

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022060225

PARENT ON BEHALF OF STUDENT,

V.

SAN DIEGUITO UNION HIGH SCHOOL DISTRICT.

DECISION

DECEMBER 15, 2022

Parent on behalf of Student filed a due process hearing request, called a complaint, with the Office of Administrative Hearings, State of California, on June 6, 2022, naming San Dieguito Union High School District as respondent. The Office of Administrative Hearings is called OAH. On June 29, 2022, the case was continued for good cause.

On October 6, 11, 12, 13, 19, 20, 24, and 25, 2022, Administrative Law Judge, referred to as ALJ, Brian H. Krikorian, heard the due process matter. Attorney Rosa K. Hirji represented Student. Attorneys Sarah Sutherland and Iris Gomez

represented San Dieguito. Tiffany Hazelwood, San Dieguito's Director of School and Student Services attended all hearing days on San Dieguito's behalf. Parent attended all hearing days on behalf of Student.

The matter was continued to November 10, 2022, for the parties to submit closing briefs. Closing briefs were received on November 10, 2022, the record was closed, and the matter was submitted for decision. Both parties filed replies on November 17, 2022, which were also considered by the ALJ.

ISSUES

An individualized education program shall be referred to as an IEP. A free appropriate public education shall be referred to as a FAPE.

1. Did San Dieguito fail in its child find obligations beginning on or about August 23, 2021?
2. Did San Dieguito deny Student a FAPE, and deny Parents their participation rights by failing to timely present an assessment plan upon Parents' request in December 2021?
3. Did San Dieguito deny Student a FAPE and deny Parents their participation rights by failing to timely complete its assessments and offer an IEP, on or about March 7, 2022?
4. Did San Dieguito subject Student to discrimination, thus denying him a FAPE under the Individuals with Disabilities Education Act?

JURISDICTION

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (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 hearing, Student has the burden of proving the issues raised by the complaint Student filed. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).) The factual statements included in this decision constitute the findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 13 years and 10 months and in the eighth grade at the time of hearing. Student resided within the San Dieguito boundaries. Student is currently attending a musical arts school within San Diego School District's boundaries. Student was eligible for special education under the category of other health impairment, and was diagnosed with attention deficit hyperactivity disorder, referred to as ADHD.

ISSUE 1: DID SAN DIEGUITO FAIL IN ITS CHILD FIND OBLIGATIONS BEGINNING ON OR ABOUT AUGUST 23, 2021?

Student contended that San Dieguito had enough knowledge to suspect Student was a child with a disability and failed to properly identify him as a candidate for special education. Therefore, San Dieguito failed in its "child find" obligations by not assessing Student for special education eligibility at the beginning of the fall 2021 semester. San Dieguito asserted that it met its obligations, and that the Del Mar Union School District, its feeder elementary school district within the same North Coastal Special Education Plan Area, referred to as a SELPA, had already identified Student as having a disability, but that he was not eligible for special education services. Student did not prove by a preponderance of the evidence that San Dieguito failed to identify Student as needing special education services on or about August 23, 2021.

Under the IDEA and California law, a school district has an affirmative, continuing obligation to identify, locate, and evaluate all children with disabilities residing within its boundaries. (20 U.S.C. § 1412(a)(3); Ed. Code, § 56300 et seq.) The duty is not dependent on any action or inaction by parents; the district must "actively and systematically seek out all individuals with exceptional needs...who reside in the district." (Ed. Code, § 56300.) In addition, the district must develop and implement "a practical method" to locate those individuals. (Ed. Code, § 56301.)

Before any action is taken with respect to the initial placement of an individual with exceptional needs in special education instruction, an individual assessment of the pupil's educational needs shall be conducted, by qualified persons in accordance with testing requirements set forth in Education Code section 56320, subdivisions (a) through (i). (Ed. Code §§ 56320 & 56322.). These two duties are commonly referred to as "child find."

DEL MAR UNION EVALUATED STUDENT IN 2019

Student attended Ashley Falls Elementary from kindergarten through sixth grade in a general education program. Ashley Falls was part of the Del Mar Union School District. Del Mar Union and San Dieguito are both members of North Coastal SELPA. Student's kindergarten teacher identified him as a student who may have attention issues. Based upon these concerns, a medical doctor diagnosed Student with ADHD in kindergarten.

In February 2017, Student was in second grade. At that time, Del Mar referred Student to the Student Study Team, referred to as an SST, over concerns with his emotional state within the classroom setting. As a result of the SST meeting, at the end of second grade, Student was placed on an accommodations plan under Section 504 of the Rehabilitation Act of 1973, referred to as a 504 Plan.

In the 2019-2020 school year, Parent voiced concerns about Student's ADHD, and the resulting anxiety and stress levels he was experiencing. As a result, Del Mar Union conducted a transdisciplinary evaluation of Student in October and November 2019. The assessment acknowledged Student suffered from ADHD, but that he did not meet the criteria for a specific learning disability or other health impairment. Student

continued receiving accommodations through his 504 Plan. As such, this case did not involve whether San Dieguito identified Student with a disability and therefore “found the child,” but whether the Student was timely assessed by San Dieguito during the fall of 2021.

STUDENT ENROLLED IN SAN DIEGUITO BEGINNING THE 2021-2022 SCHOOL YEAR

Student matriculated from sixth grade to seventh grade in the fall semester of 2021. Student enrolled at Pacific Trails Middle School within San Dieguito in August 2021. Prior to the semester beginning, Parent emailed Lisa Curry, a counselor at Pacific Trails, and advised her that Student had a 504 Plan in place, and that Parent wanted to raise the concern that Student was anxious about attending school in-person. Student had been attending classes virtually since March 2020, due to the Covid-19 pandemic.

On August 20, 2021, Parent again emailed Curry, advising her that Student reported he felt like he “can’t follow directions” and was constantly relying on classmates to ask what he was supposed to be doing. Student described it to Parent as being able to hear what the teacher was saying but not retaining any of the information. Parent requested guidance from Curry on what could be done to help Student, especially within his 504 Plan. Curry advised Parent that she would monitor Student, but also wanted to allow him time to adjust to the change from elementary school to middle school, as well as coming back to in-person classes for the first time in over 18 months. Curry also emailed Student’s 504 Plan to each teacher at the beginning of the school year. Student’s teachers acknowledged they had received, or were aware of, the 504 Plan for Student.

On September 2, 2021, Parent again emailed Curry with concerns about Student having a “meltdown” at home. On September 3, 2021, Curry responded. Curry noted she had already spoken to Student and suggested that Parent touch base with her by phone the next week. Curry also opined at hearing and in the email that some of what Parent was reporting seemed to be the typical adjustment students experienced to the changes from elementary to middle school.

Curry’s goal was to observe how significant the impact of the disability was on Student’s ability to be educated. These factors include if the student comes to school regularly, if the student’s attendance is impacted, if the student gets the work done, and if the student can access the curriculum. Curry advised Parent that she wanted to ensure that Student’s teachers implemented Student’s accommodations in the 504 Plan before taking additional actions. Curry opined that there were numerous accommodations they would try, such as providing more homework time, an organization group, a study skills class, and an afterschool “power hour,” which allows for a catch up session for Students. Before considering special education services, the general education teachers would first consider these accommodations to maintain Student’s education in the least restrictive environment.

Over the next two months, Parent, teachers, and Curry worked to provide Student with accommodations through his 504 Plan. Lucinda Honselaar was Student’s homeroom and history teacher in seventh grade. Honselaar testified at the hearing. Honselaar was aware of the 504 Plan, obtained a copy from the school office, and spoke to Parent prior to the 2021-2022 school year beginning. Honselaar observed Student playing catch-up during the fall semester. His assignments were often missing entries or responses, and he would have to fill in the gaps. Honselaar testified that Student made a strong effort to meet his expectations but needed coaching and reminding.

Student did not prove by a preponderance of the evidence that San Dieguito failed to exercise its “child find” obligations. The crux of Student’s “child find” allegations was that Student’s difficulties in the early months of the fall 2021 semester should have put San Dieguito on notice that Student needed a new assessment for special education services. A pupil shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code § 56303). A district’s “child find” obligations are not measured by whether they identified every category for eligibility, but whether they failed to identify Student as having special needs. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204.)

Here, San Dieguito correctly asserted that Student was “found” both when Del Mar Union identified Student as having ADHD, and then, when Del Mar Union assessed Student for special education in 2019. Del Mar Union did not identify Student as eligible for special education, but instead, continued to offer him a 504 Plan. Because Del Mar Union is the feeder elementary school district for San Dieguito, and both school districts are part of the same SELPA, Student was “found” when Del Mar Union conducted its 2019 assessment. The fact that Student experienced additional and more severe ADHD symptoms in fall 2021, does not equate with San Dieguito failing to identify Student as a child with disabilities. San Dieguito already knew Student was a child with a disability at the beginning of the 2021-2022 school year and took steps to address Student’s disability through his 504 Plan. Thus, San Dieguito met its “child find” duties. San Dieguito prevailed on this issue.

ISSUE 2: DID SAN DIEGUITO DENY STUDENT A FAPE, AND DENY PARENTS THEIR PARTICIPATION RIGHTS BY FAILING TO TIMELY PRESENT AN ASSESSMENT PLAN UPON PARENTS' REQUEST IN DECEMBER 2021?

SAN DIEGUITO PROCEDURALLY VIOLATED THE IDEA BY NOT TIMELY PROVIDING A PSYCHOEDUCATIONAL ASSESSMENT PLAN FOR STUDENT

Student argued that San Dieguito denied Student a FAPE by initially denying Parent's request for a psychoeducational assessment referral. San Dieguito contended that it did not deny Student a FAPE. San Dieguito argued that once it received additional information after its denial of the request, it agreed to assess Student and that its decision not to assess Student in December 2020 was based on the good faith belief that Student's 504 Plan should be fully implemented before assessing Student for special education. Student proved by a preponderance of the evidence that San Dieguito procedurally violated the IDEA by not agreeing to assess Student when requested by Parent in December 2020.

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Rowley*, supra, 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].) Federal law uses the term evaluation and California uses assessment, but the two terms have the same meaning and are used interchangeably in this Decision. Assessments are required to determine eligibility for special education, and the type,

frequency, and duration of needed specialized instruction and related services. (20 U.S.C. § 1414(a); 34 C.F.R. § 300.303; Ed. Code, §§ 56043(k), 56381, subd. (a).).

A proposed assessment plan shall be developed within 15 calendar days of referral for assessment, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation more than five school days, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension, pursuant to Education Code section 56321, subdivision (a). (Ed. Code § 56043, subd. (a).) Once a child has been referred for an initial assessment to determine whether the child is an individual with exceptional needs, an IEP team meeting shall occur within 60 days of receiving parental consent for the assessment. (Ed. Code §56043, subd. (c).)

By November and December 2021, Honselaar observed Student having an emotional setback. Student was no longer enthusiastic or happy, and seemed out of place. Student claimed to have bad experiences in his other classes. He seemed defeated in her homeroom class. Honselaar would try to motivate and help Student and would go through his binder to find missing assignments. She also spoke with Student's other teachers and worked with Student to advocate for himself.

Andrea Grillot was Student's English teacher in seventh grade. Grillot testified at hearing. Grillot read Student's 504 Plan before the school year started and placed him in an appropriate position in the classroom so she could assist him. By the end of October 2021, Grillot observed that overall, student worked independently and almost always had interpersonal relationships with other students. She did not observe major issues with Student, although she agreed that Student's ADHD made it harder for him to focus.

Student's Spanish teacher was Shea Star. Star testified at hearing. Star received the 504 Plan at the beginning of the school year, and she implemented the accommodations for Student. She would provide extended time as needed, although she didn't believe that Student was using the accommodations provided. In contrast, Parent testified that Student complained that Star would not provide him additional time and would not repeat questions when he asked her to do so. Star testified that she felt Student became bored and inattentive due in part to his mastery of the Spanish language. Star opined he benefited from the class.

On November 9, 2021, a 504 Plan meeting was held via videoconference.

Participants included

- Parent,
- Curry,
- Honselaar,
- Mary Anne Nuskin,
- the school principal, and
- Student's teachers.

Parent testified that during the 504 Plan meeting, Nuskin appeared dismissive of Parent's concerns, and noted immediately that Student's grades were better than other students on 504 Plans. In testimony and emails, Parent felt this showed Pacific Trails' personnel were indifferent to Student. Parent also opined at hearing that the new 504 Plan relied too heavily on teacher initiative and discretion and had no "teeth."

On December 5, 2021, Parent emailed Curry following up a conversation on November 30, 2021. In her email, Parent formally requested that San Dieguito conduct a neuro educational assessment of Student. Parent noted that the last school

assessment was conducted in fall 2019, and that Student was having further difficulties with following oral directions, turning in assignments, and had a stammer during periods of stress and anxiety.

On December 20, 2021, Kathryn Freeman, assistant principal of Pacific Trails, provided a prior written notice to Parent in response to the assessment referral. San Dieguito declined to assess Student. San Dieguito believed that Student was showing progress without the need for special education services. The school team evaluating the referral believed the 504 Plan still provided sufficient accommodations to aid Student in the least restrictive environment. The team wanted the opportunity to implement interventions within the general education setting, in the least restrictive environment, and monitor progress with additional support before considering whether Student required special education and related services.

Monica Davey was a program supervisor for San Dieguito for five years. She is currently employed as the coordinator of special education at San Marcos Unified. Davey was responsible for referrals for assessments at San Dieguito, participated in the decision to deny Parents' referral, and testified at the hearing. According to Davey, the decision to deny Student an assessment was a team decision. While San Dieguito considered Parents' concerns, those concerns were not the only factors that went into San Dieguito's decision-making process. San Dieguito looked at the full picture, and how Student functioned within the school setting. Davey opined that Student was making progress at the time of the referral and was accessing the general education program with the help of his 504 Plan.

On December 20, 2021, Parent emailed Freeman and Curry. Parent raised several follow-up concerns. First, Parent requested more information about modifying

Student's schedule to include a study skills class, instead of physical education, referred to as PE. Second, Parent reiterated Parents' concerns that Student's emotional well-being was being taxed, and that he often felt overwhelmed and anxious. Third, Parent requested a copy of all underlying data that was relied upon by San Dieguito when denying the assessment, and more information on its policies implementing the 504 Plan. Finally, Parent raised the fact that Student was often late in turning assignments or did not turn them in at all.

On January 18, 2022, Student's counsel corresponded with Nuskin and Davey. In her letter, Student's counsel informed San Dieguito that Student's complex needs were manifesting as difficulty with processing oral directions, as well as verbal tics during periods of stress and anxiety in class. Student's counsel gave notice that Parents would privately assess Student and seek reimbursement from San Dieguito. On January 24, 2022, Davey emailed Student's counsel and notified Parent that San Dieguito would agree to assess Student in the areas of

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

San Dieguito reversed its decision based on additional input from Parent and Student's counsel. Parent signed the assessment plan the same day.

Student proved that San Dieguito failed to develop an assessment plan for Student within 15 days of when Parent requested an assessment referral on December 5,

2021. If a school district is on notice that a child may have a particular disorder, it must assess that child for the disorder regardless of the district's subjective opinion. (*Timothy O. v. Paso Robles Unified Sch. Dist.* (9th Cir. 2016) 822 F.3d 1105, 1121-1122. The threshold for suspicion is relatively low and is focused on whether the child should be evaluated for services, not whether he or she will qualify for those services. (*Department of Educ., v. Cari Rae S.* (9th Cir. 2001) 158 F. Supp.2d 1190, 1195.)

At the beginning of the fall 2021 semester, San Dieguito made a reasonable decision to withhold additional assessments and changes until Student had settled into middle school, and the accommodations of the 504 Plan had been implemented in a general education setting, as required by Education Code section 56303. Contrary to Student's argument, Parents' initial concerns did not rise to the level of San Dieguito ignoring Parents or Student. Moreover, the evidence did not demonstrate that Student was manifesting new or different behaviors other than those generally attributed to ADHD.

However, by December 5, 2021, San Dieguito had sufficient data to develop an assessment plan after Parent's referral. Student's last psychoeducational assessment was two years old. Both parents testified that by November 2021, Student was exhibiting signs of depression and anxiety, had lost self-esteem, and had no enthusiasm to attend school. Student reported to Parents he felt singled out by some teachers and no longer cared about meeting expectations. Honselaar testified that Student had an "emotional break" by November and December of 2021. He seemed out of place and was having bad experience in his other classes. He often appeared "defeated" when he was in homeroom with her. Honselaar testified that she reported these concerns to Curry and Nuskin. The school team knew most, if not all these facts, including those in Parent's December 20, 2021 email, in early November 2021.

A school district's failure to conduct appropriate assessments may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033.). While some of Student's teachers subjectively believed that the 504 Plan accommodations were working and Student's overall grades were good, Pacific Trail's evaluation team should have developed an assessment plan within 15 days of Parent's request. Student proved San Dieguito's failure to timely develop an assessment plan procedurally violated the IDEA.

SAN DIEGUITO DENIED STUDENT A SUBSTANTIVE FAPE BY DEPRIVING HIM OF EDUCATIONAL BENEFITS

In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following:

- Impeded the right of the child to a FAPE.
- Significantly impeded the opportunity of the parent to participate in the decision-making process regarding the provision of a FAPE to the child of the parent.
- Caused a deprivation of educational benefits. (20 U.S.C § 1415(f)(3)I; Ed. Code, § 56505, subd. (f)(2).)

A hearing officer also shall not base a decision solely on non-substantive procedural errors unless the hearing officer finds that the non-substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian of the pupil to participate in the formulation process of the IEP. (Ed. Code, § 56505, subd. (j).)

Here, Parent fully participated in the decision-making process. Parent regularly emailed and corresponded with Curry, Honselaar and Student's other teachers. Parent was included in all necessary 504 Plan meetings, and Parents' input was considered by the referral team both before and after the denial. However, as discussed in more detail in Issue Three and the remedies section, the failure to timely assess Student resulted in a meaningful delay of services to Student. The assessment ultimately concluded that Student was eligible for special education services, and those services were not implemented through an IEP until over five months after the assessment plan should have been presented. This delay in assessing Student caused a deprivation of educational benefits to Student and impeded his right to a FAPE. Student prevailed on Issue Two.

ISSUE 3: DID SAN DIEGUITO DENY STUDENT A FAPE AND DENY PARENTS THEIR PARTICIPATION RIGHTS BY FAILING TO TIMELY COMPLETE ITS ASSESSMENTS AND OFFER AN IEP ON OR ABOUT MARCH 7, 2022?

Student contended that San Dieguito's failure to timely assess Student, and thereafter create and implement an IEP, denied Student a FAPE. Student argued that the delay in agreeing to the assessment referral was compounded by San Dieguito's further delay in completing the IEP. San Dieguito argued there were no significant delays in creating the IEP, and that many of the delays were caused due to scheduling challenges and Parent's input. As established in Issue Two, Student proved by a preponderance of the evidence that failure to timely develop an assessment plan denied Student a FAPE, which substantively impeded Student's receipt of special education services. Student did not prove by a preponderance of the evidence, however, that once

the assessment and IEP process began, San Dieguito denied Student a FAPE. Nor did Student prove that Parents' participation rights were impeded beyond the delay in providing the assessment plan.

SAN DIEGUITO'S 2022 ASSESSMENT OF STUDENT WAS COMPLETED WITHIN 60 DAYS

Lauren Aguiar was a school psychologist for Pacific Trails. Chrissy Krommenhoek was the educational specialist. Julia Chowdhury was the speech and language pathologist. All three contributed to the assessment report. Aguiar and Krommenhoek testified at the hearing. Student did not challenge the findings or validity of the 2022 psychoeducational assessment.

Aguiar evaluated Student from January 2022 through March 2022. This included

- observations of Student at school,
- a review of his health history,
- vision and hearing screenings,
- interviews with Parents and teachers, and
- administration of nine assessment tests.

The report was dated March 25, 2022, but a draft was provided to Parents on March 18, 2022. Thus, the report was completed within 60 days of January 24, 2022.

The report recommended eligibility for Student for special education services under the category of other health impairment due to his ADHD and a tic disorder. The report did not recommend eligibility under any other special education category. On March 29, 2022, Chowdhury updated the assessment report at page 22, to include her

observations that occurred on March 18, 2022. On May 4, 2022, Parents received a final draft of the assessment report. The updates included dates of classroom observations on page 20, dates of testing on page 21, and supplemental assessment on the Test of Auditory Processing on pages 28 and 29. There was, however, no change in the report's finding of eligibility in the subsequent drafts and this did not delay or impact the finding of eligibility at an IEP team meeting.

SAN DIEGUITO DID NOT DELAY THE DEVELOPMENT OF THE IEP

THE MARCH 25, 2022 IEP TEAM MEETING DATE

San Dieguito calculated that based on Parent's consent to the assessment plan on January 24, 2022, the IEP team meeting was to be held by March 25, 2022. On March 8, 2022, Student's counsel's office emailed Krommenhoek and indicated Parents and counsel were available to meet on March 25, 2022 and requested a two hour meeting. On March 11, 2022, Krommenhoek emailed counsel and attached an IEP team meeting notice for March 25, 2022, and an excusal form for a general education teacher. Krommenhoek advised that the meeting would be held virtually for two hours, and that if Parents wanted an in-person meeting, to notify her by March 18, 2022.

The excusal form included in the March 11, 2022 email, provided for the excusal of a general education teacher from the IEP team meeting "in part." Krommenhoek testified that she included this form as her standard procedure with all IEP team meeting notices because it was often difficult to have a general education teacher present for the entire meeting, due to class schedules. This helped her in scheduling because she could make allowances for the teachers' schedules, and perhaps have an additional general education teacher available.

On March 22, 2022, counsel for Student corresponded with Krommenhoek, and included a signed copy of the IEP team meeting invitation. Student's counsel did not mention anything about the meeting excusal. The day before the scheduled meeting, on March 24, 2022, Student's counsel emailed Krommenhoek stating that Parent did not agree to waive the presence of a general education teacher during the IEP team meeting. Student's counsel also requested that Honselaar be in attendance for the entire meeting. Finally, Student's counsel indicated that if a general education teacher and Honselaar could not be present for the entire meeting, Parents would not agree to the March 25th meeting going forward.

On March 24, 2022, Krommenhoek emailed a response to Student's counsel, and stated that if Student wanted a general education teacher and Honselaar in attendance for the full IEP team meeting, the meeting would have to be rescheduled. On March 24, 2022, Student's counsel confirmed by email that Parents wanted Honselaar to be present at the meeting and wanted to reschedule the meeting for a "date/time when Ms. Honselaar can be present."

THE APRIL 18, 2022 IEP TEAM MEETING

In order to ensure a general education teacher and Honselaar would be present at the next meeting, Krommenhoek emailed Student's counsel to advise that San Dieguito had reserved the soonest available meeting date of April 22, 2022, for a two hour block. San Dieguito was out of session during the week of April 4, 2022 due to Spring Break. The parties ultimately agreed to meet on April 18, 2022, for 90 minutes

A draft IEP was presented to Parent days before the meeting. The IEP recommended special education eligibility for Student under other health impairment and offered two goals for on task behavior and coping skills. In attendance at the

meeting was Davey, Honselaar, Krommenhoek, Chowdhury, Aguiar, Parent and Student's counsel. After presentation of the findings of the various assessments, the parties ran out of time. The parties looked at dates for the next two weeks. Once again, Student's counsel insisted that Honselaar be made available to attend the entire meeting. The parties agreed to meet on May 4, 2022.

THE MAY 4, 2022 IEP TEAM MEETING

The parties held a second IEP team meeting on May 4, 2022. In attendance were

- Parent,
- Aguiar,
- Krommenhoek,
- Chowdhury,
- Davey,
- Student's counsel, and
- Honselaar.

The team, including Parents, agreed to the eligibility of other health impairment. The team agreed to add an executive functioning goal and to develop two separate goals for coping skills and self-advocacy. Accommodations were added to provide Student with a break when he expressed the need for it. The San Dieguito team agreed to revise the IEP to align with Student's 504 Plan and to consider a reading comprehension goal. Due to time constraints, the San Dieguito team agreed to revise the IEP to incorporate the suggested changes and provide Parents with a revised copy the next week. Parents were advised that they could consent to the parts of the IEP that they agreed with in the interim. Counsel for Student again raised concerns that the IEP process was being delayed, which negatively affected Student.

THE MAY 27, 2022 IEP TEAM MEETING

The parties held a third and final IEP team meeting on May 27, 2022. In attendance were Parent, Aguiar, Krommenhoek, Chowdhury, Davey, Student's counsel, and Honselaar. Parent submitted numerous concerns regarding accommodations and services in writing to the team. The team discussed those concerns. The final version of the IEP was revised to add seven additional goals, including in the areas of reading comprehension and speech. San Dieguito offered Student 120 minutes per month for counseling and guidance, 230 minutes per week for specialized academic instruction, and 450 minutes per year of speech and language services. The team, including Parent, agreed to the services, accommodations, and goals in the IEP. Parent consented to the implementation of the IEP on June 2, 2022, except for the emergency circumstances program, and disagreed that a FAPE was offered. Student did not substantively challenge the June 2, 2022 IEP in this matter.

An IEP required because of an assessment of a pupil shall be developed within a total time not to exceed 60 calendar days, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the parent's or guardian's written consent for assessment, unless the parent or guardian agrees in writing to an extension, pursuant to Section 56344. (Ed. Code §56043(f)(1)).

The crux of Student's argument is that San Dieguito unreasonably delayed the IEP process, resulting in a denial of FAPE to Student. Student argued had the process been expedited, Student would have received services and accommodations sooner. As determined in Issue Two, San Dieguito failed to timely develop an assessment plan for Student. However, putting that delay aside, once Parent consented to the assessment

plan on January 24, 2022, San Dieguito completed the psychoeducational assessment and gave Parents a copy of the assessment report within 60 days. Further, once the IEP process was commenced, both parties mutually requested and agreed to scheduling changes and delays. Thus, the delays in completing the IEP, were not caused solely by San Dieguito.

San Dieguito was prepared to commence Student's IEP team meeting on March 25, 2022. It blocked a two hour time slot for the attendees as requested by Student's counsel and sent out a notice to Parent and Student's counsel two weeks in advance. San Dieguito also complied with Student's request to provide documents and assessment reports five days before the meeting. The notice included an excusal for a general education teacher. Contrary to Student's suggestion, the notice did not excuse a general education teacher for the entire meeting, but only for part of the meeting. This was credibly explained at the hearing by Krommenhoek, who stated it was often difficult to schedule a general education teacher for the full time of a meeting, and she included such excusals with IEP team meeting notices as a matter of course.

Student's counsel returned the signed meeting notice on March 22, 2022 but waited until the day before the IEP team meeting to object to the excusal notice. Student's argument that because Parent did not sign and return the excusal request, that amounted to an objection to the excusal, is without merit. Had Parent been unrepresented this argument may hold some weight. But as experienced attorneys, Student's counsel was charged with the responsibility of fully reviewing Krommenhoek's March 11, 2022 email and attachments and advising their clients accordingly.

Student's counsel and Parent also insisted that Honselaar attend each IEP team meeting. This posed an additional scheduling hurdle for San Dieguito. Student's

counsel requested the March 25, 2022 meeting not go forward unless both a general education teacher and Honselaar were in attendance and confirmed this in writing by email. As such, any delay in commencing the first IEP meeting was due to mutual agreement.

The IEP team meeting was then rescheduled for April 22, 2022. When Student objected to this date, the meeting was moved forward to April 18, 2022. When considering the intervention of Spring Break, San Dieguito rescheduled the meeting for approximately two weeks after the original March 25, 2022 meeting date. Student did not prove by a preponderance of the evidence that this two week delay was unreasonable, especially because the delay was to accommodate Parents' request.

The next IEP team meeting was held on May 4, 2022. Student also did not prove by a preponderance of the evidence that holding the meeting on May 4, 2022 was an unreasonable delay. At that meeting a draft IEP was discussed, and Parents and Student's counsel requested several changes and additions. Parents and counsel submitted more written concerns to the IEP team, which necessitated a final IEP team meeting on May 27, 2022.

Despite the delay in developing an assessment plan for Student, Parents' and Student's rights of participation were not hampered or delayed because Student's IEP was developed over three IEP team meetings. To the contrary, Parents and Student's counsel were an integral part of the IEP process, as evidenced by their input in when the IEP team meetings would be held, who would attend, and for how long the meetings would last. Thus, San Dieguito timely held Student's initial IEP team meeting. San Dieguito prevailed on Issue Three.

ISSUE 4: DID SAN DIEGUITO SUBJECT STUDENT TO DISCRIMINATION, THUS DENYING HIM A FAPE UNDER THE IDEA?

Student argued that San Dieguito discriminated against him and denied him the benefit of his educational program when it denied him access to accommodations that were required for him to receive a FAPE. Student first contended that San Dieguito discriminated against him because it failed to maintain sufficient "child find" policies and failed to implement the correct policies in locating Student as eligible for special education services. However, as discussed in detail in Issue One, San Dieguito did not violate the principle of "child find." Student then argued that San Dieguito's delay in acting on Parents' concerns and its failure to refer Student for a new assessment rose to the level of discrimination. Finally, Student argued that San Dieguito's personnel exhibited hostility towards Student's disability and concerns, and this rose to the level of discrimination. Prior to and during the hearing, San Dieguito made multiple motions to dismiss Issue Four on jurisdictional grounds. San Dieguito denied any discrimination occurred. Student did not prove by a preponderance of the evidence that San Dieguito discriminated against him under the IDEA.

At the prehearing conference, Issue Four was limited only to discrimination under the IDEA and excluded any claims under the Americans with Disabilities Act, called ADA, or 504 violations. OAH does not have jurisdiction to entertain claims based on Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) nor the ADA (42 U.S.C. § 12101 et seq.).

Schools have an obligation to ensure that a student with a disability who is the target of bullying or hostility continues to receive a FAPE in accordance with his IEP or Section 504 plan. The school should, as part of its appropriate response to the bullying,

convene the IEP or Section 504 team to determine whether, because of the effects of the bullying, the student's needs have changed such that the IEP or 504 plan is no longer designed to provide FAPE. (*Dear Colleague Letter* (Office of Special Education and Rehabilitative Services/ Office of Special Education Programs, 2013); and *Dear Colleague Letter: Responding to Bullying of Students with Disabilities*, (Office of Civil Rights, 2014), see also, e.g., *J.M. v. Department of Educ., State of Hawaii* (D. Hawaii 2016), *aff'd*, (9th Cir. 2018, unpublished).

As discussed in Issue Two, San Dieguito denied Student a FAPE by not acting sooner on Parents' written assessment request of December 5, 2021. However, this was a procedural and substantive violation of the IDEA and did not amount to discrimination. As discussed in Issue Three, San Dieguito did not unreasonably prolong the IEP process resulting in San Dieguito intentionally denying Student services. There was simply no evidence that San Dieguito was intentionally withholding services from Student in a manner that would amount to discrimination under the IDEA.

Student pointed to comments made and conduct by Curry, Grillot, Hunner, Star and Nuskin during the 2021-2022 school year that showed a lack of concern towards Student, and actions that may have singled Student out as a child with disabilities. Parent, Honselaar and Rene Noga all testified to an incident where Student's science teacher allegedly singled him out due to his being on a 504 Plan. However, Student did not prove the school staff's comments or actions amounted to discrimination under the IDEA. Finally, a significant amount of hearing time was spent discussing Parents' request to have Student be placed in a study skills class in lieu of PE. None of this came close to being a hostile environment for Student, and there was no evidence presented that

hostility or bullying by other students occurred. Student failed to show how any of these actions amounted to discrimination under the IDEA. Student did not prove by a preponderance of the evidence that San Dieguito discriminated against Student under the IDEA.

San Dieguito prevailed on Issue Four.

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:

San Dieguito did not fail in its child find obligations beginning on or about August 23, 2021.

San Dieguito prevailed on Issue One.

ISSUE 2:

San Dieguito denied Student a FAPE and denied Parents their participation rights by failing to timely present an assessment plan upon Parents' request in December 2021.

Student prevailed on Issue Two.

ISSUE 3:

San Dieguito did not deny Student a FAPE or deny Parents their participation rights by failing to timely complete its assessments and offer an IEP, on or about March 7, 2022.

San Dieguito prevailed on Issue Three.

ISSUE 4:

San Dieguito did not subject Student to discrimination, thus denying him a FAPE under the IDEA.

San Dieguito prevailed on Issue Four.

REMEDIES

Student prevailed on Issue Two. Student is entitled to a remedy for the denial of a FAPE.

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

Compensatory education is an equitable remedy that depends upon a fact-specific and individualized assessment of a student's current needs. (*Puyallup, supra*, 31 F.3d at p. 1496; *Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524 (*Reid*)). The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place" (*Reid, supra*, 401 F.3d at p. 524; *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.* (9th Cir. 2011) 631 F.3d 1117, 1125.) However, hour-for-hour relief for a denial of FAPE is not required by law. (*Puyallup, supra*, 31 F.3d at p. 1497.) "[E]quitable considerations are relevant in fashioning relief." (*Burlington, supra*, 471 U.S. at p. 374.)

Student requested that OAH order San Dieguito to fund independent educational evaluations in the areas of psychoeducation and speech and language, and that San Dieguito personnel should undergo training on "child find" and assessment policies. Student conceded at hearing, however, that he did not challenge the validity or efficacy of San Dieguito's psychoeducational assessment. Student believes that independent evaluations are warranted as a remedy for the delays during the 2021-2022 school year. Student did not establish an entitlement to independent evaluations funded at public expense, nor did the evidence establish that further training of San Dieguito personnel was warranted.

Student is, however, entitled to compensatory services due to San Dieguito's delay in developing an assessment plan, which impeded Student's receipt of special education and services. Student requested that San Dieguito provide, through a nonpublic agency, 138 hours of academic services, seven hours and 30 minutes of

speech and language services, and 18 hours of counseling services. Student did not prove at hearing that Student required this degree of services.

The ALJ relied on the school calendar for the 2021-2022 regular school year to calculate a remedy. San Dieguito should have accepted the referral request on December 20, 2021. Instead, it accepted the request on January 24, 2022. Based on San Dieguito's instructional calendar for the 2021-2022 school year, and considering school vacations of five days or more, this amounted to a 12 day delay

In the IEP consented to by Parent, San Dieguito offered Student 120 minutes per month for counseling and guidance, 230 minutes per week for specialized academic instruction, and 450 minutes per year of speech and language services. Student was denied services for 12 school days. Student is entitled to 552 minutes of academic instruction, one hour of speech and language services, and one hour of counseling services. San Dieguito shall provide Parents with a choice of three nonpublic agencies that provide those services and shall fund the services from a certified nonpublic agency.

Compensatory services shall be available to Student until December 31, 2024, and shall not exceed the amounts above.

ORDER

1. Within 30 days of this decision, San Dieguito shall provide Parents with a choice of three nonpublic agencies that provide academic, speech and language, and/or counseling services. San Dieguito shall fund the services

for Student from a certified nonpublic agency, up to 552 minutes in academic instruction, and one hour each in counseling and speech and language.

2. These services shall be available to Student until December 31, 2024.
3. Student's other requests for relief are denied.

RIGHT TO APPEAL THIS DECISION

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

Brian H. Krikorian

Administrative Law Judge

Office of Administrative Hearings