

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

FRUITVALE SCHOOL DISTRICT.

OAH Case No. 2018070377

DECISION

Parent on Student's behalf filed a due process hearing request with the Office of Administrative Hearings, State of California, on July 5, 2018, naming Fruitvale School District. OAH continued the matter for good cause on August 29, 2018. Administrative Law Judge Adrienne L. Krikorian heard this matter in Van Nuys, California on August 29 and 30, 2018, and in Bakersfield, California, on September 11, 12 and 13, 2018.¹

Attorneys Diane Weissburg and Jerry Weissburg represented Student. Student's mother attended the hearing and testified. Attorneys Christina Oleson and Darren Bogé represented Kern County. Dr. Rebecca Rocha, Director of Special Education, attended the hearing on behalf of Fruitvale and testified.

The ALJ granted a continuance for the parties to file written closing arguments on or before October 9, 2018. The record remained open until October 9, 2018. Upon timely receipt of written closing arguments, the record was closed, and the matter was

¹ Fruitvale filed its response to Student's amended complaint on July 16, 2018, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir.) 858 F.3d 1189, 1199-1200.)

submitted for decision.

ISSUES²

1) Did Fruitvale deny Student a free appropriate public education during the two-year statutory period by failing to assess Student in:

- a) Educationally necessary vision therapy;
- b) Occupational therapy;
- c) Speech and language; and
- d) Auditory processing?

2) Did Fruitvale deny Student a FAPE during the two-year statutory period by failing to offer services in the areas of:

- a) Educationally necessary vision therapy;
- b) Occupational therapy;
- c) Speech and language; and
- d) Auditory processing?

SUMMARY OF DECISION

Student prevailed on Issues 1(a) through 1(d) proving that Fruitvale was aware of and had reason to know or suspect that Student had possible needs in the areas of educationally related vision, occupational therapy, speech and language and auditory processing. Mother provided information to Fruitvale from the time Student was initially assessed for special education services that reflected her concerns about Student's deficits in each of the areas at issue. She continued to express her concerns to the IEP teams and to Student's fourth grade teachers. Fruitvale should have responded to

² The parties discussed and agreed to the issues as stated in this Decision at the prehearing conference on August 20, 2018.

Mother, issued an assessment plan, and assessed Student at least as early as the beginning of the 2017-2018 school year to determine if he had unmet needs, or to rule out the need for additional services in the areas at issue. By failing to respond to Mother's repeated concerns and initiate assessments before February 2018 and April 2018, Fruitvale impeded Mother's ability to participate in a meaningful way at the October 2016 and October 2017 IEP team meetings. Student made educational progress and accessed his education at grade level in third and fourth grades; therefore, Fruitvale did not deprive him of access to a FAPE or educational benefit. Student did not prevail on Issues 2(a) through 2(d).

FACTUAL FINDINGS

1. Student was a 10-year-old boy who resided during relevant time periods within Fruitvale's district boundaries with Mother. He was eligible for special education under the category of specific learning disability, inclusive of dyslexia.

2. Fruitvale is an independent school district that received support from the Kern County Superintendent of Schools Office. The Kern County Consortium Special Education Local Plan Area provides special education supports and services to multiple school districts within Kern County. Fruitvale is within the Kern County SELPA.

BACKGROUND

3. Student was in the first grade during the 2014-2015 school year. Mother expressed her concern to Student's first grade teacher and the school principal about Student being off task and not paying attention. Mother had a master's degree and was a social worker; she worked for the Kern County Department of Social Services. Her work included assisting families with children with special needs, screening the children, and attending independent educational program team meetings as a surrogate parent. She was not an occupational therapist or a speech therapist.

4. Fruitvale held a Student Study Team meeting on March 17 and April 16, 2015. The team noted Student wrote "b" backwards several times and had difficulty staying focused which affected his grades. Cedars Sinai Hospital evaluated Student on May 12, 2015, and summarized findings in a two-page report. The neurologist noted her findings were "suggestive of" weak reading, "great auditory processing/auditory learning," strong visuospatial skills, significant difficulty with phonemic awareness³ suggestive of dyslexia, and slow reading fluency. The neurologist recommended intensive help with reading and decoding, using a program such as Lindamood-Bell Learning Processes or Orton Gillingham. On May 13, 2015, Mother provided the Cedars Sinai medical report to Fruitvale and requested an individualized education program for Student.

5. Fruitvale assessed Student at the beginning of the 2015-2016 school year. Student's IEP team reviewed the assessments and the Cedars Sinai report in October 2015. The IEP team found Student eligible for special education under the category specific learning disability. It offered Student resource support services for reading based on a pull-out model. Mother consented to and Fruitvale implemented Student's October 2015 IEP. Mother remained concerned during that school year that Student was not making progress in reading, he had trouble sounding out words, and he lacked phonemic awareness. Mother visited his classroom. She talked with his second-grade teacher and the school principal about her concerns. She worked extensively with Student at home on his spelling words. His handwriting looked to Mother like it came

³ Phonemic awareness is the ability to hear sounds properly and make a connection of sounds to what the person sees. Auditory decoding is a peripheral hearing disorder where a person does not hear certain sounds properly. When both problems exist, a person may have difficulty translating sounds within the brain.

from a child much younger than Student. He wrote letters backward. Mother did not request further assessments.

2016-2017 SCHOOL YEAR

6. Student began third grade in August 2016. His general education teacher was Denis Lepine. Mr. Lepine, who testified at hearing, had a master's degree in education and was a teacher since 1993. He had a moderate/severe special education teaching credential. He taught special education classes for the Kern County Superintendent of Schools for 13 years. He was teaching elementary school general education classes at the time of hearing. Mr. Lepine knew at the beginning of the 2016-2017 school year that Student had an IEP which provided resource support for reading. Resource teacher Barbara Roeder provided Student with resource support for reading outside of the classroom for 30 minutes a day, using the Orton Gillingham teaching method. Mother visited the classroom at least monthly, and Student's grandmother assisted in the classroom several times a week.

7. Fruitvale held Student's annual IEP team meeting on October 4, 2016. All required IEP team members were present, including Mother. The IEP team discussed Student's present levels of performance. Mother reported that Student's needs included writing complete sentences, spelling words correctly, and spelling sounds phonetically. She also told the IEP team Student could not tie his shoes, catch a ball, spell, he rubbed his eyes, had headaches and had double vision, but the IEP team did not record her concerns in the IEP document. Academically, on the Informal Reading Inventory, he read second and third grade materials with 97 percent accuracy and 81 percent comprehension; he read a third-grade passage with 47 correct words per minute. Student followed all classroom rules and was not a distraction or behavior problem. He got along with his classmates in and out of the classroom. He needed to work on handwriting and fine motor skills and required small group instruction to address his

goals and objectives. Communication and motor abilities were not an area of concern.

8. The IEP team developed two goals in reading and one social emotional goal. The reading goals targeted increased word recognition and fluency and reading comprehension. The social emotional goal addressed Student's lack of attention in the classroom setting by increasing classroom listening skills. The IEP team included numerous classroom accommodations, including seating near the teacher in the front of the class, testing in the resource room, seating away from distractions and noise, noise buffers or a study carrel, testing in a small group, presentation of materials in small chunks, verbal encouragement, frequent check for understanding, on-task reminders, directions given in a variety of ways, a visual schedule and use of highlighters, a modified spelling list with words sent home on Fridays, and spelling grades based on effort.

9. The IEP team offered placement in the general education classroom and 120 minutes a week of specialized academic instruction in a separate classroom. Mother asked for a speech and language assessment at the IEP team meeting. The IEP notes do not reflect the request and Mother received no response to her request from Fruitvale. Mr. Lepine did not recall Mother asking for any assessments. Fruitvale's policy was to ask a parent to put any requests for assessments in writing, even if made at an IEP team meeting, so Fruitvale would have a record of the request and could respond to the request. Mother consented to the IEP and Fruitvale implemented it for the remainder of the 2016-2017 regular school year.

10. During the 2016-2017 school year, Student's writing was slightly vague and disorganized with some letter reversals. Mr. Lepine opined Student did not demonstrate anything in his writing that Mr. Lepine could not correct in class with feedback, and he could make sense of what Student wrote. Student's penmanship was legible, he could follow the content of his writing and could produce a writing based on

the topic assigned. Mr. Lepine consulted weekly with Ms. Roeder regarding Student's reading and handwriting progress. Mr. Lepine saw no need for occupational therapy services. Mr. Lepine graded Student's spelling based on 10 correct words from a list of 18 words. Although Student needed help writing complete sentences, and spelling words and sounds phonetically, Mr. Lepine saw no need for academic assessments beyond the standardized testing administered to all students. Student never complained to Mr. Lepine that he was experiencing double vision or blurry vision. Mr. Lepine never saw him squint or cover one eye to compensate for vision issues. Mr. Lepine observed that Student could express himself and was understandable. Mr. Lepine did not see a need for speech and language services during the 2016-2017 school year.

11. Mother worked with Student in the evenings on his spelling words regularly during third grade. She spent time helping him sound out the words. She believed Student memorized the spelling of words in preparation for testing. She was concerned that his teachers graded Student on only 10 of the 18-20 words the rest of the class received. Mother did not ask for assessments during that school year after Student's annual IEP meeting because she believed Fruitvale had the obligation to follow up on the concerns she expressed during the October 2016 IEP meeting.

12. Student received a final grade for the 2016-2017 school year of C- with an asterisk in all subjects except in English, in which he received a B-. The asterisk meant that he was working with a modified curriculum. He received an "N" for "needs improvement" in handwriting. Mr. Lepine understood that all students with modified curriculums received a C- as their grade. He opined that a student could make academic progress with a modified curriculum even if he or she was performing below grade level. He also opined a student performed at grade level if he or she received a grade of B or higher. He opined once a student with modifications received a higher grade in a subject, Fruitvale should then assess the student to determine whether the modifications

to the student's curriculum could be removed.

2017-2018 SCHOOL YEAR

13. Student began the 2017-2018 school year in August 2017. Bryan Maddern was his general education fourth grade teacher. Mr. Maddern, who testified at hearing, had a master's degree in education. He held a multiple subject teaching credential and certificate of clearance as an administrator. Ms. Roeder continued as Student's resource support teacher. Mr. Maddern consulted at the beginning of the school year with Ms. Roeder regarding Student's IEP modifications and accommodations. He assigned Student a seat near the front of the class and by the teacher within the first three weeks of school.

14. During the first six weeks of school, Student did not require instructions broken into segments any more than the typical children in Mr. Maddern's class. He followed multi-step directions, did not require on-task reminders, completed assignments without additional prompting, and did not require more frequent checks for understanding than other children in the class.

15. Fruitvale held Student's annual IEP team meeting on October 3, 2017. All required IEP team members were present, including Mother. The IEP team discussed Student's present levels of performance at the time of the IEP. Mother reported concerns in the area of social maturity, which was the only concern the IEP recorder noted in the present levels. In academics, Student read a third-grade passage with 92 percent word accuracy and 90 percent comprehension; he read a fourth-grade passage with 94 percent word accuracy and 80 percent comprehension. Mr. Maddern reported Student participated occasionally in all subject areas; he participated during reading by offering his thoughts about the theme of the story the class was reading, made predictions and provided text evidence to support how he arrived at an answer. He was reading at grade level or above when compared to other students in the classroom. In

narrative writing, Student could develop characters, setting, conflict and resolution. He struggled with grammar, spelling and sentence structure.

16. The IEP team developed two goals, one in reading and the other in writing. The reading goal targeted Student's ability to recognize sight words at grade level standards. Sight words are high frequency words that a child learns in the first through third grades as they learn to read. Children in the fourth grade continue to build on third grade reading skills, focusing on comprehension. The second goal targeted Student ability to communicate through his writing. It focused on objectives relating to planning, revising and editing using correct capitalization, punctuation, grammar and subject verb agreement.

17. The IEP team offered Student similar modifications and accommodations in the classroom and during testing as in his 2016 IEP. The IEP did not include a modified spelling list, although his grades would be effort based. The IEP team offered specialized academic instruction with resource support 120 minutes a week and placement in a general education classroom for 92 percent of the school day. The IEP did not offer extended school year services. Mother agreed to and signed the IEP without asking the IEP team for any additional assessments.

18. Fruitvale implemented the 2017-2018 IEP. Mr. Maddern taught Student in all subjects, except for the 30-minute pull out session with Ms. Roeder four days a week. In late October 2017, Mr. Maddern met with Mother during Open House. Mother discussed her concerns about Student's lack of phonemic awareness. She suggested, using a relative as a comparison, that Student might benefit from speech and language therapy to address her concerns about phonemic awareness. Mother never specifically requested a speech and language assessment. Mr. Maddern did not notify Fruitvale staff about Mother's request for speech therapy.

19. Student performed at or above grade level during the first semester. He

continued to need improvement in grammar and writing structure. Mr. Maddern graded him on 10 correct spelling words from the complete list provided to all students. Even though the IEP team did not note the modification in the October 2017 IEP, he did so because he understood Student had this modification in third grade.

20. Mother remained concerned about Student's handwriting and phonemic awareness during the fourth grade. Handwriting standards exist only in the first grade, where teachers instruct children to print capital and lowercase letters. Under the California Common Core Curriculum, writing integrates with technology after first grade. Academic standards do not apply to handwriting in grades higher than first grade. Report cards do not reflect a letter grade in handwriting after first grade. Acceptable handwriting varies among students.

21. In Mr. Maddern's fourth grade classroom, depending on the availability of technology, children would initially handwrite a task, and then translate that to a computer which had spell-check embedded. Students did not receive a letter grade for handwriting skills. This model varied slightly based on availability of technology and teaching style. Mr. Maddern's classroom had 32 computers and children used them twice a week.

22. Mr. Madden was asked to examine an undated handwriting sample from Student during the hearing. Student produced the sample while he was in Mr. Maddern's class. The exercise that prompted the sample focused on sentence structure, including the setting (where/when), putting the thought on paper (writing) and moving on to the next idea. The children had 20 minutes, including collaboration in the whole-class setting, to produce a writing sample. Student completed the assignment. The sample included misspelled words and lines that were not even with the left margin. Mr. Maddern opined that the sample reflected a not uncommon occurrence for fourth grade. He did not see anything out of the ordinary that would have prompted him to

conclude Student needed additional assessments. In Mr. Maddern's opinion, the writing sample was typical of 25-30 percent of fourth grade students.

23. Student met fourth grade state standards in math and reading on the California Assessment of Student Performance and Progress. He performed at or above Fruitvale benchmark levels in the fourth grade. He chose to read when given free time. He read at accelerated reading levels, reading books at the mid-fourth grade level. He read books with a mix of words and pictures within the range of what Mr. Maddern expected boys his age to read. He did not skip lines when he read to a level that interfered with his comprehension. Mr. Maddern never observed Student squinting when he read or rubbing his eyes. Student never complained to Mr. Maddern that he had headaches or double vision. Based upon Student's performance in his class, Mr. Maddern opined that Student did not need additional services to access the fourth-grade curriculum as of the end of the 2017-2018 school year.

2018 ASSESSMENTS

24. On February 9, 2018, Mother took Student to Empire Eye and Laser Center for a vision screening. Student had 20/20 and 20/25 vision, did not need glasses, and demonstrated double vision attributable to convergence insufficiency. Based upon those results, on February 21, 2018, Mother wrote to Fruitvale advising special education director Janet Clark that Student had a diagnosis of oculomotor dysfunction and convergence insufficiency "affecting his educational functioning." She noted Student continued to have auditory processing issues which affected his spelling and writing at grade level. She referred back to the 2015 Cedars Sinai report. Mother requested assessments in all areas of suspected need and an IEP. She also notified Fruitvale that she had retained attorney Diane Weissburg.

25. Fruitvale responded on March 2, 2018, with an assessment plan, which Mother signed on March 6, 2018. The assessment plan identified assessments in the

areas of academic achievement, audiological, auditory processing, binocular vision, and visual “itinerant” (mobility). Mother checked the “other evaluations” box adding the words “records previously provided and to be determined.” She did not request assessments in occupational therapy, addressing Mother’s concerns about Student’s handwriting, or speech and language, addressing Mother’s concerns about phonemic awareness.

Vision

26. Optometrist Dr. Sabrina Graziano conducted a binocular vision and ocular mobility assessment (characterized at hearing as a “front end vision assessment”) on April 3, 2018. She testified at hearing. The scope of Dr. Graziano’s assessment was to evaluate basic visual physiological processes. Doctor Graziano summarized her report in writing. Dr. Graziano has worked in her own private practice and has performed educationally related vision assessments since 2013. Fruitvale contracted with her to assess Student. Fruitvale retained her only to assess Student and make recommendations. Dr. Graziano’s findings and recommendations were based only on her assessment results, including an interview with Mother. She reviewed additional records and assessment reports after her assessment in preparation for IEP team meetings.

27. Dr. Graziano concluded Student had convergence insufficiency, meaning Student had difficulty aligning his eyes when reading things up close in contrast to, for example, the white board on the wall. She opined convergence inconsistency could cause double vision and pose a challenge to a student’s scholastic progression as it relates to reading comprehension and writing. She recommended in-home vision therapy consisting of a Brock String and pencil pushups. She explained her findings to Mother after her assessment and showed Mother a video demonstrating how Student could use the Brock String, which is a string with colored beads that Student could move

closer or further away from each other to help train the eye muscles. Dr. Graziano also concluded, if Student was unable to self-sufficiently complete the tasks she recommended, in-office vision therapy was an alternative. Mother declined to give the home therapy to Student because she did not think she was qualified to assist with Student's home therapy. Mother did not implement any of Dr. Graziano's recommended home therapies.

28. Joseph Gutcher, who testified at hearing, assessed Student in functional vision learning and visual mobility and documented his findings in a written report. Mr. Gutcher had an education specialist credential and worked for Kern County Consortium SELPA as a teacher for the visually impaired and as an orientation mobility specialist. He assessed children for many of the SELPA districts. Mr. Gutcher's task was to determine if Student had yet unidentified needs that Fruitvale had not already evaluated, and that would impact his ability to access the school campus and classroom.

29. Mr. Gutcher interviewed Mother and reviewed Dr. Graziano's report as part of his preparation for assessment. No one told him before his assessment that Student was writing letters backwards. Mother reported Student had double vision resulting in fatigue and headaches which affected his reading and reading comprehension. Mr. Gutcher administered multiple screening tests and observed Student at school in various settings, including in the classroom. During observations, Student sat near the front of his class and chose to read recreationally. Mr. Maddern expressed no concerns to Mr. Gutcher about Student's ability to view the board or deskwork and told Mr. Gutcher that he did not observe signs of visual stress or fatigue, rubbing eyes, constantly looking around the room, watery eyes, or covering one eye while reading. Student similarly did not report any of those concerns. Student reported he experienced double vision when he brought items close to his face, but not while reading, copying from the board, or writing.

30. Mr. Gutcher concluded Student did not meet the state definition of visual impairment; he did not demonstrate difficulty accessing typical classroom print, or obvious visual strain at school. Student did not squint when reading materials. Student appeared to sufficiently accommodate for his visual insufficiencies caused by visual motor dysfunction. He could read without difficulty when material was 12 to 16 inches from his face, which was a typical reading range. He accessed his curriculum. He had no difficulty navigating around the classroom or recess areas. Mr. Gutcher supported Dr. Graziano's recommendation for use of a line guide or typoscope, home eye exercises, and, if Student experienced consistent signs of visual strain, auditory literacy supplements to decrease visual demands of assignments and provide visual breaks throughout the day. He did not think Student needed any additional accommodations for double vision because Student was aware of and managed his limitations.

Auditory Processing

31. Lane West Audiological conducted a basic hearing test. Student's hearing was within normal limits. Fruitvale contracted with education audiologist Dr. Beatrice Braun to assess Student's suspected disabilities in audiological and central auditory processing in March 2018. Dr. Braun has a master's degree and is a credentialed educational audiologist. She has conducted approximately 5000 auditory processing assessments, including in school systems, during her career. She has worked for multiple school districts and attended numerous IEP meetings. Her educational and professional background qualified her to offer expert opinions in the area of audiological and central auditory processing. She credibly testified at hearing.

32. In preparation for her April 18, 2018 assessment, Dr. Braun reviewed documents provided by Mother including the Cedars Sinai medical report, Fruitvale's 2015 psychoeducational assessment report, Student's October 2017 IEP, and the results of Fruitvale's vision testing and audiological evaluation. She also considered Mother's

reported concerns, as noted in the IEP she reviewed. The results of the Cedars Sinai testing suggested Student had a phonemic awareness deficit suggestive of auditory decoding deficits. Dr. Braun was not aware of Student's current reading levels or the training strategies that Ms. Roeder used during resource services. Dr. Braun opined his grades and reading levels would not have changed the recommendations in her assessment report. She opined achievement tests were a more accurate reflection of how well Student accessed the curriculum.

33. Dr. Braun tested Student at her office in Woodland Hills, California. She did not observe Student in the classroom. Student's auditory decoding was outside of normal limits. He had a central auditory processing disorder with integration deficit and decoding subtypes. Those deficits impacted his reading. Integration deficit impacts the pathways between the brain's right side (which processes pictures and music) and its left side (which processes language). A decoding deficit impacts the left side of the brain and the primary auditory cortex. The impact is on processing sound and sound blending. Student scored outside of normal limits in decoding and had difficulty processing sound.

34. Dr. Braun's report included thirty-four general recommendations, many of which were not specific to Student. In particular, she recommended that Student participate in the online CAPDOTS-Integrated computerized dichotic listening training program. The program required 25 minutes a day, five days a week for three to four months. Student could utilize the program at school or at home and it required minimal monitoring. Dr. Braun opined for Student to access his curriculum, Student required a reading program utilizing visual and verbalizing techniques such as Lindamood-Bell or similar. She also recommended a vision processing assessment with a developmental optometrist (characterized at hearing as a "back end vision assessment"). She opined that Student would eventually read slower by not using phonetic skills. She also opined

it was important to assess whether Student had a reading deficit.

Multi-Disciplinary Psychoeducational Assessment

35. School psychologist Sonia Rodriguez, Ms. Roeder, and reading intervention specialist Jennifer Constantine conducted a multidisciplinary academic assessment focusing on whether Student had auditory processing deficits and, if so, how they impacted Student's educational performance. The assessments consisted of records review, interviews of Mother, Student and Mr. Maddern, observations, and standardized testing. Each assessor contributed to the May 1, 2018 Multidisciplinary Psychoeducational Report. Ms. Rodriguez and Ms. Constantine credibly testified at hearing.

36. Ms. Rodriguez is a school psychologist and a licensed behaviorist and behavior consultant. She has a master's degree and a pupil services credential and has worked for Fruitvale for 11 years. Her training included observing children in the classroom, determining antecedents, the function of behavior and the consequences, and how behavior impacts performance. She opined one could generalize those criteria, used for children with autism, to non-autistic children.

37. Mother reported Student struggled with spelling, writing complete sentences, sounding out words when reading, and that he was socially awkward. Mr. Maddern reported to the assessors that Student had difficulty expressing himself when writing due to poor spelling and handwriting and was weak in grammar. He was academically strong in math and reading. Student was attentive during instruction, could ignore distractions, and remained on task to complete independent classwork. He copied from the board and took accurate notes. He had strong communication skills, advocated for himself, responded in a neutral manner when corrected by adults, and acted appropriately socially. Student reported to Ms. Rodriguez his favorite subject was math and least favorite was reading. He found reading difficult and hated spelling and

main idea tests. He shared information easily and gave age appropriate responses during testing.

38. Ms. Rodriguez observed Student in class and during recess. His behavior was on task 91 percent of the time, and he began reading a story recreationally after completing the assigned task. He demonstrated difficulty with printing neatly and whispered words aloud when writing. During testing Student was calm and cooperative, compliant, followed oral directions, sustained attention and remained focused in the one-to-one setting, made good effort and persisted in difficult tasks.

39. Ms. Rodriguez administered the Test of Auditory Processing Skills, Fourth Edition, including subtests. The results of the assessments measured what Student heard and understood. Student's overall score of 108 was within average range. His score in phonological processing was 92, falling in the low average range. Auditory memory and listening comprehension were above average. Student demonstrated weakness in phonological deletion, phonological blending and auditory comprehension. Student met his IEP goals in third grade; he was making progress toward meeting benchmarks and goals in fourth grade.

40. Spelling can be demonstrative of a manifestation of dyslexia, which, in Student's case, Ms. Roeder addressed during resource support. Ms. Rodriguez explained her understanding of the impact dyslexia had on eligibility for special education. Until 2017, California eligibility guidelines did not specifically include dyslexia as a subset of the eligibility category of specific learning disorder. Children with medically diagnosed dyslexia were often eligible for special education under specific learning disorder, using a discrepancy model. In 2017, California included dyslexia as a subcategory of specific learning disability, and IEP teams often noted the condition on the IEP associated with the specific learning disorder eligibility category, where appropriate.

41. Ms. Rodriguez opined Student did not require assistive technology to succeed in the classroom. She observed that he could hear the teacher and he appropriately responded. She also opined he had no need for assessment in any other areas. He accessed his education and responded well during the 2017-2018 school year. He made exceptional progress, notwithstanding dyslexia.

42. Ms. Roeder administered the Woodcock Johnson Tests of Achievement, Fourth Edition, Star Reading assessment of reading comprehension, and reported on Student's historic and current scores from the Dynamic Indicators of Basic Early Literacy Skills subtests. Student's scores on the Woodcock Johnson subtest ranged from low average to average. He had difficulty with spelling skills, basic reading skills, and his comprehension was average. He was performing at grade level in the classroom and comparable to his peers in the most recent Fruitvale benchmark assessments. On the Literacy Skills subtest from second grade until the time of assessment he needed strategic and core support. He sustained progress from the beginning of the fourth grade to the time of assessment and Ms. Roeder projected he would be at grade level in reading fluency by the end of the school year.

43. Ms. Constantine administered the Informal Reading Inventory over two sessions. She was a reading specialist for Fruitvale for 15 years. She had a master's degree in reading literacy, multiple subjects and reading specialist credentials, and had screened students with skill deficits throughout her career. She supported other elementary schools within the Kern County Consortium SELPA.

44. The Informal Reading Inventory tests four levels of reading. Student read passages out loud, and Ms. Constantine asked pre-printed comprehension questions. She did not time the test. Student did not need extensive support during testing. Student scored at the fourth-grade level on the Reading Inventory. When Ms. Constantine provided reading material at a fifth-grade level, Student reached frustration

level and she did not grade that passage. His listening comprehension was at the seventh-grade level.

45. Ms. Constantine has worked with at least 500 students with dyslexia. She opined that five to 12 percent of the general school population has dyslexia. It can exist on a continuum, including spelling, letter reversal, handwriting issues, fluency, and sometimes comprehension if the child has decoding issues. When examining Student's fourth grade writing sample at hearing, Ms. Constantine opined the sample was typical for a child with dyslexia. Students with dyslexia often print with larger letters and have issues with spelling and spacing words. Handwriting issues often persist into adulthood, where the individual will write large and use inappropriate spacing.

46. The multidisciplinary team concluded Student was eligible for special education under the category of specific learning disability, with dyslexia. They included several recommendations to address Student's dyslexia and reading needs, including a systematic approach to learn reading using the Reading Naturally program, practicing phonograms through use of multisensory teaching approaches, modified spelling tests, and use of a word wall or bank.

MAY 1, 2018 IEP TEAM MEETING

47. On April 27, 2018, Fruitvale sent Mother an assessment plan for an occupational therapy assessment. Mother signed it on May 1, 2018, after adding a speech and language assessment by a speech pathologist.

48. The IEP team met on May 1, 2018, to review the assessment reports that were already completed. All required members were present, including Ms. Clark and newly appointed special education director Dr. Rebecca Rocher. Dr. Braun and Dr. Graziano attended telephonically; Mr. Gutcher and Ms. Constantine attended in person. Mother and Attorney Weissburg attended and actively participated throughout the

meeting. Fruitvale's attorney Christina Oleson also attended. Fruitvale provided Mother with a copy of her procedural rights.

49. The IEP team reviewed Student's present levels of performance. Mother's concerns were: Student could not spell; he had no phonemic awareness; his spelling was based on memorization; he relied on pictures when reading; he had double vision; and he did not like reading. Ms. Roeder reported Student read third and fourth grade passages with more than 90 percent accuracy. Mr. Maddern reported Student was a great student and participated in all areas. Both teachers reported Student's areas of need were in grammar, spelling and sentence structure. His cognitive ability was within average range.

50. The IEP team developed goals in reading and writing. The IEP included multiple accommodations, including use of "Google Voice" to assist with verbalizing reading and writing assignments, effort-based grades, and pre-teaching for new vocabulary words in the resource room. The IEP team reviewed the assessment reports; Mother and Attorney Weissburg asked numerous questions and received responses. In contrast to the October 2016 and October 2017 IEP's, the May 1, 2018 IEP included several pages of detailed notes summarizing comments, questions and requests by all participants. Due to time constraints, the IEP team agreed to adjourn the meeting to May 21, 2018. The IEP team invited Dr. Graziano to attend to further discuss her assessment results.

MAY 21, 2018 IEP TEAM MEETING

51. The IEP team met again on May 21, 2018. All required IEP team members attended. Ms. Constantine and Mr. Gutcher attended in person; Dr. Braun and Dr. Graziano attended by phone. Attorney Weissburg and Attorney Oleson also attended.

52. The IEP team, including Mother, guests and attorneys, actively participated in the meeting and had lengthy discussions about multiple topics. Attorney Weissburg

actively engaged in the conversation, offered criticisms, and made requests relating to timing, the nature of services, and those who would provide services. The IEP team reviewed and discussed the multidisciplinary assessment report, reviewed Student's present levels of performance, and noted he was performing at grade level. Mother commented that Student could read but she wanted him to learn to decode words. The IEP team discussed Dr. Braun's report and her recommendations. They continued to discuss Dr. Graziano's findings and recommendations. She provided her feedback to Dr. Braun's report and recommended additional assessments in vision based on Dr. Braun's recommendations and because she was not licensed to conduct more advanced assessments. The IEP team discussed proposed goals; developed two new goals; and received comments from Attorney Weissburg. They discussed how Student's vision was affecting him at school. Dr. Graziano actively participated in this discussion, discussing her opinions of Student's abilities and needs, and her recommendations for in-home therapy. She offered to open her office on Saturdays to provide Student with her recommended therapies.

53. Mother expressed concern that she had asked for speech and language and occupational therapy assessments for two years. Ms. Clark responded Fruitvale had no record of Mother's earlier requests, but that assessments in those areas were pending based on the May 1, 2018 assessment plan. Attorney Weissburg stated that Fruitvale should complete the assessments in 30 days because the end of the school year was approaching. Ms. Clark explained Fruitvale had 60 days to assess Student.

54. The IEP team discussed Dr. Braun's recommendation for the CAPDOTS program. Mother and Attorney Weissburg actively participated in this discussion. The IEP team discussed providing Student with this program during summer school, which took place through the month of June 2018. The IEP team agreed to continue the

meeting; no date was set. The May 21, 2018 IEP notes consisted of several pages of detailed comments, questions and requests by all participants.

REQUEST FOR INDEPENDENT ASSESSMENT

55. On May 21, 2018, at the end of the IEP team meeting, Ms. Weissburg provided the IEP team with a written request, signed by herself and Mother, for an independent educational evaluation with Dr. Beth Ballinger, whose office was in Huntington Beach, California. Ms. Oleson responded in writing on May 25, 2018. Fruitvale agreed to fund an independent vision evaluation in accordance within the Kern County Consortium SELPA guidelines. The guidelines provided that independent evaluators should be within a 120-mile radius of the school district of residence. The SELPA established the 120-mile radius to ensure the child could travel, be assessed, and return home in one day. On an exceptional basis and based on a showing of necessity by the parents, the guidelines provided a means for the parent to use an assessor outside of the 120-mile radius.

56. Attorney Weissburg responded on June 12, 2018, providing a list of potential assessors. Her list included Dr. Penelope Suter, whose practice is located within the SELPA geographic guidelines, in contrast to Dr. Ballinger, whose office was in Orange County, California. Ms. Weissburg agreed to Dr. Suter if she met Ms. Weissburg's conditions, including classroom observations, attendance at IEP meetings, and a conflict waiver if she was asked by Fruitvale to also provide vision therapy services. Otherwise, she proposed that Dr. Suter could provide vision therapy because she was closer to Student's residence. Fruitvale agreed to Attorney Weissburg's contract conditions for Dr. Suter and offered a contract to Dr. Suter, inclusive of Attorney Weissburg's conditions with compensation not to exceed \$3,500. Fruitvale's superintendent signed the contract on June 27, 2018. The Board approved the contract and Dr. Suter signed it on July 12, 2018, after Ms. Weissburg filed the complaint in this matter.

SUMMER SESSION 2018

57. The school year ended on May 31, 2018. Student received a final grade of A- in reading, spelling, math and social studies; he received a B- in English. Handwriting still needed improvement.

58. Fruitvale sent Mother an administrative amendment to the October 2017 IEP adding 600 minutes of the CAPDOTS program during the 2018 summer session, running from June 1 through June 30, 2018. The program included use of headphones and Student would access it at school in a small classroom. Mother signed the amendment on May 31, 2018, and Student accessed the program through the 2018 summer session. Fruitvale speech therapist Julianne Thomas monitored Student's progress, after receiving training by Dr. Braun. She did not provide any type of speech therapy to Student or assess him during that time period. Dr. Braun also had access to Student's progress reports.

VISION ASSESSMENT – DR. BETH BALLINGER

59. Parent voluntarily, and without explanation at hearing, chose to retain Dr. Beth Ballinger to assess Student in visual information processing instead of proceeding with Dr. Suter for the publicly funded independent evaluation. Also referred to as "back end visual processing," the assessment looked at developmental vision processing, or how the brain processes information received from the front end of the visual system. Dr. Ballinger, a doctor of optometry, had 39 years of experience assessing children in developmental vision and providing vision therapy. She was board certified in vision development and vision therapy. She testified at hearing.

60. Dr. Ballinger assessed Student in her office on August 18 and 19, 2018. Her assessment did not include classroom observations, which she noted at hearing were

necessary for her to complete her assessment and recommendations. The IEP team did not consider her report before the hearing.

61. Dr. Ballinger interviewed Mother and Student as part of her assessment. She reviewed the Cedars Sinai report; Student's 2018 assessment reports by Dr. Graziano, Dr. Braun, Empire Eye and Laser; and Student's first and second grade report cards. She did not review the 2018 psychoeducational assessment. She did not know what grades Student received in fourth grade, that he performed at grade level in state testing, or what IEP accommodations he received at school. She did not know he received A's and B's at the end of the fourth grade. Her findings were based solely on her two days of testing and in-office observations, and the records review noted above. She concluded based upon testing only that Student needed 60 hours of in-office vision therapy as soon as possible given the "increased complexity and duration of visual demands of his next academic year."

62. According to Dr. Ballinger, Student demonstrated poor fine visual motor control, manifested by low visual scanning speed and horizontal scanning accuracy, poor fixation maintenance, double vision, and compensation by blocking an eye, squinting, closing one eye, or pulling the corner of the eye to form a slit. Dr. Ballinger observed Student exhibit the compensatory behavior over two days. At Dr. Ballinger's direction, Mother photographed Student squinting and closing one eye when reading during testing. Fruitvale staff denied at hearing that they ever observed Student engage in the same behavior depicted in the photographs during classroom time and or during their testing.

63. According to Dr. Ballinger, poor fine visual motor control can be exacerbated with fatigue and peripheral noise and movement. Student demonstrated challenges in laterality and directionality, visual discriminative looking, visual memory, and visual motor speed and precision. Dr. Ballinger opined the characteristics she

observed in Student were something a child can be born with; visual and cognitive demands become more sophisticated as the child grows older.

64. Dr. Ballinger recommended intensive in-office vision therapy by Dr. Suter, whom she opined was highly qualified to deliver services. Vision therapy provides activities to help eye teaming abilities from distance to near, better endurance to control the vision system. It also addresses visual memory and visual motor sustainability. Dr. Ballinger charged Student \$1,674 for testing and to write her report. Her fee for attending an IEP, including preparation, travel and participation was \$1,800.

65. Although Dr. Ballinger was qualified based upon her education and experience to assess Student, and to offer opinions about Student's vision needs based on the extent of her assessment at the time, her opinions were minimally relevant to the issues raised in Student's complaint, for several reasons. First, her assessment was not complete. She acknowledged at hearing that she needed to observe Student in the classroom to have a better understanding of his *educationally related* needs and she did not do so because he was on summer break during her assessment. She recommended at least five hours of classroom observation to gather relevant information.

66. Second, Dr. Ballinger did not have complete information about Student's educational performance at school, particularly during the fourth grade. Her conclusions that Student's double vision and convergence insufficiency required remediation to help him access his curriculum lacked sufficient foundational knowledge. Knowing how Student actually performed at school, whether he made progress, and at what level he was performing was information that should have been essential for her to opine on whether Student's vision deficits were, in fact, impacting his access to the curriculum at school, such that he required *educationally necessary* vision therapy to make appropriate progress. She criticized Dr. Graziano for not giving Student the home-based therapy recommended in her report and for not conducting certain tests; however, she

did not know what was the intended scope of Dr. Graziano's assessment or that Fruitvale did not retain Dr. Graziano to do anything other than assess Student in "front end vision" and provide a report to the IEP team. She did not know that Dr. Graziano showed Mother a video on use of the Brock String, or that Mother declined to give the home therapy to Student because she did not think she was qualified to monitor Student's home therapy. In fact, Dr. Graziano testified that she limited the scope of her testing to those tests she was qualified to administer. Dr. Ballinger did not acknowledge that Dr. Graziano attended the May 2018 IEP meetings and actively participated in the discussions regarding Student's educational needs related to his decoding deficits, including recommending more comprehensive assessments. Dr. Ballinger also did not acknowledge that Fruitvale agreed to retain Dr. Suter to administer an independent evaluation in vision to Student, although Dr. Ballinger recommended Dr. Suter as highly qualified to offer vision therapy. Therefore, Dr. Ballinger's opinions were given little weight.

LINDAMOOD-BELL ASSESSMENT

67. Lindamood-Bell assessed Student on July 12, 2018. No one from the program testified at hearing regarding the resulting report or recommendations. Student's IEP team never saw the report during the relevant time period. The report did not identify the amount Parent paid for the evaluation. The report lacked foundation or corroboration and was given little weight.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁴

1. This hearing was held under the Individuals with Disabilities Education Act (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.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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

⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District 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. In a recent unanimous decision, the United States Supreme Court declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court's analysis, and clarified FAPE as "markedly more demanding than the 'merely more than the de minimus test'..." (*Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S.____[137 S. Ct. 988, 1000-1001] (*Endrew F.*)). The Supreme Court in *Endrew F.* stated that school districts needed to "offer a cogent and responsive explanation for their decisions" and articulated FAPE as that which is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstance." *Id.*

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); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) 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).)

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

ISSUE 1: FAILURE TO ASSESS

7. Student contends Fruitvale failed to assess him in all areas of suspected need from July 5, 2016, until July 5, 2018, ignoring Mother's multiple requests for assessments in educationally related vision therapy, auditory processing, occupational therapy, and speech and language. Student also contends that, although Fruitvale agreed in 2018 to provide an independent evaluation relating to Student's need for vision therapy, its refusal to agree to Dr. Ballinger was arbitrary. Student argued that, because other school districts in the SELPA had contracted with assessors outside of the 120-mile geographic radius, Student should have been entitled to have Dr. Ballinger independently assess him.

8. Fruitvale contends Mother never asked for assessments until her February 2018 assessment request, and then she did not ask for a speech and language or occupational therapy assessment until May 2018. It argues that Student made academic

progress and demonstrated no needs in vision, occupational therapy, speech and language, or auditory processing that suggested a need for assessments in those areas.

Assessments – Generally

9. At the beginning of each school year, each local educational area must have an IEP in effect for each child with a disability within its jurisdiction. (34 C.F.R. § 300.323(a); Ed. Code, § 56344(c).) An IEP is a written document detailing, in relevant part, the student's current levels of academic and functional performance; a statement of measurable academic and functional goals; a description of the manner in which goals will be measured; a statement of the special education and related services that are to be provided to the student and the date they are to begin; an explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activities; and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on state and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

10. To determine the contents of an IEP, school districts must assess a student eligible for special education under the IDEA in all areas related to his or her suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) When developing an IEP, the IEP team must consider the child's strengths, the parent's concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).)

11. A school district's child find obligation toward a specific student is triggered when there is a reason to suspect a disability and that special education services may be needed to address that disability. (See, e.g., *Dept. of Educ. v. Cari Rae S.* (D. Haw. 2001), 158 F.Supp.2d 1190, 1194.) After a school district deems a child eligible for special education, it must perform reassessments if warranted by the child's educational or related services needs. (20 U.S.C. § 1414 (a)(2)(A)(i); 34 C.F.R. §

300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) Absent an agreement to the contrary between a school district and a student's parents, reassessments must not occur more than once a year, or more than three years apart. (20 U.S.C. § 1414 (a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

12. 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 Sch. Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-21 (*Timothy O.*)). 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 Sch. Dist.* (9th Cir. 2008) 541 F.3d 1202].)

13. Upon parent request, the local educational agency must conduct a reassessment, even when the school determines it needs no additional data to determine the student's educational needs. (20 U.S.C. § 1415 (a)(2)(A)(ii); Ed. Code, § 56381, subds. (a)(1) & (d); 34 C.F.R. § 300.303 (a)(2).)

14. The due process hearing officer shall make its decision on substantive grounds based on a determination of whether the child received a FAPE. (20 U.S.C. § 1415 (f)(3)(E); Ed. Code, § 56505, subds. (f)(1).) In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: impeded the right of the child to a FAPE; significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a free appropriate public education to the child of the parents; or caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E); Ed. Code, § 56505, subds. (f)(2); see also *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) The hearing officer "shall

not base a decision solely on non-substantive procedural errors, unless the hearing officer finds that the non-substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program.” (Ed. Code, § 56505, subd. (j).) A procedural error results in the denial of educational opportunity where, absent the error, there is a “strong likelihood” that alternative educational possibilities for the student “would have been better considered.” (*M.L. v. Federal Way Sch. Dist.* (9th Cir. 2003) 394 F.3d 634, 657 (Gould, J. concurring in part and concurring in the judgment).)

Issues 1(a) – 1(d): Failure to Assess in All Areas of Suspected Disability

15. Student proved that Fruitvale procedurally violated the IDEA by failing to assess Student in vision, occupational therapy, speech and language and auditory processing before February 21, 2018, resulting in a significant impediment to Mother’s ability to fully participate in IEP meetings. Student historically demonstrated deficits in reading, spelling, pronouncing spelling words, phonemic awareness, and reversing letters in handwriting. Mother credibly testified that she repeatedly expressed her concerns to the IEP team members in those areas, although she did not specifically ask for assessments in writing before February 21, 2018. Mother’s concerns were not unknown to Fruitvale. Fruitvale knew or should have known assessments in each of these four areas may have been informative about alternative approaches or may have ruled out the need for additional services.

16. Specifically, Fruitvale had historic information that was suggestive of the need for a vision assessment. Mother informed Fruitvale in May 2015 that Student had diagnosed vision deficits suggestive of dyslexia. She provided the Cedars Sinai report, which remained in Student’s file. The October 2015 IEP team had that information and found Student eligible for special education under the category of specific learning

disorder. The IEP team offered resource support in reading and accommodations, including preferential seating and modified spelling tests to address his identified needs, which Fruitvale implemented.

17. After second grade, Mother reported to the October 2016 IEP team that she remained concerned about Student's struggles with writing complete sentences, spelling words correctly, and spelling sounds phonetically. She credibly testified that she told Fruitvale staff that she was concerned that she had to work extensively at home with Student on his spelling words. She was concerned he had a modified spelling list, his teachers graded him based on only 10 correct words, and that his reading had not improved by the end of second grade. The IEP team did not record her concerns in the IEP present levels of performance or IEP notes or follow up after the IEP.

18. Mother was also concerned Student could not tie his shoes, could not catch a ball, and had poor handwriting. She credibly testified that she reported her concerns to the 2016 team. The October 2016 IEP team recognized that Student struggled with handwriting, and Fruitvale staff generally knew that handwriting was often a weakness in individuals with dyslexia. Mother credibly testified that she asked for a speech and language assessment at the October 2016 IEP meeting. She acknowledged she did not put her request in writing. Mr. Lepine did not remember the meeting, or Mother, which impacted his credibility on the issue of his recollection. The absence of any note reflecting her request in the IEP notes is not dispositive because the IEP notes in 2016 were sparse in comparison to the lengthy notes in May 2018. No one from Fruitvale followed up on her request or told her to put the request in writing. Mother admitted she did not ask for assessments after that meeting because she believed that Fruitvale knew what her concerns were dating back to 2015, and that it had the responsibility to assess Student in suspected areas of need, without her having to put her request in writing.

19. In the 2017-2018 school year, Mother again expressed concern at the October 2017 IEP team meeting about Student's struggles in handwriting, reading, spelling, spelling out words, double vision, and his lack of phonemic awareness. The IEP present levels of performance only noted her concerns in the area of social maturity. The IEP notes were again sparse in comparison to the May 2018 IEP notes. However, Mother credibly testified that she discussed her concerns with Fruitvale IEP team members at the meeting and afterwards. She attended Student's classroom at least once a month, and she spoke with Mr. Maddern about her concerns. In October 2017, she asked Mr. Maddern to consider whether speech therapy would help Student's phonemic awareness. Mr. Maddern corroborated her testimony at hearing, recalling the discussion. Her request should have triggered Mr. Maddern to follow up. However, he acknowledged at hearing that he never followed up with anyone from Fruitvale, including Ms. Roeder or special education director Janet Clark. Again, Fruitvale should have assessed Student to determine whether and what type of, if any, speech therapy services could have addressed his needs.

20. Once Fruitvale assessed Student's vision and auditory processing in 2018, the assessor's conclusions supported Mother's concerns dating back to the beginning of the 2016-2017 school year. Dr. Graziano, Mr. Gutcher and Dr. Braun all recommended that Student *might* need vision therapy to address his vision deficits, and they found he required more comprehensive assessments to determine the appropriate therapy, if any. Dr. Ballinger's incomplete assessment results validated their opinions as to Student's vision deficits. In April 2018, Dr. Braun concluded during her auditory processing assessment for Fruitvale that Student had an auditory processing disorder. She credibly explained at hearing the correlation between her findings and how she concluded the condition impacted Student in school during third and fourth grade, notwithstanding his academic progress.

21. Fruitvale knew in spring 2015 that Student might be dyslexic. Fruitvale staff knew or should have known that assessing Student for an auditory processing disorder might pinpoint additional needs related to dyslexia that it could address by using specific reading programs or programs like CAPDOTS. Fruitvale added dyslexia to Student's eligibility at the October 2017 IEP. Its reading specialists and psychologist were familiar with the disability. Fruitvale had enough information by the end of the 2016-2017 school year and before February 2018 to trigger its duty to offer Mother an auditory processing assessment.

22. Fruitvale's policy was to request that parents document an assessment request in writing. However, the IDEA does not require a parent to put an assessment request in writing as a pre-condition for assessment. (See 34 C.F.R. § 300.303(a).) Student's IEP team members had an independent obligation to offer Mother an assessment plan if they knew about or suspected needs that might require special education services or supports. At the very least, assessments would have either confirmed or ruled out whether additional services were necessary for Student to access his education and make progress at school. Fruitvale's argument that it had no knowledge or reason to know that Student may need additional assessments during the relevant period was not persuasive. Mother's testimony was credible and persuasive. Fruitvale had enough information about the areas in which Student struggled despite his progress, in addition to Mother's expressed concerns and requests, to at least have offered an assessment plan to Mother during the statutory period.

23. The impact of Fruitvale's procedural violation was on Mother's ability to meaningfully participate in Student's October 2016 and October 2017 IEP meetings. Following the reasoning in the Ninth Circuit Court of Appeals in *Timothy O.*, *supra*, 822 F.3d at pp. 1124-1125, Fruitvale's failure to assess Student during the 2016-2017 and 2017-2018 school years until February 21, 2018, substantially impeded Mother's ability

to participate in Student's educational program, and deprived Mother of the information necessary to develop an appropriate educational program with appropriate supports and services for Student to address his auditory and vision related disabilities. Dr. Braun's, Dr. Graziano's and Mr. Gutcher's assessments defined areas of need that required additional testing, including a more comprehensive vision assessment. Without this information, the 2016 and 2017 IEP teams lacked the information to fully determine whether Student's IEP addressed all areas of need.

24. Student did not prove, however, that Fruitvale's procedural violation denied him access to a FAPE or deprived him of educational benefit as contemplated in *Endrew F., supra*, 137 S.Ct at pp. 1000-1001. During both school years at issue, Student performed at grade level, he made progress by the end of the year, he accessed the curriculum, and he received passing grades. Ms. Roeder provided 120 minutes a week of resource support, utilizing the Orton Gillingham approach. Mr. Maddern credibly testified that Student continued to make progress academically through the fourth grade and ended the 2017-2018 school year with A's and B's on his report card. Student's handwriting was consistent with fourth grade students his age. Students in the third and fourth grade were focusing on using technology for written communication, instead of cursive writing. Academic testing in the 2018 multidisciplinary assessment showed that Student performed at grade level in third and fourth grade during testing, accessed his educational instruction, and made progress. His handwriting did not interfere with his ability to access his educational curriculum, with the IEP modifications in place. Ms. Constantine credibly testified that Student's handwriting was consistent with those who had dyslexia. She opined that handwriting issues follow children into adulthood. Student offered no credible evidence to the contrary. Despite Student's lower grades at the end of the third grade, the evidence proved that he made slow but steady progress and ended the fourth grade at grade level.

25. In sum, Student prevailed on Issues 1(a)-(d) by proving that Fruitvale's failure to assess him from July 2016 until it began assessments in February 2018 denied Student a FAPE by significantly hindering Mother's right to have all necessary information during IEP meetings, such that she could participate in a meaningful way at those meetings.

ISSUE 2: FAILURE TO OFFER SERVICES

26. Student contends Fruitvale failed to offer Student services in the areas of educationally related vision therapy, occupational therapy, speech and language and auditory processing during the statutory period, thereby denying Student a FAPE.

27. Fruitvale contends Student did not prove he needed any additional services or supports because he successfully accessed his education and made appropriate academic progress through the time he filed his complaint. It argued that it is not obligated to provide Student with everything every assessor recommended, even if Mother requested Fruitvale to implement all recommendations.

Issue 2(a): Vision

28. Student did not meet his burden of persuasion on Issue 2(a). During both school years at issue, Student accessed his education despite his double vision and convergence insufficiency. Student performed at grade level, he made progress by the end of the year, he accessed the curriculum, and he received passing grades. Ms. Roeder provided 120 minutes a week of resource support, utilizing the Orton Gillingham approach. Student continued to make progress academically through the fourth grade and ended the 2017-2018 school year at grade level. Academic testing in the 2018 multidisciplinary assessment showed that Student performed at grade level in third and fourth grade during testing, accessed his educational instruction, and made progress.

Despite his lower grades at the end of the third grade, the evidence proved that he made slow but steady progress. By the end of fourth grade, Student was at grade level.

29. Dr. Braun opined for Student to access his curriculum, Student required a reading program utilizing visual and verbalizing techniques such as Lindamood-Bell or similar. She also recommended a vision processing assessment with a developmental optometrist. She was not qualified however to opine that Student required educationally related vision therapy to access his curriculum or make educational progress. Dr. Graziano assessed Student during the school year, observed him at school, and consulted with his teachers. She recommended in-home therapies, including the Brock String, to address Student's convergence insufficiency. Student did not access Dr. Graziano's recommendations before July 5, 2018. She opined that, if Student could not complete the in-home therapy she recommended, in-office vision therapy was an *option*. However, she was not qualified to do a more comprehensive assessment that would determine whether Student needed educationally necessary vision therapy to make progress at school. Dr. Gutcher concurred with Dr. Graziano's recommendations in her assessment report.

30. At the May 2018 IEP team meetings, the IEP team discussed Student's visual processing deficits at great length, with active participation by Attorney Weissburg and Mother. Based upon Student's reported progress, Ms. Constantin, Ms. Rodriguez, Mr. Maddern and Mr. Lepine concluded Student did not require additional services to access his curriculum or make academic progress. Mother disagreed and asked for an independent vision assessment to which Fruitvale agreed. The independent assessment was pending at the time Student filed his complaint.

31. Instead of proceeding with Dr. Suter's assessment, Student inexplicably chose instead to retain Dr. Ballinger in August 2018. No one from Fruitvale saw Dr. Ballinger's report other than in preparation for this hearing. The Ninth Circuit Court of

Appeals has endorsed the “snapshot” rule, explaining that the actions of the district cannot “be judged exclusively in hindsight” but instead, “an IEP must take into account what was, and what was not, objectively reasonable ...at the time the IEP was drafted.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (*Id.* at p. 1149.) Dr. Ballinger’s opinions, which were not supported by any classroom observations, were only relevant to the extent they corroborated or addressed information that was available to and or considered by Student’s IEP teams through July 5, 2018. As a result, Dr. Ballinger’s opinions did not support a finding that, during the relevant statutory period, Fruitvale knew or should have known definitively that Student required *educationally necessary* vision therapy to make progress at school.

32. Student did not meet his burden of proving by the preponderance of the evidence that Fruitvale denied him a FAPE from July 5, 2016 until July 5, 2018, by failing to offer an IEP that was reasonably calculated to enable Student to make progress appropriate in light of his circumstances, and specifically by failing to offer educationally related vision therapy from July 2016 until July 5, 2018. Student did not prevail on Issue 2(a).

Issue 2(b): Occupational Therapy

33. Student did not prove he required occupational therapy to access his curriculum or make appropriate progress. No one disagreed at hearing that Student struggled with handwriting. Mother’s concerns that he was not writing at grade level were understandable given his dyslexia. However, Student offered no credible evidence proving his handwriting deficits impeded his access to his education or prohibited him from making appropriate progress. No one credibly testified that he might benefit from any type of occupational therapy services to access his curriculum or needed it to make the progress at school contemplated by *Endrew, supra*, 137 S.Ct. at pp. 1000-1001. No

one offered any professional opinion that Student needed occupational therapy, in any way, to support him in the area of handwriting, based upon information available to his IEP teams through July 5, 2018.

34. Although Ms. Constantine testified that people with dyslexia often experienced problems with handwriting into adulthood, Mr. Maddern credibly testified that Student's handwriting was typical of 25-30 percent of fourth grade students. Student needed work on handwriting, but his handwriting was not interfering with his academic progress, in part because he and his classmates used technology for written communication as provided by the state standard core curriculum. Student made progress at school, performed at grade level, and accessed his education.

35. As discussed in Issue 2(a), Student made academic progress in third and fourth grade and accessed his curriculum with the supports and services in his IEPs. Student did not meet his burden of proving by the preponderance of the evidence that Fruitvale denied him a FAPE from July 5, 2016, until July 5, 2018, by failing to offer an IEP that was reasonably calculated to enable Student to make progress appropriate in light of his circumstances, and specifically by failing to offer occupational therapy services from July 2016 until July 5, 2018. Student did not prevail on issue 2(b).

Issue 2(c): Speech and Language

36. Student did not prove he required speech and language therapy to access his curriculum or make appropriate progress. The only witness who had any expertise in speech and language was Ms. Thomas. She did not testify as to Student's needs in speech and language; she limited her testimony to her participation in the CAPDOTS monitoring. No one else offered any informed opinions that proved that Student required speech and language therapy because he lacked phonemic awareness. Mother was not a speech therapist. Her experience with speech therapy was associated with another family member with an unrelated disability, who received speech therapy. That

was not enough by itself to prove that the service would also benefit Student given his unique needs.

37. Notwithstanding the lack of any expert opinions on this issue, the evidence proved that Student made academic progress in third and fourth grade and accessed his curriculum with the supports and services in his IEP's, without speech therapy. Student did not meet his burden of proving by the preponderance of the evidence that Fruitvale denied him a FAPE from July 5, 2016, until July 5, 2018, by failing to offer an IEP that was reasonably calculated to enable Student to make progress appropriate in light of his circumstances, and specifically failing to offer speech and language therapy services from July 2016 until July 5, 2018. Student did not prevail on Issue 2(c).

ISSUE 2(D): AUDITORY PROCESSING

38. Student did not meet his burden of proving by the preponderance of the evidence that Fruitvale denied him a FAPE from July 5, 2016, until July 5, 2018, by failing to offer an IEP that was reasonably calculated to enable Student to make progress appropriate in light of his circumstances, and specifically failing to offer an intensive reading program like Lindamood-Bell from July 2016 until July 5, 2018, to address an auditory processing disorder. Fruitvale's witnesses credibly testified that Student accessed his curriculum and made steady progress with the modifications and program supports in place through his IEPs. Student received reading instruction using the Orton Gillingham method through resource support throughout the statutory period. Dr. Braun opined Student needed more assistance to retrain his brain and reduce the impact of his auditory processing disorder. She recommended a specialized reading program, such as Lindamood-Bell or similar. However, her testimony did not refute that Student accessed his curriculum with his IEP modifications and supports, and that he received A's and B's while performing at grade level at the end of the 2017-2018 school

year. No one from Lindamood-Bell testified at hearing or explained the results of its July 12, 2018 assessment. Student did not prevail on Issue 2(d).

REMEDIES

1. Student prevailed on Issues 1(a)-(d). As remedies, Student requested vision therapy as recommended by Dr. Ballinger, compensatory education, and independent educational evaluations in vision, occupational therapy, speech and language and auditory processing. Fruitvale disagreed that Student should receive any compensatory remedies.

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

3. School districts may establish criteria to ensure that publicly funded independent evaluations are not unreasonably expensive. (*Letter to Wilson*, 16 IDELR 83 (OSEP October 17, 1989).) To avoid unreasonable charges for independent evaluations, a district may establish maximum allowable charges for specific tests. (*Letter to Kirby*, 213

IDELR 233 (OSEP 1989.) The maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees. (*Id.*) When enforcing independent evaluation criteria, the district must allow parents the opportunity to select a qualified evaluator who is not on the list but who meets the criteria set by the public agency. (*Letter to Parker*, 41 IDELR 155 (OSEP 2004).)

4. When enforcing reasonable cost criteria, the district must allow parents the opportunity to demonstrate that unique circumstances justifying an independent evaluation that does not fall within the school district's criteria. (*Letter to Kirby, supra*, 213 IDELR 233 (OSEP 1989).) If an independent evaluation that falls outside the district's criteria is justified by the child's unique circumstances, that evaluation must be publicly funded. (*Id.*) Where the only person qualified to conduct the type of evaluation needed by a child does not meet agency criteria, the public agency must ensure that the parent still has the right to the evaluation at public expense and is informed about where the evaluation may be obtained. (*Letter to Parker, supra*, 41 IDELR 155 (OSEP 2004).)

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 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.

6. Student established that Fruitvale had enough information, including through Mother's expressed concerns, such that it should have assessed him in vision, occupational therapy, speech and language, and auditory processing at some time between July 2016 and before February 2018. Fruitvale's procedural violation deprived Mother of important information to enable her to participate fully at IEP meetings in

2016 and certainly in 2017. Regardless of whether or not the assessments concluded Student needed additional services, Mother had a right to know that information in order to meaningfully participate at the IEP meetings. Student has therefore established a right to publicly funded independent evaluations as discussed below.

7. As to Issue 1(a), Fruitvale agreed in late May 2018 to fund an independent evaluation in vision within SELPA guidelines. The guidelines were not arbitrary or unreasonable. Ms. Weissburg first requested Dr. Ballinger, whose office was in Huntington Beach. Ms. Weissburg then agreed to Dr. Suter, who was within the 120-mile geographic boundary, and available. Student then voluntarily and inexplicably chose not to use Dr. Suter, whose contract was inclusive of observations and IEP attendance, but instead retained Dr. Ballinger, even after Fruitvale's Board approved the contract with Dr. Suter. Fruitvale's contract with Dr. Suter, including classroom observations and IEP team meeting attendance, provided a rate not to exceed \$3,500. Dr. Ballinger's fees for her testing, August 20, 2018 report and future IEP attendance, were \$3,476, which was close to what Fruitvale agreed to pay. Therefore, as a remedy for Issue 1(a), Fruitvale shall reimburse Parent up to \$3,500, subject to proof of payment, for fees paid to Dr. Ballinger for an independent vision assessment. However, it shall not be obligated to pay anything additional for an independent assessment in vision in connection with the claims in this matter.

8. As to Issues 1(b) and 1(c), Fruitvale's failure to initiate assessments in occupational therapy and speech and language before May 1, 2018, based on Mother's expressed concerns to Mr. Maddern and Student's 2016 and 2017 IEP teams, justifies the equitable remedy of independent educational evaluations in those two areas, by a provider that meets SELPA guidelines. Regarding Issue 1(d), Student offered no credible evidence that he was challenging Dr. Braun's April 2018 auditory processing assessment

results, and therefore he did not prove he was entitled to an independent evaluation in auditory processing. Accordingly, Student is entitled to no further remedies.

ORDER

1. Fruitvale shall reimburse Parent, subject to proof of payment, up to \$3,500 for Dr. Ballinger's August 2018 assessment and report, and attendance at an IEP meeting, including preparation and travel. Fruitvale shall reimburse Parent within 45 business days of receiving the proof of payment.

2. Fruitvale shall fund at public expense independent educational evaluations in the areas of occupational therapy and speech and language by a provider of Mother's choice. The assessors chosen by Mother shall meet Kern County Consortium SELPA guidelines.

3. Student's other claims for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student was the prevailing party on Issues 1(a)-1(d). Fruitvale was the prevailing party on Issues 2(a) – 2(d).

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: October 24, 2018

/s/

ADRIENNE L. KRIKORIAN

Administrative Law Judge

Office of Administrative Hearings