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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

C.B., by and through his Guardian Ad Litem CYNTHIA SMITH; CYNTHIA SMITH,

Plaintiffs,

vs.

SANTA MONICA-MALIBU UNIFIED SCHOOL DISTRICT,

Defendant.

Case No. CV 08-0894 ODW (PLAx)

ORDER AFFIRMING
ADMINISTRATIVE LAW
JUDGE’S DECISION

I. INTRODUCTION

This is an appeal of a November 13, 2007 decision of the California Office of Administrative Hearings that ruled in favor of Defendant Santa Monica-Malibu Unified School District (the “District”) on the sole issue in the case, whether the District had conducted an appropriate educational reassessment of Plaintiff C.B. in compliance with the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et. seq.* and related California statutes.

Plaintiff Cynthia Smith (“Smith”), the mother of a tenth grade student with disabilities, has challenged the findings of the Administrative Law Judge (“ALJ”). Plaintiff Smith contends that her child’s Individual Education Plan (“IEP”) did not adequately

1 address his learning disabilities as required.

2 This matter is now before the Court on Plaintiff Smith’s Opening Brief, the School
3 District’s Amended Opposition Brief, the Plaintiff’s Reply Brief, the Defendant’s Response
4 to the Reply Brief, and the record of the ALJ’s hearing.

5 Upon consideration of the Plaintiff’s appeal pursuant to 20 U.S.C. § 1400 *et. seq.*,
6 this Court AFFIRMS the ALJ’s determination that the IEP was adequately drafted to
7 address the child’s needs. Accordingly, Plaintiff’s request for an independent assessment
8 paid for by the District is DENIED.

9
10 II. BACKGROUND

11 In December 2006, at the time of the assessment at issue, the child (hereinafter
12 referred to as “C.B.”) was a tenth grade student at Malibu High School with average to
13 high-average intelligence, dyslexia, and Attention Deficit/Hyperactivity Disorder
14 (“ADHD”). C.B. was eligible for special education under IDEA due to his specific
15 learning disability and other health impairments. *See* 20 U.S.C. § 1400 *et. seq.*; (Def.
16 Opp’n at 1.) C.B. had previously been assessed and had received special education
17 services from the District since March 1999. (Def. Opp’n at 1.) His middle school grades
18 were average to above average. *Id.* Although C.B. had academic difficulty at the
19 beginning of entering the ninth grade (high school), after he transferred schools, he has
20 performed at an average to above-average level. *Id.* (citing Administrative Record “AR”
21 Vol. 5, 822-25; 854.) C.B. is currently residing with his family in Texas while his mother
22 recovers from an illness, but intends to return to Malibu High School as soon as his mother
23 is able to care for him.

24 On October 19, 2006, in preparation for C.B.’s triennial review, the District sent
25 Plaintiffs notice of a proposed IEP meeting date and a triennial assessment plan. (Def.
26 Opp’n at 1.) Plaintiff Smith objected to the proposed assessment plan and, on November
27

1 7, 2006, requested that the District fund an outside assessment by her son’s private
2 psychologist, Dr. Robert Byrd. (Id.) The District denied Smith’s request. Smith
3 eventually consented to the District’s evaluation requesting certain time constraints. (Id.)

4 As part of the District’s IEP evaluation, C.B. was assessed with thirteen standardized
5 tests to produce a four-part assessment report including: (1) a reading assessment; (2) a
6 health assessment; (3) a psycho-educational assessment; and (4) an academic assessment.
7 (Def. Opp’n at 2.) Plaintiff challenges three of the assessments (reading,
8 psycho-educational, and academic) alleging they were improperly conducted and therefore
9 rendered an inadequate plan to address her son’s needs.

10 Specifically, Plaintiff raised the following two questions on appeal: (1) Whether the
11 District’s assessment of C.B.’s special needs was “appropriate,” and if not (2) Whether
12 C.B.’s mother thereby has a right to an “independent evaluation” of C.B. paid for by the
13 District. (Pl. Opening Br. at 1.)

14 III. DISCUSSION

15 A. Standard of Review

16 A district court reviews the decision of the ALJ under a modified de novo standard.
17 *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1471-73 (9th Cir. 1993). “In an action
18 challenging an administrative decision, the IDEA provides that ‘the court shall receive the
19 records of the administrative proceedings, shall hear additional evidence at the request of
20 a party, and, basing its decision on the preponderance of the evidence, shall grant such
21 relief as the court determines is appropriate.’” *Id.* at 1471 (quoting 20 U.S.C. §
22 1415(e)(2)). The court should give due weight to the administrative proceedings by the
23 ALJ and can affirm if the court finds that the ALJ’s decision was careful, impartial and
24 sensitive to the complexities presented. *Id.* at 1476.

25 B. Statutory Framework

26 The Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et. seq.*,

1 provides federal funds to state and local agencies to provide education tailored to the
2 learning needs of children with disabilities. *Ojai*, 4. F.3d. at 1469. The purpose of the act
3 is to ensure that all children with disabilities have the availability of a free appropriate
4 public education (“FAPE”), which emphasizes their special education and related services
5 designed to their needs. 20 U.S.C. § 1400; see *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S.
6 49, 51-52 (2005).

7 Under IDEA, each child eligible for special education services receives an IEP to
8 address the child’s unique needs. 20 U.S.C. § 1401(a)(18)(D). The plan is created by a
9 team including: (1) a representative of the local educational agency; (2) the child’s teacher;
10 (3) the child’s parent; and (4) in relevant circumstances, the child. 20 U.S.C. § 1414 (a)(5);
11 34 C.F.R. § 300.343 (d). The IEP document must delineate: (1) information regarding the
12 child’s present performance; (2) a statement of annual goals and short-term instructional
13 objectives; (3) a statement of the specific educational services to be provided; (4) the extent
14 to which the child can participate in regular educational programs; and (5) objective criteria
15 for measuring the student’s progress. 20 U.S.C. § 1401 (a)(20); 34 C.F.R. § 300.346.

16 A reviewing court must engage in a two-part inquiry to determine whether the school
17 district afforded the child a FAPE. *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*,
18 317 F.3d 1072, 1079 (9th Cir. 2003). First, the court must determine whether the school
19 district complied with the procedures set forth in the IDEA. *Id.* Next, the court must
20 determine whether the individualized education program developed through the IDEA’s
21 procedures was reasonably calculated to confer an educational benefit upon the child. *Id.*

22 Procedural flaws do not automatically require a finding of a denial of a FAPE. *L.*
23 *M. v. Capistrano Unified Sch. Dist.*, 538 F.3d 1261, 1268 (9th Cir. 2008). However,
24 “procedural inadequacies that result in the loss of educational opportunity, or seriously
25 infringe the parents’ opportunity to participate in the individualized education program
26 formulation process, clearly result in the denial of a FAPE.” *Id.*

1 C. Summary of Arguments and ALJ Findings

2 Plaintiff argues that the District’s assessment of C.B.’s educational needs was
3 inadequate because it (1) was prepared without observing C.B. in his regular education
4 class, (Pl. Opening Br. at 6); (2) did not employ proper assessment tools to directly
5 determine C.B.’s educational needs (Id. at 11); (3) did not assess C.B.’s specific areas of
6 general need, (Id.); (4) did not include relevant functional, developmental and academic
7 information relating to the content of C.B.’s IEP (Id. at 14); and (5) did not include
8 supplemental information relevant to goals of enhancing C.B.’s involvement in the general
9 school community and progress in relation to the general school curriculum. (Id. at 14.)

10 Accordingly, Plaintiff argues that because the District’s assessment failed to comply
11 with the exact regulatory and statutory requirements, this Court should determine that it
12 was a per se violation of IDEA and that ALJ’s determination was thereby not “careful,”
13 “thorough,” or “sensitive to the complexity of the issues” as required by law.

14 The District in turn argues that its assessment of C.B. was appropriate and met all
15 of the legal requirements including: (1) the District’s assessors were sufficiently qualified
16 and knowledgeable to evaluate C.B.’s unique needs, (Def. Opp’n at 12); (2) the District
17 appropriately identified C.B.’s areas of suspected disability as evidenced by the fact that
18 Plaintiff did not object to the plan, (Id. at 12); (3) the assessment tools were valid and
19 reliable despite minor screening errors, (Id. at 21); and (4) the appropriate reports were
20 prepared in each instance. (Id. at 23.) Accordingly, the District argues that Plaintiff’s
21 remaining concerns with the District’s assessment does not warrant this Court’s order of
22 an independent evaluation at the District’s expense. (Id. at 23.)

23 The ALJ determined the following:

- 24 9. As set forth in Factual Findings 1 through 54, and Legal Conclusions
25 1 through 10, District established that it properly assessed Student in all areas
26 of suspected disability, including visual processing, processing speed,
27 attention, reading (including fluency, decoding and comprehension), writing
28 and academic fluency, prior to the December 11, 2006 meeting. . . .
10. Student did not establish that there was an assessment that District

1 should have, but did not conduct; that any District assessment was
2 inappropriate; or that District failed to Assess Student any area of suspected
3 disability.

(ALJ Factual Findings at 23.)

4 D. Analysis

5 With regard to the above inquiries raised by Plaintiff, the Court will separate the
6 issues into potential procedural violations. If the concerns amounted to procedural errors,
7 the Court will then ask whether those “violations” deprived the child and or parent of a
8 substantive educational benefit for the child. Plaintiff raises the following potential
9 procedural violations under the IDEA: (a) the child was not observed in his classroom as
10 dictated by 34 C.F.R. § 300.310;¹ (b) inadequate tools were used to appropriately assess
11 C.B.’s specific area of general need as required by 20 U.S.C. § 1414(b)(2)(A)² and 34
12 C.F.R. § 300.304(b)(1);³ and (c) inadequate attention was made to the content of the child’s
13 IEP relating to the child’s involvement and progress in a general education program as
14 required by 34 C.F. R. § 300.304(b)(1).

15
16 *1. Potential Procedural Violations*

17 In general, procedural flaws do not automatically require a finding of a denial of a
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19 ¹ 34 C.F.R. § 300.310(a), Observation: “The public agency must ensure that the child is observed
20 in the child’s learning environment (including the regular classroom setting to document the child’s
21 academic performance and behavior in the areas of difficulty.)”

22 ² 20 U.S.C. § 1414 b(2)(A), Conduct of evaluation: “In conducting the evaluation, the local
23 educational agency shall--(A) use a variety of assessment tools and strategies to gather relevant functional,
24 developmental, and academic information, including information provided by the parent, that may assist
25 in determining-- (i) whether the child is a child with a disability; and(ii) the content of the child's
26 individualized education program, including information related to enabling the child to be involved in
27 and progress in the general education curriculum, or, for preschool children, to participate in appropriate
28 activities.”

³ 34 C.F.R. § 300.304(b)(1) Conduct of Evaluation: “In conducting the evaluation, the public
agency must--(1) Use a variety of assessment tools and strategies to gather relevant functional,
developmental, and academic information about the child, including information provided by the parent,
that may assist in determining.”

1 FAPE. *L. M. v. Capistrano Unified Sch. Dist.*, 538 F.3d 1261, 1268 (9th Cir. 2008).
2 Instead, only those “procedural inadequacies that result in the *loss of educational*
3 *opportunity*, or seriously infringe the parents’ opportunity to participate in the
4 individualized education program formulation process, clearly result in the denial of a
5 FAPE.” *Id.* (emphasis added).

6 With regard to Plaintiff’s claims that the District failed to comply with procedural
7 requirements, the clearest violation is that C.B. was not observed in the general educational
8 environment as dictated by 34 C.F.R. § 300.310(a). Both the defendant and the ALJ agree
9 that the child was not observed in his general education environment, yet they suggest that
10 this procedural error is not dispositive of an inadequate IEP. (*See* Defendant Opposition
11 16; ALJ Factual Findings 22.)

12 The second potential procedural violation involves the adequacy of the tools used
13 to test C.B.’s dyslexia. At the administrative hearing, Dr. Robert Byrd testified that C.B.’s
14 dyslexia and processing deficits make it difficult for C.B. to comprehend what he reads
15 unless he reads it twice. (Pl. Opening Br. at 12-13.) Further, Plaintiff contends that
16 because the District tested C.B.’s deficit by giving him untimed tests, the problem was
17 masked; he would have had ample time to reread the tests himself or have teachers read
18 them for him therefore making the assessments inadequate. (*Id.* at 12.) Plaintiff contends
19 that the scores which showed he was performing at grade level or above in reading, writing
20 and mathematics thus are not a fair indicator of his educational needs or abilities. (*Id.*) The
21 District responds that each test was adequate as evidenced by the fact that there was
22 consistency with the previous testing, with the tests performed by other assessors, with the
23 assessor’s knowledge of C.B. and in some circumstances with Dr. Byrd’s assessment.
24 (Def. Opp’n at 21-22.) Additionally, the District notes that although Plaintiff has identified
25 that there were scoring discrepancies, none of these discrepancies either resulted in a plan
26 that was inadequate or caused unreasonable decisions within the plan. (*Id.* at 22.)

27 Third, Plaintiff contends that because the District gave C.B. untimed tests and
28 “accommodated him in every way imaginable” so that he would be able to attend general

1 curriculum classes, the District did not appropriately assess his progress in the general
2 education program as required by 34 C.F. R. § 300.304(b)(1). (Id. at 16.) The District
3 does not directly address whether C.B. was properly assessed to attend general curriculum
4 classes in it's opposition. (See Id. at 23). However, they do assert that “[i]nformation
5 regarding C.B.’s behavior and its relationship to his academic and social functioning was
6 included in the psycho-educational and health assessments.” (Def. Opp’n at 23.) They
7 concluded that the assessment was sufficient and that no further testing is necessary. (Id.
8 at 23.)

9 2. *Whether the Potential Procedural Violations*
10 *Amount to “Loss of Educational Opportunity”*

11 The District and the ALJ contend that none of the above potential procedural
12 violations resulted in a loss of an educational opportunity. A FAPE, as required by the
13 IDEA, must be tailored to the unique needs of each individual child. *Amanda J. v. Clark*
14 *County Sch. Dist.*, 267 F.3d 877, 894 (9th Cir. 2001). However, only “procedural
15 inadequacies that result in the *loss of educational opportunity*, or seriously infringe the
16 parents’ opportunity to participate in the individualized education program formulation
17 process, clearly result in the denial of a FAPE.” *L. M.*, 538 F.3d at 1268 (emphasis added).

18 Most cases which have found a loss of an educational violation involved a clear due
19 process violation or a blatant disregard for statutory requirements. See *Amanda J.*, 267
20 F.3d at 894 (finding that a child was denied a FAPE as a result of the school district’s lack
21 of accounting for her autism and failure to disclose child’s full records to parents); *W.G.*
22 *v. Board of Trustees of Target Range School Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir.
23 1992) (finding a denial of a FAPE because the district “failed to fulfill the goal of parental
24 participation in the IEP process and failed to develop a complete and sufficiently
25 individualized educational program according to the procedures specified by the Act”);
26 *M.L. v. Fed. Way Sch. Dist.*, 387 F.3d 1101 (9th Cir. 2004) (finding that the district’s
27 failure to include regular education teacher on individualized education program team for
28 autistic student was critical structural defect that rendered IEP invalid because possibility

1 of regular classroom placement existed); *but see also Ms. S. Ex. Rel. G. v. Vashon Island*
2 *Sch. Dist.*, 337 F.3d 1115 (9th Cir. 2003) (finding that where it was not possible for the
3 new school to fully implement the last agreed-upon IEP, the new school satisfied the IDEA
4 by adopting a plan that approximated the last agreed-upon IEP as closely as possible); *Van*
5 *Duyn v. Baker Sch. Dist.*, 502 F.3d 811 (9th Cir. 2007) (finding that any failures by the
6 school district to implement the son's IEP did not constitute violations of the procedural
7 requirements of the IDEA because the services the school district provided were not
8 materially different from what was required by the IEP, with the exception of the math
9 instruction provided prior to the ALJ's order).

10 Here, the Court concludes the potential procedural violations do not amount to a
11 loss of educational opportunity. Procedural violations one (failure to observe child in
12 general classroom setting) and two (inadequate assessment tools) raise little concern
13 because there is no evidence that there was a materially different result of the IEP due to
14 these violations. As the ALJ has noted, "[d]istrict assessors were knowledgeable regarding
15 Student's areas of disability, and regarding the areas in which Student should be assessed."
16 (ALJ Factual Findings at 22.) As the ALJ also noted, Plaintiff has failed to provide any
17 alternative tools of testing that would have more properly addressed her son's needs. (Id.
18 at 23.) Thus, this situation is most in line with *Ms. S.* or *Van Duyn* where the court found
19 that because the procedural violations did not cause a materially different IEP, there was
20 no violation of the FAPE. *See Ms. S.*, 337 F.3d 1115; *Van Duyn*, 502 F.3d 811.

21 Although procedural violation three (failure to assess whether child could properly
22 attend general classroom setting) is of the most concern, Plaintiff has failed to provide any
23 evidence concerning what would have better accounted for her child's ability to attend a
24 general classroom setting. (*See Plaintiff Opening* at 15-16.) Plaintiff argues that because
25 her child received his tests in an untimed format, the District failed to assess his ability to
26 attend a general classroom. (Id. at 16.) This unsupported assertion, however, does not
27 overcome the District's and the ALJ's conclusion that C.B.'s other assessments, i.e. his
28 health and psycho-educational evaluations, would have accounted for C.B.'s ability to

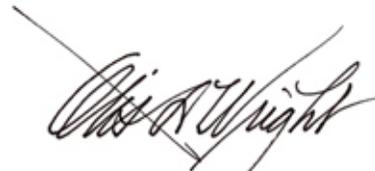
1 attend a general classroom. This reasoning is consistent with the Ninth Circuit's logic in
2 *Van Duyn*. See *Van Duyn*, 502 F.3d 811.

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4 IV. CONCLUSION

5 In light of the evidence presented at the Administrative Hearing and after giving due
6 weight to the ALJ's conclusions, this Court finds that Plaintiff has failed to prove by the
7 preponderance of the evidence that Defendant's December 2006 assessment resulted in a
8 denial of a FAPE. Although the District may have committed procedural violations in its
9 IEP assessment, those violations did not result in the loss of educational opportunity.
10 Further, this Court concludes that the ALJ's factual findings are fully supported by the
11 record, and her legal conclusions are sound, careful, impartial and sensitive to the
12 complexities presented. Accordingly, the ALJ's decision is hereby AFFIRMED.

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14 IT IS SO ORDERED.

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16 DATED: December 5, 2008



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20 OTIS D. WRIGHT II
UNITED STATES DISTRICT JUDGE