

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

PANAMA-BUENA VISTA UNION
SCHOOL DISTRICT.

OAH Case No. 2014010855

DECISION

Student filed his Due Process Hearing Request (complaint) with the Office of Administrative Hearings, State of California, on January 24, 2014, naming Panama-Buena Vista Union School District.

Administrative Law Judge Robert G. Martin heard this matter in Bakersfield, California, on March 19 and 20, 2014.

Nicole Hodge Amey, Esq. represented Student. Student's mother (Parent) attended both days of the hearing. Student did not attend the hearing.

Stacy L. Inman, Esq. represented District. District Special Education Coordinator Carol Raney attended both days of the hearing.

On March 20, 2014, at the conclusion of the hearing, the matter was continued to March 28, 2014, for the parties to file written closing arguments. On March 28, 2014, upon receipt of the written closing arguments, the record was closed and the matter submitted.

ISSUES¹

1. Whether District denied Student a free appropriate public education (FAPE) from January 23, 2012 to January 23, 2014:
 - a. By failing its “Child Find” obligation to identify Student as potentially requiring special education due to his academic and behavioral problems?
 - b. By failing to conduct a functional behavior assessment (FBA), a functional analysis assessment (FAA), a neuropsychological assessment, a social behavioral assessment, or an educationally-related mental health services assessment (EHRMS)?
 - c. By failing to provide Parent prior written notice of its refusal to assess Student in all areas of suspected disability?
2. Whether the District made specific misrepresentations that it had resolved the above issues, or withheld information that it was required to provide, such that the two-year statute of limitations with respect to Student’s special education claims should be extended?

SUMMARY OF DECISION

Student demonstrated a pattern of disruptive and disrespectful behaviors that persisted despite District and Parent attempts at intervention. Based on Student’s pattern of behavior, District should reasonably have suspected that Student might have a disability requiring special education, and should have assessed Student. As a remedy, District is ordered to implement the assessment plan prepared by District, to which Parent consented just prior to hearing.

Student did not demonstrate that District was required to provide prior written notice of failure to assess Student at any time before the complaint was filed. Student did not demonstrate that an extension of the statute of limitations in this matter was warranted, because Student did not demonstrate either that District made specific misrepresentations that it had solved the problem forming the basis of the complaint, or that it withheld information that the Education Code required it to provide.

¹ 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.) In addition to the issues stated, Student’s complaint alleged that District denied Student a FAPE by failing to provide Student a behavior intervention plan, school-based counseling, and a one-on-one behavioral aide. At the commencement of the hearing, Student withdrew Student’s request for any substantive remedies other than an initial assessment of Student and presented no evidence on these issues.

FACTUAL FINDINGS

1. At the time of hearing, Student was 14 years old and attending eighth grade general education classes at District's Actis Junior High School (Actis). Student had never been assessed, or found eligible, for special education. At all times relevant to this matter, Student lived with Parent within District's boundaries.

Student's Academic and Behavioral History

2. This matter arose from Student's history of school-related discipline for misbehavior, which commenced in kindergarten, and continued every year thereafter. During the two-year period prior to the complaint, Student was disciplined 24 times from February 29, 2012 through January 17, 2014, for behaviors ranging in severity from tardiness and gum chewing, to being disruptive in class and school activities, disrespectful of students and staff, name calling, inappropriate touching, spitting, using profanity in the class, and fighting with another student. Student also frequently received unrecorded, informal warnings prior to formal discipline. Student received 12 days of detention, and was suspended for nine days. From seventh to eighth grade Student's recorded disciplinary incidents increased markedly in number and severity, from 10 incidents in his entire seventh grade year to 13 incidents in the first two quarters of his eighth grade year.

3. During Student's seventh and eighth grades years, Student earned generally good grades with a grade point average (GPA) of 3.14 out of a possible 4.00 for seventh grade and 3.42 for the first two quarters of eighth grade.

4. In Student's classes in the second quarter of eighth grade, he earned three As, two A-s, and a B-, which would have led Student to a 3.83 GPA had Student not also received a D in physical education (PE). Student had earned an A- in PE the semester before, and his low grade in the second semester was the result of his not following instructions and being repeatedly marked down for failing to dress appropriately for gym class.

5. Student's disruptive behavior in his classes negatively impacted Student's learning and that of his classmates by diverting Student and his classmates off task and taking time away from classroom instruction. In at least one of his classes, Student's classmates asked that they not be put in workgroups with Student because of his disruptive behavior. Student's behavior also caused him to miss class when he was suspended or sent to the Vice Principal's office for discipline. Student's eighth grade physical sciences teacher, Jon Frank, was the only teacher who affirmatively testified that he did not believe that Student's behaviors impacted his learning. Mr. Frank explained that grades in the District were based 90 percent on test scores and 10 percent on other work. Mr. Frank acknowledged that Student had missed tests and science lab sessions due to his suspensions, but testified that Student usually received C grades on tests that he did not miss, and that these grades were consistent with Student's overall C grade in physical sciences. However, Mr. Frank did not explain how completely missed tests and lab sessions could have failed to affect Student's grades, and it is

more likely than not that missed tests and other work such as lab sessions negatively impacted Student's grades in some classes, if not in physical science class.

6. In the two years prior to the complaint, District relied on warnings, reports to Parent and Student's stepfather (Stepfather), detention, suspension, and revocation of privileges to discourage Student's negative behaviors, and did not consider using counseling or other forms of behavior modification in the general education environment. During this time, as punishment for his negative behaviors, in addition to the detentions and suspensions noted above, Student was: (i) dropped from the school basketball team; (ii) removed from his teacher's aide class; (iii) banned from study hall; (iv) barred from attending school assemblies and dances including the school's Renaissance dance (although in seventh grade he was allowed to attend the honor roll assembly before the dance to receive his own award, but ended up being pulled from the student audience due to misbehavior at the assembly); (v) not allowed to work with other students in a group setting in his math class; and (vi) excluded from the eighth grade graduation trip to Magic Mountain amusement park. By mid-January, 2014, Student's only significant privilege that had not been revoked due to his behavioral issues was Student's ability to attend the eighth grade graduation ceremony at the end of the school year, and this privilege remained only because District chose not to take it away, despite behavioral incidents that would have supported doing so.

7. Parent and Stepfather also attempted to discourage Student's misbehavior at school by taking away privileges at home. As an example, Student had not been allowed to have a birthday party since his eleventh birthday. Parties for his three birthdays since then had been canceled as punishment for misbehaviors.

8. In spring 2013, in hopes of motivating Student to control his negative behaviors, Parent and Stepfather told Student they would go to school with him if his misbehavior didn't stop. When the school reported more incidents of misbehavior, Parent and Stepfather made arrangements to attend an entire day of Student's classes in May 2013. Student did not engage in any negative behaviors that day, but, as Parent explained, Parent could not come to school with Student every day.

9. In fall 2013, Parent requested a meeting with all of Student's teachers to discuss Student's discipline issues in each of his classes. The District organized the meeting and it was held on November 6, 2013 among Parent and Stepfather, Actis' Vice Principal responsible for disciplinary issues, Daniel Bickham, and the teachers for all of Student's classes except his teacher aide class. At the meeting, each teacher explained how Student was behaving in his or her class. Student's English teacher stated that Student was occasionally disruptive, perhaps once a day, but not enough to cause a problem for Student or the class. Student's PE teacher stated that Student did well in PE, but that the teacher had to be firm with him and talk to him every day about his behaviors. Student's physical sciences teacher reported that Student had started rough, but was now "doing pretty good." Student was also described as being pretty good in reading class, but sometimes engaging in "attention-seeking" negative behaviors. Student's algebra teacher also reported that Student engaged in attention-seeking behaviors, and was required to work alone during class group

activities to avoid disrupting other students. Student's attention-seeking behaviors were also evident in Student's history class, where misbehavior by Student was entered into a class conduct log "at least once a day," and Student was described as "really disruptive."

10. Parent asked Student's teachers to provide Parent and Stepfather a written weekly report on Student's behavior, and the teachers agreed to do so. At the meeting, Parents were told that Student would be required to pick up a blank progress report form weekly at the school office's student window, bring it to each class to be filled out by the teacher, and deliver the progress report to Parent and Stepfather. Student did this for approximately two weeks, but after the Thanksgiving holiday stopped bringing forms for his teachers to complete. Parent testified that the absence of behavioral reports after the Thanksgiving holiday led her to believe that Student's behavior had improved, but this testimony is not credible in light of Student's three-day suspension for fighting on December 3, 2013.

11. On January 16, 2014, following Student's three-day suspension for fighting on December 3, 2013, and a one-day suspension for profanity on January 13, 2014, Parent and Stepfather arranged a meeting with Vice Principal Bickham and Principal Patrick Spears, in hopes of developing a plan to address Student's behaviors. Parent told Mr. Bickham and Principal Spears that she wanted a behavioral plan for Student to address his negative behaviors before he got to high school, and she asked whether there was any sort of testing available for Student. Mr. Bickham responded that the type of testing available would be testing for eligibility for special education. Mr. Bickham said that he did not believe that Student would qualify for special education, but that Parent could submit a written request for special education testing to him, and he would pass the request for testing along to the District. Parent and Stepfather did not recall having been told that Parent could request an assessment in writing, but Vice Principal Bickham and Principal Spears both had clear recollections of the conversation, which were more persuasive.

12. Vice Principal Bickham and Principal Spears did not offer to assist Parent in preparing a written request that the District assess Student for special education. Mr. Bickham advised Parent and Stepfather that if they felt that Student had any issues that might require medical treatment – "that maybe he's ADD or ADHD"² – they should consult with Student's pediatrician, and that sometimes medication helped students diagnosed with ADD or ADHD.

² ADHD stands for Attention Deficit and Hyperactivity Disorder, and ADD stands for the former term Attention Deficit Disorder. Both refer to the same condition, which is described in the Diagnostic and Statistical Manual of Mental Disorders, fifth edition as "a persistent pattern of inattention and/or hyperactivity-impulsivity that interferes with development, has symptoms presenting in two or more settings (e.g. at home, school, or work), and negatively impacts directly on social, academic or occupational functioning."

Student's Complaint and District's Assessment Plan

13. After meeting with Vice Principal Bickham and Principal Spears on January 16, 2014, Parent did not submit a written request for assessment, or request assistance in preparing one. On January 24, 2014, Student filed the complaint in this action.

14. At some point after the January 16, 2014 meeting with Parent, Principal Spears sent an e-mail to school psychologist Russell Van Dyke, Ph.D., asking him to speak with Student to see if Dr. Van Dyke could assist Student in making better choices with respect to his behavior. Principal Spears did not ask Dr. Van Dyke to evaluate whether Student should be assessed for special education.

15. Dr. Van Dyke was first contacted about Student on January 23, 2014, by District Special Education Director Rita Pierucci, Ph.D. Dr. Pierucci told Dr. Van Dyke that District had received a complaint with respect to Student, and asked him to contact Parent to discuss Parent's request that Student be evaluated. Dr. Van Dyke spoke with Parent on January 23, 2014 and arranged to meet with Parent on January 27, 2014 to discuss her concerns and an assessment plan for Student. District contacted Parent about preparing an assessment plan as a result of Student's complaint, and would not have otherwise done so unless Parent requested an assessment in writing.

16. On January 24, 2014, Parent left Dr. Van Dyke a message asking to reschedule their meeting scheduled for January 27, 2014. However, when Dr. Van Dyke returned Parent's call, she told him that she was canceling their meeting and that any further communications regarding Student would need to be made between Student's attorney and District's attorney.

17. Dr. Van Dyke developed an assessment plan for Student on January 27, 2014, on a District Consent for Assessment form. Unable to speak with Parent regarding her concerns with respect to Student, Dr. Van Dyke based the assessment plan on information he obtained from conversations with Dr. Pierucci, Principal Spears and Vice Principal Bickham, from the allegations of Student's complaint, and from Student's educational records. Dr. Van Dyke saw that Student was performing well academically, and that the concerns about Student arose from his behavior problems. On the form's line for "suspected disability," he filled in emotional disturbance and OHI (other health impairment, based on inability to focus in class) as the disability categories most likely to relate to Student's behavioral problems, but he was not asked to explain in detail the reasons why he chose those categories. Under "assessment area," Dr. Van Dyke checked off boxes for a self-help, social and emotional status assessment, and a general ability assessment, both to be conducted by Dr. Van Dyke, an academic performance assessment to be conducted by a special education teacher, and a health development, vision and hearing assessment to be conducted by the school nurse. Dr. Van Dyke explained that he included the assessments for academic performance and health development, vision and hearing because he routinely includes those assessments in an assessment plan simply to rule out any issues in those areas.

18. The January 27, 2014 assessment plan was mailed to Parent on January 27, 2014, together with a Notice of Procedural Safeguards and Parent's Rights. Parent received the January 27, 2014 assessment plan and Notice of Procedural Safeguards, but never consented to the terms of the January 27, 2014 assessment plan.

19. On February 6, 2014, Parent and her mother-in-law met with District Special Education Director Pierucci and District Special Education Coordinator Carol Raney in a resolution session held pursuant to Education Code section 56501. Dr. Pierucci and Ms. Raney gave Parent a revised assessment plan dated February 6, 2014. The February 6, 2014 assessment plan was substantively identical to the January 27, 2014 assessment plan, except that it added a Functional Behavioral Assessment (FBA) and "interfused observations" (observations of Student outside of his classes) to the list of proposed assessments to be conducted.

20. Dr. Van Dyke met with Student on February 28, 2014 at the request of Principal Spears, to discuss Student's prior disciplinary incidents, and to discuss possible ways the District could help Student avoid any further disciplinary issues for the remainder of the school year. Dr. Van Dyke did not meet with Student for assessment purposes because Parent had not responded to the District's assessment plan at that time. Instead, Dr. Van Dyke met with Student in his role as a counselor for school discipline problems. Student and Dr. Van Dyke discussed three of the four incidents for which Student had been suspended during eighth grade. Dr. Van Dyke's impression was that Student would have preferred to avoid the discussion. Dr. Van Dyke asked Student what his goal was with respect to disciplinary issues, and Student said that he wanted to stay out of trouble for the remainder of the school year, and Student said that he would stay away from any other students who had caused him problems in the past or who he thought might cause him to get in trouble in the future. Dr. Van Dyke suggested to Student that he might unexpectedly encounter different people in the future who might cause him problems, and encouraged Student to consider alternative responses that he could use in difficult situations. Dr. Van Dyke offered to check back in with Student if Student thought that might be helpful, but Student declined the offer.

21. On March 18, 2014, the day before the start of the hearing in this matter, Parent returned a signed copy of the February 6, 2014 assessment plan to the District. Parent consented to the terms of the February 6, 2014 assessment plan as written, except that Parent did not consent to have Dr. Van Dyke conduct Student's self-help, social and emotional status assessment, or Student's general ability assessment. Parent objected to Dr. Van Dyke because he had met with Student on February 28, 2014 without first obtaining Parent's permission to do so.

22. Student had repeatedly promised to Parent that he would control his negative behaviors and get better grades. Parent believed that Student sincerely meant to follow through on his promises but was unable to control his behaviors. Parent believed that something was wrong with Student, but readily admitted that she did not know the cause of Student's inability to control his behaviors. She expressed frustration over her inability to get help in understanding why Student acted as he did. Based on her November 6, 2013 meeting

with Student's teachers where a number of Student's teachers said that they thought Student exhibited attention-seeking behaviors, Parent thought it was possible that Student had ADHD.

23. Mr. Frank, Student's eighth grade physical sciences teacher, explained that he had been a teacher at Actis for 18 years, and had taught over 6,500 students in his career. Mr. Frank described Student as articulate and deferential, and capable of performing academically at a high level when engaged in the subject. Mr. Frank did not believe that Student had any attention difficulties. Asked about Student's behavior, Mr. Frank explained that he had developed a personal rating scale for students based on their behavior. "Schedule 1" students presented no problems, getting in trouble maybe once a year. "Schedule 2" students had some behavior issues that could be controlled with redirection such as a threat to call the student's parent. And "schedule 3" students could not be controlled and seemed unaware of the consequences of their actions. Mr. Frank characterized Student as falling between schedule 1 and schedule 2, a little rambunctious, but able to modify his behavior in response to Mr. Frank's redirection. Mr. Frank said that a student's negative behavior would lead him to suspect that the student might have a disability if there was nothing he could do as a teacher to modify the behavior.

24. Deniece Bennett, Student's eighth grade algebra teacher, believed that Student was very smart and capable, and Student earned A's in her class. Student tended to be disruptive, but in Ms. Bennett's opinion his behaviors fell within the normal range compared to other students. Student typically acted up when Ms. Bennett's back was turned, which indicated to Ms. Bennett that Student could control his behavior. Also, Student would stop his disruptive behavior when Ms. Bennett threatened to call Stepfather, which again showed that Student could control his behaviors. Ms. Bennett did not feel qualified to offer a mental health opinion regarding Student. She had previously referred students to the school counselor for evaluation when she suspected the student might have a disability, but did not suspect that Student had a disability, because his negative behaviors fell within the normal range, and he was able to control them when he wanted to.

25. Frank Pinheiro, Student's eighth grade history and study hall teacher, believed that Student was hard-working, took the course material seriously, and cared about his grades. Mr. Pinheiro also believed that Student's behavior had negatively impacted his learning and that of his classmates. Student was frequently disruptive in class, frequently engaging in attention seeking behaviors like talking out of turn, getting out of his seat, or dancing by the trash can, but Mr. Pinheiro believed that Student's behavior was within the normal range for students in his classes. Mr. Pinheiro described his progressive discipline plan to control behavior. Mr. Pinheiro kept a conduct log, and would direct a misbehaving student to sign the conduct log. After four entries in a week, or 10 entries in a quarter, the student would be given detention, and after five entries in a week, the student would be sent to Vice Principal Bickham for discipline. Students would also be subject to immediate detention or suspension for serious misbehavior. Student had never been suspended in Mr. Pinheiro's class, and had been given detention only once, for receiving ten conduct log entries in a quarter. In the first quarter of eighth grade, the number of Student's conduct log entries for misbehavior was in the top 25 percent of Mr. Pinheiro's students in all classes. In the second

quarter, Student's conduct log entries for misbehavior placed him in the bottom half of Mr. Pinheiro's students. Student's behaviors did not lead Mr. Pinheiro to suspect that Student had a disability, because they were within the normal range for Mr. Pinheiro's students, and Student could control them. Student usually acted up in Mr. Pinheiro's classes when Mr. Pinheiro's back was turned. Student kept track of the number of his entries in the class conduct log, and would limit his incidents of misbehavior to avoid qualifying for detention or referral to Vice Principal Bickham.

26. In his seventh grade history class with teacher Brooke Taff, Student earned As and Bs. Ms. Taff noted no problems with Student's ability to attend to her lectures or to his classwork, or to process information and learn the class material. Student's behavior in Ms. Taff's class was variable. Some days he exhibited excellent behavior, and on other days he exhibited attention-seeking behaviors such as walking across the classroom in slow-motion, removing and playing with his shoes and socks, describing his bathroom break to the class in detail, or rolling his eyes into the back of his head as if having a medical emergency. Ms. Taff believed that Student could control his behaviors and that when he misbehaved, he did so deliberately. Ms. Taff did not believe that special education assessments would help determine why Student engaged in attention-seeking behaviors. Based on Student's good grades and ability to control his behaviors, Ms. Taff did not suspect that Student had any disability. Had she suspected a disability, Ms. Taff would have contacted school counselors to start the special education testing process.

27. Dr. Van Dyke held a Ph.D. and a clear credential in school psychology, and had been employed as a school psychologist by the District for 10 years. Dr. Van Dyke never formally assessed Student, but reviewed Student's educational records and the complaint in this matter, discussed Student with Dr. Pierucci, Principal Spears, and Vice Principal Bickham, and met with Student and discussed techniques Student could use to avoid future disciplinary incidents.

28. Dr. Van Dyke saw nothing in Student's academic record and grades that raised a concern that Student might have a disability, but he also believed that a student could earn good grades and still have a disability requiring special education. Dr. Van Dyke also was not concerned that Student might have a disability based simply on the number of Student's disciplinary incidents. In his opinion, if the District were to conduct assessments of all Students who had three or four suspensions, without first attempting other interventions, the school would be evaluating many students unnecessarily.

29. In Dr. Van Dyke's opinion, the setting in which Student's disciplinary incidents occurred was significant. He noted that three of Student's four suspensions in eighth grade took place, not in the classroom, but in less structured settings, such as: (i) the fight occurring in the school locker room on December 4, 2013; (ii) an incident in the hallway on January 13, 2014 when Student was walking down the hallway repeatedly saying "faggy, faggy, faggy"; and (iii) an incident on January 17, 2014, in which Student inappropriately touched a female student's buttock while walking home.

30. Dr. Van Dyke found behavioral incidents occurring in structured environments such as the classroom to be more significant indicators of a potential disability. Looking at the October 29, 2013 incident in which Student was disciplined for disrupting class by spitting at his desk on his paper, not following classroom procedures, and drawing attention to himself, Dr. Van Dyke explained that, while a single incident of such behavior would not raise a concern that the Student might have a disability, a pattern of many similar incidents continuing to occur despite interventions aimed at preventing or reducing such behaviors would lead him to think that the District should consider an evaluation of the student. Dr. Van Dyke would first want to conduct a preliminary analysis to understand the context of the behavior and why it was happening, to help the teacher develop an intervention plan.

31. Dr. Van Dyke admitted that Student had a pattern of problematic behaviors, but initially was not aware of a pattern of repeated disruptive behaviors by Student in the structured environment of the classroom. When directed to incidents of disruptive classroom behavior in Student's discipline records, Dr. Van Dyke admitted that they showed an obvious pattern of disruptive behavior, and, in his opinion, an essential pattern of Student not complying with the rules being enforced where the incidents occurred. Asked whether the incidents warranted assessing Student for emotional or behavioral issues, Dr. Van Dyke did not directly answer the question, but said that the District should initially take steps to understand the context of the behavior and take steps to intervene with the Student to manage his behaviors. Dr. Van Dyke understood that the District had attempted to intervene with Student, including the November 6, 2013 parent-teacher meeting, the January 16, 2014 parent meeting with Principal Spears and Vice Principal Bickham, and a number of conversations between Student and teachers and administrators. Asked if the intervention attempts had been successful, Dr. Van Dyke believed that the number of disciplinary incidents in Student's record had decreased since the January 16, 2014 meeting.

LEGAL CONCLUSIONS

Introduction – Legal Framework Under the IDEA³

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and the California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁴ 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

³ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁴ All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

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; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "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; 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; 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); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034] ("*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 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. 950, 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); 34 C.F.R. § 300.511; 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).) 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. 56-62 [126 S.Ct. 528]; 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.a.: Child Find Obligations

5. Student contended that District failed to meet its child find obligations to Student during the two years prior to the complaint, because District failed to identify Student as potentially requiring special education and assess him for eligibility, despite Student's academic and behavioral problems. District contended that Student's academic performance and behavioral issues gave District no reason to suspect that Student might be an individual with a disability and in need of special education, and that District therefore was not required to assess him.

6. The IDEA places an affirmative, ongoing duty on the state and school districts to identify, locate, and assess all children with disabilities residing in the state who are in need of special education and related services. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); Ed. Code, § 56301, subd. (a).) This duty is commonly referred to as "child find." "The purpose of the child-find evaluation is to provide access to special education." (*Fitzgerald v. Camdenton R-III School Dist.* (8th Cir. 2006) 439 F.3d 773, 776.)

7. A school district has a child find duty whether or not the parent has requested special education testing or services. (*Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.) A school district's child find obligation toward a specific child is triggered when there is reason to suspect that he or she may be an individual with exceptional needs⁵ as defined under Education Code section 56026 and in need of special education, even if the child is advancing from grade to grade. (Ed. Code, § 56301, subd. (b)(1).)

8. The duty to assess for exceptional needs is broader than the duty to provide special education, and more easily triggered. In deciding whether there is reason to suspect that a student has exceptional needs, a school district's appropriate inquiry is whether the student should be referred for an assessment, not whether the student actually qualifies for special education services. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1195 ("*Cari Rae S.*").) Thus, the suspicion that a student has an impairment that is affecting the student's educational performance is sufficient to trigger a need for assessment. (See, e.g., *Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1032 ["The District is not required to assess double vision or optic nerve damage if it does not affect a child's educational needs"], citing Ed. Code, § 56320.) A

⁵ The Education Code generally uses the term "exceptional needs" instead of the term "disability" found in the IDEA.

school district's duty to assess a student's eligibility for special education and related services is also triggered by any request for special education or assessment from the student's parent. (Cal. Code Regs., tit. 5, § 3021(a).) If the parent's request is verbal, the district must offer to assist the parent in preparing a written request. (*Ibid.*)

9. The relationship between the duty to assess, the duty to provide special education services, and the duty to utilize general education resources where appropriate was concisely summarized in *Los Angeles Unified School District v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 819-820:

To prevent districts from 'over-identifying' students as disabled, Congress mandated that states develop effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education. (20 U.S.C. § 1400(c)(5)(f).) Schools, however, are charged with the 'child find' duty of locating, identifying and assessing all children who reside within its boundaries who are in need of special education and related services. (20 U.S.C. § 1400(a)(3); [Ed. Code, §§ 56300-56303].) If a school district suspects that a general education student may have a disability, it must conduct a special education assessment to determine whether the student qualifies for special education services. (20 U.S.C. § 1414(a)(1)(a); [Ed. Code, § 56320].) However, a student 'shall be referred for special education instruction and services only after the resources of the regular education program have been considered, and, where appropriate, utilized.' ([Ed. Code, § 56303].)

10. Although a district is required to utilize the resources of its regular education program, where appropriate, to address a student's exceptional needs, it may not delay its assessment of a student with a suspected disability on the basis that it is utilizing a response to intervention approach to accommodate the student in the regular education program. A district may deny a request to evaluate a student if it does not suspect a disability, but it must notify the parent of the basis of the decision and that basis cannot be that the district is waiting to see how the student responds to general education interventions. (Office of Special Education Programs (OSEP) *Memorandum to State Directors of Special Education* (January 21, 2011) 56 IDELR 50.)

11. Violations of child find, and of the obligation to assess a student, are procedural violations of the IDEA and the Education Code. (*Cari Rae S.*, *supra*, 158 F.Supp. 2d 1190 at p.1196); *Park v. Anaheim*, *supra*, 464 F.3d 1025 at p. 1031.)

12. In *Rowley*, the Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley*, 458 U.S. 176 at pp. 205-06.) However, a procedural

violation does not automatically require a finding that a FAPE was denied. A procedural violation results in liability for denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) (*Target Range*.)

13. Where a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. Thus, in *Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F. 3d 877, 881, 892-895, where a school failed to timely provide parents with assessment results that indicated a suspicion of autism, that lack of information significantly impeded the parents' right to participate in the IEP process fully, effectively, and in an informed manner, and the student was entitled to reimbursement for assessment costs and an in-home program, as well as compensatory education.

14. Because *Rowley* requires a district to provide a "basic floor of opportunity" through specialized instruction and related services that are individually designed – that is, provided pursuant to an IEP – a district that fails to provide an eligible student an IEP cannot avoid liability for its procedural violations of the IDEA by claiming that the student nonetheless obtained educational benefit under the *Rowley* standard. (*Cari Rae S., supra*, 158 F.Supp. 2d at p. 1196 ["In this case, however, the 'some educational benefit' standard under *Rowley* is not dispositive, especially if instruction is not provided under an appropriate IEP. No IEP; no FAPE under the *Rowley* standard"], citing *Target Range, supra*, 960 F.2d 1479 at p.1485 ["[b]ecause we hold that *Target Range* failed to develop the IEP according to the procedures required by [IDEA], we need not address the question of whether the proposed partial IEP was reasonably calculated to enable R.G. to receive educational benefits".])

15. The evidence presented of Student's ongoing disruptive and disrespectful behavior, and the persistence of his misbehavior despite repeated detentions and suspensions, interventions by teachers, administrators, and parents, and the loss of Student's privileges to participate in school activities, was sufficient to establish that Student had a significant behavioral problem during the relevant time period. It was also sufficient to establish that Student's behavioral problem caused Student to miss tests, classroom time, study time, and school activities, which must have affected Student's academic performance, even if the impact on Student's learning and grades was not quantified.

16. During the period from February 28, 2013 to October 29, 2013, Student was disciplined 11 times for disruptive or disrespectful behavior in class, and an unknown number of similar incidents occurred that did not lead to suspension. When Parent and Stepfather met with Student's teachers on November 6, 2013 and discussed Student's behavior in each of his classes, it was evident that Student exhibited a persistent pattern of disruptive behaviors in the structured classroom environment that continued to occur despite interventions aimed at preventing or reducing the behaviors. Based on the testimony of school psychologist

Dr. Van Dyke, such a pattern of behavior was sufficient to reasonably indicate to the District that Student might have a disability and should be assessed for eligibility for special education, even if, as teachers and administrators observed, Student could avoid misbehaving for a moment, a class period, or even longer in a particular class, in order to avoid detention, suspension, or other discipline.

17. Student therefore demonstrated by a preponderance of the evidence that District failed in its child find obligation to Student by failing to identify him as potentially having a disability requiring special education, and therefore in need of assessment, as of November 6, 2013, when Parent and Stepfather met with Student's teachers. The result of this procedural violation of the IDEA and Education Code was that Student was not given an initial evaluation for eligibility for special education, and Student was denied a FAPE because the lack of assessment results significantly impeded Parent's right to participate in the IEP process fully, effectively, and in an informed manner.

Issue 1.b.: Failure to Perform Certain Assessments

18. The complaint alleges that District denied Student a FAPE by failing to conduct an FBA, an FAA, a neuropsychological assessment, a social behavioral assessment, or an (EHRMS) as part of an initial assessment of Student for special education eligibility. Student presented no evidence District should have conducted any of these particular assessments, and the only evidence of what assessments would be appropriate for Student was the list of assessments included in the assessment plan that Parent consented to on March 18, 2014. This assessment plan included an FBA and a self-help, social and emotional status assessment that corresponded to the social behavioral assessment referred to in the complaint.

19. Based on the parties' agreed-upon assessments, Student demonstrated by a preponderance of the evidence that District denied Student a FAPE by failing to conduct an initial evaluation of Student for special education eligibility that included a FBA and a social-behavioral assessment. Student failed to demonstrate that District should have included a FAA, a neuropsychological assessment, or an ERMHS assessment in its initial evaluation of Student.

Issue 1.c.: Prior Written Notice of Refusal to Assess Student

20. The complaint alleges that District denied Student a FAPE by failing to provide Parent prior written notice of its refusal to assess Student in all areas of suspected disability. Student did not directly address this issue at hearing, and District did not directly respond.

21. Under Education Code section 56500.4, subdivision (a), District was required to give Parent prior written notice of an initial referral of Student for assessment, or of a District decision to refuse to assess Student. A prior written notice must contain: (1) a description of the action proposed or refused by the agency; (2) an explanation for the action; and (3) a description of the assessment procedure or report which is the basis of the action. (Ed. Code, § 56500.4, subd. (b).) An IEP document can serve as prior written notice as long

as the IEP contains the required content of appropriate notice. (71 Fed.Reg. 46691 (Aug. 14, 2006).) The procedures relating to prior written notice “are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions.” (*C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 70.) When a failure to give proper prior written notice does not actually impair parental knowledge or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*Ibid.*)

22. The prior written notice requirement was not triggered here. On November 6, 2013, Student was not referred for initial assessment, and District that day made no “decision” to fail to identify Student as potentially having a disability requiring special education. District could not have, and was not required to, give Parent notice of a non-event of which it was unaware.

23. Even if Parent’s oral request for assessment on January 16, 2014 was treated as a referral of Student for initial assessment, District had 15 calendar days in which to give the parent a written assessment plan. (Ed. Code, §§ 56043, subd. (a), 56321, subd. (b).) District timely provided Parent such a plan eleven calendar days later on January 27, 2014. District did not thereafter refuse to assess Student. When Parent initially failed to consent to District’s assessment plan, District had the option, but not the obligation, to initiate a due process hearing to obtain an order authorizing the District to assess the student. (Ed. Code, §§ 56321, subd. (c)(2), 56501, subd. (a)(3) & 56506, subd. (e).) If District, following Parent’s failure to return the assessment plan, decided not to initiate a due process proceeding to obtain an order authorizing an initial assessment of Student, that decision was neither a proposal or a refusal to initiate or change an evaluation of Student. (Ed. Code, §§ 56321, subd. (c)(3), § 56500.4, subd. (a).)

24. Student failed to demonstrate by a preponderance of the evidence that District failed to provide Parent any required prior written notice of a refusal to assess Student.

Issue 2: Statue of Limitations

25. Student contended that the usual two-year statute of limitations applicable in special education matters should be extended by 79 days because the District had failed to provide Parent the weekly behavior reports that it had agreed to provide on November 6, 2013, thereby withholding information that it was required to provide to parent, and Parent therefore thought that Student’s behavior had improved.

26. The statute of limitations for special education due process claims is 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, consistent with federal law. (Ed. Code, § 56505, subd. (l).) The statute of limitations bars claims that are based upon events occurring before the two year period. (*J.W. v. Fresno, supra*, 626 F.3d at pp. 444-445; *Breanne C. v. Southern York County School Dist.* (M.D. Pa. 2009) 665 F.Supp.2d 504, 511-512; *E.J. v. San Carlos Elementary School Dist.* (N.D.Cal. 2011) 803 F.Supp.2d 1024, 1026, fn. 1.)

27. The two-year time period does not apply to student claims against a district if the parent was prevented from requesting a due process hearing: (1) because of specific misrepresentations by the district that it had solved the problem forming the basis for the due process request; or (2) if the district withheld information from the parent that was required to provide to the parent under the Education Code. (Ed. Code, § 56505, subd. (1)(1) & (2), 20 U.S.C. § 1415(f)(3)(D).)

28. District was not required by the Education Code to provide Parent weekly reports regarding Student's behavior, and the failure to provide such reports did not amount to a specific misrepresentation that Student's behavioral issues had been resolved. Even if the behavioral reports had been required and not provided after Thanksgiving 2013, Parent could not reasonably have delayed filing a due process complaint based on a belief that Student's behavior had improved, in light of Student's three-day suspension for fighting on December 3, 2013. No basis was shown for an exception to the two-year statute of limitations for special education due process claims. Finally, even if Student had proved an exception to the statute of limitations, the sole remedy sought by Student was an assessment, and extending the statute of limitations would not have resulted in any additional remedy.

REMEDIES

1. Student prevailed on Issue 1.a. and the portions of 1.b. pertaining to an FBA and a social-behavioral assessment. As a remedy, Student requests that Student be assessed. Prior to the hearing, Parent on March 18, 2014 consented to District assessment plan dated February 6, 2014, except that Parent objected to school psychologist Dr. Van Dyke conducting two of the assessments.

2. Administrative Law Judges have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.)

3. As a general rule, a school district is entitled to conduct its initial assessments of a student using qualified assessors of its choice. (Before a child with a disability may begin receiving services under the IDEA, “[a] State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation.” (20 U.S.C. § 1414(a)(1)(A).) “The assessment shall be conducted by persons competent to perform the assessment, as determined by the local educational agency.” (Ed. Code, § 56322.) See also, *M.T.V. v. DeKalb County Sch. Dist.* (11th Cir. 2007) 446 F.3d 1153, 1160)[A school district has the right to conduct a triennial evaluation using an assessor of its choice.] Student's grounds for objecting to Dr. Van Dyke as an assessor are not sufficient to warrant an exception to that rule. Dr. Van Dyke interviewed Student in the ordinary course of his duties

as a school psychologist, and as part of normal procedures at Student's school for intervening with students with behavioral issues. He was not an attorney, and his contact with Student therefore was not an inappropriate contact with a represented party. Student offered no evidence that Dr. Van Dyke asked Student any inappropriate questions or otherwise acted improperly. Student did not offer any other evidence to demonstrate a valid objection to assessment by Dr. Van Dyke.

4. District therefore will be ordered to complete the assessments of Student specified in the February 6, 2014 assessment plan, using assessors of District's choice, and hold an initial IEP team meeting in accordance with statutory timelines calculated based on the date of this decision, unless Parent agrees in writing to an extension.

ORDER

Within 60 calendar days of the date of this decision, not counting days between Student's regular school sessions, terms, or days of school vacation in excess of five school days, the District shall complete the assessments of Student specified in the February 6, 2014 assessment plan, using the assessors of District's choice, and hold an IEP team meeting, unless Parent agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (c), 56344(a).)

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, Student prevailed on Issue 1.a. and partially prevailed on Issue 1.b. District prevailed on all other issues.

RIGHT TO APPEAL THIS DECISION

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: April 16, 2014

_____/s/
ROBERT G. MARTIN
Administrative Law Judge
Office of Administrative Hearings