

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2015030657

v.

EAST WHITTIER CITY SCHOOL  
DISTRICT.

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EAST WHITTIER CITY SCHOOL  
DISTRICT,

OAH Case No. 2015010880

v.

PARENTS ON BEHALF OF STUDENT.

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**DECISION**

East Whittier City School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on January 29, 2015, naming Student's parents on behalf of Student. Student's parents on behalf of Student filed a due process hearing request with OAH on March 13, 2015, naming Whittier. OAH consolidated the two cases, made Student's case the primary case, and continued the hearing dates for good cause on March 25, 2015.

Administrative Law Judge Susan Ruff heard this matter in Whittier, California, on June 8, 9, and 10, 2015.

Patricia Valenzuela, Attorney at Law, and Lauren-Ashley Caron, Attorney at Law, represented Student. Student's parents attended the hearing. Student did not attend.

Darin Barber, Attorney at Law, and Jeremy Rytky, Attorney at Law, represented Whittier. Diana Grant, Director of Special Education, attended the hearing on behalf of Whittier.

A continuance was granted for the parties to file written closing arguments and the record remained open until July 6, 2015. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

## ISSUES<sup>1</sup>

### Whittier's Issue:

1. Was Whittier's psychoeducational report dated February 24, 2014, appropriate, such that Student is not entitled to an independent educational evaluation at Whittier's expense?

### Student's Issues:

2. Did Whittier deny Student a free appropriate public education for the 2013-2014 and 2014-2015 school years by a) failing to assess Student in all areas of suspected disability resulting in an individualized education program that failed to address all areas of Student's needs; and b) impeding Student's parents' right to meaningfully participate in the IEP process by not considering Student's parents' input in both the assessment and placement of Student?

3. Did Whittier deny Student a FAPE by not developing an IEP within 60 days after Student's mother consented on January 22, 2014, to Whittier's January 2014 assessment plan?

## SUMMARY OF DECISION

Student is a boy who received chemotherapy to treat leukemia and is eligible for special education under the category of other health impairment. Student contends that Whittier should have assessed Student in the areas of traumatic brain injury, speech and language, occupational therapy, and social emotional needs. Student believes that the failure to do so denied Student a FAPE. Student also believes that Whittier denied Student a FAPE by not considering his parents' input regarding the assessment and placement of Student, and that Whittier denied Student a FAPE by failing to timely develop an IEP after its February 2014 assessment.

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<sup>1</sup> The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

Whittier contends that its February 2014 assessment was appropriate to address all of Student's areas of suspected disability and that no additional assessments were necessary. Whittier also contends that it complied with all procedural requirements of law and considered all input provided by Student's parents.

This decision finds that Whittier's 2014 assessment was thorough and complete, and that no additional assessments were required given the information Whittier possessed during the times relevant to this case. Whittier properly considered the input of Student's parents and did not commit any procedural violations of special education law. There was no denial of FAPE.

### FACTUAL FINDINGS

1. At the time of the hearing, Student was a nine-year-old boy who attended school in Whittier and eligible for special education under the category of other health impairment. Student has deficits in several areas, including but not limited to, attention, executive functioning and memory. At the time of the hearing, Student had just finished his third grade year.

2. When Student was four years old, he was diagnosed with leukemia. He received chemotherapy to treat his leukemia until approximately May 2013. Because the doctors were worried about the disease spreading to his brain, part of his chemotherapy was administered intrathecal (through his spinal column).

3. In January 2013, Whittier assessed Student to see if he was eligible for special education.<sup>2</sup> Student was in first grade at the time, and he was having difficulties with his memory and academic skills. His mother believed that the chemotherapy had caused him to regress academically. Student had completed his main chemotherapy treatment in March 2012, but remained on maintenance chemotherapy at the time of the assessment in January 2013.

4. School psychologist Annita Madden conducted the assessment for Whittier. She reviewed records, including a neuropsychological assessment completed by Children's Hospital, Los Angeles, in April 2012, and Student's school records. As part of her assessment, Ms. Madden conducted the Behavioral Observation of Students in Schools, which is used to calculate the percentage of time a pupil is engaged in a class activity compared to the percentage of time the pupil is off task.

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<sup>2</sup> The January 2013 assessment and the January 14, 2013 IEP team meeting both took place prior to the two-year statute of limitations period for this case. Factual Findings regarding these events are made solely as they relate to later events.

5. Nicolle Crawford, a learning center teacher, assisted with the academic portion of the assessment. She observed Student in the classroom on two occasions, received input from his parents and teacher, and reviewed Student's records, including records of academic testing done by Children's Hospital of Los Angeles in April 2012. She concluded that Student had an academic need in the area of applied math, and she proposed accommodations to be provided to assist Student with his academic subjects.

6. School nurse Yvette Onga completed the health portion of the assessment. She noted that Student was color-blind and raised a concern that Student's chemotherapy could cause difficulties including, but not limited to, decrease in attention span, comprehension, memory, multi-tasking, and behavior.

7. On January 14, 2013, Student's IEP team met to discuss the results of the assessment. Student's parents attended the meeting. The team determined that Student was eligible for special education and related services under the category of other health impairment. The IEP noted that Student's progress "toward grade level expectancies may be limited due to his medical needs associated with medication and treatment of T-Cell Leukemia ALL (acute lymphoblastic leukemia)." The team determined that Student had a need in the area of applied math and created a goal related to mathematical word problems.

8. The IEP called for Student to receive specialized academic instruction for 210 minutes weekly in the learning center. The accommodations listed in the IEP included extra time to complete classroom assignments, shortened assignments, additional support when assignments relied on color discrimination, verbal praise, on-task reinforcement, and testing in a small group setting. The IEP called for Student to spend 88 percent of his time in the regular education classroom, and 12 percent of his time outside that class.

9. During the meeting, Student's parents shared their concerns about Student's reading and writing. The general education teacher stated that Student's errors were within the normal range for a first-grade pupil. Student was behind his typical peers, but not significantly. Student's parents shared that the side effects from chemotherapy could show up years later, and the team agreed to monitor Student's progress.

10. Student's parents signed their consent to the IEP on January 15, 2013.

#### *Student's Second Grade Year*

11. In September 2013, around the start of Student's second grade year, Children's Hospital of Los Angeles conducted a follow-up neuropsychological evaluation of Student. Cathy Buranahirun, Psy.D., conducted the evaluation. Dr. Buranahirun was a licensed clinical psychologist and a clinical neurologist working at the hospital. As part of her evaluation she observed Student in an outpatient setting, administered testing, conducted a clinical interview, and reviewed Student's medical records from Children's Hospital.

12. The tests she administered included: 1) the Wechsler Intelligence Scale for Children – Fourth Edition; 2) the Wechsler Individual Achievement Test – Third Edition; 3) the Wide Range Assessment of Memory and Learning, Second Edition; 4) the Conners' Continuous Performance Test, Second Edition; 5) the Children's Memory Scale; 6) the California Verbal Learning Test – Children's Version; 7) the Behavior Rating Inventory of Executive Function; and 8) the Behavior Assessment for Children, Second Edition, Parent Rating Scales. She also administered selected subtests from a test referred to in the report as the "NEPSY."

13. In her report, Dr. Buranahirun noted that Student had normal speech volume, pressure and fluency, social pragmatics, and eye contact. Student had problems with attention, engaged in off-task behaviors, and had difficulty following directions. The intelligence testing placed Student's "current overall verbal reasoning abilities in the borderline range." A comparison of those results to his testing in April 2012, indicated he was progressing more slowly than his same-age peers in that area. His nonverbal reasoning abilities were in the low average range. Student also exhibited difficulties with cognitive flexibility (being able to shift easily from one task to another). Academic testing determined that Student was below average in reading, significantly below average in word recognition and phonetic reading skills, and below average in math skills. The rating scales filled out by Student's father indicated, among other things, that Student had difficulties with functional communication, social skills, attention, completing daily household activities, and withdrawal.

14. The report concluded that Student's memory had remained stable since his prior assessment and that his academic difficulties were likely related to his attention and executive functioning deficits. The report also concluded that the deficits in Student's neurocognitive profile were likely related to adverse effects of the chemotherapy. The report recommended that Student continue to be eligible for special education, although it did not list an eligibility category. The report recommended that Student receive extended school year services during the summer and proposed many classroom accommodations including, but not limited to, sitting close to the teacher, shorter periods of learning with frequent breaks, extra time to complete assignments and exams, repetition of instructions, redirection by his teacher, a behavior management program to help Student stay focused, and use of a multisensory methodology to present information.

15. Student's IEP team met on October 11, 2013, at the request of Student's parents. Natasha Behnam from the Student Transfer and Reintegration Program at Children's Hospital attended the meeting and presented the neuropsychological evaluation completed by Children's Hospital in September 2013.

16. The IEP team discussed Student's needs in light of the new information in the Children's Hospital assessment. Ms. Behnam, Student's mother, and Student's father provided input to the team about their observations and concerns, and Ms. Behnam suggested strategies and services that she thought would benefit Student. Student's teachers also provided input on Student's progress and needs.

17. Ms. Behnam requested that Whittier increase Student's special education services, and suggested, among other things, pull-out services for core math and writing. Ms. Behnam also suggested that Student might benefit from an aide during classroom time. The district members of the IEP team explained that they would like to complete in-class academic testing before making any changes to the IEP. Ms. Behnam was concerned about a delay in increasing the services, but the district IEP team members explained that they required data to determine areas of need. In addition, they wanted to take time to read the new Children's Hospital assessment. The team agreed to meet again to determine if new goals and increased services should be added to the IEP.

18. Student's IEP team met again on November 8, 2013. Both of Student's parents attended the meeting, along with Ms. Behnam. The team discussed the results of the informal, classroom-based assessments, as well as Student's needs and deficits. Student's parents proposed goals for the IEP and discussed specifics of other proposed goals. The team also discussed increasing the amount of specialized academic instruction that Student received. The IEP team, including Student's parents, discussed whether Student core math instruction should be in the general education classroom or the learning center.

19. The proposed IEP contained eight goals, including new goals in the areas of writing (properly using punctuation and writing three related sentences on a topic), reading, behavior (beginning an assignment without the need for so many prompts), listening comprehension, and self-advocacy (checking to determine if Student needed additional clarification of an assignment). New accommodations were added to the list of accommodations in the IEP, including but not limited to, giving visual and verbal cues, checking for understanding, and modified time for tests.

20. The services in the proposed IEP included 555 minutes per week of specialized academic instruction in a small group setting and extended school year services.<sup>3</sup>

21. Student's IEP team met again on January 10, 2014, for Student's annual IEP review. Student's parents attended, along with Ms. Behnam. At that meeting, the team discussed goals, and Whittier made an offer of placement and services for Student which included, among other things, increased time in the learning center (920 minutes weekly) and extended school year services. Student's parents did not sign their consent to the offer, although the IEP meeting notes reflected that they had previously agreed to most of the goals.

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<sup>3</sup> According to Whittier's written closing argument, Student's parents eventually signed their consent to the goals and services in the IEP on January 8, 2014. However, the document from Student's exhibit book that Whittier cites to support this fact was withdrawn during the hearing and was not entered into evidence. That January 8, 2014 IEP appears to be the IEP implemented until January 2015.

*The February 25, 2014 Assessment*

22. On December 4, 2013, Student's mother signed an assessment plan, giving Whittier authority to assess Student in the areas of academic achievement, health, and intellectual development. On approximately January 22, 2014, she signed an addendum, allowing Whittier to assess in the area of social-emotional functioning.

23. Ms. Madden conducted the assessment in January 2014 and issued a report dated February 25, 2014. She holds a school psychology credential and a counseling credential. She has worked for Whittier since approximately 1993, first as a marriage and family therapist contracted by Whittier and later as a school psychologist employed by Whittier. During her career she has conducted in excess of 300 assessments of children, and she has experience working with children who have had cancer.

24. As part of her assessment, she reviewed records, observed Student in class on two occasions, and conducted testing, including the Kaufman Assessment Battery for Children – Second Edition (Kaufman Test), the Comprehensive Test of Phonological Processing, and the Beery-Buktenica Test of Visual Motor Integration (Visual Motor Integration Test). She also administered rating scales to Student's teacher and parents, including the Behavior Assessment System for Children, Second Edition, and the Conners 3 Rating Scales.

25. Ms. Madden was familiar with each of the tests, administered them in accordance with the manufacturer's instructions, and believed that the results were valid and reliable for Student. She conducted her assessment in Student's primary language, and she chose tests that were not racially, culturally, or sexually discriminatory.

26. The Kaufman Test is a standardized test designed to measure a child's cognitive abilities and processing. Ms. Madden chose the Kaufman Test because Student had recently been tested by Children's Hospital using the Wechsler Intelligence Scales for Children and she did not want to duplicate the tests. Student scored in the average range on most of the Kaufman subtests, with the exception of story completion and word order, in which Student was below average. Overall, Student performed in the below average range. Student had more difficulty with tasks requiring rote memory, quick analysis and completion of visual components.

27. Ms. Madden administered the Behavior Assessment System for Children and the Conners 3 to Student's father to obtain the input of Student's parents, but did not directly interview Student's parents as part of the assessment process. She felt she did not need a parent interview, because she was very familiar with the input of Student's parents based on the discussions during the multiple IEP team meetings during the fall of 2013.

28. On the Behavior Assessment System for Children, Student's father and Student's second grade teacher Julia Ramos both rated Student as "clinically significant" in the area of functional communication. Student's father also rated Student as clinically

significant in the areas of attention problems, withdrawal, adaptive skills, anger, developmental social disorders, executive functioning, and resiliency. He rated Student as being “at risk” in many other areas. Student’s teacher rated Student as being at risk in attention problems, learning problems, and adaptability, but average in other areas. On the Conners 3, both Student’s father and the teacher rated Student with a very elevated score in the areas of inattention and learning problems. Student’s father rated Student with a very elevated score in peer relations, while Student’s teacher rated Student with an average score in that area.

29. On the Visual Motor Integration Test, Student scored in the below average range, with a standard score of 87 and a ranking in the 19th percentile. On the Comprehensive Test of Phonological Processing, Student scored below average in the areas of phonological awareness and phonological memory.

30. Ms. Crawford conducted the academic portion of the assessment. She administered the Woodcock-Johnson Tests of Achievement to measure Student’s academic achievement. That test is a standardized test, which is normed and valid for a pupil of Student’s age. According to the results of that test, Student was in the low average range in reading, borderline range in math, and borderline in broad written language.

31. The assessment report concluded that Student was eligible for special education and related services under the category of other health impairment due to his leukemia, and that he was demonstrating deficits in math and written language. The assessment did not analyze whether Student met the criteria for eligibility under the category of traumatic brain injury. There was no evidence that the possibility of traumatic brain injury had ever been raised to the Whittier staff before or during this assessment.

32. The assessment report made recommendations for teaching strategies and methodologies that might assist Student in class, such as incorporating visual illustrations when giving directions, teaching Student to break down information into smaller chunks, and making certain that a speaker had Student’s attention before speaking to him. According to Ms. Madden, these were strategies to be used in the classroom or home, not formal IEP accommodations.

33. Student’s IEP team met to discuss the results of the assessment on February 25, 2014. Student’s parents attended the meeting along with their attorney Mark Allen and advocate Jim Campbell. The school psychologist shared the assessment report, and Student’s parents and advocate asked questions and provided corrections to the report. When eligibility was discussed, Student’s parents asked the team to consider traumatic brain injury as the eligibility category, based on the effects of Student’s chemotherapy.

34. Whittier's team members had not previously considered that area of eligibility, and requested a release of information to enable them to speak with Student's doctors. When the subject of eligibility arose during the meeting, Student's advocate Mr. Campbell became hostile and aggressive.

35. School principal Christine Rich testified that, after the February meeting, her staff members talked to her about Mr. Campbell's conduct. They had never experienced that type of aggressive and hostile behavior before and they did not believe they should have to attend a meeting where such conduct occurred. Whittier invited Carrie Antrim, the Director of Special Education, to attend the next IEP team meeting because the staff felt intimidated and uncomfortable due to Mr. Campbell's conduct.

36. The IEP team met again on April 24, 2014, as a continuation meeting from February. Both of Student's parents attended the meeting along with Mr. Campbell. The school nurse reported that she had made several attempts to speak with Student's doctor prior to the meeting to gain information about traumatic brain injury, but the doctor did not return her calls. During the hearing, Whittier's witnesses explained that the main purpose of the meeting was to discuss whether to change Student's eligibility category. Whittier had already made an offer of FAPE during Student's annual IEP team meeting in January 2014.

37. Once again, Mr. Campbell pushed to have Student found eligible for special education under the category of traumatic brain injury. Whittier's team members explained that Student did not meet the eligibility criteria for traumatic brain injury based on the information provided to the IEP team at that time. Mr. Campbell grew hostile again, as he had done at the prior meeting. The educators who attended the meeting described Mr. Campbell's conduct as aggressive, bullying, and threatening. Ms. Rich reported that Mr. Campbell slammed papers down on a table. Whittier's members of the IEP team felt very uncomfortable and intimidated by his conduct. Because of Mr. Campbell's conduct, Whittier ended the IEP team meeting early.

38. The next IEP team meeting for Student was held in January 2015. The parties dispute whether further attempts to schedule another meeting were made between April 2014 and January 2015. Ms. Rich testified that multiple invitations were sent after the April meeting, but they were unable to secure dates until January 2015.

39. In approximately March 2014, Student's parents began to pay for private tutoring services for Student. Student's mother testified that she thought Student's parents had paid approximately \$6,200.00 as of the time of the hearing.

40. On May 9, 2014, Student's parents had Student assessed by Marie Porter of Providence Speech and Hearing Center. Ms. Porter's assessment concluded that Student suffered from a mild-moderate receptive language impairment, a mild-moderate articulation impairment, and a severe expressive language impairment. With respect to expressive

language, she found that Student was able to form simple sentences, but had difficulty using verb forms and grammatical markers, and had difficulty generating sentences containing injunctions.

41. Ms. Porter recommended individual speech therapy two times per week with transition to group therapy when the therapist deemed it appropriate. She also recommended an occupational therapy assessment because Student experienced loss of feeling in his fingers due to the chemotherapy.

42. Student did not provide the Providence assessment to Whittier at the time it was completed. There was no evidence that Student provided the Providence assessment to Whittier until after the due process complaint was filed in this case.

43. Student thereafter received speech language therapy services from Providence Speech and Hearing Center paid for by his family's private insurance beginning on approximately July 9, 2014. Student's parents paid approximately \$400.00 for the insurance co-pay. Student made progress during these therapy sessions.

#### *Student's Third Grade Year*

44. Student's IEP team met again on January 6, 2015. Student's parents attended along with their advocate Mr. Campbell. This time, Mr. Campbell's conduct was cooperative, and the parties were able to complete the meeting.

45. At the time of that January 2015 meeting, Student had met his IEP goals. The team drafted new goals in the areas of reading fluency, reading comprehension, math calculation, and written language. The IEP offer included 730 minutes of specialized academic instruction in the learning center, 30 minutes per week of individual or small group counseling, and extended school year services during the summer.

46. The accommodations offered in the IEP included, but were not limited to, extra time to complete classroom assignments, shortened assignments, testing in a small group setting, visual cues, verbal cues, and modified spelling tests. Student would be educated in the general education environment for approximately 60 percent of his school day and outside the general education environment for the remainder of his school day.

47. Student's parents and their advocate participated in the meeting and made suggestions for modifications to the goals.

48. On January 9, 2015, Student's parents consented in full to the proposed IEP by way of a letter from their attorney. The letter discussed the concerns of Student's parents regarding the assessments and portions of the IEP.

49. On the same date, Student's counsel sent a separate letter to Whittier's counsel, requesting that Whittier conduct additional assessments of Student. The letter contained approximately 12 pages of various assessments that Student's counsel requested that Whittier conduct. Some of these tests had already been conducted by Whittier or other assessors, and some of the requested tests strayed beyond education into other areas, such as medical tests to determine allergies, an optometric examination for purposes of determining if a child needed corrective lenses, and an audiology exam to determine if there was hearing loss.<sup>4</sup> In addition to the plethora of requested tests, Student's counsel demanded an independent psychoeducational evaluation of Student.

50. On February 17, 2015, Children's Hospital conducted another follow-up neuropsychological evaluation of Student. Kimberly Kayser, Ph.D., a pediatric neuropsychologist at Children's Hospital, conducted the test. One of the primary goals of her assessment was to determine if Student's "profile is consistent with possible neurocognitive effects of chemotherapy." She diagnosed Student with attention deficit hyperactivity disorder, combined type, and found that he had difficulties with attention and executive functioning skills. Student also demonstrated weaknesses in visuomotor and fine motor functioning, which Dr. Kayser indicated was common for children with ADHD. Dr. Kayser was unable to determine whether Student's problems were the result of the chemotherapy or instead caused by other factors, such as genetics/family history.

51. Dr. Kayser recommended that Student continue to receive special education under the category of other health impairment. She did not recommend that Student be found eligible under the category of traumatic brain injury, nor did she recommend that Student be assessed in the area of traumatic brain injury.

52. She recommended that Student be assessed for speech language services and occupational therapy services. She also opined, among other things, that Student might benefit from working with a child psychologist to help him learn emotional coping strategies and strategies to manage his ADHD.<sup>5</sup>

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<sup>4</sup> Some of the requested areas had nothing to do with this child's unique needs, and the letter appeared to be more of a form letter requesting every conceivable type of test, rather than a specific request for testing based on this individual child's suspected areas of disability. For example, the letter demanded a functional vocational assessment to determine Student's work readiness, even though Student was only a nine-year-old boy.

<sup>5</sup> After the date of filing of this due process case, Whittier apparently assessed Student in the areas of speech-language and occupational therapy. According to District witness testimony, no speech-language or occupational therapy services were added to Student's IEP as a result of those assessments.

53. Student made very good progress during his third grade year. Student's parents believe that his progress was due to the outside tutoring and speech and language services that Student's parents provided.

*Factual Findings Regarding the Need for Additional Assessments*

54. Student contends that Whittier failed to assess him in all areas of suspected disability, because Whittier failed to assess Student in the areas of traumatic brain injury, speech and language, occupational therapy and social-emotional needs. Whittier contends that Whittier properly assessed in all areas of suspected disability and that no additional assessments were necessary.

TRAUMATIC BRAIN INJURY

55. The parties dispute whether Whittier should have reasonably suspected that Student had suffered a traumatic brain injury. There was no evidence presented during the hearing that Student suffered an injury to his brain due to an external physical force, such as a blunt object or an accident. However, Student believes that he suffered a traumatic brain injury based on the effects of his chemotherapy.

56. The primary witness in support of Student's claim that he suffered a traumatic brain injury was his mother. Student's mother has worked as a teacher for the Los Angeles Unified School District for approximately 17 years. She is familiar with young children and their capabilities. She believes that Student's chemotherapy caused him brain damage. She testified that when Student started Kindergarten, he was very advanced academically, but as time progressed he grew further behind. She wanted Whittier to include traumatic brain injury as one of Student's eligibility categories, because it would encourage Whittier staff to take Student's situation more seriously. Student's mother believed Whittier staff members were not taking her concerns or Student's needs seriously enough. For example, Student's mother said that Whittier staff should have been contacting her when problems arose with Student rather than always waiting for her to initiate the contact.

57. Student's expert witness Dr. Kayser was more equivocal in her opinion as to what affect the chemotherapy had on Student's academics. Dr. Kayser was rather guarded during her testimony, and kept referring to her report during the questioning. She admitted that intrathecal chemotherapy has an increased risk of neurocognitive effects, but opined that she could not tell whether Student's difficulties were due to his chemotherapy or other causes (such as genetic issues in his family). She did not testify that Student had suffered a traumatic brain injury, nor did she recommend an assessment in that area. She testified that it was beyond her area of expertise to determine if Student should be eligible for special education under the category of traumatic brain injury.

58. Whittier's IEP team members did not believe there was any evidence that Student suffered a traumatic brain injury. They believed that Student was eligible for special education under the category of other health impairment. Ms. Madden testified that, even if Whittier had assessed Student for traumatic brain injury, none of the assessments or services given in his IEP would have changed.

#### SPEECH AND LANGUAGE

59. The parties also dispute whether Whittier should have assessed Student in the area of speech and language sooner than it did. Whittier contends that it had no reason to assess prior to the date of filing of this case.

60. Student's teachers testified that they saw no speech and language problems in the classroom. Student was able to express himself, to make his needs known and to participate in classroom activities. In 2014 and 2015, Student consistently made progress in school. Neither his special education nor general education teachers believed there was any need for a speech-language assessment for Student. None of Student's early testing indicated any speech or language problems. The 2012 Children's Hospital assessor had observed no obvious speech difficulties for Student during the testing sessions.

61. There was no evidence that Student's mother submitted a written request for a speech-language assessment at any time until her attorneys submitted the 12-page assessment request letter in January 2015. That letter was so over-broad and included so many requested assessments that it was not sufficient to put Whittier on notice of any need for a speech and language assessment.

62. Student relies on several pieces of evidence to argue that Whittier should have assessed Student in the area of speech and language prior to 2015. The first was the testimony of Student's mother. She testified that she raised concerns about Student's needs to Student's teachers as early as the end of Kindergarten or the beginning of first grade, including the deficits she noticed in the area of articulation and expressive language. She believes Whittier did not take her concerns seriously.

63. Second, Student cites to the comments Student's mother made to the assessors in the 2012 Children's Hospital assessment regarding Student's difficulty pronouncing "r" and "l" sounds.

64. Third, Student relies on the responses to the Behavior Assessment System for Children in Whittier's February 2014 assessment. The responses by Student's father indicated that Student was impaired in functional communication, as well as other areas. The responses of Student's second grade teacher Ms. Ramos indicated that Student had "clinically significant" issues in the area of functional communication.

65. None of these things was sufficient to put Whittier on notice that a speech and language assessment should have been conducted prior to the filing of this case in 2015. The Whittier IEP team members listened to the concerns raised by Student's mother during the IEP team meetings, but did not see any problems with speech-language which affected Student's classroom functioning. The Children's Hospital assessor in 2012 observed no obvious speech or motor difficulties for Student during the testing. Ms. Ramos did not believe that Student needed a speech-language assessment. She explained that, at times, Student would not raise his hand to ask for help when he did not understand. She moved him to the front of the room, so she could be aware of his comfort level.

66. The primary piece of evidence that Student raised regarding his speech and language needs was the assessment conducted by Providence in May 2014. However, there was no evidence that Student's parents provided that assessment report to Whittier prior to the filing of this due process case. If Whittier did not have access to the assessment, it could not consider the findings of that assessment in determining whether it should assess in that area.

67. Further, even if the Providence assessment had been timely provided to Whittier, it did not automatically show a need for Whittier to assess Student in the area of speech and language. Kristi Williams, the speech-language pathologist from Providence who testified regarding the assessment, did not state that Whittier should have assessed sooner, nor did she testify that Student required speech and language services to benefit from his special education or general education. To the contrary, she admitted that she would not know how his communication was affecting him educationally. There was no expert testimony that anything in the Providence report would have necessitated further assessment in that area by a public school.

68. Dr. Kayser's 2015 assessment recommended a speech and language assessment. Whittier assessed Student in that area in 2015, but did not find a need to add speech and language services to Student's IEP.

#### OCCUPATIONAL THERAPY

69. With respect to occupational therapy, Student contends that Whittier should have assessed him prior to the filing of this case in 2015. Student relied primarily on the testimony of Student's mother regarding the concerns she raised to the 2012 Children's Hospital assessor regarding Student's problems with balance, and the concerns she raised at the 2013 IEP team meetings regarding Student's handwriting.

70. These two factors were not sufficient to put Whittier on notice that an occupational therapy assessment was needed. The 2012 Children's Hospital assessor observed no obvious motor difficulties for Student during the testing. According to his teachers, Student had no problems with fine motor activities in the classroom, using classroom and playground equipment, or playing outdoor games with other children.

71. Student also relies on the findings in Whittier's 2014 assessment that Student scored in the 19 percentile on the Visual Motor Integration Test (in the "below average" range). However, Ms. Madden did not testify that those test results indicated a need for an occupational therapy assessment, nor did Student call an occupational therapist to testify at the hearing. One test score, standing alone, does not provide sufficient evidence to show that an occupational therapy assessment was necessary.

72. In the Providence 2014 speech and language assessment, there was a mention of a possible need for an occupational therapy assessment, but there was no evidence that the Providence report was ever provided to Whittier prior to the date of filing this due process case. A school district cannot be on notice of the contents of a report that it never received.

73. Dr. Kayser's 2015 report recommended an occupational therapy assessment. Whittier conducted an occupational therapy assessment in 2015, but no occupational therapy services were added to Student's IEP. During her testimony, Dr. Kayser affirmed the recommendation in her report that Student would benefit from a school-based occupational therapy evaluation, but she did not testify that Whittier should have conducted an occupational therapy assessment sooner, nor was she critical of any of Whittier's assessments.

#### SOCIAL-EMOTIONAL FUNCTIONING

74. Student contends that Whittier should have assessed in the area of social-emotional functioning. The evidence at hearing showed that Whittier assessed in the area of social emotional functioning in its February 2014 assessment. It was unclear from the evidence Student presented and Student's closing brief why he believes that assessment was inadequate.

75. The evidence showed that Student's mother raised concerns about Student's behavior at the January 10, 2014 IEP team meeting. In January 2014, Student's mother signed an addendum to Whittier's 2014 assessment plan to permit Whittier to assess Student's social-emotional functioning. The 2014 assessment included behavior rating scales, classroom observations and input from Student's teachers regarding his interaction in the classroom. Student's teachers did not observe any serious behavior or social concerns in the classroom besides shyness and attention problems. Instead, the teachers described Student as a friendly child who had friends and played games with his peers. Student brought in no expert testimony to explain why Whittier's assessments were inadequate or why additional assessment was necessary.

76. Student began receiving private therapy at his parents' expense in January 2014. According to the testimony of Student's mother, his therapy was intended to address his problems with meltdowns and frustration at his inability to learn. Student's parents spent approximately \$400 on this counseling.

## LEGAL CONCLUSIONS

### *Introduction: Legal Framework under the IDEA*<sup>6</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (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: (1) to ensure that 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 employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34 (2006); Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme

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<sup>6</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. 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, evaluation, 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 (2006); Ed. Code, §§ 56501, 56502, 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. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

*Issue 1: Whittier’s February 2014 Assessment was Comprehensive and Conducted Appropriately.*

5. The main dispute between the parties in the instant case involves assessments. Whittier contends that it timely and appropriately assessed Student in all areas of suspected disability. Student contends that the assessments were not comprehensive and that Student should have been assessed in additional areas, such as traumatic brain injury, speech and language, occupational therapy, and social emotional needs. Whittier brought its part of this due process case to defend its February 2014 assessment.

6. Prior to making a determination of whether a child qualifies for special education services, a school district must assess the child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) The request for an initial assessment to see if a child qualifies for special education and related services may be made by a parent of the child or by a state or local educational agency. (20 U.S.C. § 1414(a)(1)(B).) After the initial assessment, a school district must conduct a reassessment of the special education pupil not more frequently than once a year, but at least once every three years, unless the parent and district agree otherwise. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).)

7. In conducting an assessment, a school district must follow statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessors. The district must select and administer assessment materials in the pupil’s native language and that are free of racial, cultural and sexual discrimination. (20 U.S.C. § 1414(b)(3)(A); Ed.

Code, § 56320, subd. (a).) 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 also 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).) Trained, knowledgeable and competent district personnel must administer special education assessments. (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.) A credentialed school psychologist must administer psychological assessments and individually administered tests of intellectual or emotional functioning. (Ed. Code, §§ 56320, subd. (b)(3), 56324, subd. (a).)

8. In performing a comprehensive reassessment, such as a triennial assessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the district must identify any additional information that is needed by the IEP team to determine the present levels of academic achievement and related developmental needs of the pupil and to decide whether modifications or additions in the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The district must perform assessments that are necessary to obtain such information concerning the pupil. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).) A reassessment must follow procedures for assessments set forth in Education Code sections 56320 – 56330. (Ed. Code, § 56381, subd. (e).)

9. A parent has the right to obtain an independent educational evaluation if the parent disagrees with a district's assessment. (Ed. Code, § 56329, subd. (b).) When a parent makes a request for an independent evaluation, a district must either fund the independent evaluation at public expense or file for a due process hearing to show that its assessments were appropriate. (Ed. Code, § 56329, sub. (c).) If the district prevails in the due process hearing, the parent still has the right to obtain an independent assessment, but not at public expense. (*Ibid.*)

10. In the instant case, the testimony of Whittier's assessor Annita Madden regarding the appropriateness of Whittier's February 2014 assessment was mostly unchallenged. She testified unequivocally that the statutory requirements for an assessment were met – Whittier chose valid test measures that were non-discriminatory. Those tests were administered in Student's primary language and in accordance with the test manufacturer's instructions. The individuals who gave the tests had the appropriate credentials and were familiar with the tests they gave. They did not rely solely on one test result to determine Student's eligibility, but instead used a variety of test instruments.

11. In Student's written closing argument, Student contended that the failure of Ms. Madden to directly interview Student's parents invalidated the assessment. However, Ms. Madden had input from Student's parents through the rating scales filled out by Student's father. In addition, the concerns of Student's parents were well known based on their comments during the IEP team meetings.

12. Student did not bring in any expert testimony to show that the February 2014 assessment was conducted improperly or that the assessors were unqualified. Instead, Student argued that the assessment did not address all areas of suspected disability for Student. Student's arguments in that regard will be discussed below, in connection with Student's portion of the case. As will be discussed below, Student failed to prove that any additional assessments were required besides those done by Whittier.

13. Whittier met its burden of proving that its February 2014 assessment was appropriate and conducted in accordance with all statutory and regulatory requirements. It addressed all areas of suspected disability for Student known to Whittier at the time. As will be discussed below, any need to assess in additional areas did not arise until long after the assessment. Indeed, as stated above in Factual Finding 49, Student's request for an independent educational evaluation did not even occur until January 2015, almost a year after Whittier's assessment.

14. Because Whittier's assessment was appropriate, Student is not entitled to an independent educational evaluation at public expense based on that assessment.

*Issue 2: Whittier Did Not Deny Student a FAPE by Failing to Assess in the Areas of Traumatic Brain Injury, Speech and Language, Occupational Therapy, and Social Emotional Needs.*

15. Student contends that Whittier denied him a FAPE by failing to assess him in all areas of suspected disability. In particular, Student contends that Whittier should have assessed him in the areas of traumatic brain injury, speech and language, occupational therapy, and social emotional needs.

#### TRAUMATIC BRAIN INJURY

16. To determine whether Whittier should have assessed Student in the area of traumatic brain injury, it is necessary to consider whether traumatic brain injury was an area of suspected disability for Student.

17. The parties stipulated that the definition of traumatic brain injury applicable to this case would be the one set forth in 34 Code of Federal Regulations part 300.8(c)(12) (2007). The definition states:

Traumatic brain injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical

functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.

18. The definition of other health impairment under the Code of Federal Regulations is as follows:

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 – (i) Is due to chronic or acute health problems such as...leukemia...; and (ii) Adversely affects a child’s educational performance. (34 C.F.R. § 300.8 (c)(9) (2007).)

19. Based on the facts of this case and the definitions set forth in the law, traumatic brain injury was not an area of suspected disability for Student. According to the federal regulation cited above, traumatic brain injury requires an acquired injury caused by an external physical force. There was no external physical force that damaged Student’s brain in the instant case. Instead, Student may have suffered academic delays as a result of chemotherapy medicine that reached Student’s brain through his spinal cord or bloodstream. Based on the testimony of Student’s own expert, it is not clear to what extent the chemotherapy was responsible for Student’s developmental delays. However, even if the chemotherapy was solely responsible for Student’s delays, it was still not an “external” physical force.

20. The comments to the Federal Regulations emphasize the external nature of a traumatic brain injury and distinguish injuries that are caused by “internal occurrences, such as infections, tumors, fever, and exposure to toxic substances.” (57 Fed.Reg. 44794 (Sept. 29, 1992).)

21. By comparing the regulatory definitions of other health impairment and traumatic brain injury, it is clear that the law intended injury caused by the treatment of a disease such as leukemia to come under other health impairment. The definition of other health impairment specifically includes leukemia and other serious illnesses that a child can suffer. It makes sense that any physical consequences or side effects of disease treatment (such as learning disabilities) would also be addressed under the other health impairment category. Other health impairment is broad enough to cover the effects of the disease, the effects of the treatment for the disease, and any long-term effects that might have resulted from either the disease or the treatment of the disease.

22. Although Student may have exhibited some of the characteristics of a child with a traumatic brain injury, such as memory problems, he did not suffer an acquired injury due to an external physical force. If chemotherapy chemicals in a child’s bloodstream or spinal column could be considered an “external physical force,” then the definition of traumatic brain injury would be expanded far beyond that anticipated by the Congress and the California legislature. Such an overly broad definition could potentially include the use

of illegal narcotics by a child or prescription drugs which affect a child's brain. Indeed, even an allergic reaction to food which affected a child's mental functioning could come under such a broad definition.

23. However, there is no need to expand the definition of traumatic brain injury in such an unanticipated fashion. Instead, the eligibility category of other health impairment was clearly designed to cover the effects serious illnesses (and the treatment for those illnesses) might have on a child, including any long-term side effects of the medication.

24. Whittier was correct in concluding that Student was eligible for special education under the category of other health impairment. Traumatic brain injury was not an area of suspected disability given the information that Whittier possessed at all times during this case, and there was no need for an assessment in that area.

25. Further, even if Student's condition could come within the legal definition of traumatic brain injury, the evidence showed that Student received multiple neuropsychological assessments by Children's Hospital between 2012 and 2015. It appears that the Children's Hospital assessments were intended, at least in part, to examine the effects of Student's chemotherapy on his cognitive functioning. There would have been no need for further assessment by Whittier.

26. There was no denial of FAPE based on Whittier's failure to assess in the area of traumatic brain injury.

#### SPEECH AND LANGUAGE

27. Student contends that Whittier should have assessed Student sooner in the area of speech and language impairment. The evidence did not support that contention.

28. Speech and language therapy services are included among the related services which "may be required to assist a child with a disability to benefit from special education...." (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34 (2006); Ed. Code, § 56363, subd. (a).) In the instant case, Student failed to bring in sufficient evidence to show that Student had a suspected disability in the area of speech and language or that he might require speech and language services to benefit from his special education.

29. Student's teachers saw no speech and language problems in the classroom. Student was able to express himself, to make his needs known and to participate in classroom activities. None of Student's early testing indicated any speech or language problems. The 2012 Children's Hospital assessor saw no obvious speech and language problems.

30. The testimony of Student's mother regarding Student's speech deficits was important. She was a teacher and had expertise working with children. Likewise, the responses of Student's father and Ms. Ramos to the Behavior Assessment System for Children were important, particularly with respect to the functional communication

problems. However, in light of what Student's teachers were seeing in the classroom, Whittier could reasonably have concluded that the problems raised by Student's parents, while concerns that needed to be monitored, were not sufficient to require an assessment in that area. Student was able to function in the classroom. Any communication problems Student had in the home were not interfering with his ability to access his education at school. Despite Ms. Ramos' responses on the Behavior Assessment System for Children, she did not believe that Student needed speech and language services. She was able to address his communication needs in her classroom.

31. Although the Providence Report noted speech-language problems, that report was not provided to Whittier prior to the filing of the due process case. Nothing in that report or the testimony of Kristi Williams from Providence criticized Whittier's actions or stated that Whittier should have assessed sooner. When Whittier ultimately assessed Student in the area of speech and language in 2015, no speech and language services were added to Student's IEP.

32. Student had the burden to show that Whittier should have assessed Student in the area of speech and language prior to its 2015 assessment. Student failed to meet that burden. There was no denial of FAPE in that regard.

#### OCCUPATIONAL THERAPY

33. Occupational therapy is a related service that can be provided to assist a child to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34 (2006); Ed. Code, § 56363, subd. (a).)

34. Student failed to provide sufficient evidence to show that an occupational therapy assessment should have been conducted prior to Whittier's assessment in 2015. The 2012 Children's Hospital assessor observed no motor difficulties for Student. Student's teachers did not notice any fine motor concerns in the classroom. Although Student scored poorly on the Visual Motor Integration Test in Whittier's 2014 assessment, there was insufficient expert testimony to show that that score, standing alone, warranted further assessment. When Whittier finally assessed, it found no need for occupational therapy services.

35. Student had the burden to show that Whittier was on notice that further assessment was warranted in the area of occupational therapy. Student failed to meet that burden. There was no denial of FAPE in this regard.

#### SOCIAL-EMOTIONAL FUNCTIONING

36. Student contends that Whittier should have assessed him in the area of social-emotional functioning. In his written closing argument Student provides very little explanation for why Student believes that Whittier failed to adequately assess in this area.

37. The evidence showed that Student received a constant series of assessments – three different assessments by Children’s Hospital and a full assessment by Whittier in February 2014. Whittier’s 2014 assessment included observations and assessment tools designed to examine Student’s social-emotional needs. The assessors conducted classroom observations and obtained input from Student’s teachers regarding his interaction in the classroom. Student’s teachers did not observe any serious behavior concerns in the classroom besides attention problems. Student had friends, played appropriately on the playground, and participated in class. Any behavior problems he had at home were not affecting him in the classroom. Student brought in no expert testimony to explain why Whittier’s assessments were inadequate or why additional assessment was necessary. Student had the burden of proof on this issue and failed to meet that burden.

*Whittier Did Not Impede Student’s Parents’ Right to Meaningfully Participate in the IEP Process.*

38. Student next contends that Whittier denied Student a FAPE by failing to allow Student’s parents to participate in the IEP process by not considering the input of Student’s parents in both the assessment and placement of Student.

39. Parents are a required part of an IEP team and an important part of the IEP process. (Ed. Code, §§ 56304; 56341, subd. (b)(1).) A school district must consider information provided by a child’s parents during assessments and IEP team meetings. (20 U.S.C. §1414(d)(3)(A); 34 C.F.R. §§ 300.304(b)(1) (2006); 300.305(a)(1)(i) (2007); Ed. Code, §§ 56329, subd. (c); 56341.1 subd. (a)(2); 56381, subd. (b)(2).)

40. A parent has meaningfully participated in the development of an IEP when he or she is informed of the child’s problems, attends the IEP meeting, expresses disagreement regarding the IEP team’s conclusions and requests revisions in the IEP. (See, e.g., *N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031, 1036.)

41. Just because the parties disagree about a district’s offer does not mean there was a lack of parental input or involvement in the process. Parental participation does not mean that a school district must accept every preference of the child’s parents. A parent does not have a veto power at an IEP meeting. (*Ms. S. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131.) Likewise, just because the team does not adopt a placement preferred by the parent, does not mean that the parent did not have an adequate opportunity to participate in the IEP process. (*B.B. v. Hawaii Dept. of Education* (D.Hawaii 2006) 483 F.Supp.2d 1042, 1051.)

42. The evidence in the instant case showed that Whittier considered the input of Student’s parents at all times in both the assessment process and the IEP process. Student’s parents attended many IEP team meetings for Student and had the advice of an advocate or

an attorney or both. They asked questions and made suggestions regarding the IEP's. Even Student acknowledged that Student's mother and her advisors recommended IEP goals that were adopted by the team. Their concerns were considered by the team.

43. Student's parents also provided input into the assessment process by completing rating scales such as the Behavior Assessment System for Children. In addition, Whittier properly considered all outside assessments provided by Student's parents, such as the various Children's Hospital assessments. There was no evidence that Student's parents provided the Providence assessment report to Whittier prior to the filing of this case. There was no denial of FAPE.

*Whittier Did Not Deny Student a FAPE by Not Developing an IEP Within 60 Days After Student's Mother Consented to Whittier's Assessment Plan.*

44. The final issue raised by Student is a procedural one. Student contends that Whittier denied Student a FAPE because it failed to complete the February and April 2014 IEP team meetings.

45. Education Code section 56344, subdivision (a), provides, in part, that an IEP: required as a result of an assessment of a pupil shall be developed within a total time not to exceed 60 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 written consent for assessment, unless the parent agrees, in writing, to an extension.

46. The evidence showed that Whittier did, in fact, hold a timely IEP team meeting to review its February 2014 assessment. Student's mother consented to the addendum assessment plan in January 2014, and Whittier held the meeting on February 25, 2014. Whittier then held a follow-up meeting in April 2014.

47. Whittier was unable to complete the April meeting because of the hostile and bullying conduct of Student's advocate. Student's advocate apparently let zealous advocacy stray into harassment and bullying. There was no excuse for such conduct and there is no requirement in the law that an IEP meeting has to go forward under such circumstances.

48. Whittier had already made an IEP offer for Student in January 2014, during Student's annual IEP team meeting. The evidence showed that Whittier tried to conduct follow-up meetings after April 2014, but could not arrange a time with Student. There was no procedural violation of special education law by Whittier.

49. In his written closing argument, Student contended that the failure to incorporate the suggested "accommodations" from the 2014 assessment into Student's IEP showed that an IEP was not developed within the statutory timelines. However, Student

presented no evidence that those recommendations were required to be in his IEP. As stated in Factual Finding 32 above, Ms. Madden testified that the “accommodations” were just suggested teaching strategies and methodologies, not required IEP accommodations.

50. However, even if there was a procedural violation based on the failure to complete the IEP team meeting in February or April 2014, that procedural violation did not result in a substantive denial of FAPE.

51. Not every procedural violation of IDEA results in a substantive denial of FAPE. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484.) According to Education Code section 56505, subdivision (f)(2), a procedural violation may constitute a substantive denial of FAPE only if it:

- (a) Impeded the child’s right to a free appropriate public education;
- (b) Significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents’ child; or
- (c) Caused a deprivation of educational benefits.

52. In the instant case, even if there was a procedural violation it did not deprive Student of any educational benefits or impede his right to a FAPE. Student already had an outstanding IEP offer. The evidence showed that Student gained significant educational benefit with the IEP’s operative in and after February 2014. There was no harm to him from any failure to complete the February and/or April 2014 meetings.

53. Likewise, any delay did not significantly impede the opportunity of Student’s parents to participate in the decision making process. They participated in many IEP team meetings in 2013 and 2014 with the assistance of an attorney and/or an advocate. They made their opinions well known. The conduct of Student’s advocate in April 2014 was what prevented the meeting from being completed, not any conduct by Whittier. There was no substantive denial of FAPE.

#### *Student’s Requested Relief*

54. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate” relief for a party. (*Ibid.*)

55. In the instant case, there was no denial of FAPE by Whittier and therefore no need to award any compensatory education or other remedies.

ORDER

All relief sought by Student is denied.

PREVAILING PARTY

Pursuant to 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. Here, Whittier was the prevailing party on all issues presented.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: August 12, 2015

\_\_\_\_\_/s/  
SUSAN RUFF  
Administrative Law Judge  
Office of Administrative Hearings