

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019110836

PARENT ON BEHALF OF STUDENT,

V.

BELLFLOWER UNIFIED SCHOOL DISTRICT.

DECISION

September 18, 2020

On November 20, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Bellflower Unified School District as respondent. On June 24, 2020, OAH granted Student's request to amend the complaint. Administrative Law Judge Rita Defilippis heard this matter by videoconference on August 18, 19, 20, 21, and 24, 2020.

Attorneys David Grey and Barbara Grey represented Student. Parent attended all hearing days on Student's behalf. Student did not attend the hearing.

Attorneys Richard Brady and Marcia Brady represented Bellflower. Matthew Adair, Special Education Program Administrator, attended all days of hearing on Bellflower's behalf.

At the parties' request the matter was continued to September 9, 2020, for written closing briefs. The briefs were timely filed, the record closed, and the matter submitted on September 9, 2020.

ISSUES

1. Did Bellflower deny Student a free appropriate public education, called FAPE, from January 2019 through February 2020, by failing to adequately assess all areas of Student's need, specifically, psychoeducational, braille skills, orientation and mobility, and learning media technology skills?
2. Did Bellflower deny Student a FAPE during the 2019-2020 school year, up to February 28, 2020, by failing to implement 165 minutes per day of specialized academic instruction, by a teacher of the visually impaired, as identified in the June 14, 2019 individualized educational program, called IEP?

The issues vary from the issues set forth in the order following prehearing conference for this matter. On August 13, 2020, Student filed an objection to the wording of the issues in the order following prehearing conference. On August 17, 2020, Student filed a partial withdrawal of issues for hearing, without prejudice. The remaining issues, set forth above, were discussed at length, agreed to by the parties on the record, and ruled on by the undersigned, on the first day of hearing.

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:

- 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 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]; and see 20 U.S.C.

§ 1415(i)(2)(C)(iii).) Student filed for hearing in this matter and had the burden of proof on all issues. 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 16 years old and in 11th grade at the time of hearing. Student resided with Parent within Bellflower's geographic boundaries at all relevant times. Student was eligible for special education as a Student with a vision impairment as her primary eligibility and a speech and language impairment as her secondary eligibility.

ISSUE 1: DID BELLFLOWER DENY STUDENT A FAPE, FROM JANUARY 2019 THROUGH FEBRUARY 2020, BY FAILING TO ADEQUATELY ASSESS ALL AREAS OF STUDENT'S NEED, SPECIFICALLY, PSYCHOEDUCATIONAL, BRAILLE SKILLS, ORIENTATION AND MOBILITY, AND LEARNING MEDIA TECHNOLOGY SKILLS?

Student contends that Bellflower's triennial assessments of Student in the areas of psychoeducational, braille, learning media technology, and orientation and mobility functioning were inadequate to identify Student's educational needs in these areas. Student contends this deprived the IEP team of information necessary to determine her appropriate special education eligibility, services and placement, and denied her a FAPE.

Bellflower contends its 2019 triennial psychoeducational, learning media technology, and orientation and mobility assessments comprehensively assessed Student's psychoeducational, braille, learning media technology and orientation and

mobility needs and appropriately informed decisions regarding Student's special education eligibility, services and placement.

A local educational agency must conduct a reassessment of each child with a disability at least once every three years, called a triennial reassessment, unless the parent and the agency agree that it is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2); Ed. Code, §§ 56043, subd. (k), 56381, subd. (a)(2).) The agency must also conduct a reassessment if it determines the educational or related service needs of the child, including improved academic achievement and functional performance, warrant a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

The purpose of the triennial assessment is to determine whether the child continues to be a child with a disability and the educational needs of the child as it relates to the content of the child's IEP. (20 U.S.C. 1414 (b)(2)(A) (i) and (ii).) This includes assessment to determine present levels of academic achievement and developmental needs of the child; whether the child continues to need special education and related services; and whether any additions or modifications to the special education or related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child, and to participate, as appropriate in the general education curriculum. (20 U.S.C. 1414(c)(1)(B)(i)-(iv).)

Legal provisions for assessments also specify procedural requirements which are not at issue in this case. (20 U.S.C. 1414 (b); Ed. Code, 56320, subds. (a) and (b).)

Student has been functionally blind since birth due to a congenital deformation of the eyes and retinal dysplasia. Student relies on senses other than vision as major channels for learning. Her vision impairment is considered a low incidence impairment.

(Ed. Code § 56026.5.) A student must be assessed in all areas related to the suspected disability including, if appropriate, health and development, vision, including low vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. A developmental history shall be obtained, when appropriate. (Ed. Code, § 56320, subd. (f).) The assessment of a student with a low incidence disability shall be conducted by persons knowledgeable of that disability, and special attention shall be given to the unique educational needs, including but not limited to, skills and the need for specialized services, materials, and equipment. (Ed. Code, § 56320, subd. (g).)

A school district's failure to assess or appropriately assess constitutes a procedural violation of the IDEA. (*R.B., ex rel. F.B.v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 940.) The lack of assessments alone is enough to constitute a lost educational opportunity. (*Carrie I. ex rel. Greg I. v. Dep't of Educ., Hawaii* (D.Haw. 2012) 869 F.Supp.2d 1225, 1247.) A district's failure to assess and get evaluative information necessary to allow an IEP team to develop a plan reasonably calculated to provide the student with educational benefit constitutes a procedural error. (*N.B. v. Hellgate Elementary Sch. Dist.*, (9th Cir. 2008) 541 F.3d 1202, 1210.)

A procedural violation constitutes a denial of FAPE only if it 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 to their child, or caused a deprivation of educational benefits for the child. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

BELLFLOWER'S ASSESSMENTS OF PSYCHOEDUCATIONAL NEEDS

Bellflower conducted two multidisciplinary assessments, also called psychoeducational evaluations, as part of Student's triennial assessment in 2019. In California, the term "assessment" has the same meaning as the term "evaluation" in the IDEA. (Ed. Code, § 56302.5.) The first psychoeducational assessment was conducted in March 2019. The results were presented at Student's March 29, 2019 IEP team meeting. The second assessment were conducted by Bellflower in April 2019, after Parent requested an additional assessment due to her opinion that the first assessment was not comprehensive. Parent contends that both assessments were inadequate to assess Student's psychoeducational needs, and were culturally discriminatory and resulted in inaccurate results because they failed to assess Student in her native language of Spanish.

MARCH 2019 TRIENNIAL PSYCHOEDUCATIONAL EVALUATION

Stacie Kay, School Psychologist, conducted a psychoeducational evaluation as part of Student's triennial assessment in Spring of 2019. Kay received her Master of Arts in Educational Psychology in May 2003, and Bachelor of Arts in Psychology in May 2000. Kay held a Pupil Personnel Services Credential in Educational Psychology and in Counseling and was a licensed educational psychologist. Kay worked as a school psychologist for Bellflower, serving high school students for 15 years. She performed numerous special education assessments and worked collaboratively with IEP teams to develop appropriate special education services. Kay's duties also included individual counseling, facilitating social skills groups, and developing behavior intervention plans. Before that, Kay worked as a behavior supervisor in Ventura, California, and as a school psychologist for Manhattan Beach Unified School District.

Kay testified at hearing regarding her assessment of Student. Kay's testimony was cursory and inconsistent with her assessment, which failed to adequately assess Student. For these reasons, Kay's testimony regarding Student's eligibility and educational functioning were given little weight.

Kay did not conduct any tests of intellectual functioning and instead relied on scores from prior assessments, conducted three or more years earlier. Kay's assessment report stated the assessment consisted of review of records, observation, Parent input, teacher input, review of current educational performance, and the Adaptive Behavior Assessment System II. However, Kay's testimony established that Kay never met with Student or communicated with Student in any way. Kay did not directly administer any tests to Student. During testimony, Kay admitted the assessment did not include any observation of Student or interview of Parent. In addition, the assessment included input from only one teacher, Carolyn Dail, Student's special education and vision impairment teacher. Kay interviewed Dail as to Student's functioning and interests. Dail also completed the adaptive behavior checklist. Kay testified that Dail reported Student made great progress and had no concerns regarding Student's education. However, contrary to Kay's testimony, the assessment report documented numerous concerns Dail had regarding Student's education. For example, Student's retention, instant recall, transference of skills, conceptual understanding, need for prompting across all areas, reading level, and ability to follow only one-step directions.

Kay used the Adaptive Behavior Assessment System II to gather information regarding Student's general adaptive functioning in the three domains of conceptual, social, and practical, based on Parent and teacher responses.

Kay recommended IEP team consideration for Student's eligibility for special education under vision impairment and speech and language impairment, based on the 2012 and 2016 prior psychoeducational evaluations, and a March 2019 triennial speech and language assessment.

Student asserted the March 2019 psychoeducational evaluation failed to accurately assess Student's psychoeducational needs. Student alleges it did not include direct assessment of Student, an interview of Parent or Student, or a classroom observation.

Kay's assessment wholly failed to assess Student in the areas of psychoeducational needs. Specifically, it failed to conduct tests of intellectual functioning, academic achievement, or processing skills. Kay did not meet with Student or conduct any direct assessment of Student. The only test administered was the Adaptive Behavior Assessment Scales, which were checklists completed by Parent and teacher.

Bellflower held Student's triennial IEP team meeting on March 29, 2019. During the meeting, Kay presented her report and conclusions. Upon learning that Kay conducted only a records review and no direct assessment of Student, Parent requested Bellflower to further evaluate Student. Bellflower agreed to conduct further triennial testing and Parent signed an assessment plan.

On April 10, 2019, Dr. Holleran conducted additional testing. Dr. Holleran received a Doctorate in Psychology in May 2003, and a Masters' of Science in School Counseling in June 2001. She was a fully credentialed and licensed school psychologist. Dr. Holleran also held a single subject teaching credential in social science. Dr. Holleran was a school psychologist with Bellflower for 17 years, serving students from elementary

school through high school. She conducted numerous special education assessments and worked collaboratively with IEP teams to develop appropriate services for students based on her assessments.

Dr. Holleran testified at hearing regarding her assessment of Student. Her testimony was detailed and clearly articulated the basis and reasoning in support of her assessment conclusions. Dr. Holleran knew Student since she was in elementary school. She observed and interacted with Student throughout that time. Additionally, Dr. Holleran conducted Student's 2016 triennial assessment. Based on Dr. Holleran's educational credentials, professional experience, and long-standing interactions with Student, Dr. Holleran's testimony as to her assessment conclusions and opinions regarding Student were given great weight.

Dr. Holleran assessed Student in the areas of intellectual development and academic functioning. Her assessment utilized a variety of test instruments. She conducted a review of records, Student interview, an informal assessment of Student's skills, and standardized tests.

Dr. Holleran administered the testing on April 10, 2019, in Student's resource classroom. Also present in the room was another student with a visual impairment receiving instruction. The environment was quiet, Student was given frequent breaks, and rapport was easily established as Student was already familiar with and remembered Dr. Holleran. Student engaged in the assessment, persisted on all tasks, put forth good effort, displayed typical attention levels, was calm and polite, and responded to tasks within typical limits.

Dr. Holleran administered the tests in English, Student's preferred language at home and school. All tests were validated for the specific purpose for which they were

used. Tests were not normed for individuals with vision impairments, but results were analyzed with knowledge of the possible effects of Student's vision impairment on cognitive development and test performance. Dr. Holleran consulted with a professional at the School for the Blind, regarding her choice of assessment measures for Student's assessment. The California School for the Blind is a special state school of the California Department of Education that provides intensive, disability specific educational services, including evidence-based assessment, to students with vision related learning needs. Environmental, cultural and socioeconomic factors were considered and were not a factor in Student's assessed needs. Accordingly, the assessment was a valid and reliable representation of Student's then current functioning.

Dr. Holleran discussed Student's health, developmental, medical, school attendance, language background, and prior assessments, and included this information in her report. Dr. Holleran interviewed Student during breaks, and in the course of polite conversation during the assessment, regarding Student's family, favorite color, foods and music, her leisure-time activities and career interest, and her hopes and dreams. Dr. Holleran walked with Student at breaks to get snacks, giving her the opportunity to observe Student's ability to navigate the school campus and to independently purchase a snack from a vending machine by reading the braille, making her choice, and inserting coins.

Dr. Holleran did not conduct a Parent interview. Parent and teacher completed a Behavior Rating Inventory of Executive Function. Dr. Holleran also reviewed and considered Parent and teacher input from Kay's March 2019 triennial psychoeducational assessment.

Dr. Holleran used the Reynolds Intellectual Assessment Scales, Second Edition, and the Wechsler Scales of Intelligence for Children, Fifth Edition to assess Student's cognitive functioning. Student's full-scale intelligence scores could not be calculated due to several subtests not being appropriate due to Student's blindness. Student's scores on tests of her verbal intellectual functioning were significantly lower than those of Dr. Holleran's 2016 triennial assessment of Student. A chart comparing the scores was included in her report. Student's Verbal Intelligence index on the Reynolds was 43, below the first percentile, as compared to her score of 77, at the sixth percentile, in 2016. Student's Verbal Comprehension Index on the Wechsler Intelligence Scale for Children was 59, below the first percentile, as compared to her score of 84, at the 14th percentile, in 2016.

Dr. Holleran also considered Student's score, below the first percentile, in the deficient range, on the auditory reasoning subtest of the Test of Auditory-Perceptual Skills, Third Edition. She found that this score corroborated Student's difficulty identifying abstract or implied meanings, making inferences, or drawing conclusions when given information.

Dr. Holleran used Kay's March 2019 assessment results for the Adaptive Behavior Assessment System, Second Edition, based on Parent and teacher checklists, to measure Student's adaptive functioning. Student's scores were at the first percentile on the practical domain, including community use, school and home living, health and safety, and self-care. Student scored in the low-average to average range in the social and communication domains.

Dr. Holleran administered multiple additional tests to measure Student's oral language and auditory processing skills. Student's scores on these tests ranged from

the deficient to average range and were consistent with the results of the Reynolds and Wechsler results in terms of Student's ability to better conceptualize and associate concrete, as opposed to abstract, information.

As part of the updated assessment, Dail used the Woodcock-Johnson Test of Achievement, Fourth Edition, Braille Version, to measure Student's academic functioning. Student scored in the deficient range, below the first percentile, on nine out of 11 areas. She scored in the borderline range on the oral language cluster and in the average range for oral comprehension.

Dr. Holleran recommended Student's IEP team consider Student's special education eligibility under vision impairment, intellectual impairment or multiple disability, and speech and language impairment.

BELFLOWER'S APRIL 2019 PSYCHOEDUCATIONAL EVALUATION ADEQUATELY ASSESSED STUDENT'S PSYCHOEDUCATIONAL NEEDS

Student's first contention regarding the April psychoeducational evaluation was that it was unlawful and culturally discriminatory because Student was not assessed in her native language of Spanish. Bellflower contends that Student was properly assessed in English, her preferred and primary language, and that assessment in Spanish would yield lower, inaccurate results.

There are two different provisions of the IDEA, which discuss procedural safeguards regarding what language should be used to assess a student to ensure that the assessment is not culturally or racially discriminatory and results in accurate information. The section of IDEA entitled State Eligibility, requires states to develop procedures to ensure that testing and evaluation materials and procedures utilized for

the purpose of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it is clearly not feasible to do so. (20 U.S.C. § 1412(a)(6)(B).)

The section of IDEA entitled Evaluations--eligibility determinations, individualized education programs, and educational placements--requires each local educational agency to ensure that assessments and other evaluation materials used to assess a child are selected and administered so as not to be discriminatory on a racial or cultural basis and are provided and administered in the language and form most likely to yield accurate information on what the child knows, and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer. (20 U.S.C. 1414((b)(3)(A)(i) and (ii).)

Education Code, subdivision (j), requires that procedures and materials for assessment of Students who are designated English language learners shall be in their native language, defined as the language normally used by the individual. (20 U.S.C. § 1401(20).)

Student's expert, Adriana San Millan, testified on Student's behalf at hearing. San Millan held a Master's Degree in School Psychology and a Master's Degree in Special Education. She had a Bachelor's Degree in Psychology. San Millan was a bilingual school psychologist for 18 years, fluent in Spanish and English. She held clear credentials in School Psychology, Administration, and Special Education.

San Millan has worked as a school psychologist in her company, Adriana San Millan School Psychology and Special Education Services. LLC, since January 2012. She has a team of assessors, vision specialists and interns, and has conducted over

3,000 special education evaluations. San Millan's agency assessed 19 students with vision impairments last year. She personally assessed three students with vision impairments. San Millan also runs a nonprofit, Strong Healthy Minds, which provides mental health, vision, and speech services to students during the summer. San Milan was the Director of Special Education and a school psychologist for San Pasqual Valley Unified School District from July 2009 to July 2010. She was the Director of Special Education and a special day class teacher for Yuma Union High School District from August 2006 to July 2009. She was a School Psychologist, Assistant Principal, and Student Services Coordinator for Westhill Institute from August 2002 to July 2006.

Student retained San Millan to render an opinion regarding the adequacy of Bellflower's assessments of Student's psychoeducational needs. San Millan reviewed Student's records and interviewed both Student and Parent virtually. The interview was conducted in Spanish and lasted approximately 30 minutes. San Millan's testimony established her expertise regarding both the assessment of bilingual students and students with vision impairments. She also shared her personal history as a native Spanish language individual who was also fluent in English. Her testimony was credible and was accorded due weight. However, San Millan's testimony that Student would have tested higher if assessed in Spanish, was not persuasive in light of her lack of data and research to support her opinions regarding that particular issue, coupled with her limited experience with Student.

San Millan opined that Bellflower was required to assess Student in Spanish, her native language, even if Student was fluent in English. She asserted that assessing Student in English rendered the assessment invalid and culturally discriminatory.

As support for her opinion, San Millan reasoned that Student's native language was Spanish and she spoke only Spanish until preschool, making her neural pathways related to her Spanish language much stronger than those for English. Student's Father, who resided with Student, and his parents, spoke only Spanish. Student spent four to five months per year with her paternal grandparents, including annual summer family visits to their home in Mexico and regular grandparent visits to Student's home. Student's family attended Spanish language religious services, including Student's Sunday school instruction through the years. San Millan opined that Student was fluent in Spanish and a Spanish language assessment would incorporate Student's culture. As an example, test items would use the word "burrito" instead of "sandwich" and would hold more familiarity and meaning for Student. San Millan opined that Student's scores would therefore have been higher, if assessed in Spanish. However, she offered no data or research as evidence to support her opinion.

San Millan testified that if she was given the opportunity to assess Student, she would assess Student in English and Spanish. San Millan offered no opinion or explanation as to how that would be done in terms of test validity. Student failed to show how the law requiring assessment in a student's native language would support a bilingual assessment.

San Millan referred to Student's status as an English language learner, with scores at the beginning level in English language development, to evince the inappropriateness of assessing Student in English. However, she offered no data or research to support her opinion that students with significant disabilities, as here, who are English language learners, would test higher on assessments of their native language fluency.

Dr. Holleran defended the appropriateness of Student's assessment in English. Student was educated only in English since preschool, and was in ninth grade at the time of her assessment. English and English braille was Student's preferred mode of communication. Historically, Student spoke English at school with peers, teachers, and aides, and at home with her mother and siblings. Parent never requested instruction or assessment in Spanish, and instead, advocated for Student to be re-designated from an English language learner to fluent in English. Parents and teacher believed Student had commensurate skills in English and Spanish. Dr. Holleran persuasively opined that Student would therefore have done the same or worse, if assessed in Spanish.

Dr. Holleran's opinion was more persuasive than San Millan's testimony. Student's preferred and primary language was English in all environments. All assessments introduced as evidence at hearing, including the School for the Blind assessment in 2012, determined that English was the appropriate language for assessment, as it was Student's preferred and primary language. Because Student's native language was Spanish, Bellflower designated her as an English language learner. At the request of Parent, Bellflower recently completed the re-designation process for students with significant disabilities for Student to be re-designated as fluent in English. A preponderance of evidence established that English was the language most likely to yield accurate information on what Student knew and could perform academically, developmentally, and functionally. In sum, Student presented no persuasive evidence at hearing that Bellflower's psychoeducational assessment was culturally or racially discriminatory by assessing Student in English, or led to inaccurate results.

Student's second contention regarding the April psychoeducational evaluation was that Student's test scores failed to support Dr. Holleran's conclusion. Specifically,

that Student be considered for a secondary special education eligibility, as a Student with an intellectual disability.

Intellectual disability means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior, and manifested during the developmental period that adversely affects a child's educational performance. (5 C.C.R. § 3030 (b) (6).)

San Millan testified that, based on her interview with Parent and Student, Student did not present as a student with an intellectual disability. For instance, she learned that Student used an application to track her money, independently learned how to make a cheesecake on YouTube, and made a cheesecake to surprise her mother. Student also communicated that she wanted to go to college and have a career as a braille transcriber so that she could work for a particular company that Student identified by name. San Millan opined that an individual with an intellectual disability would not be able to articulate this, successfully manage money with a phone application, or navigate YouTube to independently make a cheesecake.

San Millan also opined that Student did not have subaverage general intellectual functioning and adaptive behavior deficits during her developmental period, which would be required for a finding of intellectual disability. San Millan pointed to Student's cognitive test scores in the low-average to average range in the 2016 psychoeducational evaluation report, and opined they were inconsistent with a finding of intellectual disability because they were greater than 69, the required cutoff for an intellectual disability. She opined that an individual with an intellectual disability would have low scores in all areas, but Student had average to above-average scores on subtests of phonological processing and in social and communication domains of Student's

adaptive functioning. San Millan opined that Student's low scores were better explained as being consistent with her vision impairment, and lack of appropriate vision instruction and services.

Lastly, San Millan opined that, absent a traumatic brain injury, Student's significantly discrepant scores on measures of intellectual functioning between 2016 and 2019, could not be explained, and therefore were not valid or reliable.

Dr. Holleran testified regarding her assessment of Student and defended her conclusion that Student should be considered for eligibility as a student with an intellectual disability. Dr. Holleran pointed to cognitive and adaptive functioning scores in the borderline and deficient range, in Student's 2012, School for the Blind assessment, during Student's developmental years, as being consistent with her conclusion. At age seven years, nine months, Student scored at the three-year-old level in her verbal intelligence and adaptive functioning. At that time, School for the Blind also recommended Student for secondary special education eligibility under intellectual impairment. Historically, Student struggled on test items requiring abstract thinking, inferences, drawing conclusions, working memory, and areas of adaptive functioning other than social and communication.

Dr. Holleran agreed that Student did have splinter skills in various areas including adaptive functioning domains of social, communication and self-care, and phonological functioning. She contended this was typical, and not surprising, and did not preclude a finding of intellectual disability in light of Student's other scores being in the borderline to deficient range. Student's difficulty accessing the curriculum is her consistent inability to hold information and manipulate it in a way to identify implied meaning, make

inferences, and draw conclusions. In Dr. Holleran's words, "Student has difficulty thinking beyond the words."

Dr. Holleran explained that the significantly discrepant and much lower scores on her 2019 psychoeducational evaluation, as compared to her 2016 evaluation of Student, were a reflection of the increased complexity of the test items for ninth graders. These more complex tasks require the ability to think abstractly and to conceptualize. The test items for Student when she was in sixth grade were more concrete. The test items when Student was in ninth grade started with two or three concrete items, but the test items immediately became more abstract. She explained that Student's scores were therefore lower in 2019, due to her cognitive limitations regarding abstract thinking.

Dr. Holleran opined that Student's scores were accurate and valid, and indicated that Student's cognitive deficits were an obstacle to her accessing the curriculum, secondary to her visual impairment. Dr. Holleran considered the effects of Student's visual impairment on her test performance and measures of Student's cognitive functioning. Student's visual impairment was determined to be a factor, but alone could not account for her deficient scores.

Dr. Holleran's opinions were more persuasive than San Millan's, as they related to Student's intellectual functioning. Dr. Holleran's testimony was informed and credible and addressed San Milan's specific criticisms. Dr. Holleran opined that Student's social and communicative abilities could coexist with an intellectual impairment. San Millan's testimony did not refute Dr. Holleran's explanations. San Millan had not assessed Student, and only briefly interviewed Student. On the other hand, Dr. Holleran was more familiar with Student's unique needs as she had known Student, and directly assessed Student, for the past several years. She monitored Student's educational

progress and functioning, which remained well below grade level despite intensive academic and vision services, and individualized instruction. Despite years of intensive services, Student, now in the 11th grade, required instruction at the first and second grade levels. Similarly, The School for the Blind assessment, conducted, by experts with experience assessing and working with students with vision impairments, also identified Student with an intellectual disability, along with vision impairment. Moreover, Student's IEP teams routinely recommended functional academics and specialized services because of Student's low cognitive abilities.

Student failed to provide persuasive evidence that discrepant scores, and scores in the average to low average range, negated Dr. Holleran's finding that Student had an intellectual impairment. San Millan's testimony that a person with an intellectual disability could not use an application to track money, independently make a cheesecake using YouTube, or have hopes and dreams of going to college and having a particular career, were anecdotal and unpersuasive.

Student failed to establish by a preponderance of the evidence that the April 2019 psychoeducational assessment failed to support the recommendation for Student's eligibility under intellectual impairment. Student's contention in her closing brief that, for Student, standardized measures used in her assessment had to be normed on individuals who are blind, is rejected as unpersuasive. Student provided no legal authority for this assertion.

Student's last contention regarding Bellflower's April 2019 psychoeducational assessment was that it did not include a Parent interview, Student interview, health and development, or any assessment of Student's vocational needs, which should have been incorporated into the assessment report.

San Millan testified at hearing that Dr. Holleran's assessment report was inadequate, as it did not include a parent and student interview, a classroom observation, current developmental or medical information, or assessment of Student's vocational needs. San Millan opined that a classroom observation was necessary and important in determining such things as whether Student was interacting socially at the same level as her peers or was able to follow directions.

She testified that the Parent interview was very important in determining early developmental information such as birth complications, developmental milestones, lack of instruction, or gaps in services. She explained that this was especially true in determining whether Student had an intellectual impairment. San Millan complained that Dr. Holleran did not interview Student, and that her gathering of information from Student during conversations at breaks and while conducting the assessment did not fulfill this requirement. Lastly, San Millan asserted that a vocational assessment was not done by anyone in Student's triennial assessment and therefore should have been completed by Dr. Holleran.

Dr. Holleran's assessment report contained a section entitled health and developmental/medical background describing Student's vision condition resulting in her blindness and related medical history. These were based on her review of prior records. Consequently, Student's assertion that Dr. Holleran's report did not include relevant health and developmental and medical history was unsupported by the evidence.

Student's claim that Dr. Holleran's conversations with Student did not amount to an interview are also rejected as not supported by the evidence. Dr. Holleran's report contained relevant information regarding Student that is typically elicited in a student

interview. Student presented no legal authority or persuasive evidence that the student interview had to be conducted in a more formalized manner or be contained in the assessment report in any particular way.

Student's contention that Dr. Holleran should have assessed Student's vocational needs was also unpersuasive. Student presented no authority regarding the requirement of vocational needs to be assessed by a school psychologist in the course of a psychoeducational evaluation. San Millan conceded in her testimony that it is generally the responsibility of persons other than the school psychologist to conduct such an assessment.

Dr. Holleran acknowledged that she did not conduct a parent interview, either in writing or by telephone. She did include Parent input through her record review, her consideration of Parent responses in tests of adaptive functioning completed in March 2019, as well as through the parent checklist regarding Student's executive functioning skills which she provided to Parent. Student contends that an interview of Parent would have allowed Dr. Holleran to learn of service gaps or possible brain injuries either recently or at birth, which may have influenced assessment conclusions. These arguments are speculative and Student offered no specific evidence regarding service gaps or the existence of any physical or medical injuries not already known. Student failed to sustain her burden of proof that the lack of a parent interview rendered the assessment of Student's psychoeducational needs inadequate.

Dr. Holleran also conceded that she did not do an observation of Student as part of her assessment. Student's concern was that Dr. Holleran would not be able to assess Student's social appropriateness with teachers and peers. Student did not allege any failure to assess Student's social emotional needs in the present matter. Student's social

communication is a strength and her behavior was not identified as problematic. Consequently, Student failed to present any persuasive evidence that the failure to conduct a classroom observation impacted the assessment in a way that would render it inadequate in the assessment of Student's psychoeducational needs.

For the foregoing reasons, Student failed to sustain her burden of proof that Bellflower's April psychoeducational evaluation was inadequate to assess Student's psychoeducational needs. Student did not sustain her burden of proof by a preponderance of the evidence that Bellflower denied her a FAPE, from January 2019, through February 2020, by failing to assess her psychoeducational needs.

BELFLOWER'S ASSESSMENT OF STUDENT'S BRAILLE, ORIENTATION AND MOBILITY, AND LEARNING MEDIA TECHNOLOGY NEEDS

Student contends that Bellflower's assessment of Student's braille skills, orientation and mobility, and learning media technology skills did not include some areas of the expanded core curriculum, which Student asserts must be included in any comprehensive vision or orientation and mobility assessment. Student contends that Bellflower's assessment of Student's Braille needs was inadequate as it failed to assess Student's braille writing and math skills, or to identify Student's present levels, in the use of braille, necessary for the IEP team to develop appropriate and measurable IEP goals. Student contends that Bellflower's orientation and mobility assessment was inadequate as it failed to include key areas, including Student's ability to analyze intersections, navigate lighted intersections, cross the street, and use any type of public transportation. It also failed to assess her functioning in the home with regards to her orientation and mobility to safely cook, clean, and attend to her personal hygiene.

Students with vision impairments need to study the same core curriculum as sighted students. Sighted students are able to use their vision to develop an understanding of the common core curriculum concepts and skills. In order to assist students with vision impairments to compensate for decreased opportunities to learn incidentally through sight, local educational agencies may consider an additional set of knowledge and skills known as the expanded core curriculum in the development of IEP's for visually impaired students. (Ed. Code, § 56353.) The expanded core curriculum is defined to include:

- compensatory skills, such as braille and concept development and other skills needed to access the core curriculum;
- orientation and Mobility;
- social interaction skills;
- career Skills;
- assistive Technology;
- independent living skills;
- recreation and Leisure;
- self-determination; and
- sensory efficiency. (Ed. Code, § 56353, subd. (b)(1)-(9).)

BELLFLOWER'S ASSESSMENT OF STUDENT'S BRAILLE AND LEARNING MEDIA TECHNOLOGY SKILLS WAS INADEQUATE

A functional vision assessment shall be used as one criterion in determining the appropriate reading medium or media for a student. (Ed. Code, § 56352, subd. (a).) An assessment of braille skills shall be required for functionally blind students who have the ability to read. (Ed. Code, § 56352, subd. (b).) The IEP team shall use the assessment as

one criterion for the determination of the most appropriate medium or media for a functionally blind student. (Ed. Code, § 56352, subd. (c).) Braille instruction shall be provided by a teacher who holds an appropriate credential to teach students who are functionally blind or visually impaired. (Ed. Code, § 56352, subd. (d).) Each visually impaired student shall be provided with the opportunity to receive an assessment to determine the appropriate reading medium or media, including braille instruction, for that student. (Ed. Code, § 56352, subd. (e).)

In March 2019, Bellflower assessor Claudia Pawluk conducted a learning media technology assessment of Student. Pawluk did not testify at hearing. Pawluk had a Multiple Subject Teaching Credential and two Education Specialist Instruction Credentials. Pawluk was credentialed to provide education support to students with visual impairments. Pawluk's assessment report was admitted as evidence at hearing. Her report was given little evidentiary weight due to its lack of clarity, but was probative as to the contents and scope of her assessment and undisputed reports of Student's functioning.

Some of the listed assessment procedures in Pawluk's report were unclear. The identifiable procedures included a teacher and student interview, Kamei-Hannan and Ricci Reading Assessment, an informal assessment of Student's skills needed to operate equipment, and an informal measurement of technology skills. Pawluk's assessment included an ocular history. She informally observed Student's skills needed to operate equipment, specifically, Student's hand motion while she read braille. Pawluk assessed Student's skills using her Brailenote Apex, tablet, keyboard and optical character recognition scanner. Pawluk found that Student used all equipment involved in the assessment at the emergent level, with instructional support. The report was unclear regarding what technology Student was using during the assessment.

Pawluk determined that Student's instructional reading levels remained the same as in 2016 at the pre-primer level. Pawluk included a chart entitled, "Development of Applied Technology," including six areas of perception skills, academic activities and observations for each. Pawluk failed to include an explanation of the chart, nor was there any identification of what technology or materials were used for the information obtained.

Lastly, the report included an assessment summary and six general recommendations, including: use of braille to present academic content; presentation of academic content related to Student's preferences, use of task analysis and extended time for responses; implementation of a reading program that builds up digraphs and diphthongs; training in daily living skills to guide orientation and mobility at home, in school, and in the community; and Student's use of purposeful exploration of her immediate surroundings and vocabulary development.

Dr. Sonja Biggs testified at hearing on behalf of Student. She received her Ph. D in Education in 2014, and a Master's in School Counseling and Guidance. Dr. Biggs held a Multiple Subject Credential, K-8. She was a credentialed Education Specialist for Vision Impairments, and a Credentialed Rehabilitation Specialist for Orientation and Mobility.

Since 2004, Dr. Biggs has been a vision specialist and has performed thousands of vision and orientation and mobility assessments for students with visual impairments. Since 2008, Dr. Biggs has been the Chief Executive Office or Sonja Biggs Educational Services, Inc., in Gilroy, California. Her company contracts with California school districts to provide teachers of the blind, orientation and mobility specialists, intervenors, and independent specialists, who know braille and understand how to work with blind

children. Her company provides independent vision and orientation and mobility evaluations for school districts throughout California. Dr. Biggs writes curriculum and teaches online courses, incorporating all components of the expanded core curriculum. She travels to several different schools serving both multiple disabled and vision impaired students. She writes and manages IEP goals for vision impairment. She runs the entire vision impairment program for San Benito County. She is writing a curriculum for summer school vision impairment program that includes social skills, cooking skills, and cleaning and organizational skills to assist districts to fulfill those components of the expanded core curriculum. She also mentors teachers serving students with vision impairments throughout the state of California. Dr. Biggs belongs, and has provided professional presentations, to many professional and community organizations.

Dr. Biggs testified at hearing regarding her review and opinion of Bellflower's learning media technology and orientation and mobility assessments. Her testimony evidenced her extensive knowledge and experience in the education of students with vision impairments. Her testimony was clear and thoroughly explained the educational needs of individuals with vision impairments and the required components of assessment to determine those needs. Dr. Biggs recently began an assessment of Student. Based on her educational training, extensive work educating individuals with vision impairments, and her direct experience with Student, her testimony was given great weight.

Dr. Biggs reviewed Bellflower's Learning Media Technology Assessment, Orientation and Mobility Assessment, and Student's records, including IEPs and prior assessments, to render an opinion regarding Bellflower's assessment of Student's braille, orientation and mobility, and learning media technology needs. Dr. Biggs was also retained to conduct an assessment of Student, which she was in the process of

completing. The total cost of her comprehensive vision and orientation and mobility assessment was \$6,000.

Vision specialists are required to use best practices in the assessment of Student's vision needs. Best practices for vision assessments require that all vision assessments include the areas of the expanded core curriculum. The expanded core curriculum includes all skill areas that are not learned incidentally by students with vision impairments, because they must be deliberately taught for students to gain the skills they will need for daily life. Teachers of students with vision impairments are responsible for assessing and teaching the skill areas of the expanded core curriculum. The expanded core curriculum identifies the areas that students with vision impairments require in order to be as independent as possible and to have control over their lives.

Student was in ninth grade and nearing her transition to post-secondary education and adulthood, at the time of the triennial assessments at issue in this case. She will need the skills in all areas of the expanded core curriculum to be successful in her further education, work, and independent living after high school. Preparation for these three areas is the purpose of special education services under the IDEA. It is undisputed in this matter that the expanded core curriculum defines skills appropriate for Student's instruction. Given Student's age, a comprehensive triennial assessment must incorporate all of the expanded core curriculum areas to accurately determine Student's appropriate IEP goals and services.

Assessment of Student's skills in braille, orientation and mobility, and learning media technology, determine needed vision services required by Students with vision impairments to access and learn the skills included in the core curriculum, including the expanded core curriculum.

Dr. Biggs' testimony established that the purpose of a learning media technology assessment is to determine the extent to which the student can see and how the student uses vision. It is also to determine the best medium for instruction and assistive technology to access to the curriculum. The assessment results are used to identify a student's functioning and present levels in the use of the media and technology so that the IEP team can develop appropriate goals and services.

Braille skills are assessed in a learning media technology assessment, which Dr. Biggs referred to as a vision assessment. Braille skills are also included in the compensatory component of the expanded core curriculum. Braille is the means by which students with vision impairments access the curriculum at school. It is the medium by which students read and write and achieve literacy, and is the format used for textbooks, worksheets, and literary books for students with vision impairments. Braille consists of grade one and two. Grade one is the braille version of the alphabet, used in preschool, kindergarten and first grade and for spelling for all grades. Grade two consists of contractions, or formations of dots representing words or parts of words. These are used to efficiently read and write words, sentences, and essays; read and complete worksheets; access textbooks and other reading materials; and to communicate thoughts, ideas, and knowledge.

Dr. Biggs had never seen a vision assessment like Pawluk's March 2019, learning media technology assessment. Pawluk's assessment was inadequate as it failed to include any assessment of Student's written braille skills or math skills. The information that Pawluk reported for Student's braille reading was too general and therefore inadequate. It failed to assess Student's skills regarding her ability to read and write

braille contractions, and to state Student's present levels, in a way to enable the IEP team to develop measurable and appropriate braille goals. The evidence established that assessment of Student's math skills would have required assessment of Student's use of the Nemeth Braille, a separate braille system used for learning and calculating math equations.

Pawluk's assessment also failed to discuss or assess skills in the use of technology other than the BrailleNote Apex. This inadequately assessed the expanded core curriculum component of assistive technology. Given Student's age and grade, Pawluk should have assessed her skills in the use of a computer, screen reader, and typing skills. These are skills which any high school student with a vision impairment would require in school and for postsecondary independent living, work, and further education. The assessment also failed to assess Student's ability to use optical character recognition technology to translate print into braille, or to access print information on a computer with a screen reader. These are essential skills needed to access her curriculum.

Bellflower failed to provide any expert testimony to counter Dr. Biggs persuasive and credible opinions. Student sustained her burden to establish the inadequacy of Bellflower's assessment of her braille and learning media technology skills.

BELFLOWER'S ASSESSMENT OF STUDENT'S ORIENTATION AND MOBILITY SKILLS WAS INADEQUATE

An orientation and mobility evaluation, determined to be needed for a student who is blind, has low vision, or is visually impaired, shall be conducted by a person appropriately certified as an orientation and mobility specialist. (Ed. Code, 56354(a)(1).)

The orientation and mobility evaluation shall occur in familiar and unfamiliar environments, in varying lighting conditions, and in the home, school, and community, as appropriate. (Ed. Code, 56354(a)(2).) A local educational agency shall not impose any limitations that result in the preclusion or the limitation of the ability of the student to receive instruction in orientation and mobility services in the home, school, or community setting and in varying lighting conditions. (Ed. Code, 56354(b).)

In March 2019, Magali Caro-Silva, Orientation and Mobility Specialist with Los Angeles County Office of Education, conducted Student's triennial orientation and mobility assessment for Bellflower. Caro-Silva did not testify at hearing. Her assessment report was admitted as evidence at hearing. It was given due weight as probative of Student's undisputed levels of functioning and the scope and contents of her assessment.

Student's orientation and mobility skills were assessed on her school campus, and in the community. Parent and teacher interviews were conducted. Student's background information documented Student's blindness since birth. At the time of the assessment, Student's present levels of orientation included her ability to independently navigate the classroom, needing prompts some days. Outside the classroom, Student was able to navigate the route to the gymnasium and lunch room, from her classroom, using landmarks and trails. Student was able to travel on simple straight line and "L" shaped paths, keeping track of blocks, but requires verbal prompts to use auditory clues to guide her orientation. When asked, student was able to identify streets around school, by name, with 75 percent accuracy. No assessment was conducted of Student's orientation and mobility skills in the home, other than by a general comment by Parent.

Student's then present levels of mobility included her inability to keep a constant and appropriate cane arc, without prompts. She walked at an appropriate pace when using human guide but tended to walk very slowly when asked to walk independently without trailing along the pathway. Student showed hesitation when going down curbs. Student had difficulty keeping a straight line unless given prompts. Student was able to enter through a closed door, with and without human guide, and was able to go up and down stairs, while holding onto her cane, with and without human guide. She was able to find a curb with 90 percent accuracy, and independently cleared the gutter, and appropriately managed the cane when she and the evaluator established it was safe to cross. Student was able to cross residential streets, with verbal and physical prompts from the instructor to maintain body alignment toward the opposite corner.

Caro-Silva assessed Student's concept development, as it related to her body parts and following verbal directions, identifying her left and right and that of another. Assessment of Student's orientation and mobility during shopping was assessed as to her ability to wait in a line, place items on the counter, hand the appropriate amount of money to the cashier, put change into her wallet, fold bills according to value, and ask for assistance from store employees. Caro-Silva assessed Student's cane skills, as they related to Student's ability to independently find and fold the cane, placing the cane in the holster on her jeans, and cane technique.

Caro-Silva next assessed Student's orientation and mobility in her daily living skills as they related to zipping and unzipping clothing, backpack and purse, locating her backpack in class, and retrieving items from backpack, ability to tie her shoes, and put on undergarments. Parent provided shoe tie and dressing information. Student had no apparent issues with hearing. General assessment recommendations were

stated as street crossing, shopping and money, use of environmental cues for orientation, problem solving for route travel, and refinement of cane skills.

Dr. Biggs testified regarding her opinions of Caro-Silva's orientation and mobility assessment. Considering the importance of areas of the expanded core curriculum, and Student's age, the orientation and mobility assessment was inadequate as it failed to assess Student's skills related to her analysis of intersections; navigation of lighted intersections; bus or other public transportation travel, directionality including north, south, east, and west, and ability to follow left and right directions. The assessment failed to assess Student's orientation and mobility in the expanded core curriculum component of daily living skills, including cooking, cleaning, laundry, personal hygiene, securing shopping list items, and banking. There was no evidence presented at hearing of assessment of Student's mobility in the home, other than general comment during Parent interview.

Dr. Biggs credibly and persuasively established that a comprehensive triennial assessment of the enumerated omitted assessment areas was crucial, given Student's age and grade, to enable her to develop these skills in the next three years. Without assessment of these crucial areas, the IEP team lacked sufficient information to accurately and appropriately determine appropriate and measurable goals and services, based on a full picture of Student's needs and circumstances.

Bellflower failed to provide any expert testimony by a vision or orientation and mobility expert, to counter Dr. Biggs well supported, credible, and persuasive testimony and expert conclusions. Student sustained her burden of proof, by a preponderance of the evidence, to establish that from January 2019 through February 2020, Bellflower

failed to adequately assess Student's braille, learning media technology, and orientation and mobility needs.

In light of Student's total blindness since birth, and the related assessment requirements to accurately and comprehensively identify her educational needs as a blind student, the failure to adequately assess Student's braille, learning media technology, and orientation and mobility needs, precluded the IEP team's identification of a FAPE for Student. This procedural violation denied Student a FAPE, as it deprived Student of the educational benefit of receiving individually designed services based on her unique needs. The failure also deprived Parent of necessary information to meaningfully participate in decisions regarding the development of a FAPE for Student.

For the foregoing reasons, Student showed by a preponderance of evidence that Bellflower denied Student a FAPE from January 2019 through February 2020, by failing to adequately assess her needs in the areas of braille skills, orientation and mobility, and learning media technology skills.

Student's assertion in her closing brief that Bellflower was required to fund an independent educational evaluation or file for due process, in response to Parent's request for an independent educational evaluation as a remedy in this matter, is rejected as beyond the issues in this hearing. Student's insertion of this issue in her closing brief as an issue tried by consent, pursuant to *M.C. by and through M.N. v. Antelope Valley Union High Sch. Dist.*, (9th Cir. 2017) 858 F.3d. 1189, 1196, is also rejected. During hearing, Student asked Bellflower's Administrator one question regarding this theory. No other mention was made regarding this issue and Student's contention that the issue was tried by consent, is unpersuasive.

ISSUE TWO: DID BELLFLOWER DENY STUDENT A FAPE DURING THE 2019-2020 SCHOOL YEAR, UP TO FEBRUARY 28, 2020, BY FAILING TO IMPLEMENT 165 MINUTES PER DAY OF SPECIALIZED ACADEMIC INSTRUCTION, BY A TEACHER OF THE VISUALLY IMPAIRED, AS IDENTIFIED IN THE JUNE 14, 2019 IEP?

Student contends that her June 14, 2019 addendum IEP, required Bellflower to provide 165 minutes per day of specialized academic instruction during the 2019-2020 school year. The specialized academic instruction was in the areas of English, math, and social science, to be provided by a teacher of the visually impaired in a separate classroom. Student contends that in the 2019-2020 school year, Student's specialized academic instruction was either not provided, or provided by teachers not credentialed to provide specialized vision services. Student asserts this deprived her of educational benefit and denied her a FAPE, up until February 28, 2020.

Bellflower agrees that Student's June 14, 2019 IEP required 165 minutes of specialized academic instruction, provided by a teacher of the visually impaired, during the 2019-2020 school year. Bellflower conceded that teachers without credentials to teach vision impaired students provided specialized academic instruction to Student in English, math, and social science. However, Bellflower contends that the instruction was provided with the support of a teacher of the visually impaired and Student's education specialist. Therefore, Bellflower contends that Student was not denied a FAPE, because the implementation of Student's specialized academic instruction did not materially vary from that required by Student's June 14, 2019 IEP.

As soon as possible following the development of an IEP, special education and related services shall be made available to a student with exceptional needs in accordance with his or her individualized IEP. (34 C.F.R. §300.323(c)(2); Ed. Code, § 56344, subd. (b).) A school district violates the IDEA if it materially fails to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 815, 822 (*Van Duyn*).) "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*) However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." (*Ibid.*) The *Van Duyn* court emphasized that IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute, and "not to decide on its own no longer to implement part or all of the IEP." (*Ibid.*)

Parent testified at hearing. Her testimony was sincere and established her love and devotion to Student and her persistent advocacy on behalf of Student. Parent was able to remember conversations and IEP team meetings dating back through the years, which she communicated in detail. Her testimony was given great weight.

It was of utmost importance to Parent that Student's specialized academic instruction services continue to be delivered by one provider, credentialed to teach core subjects and to provide specialized vision services to students with vision impairments. In the 2018-2019 school year, Dail, an employee of Bellflower, who held such credentialing, provided four periods of individualized specialized academic instruction to Student in a vision impairment resource room. Parent learned in December 2018, that Dail planned to retire at the end of the school year. From that time, Parent

communicated with Bellflower administrators to make sure that a replacement teacher for Dail would be hired to similarly teach Student during the 2019-2020 school year.

On March 26, 2019, Student's triennial IEP team meeting was held to review the triennial assessments and to determine placement and services for the 2019-2020 school year. The team discussed the retirement of Dail and agreed to meet again in May 2019, to review the additional assessment Parent requested and to discuss next providers of services for Student. Parent consented to the IEP, with the exception of placement and vision services for the 2019-2020 school year. Parent was concerned that a teacher to replace Dail had not yet been secured.

On May 21, 2019, Bellflower convened an IEP team meeting for Student. Parent did not consent to the IEP.

On June 14, 2019, Bellflower provided Parent an addendum IEP, offering placement and services for the 2019-2020 school. The notes section of the addendum IEP stated:

- specialized vision services to be three self-contained classes for support with specialized academic instruction in English, math, and social science provided by visual impairment teacher in a separate classroom.

The service page of the June 14, 2019 addendum IEP described the services as follows:

- specialized vision services, to be provided individually, 55 minutes, times three, for a total of 165 minutes per day, to be provided from June 8, 2019, to March 26, 2020. A comment underneath, stated specialized academic instruction and support for English, math, and social science provided by the vision impairment

teacher in separate classroom may include academic and instructional supports such as braille code, vision impairment equipment and technology, and skill specific instruction for a blind student (expanded core curriculum).

Bellflower's first instructional day of the 2019-2020 school year was August 15, 2019. On August 28, 2019, Bellflower wrote Parent a letter informing her that Student was not provided any specialized vision services during the first five days of the 2019-2020 school year. Bellflower informed Parent that it would provide 825 minutes of compensatory specialized vision services, calculated at 165 minutes per day, for five days, to be provided during the regular 2019-2020 school year.

Pawluk was contracted by Bellflower to provide Student's 165 minutes per day of specialized academic instruction, required by Student's June 14, 2019 addendum IEP. During hearing, it was undisputed that Pawluk held a multiple subject credential as well as a credential to instruct Student's with vision impairments. Pawluk's service logs were admitted as evidence at hearing. Maricela Lopez-Harvin, Special Education Administrator, oversaw school sites within Bellflower regarding special education compliance and instruction. Lopez-Harvin credibly testified that the logs admitted as evidence were submitted to her by Pawluk, either weekly or every other week, and she reviewed them, checked the services in relation to attendance, and verified the services with Student's case carrier. The logs documented that Pawluk provided Student with direct instruction on accessibility and content according to the goals in her IEP, from August 21, 2019, through February 13, 2020.

On October 4, 2019, an addendum IEP team meeting was held at the request of Parent. Student, Parent, Matthew Adair, Bellflower's Special Education Administrator, Pawluk, Pawluk's supervisor from the Los Angeles County Office of Education, and

Hutton, were in attendance, among others. Parent was aware that substitute teachers were now working with Student to provide Student's academic instruction. She wanted to discuss what exactly the district is doing.

Bellflower detailed an offer of services to Student, which now included the vision impairment teacher working with a credentialed teacher in the provision of Student's specialized academic instruction. This is because it was agreed by Bellflower, Pawluk, and her supervisor that Pawluk's role as an itinerant teacher was more properly to provide support for Student's academic instruction, as opposed to being solely responsible for Student's academic instruction. The October 4, 2019, addendum IEP notes detailed Bellflower's offer of specialized vision services, including specialized academic instruction for English, math, and social science, in three self-contained classes. The specialized academic instruction was now to be provided by a vision impairment teacher in conjunction with a credentialed teacher. The service page of the addendum IEP also changed. A section entitled specialized academic instruction was added, in the exact same amount as the specialized vision services: 55 minutes, three times a day, for a total of 165 minutes per day.

Parent signed her consent to the October 4, 2019 addendum IEP. Upon her consent to the October 4, 2019 addendum IEP, Student's specialized academic instruction services were materially changed. Bellflower was required to implement the specialized academic instruction as identified in that Addendum IEP, and not the June 14, 2019 Addendum IEP. The October specialized academic instruction by a teacher of the visually impaired was now to be provided in conjunction with a credentialed teacher, and not by a teacher of the visually impaired alone. The issue of whether Bellflower implemented the specialized academic instruction by a teacher of the visually impaired, as identified by the June 14, 2019 addendum IEP, therefore involves the time period

from August 15, 2019, through October 3, 2019. The identification, appropriateness, and implementation, of the services, by a teacher of the visually impaired, consented to by Parent, at the October 4, 2019 IEP team meeting, are beyond the scope of this hearing to determine.

Parent's and Bellflower's contentions that the October 4, 2019 addendum IEP did not change the specialized academic instruction by a teacher of the visually impaired, are rejected, as not supported by the documentary and testimonial evidence. Parent testified that she agreed to the offered services, including the academic instruction by credentialed teachers, because it was that or nothing. Both Hutton and Adair testified that the role of the credentialed teachers, two of whom they believed to be special education teachers, was to provide academic instruction to Student. Therefore, Bellflower was aware that the October addendum IEP changed Student's specialized academic instruction services.

In Bellflower's closing brief, Bellflower, for the first time, dismissed the entire added specialized academic instruction section of the service page, as a clerical error. The purpose of a formal written IEP, is to create a clear record by which a student's IEP services are defined, so that service providers can implement the services with fidelity. The requirement of a written formal document must be rigorously enforced. (*Union School District v. Smith*, (9th Cir. 1994) 15 F.3d 1519, 1526.)

Bellflower expressly acknowledged its failure to provide any specialized vision services the first five days of the school year, August 15, 2019, through August 21, 2019, and notified Parent that it was providing 825 minutes of compensatory services to compensate for that gap in services. Student sustained her burden that Bellflower failed to implement her 165 minutes of academic instruction from August

15, 2019, through August, 21, 2019. Bellflower has already committed to provide compensation for that time. Consequently, Student failed to establish lack of instruction for five days, given Bellflower's offer for compensatory education, was a material failure to implement Student's IEP.

Although Pawluk did not testify at hearing, evidence established that she had a multiple subject teaching credential as well as a credential authorizing her to teach students with visual impairments. Evidence, including Pawluk's service logs, also established that she provided direct instruction to Student, according to Student's IEP, from August 21, 2019 until October 4, 2019.

Student failed to submit persuasive countervailing evidence to show that Pawluk failed to implement the IEP services, or that she was unqualified to teach Student.

Student failed to sustain her burden of proof by a preponderance of the evidence that, during the 2019-2020 school year, up to February 28, 2020, Bellflower failed to implement the 165 minutes of specialized academic instruction by a teacher of the visually impaired, as required by the June 14, 2019 addendum IEP.

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: Bellflower denied Student a FAPE from January 2019, through February 2020, by failing to adequately assess all areas of Student's braille, learning media technology and orientation and mobility needs. Student prevailed, in part, on Issue

One. Bellflower adequately assessed Student's psychoeducational needs and did not deny Student a FAPE regarding the assessment of her psychoeducational needs from January 2019, through February 2020. Bellflower prevailed, in part, on Issue One.

Issue 2: Bellflower implemented Student's specialized academic instruction, by a teacher of the visually impaired, during the 2019-2020 school year, as required by Student's June 14, 2019 addendum IEP. Bellflower prevailed on Issue Two.

REMEDIES

Student sustained her burden of proof that Bellflower denied her a FAPE from January 2019 through February 2020, by failing to adequately assess all of her braille, learning media technology, and orientation and mobility needs. As a remedy, Student requested an order compelling Bellflower to fund independent educational evaluations in the areas of vision and orientation and mobility, to facilitate an assessment by the California School for the Blind, to provide Student with compensatory educational services, and to craft and implement an IEP to address Student's needs.

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Ibid.*) An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia*, (D.D.C. Cir. 2005) 401 F.3d

516, 524.) 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.” (*Ibid.*)

Bellflower failed to adequately assess Student’s braille, learning media technology, and orientation and mobility needs. This failure denied Student a FAPE, as it resulted in the IEP team having inadequate information regarding Student’s needs to enable the team to make decisions regarding the provision of FAPE to Student. Parent was also deprived of the information regarding Student’s needs to enable them to effectively participate in the IEP team decision-making process regarding the provision of a FAPE to Student. The appropriate remedy for this failure is an order compelling Bellflower to fund an independent educational vision and orientation and mobility assessment, and to provide Bellflower with a copy of the assessment so that the IEP team can consider the assessment. This remedy will provide Student with the assessment she would have received if Bellflower had adequately assessed her braille, learning media technology, and orientation and mobility needs in the first place.

Student presented evidence that Dr. Sonja Biggs was in the process of conducting an assessment of Student’s braille, orientation and mobility, and learning media technology needs, for a total cost of six thousand dollars (\$6,000). Bellflower shall fund the cost of Dr. Biggs’ assessment at a cost not to exceed six thousand dollars (\$6,000).

Student presented no evidence of her needs for compensatory services. Therefore, her request for compensatory educational services is denied.

ORDER

1. Student shall submit an invoice, and proof of payment, if any, to Bellflower for the cost of the independent assessment. Within 15 days of either proof of payment or receipt of the invoice and completion of the assessment, Bellflower shall either reimburse Parent for the cost of the independent assessment, not to exceed \$6,000, or pay Dr. Biggs directly, if Biggs has not already been paid.
2. Within 15 days of Bellflower's payment for the independent evaluation, Parent shall provide Bellflower with a copy of the independent educational evaluation assessment report.
3. Within 30 days of receipt of the assessment report, Bellflower shall convene an IEP team meeting, to review the results of the assessment.

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/

Rita Defilippis

Administrative Law Judge

Office of Administrative Hearings