

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA  
IN THE MATTER OF  
PARENT ON BEHALF OF STUDENT  
V.  
ESCONDIDO UNION SCHOOL DISTRICT  
OAH CASE NO. 2017040003

DECISION AFTER REMAND

Student filed his Due Process Complaint on March 28, 2017. After a due process hearing in August 2017, the Office of Administrative Hearings issued a Decision on October 10, 2017. The Office of Administrative Hearings is referred to as OAH. Student appealed the Decision to the United States District Court for the Southern District of California. On December 18, 2018, the District Court reversed the OAH Decision on one issue and remanded the case to OAH without instructions. (*D.O. v. Escondido Union School Dist.* (S.D. Cal. Dec. 18, 2018, Case No.: 3:17-cv-2400-BEN-MDD) 2018 WL 6653271.)

Administrative Law Judge Kara Hatfield heard this matter after remand in Escondido, California, on April 9, 2019. The record includes the pleadings, exhibits, testimony, and written closing arguments from the original due process hearing and the exhibits, testimony, and written closing arguments from the hearing after remand.

The hearing after remand was held based on the District Court's order that reversed the ALJ's conclusion and remanded this matter back to OAH without instructions. OAH interpreted the remand as for the purpose of determining what remedy was appropriate for what the District Court said was a denial of a free appropriate public education, commonly referred to as a FAPE.

Student has maintained throughout the proceedings on remand that the record from the original due process hearing was adequate to afford Student the remedies he

requested. The only remedy Student sought at the original due process hearing for this specific FAPE denial was an independent education evaluation.

Escondido wanted to present rebuttal evidence to Student's contention as to the appropriate equitable remedy already in the administrative record in the original hearing. Less than two months after the original due process hearing was held, Escondido conducted the delayed autism assessment at issue in the original due process hearing. Escondido argued this evidence, developed immediately after the original due process hearing, was relevant to the question of what was an appropriate equitable remedy based on the District Court's order, in opposition to Student's request for an independent educational evaluation. (See *E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1006.)

Student was allowed to present evidence to counter Escondido's rebuttal evidence. Student also changed his requested remedy from an independent educational evaluation to reimbursement for an independent assessment conducted right before the remand hearing. Student additionally requested district-wide training of all special education staff regarding Escondido's statutory obligation to assess students when it has notice of a suspected disability.

Paul Hefley, Attorney at Law, represented Student. Mother attended the hearing. Student did not attend the hearing.

Deborah Cesario and Sara Ebert, Attorneys at Law, represented Escondido Union School District. Kelly Prins, Escondido's Assistant Superintendent of Student Support Services, and Meggan Lokken, Escondido's Director, attended the hearing.

At the parties' request, OAH continued the hearing after remand to April 30, 2019, for written closing arguments. Closing arguments were timely filed, the record was closed, and the matter after remand was submitted on April 30, 2019.

## ISSUE ON REMAND

The District Court did not specify for what purpose the case was remanded. Because the District Court found a denial of FAPE but did not award Student any remedy, OAH interpreted the District Court's remand order as being for the purpose of determining a remedy for what the District Court found was a denial of FAPE.

The issue on remand is:

What is an appropriate remedy for the denial of a free appropriate public education the District Court found as a result of Escondido's four-month delay in offering Student an autism assessment?

## SUMMARY OF DECISION AFTER REMAND

As an equitable remedy for the denial of a free appropriate public education the District Court found as a result of Escondido's four-month delay in offering Student an autism assessment, Escondido is ordered to reimburse Mother \$3,500 for the psychoeducational assessment she obtained from Cynthia Norall, Ph.D.

## FACTUAL FINDINGS

Student was nine years and 11 months old and in the fourth grade at the time of the original hearing. Student was 11 years and six months old, and in the sixth grade at a different school at the time of the hearing after remand. He resided with Mother within Escondido's boundaries at all relevant times. Student was eligible for special education and related services due to emotional disturbance and other health impairment.

After July 2016, Student received ongoing therapy at Rady Children's Hospital from licensed clinical psychologist Margaret Dyson, Ph.D. During an IEP team meeting on December 5, 2016, which Dr. Dyson attended by telephone, Dr. Dyson stated she had completed an assessment and based on the assessment, Student appeared to meet

criteria for Autism Spectrum Disorder.

## THE PARTIES' DUE PROCESS COMPLAINTS AND RESPONSES

On March 28, 2017, Student filed and served on Escondido his original Request for Due Process Complaint. He alleged he had autism, bipolar disorder, emotional disturbance, anxiety, attention deficit hyperactivity disorder, oppositional defiance disorder, and anxiety disorder, and that the combination of these adversely affected his educational performance. He also alleged that he had regressed in his reading, math, and language usage, and performed below grade level on California's Standardized Testing and Reporting in reading comprehension and math. Among other allegations, Student specifically complained that Escondido did not assess him for educationally related mental health services or a functional behavior assessment as part of Student's November 2015 triennial reassessment. Student did not specifically complain that Escondido had failed to assess him for autism. Student's only statement of the issues presented relative to assessments was whether Escondido denied Student a FAPE for the 2016-2017 school year by failing to assess Student in all areas of suspected disability, without specifying in which areas of suspected disability Escondido failed to assess. Student requested "independent educational assessments in all suspected areas of disability," as a remedy, without specifying the areas in which Student sought independent educational evaluations.

Escondido's attorney sent Student's attorney a response to the original Complaint on April 7, 2017. Escondido contended it had assessed Student in all areas of suspected disability in the triennial reassessment and had subsequently conducted a functional behavior assessment and an educationally related mental health services assessment. Escondido stated autism had not been a suspected area of disability, but acknowledged that at the December 5, 2016 IEP team meeting, Escondido learned a Rady Children's Hospital assessment indicated Student met criteria for autism spectrum

disorder. Escondido enclosed an assessment plan dated April 4, 2017, seeking authorization to assess Student for autism. The assessment plan indicated the assessment was proposed because “[p]er parent and [Student]’s Rady’s Children Therapist there is a possibility of a medical diagnosis of Autism.” The assessment plan indicated the school staff was awaiting a copy of the report for review as part of the evaluation. Escondido also enclosed a Student/Patient Release of Information form for Mother to sign to authorize Rady Children’s Hospital to disclose Student’s health information, psychological/psychometric reports, and educational related records to Escondido. Escondido “renew[ed] its request for a copy of the Rady Children’s assessment report” and stated that upon receipt, it would be considered at an IEP team meeting.

Mother had never requested that Escondido assess Student. Student’s Due Process Complaint specifically complained about Escondido’s failure to conduct educationally related mental health services and functional behavior assessments, but did not allege failure to assess for autism and did not request assessment for autism. Escondido proposed to assess Student four months after Dr. Dyson informed Escondido of her diagnosis. This time period included the two and a half weeks Escondido was on winter break from December 23, 2016, until January 10, 2017.

On April 20, 2017, Student filed and served a motion to amend his Due Process Complaint. OAH granted the motion to amend on April 27, 2017. Student alleged he had autism spectrum disorder, bipolar disorder, emotional disturbance, anxiety, attention deficit hyperactivity disorder, oppositional defiance disorder, and anxiety disorder, and that the combination of these adversely affected his educational performance. Among other concerns, Student alleged that at the December 5, 2016 IEP team meeting, Dr. Dyson informed Escondido she had conducted an autism assessment and that Student had autism spectrum disorder. Student complained Escondido failed to

assess Student for autism and did not present Mother with an assessment plan until April 7, 2017. Student's statement of the issues presented relative to assessments was:

- whether Escondido denied Student a FAPE for the 2016-2017 school year by failing to assess Student in all areas of suspected disability, without specifying in which areas of suspected disability Student contended Escondido failed to conduct assessment; and also
- whether Escondido denied Student a FAPE by failing to timely assess Student in all areas of suspected disability following the December 5, 2016 IEP team meeting.

Student requested as a remedy "independent educational assessments in all suspected areas of disability," without specifying the areas in which Student sought independent educational evaluations.

Escondido's attorney sent Student's attorney a response to the amended Complaint by email and fax on May 8, 2017. Escondido contended it had assessed Student in all areas of suspected disability in the November 2015 triennial reassessment and had subsequently conducted a functional behavior assessment and an educationally related mental health services assessment. Escondido again stated autism had not been a suspected area of disability, but acknowledged that at the December 5, 2016 IEP team meeting, Escondido learned a Rady Children's Hospital assessment indicated Student met criteria for autism spectrum disorder. Escondido stated it had sent an assessment plan on April 7, 2017; but Mother had not consented to the assessment, and instead Student amended his complaint. Escondido indicated that because Mother had not signed the assessment plan, it would file a due process complaint to obtain authorization to assess Student in the area of autism.

On May 15, 2017, Escondido filed and served on Student's attorney a Due Process Complaint seeking, among other things, authorization to assess Student in the

area of autism without parental consent pursuant to the assessment plan it had sent Student's attorney on April 7, 2017.

On May 26, 2017, Student filed and served on Escondido's attorney a response to Escondido's complaint. Regarding Escondido's request for authorization to assess Student for autism, Student contended Escondido's request to assess Student for autism was untimely.

### ESCONDIDO PROPOSED INDEPENDENT EDUCATIONAL EVALUATIONS

Escondido and Mother met on June 21, 2017. Escondido proposed some services and supports for Student that were not dependent upon the parties entering into a settlement agreement concerning the pending due process matters. Escondido offered to fund independent educational evaluations in the areas of academics, autism, and educationally related mental health services by Dr. Jeffrey Owens, one of 33 independent evaluators for psychoeducational assessment pre-approved by the San Diego County Office of Education.

Escondido wrote to Mother on July 17, 2017, with a copy to Student's attorney. Escondido's July 17, 2017 letter reiterated the June proposals and that they were not contingent upon resolution of the due process case but were intended to support Student and Mother prior to the start of the 2017-2018 school year. Escondido included its independent educational evaluation policies and procedures with the letter, and a list of the independent evaluators, in addition to Dr. Owen, pre-approved by the San Diego County Office of Education.

Escondido's criteria for independent psychoeducational evaluations specified the list of potential evaluators was not exhaustive and was not intended to limit a parent's options in obtaining an independent educational evaluation from other qualified professionals who met the agency criteria outlined in the policy. That criteria included:

- the independent evaluator had to be located within the boundaries of San

Diego County;

- the evaluator had to be qualified by credential or license depending on the area being assessed, with a full psychoeducational assessment requiring a credentialed school psychologist, licensed psychologist, licensed educational psychologist, or clinical psychologist; and
- the evaluation had to meet cost limits, which for a psychoeducational evaluation was no more than \$3,500.

Mother never accepted or pursued Escondido's offer of independent assessments, including in the area of autism, which was not conditioned upon settlement of the due process cases Student and Escondido had filed.

#### ESCONDIDO'S OCTOBER 2017 TRIENNIAL REASSESSMENT OF STUDENT

On August 23, 2017, before the second day of the original due process hearing started, Escondido presented Mother a new assessment plan for Escondido to assess Student for autism. Mother signed consent.

Pursuant to the assessment plan Mother signed on August 23, 2017, Escondido conducted a triennial reassessment of Student in the areas of academic achievement, health, intellectual development, motor development, sensory processing, social-emotional/behavioral functioning, the need for educationally related mental health services, and language/speech communication development.

The details of the October 2017 triennial reassessment were not in dispute in the original due process hearing, as it had not been conducted yet. And the adequacy of the October 2017 triennial reassessment is not in dispute in the hearing after remand, because this is not an appropriate forum for any contest regarding its sufficiency. Escondido introduced the triennial reassessment and testimony about it to argue that the procedural defect of the delayed April 2017 assessment plan had already been remedied through Escondido assessing Student for autism in October 2017, therefore



Student was not entitled to any additional remedy.

The triennial reassessment included a speech and language evaluation by speech-language pathologist Karen Roberts, and a motor development and sensory processing evaluation by occupational therapist Camile Moody. School nurse Holly Hart conducted a health assessment. Special education teacher Rebecca Chandler conducted an academic assessment. School psychologist Salvatore D'Amico conducted a psychoeducational assessment. The results of these assessments were all reported or referenced in the Team Evaluation Summary report dated October 16, 2017, authored by Mr. D'Amico.

Mr. D'Amico considered three categories of eligibility for special education and related services for Student. With respect to other health impairment, Mr. D'Amico concluded Student presented with medical diagnoses that adversely impacted his educational performance including attention deficit hyperactivity disorder and bipolar disorder unspecified. However, he recommended the IEP team consider continued eligibility under the category of emotional disturbance. Regarding emotional disturbance, Student satisfied four out of five characteristics. Student presented with behavioral characteristics of an emotional disturbance since he enrolled in the Intensive Behavior Intervention classroom years ago, satisfying the criteria that the characteristics be exhibited over a long period of time. And these characteristics were exhibited with high severity in both the home and school environments, satisfying the requirement that the characteristics exist to a marked degree. Finally, these characteristics had a high impact within the school environment and satisfied the criteria that the characteristics adversely affect educational performance. Mr. D'Amico concluded Student therefore met the educational criteria as a student with an emotional disturbance.

Concerning autism as an eligibility category, Mr. D'Amico did not write in the report that the definition he relied on for autism was, specifically, California Code of

Regulations, title 5, section 3030, subdivision (b)(1). But Mr. D'Amico accurately included in his report the definition of autism for eligibility for special education and related services as specified in California law: the presence of characteristics significantly affecting verbal and nonverbal communication and social interaction, and adversely affecting a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or in daily routines, and unusual responses to sensory experiences.

Mr. D'Amico did not articulate that Section 3030, subdivision (b)(1)(A), qualifies the definition of autism by noting, "Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined by subdivision (b)(4) of this section." However, Mr. D'Amico considered that exclusion and offered his analysis regarding that eligibility category's disqualifying limitation. Mr. D'Amico wrote that although Student presented with social communication deficits, they largely depended on his mood or current behavioral functioning and appeared to be more indicative of emotional disturbance. Unusual, repetitive, and stereotyped behaviors were inconsistent across home and school environments and were not the major contributing factor to Student's educational deficits. Mr. D'Amico opined Student's behavioral deficits were more indicative of emotional disturbance than autism.

At the IEP team meeting on October 16, 2017, the IEP team retained Student's eligibility categories of emotional disturbance as primary, and other health impairment as secondary. Mother did not disagree with that conclusion or propose autism as the primary or secondary eligibility category. Mother never requested independent educational evaluations based on disagreement with any of the October 2017 assessments.

This Decision makes no conclusions about the quality or accuracy of Escondido's triennial reassessments.

#### DISTRICT COURT OPINION AND REMAND

The United States District Court for the Southern District of California determined on December 17, 2018, that Escondido "was reasonable in waiting *some* period of time for Dr. Dyson's report before assessing" (emphasis in original) Student, but "the four-month delay was unreasonable under the circumstances, constituting a procedural violation," and denied Student a FAPE "on the basis of the educational benefit ground," because Student's "IEP goals were likely inappropriate because they were made without sufficient evaluative information about his individual capabilities as a potentially autistic child."

#### DR. NORALL'S APRIL 1, 2019 PSYCHOEDUCATIONAL ASSESSMENT

Student obtained an assessment by licensed educational psychologist Cynthia Norall, Ph.D. immediately before the hearing after remand. Student now requests that Escondido reimburse Parent \$3,500 for Dr. Norall's psychoeducational evaluation as the requested relief on remand.

Dr. Norall received her bachelor of arts degree in psychology from University of California, Davis, in 1983. She received her master of science degree in counseling and multicultural issues from San Diego State University in 1987. She obtained Pupil Personnel Services and School Psychology credentials and worked as a bilingual school psychologist for several school districts in and around San Diego County and for the San Diego County Office of Education between 1986 and 1999. She was licensed as an educational psychologist in 1992. She received a doctor of philosophy degree in education in 1999 from University of Santa Barbara, a private school that no longer existed at the time of the hearing after remand. She became certified as a Cognitive

Behavioral Therapist and Board Certified Behavior Analyst – Doctoral. Dr. Norall's business entity at the time of the remand hearing, TRIO Consultants, Inc., was based in San Diego County.

As with Mother's testimony during the original due process hearing, during her testimony at the hearing after remand, Mother could not remember any specifics or details about important events. Mother seemed to recall nothing about Dr. Norall's evaluation or how it came to be conducted, which happened during the 30 days immediately before the hearing after remand. The evidence was unclear as to how Dr. Norall became involved in evaluating Student, but it appeared Student's attorney selected her and requested an expedited assessment. In Student's closing argument, he asserted the reason he engaged Dr. Norall to conduct an assessment in the spring of 2019 was "in order to rebut the District's [2017] assessment and show [Mother] should be entitled to an independent educational evaluation as an equitable remedy" for the denial of FAPE the District Court found.

Dr. Norall wrote a report titled Confidential Psychoeducational Evaluation, dated April 1, 2019. She charged \$3,500 for the evaluation. She tested Student on March 7, 16, 25, 26 and 28, 2019. Dr. Norall reviewed Dr. Dyson's December 2016 assessment and Escondido's October 2017 triennial reassessments, with the exception of the language and speech assessment.

Dr. Norall noted that at the time of her assessment, Student saw a psychiatrist every two weeks and saw Dr. Dyson for therapy. Student took multiple medications for anxiety, an antipsychotic, a mood stabilizer, and a sleep aide, in addition to a medication to treat allergies.

Dr. Norall observed Student at school on two dates for a total of three hours. Escondido personnel were present during those observations and they disputed some of Dr. Norall's characterizations of Student's actions during the observation.

Dr. Norall administered the following standardized instruments:

- Autism Diagnostic Observation Scale – Second Edition, Module 3;
- Vineland Adaptive Behavior Scale – Second Edition, parent survey form;
- Kaufman Test of Educational Achievement – Third Edition;
- Wide Range Achievement Test – Fourth Edition, sentence comprehension subtest;
- Wisconsin Card Sorting Test;
- Bender Visual-Motor Gestalt test, Second Edition; and
- Beery Developmental Test of Visual-Motor Integration – Sixth Edition.

Escondido personnel contested many aspects of Dr. Norall's evaluation. Some examples were her general credibility and ethics, the contention she did not comply with the publisher's instructions regarding an instrument's administration and that her noncompliance invalidated the results, the contention she did not comply with standard practice regarding reporting her results and therefore her results were not credible, and the contention she used a superseded instrument and only obtained information from one instead of multiple reporters. Escondido criticized Dr. Norall's assessment for failing to specify the criteria she used to reach her conclusions, specifically whether she, a licensed educational psychologist, considered Student's classifications under the Education Code and California Code of Regulations, or under the Diagnostic and Statistical Manual, version 5.

Escondido disputed that Dr. Norall's assessment was an independent educational evaluation in the area of autism. While the North Inland Special Education Region Special Education Local Plan Area guidelines and criteria for independent educational evaluations did not specifically list an independent evaluation in the area of autism, school psychologist and program specialist Ms. Lane testified an assessment for autism could fall under a few categories, such as behavioral/functional behavior,

neuropsychological, or full psychoeducational evaluations. Ms. Lane asserted reasons Dr. Norall's evaluation did not amount to a behavioral/functional behavior assessment. To Ms. Lane's knowledge, Dr. Norall was not licensed to conduct a neuropsychological assessment. And Ms. Lane asserted reasons Dr. Norall's evaluation was not a full psychoeducational assessment.

This Decision makes no conclusions about the quality or accuracy of Dr. Norall's evaluation.

#### TRAINING ESCONDIDO PROVIDED SCHOOL PSYCHOLOGISTS ON AUGUST 18, 2017

Over Student's objection, the ALJ received limited evidence regarding a training Escondido provided to 20 school psychologists on August 18, 2017, four days before the original due process hearing. The training was titled "Complying with Child Find & Timeline Requirements." Mr. D'Amico testified the training concerned the identification of students with disabilities and protocol regarding assessment plans.

### LEGAL CONCLUSIONS

#### INTRODUCTION – USE OF LEGAL CONCEPTS THROUGHOUT THE DECISION

In this discussion, unless otherwise indicated, this introduction's legal citations are incorporated into each issue's conclusion. All references to the Code of Federal Regulations are to the 2006 version.

#### LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (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 Individuals with Disabilities Education Act is often referred to as the "IDEA." The main purposes of the IDEA are:

1. to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and

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

A free appropriate public education, often called 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, commonly called an 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 or supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

In general, an IEP is a written statement that is developed by parents and school personnel using the IDEA's procedures. The IEP describes the child's present levels of performance, needs, and academic and functional goals related to those needs. It also provides a statement of the special education; related services, which include transportation and other supportive services; and program modifications and accommodations that will be provided for the child to work towards the stated goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14) & (26), 1414(d)(1)(A); Ed. Code, §§ 56031, 56032, 56345, subd. (a), and 56363, subd. (a); 34 C.F.R. §§ 300.17, 300.34, 300.39; Cal. Code Regs., tit. 5, § 3001, subd. (p).)

*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 as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

In *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000] (*Endrew F.*), the Supreme Court held that a child’s “educational program must be appropriately ambitious in light of his circumstances.” “Every child should have a chance to meet challenging objectives.” (*Ibid.*) *Endrew F.* explained that “this standard is markedly more demanding than the ‘merely more than de minimis’ test . . . . The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at pp. 1000-1001.) The Court noted that “any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” (*Id.* at p.999.) However, the Supreme Court did not define a new FAPE standard in *Endrew F.* The Court acknowledged that Congress had not materially changed the statutory definition of a FAPE since *Rowley* was decided and so declined to change the definition itself. The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

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, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Student requested the hearing in this matter, and therefore Student has the burden of proof on the issue for hearing after remand.

#### ISSUE: APPROPRIATE REMEDY FOR DENIAL OF FAPE BY FOUR-MONTH DELAY IN OFFERING AUTISM ASSESSMENT

The District Court determined Student was denied a FAPE when Escondido did not offer to assess Student for autism for four months after learning on December 5, 2016, Dr. Dyson had diagnosed him with autism spectrum disorder under the Diagnostic and Statistical Manual, version 5. Student requests an independent educational evaluation but preferably reimbursement of \$3,500 for the assessment Dr. Norall conducted in March 2019, and training of Escondido personnel.

Escondido argues neither an independent assessment nor reimbursement for Dr. Norall's evaluation are warranted, and training was already conducted. Escondido contends Student should receive no further remedy for what the District Court found was a denial of FAPE.

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)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996,

85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an Administrative Law Judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168] (*Forest Grove*).)

In remedying a denial of a FAPE, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, 471 U.S. at p. 374.)

An independent educational evaluation at public expense may be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-823.)

Training school district personnel can be an appropriate compensatory remedy. (See *Park, ex rel. Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1034.)

Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra*, 471 U.S. at 369-71; *Forest Grove, supra*, 557 U.S. at pp. 242-243.) "Whether to order reimbursement, and at what amount, is a question determined by balancing the equities." (*Town of Burlington v. Department of Educ. for Com. of Mass.* (1st Cir. 1984) 736 F.2d 773, 801, *aff'd sub nom. Burlington, supra*, 471 U.S. at p. 374 ["We do think that the court was correct in concluding that 'such relief as the court determines is appropriate,' within the meaning of § 1415(e)(2), means that equitable considerations are relevant in fashioning relief."].)

*Burlington and Florence County School Dist. Four v. Carter* (1993) (510 U.S. 7 [114 S.Ct. 361, 126 L.Ed.2d 284] (*Carter*)), held that § 1415(i)(2)(C)(iii) authorizes courts to

reimburse parents for the cost of private-school tuition when a school district fails to provide a child a FAPE and the private-school placement is appropriate. These cases' guidance regarding equitable considerations being relevant in fashioning relief related to affording a student "appropriate relief" for denial of FAPE, not exclusively the specific question of reimbursement for private school tuition.

For example, a student may be entitled to reimbursement for private tutoring services. (*Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047.) In making the determination of whether reimbursement is appropriate, a "court may consider all relevant equitable factors, including, *inter alia*, notice to the school district before initiating the alternative placement; the existence of other, more suitable placements; the parents' efforts in securing the alternative placement; and the level of cooperation by the school district. [Citation to *Forest Grove, supra*, 523 F.3d at pp. 1088–1089.] These factors make clear that '[t]he conduct of *both* parties must be reviewed to determine whether relief is appropriate.' [Citation to *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir.1992) 960 F.2d 1479, 1486.]" *Anchorage School Dist. v. M.P.*, 689 F.3d at p. 1059 (emphasis in original).)

Student argues in a formulaic approach that when a school district fails to timely assess a student, the student is automatically entitled to an independent educational evaluation at public expense. Student relied on this interpretation when Mother refused to sign the assessment plan Escondido presented her on April 7, 2017, and amended his complaint for due process to include a claim for failing to timely assess Student for autism. Mother's refusal to allow Escondido to assess Student for autism limited Escondido's liability to the four months between December 5, 2016, and April 7, 2017, a time period that included the two and a half weeks Escondido was on winter break and "some period of time" time the District Court concluded was reasonable.

Student argues the delay in receiving a remedy for Escondido failing to promptly

provide Mother an assessment plan was caused by the ALJ incorrectly concluding Student was not denied a FAPE and his need to appeal to the District Court. Student is incorrect. In June 2017, and again in July 2017, Escondido offered to fund an independent educational evaluation at public expense, not contingent upon Student settling the due process case he and Escondido each had pending at the time. Escondido tried to afford Student an independent assessment to develop supports for Student at the start of the 2017-2018 school year. Mother and Student's attorney were aware of the opportunity to receive an independent educational evaluation at public expense by an assessor of their choosing, but declined the no-strings-attached offers in June and July and elected to go to hearing in August 2017. At that point, any further delay in having Student independently assessed for autism was caused by Mother and Student's attorney, not by Escondido or the Office of Administrative Hearings.

Student did not seek additional information regarding his disabilities and appropriate services to address them until, in anticipation of litigation, he engaged Dr. Norall for the admitted purpose of rebutting Escondido's October 2017 assessment and showing Student should be entitled to an independent educational evaluation as an equitable remedy. Dr. Norall's assessment was undertaken as a litigation strategy, not in pursuit of any educational strategy.

Student's amended complaint sought as a remedy unspecified independent assessments in all areas of suspected disability. Student's written closing argument after the initial hearing requested an independent psychoeducational evaluation. The District Court failed to award Student any remedy after it decided he prevailed on the issue of timeliness of offering an autism assessment. By the time of the hearing after remand, Student preferred to receive reimbursement of \$3,500 for Dr. Norall's evaluation he stated he "obtained in order to rebut the District's assessment at the evidentiary hearing."

Having considered “the conduct of both parties,” it is equitable to award Student an independent educational evaluation at public expense, just as Escondido had proposed in summer 2017. Based upon the District Court’s determination of unreasonable delay, the most commonly awarded remedy for untimely assessment by a school district is an independent educational evaluation. Student delayed an autism assessment, either by Escondido or by an independent evaluator, but common practice suggests the appropriate remedy for what the District Court said was a denial of FAPE is an independent educational evaluation.

The evidence established an assessment for autism might be conducted by a variety of categories of evaluation. Student ultimately selected a psychoeducational evaluation, which was one of the assessment types appropriate to assess for autism. The appropriate remedy for Student is an independent psychoeducational evaluation.

Student selected Dr. Norall, a licensed educational psychologist based in San Diego County who charged \$3,500 to conduct what she classified as a psychoeducational evaluation. By license, location, and cost, Dr. Norall satisfied Escondido’s criteria for independent educational evaluators. If the ALJ had first awarded Student the typical independent psychoeducational educational evaluation and Student then selected Dr. Norall to conduct an assessment, Escondido’s criticisms of Dr. Norall’s evaluation would be irrelevant to the issue of payment. Whether or not an independent educational evaluation is ultimately valid, reliable, and accurate is not a condition for payment. And the facts that Student delayed pursuing an independent evaluation for 18 months and then procured it “in order to rebut the District’s [2017] assessment” rather than to develop information to benefit Student’s education also do not defeat the reasonableness of simply granting reimbursement rather than a new independent evaluation. Student is therefore awarded \$3,500 reimbursement for the April 1, 2019 assessment by Dr. Norall.

The District Court concluded some undefined amount of time was reasonable for Escondido to wait before giving Mother an assessment plan to assess Student for autism, but the total delay was unreasonable. Student contends Escondido had decided not to assess based on the subjective opinions of its staff regarding whether Student has autism. Student is incorrect. Escondido had decided to assess Student, but was waiting to receive Dr. Dyson's evaluation report. The District Court determined Escondido waited too long.

Student did not originally request training for Escondido personnel as a remedy for the delay in giving Mother an assessment plan regarding autism. His training requests only pertained to other claims. At the hearing after remand, Student added a staff training remedy to his requests.

Student did not show Escondido's conduct was so egregious as to necessitate staff training for all special education personnel or even specific personnel regarding Escondido's statutory obligation to assess students when it has notice of a suspected disability. It is not equitable to require such training.

The parties are reminded of the existence and services of the Diagnostic Center, to which a student may be referred for further assessment and recommendations. (Ed. Code, § 56326.) There are three regional assessment centers operated by the State Special Schools and Services Division of the California Department of Education, geographically serving southern, central, and northern California. The Diagnostic Centers provide assessment, training, and technical assistance to all local educational agencies in California. Services include:

- Comprehensive, state-of-the-art assessment and educational planning services to assist local school districts in determining the needs of their most complex students;
- On-site technical assistance and consultation in program and instructional

design based on the unique needs of each student;

- Professional development opportunities for teachers, administrators and special education staff, including presentations at national, statewide, and local conferences and workshops, provided by specialists with "hands-on" experience;
- Family education opportunities, including consultation, referral, and resource information.

There is no cost for assessment services; however, requests for services must be generated by the local school district. (<http://www.dcs-cde.ca.gov/index.htm> [last accessed on August 13, 2019].)

Diagnostic Center, Southern California provides high-quality, individualized services to special education students, their families, and school districts. Services are provided by expert, transdisciplinary teams of diagnostic professionals that may include educational specialists, speech-language specialists, school psychologists, clinical psychologists, and pediatricians who address the unique educational needs of Southern California's most difficult-to-serve students enrolled in special education programs. (<http://www.dcs-cde.ca.gov/index.htm>.)

A formal application for admission at a Diagnostic Center must be made by the local educational agency and signed by the Director of Special Education. The Diagnostic Centers do not accept referrals sent in by parents. (<http://www.dcs-cde.ca.gov/asm/referral.html> [last accessed on August 13, 2019].)

The local educational agency is responsible for completing a referral packet consisting of filling out a detailed form, securing written parental releases for information, submitting all educationally relevant reports and testing results, and compiling critical student information. The parents must also complete an information packet as part of the application process. Incomplete referrals will be returned.

<http://www.dcs-cde.ca.gov/asm/referral.html>.)

Once the completed application is received, the Diagnostic Center's Admission and Review Committee does a comprehensive case review of the referral, which includes telephone consultation with the referring administrator, or school district contact person. Following case review, the decision to accept or reject the referral will be made.

<http://www.dcs-cde.ca.gov/asm/referral.html>.)

If the student is not accepted for assessment, the file will be returned with a letter explaining why the case was rejected, and in many cases, suggestions for other agencies or resources which may be better suited to assist the student. (<http://www.dcs-cde.ca.gov/asm/referral.html>.)

## ORDER

1. Within 30 days of this Decision, Escondido shall reimburse Mother \$3,500 for Dr. Norall's evaluation.
2. All other relief sought by Student is denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, the District Court determined that Student had prevailed on one issue in the prior due process hearing. This Decision After Remand grants Student a remedy for what the District Court concluded was a denial of FAPE in the single issue on which Student prevailed, and Student is therefore the prevailing party.

## RIGHT TO APPEAL THIS DECISION

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: August 13, 2019

/s/

KARA HATFIELD

Administrative Law Judge

Office of Administrative Hearing