

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020080508

PARENT ON BEHALF OF STUDENT,

v.

THE MET SACRAMENTO PUBLIC HIGH SCHOOL.

DECISION

OCTOBER 30, 2020

On June 29, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming The Met Sacramento Public High School. OAH continued the matter on August 14, 2020. Administrative Law Judge Charles Marson heard this matter by videoconference on September 22, 23, 24 and 25, 2020.

Parent represented Student and attended all hearing days on his behalf. Kyle A. Raney, Attorney at Law, represented The Met. Becky Bryant, Sacramento City Unified School District's Special Education Local Plan Area Director, attended all hearing days on The Met's behalf except for the morning of September 25, 2020, on which Toni

Westermann, Sacramento City Unified's Interim Special Education Director, attended on The Met's behalf.

At the parties' request, the matter was continued to October 12, 2020, for written closing brief. The record was closed and the matter was submitted on October 12, 2020.

ISSUES

1. Did The Met deny Student a free appropriate public education, called a FAPE, from August 2018 to March 11, 2020, by failing to timely or adequately assess Student in all areas of suspected disability; specifically, academic achievement, health, language and speech, communications development, motor development, social-emotional behavior, adaptive behavior, and post-secondary transition?
2. Did The Met deny Student a FAPE, from August 2018 to March 11, 2020, by failing to find him eligible for special education?
3. Did The Met deny Student a FAPE, from August 2018 to March 11, 2020, by failing to develop an individualized education program, called an IEP, for him?

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

1. all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
2. 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 a free appropriate public education, referred to as 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]; see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student initiated this proceeding and bore the burden of proving his claims. 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 a 14-year-old boy in the ninth and tenth grades at The Met, a charter school of the Sacramento City Unified School District, from August 2018 to March 11, 2020. He resided in the Folsom Cordova Unified School District and previously attended school there. Folsom Cordova found him eligible for special education under the category of speech and language disorder and gave him an IEP, but it later determined that Student had progressed so much that he no longer needed

speech services. With Parent's agreement, Folsom Cordova exited Student from special education and gave him a "504 Plan" pursuant to the Rehabilitation Act of 1973.

Parent became dissatisfied with the program Folsom Cordova gave Student and enrolled him in The Met in August 2018. The Met is a high school that teaches traditionally on Monday, Wednesday and Friday, but places its students in jobs in the community, where they work on Tuesdays and Thursdays.

The Met assessed Student and decided he was not eligible for special education. It offered him another 504 plan, which Parent rejected. Parent withdrew Student from The Met on or about March 11, 2020, and then initiated this action to establish that Student was eligible for special education and related services under the IDEA during his enrollment at The Met.

ISSUE 1: DID THE MET DENY STUDENT A FAPE FROM AUGUST 2018 TO MARCH 11, 2020, BY FAILING TO TIMELY OR ADEQUATELY ASSESS HIM IN ALL AREAS OF SUSPECTED DISABILITY; SPECIFICALLY, ACADEMIC ACHIEVEMENT, HEALTH, LANGUAGE AND SPEECH, COMMUNICATIONS DEVELOPMENT, MOTOR DEVELOPMENT, SOCIAL-EMOTIONAL BEHAVIOR, ADAPTIVE BEHAVIOR, AND POST-SECONDARY TRANSITION?

Parent contends that The Met exceeded the 60-day time limit for conducting and reporting on assessments, that some of them were inadequate in the information they collected, and that The Met did not assess Student in all areas of suspected disability.

The Met contends that it timely and adequately assessed Student in all areas of suspected disability, including academic achievement, health, language and speech,

communications development, motor development, social-emotional behavior, and adaptive behavior. It contends that Student was too young to be entitled to a post-secondary transition assessment.

A district must ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) A district need not assess under this requirement unless it has some notice that a particular child has displayed symptoms of a covered disability. (*Timothy O. v. Paso Robles Unified Sch. Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119.)

A parent may request an initial evaluation to determine if the child is a child with a disability. (20 U.S.C. § 1414(a)(1)(B).) A district must generally give parent an assessment plan within 15 calendar days of a referral for assessment, (Ed. Code, §§ 56043, subd. (a); 56321, subd. (a).) The parent has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c)(4).) Once a parent consents, the district usually must complete the assessment and hold an IEP team meeting to discuss the results within 60 days of receipt of the signed assessment plan, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays. (Ed. Code § 56043(f)(1).) The assessment report must be provided to the parent at or before the IEP team meeting at which the assessment is discussed. (Ed. Code, § 56329, subd. (a)(1).)

Beginning not later than the first IEP to be in effect when a child with a disability turns 16, the IEP must include appropriate measurable postsecondary goals related to training, education, employment, and, where appropriate, independent living skills. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); 34 C.F.R. § 300.320(b) (2006); Ed. Code, § 56345,

subd. (a)(8).) Every such IEP must also include transition services to assist the child in reaching those postsecondary goals. (*Ibid.*)

TIMELINESS OF ASSESSMENTS

On September 10, 2018, shortly after enrolling Student at The Met, Parent requested that The Met assess him in all areas of suspected disability. The Met timely organized a meeting within 10 days, on September 20, 2018, to discuss the details of Parent's request, and asked that she bring "any academic information or testing information" to the meeting. Parent attended the meeting, as did resource teacher Scott Ford and school psychologist Taisiya Kulvidyuk. The attendees discussed areas in which Parent sought assessment, and two days later Parent described the discussion in an email as involving "my son's prior IEP, 504 plans, medications and diagnosis provided." This was an apparent reference to Student's long-standing diagnosis of attention deficit hyperactivity disorder, or ADHD, and the fact that he took Adderall to control it.

On September 25, 2018, Ford provided Parent an assessment plan. Parent promptly signed it but sent it by an unnamed delivery service to the Sacramento City Unified School District rather than to The Met, as Ford had requested. The record does not clearly show that Sacramento City actually received it. Parent claimed in an email that someone at Sacramento City signed for it, but never produced any signature to The Met or at hearing. Ford asked Parent to send another signed copy of the assessment plan, and The Met received the signed copy on October 15, 2018.

School psychologist Kulvidyuk coordinated an interdisciplinary assessment of Student which included her own psychoeducational assessment, an academic assessment by Ford, a behavior assessment by behavior intervention specialist Selicia

Fletcher, and a health assessment by the district's nurse. Speech and language pathologist Dianne Walker also conducted a speech and language assessment. The multidisciplinary assessment report was produced on November 9, 2018, and the speech and language assessment report was produced on December 7, 2018.

On November 30, 2018, Ford sent Parent a notice of an IEP team meeting set for December 13, 2018, at which the assessment reports would be discussed. If the meeting had been held on that date, it would have been within the 60-day timeline for assessing and reporting after an assessment plan has been received. (Ed. Code § 56043(f)(1).) Ford established at hearing that he would have provided the written assessment reports to Parent by or before the proposed December 13, 2018 meeting. (See Ed. Code, § 56329, subd. (a)(3).)

Parent declined in a December 7, 2018 email to attend the proposed December 13, 2018 IEP team meeting because she had not yet received the assessment reports and wanted time to consider them before the meeting. Ford provided the assessment reports to Parent on December 19, 2018. Parent and Ford agreed in further emails that the IEP team meeting would be held instead on January 10, 2019, to allow her time to review the reports. The assessment reports were reviewed at the IEP team meeting on January 10, 2019.

An IEP team meeting to report on district assessments that is held more than 60 days after the district's receipt of a signed assessment plan is still timely if the parent and the district agree in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f), 56302.1, subd. (a); 56344, subd. (a).) The emails between Parent and Ford resetting the meeting for January 10, 2019, can be fairly construed to constitute such a written agreement. Student argues that any such agreement must be

made, in the case of an assessment for specific learning disorder, between parents and “a group of qualified professionals,” which was not done here. (See 34 C.F.R. § 300.309(c).) However, that rule applies only when “[P]rior to a referral, a child has not made adequate progress after an appropriate period of time when provided instruction. . . (*Id.*, subd. (c)(1).) That did not occur here; Parent requested assessment almost immediately upon Student’s entry into The Met.

In the alternative, The Met made reasonable efforts to convene a timely meeting to discuss the assessments but Parent declined to appear until after the deadline had passed.

If The Met made any procedural error in the timing of the assessments and the subsequent meeting, that error did not impede Student’s right to a FAPE, significantly impede Parent’s right to participate in the IEP process, or deprive Student of educational benefits. Any such error therefore did not constitute a denial of FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subds. (f)(2) & (j).) To the contrary, the additional time Parent requested and received maximized her participation in the January 10, 2019 IEP team meeting because it gave her the opportunity to study the assessments at length before the meeting and prepare to ask detailed questions about them.

The Met therefore did not fail to timely report on its assessments within the 60-day time limit, as lawfully extended by the parties, or if it did, any such failure was harmless and did not deny Student a FAPE.

AREAS AND ADEQUACY OF ASSESSMENTS

ACADEMIC ACHIEVEMENT

Ford assessed Student's academic achievement by administering to Student the Woodcock-Johnson Test of Achievement, Fourth Edition. Ford was qualified to assess Student's academic achievement because he was a resource teacher, had multisubject and mild/moderate teaching credentials, and had 19 years of experience in administering versions of the Woodcock-Johnson several times a year. Ford was aware from the September 20, 2018 meeting with Parent that she was particularly concerned about Student's mathematics and handwriting.

Student's cluster scores on the Woodcock-Johnson were all average. He scored 111 on Basic Reading Skills, 102 on Reading Comprehension, 96 on Math Calculation Skills, 104 on Math Problem Solving, and 103 on Written Expression. As Ford testified at hearing, these scores did not confirm Parent's suspicions that Student was struggling in math or handwriting.

Student does not contend that there was any flaw in Ford's administration of the Woodcock-Johnson. The Met Student did not meet his burden to show that the academic assessment was not adequate.

SOCIAL-EMOTIONAL STATUS

Kulvidyuk was an experienced and credentialed school psychologist who had assessed more than a thousand students, and was qualified to assess Student. She testified for most of a hearing day and was careful, logical, and balanced. Kulvidyuk was very familiar with Student's files and tests. Her testimony was consistent with

contemporary documents and was not undermined on cross-examination. Kulvidyuk was a credible witness, and her opinions are given substantial weight here.

Kulvidyuk was thorough in her assessment. She interviewed Parents, sought the opinions of Student's teachers, conducted classroom observations, reviewed his school records, and administered several widely used assessment measures. These included the Behavior Assessment System for Children – Third Edition (BASC-3), which involved distributing and analyzing rating scales filled out by Student's Parents and teachers.

Student's three principal teachers informed the assessors that Student had no problems at school. They described him variously as motivated and intelligent, kind and respectful, and caring and determined. Parent told the assessors that Student "loves his new school The Met" and had at least four close friends. He got along with teachers, adults and family members. Parent mentioned that Student had gotten into trouble in the past and had received counseling in 2014 to help him during his parents' divorce. Student's only criticism of Kulvidyuk's assessment was that she did not contact Student's pediatrician. It is not clear from the record that Parent ever suggested such a contact, identified any doctor as Student's pediatrician, or executed a waiver of confidentiality so that The Met could contact the pediatrician. Student does not argue that his pediatrician had any information that would have changed Kulvidyuk's assessment.

Student did not meet his burden to show that the social and emotional assessment was not adequate.

SPEECH AND LANGUAGE

Dianne Walker, a licensed speech and language pathologist employed by Sacramento City for 20 years, was qualified to conduct the speech and language assessment of Student. She assessed him in November and December 2018 and issued her report on December 7, 2018. The report was provided to Parent on December 19, 2018, and discussed at the IEP team meeting on January 10, 2019.

Student identifies no specific failing in Walker's speech and language assessment, and Student did not meet his burden to show that the assessment was not adequate.

BEHAVIOR

Fletcher was an experienced and credentialed behavior intervention specialist qualified to assess Student's behavior. She collected and reported data on Student's behavior in and out of class. Her purpose was to determine whether Student's behavior impeded his learning or the learning of others.

In reviewing Student's cumulative file, Fletcher learned that he had been suspended five times for misbehavior, but all the incidents were more than a year old and at a previous school. Fletcher could not find any reference to a disciplinary hearing resulting from any of those incidents. Student's behavioral history concerned her at first, but she confirmed with Student's teachers that he had never been referred for discipline of any kind in his present placement. Advisory teacher Grace Yates told Fletcher that she had no concerns about Student's behavior, which was on a par with the other students in the class. Student's Global Issues teacher Manuel Favela also had no concerns about his behavior, stating that "I have never had any behavior problems with him and don't expect to." Math teacher Monica Hunt also reported that she had no

problems with Student's behavior, and added that he participated well and asked questions respectfully. Fletcher checked this information against the BASC-3 rating scales collected by Kulvidyuk and found that the results were consistent. Based on this information, Fletcher concluded that while Student may have had some behavioral problems more than a year earlier in a different school, he no longer displayed behavioral difficulties.

Fletcher also investigated the possible effect of Student's ADHD on his education. She and her assistant observed Student in his classes on 15 consecutive days between October 31 and November 30, 2018. They noted his behavior every 30 seconds on a form devised by Fletcher for that purpose, primarily to determine how well he was staying on task in the classroom. They found that Student was on task 84.2 percent of the time. Student's attention to his class work compared favorably to his classmates, who averaged on-task behavior about 70 percent of the time. Fletcher checked her results against the results of the rating scales distributed by Kulvidyuk, and concluded that her results were consistent with Kulvidyuk's testing. Fletcher reported that Student did not need a behavior goal, a behavior intervention plan, or any other form of behavioral support. She concluded that any incidences of inattention were not adversely affecting his education.

Student did not meet his burden to prove that The Met's behavior assessment was not adequate.

HEALTH

School nurse Laurisa Elhai assessed Student's health on November 5, 2018, which she was qualified by licensure and training to do. After interviewing Parent, Elhai reported that Student's only health difficulties were ADHD and seasonal allergies.

Student was taking Adderall to regulate his ADHD. Elhai measured Student's sight, hearing and dental condition. She discussed her findings with Parent on October 29, 2018, and wrote her health report on November 5, 2018. for inclusion in the interdisciplinary report. Parent had no questions about the report at the January 10, 2019 IEP team meeting. Student does not assert there was any specific flaw in the health assessment and did not meet his burden of proof that the health assessment was inadequate.

POST-SECONDARY TRANSITION

Student was born on October 1, 2004, and became 14 years of age in Fall 2018 when his assessments were being conducted. Transitional needs do not constitute an area of disability, but are assessed according to a separate provision of the IDEA.

The IDEA and state law require a district to conduct a transition assessment and include a transition plan in "the first IEP to be in effect when a child with a disability turns 16." (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); 34 C.F.R. § 300.320(b) (2006); Ed. Code, § 56345, subd. (a)(8).) Since IEP's are renewed annually, Student was a year away from having an IEP that would be in effect when he turns 16. The Met therefore had no legal obligation to assess Student's transitional needs.

COMMUNICATIONS DEVELOPMENT

The fall 2018 assessment plan called for assessment of Student's communications development as part of speech pathologist Walker's speech and language assessment. In November and December 2018, Walker assessed Student's communications development both by observation and by administering the Clinical Evaluation of Language Fundamentals, Fifth Edition.

In April 2015, Folsom Cordova assessed Student's speech and language and decided he was eligible for special education in that category. The Folsom Cordova assessment found that Student had a mild frontal lisp and could produce all English phenomes correctly in all contexts except for the /s/ and /z/ sounds. The individual services provided by Folsom Cordova focused on that problem.

By the time of The Met's speech assessment in December 2018, Walker reported that "his speech sound productions are no longer judged to be of concern and his overall speech clarity was considered to be very good." By the time of Walker's assessment, Student "ha[d] achieved mastery" of the /s/ and /z/ phonemes that had troubled him earlier.

Student did not meet his burden to prove that The Met's assessment of his communications development was not adequate.

MOTOR DEVELOPMENT

Parent did not mention any concern about motor development to The Met's staff in fall 2018. Nonetheless, The Met offered to conduct an occupational therapy assessment in fall 2018, but Parent declined it. Student did not meet his burden to show that The Met had any reason to suspect that Student might have a motor development deficit or any other occupational therapy need, and correctly concluded that motor development was not an area of suspected disability for him. The Met was therefore under no obligation to conduct an occupational therapy assessment.

ADAPTIVE BEHAVIOR

Kulvidyuk's psychoeducational assessment report addressed Student's adaptive behaviors at length through the administration of the BASC-3. The rating scales she

sent to both Parents and Student's three teachers inquired into his adaptability, social skills, leadership, activities of daily living, functional communication and executive functioning. In her assessment report, Kulvidyuk dedicated several pages to separately analyzing the ratings of each respondent in each of those areas.

Student did not meet his burden to prove that The Met's assessment of his adaptive behavior was not adequate.

In summary, Student did not prove that The Met denied him a FAPE by failing to timely and appropriately assess him in any of the areas he alleged.

ISSUE 2. DID THE MET DENY STUDENT A FAPE, FROM AUGUST 2018 TO MARCH 11, 2020, BY FAILING TO FIND HIM ELIGIBLE FOR SPECIAL EDUCATION?

ISSUE 3. DID THE MET DENY STUDENT A FAPE, FROM AUGUST 2018 TO MARCH 11, 2020, BY FAILING TO DEVELOP AN IEP FOR HIM?

Student contends he is eligible for special education in the categories of speech and language disorder, specific learning disability, emotional disturbance and autism. The Met contends he is not eligible in any of those categories. Issues 2 and 3 are considered together because if Student can establish eligibility, he also establishes entitlement to an IEP.

At the January 10, 2019 IEP team meeting, after the assessors presented their reports, the team discussed Student's possible eligibility for special education. All the members of the IEP team except Parent concluded that Student was not eligible in any category, and that his individual needs could be addressed with a 504 plan.

Parent disagreed with the IEP team's conclusions and requested independent educational assessments in the areas of speech and language and psychoeducational status. The Met agreed to fund those two independent assessments. Parent selected Bright Start Therapies for the speech and language assessment and Dr. Connie Hale for the psychoeducational assessment. The IEP team discussed the results of those independent assessments at an IEP team meeting on September 25, 2019.

Two Bright Start Therapies representatives attended the meeting to present their speech and language assessment, and Dr. Hale attended by telephone to discuss her psychoeducational assessment. The IEP team again considered Student's possible eligibility for special education, and again decided that he was not eligible in any category and could be adequately served by a 504 plan.

SPEECH AND LANGUAGE ELIGIBILITY

A student is eligible for special education and related services in the category of language or speech disorder when he or she demonstrates difficulty understanding or using spoken language to such an extent that it adversely affects his or her educational performance and cannot be corrected without special education and related services. (Ed. Code, § 56333.) That difficulty must result from any of the following disorders:

1. Articulation disorders, such that the pupil's production of speech significantly interferes with communication and attracts adverse attention.
2. Abnormal voice, characterized by persistent, defective voice quality, pitch, or loudness.
3. Fluency difficulties which result in an abnormal flow of verbal expression to such a degree that these difficulties adversely affect communication between the pupil and listener.

4. Inappropriate or inadequate acquisition, comprehension, or expression of spoken language such that the pupil's language performance level is found to be significantly below the language performance level of his or her peers.
5. Hearing loss which results in a language or speech disorder and significantly affects educational performance.

(Ibid.)

Speech pathologist Walker reported at the January 10, 2019 IEP team meeting and confirmed at hearing that in her one-to-one interactions with Student while assessing him, Student used appropriate pragmatic communication and exhibited normal social overtures. He also exhibited a good sense of humor, a command of language, and an extensive vocabulary. Student was polite, friendly and cooperative. Walker found no concerns in their interactions with Student's articulation of speech sounds in conversation. Student was 95 to 100-percent intelligible. Walker acknowledged that Student previously had an IEP providing speech and language services because of difficulty with the /s/ and /z/ phenomes, but concluded: "[A]s evidenced by his conversational speech, he has achieved mastery of those skills." She confirmed these conclusions by observing Student in class, watching Student with his peers in the hallway, and speaking with his teachers.

Walker also administered to Student the Clinical Evaluation of Language Fundamentals – Fifth Edition, referred to as CELF-5, to measure his receptive and expressive language skills, including semantics, morphology, syntax and memory. Student's scores were in the average or above average range on all the CELF-5's tests. Walker concluded that Student had average to above average receptive and expressive language skills, that his articulation skills were normal and no longer of concern.

In Walker's testing, Student's ability to produce the /s/ and /z/ phonemes accurately ranged from 95 to 100 percent. When specifically asked to produce those sounds, he could do so 100 percent of the time. Walker described this mild imperfection as a speech difference, but not a disability or disorder, and opined that it was not concerning because it had no impact on his intelligibility. She emphasized at hearing that the goal of her work was for a student to achieve intelligible and functional speech, not perfect speech. She added that many speech goals require only 80 percent accuracy to be successful. Her overall impression of Student's speech abilities was that he was very articulate, intelligent, conversational, and gregarious. From Walker's observations, Student appeared to have many friends, participated in his classes, and his teachers reported that he had very strong communication skills.

In Walker's opinion, Student was not eligible for special education in the category of speech and language disorder because he did not meet the criteria. He had no difficulty with pragmatic language, no difficulty with articulation, and no expressive or receptive language delay.

The Bright Start assessors, in their independent assessment, reached many conclusions similar to Walker's. Their oral motor examination of Student revealed that all of his oral functions, voice tone, volume and rate of speech were within normal limits.

However, Bright Start administered the Goldman-Fristoe Test of Articulation – Third Edition, referred to as GFTA-3, to Student, and reported that he could produce the /s/ and /z/ phonemes only inconsistently. He had very low scores on articulation at the sentence level and sounds at the word level.

The rest of Bright Start's testing showed Student to be average in speech and language skills. On the Oral and Written Language Scales – Second Edition, Student's

oral composite score was within the average range and his subtests were all above the 50th percentile. On the Social Language Development Test - Adolescent Normative Update, his scores were average in one category and above average in three others. Bright Start reported that Student presented with average receptive and expressive language skills in both oral and written language, and had average communications skills. Without explanation, however, it recommended "[d]aily intensive speech drills" for "improvement and a positive prognosis."

The Bright Start independent assessment had limited persuasive value for a variety of reasons. First, with the exception of two subtests on the GFTA-3, all of the formal tests administered showed that Student was in the average range. Bright Start's assessors did not explain how their informal observations could be so different from their test results. Nor did the Bright Start report attempt to address, or even mention, the different conclusions reached by Watson and The Met's teachers. In addition, the Bright Start assessors did not explain why they thought Student needed intensive daily speech drills. No Bright Start witness testified, so the Bright Start results could not be fully evaluated.

Most importantly, the Bright Start assessors did not analyze the question of eligibility. One of the referral questions for the Bright Start assessment was whether Student was eligible for special education in the category of language and speech disorder. The Bright Start report quoted the legal requirements for eligibility in detail, but then the assessors did nothing to compare their results with those requirements. Without explanation, Bright Star simply asserted that his articulation difficulties amounted to a disability.

The Bright Start conclusion was also not persuasive because the assessors did not explain how Student's articulation difficulty fit in the definition of speech and language disorder, and did not address its impact on his education. In addition, the consistent observations of Student's teachers and The Met's assessors carried more weight than two low scores on the Goldman-Fristoe Test of Articulation.

Walker's opinion was more persuasive than anything in the Bright Start report. It was buttressed by her consistent, careful, balanced and therefore credible testimony at hearing. It was also supported by the observations of all of Student's teachers that, notwithstanding any articulation difficulties, Student's speech was fully intelligible and had no detrimental effect on his education.

Student did not discharge his burden of proving that he was eligible for special education in the category of speech and language disorder.

SPECIFIC LEARNING DISORDER ELIGIBILITY

Student's expert Dr. Hale was a licensed educational psychologist, but her credentials are not otherwise in the record. Hale examined Student's files, observed him in class, and administered to him numerous standardized and non-standardized tests. Most of the resulting scores were consistent with the scores Kulvidyuk had obtained.

Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may have manifested itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The basic psychological processes include attention, visual

processing, auditory processing, phonological processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).)

The presence or absence of a specific learning disorder is usually determined by examining whether a pupil has a severe discrepancy between intellectual ability and achievement in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B).) In analyzing test data, the calculation of a severe discrepancy requires the application of a complex mathematical formula involving a mean score of 100 and a standard deviation of 1.5. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B)(1).)

The dispute in this matter involves the starting point for that mathematical calculation, which requires determining Student's intellectual ability. Student is African-American and could not be given a standardized intelligence test like an IQ test. (See *Larry P. v. Riles* (9th Cir. 1986) 793 F.2d 969.) In determining Student's intellectual ability for her assessment, Kulvidyuk decided that Student's special nonverbal cluster score of 105 on the widely used Differential Ability Scales, Second edition, known as the DAS-II, was the best and most reliable estimate of his cognitive ability. Student's scores on the DAS-II were in the high range for verbal skills and in the average range for everything else. Student's verbal score on the DAS-II was 127, his nonverbal score 103, and his spatial score 106. Kulvidyuk opined at hearing that these three commonly averaged scores were too far apart to produce a reliable general conceptual ability score. Kulvidyuk used instead the special nonverbal cluster score of 105, which in her opinion, and in light of all Student's scores, provided the best estimate of Student's intellectual capacity. In her report she explained the technical aspects of this choice at length.

Using the cluster score of 105 as the starting point, Kulvidyuk demonstrated that no severe discrepancies existed between Student's intellectual ability and his achievement.

Dr..Hale arrived at a different conclusion by using a different starting point to establish Student's intellectual ability. She also used a DAS-II score., but she selected only the highest score of 127 on the verbal ability subtest and ignored the other DAS-II scores relating to Student's intellectual ability. Because of that choice, she was able to find several severe discrepancies. When asked at hearing why she chose the single score 127 as the best measure of Student's cognitive ability, Hale replied: "You can't fake smart," and therefore Student's verbal ability was "at least" within the 127 range. This response seemed to imply that a high score on a cognitive test must be right, which is not plausible.

The regulation that defines specific learning disorder requires the use of multiple sources in measuring a student's intellectual ability, and prohibits the use of a single score. It provides that the decision as to whether or not a severe discrepancy exists shall take into account all relevant material which is available on the pupil. (Cal. Code Regs., tit. 5, sec. 3030, subd. (10)(B).) The same regulation provides that: no single score or product of scores, test or procedure shall be used as the sole criterion for the decisions of the IEP team as to the pupil's eligibility. (*Ibid.*)

Kulvidyuk's choice of a starting point for calculating discrepancies was reasonable, logical, and consistent with the regulation. It was also consistent with the fact that most of Student's other scores on the DAS-II were in the average range. Hale's use of Student's single highest score on the DAS-II as a starting point violated the regulation's requirement that all relevant material be considered, and its prohibition of the use of a single score. Hale's opinion that Student presented with the sort of severe

discrepancies that would indicate a specific learning disorder was therefore both contrary to law and unpersuasive.

In addition, Student offered no evidence, other than Hale's opinion, that he had a severe discrepancy between intellectual ability and achievement. The eligibility regulation requires that a severe discrepancy be corroborated by other assessment data which may include other tests, scales, instruments, observations and work samples, as appropriate. (Cal. Code Regs., tit. 5, sec. 3030, subd. (10)(B).) Neither Hale nor Student addressed this requirement, and the record does not show the existence of such corroboration. And even on the assumption that Hale's starting point for calculating discrepancies was correct, Student did not meet his burden of showing that he suffered from a processing deficit or that such a deficit adversely affected his education.

Student did not prove that he was eligible for special education in the category of specific learning disorder.

OTHER HEALTH IMPAIRMENT ELIGIBILITY

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment. (Cal. Code Regs., tit. 5, sec. 3030, subd. (9)(B).) The limited strength, vitality or alertness must be due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome. (Ibid.) It must also "[a]dversely affect[] a child's educational performance." (*Ibid.*)

Student was diagnosed at age four as having ADHD, and could potentially be eligible in the category of other health impaired as a result. But The Met's interdisciplinary assessment report recommended that the IEP team find Student ineligible in that category. It concluded: "Even though [Student] was diagnosed with ADHD and he is taking Adderall daily, he obtains satisfactory grades and has the knowledge and skills typical of a student his age and grade at school."

The assessors' conclusion was supported by considerable evidence. Student's teachers reported to the assessors that Student's attention occasionally wandered in class, but no more so than was typical of teenage boys. Behavior intervention specialist Fletcher and her team closely observed Student in class for 15 consecutive days, recording whether he was on or off task every thirty seconds. The assessors concluded Student was on task 84.2 percent of the time, significantly better than the 70 percent average of his typical classmates. This finding was consistent with teacher reports on the BASC-3 rating scales. Nothing in Student's grades reflected any effect of his ADHD on his academic work. All of Student's teachers told Kulvidyuk, in fall 2018, that he was getting A's and B's in his classes. Both parents reported on their BASC-3 rating scales that Student had trouble maintaining his attention in the home environment, but The Met's staff did not see that at school.

Dr. Hale reached the opposite conclusion. She opined in her assessment report and at hearing that Student was eligible for special education in the category of other health impaired. Her explanation of that finding was not persuasive.

Many of Hale's findings appeared to support The Met's position. She observed Student for 40 minutes in his Global Issues/Geography class and found him "on task 100% of the time." Hale also observed him for an hour at his job at the pizza restaurant

and found him attentive to his customers' needs, always busy, and doing his job well. And when she observed and tested him at home, he was attentive. This was confirmed by her testing. On the Attention/Concentration Index of the Wide Range Assessment of Memory 2, also referred to as the WRAML-2, he scored in the average range. On the Conners Third Edition, which tests for ADHD, all four school respondents rated him in the average range on inattention, hyperactivity and impulsivity. Analyzing the CONNERS-3 results, Hale concluded: "[A]lthough [Student] has a diagnosis of ADHD, he is not demonstrating behaviors that are typical of students with ADHD at The Met." The opposite was true at home, according to Parents' rating scales.

Notwithstanding her contradictory findings, Hale concluded in her report that Student was eligible for special education as other health impaired. She reasoned that there were "some" behavioral concerns reported at school, and Parent reported such concerns at home. Hale stated that though Student had minimal behavioral concerns due to the unique structure of The Met, he had a history of behavioral difficulties at previous schools and his diagnoses of ADHD and Oppositional Defiant Disorder, also referred to as ODD, had an impact on his ability to successfully access his academics.

None of these reasons was persuasive. Hale's reference to "some" behavioral difficulties at school reflected her admitted error in mistaking a student teacher for Student's math teacher. The evidence at hearing showed that Kulvidyuk sent rating scales to Student's teachers, who were Grace Yates for an Advisory class, Monica Hunt for math, and Manuel Favela for Global Issues/Geography. Hale also sent rating scales to Yates and Favela, but assumed that Stephanie Gonzales was Student's math teacher and sent rating scales to her instead of Monica Hunt, of whom she showed no awareness. In fact, Gonzales was only a student teacher, and was assisting Hunt in math class.

This mistake mattered greatly to Hale's conclusions, because throughout her report, when she reported such matters as "some" behavioral concerns, she was usually reporting the responses of Gonzales, not the other teachers. Almost uniformly throughout the rating scales, Student's three teachers reported average performance and no concerns, but Gonzales frequently reported "mildly elevated" or "elevated" behavior. As several of The Met's witnesses observed at hearing, the opinions of Student's three experienced teachers were much more reliable than those of Gonzales, who was new to teaching. A student teacher has far less exposure to many students, lacks the ability to compare more than a few of them, and is much more likely to perceive as unusual behavior that more experienced teacher would see as normal.

When Hale learned at hearing that Gonzalez was a student teacher and Hunt was Student's math teacher, she claimed it made no difference. Asked whether an experienced teacher might view a student differently, she refused to answer the question directly, and spoke instead about seeing a picture of what was going on in the classroom at the time. She asserted that Gonzalez's responses were a piece of that picture. These answers did not adequately refute The Met's argument that Hunt overly and unknowingly relied on the ratings of a novice and disregarded the uniform reactions of more experienced teachers in reaching her eligibility conclusion.

Dr. Hale also incorrectly assumed in her report that behavioral difficulties fell within the other health impaired eligibility category. She wrote that since Student "has a history of behavioral difficulties at previous schools," he "also meets special education criteria under the Other Health Impaired category." At least without explanatory circumstances, the definition of other health impaired does not permit that conclusion. The category of other health impaired addresses a difficulty that leads to "limited strength, vitality or alertness," something to which behavior, without more, has no

apparent relationship. (Cal. Code Regs., tit. 5, sec. 3030, subd. (9)(B).) In addition, a student having ADHD is not eligible for special education unless his education is adversely affected by the ADHD. Hale thought this requirement was satisfied merely by the existence of the diagnosis and the "slightly elevated" or "elevated" rating scales.

Parent told assessors and testified that Student had substantial lapses of attention at home. However, her assertion that his lapses of attention also occurred at school was not supported by any other evidence. For these reasons, Student did not prove he was eligible for special education in the category of other health impaired.

EMOTIONAL DISTURBANCE ELIGIBILITY

A student may be eligible for special education in the category of emotional disturbance, which is a condition exhibiting one or more of five specific characteristics. The five characteristics are an inability to learn that cannot be explained by intellectual, sensory, or health factors; an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of behavior or feelings under normal circumstances; a general pervasive mood of unhappiness or depression; and a tendency to develop physical symptoms or fears associated with personal or school problems. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(4).) A student is not eligible as emotionally disturbed unless one of those characteristics has existed over a long period of time and to a marked degree. The condition must also adversely affects a child's educational performance. (*Ibid.*)

The evidence showed that Student had none of these characteristics. He was able to learn, and his grades were consistent with his cognitive capacity. Student had many friends and got along well with adults. The record does not reveal that he displayed any inappropriate behaviors or feelings at The Met. Student was not unhappy

or depressed. He scored himself as average on Kulvidyuk's Children's Depression Inventory, as did the adults who returned ratings. Parent told Kulvidyuk that Student displayed depressive behaviors no more often than others his age. There was no evidence that Student had any physical symptoms or fears associated with personal or school problems. Based on these facts, Kulvidyuk and the other school members of the IEP team correctly concluded that Student was not eligible as emotionally disturbed. There was no evidence to the contrary.

Student did not prove that he was eligible for special education in the category of emotionally disturbed.

AUTISM ELIGIBILITY

The Met did not initially assess Student for autism because it had no reason to suspect that it was an area of disability for him. Parent testified that she believed she mentioned autism at the September 20, 2018 meeting discussing an assessment plan, but later testified that The Met would not have learned of Student's autism without calling his doctors. The Met's evidence that she did not mention autism at the September meeting was more consistent and persuasive. Ford and Kulvidyuk, the school staff in attendance, were certain that Parent did not mention autism there. Kulvidyuk added that, as the school psychologist who would test for autism if it was suspected, she would have been very interested in such a claim. Parent's email after the meeting mentioned telling the school staff only of a "diagnosis," which was apparently a reference to ADHD, not autism. Nothing in the extensive emails between the parties concerning the assessment plan mentioned autism, or showed that Parent complained about the omission of autism from the plan.

The weight of evidence showed that Parent did not mention possible autism to school staff at the September 20, 2018 meeting or later in 2018. By the time she did so on January 10, 2019, The Met's assessments had been completed.

The Met first learned that Parent suspected autism during the January 10, 2019, IEP team meeting, at which The Met's assessments were presented and discussed. During the meeting, Parent handed Ford a note dated January 4, 2019, reflecting Student's visit to Dr. Harjot Sekhon, a psychiatrist who saw Student every six weeks for medication management. In the note, Sekhon listed autism as a previous diagnosis. According to background information given by Parent to the Bright Start assessors, Sekhon had diagnosed Student as having autism when he was four years old.

As soon as The Met learned of Student's autism diagnosis, the IEP team revisited its assessments to see if any of the results was consistent with autism. On January 18, 2019, The Met sent Parent a lengthy re-analysis of the results of those assessments in the areas of communications development, social skills and repetitive behaviors. The re-analysis demonstrated that the results of the Met's assessments were inconsistent with the presence of autism and emphasized that "at no time did the team see any indications of Autism during the assessment period."

Nonetheless, The Met offered in that same letter to conduct another assessment of Student for autism, and requested Parent's permission to do so. It also offered to treat the January 10, 2019 IEP team meeting as "tabled" and to finalize the IEP after the new assessment results were completed and considered. Parent did not agree to either proposal, and requested independent assessments instead. These events limited The Met's ability to assess Student for autism.

For the purpose of eligibility, California law defines autism as a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, and adversely affecting a child's educational performance. The regulation adds that other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(1).)

Dr. Sekhon did not testify at hearing. The only evidence that Student was on the autism spectrum was the independent assessment by Dr. Hale, who opined that Student qualified for special education as autistic because he was “demonstrating some mild behaviors associated with an [autism] diagnosis.” Hale based this claim primarily on her overreliance on the rating scales of the student teacher and did not consider the contrary information from Student’s more experienced teachers. Hale showed no awareness of the contrary analysis in The Met’s January 18, 2019 reconsideration of its own assessment results in the context of possible autism. Hale made no effort to analyze whether these “mild behaviors” were significantly affecting Student’s verbal and nonverbal communication and social interaction, or whether they were adversely affecting his educational performance. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(1).) For all those reasons, Hale’s conclusion that Student qualified for special education as autistic was wholly unpersuasive.

Student did not prove that he was eligible for special education as autistic.

STUDENT’S NEED FOR SPECIAL EDUCATION

The evidence showed that Student did have some mild limitations. His auditory processing and visual-motor integration were somewhat slow. He had some difficulty

with handwriting, and needed more time on tests. Executive functioning was a relative weakness. He sometimes had trouble remembering lengthy segments of information.

Student contends that he was eligible for special education because these limitations had an adverse effect on his education. The Met contends that they did not.

Not every student who is impaired by a disability is eligible for special education. Some disabled students can be adequately educated in a regular education classroom. Federal law requires special education for a "child with a disability," who is defined in part as a child with an impairment who, by reason thereof, needs special education and related services. (20 U.S.C. § 1401(a)(3)(A)(ii); 34 C.F.R. § 300.8(a)(i)(2017).) State law requires special education for "individuals with exceptional needs," who are defined in part as individuals whose impairment requires instruction, services, or both, which cannot be provided with modification of the regular school program. (Ed. Code, § 56026, subd. (b).) Special education is defined as specially designed instruction to meet the unique needs of individuals with exceptional needs, whose educational needs cannot be met with modification of the regular instruction program." (Ed. Code, § 56031.) California's regulatory list of eligibility categories is prefaced by the general requirement that the degree of the child's impairment requires special education. (Cal. Code Regs., tit. 5, § 3030, subd. (a).) Accordingly, the Education Code provides that a student shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized" (Ed. Code, § 56303; see *Hood v. Encinitas Union Sch. Dist.* (9th Cir. 2007) 486 F.3d 1099, 1106-1107 [decided under former Ed. Code, § 56337].)

Parent told assessors, and testified, that Student's ADHD, speech and other limitations caused him difficulty in school. She pointed to two poor grades Student had

received as proof of this claim, but those grades were not caused by any disability. By the time of the January 10, 2019 IEP team meeting, Student was receiving a D in math and an F in PE. The Met's witnesses proved, however, that the math grade was only a mid-semester reflection of a missing quiz. The Met does not itself offer PE, but it requires each student to take some sort of PE outside of the school and report on it by turning in a log of attendance and activities. By the time of the January 2019 IEP team meeting, Student had not turned in his log, which accounted for his F.

Student's grade in math was a C at the end of the semester. The Met's academic program is more rigorous than that of the average public high school, and Student was in an advanced math class. Student's C in advanced math was neither proof of disability nor cause for alarm. By the end of the year he was receiving an A in PE. His other year-end grades were B's in English and his job internship, and A's in earth science and contemporary global issues. His grades overall were commensurate with his cognitive capacity and did not demonstrate any effect from any disability.

Dr. Hale conceded at hearing that Student was doing very well academically at The Met. Her findings of eligibility in three categories reflected her concern that Student might have more difficulties in a future placement. She described The Met as unique because Student was not sitting at a desk all day, but stated "If you take him out of that, he needs to go to college, he will need more support." Hale did not explain why that mattered to the eligibility of a student who was a freshman in high school when she assessed him.

Hale testified that, in making eligibility determinations, she always considered a student's needs over a three-year period because the student could move to a different school. She believed her assessments must recognize that "in other settings" a student

may have other needs. This speculation about Student's future need for special education in a different placement and a different school had no legal support, was not part of a proper eligibility determination, and thoroughly undermined Hale's opinions about Student's eligibility.

In the end, Dr. Hale essentially conceded that Student did not need special education. Her report concluded with this statement: "Although [Student] qualifies for special education services, the team may want to discuss whether a 504 Plan would better meet his needs . . ." At hearing she testified: "I think 504 would work." In her report she recommended several accommodations for Student such as preferential seating, breaking down complex tasks, and additional time for assignments and tests, but she conceded at hearing that all of her recommendations, as well as all of the recommendations of the Bright Start assessors, could be implemented by a 504 plan.

The Met proved convincingly that Student is a successful student who does not need special education. Josue Guzman, Student's Earth Science teacher, described him as a student who put forth good effort, had a good attitude, and was resilient and adaptable: a "[g]reat student with no problems." Grace Yates, Student's Advisory teacher, described him as cooperative, happy, adaptable, and empathetic, and added that Student had good peer relations and put forth good effort. Manuel Favela, Student's Global Issues teacher, stated: "This student is college bound and not at all learning disabled." Substantial documentary evidence confirmed that these descriptions were accurate.

Student did not prove that his mild deficits established eligibility for special education. The evidence showed that those limitations may be adequately addressed in

general education by a 504 plan, and that Student does not need and is not entitled to a special education IEP.

PROCEDURAL ISSUE

On the second day of hearing, Parent requested the removal of the Administrative Law Judge, also referred to as ALJ, and the appointment of another judge on the ground that she did not believe the ALJ could be fair to her son. She stated that at the beginning of a recess, when the ALJ had been slow to turn off his audio and video equipment, she had heard him muttering something that caused her to question his impartiality.

The ALJ treated Parent's request as a challenge for cause and asked Parent to put on the record what she thought she heard. She declined to do so. After careful consideration, the ALJ determined he was not biased against Student or Parent and denied the challenge for cause. Parent moved for reconsideration on the ground that some other judge should decide her challenge, and on the third day of hearing that motion was denied on the ground that it did not raise anything different in the earlier challenge.

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.

Issue 1: The Met did not deny Student a FAPE from August 2018 to March 11, 2020, by failing to timely or adequately assess him in all areas of suspected disability. The Met prevailed on Issue 1.

Issue 2: The Met did not deny Student a FAPE from August 2018 to March 11, 2020, by failing to find him eligible for special education. The Met prevailed on Issue 2.

Issue 3: The Met did not deny Student a FAPE from August 2018 to March 11, 2020, by failing to develop an IEP for him. The Met prevailed on Issue 3.

ORDER

Student's requests for relief are denied.

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.

/s/

Charles Marson

Administrative Law Judge

Office of Administrative Hearings