, 2016 IEP meeting, there was no necessity for further assessment of attentional issues justifying further assessment by Dr. Weckerly. Although Dr. Weckerly's report is comprehensive and authoritative, it simply falls too far after the events of this case to be reasonably made District's obligation pursuant to the issues and findings in this case.

9. Student also requested that District undergo five hours of training as a remedy for District's failure to fulfill its child find obligations prior to June 2, 2015. However, Student did not meet her burden of offering evidence establishing that District needed training, which District personnel required training, the amount of training hours required, or the appropriate providers of such training. Although District failed to timely assess Student despite Ms. Lawson's extensive concerns about Student reported in the January 19, 2015 student study team form 1, and the school psychologist failed to undertake more than a cursory assessment of Student's attentional issues in the classroom, these errors do not in and of themselves justify ordering training for District in the absence of further evidence of the type listed above. The Student's request for District training is therefore denied.

ORDER

1. District shall fund 60 hours of an intensive reading program, provided by a non-public agency, and comprising of a total of 60 hours, including a 30-hour block to allow an intensive one and one-half hour per day program for a four-week period during the summer break, 20 hours at one hour per week until the summer break, and 10 hours at one hour per week once the four-week intensive program is concluded.

2. All 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. Student prevailed on issues 1 and 3a,b. District prevailed on issue 2.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DATE: January 5, 2018

/s/

TED MANN

Administrative Law Judge

Office of Administrative Hearings