

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020070598

PARENTS ON BEHALF OF STUDENT,

v.

PALOS VERDES PENINSULA UNIFIED SCHOOL DISTRICT.

DECISION

March 11, 2021

On July 22, 2020, Student filed a due process hearing request with the Office of Administrative Hearings, State of California, naming Palos Verdes Peninsula Unified School District. The Office of Administrative Hearings will be called OAH. Palos Verdes Peninsula Unified School District will be called Palos Verdes. OAH granted continuances in the case on August 27, 2020, November 13, 2020, December 17, 2020, December 22, 2020, January 11, 2021, and January 21, 2021.

Administrative Law Judge Tara Doss presided over the hearing via videoconference using the Microsoft Teams application, on December 16, 17, and 22, 2020, and January 11, 19, 20, 21, and 26, 2021. Attorney Andrea Tytell represented

Student. Parents attended on all days of hearing. Student did not attend the hearing. Attorney Sundee Johnson represented Palos Verdes. Kimberly Taylor, Director of Special Education and Pupil Personnel Services, attended on all days of hearing on behalf of Palos Verdes.

At the request of the parties, OAH granted a continuance to February 16, 2021, to file written closing briefs. OAH closed the record and submitted the case for decision on February 16, 2021.

ISSUES

In this Decision, a free appropriate public education will be called a FAPE and an individualized education program will be called an IEP. At the start of the hearing, the parties agreed to the issues as stated in the November 9, 2020 Order Following Prehearing Conference. The issues have been reworded for clarity within the discretion of the Administrative Law Judge. (*M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189.) No substantive changes were made.

1. Did Palos Verdes deny Student a FAPE from February 2017, through July 22, 2020, by failing to meet its “child find” mandate?
2. Did Palos Verdes deny Student a FAPE from February 2017, through July 22, 2020, by failing to assess Student in all areas of suspected disability, specifically, in the areas of attention deficit hyperactivity disorder and autism?
3. Did Palos Verdes deny Student a FAPE from February 2017, through July 22, 2020, by failing to adequately consider private assessments?
4. Did Palos Verdes deny Student a FAPE by failing to conduct legally sufficient assessments of Student in February 2020?

5. Was Palos Verdes obligated to reimburse Parents for the cost of Student's nonpublic school placement from November 1, 2018, through July 22, 2020, when Palos Verdes recommended eligibility for Student under the category of emotional disturbance at the February 27, 2020 IEP team meeting?
6. Did Palos Verdes deny Student a FAPE when it failed to conduct assessments of Student in the areas of assistive technology and autism in response to Parents' request at the February 27, 2020 IEP team meeting?
7. Did Palos Verdes deny Student a FAPE by failing to offer placement and services that enabled Student to make reasonable progress, following the implementation of distance learning in response to the COVID-19 pandemic?

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, called 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 related 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) and (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, 56-62; and *see* 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Student has the burden of proof on all issues. The factual statements below constitute the written findings of fact required by the IDEA and California law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).) All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

Student was 12 years old at the time of hearing. Student resided within Palos Verdes's attendance boundaries at all relevant times. During the time period at issue in the Decision, Student was eligible for special education under the category of other health impairment, due to behaviors characteristic of attention deficit hyperactivity disorder.

Student was born premature with low birth weight and spent six weeks in the neonatal intensive care unit. Student was likely exposed to drugs and alcohol in utero. As a result, Student's developmental milestones were delayed. At age five, a pediatrician diagnosed Student with attention deficit hyperactivity disorder. At age 10, a private psychologist diagnosed Student with autism spectrum disorder.

PRELIMINARY ISSUE: STATUTE OF LIMITATIONS AND TOLLING AGREEMENT

NO BINDING LEGAL AUTHORITY SUPPORTS TOLLING AGREEMENTS AS AN EXCEPTION TO THE STATUTE OF LIMITATIONS IN SPECIAL EDUCATION CASES

The parties contend OAH should recognize an agreement they signed on October 18, 2019, which tolled the two-year statutory period back to February 2017. Student and Palos Verdes included arguments in favor of the tolling agreement in their closing briefs.

Student contends the agreement is valid under contract law and that Student would be prejudiced if OAH does not enforce it. Further, Student relies on previous OAH rulings that recognized tolling agreements. Palos Verdes contends OAH should recognize the parties' agreement because there is no explicit prohibition against tolling agreements in special education law. Palos Verdes also relies on previous OAH rulings supporting its contention that OAH has the discretion to allow tolling agreements.

A party may file a due process complaint with respect to any matter relating to the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education to that child. (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) OAH's jurisdiction is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.) Neither the IDEA, nor the California Education Code grants OAH the authority to enforce private agreements between parties.

With two limited exceptions, a party must file a due process complaint within two years from the date they knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C); Ed. Code, § 56505, subd. (l).) This time period is commonly referred to as the “statute of limitations.” The two-year statute of limitations does not apply to a parent who was prevented from requesting the due process hearing because either the educational agency misrepresented that it had solved the problem forming the basis of the due process request or the educational agency withheld information from the parent that it was legally required to provide. (20 U.S.C. § 1415(f)(3)(D); Ed. Code, § 56505, subd. (l).) These are the only two exceptions in the IDEA and California Education Code that allow for tolling the statute of limitations.

Neither party cited to any binding legal authority that grants OAH the power to recognize or enforce a private agreement between parties to toll the statute of limitations. Instead, the parties cited to three previous OAH rulings; one that did not recognize a tolling agreement, and two that did. (*See Student v. Long Beach Unified Sch. Dist.* (February 22, 2019) OAH Case No. 2018050736 [refusing to decide claims outside two-year statute of limitations on the grounds that there is no applicable legal authority that requires OAH to recognize tolling agreements.]; *but see Student v. Palos Verdes Peninsula Unified Sch. Dist.* (September 24, 2020) OAH Case No. 2020020524, and *Student v. Savanna Sch. Dist.* (November 16, 2017) OAH Case No. 2017100226 (Order Granting in Part and Denying in Part District’s Partial Motion to Dismiss) [both cases allowing claims outside two-year statute of limitations on the grounds that the IDEA and California Education Code do not explicitly prohibit tolling agreements].) While orders and decisions in special education due process hearing proceedings may be cited as persuasive, they are not binding authority. (Cal. Code Regs., tit. 5, § 3085.)

Student's contention that it would be prejudiced if OAH does not enforce the parties' agreement suggests that OAH should rely on equitable tolling provisions. However, common law or equitable exceptions to the statute of limitations do not apply to IDEA cases. (*D.K. v. Abington Sch. Dist.* (3rd Cir. 2012) 696 F.3d 233, 248.) If Congress intended there to be additional exceptions to the two-year statute of limitations, including parties' ability to toll the statute through private agreement, they could have included such exceptions when they reauthorized the IDEA in 2004. Instead, "the legislative and regulatory history of the 2004 amendments to the IDEA make clear that only the enumerated statutory exceptions may exempt a plaintiff from having his claims time-barred by the statute of limitations." (*D.K. v. Abington Sch. Dist.*, *supra*, at p. 248.) Further, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." (*Ibid.*, citing *Andrus v. Glover Constr. Co.*, (1980) 446 U.S. 608, 616-617.)

Similarly, if the California legislature intended to create additional exceptions to the two-year statute of limitations, they could have done so when they amended the California Education Code in 2005, to align with the IDEA's 2004 amendments. In fact, the legislature took affirmative steps to amend the statute of limitations in special education cases. Before the IDEA 2004 amendments, California Education Code section 56505, subdivision (l), allowed a three-year statute of limitations, which the legislature amended to reflect the two-year statutory period in the 2004 IDEA amendments. Just as the legislature amended this provision, they could have included additional exceptions like tolling the statute of limitations through private agreement.

The parties failed to cite to any binding legal authority that allows OAH to recognize and enforce a tolling agreement, and nothing in federal or California special education law suggests lawmakers intended to allow additional exceptions to the two-year statute of limitations. Thus, OAH will not recognize the parties' October 18, 2019 tolling agreement. Accordingly, Student's claims that arose before July 22, 2018, are time-barred unless Student proves one of the statutory tolling exceptions apply. This is not a determination regarding the validity of the parties' tolling agreement and nothing in this Decision precludes the parties from privately honoring the agreement.

STUDENT DID NOT PROVE THE STATUTORY EXCEPTIONS TO THE STATUTE OF LIMITATIONS APPLY

Student contends that even if OAH does not recognize the parties' agreement, the statute of limitations should be tolled because Palos Verdes misrepresented and withheld information which prevented Student from filing a due process request.

To satisfy the misrepresentation exception to the statute of limitations, Student must prove that Palos Verdes intentionally misled Parents or knowingly deceived them regarding Student's progress. (*D.K. v. Abington Sch. Dist., supra*, at p. 246.) To satisfy the withholding of information exception to the statute of limitations, Student must prove Palos Verdes failed to provide statutorily required information, such as procedural safeguards, assessment or IEP team meeting notices, assessment reports, IEP documents, prior written notice, or student records specifically required by the IDEA or the California Education Code. (*Ibid.*) Finally, as part of both exceptions, Student must prove Parents were prevented from requesting a due process hearing as a result of Palos Verdes's actions.

PALOS VERDES DID NOT MISREPRESENT IT HAD RESOLVED A PROBLEM FORMING THE BASIS OF THE COMPLAINT

Student's closing brief alleges six instances where Palos Verdes made misrepresentations to Parents regarding Student's progress or educational program. Student's first two allegations that reading assessments were not conducted by a credentialed teacher, and that the assessments did not accurately reflect Student's reading skills, do not satisfy the exception because they do not allege specific misrepresentations that Palos Verdes resolved a problem forming the basis of the complaint. Further, Student did not prove these allegations were true.

Student's third and sixth allegations that Palos Verdes misrepresented Student's achievement in a third-grade report card and a May 14, 2018 IEP, do not satisfy the exception because the evidence did not support a finding that Palos Verdes inflated Student's grades or present levels in the May 14, 2018 IEP. While Parents believed Student's reported progress was inflated, the evidence did not support this claim. Further, even if the scores were inflated, Student did not offer any evidence to prove Palos Verdes knowingly or intentionally misled Parents into believing Student's performance was better than it was.

Student's fourth and fifth allegations that Palos Verdes incorrectly determined Student did not meet the criteria for autism spectrum disorder, and that Palos Verdes predetermined this determination before the May 14, 2018 IEP team meeting, do not satisfy the exception for three reasons. First, Student did not prove these allegations were true. Second, these allegations do not claim Palos Verdes specifically misrepresented it had resolved a problem related to eligibility or predetermination.

Finally, neither Student's eligibility for autism nor predetermination are issues in this case.

For these reasons, Student did not prove the misrepresentation exception to the statute of limitations applies. Even if any of Student's allegations showed a specific misrepresentation by Palos Verdes that it had resolved a problem forming the basis of the complaint, Student did not offer any evidence that showed how Palos Verdes's alleged misrepresentations prevented Parents from filing a request for due process hearing.

PALOS VERDES DID NOT WITHHOLD STATUTORILY REQUIRED INFORMATION FROM PARENTS

Student alleges five instances where Palos Verdes withheld information. Student's first and second allegations that Palos Verdes predetermined eligibility and did not inform Parents it was considering an emotional disturbance eligibility in preparation for a February 27, 2020 IEP team meeting, do not satisfy the exception because these allegations happened within the two-year statutory period and tolling the statute is unnecessary. Similarly, the fifth allegation that Palos Verdes's special education teacher omitted information from an observation of Student in November 2019 also happened within the two-year statutory period.

The third allegation that Palos Verdes did not inform Parents that Student's group instructional aide was acting as a one-to-one aide does not satisfy the exception because the evidence did not prove it true. The fourth allegation that Palos Verdes did not inform Parents that teachers asked Student about taking medication did not satisfy the exception because Palos Verdes was not required by law to provide this information to Parents. Finally, even if any of the allegations proved Palos Verdes withheld

information from Parents it was required to provide, Student did not offer any evidence that showed how Palos Verdes's alleged withholding of information prevented Parents from filing a request for due process hearing.

The parties offered no binding legal authority that supports OAH recognizing the parties' tolling agreement. Student did not prove that either of the statutory exceptions to the statute of limitations apply. Therefore, for the purposes of this Decision, the statutory period began on July 22, 2018, and ended on July 22, 2020, when Student filed the due process complaint. The timeframe for the stated issues will be amended to reflect the applicable statute of limitations. Any reference in this Decision to facts and allegations that happened before July 22, 2018, is for background purposes only.

ISSUE 1: DID PALOS VERDES FAIL TO MEET ITS "CHILD FIND" MANDATE FROM JULY 22, 2018, THROUGH JULY 22, 2020?

Student contends Palos Verdes failed to timely identify and evaluate Student's needs related to attention deficit hyperactivity disorder. Palos Verdes contends it satisfied its "child find" obligations when it assessed Student in January 2016 and offered eligibility under the category of other health impairment.

A FAPE means special education and related services provided to a child with a disability at public expense, that meet state educational standards and conform with the child's IEP. (20 U.S.C. §§ 1401(9) and 1412(a)(1); 34 C.F.R. §§ 300.17 and 300.101(a).) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14) and 1414(d)(1); 34 C.F.R. §§ 300.320, 300.321, and 300.501; *see* Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363, subd. (a).)

Special education is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) Related services are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) An IEP is a written statement for each child with a disability that is developed, reviewed, and revised based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); 34 C.F.R. § 300.320; Ed. Code, § 56032.)

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 Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

PALOS VERDES SATISFIED ITS "CHILD FIND" MANDATE

School districts have an ongoing and affirmative duty to identify, locate, and assess all children with disabilities within their jurisdiction, who need special education and related services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(1)(i); Ed. Code, §§ 56300 and 56301(a).) This duty is referred to as "child find." School districts are not required to classify a child by his or her disability so long as the child meets eligibility criteria under the IDEA and is recognized as a child with a disability. (20 U.S.C. § 1412(a)(3)(B); 34 C.F.R. § 300.111(d); Ed. Code, § 56301(a).)

Student did not prove Palos Verdes failed to meet its child find mandate. Palos Verdes initially assessed Student for special education and related services during the

2015-2016 school year, when Student was in the first grade. Palos Verdes attempted general education interventions when Student was in kindergarten, but Student required additional support to address off-task behavior and academic challenges. At an IEP team meeting on January 26, 2016, Palos Verdes recommended special education eligibility for Student under the category of other health impairment due to Student's attention deficits and difficulty staying on task. Palos Verdes satisfied its child find obligations when it identified and assessed Student pursuant to the IDEA and the California Education Code.

Accordingly, Student did not prevail on this issue. Student would not have prevailed on this issue even if OAH recognized the parties' tolling agreement.

ISSUE 2: DID PALOS VERDES FAIL TO ASSESS STUDENT IN THE AREAS OF ATTENTION DEFICIT HYPERACTIVITY DISORDER AND AUTISM FROM JULY 22, 2018, THROUGH JULY 22, 2020?

ISSUE 4: WERE PALOS VERDES'S ASSESSMENTS OF STUDENT IN PREPARATION FOR THE FEBRUARY 2020 IEP TEAM MEETING LEGALLY SUFFICIENT?

Student contends in Issue 2 that Palos Verdes should have assessed Student for autism before February 2020. Student did not make any contentions, at hearing or in the closing brief, related to Palos Verdes's failure to assess in the area of attention deficit hyperactivity disorder. Student's closing brief also alleged for the first time that Palos Verdes failed to assess Student in the area of specific learning disability. However, the complaint did not allege, and Student did not raise at the prehearing conference, any issue related to Palos Verdes's failure to assess Student for a specific learning

disability. Further, Palos Verdes did not consent at any time to amending the issues for hearing. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i) [the party requesting the hearing may not raise issues at the due process hearing that were not raised in the complaint unless the other party agrees].) Accordingly, the Decision will not address the issue of whether Palos Verdes failed to assess in the area of specific learning disability.

Student contends in Issue 4 the assessments Palos Verdes conducted in Fall 2019, in preparation for the February 2020 IEP team meeting, were insufficient because the reports mischaracterized assessment data and Student's present levels of performance. Student contends Palos Verdes could not draft appropriate IEP goals as a result of the mischaracterized information.

Palos Verdes contends it had no reason to suspect autism as an area of disability for Student until Student's attorney requested an assessment for autism in November 2017, at which point, it assessed Student and issued a supplemental psychoeducational evaluation report in January 2018. Palos Verdes further contends the supplemental psychoeducational evaluation appropriately assessed Student for autism. Finally, Palos Verdes contends it appropriately assessed Student in the areas of academics, occupational therapy, speech and language, and psychoeducation in preparation for the February 2020 IEP team meeting.

School district evaluations of students with disabilities under the IDEA serve two purposes: identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.)

Once a school district identifies a student as a child with a disability in need of special education and related services, and a parent consents to services, the school

district has an ongoing duty to evaluate the needs of that student. Specifically, school districts must conduct a reevaluation if the student's educational or related service needs, including improved academic achievement and functional performance, warrant a reevaluation, or if the student's parents or teacher request a reevaluation. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a).) Irrespective of who initiates the request, the school district must obtain informed consent from the parent before conducting an evaluation. (20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. § 300.300(a).)

Within 15 days of a student's referral for assessment, the school district must provide a proposed assessment plan to the parents. (Ed. Code, § 56321(a).) A copy of the notice of parent's rights must be attached to the assessment plan. (*Id.*) The proposed assessment plan must be in a language easily understood by the general public; must be in the parent's native language; must explain the types of assessments to be conducted; and must state that no IEP will result from the assessment without parental consent. (Ed. Code, § 56321(b).)

In conducting an evaluation, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) The school district must not use any single measure or assessment as the sole criterion for determining whether the child is a child with a disability or determining the appropriate educational program for the child. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2).) Assessments and other evaluation materials must not be discriminatory on a racial or cultural basis, and must be administered in the language and form most likely to yield accurate information. (20 U.S.C. § 1414(b)(3)(A)(i) and (ii); 34 C.F.R. § 300.304(c)(1)(i) and (ii).)

Assessments and other evaluation materials must be administered in accordance with the publisher's instructions and be used for valid and reliable purposes. (20 U.S.C. § 1414(b)(3)(A)(iii) and (v); 34 C.F.R. § 300.304(c)(1)(iii) and (v).) Assessments must be sufficiently comprehensive to identify all the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304 (c)(6).) Further, the student must be assessed in all areas related to suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).)

Assessments must be administered by trained and knowledgeable persons, who are competent to conduct such assessments. (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (b)(3), and 56322.) A credentialed school psychologist must conduct any psychological assessments. (Ed. Code, § 56324.)

Assessors must prepare a written report of the assessment results that includes:

1. whether the student may need special education and related services;
2. the basis for that determination;
3. the relevant behavior noted during the observation of the student in an appropriate setting;
4. the relationship of that behavior to the student's academic and social functioning;
5. the educationally relevant health and development, and medical findings;
6. for students with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services;

7. a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and
8. the need for specialized services, materials, and equipment for students with low incidence disabilities. (Ed. Code, § 56327.)

Parents must receive a copy of the evaluation report. (20 U.S.C. § 1414(b)(4)(B); 34 C.F.R. § 300.306(a)(2).)

PALOS VERDES APPROPRIATELY ASSESSED STUDENT IN THE AREAS OF ATTENTION DEFICIT HYPERACTIVITY DISORDER AND AUTISM

Student did not prove Palos Verdes failed to assess Student in the area of attention deficit hyperactivity disorder or autism during the statutory period. After Palos Verdes initially assessed Student in 2016, it further assessed Student's attention needs in December 2017 and January 2018, when it conducted a functional behavior assessment. The assessment identified Student's off-task behavior as the target behavior, and recommended several intervention strategies, including a social skills group, school counseling, instructional aide support, and a behavior intervention plan.

On November 29, 2017, Student's attorney requested that Palos Verdes assess Student for autism using the Gilliam Autism Rating Scale and Autism Diagnostic Observation Schedule. On December 7, 2017, Palos Verdes provided Parents with an assessment plan to assess for autism eligibility. Parents consented to the assessment.

In December 2017 and January 2018, Palos Verdes school psychologists, Cori Gorman and Dr. Jason Checca, collaborated to assess Student and issued a supplemental psychoeducational evaluation report on January 18, 2018. As part of the evaluation, Gorman and Dr. Checca observed Student, received input from Parents and

Student's teachers, and administered the Autism Diagnostic Observation Schedule-Second Edition, the Childhood Autism Rating Scale-Second Edition, the Social Responsive Scale-Second Edition, and the Behavior Assessment for Children-Third Edition. The purpose of each assessment tool was to determine whether Student was eligible to receive special education and related services under the category of autism. Based on the assessment results, Gorman and Dr. Checca concluded Student did not meet the eligibility criteria for autism but continued to meet the eligibility criteria for other health impairment due to Student's needs related to attention deficit hyperactivity disorder. Gorman and Dr. Checca reviewed their assessment at IEP team meetings held on May 14, 2018, and June 5, 2018. Parents attended both meetings.

Parents obtained a private psychoeducational evaluation from licensed educational psychologist Dr. Chris Davidson because they were dissatisfied with Palos Verdes's determination that Student did not meet the eligibility criteria for autism. Dr. Davidson assessed Student in May 2018, and presented the complete findings of the evaluation at an IEP team meeting on September 14, 2018. Dr. Davidson diagnosed Student with autism spectrum disorder and recommended special education eligibility under the category of autism. The Palos Verdes IEP team participants disagreed with Dr. Davidson's eligibility recommendation and instead relied on Gorman and Dr. Checca's assessment results. However, due to the inconsistencies between the two assessment reports, Palos Verdes offered to reevaluate Student and gave Parents an assessment plan for a comprehensive evaluation of Student's special education and related service needs.

The September 14, 2018 assessment plan proposed assessments in health, intellectual development, language, speech, and communication development, social emotional functioning, and behavior. The assessment plan was written in Parents' native

language of English. The plan was easy to understand, explained the reason for the proposed assessments, and explained the types of assessments to be conducted, including who would conduct the assessments. Finally, the plan stated that Palos Verdes would not provide special education services to Student without Parents' written consent. Palos Verdes offered Parents a copy of their parental rights, but Parents declined it. The assessment plan was legally sufficient.

PALOS VERDES CONDUCTED LEGALLY SUFFICIENT ASSESSMENTS OF STUDENT IN PREPARATION FOR THE FEBRUARY 2020 IEP TEAM MEETING

Student did not prove Palos Verdes's assessments in preparation for the February 2020 IEP team meeting were legally insufficient. In November 2018, Parents unilaterally placed Student at Summit View, a nonpublic school, at which point Parents stopped communicating with Palos Verdes. Parents consented to the September 14, 2018 assessment plan on January 26, 2019, more than four months after receiving it. Palos Verdes assessors, including special education teacher Chelsea Morgan and speech and language pathologist Kia Barnett, contacted Parents to begin the assessments. Parents did not respond to the assessors and did not make Student available for Palos Verdes to assess until Fall 2019.

In October 2019, Palos Verdes assigned school psychologist Rachel Guest to complete Student's psychoeducational evaluation. On October 31, 2019, Guest gave Parents another assessment plan that included motor development. Parents consented to the assessment plan on November 3, 2019. The assessment plan was legally sufficient for the same reasons discussed with the September 2018 assessment plan.

Palos Verdes conducted academic, occupational therapy, speech and language, and psychoeducational assessments of Student in October, November, and December 2019, pursuant to the September 14, 2018, and October 31, 2019 assessment plans. Student attended Summit View at the time of the assessments.

PALOS VERDES'S ACADEMIC ASSESSMENT WAS APPROPRIATE

Student did not prove Palos Verdes's November 6, 2019 academic assessment was legally insufficient. Palos Verdes special education teacher Morgan conducted an academic assessment of Student and issued a report on November 6, 2019. Morgan was trained and competent to conduct the assessment. Morgan held a master's degree in special education and a special education teaching credential. At the time of the assessment, Morgan had worked as a special education teacher for four years and had conducted at least 50 academic assessments. Morgan was familiar with Student. Morgan conducted Student's initial academic assessment for special education in 2016, and provided specialized academic instruction to Student from first grade through the beginning of fourth grade, when Student left Palos Verdes to attend Summit View.

Morgan used a variety of assessment tools, including input from Student's teacher and Parents, test observations of Student, and the Woodcock-Johnson IV Test of Achievement, a standardized assessment. Morgan administered the Woodcock-Johnson in accordance with the publisher's instructions and the results accurately reflected Student's performance on the test. Morgan's assessment was not used as the sole criterion for determining Student's special education needs. The assessment was administered in Student's native language of English. Student offered no evidence the assessment was discriminatory in any way. Student offered no evidence that proved Student's scores on the Woodcock-Johnson were inaccurate.

Morgan prepared a written report and gave a copy to Parents. The report was well-organized and easy to understand. Morgan's report was incorporated into Guest's psychoeducational assessment report, which will be discussed later in the Decision. The November 6, 2019 academic assessment was legally sufficient.

PALOS VERDES'S OCCUPATIONAL THERAPY ASSESSMENT WAS APPROPRIATE

Student did not prove Palos Verdes's December 19, 2019 occupational therapy assessment was legally insufficient. Palos Verdes occupational therapist Amy Fehr conducted an occupational therapy assessment of Student and issued a report on December 19, 2019. Fehr was trained and competent to conduct the assessment. Fehr held a master's degree in occupational therapy and a California occupational therapy license. At the time of the assessment, Fehr had worked as an occupational therapist for eight years. Fehr regularly conducted occupational therapy assessments and provided treatment for students with occupational therapy needs.

Fehr used a variety of assessment tools, including a review of Student's records, observation of Student during testing and in the classroom and playground settings, teacher interview, input from Parents, work samples, and both standardized and non-standardized assessment measures. Specifically, Fehr administered the Beery-Buktenica Developmental Test of Visual-Motor Integration-Sixth Edition, Bruininks-Oseretsky Test of Motor Proficiency-Second Edition, Sensory Processing Measure, and Handwriting Without Tears. Fehr administered these measures to assess Student's fine motor, visual-motor integration, and sensory processing abilities, which Student's teacher told Fehr were areas of concern. Fehr administered the assessment measures according to the publisher's instructions and Student's skills were accurately reflected in the results.

Fehr's assessment was sufficiently comprehensive to identify all of Student's occupational therapy needs. For example, Fehr assessed Student's gross motor and self-help skills, including the ability to maintain adequate posture while seated and independently access school materials, even though these were not suspected areas of need. Student offered no evidence that proved Palos Verdes should have assessed Student in any other areas of occupational therapy. Fehr administered the assessment in Student's native language of English. Student offered no evidence the assessment was discriminatory in any way. Student offered no evidence that proved the assessment results were inaccurate.

Fehr prepared a written report and gave a copy to Parents. The report was well-organized and easy to understand. It included each assessment measure Fehr used and gave a detailed explanation of Student's performance. In the report, Fehr recommended school-based occupational therapy services to address Student's handwriting and sensory regulation and attention needs, and explained why the services were necessary. Fehr also recommended several occupational therapy related accommodations to improve Student's classroom performance. The December 19, 2019 occupational therapy report was legally sufficient.

PALOS VERDES'S SPEECH AND LANGUAGE ASSESSMENT WAS APPROPRIATE

Student did not prove Palos Verdes's December 20, 2019 speech and language assessment was legally insufficient. Palos Verdes speech and language pathologist Melinda Hill conducted a speech and language assessment of Student and issued a report on December 20, 2019. Hill was trained and competent to conduct the assessment. Hill held a California teaching credential in language, speech, and hearing,

and a California license in speech pathology. At the time of the assessment, Hill had worked as a speech pathologist for 21 years. Hill regularly conducted assessments and provided direct services to students with communicative disorders and other speech and language related needs.

Hill used a variety of assessment tools, including a review of Student's records, input from Parents, testing and classroom observations of Student, and standardized assessment measures. Specifically, Hill administered the Receptive One-Word Picture Vocabulary Test-Fourth Edition, Expressive One-Word picture Vocabulary Test-Fourth Edition, Clinical Evaluation of Language Fundamentals-Fifth Edition, Test of Problem Solving, Elementary-Third Edition, and Goldman-Fristoe-Test of Articulation-Third Edition. Hill administered these measures to assess Student's receptive and expressive language skills, language-based critical thinking skills, speech intelligibility, and pragmatic language skills. Student offered no evidence that proved Palos Verdes should have assessed Student in any other areas of speech and language.

Hill administered the measures according to the publisher's instructions and they were used to yield valid results. Hill administered the assessment in Student's native language of English. Student offered no evidence the assessments were discriminatory in any way. Student offered no evidence that proved the assessment results were inaccurate.

Hill prepared a written report and gave a copy to Parents. The report was well-organized and easy to understand. It included each assessment measure Hill used and gave a detailed explanation of Student's performance. In the report, Hill reviewed the eligibility criteria for speech or language impairment and explained why Student's results did not satisfy the eligibility requirements. The report indicated Student had

challenges in pragmatic language which interfered with communication and socialization. The report did not reveal Student exhibited any behaviors characteristic of autism. Hill deferred the determination of appropriate speech and language services to the IEP team. The December 20, 2019 speech and language assessment was legally sufficient.

PALOS VERDES'S PSYCHOEDUCATIONAL ASSESSMENT WAS APPROPRIATE

Student did not prove Palos Verdes's psychoeducational assessment conducted by Guest in October 2019, was legally insufficient. Guest was trained and competent to conduct the assessment. Guest held an educational specialist degree in school psychology and a master's degree in educational psychology. Guest also held a California pupil personnel services credential in school psychology. At the time of the assessment, Guest had worked as a school psychologist for seven years. Guest conducted at least 200 psychoeducational assessments and regularly provided school counseling and behavior intervention services to students who required those services.

Guest used a variety of assessment tools, including a review of Student's records, school observations, input from Student's teacher and Parents, input from Student, and standardized assessment measures. Specifically, Guest administered the Woodcock-Johnson Tests of Cognition-Fourth Edition, Test of Auditory Processing Skills-Fourth Edition, Test of Visual Perceptual Skills-Fourth Edition, Behavior Assessment Scale for Children-Third Edition, Conners-Third Edition, Children's Depression Inventory-Second Edition, and Revised Children's Manifest Anxiety Scale. Additionally, Guest incorporated Morgan's academic assessment into the psychoeducational assessment results. Guest used the Behavior Assessment Scale and the Conners to identify whether Student

exhibited emotional and behavioral challenges, including behaviors related to attention deficit hyperactivity disorder and autism.

The assessment was sufficiently comprehensive to identify all Student's needs. Guest relied on Student's past assessments, academic progress, and Parents' input to determine the areas of functioning to assess. Guest considered both Gorman and Dr. Checca's and Dr. Davidson's 2018 psychoeducational assessments, but relied on current assessment data to determine Student's eligibility and need for special education and related services. Guest used broadband measures like the Woodcock-Johnson and Behavior Assessment Scale to discover which areas of concern required further investigation. For example, Student's results on the Woodcock-Johnson led Guest to administer the Test of Auditory Processing Skills and Test of Visual Perceptual Skills. Similarly, Student's results from the Behavior Assessment Scale led Guest to administer the Conners, Child-Depression Inventory, and Manifest Anxiety Scale.

In Guest's opinion, expressed at hearing, none of the assessment tools revealed Student exhibited behaviors characteristic of autism or that autism was an area of suspected disability. Neither Parents nor Student's teacher raised autism as a concern. Guest did not observe any deficits in verbal or nonverbal communication, which a child with autism typically exhibits. Instead, Guest characterized social skills as one of Student's strengths and witnessed Student interacting with peers in the classroom and during recess. Further, on the Behavior Assessment Scale, the teacher rated Student's adaptability and social skills, possible indicators for autism, in the average range. Guest neither agreed nor disagreed with Dr. Davidson's diagnosis of autism spectrum disorder, but concluded, based on the 2019 psychoeducational assessment results, that Student did not exhibit behaviors characteristic of autism to the extent that any such behaviors impacted Student's educational performance. Guest's testimony was well-reasoned and

consistent with the psychoeducational assessment results and testimony of the other Palos Verdes assessors. Therefore, Guest's testimony was credible and persuasive. Accordingly, Guest assessed Student in all areas of suspected disability relevant to a psychoeducational assessment, including attention deficit hyperactivity disorder and autism.

Guest administered the assessment in Student's native language of English. The assessment measures were administered in accordance with the test publisher's instructions. The results were a reliable and valid reflection of Student's educational and functional performance. Student offered no evidence the assessment was discriminatory in any way. Student offered no evidence that proved the assessment results were inaccurate.

Guest prepared a report and gave a copy to Parents. The report included relevant medical and development history, including Student's complicated birth history and developmental milestones, as well as, Student's diagnosis of attention deficit hyperactivity disorder and the medication Student took. The report also included detailed behavioral observations of Student and discussed how Student's behavior impacted academic and social functioning. Specifically, Guest concluded Student's off-task and inattentive behaviors impacted Student's ability to access the curriculum and, at times, impeded the learning of other students. Guest relied on the totality of the assessment results and determined Student met the eligibility criteria to receive special education under the categories of other health impairment and emotional disturbance. Guest deferred the determination for appropriate placement, services, and accommodations to the IEP team. The psychoeducational assessment was legally sufficient.

The IEP team reviewed the academic, occupational therapy, speech and language, and psychoeducational assessments at a February 27, 2020 IEP team meeting. Parents attended the meeting. Student did not prevail on Issue 4 because each of the assessments was legally sufficient. Further, Student did not prevail on Issue 2 because Palos Verdes assessed Student in the area of attention deficit hyperactivity disorder and ruled-out autism as a possible area of suspected disability in Gorman and Dr. Checca's 2018 supplemental psychoeducational assessment and in Guest's psychoeducational assessment. Student would not have prevailed on Issue 2 even if OAH recognized the parties' tolling agreement.

ISSUE 3: DID PALOS VERDES FAIL TO ADEQUATELY CONSIDER PRIVATE ASSESSMENTS PARENTS PRESENTED TO THEM FROM JULY 22, 2018, THROUGH JULY 22, 2020?

Student contends Palos Verdes ignored Dr. Davidson's recommendations regarding eligibility during the May 14, 2018, June 5, 2018, and September 14, 2018 IEP team meetings. Student also contends Palos Verdes should have adopted Dr. Pantea Sharifi-Hannauer's diagnosis of autism and recommendation for a nonpublic school placement when presented to the IEP team on September 14, 2018.

Palos Verdes contends it meaningfully considered Dr. Davidson's input at the May 14, 2018, June 6, 2018, and September 14, 2018 IEP team meetings, and Dr. Sharifi-Hannauer's input at the September 14, 2018 IEP team meeting. Palos Verdes further contends it had no obligation to adopt recommendations from private assessments.

If a parent obtains an independent educational evaluation at private expense, the results of the assessment must be considered by the school district with respect to the

provision of a FAPE to the student. (34 C.F.R. § 300.502(c)(1); Ed. Code, § 56329, subd. (c).) There is no requirement that the school district adopt the findings of the private evaluation. (*See T.S. v. Board of Educ. of Town of Ridgefield*, (2nd Cir. 1993) 10 F.3d 87 [holding the special education director's and school psychologist's review of an independent educational evaluation satisfied the school district's IDEA duty to consider the evaluation]; *see also G.D. v. Westmoreland School District* (1st Cir. 1991) 930 F.2d 942, 947 [holding that a public agency's duty to consider an independent educational evaluation does not require a substantive discussion of the evaluation].)

Student did not prove Palos Verdes failed to consider Dr. Davidson's or Dr. Sharifi-Hannauer's recommendations. Dr. Davidson completed the testing and observation portions of the private evaluation in May 2018. However, Dr. Davidson did not provide Palos Verdes with a completed copy of the report until September 2018. Even though Dr. Davidson's report was not completed, Dr. Davidson participated in Student's IEP team meetings on May 14, 2018, and June 6, 2018, and provided input regarding the preliminary evaluation results. School psychologist Gorman and special education teacher Morgan reviewed Dr. Davidson's report before the September 2018 IEP team meeting. Dr. Davidson participated in Student's September 14, 2018 IEP team meeting, and reviewed the completed private evaluation results, including recommendations for eligibility, goals, accommodations, and services. The IEP team also reviewed a letter Parents provided from child neurologist Dr. Sharifi-Hannauer, who confirmed Dr. Davidson's diagnosis of autism and recommended Student attend a nonpublic school.

Palos Verdes considered the input and recommendations of Dr. Davidson and Dr. Sharifi-Hannauer. Dr. Davidson participated in three IEP team meetings for Student within one year and at no time, did Palos Verdes interfere with Dr. Davidson's

opportunity to present the evaluation findings or to make recommendations. Similarly, the Palos Verdes IEP team members reviewed Dr. Sharifi-Hannauer's recommendations upon receiving the letter from Student's attorney. Palos Verdes was not required to adopt Dr. Davidson's or Dr. Sharifi-Hannauer's recommendations. Thus, Student did not prevail on this issue. Student would not have prevailed on this issue even if OAH recognized the parties' tolling agreement.

ISSUE 5: DID PALOS VERDES'S FINDING OF ELIGIBILITY FOR STUDENT UNDER THE CATEGORY OF EMOTIONAL DISTURBANCE OBLIGATE THEM TO REIMBURSE PARENTS FOR THE COST OF NONPUBLIC SCHOOL FROM NOVEMBER 1, 2018, THROUGH JULY 22, 2020?

Student contends Palos Verdes's recommendation at the February 27, 2020 IEP team meeting that Student met eligibility criteria for emotional disturbance, obligated Palos Verdes to reimburse Parents for the cost of Summit View from November 1, 2018, through July 22, 2020. Palos Verdes contends it was not obligated to pay for Student's attendance at Summit View, and that its recommendation of an emotional disturbance eligibility in no way changed Student's IEP or influenced Parents' decision to continue Student's nonpublic school placement.

Courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (*See Sch. Comm. of Town of Burlington, Mass. v. Department of Educ. of Mass.* (1985) 471 U.S. 359, 369.) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove Sch. Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, n. 11.) Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private

placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C)(ii); *Burlington, supra*, at p. 370; *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.)

In this case, Parents are not entitled to reimbursement from Palos Verdes for Parents' unilateral placement of Student at Summit View because this Decision does not find that Palos Verdes denied Student a FAPE at any time during the statutory period. Accordingly, Student did not prevail on this issue.

ISSUE 6: DID PALOS VERDES FAIL TO COMPLETE ASSESSMENTS OF STUDENT IN ASSISTIVE TECHNOLOGY AND AUTISM IN RESPONSE TO PARENTS' FEBRUARY 27, 2020 REQUEST?

Student contends the lapse in time between when Parents requested assessments in autism and assistive technology at the February 27, 2020 IEP team meeting, and when Palos Verdes reviewed the results in November 2020, resulted in a denial of FAPE. Palos Verdes contends Student never requested an assistive technology assessment. Palos Verdes further contends the delay in conducting the autism assessment was the result of Parents' delayed consent to the assessment plan and school closures due to the COVID-19 pandemic. Finally, Palos Verdes contends that any delay in the autism assessment did not result in a denial of FAPE to Student.

A school district has 60 days from the date it receives the parent's written consent for assessment, excluding vacation and days when school is not in session in excess of five schooldays, to complete the assessments and develop an IEP, unless the parent agrees in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56043,

subd. (f)(1).) The 60-day timeline does not apply if the parent repeatedly fails or refuses to produce the child for the assessment. (20 U.S.C. § 1414(a)(1)(C)(ii)(II); Ed. Code, § 56302.1, subd. (b)(2).)

Student did not prove Palos Verdes failed to assess Student in the areas of assistive technology and autism in response to Parents' request at the February 27, 2020 IEP team meeting. Student's attorney requested additional testing in autism at the February 27, 2020 IEP team meeting. Student did not offer any evidence proving Student's attorney or Parents requested an assistive technology assessment at any time during the statutory period. On February 28, 2020, within the 15-day timeline required by the California Education Code, Palos Verdes gave Parents an assessment plan to conduct an autism assessment. Parents did not consent to the assessment plan until May 15, 2020.

The last day of the 2019-2020 school year at Palos Verdes was June 11, 2020. Only 27 days elapsed between May 15, 2020, and June 11, 2020, which means Palos Verdes had 33 more days to timely complete the assessment. The days during summer vacation did not count against the 60-day timeline. Thus, Palos Verdes had no obligation to complete the assessment and hold an IEP team meeting until the 2020-2021 school year. The 2020-2021 school year falls outside the statutory period in this case. Therefore, this Decision cannot determine whether the autism assessment was timely. Student did not prevail on this issue.

ISSUE 7: DID PALOS VERDES FAIL TO OFFER STUDENT PLACEMENT AND SERVICES THAT ENABLED REASONABLE PROGRESS FOLLOWING THE IMPLEMENTATION OF DISTANCE LEARNING IN RESPONSE TO COVID-19?

Student contends distance learning was ineffective when Student returned to Palos Verdes for the 2020-2021 school year. Palos Verdes contends any claims Student has regarding the 2020-2021 school year, fall outside the time period for claims alleged in Student's July 22, 2020 complaint.

This Decision does not decide any issues that arose after July 22, 2020. Neither Student's complaint nor Student's closing brief alleged any claims that Palos Verdes failed to offer appropriate placement and services through distance learning during the statutory period. Moreover, Student attended Summit View during the 2019-2020 school year, and did not begin attending a Palos Verdes school until August 2020, which was after the time period alleged in Student's complaint. Thus, Student did not prevail on this issue.

CONCLUSIONS AND PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Palos Verdes prevailed on all issues heard and decided. Specifically:

1. Student did not prove Palos Verdes denied Student a FAPE from July 22, 2018, through July 22, 2020, by failing to meet its "child find" mandate. Palos Verdes prevailed on Issue 1.

2. Student did not prove Palos Verdes denied Student a FAPE from July 22, 2018, through July 22, 2020, by failing to assess Student in all areas of suspected disability, specifically, in the areas of attention deficit hyperactivity disorder and autism. Palos Verdes prevailed on Issue 2.
3. Student did not prove Palos Verdes denied Student a FAPE from July 22, 2018, through July 22, 2020, by failing to adequately consider private assessments. Palos Verdes prevailed on Issue 3.
4. Student did not prove Palos Verdes denied Student a FAPE by failing to conduct legally sufficient assessments of Student in February 2020. Palos Verdes prevailed on Issue 4.
5. Student did not prove Palos Verdes was obligated to reimburse Parents for the cost of Student's nonpublic school placement from November 1, 2018, through July 22, 2020, when they recommended eligibility for Student under the category of emotional disturbance at the February 27, 2020 IEP team meeting. Palos Verdes prevailed on Issue 5.
6. Student did not prove Palos Verdes denied Student a FAPE when it failed to conduct assessments of Student in the areas of assistive technology and autism in response to Parents' request at the February 27, 2020 IEP team meeting. Palos Verdes prevailed on Issue 6.
7. Student did not prove Palos Verdes denied Student a FAPE by failing to offer placement and services that enabled Student to make reasonable progress, following the implementation of distance learning in response to the COVID-19 pandemic. Palos Verdes prevailed on Issue 7.

ORDER

All Student's claims for relief are denied.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Tara Doss

Administrative Law Judge

Office of Administrative Hearings