

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

THE CONSOLIDATED MATTERS INVOLVING:
PARENT ON BEHALF OF STUDENT, AND
CABRILLO POINT ACADEMY.

CASE NO. 2023020680

CASE NO. 2023020409

DECISION

July 20, 2023

On February 16, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parents on behalf of Student, naming Cabrillo Point Academy, called Cabrillo. A due process hearing request is called a complaint. On February 13, 2023, Cabrillo filed a complaint naming Student in OAH case number 2023020409. On February 23, 2023, OAH issued an order consolidating the cases, and designated Student's case as the primary case. On March 21, 2023, OAH granted the parties' joint request to schedule mediation and continue the due process hearing. Administrative Law Judge Jennifer Kelly heard the matter via videoconference on May 16, 17, 18, and 23, 2023.

Attorney Paul A. Hefley, Jr. represented Student. Parents attended all hearing days. Attorney Courtney M. Brady represented Cabrillo. Cabrillo's Director of Special Education, Dr. Pamela Gandara, attended all hearing days.

At the parties' request, OAH continued the matter to allow time for them to prepare written closing argument briefs. OAH closed the record and submitted the matter on June 12, 2023.

STUDENT'S ISSUES

At the start of the hearing, Student withdrew Issue 1 regarding the appropriateness of Cabrillo's October 26, 2022, psychoeducational assessment and report, as revised on November 29, 2022. Student also withdrew Issue 4 concerning the appropriateness of goals, accommodations, and Cabrillo's placement offer. Finally, Student withdrew Issue 5 regarding Cabrillo's cancellation of a December 13, 2022, individualized education program, called IEP, team meeting, as stated in the May 8, 2023 Order Following Prehearing Conference.

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The remaining issues have been renumbered accordingly. An administrative law judge has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

A free appropriate public education is called a FAPE.

1. Did Cabrillo deny Student a FAPE by failing to assess Student in all areas of suspected disability following Parents' written request on August 8, 2022, through February 16, 2023, specifically in the areas of:
 - a. functional behavior; and
 - b. assistive technology?
2. Did Cabrillo deny Student a FAPE by predetermining its offer of placement in the October 27, 2022 IEP, as amended on January 11, 2023?

CABRILLO'S ISSUE

3. Was Cabrillo's October 26, 2022, psychoeducational assessment and report, as revised on November 29, 2022, appropriate?

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JURISDICTION

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE, to the child. (20 U.S.C. § 1415(b)(6) and (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Each party had the burden of proof as to their respective issues. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was five years old and in transitional kindergarten at the time of the hearing. Student resided within Hemet Unified School District's geographic boundaries. Student enrolled in Cabrillo, a public charter school, effective August 15, 2022. Cabrillo offered a non-classroom based, independent study program. Cabrillo found Student eligible for special education under the primary category of autism on January 11, 2023.

LEGAL FRAMEWORK

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006).) Parents and school personnel develop an IEP for an eligible student based upon the IDEA and state law. (20 U.S.C. §§ 1401(14), 1414(d)(1); Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363, subd. (a); 34 C.F.R. §§ 300.320 (2007), 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, 402 [137 S.Ct. 988, 1000] (*Endrew F.*).

CHARTER SCHOOLS

Cabrillo was a nonprofit public benefit corporation and, therefore, was designated as a local educational agency, called LEA, responsible for providing special education and related services to its students. (Ed. Code, §§ 56026.3, 47604.) Students with disabilities

retain all rights under the IDEA when they attend a charter school, just as they would when attending traditional public schools. (34 C.F.R. § 300.209(a).) A charter school that is a LEA must serve children with disabilities in the same manner that a LEA serves children with disabilities in other public schools. (*Id.*, subd. (b)(1)(i); Ed. Code, § 47604.)

Cabrillo provided a non-classroom based, independent study general education program to its students. Parents at Cabrillo served as their children's learning coach and were supported by a home study teacher. Cabrillo offered the full continuum of special education placements to students eligible for special education.

Cabrillo was part of the El Dorado Charter special education local plan area, called SELPA. El Dorado Charter SELPA was not the responsible LEA for Student and did not provide any special education programs or services to Cabrillo's students.

BACKGROUND FACTS

Student was four-years old when he enrolled at Cabrillo for the 2022-2023 school year. Student qualified for early intervention services through the Inland Regional Center based upon developmental delays. He received occupational therapy and speech and language services. Temecula Valley Unified School District, called Temecula Valley, assessed Student for special education in fall 2021. Temecula Valley was Student's district of residence at the time. Temecula Valley did not find Student eligible for special education at a December 15, 2021, IEP team meeting.

Parents disagreed with Temecula Valley's assessments and determination of non-eligibility. Temecula Valley funded independent educational evaluations at public expense in

- psychoeducation,
- speech and language,
- occupational therapy,
- visual processing, and
- occupational therapy.

Clinical psychologist Robin Morris, Psy.D conducted a private psychological evaluation and report in April 2022. Dr. Morris diagnosed Student with autism.

Parents and Cabrillo had discussions in spring 2022 concerning Student's potential enrollment at Cabrillo and his eligibility for special education. At hearing, Student attempted to introduce email communications between Parents and Cabrillo's attorney of record from May 2022, in which Parents provided Cabrillo a copy of Dr. Morris's psychological report for Student. Student believed Parents' pre-enrollment communications with Cabrillo proved Cabrillo predetermined a placement offer for Student eight months later in January 2023. A charter school's obligation to a student is triggered upon enrollment. (*N.F. v. Antioch Unified School District* (N.D. Cal. 2021) 2021 WL 3355280, at *6, affirmed (9th Cir. 2022) 2022 WL 1125645.) In May 2022, the responsibility to offer a FAPE rested with Student's district of residence. (*Id.*; see also Ed. Code, §§ 47641, subd. (a), 47646; 34 C.F.R. § 300.209(a).)

Parents' communications with Cabrillo in May 2022 did not "prove or disprove any disputed fact that is of consequence to the determination" of the issues at hearing,

including Student's claim Cabrillo predetermined its placement offer at the January 11, 2023, IEP team meeting. (Evid. Code, § 210) Further, the written communications between the parties included confidential settlement communications. (Evid. Code, § 1152.) Student's pre-enrollment communications in May 2022 were excluded.

Parents entered into a Master Agreement for Independent Study with Cabrillo on June 16, 2022, for the purpose of enrolling Student in Cabrillo. Under the terms of this agreement, Student enrolled with Cabrillo for the 2022-2023 school year effective August 15, 2022.

Prior to enrolling at Cabrillo, in July 2022, Parents retained optometrist Alexis Coffey and audiologist Maria Abramson, to assess Student in the areas of visual processing and auditory processing. Parents obtained occupational therapy and speech and language evaluations for Student in August 2022. Parents believed these assessments demonstrated Student had areas of need in visual and auditory processing, speech and language, and occupational therapy.

Parent requested Cabrillo evaluate Student for special education eligibility on August 8, 2022. Parents' request for referral informed Cabrillo that Student had been diagnosed by private evaluators with

- autism,
- speech and language delays,
- gross and fine motor deficits, and
- auditory and visual processing disorders.

Parents requested Cabrillo conduct evaluations in the areas of

- psychoeducation,
- occupational therapy,
- speech and language,
- visual processing by a developmental optometrist,
- audiological processing by an audiologist,
- functional behavior, and
- emotionally related mental health services.

At hearing, Student clarified the request for emotionally related mental health services meant educationally related mental health services.

CABRILLO'S ISSUE: WAS CABRILLO'S OCTOBER 26, 2022,
PSYCHOEDUCATIONAL ASSESSMENT AND REPORT, AS REVISED
ON NOVEMBER 29, 2022, APPROPRIATE?

Cabrillo's issue is addressed first because the factual and legal findings for this issue apply to the analysis of Student's issues. Cabrillo contends its October 26, 2022, psychoeducational assessment and report, as revised on November 29, 2022, collectively called the psychoeducation assessment, was timely and conducted with Parents' consent. Cabrillo further asserts the psychoeducational assessment complied with statutory requirements and elicited accurate information for the December 1, 2022 and January 11, 2023, IEP teams for use in determining Student's eligibility for special education and developing an appropriate educational program for Student.

Student contends Cabrillo's psychoeducational assessment did not accurately reflect Student's needs, specifically in the areas of auditory and visual processing, functional behavior, and assistive technology.

ASSESSMENT PLAN AND PARENTAL CONSENT

A child with a disability is a child who has been evaluated and identified with one or more of a number of specific disability classifications, and by reason thereof requires special education and related services. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a).) Before any action is taken to place a student with exceptional needs in a special education program, a student's educational needs must be assessed. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) The IDEA uses the term "evaluation," while the California Education Code uses the term "assessment." In this Decision, the terms mean the same thing and are used interchangeably. (34 C.F.R. § 300.300; Ed. Code, § 56302.5.)

An assessment may be initiated by request of a parent, a State educational agency, other State agency, or LEA. (20 U.S.C. § 1414(a)(1)(B); Ed. Code, §§ 56302, 56029, subd. (a), 56506, sub. (b); *Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) Assessments are required to determine eligibility for special education, and the type, frequency, and duration of specialized instruction and related services that are required. (20 U.S.C. § 1414(a); 34 C.F.R. § 300.303; Ed. Code, § 56043.)

A school district must assess the child in all areas of suspected disability before determining whether a child qualifies for special education services. (20 U.S.C. § 1414(a), (b)(3)(B); 34 C.F.R. § 300.301(a); Ed. Code, § 56320, subd. (f).) This requirement allows the child's IEP team to have a "complete picture of the child's functional, developmental,

and academic needs, which in turn allows the team to design an [IEP] tailored to the needs of the individual child." (*Timothy O. v. Paso Robles Unified Sch. Dist.* (9th Cir. 2016) 822 F.3d 1105, 1111, *cert. denied*, (2017) 137 S. Ct. 1578 (*Timothy O.*)).

The school district must follow statutory guidelines that dictate both the content of the assessments and the qualifications of the assessors. An assessment requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56321, subd. (a).) To obtain parental consent the school district must provide proper notice to the student and his parents within 15 days of the parents' request for an assessment. (20 U.S.C. § 1414(b)(3) and (c)(1); Ed. Code, § 56321, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental rights and procedural safeguards under the IDEA and state law. (20 U.S.C. §§ 1414(b)(3) and (c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must

- be in language easily understood by the general public,
- be provided in the native language of the parent,
- explain the types of assessments the district proposes to conduct, and
- advise that the IEP will not result from the assessment without the consent of the parent. (34 C.F.R. § 300.300(a)(ii); Ed. Code, § 56321, subds. (b)(1)-(4).)

If a school district wishes to deny a parent's request for a special education assessment, it must provide prior written notice to the parents explaining its refusal to conduct an evaluation. The notice must explain why the school district does not suspect that the child has a disability and what records or evaluations it used as the basis for its decision. (34 C.F.R. § 300.503(b); Ed. Code, § 56500.4, subd. (b); *Timothy O.*, *supra*, 822 F.3d 1105, 1110, fn. 8.) This is known as a prior written notice.

Cabrillo proved its August 22, 2022 assessment plan met all legal requirements. Cabrillo responded to Parents' August 8, 2022, request for referral by timely developing and offering Parents an August 22, 2022 assessment plan. The assessment plan enclosed a copy of parental rights and procedural safeguards under the IDEA and California law. The assessment plan included a description of proposed assessments to determine Student's

- eligibility,
- present levels of academic achievement,
- functional needs, and
- individual education needs.

The assessment plan proposed assessments in the areas of

- health,
- academic achievement,
- speech and language,
- motor development,
- intellectual development,
- adaptive behavior, and
- social-emotional behavior.

An education specialist and a school psychologist would conduct the academic achievement assessment. A school psychologist would conduct the intellectual development, social emotional/behavior, and adaptive evaluations. (20 U.S.C. § 1414(b)(3) and (c)(1); Ed. Code, § 56321, subd. (a).)

The assessment plan indicated the psychoeducational assessment would include a review of records, observations, and interviews. The assessors would use standardized

tests, interviews, record review, and observations. The plan was in Student's primary language of English, described the proposed assessments, and explained the assessment would be reviewed at an IEP team meeting before a program was proposed and, with Parents' consent, implemented. (34 C.F.R. § 300.300(a)(ii); Ed. Code, § 56321, subd. (b)(1)-(4).)

Concurrently with its offer of an assessment plan, on August 22, 2022, Cabrillo issued a prior written notice to Parents declining their requests for

- an audiological processing assessment by an audiologist,
- a visual processing assessment by a developmental optometrist,
- a functional behavior assessment, and
- an educationally related mental health services assessment.

Cabrillo explained a credentialed and qualified school psychologist would assess Student in the areas of auditory processing, visual processing, and social emotional behavior as part of its initial assessment.

Parents believed Student required visual processing and audiology assessments by a developmental optometrist and audiologist, respectively. Parents did not understand that a school psychologist could initially assess students for visual, auditory, and phonological processing strengths and weaknesses in the educational setting. On August 22, 2022, Mother reiterated her request that the August 22, 2022 assessment plan be amended to include assessments for visual processing by a developmental optometrist and audiological processing by an audiologist.

On August 23, 2023, Cabrillo issued a second prior written notice declining these requests and clarified that a credentialed and qualified school psychologist would

initially assess Student's auditory and visual processing, and social emotional behavior. In the event the initial evaluation determined the need for advanced visual or auditory processing testing by outside providers, a referral could be made.

On August 29, 2022, Mother signed and returned the August 27, 2022, assessment plan. On the document, she added requests to include an additional assessment in the area of assistive technology. Mother also reiterated her request that Student's visual processing and audiology needs be evaluated by a developmental optometrist and audiologist, and that Student's behavioral needs be assessed by a board-certified behavior analyst. In an August 24, 2022 email Mother also requested an adapted physical education assessment.

On September 6, 2022, Cabrillo issued a third prior written notice to Parents indicating it did not agree to the proposed changes to the August 22, 2022, assessment plan, with the exception of granting Parents' request to assess Student in the area of adapted physical education. Cabrillo declined Parents' request to assess Student in the areas of

- assistive technology,
- visual processing by a developmental optometrist,
- audiological processing disorder by an audiologist, and
- behavior by a board-certified behavior analyst.

At hearing, Student argued Cabrillo failed to consider Parents' requests for assessments in all areas of need. Mother testified at hearing. Mother believed Cabrillo should have conducted an auditory processing assessment by an audiologist, and a visual processing assessment by an optometrist. Mother provided Cabrillo copies of the private visual perception and auditory processing evaluations Parents obtained for

Student in July 2022. Mother did not explain why further assessments in these areas were necessary for the initial assessment. Mother also believed functional behavior and assistive technology assessments should have been conducted as part of the initial assessment.

Cabrillo proved its August 22, 2022 assessment plan met the procedural requirements under the IDEA and the California Education Code. Cabrillo also proved it obtained Parents' consent to conduct Student's psychoeducational assessment. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3), (c)(1); Ed. Code, § 56321, subd. (a).) Cabrillo provided Parents with proper notice of the proposed assessments and obtained Parents' prior written consent. Parents reviewed and signed the assessment plan, with revisions, within 15 days on August 27, 2022. Cabrillo received the assessment plan on August 29, 2022.

TIMELINESS OF ASSESSMENT

School districts must complete special education assessments and hold an IEP team meeting to discuss the results of the assessment within 60 days of the date the school district receives the signed assessment plan unless the parents agree in writing to an extension. (20 U.S.C. § 1414(a)(1)(c); 34 C.F.R. § 300.301(c)(1)(i), (ii); Ed. Code, §§ 56043, subds. (c) and (f)(1); 56321.1, subd. (a), and 56344, subd. (a).) This timeline does not include the days between the student's regular school sessions, terms, or days of school vacation in excess of five school days. (Ed. Code, § 56043, subd. (f)(1).) California law requires that the assessment report be provided to the parent. (Ed. Code, § 56329, subd. (a)(3).)

Cabrillo proved the psychoeducational assessment was conducted, the psychoeducational report was completed, and IEP team meetings were held to review the assessment results on December 1, 2022, and January 11, 2023.

PARENTS' REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATIONS

A parent may request an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b)(1); Ed. Code, §§ 56329, subd. (b), 56506, subd. (c).) In response to a request to pay for an independent educational evaluation, a school district must, without unnecessary delay, either file a request for due process hearing to show that its evaluation was appropriate or provide the independent educational evaluation at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (b) and (c); *Baquerizo v. Garden Grove Unified Sch. Dist.* (9th Cir. 2016) 826 F.3d 1179, 1185.) If the final decision resulting from the due process hearing is that the evaluation was appropriate, the parent still has the right to obtain an independent educational evaluation, but not at public expense. (34 C.F.R. § 300.502(b)(3); Ed. Code, § 56329, subd. (c).)

Parents disagreed with the adequacy of Cabrillo's psychoeducational assessment. More specifically, Parents believed Cabrillo failed to adequately assess Student in the areas of auditory and visual processing. On January 11, 2023, Parents requested independent educational evaluations in the areas of auditory processing and visual processing at Student's IEP team meeting and by email.

On January 20, 2023, Cabrillo declined to fund independent educational evaluations in these areas through a prior written notice. The prior written notice

complied with the requirements set forth in title 34 Code of Federal Regulations section 300.503. Cabrillo informed Parents it would file a due process hearing request to defend the appropriateness of the psychoeducational evaluation, which included auditory and visual processing components.

Cabrillo filed a request for due process hearing on February 13, 2023, to defend the appropriateness of its psychoeducational assessment. This was approximately four weeks after Parents notified Cabrillo of their request for independent educational evaluations. Cabrillo acted without unnecessary delay in responding to Parents' request for independent educational evaluations and in filing for due process to defend its assessment, and Student did not claim otherwise. (Ed. Code, § 56329; *see J.P. v Ripon Unified Sch. Dist.* (E.D. Cal. 2009) 2009 WL 1034993.)

ASSESSMENT REQUIREMENTS

A school district must follow statutory guidelines for conducting assessments. Individuals who are both knowledgeable of the student's disability and competent to perform the assessment must conduct assessments of student's suspected disabilities. (20 U.S.C. § 1414(b)(3)(B)(ii); Ed. Code, §§ 56320, subd. (g), 56322.) A psychological assessment must be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the student. (Ed. Code, § 56324, subd. (a).) The determination of what tests are required is made based on information known at the time. (*Vasheresse v. Laguna Salada Union School Dist.* (N.D. Ca. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) School district assessors must review existing evaluation data on the

child, including information provided by the parents, current classroom based, local or State assessments, classroom-based observations, and observations by teachers and related service providers. (20 U.S.C. § 1414(c)(1); 34 C.F.R. § 300.305(a)(1).)

When conducting assessments, assessors must:

- use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parents;
- not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and
- use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. (20 U.S.C. § 1414(b)(2)(A) and (B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).)

Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (20 U.S.C. § 1414(b)(3)(C); 34 C.F.R. § 300.304(c)(6); Ed. Code, § 56320, subd. (c).) The assessments used must be:

- selected and administered so as not to be discriminatory on a racial or cultural basis;
- provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally;
- used for purposes for which assessments are valid and reliable;

- administered by trained and knowledgeable personnel; and
- administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b)(A) & (c)(5); 34 C.F.R. § 300.304(b)(1); Ed. Code, § 56320, subds. (a), (b).)

PSYCHOEDUCATIONAL ASSESSMENT

Cabrillo did not prove its psychoeducational assessment procedurally complied with the IDEA. Cabrillo's psychoeducational assessment met some but not all applicable legal standards. Cabrillo failed to complete the phonological portion of the assessment due to Student's behaviors, and thereafter, neglected to readminister the assessment or use an alternate testing method to measure Student's phonological strengths and weaknesses. Cabrillo failed to prove the visual processing component of its psychological assessment was administered in accordance with the assessment producer's instructions. Cabrillo did not establish it considered Student's private evaluations in visual processing and developmental optometry or explain how these reports informed Cabrillo's determination of Student's strengths and weaknesses in phonological and visual processing.

Cabrillo retained educational psychologist Joe Rubio to conduct Student's initial psychoeducational assessment and prepare a psychoeducational assessment report, which included assessments in the areas of intellectual development, academics, social-emotional behavior, and adaptive functioning. Concurrent assessments in occupational therapy and speech and language were completed by other assessors and are not analyzed in this Decision.

Rubio was a licensed educational psychologist. He held a bachelor's degree in professional studies, a master's degree in educational psychology, and was a candidate for a doctorate degree in philosophy in education, with an emphasis on school psychology. Rubio held a pupil personnel services credential in school psychology. Rubio worked in the education field since 2011 as a school psychologist and a program administrator in special education. Rubio completed hundreds of psychoeducational assessments as both a school psychologist and an independent contractor. Rubio's education, credentials, and experience rendered him qualified to conduct psychoeducational assessments, administer standardized tests, interpret the results, and prepare assessment reports.

Rubio considered whether Student met eligibility criteria under multiple special education categories, including specific learning disability, speech and language impairment, and autism. Rubio interviewed Mother and Student's home study teacher. Mother provided additional input through completing a parent developmental history, a background questionnaire, and assessment rating scales.

Rubio reviewed prior assessments for Student, including an Inland Regional Report dated December 2019, which assessed Student's language, fine motor, and adaptive skills. Rubio also reviewed an IEP dated December 15, 2021, from Temecula Valley Unified School District.

OBSERVATIONS AND INTERVIEWS

Rubio conducted a brief informal interview with Student prior to standardized testing, and during testing breaks. Student had difficulties sustaining attention, reciprocating conversation, and participating in joint play with Rubio.

Rubio interviewed Mother on two occasions. Mother was worried about Student's speech intelligibility, pragmatic language skills, and oral motor function. Mother also expressed worries about Student's behaviors associated with autism, including

- struggling to engage with others,
- reciprocating conversations,
- regulating his emotions, and
- transitioning between activities.

Student sometimes engaged in lengthy tantrums. Mother shared that Student had recently been assessed by several private assessors, and engaged in lengthy periods of crying, wailing, and refusal prior to and after each testing session. Student had difficulty eating certain foods and was not yet toilet trained.

Rubio interviewed Student's homeschool teacher, Carissa Boyd, on two occasions. In the first interview, Boyd could not offer progress updates because she had only one interaction with Student and had not yet worked with him. Boyd obtained work progress statements from Mother for two learning periods. The work statements were called, "I CAN" statements and reflected whether Student could meet transitional kindergarten expectations in various pre-academic areas. The "I CAN" statements reflected Student met expectations in the areas of

- following one and two-step oral directions,
- printing many uppercase and lowercase letters,
- writing numbers from 0 to 20,

- correctly naming shapes,
- describing many types of jobs in school and in the community, and
- finding land and water on a map or globe.

Student was below expectations in naming numbers and counting in sequence and counting by ones.

In the next interview, Boyd reported she had completed one virtual learning session with Father. Student did not attend this session, and therefore Boyd did not observe Student in the instructional setting.

Rubio observed Student virtually in his home school setting during an instructional reading activity with Mother. Student did not want to participate in the activity, and after a few minutes got up from his seat and ran away from the area. Mother redirected Student back to the activity. Student continued to have difficulty completing the task and required significant prompting and redirection. Student ran off camera again. Mother could not reengage Student in the activity despite several attempts.

Rubio observed Student during two testing sessions. Student demonstrated significant behaviors during both testing sessions, including tantrums. Student refused to exit the car or enter the building. On the first day, he kicked, screamed, and hit Mother, leaving marks on her neck.

Rubio had difficulty establishing rapport with Student. Throughout the testing sessions, Student struggled with maintaining attention, regulating his emotions, and transitioning between locations and activities. Student was inattentive, did not interact with Rubio, and had difficulty articulating some words. Student exhibited sensory

needs. At times he would walk around the testing room and glide his hand on the wall or the filing cabinets. Student sometimes mumbled to himself or laughed inappropriately. Student's inability to sustain attention and need for movement breaks to manage his behavior lengthened the time required to complete the cognitive assessment.

During the second testing session, Student's behaviors were more severe. Father accompanied Student. Student had difficulty engaging with Rubio and paying attention. Student frequently required redirection and movement breaks. At times, Student left the testing area and climbed on the table.

COGNITIVE TESTING

Rubio administered the Kaufman Assessment Battery for Children, Second Edition Normative Update, called Cognitive Test, to assess Student's cognitive ability. The Cognitive Test allowed the assessor to select from one of two assessment models based upon the child's background and reason for referral. Rubio selected the model that does not measure acquired knowledge, or crystallized ability, to measure Student's general cognitive ability. The test focused on Student's mental processing abilities instead of assessing Student's acquired knowledge. Student's mental process indexing score was in the average range as compared to his same aged peers. Student's overall mental processing abilities exceeded those of 58 percent of same aged children.

Rubio administered the sequential process index, which measured the ability to solve problems by remembering and using an ordered series of images or ideas. Short-term memory is the ability to receive and hold information and then use it within a few seconds. Number recall measures the ability to repeat a series of increasingly

long numbers. The word order subtest required Student to touch a series of images on cards in the same order the assessor said the names of the images. Student scored 91 on this index, within the average range when compared to his same aged peers.

The simultaneous processing index measured Student's ability to solve spatial, analogical, or organization problems that required processing many stimuli at once. This index also assessed Student's ability to perceive, store, manipulate, and think using visual information. The conceptual thinking subtest required Student to choose one picture from a group of four or five pictures that did not belong. Student scored in the above-average range on this subtest when compared to his same age peers. The face recognition subtest required Student to look at a face of one or two people for five seconds, and then locate the correct faces from a group photograph. Student scored in the high average range. The triangles subtest required Student to assemble rubber triangles to match a picture of an abstract design. Student scored in the average range. Student's overall score on this index was above average and Student's overall abilities in this area were better than 86 percent of same aged children.

Rubio administered the learning ability index, which measured Student's ability to complete different types of learning tasks, including recalling one part of a previously learned but unrelated pair of items. This index measured Student's ability to store and retrieve newly learned information. Student scored in the average range when compared to his same aged peers.

Rubio's report determined Student had no educationally relevant areas of need in the area of broad intelligence.

AUDITORY/PHONOLOGICAL PROCESSING

Phonological processing refers to the use of phonological information, especially the sound structure of oral language, in processing written and oral language commonly used for academics and everyday activities. Phonological processing is included in the description of basic phonological processes. (Ed. Code, § 56334.)

Assessment tools must be tailored to assess specific areas of educational need. (Ed. Code, § 56320, subd. (c).) Assessors may not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(A) and (B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).)

Cabrillo conducted a single assessment of auditory processing by administering the Comprehensive Test of Phonological Processing, Second Edition, called Phonological Test, to measure Student's phonological awareness, phonological memory, and rapid naming skills. Student could not complete the assessment because of his maladaptive behaviors. During the assessment, Student laid on the ground, grabbed objects off the desk, and answered questions haphazardly. Student eloped from the desk and ignored directions from Rubio and Parent. Student mumbled to himself and did not respond when called by his name.

Rubio did not present scores for the Phonological Test because he could not get past the instructions due to Student's disengagement. Cabrillo did not offer the assessment producer's testing protocols or Student's scoresheets into evidence at hearing. Cabrillo did not attempt to readminister the Phonological Test at any time

after his initial attempt. At hearing, Rubio did not explain why he elected not to re-administer the Phonological Test on a different day, or why he did not conduct an alternative testing assessment to measure Student's phonological processing abilities.

Rubio conceded he did not complete Student's phonological testing. He acknowledged that the phonological component of the psychoeducational assessment was important in determining Student's special educational programming. However, Rubio did not believe additional phonological testing was necessary because he had enough information to determine Student's eligibility for special education services.

This demonstrated a fundamental misunderstanding of the purpose of special education assessments. Assessments are necessary not only to determine a child's eligibility for special education, but also to collect data for the IEP team to have a "complete picture of the child's functional, developmental, and academic needs ...". (*Timothy O., supra*, 822 F.3d 1105, 1111; 20 U.S.C. § 1414(a); Ed. Code, § 56320.) This information, in turn, allows the IEP team to design an IEP tailored to the needs of the individual child. (*Id.* at 1119.) Absent complete information about Student's phonological processing skills and deficits, the IEP team did not have reliable information on which to determine the educational services necessary to meet his needs.

Cabrillo did not prove the Phonological Test was selected and administered to best ensure that the test results reflected Student's phonological strengths and weaknesses. (Ed. Code, § 56320, subd. (a).) Cabrillo's assessment in this area was not sufficiently comprehensive to identify Student's special education and related services needs as required by the IDEA. (34 C.F.R. § 300.304(c)(6).) Cabrillo did not meet its

burden of proving the phonological processing component of the psychological assessment was legally compliant. This was a procedural violation under the IDEA.

VISUAL PROCESSING

Visual processing is the ability to analyze and synthesize visual stimuli. A visual processing, or perceptual disorder, refers to the hindered ability to make sense of information through information one sees. Difficulties with visual processing affects how visual information is interpreted by the brain.

Legally compliant assessments must be used for purposes for which assessments are valid and reliable. They must be administered by trained and knowledgeable personnel and administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b)(A) & (c)(5); 34 C.F.R. § 300.304(b)(1); Ed. Code, § 56320, subds. (a) & (b).) The assessments must be administered in a language and form most likely to yield accurate results regarding the student's academic, developmental, and functional abilities. (20 U.S.C. § 1414(b)(3)(A); 34 C.F.R. § 300.304(c)(1)(v); Ed. Code, § 56320, subd. (a) & (b)(3).)

Cabrillo did not establish its visual processing assessment was administered by trained and knowledgeable personnel in accordance with the instructions provided by the producer of the testing instrument. (20 U.S.C. § 1414(b)(3)(A)(v); 34 C.F.R. § 300.304(c)(1)(v); Ed. Code, § 56320, subd. (b)(3).) Rubio administered the Developmental Test of Visual Perception, Third Edition, called Visual Perception Test, to assess Student's visual and visual motor processing necessary for academic activities, including written work. Rubio had not been trained on how to administer this testing instrument. He testified that portions of the Visual Perception Test were similar to other assessment

tools he had previously administered, including the Beery Visual Motor Integration assessment. He did not believe it was necessary, therefore, to receive training on the Visual Perception Test. Rubio conceded the last time he read the testing manual for the Visual Perception Test was two years previously. Rubio unconvincingly explained he followed the testing protocols when administering the Visual Perception Assessment and that he did not deviate from standards, even though he had not been trained on this testing instrument and had not recently read the testing manual.

This test consisted of a visual perceptual and visually guided motor composites. The five subtests measured different but interrelated visual perceptual and visual motor abilities. Rubio reported the scores on the Visual Perception Test. On the visual motor integration test, Student was required to perform complex eye-hand coordination tasks. The eye-hand coordination subtest measured Student's ability to draw precise straight or curved lines in accordance with visual boundaries. Student performed within the below average range. The copying subtest measured Student's ability to recognize the features of design and draw it from a model. Rubio reported Student performed within the low average range on this subtest. Rubio determined Student's overall score on the visual motor integration test was below average.

The motor-reduced visual perception test was the most direct measure of visual perception because it required only minimal motor skills, specifically pointing, to show perceptual confidence. This portion of the assessment was comprised of three subtests, including figure-ground, visual closure, and form constancy. Rubio reported Student scored in the below average range.

Rubio determined Student's overall score on the Visual Perception Test fell in the below average range. Rubio cautioned that the scores were significantly impacted by Student's inability to sustain attention to the task. Student wandered away from the testing table and answered the questions haphazardly.

The absence of reliable testing data administered by trained and knowledgeable personnel and used for the purposes for which the assessment was valid and reliable rendered the Visual Perception Test results unreliable. (20 U.S.C. § 1414(b) & (c)(5); Ed. Code, § 56320, subds. (a) & (b).) Cabrillo did not prove it complied with the procedural requirements under the IDEA for administering the Visual Perception Test, which was a procedural violation under the IDEA.

DECEMBER 1, 2022 IEP TEAM MEETING

The IEP team reconvened on December 1, 2022, to review Cabrillo's assessments and determine eligibility. Parents and their advocate Peter Atwood, general education teacher Carissa Boyd, special education teacher, Cyline Cervantes, administrative designee Kathryn DiSano Lopez, a school nurse, two speech and language pathologists, and two occupational therapists attended. Occupational therapist Mark Wilson attended part of the IEP team meeting.

Rubio presented his psychoeducational assessment results to the IEP team. (Ed. Code, § 56327, subds. (a) & (b).) He described his difficulties in assessing Student because of Student's maladaptive behaviors, including refusing to enter the testing room, kicking, screaming, and failing to engage with Rubio or follow instructions. Rubio described the assessments as being "one of the more difficult assessments" he had completed in his career because of Student's inability to sustain attention.

Rubio reported the results of the visual processing assessments to the IEP team. He explained Student's scores were scattered. More specifically, on the visual processing subtests on the Cognitive Assessment, Student scored in the average range. Student's overall score on the Visual Perception Test was below average. Student had the most difficulty with the form constancy subtest, which required Student to find a matching image in a field of multiple images. Rubio explained this subtest was an area of relative weakness for Student. Rubio attributed Student's weaknesses on the Visual Perceptual Test to Student's inability to sustain attention to the test based upon his behaviors attributable to autism.

If a parent obtains an independent educational evaluation or shares an evaluation they privately paid for, the school district must consider the evaluation when making decisions about the student. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. §§ 300.304, 300.502(c)(1).) A school district has no obligation to adopt the evaluator's recommendations or conclusions. (See *T.S. v. Board of Educ. of the Town of Ridgefield* (2nd Cir. 1993) 10 F.3d 87, 89-90.)

Cabrillo did not prove it considered the visual and auditory processing reports provided by Parents as part of the psychoeducational assessment. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304.) Cabrillo did not explain whether Dr. Abramson's and Coffey's testing accurately captured Student's auditory and visual processing deficits and needs. Cabrillo offered no evidence how it interpreted Dr. Abramson's auditory processing evaluation or Coffey's visual processing evaluation. Cabrillo also did not explain how these reports informed its decisions about Student's skills and deficits in these areas. Cabrillo provided no explanation for failing to consider any of the findings of Dr. Abramson's or Coffey's assessments results, or their recommendations for accommodations and services.

In response to inquiries from Parents and their advocate if he had reviewed Abramson's and Coffey's reports, Rubio told the December 1, 2022, IEP team he had reviewed the reports. However, Rubio could not explain how he interpreted their testing results in relation to Cabrillo's testing. In response to Mother's question if he had reviewed Dr. Abramson's auditory processing evaluation, Rubio told the IEP team he had, and further that Student's behavioral rigidity during Rubio's assessments was so prevalent that it "invalidated" the test results.

Rubio also could not answer questions by Parents and their advocate at the December 1, 2022, IEP team meeting, about his interpretation of Coffey's visual processing report. Coffey's report determined Student had delayed visual functional and perceptual skills. Coffey recommended vision therapy sessions to support Student's academic development. Rubio generally opined that Student's visual processing deficits were attributable to behaviors associated with autism. However, Rubio's failure to conduct the Visual Perception Test in accordance with the producer's instructions or to explain how Coffey's evaluation informed his decisions about Student's visual processing deficits rendered Rubio's opinions in this area unpersuasive.

For these reasons, Cabrillo did not prove the outcome of Student's phonological and visual processing assessments were sufficiently comprehensive to identify Student's special education and related service needs as required by the IDEA. (34 C.F.R § 300.304(c)(6)). Cabrillo did not establish that its assessments were sufficiently comprehensive to rule out visual and phonological deficits, or that additional visual and auditory processing assessments were not necessary. Cabrillo failed to meet its burden of proving its psychoeducational assessment was legally

compliant based upon deficiencies in the phonological and visual proceedings components. Cabrillo also failed to consider the private evaluations by Dr. Abramson and Coffey, which also made the psychoeducational evaluation deficient.

Cabrillo did not meet its burden of proof on its sole issue.

STUDENT'S ISSUE 1: DID CABRILLO DENY STUDENT A FAPE BY FAILING TO ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY FOLLOWING PARENTS' WRITTEN REQUEST ON AUGUST 8, 2022, THROUGH FEBRUARY 16, 2023, SPECIFICALLY IN THE AREAS OF FUNCTIONAL BEHAVIOR AND ASSISTIVE TECHNOLOGY?

Student contends Cabrillo denied him a FAPE by failing to assess him in the area of behavior from August 8, 2022, through February 16, 2023. At hearing and in his closing brief, Student did not challenge the adequacy of the behavior assessments conducted by Cabrillo in the psychoeducational assessment. Instead, Student contends Cabrillo should have conducted a functional behavior assessment as part of the initial assessment to determine the triggers and functions of Student's behaviors. Student asserts that Cabrillo's agreement to conduct a functional behavior analysis in its January 20, 2023, prior written notice was impermissibly conditioned on Student's attendance at a non-public school. Student further contends Cabrillo should have assessed him in the area of assistive technology. Student argues Cabrillo's failure to assess him in these areas resulted in a denial of FAPE to Student and denied meaningful parental participation.

Cabrillo contends Student was not eligible for special education at the time he enrolled at Cabrillo on August 15, 2023. It contends Parents made a written request for an initial assessment on August 8, 2022, and that Cabrillo timely issued an assessment plan, and with parental consent assessed Student in all areas of suspected disability. Cabrillo further contends its initial assessment included evaluation of Student's academic, behavior, social-emotional, and intellectual development skills and deficits. Cabrillo further asserts Student did not have suspected areas of need in the area of assistive technology devices and services, and it therefore was not obligated to assess Student in this area.

CABRILLO'S BEHAVIORAL ASSESSMENT

The educational benefit provided to a child requiring special education is not limited to addressing the child's academic needs, but also their 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.)

When a child's behaviors impede his learning or that of others, the IDEA requires that the IEP team consider the use of positive behavioral interventions and supports and other strategies to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i).) The IDEA does not require a functional behavior assessment prior to development of a behavior intervention plan unless the child's placement has been changed for disciplinary reasons and the conduct that resulted in discipline is determined to have been a manifestation of the child's disability. (20 U.S.C. § 1415(k)(1)(F).) The United States Department of Education, in promulgating regulations implementing the IDEA, explained that the IEP team determines whether a behavior intervention plan is required, and although a functional behavior assessment may assist the team to address behavioral issues, the IDEA does not require a functional behavior assessment to formulate a behavior intervention plan. (971 Fed. Reg. 46683 (Aug. 14, 2006); see also *J.C. v. New York City Dept. of Educ.* (2d Cir. 2016) 643 Fed.Appx.31 [pre-planned functional behavior assessment is not necessary if the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior].)

California law requires that children exhibiting serious behavioral challenges receive timely and appropriate assessments and positive supports and interventions in accordance with the IDEA. (Ed. Code, § 56520, subd. (b)(1).) An IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address the behaviors. (Ed. Code, § 56341.1, subd. (b)(1).) A behavior intervention plan is the "systematic implementation of procedures that result in long lasting positive changes in the individual's behavior." (Cal. Code Regs., tit. 5, § 3001, subd. (d).) It includes the design, evaluation, implementation, and modification of the student's

individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*)

A person recognized by the national Behavior Analyst Certification Board as a Board-Certified Behavior Analyst may conduct behavior assessments and provide behavior intervention services for individuals with exceptional needs. (Ed. Code, § 56525, subd. (a).) A school district is not required to use a Board-Certified Behavior Analyst to conduct behavior assessments and provide behavior intervention services for individuals with exceptional needs. (Ed. Code, § 56525, subd. (b).) Rather, the law requires assessments to be conducted by persons competent to perform the assessment as determined by the LEA. (Ed. Code, § 56322.)

Student did not prove Cabrillo denied him a FAPE by failing to assess Student's behavior through a functional behavior assessment. Student believed a functional behavior assessment would better target Student's problem behaviors and help the IEP team understand the root cause of these behaviors. However, the selection of particular testing or evaluation instruments is left to the discretion of the State and local educational authorities. (*Letter to Anonymous* (OSEP September 17, 1993).)

Cabrillo's August 22, 2022 initial assessment plan proposed evaluating Student's adaptive behavior, and social-emotional behavior by a school psychologist. Katyanne Downing testified at hearing. Downing was employed by Cabrillo as an assessment team education specialist. She was responsible for generating initial assessment plans and developed Student's initial assessment plan. She developed approximately

200 initial assessment plans and administered around 500 academic assessments over the course of her career. She held a bachelor's degree and a special education credential.

After Parent's request for referral, Downing collaborated with the lead school psychologist and education specialist about Parents' concerns related to Student's prior diagnosis of autism. Downing opined that typically when autism is suspected, initial assessments include

- academics,
- health,
- intellectual development,
- speech and language,
- motor development,
- social emotional, and
- behavior.

She understood Parents had concerns about Student's deficits in the areas of phonological and visual processing. She opined these areas would be initially assessed by a licensed school psychologist. Downing opined Cabrillo's assessment plan appropriately addressed Parents' educationally related areas of concern, including in the area of behavior. Student offered no expert testimony or other evidence refuting Downing's opinions. Downing's opinions were persuasive based upon her experience and candid and straightforward demeanor when testifying.

Rubio assessed Student's behavioral needs through multiple rating scales and Student observations. Mother reported elevated and very elevated scores in all areas on

the Connors Early Childhood rating scale, including defiance and aggressive behaviors, social functioning, atypical behaviors, and anxiety. Rubio determined the very elevated ratings were consistent with his observations of Student during instruction and testing observations. Student struggled with transitioning between activities, displayed aggression towards his parents, had difficulty regulating his emotions, and struggled with social interactions.

Mother's responses on the Vineyard Adaptive Ratings Scales, Third Edition, indicated Student displayed clinically significant scores for internalizing problems, or emotional behavior, and externalizing problems, such as acting out. These maladaptive behaviors included

- fixating on objects,
- harming himself,
- using strange or repetitive speech,
- repeating physical movements, and
- wandering away without regard to safety.

Rubio administered the following assessments to determine behaviors associated with autism spectrum disorder: Autism Rating Scales; and The Childhood Autism Rating Scale, Second Edition.

Mother completed the Autism Rating Scales, a norm-referend assessment designed to identify symptoms, behaviors, and features of the full range of autism spectrum disorders. Mother rated Student elevated or very elevated in the areas of

- peer socialization,
- adult socialization,

- social/emotional reciprocity,
- atypical language,
- stereotypy,
- behavioral rigidity,
- sensory sensitivity, and
- attention/self-regulation.

Rubio determined Mother's ratings of Student's symptoms matched the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, criteria for autism.

Rubio also administered The Childhood Autism Rating Scale, Second Edition, to Mother. This behavior rating scale is intended to help diagnose autism and was designed to differentiate children with autism from those with other developmental delays. The scale is used to observe and subjectively rate 15 items. Mother's overall ratings fell within the mild to moderate symptoms of autism. Rubio determined Mother's ratings were consistent with his observations of Student.

Cabrillo's assessment of Student's behavioral needs complied with all legal requirements. The assessment instruments chosen by Rubio were designed to gather information on Student's behavioral needs to guide Student's IEP team in determining Student's special education eligibility and developing an educational program to meet his needs. Rubio was aware of Student's inappropriate behaviors in the home school setting and chose assessment instruments or strategies appropriate in light of Student's disabilities, and to ensure accurate results.

Rubio confirmed the assessment materials and procedures used during the behavior assessment were selected so as to not be racially, culturally, or sexually discriminatory, and were given in Student's primary language of English, administered in accordance with instructions, and were valid for the purpose for which they were used. (20 U.S.C. § 1414(b)(3)(A)(i) and (iii); Ed. Code, § 56320, subds. (a) and (b).) The behavior-related components of the psychoeducational assessment were sufficiently comprehensive to identify Student's behavioral needs.

The test instruments for the rating scales Rubio used were technically sound and demonstrated the effect of behavioral factors on Student's functioning. Rubio persuasively opined the assessments results were valid and provided useful information regarding's Student's behavioral functioning. Rubio's experience, demeanor, and his genuine concern for Student rendered his testimony on this issue persuasive. The assessment results demonstrated that Student engaged in aggression and noncompliance to escape demands, all of which adversely affected Student's educational progress and performance.

Rubio summarized the results of the behavioral assessments in the psychoeducational assessment. Rubio presented the results of his findings at a December 1, 2022, IEP team meeting. Rubio described the maladaptive behaviors he observed during his observations of Student. Rubio reported the results of Mother's various rating scales. Mother reported very elevated scores in a number of areas, including anxiety, mood and affect, physical symptoms, sleep problems, and bizarre behaviors. Rubio determined these behaviors were consistent with his observations of Student and with behaviors attributable to autism.

STUDENT'S IEP TEAM DISCUSSED THE NEED FOR A FUNCTIONAL BEHAVIOR ASSESSMENT AT THE JANUARY 11, 2023 IEP TEAM MEETING

Student's IEP team reconvened on January 11, 2023. Cabrillo retained Marc Purchin, a third-party mediator, to facilitate the IEP team meeting because of the argumentative and unproductive communication at the December 1, 2022, IEP team meeting by some IEP team members.

The January 11, 2023 IEP team discussed Student's eligibility for special education. After a vigorous discussion by the IEP team with input from Parents and their advocate, the IEP team determined Student qualified for special education under the categories of autism and speech and language disorder. The IEP team then discussed Student's present levels of performance and goals. In the area of behavior, Student demonstrated significant maladaptive behaviors, including engaging in tantrums, hitting, screaming, crying, and eloping. Student had difficulty expressing his wants and needs and resorted to maladaptive behaviors. The January 11, 2023 IEP team determined Student's behaviors impeded his learning.

The IEP team developed behavioral goals in the areas of independently following one-step directions and sustaining attention to task. Rubio recommended that a goal be developed to address Student's elopement behaviors in the educational setting. Rubio agreed to draft a proposed goal in this area for review by the IEP team. In response to concerns by Father about Student's safety, Rubio opined that a functional behavior assessment would be appropriate to determine the antecedents to Student's behaviors

in the learning environment. Rubio recommended that the IEP team consider the appropriateness of a functional behavior assessment within an appropriate educational setting. Rubio believed the IEP team should consider the appropriateness of an independent study program and whether Student would benefit from another setting, such as classroom-based instruction, a special day class, or specialized academic instruction.

Parents verbally renewed their request for a functional behavior assessment. There was no response from the Cabrillo team members, nor was there a discussion at that time about whether a functional behavior assessment was necessary to determine Student's behavioral needs. The January 11, 2023, IEP team, did not determine whether a functional behavior assessment was necessary.

Cabrillo responded to Parents' request for a functional behavior assessment through a January 20, 2023, prior written notice. The prior written notice granted Parents' request for a functional behavior assessment to be conducted 30 days after implementation of Cabrillo's placement offer at a non-public school. A non-public school is 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, §§ 56034, 56035.) An assessment plan would be issued for Parents' consent 15 days prior to the end of the 30-day period.

At hearing and in his closing argument, Student argued Cabrillo's offer to conduct a functional behavior assessment was impermissibly conditioned on Student's acceptance of Cabrillo's placement offer at a non-public school. Parents believed the

functional behavior assessment should be conducted in the home environment because Student was attending school at home based upon Cabrillo's independent study educational model.

An individual with exceptional needs may participate in independent study if the student's IEP specifically provides for that participation. (Ed. Code, § 51745, subd. (c).) If a parent or guardian of an individual with exceptional needs requests independent study pursuant to Education Code section 51745, subdivision (a)(5), the student's IEP team shall make an individualized determination as to whether the student can receive a FAPE in an independent study placement. (*Ibid.*) A student's inability to work independently, the student's need for adult support, or the student's need for special education or related services shall not preclude the IEP team from determining that the student can receive a FAPE in an independent study placement. (*Ibid.*)

Cabrillo's IEP team members, including Rubio, believed the functional behavior assessment should be conducted in person in a school-based program. Cabrillo believed the team did not have information about Student's behavior or functional needs in a classroom environment. Student offered no evidence, including expert testimony, in support of his argument that the functional behavioral assessment should be completed in the home setting. Although Parents desired the assessment to be in the home setting, the IEP team did not make an individualized determination that Student could receive a FAPE in an independent study placement. (Ed. Code, § 51745, subd. (c).) Further, a functional behavior assessment conducted outside of school could not provide data on Student's behavior in the educational environment, and therefore would not provide relevant information that directly assisted in determining Student's educational needs. (34 C.F.R. § 300.304(c)(7).)

Student failed to meet his burden of proving Cabrillo denied him a FAPE by failing to conduct a functional behavior assessment between August 8, 2022, through February 16, 2023. Cabrillo's initial behavior assessment of Student was appropriate and complied with legal requirements. Cabrillo's initial behavior assessment of Student was properly conducted by a qualified assessor. Rubio had the training and experience necessary to assess students with autism who had suspected behavioral needs. Rubio considered Parents' concerns about Student's failure to attend to task and reciprocate conversations, tantrums, aggressive behavior, and elopement. Rubio used a variety of assessment tools, including observations during instruction and assessments, interviews with Parent, and rating scales.

After completing his initial behavior assessments, Rubio determined further behavioral assessments were appropriate to determine the antecedents to Student's behaviors in the educational environment. Rubio recommended to the January 11, 2023, IEP team, that it consider a functional behavior assessment. Parents renewed their request for a functional behavior assessment at the January 11, 2023, IEP team meeting. Cabrillo timely responded to Parents request and agreed to conduct a functional behavior assessment through a January 20, 2023, prior written notice. Student did not meet his burden of proof on this issue.

ASSISTIVE TECHNOLOGY

An IEP team must consider the communication needs of a student when developing an IEP. (20 U.S.C. § 1414(d)(3)(B)(iv); Ed. Code, § 56341.1, subd. (b)(4).) An IEP team must consider whether the child needs assistive technology devices and services. (20 U.S.C. § 1412(d)(3)(B)(v).) An assistive technology device is any equipment that is used to increase, maintain, or improve the functional capabilities of a child with a

disability. (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.) Assistive technology devices or services may be required as part of the child's special education services, related services, or supplementary aids and services. (34 C.F.R. § 300.105.)

Student failed to meet his burden of proving Cabrillo denied him a FAPE by failing to conduct an assistive technology assessment. Student offered no persuasive evidence establishing Cabrillo should have offered an assistive technology assessment. No witness testified an assistive technology device would have increased, maintained, or improved Student's functional capabilities. Student called no expert witness to support his contention an assistive technology assessment should have been offered.

Even assuming Cabrillo failed to assess Student in this area, there was no evidence that Student's right to a FAPE was impeded, that Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student was significantly impeded or that Student suffered a deprivation of educational benefits. Student failed to meet his burden of proving Cabrillo denied him a FAPE by failing to conduct an assistive technology assessment.

STUDENT'S ISSUE 2: DID CABRILLO DENY STUDENT A FAPE BY PREDETERMINING ITS OFFER OF PLACEMENT IN THE OCTOBER 27, 2022, IEP, AS AMENDED ON JANUARY 11, 2023?

Student contends Cabrillo committed a procedural violation when it prevented parental participation by predetermining Student's placement offer at the January 11, 2023 IEP team meeting. Student argues Cabrillo violated the IDEA by making an offer of placement before the IEP team discussed present levels of performance, goals, and services, and that Cabrillo came to the meeting with a "take or leave it" attitude.

Cabrillo contends it considered several placements before making its offer at the January 11, 2023 IEP team meeting. Cabrillo asserts it researched placement options prior to the January 11, 2023 IEP team meeting, for the purpose of discussing placement with the IEP team and was open to discussion with the IEP team members. Cabrillo contends it offered a non-public school consistent with the assessors' recommendations. Cabrillo maintains the IEP team meeting ended on January 11, 2023, due to time constraints, and the IEP team members, including Parents and their advocate, agreed to reconvene to continue discussion about Cabrillo's FAPE offer, including placement.

CABRILLO'S COMMUNICATION PLAN TO PROMOTE CIVILITY

Cabrillo and Parents had a strained relationship. This was reflected in the parties initial communications at the start of the 2022-2023 school year, and Parents' initial special education referral. Communications between Parents and Cabrillo's representatives were unproductive, leading Cabrillo to develop a communications plan for Parents in October 2022, to facilitate civil dialogue between Parents and Cabrillo's teachers, staff, and administration.

Although the parents of students with disabilities have the right to participate in the educational process and advocate on their children's behalf, school districts may impose reasonable limits on a parents' communications if those communications are inappropriate. A school district may put a communication plan into place to:

- limit the parents' ability to contact certain school representatives;
- assign a designated administrator as the parents' point of contact;

- require the parents to summarize their concerns to a single email or telephone call; and
- inform the parents when the school district's point of contact will respond to their inquiries.

(*Forest Grove Sch. Dist. v. Student* (D. Ore. 2018) 2018 WL 6198281, at *13 (a school district may choose to implement a communication plan if the parents excessively communicate with school staff).)

Dr. Gandara testified at hearing about the communication difficulties between the parties. Dr. Gandara held a doctorate in educational leadership, a master's degree in educational administration, and a bachelor's degree in special education. Dr. Gandara held a multiple service teaching credential and an administrative services credential. Over the course of her career, she had worked as a special education teacher, a school principal, a regional director of special education, and an executive director of special education.

Dr. Gandara persuasively testified that Parents intimidated her and other members of Cabrillo's staff and assessors and made them uncomfortable. Parents engaged in a pattern of repetitive, voluminous, and hostile communications with Cabrillo's staff, assessors, administration, and governing board. Parents filed multiple Uniform Complaint Procedures actions, California Department of Education compliance complaints, and grievances with Cabrillo's SELPA and superintendent. Some of Cabrillo's staff felt intimidated by Parents and refused to work with them. Student did not refute Dr. Gandara's recounting of Parents' conduct.

In an effort to promote civility and constructive communication, Cabrillo developed a communication plan, which it sent to Parents on October 21, 2022. The

communication plan directed Parents to direct communications to Cabrillo's attorney of record regarding complaints about Student's educational programming, records requests, submission of work samples, attendance logs, requests for general education, and planning amounts. The communication plan confirmed that any questions or concerns regarding Student's special education programming should be addressed to Student's case manager, Cyline Cervantes.

Parents refused to consent to the communication plan on the basis it violated their right to free speech under the First Amendment to the United States Constitution. School districts have the right to place reasonable time, place, and manner restrictions on parental communications. In a recent decision, the Ninth Circuit Court of Appeals upheld the right of a school district to implement a communication plan to address the manner in which the parent communicated with the school district. (*K.S.F. v. Lake Washington School Dist. #414* (9th Cir. 2020) 947 F.3d 621, 627 (school district's imposition of reasonable limitations on the manner in which the parent communicated with district employees did not violate parent's First Amendment rights).)

Despite Cabrillo's efforts to streamline communications with Parents and promote civility, Parents and their advocate were disruptive and sometimes hostile at the IEP team meetings at the center of this dispute. This disrupted the orderly progression of Student's IEP development. However, the IDEA protects the student's interests, not the parents. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 103, 1043 (*Doug C.*)). A school district may not blame a parent's decision to not participate in an IEP team meeting for its own failure to create an IEP with the participation of the appropriate parties. (*Target Range, supra*, 960 F.2d 1479, 1485.) Although Parents and

their advocate were difficult and impeded the IEP development process, their actions did not relieve Cabrillo of its affirmative obligation to comply with the requirements of the IDEA.

PARENTAL PARTICIPATION

Special education law places a premium on parental participation in the IEP process. School districts must ensure that parents have the opportunity “to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a [FAPE] to such child.” (20 U.S.C. § 1415(b)(1) & (6), (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal Code Regs., tit. 5, § 3082.) The IEP team must consider the concerns of the parent for enhancing the student’s education, as well as information provided by the parent about the student’s needs. (20 U.S.C. § 1414(d)(3)(A) & (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).) 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] [“[T]he informed involvement of parents” is central to the IEP process.]) Parental participation in the IEP process is considered “[a]mong the most important procedural safeguards.” (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

A school district must permit a child’s parents “meaningful participation” in the IEP process. (*Ms. S. ex rel G. v. Vashon Island Sch. Dist.* (9th Cir. 2008) 552 F.3d 1115, 1131 (*Vashon Island*).) An adequate opportunity to participate can include a visit by the parent to the proposed placement. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 461.)

PREDETERMINATION OF A CHILD'S PLACEMENT IS A PROCEDURAL VIOLATION UNDER THE IDEA

Predetermination of a student's placement is a procedural violation under the IDEA. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(b) and (c)(1); Ed. Code, § 56304, subd. (a).) In determining the educational placement of a disabled student, the public agency must ensure that the placement is based on the child's IEP. (34 C.F.R. §§ 300.116(b)(2); 300.552.). A school district is obligated to ensure that a continuum of alternative placements is available to meet a student's needs, including instruction in

- regular classes,
- special classes,
- special schools,
- home instruction, and
- instruction in hospitals and institutions. (34 C.F.R. § 300.115.)

Pretermination occurs when placement is determined without parental involvement in developing the IEP. (34 C.F.R. §§ 300.327, 300.501(c)(1); *Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858 (*Deal*).) A school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP team to a predetermined placement. (*W.G. v. Bd. of Tr. Of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).) A school district predetermines an offer when it presents one placement option at an IEP team meeting and is unwilling to consider other alternatives. (*H.B., et al., v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344; *Vashon Island, supra*, 552 F.3d 1115, 1131 ["a school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then

simply presents the IEP to the parent for ratification.].) A school district's unwillingness to consider any other placement also constitutes predetermination. (*K.D. ex rel. C.L. v. Dept's of Educ., Hawaii* (9th Cir. 2011) 665 F.3d 1110, 1123..) A district may not arrive at an IEP team meeting with a "take it or leave" it offer. (*J.G. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn. 10, citing *Vashon Island, supra*, 337 F.3d 1115, 1131.)

An IEP is not predetermined simply by meeting to discuss a child's programming in advance of an IEP team meeting. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688., 693, fn. 3. (*Knox County Sch.*)). Although school district personnel may bring a draft IEP to the meeting, parents are entitled to a full discussion of their questions, concerns, and recommendations before an IEP is finalized. (*Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036; *Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities* 64 Fed. Reg. 12406, 12478 (March 12, 1999).) The IDEA does not require a school district to accept the parents' choice of programs, but it must consider suitable alternatives. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education ... designed according to the parents' desires."], citing *Rowley, supra*, 458 U.S. at p. 207; *Blackmon v. Springfield R-XII School Dist.* (8th Cir. 1999) 198 F.3d 648, 658.)

Predetermination violates the IDEA because the statute requires placement be based on the IEP, and not vice versa. (*Speilberg v. Henrico Cnty Pub. Schs.* (4th Cir. 1988) 853 F.2d 256, 258-250). A school district's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a FAPE denial. (*Deal, supra*, 392 F.3d 840, 858.)

CABRILLO OFFERED STUDENT'S PLACEMENT PRIOR TO DEVELOPING STUDENT'S IEP AND DISPLAYED AN UNWILLINGNESS TO CONSIDER OTHER ALTERNATIVES

The weight of the evidence proved Cabrillo predetermined Student's offer of placement at the January 11, 2023, IEP team meeting, by prematurely making a placement offer before developing Student's IEP and being unwilling to consider other placement options. Although school districts are permitted to form opinions and compile reports prior to an IEP team meeting, this conduct is only harmless as long as school officials are "willing to listen to the parents". (*Knox County Sch., supra*, 315 F.3d 693-694, fn. 3 (noting that school system representatives should "come to the meeting with suggestions and open minds, not a required course of action").) Here, the evidence proved Cabrillo independently developed a proposed IEP that would place Student in a preexisting, predetermined program, and was unwilling to consider other alternatives.

Cabrillo began researching placements options for Student after the December 1, 2022 IEP team meeting. Dr. Gandara explained if a student's IEP team determined an eligible student could not access services virtually, Cabrillo provided instruction and services in-person. For students who required in-person instruction, Cabrillo contracted with other LEAs or non-public schools. Dr. Gandara believed Student was eligible for special education based upon the December 1, 2022, IEP team's discussions. She also understood Student required a school-based program in a small, structured classroom setting. She opined it was necessary to research schools prior to the January 11, 2023, IEP team meeting, to ensure Cabrillo had a placement available for Student. She reasoned it could take several months to locate an available placement and enter into a memorandum of understanding with another LEA or non-public school.

Kathryn DiSano Lopez was a program specialist for Cabrillo. DiSano Lopez was responsible for overseeing a team of special education teachers at the transitional kindergarten to third grade levels, DiSano Lopez testified at hearing. DiSano Lopez was tasked with researching placements for Student following the December 1, 2023, IEP team meeting, together with speech and language pathologist Cassandra Jahnkow, and Assistant Director of Special Education, Lisa Ostertag.

According to DiSano Lopez, Student's school of residence at the time, Temecula Valley, could not accept Student due to unavailability. The surrounding school districts, including Murrieta and Perris, also did not have space. DiSano Lopez did not explain what types of programs she was tasked with researching, nor how the programs were appropriate based upon Student's IEP, which had not yet been developed.

DiSano Lopez met with other IEP team members prior to the January 11, 2023, IEP team meeting, to develop an offer of FAPE for discussion with the IEP team. DiSano Lopez, and other IEP team members, including Ostertag and Jahnkow, toured Oak Grove at The Ranch, called Oak Grove, a non-public school, prior to the January 11, 2023, IEP team meeting.

DiSano Lopez acknowledged Cabrillo's decision to offer Student placement at Oak Grove was made prior to the January 11, 2023, IEP team meeting. Student's IEP team had not yet determined Student's eligibility, accommodations or services, or the frequency, length, and duration of services. DiSano Lopez explained the Cabrillo IEP team members planned to tell Parents that some of the IEP team members had toured Oak Grove, but Cabrillo was open to considering other placement options. DiSano Lopez's testimony was not persuasive because it was inconsistent with her comments at

the January 11, 2023, IEP team meeting. In response to a question from Mother about whether the proposed services could be provided at another placement option, DiSano Lopez responded the services would be delivered at a non-public school.

Cylina Cervantes testified at hearing. Cervantes had been an educational specialist with Cabrillo since 2018 and was Student's case manager. At the time of hearing, Cervantes had not met Student. Cervantes presented the placement offer at the January 11, 2023, IEP team meeting, after the IEP team's discussion about Student's goals. Cervantes told the IEP team they should consider the full continuum of placement options and proposed schools they had reviewed. The IEP team had not yet discussed Student's required services, including their length, frequency, and duration. There was no discussion about what Student's services would look like in other settings. In fact, Student's services had not been discussed. Although services might be delivered differently in a particular setting, without a discussion of Student's services needs and the least restrictive environment to implement these services, Parents could not understand the appropriateness of the offer. Cabrillo made the placement offer before the IEP team had an informed discussion about the continuum of placement options or Student's least restrictive environment.

Cervantes informed the IEP team that a non-classroom based independent study program was not appropriate for Student and he required a structured, in-person setting with credentialed staff. Cervantes also informed the IEP team Cabrillo had researched available classroom-based settings and located a placement at Oak Grove for the team to consider. Oak Grove would provide Student with daily opportunities to

learn school readiness skills in a small group, structured classroom with modeling from his peers. He would receive daily behavioral reinforcement and social skills by service providers at the site.

After Cabrillo made the placement offer, several members of the IEP team, including Parents and their advocate, Rubio, and occupational therapist Mark Wilson, expressed strong disagreement about the appropriateness of placement at Oak Grove. Oak Grove served students with histories of chronic and severe social, emotional, behavioral, and academic challenges. Rubio believed a functional behavior assessment should be conducted before the IEP made a placement determination for Student. He suggested the IEP “hit the brakes” on the placement discussion. He told the IEP team he would dissent if Cabrillo offered Oak Grove.

Occupational therapist Mark Wilson similarly disagreed that Oak Grove was an appropriate placement for Student and believed other placement options should be explored. Wilson testified at hearing. Wilson was a licensed occupational therapist. He held a bachelor’s degree in criminology, and a master’s degree in occupational therapy. He conducted over 500 occupational therapy assessments over his 25 years working in the field of occupational therapy. Since 2016, he worked almost exclusively in pediatric occupational therapy. Wilson conducted an occupational therapy assessment for Student as part of Cabrillo’s initial evaluation of Student, which was not at issue in this proceeding.

Cabrillo argued Rubio and Wilson did not understand that Oak Grove had two locations, and Rubio and Wilson did not understand which location was being offered. Cabrillo did not offer evidence about the differences, if any, between the two locations

or the programs they offered. Further, the issue of whether the placement was appropriate for Student is not at issue in this Decision. What is at issue is whether Cabrillo predetermined its placement offer at Oak Grove.

Following a heated exchange between Parents and their advocate and the other members of the IEP team, Cabrillo reiterated its placement offer. Cervantes and DiSano Lopez informed Parents they would finalize the IEP document to incorporate the IEP team's recommendations and forward the document to Parents for signature and comment. There was no agreement to reconsider the placement offer in light of the serious concerns raised by Rubio, Wilson, Parents, and their advocate. There was no acknowledgment that the team should discuss Student's least restrictive environment, the continuum of placement options, and placement alternatives.

Lauren Betchol, Program Specialist for the El Dorado SELPA, attended the January 11, 2023, IEP team meeting, to provide procedural support for the IEP team. Betchol provided program support to charter schools. She held a mild to moderate special education teaching credential and a pupil personnel services credential in school psychology.

Betchol testified at hearing. She opined that the January 11, 2023 IEP team did not appropriately discuss the continuum of placement options and Student's least restrictive environment prior to making Student's placement offer at Oak Grove. She believed it was inappropriate to make the placement offer before discussing the other components of Student's IEP, including services. After the January 11, 2023, IEP team meeting, Betchol recommended that the IEP team restart the IEP development process. She provided the IEP team members a list of recommendations for how to conduct the continued IEP team meeting.

Following its offer of placement, Cabrillo made its offer of accommodations and services, which included

- 330 minutes of weekly specialized academic instruction,
- 30 minutes of weekly speech and language services in a group setting and 30 minutes of weekly individual speech and language services, and
- 30 minutes of weekly occupational therapy services.

These services aligned with the services minutes imbedded within Oak Grove's program.

Cabrillo argued the January 11, 2023, IEP team agreed at the end of the meeting to reconvene at a later date to discuss Cabrillo's FAPE offer. No evidence was presented that Cabrillo's IEP team members made it clear to Parents at the outset of the meeting that the services and placement proposed by Cabrillo were preliminary recommendations for review and discussion with Parents. (71 Fed. Reg. 46, 678 (2006).)

Cabrillo argued there was consensus by the IEP team to revisit the issue of Student's placement at a later IEP team meeting. This argument was not supported by the weight of the evidence. Cervantes originally testified Cabrillo made its final FAPE offer at the January 11, 2023, IEP team meeting. She then changed her testimony and claimed the offer of FAPE was postponed until January 24, 2023, a continuation IEP team meeting. This inconsistency rendered Cervantes' testimony unreliable and unpersuasive.

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DiSano Lopez testified the IEP document was a draft document for consideration and discussion by the IEP team. Her testimony contradicted her comments to Parents that the IEP document would be sent to them for review and signature, and that they could sign the document with exceptions. DiSano Lopez's and Cervantes's statements at the January 11, 2023, IEP team meeting were inconsistent with Cabrillo's willingness to discuss other placement options. These comments were equivalent to a "take it or leave it" offer.

Further, the January 11, 2023, IEP document, did not state the parties agreed to have further discussion on the placement offer. Although the parties agreed to reconvene the meeting to discuss Cabrillo's offer, no evidence was offered that the parties thereafter had a discussion about the continuum of placement options or Student's least restrictive environment. This constituted predetermination and procedurally violated the IDEA.

CABRILLO'S PREDETERMINATION OF STUDENT'S EDUCATIONAL PLACEMENT SUBSTANTIVELY DENIED STUDENT A FAPE

A school district is required to conduct, not just an IEP team meeting, but a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d 1479, 1485.) "Participation must be more than a mere form; it must be meaningful." (*Deal, supra*, 392 F.3d 840, 858 (emphasis in original).)

Predetermination causes a deprivation of educational benefits where, absent the predetermination, there is a strong likelihood that alternative educational opportunities for the student would have been better considered. (*M.S. v. Los Angeles Unified School Dist.* (C.D. Cal. September 12, 2016, Case No. 2:15-cv-05819-CAS-MRW) 2016 WL 4925910,

at *12 (citing *Doug. C., supra*, 720 F.3d 1038, 1047.) Predetermination is an automatic violation of a parent's right of participation under the IDEA. (*Las Virgenes, supra*, 239 Fed.Appx. 342, 344; quoting 20 U.S.C. § 1415(b)(1).)

Cabrillo's predetermination of Student's placement at the January 11, 2023, IEP team meeting, prevented Parents' participation in the placement decision and the IEP development process. It prevented a discussion of Student's required services and the least restrictive environment where those services could be implemented. It prevented Parents from addressing their concerns about Student's maladaptive behaviors, including failing to reciprocate communications and engaging in tasks, and eloping.

Cabrillo should have completed development of Student's IEP before making an offer of placement. This necessarily should have included a robust discussion about Student's services, the continuum of placement options, and Student's least restrictive environment. The failure to afford Parents this opportunity violated the goal of parental participation in the IEP process. (*Target Range, supra*, 960 F.2d 1479, 1485.)

Cabrillo argued Parents and their advocate engaged in disruptive behavior during the December 1, 2022, and January 11, 2023, IEP team meetings, which prevented Cabrillo from explaining its placement offer and addressing Parents' concerns. The overwhelming weight of the evidence proved Parents disrupted the IEP process. Parents tried to change the order of the meeting agenda, interrupted assessors when they were presenting, questioned the qualifications of the assessors, told assessors to "hurry up" when they were speaking, shared documents on screen without permission, insulted the other IEP team members, and claimed Parents were denied parental participation. They objected to

the meetings taking place virtually and lasting only two hours. Student's advocate was similarly disruptive. He accused Cabrillo of engaging in illegal behavior and threatened various legal actions. Parents' and their advocate's behavior disrupted the orderly progression of the IEP team meetings, and often times prevented a thorough discussion of Student's needs. This conduct was antithetical to the cooperative process envisioned by the IDEA. However, the IDEA protects the rights of the child, not the parents. (*Doug C., supra*, 720 F.3d 1038, 1043-1044 (a school district may not avoid its responsibilities for meeting the IDEA's statutory requirements by blaming the parents.))

Further, nothing in the IDEA makes a school district's duties contingent on parental cooperation or acquiescence in the school district's preferred course of action. (*Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055 (School districts "cannot excuse their failure to satisfy IDEA's procedural requirements by blaming the parents," citing *Target Range, supra*, 960 F.2d 1479, 1485.)) A school district "cannot abdicate its affirmative duties under the IDEA." (*Id.* at p. 1056; *Bd. of Directors, Missoula County, Mont.* (9th Cir. 2008) 541 F.3d 1202, 1209.)

The evidence proved that Cabrillo predetermined Student's placement offer made at the January 11, 2023, IEP team meeting, and thereby prevented Parents' participation in the IEP process. This constituted a substantive FAPE denial.

CONCLUSIONS AND PREVAILING PARTY

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

STUDENT'S ISSUE 1:

Cabrillo did not deny Student a FAPE by failing to assess Student in all areas of suspected disability following Parents' written request on August 8, 2022, through February 16, 2023, specifically in the areas of functional behavior and assistive technology.

Cabrillo prevailed on Issue 1.

STUDENT'S ISSUE 2:

Cabrillo denied Student a FAPE by predetermining its offer of placement in the October 27, 2022 IEP, as amended on January 11, 2023.

Student prevailed on Issue 2.

CABRILLO'S ISSUE 3:

Cabrillo did not prove its October 26, 2022, psychoeducational assessment and report, as revised on November 29, 2022, was appropriate.

Student prevailed on Issue 3.

REMEDIES

Administrative law judges have broad latitude to fashion appropriate equitable remedies for FAPE denials. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*); *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) This broad

equitable authority extends to an Administrative Law Judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

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); *Burlington, supra*, 471 U.S. 359, 374.).) Appropriate relief means “relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” (*Puyallup, supra*, 31 F.3d 1489, 1497.)

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Id.* at p. 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. (*Id.* at p. 1497.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265; *Orange Unified School Dist. v. C.K.* (C.D.Cal. June 4, 2012, No. SACV 11-1253 JVS(MLGx) 2012 WL 2478389, at *12.) Compensatory education is an equitable remedy that depends upon a fact-specific and individualized assessment of a student’s current needs. (*Puyallup, supra*, 31 F.3d 1489, 1496.; *Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid, supra*, at p. 524; *Prescott, supra*, 631 F.3d 1117, 1125.) However, hour-for-hour relief for a denial of FAPE is not required by law. (*Puyallup, supra*, 31 F.3d at p. 1497.) “[E]quitable considerations are relevant in fashioning relief.” (*Burlington, supra*, 471 U.S. 359, 374.) The conduct of both parties

must be reviewed and considered to determine whether equitable relief is appropriate. (*Puyallup, supra*, 31 F.3d at pp. 1496-1497.) A student should not be punished for a parent's missteps.

The IDEA does not require compensatory education services to be awarded directly to a student. Staff training can be an appropriate compensatory remedy. (*Park, supra*, 464 F.3d 1025, 1034.) Appropriate relief considering the purposes of the IDEA may include an award that school staff be trained in areas in which violations are found, to benefit the specific student involved, or to remedy procedural violations that may benefit other students. (*Ibid.*)

Cabrillo did not prevail on its sole issue. It did not establish its psycho-educational assessment was appropriate. As a remedy for this failure, Cabrillo shall fund an independent psychoeducational evaluation at public expense. Within 30 days of this Decision, Cabrillo shall contract with a nonpublic agency of Parent's choice for an independent psychoeducational evaluation, including phonological and visual processing, by a licensed school psychologist. The cost of the evaluation shall not exceed \$5,000. Cabrillo shall hold an IEP team meeting for the presentation of the psychoeducational evaluation upon its completion and shall fund the attendance of the assessor at the meeting for up to two hours.

Student did not prevail on Issue 1. Student did not establish Cabrillo denied him a FAPE by failing to offer to assess Student in the areas of functional behavior and assistive technology. Cabrillo was on notice as of January 11, 2023, that a functional behavior assessment was needed to develop information about the causes of Student's maladaptive behaviors. Cabrillo offered Student a functional behavior assessment through a prior written notice dated January 20, 2023. Student did not prove that

Cabrillo was required to conduct the functional behavior assessment in the home setting. Further, Student did not prove by a preponderance of the evidence that Cabrillo should have conducted an assistive technology assessment. Student is not entitled to a remedy on this issue.

Student prevailed on Issue 2. Student proved by a preponderance of the evidence that Cabrillo predetermined Student's placement offer at the January 11, 2023, IEP team meeting. This constituted a procedural violation of the IDEA which denied Parents meaningful participation in development of Student's IEP and denied Student a FAPE.

As a remedy for this violation, Student requested at least six hours of training for all Cabrillo special education staff in the areas of special education assessments, predetermination, and parental participation. Staff training is an appropriate remedy based on the facts of this case. Student did not establish Cabrillo required training in the area of special education assessments. Training in the area of parental participation and predetermination is an appropriate remedy for Cabrillo's FAPE denial. Cabrillo must contract with a non-public agency or independent law firm specializing in special education law to provide four hours of training to Cabrillo's administrators and special education staff concerning best practices for promoting parental participation at IEP team meetings, and avoiding predetermination of FAPE offers.

As a further remedy for Cabrillo's predetermination of its January 11, 2023, placement offer, it shall convene an IEP team meeting within 15 calendar days of the start of the 2023-2024 school year to discuss Student's services, the continuum of

placement options, and Student's least restrictive environment and make a legally compliant placement offer. Parents shall be provided an opportunity to ask questions about the placement offer and to express their concerns.

The weight of the evidence established Parents did not understand the cooperative process contemplated by the IDEA and the importance of exercising civility towards Cabrillo's staff and administrators. Further, Parents' conduct disrupted and interfered with the development of Student's IEP. Related services under the IDEA include parent counseling and training. (34 C.F.R. § 300.34(a).) Cabrillo shall provide Parents four hours of parent counseling and training to assist Parents in understanding the special needs of Student and help Parents to acquire the necessary skills that will allow them to support the implementation of Student's IEP. (34 C.F.R. § 300.34(c)(8); 71 Fed. Reg. 46573 (2006).) The services shall be provided by a non-public agency by a qualified social worker, psychologist, guidance counselor, or other qualified personnel. (34 C.F.R. § 300.34(c)(2).) The training shall include tools for Parents to effectively communicate with teachers, staff, and administration.

ORDER

1. Within 30 calendar days of this Order, Cabrillo shall contract with a licensed school psychologist of Parents' choice, for an independent psychoeducational evaluation report at a cost not to exceed \$5,000.00. Cabrillo shall hold an IEP team meeting within 30 days of receipt of the independent psychoeducational evaluation and fund up to two hours of the cost of the assessor's attendance at the IEP meeting to review the evaluation.

2. Within 15 days of the start of the 2023-2024 school year, Cabrillo shall convene an IEP team meeting to discuss Student's services, the continuum of placement options, and Student's least restrictive environment, and shall make a placement offer that complies with IDEA procedures. Parents shall be provided an opportunity to ask questions and express their concerns about the placement offer.
3. Within 30 calendar days from the date of this Order, Cabrillo shall contract with a non-public agency or independent law firm specializing in special education law to provide four hours of training to Cabrillo's administrators and special education staff concerning requirements and best practices for promoting parental participation and avoiding predetermination of FAPE offers at IEP team meetings. This training shall be completed by December 31, 2023.
4. Within 30 calendar days of this Order, Cabrillo shall contract with a nonpublic agency of its choice to provide Parents four hours of parent counseling and training to assist Parents in understanding the special needs of Student and help Parents to acquire the necessary skills that will allow them to support the implementation of Student's IEP. The services shall be provided by a non-public agency by a qualified social worker, psychologist, guidance counselor, or other qualified personnel, and shall include tools for effective communication with teachers, staff, and administration.
5. All 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.

Jennifer Kelly

Administrative Law Judge

Office of Administrative Hearings