

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2019090129

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PARENT ON BEHALF OF STUDENT,

v.

CHAFFEY JOINT UNION HIGH SCHOOL DISTRICT.

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DECISION

OCTOBER 9, 2020

On September 3, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Chaffey Joint Union High School District. By Order dated January 6, 2020, Student was permitted to file an amended complaint. At a prehearing conference on February 21, 2020, the matter was continued for good cause.

Administrative Law Judge June R. Lehrman heard this matter via videoconference on June 16-18, 2020, June 23-25, 2020, July 7, 2020, July 9, 2020, July 21-22, 2020, July 28-30, 2020, August 4-6, 2020, August 11-13, 2020, and August 18 and 19, 2020. Tania Whiteleather, attorney at law, represented Student. Father attended on Student's behalf. Tiffany Santos and Joshua Walden, attorneys at law, represented Chaffey. Special Education Director Kelly Whelan, and Dr. Royal Lord, program manager for the West End Special Education Local Plan Area, attended on Chaffey's behalf. At the parties' request, the matter was continued to September 10, 2020, September 24, 2020 and October 2, 2020 for written closing briefs. The record was closed, and the matter was submitted on October 2, 2020.

## ISSUES

1. After September 3, 2017, did Chaffey deny Student a free appropriate public education, referred to as a FAPE, by failing to timely review all of the outstanding independent educational evaluations as part of creating an individualized education program, known as an IEP, for the 2017-2018 school year?
2. After September 3, 2017, did Chaffey deny Student a FAPE by failing to timely complete and review the adapted physical education assessment pursuant to Parent's consent in July 2017?
3. Did Chaffey deny Student a FAPE by failing to timely complete the adapted physical education assessment pursuant to Parent's consent in October 2018?
4. Did Chaffey deny Student a FAPE by failing to conduct an assistive technology assessment as part of Student's 2018 IEP triennial review?
5. Issue 5 was withdrawn.
6. Issue 6 was withdrawn.

7. Did Chaffey deny Student a FAPE in the 2018 annual IEP by failing to develop measurable annual goals, specifically goals based on appropriate baselines in areas of need which could be implemented?
8. Issue 8 was withdrawn.
9. Between September 3, 2017 and the date the amended complaint was filed, did Chaffey deny Student a FAPE
  - a. By failing to address Student's lack of progress and regression in the area of speech and language identified in the 2017 Abby Rozenberg evaluation report, including by failing to offer appropriate speech and language services in the IEP developed at the November 2017 team meeting?
  - b. By failing to address Student's lack of progress and regression in the area of speech and language identified in the 2019 Susan Hollar evaluation report, including by failing to offer appropriate speech and language services in the IEP developed at the May 2019 IEP team meeting?
10. Issue 10 was withdrawn.
11. Did Chaffey deny Student a FAPE in the area of occupational therapy since September 3, 2017
  - a. By failing to address Student's sensory needs by providing services in a specialized therapy room or consultation services with a qualified individual?
  - b. By reducing Student's clinical occupational therapy services in the May 2019 IEP?
12. Issue 12 was withdrawn.
13. After September 3, 2017, did Chaffey deny Student a FAPE by failing to timely and appropriately give prior written notice to Parent when it refused to implement the

services recommended by the independent educational assessors, specifically Susan Hollar, Robin Morris, Bea Braun, and Cherie Francis-Boegeman?

14. Between September 3, 2017 and the date the amended complaint was filed, did Chaffey deny Student a FAPE by failing to accurately report his grades, specifically, by reporting that Student was completing grade or near-grade level curriculum and giving him "A" grades?

The amended complaint contained 15 numbered issues. At the February 21, 2020 prehearing conference and the June 8, 2020 prehearing conference, one issue was dismissed and the remaining 14 issues were re-organized and re-numbered. On June 10, 2020, and June 17, 2020, Student withdrew issues 5, 6, 8, 10 and 12, leaving only the remaining issues 1, 2, 3, 4, 7, 9, 11 (a) and (b), 13 and 14, to be determined in this hearing. Because the hearing record contains numerous references to the issues as so numbered, this Decision retains that numbering.

In addition, issue 9 has in this Decision been renumbered into issues 9(a) and 9(b), each pertaining to distinct IEP's. This clarification is consistent with *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090.

## JURISDICTION

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.) All future references to the Code of Federal Regulations are to the 2006 version, unless

otherwise noted. The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

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

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 FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student had the burden of proof on all issues presented. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 17 years old and in 11th grade at the time of hearing. Student resided within Chaffey's geographic boundaries at all relevant times. Student was eligible for special education under the category Autism.

ISSUE 1. AFTER SEPTEMBER 3, 2017, DID CHAFFEY DENY STUDENT A FAPE BY FAILING TO TIMELY REVIEW ALL OF THE OUTSTANDING INDEPENDENT EDUCATIONAL EVALUATIONS AS PART OF CREATING AN IEP FOR THE 2017-2018 SCHOOL YEAR?

Student contends that when Student transitioned into Chaffey from prior school district Etiwanda in or around August 2017, at the beginning of the 2017-18 school year, Chaffey denied him a FAPE by failing to timely review independent educational evaluations, known as IEE's, that had been conducted while Student was attending Etiwanda. Specifically, Student contends Chaffey failed to timely review speech and language IEE's that had been conducted by assessor Abby Rozenberg on or around January 17, 2016 and January 18, 2017, and occupational therapy IEE's conducted by Suzanne Smith-Roley on or around February 16, 2016 and January 3, 2017. Student's closing argument also mentioned IEE's by Dr. Eckman and Dr. Ballinger. Despite explicit instruction to specify with exact clarity the precise IEE's that are at issue, Student's closing argument also mentioned "two others." The "two others" might refer to an assistive technology assessment performed by Cindy Cottier on or around March 30, 2016, a psycho-educational IEE conducted by Chris Davidson on or around January 7, 2017, and/or a central auditory processing evaluation conducted by audiologist Bea Braun on or around November 8, 2017. Chaffey contends that it timely reviewed all the IEE's at IEP team meetings as soon as possible following upon Student's enrollment into Chaffey, during the first part of the 2017-18 school year.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP, for

an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000].)

In the event of a procedural violation, a denial of FAPE may only be found if that the procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subds. (f)(2) & (j).)

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(b).) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP team meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693-5; *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. Except as provided by law, hearsay evidence is inadmissible. (Evid. Code, § 1200.) In administrative proceedings, hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (Gov. Code, § 11513.)

Student has failed to establish the lack of timely review of the IEE's. On June 23, 2017, while Student was still with Etiwanda and was about to transition into high school for the 2017-18 freshman ninth grade year, Chaffey convened a transition IEP team meeting. The IEP stated that the team would reconvene to review IEE's that had been completed but not yet presented to Chaffey. During the 2017-18 school year, eight more IEP team meetings occurred on July 31, 2017, August 31, 2017, September 25, 2017, October 26, 2017, November 1, 2017, January 18, 2018, February 20, 2018 and May 3, 2018. Student argues that Chaffey was required to hold an IEP team meeting within 30 days of parental request. Chaffey did so here.

Dr. Davidson's psychoeducational IEE was timely reviewed on August 31, 2017. This was the only IEE in Chaffey's possession by that time. Student failed to present any evidence as to when the other IEE's were provided to Chaffey, so failed to establish that they were not timely reviewed upon receipt. Student also concedes in his closing brief that there are no legally-mandated timelines regarding the review of an IEE.

Dr. Eckman's IEE was reviewed on September 25, 2017. Suzanne Smith Roley's occupational therapy evaluations were reviewed on October 26, 2017. Abby Rozenberg's speech and language IEE's were reviewed on November 1, 2017. These IEP team meetings



all occurred during the first semester of the school year and provided timely review of those IEE's after Student's enrollment. Bea Braun's audiology report was not even completed until November 8, 2017 and was timely reviewed shortly thereafter on January 18, 2018.

Chaffey worked diligently to schedule IEP team meetings with the independent assessors and held multiple meetings to accommodate their schedules. The reviews were all timely in light of the assessors' availability. The number and timing of the IEP team meetings Chaffey convened, given that there is no specific procedural law cited regarding the timeliness of review of IEE's, was reasonable. Thus, there was no procedural violation. Student argues that the attendance of the independent assessors at the IEP team meetings to review their reports was not legally required so long as knowledgeable other people attended who could interpret the reports. However, it was assuredly not a denial of FAPE to ensure the IEE assessors' attendance, nor to schedule the IEP meetings as soon as was reasonably possible in order to do so.

Even if the reviews were untimely, which they were not, Parent has not established any resultant harm. Not all procedural violations are of legal consequence. (20 U.S.C. § 1415 (f)(3)(E)(i) & (ii) ; Ed. Code, § 56505, subds. (f) & (j) [decision cannot be based solely on a non-substantive error unless the error resulted in the loss of an educational opportunity or interfered with parental participation in the IEP process].)

Student failed to establish that his right to a FAPE was impeded, or that he was deprived of any educational benefits, for the following reasons. First, Chaffey offered and implemented the most important services recommended in the IEE's concerning speech and language, and occupational therapy. Suzanne Smith-Roley recommended

occupational therapy using a sensory integrative approach for two hours a week in a clinical setting, and this type, frequency and duration of service was offered at the October 26, 2017, IEP team meeting. The evidence established that the same level of service had been offered earlier, at or before the July 31, 2017, IEP, and provided since then.

Abby Rozenberg recommended two hours of speech therapy per week, and this was offered at and before the November 1, 2017 IEP team meeting and implemented with Parent's consent.

To the extent any of the IEE assessors' recommendation were not offered, Student failed to put on any competent evidence that the recommendations were necessary or appropriate. Not all the IEE assessments, specifically Eckman's and Ballinger's, were even introduced into evidence. For those that were in evidence, specifically Smith-Roley's, Rozenberg's, Cottier's, Davidson's and Braun's, they were admitted as unauthenticated hearsay evidence only. The documents were admitted to prove that the assessments had occurred, and to establish the timing of when they were reviewed at IEP meetings. No foundation was laid for their contents, the truth of their assertions, or the appropriateness of their findings, results or conclusions. None of these IEE assessors was called to testify. The assessors' qualifications, procedures, protocols, results and recommendations were not established, nor subject to examination or cross-examination. The mere existence of an IEE does not, without appropriate foundation for its contents, prove that it made appropriate recommendations. For these reasons, Student has failed to establish that failure to adopt the assessors' recommendations impeded Student's right to a FAPE, or deprived Student of educational benefits.

In terms of the third type of possible resultant harm from procedural violations, Parent was not denied an opportunity to participate in the development of Student's

educational program. Father, at hearing, acknowledged that he was always given an opportunity to supply his input and it was made part of the record in the IEP's. He consistently made written comments to IEP's either in handwriting with his signatures or by detailed typed comments. For example, Father submitted three pages of detailed typed comments after the June 23, 2017 meeting, four pages of detailed typed comments after the July 31, 2017 and August 31, 2017 meetings, handwritten notes on the signature pages of the September 25 and October 26, 2017 IEP's explaining what he was and was not consenting to and why, and six pages of detailed typed comments to the January 18, 2018 IEP team meeting. He cordially and frequently communicated with Chaffey's staff, even when disagreeing with them, concerning topics that included Student's present levels, goals, grades and reading levels, and the timing and scheduling of IEP's and IEE's. Father's advocate Chris Russell attended every IEP team meeting except for February 20, 2018. For the past three school years, Father was advised by an attorney and two educational consultants. Father attended all the IEP team meetings. Each IEP team meeting lasted at least two hours, and some went beyond four hours. Father was able to invite participants such as service providers and IEE assessors, who did attend. Notice of procedural safeguards was provided each school year. At each IEP team meeting, Father shared his thoughts and questioned Chaffey's staff. Father reviewed the notes of each IEP team meeting at the end of the meeting. The evidence clearly and unequivocally established ample parental participation.

For all the above reasons, Student failed to establish any of the elements of issue 1.

ISSUES 2 AND 3. AFTER SEPTEMBER 3, 2017, DID CHAFFEY DENY STUDENT A FAPE BY FAILING TO TIMELY COMPLETE AND REVIEW THE ADAPTED PHYSICAL EDUCATION ASSESSMENT PURSUANT TO PARENT'S CONSENTS IN JULY 2017 AND OCTOBER 2018?

Student contends that Parent signed an assessment plan for an assessment in the area of adapted physical education, known as APE, on or around July 31, 2017 and then again on October 23, 2018, but that Chaffey never conducted an APE assessment. Chaffey contends that there was no denial of FAPE because it conducted an APE assessment in December 2017, and that in any event Student was provided appropriate APE services during his entire time at Chaffey.

A reassessment of a student who is receiving special education and related services must occur at least once every three years unless the parent and the school district agree that such a reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) Reassessments require parental consent. (34 C.F.R. § 300.300(c)(1)(i); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent for a reassessment, the school district must provide proper notice to the parent. (20 U.S.C. §§ 1414(b)(1); 34 C.F.R. § 300.300 (c); Ed. Code, §§ 56321, subd. (a), 56329.) The notice consists of a proposed written assessment plan describing any evaluation procedures the district proposes to utilize and a copy of the procedural safeguards under the IDEA and state law. (20 U.S.C § 1414(b)(1); 34 C.F.R. § 300.304(a); Ed. Code, § 56321, subd. (a).) The assessment must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school vacations in excess of five school days, unless the parent consents in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c); Ed. Code, §§ 56043, subds. (f)(1), 56302.1, subd. (a), and 56344, subd. (a).)

A local educational agency must assess a special education student in all areas of suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) A local educational agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. (20 U.S.C. § 1414(b)(2)(A).) No single measure or assessment shall be the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) The assessments used must be selected and administered so as not to be discriminatory on a racial or cultural basis, provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, used for purposes for which the assessments are valid and reliable, and administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b)(3)(A)(v); Ed. Code, §§ 56320, subds. (a) & (b).) Individuals who are both knowledgeable of the student's disability and competent to perform the assessment, must conduct assessments of students' suspected disabilities. (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code §§ 56320, subd. (g); 56322.) Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304(c)(6).) The local educational agency must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) A school district's failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural denial of a FAPE. (*See Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031-1032.) The failure to obtain critical

assessment information about a student, renders the accomplishment of the IDEA's goals -- and the achievement of a FAPE -- impossible. (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1210 [quoting *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 894].)

Here, Student has established a denial of FAPE as a result of Chaffey's failure to conduct an appropriate APE assessment. Student's APE needs were acknowledged at the first June 23, 2017 transition IEP team meeting. At that IEP, Student's prior middle school APE teacher reported his present levels and recommended an APE assessment. Chaffey offered an APE assessment, with a proposed APE assessment plan attached to the IEP document. The team also wrote an APE goal and offered Student 450 yearly minutes of APE services within a general education physical education class. Father credibly testified that he signed the assessment plan at the next IEP team meeting on July 31, and left it with Chaffey, but did not make a copy.

It appears that the signed assessment plan fell through the cracks at Chaffey. On December 15, 2017, Chaffey's APE teacher Lori Freers nevertheless conducted an informal, one-period assessment of Student by observation only. Chaffey provided no explanation at hearing for what prompted this. Freers did not see the signed assessment plan. She did not review any documents. She was unaware whether Student had had APE services in the past. She was unaware of the offer that had been made for APE services in the June 23, 2017 or July 31, 2017 IEP's. At hearing, Freers acknowledged that her observation was not a formal assessment, did not involve protocols with specific activities nor did she make a record of the results, or perform any standardized tests. She watched Student in his

general education physical education class. At hearing, she acknowledged that her assessment would not have been a sufficient source of information from which to generate baselines or goals.

Freers generated a one-page report. She concluded Student was eligible for APE and would fit in well with her modified physical education class, a smaller class catering to students who required more individualized attention. At an IEP team meeting on January 18, 2018, Freers shared her observations and recommendations. At that meeting, the team determined that Student should remain in the general education physical education class, with 15 minutes of weekly consult between Freers and the general education physical education teacher.

On April 23, 2018, Chaffey generated, and Father consented to Chaffey's three-year triennial assessment plan, which did not propose an APE assessment. At hearing, Freers acknowledged that APE was a known area of need for Student at that time.

On May 3, 2018, an annual IEP team meeting was convened for the 2018-19 school year. Freers again recommended the modified class, as she believed Student needed a smaller setting to work on his APE goal. After team discussion, Student remain in general education physical education, but with an increase in APE consult services to 55 minutes weekly, with comments that the APE and physical education teacher would collaborate to ensure skill acquisition and safety. At the May 3, 2018 IEP team meeting, Freers proposed and the team adopted an annual APE goal that stated when a new sport was introduced to Student, he would acquire the basic skills, such as batting, catching, or throwing, to participate in the activity with his peers 80 percent of the time. In the absence of an

assessment, the goal was based solely on her observations in December 2017. At hearing, Freers could not specify which skills were being targeted by this goal.

After the May 3, 2018 IEP team meeting, Father emailed Chaffey to request a copy of the APE assessment plan that he had signed the previous year.

On October 18, 2018, the first of several IEP team meetings occurred as part of Student's triennial review. Freers wrote an informal progress report dated October 18, 2018, based upon her consult sessions with the general education physical education teacher.

At or around the time of the October 18, 2018 IEP, Father again asked for a copy of the signed APE assessment plan from the previous year. Chaffey could not locate the signed assessment plan. Staff located an unsigned copy of the June 23, 2017 proposed assessment plan and gave it to Father. Father signed it, again, on October 23, 2018 and provided this to Chaffey. Chaffey, however, took no further action to conduct an APE assessment. Freers did not see the assessment plan, either before or after Father re-signed it on October 23, 2018. At the final triennial IEP meeting the next January, Chaffey offered an APE goal and an offer of services, both of which were carried over from the May 3, 2018 IEP without change. No APE assessment had been done as part of the triennial assessments, nor in response to Father's October 23, 2018 re-signing of the prior year's APE assessment plan.

Freers provided nominal APE services to Student during the 2018-19 and 2019-20 school years as part of her consultation minutes. But, at hearing Freers' recollections were vague as to the content of her services. Student was enrolled in general education physical education and she served him intermittently during class. Her statement that she worked



on breaking down the skills so Student could have more success in activities was ambiguous, lacked detail or examples, and in light of her poor recollection, was not credible or persuasive evidence that she provided meaningful APE services to Student.

Student prevailed on issues 2 and 3. On July 31, 2017 and October 23, 2018, Parent provided written consent to an APE assessment plan. Chaffey failed to conduct an assessment within 60 days of either date. Freers' December 2017 informal assessment was not IDEA-compliant. It did not use a variety of assessment tools and strategies and was not sufficiently comprehensive to identify all of the Student's service needs. It was admittedly not sufficient to generate goals. The goals and services that were generated at the May 2018 annual were haphazardly developed, based on informal observations only, without any basis in proper assessment information, and were carried over identically to the next IEP triennial offer. The procedural violation of failing to conduct an appropriate APE assessment, at any time and despite Student's acknowledged needs in this area, significantly impeded the parent's opportunity to participate in the decision-making process, and likely caused a deprivation of educational benefits.

The June 23, 2017 transition and July 31, 2017 IEP's offered 450 yearly minutes of APE services. However, without a formal APE assessment, Chaffey changed Student's APE services at the January 18, 2018, IEP, and offered 15 minutes weekly consult between Freers and the general education physical education teacher. Then, the May 3, 2018 IEP offer increased APE services to 55 minutes weekly. There was no explanation or justification presented at hearing for why any of these offers was appropriate. For these reasons Student prevails on issues 2 and 3. Remedies are discussed below.

#### ISSUE 4. DID CHAFFEY DENY STUDENT A FAPE BY FAILING TO CONDUCT AN ASSISTIVE TECHNOLOGY ASSESSMENT AS PART OF STUDENT'S 2018 IEP TRIENNIAL REVIEW?

Student contends that assistive technology, referred to as AT, was an area of recognized need for Student that Chaffey failed to assess as part of its triennial evaluations in the fall of 2018. Chaffey contends that Student was assessed by private independent AT assessor Cindy Cottier in 2016, and her recommendations were incorporated into his IEP's, so he did not require an additional AT assessment. Chaffey also contends that the IDEA does not in all circumstances demand that AT needs be assessed, and that Parent waived an AT assessment at the May 7, 2019 IEP team meeting.

The IDEA requires each public agency to ensure that AT devices and services are made available to each child with a disability if such devices or services are required as part of the child's special education, related services, or supplementary aids and services. (34 CFR 300.105 (a).) Districts are required to provide AT devices or services to a student with a disability if the participants on the student's IEP team determine that the student needs such a device or service in order to receive FAPE. As part of the IEP-development process, the IEP team must consider whether the child needs AT devices and services. (34 CFR 300.324 (a)(2)(v).) To determine whether, and what AT is necessary for a student to receive a FAPE, the district may need to conduct an evaluation of the student's specific needs. Students are entitled to an individual evaluation to determine whether they require AT devices or services for FAPE. (*Letter to Fisher*, 23 IDELR 565 (OSEP 1995).)

In 2016, while Student was at Etiwanda, independent AT assessor Cindy Cottier assessed Student and recommended a laptop or Chromebook, use of the Co-Writer and

Snap & Read programs to assist with reading and writing, and use of a program to acquire typing skills. The June 23, 2017 transition IEP notes indicated these recommendations were already being implemented. However, the IEP did not specifically offer these items in the accommodations and supports page, where such items should normally appear, nor elsewhere in the formal offer of FAPE. This deficit persisted in every IEP for the entire 2017-2018 school year and the majority of the 2018-2019 school year. Each IEP noted, however, that the recommended accommodations were in place and being implemented.

Chaffey's April 23, 2018 triennial assessment plan did not propose an AT assessment. When Chaffey conducted triennial assessments in the fall of 2018, it did not assess Student's AT needs, either by a separate assessment or as part of the other assessments performed. Student's triennial IEP occurred over three meetings on October 18, 2018, November 5, 2018 and January 10, 2019. The triennial IEP documents acknowledged Student's need for AT devices and services, and generally stated that he was provided with both. None of these three IEP's made a formal offer of AT services or mentioned the devices and services in the accommodations and supports pages, or elsewhere. Although mentioned in the notes, the AT devices and services were not phrased as a formal offer.

After the triennial IEP team meetings, an IEP amendment meeting occurred on May 7, 2019 to review IEE's that had been conducted. The notes of that IEP state the team agreed that there were AT opportunities currently available to Student in the school setting and an AT assessment was not required at that time. Father and his advocate initialed the bottom of the notes pages, as was their habit for other IEP's as well. Chaffey Speech Pathologist Chris Wegner, who attended that IEP team meeting, testified that Father

agreed no AT assessment was necessary because supports were already in place. Wegner thought no AT assessment was necessary because Student already had what he needed, that being the Chromebook and the applications.

For the first time, on the supplementary aids and services page of this May 2019 IEP, there appeared a formal offer of access to extensions on the google classroom/Chromebook to include book share, snap and read and text to speech applications, and in addition, access to co-writer to support written language. This offer was made without a current AT assessment.

For all the same reasons as pertain to the APE assessment, Student prevails on issue 4 as well. Districts are legally obligated to assess in all areas of suspected need every three years. AT was a recognized area of need for Student. Student had not been assessed in this area of need since Cindy Cottier's March 30, 2016 assessment.

District's argument, that an AT assessment was not specifically required here, fails. Student had recognized needs. No IEP made any formal offer of devices and services prior to May 7, 2019. Student's needs had not been otherwise identified through other types of evaluations. By March 30, 2019, three years had elapsed since the prior Cottier assessment. A new assessment was required, unless waived. The notes pages of the May 7, 2019 IEP failed to establish waiver, which is an affirmative defense, as to which Chaffey bears the burden of proof. Father and his advocate's testimony was ambiguous as to the intent of their initials on the notes pages, and failed to establish the note's accuracy, or whether Parent intended his initials to indicate assent. Chaffey at hearing played a tape of the May 7, 2019 IEP, but the recording was garbled and ambiguous. If relying on a waiver of the assessment obligation, Chaffey should have, and failed to, document it.

The failure to assess in AT resulted in the same deficits as were discussed above with APE. Services, devices and accommodations were offered, but without an assessment there was no way to know if they met Student's current needs. Because of the lack of assessment, the services were haphazard and without a basis in proper information. They were not properly documented until May 7, 2019. Wegner's testimony that an assessment was not required because Student already had what he needed begged the question of what Student needed, and how was this known at the time. Student prevailed on issue 4. Remedies are discussed below.

#### ISSUE 7. DID CHAFFEY DENY STUDENT A FAPE IN THE 2018 ANNUAL IEP BY FAILING TO DEVELOP MEASURABLE ANNUAL GOALS, SPECIFICALLY GOALS BASED ON APPROPRIATE BASELINES IN AREAS OF NEED WHICH COULD BE IMPLEMENTED?

Student argues that certain baselines were inadequate, lacking any objective numerical data regarding Student's then-current present levels of performance. Student contends that the absence of objectively verifiable data in the baselines renders the goals unmeasurable, because progress from the baselines to the goals could not be objectively measured. Chaffey argues the baselines were appropriate and the goals measurable. Chaffey also contends that while the IDEA requires that an IEP state a student's present levels of performance, there is no specific legal requirement that baselines be stated, nor what their content must be.

An IEP is a written document for each child with a disability that includes: a statement of the child's present levels of academic achievement and functional performance; and a statement of measurable annual goals, including academic and

functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320Ed. Code, § 56345, subd.(a)(2).) The IEP shall show a direct relationship between the present levels of performance, the goals and objectives, and the specific educational services to be provided. (Cal.CodeRegs.,tit.5, § 3040.) When appropriate, the IEP should include short-term objectives that are based on the child's present levels of academic achievement and functional performance, a description of how the child's progress toward meeting the annual goals will be measured, and when periodic reports of the child's progress will be issued to the parent. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320; Ed. Code, § 56345, subd. (a)(3).)

As stated above, in the event of a procedural violation, a denial of FAPE may only be found if that the procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE, or caused deprivation of educational benefits.

At hearing, Student specified that at issue were 22 of the 28 baselines in the triennial IEP finalized in January 2019, specifically the baselines for goal 1 in skill acquisition, 2 in visual tracking, 3, 4, 5 and 6 in vision therapy, 7, 8 and 9 in reading, 10 in written expression, 11 in calculation, 12 in college awareness/vocation, 13 in career awareness, 14 in independent living, 15 in task-completion, 17 in on-task behavior, 18 in multi-step sequencing, 23 in writing skills, 24 in keyboarding, and three baselines delineated as SL #1, #2 and #3 in speech and language.

Each of the related goals was measurable. For example, goal 2 in visual tracking stated that by October 3, 2019, Student would be able to meet 50 targets for either eye in 60 seconds in four out of five trials over several visits for repeatability as reported by vision therapist records and data. Goal 8 in reading comprehension stated that Student, when given questions involving character development in third to fifth grade level text material, would successfully analyze the character's interactions, thoughts or beliefs, by answering at least five questions on the specific character, as measured by student work samples, teacher observations, and or oral assessments, on four out of five trials with at least 80 percent accuracy. Goal 9 in reading stated that when given a list of 20 grade-level words containing short and long vowels or unpredictable patterns, Student would accurately read multisyllabic words as measured by teacher observations and oral assessment on four out of five trials with 80 percent accuracy.

Student's contention is based not on the goals themselves, but rather the baselines. Student contends the baselines are vague and stated as a narrative description, rather than specifically measurable. For example, the baseline for goal 8 in reading comprehension stated that Student was able to identify main characters throughout a reading passage, some of the details of what happens to them and what they are going through, as well as answer some basic questions about that character and who they are, but he continued to struggle at analyzing specific details on that character. It did not contain any numerical examples of his skills.

However, there is no specific legal requirement for baselines, nor that they contain numerical measurements, nor that the present levels contain measurements. IDEA requires that the goals themselves be measurable, which here they were. There was no procedural violation. Each goal also contained short-term objectives and a description of how

Student's progress toward meeting the annual goals would be measured. The IEP showed a direct relationship between the present levels of performance, the goals and objectives, and the specific educational services to be provided. Chaffey met the legal requirements for the content of goals. Student's contentions fail.

An analogous argument, that FAPE required measurable baselines, was recently rejected in *Nunez v. Grossmont Union High School Dist.* (S.D. Cal. September 30, 2019, No. 17-cv-2097-L-MDD) 2019 WL 4849172 (*Nunez*). That case held that a school district did not deny the parent of an 11th-grade student an opportunity to meaningfully participate in an IEP meeting where the baselines were arguably inadequate. There, as here, Student contended that his IEP was deficient because his present levels, and thus his baselines, were not updated. The ALJ rejected this contention because Plaintiff did not address the goals on the merits. Instead, the contention rested entirely on the general proposition that an IEP cannot include appropriate goals if it does not include adequate baselines or current levels. The District court found parent had amply participated in the development of IEP's, and that even if the IEP did not include adequate present levels, any procedural violation was harmless and there was no denial of participatory rights. (*Nunez, supra* at \*6-9.)

Such are the identical arguments here, and they are rejected for the same reasons. Here, Parent was as intimately involved in his son's education as the parent in *Nunez*. For example, by email dated October 1, 2018 leading up to the triennial, Parent recounted his observation of Student in class. By an October 15, 2018 email to an occupational therapy clinician, Father asked him to address coordination, balance and physical strength as Student's areas of need. On November 28, 2018, he emailed Student's teacher asking for current grade levels. After the triennial IEP, while IEE's were pending, there were numerous detailed emails from Father asking the independent assessors to target and address



particular perceived deficits and proposed therapies, based upon Parent's personal knowledge regarding Student's performance. After the May 2019 IEP following the IEE's, Father sent a three-page detailed reaction to the May 2019 IEP, demonstrating intimate knowledge of Student's present levels and progress on goals.

In short, deficits in these baselines, even if there were any, were harmless. The goals were measurable notwithstanding. The general proposition that an IEP cannot include measurable goals if it does not include numerically measurable baselines is unpersuasive. There was no denial of FAPE or of Parents' participatory rights. Student failed to meet his burden of proof on issue 7.

ISSUE 9. BETWEEN SEPTEMBER 3, 2017 AND THE DATE THE AMENDED COMPLAINT WAS FILED, DID CHAFFEY DENY STUDENT A FAPE (A) BY FAILING TO ADDRESS STUDENT'S LACK OF PROGRESS AND REGRESSION IN THE AREA OF SPEECH AND LANGUAGE IDENTIFIED IN THE 2017 ABBY ROZENBERG EVALUATION REPORT, INCLUDING BY FAILING TO OFFER APPROPRIATE SPEECH AND LANGUAGE SERVICES IN THE NOVEMBER 2017 IEP, AND (B) BY FAILING TO ADDRESS STUDENT'S LACK OF PROGRESS AND REGRESSION IN THE AREA OF SPPECH AND LANGUAGE IDENTIFIED IN THE 2019 SUSAN HOLLAR EVALUATION REPORT, INCLUDING BY FAILING TO OFFER APPROPRIATE SPEECH AND LANGUAGE SERVICES IN THE MAY 2019 IEP?

Student contends that the independent speech and language reports by assessors Abby Rozenberg and Susan Hollar recommended two hours of speech therapy weekly to

meet Student's speech needs. Student disputes the appropriateness of Chaffey's triennial speech language assessment, and the subsequent reduction in the offer of speech and language services. Chaffey contends that it always provided the two hours, that its triennial assessment was appropriate and that it appropriately reduced its offer of speech language services, although it has never implemented that reduction.

At the transition IEP on June 23, 2017, before Student entered high school, Chaffey's IEP team members had not had an opportunity to review Abby Rozenberg's IEE report. Chaffey offered Student 60 minutes per week of individual and 60 minutes per week of group speech and language services on information received at the IEP team meeting. The team later reviewed Abby Rozenberg's IEE, that had been conducted on or around January 18, 2017, at a November 1, 2017 IEP team meeting. Rozenberg's report recommended two hours of weekly speech therapy, one individual and one group. The November 1, 2017, IEP offered essentially this, in one 45-minute session and one 50-minute session to align with Student's class schedule.

For this reason, Student failed to establish issue 9(a) which relates to Abby Rozenberg's recommendations and the November 1, 2017 IEP that incorporated them. Furthermore, as discussed above, Rozenberg was not called to testify as a witness, her report was uncorroborated hearsay, and no foundation was laid for the validity of her scores, or the appropriateness of her recommendations. Student failed to prove that he needed the level of service recommended in Rozenberg's report in November 2017. In any event, the two hours of weekly speech therapy was continually provided. Student failed to establish issue 9(a).

Speech language pathologist Wegner performed Chaffey's triennial speech and language assessment over two different dates in October and November 2018. Susan Hollar's expert testimony established the inappropriateness of the Wegner assessment. Wegner administered three standard instruments, the Comprehensive Assessment of Spoken Language-Second Edition, called the CASL-2, the Test of Language Development, and the Social Language Development Test. But, he did not administer all the subtests of the instruments. Rather, he picked and chose among them. The CASL-2 consisted of a battery of 14 stand-alone tests, each of which measured a specific oral language skill. The scores of each test could be interpreted separately or combined to yield summary index scores that represented broader areas of oral language function. While it was not prohibited by the test manual to pick and choose certain subtests, Wegner could not convincingly explain his choices. Rather, he stated that he was not targeting all the core index areas and did not administer certain subtests because they would be too difficult for Student. Wegner believed he was intentional in his choice of which subtests and chose the best subtests for Student's needs. His testimony was unconvincing and amounted to a decision that he would not administer to Student anything that was too hard. This defeated the purpose of the assessment and yielded unreliable results. Since Wegner did not administer all the necessary subtests, he did not obtain a core index score nor any composite scores.

Hollar's critique of Wegner's assessment was persuasive. Hollar was concerned that Wegner did not administer sufficient subtests. She believed all the subtests should have been administered, or at least those that were required to create a core index. She criticized Wegner for not administering tests of narrative language to assess Student's

ability to construct a narrative, although such instruments do exist. The subtests Wegner chose bewildered her, because he only used two of many subtests for social language, in which Student had admitted needs. Wegner's report did not explain his selective subtest choices. She also stated that Wegner did not administer core subtests of another test instrument used, and therefore Chaffey did not get a complete picture of Student.

Wegner, in turn, critiqued Hollar's assessment in large part because Hollar was unfamiliar with Student. Wegner relied on his own good rapport with Student to establish that his results were superior to Hollar's. This critique of Hollar's assessment was unconvincing and given little weight, as Hollar persuasively opined that an assessor does not need to have a personal relationship with a student to appropriately assess him.

At Student's triennial IEP team meetings finalized on January 10, 2019, Chaffey reduced its offer of speech services. Group speech remained at approximately weekly, but individual speech services were reduced to every other week, or 15 times per year. Wegner confirmed at hearing that this was a reduction of the prior speech offer. But, he confusingly recalled that what was being reduced was the group speech, from once a week to every other week, because the team wanted Student to generalize the group pragmatic language skills. However, the offer itself actually reduces the individual services and not the group services.

Father agreed to the triennial IEP with exceptions, stating that he disagreed with the reduction in speech services, and he later requested that Chaffey funded an IEE by Hollar, which occurred in February 2019 and was reviewed at the May 7, 2019 IEP.

Hollar administered a large battery of tests including a variety of instruments. Her observation was that Student struggled with higher order language and social language.

He could not banter. He was weak in idiomatic language. He did not add appropriate background facts and did not understand indirect requests. He would not know how to fix a conversation if something went awry--that is, he lacked "repair strategies" for miscommunications. Hollar recommended one individual and one group session per week for 60 minutes each.

The validity of Hollar's report was amply established by her extensive testing of Student, her superb credentials as a respected speech language pathologist hired by many school districts, her detailed and coherent explanations, and her clear and unflappable demeanor at hearing. Chaffey's critique of her scoring of her protocols was, overall, in light of her demeanor and explanations, not persuasive. She was also very knowledgeable about the protocols and manuals for the various instruments she and Wegner administered. Her opinions were given great weight.

Notwithstanding Hollar's report, the offer at the conclusion of the May 2019 IEP team meeting was the same as at the January 2019 IEP and retained the reduction in individual sessions from weekly to every other week. This amounted to a denial of FAPE, as it was not based on an appropriate assessment and ignored the more persuasive IEE performed by Hollar. The offer was also inconsistent with Wegner's own rationale for generalizing group speech, in that the offer reduced individual not group services. Student therefore prevails on issue 9(b). Remedies for this denial of FAPE are discussed below.

ISSUE 11. DID CHAFFEY DENY STUDENT A FAPE IN THE AREA OF OCCUPATIONAL THERAPY SINCE SEPTEMBER 3, 2017, BY (A) FAILING TO ADDRESS STUDENT'S SENSORY NEEDS BY PROVIDING SERVICES IN A SPECIALIZED THERAPY ROOM OR CONSULTATION SERVICES WITH A QUALIFIED INDIVIDUAL? (B) REDUCING STUDENT'S CLINICAL OCCUPATIONAL THERAPY SERVICES IN THE MAY 2019 IEP?

Student contends that Chaffey did not offer appropriate occupational therapy services. Specifically, Student contends that his results on an occupational therapy assessment for sensory integration deficits called the Sensory Integration and Praxis Test or SIPT, demonstrated that he required occupational therapy services in a specialized clinical setting with particular equipment, for two hours each week, provided by a SIPT-certified therapist.

Chaffey contends that its offers and provision of occupational therapy services was appropriate. Specifically, Chaffey contends that it provided the requested services for most of the relevant time frame. For the period of time it did not, Chaffey contends that Student's needs in the area of occupational therapy did not require this specialized training or equipment. Student's needs, it contends, were in the area of organization, focus, attention, and other areas for which appropriate school-based occupational therapy could be, and was, provided.

Under California law, Occupational Therapists and Occupational Therapist Assistants are defined at California Business and Professions Code section 2570.2, subdivisions (h) and (i). The requirements for occupational therapy are set forth at California Code of

Regulations, title 34, section 3051.6, subd. (b). An occupational therapist must be currently registered with the American Occupational Therapy Association. (Cal. Code Regs., tit. 34, § 3051.6, subd. (b)(2).) An Occupational Therapy Assistant is qualified to assist in the practice of occupational therapy and works under the appropriate supervision of a licensed occupational therapist. (Bus. & Prof. Code, § 2570.2, subd. (i).)

Occupational therapists may obtain and become specialized in certain advanced practices. At present the only specific areas of legally-recognized advanced practice for occupational therapists are rehabilitation of the hand, wrist, and forearm, and for swallowing, including instrumental evaluation, endoscopic evaluation, and videofluoroscopic swallowing studies. (Cal. Code Regs., tit. 16, § 4150.) The evidence established, however, that there are numerous other post-graduate areas of specialized study that are not specifically mentioned in the regulations.

School districts are not required to include specific teaching methodologies in the IEP. (*Rowley, supra*, 458 U.S. at p. 208; 71 Fed. Reg. 46,665 (2006).) A parent's disagreement with a school district's educational methodology is insufficient to establish an IDEA violation. (*Carlson v. San Diego Unified School Dist.* (9th Cir. 2010, unpublished) 380 F. Appen. 595, 597; see also, *Lachman v. Illinois State Board. of Education* (7th Cir. 1988) 852 F.2d 290, 296-97, cert. denied at 488 U.S. 925 [parents did not have a right to compel a school district to provide a specific communication methodology].)

The evidence established that the SIPT-certification Student contends was necessary to address his sensory integration needs is an advanced form of post-graduate training that is not required for licensure as an occupational therapist and is not one of the specifically regulated advanced certifications. The particular form of specialized therapy

that Student seeks has been trademarked with the name "Ayres Sensory Integration" to prevent its being diluted by competing branches of practice that use other methods to address sensory integration deficits. Currently the only organization offering SIPT certification is the Collaborative for Leadership in Ayres Sensory Integration. Suzanne Smith-Roley, who assessed Student in 2016 and 2017, is a founding member of the Collaborative for Leadership in Sensory Integration. Richard Furbush, who was one of Student's treating therapists and an expert witness at hearing, is married to Smith-Roley. Cherie Francis-Boegeman, who performed Student's independent occupational therapy assessment in 2019 and testified as an expert witness at hearing, described Smith-Roley as her mentor. One of Student's treating therapists, Cynthia Conway, described Ayres Sensory Integration as a "bottom up" neurological approach, with the goal of re-organizing the neurological system through play-based modalities. She described Ayres Sensory Integration therapy as "not typical occupational therapy." There are other types of occupational therapy that address sensory integration dysfunction. Ayres Sensory Integration requires what it refers to as its own proprietary fidelity measures, using specific types of equipment to provide sensory input. Furbush, at hearing, opined that only a SIPT-certified clinic could, appropriately and with fidelity, provide the types of equipment necessary for Student, including trampolines and swings large enough to suspend Student, and to provide the intensity of input Furbush deemed necessary.

At the transition IEP team meeting on June 23, 2017, Parent requested clinic occupational therapy at a nonpublic agency clinic called Sky Pediatric for two weekly 60-minute sessions. The clinician at Sky was Furbush. Although not documented, Chaffey began providing one of the requested clinic weekly hours of occupational therapy at Sky prior to July 31, 2017. The July 31, 2017 IEP documented that offer. At or before the



July 31, 2017 IEP, Chaffey also offered the second clinic hour that Parent had requested and was working to schedule it. Cynthia Conway was soon selected to provide the second clinic hour. Parent consented to the offer of two weekly hours of clinic occupational therapy. The first day of the 2017-18 school year was August 7, 2017. Student thus received two hours of clinical occupational therapy consistently beginning shortly upon his enrollment.

At an IEP meeting on October 26, 2017, the IEP team reviewed Smith-Roley's occupational therapy evaluations that had been performed the prior year while Student was at Etiwanda. Smith-Roley recommended occupational therapy for two hours a week in a clinical setting. Consistent with Smith-Roley's recommendations, the October 26, 2017 IEP offered this frequency and duration of service, continuing the earlier offer already made on or before July 31, 2017.

In the fall of 2018, Lisa Palmisano, a licensed Occupational Therapist employed by the San Bernardino County Superintendent of Schools and contracted to Chaffey, conducted Chaffey's triennial occupational therapy assessment. She assessed Student via teacher and parent interviews, informal fine-motor and self-care testing, a functional observational checklist using her own observations and staff interviews, a normed and standardized handwriting assessment, and a sensory profile questionnaire administered to Student, that consisted of a normed but not standardized structured interview. She also administered a normed and standardized testing instrument that measured fine motor precision, and hand-eye coordination, and visual motor performance.

The results of the self-rated sensory questionnaire scored Student similar to peers in the area of sensory-seeking, sensory-sensitivity and sensory-avoiding. Student

demonstrated occasional sensory-seeking by rocking, smacking the table and auditory self-stimulation. With regard to Student's fine-motor, visual-perceptual and writing skills, he was able to color inside small shapes, complete two mazes, connect dots, cut out a circle and copy a variety of designs independently. He used a ruler to assist with his printing performance, but provided multiple writing samples with and without a ruler. The writing samples showed a 100 percent legibility rate. Student was independent with using all classroom tools such as scissors, stapler, glue stick and tape dispenser.

Student's visual motor skills were in the low-average range. His fine and gross motor skills were below average overall. On the measure of writing skills, Student obtained a perfect score in every category (capital, lowercase and numbers), except sizing. Student received an overall 95 percent accuracy rate for printing of letters and numbers.

According to Palmisano's own observation and staff interviews regarding Student's self-help skills, Student was independent with carrying and accessing his backpack, putting on and taking off his jacket, manipulating snaps and zippers, using the restroom, washing and drying his hands, feeding himself using utensils, opening packages and containers, drinking from a cup or using a straw, and was able to use all amenities on campus.

Palmisano obtained no standardized scores of Student in the area of sensory processing. The only assessment tool that provided standardized scores in the area of sensory processing was the SIPT. She did not use the SIPT because she is not certified to administer that instrument and it is not normed for students above the age of eight years and 11 months. Therefore, her review of Student's sensory processing was observational only. She reported her observational findings for tactile, vestibular, proprioceptive, auditory, visual and olfactory issues. Student did not display any tactile sensory-seeking or

avoiding behaviors during this her observation. He occasionally sought movement for self-regulation and muscle input during the school day. He showed sensitivity to certain sounds. He was occasionally distracted with visual stimuli.

Although subject to fierce criticism at hearing by Student's SIPT-certified expert witnesses, and although there were some areas in which Palmisano's testimony was not reliable, Student failed to establish that Palmisano's lack of SIPT-certification rendered her assessment, and the triennial offer of services based thereon, flawed. Palmisano expressed unconvincing opinions that there is a bright-line distinction between school-based versus clinic, or educational versus medical occupational therapy. She also inaccurately recalled the offers of occupational therapy that were made at various IEP team meetings. However, these ambiguities in her understanding and recollection did not, overall, undermine her assessment or the accuracy of her observations, especially in light of the lack of credibility of Student's witnesses addressed below. (See, e.g., *Student v. Garvey School Dist.* (2009) OAH Case No. 2008110623 [Critique of district assessment because assessor was not SIPT-certified was "not persuasive and cannot be given any weight, [as there] is no state licensing requirement that an OT assessment involving evaluation of sensory processing disorder be performed by an OT with a SIPT test certification."]; *Student v. Garvey School Dist.* (2008) OAH Case No. 2007100989 [District's assessment was appropriate, especially where Student was outside the age range for the SIPT, and evidence did not establish that a SIPT-certified assessor was necessary or superior].)

Palmisano used a variety of assessment tools and strategies that provided the triennial IEP teams with accurate information on Student's fine motor abilities and sensory integration skills. Her assessment was sufficiently comprehensive to identify Student's occupational therapy needs. Palmisano's assessment did, with minor exceptions, accurately

portray Student's then-current functioning, according to all the other evidence adduced at hearing.

Palmisano's testimony and assessment results, and all the other evidence presented at hearing, convincingly established that Student navigated independently in the school environment. Student was independent with dressing, hygiene, toileting, and feeding. Student could climb stairs and navigate the Chaffey campus independently, to and from different classrooms in buildings, some of which were three stories, including finding his way to and from remote rooms. At home, he vacuumed, washed dishes, did laundry, washed the car and cooked simple meals for himself. He could use all amenities on campus. The main areas of dispute with Palmisano's findings involved Student's ability to follow multi-step directions and his organizational skills. Student did have deficits in these areas. His belongings were disorganized, and he had difficulty following multi-step directions. In the area of independence, he had and required full-time aide support, because he required prompting and redirection to attend to tasks. However, the triennial offer of FAPE, discussed below, appropriately addressed these deficits.

Student's triennial IEP team meeting occurred over three dates on October 18, 2018, November 5, 2018 and January 10, 2019. Chaffey's offer of occupational therapy at the conclusion of the three triennial meetings reduced the clinic occupational therapy offer to one hour a week instead of twice. For the second hour, it did not offer clinic but it did offer an additional weekly hour of school-based occupational therapy provided by a nonpublic agency.

After the triennial offer, Parent disagreed with the proposed reduction in the clinic occupational therapy services. Father requested and was granted IEE's in several areas including occupational therapy. Despite the reduction in the offer, to which Parent did not

consent, Chaffey continued to provide both clinic hours, one with Furbush and one with Conway, for the duration of the 2018-2019 school year, until May or June 2019.

Student's occupational therapy IEE was conducted by Cherie Francis-Boegeman on or around January 12, 2019. Boegeman reviewed records and prior assessments, particularly the IEE that had been conducted by Smith-Roley in 2017. Like Smith-Roley, Boegeman administered and relied most heavily on the SIPT. She used the SIPT because it was the only standardized sensory profile measure available, although it was standardized only up to children aged eight years 11 months, and Student was 15 years old at the time. Student scored poorest in the subtests for praxis on verbal command, or the ability to follow oral directions. He scored poorly on maintaining balance during a variety of standing and walking tasks. He also scored poorly on prostratory nystagmus, which measures one aspect of the processing of the vestibular sensory information, related to the coordination of head and eye movements, arousal and other central nervous system functions. He also scored poorly in oral praxis, which measures the ability to copy facial and oral positions and motions. He scored poorly in figure ground perception, involving the interpretation of, and ability to perceive and discriminate, visual information without involving motor coordination.

Boegeman made recommendations to continue the occupational therapy service delivery of two hours per week, in a specialized therapy room, by a qualified SIPT-trained therapist.

Boegeman lacked credibility and her assessment was given little weight. First and most important, all the numerous and detailed recommendations in her report were cut, pasted and quoted verbatim with no alterations from the Smith-Roley 2017 assessment, and therefore were not her own independent work.

Second, she communicated with Furbush and with Smith-Roley, and with Father, both by email and via conference call, about her report during its drafting, asking for their advice and input in remarkably direct ways. For one example, she provided her SIPT data to Smith-Roley for comment about its analysis and interpretation.

Most damaging to her credibility, when asked how she could know if Smith-Roley's underlying protocols to the 2017 assessment were accurately reported, she answered "I don't know how to answer that." The simple and obvious answer would have been that she could not verify the accuracy of Smith-Roley's 2017 results. She then proceeded to lionize Smith-Roley's reputation as a prolific writer and researcher, highly honored, who had dedicated her life to sensory integration therapy. These answers were evasive. Later, in an attempt to rehabilitate this testimony, she stated that because of Smith-Roley's stellar reputation, she would not need to see Smith-Roley's protocols to trust the accuracy of the results, as if such an accomplished person could never err. Boegeman's unquestioning faith in Smith-Roley severely undermined her credibility as an independent expert witness.

Moreover, as Boegeman admitted, Student was well over the age-range on which the SIPT was standardized. She did not know what the SIPT manual said about how to view such results. She could not confirm or deny if the SIPT was most recently standardized in 1989, or if its normative data was gathered in 1984-85. Nor could she confirm whether the manual cautioned that children on the autism spectrum can often score low on praxis. Finally, Boegeman did not obtain any input from teachers and did not observe Student at school. (*Fullerton Unified School v. Student*, (2011) OAH Case No. 2011080355 [No denial of FAPE, where Student's clinicians' opinion did not contain any school-based observations or contain any information about Student's classroom performance, and because the "SIPT

[was] not [standardized] for Student's age range," and "even if it were, school –based observations demonstrated that Student could function at school despite his deficits"].)

Boegeman's IEE was discussed at an IEP amendment meeting on May 7, 2019. The offer at the conclusion of the May 2019 IEP was unchanged from the January 2019 triennial offer, consisting of one hour of clinic and one hour of school-based occupational therapy. On May 22, 2019, Father submitted three pages of written comments to the May 7, 2019 IEP, in which he disagreed with the reduction of clinic services. The last day of the 2018-19 school year was May 23, 2019. Although Chaffey had proposed reducing the clinic hours at the triennial in January 2019, they continued to provide the entire two hours of clinic based occupational therapy for the entire 2018-19 school year because Parent did not consent to the January 2019 IEP. The decrease went into effect in June of 2019.

The first day of 2019-20 school year was August 7, 2019. For 2019-2020, Chaffey provided, in accordance with the triennial offer, two hours of occupational therapy, one of which continued to be clinic-based with Furbush. The second hour was provided within the school setting by Maegan Robinson, a certified occupational therapy assistant. Under the supervision of a supervising occupational therapist, she provides both school-based and clinic-based services. She is not SIPT-certified. She credibly established that sensory integration and processing issues can be addressed without SIPT-certification. Her clinic has a sensory integration gym with specialized equipment. She testified that she could and would have recommended that Student receive clinic-based services, had she not sincerely believed his needs should be addressed in the school setting where sensory coping skills could be generalized. Although not yet licensed as an occupational therapist, Ms. Robinson

has almost completed that training. She established her credibility at hearing through her experience, education, training and her thorough, complete, consistent and knowledgeable answers.

Robinson is trained in sensory processing and sensory integration, although not in the methodology espoused by the SIPT. Nothing beyond the basic occupational therapist license is required to work with children on sensory processing issues. Robinson persuasively opined that Ayres Sensory Integration is not the only way to comprehensively understand sensory integration, and that SIPT is using very old norms from the 1980's. She testified very convincingly that during 2019-20 school year, Student needs were most appropriately addressed in the school setting with services both pushed-in to his classroom and provided in individual pull-out sessions.

Robinson used sensory warm-ups, or sensory input prior to a task, with Student to give him the sensory input he needed to allow him to attend to that task. She worked with him on the school track, treadmill and trampoline as part of her sessions, all located on the Chaffey campus. She could play jumping games with Student on the trampoline to challenge his vestibular system. He had therapy balls, cushions and an incumbent bicycle available to use on campus, for sensory input throughout the day. She recommended a sensory lifestyle, which is a new term for a sensory diet, to indicate that sensory strategies should be integrated throughout the day, to include intermittent sensory input that could be facilitated by Student's aide. She very convincingly opined that Student's occupational therapy needs would best be met within the school setting, to generalize sensory strategies throughout the day while doing normal tasks. (See, e.g. *Fullerton Unified School v. Student*, *supra*, OAH Case No. 2011080355 [no denial of FAPE where a school district's



non-SIPT trained staff provided school-based services including a sensory diet[.]) Robinson had a treatment plan targeted to particular IEP goals, and very convincingly opined at hearing that such a plan is required, because it provides a road map to guide the steps toward accomplishment of the governing goal.

On September 25, 2019, in preparation for an IEP to be held on September 30, 2019, Robinson wrote a progress report in which she opined that several of Student's occupational therapy goals from the January 2019 IEP had been met. On September 29, 2019, in preparation for the same IEP, Father wrote Furbush an email, copying Conway and Boegeman, asking Furbush to specify the clinic occupational therapy service level in his recommendation, and thanking Furbush for the "help to make your recommendation air tight." Furbush wrote a progress report dated September 30, 2019 for that IEP, reporting Student's progress on goals.

Furbush's progress report was emblematic of the haphazardness of the rest of his testimony. Student relied heavily on Furbush's expert testimony as Student's treating clinician from June or July 2017 until at least March of 2020, but Furbush was an unconvincing witness. Unlike Robinson, he had no treatment plan targeted to particular IEP goals. His progress report recounted goals he had been working on with Student, but the goals were not the same as, nor tied in to, any particular IEP.

At hearing, Furbush could not clarify the genesis of his clinical session goals. Furbush could not, overall, tie the services he provided to any assessment or annual IEP goal. As he had no treatment plan, there was no documentary trail governing what he did with Student in clinic. He stated that he worked with Student on organizing notes from history class in 2018, but could then not explain why Student's transcript showed that

Student had not taken history class in either 2017-18 or 2018-19. He admitted that although he was supposed to be implementing IEP goals, the clinic could not address a particular goal that required 40 minutes of attending to a task, because "some of the OT goals don't work in the clinic." He stated he was working on sensory integration "that would not translate to the school," because the clinic setting was not an academic environment.

Furbush also testified very inconsistently and unconvincingly to his data-collection and recordkeeping. He testified to having done an assessment of Student himself, then clarified that there was no formal assessment report, but his informal "assessment" would be reflected in his "progress notes," then stated that he had perhaps produced a "summary." He stated his "data" would be reflected in his "progress notes," or "treatment notes." However, no such documents appear to exist, and none were presented, nor any explanation given for their absence from the record. Again and again, he testified that he had assessed Student using the SIPT in January 2019, going so far as to state that the SIPT protocols should be in Sky's file, and should be dated, as should have been his notes. He later recanted that testimony and stated that he had not administered the SIPT in January 2019, and that his testimony about that had been in error. Further ambiguities in his testimony include his failure to recall communicating with Boegeman regarding her 2019 IEE, despite evidence of email correspondence between him and Boegeman concerning her report before it was finalized.

Furbush was also an unconvincing advocate for the superiority of SIPT-training over and above other occupational therapy methodologies. Ayres Sensory Integration aims to challenge and re-wire the nervous system by means of specific combinations of physical challenges, surprise elements, novel combinations, and intense sensory input. Furbush

testified sincerely, but vaguely, to the SIPT as giving a “deeper understanding” of appropriate intervention, targeting and treatment. He stated that his training and experience in sensory integration was a “philosophy of treatment” and a “theoretical framework.” His disagreement with Robinson came down to a “difference of opinion,” because Robinson “did not have the training or education to interpret the SIPT.” He admitted that non-SIPT trained therapists may address sensory issues, but vaguely opined that only SIPT-trained clinicians have the kind of “organized training” and “comprehensive knowledge” to address “the problems addressed in sensory integration.” Non-SIPT training would not allow Robinson to “address the underlying issues.” The SIPT provides the “pathway to higher levels of functioning.” Ayres Sensory Integration is a “theory and frame of reference for a methodology.” His clinic equipment was essential in his opinion, but it was not just the equipment, it was the frequency and duration and the “knowledge and expertise to use it [that is] essential.” Because he was using a “specific approach to treatment,” he did not need to speak to the school occupational therapist to see what was happening in the classroom because what “guided me in the clinic setting was [Student’s] progress in the clinic.” Regardless of what equipment the school had or did not have, it would be insufficient for “meeting [Student’s] needs using the Ayres Sensory Integrative approach,” because it “is a complex treatment approach.” The explanations of the superiority of SIPT training and the Ayres Sensory Integrative approach were vague, exaggerated, and unconvincing.

Finally, although disputing what the school could provide, he admitted to never observing Student at school, not knowing Student’s abilities to navigate the campus independently, never speaking to Student’s teachers outside the IEP, although he did speak

to the case carrier, and also admitted that he did not know what equipment the school did or didn't have, such as a treadmill, jump ropes, basketball court, etc.

Although credible and independent, Student's other treating occupational therapist and expert witness Conway also failed to establish the superiority of Ayres Sensory Integration to meet Student's needs. Conway's testimony was measured. She carefully phrased and qualified her opinions. Her measured testimony was insufficient to establish SIPT-certification or Ayres Sensory Integration methodologies, or to overcome Student's overall lack of proof that these were necessary to provide Student with FAPE in the area of occupational therapy.

Student failed to establish issues 11 (a) or (b). The evidence established that the change in occupational therapy delivery from two hours in a clinic setting, to one hour of clinical services and one hour of school-based services was reasonably calculated to allow Student to make progress in light of his circumstances. The change to a school-based delivery model would enable Student to generalize sensory strategies and increase his ability to attend to tasks in the school environment. The reduction of occupational therapy clinic services from two hours per week to one hour per week in the January 2019 IEP did not deny Student a FAPE. Chaffey prevailed on issues 11(a) and 11(b).

ISSUE 13. AFTER SEPTEMBER 3, 2017, DID CHAFFEY DENY STUDENT A FAPE BY FAILING TO TIMELY AND APPROPRIATELY GIVE PRIOR WRITTEN NOTICE TO PARENT WHEN IT REFUSED TO IMPLEMENT THE SERVICES RECOMMENDED BY THE INDEPENDENT EDUCATIONAL ASSESSORS, SPECIFICALLY SUSAN HOLLAR, ROBIN MORRIS, BEA BRAUN, AND CHERIE FRANCIS-BOEGEMAN?

Student contends that Chaffey denied parental participation by failing to give timely and complete prior written notices when failing to implement services recommended by certain independent assessors. Chaffey contends there was no lack of parental participation and that its prior written notices were appropriate.

A parent must be provided "written prior notice" when a school district proposes, or refuses, to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. 20 U.S.C. § 1415(b)(3); Ed. Code, § 56500.4.) The notice must include a description of the action proposed or refused by the school district, an explanation of why the district proposes or refuses to take the action, a description of each evaluation procedure, test, record, or report used as a basis for the proposed or refused action, a description of any other factors relevant to the district's proposal or refusal, a statement that the parents have protection under the procedural safeguards of IDEA, and sources for the parents to contact to obtain assistance. (20 U.S.C. § 1415(c); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4.) An IEP document can serve as prior written notice as long as the IEP contains the required content of a prior written notice. (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540, 46691 (Aug. 14, 2006)(Comments to 2006

Regulations).) The procedures relating to prior written notice “are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions. (*C.H. v. Cape Henlopin School Dist.* (3d Cir. 2010) 606 F.3d 59, 70.) When a violation of such procedures does not actually impair parental knowledge of or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*Ibid.*)

The amended complaint vaguely referred to “several” unidentified IEE assessors as to whose recommendations the prior written notices were allegedly insufficient. At the prehearing conference, the assessors were narrowed down to five, specifically Bea Braun, Susan Hollar, Robin Morris, Cherie Francis-Boegeman and Cynthia Conway. At hearing on June 17, 2020, after argument, the ALJ removed Cynthia Conway from the list, based on Chaffey’s uncontested contention that Conway’s IEE post-dated Student’s due process complaint and could not be at issue in this matter.

The dates of the IEP’s at which the four remaining independent assessors’ assessments were reviewed, are pertinent to the prior written notice question presented in this issue. Bea Braun’s report was reviewed at an IEP on January 18, 2018. The remaining three assessments were prepared after the January 2019 triennial IEP and reviewed at the May 7, 2019 IEP team meeting.

More than 10 letters from Chaffey were introduced into evidence, that could be construed as prior written notices, or referred to as PWN’s. Student was therefore instructed to specify in closing argument which specific PWN documents were at issue, which assessors they related to, and in what manner Student was thereby denied a FAPE.

Student's closing argument mentions only one single PWN document as being at issue, that being Chaffey's PWN dated May 10, 2019. Student's closing argument states that when the parent requested services recommended by the several independent evaluators in speech/language and occupational therapy, Chaffey responded with a PWN on May 10, 2019 that did not include any description of the evaluation procedures, assessments, records, or reports on which Chaffey relied. Student contends that the lack of information left Father without the ability to understand the reason the May 2019 IEP team did not adopt the assessors' recommendations or to make an informed decision about Chaffey's FAPE offer.

Therefore, only the May 10, 2019 PWN document is addressed in this Decision. Student's Closing argument is construed as a waiver of any other contentions regarding any other PWN documents.

Student's contention fails as regards the assessor Bea Braun, whose assessment report was reviewed in 2018, more than a year prior to the PWN. The PWN document that Student puts at issue, dated May 10, 2019, more than a year later, did not pertain to Bea Braun's assessment in any respect.

Student's contention also fails as to the remaining three assessors Morris, Boegeman and Hollar. Although the PWN document was sent three days after the May 7, 2019 IEP team meeting at which those three assessors' reports were reviewed, the PWN did not pertain to those reports, those assessments, or that IEP.

Rather, that PWN was part of a string of correspondence that involved the triennial IEP offer that had been finalized earlier, in January 2019. Specifically, letters from Chaffey dated March 8, 2019, April 25, 2019, and the May 10, 2019 PWN letter at issue, had all

sought to clarify Parent's consent to the implementation of the offer that had been made at the January triennial. The May 10, 2019 PWN, thus, did not involve independent assessments at all. Since Student's issue, as stated in the four corners of the complaint, addressed PWN's concerning independent assessors' recommendations, and since the PWN Student placed at issue does not concern that, Student has failed to establish a nexus between his contentions and his proof. For this reason alone, Student failed to establish issue 13.

Even to the extent that the May 10, 2019 letter, which concerns the January 2019 IEP triennial offer, did not reiterate all the legally required content concerning the triennial offer, this procedural violation did not result in a denial of meaningful parental participation. Parent had received and read all Chaffey's triennial assessments, and had vigorously participated in the discussions of those assessments at the IEP team meetings on October 18, 2018, November 5, 2018 and January 10, 2019 with his advocate.

The IEP documents themselves, both of the triennial meetings and the May 9, 2019 amendment, constituted notice of Chaffey's position. In addition, Father wrote detailed comments to the January 10, triennial offer after the three triennial meetings were completed, demonstrating both a familiarity with the terms of the offer and the information considered by the IEP teams. Hollar, Morris and Boegeman conducted IEE's funded by Chaffey at Parent's request after he disagreed with the district assessments relied upon for the January 2019 IEP offer. Father attended with his advocate the May 7, 2019 IEP where the Hollar, Morris and Boegeman IEE assessments were reviewed. In addition, Father wrote three pages of comment following that May 2019 IEP, again displaying both a familiarity with the terms of the IEP offer and the bases for that offer. In



addition, Procedural Safeguards were attached to the PWN. Father was well-aware of the basis of Chaffey's offer of educational services, views, and of his own rights and remedies.

Student failed to identify a PWN letter in dispute that pertained to the four assessors whose recommendations Student contends were rejected without sufficient explanation. However, to the extent the May 10, 2019 PWN letter was procedurally insufficient, Parent actively participated in the IEP team meetings that reviewed and discussed the independent assessors' assessment results and recommendations. Student did not prove that any failure of Chaffey to give notice that the May 7, 2019 IEP team declined to adopt all of the independent assessors' recommendation had any impact on Parent's knowledge or participation in educational decisions. Student failed to meet his burden of proof on issue 13.

ISSUE 14. BETWEEN SEPTEMBER 3, 2017 AND THE DATE THE AMENDED COMPLAINT WAS FILED, DID CHAFFEY DENY STUDENT A FAPE BY FAILING TO ACCURATELY REPORT HIS GRADES, SPECIFICALLY, BY REPORTING THAT STUDENT WAS COMPLETING GRADE OR NEAR-GRADE LEVEL CURRICULUM AND GIVING HIM "A" GRADES?

Student contends that his grades in his high school classes were inflated, despite his academic deficits, which showed his reading and math skills to be at the elementary school level, and despite the fact that he was unable to work independently without the assistance of a one-to-one aide. Student further argues that Chaffey denied Student a FAPE by claiming he was completing diploma requirements because he was unable to independently access the curriculum. Chaffey contends that the grades are legitimate and

that Student is on track to graduate with his current 3.64 grade point average. Chaffey also contends that the issue of grades is outside OAH jurisdiction and should be dismissed.

When grades are given for any course of instruction taught in a school district, the grade given to each pupil shall be the grade determined by the teacher of the course and the determination of the pupil's grade by the teacher, in the absence of clerical or mechanical mistake, fraud, bad faith, or incompetency, shall be final. (Ed. Code, § 49066.)

In California, no diploma shall be conferred unless the pupil has met the standards or proficiency in basic skills prescribed by the governing board of the high school district or equivalent thereof. (Ed. Code, § 51412.)

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under this section, unless the other party agrees otherwise. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

IDEA requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Where a student is "functionally illiterate," a trier of fact may discount his grade promotions and look to his testing and independent evaluations to determine if the student was offered or provided a FAPE. (*Hall v. Vance County Bd. of Educ.*, (4th Cir. 1985) 774 F.2d 629, 636.)

In *Rowley*, the Supreme Court held that the grading and advancement system constitutes an important factor in determining educational benefit. (*Rowley, supra*, 458 U.S. at p. 203.) "Children who graduate from our public school systems are considered by our society to have been 'educated' at least to the grade level they have completed." (*Ibid.*) Regular examinations are administered, grades are awarded, and yearly

advancement to higher grade levels is permitted for those children who attain “an adequate knowledge of the course material.” (*Id.* at p. 203.)

Student has failed to meet his burden of proof that he was denied a FAPE by virtue of his grades. Although *Rowley* presumes that a passing grade indicates attainment of an adequate knowledge of the course material, there are, according to all the evidence adduced at hearing, and all the legal contentions cited, no legal or factual standards that govern what grades mean. No evidence or law presented here was sufficient to meet Student’s burden of proving that it is a denial of FAPE when grades fail to reflect achievement or mastery of the subject matter. Moreover, as Chaffey argues, California law provides a separate process for parents to challenge their children’s grades, which process is not within OAH’s jurisdiction. (Ed. Code, §§ 49066, 49070.)

On December 20, 2017, Student received his first semester report card which reflected grades of A’s and B’s. By emails on April 26, 2018, Father requested a neuropsychological IEE in order to counteract questions being raised by Student’s teachers at that time about Student’s cognition and academic ability. Chaffey’s triennial academic assessment in the fall of 2018 noted deficient, low and low average assessment scores in all academic areas. Grade equivalents ranged from a low of 2.3 in passage comprehension to a high of 5.2 in math facts fluency, with most grade equivalents in the third and fourth grade level in reading, math and writing. District’s neuropsychological assessor, Dr. Plew, found that Student could not perform grade level work independently, needed the help of his aide, and was autistic with significant cognitive impairment.

The October 2018, November 2018 and January 2019 IEP triennial IEP teams noted Student’s academic struggles in expository writing, and weakness in reading

comprehension. On November 18, 2018, at the second of the three triennial IEP meetings, Kyle Appleford, who was Student's 2018-19 case carrier and 2019-20 special education English teacher, reviewed Student's progress toward graduation. At that time, Student had attained 125 credits toward graduation, of the 230 units or credits that were required to graduate.

On March 12, 2019, Father agreed to the January 10, 2019 triennial IEP with exceptions. Father complained about the disparity between Student's achievement and his grades. Father wrote that the interventions and academic goals were insufficient to address what he referred to as Student's "overwhelming and large grade gap."

Student's grades for 2017-18, 2018-19 and the first semester of 2019-20, were all A's and B's. Appleford, at hearing confirmed that as of the fall of October 2019, when Student was in the 11th grade, Student was only able to read at the upper second grade to lower fifth grade reading level. He conceded that Student was only able to access some parts of the English and history curriculum with assistance. Student had a full time one-to-one aide in every class who redirected and prompted him and attempted to ensure understanding of the curriculum by re-wording and re-phrasing it. Both Appleford, and history teacher Charles Molnar, admitted that Student's comprehension and mastery was limited, but they asserted at hearing that he was grasping some of the key concepts. In history, according to Molnar, Student was completing grade level work on ancient Greece and Rome, the French revolution, World War I, World War II and Imperialism. However, Student's testimony at hearing concerning ancient Greece, Rome, the two world wars, and imperialism confirmed that Student had only the most rudimentary comprehension or recognition of what he had reportedly studied.

But, both Appleford and Molnar testified, and their testimony was uncontradicted, that the A and B grades Student received were, nevertheless, accurate. Student's grades were based on participation, projects, tests and willingness. Grades were not reflective of whether a particular student was able to read at a particular grade level because, as Appleford testified, that would not be "fair." For Appleford, grades were about effort, not mastery. School psychologist Monica McCort was not surprised by Student's grades because "he's a great kid." Grades reflected participation, homework, and engagement. A grade was not always reflective of a student's reading level, i.e. a student with severe disabilities can exhibit mastery in ways other than reading. As far as writing, a student can show what he has learned verbally rather than writing it. The theory of "differentiated instruction," in use for last ten years, allows looser standards than older fashioned teachers who, for example, might have required everyone to write a five-paragraph essay on a topic in order to pass it.

Chaffey's uncontradicted evidence established that grading protocols are district-based and not governed by statewide standards. In other words, every school district can decide its own set of grading standards, methods, and requirements. Some districts do have standards-based grading assessments, but not all. At Chaffey, each teacher decided his or her own grading protocols, in collaboration with their departments. Chaffey established that the grading rubrics created by teachers might include engagement and participation, and that since Student was very diligent, his eagerness was a legitimate factor incorporated into his grades. Student offered no contrary evidence. Thus, Student did not establish that his grades violated any school, state, federal or other policy. And, the evidence also established Student was, in fact, making progress appropriate in light of his circumstances, as FAPE requires. Thus, notwithstanding the disparity between Student's high grades and low mastery, Student has established no denial of FAPE.

On the last day of this 21-day due process hearing, Student attempted to pour into the record various unauthenticated, hearsay documents from various websites, concerning reading standards and the “common core,” with no foundation laid for any of them. None of this amounted to competent evidence that Student’s grades had to reflect subject-mastery, or that Student was denied a FAPE because of grade inflation.

As to the related argument encompassed within this issue, that being on a diploma track amounted to denial of FAPE, the evidence established that there are different pathways for completing high school. These have different requirements, and different implications for college preparedness. One can complete high school but not have the necessary credits for college. Such an individual can proceed to a trade school, a community college or junior college. Students may also be placed on an alternate track whereby they obtain a certificate of completion. Usually this track applies to students who are in moderate to severe or functional life skills programs. The certificate of completion track involves an alternate curriculum, not the regular high school curriculum. Students on a certificate of completion track take alternate assessments. Such students remain eligible for special education and related services until age 22. Whether a student is on a diploma or a certificate track is an IEP team decision. California law provides that no diploma shall be conferred unless the pupil has met the standards or proficiency in basic skills prescribed by the governing board of the high school district or equivalent thereof. (Ed. Code, § 51412.) However, no evidence was presented as to what Chaffey prescribes as standards of proficiency in basic skills, nor how those would be measured prior to Student being able to graduate.

The contention that Student should not be on the diploma track runs contrary to all of Father’s expressions at every IEP team meeting about his expectations for Student.

Furthermore, graduation has not yet happened, and no evidence was submitted concerning what if any assessments might be required before it does happen. Thus, the contention that graduation will happen is speculative. Moreover, since graduation has not yet occurred, and Student's IEP team can still revisit what track he should be on, now that Father has expressed his wish for Student to be on a certificate of completion track, it is not, at this point, ripe for adjudication. Moreover, graduation was not the specific issue Student pled in the amended complaint. The issue as pled addresses grades, and contains only a passing reference to graduation. Therefore, the issue of graduation is outside the pleadings. Thus, notwithstanding the undisputed evidence that Student was not mastering the course material, Student has simply failed to establish by any law or evidence that this fact has amounted to a denial of FAPE.

## CONCLUSIONS AND PREVAILING PARTY

As required by 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.

Chaffey prevailed on issue 1. Student did not prove that Chaffey denied Student a FAPE after September 3, 2017, by failing to timely review all of the outstanding independent educational evaluations as part of creating an IEP, for the 2017-2018 school year.

Student prevailed on issue 2. Chaffey denied Student a FAPE after September 3, 2017, by failing to timely complete and review the adapted physical education assessment pursuant to Parent's consent in July 2017.

Student prevailed on issue 3. Chaffey denied Student a FAPE by failing to timely complete the adapted physical education assessment pursuant to Parent's consent in October 2018.

Student prevailed on issue 4. Chaffey denied Student a FAPE by failing to conduct an AT assessment as part of Student's 2018 IEP triennial review.

Chaffey prevailed on issue 7. Student did not prove that Chaffey denied Student a FAPE in the 2018 annual IEP by failing to develop measurable annual goals, specifically goals based on appropriate baselines in areas of need which could be implemented.

Chaffey prevailed on issue 9(a). Student did not prove that Chaffey denied Student a FAPE between September 3, 2017 and the date the amended complaint was filed, by failing to address Student's lack of progress and regression in the area of speech and language identified in the 2017 Abby Rozenberg evaluation report, including by failing to offer appropriate speech and language services in the IEP developed at the November 2017 IEP team meeting.

Student prevailed on issue 9(b). Chaffey denied Student a FAPE between September 3, 2017 and the date the amended complaint was filed, by failing to address Student's lack of progress and regression in the area of speech and language identified in the 2019 Susan Hollar evaluation report, including by failing to offer appropriate speech and language services in the IEP developed at the May 2019 IEP team meeting.

Chaffey prevailed on issues 11(a) and 11(b). Student did not prove that Chaffey denied Student a FAPE in the area of occupational therapy since September 3, 2017, by (a) failing to address Student's sensory needs by providing services in a specialized therapy



room or consultation services with a qualified individual or (b) reducing Student's clinical occupational therapy services in the May 2019 IEP.

Chaffey prevailed on issue 13. Student did not prove that Chaffey denied Student a FAPE, after September 3, 2017, by failing to timely and appropriately give prior written notice to Parent when it refused to implement the services recommended by the independent educational assessors, specifically Susan Hollar, Robin Morris, Bea Braun, and Cherie Francis-Boegeman.

Chaffey prevailed on issue 14. Student did not prove that Chaffey denied Student a FAPE between September 3, 2017 and the date the amended complaint was filed, by failing to accurately report his grades, specifically, by reporting that Student was completing grade or near-grade level curriculum and giving him "A" grades.

## REMEDIES

Student prevailed on issues 2, 3, 4, and 9(b). Administrative Law Judges have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Committee of Burlington, Mass. v. Dept. of Education* (1985) 471 U.S. 359, 370; *Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) The broad authority to grant relief extends to the administrative law judges and hearing officers who preside at administrative special education due process proceedings. (*Forest Grove School Dist. v. T.A.* (2009) 129 S.Ct. 2484, 2494, fn. 11; 174 L.Ed.2d 168.)

To remedy 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 FAPE 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.) The award must be fact-specific and be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

For issues 2, 3 and 4, the failure to assess for APE and AT, Student is entitled to independent educational evaluations in those areas, funded by Chaffey, in accordance with SELPA guidelines.

Student failed to submit evidence pertaining to potential compensatory education that might be owed in these areas, despite the prehearing conference order specifically advising any party seeking a compensatory award would bear the burden of proving the need for, amount, frequency and duration of compensatory services. In addition, the evidence established that Student was provided APE and AT services throughout the relevant time frame. Accordingly, no compensatory services are awarded for Chaffey's failure to timely conduct APE or AT assessments.

For issue 9(b), the reduction of speech services at and after the triennial IEP, based on Wegner's assessment and in spite of Hollar's more persuasive independent evaluation, Student prevails. This Decision finds that Student was entitled to two weekly hours, one individual and one group, of speech and language therapy after the May 7, 2019, IEP, when Hollar's assessment was reviewed. In its offer of speech and language services, the May 7, 2019 IEP did not offer FAPE. However, no compensatory speech services are awarded, given that Chaffey continued to provide the two weekly hours

through the filing of Student's amended complaint, and the proposed reduction in service hours was never implemented.

## ORDER

1. Chaffey will fund independent educational evaluations in adapted physical education and assistive technology, using assessors of Student's choosing, however those assessors must meet SELPA guidelines.
2. Following the independent assessments, Chaffey shall convene an IEP team meeting, virtually or in person, whichever is safe and feasible, to develop appropriate adapted physical education goals and services and appropriate assistive technology accommodations. Chaffey shall fund the assessors' attendance at that IEP team meeting.
3. Student's speech and language services shall remain two weekly hours, one individual and one group, unless and until a properly convened IEP team revises them based on new assessments.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

June Lehrman

Administrative Law Judge

Office of Administrative Hearings