

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2010041011

**DECISION**

The due process hearing in this matter was held on June 28 and July 1, 2010, in Los Angeles, California, before Clifford H. Woosley, Administrative Law Judge, Office of Administrative Hearings, State of California.

Attorney Jennifer Guze Campbell, Special Education Law Firm, appeared on behalf of Student. Student's mother (Mother) and advocate James Campbell were present for the hearing. Patrick Balucan, Assistant General Counsel, appeared on behalf of Los Angeles Unified School District (District). District Due Process Specialist, Sharon Robertson, attended on June 28, 2010 and District Coordinator for the Due Process Unit, Lisa Kendrick, attended on July 1, 2010.

On April 20, 2010, Student filed the request for due process hearing. On June 7, 2010, a continuance was granted for good cause. At the close of hearing, the matter was continued to July 19, 2010, when closing briefs were received, the record was closed, and the matter was submitted.

**ISSUES**

1. Did District deny Student a free appropriate public education (FAPE) for the 2009-2010 school year by failing to meet its "child find" obligation and assess Student for special education services?
2. Did District deny Student a FAPE for the 2009-2010 school year by failing to assess Student as requested?

3. Did District deny Student a FAPE for the 2009-2010 school year by failing to timely provide Student's complete educational records to Mother?

## FACTUAL FINDINGS

1. Student is a 9-year-old girl who, as of the date of hearing, had not been found eligible for special education. Though her home address is within the Montebello Unified School District boundaries, Student attended District's Robert Hill Lane Elementary (Lane) for the 2009-2010 school year on an inter-district permit. At the time of the hearing, Lane Elementary had recommended that Student's inter-district permit not be renewed for the 2010-2011 school year because Student was absent too frequently.

2. Mother testified at the hearing, stating that Student exhibited extreme anxiety and behavioral inappropriateness the entire 2009-2010 school year. Student had trouble playing with other children and would become agitated, though she never bit or struck others. Student often hesitated before speaking. Mother believed that Student had delay in recall and other memory problems. Mother believed that Student was two years behind in her studies and that the cause was learning disabilities. Mother's opinion is based upon conversations with and observation of her daughter, as well as her contention that Student suffers from Attention Deficit/Hyperactivity Disorder (ADHD). Mother offered no convincing evidence at hearing to corroborate her conclusion that Student suffered from ADHD. She did not submit nor cite any test, diagnosis, or assessment in support of her opinions regarding Student.

3. William E. Otto testified that he had been employed by the District for 13 years and had been principal of Lane Elementary for one year. Before, he was the Assistant Principal and Elementary Instructional Specialist (APEIS) at Hammel Elementary for three years and Mariana Elementary for two years. An APEIS is an assistant principal who specializes in special education. He was previously a teacher at Marianna Elementary for six years. Before coming to the District, Mr. Otto was a substitute teacher for Westminster School District and Los Nietos School District.

4. Mr. Otto received a bachelor of arts in theology in 1980 and a master of divinity in 1983 from Phillips University. He received a master's in educational administration from California State University, Dominguez Hills, in 2002. He received a California standard teaching credential in 1997, through the District intern program. He holds a National Board Certification from the National Board of Professional Teaching Standards and a Certification for Educational Administration, Tiers One and Two, which qualifies him to be a principal. Mr. Otto possessed all the required qualifications and licenses necessary to be principal of Lane and had substantial education, training and experience in special education, including a district's assessment obligations, the assessment process, the development of IEP goals and objectives, and the provision and administration of special education and related services.

5. Mr. Otto first met Mother in August 2009 when she asked for an inter-district permit for Student to Lane, where Mother worked nearby.

6. Mother claimed that she told Mr. Otto about Student's alleged learning disabilities at their initial meeting, including that Student had ADHD. She alleged that she showed him a copy of a Discharge Summary from Intercommunity Child Guidance Center, which provided counseling services to Student in 2008. The counseling discharge document refers to a history of ADHD and Adderall XR prescription.<sup>1</sup> In contrast, Mr. Otto could not recall any discussion about Student's functioning, performance, or problems. Mr. Otto confidently testified that Mother did not mention anything about a possible learning disability at this first meeting. Mr. Otto noted that if Mother had said that Student had ADHD or a suspected learning disability, Mr. Otto would have referred Mother to District's permit office. The permit transfer paperwork inquired about a student having special education needs or an IEP and the local school administrator was not authorized to unilaterally grant an inter-district permit in such situations. Since there was no mention of such needs, Mr. Otto granted the inter-district permit upon Mother's completion of the paperwork. Therefore, considering the inter-district transfer process in August 2009, Mr. Otto was not informed of Student's alleged ADHD and learning disabilities at the initial meeting with Mother.

7. Student attended general education teacher Catherine Lee's third grade class at Lane Elementary. Ms. Lee testified at the hearing. Ms. Lee has worked for the District as a general education elementary school teacher for 26 years. In September 2009, Mother told Ms. Lee that she believed that Student had learning disabilities. She does not recall Mother saying that Student had ADHD. Mother claimed that Ms. Lee said that budget constraints did not permit testing for Student's learning disabilities and that the principal, Mr. Otto, said that there was no money in the budget to do assessments. At hearing, Ms. Lee credibly denied making such a statement. Ms. Lee stated that Mother did not request that Student be assessed for learning disabilities in September 2009. Ms. Lee did not discuss doing an assessment of Student with Lane Elementary principal William Otto. Ms. Lee was aware that Student suffered from asthma; Student had an inhaler available at school. Other than indicating that some of the absences may have been related to Student's asthma, Student presented no evidence as to how the asthma may have affected Student's ability to access her curriculum. Ms. Lee was unaware of any other alleged disorder.

8. Ms. Lee described Student as a sweet child who got along well with peers. Student had friends. Ms. Lee saw no pragmatic issues in Student's interactions with peers. She observed Student on the playground about 10 times over the year and Student was never alone but always playing with other students.

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<sup>1</sup> This discharge document was not admitted as evidence of Student's alleged ADHD because the counseling center did not diagnose Student and did not indicate why it identified Student as having ADHD. Student did not submit any diagnostic evidence of ADHD to the District nor at hearing.

9. Twenty-eight students attended Ms. Lee's third grade class in 2009-2010. Ms. Lee had adult volunteers and student teachers. Ms. Lee would personally talk to Student at least once a day. Student did not exhibit any challenges in appropriately using language or articulating her thoughts and feelings. Student would lose focus for non-preferred activities, while paying attention if the subject was something she enjoyed. Ms. Lee had Student sit close and Student would respond to Ms. Lee's redirection. This did not interfere with Student's ability to access her curriculum. Such loss of focus for certain activities was not unusual for third grade students.

10. Mr. Otto met with Mother on September 22, 2009. Mother had already talked to Ms. Lee. Mother said that Student was being teased by other girls, who were making fun of her clothes. Mr. Otto identified and talked to the girls, who admitted they teased Student. He reprimanded the girls with a warning. The incident did not indicate Student had difficulty in pragmatic social interaction. Student was not the problem but was the victim of another student's improper conduct. The incident did not lead Mr. Otto to suspect that Student had a learning disability.

11. Early in the school year, Student once complained to Mr. Otto that she did not have any friends. However, she developed at least six good friends. Student had never been sent to his office for discipline. Student would stop by Mr. Otto's office just to talk. One time, Mr. Otto talked to Student after she had a spat with a friend. However, soon thereafter, Mr. Otto observed that Student and the friend were playing together. Mr. Otto did not see any evidence that Student had difficulty with social interactions or making friends.

12. In November 2009, Mother spoke to Mr. Otto and said that Student had ADHD. Mr. Otto was surprised because he was unaware of Student having conduct associated with ADHD, which would have been brought to his attention. Mother said that Student had taken medication over the summer. Mr. Otto told Mother that the District does not diagnose ADHD but looks for other impairments, such as a specific learning disability. Mr. Otto asked Mother for a note from a doctor regarding ADHD or a prescription for ADHD medication. At hearing, Mother claimed that she had given Mr. Otto a copy of the guidance center discharge summary for the second time. However, this was not corroborated by Mr. Otto. Mother did not ask for an assessment but Mr. Otto offered to assist Mother in writing a request for assessment when she brought the doctor's note. Mother did not request assistance in making a request in writing. Mother did not provide any documentation from a doctor regarding the ADHD. Mr. Otto subsequently discussed Mother's belief that Student had ADHD with Mr. Lee.

13. On November 23, 2009, District received a notice of representation from a law firm stating that it represented Student. On December 1, 2009, the District received a request for Student's school records from the law firm.

14. J. Wiley Campbell testified about a December 8, 2009 parent-teacher conference. Mother requested that Mr. Campbell arrange a parent-teacher meeting because of her concern regarding a note to Student from Ms. Lee regarding Student's failure to obtain

needed signatures from Mother. Mr. Campbell works as a paralegal and IEP advocate for the Special Education Law Firm. He has a 2008 bachelor of science degree from California State University, Long Beach, in business administration and operations management. He has taken no formal coursework in the field of education. He has not taken classes nor has any training in learning disabilities or assessments. He has no experience in standardized testing and has no training or certification as a paralegal. He admitted that he has a financial interest in a favorable outcome for Student in the due process proceeding.

15. Mother, Ms. Lee, Mr. Otto, and Mr. Campbell attended the December 8, 2009 conference. Mr. Otto provided Student's report card and work samples. Student's cumulative file did not contain any other documentation or notes. Student's prior private school had not yet provided its records. There was no special education file because Student was not a special education student. Student's general education cumulative file consisted of Student's report card and the identification information on the outside of the cumulative file. Mr. Otto did not separately send the report card to Student's counsel in response to the December 1, 2009 letter. He provided the records to a representative of the law firm who was present at the meeting, within five business days of the record request.

16. Mr. Campbell reported that at the December 8, 2009 conference, Mother talked about how Student did not have friends and would not express her concerns with school staff in the classroom or on the playground. However, Ms. Lee credibly testified to the contrary that Student did have friends in the classroom and that she saw Student with friends whenever Ms. Lee observed her on the playground. Mr. Campbell also reported that Mother stated that Student was diagnosed with ADHD. However, neither Mr. Campbell nor Mother provided any medical diagnosis of ADHD at the meeting.

17. Mr. Otto reported that Student's overall performance and functioning were discussed. Ms. Lee discussed how grades were determined and reviewed Student's work. Ms. Lee talked about how Student was not completing the math assignments, but that Student was able to do her reading, with a 75 per cent comprehension level. Mother or Mr. Campbell asked if the inability to complete tasks was related to a learning disability. Both Ms. Lee and Mr. Otto responded that they considered Student to have more of a "hole" in learning mathematics. Student was primarily distracted from completing tasks that were related to math, which Student did not like.

18. Mr. Otto told Mother and Mr. Campbell about interventions being used to assist Student in her math, which included small group instruction and one-to-one support. These were general education interventions due to Student's weakness in math. Accommodations included moving Student to the front of class, because Student would sit in the back, and providing individualized attention in class, at recess, and after school. Mr. Otto noted that it was not unusual for a student to have a weakness in one particular subject – like math or language – but be strong in other subjects. This did not necessarily indicate a learning disability. Student had no indication of processing or visual challenges other than her struggle with math. Student was able to concentrate on her reading, which was an area of

strength. Student was a good reader. Mr. Campbell did not say that Student had a disability. Neither Mother nor Mr. Campbell requested that District assess Student.

19. As of the December 8, 2009 meeting, Student had been absent seven to eight times, which Mr. Otto thought excessive. Typically, a student might have eight absences for the entire year; Student had this number within three months. Mother stated that she thought the school's absence record to be incorrect. Ms. Lee double checked after the meeting and found the absence record to be accurate. Eventually, Student was referred to Manual Banelos, the assigned PSA (Pupil Services and Attendance) counselor, who was responsible for investigating excessive absences.

20. By letter dated January 13, 2010, Student's counsel requested assessment of Student to determine eligibility for special education services. Mother said that she agreed with the assertions of the letter, which claimed that Student was not near grade level in reading and showed developmental delays in using language. Mother also asserted that Student was not adept in using fine motor skills, but she did not indicate whether she told Mr. Otto or Ms. Lee. The 11-page January 13, 2010 letter listed 26 areas of suspected disability. At hearing, Student did not produce evidence to corroborate the letter's assertions.

21. Mr. Otto received a copy of Student's counsel's January 13, 2010 letter requesting an evaluation at about the time school was back in session following winter vacation. Mr. Otto understood a district's obligation to assess a student upon a written request. However, based upon an out-of-date policy and procedure manual, he erroneously believed that Student's home school district would be conducting the assessment. Mr. Otto talked to the District's due process department after receiving a copy of the assessment request. He thought that the due process department would be contacting Montebello Unified School District to commence the assessment process.

22. By letter dated January 26, 2010, Student's counsel notified the District of Mother's concern that Student was being bullied at school. At hearing, Mother stated that Student was again being picked on because she was overweight and wore glasses and that Ms. Lee or Mr. Otto would call Mother to pick Student up at school. Mother related that when Student would become anxious, she would sweat and have to use the bathroom. Student believed that she would get in trouble with Ms. Lee if Student got upset. Sometimes, according to what Mother said she was told by Ms. Lee and Mr. Otto, Student would lash out at other kids. Mother would check with Ms. Lee at least every other day to see how Student was doing. Ms. Lee would tell Mother if Student had a "bad" day. Mother's testimony regarding Student's relationships with peers was in stark contrast to the observations of Ms. Lee and Mr. Otto.

23. Mr. Otto investigated the January 2010 report of bullying. He determined that it involved the same schoolmate as the incident in the fall. Mr. Otto talked to Student, who admitted that the incident had actually happened a while back. The other student said that she had not talked to Student for months. Mr. Otto determined that the incident to which

Mother referred had actually occurred long before and was no longer an issue. Mr. Otto did not tell Mother the results, having spoken to Student.

24. When District failed to send a proposed assessment plan or prior written notice, Student filed for due process on April 20, 2010.

25. The District's legal department contacted Mr. Otto in April 2010, informing him that Student's home district was not responsible for assessing Student. Accordingly, on April 30, 2010, Mr. Otto prepared and mailed to Mother a Special Education Assessment Plan, along with a Parent's Guide to Special Education Services. The Assessment Plan was also sent home in Student's backpack.

26. Mother did not sign and return the Assessment Plan, testifying that she believed the assessment could not be completed before the end of the year and that Student's home district would not be able to use the assessment in fall 2010.

27. Mr. Otto prepared another Assessment Plan dated May 14, 2010, mailing it to Mother and sending it home in Student's backpack. On May 17, 2010, Mr. Otto again sent an Assessment Plan to mother, by certified mail. Mother never returned a signed assessment plan and, as a consequence, the District was unable to commence assessment of Student. If the assessment plan was signed, Mr. Otto would have assured the completion of the assessment process, including an IEP, before the end of the school year.

28. On May 21, 2010, Mr. Otto sent a letter to Student's counsel with copies of all records in Student's cumulative file. Since the December 8, 2009 parent-teacher meeting, Montebello Christian School had sent its file for Student. Student's file now also contained attendance reports, contact logs for absences, immunization records, an unsigned special education assessment plan, teacher assessments, correspondence, and a STAR Report. Mr. Otto explained that, although requested by Student's counsel, there were no records for: disciplinary actions, psychologist reports, IEPs, 504 plans, pre-referral or SST records, letter grades (because District used numbers), therapist reports, family histories, and transportation.

29. As of May 2010, the District's inter-district permit approval process had changed since Mr. Otto granted Mother's permit in summer 2009. The local administrator was no longer empowered to determine inter-district permit requests; instead, all requests had to go to the District's permit office. However, Mr. Otto recommended that Mother's inter-district permit request for the 2010-2011 school year be denied because of Student's excessive absences and tardies. He hoped that going to a school closer to Student's home might decrease the number of absences.

30. Generally, Mother claimed that Student's grades deteriorated over time. In reviewing Student's progress reports for the first two grading periods of third grade, Mother asserted that the grades of partially proficient supported her belief that Student was falling further behind in school. However, Student's school performance and the testimony of

Student's general education teacher and principal provided a more accurate measure of Student's performance and capabilities.

31. Ms. Lee reviewed Student's progress report for the first and second of the three grading periods for third grade. Student received a score of "2," which signified "Inconsistent," in both reporting periods in Writing and Listening. However, Student demonstrated progress in both disciplines since the grading reflected increasingly difficult State standards. Ms. Lee stated that Student's Writing was borderline "2" and approaching proficiency. If Student had not been making progress, her grades would have decreased. Student scored "3," or "Consistent," for both grading periods in Reading and Speaking, also demonstrating academic progress in both subjects. During the school year, Student was reading and comprehending at grade level. By the end of the year, Student was reading and comprehending at fourth grade level.

32. Student's primary struggle was in Mathematics, in which she scored a "1," or "Poor," in the first grading period, and a "2" in the second grading period. Student did not like math. Student had low test scores and difficulties in understanding and retaining new concepts in mathematics, unlike reading or writing. Ms. Lee believed that Student's excessive absences significantly contributed to Student's ability to progress in mathematics. Lane Elementary used the Envisions math curriculum. Students study concepts in a set time and set order. Missing days affected Student's ability to learn new concepts and could have affected test scores. Student would have difficulty doing her math homework because she was not in class to learn the new concepts. Mother acknowledged that Student had numerous absences during third grade, stating that she always provided an absence note, either from a doctor or her. Mother, Ms. Lee, Mr. Otto, and attendance documentation all addressed the number of Student's absences and tardies during the 2009-2010 school year. The evidence established that Student was absent more than 20 times, an excessive amount. Despite these absences, by the end of the year, Student was approaching third grade standards for math proficiency.

33. Ms. Lee did not believe that Student had ADHD or a learning disability. Student was able to learn new concepts with small group instruction and remediation, progressing in language arts and making progress in all subjects. Having difficulty in a subject was different from having a learning disability. Student's ability to progress in math and in other subjects indicated that math was a weak subject for Student as opposed to having a learning disability.

34. Mr. Otto did not believe that Student had a learning disability. At hearing, Mr. Otto expressed his opinion that the absences were Student's primary problem in maintaining her math studies. Math requires acquisition of skills, built upon one another. When a student misses math lessons, that student must be taught what was missed in order to move on. Student was capable of learning; she was bright, articulate, and kind. Mr. Otto also stated that, based upon his observations of Student, and his experience, he does not believe

that she has ADHD. However, ADHD requires a medical diagnosis and no such diagnosis was provided by Mother.

35. Mother listed a number of special education services which she believed her daughter would have received had the District timely assessed Student. These included: special education resource; one-to-one assistance with reading; a behavioral plan; speech and language services; psychological counseling; and social interaction. As a result of not receiving such services, Mother believed that Student was deprived access to her curriculum.

## LEGAL CONCLUSIONS

1. As the petitioning party, Student had the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Under the Individuals with Disabilities Education Act (IDEA) and State law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(a); 34 C.F.R. § 300.101; Ed. Code, § 56000.) A FAPE means special education and related services that are available to the special needs pupil at no charge to the parents, that meet state educational standards, and that conform to the child's IEP. (20 U.S.C. § 1401(a)(9); 34 C.F.R. § 300.17 (2006); 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(a)(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031, subd. (a).) "Related services" are developmental, corrective and supportive services that are required to assist a special needs pupil to benefit from special education. (20 U.S.C. § 1401(a)(26); 34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) Related services include transportation, developmental, corrective and supportive services as may be required to assist the pupil in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).) Specially designed instruction also includes accommodations that address a child's unique needs and that ensure access to the general curriculum. (34 C.F.R. § 300.39(b)(3) (2006).)

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 United States Supreme Court addressed the level of instruction and services that must be provided to a pupil with a disability to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide the student with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide a "basic floor of opportunity" that consists of access to specialized instructional and related services that are individually designed to provide educational benefit to the student. (*Id.* at p.

201; *J.L. v. Mercer Island School District* (9th Cir. 2009) 575 F.3d 1025, 1034,1037-1038 & fn. 10 (*Mercer Island*).

4. Before any action is taken with respect to the initial placement of an individual with exceptional needs in special education instruction, an individual assessment of the pupil's educational needs shall be conducted in all areas of related and suspected disabilities. (20 U.S.C. §1414(a)(1)(A); Ed Code §56320, subd. (f); 34 C.F.R. § 300.301(a).)

5. In order to be eligible for special education services, a student must have one or more specific disabilities. (20 U.S.C. §1401(3)(A); 34 C.F.R. §300.7(a)(1); Ed. Code, §56026, subd. (a); Cal. Code Regs., tit., 5, §3030.) For purposes of special education eligibility, the term "child with a disability" means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, require instruction, services, or both, which cannot be provided with modification of the regular school program. (20 U.S.C. §1402(3)(A)(ii); 34 C.F.R. §300.7(a).) Similarly, California law defines an "individual with exceptional needs" as a student who is identified by an IEP team as "a child with a disability" pursuant to 20 U.S.C. section 1402(3)(A)(ii), and who requires special education because of his or her disability. (Cal. Ed. Code §56026, subd. (a), (b).) California Code of Regulations, title 5, section 3030 includes a list of conditions, referred to in the regulation as impairments, that may qualify a pupil as an individual with exceptional needs and thereby entitle the pupil to special education if required by "the degree of the pupil's impairment."

#### *Issue 1: "Child Find"*

6. Student's first issue is that, for the school year of 2009-2010, District failed to meet its "child find" obligation because it did not assess Student even though it had reason to suspect that Student had a disability and that special education services may be needed to address that disability. Student contends that the District should have referred Student for evaluation because of Mother's assertions regarding Student's ADHD, suspected learning disabilities, poor academic performance, poor peer relations, and inappropriate behavior.

7. The IDEA and State law impose upon each school district the duty to actively and systematically identify, locate, and assess all children with disabilities or exceptional needs who require special education and related services, including children with disabilities who may be homeless or migrant, wards of the state, or not enrolled in public school program. (20 U.S.C. §1412(a)(3); 34 C.F.R. §300.125; Ed. Code §§56300, 56301.) This statutory obligation of a school district to identify, locate, and assess children with disabilities is often referred to as the "child find" obligation and applies also to children who are suspected of having a disability and in need of special education even though they may be advancing from grade level to grade level. (34 C.F.R. §300.125(a)(2).) A state must

ensure that these “child find” duties are implemented by public agencies throughout its jurisdiction as part of its general obligation to ensure that a FAPE is available to all children with disabilities who reside within the state. (34 C.F.R. §300.300(a)(2).)

8. “The purpose of the child-find evaluation is to provide access to special education.” (*Fitzgerald v. Camdenton R-III School District* (8th Cir. 2006) 439 F.3d 773, 776.) A district’s child find obligation toward a specific child is triggered when there is reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Rae* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

9. A student “whose educational performance is adversely affected by a suspected or diagnosed attention deficit disorder or attention deficit hyperactivity disorder” and who meets the eligibility criteria for specific learning disability or other health impairment under Education Code section 56377 and California Code of Regulations, tit. 5, section 3030, subdivisions (f) and (j), is entitled to special education and related services. (Ed. Code, § 56339, subd. (a).)

10. The District presented substantial and persuasive evidence that Student’s academic performance, peer relations, and classroom behavior were consistent with an average third grade general education student, who struggles in mathematics. Third grade teacher Ms. Lee believably testified, reviewing Student’s report card, that Student did not have a suspected learning disability. She testified that Student’s performance indicated the opposite, since Student was able to learn new concepts with small group instruction and remediation, progressing in language arts and making progress in all subjects. Student struggled in math, but progressed throughout the year. Her ability to progress in other subjects indicated that Student was weak in a subject as opposed to a learning disability. Mr. Otto expressed a similar professional opinion regarding Student’s academic performance, noting that Student’s struggles with math were in contrast to her success in reading and writing.

11. Both Ms. Lee and Mr. Otto also testified that Student’s excessive absences contributed to her struggles in mathematics. The math curriculum required concept acquisition, which was especially vulnerable to missed days, since each new math concept was based upon mastery of the last math concept. Student therefore had conceptual “holes” in her mathematical comprehension, causing her further frustration in a disfavored subject. Neither Ms. Lee nor Mr. Otto believed that Student’s struggles with math indicated a suspected learning disability, especially since Student was able to progress in this subject and in her other subjects despite the many absences.

12. Student’s assertion that her behavior and peer relationships should have indicated a need for assessment was also unsupported by evidence. Ms. Lee and Mr. Otto both testified that Student had a group of friends. Student played with others on the

playground. Neither Ms. Lee nor Mr. Otto observed any abnormal or unusual peer relational difficulties for a third grader. Student's classroom behavior, including her inattention with non-preferred subjects, was not out of character for a third grade student. Student was redirected and remediated with the use of general education interventions.

13. Mother's testimony that Student was bullied on two occasions did not support the contention that Student's behavior indicated a need for a special education assessment. Mother's testimony was based upon discussions with her daughter. Mr. Otto investigated both alleged bullying incidences. The first incident in the fall was traced to a schoolmate who was reprimanded by the principal Mr. Otto. The second incident reported by Mother and counsel in January 2010 was determined to have occurred long before reported by Student. Neither of these incidents was caused by Student. The schoolmate, not Student, had been the problem. Neither incident indicated that Student had a suspected learning disability or was in need of evaluation.

14. Student's counsel heavily relied upon the assertion that Student was diagnosed with ADHD. ADHD was the lynchpin upon which Student made the argument that District was obligated to assess before the January 2010 written referral. Yet, Student's counsel did not present admissible documentary or testimonial evidence establishing that Student was diagnosed with ADHD. Further, Student did not meet her burden of proof that District should have suspected that Student had ADHD or a suspected learning disability.

15. Mother claimed to have informed Mr. Otto at their first meeting in summer 2009 that Student had ADHD. Mr. Otto testified that Mother made no mention of Student allegedly having ADHD or any learning disability, at their first meeting. Mother was seeking an inter-district permit which Mr. Otto was then empowered to grant as long as Student did not have any learning disability or IEP. If Mother had said that Student had ADHD or a suspected learning disability, Mr. Otto would have been required to refer Mother to District's permit office. The permit paperwork inquired about a student having special education needs or an IEP and a local school administrator, like Mr. Otto, was not authorized to grant an inter-district permit in such situations. Since there was no mention of such needs, Mr. Otto granted the inter-district permit. Accordingly, Mr. Otto was not informed of Mother's beliefs that Student had ADHD or other learning disabilities in summer 2009.

16. Mr. Otto credibly testified that he first learned of Mother's assertion that Student had ADHD at a November 2009 meeting with Mother. Though Mother did not ask, he thought that Mother was saying that the ADHD should be looked at by the District. He indicated that the District cannot diagnose ADHD but it can assess for learning disabilities.

17. Student did not prove her educational performance was affected by a suspected or diagnosed ADHD. Based upon Student's academic performance, classroom demeanor, playground activity, and peer relationships, Mr. Otto stated that he did not believe that Student suffered from ADHD nor did he have any information which would cause him to suspect that Student might have ADHD. Ms. Lee similarly testified that she did not have

reason to suspect that Student suffered from ADHD and that Ms. Lee did not believe that Student had ADHD.

18. The District did not violate its “child find” obligation regarding possible special education eligibility based on ADHD or another suspected learning disability during any relevant time period. Student did not present evidence that Student’s school behaviors, peer relationships, failure to do homework, struggles with math, or academic performance were related to the alleged ADHD or any other learning disability. The only evidence presented by Student’s counsel was Mother’s beliefs. Though these observations certainly demonstrated sincere parental concern, the Mother’s beliefs regarding her daughter’s special educational needs were not supported by evidence. Substantial evidence supported District’s view that Student was an average pupil who struggled with math, which was adequately addressed by general education accommodations. Further, Student’s behavior was consistent with a third grader, including the development and maintenance of typical peer relationships. District was not required to refer Student for evaluation because it did not have reason to suspect that Student had a disability or reason to suspect that special education services may be needed to address that disability. The documentary evidence and professional opinion presented at hearing demonstrated that Student was not suspected of being in need of assessment for special education services.

19. Student has not met the burden of proving that District failed to meet its “child find” obligations for the 2009-2010 school year. (Legal Conclusions 12-16, 20-21; Factual Findings 6-9, 11-14, 21, 24-28, 32-34.)

*Issue 2: Failing to Assess Upon Written Referral*

20. Student contends that she was denied a FAPE because the District did not evaluate her in response to Mother’s oral requests and the January 13, 2010 letter from Student’s counsel.

21. A referral for a special education assessment means any written request for assessment to identify an individual with exceptional needs made by a parent, teacher, or service provider of the individual. (Ed. Code §56029, Subd. (a) and (b).) All referrals for special education and related services shall initiate the assessment process and shall be documented; when a verbal referral is made, staff of the school district or special education local plan area shall offer assistance to the person in making a request in writing and shall assist the individual if the individual requests such assistance. (Cal. Code Regs. §3021, subd. (a).) This documentation shall not delay the timelines for completing the assessment plan or assessment. (Cal. Code Regs. §3021, subd. (b).)

22. When a verbal referral for special education and related services is made, school district staff shall offer to assist the individual in making a request in writing and, if the individual requests such assistance, shall assist the individual. (Cal. Code Regs. §3021, subd. (a).)

23. In response to and within 15 days of the written referral,<sup>2</sup> the local educational agency (LEA), such as the District, shall give the parent a written, proposed assessment plan which explains, in language easily understood by the general public, the types of assessments to be conducted. (Ed. Code §56321, subs. (a) and (b).) The parent or guardian then has 15 days to consent in writing to the proposed assessment. (Ed. Code §56321, subd. (c).)

24. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

25. In matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural violations impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley, supra*, 458 U.S. at 206-07; see also *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1482; *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877.)

26. Mother did not request an assessment when she first met with Mr. Otto in August 2009. Mother did not ask for an assessment when she spoke to Ms. Lee in September 2009. At the November 2009 meeting, Mr. Otto asked Mother to bring in a doctor's note regarding the alleged ADHD and offered to assist Mother to write an assessment referral using the ADHD diagnosis. Mother did not thereafter ask for assistance in writing a referral nor did she bring a doctor's note regarding the alleged ADHD diagnosis. A school district's staff is required to offer assistance in making a written request for assessment and shall assist the individual if the individual requests such assistance. Here, Mr. Otto offered to assist but Mother did not request assistance or otherwise accept Mr. Otto's offer. Mother did not request an assessment.

27. Neither Mother nor Mr. Campbell testified that an assessment was requested at the December 2009 parent-teacher conference. Neither Mother nor Student's counsel requested an assessment before the January 2010 written referral.

28. District failed to follow procedure in response to the January 2010 written request to evaluate in that it did not provide an assessment plan within 15 days of the request. However, in order to rise to the level of a FAPE deprivation, Student must show that the procedural violation: (1) caused a deprivation of educational benefits, (2) significantly impeded Mother's opportunity to participate in the decision-making process regarding the provision of a FAPE, or (3) impeded Student's right to a FAPE. Here, Student's counsel has failed to demonstrate how Student was harmed by the procedural violation.

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<sup>2</sup> Exceptions to this timeline are inapplicable herein.

29. To be eligible for a FAPE, a student must be found to have one or more specific disabilities as enumerated by State and federal statute. Student did not present admissible or persuasive evidence that Student would be eligible for any of the listed learning disabilities and, therefore, entitled to a FAPE. Similar to the “child find” analysis, District did not observe nor was otherwise aware of any suspected learning disability. Ms. Lee and Mr. Otto both affirmatively testified to their professional belief that Student does not have a learning disability.

30. Student did not put on evidence of any learning disabilities. Student’s counsel did not present an independent psycho-educational evaluation, indicating that Student was in need of special education services. Student’s counsel did not submit any assessment or evaluation of Student in an area of claimed need. Student did not produce an expert witness, attesting to Student having a learning disability which required special education services. Student did not identify academic performance indicative of a learning disability. Student’s peer relationships were unremarkable and typical of a third grader.

31. Mother’s anecdotal statements and observations were uncorroborated and effectively undermined by District’s testimony and documentation. The District presented credible and convincing evidence that Student was an average third grader who struggled with math, which was appropriately addressed by general education accommodations.

32. Since there was no indication that Student would be entitled to a FAPE, District’s procedural violation could not have impeded the right of the child to a FAPE or impeded Mother’s opportunity to participate in the decision-making process regarding the provision of a FAPE. Also, the District’s procedural violation could not have deprived Student of educational benefit since the evidence indicates that Student was progressing in the general education curriculum.

33. Student has failed to demonstrate that District denied Student a FAPE by not assessing Student in response to Mother’s request or the written referral of Student’s counsel. (Legal Conclusions 29-30, 34; Factual Findings 7-11, 19-20, 22, 32-34.)

### *Issue 3: Educational Records*

34. Student contends that District failed to timely produce Student’s records when requested. As a result, Mother’s ability to provide evidence and proof to the District of Student’s history of severe asthma attacks, as reflected by current and past school records, was seriously impeded by the District’s failure to provide such records. Student allegedly suffered the loss of educational opportunity and the procedural error amounted to a denial of FAPE. Student did not, however, prove that District failed to timely produce Student’s records and, even so, how such procedural violation amounted to a denial of FAPE.

35. To guarantee parents the ability to make informed decisions about their child’s education, the IDEA grants parents of a child with a disability the right to examine all

relevant records relating to their child's "identification, evaluation and educational placement." (20 U.S.C. §1415(b)(1).) Parents may also request copies of records if failure to provide such copies would effectively prevent parents from exercising their right to inspect and review the records. (See 34 C.F.R. §300.613(b)(2) (2006).) In addition to the right and opportunity to examine school records, all parents have the right to receive copies of all school records within five business days after such request is made by the parent. (Ed. Code §56504.)

36. Student's counsel requested that District produce Student's records in a December 1, 2010 letter. On December 8, 2009, Mr. Otto, Ms. Lee, Mother, and Mr. Campbell participated in a parent-teacher conference. Mr. Otto provided Mother and Mr. Campbell with Student's report card, which was the only document in Student's cumulative general education file. Student's former private school had yet to forward Student's records. Student did not have a special education file. Therefore, within five business days of the request, Mr. Otto had provided the records. The District was therefore in compliance with State and federal law.

37. Additionally, Mr. Otto sent a May 21, 2010 letter to Student's counsel with copies of all records in Student's cumulative file. Since the December 8, 2010 parent-teacher meeting, Montebello Christian School had sent its file on Student. Student's file now also contained attendance reports, contact logs for absences, immunization, unsigned special education plan, teacher assessments, correspondence, and a STAR Report. The testimony indicated that Student's cumulative file did not contain these additional documents in December 2009.

38. At the time of hearing, Student's counsel had been in possession of all documents then in Student's cumulative file for more than 30 days. Student put on no evidence of how these records were somehow insufficient, impeded Mothers ability to prove up Student's severe asthma attacks, or otherwise interfered with hearing preparation. Also, Student presented no evidence as to how the asthma may have affected Student's ability to access and benefit from her curriculum. Therefore, even if District had failed to timely provide Student's records, Student has failed to demonstrate that such procedural violation amounted to a denial of FAPE by depriving Student of educational opportunity.

39. Student has not met the burden of proving that District denied Student a FAPE because it did not timely produce Student's records. (Legal Conclusions 38, 40; Factual Findings 15-17.)

## ORDER

All of Student's claims for relief are denied.

