

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF
PARENT ON BEHALF OF STUDENT,
v.
VISTA UNIFIED SCHOOL DISTRICT.
OAH CASE NUMBER 2019020664

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings on February 19, 2019, naming Vista Unified School District. Vista Unified filed its response to Student's complaint on March 1, 2019, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.) OAH continued this matter for good cause on April 2, 2019.

Administrative Law Judge Linda Johnson heard this matter in Vista, California, on May 29, 30, June 5, 10, and 13, 2019.

Attorney Meagan Nunez represented Student; Attorney Patricia Darlin and Law Clerk Diana Lopez assisted Ms. Nunez during the hearing. Student's Mother attended the hearing each day on Student's behalf. Student did not attend the hearing. Attorney Tiffany Santos represented Vista Unified School District. Rebecca Norbriga, Executive Director of Special Education, and Dr. Leslie Taylor, Special Education Coordinator, attended alternate days of the hearing on Vista Unified's behalf.

At the parties' request, OAH continued this matter to June 27, 2019, for written closing arguments. Upon timely submission of written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES

Prior to the start of the hearing Student withdrew Issues 1(b) and 2(c). The issues

set forth below have been renumbered as permitted by *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443. No substantive changes have been made.

1. Did Vista Unified substantively deny Student a free appropriate public education during the 2018-2019 school year by failing to find him eligible for special education?
2. Did Vista Unified procedurally deny Student a FAPE during the 2018-2019 school year by preventing Parent from participating in Student's education by:
 - a. Failing to hold an individualized education program team meeting before moving forward with expulsion proceedings, thus engaging in predetermination; and
 - b. Failing to conduct a legally adequate evaluation in the area of psychoeducation?

SUMMARY OF DECISION

Student proved, by a preponderance of the evidence, that Vista Unified denied him a FAPE when it failed to find him eligible for special education as a student with an emotional disturbance. Student had a diagnosis of depression and a general pervasive mood of unhappiness or depression that impeded his ability to be successful in the general education environment. Student also proved Vista Unified denied Student a FAPE by failing to provide a legally compliant psychoeducational assessment when it discounted specific rating scales without any explanation in its psychoeducational assessment report. Further, Vista Unified failed to take into account Parent's rating scales, and failed to consider Student's conduct in the home which, due to Vista Visions Academy's primarily home-based educational program, was Student's primary educational setting. By failing to provide an adequate assessment, Vista Unified prevented Parent from meaningfully participating in the development of Student's individualized educational program.

Student did not prove that Vista Unified engaged in predetermination by failing to hold an IEP team meeting prior to moving forward with the expulsion proceedings. Vista Unified held an IEP team meeting prior to the expulsion proceedings.

FACTUAL FINDINGS

Student was a 14-year-old male who lived within Vista Unified's boundary with his Parent. Student attended Vista Visions Academy, a small, nontraditional, independent study hybrid program. At the time of the hearing Student was not eligible for special education services.

STUDENT'S MIDDLE SCHOOL ACADEMIC DECLINE

Student attended Madison middle school for sixth and seventh grade. Student's grades through the end of his sixth grade year were mostly As and Bs. During seventh grade Student's grades started to decline. Student received mostly Cs, Ds, and an F in seventh grade. During the spring of Student's seventh grade year he was diagnosed with depression and oppositional defiant disorder and confided in Parent that he contemplated suicide. Student had a sharp kitchen knife in his bedroom closet and sat in the closet with the knife several times thinking about killing himself.

2018-2019 SCHOOL YEAR

Vista Innovation and Design Academy

Student transferred to Vista Innovation and Design Academy for his eighth grade year. Vista Innovation and Design Academy is a traditional middle school within Vista Unified. From the outset, Student had significant difficulty getting to school. School started on Wednesday, August 15, 2018, but Student did not attend the first two days of school. Parent worked with Anita Heveron, school counselor, to get Student to school. Ms. Heveron made a referral to the school social worker on the first day of school and to

the school resource officer on the second day of school. The school resource officer made a home visit to speak with Student on the second day of school. Student missed four of the 55 days he attended Vista Innovation and Design Academy and was late to school without an excusal on seven days because he did not want to attend school.

Ms. Heveron met with Student on a regular basis during the two and a half months he attended Vista Innovation and Design Academy and referred to herself as "Student's best friend." Ms. Heveron used the term "best friend" to refer to students who needed more attention. Ms. Heveron wanted Student to know that someone at school was looking out for him and she tried to talk to him in the hallway or at lunch every day. In addition to the daily informal contact Ms. Heveron had with Student, she met with him eight times to discuss behavior, attendance, or parent or teacher concerns.

Additionally, Ms. Heveron spoke with Parent several times about Student's behavior. Parent told Ms. Heveron Student had a diagnosis of depression and oppositional defiant disorder, was taking medication, and seeing a psychiatrist. Parent agreed to have Ms. Heveron share that information with Student's teachers. Parent also asked Ms. Heveron for help getting Student to school.

On August 23, 2018, Ms. Heveron met with Student, Parent, and the school social worker to brainstorm ideas to get Student to attend school. Ms. Heveron suggested outside counseling and changed Student's elective to Encuentros, a class designed to empower young men and connect them with their communities. Ms. Heveron met with Student again on three additional occasions in September to discuss continued attendance and behavior issues.

On September 20, 2018, Parent reached out to Student's English teacher, Lori Buckley, because he was failing her class. Ms. Buckley assumed Student was changing schools because he refused to participate in any classwork or activities. On September 21, 2018, Parent told Ms. Heveron about the difficulties Student was having in Ms.

Buckley's class and that he refused to read the assigned book. When Parent talked to Student about the book he completely shut down and refused to read the book or speak to Parent about it. On September 28, 2018, Ms. Heveron changed Student's English class from Ms. Buckley's class to David Ruiz's class as a result of the difficulty he had with Ms. Buckley.

On September 25, 2018, Parent contacted Kaili Palmer, Student's history teacher. Parent informed Ms. Palmer that Student had depression and oppositional defiant disorder, that he took medication for it, and that he does not like speaking about himself. Student's in Ms. Palmer's class wrote in their journals daily. Student was initially resistant to the activity but eventually participated. One entry in Student's journal that stood out to Ms. Palmer was that Student wrote that he could not make anyone happy. Even though Ms. Palmer described him as a good student who could have done a lot better in class, Student still struggled to turn in work despite all work being completed in class.

Despite the regular counseling check ins, Student continued to struggle with behavior. On October 1, 2018, Ms. Heveron met with Student, at Parent's request, to discuss a tattoo he got over the weekend. Parent was concerned about Student and his behavior. Ms. Heveron spoke to Student but he no longer talked to her as much as he did earlier in the school year. Ms. Heveron suggested a boarding school to Parent that she might want to look into for Student. On October 10, 2018, Student had a meeting with Ms. Heveron, Parent, the school social worker, and an administrator to review a behavior contract as a result of a suspension. As part of the contract Student was required to attend anger management classes.

Student's behavior struggles continued and on October 13, 2018, he went to see Ms. Heveron to seek her advice to avoid a fight. Ms. Heveron met with Student again on October 17, 2019. On October 26, 2018, Vista Innovation and Design Academy referred

Student to a gang intervention program, plus individual counseling for anger management and decision making, alcohol, tobacco, and drug counseling, and an empowering young men group. On October 29, 2018, Student got into a disagreement with another student that resulted in posturing but not an actual fight.

Expulsion from Vista Innovation and Design Academy

On October 30, 2018, Student got into a fight at school that resulted in a recommendation for expulsion from Vista Innovation and Design Academy. The initial expulsion hearing was scheduled for November 28, 2018. Vista Unified postponed the expulsion hearing until December 19, 2018, at Parent's request. Subsequent to that, as part of a settlement agreement, Student transferred to Vista Visions Academy. As part of the same settlement agreement, Vista Unified conducted an assessment for special education. Consequently, Vista Unified postponed the expulsion hearing until after it completed the special education assessment. As a result of the recommendation for expulsion, Student could not access any of the interventions Vista Innovation and Design Academy put in place on October 26, 2018.

On October 30, 2018, the day Student got into an altercation at school and was suspended pending expulsion, he attempted suicide. When Student got home from school he took between 18 to 20 pills of his depression medication. Parent had to call an ambulance and Student was hospitalized. Parent shared this information with the independent educational evaluator who discussed the suicide attempt in her report. However, Parent did not share it with Vista Unified.

Vista Visions Academy

Student started at Vista Visions Academy on December 10, 2018. Vista Visions Academy differed from Vista Innovation and Design Academy, and all other comprehensive middle schools, in that Student only attended school two days a week

for enrichment purposes. Student was required to do all school work at home, thus all academic demands were removed from the school environment. Vista Visions Academy was housed in one building that is the size of two traditional classrooms. There was a small front office area and two classrooms portioned off from each other. There were no more than 18 students in the class at any given time and students did not change classes like a typical middle school.

When Student transferred to Vista Visions Academy, his grades were Bs and Cs in all subjects except math, in which he had a D and English in which he had no mark because he had not completed enough work to earn one. Student initially appeared to do well at Vista Visions Academy. However, by March 2019, Student was not engaged in the program and the staff could not connect with him. On May 1, 2019, Michelle Snyder, the lead teacher at Vista Visions Academy, suggested that Student could work at home all five days instead of coming to school for two days per week. Even in a smaller more supportive setting, with all academic demands removed, Student still struggled.

VISTA UNIFIED'S PSYCHOEDUCATIONAL ASSESSMENT

Janeen Ponchetti conducted Student's psychoeducational assessment between December 3, 2019, and February 5, 2019. Ms. Ponchetti has a Bachelor of Arts in sociology, a Master of Arts in education with an emphasis in counseling, an educational specialist credential, and a pupil personnel services credential. Ms. Ponchetti has been a school psychologist since May 2016, and has worked for Vista Unified the entire time. Ms. Ponchetti estimated she conducted more than 300 assessments so far during her career.

Prior to conducting the assessment, Vista Unified sent Parent a legally compliant assessment plan on November 29, 2018. Vista Unified proposed to assess Student in the areas of academic achievement, health, intellectual development, language and speech communication development, social emotional behavior, and adaptive behavior. The

only portion of the assessment at issue is the psychoeducational portion conducted by Ms. Ponchetti. This decision does not address the academic achievement, health, or speech and language portions of the assessment. Parent signed the assessment plan on December 3, 2018.

Ms. Ponchetti reviewed Student's records, conducted assessments, and observed Student. She did not interview any of Student's teachers or Parent. Ms. Ponchetti had not met Student prior to the assessment and spent 10 hours with him over the course of three meetings in December 2018 and January 2019.

To assess Student's cognitive ability Ms. Ponchetti administered the Kaufman Assessment Battery for Children, Second Edition and the Woodcock Johnson Test of Cognitive Abilities, Fourth Edition. Ms. Ponchetti reported Student's score in long term retrieval as low average. Although the long term retrieval category on the Kaufman Assessment Battery was listed as not interpretable, Student's two subset scores were listed, one as average and the other as below average and Student scored in the low range on the Woodcock Johnson Test of Cognitive Abilities.

Ms. Ponchetti reported Student's overall visual processing score in the low average range. On the Kaufman Assessment Battery, he scored below average and on the Woodcock Johnson Test of Cognitive Abilities he scored in the low range. Ms. Ponchetti also reported Student's score in processing speed as low average. His overall processing speed index score on the Woodcock Johnson Test of Cognitive Abilities was low, however, the two subtest scores were average.

To assess Student's social emotional behavior and adaptive behavior Ms. Ponchetti used the Behavior Assessment System for Children, Third Edition rating scales. Ms. Ponchetti gave rating scales to Parent, Student, and two general education teachers, Joseph Armenta, Student's physical education and Encuentros teacher, and Emily Adler, Student's mathematics teacher. Mr. Armenta rated Student as clinically significant for

aggression, conduct problems, depression, atypicality, and withdrawal. Mr. Armenta rated Student as at-risk in hyperactivity, anxiety, attention problems, learning problems, adaptability, social skills, leadership, study skills, and functional communication. Ms. Adler rated Student as clinically significant in conduct problems, learning problems, social skills, and study skills. Ms. Adler rated Student as at-risk in hyperactivity, attention problems, adaptability, leadership, and functional communication. Mr. Armenta noted that Student was prone to anger and acted without thinking and rated Student as often seemed lonely, was often pessimistic, and often had trouble concentrating.

Parent rated Student clinically significant for depression, withdrawal, and leadership. Parent rated Student at-risk for aggression, conduct problems, adaptability, social skills, and functional communication. Parent rated Student as always thinks he is sick, always is sad, always isolates himself from others, always avoids eye contact, always is nervous, always seemed lonely, always prefers to play alone, and sometimes says he wants to kill himself. Student rated himself as at-risk for depression, sense of inadequacy, relation with parent, and self-reliance.

Ms. Ponchetti followed up on the Behavior Assessment System ratings with Student but not with Parent. Student completed the Reynolds Adolescent Depression Scale, Second Edition. Student rated himself as average for all areas including dysphoric mood, negative affect, negative self-evaluation, and somatic complaints. However, Ms. Ponchetti did not interview Student or Parent about any of their responses. At hearing Ms. Ponchetti explained that she discounted Mr. Armenta's clinically significant score of depression on the Behavior Assessment System because she had a conversation with him and claimed he was mostly thinking about the October 30, 2018 fight when he filled out the rating scale. However, Ms. Ponchetti did not include this information anywhere in her report.

Ms. Ponchetti gave the Emotional Disturbance Decision Tree rating scales to Ms.

Adler and Ms. Palmer. On the Emotional Disturbance Decision Tree, both Ms. Adler and Ms. Palmer rated Student as mild at-risk for attention deficit hyperactivity disorder and Ms. Palmer rated Student as in the moderate clinical range for a pervasive mood or depression. Both teachers rated Student as normal in all other areas.

Ms. Ponchetti pointed out in the psychoeducational assessment report that the raters reported the emotional behavioral problems had “not been present for more than six months.” However, all the teachers Ms. Ponchetti gave rating scales to were Student’s teachers at Vista Innovation and Design Academy where Student only attended for two and a half months. Both Ms. Palmer and Ms. Adler also completed the educational impact portion of the Emotional Disturbance Decision Tree. Ms. Palmer inaccurately stated that Student had one behavior related suspension when Student had been suspended three times for his behavior. Ms. Adler neglected to answer three questions. Both of those errors resulted in lower educational impact scores than would have been recorded had the ratings been fully and accurately completed.

Ms. Ponchetti also gave one of Student’s teachers and Parent the Adaptive Behavior Assessment System, Third Edition. Ms. Ponchetti did not identify which teacher she gave the rating scale to. Student’s teacher rated his adaptive behavior in the average range and Parent rated Student’s adaptive behavior in the low or below average range for communication, self-direction, leisure and social.

Ms. Ponchetti gathered additional information from Ms. Adler, Ms. Palmer, Mr. Ruiz, and Mr. Armenta through email. Ms. Adler reported Student was quiet and did not want to work. Further, Student would not start or complete work and he would not take notes, complete assignments, work on projects, communicate with peers, or stay on task. Ms. Palmer reported Student participated most of the time, that he was very bright and had a high ability to understand the content of American history, and was polite.

Mr. Ruiz reported Student transferred into his English class part way through the

semester and made minimal effort to stay on task. Mr. Ruiz also reported Student did not participate much in class and seemed to have difficulty focusing on the task at hand. Mr. Armenta reported Student was pleasant and participated when prompted but did not volunteer to speak. Student did not complete many assignments, and had trouble focusing and attending. Mr. Armenta thought Student's mind was somewhere else. Although Ms. Ponchetti received all of these emails on February 4, 2019, she did not include it in the psychoeducational assessment report.

Ms. Ponchetti observed Student at Vista Visions Academy for 35 minutes in January 2019. Ms. Ponchetti did not note the date of the observation in her report, nor did she note how many other students or teachers were present. Ms. Ponchetti observed Student as the school day started. Ms. Ponchetti observed the morning meeting, which is the time when the teacher asks students thought provoking questions. Ms. Ponchetti observed Student's transition to the science lab. Ms. Ponchetti did not observe Student when he was asked to complete any school work. Ms. Ponchetti's observation was on one of the two days Student attended Vista Visions Academy for enrichment. The other 3 days of the week Student worked independently at home. Ms. Ponchetti did not observe Student doing school work at home.

Ms. Ponchetti concluded that Student did not meet the eligibility category of emotional disturbance. She noted that Student demonstrated the ability to learn based on what his current teachers reported. However, at the time of the assessment Student had only been enrolled in his then current program for a little over a month and had only attended school less than eight days.

Ms. Ponchetti concluded that based on the Behavior Assessment System and Emotional Disturbance Decision Tree that Student did not exhibit an inability to build or maintain relationships, did not display inappropriate behaviors or feelings under normal circumstances, and did not develop physical symptoms or fears associated with school.

Ms. Ponchetti used Student's at-risk responses on the Behavior Assessment System and average responses to the Reynolds Adolescent Depression Scale coupled with his teachers' responses to the Emotional Disturbance Decision Tree to conclude he did not display a general mood of unhappiness or depression. Ms. Ponchetti did not consider the teacher responses to the Behavior Assessment System or any of Parent's responses despite the fact that all of Student's school work was completed in the home environment. Ms. Ponchetti did not address Student's attendance issues, any of the interventions Vista Innovation and Design Academy put into place, or Student's suspensions and recommendation for expulsion. Ms. Ponchetti did not address the fact that all of the social emotional ratings she considered came from people who had known Student less than three months.

INDEPENDENT EDUCATIONAL EVALUATION

Dr. Crystal Bejarano also assessed Student in January 2019. Dr. Bejarano has a Bachelor of Arts in physical education, a Master of Science in school psychology, a Doctor of Psychology in educational psychology, and a professional clear administrative credential. Between August 2003, and June 2017, Dr. Bejarano was a school psychologist for several school districts in California, a director of special education for two California school districts, a director of informal dispute resolution, and a program supervisor for an educationally related mental health services day treatment program. Since July 1, 2017, Dr. Bejarano has been an educational psychologist for Brain Learning in southern California. Dr. Bejarano estimated she conducted between 800 to 900 assessments and attended over 1000 IEP team meetings.

Dr. Bejarano interviewed Parent, Student, and Ms. Snyder, and also observed Student at Vista Visions Academy. Dr. Bejarano observed Student on January 28, 2019, at 9:35 AM for 45 minutes. Similar to Ms. Ponchetti's observation, Dr. Bejarano also observed Student during the morning meeting, however, she also observed Student

during class time when he was supposed to complete a mathematics assessment. Dr. Bejarano's observation while Student was supposed to be working on the mathematics assessment lasted about 20 minutes. During that time, Student was off task by looking at his phone, staring into space, or fidgeting for almost half the time.

Dr. Bejarano administered the Child Depression Inventory to Student and Parent, as well as the Conners Comprehensive Behavior Rating Scales to Student and Parent. Dr. Bejarano did not have any of Student's current teachers fill out rating scales as they had only had Student in class for a few days at the time of her assessment. Dr. Bejarano did not have any of Student's previous teachers fill out rating scales as it had been almost three months since Student was in his previous school. Dr. Bejarano also administered to Student:

1. The Coping Responses Inventory;
2. The Developmental Test of Neuropsychological Assessment, Second Edition;
3. The Academic Achievement Battery;
4. Delis-Kaplan Executive Function System;
5. The Kaufman Test of Educational Achievement, Third Edition;
6. The Repeatable Battery for the Assessment of Neuropsychological Status;
7. and the Reynolds Intellectual Assessment Scales.

Dr. Bejarano's report was primarily based on information from Parent and Student, and some information from Ms. Snyder. Dr. Bejarano's report detailed the domestic violence Student witnessed as a child and adolescent and multiple suicide attempts. Dr. Bejarano evaluated Student's behavior and mannerisms. Student had a flat affect, was quiet and guarded, and withdrawn.

Vista Unified's psychoeducational assessment and Dr. Bejarano's independent educational evaluation came to many of the same conclusions. Both found similar cognitive abilities, and Parent reported significant concerns with depression. Dr.

Bejarano's report differed from Vista Unified's report in that Student's self-report of depression was more significant. Student reported on the Children's Depression Inventory very elevated negative mood, functional problems, ineffectiveness, and interpersonal problems. On the Conners Comprehensive Behavior Rating System Student reported very elevated defiant and aggressive behaviors, violence potential, and physical symptoms. Student's responses on the Coping Responses Inventory were mostly well below average.

Dr. Bejarano found Student eligible for special education under the disability category of emotional disturbance because he exhibited a general pervasive mood of unhappiness or depression over a long period of time. Dr. Bejarano recommended educational counseling and cognitive therapy. Dr. Bejarano also recommended an educational placement that included opportunities for positive adult and student interaction, opportunities for regular collaboration with mental health providers, and direct support for gaps in his academic skills. Dr. Bejarano also opined that Student would benefit from specialized academic instruction.

Dr. Bejarano's testimony regarding the signs of depression in adolescents was thorough and thoughtful. Adolescent males who have depression may be frequently absent from school, make minimal effort on school work, not participate in class, do not turn in assignments, lack focus, may be fatigued, and may be irritable. Additionally, it is not uncommon for people with depression to act differently at different times. Student tended to use avoidance strategies to cope with stressors. Student's attendance, erratic mood, irritability, discipline record, changes in friend group, difficulties at home, and suicide attempts all led Dr. Bejarano to the conclusion that Student exhibited a general pervasive mood of unhappiness or depression, for a long period of time, to a marked degree, that impacted his educational performance.

IEP TEAM MEETING

On February 5, 2019, Vista Unified held Student's initial IEP team meeting. Parent and Ms. Darlin attended on behalf of Student. For Vista Unified, Lisa Mackay, school nurse, Ms. Snyder, Tammy Parker, Vista Unified program specialist, Nicole Weissner, speech and language pathologist, Rianne Macinnes, education specialist, Sarah Orloff, attorney for Vista Unified, and Ms. Ponchetti all attended.

Ms. Ponchetti reviewed her assessment and focused on the summary of her report. Ms. Ponchetti reported Student's teachers at Vista Innovation and Design Academy noted conduct problems but Student's teacher at Vista Visions Academy, where he had attended for approximately eight days, did not. Ms. Ponchetti summarized the Emotional Disturbance Decision Tree rating results and represented that Student's teachers rated Student in the average range with the exception of one area that was "a little elevated" as one teacher rated Student in the moderate clinical range for depression.

Ms. Ponchetti explained the ratings on the Behavior Assessment System and informed the team that one of the two teachers noted clinically significant scores in the area of depression, as did Parent, but Student only rated himself as-risk for depression. Ms. Ponchetti reasoned that, because the scores were not consistent across multiple areas, depression was not a significant area of concern. Ms. Ponchetti's discussion of her report lasted eight minutes.

Parent reported Student did not want to attend Vista Visions Academy and she had significant difficulty getting him to school. Parent also reported Student was isolated at home; did not want to do any schoolwork. Additionally, Student did not want to interact with his family, or leave the house, even to go to the store.

Ms. Snyder reported that during the eight days Student had been at Vista Visions Academy he was polite and quiet. He had all Bs and Cs in his classes, but completed

significantly less work in mathematics than his other classes. Student was engaged in guitar class.

Ms. Ponchetti reviewed Dr. Bejarano's independent educational evaluation which found similar processing scores, assessment results, and academic findings to those in Vista Unified's psychoeducational report. Ms. Ponchetti pointed out that Dr. Bejarano was concerned about Student's depression but found that Student's educational setting was supportive of students who may not easily integrate into a larger school setting. Dr. Bejarano found Student eligible for special education under emotional disturbance.

Ms. Ponchetti discounted Dr. Bejarano's findings because she did not include any teacher rating scales. Ms. Ponchetti reviewed her conclusion that Student did not meet the eligibility criteria for emotional disturbance because he had an ability to learn. Ms. Ponchetti based her opinion on Student's current teachers' reports that he was doing well at his new school that he had attended for a month and a half. Ms. Ponchetti reiterated that Student had satisfactory relationships with peers and teachers and displayed appropriate behaviors in the educational setting. Ms. Ponchetti again concluded that Student did not display a general mood of unhappiness or depression in the school setting because not all of his teachers reported concerns in the area of depression. Finally, Ms. Ponchetti reviewed that Student did not display physical symptoms or fears associated with school.

Ms. Ponchetti reviewed the criteria for other health impairment and concluded that Student did not meet the eligibility category but did not say why. Ms. Ponchetti also reviewed the criteria specific learning disability and concluded that Student did not meet the eligibility category as he did not demonstrate a severe discrepancy in his academic ability and academic achievement.

Vista Unified concluded that Student did not meet any eligibility category for special education. The IEP team did not discuss Student's multiple suicide attempts or

discuss how Student's performance at Vista Visions Academy, a smaller setting with all academic demands removed, differed from his classroom performance at Vista Innovation and Design Academy, or the home setting, where he was required to complete all classwork. The IEP team did not discuss Student's behavior or discipline record while he was at Vista Innovation and Design Academy.

EXPULSION PROCEEDING

Craig Wiblemo executive director of student support services for Vista Unified, did not attend the IEP team meeting but he did call Ms. Parker after the meeting to learn the outcome and to ask if he needed to reschedule the expulsion hearing to accommodate a manifestation determination review meeting. Ms. Parker informed him that Student had been determined not eligible for special education.

On February 6, 2019, Parent and Student met with Mr. Wiblemo. Vista Unified offered, and Parent agreed to, a stipulated expulsion. Student, Parent, and Mr. Wiblemo all signed the agreement on February 6, 2019.

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) and (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).) Generally, a party is limited to filing a request for due process two years from the date the person knew or should have known of the facts which form the basis for the request for a due process hearing.

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, and therefore has the burden of proof on the issues.

ISSUE 1: FAILURE TO FIND STUDENT ELIGIBLE FOR SPECIAL EDUCATION

Student alleged Vista Unified denied him a FAPE by failing to find him eligible for special education services during the February 5, 2019, IEP team meeting. Student argued he exhibited a pervasive mood of unhappiness or depression to a marked degree. Vista Unified alleged Student did not qualify for Special education because he did not display a general pervasive mood of unhappiness or depression across multiple settings.

For purposes of evaluating a child for special education eligibility, the district must ensure that “the child is assessed in all areas of suspected disability.” (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158.) A school district is required to ensure that the evaluation is sufficiently comprehensive to identify all of the child’s needs for special education and related services whether or not commonly linked

to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).) There was no dispute that Student was assessed in all areas of suspected disability.

A child with emotional disturbance exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- a. an inability to learn that cannot be explained by intellectual, sensory, or health factors;
- b. an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- c. inappropriate types of behavior or feelings under normal circumstances;
- d. a general pervasive mood of unhappiness or depression; or
- e. a tendency to develop physical symptoms or fears associated with personal or school problems.
- f. Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under subdivision (b)(4) of this section.

(Cal. Code Regs., tit. 5, § 3030, subd. (b)(4).)

Here, Student argued he exhibited a general mood of unhappiness or depression over a long period of time and to a marked degree, and that it impacted his educational performance. Vista Unified argued that Student did not qualify for special education because he did not exhibit signs of the general, pervasive unhappiness necessary to meet the definition of emotional disturbance.

Student established by a preponderance of the evidence that he suffered from pervasive depression that impacted his ability to learn and maintain relationships. He submitted evidence of his diagnosis of severe depression which was supported by

clinically significant and moderate clinical ratings of depression from two of the three teachers who filled out rating scales, two suicide attempts, and his decline in grades and increase in school discipline. His school avoidance and unwillingness to engage in social interactions with his family or peers along with his refusal to do school work, all showed he had a general mood of unhappiness or depression and it impacted his educational performance.

Conversely, Vista Unified's argument that Student did not meet eligibility requirements for special education was not supported by the evidence. Ms. Ponchetti discounted information from teachers that indicated Student was depressed without a reasonable basis for doing so, and without explanation in her report. She sought additional information from teachers regarding Student's performance in their classes and their observations of his affect and conduct and then failed to include the information they provided in her report or raise their concerns as points of discussion during the February 5, 2019 IEP team meeting.

Ms. Ponchetti pointed out during the IEP team meeting that Student had some behavioral issues while at Vista Innovation and Design Academy but that he did not exhibit the same behavior problems at Vista Visions Academy. However, Ms. Ponchetti neglected to discuss the difference in the two environments or that Student had only attended Vista Visions Academy for a few days at the time of the IEP team meeting.

Ms. Ponchetti did not interview Parent regarding her responses, which included answers that Student sometimes said he wanted to kill himself. Ms. Ponchetti also did not take into account that Student was required to complete all academic work at home, which made the home environment also an academic setting. Ms. Ponchetti relied on Student's self-report on the Reynolds Adolescent Depression Scale to show that Student did not report feelings of depression. Conversely, Dr. Bejarano interviewed Parent and administered several different rating scales to Student which showed that Student

exhibited signs of depression in multiple settings.

Contrary to Vista Unified's argument, the ratings did show consistency of Student's depression, and showed it across environments. Mr. Armenta reported clinically significant scores in the area of depression on the Behavior Assessment System. Ms. Palmer, noted moderate clinical responses to depression. In addition to two of three teachers noting clinically significant or moderately clinical responses to depression, Parent also noted clinically significant responses to depression. Moreover, when Ms. Ponchetti followed up with Student's teachers, three of the four, including Ms. Palmer, said Student did not complete much, if any, school work and he had difficulty focusing in class.

Dr. Bejarano's testimony regarding how depression manifests in adolescent boys was persuasive, uncontroverted, and provided a clear explanation of why Student's conduct, attendance difficulties, and lack of motivation was a manifestation of Student's depression. The fact that depression can manifest as inattentiveness, lack of focus, missing school, or failure to complete classwork or homework explained Student's struggles at Vista Innovation and Design Academy. Student exhibited all of these behaviors while at Vista Innovation and Design Academy and three of the four teachers Ms. Ponchetti followed up with informed her that Student had those behaviors at school. In most classes Student completed minimal, if any, classwork and was often distracted or exhibited an inability to focus. Dr. Bejarano also opined that Student would benefit from specialized academic instruction. Moreover, Student's placement at Vista Visions Academy was nothing like a comprehensive middle school. Student only attended school twice a week and even then it was only for enrichment purposes. That environment removed nearly all academic demands from Student and placed them on the home environment.

Vista Unified's argument that Student did not need specialized academic

instruction was not persuasive as his educational environment was so drastically different from a comprehensive setting Ms. Ponchetti could not have determined that he did not need specialized academic instruction.

For the foregoing reasons, Student met his burden of proving that Vista Unified denied him a FAPE by failing to find him eligible for special education under the eligibility category of emotional disturbance at the February 5, 2019, IEP team meeting.

ISSUE 2(A): PREDETERMINATION

Student alleged Vista Unified denied him a FAPE by failing to hold an IEP team meeting before moving forward with expulsion proceedings thus engaging in predetermination. Vista Unified argued it rescheduled the expulsion hearing to a date after the initial IEP team meeting to discuss Student's eligibility for special education and if Student had been found eligible it would have scheduled a manifestation determination review meeting prior to the expulsion hearing. Vista Unified further argued the reason the IEP team meeting was held the day before the expulsion hearing was because Student requested the IEP team meeting be rescheduled.

Federal and State law require that a district must afford parents of a child with a disability the opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) The IEP team must consider the concerns of the parent for enhancing the student's education, and information on the student's needs provided to or by the parent. (20 U.S.C. § 1414(d)(3)(A) and (d)(4)(A)(ii); 34 C.F.R. § 300.324(a)(1)(ii) & (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(2), (d)(3) & (f).) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904] ["[T]he informed involvement of parents" is central to the IEP process.]) Parental participation in the IEP process is considered

"[a]mong the most important procedural safeguards." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 (*Amanda J.*))

Predetermination is a procedural violation of the IDEA that occurs in connection with an IEP team meeting, when a district has decided on its offer prior to the meeting, such as when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgenes*, 239 Fed.Appx. 342, 344-345.)

Predetermination causes a deprivation of educational benefits where, absent the predetermination, there is a strong likelihood that alternative educational possibilities for the student would have been better considered. (*M.S. v. Los Angeles Unified School Dist.* (C.D. Cal. September 12, 2016, Case No. 2:15-cv-05819-CAS-MRW) 2016 WL 4925910 at p.12. (citing *Doug C.*, *supra*, 720 F.3d 1038, 1047).) District team members may form opinions prior to IEP meetings. However, if the district goes beyond forming opinions and becomes "impermissibly and deeply wedded to a single course of action," this amounts to predetermination. (*P.C. v. Milford Exempted Village Schools* (S.D. Ohio, Jan. 17, 2013, No. 1:11- CV-398) 2013 WL 209478, p.7.)

Predetermination is an automatic violation of a parent's right of participation under the IDEA. Where predetermination has occurred, "regardless of the discussions that may occur at the meeting, the school district's actions would violate the IDEA's procedural requirement that parents have the opportunity 'to participate in meetings with respect to the identification, evaluation, and educational placement of the child.'" (*H.B. v. Las Virgenes*, *supra*, 239 Fed.Appx. at p. 344, quoting 20 U.S.C. § 1415(b)(1).)

Student did not meet his burden that Vista Unified engaged in predetermination by failing to hold an IEP team meeting prior to the expulsion hearing. Vista Unified initially scheduled the expulsion hearing for November 28, 2018. However, Vista Unified rescheduled the expulsion hearing once it began Student's assessment for special education. Student's rescheduled expulsion hearing was February 6, 2019. Vista Unified

scheduled Student's initial IEP team meeting to review the assessment on January 30, 2019. Vista Unified rescheduled the initial IEP team meeting to February 5, 2019, at Parent's request. Mr. Wiblemo's testimony was persuasive in that if Vista Unified had found Student eligible for special education Vista Unified would have held a manifestation determination review meeting prior to the expulsion hearing. Mr. Wiblemo called Ms. Parker after the IEP team meeting to inquire if he needed to postpone the expulsion hearing so Vista Unified could hold a manifestation determination review meeting. Mr. Wiblemo confirmed the IEP team meeting had been held prior to holding the expulsion hearing. Vista Unified did not engage in predetermination.

ISSUE 2(B): FAILURE TO CONDUCT A LEGALLY ADEQUATE PSYCHOEDUCATIONAL EVALUATION

Student alleged Vista Unified denied him a FAPE by failing to conduct a legally adequate initial psychoeducational evaluation. Student argued Vista Unified's psychoeducational assessment report was inadequate because Ms. Ponchetti did not interview Student's teachers for the report, mischaracterized Student's scores on the Kaufman Assessment Battery, incorrectly scored the Emotional Disturbance Decision Tree, and failed to include Mr. Armenta's clinically significant depression rating. Vista Unified argued its psychoeducational assessment and corresponding report met all legal requirements.

Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.) An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.) Thereafter, a special education student must be reassessed at least once every three years, or more frequently if conditions warrant, or if a parent or teacher requests an assessment. (Ed. Code, § 56381,

subd. (a).) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).) The only assessment Student challenges in this case is the psychoeducational assessment.

If a district decides to assess a student, it must give the parent a written assessment plan within 15 calendar days of referral, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five schooldays, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (a); 56321, subd. (a).) The plan must explain, in language easily understood, the types of assessments to be conducted. (Ed. Code, § 56321, subd. (b).) The parent then has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c)(4).) The assessment plan met all legal requirements. This was not in dispute.

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

Assessments must be conducted by individuals who are both "knowledgeable of [the student's] disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).)

School districts are required to ensure that the assessment tools and strategies provide relevant information that directly assists persons in determining the educational needs of a child. (34 C.F.R. § 300.304(C)(1)-(7).)

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

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

Once a student has been referred for a reassessment, a determination of eligibility and an IEP team meeting shall occur within 60 days of receiving parental consent for the assessment. (See 20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56302.1, subd. (a).) There was no dispute that Ms. Ponchetti was qualified to conduct the assessment, that she used appropriate instruments to evaluate Student's disabilities and that the testing was unbiased. Nor was the timeliness of the testing in dispute. What was disputed was the accuracy of the testing analysis.

Student's argument, that Ms. Ponchetti's mischaracterization of Student's scores on the Kaufman Assessment Battery and Woodcock Johnson Test of Cognitive Abilities rendered the assessment inaccurate and therefore unreliable, was not persuasive. Although Ms. Ponchetti reported some of Student's score in the low average range, when the subtest scores were actually in the low or below average range, Student did not present any evidence that the mischaracterization resulted in a denial of FAPE as Student contended that the only disability at issue was emotional disturbance. Student failed to prove that a mistake on reporting of the cognitive abilities testing impacted any conclusions Ms. Ponchetti made regarding the eligibility category of emotional

disturbance.

However, the information presented in the Emotional Disturbance Decision Tree section was not accurate and the team relied on that information in determining that Student did not qualify for special education. Both Ms. Palmer and Ms. Adler incorrectly filled out the educational impact portion of the Emotional Disturbance Decision Tree. Ms. Palmer answered one question incorrectly and Ms. Adler neglected to answer three questions. Both of those errors resulted in lower educational impact scores. Ms. Palmer and Ms. Adler also both noted that the emotional behavior problems had not been present for more than six months. However, Student only attended Vista Innovation and Design Academy, where both teachers knew Student, for two and a half months. If the team had the correct information, that Student's behaviors had moderate educational impact instead of a mild educational impact, the team may have made a different decision regarding Student's eligibility.

Additionally, Ms. Ponchetti excluded some pertinent scores from Mr. Armenta and Parent without a reasonable explanation and without noting that the scores were not considered in her report. This deprived the IEP team of complete information on which to base consideration of Student's eligibility.

Student met his burden of proving that Vista Unified's psychoeducational assessment was not legally adequate.

REMEDIES

ALJ's have broad latitude to fashion appropriate equitable remedies for FAPE denials. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) In remedying a FAPE denial, 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). The purpose of the IDEA is to provide students

with disabilities “a free appropriate public education which emphasizes special education and related services to meet their unique needs.” (*Burlington, supra*, 471 U.S. 359, 374.) Appropriate relief means “relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” (*Puyallup, supra*, 31 F.3d. at p. 1497.)

Student proved he should have been found eligible for special education services during the February 5, 2019, IEP team meeting under the eligibility category of emotional disturbance. Student also established that Vista Unified’s psychoeducational report did not meet legal requirements. Student’s sole requested remedy is eligibility for special education and Student has established entitlement to that.

ORDER

Within 30 days of this decision Vista Unified is to hold an IEP team meeting to find Student eligible for special education under the category of emotional disturbance, and develop an IEP for Student.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issues 1 and 2(b). Vista Unified prevailed on Issue 2(a).

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: July 24, 2019

/s/

LINDA JOHNSON

Administrative Law Judge

Office of Administrative Hearings