

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2022010393

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PARENTS ON BEHALF OF STUDENT,

v.

KENTFIELD SCHOOL DISTRICT.

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DECISION

JULY 18, 2022

On January 14, 2022, Student filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Kentfield School District, called Kentfield.

Administrative Law Judge Robert G. Martin heard this matter by videoconference on April 19, 20, 21, 28, and 29, 2022, and May 3, and 4, 2022.

Attorney Damien Troutman represented Student. Father attended all days of hearing. Attorney Jan Tomsy represented Kentfield. Virginia DiGirolamo, Director of Student Services, attended all days of hearing on Kentfield's behalf.

At the request of the parties, OAH continued the matter to June 9, 2022, for the parties to file written closing briefs. OAH closed the record and submitted the case for decision on June 9, 2022.

## ISSUES

1. Did Kentfield deny Student a free appropriate public education, called FAPE, from January 14, 2020, through the 2021-2022 school year, until January 14, 2022, by:
  - a. failing to appropriately assess Student in its January 2020 assessment, by not including years of informal intervention data that had not resulted in adequate progress;
  - b. failing to deem Student eligible for special education and related services under the category of specific learning disability; and
  - c. failing to offer goals, services, and accommodations?

At the due process hearing, Student withdrew the contention that Kentfield denied Student a FAPE by failing to find Student eligible for special education under the category of other health impairment.

## JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, called IDEA, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006); 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; Ed. Code, §§ 56501, 56502, 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 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student, as the filing party, had the burden of proof by a preponderance of the evidence in this matter. The factual statements below 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).)

At the time of hearing, Student was 14 years old and attended eighth grade in Kentfield. Parents and Student resided within Kentfield's attendance boundaries at all relevant times. Student had never been found eligible for special education.

In the two years prior to the complaint, Kentfield convened two individualized education program team meetings, called IEP meetings, to consider Student's possible eligibility for special education based on assessments and other data. In January 2020, the IEP team considered a Kentfield psychoeducational assessment and other data, and concluded Student did not have a disability and was not eligible for special education. In September 2021, the IEP team considered a private neuropsychological assessment provided by Parents that found Student had a specific learning disability. Kentfield refused to offer Student eligibility for special education based on the private assessment, but instead, offered to conduct further assessments and reconvene the IEP team meeting to consider Student's eligibility.

## LEGAL FRAMEWORK

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

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make

progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000] (*Endrew F.*.)

ISSUE 1(A): DID KENTFIELD DENY STUDENT A FAPE FROM JANUARY 14, 2020, UNTIL JANUARY 14, 2022, BY FAILING TO APPROPRIATELY ASSESS STUDENT IN ITS JANUARY 2020 ASSESSMENT, BY NOT INCLUDING YEARS OF INFORMAL INTERVENTION DATA THAT HAD NOT RESULTED IN ADEQUATE PROGRESS?

Student contends Kentfield's psychoeducational assessment of Student dated January 13, 2020 denied Student a FAPE by failing to appropriately assess Student for eligibility for special education based on a specific learning disability, because it did not adequately consider either Student's five-year history of not meeting State academic standards in state testing, despite repeated general education interventions, or teacher and Parent concerns about Student's challenges with reading comprehension and executive functioning.

Kentfield contends it appropriately conducted its psychoeducational assessment and considered Student's general education interventions, even though it was not required to do so because Kentfield did not use a response to an intervention program of scientific, research-based interventions to support struggling students and identify those with specific learning disabilities. Kentfield also contends its assessment appropriately considered teacher and Parent concerns.

## RELEVANT LAW

Kentfield's psychoeducational assessment was an initial evaluation of Student for possible eligibility for special education under the category of specific learning disability.

A specific learning disability is one of 13 categories under which a student in California may demonstrate a degree of impairment requiring special education. (Cal. Code Regs., tit. 5, § 3030, subds. (a), (b)(1)-(13).) A specific learning disability is defined as a disorder in one or more of the basic psychological processes involved in understanding or using written or spoken language, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. (20 U.S.C. § 1401 (30)(A); 34 C.F.R. § 300.8(c)(1); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) The basic psychological processes include

- attention,
- visual processing,
- auditory processing,
- phonological processing,
- sensory-motor skills,
- cognitive abilities including association, conceptualization, and expression.

(Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) Disorders affecting these processes include perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (20 U.S.C. § 1401 (30)(B); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) Specific learning disabilities do not include learning problems that are primarily the result of visual, hearing, or motor disabilities, intellectual

disability, emotional disturbance, or environmental, cultural, or economic disadvantage. (20 U.S.C. § 1401 (30)(C); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).)

Notwithstanding the definition of a specific learning disability as a processing disorder, the eligibility criteria for determining a student has a specific learning disability do not require a school district to assess a student for a processing disorder, or document the existence of a processing disorder, to determine the student has a specific learning disability. (See 34 C.F.R. § 300.309; Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B).) The United States Department of Education in its comments to 2006 IDEA regulations rejected suggestions that the criteria for finding a specific learning disability should require documentation of a basic psychological processing disorder. The Department explained:

The Department does not believe an assessment of psychological or cognitive processing should be required in determining whether a child has [a specific learning disability]. There is no current evidence that such assessments are necessary or sufficient for identifying [a specific learning disability.] Further, in many cases, these assessments have not been used to make appropriate intervention decisions.

United States Department of Education, Office of Special Education and Rehabilitative Services (OSERS), Analysis of Comments and Changes to 2006 IDEA part B Regulations, 71 Fed.Reg. 46591, 46651 (Aug. 14, 2006) (Comments to 2006 IDEA Regulations). The Department noted a research consensus as of 2002 that “processing deficits should be eliminated from the criteria for classification.” (*Ibid.*) The Department also noted that

the implementing regulations permit, but do not require, a district to use a "pattern of strengths and weaknesses" testing methodology that includes testing of psychological or cognitive processing. (*Ibid.*)

Kentfield's psychoeducational assessment used such a pattern of strengths and weaknesses assessment as part of its analysis of whether Student had a specific learning disability. In conducting its psychoeducational assessment, Kentfield was required to comply with the statutes and regulations governing all assessments, additional statutes and regulations governing assessments for specific learning disabilities, regulations specific to pattern of strengths and weaknesses assessments, and with the instructions provided by the producer of the tests used in its pattern of strengths and weaknesses assessment, which is required by the statutes and regulations.

## STATUTES AND REGULATIONS APPLICABLE TO ALL METHODS OF ASSESSING FOR SPECIFIC LEARNING DISABILITIES

A school district assessing a student's eligibility based on any suspected category of disability may not rely on any single measure or assessment, or single score or product of scores, as the sole criterion for determining the student's eligibility. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e); Cal. Code Regs., tit. 5, § 3030, subd. (a).) Instead, it must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, to assess whether the student has a disability, and, if eligible, the content of the student's individualized education program. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) If a review of existing evaluation data identifies additional evaluation data needed to determine whether the student has a qualifying disability requiring special education and related services, the present levels



of academic achievement and related developmental needs of the child, and the educational needs of the child, the district must administer such assessments and other evaluation measures as may be needed to produce the needed data. (20 USC § 1414(c)(2); 34 C.F.R. § 300.305(a)(2) & (c).) The student must be assessed in all areas related to the suspected disability. (Ed. Code § 56320, subd. (f).) The assessment must use technically sound instruments, shown through research to be valid and reliable, that assess the relative contribution of cognitive, behavioral, physical, and developmental factors. (20 USC § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3); Comments to 2006 IDEA Regulations, 71 Fed.Reg. 46591, 46642.)

All assessments must be conducted by individuals who are both knowledgeable of the student's disability, and competent to perform the assessment, as determined by the local educational agency. (Ed. Code, §§ 56320, subd. (g), 56322.) All assessments and other evaluation materials must be administered by trained and knowledgeable personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iv) & (v); 34 C.F.R. § 300.304(c)(iv) & (v); Ed. Code, § 56320, subd. (b)(3).) Any psychological assessment, including individually administered tests of intelligence and emotional functioning, must be conducted by a credentialed school psychologist. (Ed. Code, §§ 56324, subd. (a), 56320, subd. (b)(3).) Any health assessment must be conducted by a credentialed school nurse or physician. (Ed. Code, § 56324, subd. (b).)

After assessments and other evaluation measures have produced the evaluation data needed to determine eligibility, a group of qualified professionals and the parents, generally constituting an IEP team, uses the data to determine the student's eligibility. (Ed. Code, § 56330; 34 C.F.R. § 300.306(c)(1).)

## ADDITIONAL REGULATIONS APPLICABLE TO ASSESSMENTS FOR SPECIFIC LEARNING DISABILITIES

The implementing regulations specify additional procedures for identifying students with specific learning disabilities that include procedures for assessments, and also procedures that must be followed by the IEP team determining whether the child has a specific learning disability. (See 34 C.F.R. §§ 300.307- 300.311; Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)5.) With respect to assessments, a school district may use any of three specified methods of assessment. (34 C.F.R. §§ 300.307 and 300.309; Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B) & (C).) The assessment must include observation of the student in the student's learning environment to document the student's academic performance and behavior in the areas of difficulty. (34 C.F.R. § 300.310; Ed. Code, § 56341, subd. (c).)

## ADDITIONAL REGULATIONS APPLICABLE TO ASSESSMENTS USING THE PATTERN OF STRENGTHS AND WEAKNESSES METHODOLOGY

The pattern of strengths and weaknesses methodology is one of three assessment methods referenced in the IDEA, California Education Code, and their implementing regulations. The other two methods are the severe discrepancy methodology and the response to intervention methodology. The severe discrepancy method looks for a specified statistical difference between a student's standardized test scores in intellectual ability, and the student's standardized test scores in one or more specified areas of academic achievement. (See Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B)1.) If the standardized tests do not reveal the required statistical difference, the IEP team determining eligibility may still find that a severe discrepancy exists, if it

documents that a discrepancy between ability and achievement exists as a result of a disorder in one or more of the basic psychological processes. (*Id.*, at subd. (b)(10)(B)3.) The response to intervention method looks at whether a student made sufficient progress to meet age or State-approved grade-level standards in one or more specified areas of academic achievement when provided a program of scientific, research-based interventions. (*Id.*, at subd. (b)(10)(C)2(ii).)

The IDEA and Education Code statutes specifically refer only to the severe discrepancy and response to intervention methodologies. They provide that a state may not require school districts to use the severe discrepancy methodology in determining whether a student has a specific learning disability, and must permit districts to use the response to intervention methodology. (20 U.S.C. § 1414(b)(6); Ed. Code, § 56337, subds. (b) and (c).) The IDEA's implementing regulations authorize states to permit districts to use other alternative research-based procedures for determining whether a child has a specific learning disability (34 CFR § 300.307(a)(3), and specifically include the pattern of strengths and weaknesses methodology as one such procedure that a state may allow districts to use. (34 C.F.R. § 300.309(a)(2)(ii).) The IDEA implementing regulations require states to adopt criteria for determining whether a child has a specific learning disability, and require school districts to use the criteria adopted. (34 CFR § 300.307(a) & (b).) California regulations specifically allow districts to use the pattern of strengths and weaknesses methodology (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)2.(ii)), as well as the severe discrepancy and response to intervention methodologies. (Cal. Code Regs., tit. 5, § 3030, subds. (b)(10)(B) & (C)2.(i).)

A California school district must use at least one of the three methodologies adopted in section 3030, subd. (b)(10) as a component of its evaluation of a student for a specific learning disability, but may not rely on any of the methods as the sole basis

for determining whether a student has a specific learning disability. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B) and (C).) A district may use more than one of the methodologies in its evaluation, but the regulations do not require it to do so. (Ibid.) The severe discrepancy, response to intervention, and pattern of strengths and weaknesses methodologies for evaluating specific learning disability are each considered a single measure or assessment. Guidance from the United States Department of Education Office of Special Education Rehabilitative Services, called OSERS, in Letter to Prifitera, (OSERS, March 1, 2007), explained that information from the severe discrepancy, response to intervention, or pattern of strengths and weaknesses methodologies is just one component of an overall comprehensive evaluation of a child suspected of having a disability. (See also *M.M. v. Lafayette School Dist.* (9th Cir. 2014) 767 F.3d 842, 853 [approving using data acquired through a student's participation in a response to intervention program to corroborate the results of a severe discrepancy assessment].)

California school districts must use at least one of the three methods, but may not rely on any of the methods as the sole basis for determining whether a student has a specific learning disability. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B) and (C).) The severe discrepancy, response to intervention, and pattern of strengths and weaknesses methodologies for evaluating specific learning disability are each considered a single measure or assessment, and just one component of an overall comprehensive evaluation of a child suspected of having a disability. (United States Department of Education Office of Special Education Rehabilitative Services, *Letter to Prifitera*, (OSERS, March 1, 2007).) A public agency must use a variety of data gathering tools and strategies in addition to a severe discrepancy, response to intervention, and pattern of strengths and weaknesses assessment methodology. (*Ibid.*; United States

Department of Education Office of Special Education Programs, *Letter to Zirkel*, (OSEP, December 11, 2008); *M.M. v. Lafayette School Dist.*, *supra*, 767 F.3d 842, 853 [approving using data acquired through a student's participation in a response to intervention program to corroborate the results of a severe discrepancy assessment].)

To support an IEP team's ultimate determination that a student has a specific learning disability using a pattern of strengths and weaknesses methodology, the assessment must find data indicating the student is not achieving adequately for the child's age or to meet State-approved grade-level standards in one or more of the eight areas of

- oral expression,
- listening comprehension,
- written expression,
- basic reading skill,
- reading fluency skills,
- reading comprehension,
- mathematics calculation, or
- mathematics problem solving.

(34 C.F.R. § 300.309(a)(1); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)1.) The assessment must also find data the student is achieving inadequately despite having been provided learning experiences and instruction appropriate for the child's age or State-approved grade-level standards. (*Ibid.*)

If the assessment finds the student is not achieving adequately despite appropriate experiences and instruction, the assessment must find data the student exhibits a pattern of strengths and weaknesses in performance, achievement, or both,

relative to age, State-approved grade-level standards, or intellectual development, that is determined by the IEP team to be relevant to the identification of a specific learning disability, using appropriate assessments. (34 C.F.R. § 300.309(a)(2)(ii); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)(2)(ii).) Performance refers to the results of standardized assessments in areas of basic psychological processes, including attention, visual processing, auditory processing, phonological processing, sensory-motor skills, and cognitive abilities. (See Comments to 2006 IDEA Regulations, 71 Fed.Reg. 46591, 46654 [Section 300.309(a)(2)(ii) permits the assessment of patterns of strengths and weakness in performance, including performance on assessments of cognitive ability].)

Achievement refers to the results of standardized assessments of academic skills in

- oral expression,
- listening comprehension,
- written expression,
- basic reading skill,
- reading fluency skills,
- reading comprehension,
- mathematics calculation, and
- mathematics problem solving.

(See Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)(1).) State-approved grade-level standards means state academic performance benchmarks for children at each grade level, such as California's Common Core State Standards. (See Comments to 2006 IDEA Regulations, 71 Fed.Reg. 46591, 46652.) Intellectual development refers to a standard of intellectual development such as that commonly measured by IQ tests. (See Comments to 2006 IDEA Regulations, 71 Fed.Reg. 46591, 46651.)

The assessment must find that any underachievement or pattern of strengths and weaknesses exhibited by the student is not primarily the result of a visual, hearing, or motor disability, intellectual disability, emotional disturbance, cultural factors, environmental or economic disadvantage, or limited English proficiency. (34 C.F.R. § 300.309(a)(3); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)(3).)

Finally, to rule out lack of appropriate instruction in reading or math as the cause of any underachievement, the assessment must find data demonstrating that prior to, or as a part of, the referral process, the student was provided appropriate instruction in a regular education setting, delivered by qualified personnel. (34 C.F.R. § 300.309(b); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)(4).) The assessment must also find data-based documentation of repeated assessments of the student's achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the parent. (*Ibid.*)

The regulations leave it to the IEP team to decide what strengths and weaknesses in performance and/or achievement are relevant to the identification of a specific learning disability, and whether the strengths and weaknesses should be evaluated relative to age and State-approved grade-level standards, or intellectual development. The regulations also allow the IEP team to decide what pattern in strengths and weaknesses is relevant to the identification of a specific learning disability, and what assessments of basic psychological processes and academic skills should be used to look for the pattern. (34 C.F.R. § 300.309(a)(2)(ii); Cal. Code Regs., tit. 5, § 3030, subd.

(b)(10)(C)(2)(ii).) In response to commenter concerns that section 300.309(a)(2)(ii) did not sufficiently define "pattern of strengths and weaknesses," the Department of Education explained,

"Patterns of strengths and weaknesses commonly refer to the examination of profiles across different tests used historically in the identification of children with [a specific learning disability]. We believe that the meaning of 'pattern of strengths and weaknesses' is clear and does not need to be clarified in these regulations." (Comments to 2006 IDEA Regulations, 71 Fed.Reg. 46591, 46654.)

## KENTFIELD'S JANUARY 2020 PSYCHOEDUCATIONAL ASSESSMENT WAS APPROPRIATE

### KENTFIELD'S ASSESSORS WERE QUALIFIED

School psychologist Catherine Teller conducted Kentfield's psychoeducational assessment of Student in December 2019, and January 2020, assisted by special education teacher Patricia Beales, who administered the academic achievement tests used in the assessment. Both Teller and Beales were knowledgeable regarding specific learning disabilities, competent to perform the portions of the assessments they conducted, and were appropriately credentialed. Teller held a master's degree and an education specialist degree in school psychology, and received graduate school training in the 10 different theoretical approaches to assessing for a pattern of strengths and weaknesses. At San Francisco Unified School District, from 2013 to 2016, Teller



participated in three to four full days of training in assessing students using the pattern of strengths and weaknesses method used to assess Student, and later trained others in how to perform the assessment. As a school psychologist, Teller had conducted approximately 500 psychoeducational assessments, including approximately 300 assessments for specific learning disabilities using the pattern of strengths and weaknesses method used to assess Student.

Beales had 27 years of experience as a special education teacher. Beales held a master's degree in education, and an education specialist credential authorizing her to teach students with mild to moderate disabilities. Beales also held a resource specialist certificate authorizing her to conduct educational assessments, and provide instruction and special education support services to students with IEP's assigned to general education classroom teachers for most of the school day. Beales had conducted over one thousand academic assessments. She was trained in using, and had frequently used, the academic assessments she administered to Student.

#### KENTFIELD'S ASSESSMENT REVIEWED EXISTING DATA ON STUDENT'S EDUCATIONAL PERFORMANCE

The psychoeducational assessment reviewed Student's existing educational performance data. Teller obtained input from Parents and Student's teachers, and reviewed Student's academic history and general education interventions. Teller recorded Student's performance on standardized statewide testing measuring Student's academic progress towards mastering the grade-level knowledge and skills. Teller also observed Student in his classroom setting.

Parents completed a background questionnaire for Teller. They explained academics had been an ongoing challenge for Student since first grade, particularly in the areas of reading comprehension and math. They reported Student tended to think he understood concepts when he actually did not, and was off the mark. Although he happily did his homework, he did not seem to understand it. Parents were concerned that because Student had a good attitude and good behavior, his teachers were often missing his academic difficulties. Although Student was trying hard in school, he had recently said that he was feeling stupid.

Teller reviewed teacher comments from an October 2019 student study team meeting with Student's current sixth-grade teachers at which Parents had requested Kentfield assess student's eligibility for special education. Teller followed up by sending questionnaires to the teachers. Teacher comments suggested Student had difficulty with reading comprehension and understanding complex concepts. Student was generally described as quiet, wanting to do well, and having good to excellent behavior and social skills. Student's math and English language arts teachers expressed concerns regarding his ability to understand concepts as they became more complex. Student was behind in math, but in an online program in an extended math class offered as an intervention to general education students, he had worked his way quickly through the content for third and fourth grade, and most of fifth grade. Student's English language arts teacher reported Student had difficulty thinking abstractly and understanding concepts even when they were repeated. He struggled with interpreting text and drawing inferences from it. Student was not reading on his own initiative but tried to present an outward appearance that he was. When required to write about something he had read, Student had difficulty locating examples in the text to answer questions or

to use as supporting evidence. In reading comprehension, Student had difficulty determining a central idea, or recognizing the difference between supporting details and main ideas in a story. The teacher was concerned that across subject matter and tasks, Student was not responding as expected to feedback and support from her. For example, he would not apply checklists or written feedback to add to, edit, or complete his work. She was also concerned that he had difficulty engaging in, and completing academic tasks. Four of five teachers were concerned Student did not ask for help, and echoing Parent concerns, his science teacher wondered if that was because Student did not realize when he was not understanding something.

Teller reviewed Student's previous report cards and academic record, and included a detailed educational history in the psychoeducational assessment report. The educational history accurately recorded Student's grades and most of the relevant teacher comments from his report cards, with no material omissions. Teller separately described the general education intervention support programs Student had participated in since second grade. A separate chart listed Student's scores in third, fourth and fifth grade in the California Assessment of Student Performance and Progress, Smarter Balanced Assessment Consortium test. This test was administered statewide to measure students' academic progress towards mastering the grade-level knowledge and skills specified in California's Common Core State Standards for educational achievement in English language arts and mathematics.

Integrating the separate sections of educational history, interventions, and state assessment scores shows Student in elementary school had issues with reading comprehension, reading fluency, and understanding math word problems that led to low grades in English language arts and math. However, Student never received failing

grades. In response to Student's issues, Kentfield had implemented general education interventions that provided Student additional academic instruction. Although Student's grades improved over time to mostly B's and C's, he consistently failed to meet state standards for English language arts in the statewide Smarter Balanced Assessment, and only once met the state standard in math.

In second grade, Student was graded as having only a partial understanding of state grade-level standards in all reading areas and some writing and math areas, needed further growth in reading fluency and comprehension, and was participating in a math booster support group. In third grade, Student was graded as having a significant understanding of state grade-level standards for almost every area related to reading and writing, and two-thirds of the math concepts. However, his scores in the statewide Smarter Balanced Assessment near the end of the year indicated he was performing in the lowest of the four ranges, "standard not met," in both English language arts and math, indicating he was far behind grade level in those areas.

In fourth grade, 2017 to 2018, Student was graded as having a significant understanding of common core standards in most writing and math areas, but only a partial understanding of reading skills, and a minimal understanding of how to read at a sufficient fluency rate to support comprehension. Student participated with his teacher in three small group reading intervention sessions per week in spring 2018. His statewide test scores were consistent with his grades, and showed improvement. Student received a "standard nearly met" score in English language arts, and a "standard met" score in math.

In fifth grade, Student entered Kent Middle School. As recommended by his fourth-grade teacher, Student began the year enrolled in a daily extended reading

support class, in addition to his regular English language arts class. The extended reading class was part of Kentfield's multi-tiered system of supports for general education students, which also included an extended math class and an academic workshop to help students plan and achieve goals by developing executive functioning skills in

- adaptable thinking,
- planning,
- self-monitoring,
- self-control,
- working memory,
- time management, and
- organization.

Roughly one-third of Kent Middle School's general education students were enrolled in one or more of these supports. Student was enrolled in an extended reading class for the first two trimesters of fifth grade, but was exited from it in April 2019 after his standardized reading inventory score showed him to be a proficient fifth grade reader, with a lexile measure of 949. Student was enrolled in an extended math class during the third trimester. At the end of fifth grade, Student received A's in history and science, a C plus in English language arts, and a B minus in math. However, Student's average to above-average grades in English language arts and math were not reflected in Student's Smarter Balanced Assessment scores. These scores declined from Student's fourth grade performance, with a "standard not met" score in English language arts, and a "standard nearly met" score in math.

Student's first trimester of sixth grade ended November 26, 2019. His report card grades and teacher comments were not included in the January 13, 2020

psychoeducational assessment, but the grades showed a slight decline from his final grades from the prior school year, except for a steep decline in science from an A to a C-minus. Teacher comments were consistent with those recorded from Student's October 2019 student study team meeting and teacher responses to assessment questionnaires. Student was graded C in English language arts and math, B-minus in history, and C-minus in science. Teacher comments in English language arts included Student's volume of reading was not meeting grade-level standards. In history, comments included that Student struggled with new concepts, made careless errors applying concepts he understood, and needed to ask for help more often. In math, Student struggled with multi-step problems. Sixth grade interventions were noted in the assessment. These included extended math class, and classroom intervention strategies and informal accommodations for Student. These interventions included

- preferential seating,
- reduced paper and pencil tasks,
- alternative materials and assignments,
- increased use of verbal responses,
- directions given in a variety of ways,
- repeated review and drill,
- extended time for completing tests and assignments, and
- access to assistive technology supports including use of online textbooks that read text aloud.

The decline in Student's grades shows these interventions did not improve Student's academic performance.

Teller observed Student in his English language arts and math classes that taught Student in his areas of difficulty. Student exhibited typical academic performance and behavior in these classes. He was generally on-task when following directions, tracking discussions, actively working on practice problems, taking a computer-based test, and responding when called on. He participated in group discussions, and without hesitation gave correct answers when called on twice in math class. He took a little longer than most students when responding to directions or transitioning between activities, but not to a degree that interfered with his engagement in the classroom.

#### KENTFIELD UTILIZED AN APPROPRIATE PATTERN OF STRENGTHS AND WEAKNESSES ASSESSMENT METHODOLOGY AS A TOOL IN STUDENT'S PSYCHOEDUCATIONAL ASSESSMENT

Since 2016, Kentfield has exclusively used the pattern of strengths and weaknesses methodology as part of its assessment of students for a specific learning disability, and has not used the severe discrepancy or response to intervention methodologies. This methodology involved administering standardized tests of psychological processing like the Weschler Intelligence Scale for Children, and standardized tests of academic achievement like the Woodcock-Johnson Tests of Achievement, then analyzing the test results for relevant patterns of strength and weakness that indicated a specific learning disability.

Kentfield's assessment used what Teller described as a combination of two of the three major pattern of strengths and weaknesses models for assessing specific learning disabilities. Teller used the cross-battery model developed by Ortiz and Flanagan to develop relevant data from standardized testing of Student's psychological processing. Teller then used the simple model developed by Catherine Christo, Ph.D. to analyze

that psychological processing data, and the data from standardized tests of Student's academic achievement, to look for a pattern of strengths and weaknesses in psychological processing and academic achievement relative to Student's age.

To find a pattern of strength and weaknesses indicating a specific learning disability under the simple model, the data was required to first show that Student had one or more psychological processing areas in which his score indicated both a statistically significant normative weakness compared to other students his age, and also a statistically significant relative weakness compared to Student's own best score in a psychological processing area. Then, to demonstrate that the weakness in psychological processing was affecting Student's academic achievement, the data from Student's academic achievement testing, analyzed in accordance with the test producers, was required to show Student demonstrated a statistically significant normative weakness in academic achievement compared to other students his age, in an area of academic achievement that was linked by research to the psychological processing area or areas in which Student exhibited normative and relative weakness.

Student raised a number of objections to the pattern of strengths and weaknesses assessment methodology used by Kentfield, but none of them were persuasive. Student argued, with no supporting law or testimony, that it was inappropriate to require both a normative and relative processing weakness. Student also argued that Teller's description that the assessment looked for a deficit in an area of cognitive processing, instead of a deficit in a basic psychological process, which include, but are not limited to, cognitive abilities, indicated an improper focus on just one psychological process. However, Student's own experts also used the term cognitive process interchangeably with the term basic psychological processes, such as in Student's Exhibit S26, Descriptive Comparison: Cognitive Processes, prepared by



neuropsychologist Mitchell Perlman. Finally, Student argued that Kentfield was legally obligated to conduct a severe discrepancy analysis in addition to the pattern of strengths and weaknesses assessment to avoid relying on its pattern of strengths and weaknesses assessment as the sole criterion for determining whether Student had a disability. However, the criteria for finding a disability are not limited to the severe discrepancy, pattern of strengths and weaknesses, and response to intervention methodologies, but also include other evaluation measures used by Kentfield, including educational record reviews, parent and teacher interviews and questionnaires, and classroom observations. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) Also, the severe discrepancy methodology for determining a specific learning disability is disfavored to the extent that states may not require a district use it. (20 U.S.C. § 1414(b)(6); Ed. Code, § 56337, subds. (b) and (c).)

Student did not prove that the pattern of strengths and weaknesses assessment methodology used by Kentfield could not be determined by the IEP team to be relevant to the identification of a specific learning disability (34 C.F.R. § 300.309(a)(2)(ii); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)(2)(ii).) Student also did not prove the methodology used was not examination of profiles across different tests used historically in the identification of children (Comments to 2006 IDEA Regulations, 71 Fed.Reg. 46591, 46654), or was otherwise inappropriate.

KENTFIELD PROPERLY CONDUCTED THE PATTERN OF STRENGTHS  
AND WEAKNESSES ASSESSMENT IT USED IN STUDENT'S  
PSYCHOEDUCATIONAL ASSESSMENT

Kentfield properly conducted its pattern of strengths and weaknesses assessment of Student under the combined cross-battery model plus simple model methodology.

The cross-battery model is based on a theory that human intelligence is made up of a large number of narrow abilities in psychological processing that contribute to a smaller number of broad abilities. The terms used in the Education Code regulations do not always align directly with terms used in practice, and in this instance the broad abilities are similar in concept to the basic psychological processes listed in California Code of Regulations, title 5, section 3030, subdivision (b)(10).

The cross-battery assessment model uses scores from multiple standardized subtests of basic psychological processes to generate composite scores for seven broad abilities that research suggests are most tied to academic success. The broad abilities measured are

- crystallized knowledge,
- fluid reasoning,
- short-term memory,
- long-term retrieval,
- auditory processing,
- visual processing, and
- processing speed.

Teller's usual procedure, employed with Student's assessment, was to administer tests in these seven areas, plus two additional areas of attention/executive functioning and sensorimotor processing that were not included in the cross-battery model, but that Teller considered relevant to a more comprehensive evaluation of basic psychological processes. After administering tests in these nine areas, Teller's usual was to look at the results and see if the test results in one or more areas suggested she should "dig deeper" and conduct more tests of psychological processes.

The standardized psychological processing subtests used in the cross-battery model to collect data must be selected by the test administrator to reliably measure narrow processing abilities that are included in each of the broad abilities, and must be shown by research to be linked to an area of academic achievement that is also being tested. To help select relevant narrow cognitive abilities and subtests, Teller used a tool called the COMPARES model, developed by the Ventura School District. This model includes a table showing the degree to which research indicates a particular narrow ability, or processing deficit identified in the Education Code, is connected to an area of academic achievement, ranging from convincing, to partially convincing, to not connected by research.

Starting with the Weschler Intelligence Scale for Children, 5th Edition, as her primary testing battery for psychological processes, Teller selected standardized subtests that would measure the relevant narrow cognitive abilities. Teller supplemented the Weschler subtests with additional subtests from the Comprehensive Tests of Phonological Processing, 2nd Edition, the Developmental Neuropsychological Assessment, 2nd Edition, and the Feifer Assessment of Reading to get data on narrow cognitive abilities not measured by the Weschler, and to minimize the effects of different norming samples. Teller input the subtest scores from the standardized test batteries into the X-BASS Cross-Battery Assessment Software System, Version 1.0, a program that uses the standardized subtest scores to calculate broad ability composite scores based on the cross-battery model. Teller used standardized subtests from the Developmental Neuropsychological Assessment, 2nd Edition, and the Delis-Kaplan Executive Functioning System to assess Student's attention and executive functioning,

and calculated Student's scores in those areas according to the test producers' instructions. Teller similarly used the Beery-Buktenica Test of Visual-Motor Integration, 6<sup>th</sup> Edition, to test Student's sensorimotor processing.

Altogether, Teller administered 24 standardized subtests to Student to derive scores relevant to 20 narrow processing abilities, plus Student's attention-related scores in selective attention and attentional shift. Twenty-one of Student's subtest scores were within one standard deviation of the mean standard score of 100, that is, within the range from 85 to 114 which included the scores of 68 percent of the children of Student's age who were tested. Scores in this one-standard deviation range were all considered statistically within normal limits, neither normative strengths nor normative weaknesses. Student had one subtest score of 125 related to his reasoning abilities that was rated a normative strength because it fell in the two-standard deviations above the mean range of 115 to 129 which included the scores of 13.6 percent of same-age test-takers. Student also had two subtest scores of 80 related to working memory and attention, that were normative weaknesses because their scores fell within two-standard deviations below the mean, in the range of 70 to 84. Student's score of 80 in the area of attention and executive processing related to his ability to sustain, maintain, and shift attention when presented with multiple instructions was a normative weakness.

From the subtests scores relating to Student's narrow processing abilities, the X-BASS cross-battery software generated composite scores for six of Student's seven broad processing abilities. None of these broad ability scores showed a normative weakness at 84 or less, although one was borderline. No pair of high and low scores showed a relative weakness with a 16 points or greater difference between the scores, although, again, one pair of scores was borderline. Student scored 100 in crystallized

knowledge, 97 in short-term memory, 92 in long-term retrieval, 90 in auditory processing, 100 in visual processing, and, on the borderline, an 85 in processing speed. The X-BASS software did not generate a composite score for fluid reasoning because the subtest scores of 100 and 125 relating to the included narrow cognitive abilities of quantitative reasoning, and induction and general sequential reasoning, respectively, were too different.

Beales administered the Woodcock-Johnson Tests of Achievement, Standard and Extended Tests, 4th Edition, the Woodcock-Johnson Tests of Oral Language, 4th Edition, and the Tests of Written Language, 4th Edition, to assess Student's academic achievement, and from Student's results on subtests, calculated composite index scores for 23 broad areas of academic achievement according to the test producers' instructions.

None of Student's 23 composite index scores indicated Student had a normative weakness in any area of academic achievement. Just one subtest score out of 23, an 81 in understanding directions, showed a normative weakness. This weakness was consistent with Parent and teacher comments that Student had difficulty following directions.

Beales administered 13 standardized subtests from the Woodcock-Johnson Tests of Achievement, testing narrow skills necessary for reading, writing, math, and spelling. The subtest scores generated 17 composite index scores, each a standardized overall measure of a broad academic skill. For example, the broad academic skill of reading fluency, in which Student scored 98, included measures of Student's skills of accuracy, automaticity, and prosody. Prosody is the ability to read text accurately, with effortless word recognition, and appropriate rhythm, tone, pitch, pauses, and word stresses.

All of Student's subtests and index scores on the Woodcock-Johnson Tests of Achievement fell within normal limits, within one standard deviation of the mean score of 100, in the range from 85 to 114 characterized as within normal limits. Student's lowest subtest score was 86 in passage comprehension, and his high subtest score was 107 in writing samples, which involved writing responses to a variety of demands. Student's lowest index score was 90 in reading comprehension, with remaining index scores of 96 or higher. Student's highest index scores were 104's in both written expression and written language.

Beales administered three subtests from the Woodcock-Johnson Tests of Oral Language to assess Student's oral language skills. Student scored within normal limits in the subtests for picture vocabulary and oral comprehension, but showed a normative weakness in understanding directions. Student scored within normal limits on the index scores of oral language, broad oral language, and listening comprehension, although Student's score of 88 in listening comprehension was near the low end of the normal limits range.

Beales administered seven subtests from the Tests of Written Language to assess Student's written language skills. All of Student's subtest scores fell within normal limits, as did Student's index scores estimating Student's ability to write in traditional formats, write spontaneously-composed essays, and Student's overall writing ability.

To follow up on teacher reports that Student had difficulty answering questions that required him to think beyond the literal text he was reading, Teller administered the silent reading fluency subtest from the Feifer Assessment of Reading. This test required Student to silently read a passage and then answer a series of questions whose answers were either in the literal text or could be inferred from the text. Student read the text

quickly, but, as his teachers reported, he had trouble inferring answers not contained in the literal text. Nevertheless, Student's score of 89 in silent reading comprehension was within normal limits.

Teller included a short summary of her findings and analysis in the psychoeducational assessment report. Teller noted Parents had referred Student due to concerns with his learning progress in math and reading comprehension, and his attention. From her record review, Teller determined Student had participated in different forms of general education intervention support since elementary school, but concerns had persisted despite Student having responded well to the intervention support. Teller then summarized the test results from Student's psychological processing assessments conducted and analyzed using Kentfield's pattern of strengths and weaknesses model.

Student showed normative strength in inductive fluid reasoning. His skills in verbal reasoning and crystallized knowledge, short-term/working memory, nonverbal reasoning, long-term memory retrieval, visual/spatial thinking, and sensorimotor tasks were all within normal limits. Student had no normative weakness in any overall area of processing, but had slight relative weaknesses in auditory processing, processing speed, and executive functioning processing.

The summary did not list Student's academic achievement test results. These were included in a separate addendum report submitted by Beales at the same time.

The psychoeducational assessment's eligibility review for specific learning disability stated Student did not meet the eligibility criteria for a specific learning disability under the pattern of strengths and weaknesses model because Student did not demonstrate a normative weakness in any area of academic achievement, or a

normative and relative weakness in any area of processing or cognitive ability. The assessment stated the determination of eligibility and appropriate supports and services would be made by Student's IEP team, based on all collected data. Eligibility would be based on meeting all of the criteria for a specific learning disability, and a determination that Student's educational needs could not be met by a general education teacher with accommodations and modifications of the regular school program.

Teller recommended general education supports and strategies including teaching using multiple modalities, limiting the length and complexity of instructions, using visual references like checklists and graphic organizers, reminders to reference directions to complete tasks, verbalizing the thinking process to serve as a model, teacher questions to check understanding, encouragement to self-check schoolwork and homework for understanding, repeating, rephrasing and reinforcing information with examples, and extra time on assignments and tests.

Student argued that Kentfield did not appropriately conduct its psychoeducational assessment using the pattern of strengths and weaknesses methodology, because it failed to include an analysis of Student's history of general education interventions and relied solely on assessment scores. Student is correct that a district making an eligibility determination must ensure that information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior, is documented and carefully considered. (Ed. Code, § 56330; 34 C.F.R. § 300.306(c)(1).) However, it is the role of the IEP team to interpret evaluation data and carefully consider information from a variety of sources.



(Ed. Code, § 56330; 34 C.F.R. § 300.306(a)(1) & (c)(1).) Kentfield's psychoeducational assessment appropriately documented information from a variety of sources for consideration by Student's IEP team.

Student also argued Kentfield's assessment was conducted inappropriately because Teller did not conduct a third subtest to resolve the excessive difference between Student's fluid reasoning subtest scores of 100 and 125, to calculate a definitive fluid reasoning broad processing ability score. Student's expert James Bylund, Ph.D., was a credentialed school psychologist and licensed educational psychologist with 11 years' experience as a school psychologist, program specialist, and director of student support services. He had conducted hundreds of assessments for specific learning disabilities, was familiar with the academic achievement and cognitive processing assessment tools Teller used, and provided clear, knowledgeable and credible testimony on how to interpret their test results. Bylund testified Teller should have administered additional tests to resolve the discrepancy in the subtest scores and arrive at a composite score. He opined that additional testing would likely have led to a fluid reasoning broad processing ability score around 115, which would have required Kentfield to find Student eligible under either a severe discrepancy analysis, or a pattern of strengths and weaknesses analysis. Although this argument was not an issue for hearing, it was the subject of testimony and cross-examination, and so is addressed here. This argument fails because any failure to arrive at a fluid reasoning score would not have affected the determinations of Kentfield's assessment. First, even if Kentfield had calculated a reading fluency reasoning broad ability score of 115, it would not have been required to conduct a severe discrepancy analysis in addition to its pattern of strengths and weaknesses analysis in order to apply the high score. (Cal. Code Regs.,

tit. 5, § 3030, subd. (b)(10)(B) and (C); 20 U.S.C. § 1414(b)(6); Ed. Code, § 56337, subds. (b) and (c).) Second, although a 115 score in reading fluency would be sufficient to establish processing speed as a relative weakness in Student's broad processing abilities, Student's scores would still not demonstrate the normative weakness in processing or academic achievement required to find a specific learning disability under Kentfield's pattern of strengths and weaknesses model.

Third, Student argued Kentfield's psychoeducational assessment was conducted inappropriately because Teller administered only the silent reading fluency subtest of the Feifer Assessment of Reading that looks at an area of academic achievement, and failed to administer the orthographic processing subtest of the Feifer Assessment of Reading used to measure a student's broad processing ability to quickly recognize letter sequences and patterns and spell phonetically irregular words. Student argued that the Feifer orthographic processing subtest, when conducted by Student's experts, indicated Student's orthographic processing was a normative processing weakness scoring 80 or below. However, Student did not offer evidence that the single Feifer Assessment subtest was sufficient to arrive at a broad orthographic processing ability score under the producer instructions for the cross-battery model and X-BASS software used by Kentfield. Also, even if an orthographic processing score of 80 was used to establish a normative and relative processing weakness, Student's scores would still not demonstrate the required normative weakness in academic achievement.

Finally, Student argued the general education supports and strategies Teller recommended for Student were specialized academic instruction requiring special education, and therefore admissions of Student's eligibility for an IEP. Student specifically referenced teaching using multiple modalities, reminding Student to

follow directions, providing Student checklists and organizers, checking Student's understanding, and repeating and rephrasing instructions. The authority cited by Student does not support Student's proposition. In *L.J. v. Pittsburg Unified School District* (9th Cir. 2017) 850 F.3d 996, the student received numerous services not offered to general education students, including a one-on-one paraeducator, specially designed mental health services including assessments, individual therapy, and intensive home-based services, and a behavior therapist designing individualized behavior support plans. All of Teller's recommendations are of a type frequently offered to general education students, and delivered by a general education teacher.

Student failed to prove Kentfield failed to appropriately conduct its psychoeducational assessment of Student. Kentfield prevailed on this issue.

#### KENTFIELD'S DETERMINATION OF STUDENT'S ELIGIBILITY FOR SPECIAL EDUCATION VIOLATED IDEA PROCEDURES BY FAILING TO CAREFULLY CONSIDER STUDENT'S HISTORY OF GENERAL EDUCATION INTERVENTIONS

On January 15, 2020, Kentfield held an initial IEP team meeting to review Student's psychoeducational assessment and determine whether Student was eligible for special education. Parents, a school administrator, and Student's math, extended math, and science teachers attended.

A school district's determination of a student's eligibility for special education must be made by a group consisting of the parents, and a team of qualified professionals which must include the child's teacher and a school psychologist or

other person qualified to conduct individual diagnostic examinations. (34 C.F.R. § 300.308; Ed. Code, § 56341, subd. (c).) As in this case, the required group will generally constitute an IEP team.

The IEP team must review evaluation data to determine whether the student has a qualifying disability requiring special education and related services, the present levels of academic achievement and related developmental needs of the child, and the educational needs of the child. (34 C.F.R. § 300.305(a)(2).) In interpreting the evaluation data, the school district may not rely on any single measure or assessment. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e); Cal. Code Regs., tit. 5, § 3030, subd. (a).) Instead, it must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior, and ensure that information obtained from all of these sources is documented and carefully considered. (Ed. Code, § 56330; 34 C.F.R. § 300.306(c)(1); *M.M. v. Lafayette Sch. Dist.*, *supra*, 767 F.3d 842, 853.)

If the school district determines the student has a disability, it must also determine whether the student requires special education and related services to address the disability. To prevent districts from 'over-identifying' students as disabled, Congress mandated that states develop effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education. *Los Angeles Unified School District v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 819-820; (20 U.S.C. § 1400(c)(5)(f).) A student shall be referred for special education instruction and services only after the resources of the regular education program have been considered, and, where appropriate, utilized. ([Ed.

Code, § 56303].) If the school district determines that a student has a disability and needs special education and related services, it must develop an IEP for the student. (Ed. Code, § 56330; 34 C.F.R. § 300.306(c)(2).)

At the January 15, 2020 initial IEP team meeting, Parents stated their concern that Student was not able to display on tests skills he appeared to have learned and was able to apply on homework. Parents were also concerned that Student was inconsistent in his ability to manage the tracking of his responsibilities and maintain his level of engagement. Teller and Beales presented Student's psychoeducational assessment. In reaching its determination of Student's eligibility, the IEP team deferred to Teller's expertise in assessing Student's for specific learning disabilities. The meeting notes and hearing testimony reflect no questions from Parents or other IEP team members, or any discussion at the meeting regarding the assessment, other than a discussion of Student's executive functioning difficulties and their impact in the areas of self-awareness and acceptance of support. The general education teachers provided no input beyond their prior input that was embedded in the psychoeducational assessment.

The Kentfield IEP team members determined Student did not meet eligibility criteria for a specific learning disability. The language explaining the basis for the determination repeated, verbatim, the language from the psychoeducational assessment. Kentfield's IEP team members suggested continued use of general education interventions. They recommended Student remain enrolled in the extended math class and enroll in an academic workshop class to work on executive functioning skills. They recommended other supportive strategies of self-monitoring checklists to use during tests, and a behavior chart to encourage Student to check in with his teachers and apply feedback and support strategies provided by them.

Kentfield's almost-exclusive focus on the results of its pattern of strengths and weaknesses assessment calculations as the basis for determining Student's eligibility violated the IDEA's requirement that a school district assessing a student's eligibility may not rely on any single measure or assessment. Although Teller appropriately used a variety of assessment tools and strategies to gather relevant information about Student, including a review of school records, parent and teacher questionnaires, and classroom observation, virtually no use was made of the information collected. Teller documented the information in the psychoeducational assessment but the IEP team didn't appear to apply any of it to its analysis of Student's eligibility.

The information not considered by Student's IEP team provided substantial evidence that might support a determination that Student was eligible for special education based on a specific learning disability.

In particular, although Student was of average intelligence, eager to learn, hard-working, and had received numerous general education interventions and supports since second grade, he had never met State-approved grade-level standards in English language arts. In fifth grade, Student received daily extended reading support class for two-thirds of the school year, and extended math class in the last trimester, but his scores on the statewide Smarter Balanced Assessment declined from his fourth-grade performance, falling in the lowest range of "standard not met" in English language arts. This suggested general education interventions were ineffective at improving Student's academic performance.

Additionally, teacher responses to assessment questionnaires indicated ongoing teacher concerns regarding Student's learning difficulties in reading comprehension, understanding complex concepts, thinking abstractly, attention, and task completion. Student's English language arts teacher was concerned he was not benefitting from strategies and supports she provided, again suggesting that general education interventions were ineffective with Student.

While this evaluation data alone would not be a sufficient basis for finding a specific learning disability, careful consideration by the IEP team of the failure of repeated general education interventions to bring Student to grade-level standards, and ongoing teacher concerns, might have led the team to request testing of additional broad processing abilities, such as orthographic processing, beyond the seven standard broad processing abilities included in the pattern of strengths and weaknesses assessment. Alternatively, such consideration might have led the IEP team to assign more weight to Student's intervention history and statewide test results, and less on the mathematical application of the pattern of strengths and weaknesses methodology. This is especially true where scores just one point lower score in processing speed, and three points lower in listening comprehension, would have resulted in calculations of normative and relative weaknesses indicting that Student had a specific learning disability.

## STUDENT FAILED TO PROVE THE IEP TEAM'S PROCEDURAL VIOLATION DENIED STUDENT A FAPE

The Supreme Court has recognized the importance of adherence to the procedural requirements of the IDEA. (*Board of Ed. of Hendrick Hudson Central School Dist., Westchester City. v. Rowley*, 458 U.S. 176, at pp. 205-206) 102 S.Ct. 3034, 73

L.Ed.2d 690 (1982).] However, a procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in liability for denial of a FAPE only if the violation:

1. impeded the child's right to a FAPE;
2. significantly impeded the parent's opportunity to participate in the decision-making process; or
3. caused a deprivation of educational benefits.

(20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) (*Target Range*.) A failure to provide relevant evaluation data to parents and an IEP team considering eligibility can significantly impede the parents' opportunity to participate in the decision-making process if the failure deprives the parents of information they need to advocate effectively for their child. (*M.M. v. Lafayette School Dist., supra*, (9th Cir. 2014) 767 F.3d 842, 853-856.) This issue does not apply in this case, however, because the evaluation data on Student's educational history and teacher and parent concerns was either known to Parents, or included in Kentfield's psychoeducational assessment. The information was thus available for Parents and the other IEP team members to discuss when deciding whether Student had a specific learning disability and required special education.

A procedural violation, such as an IEP team's failure to carefully consider all evaluation data relevant to a determination of eligibility, cannot qualify an otherwise ineligible student for IDEA relief. (*R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 942.) A child ineligible for IDEA opportunities in the first instance cannot lose those opportunities merely because a procedural violation takes place. (*Ibid.*) Whether Kentfield denied Student a FAPE therefore depends on whether Kentfield



should have found Student eligible for special education under the category of specific learning disability, based on careful consideration of all the evaluation data available as of January 2020. (*J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801 [An IEP team's actions are not judged in hindsight, but evaluated in light of the information available at the time of the IEP.]) If yes, then Kentfield was required to develop an IEP for the student, and its failure to do so impeded Student's right to a FAPE and caused a deprivation of educational benefits. (Ed. Code, § 56330; 34 C.F.R. § 300.306(c)(2).)

An administrative law judge has the authority to determine whether a student is eligible for special education and related services under the IDEA. (*Hacienda La Puente Unified School Dist. v. Honig* (9th Cir. 1992) 976 F.2d 487, 492-493.) If a school district has failed to properly identify a student as eligible for special education, and therefore, failed to develop an appropriate IEP for the student, the district has denied the student a FAPE. (*Dept. of Ed., State of Hawaii v. Cari Rae S.*, (D. Hawaii 2001) 158 F.Supp.2d 1190, 1196.)

Kentfield is entitled to deference on this question. Courts should not substitute their own notions of sound educational policy for those of the school authorities which they review. (*Rowley, supra*, 458 U.S., at 206, 102 S.Ct. 3034; *Endrew F., supra*, 137 S.Ct. 988, 1001–1002.) In this case, classroom observations of Student indicated he was able to access his education in a general education environment with minimal general education supports. Student was earning average grades, with no grade lower than a C-minus, and was advancing from grade to grade.

The question is not whether Student's initial IEP team had discretion to find Student eligible for special education based on a specific learning disability. They

plainly did. Student nearly qualified mathematically as a child with that disability under Kentfield's pattern of strengths and weaknesses assessment analysis. He had a history of not meeting grade level standards on statewide testing despite general education interventions. Teachers and Parents expressed concerns regarding Student's learning difficulties with reading comprehension, understanding complex concepts, thinking abstractly, attention, and task completion. These factors could have supported a finding of eligibility.

The question is whether Student's initial IEP team was required to exercise its discretion to find Student eligible, based on the above information available to it in January 2020. The legal authorities offered by Student do not hold or suggest that a school district is required to decide in favor of eligibility in a close case. Because Kentfield's determination that Student did not have a specific learning disability is entitled to deference, and because the law favors using general education interventions before referring a child for special education, Student has failed to prove that Kentfield denied him a FAPE by not finding him eligible for special education in January 2020.

**ISSUE 1(B): DID KENTFIELD DENY STUDENT A FAPE FROM JANUARY 14, 2020, UNTIL JANUARY 14, 2022, BY FAILING TO DEEM STUDENT ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES UNDER THE CATEGORY OF SPECIFIC LEARNING DISABILITY?**

In addition to its contention Kentfield should have deemed Student eligible for special education based on its January 2020 psychoeducational assessment, addressed above, Student contends Kentfield denied Student a FAPE by refusing to offer him eligibility for special education in September 2021, based on Parents' privately-obtained psychoeducational/neuropsychological evaluation that determined Student had a

specific learning disability. Kentfield contends it could not legally rely on Student's privately-obtained assessment, because it was conducted by clinical psychologist who was not qualified to conduct a psychoeducational assessment because he was not a credentialed school psychologist. Kentfield contends it acted appropriately by considering the private psychoeducational/neuropsychological assessment and offering Parents an assessment plan for a district psychoeducational assessment to revisit Student's eligibility.

## STUDENT'S PRIVATELY-OBTAINED PSYCHOEDUCATIONAL AND NEUROPSYCHOLOGICAL ASSESSMENT

Following Student's initial IEP team meeting in January 2020, Student received grades of C or C-plus in all of his academic subjects in his second trimester of sixth grade. For the third trimester of sixth grade, Student participated in remote learning due to the COVID-19 pandemic. Kentfield suspended the use of letter grades and graded all students on a pass-fail basis. Student received all passing grades. Statewide Smarter Balanced Assessments at the end of the 2019 to 2020 school year were also suspended. In his English language arts and history classes, Student had difficulty managing the workload during remote learning and needed a weekly review emailed. He had difficulty developing strategies to recognize when he misunderstood ideas when reading or watching instructional videos, or when he needed to reread content to understand it. In the middle of the school year, Student's English language arts teacher tested Student and found him to be reading at a late fourth grade or early fifth grade level, with a lexile level of 773. This level was nearly 200 points lower than his lexile score of 949 in April 2020 when he met the criteria to exit from his extended reading intervention class.

Parents continued to have concerns about Student's understanding of math concepts, and organizational skills. In summer 2020, they hired a math tutor and an executive functioning coaching service for Student.

Student resumed in-person learning for seventh grade in August 2020, with all new teachers except in one elective course. Student started the year enrolled in academic workshop, a course offered to general education students with executive functioning challenges who required help to organize, manage, and complete assignments. In September 2020, Student's English language arts teacher requested he be switched from his academic workshop class to her extended reading support class so that she could monitor and collect data on his reading progress. She found Student to be a reluctant reader. He was like "a deer in the headlights" when called on, his answers to her questions were sometimes "a bit off." She noted Parents already had an executive functioning tutor for Student, and believed Student would benefit more from direct reading instruction than an additional executive functioning support.

Student received first trimester grades from C-plus to B in his core subjects, which improved in his second trimester to grades from B-minus to A-minus, and in his third trimester in the spring of 2021, to grades from B-minus to B-plus. Student's teachers noted only minor concerns on his report cards, that his volume of reading was not meeting grade level expectations, and that he needed to read directions more carefully. Although statewide grade-level Smarter Balanced Assessments resumed in 2021, neither party offered evidence on Student's scores on these tests, if any existed. Student's spring 2019 Smarter Balanced Assessment results were the most recent state standardized tests in evidence, and his early 2020 reading lexile score in sixth grade was the last such lexile score offered in evidence.

In summer 2021, Parents funded a psychoeducational/neurological assessment conducted by Mitchell Perlman, Ph. D. Perlman earned his doctorate in clinical psychology in 1986, and a postdoctoral masters in clinical psychopharmacology in 2010. Perlman was trained in administering and analyzing tests of processing abilities and academic achievement, and frequently assessed children for possible learning disabilities. Perlman had conducted IEP evaluations for school districts as well as numerous independent educational evaluations. He interned in school psychology in 1984 to 1985, but was not a licensed school psychologist.

Perlman administered standardized tests to Student in the areas of cognitive/neurological functioning, executive functioning, and academic achievement. His assessment results were similar to those obtained by Kentfield in January 2020, with three principal exceptions. First, Perlman assessed Student for a deficit in basic psychological process of orthographic processing, which had not been directly assessed by Kentfield. Orthographic processing is the ability to understand and recognize orthography, which is the manner in which letters and punctuation marks are used to form words. Components include letter patterns, spelling, punctuation, abbreviations, and special symbols. Perlman administered six tests to Student addressing orthography, and concluded Student had a processing deficit in orthography. Perlman also calculated Student's full scale IQ at 116, which was 12 points higher than Kentfield's result. Finally, based on his assessment of Student's full scale IQ, Perlman concluded Student had a specific learning disability based on severe discrepancies between his IQ and his academic achievement in the areas of reading comprehension and spelling. Perlman attributed Student's low achievement in those areas compared to others to Student's orthographic processing deficit.

Perlman recommended Student be made eligible for special education based on his specific learning disability, and be given goals in the areas of reading comprehension, spelling and orthography, math concepts and application, and organization. Perlman recommended related services including research-based program targeting orthographic processing deficits and research-based literacy intervention program to improve Student's listening comprehension, oral expression, reading comprehension, and written expression. He recommended that a resource specialist monitor Student's math progress and provide specialized academic instruction if needed. He recommended Student be provided a viable method of organizing his coursework, and accommodations of being provided text in a digital format, and a text reader capable of highlighting text while it is being read, to provide Student a corrective experience, by increasing the number of neurologic connections/associations between the words' orthography and their pronunciation. He also recommended in-class accommodations of frequent teacher check-ins on Student's understanding of tasks and quality of work. Perlman also recommended further assessments in the areas of assistive technology, pragmatic social and language skills, vision therapy to check on eye-tracking skills, and neurology to assess whether Student sometimes losing attention in conversations might be due to silent seizures.

On August 10, 2021, Student's attorney sent Kentfield a copy of Perlman's report and requested Kentfield schedule an IEP team meeting to review it.

Under California law, if a parent shares an independent educational evaluation obtained at private expense, the school district must consider the results of the evaluation, and the results may be presented at evidence at a due process hearing. (Ed. Code § 56329, subd. (c).) These provisions impose slightly fewer potential restrictions on the ability of parents and students to select assessors than the federal regulations

implementing the IDEA, which provide that an independent educational evaluation obtained at private expense must be considered by the school district if it meets agency criteria, but may be presented as evidence at a due process hearing without regard to whether it meets agency criteria. (34 C.F.R. § 300.502(c)(1) & (2).)

The term “consider” is not defined in either federal or state law. The IDEA and Education Code do not suggest that a district must adopt the findings or recommendations of an independent educational evaluation. (Ed. Code § 56329, subd. (c); 34 C.F.R. § 300.502(c)(1) & (2).) The first, second circuit and eighth circuits have held that a substantive discussion of the independent educational evaluation is not required, and a district sufficiently considers an independent educational evaluation when a district employee reviews the evaluation and responds to it in correspondence (*Evans v. Dist. No. 17* (8th Cir. 1988) 841 F.2d 824, 830), or comments on it or reviews it at an IEP team meeting. (*Mr. P v. West Hartford Board of Ed.* (2d Cir. 2018) 885 F.3d 735, 753, citing *G.D. v. Westmoreland School Dist.* (1st Cir. 1991), 930 F.2d. 942, 947.)

In this case, Kentfield convened an IEP team meeting to discuss Perlman's assessment near the start of Student's eighth grade school year, on September 20, 2021. Attending the meeting were Parents and Student's attorney, Kentfield's special education director, the school principal, school psychologist Teller, a special education resource specialist, and Student's English language arts and math teachers.

Student's teachers reported on his current performance. Student's English language arts teacher did not believe he was struggling in her class. She had been his extended reading teacher and language arts teacher last year, and, although Student needed to work on his ability to infer information from the literal text, he comprehended very well what he was reading and could discuss in detail the plotline. He had a good idea of

setting, plot, character and character development. He could think deeply about the motivations of writers. In math class, Student had made a few mistakes on the first tests of the year that were common among his classmates. Student had been one of the first to turn in his test and had not finished some problems and had not carefully read the test questions.

Perlman presented his assessment, which the Kentfield IEP team members had already reviewed. Student's teachers responded to questions from Student's attorney, and Teller, Kentfield's attorney, and Student's English language arts teacher asked about how he had conducted his assessment, and how Student's perceived orthographic would affect his academic performance. Kentfield proposed that Kentfield conduct a comprehensive psychoeducational assessment, then reconvene the IEP team to review the two assessments and consider Student's eligibility for special education. This would have occurred in November 2021, based on the 60 days allowed by statute for a district to complete an assessment and hold an IEP team meeting to review it. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043.) To follow up on Perlman's assessment results, Kentfield prepared and provided Parents an assessment plan for assessments in the areas of

- academic achievement,
- cognitive development,
- language and speech development,
- social emotional and behavioral development,
- health, and
- assistive technology.



After some discussion, Parents rejected Kentfield's proposal to conduct further assessments, and demanded that Kentfield make Student eligible for special education based on Perlman's assessment.

#### KENTFIELD PROPERLY CONSIDERED STUDENT'S PSYCHOEDUCATIONAL AND NEUROPSYCHOLOGICAL ASSESSMENT

Kentfield satisfied its obligation under the Education Code to consider Perlman's independent educational evaluation. Multiple Kentfield IEP team members read Perlman's written evaluation, participated in a review of the evaluation with Parents and Perlman at an IEP team meeting, and asked Perlman questions about it. Kentfield then acted on Perlman's evaluation by preparing an assessment plan to follow up on the Perlman's evaluation data. This was more than was required under the law, and Kentfield's review of Perlman's evaluation did not procedurally violate its obligation under the Education Code to consider the evaluation.

#### PERLMAN'S ASSESSMENT DID NOT PROVE STUDENT HAD A SPECIFIC LEARNING DISABILITY, OR REQUIRED SPECIAL EDUCATION

A district's procedurally adequate consideration of an independent educational evaluation of a student is not sufficient to establish that the district has not denied the student a FAPE. In the case of an initial evaluation of a student's potential eligibility for special education, a district may substantively deny the student a FAPE if it fails to make the Student eligible despite evaluation data in an independent educational evaluation that persuasively shows the existence of a disability and the need for special education and related services. Deference to a school district determination is based on the

application of expertise and the exercise of judgment by school authorities. (*Endrew F., supra*, 137 S.Ct. 988, 1001–1002.) If a district rejects the findings of an independent evaluator, it must be able to offer a cogent and responsive explanation for its decision. (*Ibid.*)

Here, Perlman's determination that Student was eligible for special education was based on two assessment findings challenged by Kentfield. First, Kentfield challenged Perlman's finding that Student had a deficit in orthographic processing because it was based on a single subtest score of 80 in the letter choice subtest of the Test of Orthographic Competence. In three other subtests, word choice, word scramble, and sight spelling, Student had scores of 90, 95, and 100. Teller testified that, as with other processing ability tests used in assessing Student, the test producer specified that finding of a deficit should be based on composite index scores, not subtest scores. Student did not produce evidence from the test producer to prove that Perlman's conclusion that Student had an orthographic processing deficit could be validly drawn from the single subtest.

Second, Kentfield challenged Perlman's calculation of Student's full scale IQ as 116, which was 12 points higher than the 104 score shown in Kentfield's assessment. These two scores are nearly one standard deviation apart. Student did not present evidence that Student's full scale IQ score on Perlman's assessment was more reliable than his score on Teller's. Based on the testimony of Student's expert Bylund regarding Kentfield's obligation to resolve discrepancies in Student's fluid reasoning subtest scores by administering a third test, the appropriate way to resolve the discrepancy would have been to administer a third test, which is what Kentfield would have done if Parents had approved Kentfield's assessment plan.

Perlman's disputed evaluation data was not bolstered by evidence of poor grades, significant teacher concerns, or standardized testing of Student after fifth grade showing Student was not meeting state grade-level standards. Student failed to prove Student had a specific learning disability, or required special education and related services, based on Perlman's assessment of Student and other data available to Kentfield as of September 2021. Kentfield could have agreed to make Student eligible for special education under the category of specific learning disability based on all of the information available to it from Perlman's assessment, Teller's assessment, teacher comments and observations, and Student's educational history and response to general education interventions, but it was not required to do so. Kentfield acted reasonably when it proposed district assessments followed by an IEP team meeting to review Perlman's and district's assessments.

Kentfield prevailed on this issue.

**ISSUE 1(C): DID KENTFIELD DENY STUDENT A FAPE FROM JANUARY 14, 2020 UNTIL JANUARY 14, 2022, BY FAILING TO OFFER GOALS, SERVICES, AND ACCOMMODATIONS?**

Based on the prior conclusions in Issues 1(a) and 1(b) that Kentfield was not required to make Student eligible for special education, Kentfield had no obligation to offer Student special education goals, services, or accommodations. Kentfield prevailed on this issue.

## CONCLUSIONS AND PREVAILING PARTY

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

### ISSUE 1(A):

Kentfield did not deny Student a free appropriate public education from January 14, 2020, through the 2021-2022 school year, until January 14, 2022, by failing to appropriately assess Student in its January 2020 assessment by not including years of informal intervention data that had not resulted in adequate progress.

Kentfield prevailed on Issue 1, subsection a.

### ISSUE 1(B):

Kentfield did not deny Student a free appropriate public education from January 14, 2020, through the 2021-2022 school year, until January 14, 2022, by failing to deem Student eligible for special education and related services under the category of specific learning disability.

Kentfield prevailed on Issue 1, subsection b.

### ISSUE 1(C):

Kentfield did not deny Student a free appropriate public education from January 14, 2020, through the 2021-2022 school year, until January 14, 2022, by failing to offer Student goals, services, and accommodations.

Kentfield prevailed on Issue 1, subsection c.

### ORDER

1. All Student's requests for relief are denied.

### RIGHT TO APPEAL THIS DECISION

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

/s/

Robert G. Martin

Administrative Law Judge

Office of Administrative Hearings