

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENTS ON BEHALF OF STUDENT,

v.

PIEDMONT UNIFIED SCHOOL DISTRICT.

CASE NO. 2023010391

DECISION

JULY 11, 2023

On January 17, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student naming Piedmont Unified School District. On March 23, 2023, OAH granted Student's motion to file an amended complaint. Administrative Law Judge Theresa Ravandi heard this matter by videoconference on May 16, 17, 18, and 23, 2023.

Attorney Kristin Springer represented Parents and Student. Attorney Shira Mowlem assisted. Both Parents attended the first three hearing days and Mother was present the last day on Student's behalf. Attorney David Mishook represented Piedmont Unified School District. Attorney Lilianna Romero assisted. Special Education Director Douglas Harter attended all hearing days on Piedmont's behalf.

At the parties' request the matter was continued to June 26, 2023, for written closing briefs. The record closed, and the matter was submitted on June 26, 2023.

ISSUES

1. Did Piedmont deny Student a free appropriate public education, called FAPE, during the 2020-2021 school year beginning January 16, 2021, by:
 - a. failing to assess Student in all areas of suspected disability, namely, a specific learning disability; and
 - b. failing to find Student eligible for special education under the category of specific learning disability?
2. Did Piedmont deny Student a FAPE during the 2021-2022 school year by:
 - a. failing to assess Student in all areas of suspected disability, namely, a specific learning disability;
 - b. failing to provide Parent an assessment plan after Student's teacher identified a need for assessment on October 7, 2021; and
 - c. failing to find Student eligible for special education under the category of specific learning disability?
3. Did Piedmont deny Student a FAPE during the 2022-2023 school year until March 23, 2023, by:
 - a. failing to conduct a speech and language assessment of Student as part of the September 2022 assessments;
 - b. failing to timely complete speech and language and occupational therapy assessments which Parents consented to on September 15, 2022;

- c. failing to offer appropriate reading, speech, writing, and social-emotional goals in the September 8, 2022 individualized education program, called IEP;
- d. failing to offer appropriate services to address Student's reading, speech, writing, and social-emotional needs in the September 8, 2022 IEP;
- e. predetermining placement at the November 7, 2022 IEP team meeting; and
- f. failing to consider an independent speech assessment report provided by Parents on February 18, 2023, or convene an IEP team meeting to discuss it?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); and see 20 U.S.C. § 1415(i)(2)(C)(iii).)

Student had the burden of proving each issue. 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 10 and a half years old and in fourth grade at the time of hearing. He attended Charles Armstrong School, a private school in Belmont, California since September 30, 2022. Charles Armstrong was not certified by the California Department of Education as a nonpublic school. Student resided within Piedmont's geographic boundaries at all relevant times.

Piedmont originally found Student eligible for special education under the category of speech or language impairment in January 2018 due to articulation deficits. Piedmont determined Student no longer required speech services and, with Parent consent, Student exited special education in March 2021. In September 2022, Piedmont found Student eligible for special education under the category of specific learning disability.

ISSUES 1a, 1b, 2a, AND 2c: DID PIEDMONT DENY STUDENT A FAPE BEGINNING JANUARY 16, 2021, THROUGH THE 2021-2022 SCHOOL YEAR BY FAILING TO ASSESS HIM FOR A SPECIFIC LEARNING DISABILITY AND FIND HIM ELIGIBLE FOR SPECIAL EDUCATION UNDER THIS CATEGORY?

Student contends Piedmont should have suspected he had dyslexia and had a duty to assess him for a specific learning disability from January 16, 2021, through the 2021-2022 school year. Student alleges his speech and language issues and continued phonics, reading, and writing struggles, despite intervention, placed Piedmont on notice of a need to assess. Student asserts Piedmont provided him specialized instruction which showed he required and was eligible for special education. Student claims Piedmont denied him a FAPE by failing to assess and find him eligible for special education under the category of specific learning disability.

Piedmont argues it provided Student general education Response to Intervention reading and phonics support during this time period. Piedmont contends Student was making appropriate progress with these general education interventions and meeting grade-level standards. It alleges it had no reason to suspect Student might have a specific learning disability for which he required special education prior to February 2022. Piedmont contends it properly discharged its child find duty when it issued a February 18, 2022 assessment plan. Piedmont asserts Parent's delayed consent prevented it from assessing Student during the 2021-2022 school year, and Student failed to prove eligibility.

THE TIME PERIOD BEFORE STUDENT'S EXIT FROM SPECIAL EDUCATION

PIEDMONT WAS NOT REQUIRED TO ASSESS STUDENT FOR A SPECIFIC LEARNING DISABILITY

Student's assessment and eligibility claims span two separate time periods governed by distinct legal requirements based on Student's right to a FAPE. From January 16, 2021, through March 18, 2021, Student was a special education student, entitled to the rights and protections the IDEA and state law afforded eligible students. During this time of eligibility, Piedmont generally had a duty to reassess Student upon parent or teacher request or if it determined Student required a reassessment.

In California, the term "assessment" has the same meaning as the term "evaluation" in the IDEA. (Ed. Code, § 56302.5.) These terms are used interchangeably in this Decision. After a student has been deemed eligible for special education, a reassessment shall be conducted if the district determines that the educational or related services needs of the student warrant a reassessment, or if the parent or teacher requests reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) All referrals for special education and related services shall initiate the assessment process and shall be documented. (Cal. Code Regs., tit. 5, § 3021, subd. (a).) The district must provide the parent a proposed assessment plan along with notice of the parent's rights within 15 days of the referral for assessment, not counting days between the student's regular school sessions. (Ed. Code, § 56321, subd. (a).)

During the 2020-2021 school year, Student had what Piedmont witnesses referred to as a "speech only" IEP. There is no such legal construct. Rather, Student's IEP team had determined he was eligible for special education under the category of

speech or language impairment and offered goals and services addressing his speech needs. Student received group speech services targeting his articulation deficits. That Student received only speech and language services did not diminish his right to a FAPE.

Student's January 5, 2021 annual IEP noted that Student's speech errors interfered with his spelling. Student's academic present levels identified Student's speech as impacting his writing and reading and that he had difficulty processing certain letter sounds and consonant blends. Parent also reported to the team that they noticed Student's speech deficits impacted his reading and writing and that he struggled with letter reversals. Parent believed Student was not making sufficient reading and writing progress given the effort he put in and more than a year of general education reading intervention.

At the January 5, 2021 IEP team meeting, Parent expressed concern about Student's progress and wondered if there were other possible assessments that should be considered, given Student's speech needs and continued reading and writing challenges despite interventions. It was unclear when Piedmont last assessed Student. The January 2021 IEP document indicated Student's last evaluation was in January 2018, but it also stated his next evaluation was due in February 2022. Student's IEP creates ambiguity regarding whether he was entitled to a triennial evaluation. In this case, however, Student did not place at issue the timeliness of Student's triennial assessment.

Accordingly, as pled, Student's right to an assessment for a specific learning disability would be based on district's determination of the need to assess or parent or teacher request. Although a district must honor a parent's request for a reevaluation if it has not evaluated the student in the previous 12 months, this obligation hinges on the parent making such a request. (See *M.S. v. Lake Elsinore Unified School Dist.* (9th Cir.

2017) 678 F. Appx 543, 544 (unpublished)(*M.S.*.) Parent's general inquiry about further assessments at the January 2021 IEP team meeting did not constitute a parent request for reevaluation. (*Ibid.*)

Piedmont agreed to share Parent's academic concerns with the school site response to intervention team and have that team determine if Student was making good progress or if further assessment was warranted. Piedmont acknowledged that Student's speech might be impacting his academics and determined a speech reevaluation was warranted. Piedmont asked Student's IEP speech provider, credential speech language pathologist Jazmine Tylor, to conduct a language battery assessment to see if Student's speech or language played a role in his reading and writing issues.

As such, even if Parent's question about further assessment constituted a Parent request for reevaluation, Piedmont did reassess Student. Piedmont conducted a speech and language assessment to determine if any deficits in this area were impacting Student's academic functioning. Piedmont did not determine that Student's educational or related services needs warranted any additional assessment other than the speech and language assessment. Nor did Student's teacher request any assessment.

Therefore, the threshold question regarding Piedmont's failure to assess Student for a specific learning disability during this two-month time period is whether Parent requested such an assessment. Student had the burden of proving that Parent requested a more specific assessment of his needs relative to a specific learning disability. Student did not meet this burden.

The purpose of an assessment plan is to provide notice to a parent of what assessments a district is proposing to conduct and by whom. (20 U.S.C § 1414(b)(1); 34 C.F.R. § 300.304(a); Ed. Code, § 56321, subd. (a).) Once parents receive this notice,

they can consent to or disagree with the proposed assessments and propose alternate assessments. Student did not introduce into evidence any assessment plan governing Tylor's March 2021 speech and language assessment. Nor did Student elicit testimony about any proposed assessment plan. Upon receipt of a proposed assessment plan, the burden would shift to Parent to voice any disagreement if the plan was not responsive to Parent's concerns about Student's academic functioning.

Student did not contend Piedmont failed to assess him pursuant to a signed assessment plan, but rather alleged a general failure to assess for a specific learning disability. Student did not prove Parent requested an assessment to determine if Student had a specific learning disability. Nor did Student establish that a teacher requested such an assessment or that Piedmont determined a specific learning disability assessment was merited. As such, Piedmont was not required to assess Student for a specific learning disability.

Tylor completed Student's speech and language assessment and presented it at an amendment IEP team meeting on March 18, 2021. The assessment showed Student no longer qualified as having a speech or language impairment and did not require articulation or any language services. Tylor acknowledged at hearing that she could not independently determine Student's academic needs. A district must ensure that an evaluation is sufficiently comprehensive to identify all of the student's needs for special education and related services, whether or not commonly linked to the identified disability category. (20 U.S.C. §1414(b)(3); 34 C.F.R. § 300.304(b)(1)(ii) & (c)(6); see Ed. Code, § 56320, subd. (f) [shall assess in all areas related to the suspected disability].) However, the legal sufficiency of Tylor's speech assessment and her qualifications were not at issue in this hearing. Another IEP team member, Student's second grade teacher, Nancy Roscelli, acknowledged Student's spelling and writing weaknesses but informed

the IEP team he had made good reading progress. Piedmont recommended that Student be exited from special education at the March 18, 2021 amendment IEP team meeting. Parent provided written consent to exit Student that same evening.

Piedmont determined that a speech and language reevaluation of Student was warranted. Piedmont did not determine a need for any other assessment and Student's teacher did not request any other assessment. Further, Student did not allege a failure to conduct his triennial assessment. As such, any duty to assess Student in an area other than speech and language hinged on Parent's request. (*M.S., supra*, 678 F. Appx 543, 544.)

Student did not prove that Parent request a reevaluation. Even if Parent's January 5, 2021 IEP team meeting inquiry, whether further assessments could determine if Student's speech continued to impact his academic functioning, constituted a reassessment request, Parent testified she did not request any specific evaluation.

In response to Parent's general inquiry, Piedmont recommended an evaluation to see if Student's speech was impacting his reading and writing. Tylor completed this assessment. Parents received a copy of the evaluation and notice of their procedural safeguards prior to the March 2018 IEP team meeting. Student's IEP team, including Parent, met to review the results. There was no procedural violation.

A school district is required to evaluate the educational needs of a child with a disability before determining the child is no longer eligible for special education. (20 U.S.C. § 1414(c)(5)(a); 34 C.F.R § 300.305(e)(1); Ed. Code, § 56381, subd. (h).) Piedmont did not assess Student's academic needs, or any attention deficits noted by Tylor.

However, Student did not allege his exit from special education was not valid or the requirements to exit a student were not met. Student did not identify as an issue for hearing that Piedmont failed to appropriately assess him prior to finding he no longer qualified for special education. Student did not challenge any procedures related to his exit from special education nor assert any substantive violations in this regard.

The propriety of Student's exit was not at issue. Parent's consent to exit Student from special education had legal effect and changed Student's status to a general education student as analyzed next.

Student failed to meet his burden of proving Piedmont was required to assess him for a specific learning disability beginning January 16, 2021, through the time of his exit from special education on March 18, 2021.

EVEN IF PEIDMONT WAS REQUIRED TO ASSESS STUDENT FOR A SPECIFIC LEARNING DISABILITY, STUDENT DID NOT PROVE SUBSTANTIVE HARM

A district's failure to conduct appropriate assessments or to assess in all areas of suspected disability constitutes a procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032-1033 (*Park*); *Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1118, cert. den. (Apr. 17, 2017, No. 16-672) 137 S.Ct. 1578 [2017 WL 1366731] (*Timothy O.*). While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. (*W.G. v. Board of Trustees of*

Target Range School Dist. No. 23 (9th Cir. 1992) 960 F.2d 1479, 1484, superseded on other grounds by statute (*Target Range*.) A procedural error causes a denial of a FAPE only if the violation:

- impeded the student's right to a FAPE;
- significantly impeded the parent's opportunity to participate in the decision making process; or
- caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subds. (f)(2) & (j); *Target Range, supra*, 960 F.2d 1479, 1484; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.)

Student contended, but failed to prove, Piedmont's failure to assess him for a specific learning disability impeded his right to FAPE and denied him educational benefit because it failed to identify and address his academic needs. Parents arranged a private assessment of Student which was completed in May 2022. This assessment identified reading and writing needs. Piedmont's September 2022 assessment of Student also identified writing needs in the area of spelling. However, these after-acquired assessments did not prove Student was denied educational benefit more than a year prior from January through March 2021.

Student failed to prove he was denied educational benefit or otherwise suffered substantive harm during this two-month period. After the March 2020 COVID-19 school closures, Student remained in distance learning the remainder of first grade and all of second grade, the 2020-2021 school year. Distance learning was challenging, but Student made academic progress and benefited from general education interventions.

A student shall be referred for special education instruction and services only after the resources of the regular education program have been considered and utilized if appropriate. (Ed. Code, § 56303.)

Credentialed reading intervention specialist Giena Vogel provided Student Tier 2 phonics and reading intervention in second grade, including from January through March 2021. Tier 2 services were part of Piedmont's Response to Intervention program, a formal academic intervention program available to all general education students as part of its multi-tiered systems of support. Tier 2 intervention was remedial instruction for students who were not showing proficiency with specific skills. These services targeted Student's areas of weakness in phonics and reading. Piedmont's school-based response to intervention team met monthly to track and review Student's progress, just as it did for each participating student.

Vogel was trained in Orton-Gillingham, a research-based, sequential reading program, and other structured literacy approaches. Vogel provided Student small group Orton-Gillingham instruction which targeted phonics skills. Student contended, but did not prove, these services were special education services tailored to Student's unique situation. Nor did Student prove he required specialized academic instruction in reading or spelling to receive educational benefit and be involved in and make progress in the general education curriculum during this two-month period.

Vogel was an elementary school teacher for nearly 30 years and one of Piedmont's reading specialists for the past five years. Student made good progress in reading intervention. Piedmont issued report cards based on the California Common Core curriculum standards. The report cards reflected a student's progress on state standards that teachers were required to teach for each grade level. Each trimester,

the teacher awarded a mark of “1” if there was a concern; a “2” for progress toward the standard; and a “3” for meeting or exceeding standards. Piedmont witnesses established that Student’s marks accurately reflected his progress on grade-level standards. By the end of the second trimester in March 2021, Student was reading at grade level, having met or exceeded all second-grade reading standards.

Because of his progress and reading proficiency, Student completed the reading intervention program in March 2021. There was no evidence Student required IEP services or supports in the area of reading.

Similarly, Student did not prove he required specially designed instruction in the area of spelling to receive educational benefit. Student had been in distance learning for almost one year. The evidence showed many students struggled to make grade-level writing standards during distance learning given the reduced instructional time and its remote delivery. Even so, Student met or exceed second trimester paragraph writing standards, and made progress on spelling and editing standards. Distance learning was also challenging for teachers. Piedmont witnesses established it was particularly difficult to teach and monitor spelling and writing remotely, and many second and third graders tested below spelling benchmarks upon return to in-person learning. Student was receiving Tier 2 phonics support and making expected progress.

Student did not establish Piedmont’s failure to assess for a specific learning disability impeded his right to FAPE or denied him educational benefit.

STUDENT DID NOT PROVE THAT FAILING TO ASSESS HIM FOR A SPECIFIC
LEARNING DISABILITY SIGNIFICANTLY IMPEDED PARENT PARTICIPATION

Student contended, but did not prove, Piedmont's failure to assess Student for a specific learning disability denied Parent meaningful participation in the decision-making process. Generally, the failure to obtain critical assessment information about a student "render[s] the accomplishment of the IDEA's goals – and the achievement of a FAPE – impossible." (*N.B. v. Hellgate Elementary School Dist.* 541 F.3d 1202, 1210 quoting *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 894 (*Amanda J.*); *Timothy O., supra*, 822 F.3d 1105, 1119 [lack of assessment data deprived student of critical educational opportunities and substantially impaired parent's full participation in the IEP process].) The facts in the current case are significantly different from the facts underlying these seminal failure-to-assess cases. As such, even if Piedmont had been required to assess Student for a specific learning disability from January to March 2021, its failure to do so did not significantly impeded Parent participation.

Piedmont provided Parents a copy of Tylor's speech assessment report and a copy of their procedural rights prior to the March 18, 2021 IEP team meeting. Parent participated in the IEP team meeting. Piedmont reviewed its speech assessment report with Parent and recommended that Student be exited from special education. Parent did not challenge the assessment recommendation or request further reassessment. Parent did not voice any concern that Piedmont's assessment was not responsive to Parent's concerns.

On the contrary, Parent agreed Student had made progress and was doing well and consented to Student's exit from special education. Parent's action had legal effect: Student became a general education student, no longer entitled to a FAPE.

At the January 5, 2021 IEP team meeting, Parent asked about further assessment given Student's speech, its impact on his academics, and his continued academic struggles despite general education intervention. Piedmont agreed a speech and language reassessment was warranted to determine if Student's speech was impacting his academics. Piedmont assessed Student's speech and language needs, and determined he no longer qualified as having a speech or language impairment and no longer had speech or language needs. Student's IEP team, including Parent, met and reviewed the assessment. Piedmont recommended that Student be exited from special education. Parent consented. On these facts, Student did not prove Parent's participatory rights were significantly impeded.

Student did not prove Piedmont's failure to assess for a specific learning disability from January 16, 2021, until March 8, 2021 denied him a FAPE.

THE TIME PERIOD AFTER STUDENT'S EXIT FROM SPECIAL EDUCATION

STUDENT DID NOT PROVE ELIGIBILITY

Student's status changed beginning March 19, 2021, through the 2021-2022 school year. Student became a general education student the evening of March 18, 2021, once Parent consented to the amendment IEP exiting him from special education. To prove Piedmont denied him a FAPE during this time period, Student needed to establish he was eligible for special education and entitled to a FAPE. (*R.B. v. Napa Valley Unified Sch. Dist.*, (9th Cir. 2007) 496 F.3d 932, 942 (*R.B.*).

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.) Not every student with a disability

qualifies for special education. California Code of Regulations, title 5, section 3030, defines the elements necessary to establish eligibility for special education pursuant to a specific learning disability. A student may be eligible for special education in the category of specific learning disability if the student has:

“... a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may have manifested itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. 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); see 20 U.S.C. §1401(30); Ed. Code, § 56337, subd. (a).)

A California school district must use at least one of three methods identified in Title 5 of the California Code of Regulations, section 3030, subdivision (b)(10) as a component of its evaluation of a student for a specific learning disability. However, a district may not rely on any of these 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).) One method is to evaluate whether a student has 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 group to be relevant to the identification of a specific learning disability.” (Cal. Code Regs., tit. 5, § 3030 (b)(10)(C)(2)(ii).) Piedmont used the pattern of strengths and weaknesses method in determining Student’s eligibility.

Alternatively, a district may consider whether a student has a severe discrepancy between intellectual ability and achievement in

- oral expression,
- listening comprehension,
- written expression,
- basic reading skill,
- reading comprehension,
- mathematical calculation, or
- mathematical reasoning. (Cal. Code Regs., tit. 5, § 3030 (b)(10)(B); see 20 U.S.C. § 1414(b)(6)(A).

Student’s private assessor used the severe discrepancy model in reaching his diagnoses. A district may also establish eligibility if the student

- does not achieve adequately to meet grade level standards in oral expression; listening comprehension; written expression; reading; and mathematics; and
- fails to make sufficient progress when provided scientific, research-based intervention. (Cal. Code Regs., tit. 5, § 3030 (b)(10)(C)(1) & (2)(i); see 20 U.S.C. § 1414(b)(6)(B).)

While each disability category has its own criteria for determining eligibility, one common eligibility requirement is a need for special education. A child with a disability includes a child that qualifies under the special education category of specific learning disability and, 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); see Cal. Code Regs., tit. 5, § 3030, subd. (a) [must demonstrate the degree of impairment requires special education].) California law further specifies the student must require instruction and services which cannot be provided with modification of the regular school program. (Ed. Code, §56026, subd. (b).)

An ALJ has the authority to determine whether a student is eligible for special education and related services under the IDEA. (*Hacienda La Puente Unified Sch. Dist. Of Los Angeles v. Honig* (9th Cir.1992) 976 F.2d 487, 492-493 (*Hacienda*).) However, Student failed to present any persuasive evidence he qualified for special education under the category of specific learning disability from March 18, 2021, through the remainder of the 2020-2021 and the 2021-2022 school years.

Dr. Kent Grelling completed a private psychological evaluation of Student in May 2022. Dr. Grelling had over 20 years of experience evaluating students with learning disabilities and consulting with school districts on how to best support these students.

Based on his assessment, Dr. Grelling diagnosed Student with a specific learning disability in reading and writing, what he commonly called dyslexia. Student did not elicit any testimony from Dr. Grelling as to the enduring characteristics of dyslexia. Dr. Grelling was not asked to provide, and did not offer, an opinion whether Student's May 2022 testing profile, including cognitive functioning and academic achievement,

would have likely been the same had Student been assessed the year prior. Nor did Student offer any other evidence establishing he was eligible as a student with a specific learning disability beginning in March of 2021.

Piedmont completed its academic and psychoeducational assessments of Student by September 2022, and found he met, just barely, the eligibility criteria for having a specific learning disability in spelling. Piedmont's assessors were not asked to provide, and did not offer, any opinions whether Student would have met eligibility criteria had they completed their assessments in spring 2021 or during the 2021-2022 school year. Student failed to introduce any evidence he met the criteria for having a specific learning disability and required specialized instruction and services that could not be provided with modification to the general education program during this time frame.

Rather, the evidence showed Student finished second grade having met or exceeded all literacy standards except spelling and editing where he had made progress towards standards. Student continued to read at grade level with good fluency and comprehension, though he had difficulty spelling multisyllabic words.

Student returned to in-person learning for third grade, the 2021-2022 school year. Student's spelling was below grade level similar to many third graders newly returning from remote instruction. Piedmont reasonably attributed this to the unique and unprecedented challenges of distance learning from the end of the 2019-2020 school year through the 2020-2021 school year.

It was challenging to effectively teach and evaluate writing and spelling with limited synchronous instruction and no interpersonal, real-time checks and reminders. A lack of appropriate instruction, an exclusionary factor in determining eligibility, contributed to Student's poor spelling.

Even so, by March 2022, the end of the second trimester, Student was meeting grade level spelling expectations. Student finished third grade having met or exceeded all grade-level literacy standards in reading, language, and writing. Student failed to meet his burden of proving he was eligible for special education under the category of specific learning disability from March 18, 2021, through the 2021-2022 school year. As Student was not entitled to FAPE, there was no FAPE denial.

PIEDMONT FULFILLED ITS CHILD FIND DUTY TO ASSESS

As of March 19, 2021, Student was a general education student. As such, Piedmont had a "child find" duty to refer Student for a special education evaluation if it had a reason to suspect he might have a qualifying disability.

A school district is required to actively and systematically seek out, identify, locate, and evaluate all children with disabilities who may need special education and related services, regardless of the severity of the disability, including those students advancing from grade to grade. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, § 56171, 56301, subds. (a) and (b).) This duty to seek and serve children with disabilities is known as "child find."

A school district's child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect a disability, and reason to suspect that

special education services may be needed to address that disability. (*Dept. of Ed., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* 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.*)

A school district's pursuit of general education interventions in accord with state policy may not be used to unreasonably delay the special education assessment process. (*Johnson v. Upland Unified School District* (9th Cir. Jan. 8, 2002, No. CV-98-09501-AHM) 2002 WL 22345 at p. 1; See *Hacienda, supra*, 976 F.2d 487, 491-492.)

Further, a district may not delay assessing a student with a suspected disability on the basis that it is utilizing a response to intervention approach to accommodate the student in the regular education program. (*Memorandum to State Directors of Special Education*, Office of Special Education Programs (OSEP 2011) 56 IDELR 50.)

Student finished second grade having met or exceeded standards in all areas except two: Language-spelling patterns and punctuation; and Writing-editing. In these two areas he had made progress toward grade-level standards, with recent improvement noted in self-correction. In light of the challenges of remote-instruction, many students struggled to meet grade-level writing standards. As such, Student's failure to meet two writing standards was not sufficient to trigger Piedmont's obligation to assess Student for special education eligibility.

Returning to in-person learning was an adjustment for Student, not unlike many other children. Student found it hard to separate from Parent when she dropped him off. Kate Campbell, Student's third grade teacher, noticed concerns with Student's spelling and phonemic awareness at the start of the school year. Campbell had a master's degree

in education psychology and over 30 years of experience as a third-grade teacher with Piedmont. Student continued to read at grade level but was not applying learned phonics strategies.

Rather, he rushed through his reading without sounding out words and guessed at unfamiliar words. This negatively impacted his comprehension. Campbell referred Student for phonics intervention to address spelling weaknesses in October 2021. As Student had benefitted from past Tier 2 services, this was a reasonable step following a year of reduced instruction during distance learning and the related difficulty of effectively teaching writing and evaluating progress.

Student did not prove Piedmont had reason to suspect a disability in fall 2021. As such, this referral to Tier 2 services did not constitute an unreasonable delay in referring Student for a special education assessment.

Student resisted being pulled from class to attend small group instruction. Campbell met with Student after school to provide extra help without the stigma Student associated with his intervention services. Prior to winter break, Parent shared with Piedmont staff her concern that what she called "the disconnect" Student's academic effort and progress was growing. Parent reported that Student's academic struggle and belief that his peers were outperforming him began to negatively impact his social, emotional, and physical wellbeing.

In response to Parent's concerns, Piedmont convened a Student Study Team meeting with Parents on January 13, 2022. The team discussed Parent concerns with Student's self-esteem, anxiety, reported physical symptoms and school avoidance, and his spelling and reading difficulties related to phonics. Student's spelling level was at the end of first grade level. Campbell informed the team that Student had not made

much reading progress because of his tendency to rush and guess at unfamiliar words. Piedmont offered additional general education reading intervention services to reinforce Student's application of his phonics skills and practice decoding. It also offered general education counseling to address school anxiety.

The Student Study Team meeting notes do not reflect any discussion about a special education evaluation, though this was Piedmont's usual forum for such a discussion. Student's continued spelling difficulties and failure to apply learned phonics strategies despite Tier 2 spelling and phonics intervention, and Parent report of increased social-emotional concerns were sufficient to raise a suspicion that Student may have a disability and need for special education. The January 2022 Student Study Team meeting discussions triggered Piedmont's child find duty to assess Student for a specific learning disability.

Child find imposes an affirmative duty to evaluate upon notice a student may have a qualifying disability. It does not impose a specific deadline for evaluating the child. The evaluation should take place within a reasonable time after school officials are put on notice. (*School Bd. of the City of Norfolk v. Brown* (E.D. Va. 2010) 769 F.Supp.2d 928, 942 [citation omitted].)

On January 19, 2022, Parent informed Piedmont that she was not pursuing a special education assessment. Rather, Parent had arranged for Lindamood Bell to privately assess Student. Even so, on February 14, 2022, school psychologist Marianne Peirce sent Parent an assessment plan. This plan proposed to have a resource specialist assess Student's academic achievement and a school psychologist assess his intellectual

and motor development. Piedmont timely fulfilled its child find duty to Student as of February 14, 2022, when it issued an assessment plan offering to conduct a psychoeducational including academic assessment of Student.

Student did not meet his burden of proving Piedmont failed to discharge its child find duty.

Even if Piedmont had a reason to suspect Student might have a specific learning disability prior to January 2022, or unreasonably delayed in issuing an assessment plan, such procedural violations would not result in a denial of FAPE in this instance. Student failed to prove he was entitled to a FAPE beginning March 19, 2021, through the 2020-2021 and 2021-2022 school years. The Ninth Circuit held that a district's procedural violation "cannot qualify an otherwise ineligible student for IDEA relief" and constituted harmless error where the student was not entitled to FAPE. (*R.B., supra*, 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.*) Student did not prove he was eligible for special education. Therefore, any failure to assess him for special education could not have denied him a FAPE.

In summary, Student failed to prove Piedmont was required to assess him for a specific learning disability from January 16, 2021, through the 2021-2022 school year. Even if Piedmont was required to assess Student for a specific learning disability, Student did not prove this procedural violation denied him a FAPE.

Student did not prove he was eligible for special education under the category of specific learning disability from January 16, 2021, through the 2021-2022 school year.

ISSUE 2b: DID PIEDMONT DENY STUDENT A FAPE DURING THE 2021-2022 SCHOOL YEAR BY FAILING TO PROVIDE PARENT AN ASSESSMENT PLAN AFTER STUDENT'S TEACHER IDENTIFIED A NEED FOR ASSESSMENT ON OCTOBER 7, 2021?

Student contends Campbell's October 7, 2021 email to Parent identified a need for a special education assessment and should have triggered an assessment plan within 15 days. Student argues Piedmont's failure to issue an assessment plan denied him a FAPE. Piedmont asserts Campbell's email did not constitute a referral for assessment, and it was not required to issue an assessment plan. Piedmont further contends that even if there was a procedural violation, Student was not eligible for special education at this time, so any error was harmless.

Campbell sent Parent an email on October 7, 2021, letting Parent know of her plan to refer Student back to Vogel for Tier 2 phonics support because his weak skills were impacting his reading. She explained this would help determine if Student could shore up his skills or if something more was needed. Campbell's email laid out a plan to work as a team to develop and monitor Student's phonics skills. She proposed the following steps:

- phonics intervention with Vogel;
- Parents to ensure Student read books at and not above his reading level and that he read aloud at home; and
- then checking in at parent-teacher conferences to see if any further action was warranted.

This email, standing alone, did not raise a suspicion of disability or identify a need for a special education assessment. Nor did it constitute a teacher referral for assessment. Student did not establish Piedmont was required to issue an assessment plan based on Campbell's October 2021 email.

Further, as previously determined, Student failed to establish he was entitled to a FAPE during the 2021-2022 school year. Therefore, even if Campbell's email constituted an assessment referral, Piedmont's failure to issue an assessment plan could not have denied Student a FAPE. (*R.B., supra*, 496 F.3d 932, 942.) Student did not prove this issue.

ISSUE 3a and ISSUE 3b: DID PIEDMONT DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR UNTIL MARCH 23, 2023, BY FAILING TO ASSESS STUDENT'S SPEECH AND LANGUAGE AS PART OF THE SEPTEMBER 2022 ASSESSMENT?

Student asserts Piedmont should have suspected he had speech or language needs that required evaluation as part of its September 2022 assessments. Piedmont contends it thoroughly assessed Student's speech and language needs in March 2021 and determined he no longer qualified as having a speech or language impairment and did not have any speech needs. Piedmont asserts that when it issued an assessment plan 11 months later, it had no reason to suspect Student had speech or language needs. Piedmont argues that between February 14, 2022, when it issued an assessment plan, and May 25, 2022, when Parent consented, there was no indication Student's speech or language was an area of concern, so it was not required to assess this area as part of the September 2022 assessments.

Students who may be eligible for special education must be evaluated and assessed for all suspected disabilities. (*Timothy O., supra*, 822 F.3d 1105, 1110.) In analyzing a failure to assess claim, 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. (*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.) It is not based on hindsight. (*Ibid.*)

There was no persuasive evidence that Student might have a speech or language impairment or speech or language needs following his exit in March 2021 until the September 8, 2022 IEP team meeting. Student's IEP team reviewed Dr. Grelling's and Piedmont's assessment reports at the September 2022 IEP meeting.

Piedmont's March 2021 speech and language assessment determined Student did not have a language disorder or any communication deficits impacting his education. He demonstrated normal articulation, oral-motor function, voice, and fluency, and no longer qualified as having a speech or language impairment. At the end of second grade, Student met or exceeded literacy standards in speaking and listening. Roscelli, Student's second grade teacher, noted Student had no observable speech issues and he liked to talk. She had 25 years of experience as a second and third grade teacher with Piedmont. Roscelli described Student as enthusiastic in his contributions to class discussions. There was no evidence Student had speech or language needs following his exit from special education through the remainder of second grade.

By November 2021, Student was making progress towards third grade literacy standards in speaking and listening. Campbell had Student focus on elaborating when expressing his ideas. Student met or exceeded this standard for the second and third trimesters.

At the January 2022 Student Study Team meeting, Parent was concerned that Student struggled to express his ideas. Campbell did not observe this in class. Parent's concern did not put Piedmont on notice of a need to assess Student's speech and language needs in light of his demonstrated expressive language skills in class.

Piedmont provided Parent a February 14, 2022 assessment plan offering evaluations by the special education teacher, nurse, and school psychologist. Parent delayed signing consent until May 25, 2022. Despite the three-month delay in providing consent, Parent did not disagree with the proposed assessments or ask Piedmont to also assess Student's speech and language needs.

Dr. Grelling's May 2022 assessment report noted that while Student had relatively strong receptive language skills, his ability to generate language to express his knowledge appeared compromised. He recommended a full speech assessment. However, Piedmont did not receive this report until on or after May 25, 2022, just before summer break. Piedmont considered this report at Student's September 2022 IEP team meeting. Therefore, Dr. Grelling's recommendation that Student receive a speech and language assessment was not available in time for Piedmont to include it in the September 2022 assessments.

Student did not prove speech and language was an area of suspected disability that Piedmont was required to assess as part of the September 2022 evaluations.

ISSUE 3b: DID PIEDMONT DENY STUDENT A FAPE BY FAILING TO TIMELY COMPLETE SPEECH AND LANGUAGE AND OCCUPATIONAL THERAPY ASSESSMENTS WHICH PARENT CONSENTED TO ON SEPTEMBER 15, 2022?

Student asserts Piedmont was required to complete a speech and language and an occupational therapy assessment within 60 days of Parent's September 15, 2022 consent to assess. Student contends Piedmont denied him a FAPE by failing to complete these assessments.

Piedmont argues it was not required to complete these assessments because Student disenrolled from the District at the end of September 2022. Piedmont claims it had no duty to assess Student once Parents privately placed him at Charles Armstrong. Alternatively, Piedmont argues there was no FAPE denial as Parent was not likely to return Student to District programming prior to the end of the 2022-2023 school year.

Special education assessments must be completed, and an IEP team meeting held, within 60 days of receiving consent, excluding school vacations in excess of five school days and other specified days. (20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c); Ed. Code, §§ 56043, subd. (f)(1), 56302.1, subd. (a), & 56344, subd. (a).) A parentally placed private school child with a disability does not have an individual entitlement to special education and related services that the child would receive if enrolled in a public school. (*Capistrano Unified Sch. Dist. v. S.W.*, (9th Cir. 2021), 21 F.4th 1125, 1138-1140, cert. den. (Oct. 3, 2022, No.21-1479) 143 S.Ct. 98 [214 L.Ed.2d 20] (*Capistrano*); 20 U.S.C. § 1412(a)(10)(A).); 34 C.F.R. §§ 300.130 & 300.137(a).) The IDEA and its implementing regulations do not distinguish between private school students who are privately placed because of a FAPE dispute or those privately placed as a matter of preference. (*Ibid.*)

On August 16, 2022, Parent paid a deposit for Charles Armstrong to hold a spot for Student. Parent paid in full Charles Armstrong's 2022-2023 tuition costs on September 6, 2022, prior to Student's IEP team meeting. Parent's action showed an intent to follow Dr. Grelling's May 2022 recommendation to place Student at a specialized school for children with dyslexia. Even so, Parent's action and intent, and Student's subsequent disenrollment, did not eliminate Piedmont's duty to assess Student pursuant to a signed assessment plan.

Enrollment is not a prerequisite to assessing a student's special education needs.

"The Department of Education's regulations implementing the IDEA specifically contemplate that, upon a parent's request, a school district must evaluate a child residing in its district for purposes of making a FAPE available to her, even if she is enrolled in a private school in another district." (*Bellflower Unified Sch. Dist. v. Lua*, (9th Cir. 2020) 832 F. Appx 493, 495–96).

Similarly, disenrollment, in and of itself, does not relieve a district of its obligation to timely complete agreed-upon assessments.

Dr. Grelling's May 2022 assessment of Student pointed to a possible expressive language issue with word retrieval. He recommended a full speech assessment. At the September 8, 2022 IEP team meeting, Piedmont proposed to assess Student's expressive language and fine motor skills based on Dr. Grelling's recommendations and its own assessments. It provided Parent an assessment plan on September 8, 2022, proposing to assess Student's speech and language and occupational therapy needs.

Parent consented to the assessments on September 15, 2022. That same day, Parent signed the September 2022 IEP with exceptions. Parent agreed to eligibility under specific learning disability but did not agree the offered accommodations and specialized academic instruction constituted FAPE.

On September 15, 2022, Parent provided Piedmont a notice of intent to unilaterally place Student at Charles Armstrong and seek reimbursement. On October 3, 2022, Piedmont's Director of Special Education, Douglas Harter, provided Parents prior written notice denying their requests to change Student's educational placement and for tuition reimbursement. Piedmont reached out to engage Parent in continued FAPE discussions and to schedule a follow-up IEP team meeting for November 7, 2022.

Following Student's disenrollment, Piedmont continued to engage Parent in FAPE discussions in an effort to finalize Student's IEP. However, it failed to take any steps to conduct Student's speech and occupational therapy assessments. This denied Parents a meaningful opportunity to participate in the IEP development process.

Piedmont's reliance on *Capistrano* in support of its decision to not complete the agreed-upon assessments is misplaced. *Capistrano* did not involve the duty to assess a privately placed student. Nor does it stand for the proposition that a school district is relieved of its duty to assess pursuant to a signed assessment plan once a parent privately places the student.

Rather, the Ninth Circuit held that if parents enroll their child in private school, the school district does not need to develop an IEP, even if parents requested reimbursement

or filed a complaint. (*Capistrano, supra*, 21 F.4th 1125, 1138.) There is no “freestanding requirement” that a district develop an IEP for a privately placed student unless the parent asks the district to do so. (*Ibid.*)

Piedmont was responsible for timely completing Student’s speech and language and occupational therapy assessments. Student proved Piedmont committed a procedural violation by failing to timely complete the agreed-upon assessments. (*Park, supra*, 464 F.3d 1025, 1032-1033; *Timothy O., supra*, 822 F.3d 1105, 1118.) Student also proved this procedural violation denied him FAPE by significantly impeding Parent participation. (*Target Range, supra*, 960 F.2d 1479, 1484.) In failing to timely assess Student’s language and fine motor needs, Piedmont deprived the IEP team, including Parents, of important assessment information. (*Amanda J., supra*, 267 F.3d 877, 894.) This significantly impeded Parents’ informed and meaningful participation in the IEP development process. Without this information, Student’s IEP team could not determine if Student had educational needs in these areas and, if so, how to best address them. “Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA.” (*Id.* at p. 892.)

The Ninth Circuit has held that a procedural error resulting in a loss of an educational opportunity denies a student a FAPE. (*Doug. C. v. Hawaii Department of Education* (9th Cir. 2013) 720 F.3d 1038, 1047 (*Doug C.*)) “A procedural error results in the denial of an educational opportunity where, absent the error, there is a ‘strong likelihood’ that alternative educational possibilities for the student ‘would have been better considered.’” (*Ibid.*, quoting concurring opinion of Judge Gould in *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 657.)

Piedmont's failure to assess suspected areas of need as identified in the September 8, 2022 assessment plan resulted in a loss of educational opportunity under the rationale of *Doug C.* Without assessment data on the impact of Student's speech, language, or fine motor skills on his learning, Student's IEP team could not consider appropriate services or alternative programming to meet such needs. As such, these assessment failures significantly impeded Parents' informed and meaningful participation at the November 2022 IEP team meeting. Had Piedmont completed these assessments, the IEP team could have discussed the results at the November 2022 IEP team meeting and determine whether additional or alternative programming was warranted.

Piedmont argued in its closing brief that failing to complete these assessments did not deny Student a FAPE because Parent had no intent of returning Student to public school. This argument is not persuasive. These assessments were meant to identify Student's educational needs regardless of Parent's chosen placement. Disregarding this violation "would subvert the purposes of the IDEA and sanction a school district's unilateral decision to abandon its statutorily required responsibility to the detriment of its students." (*Bellflower Unified School Dist. v. Jimenez* (C.D. Cal., Feb. 17, 2021, No. CV 20-2372-DMG (KSX)) 2021 WL 1055198, at *15 citing *Anchorage School Dist. V. M.P.* (9th Cir. 2012) 689 F.3d. 1047, 1059, appeal dismissed (9th Cir., Jan. 11, 2023, No. 21-55250) 2023 WL 2523462.)

Student proved Piedmont denied him a FAPE by failing to timely complete the agreed-upon speech and language and occupational therapy assessments.

ISSUE 3c: DID PIEDMONT DENY STUDENT A FAPE BY FAILING TO OFFER APPROPRIATE READING, WRITING, SOCIAL-EMOTIONAL, AND SPEECH GOALS IN THE SEPTEMBER 8, 2022 IEP?

Student contends Piedmont denied him a FAPE by failing to develop a decoding goal and a reciprocal encoding goal, and by failing to offer any social-emotional or speech goals. Student asserts the spelling pattern goal was not specific or measurable.

Piedmont contends Student did not require a separate decoding goal; the spelling goals were measurable and appropriate for Student's needs; and Student did not have social-emotional or speech needs, so he did not require goals in these areas.

The IEP must contain a statement of measurable annual goals designed to:

1. meet the student's needs that result from his disability to enable the student to be involved in and progress in the general education curriculum; and
2. meet each of the child's other educational needs that result from his disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2); U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4, 64 Fed. Reg. 12406, 12471 (1999 regulations) [no requirement for goals in areas of the general curriculum not impacted by the child's disability].)

The educational benefit to be provided to a special education student is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v.*

California Special Educ. Hearing Office (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique 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, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106, reversed in part on other grounds by *Schaffer, supra*, 546 U.S. 49, 56-58.)

The IEP team develops measurable goals, based on the child's present levels of academic achievement and functional performance, addressing the student's areas of need and which the student has a reasonable chance of attaining within a year. (Ed. Code, § 56345, *Letter to Butler* (OSERS Mar. 25, 1988) 213 IDELR 118.) The purpose of annual goals is to permit the IEP team to determine whether the student is making progress in an area of need. As such, the IEP must also contain a statement of how the student's goals will be measured and when the parent will receive periodic reports on the student's progress towards his goals. (20 U.S.C. §1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3) (2007) Ed. Code, § 56345, subd. (a)(3).) The IEP team need not draft IEP goals in a manner that the parents find optimal, as long as the goals are objectively measurable. (*Bridges ex rel. F.B. v. Spartanburg County School Dist. Two* (D.S.C., Sept. 2, 2011, No. 7:10-CV-01873-JMC) 2011 WL 3882850 [the use of percentages tied to the completion of discrete tasks was an appropriate way to measure student progress].)

STUDENT'S READING AND WRITING NEEDS

In his May 2022 psychoeducational assessment of Student, Dr. Grelling diagnosed Student with a specific learning disability in reading accuracy and fluency, and in written expression in spelling and clarity of writing. He described Student as having "textbook dyslexia" characterized by a phonological processing deficit and a significant discrepancy between his intelligence and tested reading skills.

Peirce and Seibert completed Student's psychoeducational assessment in September 2022. Peirce held a diplomate in school neuropsychology and was a licensed educational psychologist. She worked as a school psychologist for 15 years, the last eight with Piedmont. Like Dr. Grelling, Peirce also identified Student as having a phonological processing deficit. She further determined Student met special education eligibility criteria for having a specific learning disability in spelling pursuant to the pattern of strengths and weaknesses eligibility model. Piedmont did not find that Student had a normative weakness in reading.

Seibert served as a program specialist with Piedmont since 2014. She was trained in Orton-Gillingham and other teaching strategies for students with dyslexia. She had completed approximately 50 academic evaluations of students with a suspected learning disability. Seibert administered the Kaufman Test of Educational Achievement, Third Edition, Form A, to test Student's overall reading, math and writing abilities. This was the standard battery Piedmont used for determining a specific learning disability.

The Reading Composite included three subtests: letter-word recognition which measures the ability to identify and pronounce words; reading comprehension; and the timed test of silent reading fluency. Dr. Grelling criticized Piedmont's assessment for not testing Student's ability to decode nonsense words or pseudowords. Piedmont's evaluation focused on Student's overall academic functioning and ability to access grade level curriculum. Peirce used a Cross Battery Assessment System that integrated data from different processing areas and compared similar subtests across different instruments. This allowed her to identify Student's processing strengths and weaknesses and relate these to his academic skills to identify areas of educational impact. Piedmont reasonably determined Student's only area of deficit was spelling.

Student scored in the average range on all the Kaufman subtests in reading, math, and writing except for spelling. Student's spelling score was one point below average, while his overall Written Language Composite score was average. Student's testing behavior impacted his spelling score. He was impatient during the spelling test, appeared to make careless errors from not listening, and did not put forth good effort near the end. The evidence showed that spelling, the ability to encode words, is heavily dependent on the ability to phonetically analyze language, as is decoding or the ability to break down words. Piedmont obtained valid data on Student's phonetic skills. Its assessment showed Student did not have a decoding deficit.

Dr. Grelling similarly noted that Student became increasingly distracted during tasks, particularly those he found challenging, and his lack of attention and effort lowered his scores. Dr. Grelling administered the Wechsler Individual Achievement Test, Fourth Edition, to measure Student's academic skills. Student's overall total achievement score was in the average range. His Reading Composite score which included a decoding test was also average.

However, Student scored particularly low on subtests measuring phonetic reading. On the pseudoword decoding subtest he scored in the first percentile. On the phonemic proficiency subtest, he scored in the fourth percentile.

Student scored in the average range on all other reading subtests, including

- word reading,
- reading comprehension,
- oral reading fluency,

- orthographic fluency,
- orthographic choice, and
- decoding fluency.

Notably, decoding fluency also measured Student's ability to decode pseudowords, but it was a timed and therefore more difficult test. Dr. Gelling did not account for this discrepancy which called into question the validity of the significantly below average pseudoword decoding score. Just as in Piedmont's assessment, Student's spelling score was one point below average.

Piedmont looked at many data points in addition to standardized test scores to identify Student's unique needs and determine any educational impact. Peirce considered Student's school-based interventions, report cards, screening measures, and state testing results in determining eligibility and identifying his academic needs.

At the end of second grade, Student met or exceeded all reading standards. Roscelli described Student as effectively applying word analysis skills, showing good reading skills, and using various strategies to decode challenging words. Lindamood Bell's January 2022 pre-assessment of Student showed he was reading above grade level in terms of rate, accuracy, fluency, and comprehension, testing as high as sixth grade, with deficits in phonemic awareness. As noted by Dr. Gelling, these deficits remained after Student's participation in Lindamood Bell's five-week intensive reading program beginning in March 2022. Student's post-assessment showed he was reading up to the seventh-grade level. During third grade, Student was absent 15 days, missed five weeks of regular programming, and still met or exceeded all reading, writing, and literacy standards by the end of the year. On the May 2022 California Assessment of Student Performance and Progress, Student's English language arts Lexile score fell in

the average range for the end of third grade. On the August 2022 Scholastic Reading Inventory, Student's Lexile score was in the average range for the beginning of fourth grade.

Piedmont used the Fountas and Pinnell Reading Assessment to measure reading accuracy, fluency, and comprehension. This tool allowed teachers to calculate scores to determine reading levels which correlate to grade level text. Student's witness Katherine Futterman, Ed.D., was qualified at hearing as an expert in the identification, assessment and educational intervention of students suspected of dyslexia who may qualify as having a specific learning disability. Futterman testified the Fountas and Pinnell system was not recommended for students with dyslexia because it was a balanced literacy approach that only minimally focused on foundational reading skills at the discrete sound level. Despite this criticism, Piedmont established the Fountas and Pinnell assessments provided useful information on Student's reading ability and progress.

At the beginning of fourth grade, Student's August 2022 Fountas and Pinnell Reading Assessment showed Student was reading at grade level, Level Q, for fluency and accuracy but not comprehension. Student did not want to leave class to take the reading assessment and was not a willing participant. His below grade level comprehension score did not accurately reflect his ability given his Kaufman test scores. Seibert reasonably attributed his lower comprehension score to a lack of effort and engagement.

Decoding is a foundational reading skill and an academic area in the California state standards for second and third grade. Roscelli and Campbell were required to teach and evaluate Student's decoding skills. At the end of both second and third grade, Student was a proficient reader, reading at grade level. That Student read at

grade level meant he was decoding at grade level. As such, his decoding skills were not impacting his ability to be involved in and progress in the general education curriculum.

Dr. Grelling attributed Student's average reading scores and grade level reading performance, in light of his poor phonetic decoding skills, to compensatory strategies and Student's ability to use higher order aspects of language to demonstrate comprehension. Regardless of his strategy, Student was meeting grade-level reading standards.

Both Campbell and Vogel found it common for a student to read at grade level yet struggle phonetically. Student's tendency to rush negatively impacted his decoding. Student required frequent reminders to slow down and sound out unfamiliar words. Campbell found this typical for many third graders. Student was able to apply learned phonics strategies and successfully decode novel words when he took his time. Student knew the phonetic rules but needed to slow down to practice this skill which involved patience, and training his eyes to locate the phonemes, and then sound them out.

Dr. Grelling also noted Student's tendency to rush and pay less attention to fine visual details on several test instruments. Dr. Grelling acknowledged this tendency impacted Student's reading, causing him to substitute visually similar words. The evidence showed Student's rushing, rather than a decoding deficit, impacted his reading skills.

Piedmont did not administer a pseudoword decoding subtest to Student as this was not part of its established academic testing practice. Even so, Piedmont did not dispute Student's subtest score as reported by Dr. Grelling. Rather, it appropriately considered Student's scores in light of Student's overall reading proficiency. District

assessors shall not rely on a single measure as the sole criterion for determining an appropriate educational program. (20 U.S.C. § 1414 (b)(2)(B); 34 C.F.R, § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) Seibert testified that Student's below average pseudoword decoding and phonemic awareness scores indicted he had a discrete skill that was more challenging but was not impacting his overall reading ability. Her testimony was persuasive, corroborated by teacher observations and assessments, State testing, and Lindamood Bell reports, and entitled to substantial weight.

Piedmont appropriately considered Student's ability to pull together all of his skills which enabled him to perform at grade level. The evidence showed Student's low pseudoword decoding and phonemic awareness scores were not impacting his reading accuracy, fluency or comprehension, or his ability to decode English words.

Dr. Grelling's testing uncovered an area of concern which he believed could impact Student's comprehension in the future as text became more difficult. Student did not meet his burden of proving that decoding was an area of unique need for which he required a separate goal at the time of the September 2022 IEP team meeting.

APPROPRIATE READING AND WRITING GOALS

In preparing for the September 8, 2022 IEP team meeting, Seibert reviewed her assessment results with resource specialist Molly Coffey-Smith. Coffey-Smith was a credentialed special education teacher of 23 years, and was trained in Orton-Gillingham and Lindamood Bell methodologies. Coffey-Smith was Student's case

manager and responsible for implementing his IEP goals and providing specialized academic instruction if he returned to Piedmont. Together, Seibert and Coffey-Smith drafted a reading goal and two spelling goals for Student.

Piedmont called Goal One in Student's September 8, 2022 IEP offer a "reading maintenance goal." Seibert proposed this goal to monitor Student's reading and make sure he continued to make appropriate progress. Student's reading goal called for him to read Level S text within one year. Fourth grade level text includes Levels Q, R, and S, with Level S corresponding to the end of fourth grade expectations. Student was reading level Q text with 96 percent accuracy. As such, this goal required Student to continue reading at grade level. He would need to demonstrate at least 95 percent accuracy, at a rate of 100-120 words per minute, and show satisfactory comprehension by discussing or answering questions as measured by teacher records and informal reading assessments.

Although Student's expert criticized the Fountas and Pinnell system, Futterman did not establish this system failed to accurately measure Student's reading accuracy, fluency, and comprehension. The reading goal was measurable. Coffey-Smith would conduct grade level progress monitoring and consult with Student's general education teacher on her assessments. The reading goal was appropriate to Student's reading needs. Student contended, but did not prove, he required a precursor goal of single word decoding. However, Student was required to demonstrate decoding skills to meet this reading goal.

Goals Two and Three addressed Student's spelling needs, which are a necessary foundational skill for writing. Student had weaknesses in spelling. He demonstrated inconsistent application of known spelling patterns, sometimes correctly spelling a

pattern and other times getting it wrong. Annual Goal Two required Student to correctly apply 22 identified spelling patterns in one and two syllable words, in his writing samples, 90 percent of the time. Student was also required to correctly spell eight of 10 words with at least 10 of these patterns, in two of three samples, as measured by work samples, teacher records and informal assessments.

Futterman opined that the spelling pattern goal was not specific as it addressed handwriting and spelling, nor measurable given the numerous patterns. However, Futterman's opinion was unsupported by the evidence or research. Piedmont established the identified spelling patterns followed the developmental sequence of how students learn to read and spell. Seibert and Coffey-Smith explained in detail how this goal would be implemented in class and measured. Their testimony persuasively countered Futterman's unsupported opinion.

Coffey-Smith would teach Student specific phonological rules and work with him on four to six spelling patterns at a time, focusing on skills sequentially. Next, she would assess Student's skills on the patterns and rules taught to ensure mastery. By the end of the year, she would assess Student's skills on all of the multiple patterns. This goal was appropriate to meet Student's spelling needs and capable of being met within a year period.

Futterman established that decoding and spelling are reciprocal skills such that an encoding goal should mirror any decoding goal by requiring the same level of mastery of the same material. However, Student failed to prove a need for a separate decoding goal. Student did not prove Goal Two was deficient for failing to mirror a non-existent decoding goal. Further, given the reciprocity between encoding and decoding, both of the spelling goals supported Student's decoding skills.

Goal Three addressed spelling irregular words. Student misspelled or inconsistently spelled several irregularly spelled common sight words. This annual goal required Student to correctly spell words from a list of 200 irregularly spelled common sight words 90 percent of the time, and, on spelling tests of 20 of these words, correctly spell eight of 10 words, in four of five assessments, as measured by work samples, teacher records, or informal assessments. The goal essentially required 80 percent accuracy on tests within a year. This goal was appropriate to Student's needs and measurable.

Each goal offered in Student's September 8, 2022 IEP was appropriate to Student's unique needs, sufficiently ambitious, measurable, and capable of being attained within a year. Student did not meet his burden of proving Piedmont denied him a FAPE by failing to offer appropriate reading and writing goals in the September 2022 IEP.

NO NEED FOR SOCIAL-EMOTIONAL GOALS

Dr. Grelling highlighted what he called Student's "highly unusual" endorsement of depression, anxiety, social inadequacy, and negative attitude towards school on social-emotional rating scales. He attributed Student's response pattern to his academic struggles and the social disruption of the pandemic.

Parent told Dr. Grelling that Student's generalized worries increased during the pandemic and included Black Lives Matter protests, forest fires, and war as seen on the news. The family was isolated during the pandemic, and Student had frequent sibling conflicts. Parent rated Student as having elevated anxiety and depression. In contrast, Campbell's ratings were all in the average range, though her average rating of Student's

anxiety was just below the at-risk level. Despite Student and Parent elevated assessment ratings, Student failed to prove he had any social or emotional needs impacting his academic progress, school behavior, or socialization.

Student told Dr. Grelling he hated school, complaining in particular about his extracurricular Spanish class before school and weekly spelling tests. However, he also shared he liked his teachers, liked to read, and had school friends. Dr. Grelling diagnosed Student with an adjustment disorder, which was based on a dysphoric mood not displayed at school, outbursts at home, and his anxious mood. Notably, Dr. Grelling did not diagnose Student with depression or anxiety. Rather, Dr. Grelling was concerned Student might be at risk for a such mood disorders in the future.

There was no evidence that Student was suffering such symptoms at the time of the September 2022 IEP team meeting. Piedmont witnesses established that Student's anxiety at school was within the normal range and did not rise to the level of an educational need nor adversely impact his educational performance. This evidence was unrefuted.

Parent believed returning to school had been difficult for Student socially and emotionally. Although Parent informed Piedmont in fall 2022 that Student's school anxiety resulted in physical symptoms, these symptoms were not present at school. At hearing, Parent described Student's reluctance to enter class, and considered this school avoidance caused by performance anxiety. However, her description of Student holding her hand and wanting hugs before entering class was more indicative of clinginess as he re-adjusted to in-person learning. Campbell established that Student transitioned well to in-person learning, and third grade in general, with an expected level of nervousness.

Although Campbell acknowledged that performance anxiety caused Student to rush through his work, she found this typical for many of her students. It was Campbell's experience that third graders commonly rushed to get their work done and needed prompts to slow down, re-read, and re-think. Her testimony was persuasive and unrefuted. Student responded positively to Campbell's reminders to slow down. In areas of particular anxiety such as spelling tests, Student benefited from extra practice with the class aide and reviewing spelling lists that Campbell sent home.

Campbell was sensitive to Parent's report of Student's negative self-concept and wished Student felt better about himself as a learner. However, in her 30 years of experience teaching third graders, it was common for them to compare themselves to one another at that age. Student was functioning well socially and emotionally at school and met or exceeded all third-grade level literacy standards despite reported performance anxiety or a lack of self-confidence.

In response to Parent concerns, Piedmont offered to have the school counselor work with Student on anxiety and self-esteem issues in January 2022. Parent declined as she believed Student would not want to miss class, and he had a private therapist.

School Psychologist Peirce also interviewed Student during her September 2022 assessment. Student shared that the past few years had been difficult, and he was nervous about the start of fourth grade. Peirce administered Parent, Teacher, and Student social-emotional rating scales. Based on Parent and Student report, Student experienced moderate distress with both depressive and anxious symptoms. Consistent with Campbell's rating scales for Dr. Grelling's assessment, Student's fourth grade teacher reported no concerns based on the first several weeks of the school year.

Student had experienced lots of disruptions, including

- the COVID-19 pandemic and school closures during first grade;
- more than a year of distance learning and social isolation;
- adjustment back to in-person learning for third grade; and
- adjustment to a Lindamood Bell program and then back to his class.

However, Student showed his resiliency in light of these disruptions. Student was functioning well socially in the school setting. His teachers described him as socially skilled and well-liked. Student's third grade report card did not indicate any social-emotional impact on his education. Campbell described him as a pleasure to have in class. He interacted cooperatively, treated others with respect, showed good effort, listened attentively, and followed directions. Similarly, Lindamood Bell staff were impressed by Student's positive interactions and did not observe any social or emotional concerns in spring 2022.

Student's fourth-grade teacher described him as "really happy," as reported in the September 2022 IEP team meeting notes. He was settling in well, was socially influential with peers, and had good friends. Student did not exhibit any social or emotional concerns at school. Student did not prove he had emotional or social needs that negatively impacted his involvement and progress in the general education curriculum.

Peirce reasonably determined Student's social-emotional functioning was not an area of educational need as his reported symptoms were not impacting his educational performance. Dr. Grelling testified that many children with dyslexia develop emotional reactions to it that magnify the impact. However, Dr. Grelling did not opine that Student

required any social or emotional goals to address any such emotional reaction. Rather, he determined Student needed to accept his learning differences and could only do this if he attended a specialized school for students with dyslexia.

Student failed to prove he had a social or emotional need impacting his education for which he required a goal. Student did not call his private therapist as a witness nor any of his teachers or school counselor, if any, from Charles Armstrong to identify social-emotional needs or required social emotional goals or programing. None of Piedmont's witnesses, including its assessors, teachers, and administrators, identified Student as having a social-emotional need which negatively impacting his education and required a goal. Student did not meet his burden of proving he had social-emotional needs that negatively impacted his school performance such that Piedmont was required to offer a goal in this area.

NO NEED FOR SPEECH GOALS

As of September 8, 2022, Piedmont was on notice that speech and language was a suspected area of disability for Student which triggered a duty to assess. It promptly issued an assessment plan. However, Student's speech or language needs, if any, were not known when his IEP team finalized his draft goals at the September 8, 2022 IEP team meeting.

Student failed to prove he had speech and language needs at the time of the September 2022 IEP team meeting such that Piedmont was required to offer speech and language goals.

The September 8, 2022 IEP appropriately identified reading and writing as Student's areas of unique need. It offered a reading maintenance goal and two spelling goals. These goals were reasonably calculated to allow Student to make appropriate educational progress in light of his circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, 399 [137 S.Ct. 988, 197 L.Ed.2d 335] (*Endrew F.*) Any student might benefit from having additional goals. However, "[A]n IEP is not required to contain every goal from which a student might benefit." (*Capistrano, supra*, 21 F.4th 1125, 1133.)

Student did not establish Piedmont denied him a FAPE by not offering goals in the additional areas he proposed. Student did not meet his burden of proving Piedmont denied him a FAPE by failing to offer appropriate reading, writing, social-emotional, and speech goals.

ISSUE 3d: DID PIEDMONT DENY STUDENT A FAPE BY FAILING TO OFFER APPROPRIATE SERVICES TO ADDRESS HIS READING, WRITING, SOCIAL-EMOTIONAL AND SPEECH NEEDS IN THE SEPTEMBER 8, 2022 IEP?

Student alleges Piedmont denied him a FAPE by failing to offer an appropriate structured literacy program for a minimum of 30 minutes per day to address his reading and writing needs. Student contends Piedmont's failure to offer any speech and social-emotional services denied him a FAPE.

Piedmont asserts Student's specific learning disability minimally impacted his spelling, and its specialized academic instruction offer was sufficient to support his

academic goals and allow him to make appropriate progress. Piedmont contends Student did not require speech or social-emotional services to receive educational benefit.

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. (*Rowley, supra*, 458 U.S. 176, 201-204; *Endrew F., supra*, 580 U.S. 386, 399.) "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 (a) (2006); Ed. Code, § 56031, subd. (a).)

California law does not specifically define the term "specialized academic instruction," but the understanding of that term in California is that its meaning is the same as the federal term "specially designed instruction." (See California Legislative Analyst, Overview of Special Education in California, November 6, 2019, (<https://lao.ca.gov/Publications/Report/4110>).) Specially designed instruction is defined as adapting the content, methodology, or delivery of instruction to address the unique needs of the student with a disability and to ensure access to the general curriculum so the student can meet the applicable state educational standards that apply to all students equally. (34 C.F.R. § 300.39(b)(3) (2006).)

The Education Code describes the duties of a resource specialist, like Coffey-Smith. These include providing IEP instructional services to a pupil, like Student, who has been assigned to regular classroom teachers for a majority of a school day. (Ed. Code, § 56362, subd. (a)(1).) Education Code section 56335 describes educational services for students with dyslexia as an evidence-based, multi-sensory, direct, explicit, structured, and

sequential approach to instruction. (Ed. Code § 56335, subd. (a).) Education Code section 56335 does not require any additional information be included in the IEP of a student with dyslexia.

School districts need not specify an instructional method in the IEP unless that method is necessary for a student to receive a FAPE. (*C.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1122; 71 Fed. Reg. 46,665 (Aug. 14, 2006); *Crofts v. Issaquah School Dist. No. 411* (9th Cir. 2022) 22 F.4th 1048, 1056, citing *J.L. v. Mercer Island School Dist.*, (9th Cir. 2010) 592 F.3d 938, 945 fn.5 [districts are “entitled to deference in deciding what programming is appropriate as a matter of educational policy.”] see *Rowley, supra*, 458 U.S. 176, 206 & 208 [questions of educational policy and methodology left to school authorities].)

PIEDMONT OFFERED APPROPRIATE READING AND WRITING SERVICES

Piedmont’s September 2022 IEP offered Student 90 minutes per week of group specialized academic instruction to support his spelling and reading goals. The offer specified that 60 minutes would be push-in services during Student’s writing or spelling class and 30 minutes pull-out services for additional spelling or reading instruction.

The evidence established that Student required a minimal amount of support to continue to access grade level reading. Specifically, 30 minutes per week was sufficient to enable Student to meet his reading maintenance goal. Student did not contend otherwise.

The service offer included a transition plan to address Student’s resistance to intervention and bolster his acceptance of pull-out services. The IEP specified the

special education teacher would initially deliver all 90 minutes of instruction in the classroom to develop rapport with Student and determine the best approach to implement pull-out time.

Education Specialist Coffey-Smith explained her plan to work with Student during his general education spelling program to ensure that he was accessing the curriculum. Student was spelling close to grade level, but she would differentiate or modify the curriculum as needed to ensure his involvement and progress. Depending on Student's needs, this might include

- shortening spelling lists to reduce cognitive demand;
- implementing multisensory strategies to teach phonics;
- teaching mnemonics to learn spelling patterns and support memorization; and
- using Orton-Gillingham based supplemental programs.

Coffey-Smith's differentiation tools were responsive to Peirce's evaluation recommendation for multisensory approaches to address Student's phonological processing deficit. Coffey-Smith was experienced in teaching phonology, spelling, and reading to students with specific learning disabilities.

At hearing, Coffey-Smith explained her teaching approach. It was her practice to start with a formative assessment of each new student. Formative assessments looked at specific skills and informed her instruction by identifying the point of skill breakdown and providing a starting point. Coffey-Smith used a variety of reading and spelling methods depending on students' needs. For spelling instruction, she used guided spelling or dictation components from structured literacy programs, including one

based on the Orton-Gillingham scope and sequence. Coffey-Smith taught spelling like she taught reading: direct and explicit instruction, beginning with simple decodable words before progressing to non-decodable, irregularly spelled words, and monitoring progress along the way.

Futterman opined a minimum of 30 minutes per day was required to implement a structured literacy approach with fidelity, and that ideally a dyslexic student should receive 45 to 60 minutes per day remediation. As such, she concluded Piedmont's offer of 30 minutes per week pull-out services was inadequate to remediate Student's reading and spelling deficits.

However, Futterman's opinion was based on her belief that Student required a reading remediation program focusing on decoding. As determined in Issue 3c, Student did not establish he had a specific educational need in the area of decoding or that he required a decoding goal or reading remediation. As such, Futterman's opinion was not persuasive. Piedmont established Student required a minimal amount of specialized academic instruction to support his reading maintenance goal.

Futterman's opinion also failed to account for the offer of 60 minutes of push-in instruction. Futterman was not knowledgeable about Piedmont's general education spelling and reading programs, though she acknowledged they could be appropriate to Student's needs if they used a structured literacy approach with a specific scope and sequence. Futterman also criticized the September 2022 IEP specialized academic instruction offer for failing to specify that the instruction would be provided through a structured literacy approach. However, neither the IDEA nor California law require this level of specificity.

Piedmont also offered 30 minutes per month of special education consultation services. During this time, Coffey-Smith would help Student's general education teacher implement any modifications to the spelling program, advise her on accommodations, and review Student's needs and progress. To further support Student's academic needs, the IEP offered the following program accommodations, many of which Dr. Grelling recommended:

- extended time
- use of spell and grammar check
- graphic organizers for writing assignments
- preferential seating limiting auditory distractions
- visual supports
- practice and prompts to re-read and edit his work, and
- use of audio books.

Student did not prove that Piedmont's offer of specialized academic instruction failed to meet his reading and writing needs known to the IEP team at the time of the September 8, 2022 IEP team meeting. Coffey-Smith was ready and able to deliver Student's specialized academic instruction in an explicit, multisensory, direct, sequential manner which is structured literacy.

Futterman's recommendation for daily structured literacy remediation, and Dr. Grelling's recommendation for placement in a specialized school for children with dyslexia were based on the unproven premise that Student had a unique educational need in the area of decoding and required substantial reading remediation. As such, their opinions were not persuasive nor afforded much weight.

Additionally, Dr. Grelling's recommendation that Student attend a private school that served only student with dyslexia was at odds with the IDEA's strong preference that students be educated in the least restrictive environment. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a).) The evidence showed Student required only modest academic support from a credentialed special education teacher to enable him to continue to make appropriate academic progress. Student could access this support in the general education classroom with minimal pull-out instruction.

Given Student's overall reading and spelling ability, the evidence showed that 90 minutes per week of specialized academic instruction was sufficient to support Student's progress on his three goals. The September 2022 IEP offered a sufficient amount of specially designed instruction reasonably calculated to meet Student's literacy needs and enable him to make appropriate progress in light of his circumstances.

Student failed to establish the September 2022 offer of specialized academic instruction and consultation services were inadequate to meet his needs.

STUDENT DID NOT REQUIRE SOCIAL-EMOTIONAL OR SPEECH SERVICES

Related services are supportive services that are required to assist the child in benefiting from special education and may include speech and language therapy, counseling, and psychological services when appropriate. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34 (2006); Ed. Code, § 56363, subds. (a) &(b).) As determined in Issue 3c., Student failed to prove he had educational needs in the areas of social-emotional functioning or speech and language. As such, Student did not prove he required related services in

these areas to assist him in benefitting from special education. Even so, Piedmont considered general education counseling at the September 2022 IEP team meeting and made this available to Student to address any emotional challenges.

Student did not prove Piedmont denied him a FAPE by failing to offer appropriate services to address his reading and writing needs. Student did not prove he had social-emotional or speech needs for which he required related services. Student did not prove Piedmont denied him a FAPE by failing to offer appropriate services to meet his educational needs in the September 8, 2022 IEP.

ISSUE 3e: DID PIEDMONT DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR BY PREDETERMINING PLACEMENT AT THE NOVEMBER 7, 2022 IEP TEAM MEETING?

Student asserts Piedmont predetermined its general education placement offer at the November 7, 2022 IEP team meeting. Student argues that Piedmont's failure to notify Parents that its attorney would be attending this meeting, and the attorney's and special education director's participation demonstrated predetermination.

Piedmont contends it came to the November 2022 IEP team meeting open to considering Student's needs and progress, and reviewing its FAPE offer in light of any changed circumstances. Piedmont contends it was legally prohibited from offering an IEP placement at a noncertified private school, and its failure to do so was not predetermination.

Predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the

meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Board of Educ.* (6th Cir. 2004) 392 F.3d 840, 857-858 (*Deal*); *H.B. v. Las Virgenes Unified School Dist.* (July 3, 2007, No. 05-56485, p.2) (9th Cir. 2007) 239 Fed. Appx. 342, 344-345 [nonpub. opn.].) A district may not arrive at an IEP team meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.)

Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to a full discussion of their questions, concerns, and recommendations, before the IEP is finalized. (*Assistance to States for the Education of Children with Disabilities*, 64 Fed.Reg. 12406, 12478 (Mar. 12, 1999).) School officials may permissibly form opinions prior to IEP meetings. However, if the district goes beyond forming opinions and becomes “impermissibly and deeply wedded to a single course of action,” this amounts to predetermination. (*P.C. v. Milford Exempted Village Schools* (S.D. Ohio, Jan. 17, 2013, No. 1:11- CV-398) 2013 WL 209478, p.7.)

The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904] “[T]he informed involvement of parents” is central to the IEP process.]) Predetermination of an IEP offer violates the mandate of meaningful parental participation. A school district cannot independently develop an IEP, without meaningful parental participation, and then present the IEP to the parent for ratification. (*Target Range, supra*, 960 F.2d 1479, 1484.)

A school district that predetermines the child's program and does not consider the parents' requests with an open mind, has denied the parents' right to participate in the IEP process. (*Deal, supra*, 392 F.3d 840, 858; *Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131, superseded on other grounds by statute.)

Student's arguments that the attendance of Harter and Piedmont's counsel at the November 2022 IEP team meeting, and counsel's recitation of the legal prohibition of offering an IEP placement at a private school, resulted in a predetermined placement were not persuasive. (see *G.G. v. Cornejo Unified School Dist.* (C.D.Cal., Nov. 2, 2022, No. CV 21-9135 DSF (MARx) 2022 WL 17478600, at p. 7 [district's failure to consider noncertified private placement did not deny meaningful participation], appeal dismissed sub nom. *G. G. by and through Good v. Cornejo Valley Unified School Dist.* (9th Cir., Jan. 17, 2023, No. 22-56137) 2023 WL 2328126.)

A "nonpublic, nonsectarian school" as part of the continuum of program options means a private, nonsectarian school that enrolls individuals with exceptional needs pursuant to an IEP and is certified by the California Department of Education. (Ed. Code, §§ 56361, subd. (e), 56034.) The California Constitution prohibits public funds going to "any school not under the exclusive control of the officers of the public schools." (Cal. Const., art. IX, § 8.) Piedmont could not offer placement at Charles Armstrong as it was not a certified nonpublic school. It is not impermissible predetermination for a school district to confirm it will not offer placement at a school at which it is not legally authorized to place students.

There was no evidence Piedmont met prior to the November 2022 meeting to determine its IEP offer in advance. Sending a required prior written notice informing Parents their request for private school tuition reimbursement was denied, and that

Piedmont continued to believe its initial IEP offered placement in the least restrictive environment, does not constitute predetermination. Student offered no legal authority that Piedmont was required to propose alternate placements. Further, during the November 2022 IEP team meeting, Piedmont asked questions about Charles Armstrong and asked if Parents had explored certified nonpublic school placements for its consideration. This showed it was not impermissibly wedded to its general education placement offer and was willing to openly consider Parents' input. Parents did not propose any alternate placements on the continuum of program options.

The law requires that parents be included in the IEP team and that their concerns, questions, and input be taken seriously. The November 2022 IEP team meeting transcript shows this happened. Parents attended the meeting and actively participated with their advocate. A Charles Armstrong representative attended at Piedmont's request and provided an update. Piedmont team members asked questions about Student's private placement and Parents' plans. They listened to Parents' input that Student benefitted from being with other students like him, and considered a letter from Student's private therapist noting Student's increased self-confidence. Piedmont's counsel requested current assessment results, but none were provided. All of this weighs against Student's claim of predetermination. The evidence did not support Student's predetermination claim.

Student did not meet his burden of proving Piedmont predetermined placement at the November 2022 IEP team meeting.

ISSUE 3f: DID PIEDMONT DENY STUDENT A FAPE BY FAILING TO CONSIDER AN INDEPENDENT SPEECH ASSESSMENT REPORT PROVIDED BY PARENTS ON FEBRUARY 18, 2023, OR CONVENE AN IEP TEAM MEETING TO DISCUSS IT?

Student argues Piedmont was required to consider the results of a privately obtained speech assessment, or convene an IEP team meeting to discuss it, following Piedmont's receipt of the report on February 18, 2023.

Piedmont contends the report was not an assessment but rather a speech consultation note. Further, Piedmont argues Student's counsel sent it to its counsel as part of settlement negotiations. For these reasons, Piedmont maintains it was not required to consider the report or discuss it at an IEP team meeting.

The results of an evaluation obtained by the parent at private expense must be considered by the school district, if the evaluation meets public agency criteria, in any decision made with respect to the provision of FAPE to the child. (20 U.S.C. § 1414(d)(3) & (4); 34 C.F.R. § 300.502(c)(1); Ed. Code, § 56329, subd. (c).) More generally, a school district is required to consider the results of a privately procured assessment when developing and revising an IEP. (Ed. Code, §§ 56341.1, subds. (a) & (d)(3), 56381, subd. (b)(1).)

Additionally, the IEP team is required to consider the concerns of the parent for enhancing the student's education and information on the student's needs provided to or by the parent. (20 U.S.C. § 1414(d)(3)(A) and (d)(4)(A)(ii); 34 C.F.R. § 300.324(a)(1)(ii) & (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(2), (d)(3) & (f).) An IEP team meeting requested

by a parent must be held within 30 calendar days, not counting days between the regular school sessions, or days of school vacations in excess of five schooldays, from the date of receipt of the parent's written request. (Ed. Code, §§ 56043, subd. (l); 56343.5.)

On Saturday, February 18, 2023, Student's counsel emailed Piedmont's counsel, generally discussing a settlement proposal regarding this matter. Student's counsel additionally shared that Parents had obtained a speech assessment of Student. She asked if Piedmont would like to convene an IEP team meeting to review it, and attached a copy. The January 11, 2023 three-page document was labeled a "speech consultation note," and was written by a licensed speech language pathologist with Speech Inc. in San Francisco regarding Student's intake session. The author identified one test measure administered in the area of phonological working memory. The author recommended weekly speech therapy sessions for Student to help develop a treatment plan and goals.

There is significant overlap between this issue and Issue 3b. In Issue 3b., this Decision determined Piedmont denied Student a FAPE by failing to timely complete the agreed upon speech and language assessment, for which a remedy will be awarded. Student shared the Speech Inc. consultation note with Piedmont precisely because it failed to complete its own assessment and identify Student's speech and language needs.

Student did not establish this consultation note was the equivalent of a privately obtained independent educational evaluation that met agency criteria, or even a private assessment. However, the speech consultation note included information on Student's needs that the IEP team was required to consider upon Parent request for an IEP team

meeting. (*Capistrano, supra*, 21 F.4th 1125, 1138.) Student's counsel's email inquiry to Piedmont's counsel during the course of settlement discussions did not constitute a parent request to convene an IEP team meeting.

Even if Piedmont was required to convene an IEP team meeting, it would have had 30 days from receipt of the information to schedule it, on or about March 20, 2023. Student's claims in this case extend only to March 23, 2023. Student did not introduce any evidence that Piedmont's failure to consider the speech intake note at an IEP team meeting denied him a FAPE or significantly impeded Parent participatory rights for these three days.

Student did not prove Piedmont denied him a FAPE by failing to consider the Speech Inc. consultation note provided to Piedmont's counsel in February 2023, or by failing to convene an IEP team meeting to discuss it.

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

Piedmont did not deny Student a FAPE by failing to assess him for a specific learning disability during the 2020-2021 school year beginning January 16, 2021 to 2021.

Piedmont prevailed on Issue 1a.

ISSUE 1b:

Piedmont did not deny Student a FAPE during the 2020-2021 school year by failing to find him eligible under the category of specific learning disability.

Piedmont prevailed on Issue 1b.

ISSUE 2a:

Piedmont was not required to assess Student for a specific learning disability during the 2021-2022 school year, and, therefore, did not deny him a FAPE by failing to assess.

Piedmont prevailed on Issue 2a.

ISSUE 2b:

Piedmont did not deny Student a FAPE during the 2021-2022 school year by failing to provide Parent an assessment plan after Student's teacher identified a need for assessment on October 7, 2021.

Piedmont prevailed on Issue 2b.

ISSUE 2c:

Piedmont did not deny Student a FAPE during the 2021-2022 school year by failing to find him eligible under the category of specific learning disability.

Piedmont prevailed on Issue 2c.

ISSUE 3a:

Piedmont did not deny Student a FAPE during the 2022-2023 school year until March 23, 2023, by failing to conduct a speech and language assessment of Student as part of the September 2022 assessments.

Piedmont prevailed on Issue 3a.

ISSUE 3b:

Piedmont denied Student a FAPE during the 2022-2023 school year by failing to timely complete speech and language and occupational therapy assessments which Parent consented to on September 15, 2023.

Student prevailed on Issue 3b.

ISSUE 3c:

Piedmont did not deny Student a FAPE during the 2022-2023 school year by failing to offer appropriate reading, writing, social-emotional, and speech goals.

Piedmont prevailed on Issue 3c.

ISSUE 3d:

Piedmont did not deny Student a FAPE during the 2022-2023 school year by failing to offer appropriate services to address Student's reading, writing, social-emotional, and speech needs.

Piedmont prevailed on Issue 3d.

ISSUE 3e:

Piedmont did not predetermine placement at the November 7, 2022 IEP team meeting.

Piedmont prevailed on Issue 3e.

ISSUE 3f:

Piedmont did not deny Student a FAPE by failing to consider an independent speech assessment provided by Parent on February 18, 2023, or by failing to convene an IEP team meeting to discuss it.

Piedmont prevailed on Issue 3f.

REMEDIES

ALJ's have broad latitude to fashion appropriate equitable remedies for FAPE denials. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3) (2006).) 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, 822-23.) Procedural violations that significantly impede parental participation in the IEP process constitute denials of FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subds. (f)(2), (j).)

Piedmont denied Student a FAPE by failing to complete a speech and language and occupational therapy assessment pursuant to the consented-to September 2022 assessment plan. Student is entitled to independent speech and language and occupational therapy assessments at public expense.

ORDER

1. Piedmont shall fund independent speech and language and occupational therapy assessments of Student consistent with current Special Education Local Plan Area criteria for independent educational evaluations.
2. All of Student's other 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.

Theresa Ravandi
Administrative Law Judge
Office of Administrative Hearings