

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS INVOLVING:
PARENT ON BEHALF OF STUDENT, AND
PLEASANTON UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2024041122

OAH CASE NUMBER 2023120389

DECISION

October 1, 2024

On December 11, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from the Pleasanton Unified School District, naming Student. The matter was designated OAH Case No. 2023120389.

On April 29, 2024, OAH received a due process hearing request from Student, naming Pleasanton. The matter was designated OAH Case 2024041122. On May 3, 2024, OAH consolidated the two matters, designated Student's Case No. 2024041122 as the primary case, and ordered the consolidated cases to proceed on the timeline of Student's case. On June 6, 2024, OAH continued the consolidated matters.

Administrative Law Judge Charles Marson heard these matters on August 13, 14, 15, 20, 21, and 22, 2024, by videoconference.

Attorney Nicole Hodge Amey represented Student. Student's Mother attended all hearing days on Student's behalf. Attorney Aisha Sleiman represented Pleasanton. Dr. Jeni Rickard, Pleasanton's Senior Director of Special Education, attended all hearing days on Pleasanton's behalf.

At the parties' request the matter was continued to September 9, 2024, for written closing briefs. The record was closed, and the matter was submitted on September 9, 2024.

STUDENT'S ISSUES

1. Did Pleasanton deny Student a FAPE during the 2022-2023 school year by failing to:
 - a. conduct an autism assessment and an educationally related mental health assessment since May 2023;
 - b. assess in the areas of attention deficit hyperactivity disorder, anxiety, dyslexia, apraxia of speech, apraxia of physical therapy, apraxia of occupational therapy, central processing disorder, and sensory processing, pursuant to Parents' June 5, 2023 request;
 - c. implement services as set forth in Student's January 24, 2020 IEP, specifically:
 - i. providing Student with more specialized academic instruction minutes than agreed upon in the January 24, 2020 IEP, without parental consent;
 - ii. failing to consistently provide speech language, physical therapy, and transportation services;

- iii. failing to implement any goals, and thus also failing to report on any goal progress; and
 - d. ensure Parents' meaningful participation in the decision-making process regarding the provision of FAPE to Student?
- 2. Did Pleasanton deny Student a FAPE during the 2023-2024 school year by failing to:
 - a. timely provide complete educational records in response to Parents' request dated December 12, 2023, and counsel's request on March 28, 2024;
 - b. conduct legally compliant assessments on September 5, 2023, in the areas of psychoeducation, speech language, occupational therapy, physical therapy, academics, and health;
 - c. assess in the areas of attention deficit hyperactivity disorder, anxiety, dyslexia, apraxia of speech, apraxia of physical therapy, apraxia of occupational therapy, central processing disorder, sensory processing, autism, and educationally related mental health;
 - d. implement services in Student's January 24, 2020 IEP, specifically:
 - i. Providing Student with more specialized academic instruction minutes than agreed upon in the January 24, 2020 IEP, without parental consent;
 - ii. failing to consistently provide speech language, physical therapy, and transportation services;

- iii. failing to implement any goals, and thus also failing to report on any goal progress;
 - iv. failing to implement Student's January 24, 2020 IEP after unilaterally exiting Student from special education on September 8, 2023, and terminating special education services completely by November 12, 2023; and
 - v. unlawfully exiting Student from special education on September 8, 2023, when he remained eligible under Autism and Speech Language Impairment.
- e. hold an IEP team meeting within 30 days of Parents' February 13, 2024 request; and
 - f. ensure Parents' meaningful participation in the decision-making process regarding the provision of FAPE to Student?

DISTRICT'S ISSUES

1. Was Pleasanton's September 5, 2023, multidisciplinary psychoeducational assessment of Student legally compliant, such that Student is not entitled to an independent educational evaluation at public expense?
2. Is Pleasanton entitled to exit Student from special education without parental consent because Student is no longer eligible for special education under Autism and Speech Language Impairment?

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JURISDICTION

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511 (2006); Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see also 20 U.S.C. § 1415(i)(2)(C)(iii).) Here Student had the burden of proving the issues he

alleged, and Pleasanton had the burden of proving the issues that it alleged. 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 seven years old and in second grade at Pleasanton's Walnut Grove Elementary School at the time of hearing. Student sometimes resided within Pleasanton's geographic boundaries, but he and his family were highly mobile. Student was entitled to Pleasanton's special education services either by residence within Pleasanton's geographic boundaries or under the McKinney-Vento Act (42 U.S.C. §§ 11301 et seq.) at all relevant times.

Student was eligible for special education in the categories of Autism and Speech and Language Disorder, as discussed more fully below.

STUDENT'S ISSUES

ISSUES 1.a. AND 1.b.: DID PLEASANTON DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR BY FAILING TO CONDUCT ASSESSMENTS IN ALL AREAS OF NEED?

Student contends that on his arrival in Pleasanton's schools on May 10, 2023, until the end of the school year on June 2, 2023, Pleasanton should have assessed him in all the areas above and failed to do so. Pleasanton contends that there was no need for assessment during that brief period.

A school district must ensure that a student suspected of having a disability is assessed in all areas related to the suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f)).) A federal regulation similarly requires that the child is assessed in all areas related to the suspected disability (34 C.F.R. § 300.304(c)(4)(2006).)

The duty to assess is triggered by a suspicion that a student may be suffering from a disability to the extent that special education is required, and the threshold for that suspicion is relatively low. (*Dept. of Educ., State of Hawaii v. Cari Rae S.* (D. Hawai'i 2001) 158 F.Supp.2d 1190, 1195.)

Student was diagnosed with autism spectrum disorder with regression in language and social development at 18 months old at a Kaiser hospital in San Diego. Student was first declared eligible for special education and related services by the Washington Unified School District in Yolo County on January 24, 2020, when he was two years and 11 months old and in pre-school. The IEP of that date found Student eligible for special education and related services in the categories of autism and speech and language impairment. It contained eight annual goals appropriate for a pre-school student and placed Student for most of his school day in a special day class. Parents consented to the January 24, 2020 IEP, but have not fully consented to an IEP offer since that time.

Later, the family moved into the Sacramento City School District, but Parents did not consent to a new IEP. Sacramento City, therefore, implemented the January 24, 2020 IEP, including placement in a special day class.

Because Student's Father was under military orders, the family moved frequently. As a result, the family qualified as highly mobile under the McKinney-Vento Homeless Assistance Act. (42 U.S.C. § 11301 et seq.) In spring 2023, the family moved to the Pleasanton area and Mother enrolled Student in Pleasanton on May 10, 2023. On the enrollment form Mother indicated that Student had an IEP, but she could not immediately produce the complete document. Aoura Ahsan, Pleasanton's program supervisor, established at hearing that she attempted to obtain Student's records from Sacramento City, but found that she could not obtain the records or enroll Student in Pleasanton because Mother had not disenrolled him from Sacramento City.

For about two weeks after May 10, 2024, Mother provided parts of the IEP to Ahsan by means such as scans and snapshots, and worked on disenrolling Student from Sacramento City. Ahsan created an interim program for Student with the information she had. During these first two weeks after Student's enrollment in Pleasanton, and as more information was received from the last IEP, Student was placed in a mild-to-moderate special day class comparable to the one required by the January 2020 IEP. Ahsan did not obtain the full document until May 24, 2023. Without the full document, Ahsan could not determine whether Parents consented to every part of it.

Two days later, at an IEP team meeting, Ahsan proposed an interim placement in a special day class modeled on the January 2020 IEP. Mother did not agree with it because she wanted Student moved to general education. At another IEP team meeting on June 12, 2023, the offer was refined, but Mother continued to disagree with the special day class placement.

When a special education student transfers to a new school district in the same academic year, the new district must adopt an interim program that approximates the student's old IEP as closely as possible for 30 days until the old IEP is adopted or a new IEP is developed. (20 U.S.C. § 1414(d)(2)(C)(i)(1); 34 C.F.R. § 300.323(e)(2006); Ed. Code, § 56325, subd. (a)(1); see *Ms. S. ex rel G v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1134.) Pleasanton complied with those requirements on Student's arrival, except that it did not include curb-to-curb transportation in Student's program, as required by his 2020 IEP.

Student began attending Pleasanton's Alisal Elementary School on May 18, 2023, late in the 2022-2023 school year, in a mild-to-moderate special day class comparable to his class at Sacramento City. The last day of the school year was June 2, 2023. Student was frequently absent during this period and attended kindergarten for only eight days until the academic year ended.

Student now argues that Pleasanton had sufficient information by the end of the school year to suspect that Student had disabilities in the areas of

- autism,
- mental health,
- ADD/ADHD,
- anxiety,
- dyslexia,
- apraxia of speech,
- apraxia of physical therapy,

- apraxia of occupational therapy,
- central processing disorder, and
- sensory processing.

However, Student was not Pleasanton's responsibility until May 10, 2023, and the end of the school year was June 2, 2023. During that period Student attended class only eight times, and Sacramento had assessed Student in the previous year. Student does not explain why immediate reassessment was appropriate.

Students' contention is that Pleasanton did not "conduct" assessments before the end of the school year. Student did not prove that Pleasanton had any obligation to do so. Pleasanton proposed an assessment plan on June 5, 2023, three days after the end of the 2022-2023 school year. Parent signed it on June 11, 2023, and the assessments began later in June.

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ISSUE 1.c.: DID PLEASANTON DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR BY FAILING TO IMPLEMENT SERVICES AS SET FORTH IN STUDENT'S JANUARY 24, 2020 IEP, SPECIFICALLY:

- PROVIDING STUDENT WITH MORE SPECIALIZED ACADEMIC INSTRUCTION MINUTES THAN AGREED UPON IN THE JANUARY 24, 2020 IEP, WITHOUT PARENTAL CONSENT;
- FAILING TO CONSISTENTLY PROVIDE SPEECH LANGUAGE, PHYSICAL THERAPY, AND TRANSPORTATION SERVICES; AND
- FAILING TO IMPLEMENT ANY GOALS, AND THUS ALSO FAILING TO REPORT ON ANY GOAL PROGRESS?

Student has not identified any evidence that showed that, between May 10 and June 2, 2023, he was provided more specialized academic instruction minutes than his previous IEP required. That IEP gave Student a full day in a special day class, and Pleasanton proposed to do the same. The hours were slightly longer only because the kindergarten school day was slightly longer. Offering a full day in a special day class was consistent with the 2020 IEP.

Student did not produce any evidence that Pleasanton failed to consistently provide speech and language or physical therapy services, or that Student did or did not work on his goals in the eight days he attended school before June 2, 2023.

An IEP is legally required to contain a description of the manner in which the progress of the pupil toward meeting annual goals will be measured. It also must contain a statement of when periodic reports on the progress the pupil is making toward meeting the annual goals will be provided, such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards. (Ed. Code, § 56345, subd. (a)(3).) The January 2020 IEP required reporting every trimester. However, Student did not show that the eight days of Student's attendance produced sufficient information for Pleasanton to make a report. Student did not show that Parent was entitled to reports from Pleasanton on his goals during those eight days.

Student did prove that Pleasanton failed, during that brief period, to provide him the door-to-door transportation to which he was entitled. Student's last agreed-upon and implemented IEP of January 24, 2020, included door-to-door transportation to and from school. In the interim plan given to Student on his entry to Pleasanton, transportation was not provided. Parent filed a complaint concerning the absence of transportation with the California Department of Education, which found that Pleasanton was out of compliance with Student's governing IEP between May 10 and June 2, 2023. Pleasanton then reimbursed Parent for transportation during that period.

Pleasanton's failure to adhere to the transportation requirement of Student's governing IEP denied him a FAPE between May 10 and June 2, 2023. It was more than a minor discrepancy between the services actually provided to Student and those required

by his IEP. (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 826.) Student did not prove that Pleasanton denied him a FAPE between May 10 and June 2, 2023, by failing to adhere to any other provision of his governing IEP.

ISSUE 1.d.: DID PLEASANTON DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR BY FAILING TO ENSURE PARENT'S MEANINGFUL PARTICIPATION IN THE DECISION-MAKING PROCESS REGARDING THE PROVISION OF FAPE TO STUDENT?

Student argues that Pleasanton denied Mother meaningful participation in the IEP process because it failed to notify her of numerous details of its planning of Student's program between May 10 and June 2, 2023. Pleasanton argues that Mother participated fully in the drafting of the interim plan, and in the IEP team meetings that immediately followed the end of the school year.

A parent is not guaranteed notice of every action at every stage of school district planning. A parent has meaningfully participated in the development of an IEP is informed of their child's problems, attends the IEP meeting, expresses her disagreement with the IEP teams conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

Pleasanton's inclusion of Mother in the IEP process during the period between May 10 and June 2, 2023, met that standard. Parent communicated frequently with the Pleasanton program specialist who was drawing up an interim IEP. The IEP team met to discuss the interim plan on May 26, 2023, and Parent participated fully in the meeting.

Student identifies no evidence that would support his claim that Parent was denied meaningful participation in the IEP process between May 10 and June 2, 2023. Except for failing to provide transportation, Pleasanton did not deny Student a FAPE between May 10 and June 2, 2023.

ISSUE NO. 2.b.: DID PLEASANTON DENY STUDENT A FAPE DURING THE 2023-2024 SCHOOL YEAR THROUGH APRIL 29, 2024, BY FAILING TO CONDUCT LEGALLY COMPLIANT ASSESSMENTS ON SEPTEMBER 5, 2023, IN THE AREAS OF PSYCHOEDUCATION, SPEECH LANGUAGE, OCCUPATIONAL THERAPY, PHYSICAL THERAPY, ACADEMICS, AND HEALTH?

Student contends that Pleasanton's assessment addressing specific learning disability, called SLD, did not comply with law in numerous respects identified below. Pleasanton contends that its assessments, including the SLD assessment, were legally compliant in all respects.

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Pleasanton presented an assessment plan to Mother on June 5, 2023. The plan proposed to assess Student in the areas of

- academic achievement,
- health,
- intellectual development,
- language/speech communication development,
- motor development,
- social/emotional status and behavior,
- adaptive behavior, and
- occupational therapy needs.

Parent signed the assessment plan on June 11, 2023, but added to the form a request that Pleasanton also assess Student in the areas of

- attention deficit disorder,
- attention deficit hyperactivity disorder,
- dyslexia,
- apraxia of speech,
- apraxia of physical therapy,
- apraxia of occupational therapy,
- central processing disorder, and
- sensory processing.

Throughout the summer between school years, Pleasanton assessors conducted assessments of the areas of possible disability it had listed in the assessment plan. The parties dispute whether Pleasanton's assessments extended to the additional subjects

Parent had requested on the assessment plan form. Early in September 2023, Pleasanton presented the reports on the assessments it had conducted in a package called a Multidisciplinary Evaluation or Multidisciplinary Report.

On September 5, 2023, Student's IEP team assembled to review the assessment reports and "to reevaluate [Student's] support needs in elementary school." Pleasanton did not announce anything about re-evaluating eligibility for special education as the purpose of the meeting.

The assessors presented their reports at the September 5, 2023, meeting and all found that Student was not eligible for special education in the areas of autism, specific learning disability, other health impairment, or speech and language impairment. Parent did not agree with those results.

On September 8, 2023, at a second session of the meeting, Pleasanton staff proposed a "fade plan" that would, in four weeks, gradually transition Student into general education. The administrator of the meeting described the fade plan as "basically, of going from special education into general education because he is no longer eligible for an IEP." The team discussed the details of the fade plan at length, and described what Student could expect in his new classroom. Parent declined to sign the IEP document or approve the fade plan.

On October 10, 2023, outside the IEP process, the parties agreed to transfer Student to general education. Pleasanton executed the four-week fade plan, and by November 13, 2023, Student was fully in general education.

Student contends that the portion of the Multidisciplinary Report concerning specific learning disability, called SLD, was not legally compliant because it violated several specific provisions of state and federal law that are discussed below. Pleasanton contends that the SLD assessment was legally compliant in all respects.

Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (34 C.F.R. § 300.301(a) (2007); Ed. Code, § 56320.) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

A district must ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) Assessments must be conducted by individuals who are both "knowledgeable of [the students] disability" and "competent to perform the assessment, as determined by the local educational agency." (Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).)

Tests and assessment materials must be selected and administered so as not to be racially, culturally or sexually discriminatory, and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

The assessment must be sufficiently comprehensive to identify all of the student's special education and related service needs, whether or not commonly linked to the disability category in which the child is classified. (34 C.F.R. § 300.304(c)(6) (2006).)

A district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining whether he is eligible for special education, and what the content of his program should be. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1)(2006).) An assessment tool must "provide relevant information that directly assists persons in determining the educational needs of the child." (34 C.F.R. § 300.304(c)(7) (2006).)

In selecting assessment tools, the assessor must do more than pick a generally valid instrument. Tests and other assessment materials must be used "for purposes for which the assessments or measures are valid and reliable." (20 U.S.C. § 1414(a)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) Assessment tools must be "tailored to assess specific areas of educational need ..." (Ed. Code, § 56320, subd. (c).) "Special attention shall be given to the [child's] unique educational needs" (*Id.*, subd. (g).)

Assessors must 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)(C); 34 C.F.R. § 300.304 (b)(3)(2006).) "Technically sound instruments generally refers to assessments that have been shown through research to be valid and reliable. (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540-46541, 46642 (Aug. 14, 2006).)

A district must ensure that the child is observed in the child's learning environment, including the regular classroom setting, to document the child's academic performance and behavior in the areas of difficulty. (34 C.F.R. § 300.310(a)(2006).)

It is the duty of the IEP team, not the assessor, to determine whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. §§ 300.305(a)(iii)(A)(2006); 300.306(a)(1)(2017). To aid the IEP team in determining eligibility, an assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subds. (a), (b).) The report must be given to the parent or guardian. (Ed. Code, § 56329, subd. (c).) Normally, an assessment must be completed within 60 days of the receipt of parental consent for it. (34 C.F.R. § 300.301(c)(1)(i), (ii) (2007); see Ed. Code, § 56302.1(a).)

SEVERE DISCREPANCIES AND SPECIFIC LEARNING DISABILITY

"A specific learning disability is a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in the imperfect ability to listen, think, speak, write, spell or perform mathematical calculations." (20 U.S.C. § 1401(30); 34 C.F.R. § 300.8 (c)(10)(2017); Ed. Code, § 56337, subd (a).) Each state must adopt criteria for determining whether a child has a specific learning disability. (34 C.F.R. § 300.307(a)(9)(2006).) A public agency must use these criteria in determining whether a child has a specific learning disability. (34 C.F.R. § 300.307(b)(2006).)

California law provides for at least three methods to determine eligibility under the category of specific learning disability. One such method considers whether a pupil has a severe discrepancy between intellectual ability and achievement in

- oral expression,
- listening comprehension,
- written expression,

- basic reading skill,
- reading comprehension,
- mathematical calculation, or
- mathematical reasoning. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B).)

Those areas are the basic psychological processes involved in understanding or in using language, spoken or written, which may have manifested itself in the imperfect ability to

- listen,
- think,
- speak,
- read,
- write,
- spell, or
- do mathematical calculations.

The term includes conditions such as

- perceptual disabilities,
- brain injury,
- minimal brain dysfunction,
- dyslexia, and
- developmental aphasia. (20 U.S.C. § 1401(30); Ed. Code, § 56337, subd. a.)

Pleasanton chose to use the severe discrepancy model to assess Student.

The existence of a severe discrepancy is determined by a mathematical formula. A severe discrepancy is demonstrated by:

- first, converting into common standard scores, using a mean of 100 and standard deviation of 15, the achievement test score and the intellectual ability test score to be compared;
- second, computing the difference between these common standard scores; and
- third, comparing this computed difference to the standard criterion which is the product of 1.5 multiplied by the standard deviation of the distribution of computed differences of students taking these achievement and ability tests. (Cal. Code Regs., tit. 5, § 3030, subd. (10)(B)(1).)

A computed difference which equals or exceeds this standard criterion, adjusted by one standard error of measurement, the adjustment not to exceed four common standard score points, indicates a severe discrepancy when such discrepancy is corroborated by other assessment data which may include other tests, scales, instruments, observations and work samples, as appropriate. (Cal. Code Regs., tit. 5, § 3030, subd. (10) (B)(1).)

The decision as to whether a severe discrepancy exists shall be made by the IEP team, including assessment personnel in accordance with Education Code Section 56341, subdivision (d), which takes into account all relevant material that is available on the pupil. (Cal. Code Regs., tit. 5, § 3030, subd. (a).) The discrepancy shall not be primarily the result of limited school experience or poor school attendance. (Cal. Code Regs., tit. 5, § 3030, subd. (10)(B)(4).)

THE REPORT OF THE SCHOOL PSYCHOLOGIST FAILED TO PROVIDE THE INFORMATION NECESSARY FOR DETERMINING STUDENT'S SLD ELIGIBILITY.

A Pleasanton school psychologist conducted the testing for specific learning disorder and wrote the information about it presented in the Multidisciplinary Report. The ALJ granted Pleasanton's unopposed motion to omit her name and location from this Decision.

Quantifying a severe discrepancy requires measuring the difference between intellectual ability and actual achievement. (Cal. Code Regs., tit. 5, § 3030, subd. (10)(B).) In the Multidisciplinary Report's section on specific learning disability, the assessor began by discarding the usual measure of intellectual ability, the full-scale IQ score on the Wechsler Intelligence Scale for Children, 5th edition, called the WISC-V, in favor of a different method described as the General Ability Index, or GAI. The assessor explained this choice as follows:

"While the Full Scale IQ (FSIQ) is the most comprehensive score obtained from the WISC-V, as it is derived from the combined sums of seven scaled scores across the indices, it is deemed uninterpretable due to the nine-point range of scores comprising this index. The General Ability Index (GAI), which is viewed as less reliant on Working Memory and Processing Speed in comparison with the FSIQ, is presented, with [Student's] composite score in the Average range."

The statement that the GAI was "presented" appears under a chart showing that Student's score on the overall General Ability Index was 105. The chart also reported subcategories such as verbal comprehension and fluid reasoning, showing how the overall score was derived.

The GAI is only mentioned once more in the report, in its Summary. That mention merely repeats the content of the chart, noting that Student's index scores were lower in the Working Memory and Processing Speed areas, with performance classified as Low Average and Very Low, respectively.

Thus, the consequence of the assessor's choice to jettison the full-scale IQ of the WISC-V in favor of the GAI, which meant "less relian[ce] on Working Memory and Processing Speed," operated to reduce the importance of the two areas in which Student's scores were lowest and were therefore most likely to reveal severe discrepancies.

This critical choice depended upon a test measure, the General Activity Index, that is nowhere described in the report. There is no explanation of its procedures, and it does not appear on the list of measures administered which is in the front of the report. Its origin, purpose and methodology cannot be understood by a reader of the report. The report does not even mention whether it is a standardized test, or whether the school psychologist conducted it herself.

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Reducing the importance of two of the indices that comprise the WISC-V full scale IQ measure was a significant choice, especially when the student being assessed scores lower in the indices reduced, as Student did. The SLD assessment report does not explain why the assessor made this choice or mention the consequence that use of the GAI made it less likely that the assessor would find severe discrepancies.

The assessor stated only that the WISC score was "deemed uninterpretable due to the nine-point range of scores comprising this index." The meaning of this phrase is obscure. The reference to "this index" is confusing since it comes after "the combined sums of seven scaled scores across the indices." There is no way to tell which index is referenced by "this index." A parent would not understand why the assessor changed test measures, nor would most members of an IEP team.

The use of the WISC-V full scale IQ score is standard in analyzing severe discrepancies, and it produces a precise number for measurement. In *E.M. v. Pajaro Valley Unified Sch. Dist.* (9th Cir. 2011) 652 F.3d 999 (*Pajaro Valley I*), the Ninth Circuit held that, in testing for severe discrepancies under California law, districts must "make a reasonable choice between valid but conflicting test results" in determining whether a student exhibits a severe discrepancy between intellectual ability and achievement. (*Id.* at p. 1004.) On remand, the District Court upheld the use of the WISC-III's numerical full scale IQ score of 104 to make that determination. The ALJ had accepted the testimony of the district's expert that "the WISC is the most common intelligence quotient test administered to children, as well as the best predictor of school performance." (*E.M. v. Pajaro Valley Unified Sch. Dist.* (9th Cir. 2014) 758 F.3d 1162, 1168, fn. 6) (*Pajaro Valley II*). On the second appeal, the Ninth Circuit agreed with the ALJ and the District Court and affirmed the district's use of the WISC-III's intelligence score as the starting point for measuring a student's academic ability. (*Id.* at pp. 1171-1172.)

Since the Ninth Circuit has approved the WISC-III's full scale intelligence score for use in making discrepancy determinations in California, and since the use of it is common, the assessor's rejection of it simply because "it is deemed uninterpretable due to the nine-point range of scores comprising this index" is inadequate to explain why she rejected the standard measure. At minimum, the assessor was obliged to explain why she avoided the WISC score, which was not stated in the report, in favor of an undescribed alternative that discounted the two areas in which Student had received relatively low scores.

THE SLD ASSESSMENT REPORT DOES NOT CONTAIN ANY
MATHEMATICAL CALCULATIONS OR STATEMENTS OF STUDENT'S
DISCREPANCIES.

The only reference in the SLD assessment report to specific discrepancies in Student's scores appears in a chart. The chart reports 12 areas, including academic achievement and whether Student demonstrates difficulty in a basic psychological processing disorder. The report concludes none exists in any area.

The report does not clearly state whether Student's test scores produced any discrepancies, or how many of them there were, or how large they were, and does not identify the areas between which scores were discrepant. There is nothing in the report that sets forth any of the mathematical calculations that led to the assessor's conclusions. There is no way for a reader to know whether the GAI Standard Score/Scaled Score of 105 was used as the measure, or sole measure, of intellectual ability. The language above suggests that the assessor used the GAI, but the report states later that "[t]he Brigance IED III was used to assess [Student's] academic and cognitive skills in literacy and mathematics."

It is not possible to know from the Report what scores were used for determining academic achievement in the categories of Oral Comprehension, Listening Comprehension, and the like. There is no calculation of the exact number associated with any of these possible discrepancies that might be used in the calculation of 22.5 points of variation as required by the regulation. (Cal. Code Regs. tit. 5, § 3030, subd. (10) (B)(1).) Essentially the assessor simply requires the reader to take her word for it.

A dedicated reader could piece together disparate parts of the SLD and academic assessments to show that Student's scores revealed at least six possible severe discrepancies, although the assessment does not describe them that way. The Multidisciplinary Report contains an academic assessment by a resource teacher. Two of the Student's scores on the Brigance IED III developmental measure were 80 in the academic/cognitive domain, 81 in literacy and 82 in mathematics. Also on the Brigance, Student's composite score on processing was 75. On the Comprehensive Test for Phonological Processing, 2d Edition, Student's score for phonological awareness was 82. Student also scored 82 on the Print Tool memory test.

All of these scores were more than 22.5 points lower than the overall GAI score of 105. All of them were at least potential evidence of discrepancies that were sufficiently severe to support eligibility in the SLD category. If the GAI score of 105 was used to represent intellectual capacity, the report shows a 30-point gap between that and Student's processing score. These discrepancies are never quantified or discussed in the SLD assessment report.

THE SLD ASSESSMENT DOES NOT CONTAIN THE INFORMATION
REQUIRED BY THE IEP TEAM TO PERFORM ITS DUTIES, OR BY
PARENT TO PARTICIPATE IN DECISION-MAKING.

Whether discrepancies between intellectual capacity and achievement are sufficiently severe to demonstrate eligibility is not a unilateral decision for an assessor to make. Federal and State law are unusually detailed in requiring the group of decisionmakers, including parents, to evaluate such discrepancies. It is the group that must determine whether the discrepancies are not primarily the result of a visual, hearing, or motor disability, an intellectual disability, emotional disturbance, cultural factors, environmental or economic disadvantage, or limited English proficiency. (34 C.F.R. § 300.309(3)(2017).)

It is the group that must determine whether a child's underachievement is not due to lack of appropriate instruction in reading or math. (34 C.F.R. § 300.309(3)(2017).) In making that determination, the group must consider data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel. (34 C.F.R. § 300.009(b)(1)(2017).) The group must also consider data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents. (*Ibid.*) There is nothing in the SLD assessment report that would equip the group to make such determinations, and nothing in the record showing that the required data-based documentation exists or was provided to Parent.

In addition, when the group makes a determination concerning SLD eligibility, "[e]ach group member must certify in writing whether the report reflects the member's conclusion." In case it did not, the group member must submit a separate statement. (34 C.F.R. § 300.311(b)(2017).) That did not occur here, and could not have occurred without information that the assessment report did not provide.

In short, federal and State law imposed special duties on Student's IEP team members when it determined, at its September 2023 meeting, that Student was not eligible for special education in the category of SLD. Those duties could not have been discharged by an IEP team having only the information in the SLD assessment. There is nothing the record to indicate that Student's IEP team gave any thought to any of these duties, and the record shows it did not carry them out.

THE SCHOOL PSYCHOLOGIST'S RELIANCE ON A LACK OF SCHOOL EXPERIENCE OR INSTRUCTION TO EXPLAIN STUDENT'S DISCREPANCIES WAS UNSUPPORTED BY DATA, EVALUATED UNDER THE WRONG LEGAL STANDARD, AND WRONGLY APPLIED TO STUDENT'S DEFICITS IN WORKING MEMORY AND PROCESSING SPEED.

As noted above, one of the findings the IEP team was required to make was that the discrepancy shall not be primarily the result of limited school experience or poor school attendance. In considering that question, federal law requires the IEP team to evaluate whether the child received appropriate instruction in regular education settings, delivered by qualified personnel. (34 C.F.R. § 300.309(b)(1)(2017).) The team must also consider data-based documentation of repeated assessments of achievement

at reasonable intervals, reflecting formal assessment of student progress during instruction. (*Id.*, subd. (b)(2).) Student's IEP team did not make that finding or evaluate any such data before it exited him from special education.

The Multidisciplinary Report presents data concerning Student's substantial absenteeism from 2020 to 2022. It mentions, but does not quantify, significant gaps in Student's education, school moves, non-enrollment periods, and absences during enrollment periods. It notes that as a preschooler, Student had a 41 percent non-attendance record between February 2022 and June 2022. However, the Report also notes that "Mom is home-schooling" and contains a mention in the notes of a December 2022 IEP team meeting that Student had a tutor at the time. The Report shows no sign that Pleasanton knew or inquired into the extent of Student's prior instruction. In deciding possible SLD eligibility, a district must take into account "all relevant material which is available on the pupil." (Cal. Code Regs., tit 5, § 3030, subd. (b)(10)(B).)

The academic portion of the Multidisciplinary Report produced one score that was inconsistent with the notion that Student suffered from lack of exposure to instruction. The academic assessor found that Student had a strong ability to perform literacy and math skills, near the average, even though he did not attend traditional kindergarten instruction.

The record shows that Pleasanton did not obtain all the relevant information about Student's school experience or instruction that was available to it. Pleasanton made a routine request for records from Sacramento City School District, but the

package Sacramento City put in the U.S. Mail was torn open and was empty when it arrived. Pleasanton apparently did not request the information from Sacramento City again.

The school psychologist was aware of at least one previous neuropsychology assessment, which had been conducted in 2022 at the University of California, Davis by a pediatrician. The assessor testified at hearing that she had not seen the assessment report before and had no access to it. It was not mentioned in the Report. Parent testified without contradiction that the assessor never asked her for previous assessment reports.

The school psychologist did not interview Parent or Student's teachers. Although she gathered information from Parent through a history and developmental survey form featuring open-ended questions, and from a study of records, she did not speak directly to Parent and did not ask Parent about Student's school experience or exposure to instruction.

The lack of relevant information shows in the school psychologist's report, which never quantifies Student's school experience. It describes prior absenteeism, but never addresses the cause-and-effect question whether Student's uneven school exposure was "primarily" the cause of any discrepancies. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(b)(4).) Instead, the assessor's report states only that "exclusionary factors (namely, school absences and lack of instruction/exposure) *cannot be ruled out* as serving primary contributing roles impacting areas of [Student's] academic performance." (Emphasis supplied.)

"[C]annot be ruled out" is not the statutory standard. It is far weaker than the required primary cause finding, and far less favorable to Student.

Limited school experience and poor school attendance can affect several areas of academic performance. However, two basic psychological processes it does not affect are working memory and processing speed. Student presented the testimony of Dr. Eva Nicolosi, a qualified and experienced school psychologist and licensed educational psychologist. Nicolosi persuasively established that limited school experience and poor attendance have nothing to do with working memory or processing speed, which develop early in a child's life. There was no evidence to the contrary. Pleasanton, therefore, wrongly discounted Student's discrepancies in working memory and processing speed on the untenable theory that prior school experience and absenteeism could affect them.

In sum, the SLD assessment was not sufficiently comprehensive to identify all of Student's special education and related service needs. (34 C.F.R. § 300.304(c)(6)(2006).) It failed to provide relevant information that would have directly assisted persons in determining the educational needs of the child. (34 C.F.R. § 300.304(c)(7)(2006).) The SLD assessment report states that Student does not need special education but does not adequately describe the basis for making that determination. (Ed. Code, § 56327, subds. (a), (b).) The SLD assessment failed to ensure that the decision as to whether or not a severe discrepancy exists took into account all relevant material which is available on the pupil. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B).)

For all of the above reasons, Student proved that the portion of the Multidisciplinary Report addressing eligibility in the category of specific learning disability was not in compliance with the law.

REMAINING CONTENTIONS NEED NOT BE RESOLVED BECAUSE STUDENT ESTABLISHED A GLOBAL FAPE DENIAL FOR THE TIME AT ISSUE IN THIS MATTER

The finding that the SLD portion of the Multidisciplinary Report did not comply with the law invalidates the adequacy of the Report to determine eligibility. It also undermines the action of Student's IEP team at its September 5 and 8, 2023 meetings to exit him from special education. Exiting Student based on erroneous and incomplete information was an invalid act and denied Student a FAPE.

Since Pleasanton denied Student a FAPE continually from September 8, 2023, to the filing of this action on April 29, 2024, substantial relief will be awarded. That relief would not be any different if Student could prove the remaining issues he asserts. Those issues therefore need not be decided.

The finding that the SLD portion of the Multidisciplinary Assessment did not comply with the law also resolves both of the issues asserted by Pleasanton in its consolidated matter. The Multidisciplinary Report cannot be ruled appropriate and Student's eligibility for special education cannot be deemed determined as a matter of law without further assessment.

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 ISSUES

ISSUE 1.a.

Did Pleasanton fail, in the 2022-2023 school year, to conduct an autism assessment and an educationally related mental health assessment?

Pleasanton prevailed on Issue 1, subdivision (a).

ISSUE 1.b.

Did Pleasanton fail, in the 2022-2023 school year, to conduct assessments in the areas of attention deficit hyperactivity disorder, anxiety, dyslexia, apraxia of speech, apraxia of physical therapy, apraxia of occupational therapy, central processing disorder, and sensory processing?

Pleasanton prevailed on Issue 1, subdivision (b).

ISSUE 1.c.i.

Did Pleasanton fail, in the 2022-2023 school year, to implement services as set forth in Student's January 24, 2020 IEP, by providing Student with more SAI minutes than agreed upon in the January 24, 2020 IEP, without Parental consent?

Pleasanton prevailed on Issue 1, subdivision (c.i).

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ISSUE 1.c.ii.

Did Pleasanton fail, in the 2022-2023 school year, to consistently provide speech language, physical therapy, and transportation services required by Student's IEP?

Pleasanton partially prevailed on issue 1.c.ii. as to speech language and physical therapy.

Student partially prevailed on issue 1.c.ii as to transportation.

ISSUE 1.c.iii.

Did Pleasanton fail, in the 2022-2023 school year, to implement any of Student's goals, or to report on any goal progress?

Pleasanton prevailed on Issue 1.c.iii.

ISSUE 1.d.

Did Pleasanton fail, in the 2022-2023 school year, to ensure Parent's meaningful participation in the decision-making process regarding the provision of FAPE to Student?

Pleasanton prevailed on Issue 1.d.

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ISSUE 2.a.

Did Pleasanton deny Student a FAPE during the 2023-2024 school year through April 29, 2024, by failing to timely provide complete educational records?

As Student established a global FAPE denial throughout the time period, this issue was not decided.

ISSUE 2.b.

Did Pleasanton deny Student a FAPE during the 2023-2024 school year through April 29, 2024, by failing to conduct legally compliant assessments, in the areas of psychoeducation, speech language, occupational therapy, physical therapy, academics, and health?

Student prevailed on Issue 2.b. concerning the psychoeducational assessment. As Student is awarded the requested remedy of an independent psychoeducational evaluation, as described below, the rest of Issue 2.b. was not decided.

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ISSUE 2.c.

Did Pleasanton deny Student a FAPE during the 2023-2024 school year through April 29, 2024, by failing to assess in the areas of attention deficit hyperactivity disorder, anxiety, dyslexia, apraxia of speech, apraxia of physical therapy, apraxia of occupational therapy, central processing disorder, sensory processing, autism, and an educationally related mental health?

On the same basis determined in Issue 2.b, this issue was not decided.

ISSUE 2.d.

Did Pleasanton deny Student a FAPE during the 2023-2024 school year through April 29, 2024, by failing to implement services in Student's January 24, 2020 IEP?

As Student established a FAPE denial for this time period and the remedies would not have changed, this issue and its sub-issues were not decided.

ISSUE 2.e.

Did Pleasanton deny Student a FAPE during the 2023-2024 school year through April 29, 2024, by failing to hold an IEP team meeting within 30 days of Parent's, request?

As Student established a FAPE denial for this time period and the remedies would not have changed, this issue was not decided.

ISSUE 2.f.

Did Pleasanton deny Student a FAPE during the 2023-2024 school year through April 29, 2024, by failing to ensure Parent's meaningful participation in the decision-making process regarding the provision of FAPE to Student?

As Student established a FAPE denial for this time period and the remedies would not have changed, this issue was not decided.

DISTRICT'S ISSUES

ISSUE 1

Was Pleasanton's September 5, 2023, multidisciplinary psychoeducational assessment of Student legally compliant, such that Student is not entitled to an independent educational evaluation at public expense?

Student prevailed on District's Issue 1.

ISSUE 2

Is Pleasanton entitled to exit Student from special education without parental consent because Student is no longer eligible for special education under Autism and Speech Language Impairment?

Student prevailed on District's Issue 2.

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REMEDIES

ALJ's have broad latitude to fashion appropriate equitable remedies for FAPE denials. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3)(2006).) Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra*, 31 F.3d. at p. 1497.)

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 at p. 1496; *Reid v. District of Columbia* (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*, 401 F.3d at p. 524.)

Compensation to Parent for transportation between May 10 and June 2, 2023, is not awarded. The Department of Education has already required payment of it and Pleasanton has already paid it. Compensation for automobile transportation for two round trips a day between August and December 2023 is not awarded because Student did not prove at hearing that the alternate methods proposed by Pleasanton were unworkable.

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Student suffered extensive educational loss between September 8, 2023, and April 29, 2024, as a result of being exited from Special Education in reliance upon an assessment that was not legally compliant. He lost most of the benefits of special education that his governing IEP required Pleasanton to deliver.

Pleasanton argues that, after it exited Student, it continued to provide him the related services of speech and language instruction and occupational therapy. Pleasanton provided those services in the belief that the stay put doctrine, activated by another of Parent's due process requests, required it to conform to Student's last agreed-upon and implemented IEP. That was the IEP from January 20, 2020. One Pleasanton witness claimed that Student was even working on his annual goals after September 8, 2023, although there was no reporting on his progress on those goals.

Pleasanton now argues that the delivery of those related services and Student's work on those goals constituted special education. Pleasanton further asserts that as a practical matter, Student was still getting the benefits of special education even after being exited from it.

Pleasanton's argument is unpersuasive because it overlooks the fact that Student did not have legally compliant annual goals on which to work. Annual goals are central to special education, and progress on goals is the principle measure for whether a FAPE has been provided. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1462 (citation omitted); *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

Student's annual goals were written in January 2020 when he was two years and eleven months old and in preschool. The goals were appropriate for preschool. However, progress reports from an April 2022 IEP team meeting showed that Student had met all eight of those goals by that time. In the school year 2023-2024, as he entered the second grade, he still had only the goals designed for preschool that he had met at least two years before.

If Pleasanton had properly regarded Student as still in special education after September 8, 2023, it would have been obliged to make its best efforts to bring Student's goals up to date. (See *Anchorage Sch. Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055-1057 [district denied student FAPE by not updating his second-grade goals when he was in third grade, notwithstanding pendency of stay put].) If Parent did not agree to new goals, Pleasanton would have had a duty to file for due process to obtain an order allowing it to impose legally compliant goals without parental consent. (See *I.R. v. Los Angeles Unified Sch. Dist.* (9th Cir. 2015) 805 F.3d 1164, 1165.) By removing Student from special education, Pleasanton avoided these legal duties and left Student in a general education classroom with no meaningful annual goals. He was, therefore, not receiving the functional equivalent of special education.

The record does not contain sufficient evidence about the details of Student's academic progress after September 8, 2023, to tailor an hour-for-hour award. Student does not suggest one in his closing brief. The most appropriate relief that can be awarded as compensatory education on this record is academic tutoring in subjects to be determined by Parent, and in an amount that roughly approximates one hour for every school day Student was denied FAPE after deducting for absences.

ORDER

1. Pleasanton shall promptly restore Student to special education, and conduct an IEP team meeting.
2. Pleasanton shall promptly fund an independent educational evaluation in the area of psychoeducational status in accordance with its usual rules and practices and shall fund the appearance of the assessor at the IEP team meeting that considers the assessment report.
3. Pleasanton shall provide five hours of training to the members of its staff who attended the IEP team meeting on September 5 or 8, 2023, on the procedures required for exiting a student from special education. This training shall not be done by Pleasanton's staff.

The rest of Student's requests for relief are denied. Pleasanton's requests for relief are denied.

RIGHT TO APPEAL THIS DECISION

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

Charles Marson

Administrative Law Judge

Office of Administrative Hearings