

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021120672

PARENT ON BEHALF OF STUDENT,

v.

CHINO VALLEY UNIFIED SCHOOL DISTRICT

DECISION

JUNE 16, 2022

On December 21, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on Student's behalf, naming Chino Valley Unified School District, called Chino. OAH granted a continuance of the due process hearing on January 18, 2022.

Administrative Law Judge Rita Defilippis held the due process hearing by videoconference on May 3, 4, 5, 6, and 9, 2022. Attorney Timothy Adams represented Student. Law Clerk Alexia Velarde observed the hearing. Parent attended all hearing

days. Attorney Julie Coate represented Chino. Anne Ingulsrud, Director of Special Education, and Dr. Royal Lord, Program Manager for West End Special Education Local Plan Area, called SELPA, appeared on Chino's behalf on all hearing days.

OAH continued the matter to May 24, 2022, for written closing briefs at the parties' request. The parties timely filed their closing briefs. The record was closed, and the matter submitted on May 24, 2022.

ISSUES

Free appropriate public education is referred to as FAPE. Individuals with Disabilities Education Act is referred to as IDEA. Individualized education program is referred to as IEP.

1. Did Chino Valley deny Student a FAPE, for the 2019-2020 school year, starting December 21, 2019, by:
 - a. failing its "Child Find" obligation by not referring Student for special education assessment until January 28, 2020;
 - b. failing to assess Student in all areas of suspected disability pursuant to the January 28, 2020 assessment plan, specifically, in academic, social skills, and mental health, including attention and obsessive-compulsive disorder;
 - c. failing to find Student eligible for special education under the categories: specific learning disability, other health impairment, or emotional disturbance;

- d. denying Parent meaningful participation in the April 2, 2020 IEP team meeting; and
 - e. failing to fund an independent psychoeducational evaluation following Parent's April 2, 2020 request, without unnecessary delay?
- 2. Did Chino Valley deny Student a FAPE during the 2020-2021 school year by:
 - a. failing its "Child Find" obligation by not referring Student for special education assessment;
 - b. failing to find Student eligible for special education under the categories: specific learning disability, other health impairment, or emotional disturbance;
 - c. denying Parent meaningful participation in the February 16, 2021, March 5, 2021, and April 8, 2021 IEP team meetings?
- 3. Did Chino Valley deny Student a FAPE during the 2021-2022 school year up to December 21, 2021, by:
 - a. failing to find Student eligible for special education in the categories of specific learning disability, other health impairment, or emotional disturbance;
 - b. denying Parent meaningful participation in the November 29, 2021 IEP meeting by predetermining Student's placement?

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 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 (2006) Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student had the burden of proof on all issues. 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 13 years old and has always lived with Parents within the boundaries of Chino. Student attended Chino for elementary and middle school through seventh grade. Student was in eighth grade and enrolled in Futures Academy, a private school, at the time of hearing. Student has diagnoses of

- Attention Deficit-Hyperactivity Disorder, Inattentive Type,
- Generalized Anxiety Disorder,
- Unspecified Psychotic Disorder,
- Obsessive Compulsive Disorder,
- Major Depressive Disorder, and
- a Specific Learning Disorder.

Chino assessed Student for special education eligibility in 2017 and 2020. Student's IEP team did not find Student eligible for special education. Parents unilaterally placed Student in Futures Academy for the 2021-2022 school year following numerous IEP team meetings, independent educational evaluations, and the Chino members of Student's IEP team's continued determination of Student's ineligibility for special education services since 2017.

ISSUE 1C: DID CHINO DENY STUDENT A FAPE DURING THE 2019-2020 SCHOOL YEAR, FROM DECEMBER 21, 2019, BY FAILING TO FIND STUDENT ELIGIBLE FOR SPECIAL EDUCATION UNDER THE CATEGORIES OF OTHER HEALTH IMPAIRMENT, EMOTIONAL DISTURBANCE, OR SPECIFIC LEARNING DISABILITY?

Student contends that Student met the eligibility criteria for special education eligibility under the categories of other health impairment, emotional disturbance, and specific learning disability, based on Student's diagnosed conditions of

Attention-Deficit/Hyperactivity Disorder, Generalized Anxiety Disorder, Specific Learning Disorder, and Student's demonstrated symptoms of prodromal psychotic disorder, from December 21, 2019 through December 21, 2021. Student asserts that Chino's failure to determine Student's eligibility under any of these categories denied Student a FAPE.

Chino contends it assessed Student's eligibility, and Student's IEP team accurately determined Student ineligible for special education services. Chino further contends Student's identified disabilities did not adversely affect Student's educational performance throughout the statutory period at issue in this case.

A disability is "suspected," and a child must be assessed, when the school district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-21 (*Timothy O.*); *Department of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194 (*Cari Rae S.*)).

The actions of a school district with respect to whether it had knowledge of, or reason to suspect, a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (citing *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1041).)

FROM 2017 THROUGH OCTOBER 28, 2019, CHINO GAINED SUFFICIENT KNOWLEDGE TO SUSPECT THAT STUDENT HAD DISABILITIES THAT REQUIRED SPECIAL EDUCATION SERVICES

Parent's testimony regarding Student's needs was credible and persuasive. Parent explicitly described Student's school struggles and mental health. Parent clearly recalled Student's history and provided specific details consistent with documentary evidence at the time of recalled events. Since 2017, Parent copiously documented Student's history through her knowledge and consistent utilization of special education IDEA procedures to advocate for Student. Parent

- called meetings,
- sent emails,
- requested assessments,
- sought outside professional advice and referrals,
- requested independent assessments, and
- communicated frequently with teachers when she volunteered in the classroom to keep Student's service providers updated on her academic and psychological status.

Further, Parent grew up with a brother who was diagnosed with paranoid schizophrenia. This made Parent an informed observer of Student's behavior. No counselors, school psychologists, or other mental health informed individuals were involved in Student's 504 meetings or monitoring Student at school. For all these reasons, Parent's testimony regarding her daughter's behavior and mental health functioning was informed, credible, thoughtfully considered, and accorded great weight.

THIRD GRADE-2016-2017 SCHOOL YEAR

In third grade, Parent requested Chino assess Student for special education eligibility. At that time, Student was a happy, creative, friendly, and caring child who liked to play with her friends, liked school, and when asked what she liked best about herself replied, "Life." She was, however, very sensitive and emotional when it came to her progress in school and what she was able to achieve. Student had frequent migraines after her school day. Student had already been receiving general education interventions including small group instruction, individual help, extended time, and shortened assignments. Despite these interventions, Student demonstrated inconsistent study skills and homework and classwork completion, poor attention and focus, and difficulty starting and completing assignments on time. Student's third-grade report card ratings, at the time of the assessment referral, were mostly ones and twos. One indicates beginning skill level with grade level standard not met. Two indicates student is partially meeting expected grade standards. At that time, Chino knew Student had difficulty attending to large group instruction, keeping herself and her thoughts organized, and managing her stress levels, attention, and impulsivity when overwhelmed. For all of these reasons, Parent asked Chino to assess Student for special education eligibility.

FOURTH GRADE, 2017-2018 SCHOOL YEAR

After Chino conducted assessments, Student's IEP team did not find Student special education eligible but provided her general education accommodations. In response to Parent's request, Chino's School Psychologist, Kelsey Wilcox, and Special Education Teacher, Karin Summerford, conducted Student's initial multidisciplinary evaluation in early September of Student's fourth-grade year. The assessment results

demonstrated Student's average cognition. Student's academic scores fell in the average to above-average range, except for reading fluency, in the lowest end of the low-average range.

Wilcox administered the Connors-3, consisting of rating scales of Student's behavior at school and at home, to assess Student's attention. Parent rated Student in the significant range for inattention and learning problems. Wilcox specifically chose Student's third-grade teacher to complete the ratings as Student's fourth-grade teacher had little information regarding Student, as the school year had just begun. The third-grade teacher rated Student in the clinically significant range for inattentiveness, hyperactivity/impulsivity, learning problems, and executive functioning. Based on the teacher's ratings, Wilcox further probed Student's attention by administering the Test of Visual and Auditory Attention, Second Edition, IVA-2. On this test, scores of 85-115 fall within the average range. Student scored a 35 in auditory sustained attention, a 69 in visual sustained attention, and a 49 as her combined sustained attention. Wilcox observed Student's inattention during large-group instruction while conducting a classroom observation as part of her assessment.

Wilcox administered the Behavior Assessment System for Children, BASC-3, to assess Student's social-emotional functioning. Student's teacher rated Student in the clinically significant range for hyperactivity, attention, learning problems, school problems, and study skills, and in the at-risk range for conduct problems, externalizing problems, leadership, and adaptive skills. Parent rated Student at-risk in the area of anxiety. Based on these scores, Wilcox administered the Multidimensional Anxiety Scale for Children, or MASC-2, Self-Report. Student scored in the elevated range in the area of Harm Avoidance, including that she often

keeps her eyes open for danger, checks things out first to make sure they are safe, tries to do things other people like, stays away from things that upset her, and tries to do things exactly right.

Wilcox considered Student's eligibility under the categories of specific learning disability and other health impairment. Wilcox recommended that the IEP team consider Student's eligibility under the category of other health impairment, due to Student's deficits in attention and executive functioning on multiple test measures. Wilcox did not recommend IEP team consideration of Student's eligibility under specific learning disability because the bulk of Student's academic scores fell within the average to above-average range, except for reading fluency. A specific learning disability in reading fluency was not found as it did not correlate to Student's processing deficit of attention.

Chino convened Student's September 20, 2017 initial IEP team meeting to review the assessment. Student was not found eligible for special education. The IEP team concluded that Student's needs did not exceed the scope of Student's classroom embedded accommodations. The ineligibility decision was based on Student's fourth-grade teacher's verbal report at the meeting that Student struggled with math word problems but was average to above-average in language arts. The team dismissed the third-grade teacher ratings, concluding: "academic concerns from last year appear to be less of a concern this year," and also disregarded Wilcox's recommendation for other health impaired special education eligibility. Parent disagreed with the IEP team's eligibility decision and requested an independent psychoeducational evaluation by evaluator, Dr. Perry Passaro.

Despite the special education ineligibility determination, the September 20, 2017 IEP team decided to place Student in a smaller math group, and agreed to hold a STEP meeting, described as a student study team meeting, to monitor Student's progress in reading fluency and math within six weeks. The team also agreed to implement recommendations by Wilcox, including small group instruction, preferential seating, and proactive organization strategies for the timely completion of academic tasks. The team continued similar general education interventions to those provided in third grade, with the exception of small group reading instruction, which was discontinued as ineffective, and thought to be related to Student's inattention. Thus, Chino knew at that time of the IEP team meeting that Student's attention difficulties were affecting her access to her education, specifically, general education reading interventions.

On October 30, 2017, Parent wrote a letter to Student's elementary school principal, teachers, and the school psychologist, regarding Student. Student continued to struggle to comprehend and complete work, needed additional time and redirection to complete tasks, and frequently cried upon her arrival home from school due to her school-related frustration. Student was missing her recess so that she could complete work, and the small math group, computer-based intervention was questioned by Parent as ineffective. Parent requested a STEP meeting to discuss Student's progress and need for additional supports.

On November 8, 2017, Chino held a STEP meeting to discuss Student's academic progress and Parent concerns. Student was pushing herself to excel on assignments. She was voluntarily going to math class during her lunch and recess to catch up on math notes. Student was overwhelmed and confused by writing the steps in her notebook, a recommended organization strategy. Student had attention

issues and struggled to communicate her frustrations. Teachers, conversely, did not voice any academic or behavioral concerns and noted Student's report card ratings of twos or threes in all academic areas. A three indicates that Student is consistently meeting the grade level performance standards. The study team decided to continue to implement similar interventions to those Student received in third grade.

An independent educational evaluation was conducted by Dr. Perry Passaro, a licensed educational psychologist, in March and April of 2018, and documented in an assessment report dated August 2, 2018. Parent provided a copy of the report to Chino, shortly thereafter. Dr. Passaro testified at hearing regarding his assessment of Student and his opinion regarding Student's eligibility for special education. Dr. Passaro found Student met the special education eligibility criteria in the categories of other health impairment and specific learning disorder, and that Student required cognitive behavioral therapy and other services to assist Student to cope with her anxiety and reduce her stress.

Dr. Passaro graduated with a Bachelor of Science degree in Biology in 1986 from Mesa State College in Grand Junction, Colorado. He received his Master of Science Degree in Education in 1987, and PhD in Educational Psychology in 1989, from the University of Kentucky in Lexington Kentucky. After moving to California, Dr. Passaro received his California Certification in School Psychology and School Counseling in 1998, and certification in Educational Administration in 1999 from Chapman University in Orange County, California. He completed post-doctoral coursework in Clinical Psychology and Neuropsychology at Alliant University in Alhambra, California, in 2002. Dr. Passaro is currently a licensed psychologist in

private practice in Newport Beach, California, providing psychotherapy and cognitive behavioral therapy to individuals with various diagnoses, including

- obsessive compulsive disorder,
- post-traumatic stress disorder,
- high functioning autism,
- bipolar disorder,
- psychotic disorder, and
- schizophrenia.

Dr. Passaro has held various positions before moving to California. These included: Director of Special Education, School Counselor, Director of Research and Evaluation, and Educational Program Director. After he moved to California in 1996, Dr. Passaro was employed in various positions within Orange County Department of Education, including School Psychologist, Program Specialist, and Assistant Principal, and Principal, from 1996 to 2000. Thereafter he worked as a School Psychologist for Placentia Yorba Linda Unified School District until 2002. He worked as a School Psychologist and Behavior Intervention Case Manager for Santa Ana Unified School District from 2002 to 2008. Before going into private practice, Dr. Passaro worked as a licensed psychologist with Affiliated Professional Psychologists in Orange, California, and the Anxiety and Depression Center, in Newport Beach, California. Throughout his career, Dr. Passaro has performed hundreds of psychoeducational evaluations.

Dr. Passaro's testimony was informed, evidenced by the detailed and clear explanations underlying his assessment findings and related opinions regarding Student. He responded to all questions by the attorneys and the undersigned ALJ,

similarly. When confronted with contrary opinions or seemingly conflicting information when referred to evidence, Dr. Passaro respectfully and thoroughly provided his interpretation, based on his experience, knowledge, and training. His testimony evidenced his thorough understanding of the issues presented in this case, based on his past years of experience conducting psychoeducational evaluations, and serving as a special education administrator. Accordingly, his testimony regarding his 2018 assessment of Student and related opinions was accorded great weight.

Dr. Passaro's assessment results established Student's solid average cognitive ability. The Delis-Kaplan Executive Function System subtests of attention and executive functioning resulted in deficient and borderline deficient scores. These scores mirrored Wilcox's findings of clear deficits in attention and executive functioning. These deficits were corroborated by Parent rating scale and clinical interview, and a 45-minute classroom observation of Student in both large group instruction and individual seatwork. The teacher's rating scales did not indicate significant inattention or executive functioning impairment. All other processing measures were in the average to above-average range. Student's academic scores were in the average range, except for writing samples, which was in the high-average range, and story composition and spontaneous writing, which were in the below-average range.

Dr. Passaro administered the Yale-Brown Obsessive-Compulsive Scale, Burns Inventory and the Millon Pre-Adolescent Clinical Inventory, MPACI, to assess Student's psychological functioning. Manifestations of obsessive-compulsive disorder may be related to that condition or may be better explained by attention deficit disorder or another psychiatric condition. The Obsessive-Compulsive scale

revealed that Student questioned whether she completed an activity or if completed, whether it was performed correctly. Student's responses on the MPACI questionnaire demonstrated that Student is an anxious and fearful person with significant problems with attention, significant obsessions and compulsions, and she endorses her own disruptive/acting out/aggressive behaviors, and significant reality distortions. Parent responses established that Student tries very hard to succeed at schoolwork; has trouble staying on task; has a hard time finishing her work on time; and gets stressed out, overwhelmed, and anxious that she will not be able to complete tasks on time.

Most concerning to Dr. Passaro were Student's reports of perceptual distortions and depressive and distressing thoughts, specifically, Student's hearing voices talking to her and seeing things that other people did not think were present. These auditory and visual hallucinations occurred during the day and in many settings. Student's perceptual disturbances have occurred since Student was three years old. Student also has a significant mental health history in the family. Dr. Passaro concluded that it is possible that Student has an early emerging psychotic disorder called prodromal psychotic disorder, requiring close monitoring and therapeutic intervention, both psychological and psychiatric. Student's scores on these psychological functioning tests were extremely concerning to Dr. Passaro as they established Student's potential for serious mental illness.

Dr. Passaro found that Student met the DSM-5 diagnostic criteria for Attention Deficit- Hyperactivity Disorder- Inattentive Type, Generalized Anxiety Disorder, and Specific Learning Disorder with Impairment in written expression. He determined that Student met the special education eligibility criteria in the category of other health impairment due to Student's significant deficit in attention which reduces her

academic engagement. He also found she met eligibility criteria under specific learning disability in written expression due to the significant discrepancy between Student's ability and her achievement in aspects of written expression.

Dr. Passaro concluded that Student's psychological conditions require Student instruction, monitoring, and reinforcement to assist Student to self-instruct, using cognitive behavioral methods, to develop self-control and self-regulation. Student requires cognitive behavioral therapy to decrease her negative self-attitudes, distorted social expectations, mood issues, and to assist Student to identify, evaluate, and possibly change her thoughts and beliefs that may be contributing to her anxiety, obsessive thinking, and compulsive behavior. Student requires relaxation training including breathing exercises and relaxing imagery, and psychiatric consultation for medication management. Specific writing goals and interventions were recommended to address Student's writing difficulties.

FIFTH GRADE, 2018-2019 SCHOOL YEAR

Chino convened an IEP team meeting on August 22, 2018, to review the results of Dr. Passaro's assessment and again found Student ineligible for special education and related services. Dr. Passaro reviewed his assessment in detail. Parent expressed concerns regarding Student's attention in the classroom, need for more time and multiple explanations before Student understands math, and Student's anxiety regarding grades. Jeanelle Jesson, Chino's school psychologist, attended the meeting. Jesson disagreed with Dr. Passaro's opinion that Student meets the eligibility criteria under specific learning disability in the area of written expression as she did not agree that there is enough of a discrepancy between Student's ability

and her writing scores. Student's anxiety was also discussed at length. The team noted that during Dr. Passaro's five-to-six-hour assessment he did not observe any anxiety by Student.

Dr. Passaro discussed his recommendations and urgent concerns for Student's mental health and need for services to assist Student to manage her anxiety. Chino team members believed that Dr. Passaro's recommendations could be provided through a 504 plan. A 504 plan is a plan of non-special education accommodations, under Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 701 et seq.) for students identified as having an impairment affecting a major life activity. Dr. Passaro stated that academically, Student may not need an IEP, but there is a significant mental health concern and a history of mental health in the family, putting Student at risk for the same disorder. He explained that stress is one of the environmental factors that induce the condition. He urged the team to focus on Student's mental health to reduce stress because Student has anxiety and how it is managed is pivotal.

Student was determined to be ineligible for special education. Specifically, Chino IEP team members observed Student to do well at school academically and did not observe Student to evidence any need for specialized academic services. The IEP team agreed that Student needed to be monitored and discussed having a check-in with the teacher. The IEP team offered mental health services through Chino Health services, provided by interns and available to any Chino Student. Parent declined as she felt Student required a higher level of support. Parent informed the team that

she was seeking outside medical professional support through insurance to reduce Student's stress. Parent disagreed with the eligibility determination and requested an educationally related mental health assessment.

Dr. Passaro testified at hearing that he tried very hard to express to the IEP team how important it was to intervene immediately with mental health services. He felt that he failed and attributed this to the IEP team's lack of training and understanding of mental illness and belief that they knew Student better. Chino team members did not grasp the grave significance of Student's assessment results.

A 504 team meeting was held on October 30, 2018, and Student was found to have a mental impairment of inattention affecting Student's learning, which qualified her for a 504 plan. Only one of Student's teachers attended. No counselor or school psychologist attended the meeting. Student continued to get overwhelmed and shut down when doing homework. Student worried that she would not have enough time to complete her work. Parent tried to explain the effect of Student's anxiety on her work completion. If given one math worksheet, Student could complete it in 15 minutes, but if she knew there are more worksheets to do, it would take her longer than 15 minutes to complete each worksheet. The teacher inappropriately focused only on Student's grades and academic testing, noting Student was meeting grade level standards in all areas except for writing, where she is approaching standards. Chino believed Student continued to benefit from the classroom accommodations already in place. The team agreed to substantially the same set of classroom accommodations, as before. Parent reluctantly consented to the 504 plan implementation.

In fifth grade, Student had 31 tardies, 20 of which were in the last trimester. Student was frequently late, due to school avoidance related to Student's anxiety. Parent was volunteering in the classroom frequently at this time and shared Student's struggles with her teacher. Chino knew at this time that Student had difficulties with attention, focus, anxiety, and a possible psychotic disorder which was affecting Student's ability to attend school on time which affected her access to her education. This escalation in her mental health symptoms in the last trimester of the 2018-2019 school year, should have prompted Chino to again assess Student for special education and related services

SIXTH GRADE, 2019-2020 SCHOOL YEAR THROUGH OCTOBER 27, 2019

Parent considered sixth grade a turning point for Student. Specifically, Student lost long-term friendships, including those since preschool and kindergarten, due to Student's constant paranoia, which Parent described, "consumed" Student. Student reported that all the students at lunch were staring at her and the children on the playground were talking about her. Parent remembered her brother with Schizophrenia made similar statements as Student. Consequently, Parent believed Student's psychosis was worsening. Student's anxiety in school and stress also increased at this time. Student now had three teachers for academics, which Chino assigned to sixth graders to prepare them for middle school. Given Dr. Passaro's prior warnings of the effect of stress on Student's possible psychotic disorder, Parent's concerns increased, and she was compelled to share Dr. Passaro's report with Student's sixth grade teachers to make sure they were aware of Student's struggles, her increased manifestations of psychosis, and Dr. Passaro's prior assessment conclusions and predictions regarding Student's response to stress.

On October 18, 2019, Parent sent an email to Student's teachers and school principal, and attached Dr. Passaro's 2018 assessment report, outlining the impact of stress on Student's mental health. She informed them that over the past few weeks Student has been exhibiting stress-related behaviors at home due to her school workload of homework and class assignments. Student now took over three-hours to complete her homework and appeared to Parent to be on the verge of a mental breakdown. Parent alerted them that Student's academic performance can mask the effects of underlying stressors Student experiences in completing tasks and meeting her academic demands. Parent requested a 504 team meeting to make sure that teachers were aware of Student's situation and to determine needed supports.

BY OCTOBER 28, 2019, CHINO WAS AGAIN ON NOTICE THAT
STUDENT'S DISABILITIES REQUIRED SPECIAL EDUCATION SERVICES
NECESSITATING A REFERRAL FOR ASSESSMENT

On October 28, 2019, Chino held a 504 team meeting. All three of Student's teachers, principal, and assistant principal, attended the meeting. No counselor or school psychologist attended the meeting. Parent shared details supporting her belief that Student was on the verge of a mental breakdown. Parent observed Student coming home stressed, having perfectionist behavior, getting migraines when overwhelmed, and anxiety when receiving missing assignment notifications. Student internalized her stress and did not communicate it. Teachers shared that Student was doing well, seemed to enjoy school and being around peers, and kept up with homework. Student was partially meeting math standards. Student scored poorly on a recent test and failed to take advantage of the opportunity to retake it to improve her score. Student qualified for a 504 plan due to attention deficit,

generalized anxiety disorder, and concern of early signs of schizophrenia. Chino continued the same accommodations previously in place. Parent again reluctantly consented to the 504 plan.

Notice of a suspected disability may come in the form of concerns expressed by parents about a child's symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child's behavior. (*Timothy O., supra*, 822 F.3d at 1119-1120 [citing *Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796; *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202].) The threshold for suspecting that a child has a disability is relatively low. (*Cari Rae S. supra*, 158 F.Supp.2d at p. 1195.) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*) Once identified, it is extremely important to the education of children that the assessment be conducted early, thoroughly, and reliably, or disabilities may go undiagnosed, neglected, or improperly treated in the classroom. (*Timothy O., supra*, 822 F.3d at 1110 [citing 20 U.S.C. 1400(c)].)

On October 28, 2019, Chino knew that Student had disabilities in the areas of attention and anxiety, and demonstrated early signs of schizophrenia, evidenced by Chino's 2017 initial evaluation, Dr. Passaro's 2018 independent evaluation, Chino's 504 plans since 2018, Parent's repeated concerns communicated to Chino, and recent school avoidance. Chino also knew that the interventions employed since 2017, were unsuccessful in addressing Student's declining emotional functioning and concerning behavior related to school demands. Although IEP teams previously determined Student to be ineligible for special education services under other health impairment and specific learning disability, Chino had an affirmative and ongoing

duty to assess Student's suspected disabilities that may require special education services. By October 28, 2019, Chino had overwhelming evidence of suspected disabilities with increasing manifestations at school. Accordingly, Chino was required again to refer Student for a special education evaluation to determine Student's eligibility and need for special education services at that time.

A proposed assessment plan shall be developed within 15 days of referral for assessment, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five schooldays, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code, § 56043, subd. (a).) Referral for assessment means any written request for assessment to identify an individual with exceptional needs, made by a parent or guardian, a teacher or other service provider of a child. (Ed. Code, § 56029, subd. (a) and (b).) A parent shall have 15 calendar days from the receipt of the proposed assessment plan to arrive at a decision. (Ed. Code, § 56043, subd. (b).) Once a child has been referred to determine whether the child is an individual with exceptional needs and to determine the educational needs of the child, these determinations shall be made, and an IEP meeting shall occur within 60 days of receiving Parent's consent for the assessment. (Ed. Code, § 56043, subd. (c).)

Had Chino referred Student for a special education assessment at the October 28, 2019 504 team meeting, it would have had 15 days to provide Parent with an assessment plan, 60 days to complete the assessment, not including school vacations in excess of five days, and hold an IEP team meeting to review the results. That meeting would have been required to be held by January 28, 2020.

TIMELY AND APPROPRIATE ASSESSMENT OF STUDENT WOULD HAVE FOUND STUDENT ELIGIBLE FOR SPECIAL EDUCATION SERVICES BY DECEMBER 21, 2019

“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 (2006); Ed. Code, § 56031.) A child with a disability includes a child that qualifies under the special education categories of other health impairment, a serious emotional disturbance, or specific learning disability, and who as a result needs special education and related services. (20 U.S.C. § 1401(3)(A)(i), (ii); 34 C.F.R. § 300.8(a)(1) (2017).)

In California, special education is required for individuals who are defined in part as individuals whose “impairment ... requires instruction, services, or both, which cannot be provided with modification of the regular school program.” (Ed. Code, § 56026, subd. (b).) A child qualifies as an individual with exceptional needs if the results of an assessment demonstrate that the degree of the child’s impairment requires special education. (Cal. Code Regs., tit. 5, § 3030, subd. (a).)

The IEP team is charged with the duty of reviewing assessment results, determining special education eligibility, determining the IEP contents, and making recommendations regarding a student’s program and placement. (Ed. Code, § 56342.) 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 (2006).) Parents and school personnel develop an individualized education program 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 (2007), 300.321 (2007), and 300.501 (2006).)

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. (*Bd. of Educ. 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].)

ADVERSELY AFFECTS EDUCATIONAL PERFORMANCE

To establish eligibility under other health impairment, emotional disturbance, and specific learning disability, one must establish that the disability adversely affects educational performance. Neither the IDEA, nor California educational codes and regulations, define the terms "adversely affects" or "educational performance". As such, these terms must be interpreted on a case-by-case basis, considering a student's unique disabilities.

A broad interpretation of "educational performance" is appropriate, considering the purpose of special education services and the identification process for determining a student eligible for special education. The purpose of special education services under the IDEA is to prepare children with disabilities for further education, employment, and independent living. (20 U.S.C. 1400(d)(1)(A).) Assessment to determine whether a child is eligible for special education must use a variety of assessment tools and strategies to gather relevant functional,

developmental, and academic information about a child. (34 C.F.R. § 300.304(b)(1) (2006).) Assessment of all areas of suspected disability includes

- health and development,
- hearing,
- vision, motor,
- language,
- general intelligence,
- academic performance,
- communicative status,
- self-help,
- orientation and mobility skills,
- career and vocational abilities and interests, and
- social-emotional status.

(Educ. Code § 56320, subd. (f).)

Caselaw also supports a broad view of “educational performance”. A child’s educational needs are to be broadly construed to include the child’s

- academic,
- social,
- health,
- emotional,
- communicative,
- physical, and
- vocational needs.

(*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, abrogated in part on other grounds by *Schaffer v. Weast*, *supra*, 546 U.S. 49, citing H.R. Rep. No. 410,

1983 U.S.C.C.A.N. 2088, 2106.) Moreover, “educational benefit” is not limited to academic needs, but also includes the social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office, et al.* (9th Cir. 1996) 93 F.3d 1458, 1467.) Accordingly, the law requires the IEP team to consider the overall impact of Student’s limitations on Student’s educational performance in all areas, not merely academic performance.

CHINO’S SCOPE OF STUDENT’S EDUCATIONAL PERFORMANCE HAS BEEN INAPPROPRIATELY NARROW

Student’s IEP teams have consistently applied an unreasonable and inappropriately narrow focus when determining the impact of Student’s disability related needs. Only legal conclusions are reached in this Decision for the time period at issue in this case. Specifically, from December 21, 2019, forward. However, it is necessary to review Student’s prior IEP team meetings to know by when Chino was aware of Student’s needs so that legal conclusions can be reached for the time at issue in this case. For example, by September 2017, Student demonstrated clinically significant attention deficit on her educational performance. The team reviewed Chino’s initial assessment, which utilized a variety of standardized assessments, recent third-grade teacher’s report based on an entire school year, Parent report, and classroom observation, all supporting Wilcox’s recommendation to consider Student’s special education eligibility under the other health impairment category. Instead, Student was found ineligible for special education based on the fourth-grade teacher’s opinion of Student’s academic performance, specifically her language arts and math functioning, after only instructing student for five weeks.

Chino had an impermissibly narrow view of educational performance and equated it solely with academic performance. Had Chino correctly applied the legal standard and considered the impact of Student's attention deficits on her educational performance, Student may have been found eligible for special education under the other health impairment category, as recommended by Wilcox in September 2017.

Despite this knowledge, the Chino members of Student's IEP team continued with this impermissibly narrow view of educational performance. By August 22, 2018, the IEP team convened to review Dr. Passaro's independent educational assessment and did not understand the impact of Student's attention deficits, anxiety, and signs of early schizophrenia on her educational performance. The IEP team's determination that Student was not eligible for special education and related services appeared solely based on because the fact that she was getting good grades and had positive relationships with her teacher and peers and that Dr. Passaro's recommendations could be facilitated without special education services. In so doing, the team ignored that the combination of Student's impairments significantly affected Student's attention, emotional functioning, and social perceptions, as measured by a variety of standardized assessments, Student reports, Parent reports, and classroom observations.

Had Chino correctly considered Student's significant inattention, emotional functioning, and psychosis related behavior, Chino likely would have found Student eligible for special education services under other health impairment in August 2018.

Chino's argument at hearing and in its closing brief that the earlier IEP teams reached the right eligibility determination is not persuasive. Additionally, Chino argued that Student's needs could be met through 504 accommodations. This assertion was also unpersuasive. Dr. Passaro's recommended services far exceeded the scope of those that could be provided through general education interventions and a 504 plan.

Further, Chino continuously repeated that Student was not found eligible for special education under any category because she had good grades, and state test results, and good relationships with peers and teachers. Student's achieving good grades, despite Dr. Passaro's and Chino's assessment findings that Student had a significant deficit in attention and executive functioning, anxiety, and early signs of serious mental illness, was remarkable. However, historically, Student had been hyper-focused on her school performance, and had pushed herself to excel and get things exactly right, resulting in extended hours doing homework, and constant and significant anxiety that she would not complete the work on time, or do it correctly. For Student, her good grades were actually a symptom of her obsessive tendencies and school performance anxiety. Chino cannot cling to Student's grades, state test scores, and friendships as the only indicators of Student's educational performance, while ignoring a multitude of indicators of Student's declining mental health directly related to her efforts to get those grades.

STUDENT MET THE ELIGIBILITY CRITERIA UNDER OTHER HEALTH IMPAIRMENT BY DECEMBER 21, 2019

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that

- (i) Is due to chronic or acute health problems such as
 - a. asthma,
 - b. attention deficit disorder or attention deficit hyperactivity disorder,
 - c. diabetes,
 - d. epilepsy,
 - e. a heart condition,
 - f. hemophilia,
 - g. lead poisoning,
 - h. leukemia,
 - i. nephritis,
 - j. rheumatic fever,
 - k. sickle cell anemia, and
 - l. Tourette syndrome; and
- (ii) Adversely affects a child's educational performance.

(34 C.F.R. § 300.8 (c)(9) (2017); Cal. Code Regs., tit. 5, § 3030, subd. (b)(9).)

Chino's 2017 and Dr. Passaro's 2018 assessments established Student's ongoing and significant inattention and executive functioning deficits, based on multiple standardized assessments, and classroom observations. Dr. Passaro's

assessment also established that Student's psychotic behavior and distorted thinking impact Student's attention. Student ruminated about her peers who appeared to Student to stare at her and talk about her. She experienced auditory and visual hallucinations. Her inattention necessarily reduced her engagement at school and thus her educational performance.

Student's anxiety necessarily reduced her academic engagement and educational performance. She has a significant history of difficulty starting and completing assignments, directly related to her worry that she will not complete them on time or correctly. Even Student's accommodations increased her stress, specifically, her teacher's printouts of missing assignments, and her accommodation of writing down the steps to complete a task. None of the many accommodations, provided to reduce her school related stress, such as reduced workload, more time to complete assignments, were effective to prevent Student's declining mental health and ability to cope with her school demands. The combination of Student's unique disabilities, including her Attention-Deficit Hyperactivity Disorder, Predominantly Inattentive Type; Generalized Anxiety Disorder; and psychotic behavior, all resulted in her rapidly declining stamina and energy to maintain good grades, and her limited alertness with respect to her educational environment.

As noted previously, no findings are reached regarding eligibility prior to the time period at issue in this case. The evidence established, however, that by December 21, 2019, Student met the eligibility criteria under other health impairment. Further, the evidence established Student continued to be eligible for special education and related services under the category of Other Health

Impairment throughout the entirety of the statutory period at issue. This deprived Student the educational benefit of special education services and denied Student a FAPE.

BY JANUARY 28, 2020, STUDENT MET THE ELIGIBILITY CRITERIA UNDER EMOTIONAL DISTURBANCE

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- a. An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- b. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- c. Inappropriate types of behavior or feelings under normal circumstances.
- d. A general pervasive mood of unhappiness or depression.
- e. A tendency to develop physical symptoms or fears associated with personal or school problems.
- f. Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance. (34 C.F.R. § 300.8(c)(4) (2017); Cal. Code Regs., tit. 5, § 3030, subd. (b)(4).)

INAPPROPRIATE TYPES OF BEHAVIOR OR FEELINGS UNDER NORMAL CIRCUMSTANCES

By January 28, 2020, Student met the criteria for special education eligibility under emotional disturbance. Student had documented inappropriate types of behavior or feelings under normal circumstances. Chino was aware that Student saw things that others do not see and heard voices that others do not hear. This was documented to occur during the day in different settings. Student has demonstrated perceptual disturbances since age three, and self-reported visual and auditory hallucinations in 2018. Student's hallucinations impacted her attention and focus as they were identified to occur during the day in all settings, which includes school. Student has experienced inappropriate and abnormal fears and anxiety for years regarding her school performance, given her academic ability to meet grade level standards. Beginning in sixth grade, Student was consumed by paranoid thoughts regarding her peers. Student's educational performance was necessarily negatively affected by these behaviors and feelings, including her attention, her social relationships, and her full participation in academic and nonacademic school activities.

A TENDENCY TO DEVELOP PHYSICAL SYMPTOMS OR FEARS ASSOCIATED WITH PERSONAL OR SCHOOL PROBLEMS

Student developed physical symptoms or fears associated with personal or school problems. Student had been having migraines since third grade following her school day, associated with her being overwhelmed with school demands. Student was hyper-focused on her school performance beginning in third grade when she was voluntarily giving up her lunch and recess to meet with her math teacher for

extra help. Student was constantly fearful that she would not get her work completed in time or correctly. This fear caused her to expend hours completing schoolwork. Student's workload and assignments had been reduced for years, as compared with her classmates, because of Student's school related fears, anxiety, and stress.

Student's 2018 independent assessment results, based on Student's own report, established that Student was anxious and fearful. Parent has corroborated these feelings consistently since that time. Parent readily shared those concerns with Chino as she repeatedly sought special education and related services to help Student. Student was also consumed with thoughts and fears that her peers were staring at her and talking about her. Student's paranoid thoughts and fears detracted from her attention to tasks at school, her completion of classwork and homework, and resulted in a loss of personal long-term friendships. Student's migraines and fears impacted Student's emotional functioning, social relationships, and her ability to complete her schoolwork and maintain her grades without jeopardizing her mental health.

SCHIZOPHRENIA

IDEA expressly states that emotional disturbance includes schizophrenia. Chino was aware that Student was showing early signs of childhood schizophrenia, which was determined by Chino to be one of her qualifications for Student's October 28, 2019 504 plan. Dr. Passaro established Student demonstrated signs of psychosis in 2018. Although Student did not yet have a DSM-5 diagnosis of schizophrenia, there is no such requirement under the IDEA. Dr. Passaro's concern

regarding Student's risk of eventually receiving a DSM-5 diagnosis of schizophrenia was based on Student's current presentation of the same behaviors as those found in individuals with schizophrenia, such as visual and auditory hallucinations.

Dr. Passaro confirmed the accuracy of information on a schizophrenia information Sheet, based on his training and experience, published by the National Alliance on Mental Illness, which was admitted as evidence at hearing. The information sheet lists symptoms required for a diagnosis of schizophrenia. Individuals with schizophrenia have two or more of the following symptoms, occurring persistently. However, delusions or hallucinations alone can often be enough to lead to a diagnosis of schizophrenia. The symptoms include:

1. Positive symptoms of schizophrenia, known as "psychotic" symptoms: delusions or the belief that things not real are true; hallucinations which are hearing or seeing things that are not real; disorganized speech expressed as an inability to generate logical sequence of ideas.
2. Negative symptoms, meaning a reduction of a capacity, such as motivation: emotional flatness or lack of expressiveness; inability to start and follow through with activities; lack of pleasure or interest in life.
3. Cognitive symptoms pertaining to thinking process: trouble prioritizing tasks, memory and organizing thoughts; Anosognosia or lack of insight being unaware of having an illness.

Student has been exhibiting positive, negative, and cognitive symptoms of schizophrenia for a long time, to a marked degree. Student exhibited hallucinations; delusions (paranoia regarding friends/peers); difficulty starting, completing, and prioritizing tasks; and difficulty organizing her thoughts.

Student's symptoms, similar to individuals with schizophrenia, are significant in the discussion of eligibility under emotional disturbance in that all of Student's other demonstrated characteristics increase her stress, which results in an increase of her psychosis symptoms. Therefore, for Student, the characteristics of emotional disturbance she demonstrates have more significance than they would without the presence of her schizophrenia symptomatology. Student demonstrated three of the five characteristics indicating emotional disturbance over a long time and to a marked degree, each negatively affecting her educational performance. Only one is required for eligibility under emotional disturbance. These characteristics affected Student's emotional functioning and availability to participate in the regular education curriculum without jeopardizing her mental health.

By January 28, 2020, when an IEP team meeting should have been convened, Student met the eligibility criteria under the category of emotional disturbance. The failure to find Student eligible under emotional disturbance deprived Student of crucial special education and educationally related mental health services and denied Student a FAPE. The evidence further established that Student continued to be eligible under the category of emotional disturbance throughout the rest of the time at issue in this case.

Shortly after that IEP team meeting and without any special education supports or services, Student's mental health significantly deteriorated. That

deterioration corroborates the finding that Student required significant special education supports and should have been found eligible for emotional disturbance on January 28, 2020. After-acquired evidence may shed light on the objective reasonableness of a school district's actions at the time the school district rendered its decision. (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d. 999,1006.) By January 15, 2020, Parent informed Chino that Student experienced severe stress and anxiety which culminated in an emotional breakdown overnight and into that day and requested further special education assessment including an educationally related mental health assessment. At that time, Parent summarized the history and worsening of Student's stress and anxiety over time, now manifesting in Student's

- screaming,
- talking to herself irrationally,
- throwing things,
- crumpling papers,
- destroying objects,
- total refusal to work on school-related assignments, and
- severe emotional breakdowns to the point of being inconsolable.

Parent wrote that she was concerned because of Student's diagnosis and increased academic demand, that student would have a total mental health breakdown.

Chino agreed to assess Student for special education eligibility and provided Parent with an assessment plan dated January 28, 2020 but declined Parent's request for an educationally related mental health assessment.

Chino conducted the assessment and again found not eligible for special education. In the course of that assessment, in February 2020, Student informed

School Psychologist Jessen, that she wanted to kill herself and one of her teachers. A threat assessment was conducted, and a safety plan developed. The assessment also revealed clinically significant Student self-reports that Student is almost always:

- bothered by thoughts about death,
- hates school,
- gets nervous,
- is disappointed in her grades,
- has a hard time keeping her mind on her schoolwork,
- has trouble paying attention to her teachers,
- impaired capacity to enjoy school or other activities,
- worries about appearing stupid to others and
- that others are mocking her and laughing at her.

Two teachers' ratings on the Scale for Assessing Emotional Disturbance rated Student's unhappiness and depression in the indicative of emotional disturbance range.

Given Student's complete decline during the statutory period, the evidence overwhelmingly established that Chino should have found Student eligible under emotional disturbance by January 28, 2020, and provided her the much needed special education services at that time.

STUDENT DID NOT MEET THE ELIGIBILITY CRITERIA FOR A SPECIFIC LEARNING DISABILITY

A child is eligible for special education under the category of specific learning disability if the child has a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written.

(20 U.S.C. § 1401(30); Ed. Code, § 56337, subd. (a).) This type of disorder may result in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. (*Ibid.*) The basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, and the cognitive abilities of association, conceptualization, and expression.

The evidence presented at hearing did not establish that Student is eligible for special education under specific learning disability. It is undisputed that most of Student's academic scores are in the average to above-average range, with the exception of some areas in the low-average range. Accordingly, Student failed to sustain her burden to prove that she met the eligibility criteria as a student with a specific learning disability.

ISSUE 1(E): DID CHINO DENY STUDENT A FAPE BY FAILING TO FUND AN INDEPENDENT EDUCATIONAL EVALUATION, WITHOUT UNNECESSARY DELAY, FOLLOWING PARENT'S APRIL 2, 2020, REQUEST?

Student contends that the over three-month delay between Parent's request for an independent educational evaluation at the April 2, 2020 IEP team meeting and Chino's July 23, 2020 agreement to fund the independent educational evaluation, was unreasonable, and denied Student a FAPE. Chino maintains it had not finished presenting the assessment with which Parent disagreed, until the completion the part-two IEP team meeting on May 14, 2020. Chino asserts that its ultimate decision to fund the independent educational evaluation was the result of a collaborative process, which took place over a reasonable amount of time, during which it was in

constant communication with Parent regarding the request. Thus, Chino argues, that any delay in agreeing to fund the independent educational evaluation was necessary and did not deny Student a FAPE.

When a student requests an independent educational evaluation, the public agency must, without unnecessary delay, either file a request for a due process hearing to show that its assessment is appropriate or ensure that an independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2); (b)(2)(i), (ii) (2006); see Ed. Code, § 56329, subd. (c).) The regulations do not set a specific time limit for responding to a parent's request for an independent educational evaluation. Whether a district's delay is unnecessary within the meaning of the above regulation is a fact-specific inquiry. (See *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380 PVT) 2006 WL 3734289, p. 3.)

The term "unnecessary delay" as used in 34 C.F.R. § 300.502(b)(2) is not defined in the regulations. It permits 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. (*Letter to Anonymous*, 56 IDELR 175 (OSEP 2010).) Some delay in the provision of an independent educational evaluation is reasonable if the school district and the parents are engaging in active communications, negotiations, or other attempts to resolve the matter. (*J.P. v. Ripon Unified School Dist.* (E.D. Cal. April 14, 2009, No. 2:07-cv-02084) 2009 WL 1034993.) *L.S. v. Abington School Dist.* (E.D. Pa. Sept. 30, 2007, No. 06-5172) 2007 WL 2851268 (district's 10-week delay in filing a due process request was not a per se violation where there was evidence of

ongoing efforts during that time to resolve the matters and district, within 27 days of the independent evaluation request, orally told parents the request would be denied).)

Student requested an independent educational evaluation at Student's April 2, 2020 IEP team meeting, after Chino's school psychologist, Jeannelle Jesson, reviewed Chino's assessment. Parent disagreed with Jesson's assessment at the meeting as she believed that: Parent's, Student's, and teacher's reports were not considered in Chino's eligibility decision; there were errors in the report; IDEA guidelines were not followed; and, prior assessments were not considered. Parent sent an email to Chino on April 7, 2020, reiterating her disagreement with Jesson's assessment with further detail as to her prior disagreements. Part-two of Student's April 2, 2020 IEP took place on May 14, 2020. The team discussed eligibility and found Student not eligible for special education. Parent continued to request an independent educational evaluation.

On May 23, 2020, Parent emailed Chino attaching Parent's letter explaining Parent's disagreement with Student's April 2, 2020 IEP, completed on May 14, 2020. In the letter, Parent explained why she disagreed with the IEP team's decision regarding the ineligibility of Student. Parent documented the history beginning with the January 15, 2020, through the May 14, 2020 IEP team meetings.

On June 12, 2020, Chino provided Parent with prior written notice denying Parent's "May 23, 2020" request for an independent educational evaluation stating as its reason that no additional evaluation is needed to determine Student's eligibility or to meet the legal requirements of the IDEA. The prior written notice informed Parent that Chino will file a request for due process to demonstrate that its

evaluation was valid and appropriate. Chino directed Parent to contact Chino's coordinator by July 26, 2020, if Parent continued to request an independent educational evaluation.

On June 21, 2020, Parent responded to Chino's June 12, 2020 prior written notice by emailing a letter to Anne Ingulsrud, Director of Special Education. In the letter, Parent corrected what Parent considered factual errors in Chino's June 12, 2020 prior written notice, which Chino appeared to rely on in declining the independent educational evaluation. Parent remained confident in the assertion that Chino failed to conduct a legally compliant assessment and verified that Parent is still requesting an independent educational evaluation, as requested verbally on April 2, 2020, at Student's IEP team meeting, as well as in writing in Parent's April 7, 2020 email. Student requested Chino reconsider its decision as to whether to grant the independent educational evaluation, based on Parent's corrected facts. On July 23, 2020, Chino informed Parent that, upon reconsideration, it agreed to fund the requested independent educational evaluation. An independent educational evaluation at public expense means that a school district pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent. (34 C.F.R. § 300.502(a)(3)(ii) (2006).) Dr. Passaro conducted an independent educational evaluation in November 2020, and completed his assessment report on January 27, 2021.

Student's request for due process hearing, as well as Student's closing brief, expressly limited the alleged denial of FAPE regarding this issue to the time period of April 2, 2020, to July 23, 2020. Accordingly, the reasonableness of any delay in completing the independent educational evaluation between July 23, 2020, and January 27, 2021, is not analyzed or determined in this decision.

THE DELAY IN CHINO'S DECISION TO FUND STUDENT'S REQUEST FOR AN INDEPENDENT EDUCATIONAL EVALUATION, BETWEEN APRIL 2, 2020 AND JULY 23, WAS NOT UNNECESSARY

As previously discussed, in determining whether a school district funded an independent educational evaluation without unnecessary delay, takes into consideration brief periods of time, during which the parties are engaging in active communications, negotiations, or other attempts to resolve the matter. Here, Parent first requested an independent educational evaluation after the first of a two-part IEP team meeting held to discuss the disputed evaluation. The purpose of the IEP team meeting was to discuss the evaluation results, engage in an IEP team discussion regarding the assessment, and assessment conclusions. Going into the May 14, 2020 part-two IEP team meeting, it was possible that such discussion might lead to resolving Parent's concerns about Chino's assessment or perhaps reconsideration of the team's initial discussion of Student's ineligibility. Therefore, the delay from April 2, 2020, to the conclusion of the May 14, 2020 IEP team meeting, was necessary in Chino's decision-making process regarding the granting or denial of Parent's requested independent educational evaluation.

From May 14, 2020, to June 12, 2020, Chino took approximately four weeks to send Parent's its notice of its decision to file for due process hearing to defend its assessment. This decision required time for Chino to consider Parent's objections to its assessment in light of the discussion at the two IEP team meetings, and to meet and confer with the school psychologist and others to make a final decision. Therefore, the four-week delay between the May 14, 2020 IEP team meeting, and the June 12, 2020 prior written notice to Parent, was reasonable. Since so much had

transpired between Student's initial request for the independent educational evaluation, it was reasonable for Chino to include in its prior written notice, an inquiry as to whether Parents still wanted an independent educational evaluation, as well as the provision of 14 days for Parents to respond.

Parents responded on June 21, 2020, and sent a detailed letter with concerns that Chino's decision not to fund the independent educational evaluation was based on Chino's erroneous understanding of the actual facts, as understood by Parents. Parents' clarification of those facts and request for Chino's reconsideration of its decision to fund the independent educational evaluation, was also reasonable, and, in fact, resulted in Chino's reconsideration and decision to fund the independent educational evaluation.

Here, the parties engaged in good faith discussions and collaborative efforts from April 2, 2020, to July 23, 2020, to resolve the dispute over the need for an independent educational evaluation. Accordingly, Student failed to establish that the delay was an "unnecessary delay."

STUDENT'S ISSUES 1(A), 1(B), 1(D), 2(A), 2(B), 2(C), 3(A), AND 3(B) ARE NOT REACHED

Student already established a global FAPE denial from December 21, 2019, to December 21, 2021, based on the finding that Chino denied Student a FAPE by failing to find Student eligible for special education under other health impairment from December 19, 2019, and emotional disturbance from January 28, 2020, through the entirety of the statutory period. Reaching Student's remaining issues, namely,

issues 1(a), 1(b), 1(d), 2(a), 2(b), 2(c), 3(a), and 3(b), would not change or alter Student's remedies. Accordingly, no finding is made regarding those issues due to Student prevailing on Issue 1(c).

CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

ISSUE 1A:

This issue was not reached because Student prevailed on Issue 1(c) and doing so would not affect Student's remedies.

ISSUE 1(B):

This issue was not reached because Student prevailed on Issue 1(c) and doing so would not affect Student's remedies.

ISSUE 1(C):

Student prevailed on this issue.

Chino denied Student a FAPE by failing to find Student eligible for special education under other health impairment from December 21, 2019, and emotional disturbance from January 28, 2020, during the 2019-2020 school year.

ISSUE 1(D):

This issue was not reached because Student prevailed on Issue 1(c) and doing so would not affect Student's remedies.

ISSUE 1(E):

Chino prevailed on this issue.

Chino did not deny Student a FAPE by failing to fund the independent educational evaluation requested by Parents on April 2, 2020, between April 2, 2020, and July 23, 2020, without unnecessary delay.

ISSUE 2(A):

This issue was not reached because Student prevailed on Issue 1(c) and doing so would not affect Student's remedies.

ISSUE 2(B):

This issue was not reached because Student prevailed on Issue 1(c) and doing so would not affect Student's remedies.

ISSUE 2(C):

This issue was not reached because Student prevailed on Issue 1(c) and doing so would not affect Student's remedies.

ISSUE 3(A):

This issue was not reached because Student prevailed on Issue 1(c) and doing so would not affect Student's remedies.

ISSUE 3(B):

This issue was not reached because Student prevailed on Issue 1(c) and doing so would not affect Student's remedies.

REMEDIES

Student proved in Issue 1(c) that Chino denied Student a FAPE, during the 2019-2020 school year, by failing to find Student eligible for special education under other health impairment or emotional disturbance. This denial of FAPE continued through December 21, 2021. As remedies, Student requests Chino to reimburse Parents for their out-of-pocket costs for Student's educational expenses, specifically, Student's tutoring by Fusion Learning; cognitive behavioral therapy by Cognitive Behavior Associates, including transportation; Dr. Marta Shinn's independent educational evaluation through Variations Psychology, including transportation; and placement at Futures Academy for the 2021-2022 school year, including related transportation; and any other appropriate remedies. Student submitted detailed invoices, proof of payment, and mileage information for these expenses, which was admitted as evidence at hearing.

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) Factors to be

considered when considering the amount of reimbursement to be awarded include the existence of other, more suitable placements, the effort expended by the parent in securing alternative placements, and the general cooperative or uncooperative position of the school district. (*W.G. v. Bd. of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d at 1479, 487; *Glendale Unified School Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1109.)

An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School Dist. supra*, 31 F.3d at p. 1497.) The award must be fact-specific and "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid v. Dist. of Columbia, supra*, 401 F.3d. at p. 524.)

Here, had Chino timely and appropriately assessed Student's eligibility and need for special education services, Student would have been deemed eligible for special education and related services by December 19, 2019. This denied Student crucial services to address her unique disabilities, the combination of which, resulted in Student's rapidly declining mental health and educational performance. Chino's conduct in ignoring Student's declining mental health and narrow focus on grades to determine Student's ineligibility for special education services, for almost four years, weighs heavy in determining appropriate remedies.

In contrast, Parent's conduct throughout the statutory period was remarkable. Parent continuously communicated Student's declining functioning to Chino, facilitated multiple assessments, consulted with experts, and shared the information

with Chino, reluctantly agreed to allow Chino to try non-special education interventions, and funded the exact services which Chino had repeatedly denied. All of her efforts had the sole purpose of educating Chino about Student's unique disabilities, to get Student the services she required to access her education without jeopardizing her mental health.

REIMBURSEMENT FOR COSTS OF TUTORING, COGNITIVE BEHAVIORAL THERAPY, AND RELATED TRANSPORTATION

Parent funded 20 sessions of one-to-one tutoring by Fusion Learning from April 17, 2021, through the end of the 2020-2021 school year, to relieve Student's school related stress, address Student's failing grades, and to assist with Student's executive functioning challenges. The total cost of these services was \$1,700.

Parent funded 12 sessions of cognitive behavioral therapy through the licensed provider Cognitive Behavior Associates, from May 4, 2021, through August 3, 2021. The cost totaled \$3,370. Student received the therapy in-person for the three initial sessions and once rapport was established, received the remaining sessions virtually. The total round-trip distance per visit to Cognitive Behavior Associates was 89.4 miles. Parent funded this therapy in response to Student's rapidly declining mental health and threats to harm herself and her teacher.

Reimbursement for academic tutoring and cognitive behavior therapy is appropriate as these services were secured to reduce Student's stress related to her academic demands and to assist Student to develop coping strategies to navigate the effects of her anxiety, psychosis, and related attentional and executive functioning impairments. Student's request for these reimbursements is granted.

REIMBURSEMENT OF COSTS ASSOCIATED WITH PRIVATE INDEPENDENT EDUCATIONAL EVALUATION TO DETERMINE APPROPRIATE PLACEMENT

An independent educational evaluation at public expense may be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-823.) An independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student in question. (34 C.F.R. § 300.502(a)(3)(i) (2006).)

Parent gave prior written notice of intent to privately place Student, fund Student's needed supports and services, and seek reimbursement from Chino, on April 13, 2021. Parent funded a private independent educational evaluation through Variations Psychology, by Dr. Marta Shinn, PhD, a licensed clinical and educational psychologist, to clarify Student's unique needs and identify an appropriate educational placement. Chino convened an IEP team meeting on November 29, 2021, to consider Student's eligibility for special education in light of Dr. Shinn's assessment. Student traveled to Dr. Shinn's office two times for the assessment. One round trip to Dr. Shinn is 66.6 miles. Parents paid the cost of Dr. Shinn's assessment, totaling \$3,750.

Reimbursement for the cost of Dr. Shinn's evaluation is reasonable. The assessment was used to support Parent's effort to convince Chino that Student's unique disabilities required special education services and placement. Had Chino timely assessed Student and found her eligible for special education and related

services, her placement would have already been determined. Student's request for reimbursement of costs associated with securing Dr. Shinn's assessment is granted.

REIMBURSEMENT OF THE COSTS FOR TUITION AND TRAVEL RELATED TO FUTURES ACADEMY

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); *School Committee of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 369-371 [1055 S.Ct. 96] (*Burlington*).) When a school district fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" in light of the purposes of the IDEA. ALJ's have broad latitude to fashion equitable remedies appropriate for a denial of a FAPE. (*Id.* at 369-370; 20 U.S.C. § 1415(i)(2)(C)(3).)

The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent School Dist. v. State Bd. of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.) Although the parents' placement need not be a "state approved" placement, it still must meet certain basic requirements of the IDEA, such as the requirement that the placement address the child's needs and provide student with an educational benefit. (*Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14, [114 S.Ct. 361, 126 L.Ed.2d 284] (*Carter*).) Parents may receive reimbursement for the unilateral placement if it is appropriate. (34 C.F.R. § 300.148(c)(2006); Ed. Code, § 56175; *Carter, supra*, 510 U.S.

at pp. 7, 15-16]) The appropriateness of the private placement is governed by equitable considerations. (*Ibid.*) The determination of whether to award reimbursement and how much to award is a matter within the discretion of the hearing officer. (*School Committee of Burlington v. Department of Educ. supra*, 471 U.S. at p. 369.)

Student began attending Futures Academy, called Futures, on August 9, 2021, where she continued her attendance through May 9, 2022, the last day of hearing, with an expected exit date of May 20, 2022. Student attended Futures in-person, five days a week from August 9, 2021 to November 19, 2021, and virtually for the remainder of the school year. One round trip is 65.6 miles. Futures serves sixth through 12th grade general education students though primarily one-to-one instruction using a mastery-based teaching approach, which ensures mastery of a content area of the common core curriculum before a Student can proceed to the next content area.

Student received educational benefit at Futures. Student went from F's in all of her academic classes in Chino, to getting A's and B's in all of her classes, earning 25 credits, and a grade point average of 3.74, the first semester at Futures. Student was not participating in instruction the second semester of Chino, evidenced by teacher's reports of Student's refusal to turn her camera on even when asked by teachers. Student's Measure of Academic Progress, called MAP, testing, used by Futures to measure academic progress, showed significant improvement in Student's reading. Student's reading score went from a score of 216, when assessed by Futures in July 2021, upon enrollment, to 230, when tested on March 29, 2022,

indicating that Student is at or above grade level. The total cost paid by Parents for tuition at Futures, for Student's placement for the 2021-2022 school year, was \$27,100.

Reimbursement for all of the costs related to Student's placement at Futures academy are appropriate as an equitable remedy. It was carefully considered that the time at issue, and therefore, finding a FAPE denial ended on December 21, 2021. However, the evidence established such an egregious FAPE denial, that reimbursement for the entire 2021-2022 school year is appropriate. Had Chino timely identified Student for special education eligibility and services, Student's placement and services would have been determined and implemented, and likely would have positively affected the trajectory of Student's educational and mental health decline. Although not a special education placement, it provided a small, controlled setting to allow Student to utilize her academic strengths and access the curriculum while eliminating many of the stressors of a general education middle school setting, which exacerbated Student's anxiety, stress, psychosis, inattention, and executive functioning deficits. Parent's request for reimbursement of costs related to Student's placement at Futures is granted.

TRAINING IS AN APPROPRIATE REMEDY

An order for staff training is an appropriate remedy under the IDEA. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1034.)

Chino's continuous reliance on Student's grades and state testing as the primary indicator of Student's educational performance to deny Student special education eligibility and services resulted in a global denial of FAPE. In so doing,

Chino discounted assessment results, including both Chino's and independent assessments, showing clinically significant deficits in Student's psychological processing and emotional functioning. Student's psychosis, reported to Chino since 2018, evidences the most serious mental health condition with known poor outcomes and prognosis for those individuals with such a diagnosis. Chino's failure to timely find Student eligible for special education resulted in inappropriate interventions, absence of known required services, and Student's deteriorating mental health which Student was left to deal with on her own at school.

As an equitable remedy for Chino's conduct and denial of FAPE, training is an appropriate remedy. A training of Chino's school psychologists, special education administrators, special education teachers involved in Student's IEP teams from 2017, through 2021, and Student's current teachers from Chino for the 2022-2023 school year, if any, is granted as an equitable remedy. The training must include information about California's definition of "educational performance," the effects of social, emotional, and psychological conditions, including psychosis, anxiety, obsessive-compulsive disorder and depression, on a student's educational performance; how these disorders can be recognized in the classroom and through assessment; and the importance of early identification and intervention in the response to these disorders, once suspected.

ORDER

1. Chino must reimburse Parent for the cost of tutoring by Fusion Learning in the amount of \$1,700.

2. Chino must reimburse parents for their cost of providing Student with cognitive behavioral therapy by Cognitive Behavior Associates, in the amount of \$3,370.
3. Chino must reimburse Parent for the cost of mileage at the then current federal reimbursement rate, for three round trips to Cognitive Behavior Associates for Student's in-person therapy on May 4, May 12, and May 18, 2021.
4. Chino must reimburse Parents for the cost of Dr. Shinn's private independent educational evaluation through Variations Psychology, in the amount of \$3,750.
5. Chino must reimburse Parent for the cost of mileage for two round trips to Variations Psychology, at the then current federal reimbursement rate.
6. Chino must reimburse Parents for the cost of Student's placement at Futures Academy in the amount of \$27,100.
7. Chino must reimburse Parents for round trip mileage costs based on the then current federal reimbursement rate, for transporting Student to Futures Academy, from August 9, 2021 to November 19, 2021, upon proof of Student's days of attendance, to be submitted by Parents.
8. Chino must provide all reimbursement pursuant to this order within 45 days of the issuance of this decision.
9. Chino must hold an IEP team meeting within 30 days of the issuance of this decision to develop an appropriate IEP to meet Student's unique educational needs, for the 2022-2023 school year.
10. Chino must fund one staff training, for a total of two hours, as detailed above, by an outside attorney not under contract with Chino, and a

mental health professional trained and licensed in the diagnosis and treatment of mental health disorders, including psychosis, anxiety, obsessive-compulsive disorder, and depression, and not employed by Chino, by December 31, 2022.

RIGHT TO APPEAL THIS DECISION

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

Rita Defilippis

Administrative Law Judge

Office of Administrative Hearings