BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020060885
CASE NO. 2020060931

THE CONSOLIDATED MATTERS INVOLVING

PARENT ON BEHALF OF STUDENT, AND

PACIFIC CHARTER INSTITUTE; AND VALLEY VIEW CHARTER PREP

DECISION

FEBRUARY 1, 2021

On June 25, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student and Parents, referred to collectively as Student, naming Pacific Charter Institute, referred to as Pacific Charter, and Valley View Charter Prep, referred to as Valley View. Pacific Charter and Valley View are referred to collectively as Charter Schools. A due process hearing request is called a complaint. On June 26, 2020, Valley View Charter Prep filed a complaint naming Student.

On July 1, 2020, OAH consolidated the complaints, and designated Student's case as the primary case. On September 11, 2020, Student filed an amended complaint, naming the same parties as in his original complaint. Student's case remained the

primary case. On September 23, 2020, OAH granted a continuance of the consolidated cases, for good cause. Administrative Law Judge Elsa H. Jones heard this matter by videoconference using the Microsoft Teams platform on November 17, 18, 19, and December 1, 2020.

Natashe Washington, Attorney at Law, represented Student. Student's mother, referred to as Mother, attended all hearing days on behalf of herself and Student. Tilman A. Heyer and Sabrina Buendia, Attorneys at Law, represented Charter Schools. Timothy Ribota, Director, Student Services, Pacific Charter, attended all hearing days on behalf of Charter Schools. Morgan J. Kimmey, a law clerk from Mr. Tilman's and Ms. Buendia's office, also attended some hearing days.

At the parties' request the matter was continued to December 21, 2020, for written closing briefs. The record was closed, and the matter was submitted on December 21, 2020.

ISSUES

STUDENT'S ISSUE

1. Did Charter Schools deprive Student of a free appropriate public education, referred to as a FAPE, by failing to timely respond to Student's requests dated July 23, 2019, and April 22, 2020, for an independent psychoeducational evaluation, because they failed to take either of the following actions without unnecessary delay: agree to fund an independent psychoeducational evaluation, or file a due process request to defend the appropriateness of the psychoeducational evaluation?

VALLEY VIEW'S ISSUE

1. Was Valley View's psychoeducational evaluation of February 12, 2019, appropriate, and did Valley View respond to Student's requests for an independent psychoeducational evaluation dated July 23, 2019, and April 22, 2020, without unnecessary delay, such that Student is not entitled to an independent psychological evaluation at public expense?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) All subsequent references to the Code of Federal Regulations are to the 2006 version. 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 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] (*Schaffer*); and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Each party had the burden of proof as to their respective 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 15 years old and in ninth grade at the time of hearing. Student was eligible for special education under the category of specific learning disability. He was enrolled in Valley View, a charter school which offers only a home-based program. Student had been continuously enrolled in Valley View's program since January 2017, when he was in fifth grade. Student was first found eligible for special education by a different school district in March 2013, when he was seven years old.

Pacific Charter is a non-profit public benefit corporation, which operates a number of charter schools, including Valley View, in different counties and in different special education local plan areas. At the prehearing conference, counsel represented that Pacific Charter and Valley View are one and the same entity for the purposes of Student's amended complaint, and they are so treated in this Decision by the use of the term Charter Schools. As a charter school, Valley View is a local educational agency for IDEA purposes.

Valley View parents instruct their children and give grades, and have discretion to select the curriculum. For children such as Student, who are in general education for most of their day, a credentialed general education teacher from Valley View regularly

consults with parents and students about curriculum, grades, and progress. Children eligible for special education at Valley View, such as Student, have individualized education programs, known as IEPs. Student's IEPs were developed at IEP team meetings conducted under the auspices of the El Dorado County Charter Special Education Local Plan Area. Under the administration, oversight, and support of Pacific Charter, Valley View offers special education and related services pursuant to a student's IEP. Such special education and services include a certified special education teacher to provide specialized academic instruction, speech and language and occupational therapy services, assistive technology, and any other staff, services, accommodations, or modifications the student's IEP requires. Special education staff, not parents, provide special education instruction and services. When parents request an assessment, Pacific Charter decides whether to provide the assessment and, if necessary, retains the assessor to perform the assessment.

STUDENT'S ISSUE 1: DID CHARTER SCHOOLS DEPRIVE STUDENT OF A FAPE, BY FAILING TO TIMELY RESPOND TO STUDENT'S REQUESTS DATED JULY 23, 2019, AND APRIL 22, 2020, FOR AN INDEPENDENT PSYCHOEDUCATIONAL EVALUATION, BECAUSE THEY FAILED TO TAKE EITHER OF THE FOLLOWING ACTIONS WITHOUT UNNECESSARY DELAY: AGREE TO FUND AN INDEPENDENT PSYCHOEDUCATIONAL EVALUATION, OR FILE A DUE PROCESS REQUEST TO DEFEND THE APPROPRIATENESS OF ITS PSYCHOEDUCATIONAL EVALUATION?

OBLIGATION TO FUND OR FILE WITHOUT UNNECESSARY DELAY

Student contends that Charter Schools violated their obligation under the IDEA to either fund the independent psychoeducational evaluation requested by Parents in July 2019 and again in April 2020, or file a complaint to defend the appropriateness of its psychoeducational assessment without unnecessary delay. As a result, Student contends that Charter Schools deprived Student of a FAPE, because Parents endured uncertainty as whether they should incur the costs of obtaining the assessment on their own, and they did not have the information necessary to ascertain and understand Student's unique needs so as to participate fully in developing an IEP to meet those needs.

Charter Schools contend that Valley View did not unreasonably delay in filing a complaint to defend its psychoeducational assessment. They contend that during a telephone conversation between the parties on or about October 2, 2019, the parties agreed to proceed with visual and auditory processing evaluations, referred to as processing evaluations, at the expense of Charter Schools, and Parents agreed to withdraw their request for an independent psychoeducational evaluation. Charter Schools further contend, in the alternative, that Parents agreed to withdraw their request for an independent psychoeducational evaluation, subject to certain conditions, including incorporating into Student's IEP the recommendations of two processing evaluations which Charter Schools would fund. Therefore, Charter Schools contend that the operative request for an independent psychoeducational evaluation occurred when Parents again requested an independent psychoeducational evaluation in late April 2020, after the processing evaluations were completed and the IEP team did not adopt the recommendations for services set forth in the processing evaluation reports. Charter

Schools contend Valley View timely filed its complaint to defend its psychoeducational assessment on June 26, 2020, approximately two months thereafter. Charter Schools also contend Student did not demonstrate that any delay in filing the complaint deprived Student of a FAPE.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an individualized education program, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031,56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

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

Before any action is taken with respect to the initial placement of an individual with exceptional needs, an evaluation of the pupil's educational needs shall be conducted. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) In California law, an evaluation is referred to as an assessment, and the terms are used interchangeably in this Decision. The pupil must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the pupil has a disability or whether the pupil's educational program is

appropriate. (20 U.S.C. § 1414 (a)(2),(3); Ed. Code, § 56320, subds. (e) & (f).) The assessment must be sufficiently comprehensive to identify all of the child's special education and related services needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.306.)

Reassessments of the pupil shall be conducted if the local educational agency determines that a reassessment is warranted, or if the pupil's parents or teacher requests a reassessment. (Ed. Code § 56381, subd. (a)(1).) A reassessment shall occur not more frequently than once a year, unless the parent and the school district agree otherwise, and shall occur at least once every three years, unless the parent and the school district agree, in writing, that a reassessment is unnecessary. (Ed. Code § 56381, subd. (a)(2).)

The procedural safeguards of the IDEA provide that under certain conditions a parent is entitled to obtain an independent educational evaluation of a child at public expense. (20 U.S.C. §1415(b)(1).) An independent evaluation is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i).) A parent may request an independent assessment at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1), incorporated by reference into Ed. Code, § 56329, subd. (b).)

When a parent requests an independent assessment at public expense, the school district must, "without unnecessary delay," either initiate a due process hearing to show that its assessment is appropriate or provide the independent assessment at public expense, unless the school district demonstrates at a due process hearing that the assessment obtained by the parent does not meet its criteria. (34 C.F.R. § 300.502(b)(2).) The school district may inquire as to the reason why the parent

disagrees with the district's assessment, but the district may not require the parent to provide an explanation, and may not unreasonably delay its "fund or file" obligation to either provide the independent assessment at public expense or file its due process complaint to demonstrate the appropriateness of its assessment. (34 C.F.R. § 300.502(b)(4).)

Further, the district may require that an independent assessment at public expense meet agency criteria regarding assessments to the extent those criteria are consistent with the parent's right to an independent assessment, but the district may not impose conditions or timelines related to obtaining an independent assessment at public expense. (34 C.F.R. § 300.503.)

The term "unnecessary delay" is not defined in the regulations or elsewhere. Nevertheless, the Office of Special Education Programs, the entity within the United States Department of Education responsible for promulgating regulations under the IDEA, addressed the meaning of the phrase in an advisory comment letter. (See Office of Special Education Programs, *Letter to Anonymous*, August 13, 2010, 56 IDELR 175) (*Letter to Anonymous*).) In the letter, the Special Education Programs Office explained that the term "unnecessary delay" allows for "a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an [independent evaluation]." (*Ibid.*)

Whether the length of time that has passed before a district initiates a due process hearing or provides the independent evaluation at public expense constitutes an unnecessary delay is a question of fact, based upon the circumstances of the particular case. (*J.P. v. Ripon Unified School District* (E.D. Cal., April 15, 2009, No.

2:07-cv-02084-MCE-DAD) 2009 WL 1034993) (*Ripon*).) For example, in *Ripon* the court determined that the school district's due process request filed more than two months after the request for an independent evaluation was timely, as the parties were communicating regarding the request for the independent evaluation during that time, and did not come to an impasse on the issue until less than three weeks before the school district's filing. Additionally, the district's winter break began immediately after the request for an independent evaluation, which the court considered as a factor in determining the timeliness of the district's complaint.

In *L.S. v. Abington School Dist*. (E.D. Pa. Sept. 30, 2007, No. 06-5172) 2008 WL 1018789, the court held that a school district's 10-week delay in filing a due process request was not a violation of the IDEA. The court emphasized that there was evidence of ongoing efforts during that time to resolve the matter, including numerous emails and the holding of a resolution meeting.

In contrast, in the case of *Pajaro Valley Unified School District v. J.S.* (N.D. Cal. Dec. 15, 2006, No. C 06-0380 PVT) 2006 WL 3734289 (*Pajaro Valley*), the school district did not file its due process complaint to defend its assessment until approximately 11 weeks after Student's request for an independent evaluation. Then, at hearing, the school district offered no explanation as to why it delayed for 11 weeks in filing its complaint, or why that delay was necessary. The court found that, under the circumstances, the school district's unexplained and unnecessary delay in filing for a due process hearing *waived its right to contest Student's request for an independent evaluation at public expense, and by itself warranted entry of judgment in favor of Student and [parent].*" (*Id.* at p. *3.) [Emphasis added.]

At the IEP team meeting of May 14, 2018, when Student was in sixth grade at Valley View, and prior to the events that are the subject of these consolidated cases, Parents presented a letter to the IEP team expressing their worries about Student. Parents wrote they were concerned Student was not receiving an appropriate level of support for his dyslexia and dysgraphia. These conditions were diagnosed in a private neuropsychological evaluation Parents obtained in February 2014 from Erica Kalkut, Ph.D., when Student was eight-and-one-half years old, and a home-schooled second-grader in Massachusetts. Parents requested Student's triennial assessment be advanced from spring 2019 to September 2018. The letter also requested that Charter Schools agree to an independent evaluation, so that Student could be properly evaluated for dyslexia, dysgraphia, and dyscalculia. Student was not entitled to an independent evaluation, as Charter Schools had not yet assessed Student, but the IEP team agreed to advance Student's triennial assessment.

On October 16, 2018, Parents signed an assessment plan for Valley View to perform a triennial assessment of Student, to include assessment in the areas of intellectual development and social emotional/behavior, all performed by a school psychologist. The assessment plan also included an assessment in the area of academic achievement, to be performed by an education specialist, which was in fact performed by Jennifer Riggs, Student's special education teacher. The assessment plan also listed an assessment in the area of motor development to be performed by an occupational therapist, and a health assessment to be performed by a school nurse. The assessment plan had a handwritten note on it referring to a two-part IEP team meeting, stating the first part of the IEP team meeting would occur on December 13, but only had blanks for the date and time of the second part. None of the witnesses who testified at hearing

wrote those notes, and there was no specific evidence as to why and when those notes were written.

Charter Schools retained Green Leaf Psychology, a nonpublic agency, to provide the assessor for the triennial psychoeducational assessment. Green Leaf assigned Nico Peters, Psy.D., a credentialed school psychologist, to perform the assessment.

On December 13, 2018, 58 days after Parents signed the assessment plan, the IEP team met for Student's triennial IEP team meeting. The meeting was opened and continued to February 14, 2019. The IEP notes state that the meeting was continued due to Mother's unavailability due to family circumstances, and Charter Schools witnesses at the hearing confirmed that the IEP notes accurately conveyed the discussion regarding why the meeting was continued. At hearing, Parents denied that Mother was unavailable, but also acknowledged that they had never attempted to correct the IEP notes. In view of the conclusions in the Decision, there is no need to resolve this factual dispute.

Dr. Peters completed the assessment in February 2019 and generated a report of the assessment on February 12, 2019. Dr. Peters promptly provided the completed report to Parents. Dr. Peters discussed the report with Parents during a telephone conversation prior to the IEP team meeting of February 14, 2019, at which the IEP team planned to discuss the report. The conversation lasted for about an hour. The testimony was conflicting as to whether Parents expressed any displeasure with the psychoeducational assessment at that time. No party offered any documentation of the telephone call.

On February 14, 2019, Valley View convened the continued triennial IEP team meeting and discussed the results of Dr. Peters's assessment. The IEP team included

Parents, Student's general education teacher Racio Amaya, Student's special education teacher Riggs, a school administrator, and Natalie Steffans, a school psychologist from Green Leaf Psychology where Dr. Peters also worked. Dr. Peters was unable to attend the meeting, but she had discussed the psychoeducational assessment with Steffans prior to the meeting. The IEP documentation in evidence pertaining to this IEP team meeting did not detail the substance of the IEP team's discussion surrounding the psychoeducational assessment, but there was no evidence that Parents criticized or asked questions regarding the psychoeducational assessment or report.

At the IEP team meeting, Parent discussed concerns regarding Student's expressive language when speaking and writing, and his ability to complete tasks. Parent wanted to see Student achieve at grade level in reading and math by high school. Parent also expressed concern with the credentials of Student's teachers, Student's lack of progress in reading, writing, and math, and how far Student was falling behind. Additionally, Parent was concerned that Student was beginning to lose confidence and self-esteem due to his academic challenges, and Parent also noticed that Student increasingly displayed a poor attitude toward family members Parent requested a speech and language assessment and the team discussed it and recommended it, due to concerns about Student's receptive and expressive language.

On May 1, 2019, Mother sent an email to Jaime Law, the program specialist for special education assigned to Valley View. The email stated that at an IEP team meeting held the week before, the IEP team had agreed to a developmental optometrist assessing Student, as well as an auditory processing assessment. Mother requested that those assessments proceed. There was no documentary evidence presented at hearing regarding that IEP team meeting. Law emailed Mother on May 3, 2019, explaining that she would need to check with the IEP team and the administration regarding the

requested assessments. After Mother wrote a follow-up email to Law dated May 15, 2019, Law responded to Mother on May 17, 2019, denying the assessment requests. Law's email stated she had reviewed Riggs's notes, and Dr. Peters's psychoeducational assessment, which outlined Student's academic areas of need in reading, reading comprehension, reading rate, written expression, and academic fluency. Further, the psychoeducational assessment showed Student had cognitive deficits in the areas of working memory and processing speed. The email also stated that a Notice of Action was attached. The Notice of Action purported to be a prior written notice explaining Valley View's denial of these assessments.

On July 23, 2019, Parents sent a responsive email to Law, criticizing Dr. Peters's psychoeducational assessment in detail, and requesting an independent psychoeducational evaluation. In particular, Parents noted that they believed the data obtained during an assessment may provide clues related to other issues that could be explored, such as vision and auditory processing issues. They asserted they were asking for an independent assessment based upon their objections to the sufficiency and accuracy of Dr. Peters's February 2019 assessment, including the inaccurate interpretation of the assessment results, and the failure of the assessment to properly assess Student's dyslexia, dyscalculia, and dysgraphia-related issues.

On August 15, 2019, Timothy Ribota, Director of Student Services of Pacific Charter, sent an email to Parents in response to their July 23, 2019, email. Ribota had numerous job functions as Director of Student Services, including the ultimate authority to grant an independent psychoeducational assessment and other requested assessments. Prior to his employment with Pacific Charter, Ribota, who held a pupil personnel services credential, was a practicing school psychologist. In his email, Ribota explained in detail how the February 2019 assessment included assessment in the areas

of auditory processing and visual processing, and his belief that the February 2019 assessment accurately identified Student's areas of strength and weakness.

Ribota inquired whether Parents requested the independent psychoeducational evaluation because they really wanted a referral for a reassessment of Student's auditory processing and visual processing abilities. If so, Ribota suggested that Parents withdraw their request for an independent psychoeducational assessment, and then Charter Schools would move forward with the two processing assessments. He closed the email by requesting that Parents let him know whether Parents wanted to proceed with their request for the independent psychoeducational assessment, or if they wished to revoke that request and then Charter Schools would move forward with the two processing assessments.

On September 3, 2019, Parents sent a responsive email to Ribota, expressing their concerns regarding Student's challenges with his academic skills, his lack of progress in reaching grade level performance, and their belief that his special education services were not sufficient. Parents wrote they were not willing to withdraw their request for an independent psychoeducational assessment, unless Charter Schools met three conditions: perform the visual and auditory processing assessments, approve and integrate into Student's IEP whatever therapies were recommended in the reports of those assessments, and incorporate into Student's program the hours of service recommendations in Dr. Kalkut's March 6, 2014, neuropsychological report. Parents had previously provided this report to Valley View. The body of their email stated the report was attached and included the password by which Ribota could obtain the report. The copy of the email in evidence did not reflect that the report was attached, but the evidence reflected that Ribota was familiar with the contents of the report.

On September 12, 2019, Parents wrote a follow-up email to Ribota, to confirm that he received their September 3, 2019 email, because they had received no response. Father wrote another follow-up email to Ribota on October 1, 2019, documenting that Father had called Ribota's office three times and left voicemails, but still had received no response.

On October 2, 2019, Ribota and Father exchanged emails and scheduled a telephone conversation between Father and Ribota which occurred on or about that day. During the conversation, the parties discussed Parents' request for the two processing assessments, and Ribota agreed Charter Schools would fund them. Ribota did not recall the exact verbiage of the telephone call, but Ribota was under the impression that during the telephone call he agreed Charter Schools would fund the two processing assessments, and Parents withdrew their request for an independent psychoeducational assessment.

Ribota's impression was consistent with his offer in his August 15, 2019, email to Parents, stating that Charter Schools would provide the two processing assessments if Parents withdrew their request for an independent psychoeducational assessment. Ribota's impression of the telephone conversation was also consistent with his impression, alluded to in his August 15, 2019 email, that Parents' request for an independent educational evaluation was simply a vehicle to obtain the two processing assessments. Since he agreed Charter Schools would fund those assessments, he thought there was no need for the independent psychoeducational assessment. However, at hearing Ribota admitted that he did not recall the exact verbiage of the telephone call, and also admitted that Father did not specifically state that Parents were withdrawing their request for an independent psychoeducational assessment. He also admitted that Father did not specifically state Parents were withdrawing the conditions

in their September 3, 2019 email. Other than the agreement that Charter Schools would fund the two processing assessments, Ribota did not testify that he discussed or agreed to any of the conditions of Parents' September 3, 2019 email during the telephone call. Significantly, Ribota testified that he would never have agreed to the condition regarding or implementing Dr. Kalkut's service recommendations, because Dr. Kalkut's assessment and report were completed in 2014, when Student was only eight years old. In view of how much children grow and develop over the years, Ribota did not believe it was appropriate to rely on such a dated report.

Ribota did not document in any manner any of these impressions or understandings that he formulated during the telephone call. Neither Ribota nor Father sent any letter or other documentation confirming the telephone call. In particular, nobody sent any writing to Parents to document Ribota's belief that, as a result of his telephone conversation with Father, Parents had withdrawn their request for an independent psychoeducational evaluation, and therefore Charter Schools would not fund any such evaluation.

At hearing, Father's recollection of the telephone conversation differed in important respects from Ribota's recollection. Father asserted that he did not agree to withdraw Parents' request for an independent psychoeducational evaluation during that telephone conversation or at any other time. Father testified that the issue of Parents' request for an independent psychoeducational evaluation was not resolved during the telephone conversation. Father recalled most of the conversation concerned the two processing assessments that Ribota agreed to fund during the telephone call. Father's impression during the conversation was that Ribota would accept the condition in Parents' September 3, 2019 email to include in Student's IEP any therapies recommended in the two processing assessment reports, and Father told Ribota Parents

expected Charter Schools to do so. It was not clear to Father which of the recommendations of the Kalkut report Ribota would agree or not agree to include in Student's program. Father recalled that Ribota only expressed concerns about the age of that report. Mother, who was not a party to the telephone call, believed that Ribota told Father during the phone call that he would not agree to follow the service recommendations in Dr Kalkut's report.

Subsequent to this October 2019 telephone call, the two processing assessments occurred, at the expense of Charter Schools. The visual processing assessment occurred on January 8, 2020, and the auditory processing assessment occurred on January 28, 2020. Parents also obtained another auditory processing assessment for the IEP team to consider.

On January 30, 2020, Parents began to consult with Summit Center, a California certified nonpublic agency, about Student's educational program, including the results of the processing assessments and the Peters assessment.

The two processing assessment reports were discussed at the IEP team meetings on March 18, 2020, March 25, 2020, April 1, 2020, and April 22, 2020. The IEP team did not agree to include the recommendations of the reports in Student's IEP. At the March 18, 2020 IEP team meeting, Parents shared their concerns about Student's progress in academics, especially in math and reading. At the March 25, 2020, IEP team meeting, Parents expressed concerns about Student's functional vision, his dyslexia, his lack of foundational math skills, and his inability to absorb virtual lessons due to his auditory processing issues. At the April 1, 2020, IEP team meeting, the team discussed that the recommendations of the processing assessments, including the auditory processing assessment Parent obtained, needed to be related to Student's educational

performance. Parents inquired as to what was needed to show an impact on educational performance. They also expressed concerns with Student's math and reading goals and his inability to work at grade level.

Parents did not mention their request for an independent psychoeducational evaluation from September 2019 until the April 22, 2020 IEP team meeting. The notes from that meeting stated Parents expressed that they still had significant concerns about Student's progress and were "reinstating their request for an [independent psychoeducational evaluation.]" The term "reinstating" is ambiguous in this context, and there was no evidence that was the actual term Parents used at the IEP team meeting. At hearing, Parents testified that they never withdrew their request for an independent psychoeducational evaluation, and there was no documentation that they had ever done so. Rather, they considered that they reiterated or repeated their request at the April 22, 2020 IEP team meeting. The notes from the April 22, 2020 IEP team meeting further reflected that Ribota responded that Parents needed to submit a formal written request for the independent assessment.

On April 24, 2020, Parents emailed Ribota to again request an independent psychoeducational assessment. Parents received no response to their email, and they therefore sent a follow-up email to Ribota on May 15, 2020, asking that he acknowledge receipt of their request. By email dated May 15, 2020, Ribota advised Parents he would let them know shortly whether Charter Schools would fund or file. Parents heard nothing further from Ribota or anyone else, so on May 27, 2020, they again sent a follow-up email requesting a response. On the following day, Ribota emailed his response to Parents, attaching a prior written notice, dated May 27, 2020, denying their request. The prior written notice asked Parents to withdraw their request for an independent psychoeducational evaluation by June 5, 2020, or Valley View would file to

defend its psychoeducational assessment. None of Ribota's emails to Parents mentioned his understanding, based upon his telephone conversation with Father in October 2019, that Parents had withdrawn their July 23, 2019 request for an independent psychoeducational evaluation in exchange for Charter Schools funding the visual and auditory processing assessments.

On June 1, 2020, Parents emailed Ribota, advising that they would not withdraw their request. On June 25, 2020, Student filed a complaint in this matter, and, the next day, Valley View filed its complaint to defend its psychoeducational assessment. Valley View's complaint was filed approximately 10 months after Student's July 23, 2019 request for an independent psychoeducational assessment. This calculation does not include the approximately month-long span between the time the request was sent, which was during Valley View's summer break, and August 17, 2019, the end of Valley View's summer break. (See, *Ripon, supra,* at *7.)

In July 2020, Parents retained Summit Center to conduct an independent psychoeducational assessment of Student. Parents had not obtained the independent evaluation at their own expense prior to that time for a variety of reasons. They were unsure that an assessment they obtained on their own would be persuasive to the IEP team. They were concerned about finding an appropriate assessor and how much it would cost. They wanted the assessment to be done in person, which was complicated by government health guidelines issued during the COVID-19 pandemic in effect at that time. There were also scheduling issues. Father did not understand why Charter Schools were resistant to the idea of an independent assessment.

Summit Center directed Katherine Eng, Ph.D., to conduct the assessment. Dr. Eng received her Master of Arts degree in clinical psychology from the California School of

Professional Psychology in 1998, and her Ph.D. in clinical psychology from the same institution in 2002. She had been employed by Summit Center as an assessor since 2014.

Dr. Eng performed a neuropsychoeducational assessment of Student, pursuant to a formal agreement between Parents and Summit Center dated August 7, 2020, and produced an assessment report dated October 2020. The cost of the assessment was $8,350, and Parents paid this amount to Summit Center. The cost included the amount of $600 for Summit Center to appear at an IEP meeting to discuss the assessment. Mother believed Dr. Eng's report increased her understanding of Student's social/emotional issues and showed that Student's academic and social emotional challenges were increasing. Mother contacted Valley View regarding sharing the report, but Charter Schools did not receive the report until early November 2020, in response to a subpoena duces tecum of Dr. Eng's records. At the time of the hearing, Dr. Eng's assessment had not yet been discussed at an IEP team meeting.

In this case, the law required that Charter Schools do one of two things in response to Parents' July 23, 2019 email, without unnecessary delay: (1) initiate a due process hearing to show that its psychoeducational assessment was appropriate; or (2) fund an independent psychoeducational assessment, as requested by Parents. Charter Schools did not fund an independent evaluation. Valley View did not file a due process complaint to defend the appropriateness of its assessment until June 26, 2020, nearly a year after Student's first request, and a day after Student filed his own complaint seeking to recover reimbursement for Dr. Eng's independent evaluation. Student demonstrated Valley View unnecessarily delayed in filing its complaint.

Student initially requested an independent psychoeducational assessment on July 23, 2019. Charter Schools responded to this request on August 15, 2019, offering a deal: Charter Schools would fund the two processing assessments Student had previously requested if Parents withdrew their request for an independent psychoeducational assessment. On September 3, 2019, Parents responded to this offer by an email proposing their own deal: they would withdraw their request for an independent psychoeducational assessment if Charter Schools not only funded the two processing assessments, but also agreed to incorporate into Student's IEP any services recommended by those assessments, and also incorporate into Student's program the number of service hours recommended in Dr. Kalkut's report. With the parties' positions thus joined, on September 12, 2019 and October 1, 2019, Parents emailed Ribota to follow-up, and also left several voicemails between those two dates. Ribota responded on October 2, 2019, and Father and Ribota had a telephone conversation on or about that date. Ribota and Father do not dispute that during the conversation, Ribota agreed Charter Schools would fund the two processing assessments, but they dispute that other matters were discussed or agreed to during the conversation, such as whether Parents withdrew their request for an independent psychoeducational assessment, and the depth of the parties' discussion of Parents' September 3, 2019 email and its conditions.

Unfortunately, Charter Schools did not confirm the contents of the telephone call in writing, in violation of the policy and spirit, if not the letter, of the IDEA. The IDEA mandates a variety of procedural safeguards that school districts must provide to special education students and their parents. One of those procedural safeguards is prior written notice, which is the subject of title 20 United States Code section 1415(b)(3). That section provides that prior written notice shall be given to parents whenever the district proposes to initiate or change, or refuses to initiate or change, "the

identification, *evaluation*, or educational placement of the child, or the provision of a [FAPE] to the child." (Emphasis added.) The content of the prior written notice is specified in title 20 United States Code section 1415(c)(1).

In *Union v. Smith* (9th Cir. 1994) 15 F.3d 1519, the court explained the policy underlying, and the significance of, prior written notice in the context of an IEP placement offer, stating, "this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer *creates a clear record that will do much to eliminate troublesome factual disputes many years later* about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any." (*Union, supra,* 15 F.3d 1519, 1526.) (Emphasis added.)

This matter does not involve a placement decision, as in *Union*, but the reasoning of *Union* applies. Had Charter Schools promptly sent Parents a prior written notice, or simply a letter, after the October 2019 telephone conversation, confirming Ribota's understanding that Charter Schools would fund the two processing assessments and would not fund an independent psychoeducational evaluation because Parents had withdrawn their request for same, then there would likely have been no need for this factual dispute. Parents would have clarified that they had not withdrawn their request for the independent evaluation, and Valley View would have known that it had to quickly file to defend its assessment.

Student's amended complaint did not include a claim that Charter Schools violated the IDEA by failing to send a prior written notice after the telephone call, and no party addressed this issue. Therefore, this Decision does not resolve whether the

failure of Charter Schools to send a prior written notice following the October 2019 telephone call under the circumstances in this case constituted a separate procedural violation of the IDEA, apart from the violation of the IDEA alleged in Student's Issue 1. (See Ed. Code, § 56502, subd. (i).)

As a result of the failure of Charter Schools to document the terms of the agreement they believed the parties reached during the telephone call, Charter Schools took no meaningful steps to resolve Parents' request for an independent psychoeducational assessment. Rather, the parties embarked upon two separate paths. Charter Schools believed that Parents had withdrawn their request for an independent psychoeducational assessment, and thus they were no longer obligated to fund or file. Parents continued to believe that their request for an independent psychoeducational assessment was still pending, and that Charter Schools had not yet determined whether they would fund an independent psychoeducational assessment. Parents did not raise their request for an independent psychoeducational assessment during several subsequent IEP team meetings until they again requested the independent assessment at the IEP team meeting on April 22, 2020. They followed up this request with an email dated April 24, 2020. Charter Schools did not substantively respond to their request until May 28, 2020, when Ribota sent Parents a prior written notice denying their request, and asking Parents to withdraw their request. On June 1, 2020, Parents emailed Ribota advising they would not withdraw their request, and on June 25, 2020, Parents filed their complaint in this matter. Thereafter, on June 26, 2020, Valley View attempted to meet its statutory obligation to fund or file by filing its complaint to defend its February 2019 psychoeducational assessment.

Ribota was a credible witness. There was no evidence that his impression of the result of his October 2019 telephone conversation with Father was dishonest or fanciful.

However, Charter Schools erred in not documenting Ribota's view of the October 2019 telephone conversation that the parties reached an agreement by which Parents withdrew their request for an independent psychoeducational assessment. The law requires a formal fund or file response to a parental request for an independent assessment, without unnecessary delay. Case law also permits a local educational agency to briefly attempt to resolve a dispute over a parental request for an independent assessment. If the parties are unable to reach an agreement, then the local educational agency must, without unnecessary delay, fund or file. The law does not provide that an acceptable response to an independent assessment request is a vague, unconfirmed, telephonic oral "agreement" to which none of the parties actually agreed. In this case, such a response resulted in Charter Schools taking no formal action upon Parents' assessment request of July 2019 until June 2020, while the request languished for approximately 10 months.

Charter Schools failed to comply with 34 Code of Federal Regulations part 300.502(b)(2) by failing, without unnecessary delay, to fund the requested independent psychoeducational evaluation, or to file a complaint to defend its assessment.

In their closing brief, Charter Schools contend that Valley View timely filed its complaint to defend its assessment on June 26, 2020, because the operative date to determine the timeliness was April 22, 2020, and not July 23, 2019, when Parents first requested the independent psychoeducational assessment. As such, there was only a delay of 65 days between the date of the operative request and June 26, 2020, the date Valley View filed the complaint. Charter Schools contend this period did not constitute unnecessary delay, especially since they served a prior written notice barely more than a month after the April 22, 2019 request, and Valley View's school year ended on May 26, 2020.

Charter Schools make two alternative arguments in support of this position. First, they contend that, pursuant to Ribota's interpretation of the October 2019 telephone call, Parents withdrew their July 23, 2019 request for the independent evaluation. Therefore, Parents' request at the April 22, 2020 IEP team meeting and in their April 24, 2020 email constituted a new and different request for an independent assessment.

Alternatively, Charter Schools rely on the terms of Parents' September 3, 2019, email. That email stated Parents would withdraw their July 23, 2019, request for an independent assessment if Charter Schools funded the two processing assessments and then agreed to incorporate into Student's IEP the services that may be recommended in the reports of those assessments. Charter Schools contend that Parents would not know until the IEP team meetings when the IEP team would discuss the two processing assessments whether that condition was met, such that Parents would withdraw their July 23, 2019 request. In essence, Charter Schools posit that the conditions of the September 3, 2019 email tolled the fund or file period until the April 22, 2020 IEP team meeting, when Parents learned that the IEP team would not include in Student's IEP the service recommendations of the two processing assessments. At that time, Parents requested the independent psychoeducational assessment.

Charter Schools' first argument fails, as was already discussed. Charter Schools failed to confirm in writing Ribota's version of the October 2019 telephone conversation that Charter Schools would not fund an independent psychoeducational assessment, because Parents withdrew their request for it in return for Charter Schools funding the processing assessment. Since the evidence did not establish any such agreement by Parents, Valley View was required to fund or file without unnecessary delay, which it did not do.

Charter Schools' alternative theory, that the fund or file period was tolled until April 22, 2020, when Parents learned that the IEP team would not include in the IEP the service recommendations of the two processing assessments, is also incorrect. There was no evidence that Charter Schools ever agreed to the terms of Parents' September 3, 2019 email. Ribota did not testify that he accepted all of the conditions in Parents' September 3, 2019 email during his October 2019 telephone call with Father. Ribota asserted that he would never have accepted the terms of the email in any event, because he would never have agreed to include the recommendations of Dr. Kalkut's 2014 report into Student's program. As for Parents, only Father was a party to the telephone call, and neither Parent had a clear, specific, understanding as to what Ribota agreed to with respect to the September 3, 2019 email.

In short, Charter Schools never accepted all of the conditions of Parents' offer in the September 3, 2019 email, never would have accepted that offer, and never clearly conveyed their rejection of that offer to Parents during the October 2019 telephone call or thereafter. Rather, Charter Schools did not convey their rejection of Parents' offer until they implicitly rejected it at the April 22, 2020 IEP team meeting, when they rejected the recommendations of the processing assessments. Therefore, Charter Schools cannot now rely on the fortuitous contents of the email they essentially disregarded to relieve them of their obligation to timely fund or file in response to Parents' July 23, 2019, request for an independent assessment.

Finally, Charter Schools' contention that the 65-day period during which Valley View waited to file its complaint after Student's April 22, 2020 request for an independent assessment did not amount to unnecessary delay is unsupported by the evidence. At Ribota's request, Parents followed-up their April 22, 2020 request with an April 24, 2020, email. They vainly waited three weeks for a response, then sent a follow-

up email on May 15, 2020. Ribota responded to that email on the same day, stating the decision on Parents' request was pending. His email did not include any suggestions to resolve the matter. Parents waited 12 days, received no response from Charter Schools, and sent another follow-up email to Ribota on May 27, 2020. The next day, Ribota emailed Parents, denying their request and enclosing a prior written notice. The prior written notice explained that Valley View would file to defend its assessment unless Parents withdrew their request by June 5, 2020. Parents emailed Ribota on June 1, 2020, advising that they were not withdrawing their request. The evidence reflected there was no further communication between the parties regarding Parents' request before Student filed his complaint in this matter on June 25, 2020. Only after that, on June 26, 2020, did Valley View file its complaint to defend its assessment. Charter Schools offered no explanation as to why they waited 65 days to fund or file in response to Parents' request for an independent assessment, or why that delay was necessary. The only action they took during that time was to deny the request and send a prior written notice.

Courts have found delays in funding or filing necessary when the parties engaged in discussions to attempt to resolve the request for an independent assessment. (See *Ripon, supra,* 2009 WL 1034993, at *7,*8; *L.S. v. Abington School Dist., supra,* 2007 W.L. 2851268, at *10.) When, as here, such efforts are lacking, and there is no explanation offered for the delay, courts have declined to find the delay necessary. (See *Pajaro Valley, supra,* 2006 WL 3734289; at *3; *William S. Hart Union High School Dist. v. Romero* (C.D. Cal. Apr. 9, 2014, CV-13-3382-MWF (PLAx)) 2014 WL 12493766, at *10 (*Romero*).)

Student established that the failure of Charter Schools to fund or file in response to their July 2019 request for an independent psychoeducational assessment, repeated

in April 2020, violated their obligations under 34 Code of Federal Regulations part 300.502(b)(2).

FAPE VIOLATION

States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483) (*Target Range*).) Procedural violations only constitute a denial of a FAPE if they: impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process, or caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

A violation of 34 Code of Federal Regulations part 300.502 (b)(2) is a procedural violation. The issue then becomes whether it rises to the level of a denial of a FAPE. (*Romero, supra,* 2014 WL 12493766, at *11.)

The evidence was unclear as to whether Charter Schools' conduct deprived Student of an educational opportunity or educational benefits during the 2019-2020 school year. Student was performing below grade level during this time, but there was little specific evidence of Student's grades or progress on his goals during that period. There was testimonial evidence that Student's emotional state deteriorated towards the end of the 2019-2020 school year, as his anxiety increased and his self-esteem decreased, but there was no evidence specifically relating these conditions to a decline in Student's educational performance.

However, Valley View's conduct seriously infringed on Parents' opportunity to participate in the IEP formulation process. Publicly-funded independent educational evaluations provide students with access to experts who can evaluate all of the information already available to school districts and provide an independent opinion. The Supreme Court underscored the importance of this right, reasoning that it allows parents to overcome the natural advantage held by school districts when there is a dispute over a student's educational program. (See, *Schaffer, supra*, 546 U.S. 49, 60-61.) School districts already have access to expert opinions through their own specially trained staff. Independent assessments allow parents to challenge district assessments, determine whether all unique needs have been identified, and ensure the appropriateness of district programs being offered.

Charter Schools' failure to timely fund or file left Parents to wonder whether Charter Schools intended to file a request for due process to defend the psychoeducational assessment, and how long Parents should wait before filing their own complaint. Parents were uncertain about whether to incur the costs of filing a complaint or the costs of obtaining an assessment on their own to shed new light on Student's needs or educational program. Parents' ability to intelligently determine a course of action was complicated by Charter Schools failure to clearly and specifically confirm Ribota's understanding that during the October 2019 telephone conversation Parents agreed to withdraw their assessment request, and also to clearly and specifically advise Parents that Ribota had already decided at the time of that telephone call that he would not agree to all of the conditions set forth in Parents' September 3, 2019 email. Charter Schools' failure to timely fund or file thereby significantly impeded Parents' meaningful participation in the IEP development process.

Furthermore, Parents requested the independent psychoeducational assessment because they wished to investigate their consistent concerns regarding Student's dyslexia, dysgraphia, and persistent difficulties in reading, math, and in his ability to express his thoughts in writing during the 2018-2019 and 2019-2020 school years. Parents noticed a steady decline in Student's self-esteem, emotional well-being, and affinity for school, which they attributed to his challenges in these academic areas. Throughout this time period, Parents expressed their concerns about one or more of these matters at many IEP team meetings, as well as in their correspondence with Charter Schools about their assessment request. They consistently believed that Student's educational program was inadequate to meet his needs, and that their concerns were never fully addressed.

Charter Schools' conduct significantly interfered with Parents' opportunity to investigate these consistent concerns and understand Student's unique needs and potentially obtain valuable information about them through an independent psychoeducational assessment. Charter Schools' conduct therefore significantly impeded Parents' ability to participate in IEP meetings and to be involved in the development of an IEP that met Student's unique needs. Under these circumstances, Charter School' violation of the IDEA deprived Student of a FAPE.

Charter Schools contend that any delay by Valley View in filing its complaint did not deprive Student of a FAPE, because Student delayed in prosecuting this case by requesting a continuance and filing an amended complaint. Charter Schools also contend that Parents delayed in obtaining Dr. Eng's assessment. Therefore, Charter Schools contend that Student is responsible for any deprivation of FAPE he suffered by reason of delay. Finally, Charter Schools contend that Dr. Eng's assessment was defective in various respects, which diminished its usefulness to the IEP team.

Specifically, Charter Schools contend that Dr. Eng's assessment was flawed because she made three scoring errors, she selected isolated results to support some of her diagnoses and conclusions, and because her assessment included recommendations regarding occupational and speech therapy that were beyond her area of expertise.

Charter Schools' contentions are not meritorious. First, the Supreme Court and the Ninth Circuit have emphasized that a public agency's compliance with IDEA obligations is not contingent on parental consent or cooperation. (See *Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055 [district's duty to annually review and revise IEP is not contingent on parental cooperation, because "the IDEA, its implementing regulations, and our case law all emphasize the importance of parental involvement and advocacy, even when the parents' preferences do not align with those of the educational agency"].) The court reviewed other Ninth Circuit cases that addressed this issue, and concluded educational agencies "cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents." (*Id.*)

Second, it is noteworthy that Charter Schools accuse Student of delay when Valley View did not file its complaint seeking to defend its assessment until after Student filed his original complaint to obtain an independent evaluation. Moreover, no conduct of Student in conducting this litigation is comparable to the approximately 10-month delay Charter Schools imposed upon Student by violating 34 Code of Federal Regulations part 300.502(b)(2) prior to the time Student filed his complaint.

Finally, there is no legal requirement that parents obtain an independent assessment at their own expense when the school district or local educational agency fails to timely fund or file. (*Letter to Anonymous, supra.*) Some parents cannot afford to advance the costs of an independent assessment. Others, such as Parents here, were

concerned about costs as well as other factors. They had to spend time locating, selecting, and scheduling a qualified independent assessor who was available to perform the assessment, and consider whether an independent assessment they funded might be less persuasive to the IEP team than an independent assessment funded by the Charter Schools.

Additionally, as was stated above, Parents' decision as to whether to incur the costs of their own assessment was complicated by the failure of Charter Schools to clearly and specifically notify Parents that, pursuant to Ribota's version of the October 2019 telephone conversation, Charter Schools would not be funding an independent assessment. Further, Charter Schools did not clearly and specifically notify parents what Ribota had decided by early October 2019: that they would not accept the condition in Student's September 3, 2019 email to incorporate into Student's program Dr. Kalkut's recommendations regarding the number of hours of Student's services. To some degree, Charter Schools' conduct contributed to Parents' inaction of which Charter Schools now complains.

Under these circumstances, Charter Schools cannot immunize themselves from the consequences of their failure to timely fund or file by accusing Parents of not obtaining their own assessment and assessment report within whatever time frame Charter Schools considered appropriate. The evidence showed that Parents consistently expressed their concerns about their child's academic abilities and progress at all relevant times, and attempted to obtain as much information from the IEP team about their child as possible. They would have likely obtained the information they sought much earlier than they did had Charter Schools appropriately responded to their July 2019 assessment request without unnecessary delay. This is particularly so in this case, as Charter Schools failed to clearly notify Parents that they were not accepting all of the

conditions set forth in Parents' September 3, 2019 email, and Ribota's telephone conversation with Father confused rather than clarified the status of Parent's July 2019 assessment request.

Charter Schools' contentions regarding the usefulness of Dr. Eng's assessment and its impact on Student's education are also unmeritorious. First, Valley View cites no legal authority to suggest that an independent assessment must meet any standard to be publicly funded other than to meet the criteria of the local educational agency. Secondly, Charter Schools' opinion as to the usefulness of Dr. Eng's assessment to the IEP team is speculative, since, as of the time of the hearing, there had been no IEP team meeting to review Dr. Eng's assessment. Further, Charter Schools cite no legal authority that only perfect assessments, whether conducted by a school district or an independent assessor, are beneficial to Parents and to other members of the IEP team. Dr. Eng's assessment, flawed or not, assisted Mother in understanding Student's social-emotional issues, and reflected that those issues and Student's academic challenges were becoming more severe. Moreover, as the *Romero* court noted, there is always a risk that an independent evaluation may not reveal any information that affects a student's IEP. If this fact alone compelled the conclusion that the denial of a request for an independent evaluation was not a denial of a FAPE, then a district would never be required to fund an IEE. (*Romero, supra,* at *11.)

For the reasons set forth, Charter Schools' procedural violation in failing to fund or file without unnecessary delay resulted in a denial of a FAPE during the 2019-2020 school year.

VALLEY VIEW'S ISSUE 1: WAS VALLEY VIEW'S FEBRUARY 12, 2019, PSYCHOEDUCATIONAL EVALUATION APPROPRIATE, AND DID VALLEY

VIEW RESPOND TO STUDENT'S REQUESTS FOR AN INDEPENDENT PSYCHOEDUCATIONAL EVALUATION DATED JULY 23, 2019, AND APRIL 24, 2020, WITHOUT UNNECESSARY DELAY, SUCH THAT STUDENT IS NOT ENTITLED TO AN INDEPENDENT PSYCHOLOGICAL EVALUATION AT PUBLIC EXPENSE?

Valley View contends that its psychoeducational assessment of February 2019 was appropriate, and that it timely filed its complaint to defend its assessment. Student contends that Valley View's psychoeducational assessment was not legally compliant and not appropriate. Student further contends that Valley View committed a procedural error relating to the assessment in that it failed to convene an IEP team meeting to discuss the results of the assessment within the statutory 60-day period from the date Valley View received the signed assessment plan. This issue was not raised as a separate issue in Student's amended complaint, and therefore is considered part of Student's contentions with respect to Valley View's complaint. (See Ed. Code, § 56502, subd. (i).)

In view of the discussion regarding Student's Issue 1, the issue of whether Valley View's psychoeducational assessment was appropriate and Student's contentions pertaining to the deficits in the assessment and the procedures surrounding the assessment are moot. Pursuant to 34 Code of Federal Regulations part 300.502(b)(2), Valley View was required to do one of two things, without unnecessary delay. It could agree to perform the independent assessment or timely file a complaint to defend its own assessment. It did neither of those things. As was determined with respect to Student's Issue 1, Valley View did not timely file its complaint to defend its assessment, and Student is entitled to an independent educational evaluation at public expense. Therefore, the appropriateness of the assessment and whether Valley View complied

with statutory requirements pertaining to the assessment are not relevant. (See, *Romero, supra,* at *7; *Pajaro, supra,* at *3.)

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.

Student's Issue 1: Charter Schools deprived Student of a FAPE, by failing to timely respond to Student's requests of July 23, 2019, and April 22, 2020, for an independent psychoeducational evaluation, by failing to take either of the following actions without unnecessary delay: agree to fund an independent psychoeducational evaluation, or file a due process request to defend the appropriateness of the psychoeducational evaluation. Student prevailed on Issue 1.

Valley View's Issue 1: Whether Valley View's psychoeducational evaluation of February 12, 2019 was appropriate is moot. Valley View did not respond to Student's requests for an independent psychoeducational evaluation dated July 23, 2019, and April 22, 2020, without unnecessary delay and Student is entitled to an independent educational evaluation at public expense. Student prevailed on this portion of the issue.

REMEDIES

Student prevailed on its Issue 1. The only remedy Student sought was reimbursement for Dr. Eng's assessment and report, in the amount of $8,350, which includes $600 for Summit Center's appearance at an IEP team meeting to discuss the report.

Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a child with a disability. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996]; *Parents of Student W. v. Puyallup School Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. *(Id.* at p. 1496.) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist., v. T.A.* (2009) 557 U.S. 230, 240 [129 S.Ct. 2484].

An award to compensate for past violations must rely on an individualized analysis, just as an IEP focuses on the individual student's needs. *(Reid v. District of Columbia* (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.*)

Student demonstrated by a preponderance of the evidence that Charter Schools committed a procedural violation that significantly impeded Parents' opportunity to meaningfully participate in the IEP development process, when they did not fund or file without unnecessary delay in response to Parents' request for an independent assessment. Reimbursement for the cost of Dr. Eng's independent assessment is an appropriate remedy for the failure of Charter Schools to timely respond to Student's request for an independent assessment. (*Letter to Anonymous, supra,* 56 IDELR 175.)

Valley View had the right to challenge Dr. Eng's assessment by demonstrating that the assessment did not meet its criteria for assessments. (34 C.F.R.

§ 300.502(b)(2)(ii).) Valley View did not raise this as an issue at hearing, and did not challenge Dr. Eng's assessment on this ground. Furthermore, the evidence reflected that Charter Schools previously paid for an independent assessment performed by Summit Center, Dr. Eng's agency, which suggests that Summit Center indeed met Valley View's criteria for assessments.

Therefore, Student is entitled to the sum of $7,750 for the assessment report, and $600 for the cost of Summit Center's attendance at an IEP team meeting, payable as described in the Order below.

ORDER

1. Within 20 calendar days from the date of this Decision, Charter Schools shall reimburse Parents for the cost of Dr. Eng's neuropsychological evaluation and report dated October 2020, in the amount of $7,750. Student submitted sufficient documentation at hearing for Charter Schools to reimburse Parents for Dr. Eng's neuropsychological evaluation and report.
2. If not already held, Charter Schools shall convene an IEP team meeting within 30 calendar days of the date of this Decision to discuss Dr Eng's neuropsychological evaluation and report dated October 2020. If the IEP team meeting was already held to discuss Dr. Eng's evaluation and report, Charter Schools shall reimburse Parents $600 within 20 calendar days of the date of this Decision. If the IEP team meeting to discuss Dr. Eng's evaluation and report has not occurred, Charter Schools shall reimburse Parents $600 within 20 calendar days of the IEP team meeting. Student submitted sufficient documentation at hearing for Charter Schools to reimburse Parents for the attendance at this IEP team meeting.

3. Valley View's complaint is moot, and all of the relief sought by Valley View is 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/
Elsa Jones
Administrative Law Judge
Office of Administrative Hearings