

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2015110095

v.

VICTOR VALLEY UNION HIGH
SCHOOL DISTRICT AND SAN
BERNARDINO COUNTY
SUPERINTENDENT OF SCHOOLS.

DECISION

Parent on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on October 29, 2015, naming Victor Valley Union High School District and San Bernardino County Superintendent of Schools. The matter was continued for good cause on December 4, 2015.

Administrative Law Judge Chris Butchko heard this matter in Victorville, California, on February 9 through 11, and 17, 2016.

Seshah Wolde-Tsadik, Attorney at Law, represented Student. Student's mother attended the hearing, along with advocate Courtney McNair.

Vivian Billups, Attorney at Law, represented District and County. Margaret Akinnusi, Director of Special Education, attended all days of hearing on behalf of District. Richard P. Frederick, Area Director, attended all days of hearing on behalf of County. Katrina Beedle, School Psychologist, attended the afternoon of the second day of hearing on behalf of County. Denise Edge, Due Process Program Manager, attended all days of hearing on behalf of the Desert Mountain Special Education Local Program Area. Stephanie Hedberg, Program Specialist, attended the first three days of hearing on behalf of the SELPA.

On February 17, 2016, OAH granted the parties' request for a continuance to allow the parties to file closing briefs and stated that the record would remain open until February 26, 2016. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES

1. Did District and County deny Student a free and appropriate public education by failing to assess Student in the areas of speech and language, occupational therapy, physical therapy, health, augmentative alternative communication, assistive technology, academics, career aptitude, and by failing to conduct a psycho-educational evaluation from October 29, 2013 through the completion of Student's extended school year in August 2015?

2. Did District and County deny Student a FAPE by failing to design an individualized education program to meet Student's needs in the areas of occupational therapy, language and speech, and by failing to provide her with an appropriate placement and an appropriate individualized transition plan from October 29, 2013 through the completion of Student's extended school year in August 2015?¹

SUMMARY OF DECISION

Student established that District and County failed to conduct any assessments of her in connection with her triennial IEP team meeting. While District and County asserted that Parent made a knowing and intelligent waiver of her right to have assessments done, the evidence did not support their contention. Whether the failure to conduct assessments deprived Student of a free and appropriate public education cannot be determined from the record. To determine an appropriate remedy, if any, for Student, speech and language, physical therapy, occupational therapy, and psycho-educational assessments have been ordered for Student. When the assessments are complete, an additional limited hearing will be held on the issue of the type and scope of Student's compensatory education remedies.

Student did not carry her burden of proving that she was denied a FAPE by her educational program, placement, and transition plan before District and County's failure to conduct the triennial assessments, but established District and County denied her a FAPE from the triennial IEP through her exiting special education services.

FACTUAL FINDINGS

1. Student is a 22-year-old female who resided in District at all relevant times, and was eligible for special education under the category of Other Health Impairment.

¹ A third claim, involving whether District and County violated Parent's procedural right to obtain a complete copy of Student's educational records, was not presented at hearing. Student stated in her closing brief that she has chosen to drop the issue. Accordingly, this claim is dismissed.

2. Student has Angelman Syndrome, a genetic and neurological disorder that has caused her intellectual disability, delayed development, speech and orthopedic impairments, sleep disturbance, and seizure activity.

3. Student transferred into District from the Long Beach Unified School District in the spring of 2008. Her final Long Beach IEP report stated that she had a three-word vocabulary, could, with assistance, write only the first letter of her first name, could independently pour juice into a cup one-third of the time, and could run 30 or 40 feet. Student had needs in communication, hygiene, academics, and movement. The Long Beach IEP found that Student required classroom accommodations, assistive communication devices, and a behavior plan.

4. No academic, functional behavior, speech and language, physical therapy, or occupational therapy assessments of Student were provided by Long Beach to District or County in connection with her transfer or at any time thereafter.

Mr. Anderson's Class

5. Student was placed in a County-run moderate to severe handicap special day class at Sultana High School taught by Jay Anderson. She stayed in that class from the spring of 2008 until the fall of 2014, when she was transferred to a similar class in another County-run high school. She stayed in that class until she aged out of her educational program in August of 2015.

6. Mr. Anderson taught a class of 19 students, with the assistance of two paraeducators. He held a credential to teach students with moderate to severe handicaps and had over a decade of experience doing so by the time Student was placed in his class. He had no education or training as a speech therapist, physical therapist, occupational therapist, or psychologist.

7. Student received no direct, individual services other than adapted physical education² at any time during her education by District and County. Instead, Mr. Anderson's class offered what it called 'embedded services' intended to meet Student's needs through the course of the regular school day. Embedded services, as used at hearing, referred to ordinary instruction in a special day class, intended by District and County to meet students' needs that would otherwise be met through the provision of direct, individual services. No testimony was provided that Student's educational day was in any way different or distinct from that of her peers with different disabling conditions, and none of Student's IEP plans specified the character, frequency, or delivery of such embedded services.

² Adapted physical education was provided to Student one day a week for 30 minutes. Student had an adapted physical education assessment in 2008, and received services afterward until she aged out.

8. When Parent specifically requested that Student be given speech and language services, she was told that they were provided in class. Student was accompanied throughout the school day by a one-to-one nurse because of her seizure disorder and medication needs.

9. Itinerant service providers such as speech therapists, school psychologists, assistive technologists, behaviorists, and physical education specialists would visit Mr. Anderson's classroom on a weekly basis. They would observe the classroom and were available for consultation by Mr. Anderson for an average of 30 minutes to an hour per visit. They would not work individually with any student unless that student had services that were required under her or his IEP. Since Student's IEP plan did not specify that she should be provided direct services, she did not receive time with the itinerants such as the speech and language, occupational therapy, psychological therapy, and physical therapy providers.

10. The itinerant speech and language teachers trained Mr. Anderson in how to operate assistive technology devices, and he introduced and implemented them in Student's education.

11. Student suffered seizures of varying severity throughout her time in Mr. Anderson's class. Most commonly, Student appeared to have mild seizures which caused her to lose focus and attention or 'space out.' On more than one occasion, Mr. Anderson had to catch Student from falling after a more severe seizure. She never had a major or "Grand Mal" seizure in his class, but had an average of one small seizure a day. Mr. Anderson believed that Student would have major seizures at home weekly, on average. For a few days after Student had a major seizure, Mr. Anderson observed that she would be quieter and have difficulty accessing concepts that she had learned.

Alternative Assessments

12. For the approximately seven years Student was in his class, Mr. Anderson was the case manager for her IEP meetings. He drafted all of her IEP reports based upon his own observations and parent reports, and drafted the goals without assistance. He could consult with the itinerant staff if he saw a need to so do, but there were no formal assessments or other written reports or materials provided by anyone other than Mr. Anderson used in creating the IEP reports.

13. Each year Mr. Anderson would fill out an Alternate Assessment Data Collection Form. County and District considered the completion of this form to be an annual assessment of Student and a report on her progress toward her IEP goals.

14. The alternate assessment consisted of a single-page form with identifying information at the header and four boxes on each page. Each year's report for Student consisted of two pages, and Mr. Anderson filled out between five and eight boxes each year. Each box was completed by entering an IEP goal number, a keyword phrase describing the goal, and then checkboxes were marked off. The form states that duplicates of the page

should be used if more than four assessment boxes were needed. None of the alternate assessments of Student done from 2009 to 2014 was more than two photocopied pages.

15. The alternative assessment contained no narrative. For example, each box listed a functional focus, a curriculum area, a progress level, and the source of the assessment information. In the 2014 form, Student's first goal was described as "choose same color," with the focus area "Functional Academics" marked. The curricular area was checked off as "Math," and her mastery/progress level was marked as "Goal Met/Exceeded." An additional field for "reason" was not filled out, and the source of assessment data was marked only as the field "(10)." The form contained no explanation of the meaning of the categories or of the responses that could be checked off.

16. In the same report, the third assessment area was keyworded "void in toilet, wear regular underwear." It reported "Transition Partial Progress (1- 49%)" and in the reason section the box "More time needed" was checked. There was no further explanation. In the 2014 assessment there was only one other assessment area with any entry in the "reason" section, where the "Mobility/Motor" goal "latch seat belt" was also reported with only partial progress and checked the box indicating a need for more time. All other boxes reported "Intermediate Substantial Progress" or "Goal Met/Exceeded" and contained no marks at all in the reason section.

17. The source of assessment information was not given for three of the assessed areas in the 2014 alternate assessment. The only entries were marks in the boxes indicating "10," from a choice of boxes listing 10, 20, and 30. All assessment areas that listed a source of assessment information reported it as "Teacher Observation." No assessment listed "Performance Assessment" or "Work Sample Assessment," the other two choices, as the source of information about Student. Other than these yearly alternate assessments, no assessment was done of Student prior to her 2014 annual IEP, or since the 2008 adapted physical education assessment.

The 2014 IEP

18. Student's March 12, 2014 annual IEP team meeting was attended by Mr. Anderson, Student's mother, and the county nurse. There was no discussion of changing Student's placement or services at the meeting.

19. The report from the 2014 IEP team meeting stated that Student had a severe orthopedic impairment that impacted her educational performance, had a profound speech and language deficit, and needed assistance with self-care and daily living skills. Mr. Anderson recalled that at that IEP team meeting it was a priority to help Student improve her ability to communicate. The IEP team did not refer Student for any assessments of motor ability, communication/speech, or living skills. Mr. Anderson drafted the entire report, including all goals, by himself.

20. Mr. Anderson believed it would have been his role to refer Student for assessments if he saw a need, but his opinion was that Student should have been referred for assessments many years ago. He did not think a student should be assessed in high school. Mr. Anderson has referred students for assessments twice in roughly 20 years of teaching for County. He would not refer a student for assessment if he believed that the student's disability was so severe that the student was not likely to benefit from services.

21. No outside assessments were conducted in connection with the 2014 annual IEP, as had been the case for Student's County and District IEP team meetings since 2009. Student's needs and abilities were ascertained solely by Mr. Anderson through what he termed situational assessments, which he described as an on-going process throughout the year of putting Student in a situation and observing her performance. Mr. Anderson believed this was definitely the best means of assessing Student. He believed that this single method of assessment contained all necessary elements of a formal assessment, and, further, that her cognitive and functional levels made it impractical for an outside professional to conduct an assessment.

22. The 2014 annual IEP report included a transition services and post-secondary goals section. Student's post-secondary goal was to participate in an adult program that will continue to assist her with safety, social, self-help and communication skills. To those ends, Student was to continue with her current program, live at home, and participate in other services that became available. No specific programs or services were listed.

Waiver of Triennial Assessments

23. Student's Triennial IEP team meeting was due by August 28, 2014. Prior to that date, Dr. Shawn Nunnally, a County school psychologist, prepared a Triennial Reevaluation Determination form waiving Student's rights to triennial assessments. On August 18, 2014, Student's classroom was having a class party for Student's birthday. Knowing Mother would visit that day, Mr. Anderson and Dr. Nunnally presented the form to her for signature. Dr. Nunnally told Mother that she should waive Student's rights to assessments because there was no doubt that Student continued to be eligible for special education. Dr. Nunnally told Mother that he had reviewed Student's file and consulted with Mr. Anderson, and that they agreed that no further data needed to be taken. Mother had no questions and did not object, and signed the form.³ The form stated that further assessment

³ Mother strongly objected to the introduction of this document, stating that she had not signed the form and the signature for Parent was not her handwriting. As that issue need not be determined for resolution of this matter, it will be assumed that she did sign the form. County's itinerant school principal Thomas Hannet's signature also appears on this document, although he did not testify to being at this meeting and his belief was that the document was the product of a written conference. For purposes of this decision, it is assumed that Dr. Nunnally's recall of the circumstances of the triennial IEP meeting is correct.

was not needed because “[a]ll records and services are consistent with current disability as a significant factor for continued need for intensive services provided in current SDC classroom setting.”

24. According to Dr. Nunnally, this constituted Student’s triennial IEP team meeting. It took approximately 10 minutes. No IEP plan or offer of FAPE generated by this meeting appears in the record. The only documentation of the meeting is the waiver form.

25. Dr. Nunnally felt that he knew Student well enough to recommend that no assessments take place. He had reviewed Mr. Anderson’s alternative assessment reports each year and had personal knowledge of Student over several years. Had Mother not come to class that day, Dr. Nunnally stated that he would have sent the form home with Student to be signed. If Mother had not agreed to sign the form on August 18, 2014, there was no possibility that an assessment plan could be generated and assessments completed by the August 28, 2014 deadline for Student’s triennial IEP team meeting.

26. Dr. Nunnally believed that Student could not benefit from services because of her cognitive limitations. Dr. Nunnally understood that language growth took place between 24 and 30 months of age, which was above what he felt was her developmental limit. From his observation of Student in the classroom, he had determined that her developmental limit was 18 months of age. He noted, however, that her ability to sustain attention had increased over her time in Mr. Anderson’s classroom.

27. Student, according to Dr. Nunnally, could only make a gesture to her mouth indicating that she wanted to eat. He believed she had no other communicative abilities. He had never witnessed Student doing any American Sign Language signs or using any meaningful sounds or spoken language. He did not believe that she was capable of doing so, and dismissed reports that she had done so as unreliable parent reporting. If Student did make significant advances after she left Mr. Anderson’s classroom, Dr. Nunnally believed it could be explained as due to a decrease in her seizure activity or in her sleep disruption.

28. Although Dr. Nunnally recognized that the severity of Angelman Syndrome varies from person to person, he believed that Student was too impacted to benefit from any direct services. Further, conducting any traditional assessments would not be necessary because of Student’s low level of functioning. Although he would not “put limits on any kids,” it was necessary to “put a ceiling” on services at Student’s level because even eight hours a day of speech therapy would not improve her receptive or expressive language.

29. Although it requires a neurologist’s examination to determine the exact severity of Angelman Syndrome, Dr. Nunnally’s view was that the level of Student’s affliction could be determined from observation of the severity of the symptoms. Although a neurologist’s report would provide more awareness of student’s disability, Dr. Nunnally did not receive or seek a report from Student’s neurologist, who had been monitoring her seizure activity and adjusting her medication while she has attended County. He believed that it was essentially irrelevant because Student’s level of functioning would not be changed.

30. Dr. Nunnally had substantial faith in Mr. Anderson's ability to assess students, and believed that Mr. Anderson had referred students for assessments in speech and language, occupational therapy, or physical therapy three or four times per year. Because Dr. Nunnally believed Student was four standard deviations below normal functioning, he saw no reason to acquire information about her condition. He had "made a judgment call" based upon what he saw of Student in Mr. Anderson's class and saw no reason to change his opinion.

31. Dr. Nunnally has no education or training as a speech therapist, physical therapist, or occupational therapist. He made decisions about Student's educational abilities, program, and prognosis, but did not attend any annual IEP team meetings. His input into Student's IEP plan was given by consulting with Mr. Anderson, and he never discussed his views with Mother.

Student's Progress and Transition

32. Mr. Anderson reported that Student walked stiffly when she entered his class in 2008. She was not able to use a Picture Exchange Communication System image-based communication device. When she left his class in 2014 she could walk longer distances and was able to run. She was more social and wanted to participate in groups. She was able to use a larger-format four-panel alternative communication device and could use the ASL signs for yes and please. Her eating and toileting skills became greatly improved.

33. At Mother's request, Student was transferred from Sultana High School to a similar County placement at the Cobalt Institute of Math and Science following allegations that she had been mistreated. Student was placed in Dr. Dawn Menge's classroom.

34. Dr. Menge held a credential to teach students with moderate to severe handicaps and had over a decade of experience doing so by the time Student was placed in her class.⁴ She had no education or training as a speech therapist, physical therapist, occupational therapist, or psychologist.

Dr. Menge's Class

35. When she first arrived in Dr. Menge's class, Student was stubborn and resistant, which Dr. Menge attributed to the change in personnel, schedule, and staff. Dr. Menge decided to demand more out of Student and push her to make progress. Dr. Menge's class also attempted to meet Student's needs through a similar program of embedded services without individual services other than APE.

36. Initially, Student's seizures continued while in Dr. Menge's class. In Dr. Menge's experience, the impact of seizures on a child's learning and functioning varied from person to person. Seizures would generally tire students and cause them to lose some

⁴ Dr. Menge holds an education doctorate.

of their verbal skills. She believed that their brains had to “reset,” and that students could not absorb information until they had time to recover.

The 2015 IEP Team Meeting

37. Student had an additional IEP team meeting⁵ scheduled on March 13, 2015. Dr. Menge invited Scott Hansen, county school psychologist, to the IEP meeting.⁶ The county nurse attended the meeting and presented a health assessment.

38. At the March 13, 2015 IEP meeting, all of the data available to Dr. Menge about Student’s academic functioning was from her own observations, school records, and her interview of Mother. Dr. Menge knew that Student had issues with her speech and her fine and gross motor skills. Rather than addressing Student’s educational needs, Dr. Menge saw the purpose of the IEP as helping Student successfully transition out of high school.

39. To prepare for Student’s transition from school, Dr. Menge referred Student for a psychoeducational evaluation by Mr. Hansen. It was Dr. Menge’s policy to refer all graduating students for a psychoeducational assessment to help with their post-educational placement through the Inland Regional Center. District and County acknowledge that the assessment was conducted as a favor to Mother and her Inland Regional Center caseworker to help identify a post-educational adult day program for Student. The assessment was of limited scope, and not for consideration of Student’s current educational needs and services. Dr. Menge believed that the assessments made it easier for the Regional Center to design a program for the graduates.

⁵ Student’s Triennial IEP team meeting had to be held by August 28, 2014. No IEP report, other than the Triennial Reevaluation Determination, was generated from the meeting of August 18, 2014, but Dr. Nunnally considered that to be the triennial meeting. The March 13, 2015 IEP Meeting report has boxes checked indicating that it was both an annual and triennial IEP meeting, but the February 17, 2015 IEP Meeting notice for that meeting does not indicate that it was to be a triennial meeting. The subsequent meeting on May 15, 2015, was convened “to discuss the triennial report,” according to that report’s “Reason for Meeting.” If the March 2015 meeting was a late triennial meeting, it suffered the same assessment deficiency as the August 2014 meeting, for the same reasons.

⁶ Mother and Dr. Menge’s testimony differed over who invited Mr. Hansen to the IEP team meeting. Mother maintained that she requested a school psychologist attend to do an assessment of Student’s abilities and educational needs. No corroborating documentation of this request was presented. For purposes of this decision, it will be assumed that Dr. Menge invited Mr. Hansen to do a psychoeducational assessment to assist with Student’s transition based on her assessment referral practice.

The Hansen Assessment

40. Mr. Hansen had over 30 years of experience as a school psychologist. He had performed more than 3,000 assessments. In preparation for his assessment, Mr. Hansen reviewed a multi-disciplinary psychoeducational assessment of Student, which had been conducted by Long Beach Unified School District in 2005. Other than a 2008 APE assessment and Mr. Anderson's annual data collection reports, there were no subsequent assessments for him to review.

41. Mr. Hansen's psychoeducational assessment was presented at a May 15, 2015 IEP team meeting. That team meeting took place approximately one month before the end of her final school year. His assessment of Student utilized the Southern California Ordinal Scales of Development. Mr. Hansen observed Student in class for 35 to 45 minutes. He did not test or assess her communication, practical abilities, or fine/gross motor skills; he only tested her cognitive development, and that inquiry was limited to the purpose of determining whether she should be placed in a vocational or social program. He reported that Student could say "Hi" and "Thank you," and that she referred to family members as "Mama" and "Brobbo." Overall, Mr. Hansen found that Student reached a "ceiling level" at the sixth stage of development, which is typically achieved at around 18 to 24 months of age.

42. Mr. Hansen was aware that Student was seeing a psychologist, but he did not ask Mother why Student was doing so and he did not consult with that psychologist. He would only have contacted the other psychologist if there were differences between his evaluation and Mother's reports. Mr. Hansen was aware that Student had speech and motor skills issues, but did not assess those areas. He did not refer her for further assessments in those areas because he believed the education she was receiving in her classroom's naturalistic environment were the most beneficial for her language, self-help, and motor skills development.

Need for Additional Assessments

43. At the hearing, District presented Megan Tamayo, a speech and language pathologist, as an expert in both speech and assistive technology. She did not meet with Student or speak with the speech and language and assistive technology itinerant teachers who serviced Student's classroom, but had a number of conversations with Mr. Anderson and one with Dr. Menge. She also reviewed Student's IEP reports, her annual Alternate Assessments, and Mr. Hansen's psychoeducational transition assessment.

44. Ms. Tamayo concluded that there was no need to conduct a formal speech and language or assistive technology assessment because no factors existed to warrant one. She based this on the view that Student would not benefit from direct therapies because Student's cognitive functioning level was between 12 and 24 months of age, and therefore developmentally unable to benefit from direct speech or assistive technology services. She understood Mr. Hansen's psychoeducational report to conclude that the majority of Student's cognitive functioning was between 12 and 18 month level. Similarly, Ms. Tamayo reported

that student had a handful of spoken words, which would be typical for a child of between 12 and 18 months. Ms. Tamayo's conclusion was derived from Mr. Hansen's report.

45. Student did not present any expert testimony about her abilities, needs, or developmental level. Student attempted to establish her case through examination of County and District's witnesses and through lay testimony by Mother and other caregivers. Student did not present persuasive evidence supporting her claim that she was denied a FAPE by inadequacies in her placements, services, or transition plan through August 2014, when District and County should have conducted appropriate triennial assessment and held an IEP team meeting to develop Student's educational program or need to reassess Student before the triennial assessment was required.

Student's Progress

46. By the end of her time in school, according to Dr. Menge, Student could sign to say please and was able to vocalize "thank you," which was a major step for her and very exciting for Dr. Menge. Dr. Menge reported that she and her paraeducators cheered when Student said thank you because non-verbal students normally did not develop language that late in life. In addition, Student was able to go to school dances, climb stairs, and ride slides. Her stamina improved to the point that she could walk long distances and then run. Dr. Menge believed that Student's achievement was due to Dr. Menge's high expectations for Student and possibly the reduction of seizure activity brought about by a change in Student's medication.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA⁷

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)⁸ 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 free and appropriate public education 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).)

⁷ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁸ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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 individualized education program. (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)(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 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; 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).) 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] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

BURDEN OF PROOF

5. Student, as the party petitioning for relief, has the burden of proving the essential elements of its claim. (*Schaffer, supra*, 546 U.S. 49, at p. 62.)

Issue 1: Failure to Assess

6. Student contends that District and County failed to assess her in all areas of suspected disability, specifically citing the areas of speech and language, occupational therapy, physical therapy, health, augmentative alternative communication, assistive technology, academics, career aptitude, and psycho-educational functioning. District and County counter that there was no reason to conduct any assessments and that Mother consented to waive the required triennial assessments.

ASSESSMENTS

7. Assessments are required in order to determine eligibility for special education and the type, frequency and duration of necessary specialized instruction and related services. In California, the term “assessment” has the same meaning as the term “evaluation” in the IDEA. (Ed. Code § 56302.5) In evaluating a child for special education eligibility and prior to the development of an IEP, a district must assess her in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) An assessor must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is eligible for special education services. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) The student must be assessed in all areas related to her or his suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or for determining an appropriate educational program for the student. (Ed. Code, § 56320, subds. (e), (f); 20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b).)

8. The assessment must use technically-sound instruments that assess the relative contribution of cognitive, behavioral, physical, and developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) Assessment materials must be used for purposes for which they are valid and reliable. (20 U.S.C. § 1414(b)(3)(A)(iii)); 34 C.F.R. § 300.304(c)(1)(iii); Ed. Code, § 56320, subd. (b)(2).) Assessments must be administered by trained and knowledgeable personnel and in accordance with any instructions provided by the author of the assessment tools. (20 U.S.C. § 1414(b)(3)(A)(iv), (v); 34 C.F.R. § 300.304(c)(1)(iv), (v); Ed. Code, §§ 56320, subd. (b)(3) [tests of intellectual or emotional functioning must be administered by a credentialed school psychologist], 56322 [assessment shall be conducted by persons competent to perform the assessment, as determined by the school district, county office, or special education local plan area]; 56324 [a psychological

assessment shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed[.] Persons knowledgeable of the student's disability shall conduct assessments. (Ed. Code, § 56320, subd. (g).)

9. For example, difficulty in understanding or using spoken language shall be assessed by a language, speech, and hearing specialist who determines that the difficulty results from any of the following disorders: (1) articulation disorders, such that the child's production of speech significantly interferes with communication and attracts adverse attention; (2) abnormal voice, characterized by persistent, defective voice quality, pitch, or loudness; (3) fluency difficulties which result in an abnormal flow of verbal expression to such a degree that these difficulties adversely affect communication between the pupil and listener; (4) inappropriate or inadequate acquisition, comprehension, or expression of spoken language such that the child's language performance level is found to be significantly below the language performance level of his or her peers; and (5) hearing loss which results in a language or speech disorder and significantly affects educational performance. (Ed. Code, § 56333.)

10. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years ("triennial") unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code § 56381, subd. (a)(2).) A triennial assessment serves two separate but related purposes. First, it examines whether the child remains eligible for special education; second, it determines the child's unique needs which, in turn, could trigger a revision of the IEP. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The triennial consists of a review of existing information and may include additional assessments. (34 C.F.R. § 300.305 (a)(2).) A reassessment may also be performed if warranted by the child's educational or related services needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability is a procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

11. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of procedural rights under the IDEA and companion state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must appear in a language easily understood by the public and the native language of the student; explain the assessments that District proposes to conduct; and provide that District will not implement an IEP without the consent of Parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) District must give Parents and/or pupil 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

12. As part of any reevaluation, the IEP team, as appropriate, shall review existing data on the student including evaluations and information provided by the parents, current classroom-based, local, or state assessments, and observations by teachers and related services providers. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. §300.305(a)(1); Ed. Code, § 56381(b)(1).) Based upon that review, with input from the student's parents, the IEP team shall identify what additional data, if any, are needed to determine: (i) whether the student continues to have a disability and related educational needs; (ii) the present levels of academic achievement and related developmental needs of the student; (iii) whether the student continues to need special education and related services; and (iv) whether any additions or modifications to the special education and related services are needed to enable the student to meet the measurable annual goals set out in the IEP and to participate, as appropriate, in the general education curriculum. (20 U.S.C. § 1414 (c)(1)(B); 34 C.F.R. § 300.305(a)(2); Ed. Code, § 56381, subd. (b)(2).) This review of existing data may be conducted without a meeting. (34 C.F.R. § 300.305(b); Ed. Code, § 56381, subd. (g).)

INFORMED CONSENT

13. Consent means that the parent has been fully informed of all relevant information regarding the proposed action; the parent understands and agrees in writing to the proposed action; and the parent understands that the granting of consent is voluntary and may be revoked, although any revocation is not retroactive. (34 C.F.R. § 300.9; Ed. Code, § 56021.1.)

14. During the statutory time period, Student was the joint responsibility of District and County. Student was known to be a child with a disability, and was receiving special education services through her placement in the County's school.

15. An obligation to assess a student arises upon request by a parent or when the educational agency has reason to suspect that the student has a disability. A student already eligible for special education must be assessed if the educational agency has reason to suspect that the student has another disability or if there is reason to believe a student's needs have changed. Student's disabling conditions were known since her arrival from Long Beach Unified School District and no new triggering information was uncovered. However, Student did not establish that District and County needed to assess from October 2013 through the triennial IEP team meeting as the evidence did not establish any basis why District and County should have reassessed her before the triennial IEP team meeting.

16. The IDEA requires that students receiving special education be assessed at least every three years as a triennial assessment. According to the record, Student's triennial assessment was due by August 28, 2014. Other than an adapted physical education assessment in 2008, Student never received a formal assessment by District or County at any time prior Student's 2014 triennial IEP meeting. District's argument that Student was annually assessed by Mr. Anderson through the Alternate Assessment Data Collection Form is unavailing. Those documents are facially unacceptable as assessments because they are incomplete, incomprehensible, use no assessment tools other than teacher observation, and

are little more than progress reports. Further, Mr. Anderson lacks training, knowledge, and expertise to assess Student in all areas of her disability. He lacks qualification to administer speech and language, occupational, physical therapy, or psychological assessments.

17. Dr. Nunnally and Mr. Anderson presented Mother with the Triennial Reevaluation Determination Document during her visit to Student's classroom for a birthday party. They had already decided that no new assessments would take place and had not taken the steps necessary to prepare and execute an assessment plan in time to meet the statutory timelines for Student's triennial IEP meeting. Although the form required that the team review all existing assessment data, that current classroom based assessments be reviewed, that teacher and related service provider observations be reviewed, and that Parent input be reviewed and considered, the meeting was completed in ten minutes. It is not possible that all of these steps could be completed in that time.

18. In addition, a parent must give informed consent to the waiver of her child's assessment rights. Dr. Nunnally testified that he told Mother that she should waive Student's rights because there was no doubt that Student was entitled to continued special education services. In making that representation, Dr. Nunnally neglected to meet the second prong of the triennial review: to establish and determine the child's unique needs, which could cause an alteration of the services provided under the IEP. It appears Dr. Nunnally was cognizant only of the requirement that Student's continued eligibility be established at the triennial IEP meeting, and did not also recognize the possible needs for assessments to consider Student's present levels of academic achievement, her developmental needs, and whether any additions or modifications to her special education and related services plan might be needed, given the passage of over at least six years since her last assessment. Accordingly, Mother's signature does not represent informed consent to the waiver and renders the document invalid.

19. Dr. Nunnally testified that he would just have sent the waiver form home with Student if Mother had not come to class that day. If he had done so, he would have defaulted on his obligation to discuss the purposes of the triennial reevaluation and obtain Mother's informed consent. Such a misunderstanding of duty strongly suggests that District and County did not understand the need to fully inform Parent why District and County might not need to reassess Student. Dr. Nunnally, Mr. Anderson, and Mr. Hannett had decided not to conduct evaluations of Student as part of the triennial review. The fact that Dr. Nunnally considered the triennial meeting complete once Mother was induced to waive Student's rights to assessments further underscores this point. Mother's decision whether or not to sign the waiver was forced upon her without adequate warning, explanation, or proper discussion.⁹

⁹ Under circumstances such as this, where the Student was not once assessed in important areas for over six years, it is debatable whether even Mother's informed consent would be sufficient to extinguish Student's rights to be assessed. (*A.G. v. Paradise Valley Unified School District*, (9th Cir., March 3, 2016, Nos. 13-16239, 13-16707) __ F.3d __, 2016 WL 828095.) ("Because the district court relied on A.G.'s parents' consent to

20. Lacking a valid waiver, District and County are in violation of their duty to assess Student. Since the violation is procedural, relief can be granted only if it impeded the student's right to a FAPE, significantly impeded the Mother's opportunity to participate in the decision making process, or caused a deprivation of educational benefits.

21. District contends that Student suffered no impairment in her right to education or of educational benefits. Student, District argues, has been sufficiently assessed by Mr. Anderson and Dr. Menge, who provided yearly assessments based upon their experience and daily work with Student. As noted above, the yearly data collections are not assessments.

22. Student's teachers are not qualified to assess Student in all areas of suspected disability. The IDEA requires that assessments be administered by persons who are trained and knowledgeable in the fields they are assessing. Mr. Anderson, Dr. Menge, and Mr. Hansen do not have sufficient training and experience in speech and language, physical or occupational therapy to qualify as assessors.

23. Similarly, Mr. Hansen's psychoeducational assessment is not sufficient to show that Student could not benefit from additional services or therapies. Mr. Hansen's assessment was explicitly performed only for the purposes of educating Mother and the Inland Regional Center about transitioning Student to post-high school life. Mr. Hansen limited his assessment to meet that purpose and did not contact Student's psychologist or her neurologist to obtain information about her condition or even the reasons why they were treating her. For example, he did not evaluate her communication abilities, scale her practical abilities, or assess her fine and gross motor coordination. He tested only her cognitive development to recommend an adult placement for her.

24. District and County concede that Mr. Hansen's assessment was solely for vocational purposes. Since the results of the assessment were received shortly before Student aged out of her educational program, it would be implausible to suggest that the assessment was intended to be part of a meaningful review of her educational program and undercut their argument that Student had been continually assessed during her time in their program.

25. District and County's approach to Student's education was constructed on assumptions. Ms. Tamayo's conclusion that Student cannot benefit from direct speech or assistive technology is based upon a particular reading of Mr. Hansen's psychoeducational assessment that places a ceiling on Student's abilities at the 12- to 18-month level.

placement at Roadrunner in dismissing Plaintiffs' meaningful access claim without evaluating whether A.G.'s educational needs were met as adequately as those of her non-disabled peers, its decision must be reversed and remanded.")

Ms. Tamayo's report describes Student as having a level of language ability that Mr. Hansen would find unreachable at that developmental stage. Dr. Nunnally dismisses both of their reports of Student's vocabulary and vocalization as impossible, yet finds corroboration of his views in their reports.

26. Despite Student's progress linguistically, physically, and behaviorally, District and County's witnesses maintain their belief that Student cannot learn because of the twin challenges of her intellectual delays and her seizure disorder. Dr. Nunnally believes that it is impossible for Student to learn or benefit from services because of her seizures, but did not consult with her neurologist about her condition, treatment, or precise level of impact from her disease. He states that her cognitive function is too low to benefit from services, but does not know what her actual baseline would be without the effects of her seizures. Much of County and District's low opinion of Student's educability rests upon their staff's view of the impact of Student's seizures, but those views are based on generalized understandings and staff failed to make any effort to gain understanding of Student's individual circumstances from her treating neurologist or psychologist.

27. District and County based much of Student's educational program and services upon generalized assumptions about persons with Angelman Syndrome. Student is entitled to an individualized educational program, which must be based upon information about her specific needs and abilities. Although her classroom teachers have tried their best to understand her, they lacked expertise in specialties such as speech and language necessary to fully assess Student.

28. Student established that District and County failed in their duty to assess Student. No assessments were conducted for Student's triennial IEP meeting. District and County have presented a waiver for Student's triennial assessment rights, but it is clear from testimony that the waiver does not represent informed consent. Even if it is assumed that the meetings in March and May of 2015 were Student's 2014 triennial IEP team meeting, there was no effective waiver of her assessment rights and the assessment that was performed did not assess her in all areas of suspected disability.

Issue 2: Failure to Design an Appropriate Educational Program

29. Student has asserted that District and county have failed to meet her needs for occupational therapy, language and speech services, and have failed to provide her with an appropriate placement and an appropriate individualized transition plan. However, Student has not shown that she had specific needs that were not met through August 28, 2014, when District and County should have held Student's triennial IEP team meeting. Because District and County failed to conduct proper triennial assessments, which significantly impeded Parent's ability to participate in Student's educational decision making, Parent lacked the information to determine whether Student's educational program was adequate. Further, District and County's continuation of Student's educational program after August 18, 2014, cannot be determined to be appropriate because they did not conduct the required assessments.

Relief

PROCEDURAL VIOLATIONS

30. Procedural violations of the IDEA only constitute a denial of FAPE if they: (1) impeded the student'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); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

31. Procedural violations that seriously infringe on Parents' opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE. (*Shapiro v. Paradise Valley Unified Sch. Dist.* (9th Cir. 2003) 317 F.3d 1072, 1078; see also *Amanda J. v. Clark Cnty. Sch. Dist.*, (9th Cir. 2001) 267 F.3d 877, 892.) "[T]he informed involvement of parents" is central to the IEP process. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994].) Protection of parental participation is "[a]mong the most important procedural safeguards" in the IDEA. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

COMPENSATORY SERVICES

32. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*)). These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524 (*Reid*), citing *Puyallup*, supra, 31 F.3d at p. 1497.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid*, supra, 401 F.3d at p. 524.)

33. District and County's refusal to conduct any assessments into student's disabilities made it impossible for Mother to have any meaningful input into Student's individualized education plan. Without access to assessment data, a parent's right to participate is meaningless. Some courts have held that the failure to conduct assessments is almost a de facto denial of FAPE. "The lack of assessments alone is enough to constitute a lost educational opportunity." (*Carrie I. ex rel. Greg I. v. Dep't of Educ., Hawaii* (D.Haw. 2012) 869 F.Supp.2d 1225, 1247.) Student established a procedural violation which has resulted in a denial of FAPE by significantly impeding Mother's opportunity to participate in Student's IEP process.

34. Although Parent filed for hearing in this matter and generally proof of compensatory services asked for in hearing is on the party asking for the compensatory services, District and County's lack of assessments makes it impossible for Parent to understand Student's needs, present levels of performance, or needed services from August 2014 through the end of the 2015 extended school year. It is uncontested that Student has needs in speech and language, gross and fine motor abilities, life skills, and mental functioning. Further, it was the conduct of District and County in failing to perform the required assessments that placed Student in the position of not knowing what her unique needs are. In this case, it is equitable to require that complete speech and language, occupational therapy, physical therapy, and psychoeducational assessments are conducted on Student before any compensatory education can be awarded.

35. A further hearing will be scheduled regarding the type and amount of compensatory services that should be awarded to Student based upon District's denial of FAPE to Student in this matter after the assessments have been conducted. This hearing will be scheduled at a telephonic Status Conference in this case on April 25, 2016, and will be scheduled for no more than two days.

36. At this hearing, the ALJ and the parties will be able to question the assessors and the parties may put on limited evidence and witnesses regarding compensatory education. The scope of the evidence allowed and the number and identity of any witnesses will be determined at a prehearing conference, which will be scheduled at the Status Conference and will occur prior to the reconvened hearing. Both parties will receive a copy of the assessments at least five days prior to the prehearing conference.

ORDER

1. Student will nominate speech and language, physical therapy, occupational therapy, and psychoeducational assessors who meet the cost and qualification requirements for independent educational evaluations for Victor Valley Union High School District and the County of San Bernardino. Once the assessors have been selected, Student will participate in speech and language, physical therapy, occupational therapy, and psychoeducational assessments. The assessments will be at the expense of Victor Valley Union High School District and the County of San Bernardino. The assessment will be comprehensive and include observation, assessment, preparation of a written report that will contain service recommendations, and participation in the upcoming hearing on remedies. The assessment schedule will be discussed at the Status Conference, which will occur on April 25, 2016, at 1:00 p.m.

2. If Student does not present herself for the assessments or does not complete the assessments without good cause, Student shall forfeit any remedies under the IDEA for compensatory education for any denial of FAPE. If Student cannot attend any of the assessment sessions, Student will send a written motion to OAH requesting to change assessment dates and good cause will be required.

3. County and District will provide assessors with complete copies of Student's educational records and this Decision no later than five business days after nomination of the assessors. Parent will provide assessors with copies of any other relevant documents she wishes the assessors to review no later than five business days after this decision.

4. The parties will participate in the Status Conference on April 25, 2016. A two-day hearing will be held at a date to be determined at the Status Conference regarding the type and scope of compensatory education for Student based upon District and County's denial of FAPE as found in this decision. A prehearing conference will also be scheduled to discuss the evidence and witnesses which will be allowed at the hearing.

5. All parties and the ALJ will receive copies of the assessments at least five days prior to the prehearing conference.

6. The matter remains continued until the Status Conference, currently scheduled for April 25, 2016, is held.

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 partially prevailed on Issues One and Two and District and County partially prevailed on Issues One and Two.

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: April 4, 2016

/s/
CHRIS BUTCHKO
Administrative Law Judge
Office of Administrative Hearings