

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT

v.

STOCKTON UNIFIED SCHOOL DISTRICT

CASE NO. 2024020649

DECISION

JUNE 3, 2024

On February 20, 2024, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student naming Stockton Unified School District. Administrative Law Judge Judith Pasewark heard this matter via video conference on April 9, 10, 11, 16, 17, and 18, 2024.

Attorneys Robert Burgermeister and Dilini Lankachandra represented Student. Parent attended all hearing days on Student's behalf. Attorneys Dee Anna Hassanpour and Rebecca Diddams represented Stockton Unified School District. Director of Special

Education Stephanie Reeves attended all hearing days on Stockton's behalf. Stockton's attorneys Katie Yoshida, Kathleen Anderson, Sheryl Bailey, and Nic Parra observed the hearing at various times during the open hearing.

Due to the ALJ's previously scheduled medical procedures, and at the parties' request, the matter was continued to close of business on May 16, 2024, for written closing briefs and the matter was submitted on May 16, 2024.

ISSUES

1. Did Stockton fail in its child find obligation for Student from November 4, 2022, through November 16, 2023?
2. Did Stockton deny Student a FAPE by failing to provide Student a prior written notice in response to Parent's request for mental health services?
3. Did Stockton deny Student a FAPE by failing to offer Student a speech and language assessment pursuant to the November 14, 2023 assessment plan?

The ALJ has renumbered the issues as allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) No change in substance has been made. Student's Issues 1 and 2 from the prehearing conference order are combined and analyzed as one issue in this Decision because they are identical and merely divide the issue of child find into two issues over two consecutive school years.

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 FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) In this matter, Student had the burden of proof. 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).)

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.)

Student was 11 years old and in fifth grade at the time of hearing. Student moved from the Tracy Unified School District into the geographical boundaries of Stockton and enrolled at King Elementary School on November 4, 2022. Student continued to reside within Stockton's geographic boundaries at all relevant times. Student has not been assessed for special education nor has he been found eligible for special education and related services.

ISSUE 1: DID STOCKTON FAIL IN ITS CHILD FIND OBLIGATION FOR STUDENT FROM NOVEMBER 4, 2022, THROUGH FEBRUARY 20, 2023?

Student contended Stockton failed in its child find duties because Stockton had abundant information which indicated Student qualified for special education, and based upon that information, Stockton was required to refer Student for assessment.

Stockton contended none of the information available to it raised suspicion that Student had a disability which required supports and services beyond those available to general education students.

School districts have an affirmative, ongoing duty to actively and systematically seek out, identify, locate, and evaluate all children with disabilities residing within their boundaries who may be in need of special education and related services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(2006); Ed. Code, §§ 56171, 56300 et seq.) This ongoing duty is referred to as "child find" and is incorporated in California under the

Education Code. (Ed. Code, § 56301, subds. (a), (b).) California law defines an “individual with exceptional needs” as a pupil who is identified by an individualized education program, called IEP, team as “a child with a disability” who requires special education due to his or her disability, and whose instruction and services cannot be provided with only modification of the regular school program. (Ed. Code, § 56026, subds. (a) & (b).)

A school district’s obligation to identify, locate, and evaluate a specific child is triggered when there is reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. The appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

A disability is “suspected,” and a child must be assessed, when the district is on notice that the child has displayed symptoms of a disability. (*Timothy O. v. Paso Robles Unified School Dist.*, 822 F.3d 1105, 1119 (9th Cir. 2016) (*Timothy O.*).) That notice may come in the form of concerns expressed by parents about a child’s symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child’s behavior. (*Id.* at 1121 [*citing Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796, 802, and *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1205-1206].)

California law recognizes eligibility for special education and related services due to attention deficit hyperactivity disorder, known as ADHD. A student whose educational performance is adversely affected by a suspected or diagnosed ADHD must also meet the eligibility criteria for other health impairment or specific learning disability to be entitled to special education and related services. (Ed. Code, § 56339, subd. (a).) A

child may have a qualifying disability, yet not be found eligible for special education if the student does not meet the IDEA eligibility criteria. (See *Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1107-1108 and 1110.)

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

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

Stockton placed Student in a fourth-grade general education classroom for the 2022-2023 school year upon his enrollment on November 4, 2022. At that time, Parent provided Stockton with a letter which expressly requested that Stockton provide Student with a Section 504 Plan under the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., noting Student had a medical diagnosis for ADHD and anxiety. Parent believed Student had been overwhelmed at his prior school, especially with math. Parent wanted Student to be given accommodations such as breaks and extra time on schoolwork. Parent also wanted help with Student's behavior at home.

As part of the registration process, Stockton provided Parent with a District Policies and Procedures Handbook, hereafter called the Handbook, which contained information regarding Section 504 complaint policies and procedures. The Handbook provided information regarding comprehensive school counseling programs, open to all

students, designed to support students academically, socially, and emotionally. Moreover, the Handbook provided parents with information regarding child find, obtaining special education and related services, and procedures for Student Success Teams, called SSTs. The section regarding special education informed parents that, pursuant to Education Code section 56303, a student will be referred for special education instruction and related services only after the resources of the regular education program were considered and, where appropriate, utilized.

Student made a specific request for a Section 504 Plan. The Rehabilitation Act contains its own child find requirements which are not the same as the child find obligations under the IDEA. OAH has jurisdiction only over those issues which arise under the IDEA. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) Under the IDEA, a party has the right to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to such child.” (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified School. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.) Therefore, this Decision makes no determination regarding Student’s rights under Section 504.

Stephanie Reeves, Stockton’s executive director of special education, explained at hearing that neither ADHD nor anxiety symptoms automatically require special education if they do not impact the student’s education. A special education referral depended on the student’s lack of progress within the general education setting. Prior to referring a student to special education, Stockton employed tiered levels of intervention in general education. These general education interventions included site-based counseling, and mental health services available to all students, as well as classroom accommodations,

such as breaks and extra time to complete assignments. Parent's request for a Section 504 Plan involved a general education program, not special education programs or services and therefore, as the special education director, Reeves was not involved with or have any personal knowledge of Student.

Student contended he suffered headaches at school which put Stockton on notice of a need to assess. Evidence of Student's medical and mental health diagnoses was sparse. Student did not introduce any evidence confirming Student's diagnoses of ADHD or anxiety or provide any other medical information generated by doctors to support Student's claims regarding the severity and frequency of Student's headaches.

On November 7, 2022, Student went to the school office complaining of a headache, which he described as almost a migraine. Student reported he did not get migraines often. Office personnel contacted Parent who explained the headache might be due to a change in medication. Subsequently, Student complained of the occasional headache or stomachache at school. Parent reported that Student's ailments and school absences were due to medication changes.

Brittany Goodman has a master's degree in nursing and was a credentialed school nurse. Parent informed Goodman Student was on medication for ADHD and had an inhaler for asthma. No medications were administered at school. Goodman was not aware of any health reports or health incidents involving Student, but he was not the responsible party for reporting medical incidents. Student failed to solicit any evidence from Goodman to suggest Student's ADHD, anxiety, or medication needs could not be managed in the general education setting.

Assistant principal Stewart Asuncion handled Parent's request for a Section 504 Plan. Asuncion was a knowledgeable and credible witness. Asuncion held a master's degree in educational leadership with an administrative service credential and multiple skills teaching credential. Asuncion's career spanned 25 years in elementary schools, with 13 years as assistant principal at King Elementary. Asuncion's duties included developing Section 504 Plans and participating in SST meetings. Asuncion attended each SST meeting. Asuncion was familiar with Parent from the SST meetings and a few telephone conversations regarding Student roughhousing on the playground.

Asuncion interacted with Student during the 2022-2023 and 2023-2024 school years. Asuncion's observations of Student primarily occurred on the playground during recess when Asuncion supervised games and student interactions. Asuncion intervened in recess football and soccer games when students played too rough or were too competitive, which often resulted in pushing. Student's aggressive contact with peers was mutual; when Student was pushed, Student would push back. Asuncion described these moments as typical amongst competitive students in contact sports. These aggressive behaviors during recess were successfully addressed with general education interventions.

Lilian Guerra, another assistant principal at King Elementary, was responsible for student discipline. Guerra was familiar with Student and worked with him in conflict resolution sessions. Guerra described Student's behavior incidents as isolated acts in which mediation and student contracts were successful. Guerra stressed that conflict resolution was not discipline but instead constituted a positive behavior interaction. Student's conflicts were primarily related to sports with more than just Student involved.

Parent approved each resolution conflict session and never requested additional supports beyond those provided as part of the general education interventions.

During her testimony, Guerra recounted the two behavior incidents recorded on Student's Discipline Profile which were highlighted by Student at hearing and in briefing. The first incident occurred on February 24, 2023, in which Student admitted throwing his lunchbox at another child. Student was eating lunch when others started throwing food. In retaliation, Student threw his lunchbox and called the child something inappropriate. The incident resulted in a parent conference.

The second incident on May 9, 2023, identified as disruption and defiance, resulted in a loss of privileges, described as a loss of a recess period which was spent in the office with Guerra discussing the incident. Student provided no information describing this event, nor did Student establish any other incidents.

Student's behavior incidents were isolated and did not impact his education. Guerra, along with other Stockton witnesses, explained that a referral for special education and related services was generally made when a student did not respond to common interventions due to a disability; or if the student did not make progress or growth over a period of time.

Guerra saw that the general education interventions were effective for Student. He made Honor Roll, indicating he was performing at grade level or above. Student was involved in fewer incidents in the 2023-2024 school year. Student demonstrated high communication skills, a large vocabulary and appeared happy. Guerra had no concerns about Student's behavior or mental health.

Connie Fabian, Principal at King Elementary, gave descriptions of Student's behaviors with his peers consistent with those made by Asuncion and Guerra. Fabian knew of Student's involvement in minor conflicts during recess, each of which were resolved in conflict resolution sessions. Conflict resolution involved administrator-led mediations with students and often resulted in student contracts with the students in question. Fabian also stressed that conflict resolutions were not disciplinary in nature. Student's infrequent behaviors were successfully resolved in the mediation process, and Student responded well to typical Tier 1 interventions, which are behavioral interventions utilized in general education for mild or infrequent behavioral issues. Fabian opined that Student did not present with behaviors that suggested a need for assessment. Student's behaviors were not repetitive or intense in severity.

Julie Carter, Student's fourth-grade teacher, held a master's degree in education, a multiple subject teaching credential, and a certification of eligibility in administrative services credential. Carter thoughtfully described her understanding of SSTs, Section 504 Plans, and special education. Throughout her 22 years of teaching at King Elementary, Carter would refer students for special education if they demonstrated a need for additional supports outside of general education in order to make educational progress. Carter's testimony was persuasive and credible.

Carter had 33 students in her classroom during the 2022-2023 school year. Carter estimated that half of her students were performing on a fourth-grade level. She explained it was common for some students to be performing below grade level, which was not necessarily indicative of a need for special education.

Carter reported that all fourth graders exhibit misbehaviors. Student's behavior was similar to that of his peers. Carter utilized positive reinforcements in class with all students. Student was easily redirected if misbehaving, which occurred infrequently. Student usually did what was asked of him. Carter reported less than a handful of behavior incidents involving Student in the classroom. On one occasion, Student lied about a computer incident; on another, Student and a peer shoved each other. Instead, Student's disruptive behaviors typically occurred at recess consisting of roughhousing with peers. Carter opined that the general education supports she provided were effective, and both Student's academics and behaviors improved through the 2022-2023 school year.

Carter kept Parent regularly informed of Student's behavior and academic performance. Student's behavior did not impact his education. Student had no speech and language deficits. Student was a clear speaker with a large vocabulary. Student could follow directions. Student exhibited age appropriate, typical fourth-grade social skills. Student did not present with anxiety in the classroom, and Carter had no concerns about Student's mental health. Student was a happy, friendly, and nice kid.

Sopheak Sek-Rowe, Student's fifth-grade teacher, was also a highly experienced teacher, having taught at King Elementary for 23 years. Sek-Rowe had 32 students in her classroom, including one special education student. Her depiction of Student matched the profile given by Carter. She was also forthright and credible about Student's behavior.

Sek-Rowe knew Student very well. Academically, Student was a top student, articulate and easy-going with a good personality. Student read at a seventh-grade level. Student's math scores were a little below grade level, but they continued to

improve. Student needed additional time on math tests. Only a few of Sek-Rowe's students in the class performed at grade level in math. Student demonstrated no lack of fine motor skills; his handwriting was legible and his cursive writing skills were the same as his peers. Student qualified for Honor Roll in fifth grade.

Student was never non-cooperative in class; he never refused to work on non-preferred activities. Sek-Rowe utilized positive reinforcements for all students. Student earned points for good behavior quite often. Student's need for verbal redirection was similar to others in the class. Sek-Rowe offered Student the same accommodations as provided to all classmates. Student was offered breaks, but seldom asked for one. Student was always willing to complete assignments but was given extra time if needed. Sek-Rowe provided academic support with homework if needed. Student could ask questions but did so infrequently. Student's absences from school did not affect his ability to access his education.

Although Parent informed Sek-Rowe of Student's ADHD and anxiety, Sek-Rowe did not find either ADHD or anxiety a concern in the fifth grade. Student occasionally reported headaches, but he did not claim physical ailments any more often than his peers.

Like Carter, Sek-Rowe did not make referrals for special education unless other classroom interventions and strategies did not work. Sek-Rowe observed nothing in class to suggest a referral to special education and related services for Student was needed. Student had normal behavior at lunch and recess and was progressing academically. Student followed instructions in class, was not disruptive, and had no

issues with peer interactions. Student had many friends, was articulate and polite, and carried on conversations easily. Student only required Sek-Rose to employ the typical teaching strategies provided to all students.

Parent disagreed with the descriptions of Student's classroom behavior given by Carter and Sek-Rowe. Parent contended that Student had far more disciplinary actions than were reported, which resulted in Parent being called to school, Student being sent to the office, or Student being sent home. Parent's testimony, however, was not persuasive. Parent could not provide specific information, mixed up or combined events, and provided vague answers to questions about the basis for Student's complaint. Further, Student failed to provide any evidence to support Parent's contentions. Particularly damaging to Parent's credibility, was Parent's statement that she had never seen or read the complaint filed on behalf of Student, was not familiar with the issues, and did not request many of the remedies requested in the complaint. Accordingly, Parent could only give vague answers and lacked specifics. This is particularly harmful given that Parent's testimony was often the only evidence presented to demonstrate that Student required a special education assessment.

NOVEMBER 10, 2022 STUDENT STUDY TEAM MEETING

On November 10, 2022, Stockton held Student's initial SST meeting. At that time, Student had attended school in Stockton for only five days.

The November 10, 2022 SST's participants included

- Asuncion,
- Carter,
- school counselor Mai Moua,

- mental health clinician Tracy Cutino,
- Parent, and
- Student.

The team prepared a plan which was reported in the SST Meeting Summary dated November 10, 2022.

Parent reported that Student had diagnoses of ADHD and anxiety from his medical providers at Kaiser Permanente. Student previously received 30 minutes of counseling per week through Kaiser due to his ADHD and received ADHD medications from a Kaiser psychiatrist as well. Parent did not include in the evidentiary record any documentation of a medical diagnosis of either ADHD or anxiety nor of the severity of either condition. The SST members accepted Parent's representations about Student's conditions.

Parent described Student at the SST meeting as a child who made friends easily but said that at home Student hit Parent and often needed to be restrained. Parent relayed that Student's prior medications made him angry. Parent reported Student was hyperactive, talked really fast, and talked a lot when he should not be speaking. Parent also expressed concern about Student's handwriting, which she described as large and sometimes backwards.

At hearing, Parent acknowledged that her concerns were primarily based on information obtained during Student's prior years at Tracy and on Student's behavior at home. Prior to enrolling in Stockton, Parent indicated Student experienced anxiety and panic attacks, cried, had angry outbursts, and complained about school. While at Tracy, Student struggled with math, had difficulties doing homework and maintaining focus,

and required verbal redirection both at home and school. Parent, however, never sought a special education assessment while at Tracy. No other evidence was introduced at hearing to support Parent's recollections.

Carter remembered Parent and Student fondly. At the November 10, 2022 SST meeting, Carter told the team that Student was friendly, polite, asked questions, and was willing to learn. Pursuant to the district-wide, computer-based iReady academic testing given that same day, Student scored at a third-grade level in English language arts, and a first-grade level in math. Although the scores were low for a student in the fourth month of fourth grade, Carter indicated Student would be retested after the winter school break. Carter provided Student redirection and time in class for homework, which were general education accommodations provided to all students in her classroom.

To assist Parent at home, the SST team discussed providing behavior rewards at home. Additional support was offered in communication between Parent and Carter through ClassDojo, an electronic application that allows teachers and parents to communicate about class assignments and other school information. Parent could check for homework assignments and work completion through Stockton's Google classroom web site, which was available to all parents and students. The team responded to Parent's concerns about Student's behavior and academics.

The SST offered Student an accommodation to take breaks when he needed one. Although Parent reported Student's diagnosis of anxiety, no behaviors were noted at school in the short time Student had attended King. The SST, however, in response to Parent's concerns, placed Student on a "watch list" for mental health services for further consideration. A follow-up SST meeting was planned for January or February 2023.

JANUARY 27, 2023 STUDENT STUDY TEAM MEETING

Stockton held a follow-up SST meeting on January 27, 2023. Moua, Asuncion, Carter, Cutino, Parent, and Student attended.

The first issue before the team was that Student did not attend school 11 out of 40 days, had five tardies, and left school early on four days. The SST noted Student's excessive absences from school. However, Parent explained these absences were medical in nature and the SST found they did not impact Student's overall academic performance.

Carter reported Student's winter iReady scores had improved. Student scored at early fourth grade in English language arts and second grade in math, gaining a grade level in each area in less than three months. Carter described Student's growth in math and his increased involvement in the classroom, such as him asking questions. Carter did not see evidence of significant ADHD in the classroom but noted that Student sometimes needed redirection for failing to raise his hand instead of blurting out answers. In that regard, his behavior was not worse than others in class. Carter noted Student struggled to get homework turned in. Parent indicated Student told her he did his homework, but Student claimed he lost the charger for his Chromebook laptop.

Asuncion reported that if Student kept busy with activities during recess, it might reduce his conflicts with other students. Student's conflicts revolved around sports and involved mutual contact between players. Conflict resolution sessions resolved these issues, and the conflicts were not serious matters.

Parent expressed several areas of concern. Parent stated Student's handwriting was overly large and often backwards. Carter agreed to provide home support for handwriting. Carter also agreed to send home cards to make flashcards for math to assist Student with multiplication memorization. Parent expressed interest in King Elementary's after school tutoring program, and Carter provided information regarding enrollment in the tutoring program.

In addition, Parent expressed interest in mental health services for Student. In response, Moua, the school psychologist, offered school-based mental health services, which were available to all students. Cutino, one of Stockton's mental health clinicians, obtained Parent's consent to conduct mental health observations of Student to determine whether a mental health assessment was warranted.

At the time of the January 27, 2023 SST meeting, Cutino held a master's degree in counseling and psychology, was a licensed marriage and family therapist, and was certified as a clinical supervisor. Cutino's duties at Stockton included

- consultation on mental health needs and strategies;
- provision of mental health assessments;
- treatment planning for school-based mental health services, and
- collaboration with school staff to meet the mental health needs of students.

Cutino provided school-based individual and family therapy for both general education and special education students. Cutino's involvement with Student was limited only to observations to determine whether Student's ADHD and anxiety impacted his education.

Cutino's observations took place between January and March 2023. Cutino observed Student in the classroom, in passing, and on the playground during recess. Specifically, Cutino observed that Student remained on task in the classroom and was easily redirected. She saw that he had a good attitude and was a leader in the classroom. Further, Student engaged with others and acted in a socially appropriate manner. Cutino's observations of Student did not indicate any symptoms of a disability or disorder.

Cutino spoke with Carter, who expressed no concerns about Student's behavior or mental health in the classroom. Student was doing well academically and did not require additional supports beyond the classroom accommodations already in place. Student did not exhibit any speech difficulties, nor did Student display difficulties with social interaction. Based upon her observations, Cutino opined that Student's behaviors did not interfere with his education and had no need for mental health services.

Cutino shared her observations privately with Parent prior to the March 31, 2023 SST meeting. In her discussion with Parent, Parent acknowledged that her concerns regarding Student's mental health arose during Student's attendance in his prior school district and were primarily directed towards Student's behavior at home. Parent told Cutino that she simply wanted to follow up with Stockton. Parent expressed no questions or concerns about the observation process or disagreement with Cutino's findings. Nor did Parent request further assessments.

Student's closing brief attacked Cutino and mischaracterized her testimony. Student misstated the evidence, claiming Cutino said it was possible that Student qualified for special education and related services under other health impairment due to his ADHD, but argued she did not assess Student or review his records. Cutino was a

mental health clinician, not a school psychologist. Cutino never claimed to have assessed Student, only to have provided an observation to determine if a mental health assessment was needed. Cutino was not required to review Student's records to conduct an observation. Cutino's job was to watch and provide information to the SST regarding Student's then-current behaviors at school, not his past behaviors. Parent provided consent for this observation.

Student's closing brief tried to discredit Cutino for admitting in testimony that she did not know what the mental health "watch list was". The "watch list", however, was not within the purview of Cutino's duties. School psychologist Moua created and monitored the "watch list". The "watch list" had nothing to do with Cutino's observations. Cutino's lack of knowledge in that regard did not affect the weight or credibility of her testimony.

Both at hearing and in closing briefing, Student spent a significant amount of time and effort discussing eligibility for special education and establishing each Stockton witnesses' understanding of the categories of other health impairment and emotional disturbance. Unfortunately, Student failed to grasp the concept that eligibility for special education is not the issue here. The issue was child find, for which the existence of a disability does not conclusively determine special education eligibility. Student's arguments relied on the simple assumption that diagnosis alone of ADHD and anxiety requires a school district to conduct an assessment, ignoring law Student himself cited that the suspicion of an impairment must affect the student's educational performance. (*Park, ex rel. Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1032; *Timothy O., supra*, 822 F.3d at p. 1118.)

Student failed to introduce any evidence of Student's educational records from Tracy that would support his claims that he entered Stockton with a recognized disability. Student failed to present any testimony to establish the contents of Student's educational records from Tracy, let alone that Stockton even received the records. It served no purpose in Student's closing briefing to argue about the contents of Student's third-grade records from Tracy when no such information was introduced at hearing. Student has not established that the January 27, 2023 SST failed to act or follow up on any suspicion that Student might have a disability affecting his academic performance, or that it triggered Stockton's duty to assess Student for special education.

MARCH 31, 2023 STUDENT STUDY TEAM MEETING

The SST reconvened on March 31, 2023. The team members included

- Moua,
- Asuncion,
- Carter,
- Cutino,
- Parent, and
- Student.

The SST Meeting Summary, dated March 31, 2023, indicated the meeting was held to discuss Parent's request for a Section 504 Plan.

Student's attendance had increased, but his absences remained high. Parent told the team Student was starting new medication. Current reports showed Student had improved his behaviors with other students and was putting in effort to avoid conflict. Carter reported Student made huge growth in math. Student participated in a counseling group, played chess after school, and was doing well.

Cutino reported, based upon her observations of Student in the classroom and the school grounds, that Student did not need or qualify for mental health services.

School psychologist Moua held a master's degree in school psychology, and a credential in pupil personnel services. Moua, one of two counselors at King Elementary, maintained a caseload of over 500 students, and attended 10-to-20 SST meetings each year. Moua did not know Student or Parent well, as her only contact was during each SST meeting where she facilitated the meeting and took notes.

In her testimony, Moua did not independently recall much about the SST meetings and had not seen several of the exhibits referenced by Student. Although Moua's credibility was not questioned, her testimony's relevance was limited in general due to poorly phrased questioning during Student's direct examination, based upon incorrect assumptions. For example, Student repeated questions regarding the "watch list" which Student assumed to be a written document maintained by Stockton. Other testimony established that Moua's "watch list" was not a document but was merely a figurative list of students to keep an eye on. At the time, Student was the only student on Moua's list.

Moua's testimony established that at no time did Parent request a special education assessment or an IEP, nor did the SST discuss offering Student special education services. Based upon her experience in facilitating SST meetings, Moua stressed that had Parent requested special education, she would have included the request in the SST notes. Parent did not request that Student be assessed for special education, and no SST member had any suspicion that Student might require special education and related services.

The March 31, 2023 SST determined that, with the general education supports and interventions currently in place, Student was succeeding in his educational endeavors, and that Student did not need a Section 504 Plan. The team agreed to check with Carter to determine if further follow up was needed before the end of the 2022-2023 school year, and again to determine whether a follow up was needed for the 2023-2024 school year. Parent agreed with the team's plan.

The March 31, 2023 SST's findings were further supported by Student's second and third trimester report cards for the 2023-2024 school year. Carter reported that Student continued to make significant improvement in all areas. Student met all standards in English language arts. Student's math skills improved from near standard to standard, as did his performance in social studies, science, and performing arts. Student received satisfactory to outstanding scores in habits of success, which included working, sharing, and playing respectfully and cooperatively, and:

- Exercising self-control and following rules and directions;
- Demonstrating organizational skills;
- Actively participating in learning; and
- Completing classwork.

Student's grades for the first trimester of fifth grade, as reported by Sek-Rowe, indicated Student continued to perform at grade level or above in all areas. Student's behavior and habits of success remained satisfactory or outstanding, contradicting the contention that Student's ADHD was impacting Student's educational performance to any extent.

Thus, Student did not prove the results of the March 31, 2023 SST meeting constituted violation of Stockton's child find duties through November 16, 2023.

STUDENT'S EXPERT TESTIMONY

Abbe Irshay, Ed.D., testified on behalf of Student as an expert witness. Irshay, now retired, held a doctorate in educational leadership and a master's degree in curriculum and supervision. Irshay was a school principal at various districts between 2005 and 2018. Irshay has extensive experience as an education administrator, but she acknowledged she was not a specialist in special education. She emphasized much experience running IEP team meetings and negotiating and mediating program outcomes. Irshay acknowledged she had no experience with special education assessments or generating assessment plans.

Irshay provided generalized testimony about SST meetings. She reinforced Stockton's contention that an SST need not always refer a student for special education and related services. It was her opinion that the best practice is to refer a student for an SST meeting where the team and parent can then determine whether to assess for a Section 504 Plan or special education based on the student's diagnosis. This is what Stockton did for Student.

Beyond that generic information, Irshay's testimony was not credible as an expert or fact witness.

Irshay testifies regularly in a significant number of due process hearings on behalf of students represented by Student's counsel, the Law Offices of Shelia Bayne. Irshay's testimony raised serious concerns regarding her credibility as an expert witness, seeming more like a hired gun retained to give favorable testimony. According to Student's prehearing conference statement, Irshay was listed as Student's witness as of March 26, 2024, which would have provided her with sufficient time to review Student's proffered documents and speak with Student and Parent in advance of the April 16, 2024 start of hearing. Instead, Irshay waited until April 20, 2024, three hearing days after the hearing commenced to speak with Parent, who had been present at all times during the hearing.

Irshay's opinions were based solely on the hearsay information provided by Parent after listening to Stockton's witnesses testify. Irshay did not know what was discussed at the SST meetings, nor did she attempt to speak with any teachers or SST members in forming her opinions. In opining Student was performing below average, Irshay was unaware Student was on Honor Roll. Irshay did not know when Student enrolled in Stockton and did not know if the information she reviewed was about Student's time at Tracy or at Stockton. When made aware that Student did not enroll in Stockton until November 4, 2022, Irshay retracted her opinion that Stockton violated its child find duties during the 2022-2023 school year. Irshay's testimony provided no relevant information beyond her generic testimony.

Sookyung Shin, Ed.D., also testified as an expert witness on behalf of Student. Shin held a master's degree and doctorate in special education. Shin was articulate and possessed an impressive resume. Shin's resume, however, indicated she was currently employed as a certified nurse aide and certified medication aide at an assisted care facility in Kansas, outside the field of special education.

Like Irshay, Shin's testimony was tainted with bias. Shin reported she previously testified in five due process hearings for the Law Offices of Sheila Bayne. Shin stated she had been a special education consultant and parent advocate since 2010 and viewed things from a parent's perspective. Shin had never been employed in a public-school setting. She further indicated she was far more familiar with more severe disabilities than ADHD or generalized anxiety.

Further echoing Irshay, Shin was listed as Student's witness as of March 26, 2024, but did not interview Parent or Student until April 21, 2024. Shin's interviewed Parent four full hearing days after the hearing commenced. Shin reported she was contacted by Student's attorney a week prior to her testimony and was retained for her testimony in this matter at that time.

Shin's opinions were also based on the hearsay information provided by Parent after listening to Stockton's witnesses testify. As Shin's testimony unfolded, it became apparent that some of the information provided to her by Parent included information Parent did not recall in her own testimony. Parent also informed Shin that Student had a diagnosis of oppositional defiance disorder which was never reported to Stockton, but which nevertheless influenced Shin's opinions. Based upon her interview with Parent, Shin concluded that Student should have been assessed for other health impairment due to his ADHD and anxiety. As with Irshay, Shin did not know when Student enrolled

in Stockton, or whether the information provided by Parent reported on Student's time in Tracy or Stockton. Shin also incorrectly believed that Parent made a formal request to Stockton for an assessment.

As a person with advanced degrees in special education, Shin's testimony confirmed basic information offered by Stockton, including that a child with ADHD can qualify for special education under the other health impairment eligibility category, but just because a child has ADHD does not guarantee eligibility. The disability must still impact the child's education, which must be determined based upon the child's individual circumstances.

Shin was familiar with Response to Intervention, or RTI, strategies, which require conducting an assessment only after a team determines that additional supports are required or that the child continues to exhibit a pattern of behaviors. Shin also acknowledged that initial screening for anxiety was often done through observations.

In Student's case, Shin opined that Student's history of peer conflicts constituted a continuous pattern of behavior which merited assessment. Shin opined that, at minimum, the SST should have administered ADHD surveys, but she could not remember the names of the surveys or questionnaires. Shin was not a psychologist and was not qualified to select and administer assessments or make mental health diagnoses. As such, her opinions on mental health matters were not considered expert testimony, but rather lay opinions.

Student's experts did not establish Stockton failed in its child find obligations at any time.

STUDENT DID NOT PROVE A CHILD FIND VIOLATION

The testimony of Student's teachers and other SST members established there was no suspicion that Student's ADHD or anxiety impacted his education in any manner whatsoever. Neither of Student's teachers raised concerns about Student's educational performance, which included grade-appropriate academics, and typical school behavior and socialization. Stockton's witnesses described Student as an engaged, well-behaved student who demonstrated age-appropriate emotional maturity. Student failed to establish his educational performance was impacted to a degree that would raise even a slight suspicion of a disability requiring special education and related services to enable him to access his education. Thus, Stockton did not fail in its child find obligation between November 4, 2022, and November 16, 2023, on which date Stockton provided Parent and her attorney with an assessment plan for a comprehensive special education assessment.

Student failed to establish any impediment to Parent's participation in the decision-making process. Depending on the question, or who asked it, Parent's testimony became less and less credible. Parent's continual responses that she did not remember if she received documents, such as the Handbook, or she did not understand her rights as explained in the Handbook, if she received it, failed to discredit the testimony of Reeves that Stockton provided Parent with this Handbook information upon enrollment and again at the beginning of the 2023-2024 school year. Based upon the unanimous testimony of Asuncion, Carter, Moua, and Cutino, Student is disingenuous to contend Parent did not actively participate in the SST meetings.

Regardless, the issue of child find was moot. A child is not automatically eligible for special education and related services even if identified through child find. Once identified, the child must still undergo an initial evaluation to confirm eligibility. (34 C.F.R. § 303.303(a)(2).) A school district must obtain informed consent before conducting an evaluation for IDEA eligibility. The school district does not have unfettered discretion to conduct an evaluation when conducting child find. (*Fitzgerald v. Camdenton R-III Sch. Dist.* (8th Cir. 2006) 439 F3d 773, 776.)

Stockton offered Parent an assessment plan on November 16, 2023. At that point, Stockton met its responsibilities and once Parent refused to sign the assessment plan, any further obligation under child find ceased to exist. Stockton no longer had an obligation to pursue an initial determination of eligibility for special education and related services, because Parent refused to sign and provide consent to a comprehensive district assessment.

ISSUE 2: DID STOCKTON DENY STUDENT A FAPE BY FAILING TO PROVIDE A PRIOR WRITTEN NOTICE IN RESPONSE TO PARENT'S MARCH 31, 2023 REQUEST FOR MENTAL HEALTH SERVICES?

Student contended Stockton failed to provide Parent with prior written notice pursuant to Code of Federal Regulations section 303.421, following the SST's decision at the March 31, 2023 meeting that Student did not qualify for mental health services or a Section 504 Plan.

Stockton contended prior written notice was not required and did not apply to the actions of the SST under the IDEA.

Prior written notice must be sent a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of a FAPE to a child. (34 C.F.R § 300.503(a).)

Student's contention comingled and confused Stockton's obligation to provide prior written notice under Section 504 and the IDEA. OAH has no jurisdiction to determine whether written notice was required under Section 504. Instead, this decision must determine whether prior written notice was required under the IDEA.

Student did not provide sufficient evidence to support his contention that a prior written notice was statutorily required.

The parties stipulated at hearing that Stockton did not provide Parent with a prior written notice at any time. Student in his closing brief correctly restated Reeve's testimony that a school district has a duty to send a parent a prior written notice after the parent requested special education services or an assessment. The testimony at hearing, including Parent's own testimony, however, supported the factual finding that Parent never requested an assessment or special education services. Parent requested a Section 504 Plan. Student argued that the March 31, 2023 SST team denied Parent's request for a 504 Plan, and therefore had a duty to explain the reasons why it was denied. Again, OAH has no jurisdiction to determine prior written notice requirements under Section 504.

The March 31, 2023 SST meeting occurred prior to a referral for special education or a determination of special education eligibility. Further, Student still does not qualify for special education and related services as Parent did not consent to Stockton's offer of a comprehensive assessment to determine eligibility.

The SST process was designed to discuss whether Student's educational needs could be met utilizing general education strategies and accommodations. The SST determined Student did not require mental health services, nor did he require a Section 504 Plan. Student was consistently able to access his education with typical supports offered in the general education classroom. Parent agreed with the findings and interventions provided by the SST.

Student provided no authority to suggest that a prior written notice obligation attached before a referral or request for special education and related services. Student's expert witness Irshay testified she did not know what a prior written notice was. Student's only offer of proof was Parent's less than persuasive testimony, in which she provided vague and confusing responses. Only after being asked the same question in different forms did Parent admit that she had not requested assessments or special education and related services.

Every Stockton witness testified that Parent never made a request for assessment for special education and related services. The SST meetings occurred before any referral for special education services or a determination of special education eligibility. Stockton's SST procedures relate to general education interventions and strategies, which do not trigger the requirement of prior written notice under the IDEA. Stockton only had an obligation to provide prior written notice under the IDEA if it was denying an initial request to assess for a disability. Student requested a Section 504 Plan, therefore the IDEA safeguards did not apply to Student. Student failed to provide any evidence that Stockton was required to provide Parent with prior written notice.

ISSUE 3: DID STOCKTON DENY STUDENT A FAPE BY FAILING TO OFFER STUDENT A SPEECH AND LANGUAGE ASSESSMENT PURSUANT TO THE NOVEMBER 14, 2023 ASSESSMENT PLAN?

Student contended Stockton failed to conduct appropriate assessments of Student in all areas of suspected disability by failing to offer Student a speech and language assessment in the November 14, 2023 assessment plan.

Stockton contended Student did not demonstrate a need for a speech and language assessment or exhibit a suspected disability in the area of speech and language.

A school 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).) 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).)

On October 31, 2023, Student, through the Law Offices of Shelia Bayne, filed a Request for Due Process complaint against Stockton as part of OAH Case Number 2023110151, which raised the issue of child find against Stockton.

As part of Stockton's response to Student's complaint, program specialist Waynesha Fultcher, prepared an assessment plan, dated November 14, 2023. Stockton served this assessment plan on Attorney Sheila Bayne as part of Stockton's formal response to Student's complaint in OAH Case Number 2023110151. A valid proof of

service notes Stockton served its response to Student's complaint on November 16, 2023, and included the assessment plan and Parental Rights and Procedural Safeguards as attachments.

The assessment plan indicated Parent requested an assessment due to concerns related to anxiety and ADHD. To address Parent's concerns, Stockton offered to conduct an initial psychological and mental health assessment of Student. The assessments were designed to determine Student's appropriate levels of academic, cognitive, social-emotional functioning, and health status to determine eligibility and appropriate goal development for any future programming and services.

The assessment plan noted Student had a medical diagnosis of ADHD-combined type, and anxiety. Student was considered for a Section 504 Plan, but a Section 504 Plan was not appropriate at the time. Stockton offered an SST meeting, which Parent declined.

Fultcher based the assessment plan on Student's iReady scores, in class unit assessment, statewide computer-based academic testing known as Smarter Balanced Assessment Consortium scores, and teacher observations. Fultcher also based the assessment plan on Student's report cards, attendance, and discipline records. The assessment tools proposed in the plan included, but were not limited to, classroom observations, rating scales, interviews, record reviews, one-on-one testing or some other types or combination of tests.

Stockton proposed assessments for academic achievement, health, intellectual development, motor development, adaptive behavior, social-emotional and behavior. The assessment plan did not include a speech and language assessment.

On December 4, 2023, Stockton amended the November 14, 2023 assessment plan based upon discussions with Parent at the November 29, 2023 resolution session in OAH Case Number 2023110151. Pursuant to Parent's request, the amended assessment plan added a language and speech communication assessment to measure Student's ability to understand and use language and speak clearly and appropriately. The assessment would be conducted by a speech and language pathologist.

The assessment plan specified that Parent's permission must be given before Stockton assessed Student to determine initial eligibility for special education services.

Parent did not consent to either of the assessment plans.

On February 13, 2024, Stockton developed a new assessment plan, which contained the same information as the December 4, 2023 assessment plan. Fultcher sent another redrafted assessment plan to Parent via certified mail, properly addressed to Parent's verified address. Parent did not accept the certified mail. Fultcher also sent a copy of the assessment plan home with Student in his backpack.

At hearing, Student's counsel sought to establish through testimony that Parent never received an assessment plan from Stockton. Parent testified that she never received an assessment plan. Parent testified that she had never seen the assessment plans dated November 14, 2023, and December 4, 2023. Student's counsel continued this line of questioning with Fultcher as well, establishing that one of the two certified mail attempts to provide Parent with the assessment plan was invalid.

Student's counsel appeared unaware of the ramifications of Student's prior due process complaint which established that his law firm had been served with the assessment plans on behalf of Student. Counsel appeared oblivious to the logic that

Student's Issue 3 was based on receipt of the November 14, 2023 assessment plan. Specifically, had Parent never received the assessment plan, she could not allege it was inappropriate.

To remedy this miscalculation, Student in his closing brief shifted to the boilerplate language taken from the assessment plan itself, stating a speech and language assessment was necessary to measure Student's ability to understand and use language and speak clearly and appropriately. Student argued that the December 4, 2023 revision of the November 14, 2023 assessment plan to include a speech and language assessment was an admission that Stockton denied Student a FAPE by failing to include one earlier. Student's argument was unpersuasive.

Student failed to establish that a speech and language assessment was inappropriately excluded from the November 14, 2023 assessment plan. Student's entire argument was based upon Parent's sole statement that Student talked really fast at home, and the discredited testimony of Irshay and Shin, which relied on hearsay provided by Parent. The evidence provided during the hearing strongly supported the findings that Student was above average in reading, and his math skills were improving to grade-level standards. None of Stockton's witnesses observed Student speaking too fast. Student's teachers found Student articulate with age-appropriate communication skills. Neither Irshay nor Shin, who spoke directly with Student, observed any speech or language difficulties, but instead only relied on Parent's statements to conclude assessment was advisable. There was no evidence that established Student had a suspected language and speech disability or that Stockon should have included a

speech and language assessment in the November 14, 2023 assessment plan. Therefore, Stockton did not deny Student a FAPE by failing to offer a speech and language assessment in its November 14, 2023 assessment plan.

CONCLUSIONS AND PREVAILING PARTY

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

ISSUE 1:

Stockton did not fail in its child find obligation for Student from November 4, 2022, through November 16, 2023.

Stockton prevailed on Issue 1.

ISSUE 2:

Stockton did not deny Student a FAPE by failing to provide Student a prior written notice in response to Parent's request for mental health services.

Stockton prevailed on Issue 2.

ISSUE 3:

Stockton did not deny Student a FAPE by failing to offer Student a speech and language assessment pursuant to the November 14, 2023 assessment plan.

Stockton prevailed on Issue 3.

ORDER

1. All of Student's requested relief is denied.
2. OAH retains jurisdiction to rule on Stockton's May 13, 2024 Motion for Sanctions.

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.

Judith L. Pasewark

Administrative Law Judge

Office of Administrative Hearings