

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PASADENA UNIFIED SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2016060614

DECISION

On March 17, 2016, Student filed a due process hearing request with the Office of Administrative Hearings in OAH case number 2016030805, naming Pasadena Unified School District (Student's Case). The matter was continued for good cause on May 2, 2016.

On June 9, 2016, District filed its due process hearing request in this case, naming Student (District's Case). On June 22, 2016, OAH granted District's unopposed motion to consolidate District's Case and Student's Case, vacated the dates in District's case, and ordered that the consolidated actions proceed on the dates in Student's Case.

On July 11, 2016, Student withdrew Student's Case, and the matter proceeded to hearing on District's Case only.

Administrative Law Judge Robert G. Martin heard this matter on July 12 and 18, 2016, in Pasadena, California.

Attorney Meredith Reynolds represented Pasadena Unified School District. District Assistant Superintendent and Special Education Local Plan Area Director Jerrell Hill attended on District's behalf on July 12, 2016, and District Special Education Program Coordinator Marcie Kohl-Peoples attended on District's behalf on July 18, 2016.

Attorney Lisa Dennis represented Student. Attorney Carolyn Olson and advocate Hamlet Yarianian also attended. Mother attended the hearing for portions of both days. Student did not attend the hearing.

A continuance was granted for the parties to file written closing arguments and the record remained open until August 10, 2016. The parties timely filed written closing arguments, the record was closed and the matter was submitted for decision on August 10, 2016.

ISSUE

Is District entitled to conduct an educationally related intensive counseling services assessment of Student pursuant to District's April 9, 2016 assessment plan, without Parents' consent?

SUMMARY OF DECISION

District failed to prove at hearing that Student's educational or related services needs at the time of the complaint warranted an intensive counseling services assessment, or that it had satisfied all of the notice requirements for the proposed assessment. District may not proceed with its proposed intensive counseling services assessment without Parents' consent.

FACTUAL FINDINGS

1. Student is a 12-year-old boy who at all relevant times resided in District with Parents, and attended a District school. At the time of hearing, Student was eligible for special education under the primary category of specific learning disability based on a significant discrepancy between his cognitive ability and academic achievement in the areas of reading comprehension, reading fluency, and written expression due to an auditory processing disorder. Student was also eligible under the category of speech and language impairment based on receptive, expressive, and pragmatic language deficits. In June 2016, Student completed sixth grade at his school of residence, where he attended general education classes for all subjects except mathematics. He received specialized academic instruction in mathematics in a special day class.

Student's Special Education 2009-2014

2. Student initially qualified for special education at age five in 2009 in the category of speech and language impairment. Student's full scale IQ was 81. He demonstrated average processing speed, but had difficulties comprehending spoken language, and modulating auditory, visual and touch sensory input. These difficulties affected his ability to maintain attention, speak clearly, respond appropriately to noises and distractions, play age-appropriate games with his classmates, initiate tasks independently, and complete multi-step tasks. Student was friendly and well liked, and exhibited no significant maladaptive behaviors. However, he could be withdrawn when relating to adults, and he became somewhat disturbed by changes in routine or by new people or situations.

Student's individualized education program offered Student placement in an inclusion-model kindergarten classroom for the 2009-2010 school year, with speech and language therapy.

3. Student's IEP team at his March 2010 kindergarten IEP was concerned that Student was active, talkative and full of energy on the playground, but distractible, tired and inattentive during academic sessions. The team added goals and accommodations to Student's IEP to address the issue. Student's 2011 first-grade IEP team remained concerned that Student continued to show decreased attention to task and confidence when faced with academic tasks and curriculum concepts. Student was extremely kind-hearted and sensitive, but, when upset, he was not always able to communicate what had happened that upset him.

4. Student was eight years old and in second grade at the time of his March 2012 IEP team meeting. Reviewing Student's triennial assessments, the IEP changed his primary eligibility to the category of specific learning disability, based on a severe discrepancy between Student's intellectual ability and his achievement in reading comprehension, written expression and reading fluency. Student's speech and language impairment remained as a secondary eligibility category. In second grade, Student often appeared anxious, unhappy, or easily embarrassed, and sometimes lonely or distracted.

5. At Student's third-grade IEP in March 2013, his IEP team found that he continued to have deficits in expressive, receptive and pragmatic language that adversely impacted his access to the general education curriculum. He also continued to demonstrate unhappiness and anxiety with respect to social situations with peers. New goals were developed for Student to address his issues in social situations. Student was to advocate for himself during social situations with peers to avoid negative situations like peers taking advantage of him. He was also to use alternative ways of talking, writing and drawing to express his unhappiness and anxiety with peers.

6. In fourth grade, 2013-2014, the pace of the class was often quicker than Student could follow, and he had difficulty understanding inferences and concepts in his lessons. Student wanted to be accurate in his work, which slowed him down significantly. He was aware that other students were able to understand things he was not, and he sometimes cried when he did not understand material presented. As in third grade, Student had difficulty advocating for himself to ask for help or express his thoughts or feelings, or to recognize and object to another student taking advantage of him. At Student's April 2014 IEP, when he was 10 years old, he was given goals in self-advocacy, speech and language, math, reading comprehension, and written language. To assist Student in his self-advocacy goals, his IEP provided 30 minutes per month of social skills counseling.

2014-2015 School Year

7. Student's 2014-2015 fifth-grade school year commenced August 11, 2014. At an amendment IEP meeting held August 29, 2014, Mother requested that District discontinue Student's social skills counseling, and Student's IEP team agreed. Student was not experiencing the types of behaviors previously warranting counseling, and Mother wanted

Student to have more time in his general education classroom. Mother and District attendees discussed Student's upcoming 2015 triennial assessments, and District offered Mother a notice of parental rights and procedural safeguards under the IDEA and related California law. Mother stated that she understood the procedures and her rights as a parent, and declined the offered parental rights and procedural safeguards because she had multiple copies at home.

8. In fall 2014, Student was involved in an incident in a science camp boy's dorm room, in which a group of boys were roughhousing and one jumped on top of him. Student perceived that the boy had pretended to engage in a sexual interaction although the other boys denied that. Parents believed that the incident exacerbated Student's existing learning difficulties.

9. District did not convene an IEP for Student during the 2014-2015 school year. In spring 2015, Parents declined to consent to District's proposed triennial assessment of Student, and requested that District instead fund independent educational evaluations by non-District assessors. District agreed to fund an independent psycho-educational assessment by Robert Patterson, Psy. D., a licensed psychologist and educational psychologist, and subsequently also agreed to fund an independent speech and language assessment. As discussed below, Dr. Patterson's assessment was completed at the beginning of Student's 2015-2016 school year, and an IEP team meeting to review it was held in September 2015.

10. Student's 2014-2015 grades were not offered into evidence. Evidence on whether Student met his IEP goals was conflicting, and insufficient to reach a factual finding. Student's September 2015 IEP stated only that his teachers reported that he met his goals for the 2014-2015 school year, and that Parents disagreed. No additional evidence on whether Student met his IEP goals was presented.

2015 Independent Psychoeducational Evaluation

11. District and Parents asked Dr. Patterson to assist them in determining Student's current levels of functioning and possible educational needs. Parents told Dr. Patterson that they believed Student's existing learning difficulties had been exacerbated by the incident during science camp.

12. Dr. Patterson conducted his evaluation in June through August, 2015, when Student was eleven years old. He completed his report in September 2015, approximately five weeks into Student's sixth-grade school year, and presented it to Student's IEP team at a September 23, 2015 IEP team meeting.

13. To evaluate Student, Dr. Patterson reviewed Student's previous IEP's and assessments, administered standardized tests to Student and rating scales to Mother, observed Student, and interviewed his teachers. Dr. Patterson administered the following standardized tests to Student: Woodcock-Johnson Psycho-Educational Tests of Cognitive Functioning, Fourth Edition; Kaufman Tests of Educational Achievement, Second Edition; and Reynolds

and Richard Manifest Anxiety Scale, Second Edition. Dr. Patterson also had Student complete the Trauma Symptom Checklist for Children and the Draw-A-Person: Screening Procedure for Emotional Disturbance.

14. Dr. Patterson had Mother complete the following rating scales: the Comprehensive Education Function Inventory; the Connors Comprehensive Behavioral Rating Scales (Parent Version); the Autism Spectrum Rating Scale; and the Neuropsychological Processing Concerns Checklist for School Age Children and Youth, Third Edition. Dr. Patterson did not administer rating scales to any of Student's teachers because he saw inconsistencies in responses between the parent and teacher rating scales that were administered during previous assessments of Student. Mother provided what Dr. Patterson described as "very strong" comments on those ratings scales, and school staff provided only one or two comments that did not provide much additional information. He therefore opted to spend time observing Student and talking with his teachers. For example, after he observed Student, Dr. Peterson asked Student's case carrier specific questions about Student.

15. Mother's responses on the Autism Spectrum Rating Scale suggested that Student had trouble relating to peers and adults and appropriately communicating with others, as well as problems with inattention, impulse control, and changes in routine. The slightly elevated total score was that of an individual with some autistic-like behaviors.

16. Mother's Connor's Behavioral Rating Scale responses included very elevated scores in the following areas: emotional distress, upsetting thoughts, worrying, social problems, academic difficulties, language, math, and separation fears. Her responses also included at-risk scores for aggressive behaviors. Mother's high scores suggested that Student might have symptoms associated with the following disorders identified in the Diagnostic and Statistical Manual, Fifth Edition: attention deficit hyperactivity disorder – inattentive type; depression; generalized anxiety disorder; separation anxiety; social anxiety and obsessive/compulsive disorder. At hearing, Dr. Patterson testified that Mother's rating scale responses suggested that Student's anxiety at school, which had been noted in previous evaluations, was getting worse.

17. Student's test results on the Reynolds and Richard Manifest Anxiety Scale indicated that he had difficulties with attentiveness and with worry and general anxiety accompanied by physiological symptoms, but that he was in the average range for worry and social anxiety. Dr. Patterson noted that these scores were not consistent with Mother's elevated scores. Student's scores did not match those of students who would be considered to have serious emotional disturbance.

18. Student's responses to the Trauma Symptom Checklist for Children showed that the science camp incident had made a significant impact on Student. Student was reluctant to talk about the incident, and he became very upset and anxious when discussing it. He had high scores for post-traumatic stress, reflecting interests, thoughts and sensations associated with painful past events, nightmares, fears, and cognitive avoidance of negative

thoughts and memories. On the test's Sexual Distress Scale, his scores reflected distress or conflict associated with some sexual experience, which might be related to unwanted feelings or behaviors. At Student's September 2015 IEP team meeting, Student's advocate asked Dr. Patterson whether Student's trauma was impacting Student's ability to learn in the classroom. Dr. Patterson responded that Student's ability to perform in the classroom might be impacted by underlying problems such as autism, which caused Student to be easily startled.

19. Student's first day of sixth grade was August 17, 2015. Dr. Patterson observed Student on his eleventh class day, on August 31, 2015, in Student's general education science class, and during Student's transition to and from physical education. Dr. Patterson observed in the classroom that Student appeared to lack the social skills and rapid speech patterns of the other students. As a result, Student had significant difficulties responding socially that appeared to be more than simple shyness. Dr. Patterson interviewed three of Student's sixth-grade teachers. Student's teachers reported that he was a model student in that he had no behavioral problems. He was very shy, mildly withdrawn, and did not relate well to other students. Student wanted to do well, but had significant difficulties with the act of learning. If organized, he could complete work, but he required consistent help to do so. He often appeared to be lost and looking around, and it was difficult for his teachers to know whether he was having trouble processing or was truly lost. He would look at instructions, blink and lose his focus, and after a period of time, blink again and come back into focus. Student's teachers thought that he would fit much better into a special day class than in general education classes, because the special day class could offer him specialized academic instruction in a small-class environment, provide constant supervision, and present work that was broken down into small units.

20. Dr. Patterson recommended that Student's IEP team consider special education eligibility for Student under the category of autistic-like characteristics, or under the category of other health impairment based on Student's difficulty maintaining attention. Dr. Patterson believed Student's attention issues might be attributable either to characteristics associated with ADHD and/or to characteristics associated with anxiety or worry, since Student was then showing significant amounts of anxiety and worry about past events.

21. Dr. Patterson also recommended that Student's IEP team consider professional counseling services for Student to ease the trauma that he appeared to be showing from the science camp incident. Dr. Patterson recommended that the counseling be in the form of play therapy to help Student work through his post-traumatic stress issues. In his report, Dr. Patterson did not recommend any further assessments.

September 23, 2015 IEP Team Meeting

22. District convened a triennial IEP team meeting on September 23, 2015, and Dr. Patterson presented his psychoeducational report and recommendations. The IEP team did not find Student eligible for special education under the categories of autistic-like characteristics or other health impairment, nor did it offer Student any play therapy or other

counseling services. No evidence was presented of any IEP team discussion of Dr. Patterson's recommendations, or the reasons why they were not adopted by the team. The team did not discuss any further testing of Student in the area of social-emotional functioning, and Dr. Patterson did not recommend any such testing. Student's IEP team meeting was continued to allow the independent speech and language assessor to complete her evaluation for the team's consideration.

2015-2016 School Year

23. Student made good progress on his academic goals in sixth grade. In his fall semester, he earned an A- in world history, an A- in English, a C in Math, a B+ in science, a B+ in art, and an A in physical education. These were general education grades, based on core curriculum, not a modified curriculum.

FEBRUARY 2016 IEP TEAM MEETING

24. Student's IEP team reconvened on February 26, 2016, shortly after Student's twelfth birthday, to review the independent speech and language evaluation and Student's progress, and discuss proposed goals. Parents, Student's advocate, Student's attorney, and Dr. Patterson attended, and District gave Parents a notice of parental rights and procedural safeguards.

25. Student's IEP team noted the following strengths: Student was part of a lunch group and interacting with peers; he was polite and had good manners; he was smart, hard-working, concentrated well, and was growing in the classroom environment and sharing more in his English and social studies classes; he was very organized and prepared in class; he was motivated to do things on his own and working well independently with his homework, and was advocating for himself when he needed clarification or more time; Student was creative and artistic, and enjoyed helping others. Student's IEP team noted the following challenges: Student wanted to make friends; he sometimes struggled to express himself orally and in writing; his academic skills remained weak; and Parents were concerned that he was not always organized.

26. The IEP team stated that Student's social-emotional functioning and behavior were not an area of concern. Student was well-liked by his peers, and they often asked him to participate in classroom group activities. Although Student sometimes presented himself as quiet and shy, he was very outgoing when comfortable.

27. There was no evidence that the IEP team further discussed Student's social-emotional functioning. District's offer to Student of a free appropriate public education in the February 26, 2016 IEP did not include any offer of play therapy or other counseling services.

STUDENT'S REQUESTS FOR POST-TRAUMATIC STRESS COUNSELING AND DISTRICT'S REQUEST FOR ASSESSMENT

28. On March 17, 2016, Student filed Student's Case, which included a claim that District denied Student a FAPE by failing to provide Student the play therapy that Dr. Patterson recommended to address Student's post-traumatic stress. Student requested that District be ordered to fund play therapy through a private agency.

29. By letter dated April 4, 2016, Parents consented to District's FAPE offer as set forth in Student's February 26, 2016 IEP. Parents requested that Student's IEP be amended to include certain information, including that Student had difficulty understanding social cues with his peers, that he was diagnosed with ADHD, and that he was taking medication for inattention and anxiety. Parents also requested that District fund a counselor from a non-public agency to provide Student counseling for his post-traumatic stress.

30. On April 9, 2016, District Special Education Program Coordinator Marcie Kohl-Peoples replied to Parent's April 4, 2016 letter. In response to Parents' request that District fund non-public agency counseling for Student's post-traumatic stress, Ms. Kohl-Peoples sent Parents a plan for a District assessment of Student that would include an educationally-related intensive counseling services assessment to identify Student's mental health needs. Ms. Kohl-Peoples proposed that an IEP be convened to discuss the results of the assessment and to determine appropriate services, and she sought Parents' consent to the assessment.

31. The assessment plan was prepared by school psychologist Maria Montero. The plan was in English, the native language of Parents. The plan proposed that a "clinical school psychologist" conduct social/emotional, adaptive behavior, and intensive counseling services assessments. Descriptions were provided for the proposed social/emotional and adaptive behavior assessments (for example, "These scales will indicate how your child feels about himself/herself, gets along with others, takes care of personal needs at home, school and in the community"), but not for the intensive counseling services assessment. The assessment plan notified parents that no IEP would result from the assessment without their consent. There was no evidence that the plan was accompanied by a notice of parental rights and procedural safeguards.

32. Parents did not respond to District's request for consent to assessment. Therefore, on May 2, 2016, Ms. Kohl-Peoples re-sent her April 9, 2016 letter and the assessment plan. Again, there was no evidence that she included a notice of parental rights and procedural safeguards with the re-sent letter.

MAY 27, 2016 IEP TEAM MEETING

33. On May 27, 2016, District convened an amendment IEP team meeting to review Student's progress and goals, and the changes to Student's IEP that Parents had requested in their April 4, 2016 letter. Mother attended and received a notice of parental

rights and procedural safeguards. Dr. Patterson did not attend. Student's teachers provided progress updates.

34. Student's grades for his sixth-grade spring semester showed improvement over his already good grades in his fall semester. Student's most recent March 24, 2016 progress report showed that Student was earning an A- in world history, an A- in English, a B+ in Math, an A in science, and an A in physical education. His science teacher reported that Student worked very hard to keep up with the class, and was dedicated to the task at hand. His positive work ethic and accommodations such as extra time on assignments allowed him to be successful in science, where he regularly demonstrated understanding of larger science concepts. Student's teacher for English and social studies (world history) similarly praised Student's work ethic and ability to do all of his English work with accommodations including open book testing, and use of notes, outlines and graphic organizers. She reported that he thrived in social studies, learned facts very well, and shared in class.

35. As of May 27, 2016, there was no evidence that Student was struggling to access his curriculum. His teachers reported no social-emotional concerns, other than that Student tended to be shy and reserved in class, and was still working on his speech goals to improve his understanding of social cues, figurative language, and inference.

36. Mother provided a letter from Student's private physician confirming that the physician had diagnosed Student with ADHD in 2014 and had prescribed medication for inattention and anxiety. Mother denied District's request for a release to obtain Student's medical records pertaining to Student's anxiety diagnosis and treatment. She stated that Student would be receiving private counseling to work on self-advocacy and coping skills.

37. District offered Student 30 minutes per week of counseling with the District school psychologist to work on social skills. Mother rejected this offer, as she wanted to see how Student progressed with his outside therapist, and how he progressed socially in the 2016-2017 school year, before discussing possible District counseling.

38. Mother returned a signed copy of District's assessment plan, declining to consent to District's proposal to conduct an intensive counseling services assessment of Student. She told the IEP team that Student would work with his outside therapist. It was unclear whether Parents were waiving their pending request that District fund counseling for Student's post-traumatic stress. However, at the subsequent July 1, 2016 consolidated prehearing conference for Student's case and District's case, Student's counsel confirmed that Student continued to seek an order directing District to fund play therapy.

Expert Testimony Regarding the Need for an Intensive Counseling Services Assessment

39. Dr. Patterson testified in support of District's request to assess Student. In his opinion, his psychoeducational assessment report of September 2015 was outdated, but it reflected that Student's problems with self-esteem, academic performance anxiety, anxiety and social skills were significant and worsening at that time. He believed that intensive

counseling services might be warranted if Student wasn't responding to other interventions, and that a new intensive counseling services assessment would provide current information regarding Student's performance and needs at school. Dr. Patterson did not see any information from Student's May 27, 2016 IEP team meeting that suggested that Student might need intensive counseling services. He did not identify any significant new assessment methodologies that would be included in an intensive counseling services assessment that he had not used in his own psychoeducational assessment. In Dr. Patterson's opinion, an intensive counseling services assessment could augment his September 2015 assessment by helping to "separate out" the effects of Student's emotional issues in the areas of self-esteem, anxiety, academic performance anxiety, and social skills.

40. Student's expert witness, California Licensed Educational Psychologist Marlen Barbee, had 15 years' experience as a California school psychologist, and had performed 20 to 30 intensive counseling services assessments. Ms. Barbee explained that when districts provide mental health services to students, they do so on a tiered basis to address increasing levels of need. Mental health services begin with classroom interventions to address behaviors interfering with learning, such as redirection for inattentive behaviors related to ADHD. More significant behavior problems lead to a higher level of services, including higher levels of motivational tools, such as behavior charts with frequent rewards and reinforcement. If these interventions are not effective, a district might then move toward school-based counseling. Intensive counseling services are appropriate only for the highest level of need, using clinical therapists and individual counseling to address severe behaviors that did not respond to classroom interventions or school-based counseling.

41. Ms. Barbee's description of how districts tier their mental health services was consistent with District's own written Educationally Related Intensive Counseling Services Guidelines. District's guidelines described tiers of low, moderate, and intensive mental health services similar to Ms. Barbee's description. The guidelines required that a referral for intensive counseling services would only be made if a student had emotional or behavioral characteristics that impeded the student's educational progress. They further required a description of the low and moderate level interventions that had been provided to the student, including the duration, frequency and results of the services, or an explanation of why a service was considered but determined to be inappropriate. Ms. Barbee testified that there was no evidence at the time of District's assessment request in the spring 2016 that Student might have an educational need for intensive counseling services that would warrant an intensive counseling services assessment, because his progress reports showed that he was responding to classroom behavior supports and obtaining good grades, and his teachers reported no significant behaviors impeding his educational progress. Therefore, in Ms. Barbee's opinion, an intensive counseling services assessment was not warranted.

LEGAL CONCLUSIONS

*Introduction – Legal Framework under the IDEA*¹

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), 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)² et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; 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 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

¹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

² All subsequent references to the Code of Federal Regulations are to the 2006 version.

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

Issue: District’s Right to Assess Student Without Parents’ Consent

5. District contends that Student had a history of worsening problems with self-esteem, academic performance anxiety, general anxiety and social skills. District contends it needed to conduct an intensive counseling services assessment in spring 2016 to better understand the interrelationship of these co-existing social-emotional issues and their impact on Student’s access to his educational program. Student contends that as of Student’s May 27, 2016 IEP team meeting, when Parents declined consent to District’s assessment plan, there was no evidence that Student had educational needs related to his social-emotional functioning that were not being addressed by his existing IEP or that otherwise warranted a reassessment. Student also contends that District failed to prove that it complied with the notice requirements of the IDEA and Education Code.

APPLICABLE LAW

6. Once a student has been found eligible for special education pursuant to an initial assessment conducted pursuant to Education Code section 56320, a district must periodically reassess the student’s educational and related services needs. A special

education student must be reassessed every three years, but not more frequently than once a year, unless the parent and district agree otherwise. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) A district must also reassess a special education student if it determines that the educational or related services needs of the pupil, including improved academic achievement and functional performance, warrant reassessment, or if the pupil's parents or teacher request an assessment. (Ed. Code, § 56381, subd. (a)(1).) Reassessment of educational and related services needs, like initial assessments for special education eligibility under Education Code section 56320, is warranted where the district has reason to suspect that a student has an impairment that is affecting the student's educational performance and special education services may be necessary to address the impairment. (See, e.g., *Simmons v. Pittsburg Unified School District* (N.D. Cal., June 11, 2014, No. 4:13-CV-04446-KAW, 2014 WL 2738214, at page 6, citing *Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1032.)

7. A district must seek informed parental consent before conducting any reassessment of a special education student. (Ed. Code, § 56381, subd. (f)(1).) To obtain consent, the district must develop a written reassessment plan and provide it to the parents. (Ed. Code, § 56321, subd. (a); 20 U.S.C. § 1414(b)(1).) If the parents do not consent to the plan, the district may, but is not required to, pursue the reevaluation by requesting a due process hearing and proving that it needs to reassess the student and is lawfully entitled to do so. (Ed. Code, §§ 56381, subd. (f)(3).) Thus, to proceed with a reassessment over a parent's objection, a district must demonstrate at a due process hearing that: (i) the student's educational or related services needs warrant reassessment, or a triennial reassessment is due, or the student's parent or teacher has requested reassessment (Ed. Code, § 56381, subd. (a)); and (ii) that the district has properly provided parent an appropriate written reassessment plan to which the parent has not consented.

8. A district must give a parent notice of the proposed assessment that includes the proposed assessment plan and a copy of parental rights and procedural safeguards under the IDEA and related state laws. (Ed. Code, § 56321, subd. (a).) The assessment plan must be provided in a language easily understood by the public (Ed. Code, § 56321, subd. (b)(1); and in the native language of the parents (Ed. Code, § 56321, subd. (b)(2); explain the types of assessments to be conducted (Ed. Code, § 56321, subd. (b)(3); and notify parents that no IEP will result from the assessment without the consent of the parent. (Ed. Code, § 56321, subd. (b)(4); 34 C.F.R. § 300.9(a).) The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

9. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, an IDEA procedural error may be held harmless where it does not affect the student's or parent's substantive rights. *J.W. ex rel. J.E.W. v. Fresno Unified School Dist.* (9th Cir. 2010). For example, a procedural error does not deny a child a FAPE if it does not: (1) impede the child's right to a FAPE; (2) significantly impede the parent's opportunity to participate in the decision-making process; or (3) cause a deprivation of educational benefits. (20 U.S.C. §

1415(f)(3)(E)(ii); see, 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.)

10. Parents who want their children to receive special education services must allow reassessment by the school district, and cannot force the district to rely solely on an independent evaluation. (*Johnson v. Duneland Sch. Corp.* (7th Cir.1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir.1995) 64 F.3d 176, 178-79; *Gregory K. v. Longview Sch. Dist. supra*, 811 F.2d 1307, 1315; *Dubois v. Conn. State Bd. of Ed.* (2d Cir.1984) 727 F.2d 44, 48.)

ANALYSIS

11. District showed that Student had specific learning disabilities and a history of issues with self-esteem, academic performance anxiety, general anxiety and social skills. However, District did not prove by a preponderance of the evidence that there was reason to suspect that Student's emotional issues were affecting his educational performance as of District's April 9, 2016 proposed assessment plan or June 9, 2016 complaint. District therefore did not prove that an intensive counseling services assessment of Student was warranted at that time, without Parents' consent. The assessment plan for the intensive counseling services assessment also failed to comply with the law by failing to explain the types of assessments to be conducted.

DISTRICT'S NEED TO ASSESS STUDENT FOR INTENSIVE COUNSELING SERVICES

12. District argued that an intensive counseling services assessment was warranted based on Dr. Patterson's opinion and concern in September 2015 that Student's problems with self-esteem, academic performance anxiety, anxiety and social skills were significant and worsening. However, no evidence was presented that Student's educational and social-emotional performance worsened over the course of the 2015-2016 school year. Instead, Student made good progress on his IEP goals and his academics in sixth grade, with accommodations and low-level interventions through his speech and language services to develop his understanding of social cues, figurative language, and inference. He exhibited no behavior issues, was well-liked by his teachers and classmates, and participated in class discussions. Academically, Student had to work hard to keep up with the class, but with accommodations such as extra time on assignments, open-book testing, and use of notes, outlines and graphic organizers, he earned five A's and one B in core curriculum classes. There was no evidence that Student was struggling to access his education. His teachers reported no social-emotional concerns, other than that Student tended to be shy and reserved in class, and was still working on his speech goals to improve his social skills.

13. At Student's February 26, 2016 and May 27, 2016 IEP team meetings, Student's teachers reported no concerns that Student had a social-emotional impairment that was affecting his educational performance. No evidence was presented of any educational need at that time for intensive counseling services, or other services or accommodations that were not already in Student's IEP, that would warrant an intensive counseling services

assessment. Even at Student's September 23, 2015 IEP, before Student's academically-successful 2015-2016 school year, Dr. Patterson did not recommend that any further social-emotional assessments should be considered. Rather, he recommended play therapy as an appropriate means of addressing post-traumatic stress arising from Student's science camp incident. District therefore failed to prove by a preponderance of the evidence that Student's educational or related services needs warranted an assessment for intensive counseling services.

DISTRICT'S NOTICE OF PROPOSED ASSESSMENT

14. District failed to prove that it satisfied all of the notice requirements for its proposed intensive counseling services assessment. District's evidence that it sent Parents the proposed assessment plan on April 9, 2016 and May 2, 2016 was sufficient and not rebutted by Student, and the copy of the plan signed by Mother at Student's May 27, 2016 IEP team meeting confirmed her receipt of the plan. The assessment plan was in Parents' native English language, and notified Parents that no IEP would result from the assessment without Parents' consent. Parents had at least 15 days to review, sign, and return the proposed assessment plan. Although District did not prove that it sent Parents a notice of parental rights and procedural safeguards on April 9, 2016 or May 2, 2016, it did provide Parents a copy on February 26, 2016 and again on May 27, 2016. On previous occasions including Student's August 2014 IEP team meeting, mother had declined the offered parental rights and procedural safeguards because she had multiple copies at home and understood the procedures and her rights as a parent. Under those facts, the failure to include additional copies of the notice of parental rights and procedural safeguards did not significantly impede Parents' opportunity to participate in the decision making process regarding District's proposed assessment.

15. However, District's assessment plan did not adequately explain the types of assessments to be conducted, as required by Education Code, section 56321, subdivision (b)(3). In relevant part, District's plan stated only that District proposed an evaluation in the area of "Educationally Related Intensive Counseling Services (intensive counseling services)." Neither in the plan, at Student's May 27, 2016 IEP, or at hearing did District provide a description of that what that meant, such as the explanation it provided with respect to its other proposed assessments of what the proposed assessment would measure, or the assessment tools District proposed to use, or the additional data needed to determine Student's educational needs. The lack of explanation of the proposed intensive counseling services assessment test significantly impeded Parents' opportunity to participate in the decision making process regarding District's proposed assessment. In light of this, District would not be entitled to proceed with an intensive counseling services assessment of Student without Parents' consent, if it had proved that such an assessment was warranted.

ORDER

All relief sought by District in its Complaint is denied.

PREVAILING PARTY

Pursuant to 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 the sole issue heard and decided.

RIGHT TO APPEAL

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

DATED: August 29, 2016

/s/

ROBERT G. MARTIN
Administrative Law Judge
Office of Administrative Hearings