

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

**IN THE MATTER OF
PARENT ON BEHALF OF STUDENT,**

v.

BELLFLOWER UNIFIED SCHOOL DISTRICT

OAH CASE NUMBER 2019051216

DECISION

Parent on Student's behalf filed a due process hearing request, referred to as a complaint, with the Office of Administrative Hearings, State of California, on May 29, 2019, naming Bellflower Unified School District, which is referred to as Bellflower. The Office of Administrative Hearings is referred to as OAH. OAH continued the matter for good cause on June 28, 2019.

Administrative Law Judge Robert G. Martin heard the matter in Bellflower, California, on September 10, 11, and 12, 2019. The Administrative Law Judge is referred to as the ALJ.

Attorneys Hamlet Yarianian and Marian Saad represented Student. Student's Father attended the hearing and testified. He is referred to as Parent. Attorney Eric Bathen represented Bellflower. Special Education Program Administrator Matthew Adair attended the hearing on all days and testified on behalf of Bellflower.

At the close of testimony on September 12, 2019, at the parties' request, the ALJ continued the matter to October 7, 2019 for the parties to file closing briefs. The briefs were timely filed, the record closed, and the matter was submitted for decision on October 7, 2019.

ISSUES

The issues stated below were clarified and agreed to by the parties during the prehearing conference.

1. Did Bellflower fail in its "child find" obligation from May 29, 2017, to the filing of the complaint, by failing to assess Student, when Student's academic and behavior struggles indicated that Student was in need of special education services?
2. Did Bellflower deny Student a free appropriate public education, referred to as FAPE, by failing to assess Student upon Parent's request?

FACTUAL FINDINGS

Student was 14 years old and in ninth grade at Bellflower High School at the time of hearing. Bellflower High School serves grades seven through twelve. This Decision refers to Bellflower High School as High School. Student resided with his Mother within

Bellflower's boundaries during the relevant time period. Parent shared educational rights with Mother.

Bellflower found Student eligible for special education for the first time in February 2019 under the primary eligibility category of specific learning disability, and the secondary category of other health impairment, based upon characteristics of attention deficit hyperactivity disorder.

EDUCATIONAL HISTORY PRIOR TO STUDENT'S INITIAL ASSESSMENT

Student attended Bellflower schools exclusively, beginning in 2010 with kindergarten at Ramona Elementary School. Student's educational records at Bellflower included information relevant to whether and when Bellflower should have assessed Student's for special education.

Student attended general education classes from kindergarten through eighth grade. Student met or exceeded the academic standards for all of his subjects from kindergarten through second grade.

Student began struggling academically in third grade. In October 2013, Student's third grade teacher was concerned Student was not meeting academic standards in reading comprehension and writing, and might be at risk of retention. Bellflower developed a general education academic intervention plan that provided him a total of five hours per week instruction in reading and writing.

Student advanced to fourth grade. Student did not have an academic intervention plan in fourth grade. Student continued to struggle with reading and math. He was easily distracted, and worked very slowly, which kept him behind the rest of his

class. Student also lacked confidence in his abilities, was afraid to get started on his assignments, especially in writing, and was not completing his class assignments and homework. At the end of the year, Student failed to meet academic standards in nine of sixteen areas.

At the start of fifth grade Student was at risk of not meeting state academic standards in reading comprehension, writing, and math, and at risk of retention. In October 2015, Bellflower again developed a general education academic intervention plan for Student. Student received instruction in reading comprehension and essay writing three times per week, each, and math instruction two to three times per week. Student's grades improved. Student finished fifth grade meeting standards in 12 of the 13 academic areas in which his achievement was graded, and he was approaching standard in the remaining area of reading literature. Student's effort was satisfactory or outstanding in all academic areas throughout the year, as well as in study skills including organizing himself and his materials, using time effectively, following rules and directions, and completing classwork and homework. His teacher summarized the year commenting that Student was a pleasure to have in class, that he came to school every day ready to work, worked hard, and was genuinely excited to learn new things.

2016-2017 SIXTH GRADE SCHOOL YEAR

Student continued at Ramona Elementary School for sixth grade, 2016 to 2017. He transferred early in the year to the general education classroom of teacher Anita Chatterjee, who testified at hearing. Student did not have an academic intervention plan in sixth grade. Although he made satisfactory efforts in all of his academic subjects, and in study skills including completing classwork and homework, his grades fell. In his first trimester, Student met academic standards in only one subject.

In Student's second trimester, his grades fell further. He failed to meet standards in math expressions and equations, and social studies. Student again earned satisfactory effort grades in all academic areas. He worked hard to make progress, and showed commitment to his daily academic tasks. His attendance was good, and he did not exhibit any significant disruptive behaviors that impeded his learning. Student needed to put greater effort into his research for writing, and work on organizing his thoughts clearly.

The two-year period within the statute of limitations in this matter started on May 29, 2017. Student finished sixth grade on June 15, 2017. At the end of the year, of 10 academic areas, Student met standards in one English language arts area, and in technology. Student's effort was graded satisfactory in all areas. Student worked hard in the third trimester to show improvement on personal and academic fronts, and had raised his English language arts grade in speaking and listening to meet standards in that area. Ms. Chatterjee advised Student it would be important going forward for him to complete assignments in a timely manner and challenge himself with academic rigor.

Ms. Chatterjee did not refer Student for assessment to see whether he might have a disability requiring special education. She did recommend that Student be enrolled in a general education math support and enrichment course in seventh grade, to help him in math. Ms. Chatterjee testified she did not suspect Student's academic struggles might be due to a disability, because she believed Student was capable of doing his assignments but chose not to put in the effort to complete them due to a lack of motivation. Ms. Chatterjee's testimony attributing Student's failure to complete assignments and poor academic performance in sixth grade to a lack of motivation was inconsistent with the more persuasive grades and comments she gave Student at the time in his report cards. Ms. Chatterjee consistently graded Student's effort in academic

areas as satisfactory, and her comments praised Student for his hard work and commitment to making academic progress.

2017-2018 SEVENTH GRADE SCHOOL YEAR

Student attended seventh grade at High School, starting August 28, 2017. In addition to his graded physical education and core curriculum academic classes, Student was enrolled in a credit or no credit math support and enrichment course class that provided general education interventions and supports for students lacking foundational math skills. Student received interactive and individual teaching focused on his weaknesses in math. Student also received six hours per week of private home tutoring for the entire school year. In Student's first quarter, he earned an A in physical education, a C-plus in math, a C in science, F's in English and world history, and credit in his math support and enrichment class.

In October 2017, Parent left Student's guidance counselor, Vanessa Lopez, a message asking her to provide him email contact information for Student's teachers. When Ms. Lopez forwarded the requested teacher contact information to Mother instead of to him, Parent sent Ms. Lopez an email complaining about her failure to deal with him directly. Ms. Lopez responded that Parent should contact the school's principal instead of her with any future concerns. Parent replied he would do so, and stated all he asked was that High School assist Parent in teaching Student the required common core curriculum and build upon Student's strengths. The exchange between Parent and Ms. Lopez did not refer to special education or any possible assessment of Student.

Student finished the first semester of seventh grade earning an A in physical education, a C in math, a D in science, F's in English and world history, and credit in his

math support and enrichment class. Student's teachers attributed his academic difficulties to poor work habits, and a lack of motivation. At the start of Student's second semester, Ms. Lopez counseled Student regarding his behavior and his grades. She explained at hearing that Student was having trouble transitioning from the elementary school model of a single teacher for an entire day, to the middle school model with a different teacher for each subject. Student would become stressed and stop working on a subject if he fell behind by one or two assignments. Ms. Lopez counseled Student on the importance of completing and turning his assignments in on time, and gave Student a calendar to help him organize, track, and complete his assignments.

In addition to his academic difficulties, Student began displaying disruptive classroom behaviors, such as leaving his seat without permission, in fall 2017. In February 2018, Student sprayed cologne on other students in his math class, and a week later he punched another student who was annoying him. Bellflower suspended Student for three days. In April 2018, Student's horse-play with another student throwing rocks at each other led to Student being hit in the head with a rock. Parent and Bellflower discussed these incidents, but never discussed whether Student might have a disability that was interfering with his education.

Student was failing seventh-grade English and world history because he wasn't studying or turning in assignments, and had low test scores. Ms. Lopez was aware of Student's home tutoring, and gave Student printouts showing his missing assignments so he could work on them with his tutor. She also gave Student planning sheets to track his assignments, and she arranged for Student to meet with his teachers to identify his missing assignments and get extra-credit work to improve his grades.

Student finished seventh grade earning an A-plus in physical education, a D-plus in math, a C in science, F's in English and world history, and credit in his math support and enrichment class. Student's grade point average placed him at a class rank of 311 of the 393 students in his class. Student's world history teacher graded Student's citizenship and his work habits both as unsatisfactory, and commented that Student demonstrated an unsatisfactory use of his ability, lacked self-motivation, and was disruptive. Student's English teacher graded Student's citizenship and his work habits both as needing improvement, and commented that Student demonstrated an unsatisfactory use of his ability and was absent excessively.

Student's seventh grade math and math support and enrichment teacher, Heather Klingsporn, testified at hearing about the reasons for Student's poor math grades. On the positive side, Student had a curious mind, was interested in learning and solving math problems, and grasped math concepts quickly. On the negative side, Student struggled to follow through with completing and turning in assignments and homework on math concepts he initially understood, which interfered with him retaining what he'd learned. Student also had difficulty tracking his assignments and homework on a log that he was required to turn into Ms. Klingsporn at the end of each week. Student often lost or failed to turn in his log, which cost him credit and lowered his math grade. Finally, Ms. Klingsporn also attributed Student's poor math grades to difficult middle school math grading standards, which based 70 percent of a student's grade on test performance, a standard that led to a high failure rate in Ms. Klingsporn's class. Ms. Klingsporn did not suspect Student might have a disability, because he did not exhibit the large, hard-to-explain gaps in understanding, or mysterious struggles retaining information, that Ms. Klingsporn had observed in students she had previously referred for assessment.

In April and May, 2018, Student participated in California statewide standardized testing of student proficiency in English language arts and mathematics. Student did not meet state standards in any of the seven subject areas tested.

2018-2019 EIGHTH GRADE SCHOOL YEAR

Student continued at High School for eighth grade. On the second day of classes, August 21, 2018, Parent emailed Bellflower Superintendent Tracy McSparren regarding Student, requesting a meeting with Ms. McSparren and Bellflower's legal department. Parent expressed concern regarding racial discrimination and the failure of Student's counselor to respond to Parent's emails. Parent stated, "As the superintendent you're aware that my child is entitled to a free and public education."

Superintendent McSparren did not interpret Parent's email as requesting a special education assessment or expressing a concern that Student might have a disability. Ms. McSparren referred Parent's email to High School's principal, asking him to contact Parent to determine Parent's concerns.

Student's first quarter of eighth grade ended on October 5, 2018, without any significant behavior incidents, but with mixed results in his classes. Student earned a D-plus in physical education, a C-plus in math, an A in science, F's in English and U.S. history, a B in his elective graphics class, and a class rank of 358 out of 402 students. Student's citizenship in history needed improvement and his work habits were unsatisfactory. Student was disruptive, failed to turn in assignments and homework, and was in danger of failing the class. In English, Student's citizenship was satisfactory but his work habits were unsatisfactory. Student did not follow directions, failed to turn in assignments and homework, and was in danger of failing the class. Student's

citizenship in physical education and work habits needed improvement. Student did not participate in physical education and was in danger of failing the class.

Ms. Lopez counseled Student on October 5, 2018, about being disruptive and off-task in history class, requiring frequent redirection from the teacher, and preventing himself and the other students from learning. She told Student he was very smart and needed to make better choices. Student promised to work on his behavior and improve his grades.

On October 17, 2018, Parent emailed Superintendent McSparren, stating he was concerned about Student's safety and welfare in his physical education class. Parent requested a meeting with the school nurse and Student's counselor to "come up with some sort of accommodations on how to handle my son's disability." Ms. McSparren telephoned Parent the same day to discuss his email. Parent requested a student study team meeting for Student, and a meeting between Parent's attorney and Bellflower's attorney. Ms. McSparren emailed Parent shortly after their telephone conversation, providing contact information for Bellflower's attorney, and also asking whether the disability Parent referred to in his email was Student's asthma, or another suspected disability that Parent wanted Bellflower to consider and assess.

Ms. McSparren also asked staff to develop a proposed assessment plan for Student. The task was assigned to Bellflower school psychologist Abe Aryadad. Based on a review of Student's educational records, Mr. Aryadad prepared a special education assessment plan proposing to assess Student in the areas of academic achievement, health, motor development, social-emotional and behavior, and processing. On

October 18, 2018, Bellflower sent the proposed assessment plan to Parent and Mother. Parent and Mother did not immediately respond to the assessment plan.

On November 8, 2018, Student filed a due process hearing request naming Bellflower, in OAH case number 2018110378. Student alleged Bellflower failed in its child find obligations by failing to assess Student for special education, when Student's academic and behavior struggles indicated Student needed special education services.

Student finished his first semester of eighth grade earning a C in physical education, a D-minus in math, a B in science, a D-minus in English, and B's in history and his graphics class.

February 2019 Bellflower Psychoeducational Assessment of Student

On January 18, 2019, Parent returned a signed assessment plan to Bellflower, consenting to Bellflower's proposed assessments.

Mr. Aryadad assessed Student in February 2019. He completed a draft psychoeducational assessment report for Student's IEP team to discuss at an initial IEP team meeting to be held February 22, 2019. Mr. Aryadad concluded Student met criteria for special education under the eligibility category of specific learning disability, due to a weakness in processing speed that impacted Student's academic achievement in the areas of reading fluency, reading comprehension, written expression, and ability to perform math calculations.

Mr. Aryadad based his conclusions regarding Student's eligibility on:

- Student's history of academic struggles and general education interventions in reading, writing and math since third grade;

- Input from Student's current teachers that he continued to struggle in those subjects, and engaged in task avoidance when presented with work in them;
- Parent and teacher rating scales identifying Student's learning skills and study skills as areas of concern; and
- Tests that confirmed Student's deficits in phonological processing, auditory memory, basic reading skills, writing ability, and math calculation.

Mr. Aryadad also considered eligibility for Student under the category of other health impairment, based on Parent and teacher rating scales indicating that Student showed characteristics of attention deficit hyperactivity disorder. Mr. Aryadad concluded Student did not meet the criteria eligibility under this category, because observations and teacher interviews suggested Student was able to maintain focus for sustained periods of time. Student was not affected by impulsive urges that he could not control, or by heightened or limited awareness to stimuli in his environment. Mr. Aryadad instead concluded Student was engaging in off-task behavior to avoid tasks in areas affected by his processing deficit.

February 22, 2019 IEP Team Meeting

Student's initial IEP team meeting was held on February 22, 2019. Parent, Student's attorney, Bellflower's attorney, Mr. Aryadad, Student's general education history teacher, and others, attended. Mr. Aryadad presented his psychoeducational assessment. The IEP team, including Parent, ultimately found Student eligible for special education under the primary eligibility category of specific learning disability, and a secondary eligibility category of other health impairment based on attention deficit hyperactivity disorder-like characteristics. The IEP team then reviewed several proposed goals, and agreed to reconvene to complete Student's IEP.

March 19, 2019 IEP Team Meeting

Student's IEP team reconvened on March 19, 2019. The team discussed Student's placement and agreed Student would continue to attend High School in general education classes for all subjects except English and math. Student was offered special education services of 55 minutes daily of specialized academic instruction in each of those subjects, to be delivered in English and math classes co-taught by a special education teacher and a general education teacher. These classes offered Student increased individual attention and support compared to his general education classes. The IEP team also agreed on accommodations for Student including checking Student's understanding of information by having Student restate it, providing Student notes, outlines and instructions, extended time to complete tests and writing assignments, and use of a calculator and having exam questions read aloud during state testing.

Parent did not immediately consent to Student's March 19, 2019 IEP. Following the IEP, Student's teachers provided him some general education supports. For example, Student's history teacher, counseled and prompted Student to remain on-task, and provided Student scaffolding for his writing assignments by breaking them into steps and providing instruction and support for each step.

Private Psychoeducational Assessment of Student

In April 2019, Parent hired educational psychologist Marlen Barbee, Psy.D., to conduct a private assessment of Student. Parent asked Dr. Barbee to provide information regarding Student's psychological processing abilities, academic achievement, social-emotional and behavioral functioning, and recommendations for Student's placement and services.

Dr. Barbee documented her findings in a psychoeducational assessment dated August 20, 2019. Dr. Barbee's assessment results of Student's cognitive abilities, academic skills, and behavioral, social-emotional and adaptive functioning were consistent with Mr. Aryadad's results, except Student scored higher in math calculations in her testing than in Mr. Aryadad's, and Dr. Barbee did not identify math calculations as an area of academic deficit for Student.

Dr. Barbee agreed with Mr. Aryadad's determination that Student qualified for special education under the category of specific learning disability due to a deficit in processing speed, and under the category of other health impairment based on attention deficit hyperactivity disorder-like characteristics.

At hearing, Dr. Barbee was critical of Bellflower's failure to assess Student prior to Parent's request for assessment in eighth grade. In Dr. Barbee's opinion, Bellflower should have suspected Student had a disability as early as third grade, and certainly no later than seventh grade, based on his long-standing difficulties in reading, writing and math. These difficulties had not been remedied by the general education interventions Bellflower employed, and persisted every year through eighth grade.

Dr. Barbee believed if Bellflower had referred Student for assessment at any time after third grade, a trained school psychologist would have identified Student's processing and attention issues so Bellflower could address them. In Dr. Barbee's opinion, Student's teachers were mistaken when they blamed his failure to complete or turn in work on a lack of motivation or laziness. Dr. Barbee instead attributed these failures to Student's attention deficit disorder making it difficult for him to maintain focus, and his specific learning disability causing him to avoid difficult, stressful tasks.

Dr. Barbee opined Student would require extensive instruction to remediate his issues with attention, processing, and working memory, that Dr. Barbee and Bellflower both found when they assessed Student. Dr. Barbee recommended that Student should receive five hours each week of peer reviewed, research-based intervention for the next four years to address those areas of deficit. She recommended the Attention, Memory, and Processing Skills training program, and the Processing and Cognitive Enhancement training program, offered by Stowell Learning Center.

On May 6, 2019, Parent consented in writing to implement all parts of Student's IEP completed March 19, 2019. On May 29, 2019, Student dismissed OAH case number 2018110378, and filed this action. Student's grades in all his classes improved between February 2019 and the end of the school year in June 2019. Student's history grade improved from a C to a B, physical education from a B to an A, science from a C to a B, math from an F to a C, English from an F to a C-plus, and home arts from an F to a D. Student's class rank rose from 358th of 402 Students in his class, to 189th of 389 students.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

In the discussion herein, unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below. All references in this discussion to the Code of Federal Regulations are to the 2006 version.

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C.

§ 1400 et. seq.; 34 C.F.R. § 300.1 (2006) 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 FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel. This statement describes the child's needs, academic and functional goals related to those needs. It also provides a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the Individuals with Disabilities Education Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

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.” “[E]very child should have a chance to meet challenging objectives.” (*Ibid.*) *Endrew F.* explained “[t]his 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.) However, the Supreme Court did not define a new FAPE standard in *Endrew F.*, as the Court was “[m]indful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided, we decline to interpret the FAPE provision in a manner so plainly at odds with the Court’s analysis in that case.” (*Id.* at p. 1001.) The Court noted that “[a]ny 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 [italics in original].)

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, 537.)

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.) 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. (20 U.S.C. § 1415(f)(3)(C), (D).)

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) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student requested the hearing in this matter, and therefore Student has the burden of proof on the issues.

ISSUE ONE: CHILD FIND

Student contends Bellflower failed to meet its child find obligations to Student during the two years prior to the complaint, because Bellflower failed to identify Student as potentially requiring special education and assess him for eligibility, despite Student's academic and behavioral problems. Bellflower contends Student's academic performance and behavioral issues gave Bellflower no reason to suspect that Student

might be an individual with a disability needing special education, and that Bellflower therefore was not required to assess him. Bellflower also asserted at hearing and in its closing brief that Parent was rude in his communications with staff, but did not contend Parent's conduct affected Bellflower's ability to fulfill its child find obligations to Student.

The IDEA places an affirmative, ongoing duty on the state and school districts to identify, locate, and assess all children with disabilities residing in the state who are in need of special education and related services. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); Ed. Code, § 56301, subd. (a).) This duty is commonly referred to as "child find." The purpose of the child find evaluation is to provide access to special education. (*Fitzgerald v. Camdenton R-III School Dist.* (8th Cir. 2006) 439 F.3d 773, 776.)

A school district's duty to assess a student's eligibility for special education is triggered by any request for special education or assessment from the student's parent. (Cal. Code Regs., tit. 5, § 3021(a).) Additionally, a school district still has a child find duty even if the parent has not requested special education testing or services. (*Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.)

A district's duty to assess a child for a possible disability is broader than its duty to provide special education, and more easily triggered. A school district's child find obligation toward a specific child is triggered when there is reason to suspect the child may have a disability, and may need special education and related services. (Ed. Code, § 56301, subd. (a).) The Education Code describes such a child as "an individual with exceptional needs." (Ed. Code, § 56026.) The obligation to assess for possible exceptional needs applies even if the child is advancing from grade to grade. (Ed. Code, § 56301, subd (b)(1).)

A disability becomes “suspected,” and therefore must be assessed by a school district, when the district has notice that the child has displayed symptoms of that disability. (*Timothy O. v. Paso Robles Unified School Dist.*, 822 F.3d 1105, 1119-20 (9th Cir. 2016), cert. denied, 137 S. Ct. 1578 (2017) (*Timothy O.*) A district may be put on notice through concerns expressed by parents about a child’s symptoms, opinions expressed by informed professionals, or by other less formal indicators, such as the child’s behavior. (Id. at pp. 1119-1121 [citing *Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796, and *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202].)

In deciding whether there is reason to suspect that a student has exceptional needs, a school district’s appropriate inquiry is whether the student should be referred for an assessment, not whether the student actually qualifies for special education services. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1195 (*Cari Rae S.*.) School districts cannot rely on informal observations, or the subjective opinion of a staff member, to circumvent the district’s responsibility to use the thorough and reliable procedures specified in the IDEA to assess a child in all areas of suspected disability. (*Timothy O., supra*, 822 F.3d at p. 1119.) Thus, the suspicion that a student might have an impairment affecting the student’s educational performance is sufficient to trigger a need for assessment. (See, e.g., *Park v. Anaheim Union High School Dist.*, et al. (9th Cir. 2006) 464 F.3d 1025, 1032 [“The District is not required to assess double vision or optic nerve damage if it does not affect a child’s educational needs”], citing Ed. Code, § 56320.)

If a district suspects a student may have a disability affecting the student’s education, it may not delay assessing the student on the basis that it is first trying general education interventions to accommodate the student in the regular education program. (Office of Special Education Programs (OSEP) *Memorandum to*

State Directors of Special Education (January 21, 2011) 56 IDELR 50.) However, Congress mandated that states develop effective general education teaching strategies and positive behavioral interventions to assist students with disabilities, without automatically defaulting to special education. (20 U.S.C. § 1400(c)(5)(f).) Therefore, once a district has assessed a student and found a disability, it should only refer the student for special education instruction and services after it has considered whether the student's needs may be addressed by the resources of the district's regular education program, and utilized general education interventions, if appropriate. (*Los Angeles Unified School District v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 819-820, citing Ed. Code, § 56303.)

Violations of a district's child find duties, and of the obligation to assess a student, are procedural violations of the IDEA and the Education Code. (*Cari Rae S., supra*, 158 F.Supp. 2d 1190 at p.1196); *Park v. Anaheim, supra*, 464 F.3d 1025 at p. 1031.) In *Rowley*, the Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. 176 at pp. 205-06.) However, a procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in liability for denial of a FAPE only if the violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) (*Target Range*.)

The evidence in this case established that Bellflower had notice that Student had displayed characteristics of a specific learning disability and attention deficit hyperactivity disorder, and thus needed to be assessed, at all times within the two-year statute of limitations period before Student filed his complaint on May 29, 2019.

Student attended Bellflower schools since kindergarten, and possible issues with his attention and processing speed were evident throughout Student's educational history contained in his report cards and other educational records, and available for review by Bellflower personnel. These records showed Student started his schooling smart, eager to learn, and capable of meeting or exceeding the academic standards for all of his subjects from kindergarten through second grade. Student began to struggle academically in third grade. Although he continued to work hard, he struggled to meet grade standards for reading, writing and math, and was at risk of retention.

Bellflower recognized Student needed support, and provided him general education academic interventions. Student responded to these interventions, and passed third grade, but his academic performance gains were temporary, and the interventions did not remediate whatever underlying problems were causing Student's academic difficulties. Student continued to struggle in fourth grade. His teacher commented he lacked confidence in his abilities, was afraid to get started on his assignments, especially in writing, and was not completing his class assignments and homework.

In fifth grade, Student was again at risk of not meeting state academic standards in reading comprehension, writing, and math, and at risk of retention. Bellflower again recognized Student needed support, and again provided general education academic interventions. Student responded well to the interventions. He worked hard throughout the year on his academic subjects and his study skills, and was a pleasure to have in class. He ended fifth grade coming to school every day ready to work, genuinely excited to learn new things, and meeting standards in every academic subject area except reading literature.

In sixth grade, without interventions, Student's academic performance and grades fell, despite his satisfactory effort in his academic subjects. In his first trimester, Student's teacher noted his trouble with math and reading comprehension, his tendency to be distracted in class, and his difficulties following rules and directions, exercising self-control, and accepting responsibility for his behavior. Student finished sixth grade not meeting academic standards in eight of his ten subject areas.

During sixth grade, and before, Student had shown himself to be an intelligent, motivated child. He displayed symptoms of a possible processing disorder, such as difficulty with math and reading comprehension, and symptoms of possible attention deficit disorder, including his tendency to be distracted in class, and difficulty following rules and directions, exercising self-control, and accepting responsibility for his behavior.

Under *Timothy O.*, *supra*, 822 F.3d at pages 1119-1120, Bellflower should have suspected by May 29, 2017, that Student might have disabilities requiring assessment in the areas of processing and attention. His sixth grade teacher, however, did not refer him for special education assessment, because she believed Student's academic struggles were due to a lack of motivation rather than a disability or disabilities affecting his educational performance. Bellflower thus allowed the subjective opinion of a staff member to circumvent its responsibility to thoroughly assess Student, which resulted in a procedural violation of the IDEA and Education Code. Bellflower did not rectify that violation until October 2018 when it offered Parent an assessment plan.

Student's difficulties did not decrease in his 2017-2018 or 2018-2019 school years. Instead, the frequency of Student's problems with work completion, task avoidance, and disruptive behaviors increased. Based on their teaching experiences, Student's teachers continued to attribute his academic struggles to lack of motivation

without considering the possibility of any disability. However, when Mr. Aryadad reviewed Student's educational history, he quickly identified Student's processing and attention as potential areas of disability, and focused on them in Bellflower's October 18, 2018 assessment plan for Student.

Student demonstrated by a preponderance of the evidence that Bellflower failed in its child find obligation to Student by failing to identify him as potentially having a disability requiring special education, and therefore in need of assessments to determine eligibility, from May 29, 2017 until October 18, 2018, when it provided Parent an assessment plan. Student also demonstrated that, if he had been appropriately assessed any time during that period, he would have been found eligible for special education and related services. As a result of its procedural violation, Bellflower significantly impeded Parent's opportunity to participate in the decision-making process, and deprived Student of educational benefits.

ISSUE TWO: FAILURE TO ASSESS FOLLOWING PARENT'S AUGUST 21, 2018

EMAIL

Student contends Bellflower denied Student a FAPE by failing to provide Parent a special education assessment plan for Student within 15 days of receiving Parent's August 21, 2018 email to Superintendent McSparren. Student characterizes the email as a request for assistance to get Student an IEP. Bellflower contends it had no obligation to provide Parent an assessment plan because Parent's August 21, 2018 email did not request a special education assessment.

The issue of whether Bellflower should have initiated an assessment of Student in response to Parent's August 21, 2018 email is of no practical significance, because it was

determined in Issue One that Bellflower should have initiated an assessment earlier, as of May 29, 2017. Bellflower was found in Issue One to be in breach of its child find duty to assess, continuously from May 29, 2017 until October 18, 2018, when Bellflower provided Parent an assessment plan. A determination that Bellflower was required as of August 21, 2018 to assess Student on a second legal ground would not change the scope of Bellflower's liability or Student's remedy. Issue Two is therefore moot, and is not decided.

REMEDIES

Student prevailed on Issue One. As a remedy for Bellflower's failure to assess Student, Student's complaint requested an Order from OAH directing Bellflower to fund an independent educational evaluation, and fund 240 hours of compensatory education from a non-public agency. Student's closing brief requested an Order from OAH directing Bellflower to fund 696 hours of compensatory education by Stowell Learning Center, calculated based on District's offer of 550 minutes per week of specialized academic instruction in Student's IEP. Student also requested that OAH order Bellflower to reimburse Parent \$5,000 for Dr. Barbee's psychoeducational assessment of Student and allow Dr. Barbee to fully complete her assessment of Student and present her results at an IEP team meeting,

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 (*Puyallup*).) 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. at p. 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.)

REMEDY - COMPENSATORY EDUCATION

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d. at p. 1496.) This authority extends to hearing officers. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, fn. 11, 129 S.Ct. 2484.) These are equitable remedies that courts and hearing officers may employ to craft "appropriate relief" for a party. (*Puyallup* at p. 1496.) Compensatory education seeks to make up for educational services the child should have received in the first place, and aims to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA. (*R.P. ex rel. C.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1125, citing *Reid ex rel. Reid v. Dist. of Columbia* (D.C.Cir.2005) 401 F.3d 516, 518) (*Reid*); see 20 U.S.C. § 1415(i)(2)(C)(iii).) A compensatory education award need not provide "day-for-day compensation." (*Puyallup* at p. 1497.) An award compensating for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid, supra* at p. 524.) The award must be fact-specific. (*Ibid.*)

If Bellflower had provided Parent a proposed assessment plan on May 30, 2017, and Parent had returned the signed plan the following day, Student's initial IEP team meeting would have been due to be held on October 13, 2017, excluding the days

between the end of the 2016-2017 school year and the start of the 2017-2018 school year. If Parent had returned Bellflower's October 18, 2018 assessment plan the following day, Student's initial IEP would have been due to be held on December 16, 2018. Bellflower's failure of its child-find obligation thus denied Student approximately 230 school days, or 46 school weeks, of special education and related services.

Student's March 19, 2019 IEP provided Student support in English and math, through 55 minutes daily of specialized academic instruction in each of those subjects, delivered in classes co-taught by a special education teacher and a general education teacher. These classes provided Student increased individual attention and support, similar to the general education interventions Student had received in third, fifth and seventh grades. Those prior interventions had improved Student's academic performance at the time Student was receiving each intervention, but the improvement had not persisted once the intervention ended.

Dr. Barbee did not recommend additional specialized academic instruction as compensatory education. Instead, based on the findings of her private psychoeducational assessment of Student, Dr. Barbee recommended Student participate in peer reviewed, research-based intensive training programs designed to help him address his underlying deficits in the areas of attention, processing, and working memory. In her assessment report, Dr. Barbee specifically recommended the Attention, Memory, and Processing Skills training program, and the Processing and Cognitive Enhancement training program, offered by Stowell Learning Center. Dr. Barbee's assessment report did not offer an opinion on the amount of training Student needed.

At hearing, Dr. Barbee estimated Student would require five hours per week of training for four years, to overcome deficits unaddressed from third through eighth grade. Dr. Barbee did not explain how she calculated this amount, which was in any event overstated because it was based, in part, on four years of Bellflower's conduct, from third through sixth grade, that occurred outside the statute of limitations. However, based on the 550 minutes per week of specialized academic instruction in English and math provided in Student's IEP, a calculation based on 90 minutes per week of the more intensive one-on-one training programs recommended by Dr. Barbee is appropriate. Bellflower shall fund a total of 69 hours (46 weeks x 90 minutes per week) of compensatory education to address Student's deficits in the areas of attention, processing, and working memory. The compensatory education shall be the Attention, Memory, and Processing Skills training program, and the Processing and Cognitive Enhancement training program, recommended by Dr. Barbee, or, alternatively, similar peer reviewed, research-based training programs mutually agreeable to the parties. Training shall be provided by Stowell Learning Center, or, alternatively, one or more other certified non-public agencies mutually agreeable to the parties. Parent shall have sole discretion to allocate the 69 hours of compensatory education among the selected training programs. Unless otherwise agreed by the parties, Student shall have two years from the date of this decision to access the compensatory education awarded.

REMEDY – PRIVATE ASSESSMENT

A student may be entitled to an independent educational evaluation at public expense when a parent disagrees with an evaluation previously obtained by the public agency. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c).) Parents may also be awarded reimbursement for a private assessment as an equitable remedy in certain circumstances, such as where they

obtained a private assessment to determine their child's needs because the district failed to conduct an assessment within a reasonable time.

Neither of these bases for recovery applies here. Student hired Dr. Barbee after Bellflower assessed Student, and Student did not claim in this action that Bellflower's assessment was inappropriate. Parent engaged Dr. Barbee as an expert to conduct a private psychoeducational assessment of Student and testify in pending litigation, and Dr. Barbee's assessment did not reveal any significant hidden flaws in Bellflower's assessment. There are no grounds in law or equity to require Bellflower to order reimbursement of the cost of Dr. Barbee's assessment, and the request for reimbursement is denied.

Student's request for an OAH Order directing Bellflower to allow Dr. Barbee to fully complete her assessment of Student and present her results at an IEP team meeting seeks a remedy for legal claims not raised in Student's complaint. Student's request is therefore denied.

ORDER

1. Bellflower shall fund a total of 69 hours of compensatory education to address Student's deficits in the areas of attention, processing, and working memory.
 - a. The compensatory education shall consist of training of Student using the Attention, Memory, and Processing Skills training program, and the Processing and Cognitive Enhancement training program, or, alternatively, similar peer reviewed, research-based training programs mutually agreeable to the parties.

- b. Student's training shall be provided by Stowell Learning Centers, or, alternatively, by one or more other certified non-public agencies mutually agreeable to the parties.
 - c. Parent shall have sole discretion to allocate Student's 69 hours of compensatory education among the selected training programs.
 - d. Unless otherwise agreed by the parties, Student shall have two years from the date of this decision to access the compensatory education awarded.
2. All other claims for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issue One. Issue Two was mooted and therefore not decided.

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: November 14, 2019

/s/

Robert G. Martin
Administrative Law Judge
Office of Administrative Hearings