

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022060001

PARENTS ON BEHALF OF STUDENT,

v.

IRVINE UNIFIED SCHOOL DISTRICT.

DECISION

December 30, 2022

On May 26, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Irvine Unified School District, called Irvine, as the respondent. On July 6, 2022, OAH granted a joint request to continue this matter.

Administrative Law Judge Judith L. Pasewark heard this matter by videoconference in California on November 1, 2, 3, and 8, 2022. Attorneys Timothy Adams and Deylynn Axelberg represented Student. Parents attended the hearing on behalf of Student.

Attorney Amy Rogers represented Irvine. Jennifer O'Malley, Director of Special Education, attended the hearing on behalf of Irvine. Student did not attend the hearing.

At the joint request of the parties, OAH continued this matter to December 5, 2022, for written closing briefs. The parties timely filed closing briefs, the record was closed, and the matter was submitted on December 5, 2022.

ISSUES

The issues were renumbered, and descriptive language condensed for clarity. The content of the issues remained the same as discussed by the parties at the prehearing conference on October 21, 2022.

In this Decision, a free appropriate public education is called a FAPE. An individualized education program is called an IEP.

1. Did Irvine deny Student a FAPE by failing in its child find duty to identify Student as a child with a disability?
2. Did Irvine deny Student a FAPE by failing to conduct appropriate assessments of Student in all areas of suspected disability?
3. Did Irvine deny Student a FAPE by failing to consider all available information in determining Student's eligibility for special education?
4. Did Irvine deny Student a FAPE, by failing to find Student eligible for special education services and provide a plan of supports and services to meet Student's needs due to disability from April 2020 through May 26, 2022?

5. Did Irvine deny Student a FAPE by failing to provide Parents with prior written notice in response to their November 29, 2021 10-day notice of intent to unilaterally place Student in a private school and seek reimbursement of tuition expenses?

JURISDICTION

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) and (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.)

The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) In this case, Student filed the due process complaint and 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).)

At the time of the hearing, Student was 16 years old and in the 10th grade. Student resided with his parents within Irvine's boundaries. Student's home school within Irvine was University High School, called University in this Decision.

LEGAL FRAMEWORK

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

ISSUE 1: DID IRVINE DENY STUDENT A FAPE BY FAILING IN ITS CHILD FIND DUTY TO IDENTIFY STUDENT AS A CHILD WITH A DISABILITY?

Student contended Irvine's child find obligations were triggered as of the 2019-2020 school year, which required Irvine to assess Student and convene an IEP team

meeting to find Student eligible for special education and related services prior to Parent's request for an IEP on May 14, 2021. Student asserted Irvine knew of Student's significant needs due to

- attention deficit hyperactivity disorder,
- his social/emotional and executive functioning problems,
- impaired cognitive and physical functioning, and
- periods of excessive sleep.

Student contended that as a result of Irvine's failure to identify Student as a child with a suspected disability, Irvine denied Student a FAPE.

Irvine asserted that neither Parents nor Irvine suspected any disabilities prior to 2021, based upon Student's high academic achievement and athletic acumen, in spite of an undefined medical condition.

The IDEA places an affirmative, ongoing duty on the state and school districts to identify, locate, and evaluate all children with disabilities residing in the state who are in need of special education and related services. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a).) This duty is commonly referred to as "child find." California law specifically incorporates child find in Education Code section 56301, subdivision (a).

A school district's child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect, a disability, and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1194.) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Id.* at p. 1195.) Either a parent's

suspicion or a district's suspicion may trigger the need for a child-find initial evaluation to determine if the student is a child with a disability within the meaning of the IDEA. (*Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796, 802.)

A disability becomes "suspected," and therefore must be assessed by a school district, when the district has notice that the child has displayed symptoms of that disability. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119-20, cert. denied, 137 S. Ct. 1578 (2017) (*Timothy O.*) A district may be put on notice through concerns expressed by parents about a child's symptoms, opinions expressed by informed professionals, or by other less formal indicators, such as the child's behavior. (*Id.* at pp. 1119-1121 [citing *Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796, and *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202].)

School districts cannot rely on informal observations, or the subjective opinion of a staff member, to circumvent the district's responsibility to use the thorough and reliable procedures specified in the IDEA to assess a child in all areas of suspected disability. (*Timothy O., supra*, 822 F.3d at p. 1119.) Thus, the suspicion that a student might have an impairment affecting the student's educational performance is enough to trigger a need for assessment. (See, e.g., *Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1032 (*Park v. Anaheim.*)

Violations of a district's child find duties, and of the obligation to assess a student, are procedural violations of the IDEA and the Education Code. (*Dept. of Education, State of Hawaii v. Cari Rae S., supra*, 158 F.Supp. 2d 1190 at p.1196); *Park v. Anaheim, supra*, 464 F.3d 1025 at p. 1031.) In *Rowley*, the Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley*, 458 U.S.

176 at pp. 205-06.) However, a procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in liability for denial of a FAPE only if the violation:

1. impeded the child's right to a FAPE;
2. significantly impeded the parent's opportunity to participate in the decision-making process; or
3. caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) (*Target Range*.)

The actions of a school district with respect to whether it had knowledge of, or reason to suspect, a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. 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 Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1041).)

Student did not meet his burden of proof to establish that sufficient information was available to Irvine to trigger its child find obligation and assess Student prior to Parent's request for an IEP.

Prior to the 2019-2020 school year, Parents provided Irvine with Student's annual Health Condition Information form which indicated Student took medication for attention deficit hyperactivity disorder. Parents reported Student's attention deficit

hyperactivity disorder did not affect his ability to participate in routine school activities or programs and did not require any special health procedures during the regular school day.

During the 2019-2020 school year, Student's school attendance began to decline. Student suffered a series of illnesses which Parents characterized as stomach viruses, head cold, ear infections, and the flu. On February 1, 2020, Parents informed Irvine that Student was being closely watched by his pediatrician, in addition to an immune system specialist. He returned to school at that time, increased his activities, and resumed participation in sports.

By February 18, 2020, however, Parent notified Irvine that Student was very sick and not likely to return to school for the remainder of the month. On February 18, 2020, Student's pediatrician, Dr. Robert Sears, sent a letter to Irvine reporting Student contracted a long-term viral illness, possibly Epstein Barre, a chronic virus which caused chronic fatigue. He referred Student to another specialist for further diagnosis. In the meantime, Student needed rest. Dr. Sears did not know when Student would improve. Dr. Sears suggested Irvine provide Student with home/hospital services, if needed, to help Student keep up with his schoolwork, and on February 28, 2020, Dr. Sears provided a formal request for home/hospital teaching services.

On the executed form, Dr. Sears reported Student's diagnosis as long-term sinusitis and chronic fatigue. He requested home/hospital services for Student through March 30, 2020. Irvine requested additional information to determine whether Student's condition prevented him from attending school with accommodations and his prognosis for a return to school. The requested information, at that time was speculation based upon an undetermined diagnosis.

Student's fatigue was chronic, and he slept up to 22-hours per day, which made school attendance impossible. It also made home/hospital services impractical.

In an April 8, 2020 letter, Dr. Ying Ping, Student's neurologist, informed Irvine that Student exhibited a complex neurological disorder following his recent viral syndrome, which caused lingering impairment of his high cortical neurological functioning. This resulted in excessive daytime sleepiness, mental and physical fatigue, melancholia, and cognitive memory impairment which significantly decreased his mental and physical capacities and endurance. Dr. Ping suggested Irvine provide Student with a series of school accommodations which included

1. class schedule modification and homework load modification;
2. extra time for testing and exams;
3. increased one-on-one instruction time; and
4. allowing alternative educational modalities extending into summer to make up academic requirements.

Parent provided this letter to Irvine on May 12, 2020.

In April 2020, Irvine initiated distance learning due to the COVID-19 pandemic. Several of Student's teachers informally provided Student with accommodations in their virtual classes due to his illness.

By the end of the 2019-2020 regular school year, Student missed 55 days of school due to illness. Student's grades dropped, however during the third trimester no grades were assigned due to COVID-19 distance learning.

Student transitioned to high school for the 2020-2021 school year. Parents completed the annual health form which again indicated Student took medication for

attention deficit hyperactivity disorder. Parents again reported that none of Student's medical conditions affected his ability to participate in routine school activities or programs, nor did Parent believe Student required any special health procedures during the regular school day.

Classes for the 2020-2021 school year resumed in a hybrid setting. In a September 18, 2020 email, Parent contacted Student's math teacher with concerns about Student's math progress. Parent described Student's illness as mononucleosis in which he slept almost continuously for over two months. Parents supported Student with math tutoring over the summer and would continue to do so during the school year. The math teacher responded to Parent on September 24, 2020, indicating that additional resources and supports were available which corresponded with classroom lessons. As an accommodation, the math teacher allowed Student enough time to complete work and also submit late work.

On September 24, 2020, Parent emailed Nathan Schoch, Student's high school counselor, to request a conference to discuss obtaining additional support for Student. Schoch agreed to a conference but reported Student was doing well in his classes. Schoch's conclusion was ultimately supported by Student's first quarter grades, which indicated Student did well in all subjects except music. As of January 8, 2021, Student passed all classes with As and Bs, except for a D in English due to missing major assignments and homework.

In January 2021, Parents withdrew Student from Irvine, and enrolled him at Lutheran High School of Orange County, a private school. Student continued to have

illness-related attendance issues and remained at Lutheran High School only a short time. Subsequently, Parents enrolled Student at Futures Academy, a fully accredited private school.

On May 14, 2021, Parent emailed Schoch, indicating their desire to return Student to Irvine for the 2021-2022 school year. The email included a request for a complete assessment of Student for determination of eligibility for special education services under the IDEA and/or Section 504 of the Rehabilitation Act of 1973. Parents requested the assessment due to Student's new diagnoses of Kleine-Levin Syndrome, referred to as KLS, and symptoms of

- attention deficit hyperactivity disorder;
- depression,
- social anxiety, and
- difficulty making up assignments following prolonged absences.

Student had difficulty rejoining a school's ongoing curriculum after prolonged absences, which resulted in learning gaps.

Student's diagnosis of KLS was not disputed. KLS is a rare and complex neurological disorder that affects only one-in-a-million of the population. KLS is characterized by recurring periods of excessive amounts of sleep, altered behavior and a reduced understanding of the world. There is no treatment for KLS. As described by Student's neurologist, Dr. C. Phillip O'Carroll, KLS is a bona fide brain disorder that symptomatically included excessive sleeping and fatigue which recurs randomly for varying periods of time. KLS can severely impact cognitive functions even after a prolonged episode. Each episode lasts days, weeks, or months during which time all

normal daily activities stop. During an episode, Student could not care for himself or attend school. When awake during an episode, a person with KLS experiences confusion, disorientation, a complete lack of energy, and a lack of emotions. Everything seems out of focus. In between episodes individuals with KLS appear to be perfectly healthy with no evidence of behavioral or physical dysfunction. Dr. O'Carroll anticipated that for the next several years, Student would be subject to devastating bouts of hypersomnia, loss of focus, daytime fatigue, and an inability to concentrate. He further anticipated Student would grow out of KLS by his early 20s, with no lasting cognitive impairment.

While the threshold for suspecting that a child has a disability is relatively low, (*Dept. of Education, State of Hawaii v. Cari Rae S., supra*, at p. 1195.), there must still be some reasonable suspicion of a disability. Student did not establish that Irvine knew or had a reasonable suspicion that Student was a child with a disability.

Instead, Student exhibited symptoms of a temporary medical condition which incapacitated him for extended periods of time. There was no disagreement that Student's prolonged absences from school during the 2019-2020 school year, and the 2020-2021 school year, were directly related to a medical condition, which left Student lethargic and unable to attend class.

This illness, however, represented an unknown entity which perplexed Parents, Student's pediatrician, and other medical experts. Irvine had no information regarding Student's health other than that presented by Parents and Student's doctors. In spite of excessive absences from school, Student did not exhibit a need for any adaption of core content, or a change in methodology or services in order to continue successfully accessing the general education curriculum.

At no time prior to Student's diagnosis of KLS in May 2021, was Student's medical condition considered a suspected disability which would present as a chronic condition, which required more than accommodations provided on an as needed basis, to assist Student in completing assignments in the general education curriculum. In spite of excessive absences from school, Student did not exhibit a need for any adaptation of core content, or a change in methodology or services in order to continue successfully accessing the general education curriculum.

Student did not establish Irvine knew of or should have developed a suspicion that Student was a child with a disability prior to Dr. O'Carroll's letter in May 2021. While Parent expressed concerns regarding Student's struggles to keep up, there was no significant evidence of difficulties at school, when he attended. Student did not exhibit a need for specialized instruction. He maintained passing grades and excelled in physical education. Student's attention deficit hyperactivity disorder was controlled with medication and did not affect his ability to perform generally above average in his academic endeavors. The implications of Student's medical condition only became apparent in hindsight after another bout of significant illness and the diagnosis of KLS. Irvine did not fail in its child find duty prior to Student's diagnosis of KLS, and timely assessed Student when Parent requested an assessment in May 2021.

Assuming in arguendo, Irvine failed in its child find obligation, a procedural error does not automatically equate to a denial of FAPE. As a procedural violation, a child find violation results in a denial of a FAPE only if it

- impeded the child's right to a FAPE,

- significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents, child, or
- caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23 (Target Range)* (9th Cir. 1992) 960 F.2d 1479, 1484.)

As analyzed below, Student was not eligible for special education and related services, therefore, no denial of FAPE occurred. Irvine prevailed on Issue One.

ISSUE 2: DID IRVINE DENY STUDENT A FAPE BY FAILING TO CONDUCT APPROPRIATE ASSESSMENTS OF STUDENT IN ALL AREAS OF SUSPECTED DISABILITY?

Student contended Irvine did not provide a sufficiently comprehensive assessment. Student maintained that in spite of an awareness of Student's anxiety and depression, Irvine's assessments were designed to look only at the characteristics associated with Student's diagnosis of attention deficit hyperactivity disorder and executive functioning. For example, Student contended Irvine failed to administer the Behavior Assessment System for Children. As a result, Student asserted Irvine overlooked Student's anxiety and depression as reported by Parents and doctors.

Irvine contended its multidisciplinary assessment addressed all areas of Student's suspected disabilities, was administered by qualified assessors, and met all statutory requirements.

A school district must assess the child in all areas of suspected disability before determining whether a child qualifies for special education services. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.301(a); Ed. Code, § 56320, subd. (f).) The IDEA uses the term evaluation, while the California Education Code uses the term assessment. The two terms have the same meaning and are used interchangeably in this Decision. (34 C.F.R. § 300.300; Ed. Code, § 56302.5.)

In conducting an assessment, a school district must follow statutory guidelines that determine both the content of the assessment and the qualifications of the assessors. The school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) The assessment materials must be valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) They must be sufficiently comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(C); Ed. Code, § 56320, subd. (c).)

Individuals who are both knowledgeable of the student's disability and competent to perform the assessment, as determined by the school district, county office, or special education local plan area, must conduct assessments of students' suspected disabilities. (20 U.S.C. § 1414(b)(3)(B)(ii); Ed. Code, § 56320, subd. (g).) A psychological assessment must be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the student being assessed. (Ed. Code, § 56324, subd. (a).) Assessors are prohibited from relying on a single measure or assessment as the sole basis for determining whether a child is eligible for special education or the appropriate content of an eligible student's IEP. (20 U.S.C. § 1414 (b)(2)(A); Ed. Code, § 56320, subd. (e).) The evaluation must be

sufficiently comprehensive to identify all of the child's needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified. (20 U.S.C. § 1414(b)(3); 34 C.F.R. § 300.304(c)(6); Ed. Code, § 56320, subd. (c).)

As long as the statutory requirements for assessment are satisfied, parents may not put conditions on assessments; selection of particular testing or evaluation instruments is left to the discretion of State and local educational authorities. (*Letters to Anonymous* (OSEP 1993).)

Student did not prove Irvine failed to assess him in all areas of suspected disability. Student failed to sustain his burden of proof to establish insufficient assessment regarding Student's social/emotional and behavioral functioning. Student failed to establish that Irvine failed to appropriately identify Student's anxiety and depression as suspected area of need, or that it was required to administer the Behavior Assessment System for Children.

After their May 14, 2021 letter requesting assessments, on May 16, 2021, Parents sent Irvine a letter from Student's psychiatrist Dr. Kwitka Peratt. Dr. Peratt provided pediatric psychiatric services to Student for the prior three years. This letter indicated that based upon his treatment of Student, and the referral to Dr. O'Carroll, the doctors reached a definitive diagnosis of KLS. Dr. Peratt indicated Student's attention deficit hyperactivity disorder and depression were comorbid or related to his KLS.

On May 24, 2021, Parents submitted an updated health form to Irvine, which reported Student's KLS, attention deficit hyperactivity disorder, and mild depression as factors affecting Student's ability to participate in routine school activities and programs.

Parents indicated Student required accommodations for attention deficit hyperactivity disorder in class, and accommodations for make-up work or a pause in the curriculum during a KLS episode.

In response to Parents' request, Irvine created an assessment plan which proposed

- classroom observations,
- rating scales,
- interviews,
- records review,
- one-on-one testing and
- other types or combinations of tests.

Irvine determined the assessment areas based upon a review Student's educational records, medical records, and information provided by Parents. Accordingly, Irvine offered assessments in the areas of

- academic achievement,
- health,
- intellectual development,
- social emotional/behavior,
- adaptive behavior, and
- post-secondary transition.

Irvine completed Student's multidisciplinary assessment report on September 7, 2021. In addition to Parents and Student, the assessment team included school psychologist Melissa Hilken, education specialist Emily Bees, general education teachers Alexander Sears and Marissa Kaak, and school nurse, Azita Ghanderifard.

HEALTH ASSESSMENT

Ghanderifard conducted the health assessment on August 30, 2021. Student passed the standard vision and hearing screenings. Based upon information provided by Parent, in non-KLS situations, Student normally went to bed around 11:00 p.m., and obtained seven to eight hours of sleep nightly. Student's appetite was sparse and he did not eat breakfast. Parent reported no activity restrictions. Previously Student was a talented gymnast, however, since his KLS diagnosis, Student's interest and ability to participate in sports was limited.

Parents reported Student began getting sick in August 2019, and the family stumbled through two years without knowing the reasons for Student's illness. In May 2021, Student was finally diagnosed with KLS by Dr. O'Carroll, who confirmed Student suffered his first episode of KLS, characterized by excessive sleep, fatigue, and irritability, in January 2020, which lasted for several months. A second episode occurred in March 2021, lasting a few weeks. The health assessment appropriately reflected Dr. O'Carroll's May 10, 2021 medical consultation report.

Parents reported significant cognitive impairments during KLS episodes. Irvine attempted to support Student by providing home/hospital services as requested by Dr. Sears, but Student could not participate because he was sleeping over 20 hours per day. Due to his inability to receive educational instruction during KLS episodes, Student experienced learning gaps from missed curriculum and he struggled to catch up once he returned to class when he recovered.

Ghanderifard conveyed the information provided by Dr. Peratt, which reported that Student had a long-standing diagnosis of attention deficit hyperactivity disorder and took medication to support him. In May 2021 Dr. Weist, confirmed Student struggled with attention skills in both visual and audio domains.

Ghanderifard did not testify at hearing, however, Hilken reported the health information contained in the health assessment accurately reflected Student's medical history based upon the information provided by Parents. The health assessment accurately corresponded to the information provided by Student's health care providers and Parents.

ACADEMIC ACHIEVEMENT

Emily Bees, a general education teacher, administered Student's academic testing. Bees did not testify at hearing; however, Student's academic achievement levels were not disputed and were the same as those later utilized in Student's independent evaluation conducted by Dr. Jeanette Morgan.

Bees' report indicated Student was cooperative during the test sessions. His level of activity was typical for his age and grade. Student's attention and concentration was appropriate, and he was not easily distracted by external stimuli. As the tasks increased in difficulty, Student noticeably increased his level of effort. Student's effort was consistent throughout the testing sessions. Bees concluded that Student's test results were a valid representation of his present level of functioning, and the testing results should be interpreted as Student's then current minimal level of academic achievement.

Bees administered the Wechsler Individual Achievement Test, Third Edition, a comprehensive assessment designed to measure the achievement of students. Wechsler was a nationally standardized and norm referenced test that consisted of 16 subtests used to evaluate listening, speaking, reading, writing, and math skills.

Student scored within the normal range in all areas tested. Student reported his strengths as attentiveness to subjects that interested him. He reported weaknesses in memory and inattention. However, he found routines, visuals, and note taking helpful.

Due to one, low outlier math score on the Wechsler, Bees administered a subtest of the Woodcock Johnson IV Tests of Achievement, to provide more in-depth diagnostic information on Student's specific math strengths and weaknesses. Student's broad mathematics scores fell within the high average range. Test scores indicated Student's math achievement was within the average to high average range.

PSYCHOEDUCATIONAL ASSESSMENT

Hilken administered the psychoeducational assessment and wrote the assessment report. Hilken was a school psychologist for Irvine with a master's degree in education with emphasis on school psychology. She held a pupil personnel services credential in school psychology and single subject teaching credentials for visual arts and language arts. Hilken had experience with special education assessments, development of IEPs and their implementation. She had experience with Student Success Teams and 504 Plans. Hilken was the school psychologist supporting Section 504 programs at Irvine. At hearing, Hilken demonstrated both expertise and credibility. Student did not significantly

challenge Hilken's assessment tools, their validity or scoring, and the subsequent independent assessment conducted in March 2022, adopted much of her assessment report.

At hearing, Hilken confirmed that the psychoeducational assessments and assessment materials complied with State law and IDEA statutory requirements.

GRADES

Student's transcript from Futures for the period of April 26 through July 30, 2021, indicated Student completed an all-college preparatory academic class load and received high grades resulting in a 3.74 grade point average.

Upon Student's return to University in September 2021, Student's first quarter grades dropped dramatically, primarily due to poor attendance. Student was absent 13 of 37 days.

STUDENT INTERVIEW

Hilken interviewed Student. Student expressed his strengths as being respectful of others, following directions, and paying attention. He described himself as a good listener. At school, Student liked English and creative writing. Although he enjoyed algebra, Student found math to be difficult at times, especially when the teacher talked too fast.

Student reported he did not think his attention deficit hyperactivity disorder was a barrier to his ability to access the curriculum, and he could attend easily to instruction. Student shared that he tended to procrastinate and sometimes tuned out when not

interested in what was being discussed. He did not like asking questions and could be forgetful. He reported he did well when the teacher was engaging, easy to talk to, and spoke slower when delivering instruction. He reported that when he was given more time on an assignment, visuals were provided, and he had the opportunity for consistent check-ins, he was more successful with work completion.

PARENT INTERVIEW

In their interview with Hilken, Parents reiterated their concerns regarding KLS and its devastating effects on Student's consistent access to the curriculum. Because Student could not attend class or perform schoolwork for long periods of time, Student required the curriculum to be paused until he recovered from the KLS episode and could resume normal functions. Parents noted Student was extremely bright and managed to recover the second semester of the ninth grade over the 2021 summer at Futures.

TEACHER INTERVIEWS

Sears, Student's teacher at Futures, reported Student was well spoken and respectful. Student retained information well and engaged in the curriculum.

Kaak, Student's chemistry teacher at University, reported that Student's frequent absences made it very difficult for him to stay up to date on class materials. The more classes he missed, the further he got behind, because the current class materials were based upon what was previously learned. Student had been very honest about where he was with lessons and the steps he was taking to try and catch up. Student was very bright, and Kaak could walk Student through concepts he missed while absent. Student picked up on things quickly and could focus on a task or activity while he completed it.

Kaak emphasized that the extra help Student needed arose more from his excessive absences, which resulted in missed material in class, than it did from lack of capability. When Student attended class, he was on task, attentive, respectful, and a fast learner.

OBSERVATIONS

During testing, Student was attentive, engaging, and put forth effort throughout the assessment. Student answered all questions of him and declined breaks when offered to him. Student was well groomed, respectful, friendly, and demonstrated age-appropriate conversation skills. Student presented with appropriate behavior during testing. Based upon these observations, Hilken concluded the test results were a valid reflection of Student's current level of cognitive, academic, emotional and behavior functioning. Hilken noted no maladaptive behaviors.

Hilken observed Student in his chemistry class at University. Overall, Student worked independently and respectfully throughout the observation. Although Student sighed a few times while looking at his assignments, he asked the teacher for help when needed. He stopped working a few times to look around the room or put his head down, but quickly returned to his work on his own within seconds.

Based upon relevant information presented to the assessment team, Irvine determined Student's areas of suspected disability were other health impairment and specific learning disability. Although Parents reported anxiety and depression at home, Student and teacher interviews did not indicate emotional disturbance as an area of concern at school. Notably, all assessments, including Student's independent evaluation discussed later in this Decision, were conducted while Student was at school, participating

in a normal manner during periods of relatively good health. All assessments and observations took place when Student was cognitively functional and not in any phase of a KLS episode.

ASSESSMENT MATERIALS

Hilken administered the Wechsler Intelligence Scale for Children, Fifth Edition, to assess Student's cognitive abilities. Student's verbal comprehension and visual and spatial index scores fell in the high average range. Student's fluid reasoning index score fell in the average range, as did his working memory and processing speed index scores. Overall, all clusters were within the high average to average range. Student's lowest score in processing speed still fell within the average range. Based upon these results, Hilken determined Student's full-scale intelligence quotient, or IQ, score fell within the average range.

Hilken administered the Test of Auditory Perceptual Skills-4, an assessment of auditory skills, which was designed to provide information in the areas of auditory attention, basic phonological skills, auditory memory, and listening comprehension. Student's overall performance on all components of the test, placed Student in the average range.

Parents, Student, and teachers Sears and Kaak completed the Conners-Third Edition rating scales, which addressed

- attention deficit hyperactivity disorder,
- executive functioning,
- learning problems,

- aggression, and
- peer/family relations.

The Conners also functioned as a screener for anxiety and depression, two internalizing problem areas frequently associated with attention deficit hyperactivity disorder.

Parents' ratings, based on observations in the home, identified elevated or very elevated scores in inattention, and hyperactivity and impulsivity. Student's self-rating concurred with Parents' observations, regarding poor concentration, distraction, and inattention. However, when asked about his self-ratings, Student reported his inattention did not get in the way of his ability to learn in the classroom.

Sears, Student's teacher at Futures, and Kaak, Student's teacher at University, identified Student's behaviors in all areas within the average range.

Hilken utilized the Comprehensive Executive Function Inventory rating scales to measure Student's level of executive functioning in the areas of

- attention,
- emotion regulation,
- flexibility,
- inhibitory control,
- initiation,
- organization,
- planning,
- self-monitoring, and
- working memory.

Parents' scores placed Student in the low average range to average range, with a significant weakness in attention. Ratings in all other areas fell within the low average to average range, with the exception of self-monitoring which fell in the below average range.

Despite the areas of relative weakness in the home setting as reported above by Parents, the observations and teacher reports indicated that Student did not demonstrate these weaknesses in the classroom setting. Teacher reporting of Student's executive functioning provided a full-scale standard score in the superior range.

Student's self-reported full scale standard score fell within the average range. Student exhibited no significant variation among his reported scales, which validated his full-scale scores as a good description of his executive function behaviors. Hilken found Student's self-scores to be the most accurate, which contradicted Parents' reporting at times.

Hilken noted and reiterated Student's comments in his interview. Student reported he could complete all of his assignments when he chose to do so. Student reported his attention was only fleeting when he lost interest in the particular topic at hand. Student shared that his attention deficit hyperactivity disorder did not get in the way of his ability to learn.

Hilken provided the Behavior Assessment System for Children, Third Edition, rating scales to Parents, Student, and teachers, however the rating scales were not completed by the October 27, 2021 IEP team meeting, and therefore, were not reported or considered as part of the multidisciplinary assessment.

Hilken used the Adaptive Behavior Assessment System, Third Edition, by providing Parent the rating scale for observation of adaptive behavior in the home. Parent scored Student in the average range. At hearing, Hilken opined that this assessment provided the most complete measure of adaptive behavior and was likely to be the most reliable and accurate estimate of Student's overall adaptive function. Hilken concluded that adaptive function was not an area of unique need for Student.

Hilken acknowledged that her choice of assessment tools to measure social/emotional and behavioral functioning were primarily directed toward taking a closer look at the characteristics associated with Student's attention deficit hyperactivity disorder and executive functioning. While Student argued this as evidence of an incomplete assessment, it is not a persuasive conclusion. As evidenced above, after reviewing relevant medical information, school records, and parental input, Hilken determined Student's areas of suspected need were predominantly in the areas of specific learning disability, and other health impairment, which included attention deficit hyperactivity disorder and executive functioning. These assessments did not ignore the areas of anxiety and depression as reported by Parents and Dr. Peratt. The Connors in particular explored the areas of anxiety and depression. Student's teachers reported no evidence of noteworthy anxiety or depression at school.

Hilken was qualified to conduct the psychoeducational assessment of Student. Hilken used a variety of assessment tools, each designed to explore facets of Student's areas of suspected need. Student's cognitive functioning fell in the average to high average range. This correlated with his average to above average academic achievement. Hilken thoroughly investigated Student's attention deficit hyperactivity disorder and related executive functioning needs. Although Parents found areas of weakness in the home, teachers at both Futures and University found no significant problems with

Student's performance at school. Student self-reported his attention deficit hyperactivity disorder did not interfere with his ability to learn. Student's psychoeducational assessment did not uncover areas of need which required specialized academic instruction or mental health services.

STUDENT'S EXPERT WITNESS

Jeanette Morgan, Psy.D, testified at hearing as Student's expert witness. Dr. Morgan presented with an extensive professional history. Dr. Morgan was a licensed clinical psychologist and licensed educational psychologist. She held a doctorate degree in clinical psychology and family psychology. Dr. Morgan held a bachelor's degree in communicative sciences and disorders with specialization in speech pathology. She held a master's degree in specialized education with a specialization in mild to moderate special education, and an advanced pupil personnel services credential with specialization in school psychology. As a clinical psychologist, Dr. Morgan had extensive experience with anxiety disorders in children and adolescents. She also possessed experience as a school psychologist, and as a special education teacher. Dr. Morgan also held a behavior intervention case manager credential and California language acquisition and development credential.

Dr. Morgan reported that Parents initially sought an independent educational evaluation to obtain a second opinion after Irvine found Student ineligible for special education and related services. Dr. Morgan, along with the assistance of Brenda Tran, a licensed educational psychologist, assessed Student and prepared a written report on March 22, 2022, five months after Student's final IEP team meeting with Irvine on October 27, 2021.

Student's claims centered around the contention that Irvine did not provide a sufficiently comprehensive social/emotional/behavior assessment. Student argued that in spite of an awareness of Student's anxiety and depression, Irvine's assessment was designed to only to look at the characteristics associated with Student's diagnosis of attention deficit hyperactivity disorder and executive functioning. Irvine failed to administer the Behavior Assessment System for Children or conduct additional assessments in the areas of Student's social/emotional and behavioral functioning to explore parental concerns regarding Student's anxiety and depression. Nor did Irvine contact any of Student's medical providers who referenced depression as possibly comorbid with Student's diagnoses of KLS and attention deficit hyperactivity disorder.

The Behavior Assessment System for Children, Third Edition, is a series of rating scales administered to various respondents who are familiar with the student including parents and teachers, designed to facilitate the differential diagnosis and classification of a variety of emotional and behavioral disorders. The ratings are scored on scales that indicate social/emotional strengths or concerns in comparison to other same-aged children.

Dr. Morgan used the Behavior Assessment System for Children to assess Student's social/emotional and behavioral needs. After scoring this assessment, Dr. Morgan did not report significant areas of concern from Student's teachers, except in the area of somatization, as Student complained about health and physical problems. As a result, Dr. Morgan opined KLS was impacting Student's behavior.

Dr. Morgan reported Parents' scores on the social/emotional and behavior ratings scales contained significantly higher scores that indicated moderate to severe impairments in the home setting. Dr. Morgan acknowledged that parental ratings at home are commonly higher than those of teachers at school.

Dr. Morgan administered a series of additional social/emotional and behavioral functioning rating scales to Parent, Student, and the teachers at Futures. These assessments included

- the Delis-Rating of Executive Functions,
- the Clinical Evaluation of Language Fundamentals, Fifth Edition,
- the NICHO Vanderbilt Assessment Scales,
- a series of Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, referred to as DSM-5, inventories to evaluate Student for clinically significant symptoms of anxiety and depression, and
- the Beck Youth Inventories, Second Edition.

While these assessments were administered approximately six months after completion of Irvine's assessments, the results were not significantly different from those determined by Irvine. Student's teachers generally found no concerns with Student's academic performance, beyond Student's health problems interfering with his attendance. Although Student's scores indicated an elevated level for withdrawal, Student generally demonstrated appropriate social skills. Student's relative weaknesses in attention, organization, focus, and work completion were consistent with Student's previously diagnosed attention deficit hyperactivity disorder. As with Irvine's assessment, Parent scoring compared to teacher scoring was inconsistent, as Student's teachers found no areas of concern at school beyond attendance due to illness.

There is no merit to Student's claim that Irvine failed to consider the relevant information provided by Parents and Student's doctors in the creation of the assessment plan, the determination of suspected areas of need, or the selection of assessment tools used to assess Student. Irvine appropriately considered Parents' concerns and reasonably acted on those concerns. Irvine did not dispute the medical information provided by Student's doctors regarding KLS and attention deficit hyperactivity disorder. Irvine's multidisciplinary assessment explored all areas of suspected disability, including the use of ratings scales to investigate parental concerns regarding anxiety and depression, symptoms that were not observed by the assessors or described by Student's teachers at Futures or University.

Further, although Dr. Morgan's assessments were not conducted until March 2022, her assessment data and test scores paralleled Irvine assessment results. Dr. Morgan administered the Behavior Assessment System for Children, but she did not indicate it was a mandatory test for social/emotional and behavioral functioning. In fact, Dr. Morgan utilized a variety of other rating scales as well to assess Student's social/emotional and behavioral functioning. None of her assessments, including the Behavior Assessment System for Children, uncovered a pattern of clinically significant anxiety or depression, at home or at school which required intervention.

Student did not sustain his burden of proof to establish that Irvine failed to assess Student in all areas of suspected disability. After initially assessing Student, once Irvine found no evidence or suspicion of need, it was not required to continue assessing or reassessing to confirm its original findings in order to provide a comprehensive multidisciplinary assessment. Irvine prevailed on Issue Two.

ISSUE 3: DID IRVINE DENY STUDENT A FAPE BY FAILING TO CONSIDER ALL AVAILABLE INFORMATION IN DETERMINING STUDENT'S ELIGIBILITY FOR SPECIAL EDUCATION?

Student contended Irvine failed to consider all of the information provided by Parents and Student's doctors in its multidisciplinary assessment of Student and determination of special education eligibility. Student asserted that Parent provided Irvine with authorizations and releases of Student's medical records for each of Student's medical providers, yet Irvine failed to contact any of the medical providers to obtain crucial information regarding Student's physical and mental health and its impact on his education.

Irvine contended its assessors observed Student in various settings, reviewed medical and educational records, as well as extensive and detailed information from Parents, Student's teachers, and private providers, and administered a variety of tests, rating scales, and assessment measures to determine whether Student qualified for special education and related services.

Since Student's initial illness in 2019, Parent consistently provided Irvine administrators and teachers with email reports regarding Student's medical status and corresponding absences, as well as medical updates from Student's doctors intended to explain Student's medical condition.

As reported by Parents on Student's health forms, Student's attention deficit hyperactivity disorder was controlled with medication, did not affect his ability to participate in routine school activities or program, and did not require any special health procedures during the regular school day.

Input from Student's pediatrician, Dr. Sears, related back to the 2019-2020 school year, when Student's illness remained a mystery. Dr. Ping, Student's neurologist, reported an undiagnosed neurological disorder and suggested Irvine provide Student with a series of classroom accommodations which were reviewed as part of the multidisciplinary assessment. Irvine did not dispute the information presented by either doctor, however, Dr. Sears's and Dr. Ping's involvement with Student's diagnosis and treatment became obsolete with Dr. O'Carroll's diagnosis of KLS in May 2021.

Concurrent with Dr. O'Connor's diagnosis, Dr. Peratt, Student's psychiatrist, reported Student's attention deficit hyperactivity disorder and depression was comorbid with his KLS. Parents also provided Irvine with an updated health form that reported Student's KLS, attention deficit hyperactivity disorder, and mild depression as factors affecting Student's ability to participate in routine school activities and programs. Parents indicated Student required accommodations for attention deficit hyperactivity disorder.

Irvine did not dispute any of the diagnoses or related information provided by Parents and Student's doctors. The medical information provided to Irvine defined the symptoms of KLS and provided the assessment team with sufficient information to develop an appropriate assessment plan, which included assessment for suspected disabilities due to chronic illness, attention deficit hyperactivity disorder, and depression.

Procedural requirements for assessing individuals for special education and related services prohibit assessors from relying on a single measure or assessment as the sole basis for determining whether a child is eligible for special education or the appropriate content of an eligible student's IEP. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).)

Student did not prove Irvine failed to consider all available information when it assessed Student for special education and related services. Specifically, Student did not sustain his burden of proof to establish that Irvine's multidisciplinary assessment was deficient without further input from Student's medical providers.

Hilken reviewed the communications from Student's doctors as part of the assessment process. Hilken administered a variety of assessment tools which addressed the areas of concern identified by Student's medical providers. Based upon the information obtained in the multidisciplinary assessment from all areas, Student did not exhibit significant needs in the classroom. Student did not establish that further discussion with his doctors was needed or that they possessed relevant information regarding Student's academic performance or need for special education and related services. Ironically, Student's own expert, Dr. Morgan relied on the same medical information in her independent assessment as was contained in Irvine's assessment report.

Irvine considered the relevant information provided by Parents and Student's doctors in determining the areas of suspected disability, the assessments given, and the conclusions and recommendations based upon the assessment results.

Student argued Irvine failed to obtain critical information from Dr. O'Carroll. Dr. O'Carroll did not attend either of Student's IEP team meetings. In lieu of his attendance, Parents provided Irvine with a September 27, 2021 letter, which further explained Student's diagnosis of KLS. The letter was dated after the September 7, 2021 assessment report and therefore, could not have been considered as part of the assessment. However, the October 27, 2021 IEP team reviewed the letter. Moreover,

the medical content of Dr. O'Carroll's letter was largely repetitive of his previous correspondences provided to Irvine that Hilken reviewed as part of her assessment.

Dr. O'Carroll's September 27, 2021 letter provided a generic opinion that because of the severity of symptoms, KLS could grossly interfere with a student's educational progress. Therefore, to minimize the loss of education, it was necessary for an education plan to provide scheduling flexibility to accommodate episodes, and to reduce workload to avoid stress that could result from falling behind. Specifically addressing Student's needs, Dr. O'Carroll indicated that where possible, Student's school schedule should allow for dysregulated sleep patterns and time away from school. His education may need to be paused during more severe episodes with the ability to resume his course of study weeks or even months later following recovery from an episode. Dr. O'Carroll also stated that given the severity of Student's medical condition of KLS, academic services and accommodations would be necessary for Student to access his education between KLS episodes. Dr. O'Carroll concluded by stating Student's medical condition required serious consideration when developing an education plan, and he was willing to respond to any questions that might be useful in creating an education plan that would work for Student.

In a follow-up letter dated November 1, 2021, after the October 27, 2021 IEP team meeting, Parents provided Irvine with further information from Dr. O'Carroll. Dr. O'Carroll described Student as a highly intelligent young man, but due to KLS, he would be incapacitated for long periods of time throughout the school year. Dr. O'Carroll opined Student needed an IEP as he was essentially functionally disabled during these protracted episodes. Dr. O'Carroll opined in his letter that accommodations in the classroom were

simply not sufficient to deal with this debilitating disorder. Student urgently needed one-on-one education in a rolling curriculum with the ability to stop and start the curriculum depending upon his neurologic status.

Dr. O'Carroll's medical expertise was not disputed, nor was the information he provided regarding Student's diagnosis and the characteristics of KLS. However, Dr. O'Carroll's opinions regarding Student's education plan were given little weight. During his testimony, Dr. O'Carroll acknowledged he had no experience in public education. He did not educationally assess Student. He maintained only a general awareness of what constituted an IEP, and he had no knowledge of what could be provided in a 504 Plan. Dr. O'Carroll's lack of special education expertise coupled with his use of specific special education jargon in his recommendations, created a doubt that his opinions of Student's educational needs were his own. Conceptually, Dr. O'Carroll's recommendations for an educational program that paused during episodes of KLS, was a good fit for Student. In reality, as discussed in more detail below, this type of program was a parentally preferred program that could not be developed in a public school setting pursuant to State law. (see Ed. Code, § 37200 et. sec.)

Student failed to present any evidence that Irvine's assessments were inappropriate, invalid, or unreliable. Admittedly, none of the testing was done while Student was experiencing a KLS episode. Likewise, none of Student's medical consultations occurred during an episode, nor did Student access his education at Futures during an episode. By all accounts from Student's doctors and expert testimony, Student was medically unavailable during a KLS episode, and unable to function in an academic setting. This information did not invalidate the multidisciplinary assessment results. Instead, it further supported a finding that Irvine's multidisciplinary

assessment considered all relevant information available at the time of the assessment, and accurately captured Student's strengths and weaknesses in the academic setting for those periods of time when Student was cognitively functional and attending school. Irvine prevailed on Issue Three.

ISSUE 4: DID IRVINE DENY STUDENT A FAPE, BY FAILING TO FIND STUDENT ELIGIBLE FOR SPECIAL EDUCATION SERVICES AND PROVIDE A PLAN OF SUPPORTS AND SERVICES TO MEET STUDENT'S NEEDS DUE TO DISABILITY FROM APRIL 2020 THROUGH MAY 26, 2022?

An individual with exceptional needs under the IDEA is defined as a child identified by an IEP team as a child with a disability whose impairment requires instruction and services which cannot be provided with modification of the regular school program in order to ensure that the individual is provided a FAPE. (20 U.S.C. § 1401(a); 20 U.S.C. § 1401(9).) Ed. Code, § 56026, subds. (a) and (b).)

Special education means specially designed instruction, at no cost to parents, to meet the unique needs of the individual with exceptional needs, including instruction conducted in the classroom, in the home, in hospitals and institutions, and other settings. (20 U.S.C. § 1401(29); Ed. Code, § 56031.)

Under both California law and the IDEA, a child is eligible for special education if the child qualifies due to one or more of the following disabilities:

- intellectual disability;
- hearing impairment;
- speech or language impairment;

- visual impairment;
- emotional disturbance;
- orthopedic impairment;
- autism;
- traumatic brain injury;
- other health impairment; or
- specific learning disability. (20 U.S.C. § 1401(3)(A)(i)-(ii); Cal. Code Regs., tit. 5, §3030.)

A child qualifies for special education if the assessments demonstrate that the degree of the child's impairment requires special education. (Ed. Code, § 56327, subd. (a) and (b); Cal. Code Regs., tit. 5, § 3030, subd. (a).) It is the duty of the IEP team, not the assessors, 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), 300.306(a)(1).) To aid the IEP team in determining eligibility, the personnel who assess a student must prepare a written report explaining the results of the assessment. The report must be given to the parent or guardian after the assessment, though that duty has no fixed time limit. (20 U.S.C. § 1414(b)(4)(B); Ed. Code, § 56329, subd. (a)(3).)

Not every student who is impaired by a disability is eligible for special education. A student is eligible for special education and related services if he is a child with a disability who, "by reason thereof, needs special education and related services." (20 U.S.C. § 1401(3)(A)(ii); 34 C.F.R. § 300.8(a)(l); Ed. Code, § 56026, subds. (a) and (b); Cal Code Regs., tit. 5, § 3030, subd. (a).) California law defines an "individual with exceptional needs" as a student who requires special education because of his or her disability. (Ed. Code, § 56026, subds. (a) and (b).) When determining whether a student needs special education, courts consider whether the pupil can receive educational benefit from the

general education classroom. (*Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1106-1107.) Here, based on all the evidence presented, Student did not need special education or related services to access his education.

When a student has been diagnosed with a chronic illness, the IEP team shall consider:

1. the type of chronic illness;
2. the possible medical side effects and complications of treatment that could affect school functioning;
3. the educational and social implications of the disease and treatment to include but not limited to the likelihood of fatigue, absences, changes in physical appearance, amputations, or problems with fine and gross motor control; and
4. special considerations necessitated by outbreaks of infectious disease.
(Cal. Code Regs., tit. 5, § 3021.1.)

Hilken acknowledged Student's diagnosis of KLS and understood that an active episode would cause a complete shutdown of Student's cognitive functioning which resulted in Student's absence from school for an extended period of time. Upon resuming school after an episode, Student's cognitive abilities returned, and Student completed grade level classwork with accommodations from teachers.

As described above, Irvine's multidisciplinary assessment report complied with State law and IDEA statutory requirements. Hilken produced a written report of her assessment, detailing the basis of her findings and her analysis of Student's suspected disabilities and areas of educational need. She reviewed her report with the IEP team on September 15, 2021, and October 27, 2021. (Ed. Code, § 56327, subds. (a), (b).)

The psychoeducational report indicated that in determining eligibility for special education and related services, Irvine considered the following: (1) whether the impairment affected the student's educational performance, and (2) whether accommodations and supports within the general education curriculum could enable the student to remain in general education and progress in the general education curriculum. If the impairment or psychological disorder was such that it could not be corrected in the general education environment, representing the least restrictive environment, and the student was unable to receive educational benefit, then specially designed instruction and related services were warranted.

As discussed above, the IDEA requires a finding that instruction and services cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(a); 20 U.S.C. § 1401(9); Ed. Code, § 56026, subds. (a) and (b).) Student presented with a chronic illness. A KLS episode resulted in lethargy and cognitive impairment which prevented Student from attending school for varying periods of time. When Student returned to school after an episode, he was behind his peers due to his absences, but he successfully resumed grade-level curriculum and did not require specially designed instruction to receive educational benefit.

As discussed above, Irvine's multidisciplinary assessment was appropriately conducted. The assessment report included an analysis of whether Student met eligibility for special education and related services under the categories of specific learning disability and other health impairment and concluded that Student did not qualify. (Cal. Code Regs., tit. 5, § 3030, subds. (a) and (b).)

SPECIFIC LEARNING DISABILITY

A specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, which may manifest itself in the imperfect ability to

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

The term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of intellectual disabilities, or of emotional disturbance. (20 U.S.C. § 1401(30); Ed. Code, § 57337, subd. (a).)

To determine whether a student has a specific learning disability a school district is not required to take into consideration whether the student has a severe discrepancy between achievement and intellectual ability. (Ed. Code § 56337, subd. (b).) Instead, a school district may use a process that determines if the student responds to scientific, research-based intervention as part of the assessment process. (Ed. Code, § 56337, subd. (c).) Irvine elected to utilize the pattern of strengths and weaknesses model for identifying a specific learning disability.

In considering eligibility for specific learning disability, Hilken reiterated Student's assessment results which confirmed that Student demonstrated a pattern of cognitive

processing strengths, as most of his abilities fell within the average to above average range. Student did not demonstrate significant cognitive or academic weaknesses in any area. Further, Student did not display learning problems. As a result, Irvine appropriately concluded Student did not meet eligibility requirements for specific learning disability. Dr. Morgan agreed Student did not meet the eligibility requirements for specific learning disability. She offered only the caveat that although Student retained grade level skills, he could not access academic content when in a KLS episode. No one suggested Student could access his education during a KLS episode.

OTHER HEALTH IMPAIRMENT

The IDEA states that other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that: (1) is due to chronic or acute health problems, and (2) adversely affects the child's educational performance. (34 C.F.R. § 300.8(c)(9); Cal. Code Regs., tit. 5, § 3030, subd. (f).) The list of chronic or acute health conditions included in the definition is illustrative and not exhaustive. (*Joint Policy Memorandum* (OSERS 1991).)

In analyzing the components of other health impairment, Irvine considered each factor individually as it applied to Student. Based upon Student's assessment results, as applied to eligibility criteria, Student did not qualify for special education and related services under other health impairment. During episodes of KLS, when Student experienced bouts of limited strength, vitality, and alertness, he was not attending school. While at school and during the assessments, Student did not exhibit limited strength or vitality. Although Student met the definition of chronic illness due to his attention deficit hyperactivity disorder, Student did not struggle with limited alertness or

hypervigilance in the classroom. Student reported his attention deficit hyperactivity disorder did not interfere with his learning, nor did his teachers report concerns about inattention in class, or any other symptoms of attention deficit hyperactivity disorder that impacted his ability to access the general education curriculum.

By all accounts, Student could not receive educational benefit in the midst of a KLS episode. At the same time, Student could not benefit from special education or related services during a KLS episode. As a result, the implementation of an IEP could only take place once Student returned to school. Once Student returned to school, however, he did not present with limited strength, vitality, or alertness in the classroom. While there was a learning gap created by his absence, when Student returned to school, Student did not exhibit any symptoms that adversely effected his educational performance. Student understood the curriculum, performed at grade level, made progress in his studies, and required nothing more than accommodations to catch up with his peers. Student's attention deficit hyperactivity disorder did not require IEP goals or services. Student did not require specialized academic instruction to access the general education curriculum. Irvine offered appropriate accommodations for Student's attention deficit hyperactivity disorder, such as additional time to complete assignments. These accommodations did not require an IEP to implement. Thus, Irvine appropriately concluded Student did not qualify for special education and related services under the category of other health impairment.

Dr. Morgan disagreed with Hilken's determination that the multidisciplinary assessment did not support a determination of eligibility based on other health impairment. Dr. Morgan expressed that the key question to be answered was "is there a significant impairment that impacts access to education." To that effect, Dr. Morgan expressed her belief that Irvine ignored several relevant factors contained in its own

assessment report. Dr. Morgan opined it was important to look at Student as a whole to determine his needs. Specifically, Irvine did not sufficiently consider Student's drop in grades due to his stamina and attendance. Dr. Morgan believed Irvine overlooked the impact gap a KLS episode had on Student. KLS intensified Student's attention deficit hyperactivity disorder which exacerbated his ability to catch up or restart a class. KLS also impacted Student's ability to interact with peers and created mental health issues which were not considered by Irvine.

Dr. Morgan acknowledged that Student could not exhibit symptoms of other health impairment at school, because the KLS symptoms prevented Student from attending school. She opined that in analyzing other health impairment, decreased vitality at school was not required. The decreased vitality was evident from Student's inability to attend school. She acknowledged Student displayed no academic deficits and performed at grade level, but he could not access educational content when he was experiencing a KLS episode.

Dr. Morgan concluded that accommodations alone were insufficient to address Student's needs. Student required special education and related services to receive specialized academic instruction and modified educational content to fill in the gaps after a KLS episode.

Dr. Morgan's testimony was not persuasive for several reasons. First, Dr. Morgan did not review the accommodations proposed by Irvine. Next, while Dr. Morgan presented as a qualified assessor, her testimony was clouded by the appearance of bias as a witness for Student. Although Dr. Morgan indicated she was hired by Student to provide a second opinion regarding Student's assessment, her communications with Student's counsel suggested otherwise. Upon reviewing Dr. Morgan's draft assessment

report, Student's counsel sent an email to Dr. Morgan posing questions and concerns which were clearly related to legal interpretations rather than the validity of the independent evaluation. The email suggested an emphasis on Student's attention deficit hyperactivity disorder was easier to support than a primary concern regarding KLS. At hearing, Dr. Morgan maintained she sought feedback from the parties for accuracy but did not change her findings and recommendations. Her testimony, however emphasized the areas discussed in the email. The driving force of Dr. Morgan's opinion was that KLS exacerbated Student's attention deficit hyperactivity disorder which was already impacting Student's educational performance. Dr. Morgan retained her opinion that Student required an IEP while continuing to recommend Parent's preferred educational setting at Futures. Dr. Morgan knew Futures provided no special education and related services, had no special education teachers, and would not implement an IEP. As a result, her opinion regarding eligibility for special education and related services was given little weight.

EMOTIONAL DISTURBANCE

Irvine did not identify emotional disturbance as an area of need for Student, nor did Hilken analyze emotional disturbance as a category of eligibility for special education and related services. A brief discussion of emotional disturbance is merited as it was intertwined with Student's other contentions.

Student contended Irvine failed to consider Student's eligibility for special education and related services under the category of emotional disturbance based upon anxiety and depression as reported by Parents and Student's doctors. Student did not

establish that Student's multidisciplinary assessment was insufficient or that the assessment, including the social/emotional and behavioral findings, supported a finding of emotional disturbance.

Emotional disturbance means a condition exhibiting one or more of the following:

1. an inability to learn that cannot be explained by intellectual, sensory or health factors;
2. an inability to build satisfactory interpersonal relationships with peers and teachers;
3. inappropriate types of behaviors or feelings under normal circumstance;
4. a general pervasive mood of unhappiness or depression; or
5. a tendency to develop physical symptoms or fears associated with personal or school problems.

These characteristics must manifest over a long period of time and to a marked degree that adversely affects the child's educational performance. (34 C.F.R. § 300.8 (c)(4)(i).)

Student's anxiety and depression as reported by Parents and Dr. Peratt were not pervasive or observed in the school setting. While in school, Student did not exhibit an inability to learn. Student's behavior at school was exemplary, and appropriate, with both peers and teachers. Irvine was not required to analyze every category of eligibility for special education or consider eligibility areas where the assessment did not indicate a significant weakness or inability to appropriately access the general education curriculum. In consideration of all of the information contained in the multidisciplinary

assessment, there was no significant information to suggest Student's social/emotional and behavioral functioning affected his ability to learn or access his education in a general education classroom.

Although Hilken reported her assessment conclusions regarding Student's ineligibility for special education and related services, the ultimate decision of eligibility was left to the IEP team for further analysis and discussion.

IEP TEAM MEETING

Irvine convened Student's initial IEP team meeting on September 15, 2021.

Parents and their attorney attended the IEP team meeting along with all required team members:

- educational specialist Bees,
- school psychologist Hilken,
- assistant principal Matthew Pate,
- 504 psychologist Jaquelyn Kent,
- Counselor Nate Schoch,
- general education teacher Heather Garcia, and
- program specialist Bryan Lam.

Irvine provided Parents with a copy of the multidisciplinary assessment report prior to the IEP team meeting.

The IEP team reported and discussed Student's assessment results. Hilken reviewed Student educational history and presented the assessment's cognitive

assessment results. Hilken reviewed the ratings scale scores from Parents and teachers. Bees shared Student's academic achievement results. Kent, Student's general education teacher prior to his enrollment at Futures, reported that when in class, Student was an engaging student who turned in his assignments and interacted well with peers.

Parents noted that each assessment was administered when Student was not experiencing a KLS episode. Parents did not dispute that Student was very bright, but felt the assessment was not an accurate representation of Student's situation. In addition to sleeping 20 hours a day, the residual effects of a KLS episode created cognitive delays, confusion, and lethargy, which varied in frequency and duration. Parents believed Irvine missed the point: Student's challenges arose during a KLS episode, when Student could not function because he was sleeping. The episodes resulted in a lapse in Student's education, resulting in the need to make up all of the work he missed. Student required assistance in addressing the gaps in his education which were inevitable due to KLS. Parents reported that at Futures, Student received one-to-one teaching, which was helpful. Parents acknowledged, however, that Student did not receive instruction from Futures when experiencing a KLS episode. The IEP team was unable to complete its discussion of eligibility for special education and related services, so the IEP team meeting was continued to October 27, 2021.

The IEP team meeting reconvened on October 27, 2021. Parents and their attorney attended along with Bees, Hilken, Pate, Kent, Lam, and Schoch. Additionally, school nurse Ghaderifard, general education teacher Kaak, and general education teacher Brianna Smith attended the IEP team meeting.

The Irvine members of the IEP team answered Parents' questions regarding the least restrictive environment and the different categories for special education eligibility.

Parents provided an update on Student's health. At that time, Student displayed symptoms of KLS. Student struggled with his appetite and fatigue. At times, Student slumped into a deep sleep and slept for 18 hours per day. Parents reiterated Student's medical condition was difficult to understand and was very unpredictable. They sought to obtain suggestions on how to engage Student in a learning process that would switch on and off with Student's abilities.

Bees reported on an additional assessment given to further explore Student's outlier weakness in math. Student scored within the average to high average range on all academic areas tested.

Kaak shared her observations of Student in her classroom. Student did well when he attended, but he was trying to catch up on work due to his absences. Parents reported Student enjoyed science, but it was difficult for him to enjoy it when burdened with trying to catch up.

Pate noted it was difficult for a teacher to reteach instructions after a quarter, but Student's teachers would collaborate to support Student.

Hilken summarized her psychoeducational assessment and discussed her analysis of the data used to determine special education eligibility. Hilken reiterated Student presented with average to above average cognitive and academic skills. The IEP team determined Student did not qualify for special education and related services under specific learning disability.

Hilken explained why Student did not qualify for special education and related services under the category of other health impairment. In determining eligibility for special education and related services, Irvine considered the following: (1) whether the

impairment affected the student's educational performance, and (2) whether accommodations and supports within the general education curriculum could enable the student to remain in general education and progress in the general education curriculum. If the impairment or psychological disorder was such that it could not be corrected in the general education environment, representing the least restrictive environment, and the student was unable to receive educational benefit, then specially designed instruction and related services were warranted.

Although Student might exhibit a qualifying chronic health condition for other health impairment, he did not meet the second requirement of the definition which required Student to be unable to access the curriculum without specialized academic instruction. (Ed. Code, § 56026, subds. (a) and (b).) Irvine's multidisciplinary assessment report did not support a finding of eligibility under other health impairment.

Instead, as explained by the IEP team, a 504 Plan would be more appropriate to develop accommodations to support Student and fill in the gaps after prolonged absences due to a KLS episode. Irvine proposed a 504 Plan team meeting to develop a plan of accommodations to support Student in lieu of an IEP. Student did not present any persuasive evidence that a 504 Plan could not appropriately accommodate Student's educational needs related to KLS.

ADDITIONAL INFORMATION CONSIDERED REGARDING DETERMINATION OF ELIGIBILITY

Schoch, Student's school counselor at University, communicated extensively with Parents about Student's educational needs. Schoch held a masters' degree in guidance and counseling. Schoch's duties at University included school counseling, mental health,

academics, and college and career preparation. Schoch also served as the 504 Plan case manager for students on his caseload. Schoch attended both IEP team meetings and testified at hearing. Schoch's testimony explained Irvine's policy and programs available to general education students.

Schoch confirmed that Parent reached out to him regarding returning Student to University for the 2021-2022 school year. Parents indicated that after withdrawing from Irvine in January 2021, Student's illness during the remainder of the school year required Student to attend Futures through summer 2021, to recapture uncompleted ninth grade credits. Schoch agreed it would be beneficial to catch up and complete prerequisites before reenrolling at University, especially in sequential subjects, such as math and science.

Schoch also informed Parents there were other options at University such as the learning lab after school, where Student could make up classes independently. Summer school was also available to recoup classes, and additional peer tutoring was available to all students in the library after school.

Schoch indicated that Parents' request to pause the curriculum for Student during a KLS episode was not legally available at University. As Schoch explained, pursuant to State law, a public school has a finite number of days to complete required curriculum for graduation. (see Ed. Code, § 37200 et. sec.) However, a student can pass a class and receive credits up to nine weeks after the end of each semester, by completing and turning in assignments.

Jason Ingebrigtsen, the Campus Director of Futures, testified similarly to Schoch. Futures was not a certified non-public school and did not provide special education and related services. Futures was a mastery-based program in which a

student moves forward only after mastering the content. Although Futures did not implement IEPs, it did provide flexibility and accommodations through more flexible class schedules which allowed for “pausing” or the starting and stopping of classes during a semester. The pausing, however, was not indefinite. Futures’ policy allowed for pausing a class for 30 days but made exceptions on a case-by-case basis. Futures, however, required students to take a minimum of one class per semester and considered 25 weeks as the maximum time to complete a class. During his time at Futures, Student started and stopped classes, but Futures did not modify its general education curriculum. Instead, Futures offered additional support to reteach content and extended time to complete assignments. These additional supports were add-ons which cost additional money, as did retaking a class.

Futures provided one-to-one teaching; however, it was limited, as Student only attended class with each teacher once a week for 50 minutes. Although Student could ask questions or relearn concepts in class, the teacher assigned between one and four hours per week of homework to be completed independently. Student used the remainder of the school day completing class assignments.

Student attended Futures between April and September 2021, for the second semester of the ninth grade and completed general education classes in English, algebra 1, biology, and world history. Attendance records indicated Student suffered a short episode of KLS early on and did not attend class or complete assignments at Futures when ill. Once recovered, Student attained 25 credits with a grade point average of 3.8. Student also participated in a non-credited guided study program, similar to study hall, and obtained physical education credits through his participation in a gymnastics program.

The weight of the evidence showed the IEP team appropriately determined Student did not qualify for special education and related services. Given that KLS is extremely rare, there was little information to define the chronic nature of this disease in relationship to special education. Episodes are sporadic and temporary, although they can last for months at a time. Nevertheless, the legal test is not whether something, when considered in the abstract, can adversely affect a student's educational performance, but whether in reality it does. (34 C.F.R. § 300.8(c)(9)(ii); see also *A.J. v. Bd. of Educ. (E.D.N.Y.2010)*, 679 F.Supp.2d 299, 310.) The evidence established once recovered from a KLS episode, even while at Futures, Student successfully completed grade-level curriculum without the need for specialized instruction.

While Student presented evidence that KLS affected Student's ability to attend school which created gaps in his education, there was no substantial evidence to support a finding that KLS or attention deficit hyperactivity disorder adversely affected his educational performance to the extent that he required special education and related services.

Further, if accepting Student's contention that Student's medical condition adversely affected his educational performance by creating a gap in his education during a KLS episode, Student failed to establish that he required special education. (20 U.S.C. § 401(3)(A)(ii).) Student presented no evidence to establish that he could not access the general education curriculum and make the gains he needed to make to progress and successfully earn academic credits towards graduation. The IEP team appropriately determined it could support Student and close the gap created by a KLS episode with accommodations and tutoring in the general education setting without an IEP.

Likewise, Futures provided nothing more than accommodations for the general education curriculum when Student experienced prolonged absences due to KLS. The primary difference between the programs at Irvine and Futures included Futures' additional flexibility as a private school. Futures did not modify class content and only provided individualized teaching one hour per week per class. Nor would Futures indefinitely pause completion of the curriculum to accommodate a KLS episode. On balance, what Irvine could offer to support Student within the general education program was substantially similar to what Student received at Futures.

In determining eligibility for special education and related services, the question was not whether Student would benefit from one-to-one teaching or pausing of the curriculum in order to close the gap created by KLS. Certainly, Student would benefit from those services. But benefiting from such services was not criteria for determining eligibility for special education. Dr. Morgan opined that in order to close the gap, Student required pausing the curriculum, modified academic content, and one-to-one remedial instruction. Student's success in his general education classes at Irvine and at Futures disproved this hypothesis. Although Student had a chronic health problem, he did not require special education and related services to catch up or access the general education curriculum. Instead, he required accommodations and other supports available through the general education program. As such, Irvine appropriately determined Student did not qualify as a child with a disability under the IDEA. Irvine prevailed on Issue Four.

ISSUE 5: DID IRVINE DENY STUDENT A FAPE BY FAILING TO PROVIDE PARENTS PRIOR WRITTEN NOTICE IN RESPONSE TO THEIR NOVEMBER 29, 2021 TEN-DAY NOTICE OF INTENT TO UNILATERALLY PLACE STUDENT IN A NON-PUBLIC SCHOOL AND SEEK REIMBURSEMENT OF TUITION EXPENSES?

Student contended Irvine failed to provide prior written notice to Parents in response to their November 29, 2021 letter stating their intent to privately place Student and seek reimbursement from Irvine. Student contended this failure to respond left Parents unable to meaningfully participate in Student's subsequently scheduled 504 Plan team meeting.

Irvine contended Student was not entitled to prior written notice because Student's initial assessment for special education and related services took place in September 2021, and the IEP team determined Student did not meet eligibility for special education in October 2021. Thus, Irvine contended it had no obligation to provide Parents with prior written notice.

A school district must provide the parents of a child with a disability prior written notice whenever it proposes or refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE to the child. (34 C.F.R § 300.503 (a).) The provision of prior written notice includes a statement that the parents have protection under Part B's procedural safeguards. (34 C.F.R. § 300.304(a).) Notice of the procedural safeguards are required upon initial referral or parental request for the evaluation. (34 C.F.R § 300.504(a).)

A school district must provide a parent with prior written notice in response to a parent's request for an evaluation regardless of whether the district is screening or planning to screen the child to determine whether the child is suspected of having a disability. (*Letter to Mills*, OSEP (May 2, 2019), citing *Letter to Torres*, OSEP (April 7, 2009).)

Irvine was not required to provide prior written notice in response to Parents' notice of intent to privately place Student after the determination of ineligibility for special education and related services.

Student did not meet either of the requirements that would trigger Irvine's obligation to provide prior written notice. Student's notice of private placement took place in November 2021, after the completion of Student's multidisciplinary assessment and two IEP team meetings. The IEP team ultimately determined Student was not eligible for special education but offered to schedule a 504 Plan team meeting to discuss appropriate accommodations within the general education program.

As Parents disagreed with the IEP team's determination of ineligibility for special education and related services, they appropriately filed this complaint for redress and remedies under the IDEA.

OAH does not have jurisdiction to decide claims based on Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.), Section 1983 of Title 42 United States Code, the Americans with Disabilities Act (42 U.S.C. §§ 1201, et seq.), or the Unruh Civil Rights Act (Civ. Code, § 51).

Student's contention on this issue, as contained in his closing brief, specifically argued that Irvine's failure to provide prior written notice in response to the November 29, 2021 letter, resulted in Parents being unable to meaningfully participate in the subsequent 504 Plan team meeting. As such, Student's notice of private placement was in response to Irvine's offer to explore a 504 Plan. Whether or not Irvine had an obligation to provide prior written notice in relation to 504 Plan issues is beyond the scope of this hearing. OAH has jurisdiction over claims limited to those which arise under the IDEA. It does not have jurisdiction to determine issues related to Section 504 of the Rehabilitation Act of 1973. Irvine prevailed on Issue Five.

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:

Irvine did not fail in its child find obligation to identify Student as a child with a disability.

Irvine prevailed on Issue 1.

ISSUE 2:

Irvine did not fail to conduct appropriate assessments of Student in all areas of suspected disability.

Irvine prevailed on Issue 2.

ISSUE 3:

Irvine did not fail to consider all available information in determining Student's eligibility for special education.

Irvine prevailed on Issue 3.

ISSUE 4:

Irvine did not deny Student a FAPE by failing to find Student eligible for special education services and provide a plan of supports and services to meet Student's needs due to disability from April 2020 through May 26, 2022.

Irvine prevailed on Issue 4.

ISSUE 5.

Irvine did not deny Student a FAPE by failing to provide parents prior written notice in response to their November 29, 2021 10-day notice of intent to unilaterally place Student in a non-public school and seek reimbursement of tuition expenses.

Irvine prevailed on Issue 5.

ORDER

Student's requested relief on all issues is 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.

Judith Pasewark

Administrative Law Judge

Office of Administrative Hearings