

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

NEW HAVEN UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2013010236

DECISION

Administrative Law Judge (ALJ) Theresa Ravandi, from the Office of Administrative Hearings (OAH), State of California, heard this matter in Union City, California, on May 29 through 31, 2013.

Attorney Nicole Hodge Amey represented Parent and Student (Student). Parent attended the first two days of hearing through the mid-afternoon, and her advocate Jolene Mahoney Beaver attended the morning of the first day of hearing. Parent authorized her attorney to continue with the hearing in her absence. Student did not appear.

Attorney Melanie Seymour represented the New Haven Unified School District (District). Sarah Kappler, the District's director of special services, was present throughout the hearing.

On January 8, 2013, Student filed a request for a due process hearing (complaint) naming the District. On February 14, 2013, OAH granted the parties' joint request for a continuance. At hearing, the ALJ received oral and documentary evidence. The matter was continued until June 20, 2013, to allow the parties an opportunity to submit written closing briefs. The parties timely submitted their closing briefs on June 20, 2013, the record was closed and the matter submitted for decision.¹

¹ To maintain a clear record, the closing briefs have been marked as exhibits. Student's closing brief has been marked S-17, and the District's brief has been marked D-23.

ISSUES²

Issue One: From December 2008³ through March 2011, did the District fail to provide Student with a free appropriate public education (FAPE) by failing to provide Parent with a sign language interpreter for Student's individualized education program (IEP) team meetings, which violated Parent's procedural rights since it prevented Parent from meaningfully participating in the educational decision-making process concerning Student?⁴

Issue Two: From January 8, 2011,⁵ to January 8, 2013, did the District fail to assess Student in all areas of suspected disability by failing to conduct a timely triennial assessment and functional behavior assessment or functional analysis assessment?⁶

Issue Three: From January 8, 2011, to January 8, 2013, did the District deny Student a FAPE by failing to accurately measure Student's present levels of performance, and failing to offer appropriate and measurable goals?

² The issues have been reordered and renumbered for clarity. No substantive changes were made.

³ Student's issue after the prehearing conference (PHC) asserted liability starting in January of 2008. This is considered a typographical error as Student's initial IEP team meeting was not until December 2008. As analyzed below, Student contends that an exception to the statute of limitations applies.

⁴ For the first time in his closing brief, Student now asserts that this Parental participation claim extends through January 8, 2013. In his complaint Student clearly limited this claim to March 2011, the PHC order framed this issue accordingly, and Student did not object. Student's issue remains as stated. However, since the District presented a defense to Student's claim through his exit from special education in February of 2013, factual findings are made regarding Parent's participation in IEP team meetings through January 8, 2013.

⁵ At the start of the hearing, Student clarified that Issues Two and Three assert liability beginning on January 8, 2011, the date two years prior to his filing for due process.

⁶ In his complaint, Student identified Issues Two and Three as extending through the "present" and "through the present school year." At the PHC, ALJ Peter Paul Castillo stated on the record that Student's claims extended through the time of his exit from special education in February 2013, although the Order Following the PHC does not specify a time parameter. Given the rejection of Student's attempt to file an amended complaint alleging violations regarding the District's final assessments of Student and his exit from special education, Student's objections at hearing to the introduction of any evidence that post-dated the filing of his original complaint, and his closing brief which specifically limits Issue Three to January 8, 2013, Student's issues are hereby limited to the date he filed his complaint.

PROPOSED RESOLUTIONS

Student seeks, as compensatory education, 10 hours of organizational skills tutoring and 20 hours of math support; staff training on ensuring parental understanding of procedural safeguards; and the provision of two American Sign Language (ASL) interpreters and an advocate to explain procedural safeguards to Parent, the purpose of assessments, and the differences between a section 504 plan and an IEP, and to review with Parent all of Student's IEP's.⁷

CONTENTIONS OF THE PARTIES

Student contends that the District failed to provide Parent, who is deaf, with skilled ASL interpreters at IEP team meetings between December 2008 and March 2011. Student maintains that this failure prevented Parent from understanding and participating in the meetings and therefore knowing or having reason to know of Student's claims, so that the statute of limitations did not begin to run at those meetings. Student further alleges the shortcomings in interpreter services, and the District's failure to ensure Parent could read the notice of procedural safeguards, deprived Parent of information regarding her parental rights, thus bringing his claim within an exception to the two-year statute of limitations and permitting consideration of it starting in December 2008.

Student also contends that during 2011 the District failed to conduct a required behavior assessment and his triennial assessment. Student alleges that the District failed to timely obtain Parent's informed consent to waive the triennial evaluation and violated Parent's participatory rights by predetermining that additional data was not required. Finally, Student claims that the District did not accurately measure Student's present levels of performance and, therefore, did not develop appropriate, measurable goals in all areas of need, namely academics, homework completion, and social/emotional needs.

The District asserts that it provided Parent the assistance of a certified ASL interpreter at each IEP team meeting from Student's initial meeting in December 2008 through his exit from special education in February 2013. Furthermore, the District contends that it provided Parent a notice of safeguards each time it was required, had no reason to suspect that she could not read the notices, informed her of her rights at each meeting, and that Parent actively participated in all the meetings. The District maintains that Parent agreed to cancel Student's behavior assessment in February 2011, and provided her informed written consent to waive triennial testing at the October 19, 2011 IEP team meeting. The District further alleges that it timely presented the testing waiver to Parent at the triennial IEP team meeting because Student's triennial assessment was not due until December 2011, leaving sufficient time to complete assessments if Parent refused to sign the waiver. Finally, the District

⁷ Student is no longer pursuing independent assessments, the provision of ASL interpreters at IEP team meetings, or an educational placement.

asserts that it accurately measured Student's present levels of performance, determined his needs, and devised appropriate, measurable goals.

FACTUAL FINDINGS

Background and Jurisdiction

1. Student is 13 years old and resides with his Parent within the District boundaries. Parent has a hearing impairment and requires ASL interpreter services at IEP team meetings. The District found Student eligible for special education under the category of emotional disturbance on December 3, 2008. Student exited special education on February 25, 2013, upon District recommendation and with Parent's consent.⁸ At the time of hearing, Student attended seventh grade at Cesar Chavez Middle School (Cesar Chavez) under a Section 504 plan.⁹

2. By all accounts, Student is intelligent and academically capable. At his last annual IEP team meeting in October 2012, his teachers reported that he excelled in reading and drawing, had excellent penmanship, was focused, driven and willing to accept feedback to improve his work, worked very hard, had excellent school attendance, and kept his supplies and work organized.

Statute of Limitations: May Student's Participation Claim be Considered Starting in 2008?

3. In general, any 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. Exceptions to the statute of limitations exist when a parent was prevented from filing a request for due process due to: (1) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or (2) the local educational agency's act of withholding information from the parent that it was required to provide.

4. The District contends that any claim arising prior to January 8, 2011, is time-barred due to the two-year statute of limitations.¹⁰ Student claims that the statute of

⁸ Whether Student was appropriately exited from special education was not at issue in this hearing and not determined by this Decision.

⁹ A 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to students with physical or mental impairments that substantially limit a major life activity such as learning.

¹⁰ Student filed his original complaint on January 8, 2013.

limitations was tolled because of the District's failure to provide Parent with skilled ASL interpreters or adequate notice of her rights during IEP team meetings prior to January 2011.

Provision of Certified ASL Interpreters

5. The law requires the District to provide an ASL interpreter to ensure that Parent understands the IEP team meetings. The District convened an IEP team meeting for Student at his initial eligibility meeting in December 2008, and thereafter on February 3 and May 7, 2009; November 15, and December 13 and 17, 2010; and on March 3, 2011.¹¹ The evidence showed that an ASL interpreter signed each meeting attendance sheet as a participant and that the District never held an IEP team meeting for Student without a certified ASL interpreter interpreting for Parent.¹²

6. The District contracted exclusively with agencies that guaranteed the provision of certified interpreters and acted reasonably by relying upon the interpreter agencies to provide qualified interpreters.¹³ The District also reasonably relied upon Parent to inform it of any complaints about the interpreter services she received. Parent had no complaints about the interpreters who attended the December 2008 and February 2009 IEP team meetings, and she understood the discussions at the May 2009 and November and December 2010 IEP team meetings based upon her participation in them.

7. Parent informed the District in December 2010 of a concern with the ASL interpreter at the November 2010 IEP team meeting. However, the District provided a certified interpreter at that meeting. The District also offered Parent an opportunity to discuss any misunderstandings about the November 2010 meeting during the December 13, 2010 IEP team meeting, with a different interpreter present, and Parent did so. She informed the District that the prior interpreter was not effective because when Parent received the November 2010 IEP document, its description of the meeting was different than what she believed had occurred.

8. However, at hearing, Parent could not identify any discrepancy between the November 2010 team discussions and the IEP document. Parent testified that she understood the November 2010 annual meeting, and the evidence showed she participated in the team discussions. Carrie Igondjo, a program specialist with the District at that time, reviewed the

¹¹ Although Student was due for an annual IEP team meeting on or about December 2009, neither party introduced any evidence regarding this meeting.

¹² School psychologist Thora Cahill attended the May 2009 IEP team meeting. At hearing, she credibly identified the signature of ASL interpreter "Vince," who did not identify himself by title on the participant sign-in sheet.

¹³ Since at least July 2012, the District contracts with Partners in Communication for certified ASL interpreters.

signature page of the November 2010 IEP with Parent and her right to withhold consent; and Parent consented to the IEP. Parent may have later changed her mind, but the evidence did not establish that she was unable to understand the November 2010 meeting because of an unqualified interpreter.¹⁴ At the December 13, 2010 meeting, the District encouraged Parent to let it know right away of any complaint about interpreters so it could ensure she understood the meetings.

9. The ASL interpreter arrived late to an IEP team meeting on December 17, 2010. With Parent's permission, Parent and Carol Williams, the director of special services at that time, exchanged written notes until the interpreter arrived. Kristin Peterson, a District behavior analyst, attended this meeting and recalled that the meeting did not start until the interpreter arrived. Once the interpreter arrived, she translated the notes and interpreted the discussion during the IEP team meeting. Parent understood the December 2010 IEP team proceedings.

10. Parent now argues generally that she did not understand many of the IEP team meetings, but her inconsistent and unclear testimony regarding interpreter services rendered her testimony unpersuasive. Initially she testified she attended IEP team meetings without any ASL interpreter present, and then acknowledged that the District provided interpreters but she claimed they were not skilled. Parent never explained how the interpreters were unskilled; rather, she shared that she preferred to work with the same interpreter. Finally, Parent testified that when the District provided two interpreters, only one would be skilled. She stated that after the IEP team meetings, she would complain to the District, with the assistance of the skilled interpreter. However, this testimony was uncorroborated and, if credited, would show that the first time she received ineffective interpreter services was not until the October 2012 IEP team meeting, the first meeting convened with two interpreters present. Parent's testimony that she could not understand the IEP team meetings was unpersuasive especially in the absence of a contemporaneous complaint, and rebutted by evidence of her understanding and active participation at each meeting.

11. Student also contends that Parent either required two ASL interpreters at each IEP meeting due to interpreter fatigue, or that breaks during the meetings should have been taken so that one interpreter could effectively interpret. However, Student introduced no evidence of any ASL interpreter standards in this regard, whether the interpreters required or requested breaks, or how the provision of only one interpreter prevented Parent from understanding and participating in the meetings. It was up to the contracted agency how

¹⁴ Ms. Igondjo has a bachelor's of science in speech pathology and audiology and a master's degree in special education. She holds a multi-subject and special education teaching credentials as well as an autism authorization. She began to work for the District in the year 2000 as an inclusion specialist, after teaching general education for many years. In 2007, she became a program specialist for special services until she was promoted to her current position as the coordinator in 2012.

many interpreters to provide in response to the District's requests. Neither party introduced evidence of why the agency began to supply two interpreters as of October 2012.

12. Based upon the evidence summarized above, for each IEP team meeting from December 2008 through March 2011, Parent received the services of a certified ASL interpreter. Student failed to prove that the interpreters were not qualified or that Parent did not understand the meetings. The District met its obligation to take necessary actions to ensure Parent understood the proceedings.

Provision of Procedural Safeguards through January 8, 2011

13. Federal and state special education law require that the District provide Parent with a written notice of her procedural safeguards at specified times, including upon the initial referral of Student for special education services, as part of any assessment, and then annually thereafter. The District must also remind Parent of her rights at each IEP team meeting. There is no requirement that District staff explain the notice of procedural safeguards to Parent absent an affirmative request.

14. Parent furnished contradictory testimony regarding her receipt of procedural safeguards, rendering her testimony unconvincing. Initially she testified that the District never gave her a notice of procedural safeguards. Later, she admitted the District gave her several copies over the years and further explained to her the nature of the notice with the assistance of an ASL interpreter. She then stated that the District would simply hand her the notice of rights and tell her to sign that she received and understood it, and she would comply. The credible testimony of District witnesses rebutted Parent's testimony in this regard.

15. Ms. Cahill and Ms. Igondjo persuasively testified that it is the District's practice to ensure that Parent receives notice of her rights at every IEP team meeting, by providing her a written notice at each annual meeting or reminding her of her rights at meetings between annual meetings and offering her an additional copy. Additionally, Ms. Cahill provided Parent with a written notice of rights when she gave Parent the initial assessment plan.¹⁵ The evidence thus showed that the District provided Parent a notice of procedural safeguards at every IEP team meeting from December 2008 through January 8, 2011, aside from the interim May 2009 and December 13, 2010 meetings, in compliance with the annual requirement. Student did not rebut the District's evidence that it reminded Parent of her rights at the interim IEP team meetings and offered an additional copy. It is the District's standard practice to explain to the parent the nature of the notice of rights and to invite her to ask any questions. The District proved that it followed this procedure at Student's IEP team meetings.

¹⁵ Ms. Cahill is a licensed educational psychologist and a credential school psychologist. She received a master's degree and doctorate in developmental psychology and has worked for the District as a school psychologist for over 25 years.

16. It is the District's regular practice to have an IEP team member explain to the parent each section of the signature page of an IEP so that she understands what each section means, including the section acknowledging receipt of procedural safeguards. Ms. Cahill reviewed the February 2009 IEP document page by page with Parent, including the signature page. Parent confirmed that at this meeting she received notice of her parental rights and signed the acknowledgement of receipt. Similarly, Ms. Igondjo reviewed in detail the signature page for the November 15, 2010 IEP with Parent, who checked the box that she received a copy of the procedural safeguards. Ms. Igondjo had no doubt that Parent understood what she was signing.

17. District staff never read the notice of procedural safeguards to Parent nor asked the interpreter to do so. Student argues that Parent's understanding of written English is incomplete. Parent testified that writing and reading are hard for her, particularly cursive.¹⁶ Student contends that the District should have read the procedural safeguards aloud to Parent. However, Parent did not allege that English was not her native language, and the evidence showed that she is able to read and understand the written English language. Parent's own testimony established that she read the notice of procedural safeguards and thought she understood it.¹⁷ Student did not prove that the District was required to provide Parent with her rights by reading aloud the notice of safeguards.

18. Many District staff members effectively communicated with Parent through written emails. Seth Horwitt, Student's fifth grade teacher at Kitayama Elementary School (Kitayama), often had weekly email exchanges with Parent and he never questioned her ability to understand his written communications. He described their written exchanges as open, clear and effective. Likewise, School Psychologist Mike Piette communicated with Parent several times through email, never had any concerns with her ability to understand, and described Parent as "very communicative" in her written correspondence.¹⁸ Ms. Igondjo's testimony established that a deaf or hard of hearing individual's ability to read and

¹⁶ Parent's testimony that she needed help understanding an assessment plan, and could only read simple sentences did not, under the facts of this case, establish that Parent's native language or mode of communication was not a written language, triggering the duties under title 34 of the Code of Federal Regulations, section 300.503 (c)(2).

¹⁷ At hearing, Parent understood and responded to questions about procedural safeguards and also used this term during her testimony. Despite her apparent confusion by the written term "procedural safeguards" when referred to the IEP signature page, Parent clearly understood and acknowledged receipt of parental rights.

¹⁸ Mr. Piette received a master's degree in counseling as well as his school psychology credential from California State University, East Bay. He is a licensed educational psychologist and credentialed school psychologist and is board certified by the American Board of School Neuropsychology, a peer review board. He has served as a school psychologist for a total of nine years, six with the District.

write is unique to each individual, based upon his or her education and exposure. She was not aware that Parent had any challenge with written communication and witnessed Parent read and write notes back and forth to Ms. Williams.

19. Parent never requested that the notice of rights be read to her, and Student did not establish that the District had a duty to ask Parent about her reading ability. The law does not require the District to subjectively ascertain a parent's reading and comprehension abilities. The District was concerned with offending Parent by inquiring about her reading ability, but if Parent had requested that staff read the procedural safeguards to her, they would have done so.

20. The District provided Parent her notice of procedural safeguards in excess of what was required by law and had no reason to suspect that she could not read the written notice of rights. District team members asked Parent to let them know if she had any questions about her rights and, as with all parents, relied on her to notify them of any concerns. Parent never informed the District that she did not understand, or had a question about, her rights.

Parent's Ability to Understand the IEP Team Meetings

21. The evidence showed that Parent understood the discussions at each IEP team meeting from December 2008 through December 2010 as they occurred. She meaningfully participated by freely expressing her concerns and indicating when she was in agreement, providing updates on Student's medical diagnoses, suggesting behavior strategies and placement options, and advocating for Student's return to a general education classroom at Kitayama even when the District recommended against this. Parent was effective in her advocacy efforts as the District agreed to return Student to Kitayama at the December 17, 2010 IEP team meeting.

22. Student did not prove that the District deprived Parent of effective interpreter services or prevented her from understanding the procedural safeguards, or that she did not understand or participate in IEP team meetings. Therefore, Student failed to establish that the statute of limitations was tolled or that an exception applies. Student's claim that the District impeded Parent's participatory rights may only be considered starting in January 2011.¹⁹

¹⁹ In his complaint Student also contends that the statute of limitations should be tolled such that he may pursue a claim that the District predetermined his educational placement. Student's predetermination claim is time-barred. Parent understood the IEP team discussions regarding placement and was advocating for a change in placement by December 2010. As determined in this Decision, Student did not prove an exception to the statute of limitations.

Parent's Participation in IEP Team Meetings from January 8, 2011 to January 8, 2013

23. The District convened IEP team meetings on March 3, June 7, and October 19, 2011, and October 3, 2012. One ASL interpreter was present to assist Parent at each of the 2011 IEP team meetings and two interpreters appeared for the October 2012 meeting. As found in Factual Finding 6, these interpreters were certified. Student did not introduce any evidence that the District provided ineffective interpreter services at these meetings or that Parent did not understand the proceedings due to any shortcomings in interpreter services. The District took measures to ensure Parent's meaningful participation by providing her a notice of procedural safeguards at each of these team meetings.

24. Parent understood the IEP team discussions in 2011 and 2012 as evidenced by her knowing participation. Parent was active and engaged in the March and June 2011 team meetings, asking about Student's behaviors, providing feedback, and seeking the team's input as to the effectiveness of the medications Student took to alleviate his symptoms of attention deficit hyperactivity disorder (ADHD). Parent was also an active participant at the October 2011 and October 2012 annual IEP team meetings and questioned the team about Student's academics and behaviors.

25. Student failed to prove that the District did not provide Parent with a sign language interpreter which prevented her from meaningfully participating in all of Student's IEP team meetings from March 2011 through the date he filed his complaint on January 8, 2013. To the contrary, the evidence established that Parent understood the IEP team meetings and meaningfully participated in the decision-making process.

Need for Assessments from January 2011 through January 8, 2013

Consent for Behavior Assessments in December 2010

26. Since December 2008, the District members of Student's IEP team recognized that his sole area of need was in the area of behavior. At the February 3, 2009 IEP team meeting, the District and Parent agreed that Student would be placed in a special day class (SDC) at Cabello Elementary School due to ongoing behavior issues. By the time of the December 17, 2010 IEP team meeting, the District agreed to return Student to Kitayama. Parent consented to this IEP which called for Ms. Peterson, or a qualified replacement, to conduct a functional behavior assessment (FBA) or a functional analysis assessment (FAA), whichever was deemed appropriate, upon Student's return to Kitayama.²⁰

²⁰ There are no statutory or regulatory definitions of an FBA, which usually examines any behaviors that might interfere with a child's education. Under California law, for a student with serious behavior problems that impede his learning or that of others, a district is required to conduct an FAA, a highly prescriptive evaluation and, if warranted, develop a behavior intervention plan (BIP). (Cal. Code Regs., tit. 5, §§ 3001, subd. (g), 3052, subds. (a) & (b).)

27. There was no direct evidence that Parent signed a behavior assessment plan, and no plan was introduced into evidence. An IEP document from February 2011 references a December 17, 2010 assessment plan for the completion of an FAA.²¹ By law, the District had 60 days from the date of receipt of the signed assessment plan to complete the assessment and hold an IEP team meeting, not counting the days of school vacation during winter break. Failure to assess a student pursuant to a signed assessment plan, or to do so in timely manner, is a procedural violation.

Parent's Consent to Cancel the FAA via the February 2011 IEP Amendment

28. When making changes to a student's IEP, the parent and district may agree to develop a written document to amend the student's current IEP rather than convene a team meeting. Student contends that the District denied him a FAPE when it failed to timely conduct a behavior assessment as agreed to at the December 17, 2010 IEP team meeting. A February 2011 written amendment to Student's IEP shows that Parent and the District agreed that an FAA was unnecessary and the assessment plan was void. Parent argues her consent to the amendment was not informed.

29. Beginning in January 2011, Ms. Peterson collected data on Student's behaviors.²² Since Student's return to Kitayama, he had not engaged in any of the behaviors identified in his November 2010 behavior support plan (BSP). Ms. Peterson told Parent about Student's improved behaviors through a series of emails and once by phone with interpreter services. Ms. Peterson and Parent agreed that a behavior assessment was no longer needed. Parent does not contend otherwise, and at hearing she acknowledged that Student's behaviors improved once he transferred back to Kitayama. Ms. Peterson was in frequent contact with Parent and had no concerns about Parent understanding her email messages. Parent responded in a knowing manner to her written correspondence and was "extremely excited" to cancel the FAA.

²¹ Ms. Peterson had no recollection of providing Parent with an assessment plan. Ms. Williams sent Parent a letter dated December 7, 2010, indicating the District's willingness to conduct an FAA and directing Parent to sign the "attached" assessment plan if she wanted the District to proceed. Parent acknowledged receipt of this letter, but did not recall an attached assessment plan.

²² Ms. Peterson is a board certified behavior analyst and the clinical director of STE Consultants where she provides behavior programming and assessments for children. She earned her bachelor's degree in psychobiology from the University of California, Los Angeles and a master's in clinical psychology at Antioch University in Los Angeles, and is certified in applied behavior analysis. She worked at Autism Behavior Consultants in Torrance and then at Pacific Child and Family Association in the Bay area before serving as a District behaviorist from 2010-2013.

30. Ms. Peterson prepared the February 2011 IEP amendment page, discussed the content with Parent through emails and once by phone with an interpreter service, and mailed it to Parent and also sent it home with Student. Parent understood and agreed to the amendment. On February 1, 2011, within 60 days of the team's initial agreement to conduct a behavior assessment, Parent provided informed consent to cancel the assessment through a signed IEP amendment page. Since Parent knowingly agreed to cancel the FAA before its completion was required, Student did not meet his burden of proof that the District was required to conduct it.

Student's Continued Progress through January 8, 2013

31. In his closing brief, Student appears to abandon his contention that the District was required to conduct a behavior assessment in early 2011 and failed to do so. It was unclear at hearing whether Student contended that the District was required to conduct a behavior assessment subsequent to the February 2011 IEP amendment. In any event, Student made remarkable progress through October of 2012. The behaviors previously targeted by his November 2010 BSP, including yelling, elopement, work refusal, and bullying, did not resurface. The District and Parent agreed that Student no longer required a behavior aide or BSP. They agreed to reduce Student's counseling services, and carry forward one behavior goal to address Student's occasional "blurting out" in class. Student continued to do well academically and behaviorally and had no behavioral referrals.

32. Sometime after the October 2012 annual IEP team meeting, Student's disruptive behaviors increased and his grades declined. For several weeks in December 2012 and January 2013, Student seemed frustrated and distracted. Even so, he did not receive any disciplinary referrals. Student offered no evidence that he required a behavior assessment and did not meet his burden of proof that the District had a duty to conduct a behavior assessment from the date of the signed February 2011 amendment IEP, which canceled the FAA, through the date he filed his complaint on January 8, 2013.²³

The 2011 Triennial Assessment

33. Federal and state special education law require the periodic reassessment of a student with a disability at least every three years and not more often than once a year, unless the parent and district agree to a different assessment schedule. Student's initial eligibility assessment for special education occurred in November and December 2008. Therefore, Student was due for a triennial assessment by December 2011. Student contends that the District committed a procedural violation because it did not timely complete his triennial assessment.

²³ Parent signed an assessment plan on December 17, 2012, which called for assessments in the area of academics, intellectual development, health and social/emotional needs. This assessment plan, any modifications to it, and the resulting assessments were not at issue in this hearing.

34. As part of any reevaluation, the IEP team shall review existing data on the student, and with input from the parent, identify what if any additional data is needed to determine whether the student continues to be eligible for special education, the student's present levels of performance and educational needs, and whether any additions or modifications to his educational program are needed to enable him to meet his goals and participate in the general education curriculum. This review need not be conducted as part of an IEP team meeting. If the IEP team determines that no additional data is required to determine eligibility and educational needs, the district shall notify the parent of the determination and the reasons for it and the right of the parent to request an assessment; the district is not required to conduct an assessment unless requested by the parent.

35. The District uses a form entitled "Three Year Re-Evaluation Plan, Written Prior Notice" commonly referred to as a "testing waiver" when it recommends that a triennial assessment be waived. At Student's triennial IEP team meeting on October 19, 2011, Mr. Piette proposed that the team agree to waive Student's triennial testing on the ground that further assessment information was unnecessary. Student's physical education (P.E.) teacher, an administrator, Mr. Piette, and Parent all signed the testing waiver, indicating that additional data was not required.²⁴

36. Mr. Piette had determined that additional testing was not required to maintain Student's eligibility based upon his review of Student's prior IEP's and assessments, his interviews of Student's teachers, his email correspondence with Parent, his interview of Student (who stated he did not want to be tested), and his consultation with Kim Christian, a resource specialist with Cesar Chavez at that time. Ms. Christian had never worked with Student, but she was qualified to provide professional input on special education and Student's academic and testing needs based upon her review of Student's IEP, consultation with Mr. Piette, and her experience.²⁵ Her testimony established that Student did not require academic testing as he had no areas of academic need.

37. The District determined that although Student's behaviors improved since his initial assessments, based upon Student's history, he continued to qualify for special education and related services, and it would not be prudent to expect Student to immediately transition from having a one-to-one aide as he started middle school to exiting special education. The District concluded that the better plan was to remove the aide, monitor Student's progress, and then conduct full assessments to determine continued eligibility.

²⁴ No box was checked to indicate the assessment planning team's final determination of whether testing was required. However, there was no ambiguity that the District determined there was no need for additional testing.

²⁵ For the past 13 years, Ms. Christian was a resource specialist for the District, and regularly administered academic testing to students. This is her first year as the assistant principal of Cesar Chavez. She obtained her clear teaching credential in 1988 from the California State University in Los Angeles and a master's in educational leadership with her tier one administrative credential in 2007 from California State University, East Bay.

38. Mr. Piette explained to Parent in detail the waiver process and form. He followed his usual practice of informing Parent that if she wanted him to assess Student, he would, and advising Parent that she had a right to disagree and that it was her decision whether or not to waive testing. Parent understood and was happy with the waiver process. Parent signed a further acknowledgement on the testing waiver that she understood the waiver, had received and understood her rights and procedural safeguards, and agreed with the team's determination. Mr. Piette had no doubt that he had sufficient time to complete a triennial assessment and convene a triennial IEP team meeting by December 3, 2011, three years after Student's initial evaluations, if Parent exercised her right to request a reassessment.

39. At hearing, Parent acknowledged that she agreed to waive Student's triennial assessments. She confirmed that at the time she signed the waiver, the District explained what it was, an ASL interpreter interpreted both the waiver form and the explanation, and she agreed that Student did not require assessments. Therefore, Parent provided informed consent to waive Student's triennial assessment for the purposes of determining continued eligibility.

40. However, the District did not review with Parent the purposes of the triennial assessment beyond a determination of continuing eligibility, including updating present levels, and determining educational needs and whether any changes to programming were advisable, nor does the testing waiver provide for this. Nevertheless, this failure to fully disclose, even if it constitutes a procedural violation, did not result in a substantive denial of a FAPE. Not every procedural violation results in a denial of a FAPE. For a procedural inadequacy to constitute a denial of FAPE, it must have (a) impeded the child's right to a FAPE, (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE, or (c) caused a deprivation of educational benefits.

41. At the triennial IEP team meeting, Student's teachers provided information on his behavioral functioning and academic progress reports and grades. This information along with Student's California Standardized Testing (CST) scores and curriculum tests, allowed the team to identify any areas of educational need. No team member, including Parent, raised any concerns about Student's academic functioning, educational setting, or services. The team reviewed Student's progress on his goals. His behavior had demonstrably improved, he had successfully met each goal, was succeeding in the general education curriculum, and Parent was pleased with his progress. The team had sufficient existing data to appropriately address Student's minimal programming needs without additional assessments, and to implement necessary changes to his programming, which included a reduction in counseling, and the removal of his BSP and aide. The District's failure to explain to Parent the additional purposes of a triennial assessment prior to obtaining her waiver, did not significantly impede her ability to participate in the decision-making process or result in a loss of educational benefit.

42. Student provides no authority for his contention that the District committed a procedural violation by not providing Parent with the testing waiver prior to the date of the scheduled triennial IEP team meeting. Student also contends that Parent was simply handed the testing waiver and asked to sign at the start of the meeting without participating in the data review. To the contrary, during the IEP meeting the team reviewed existing data on Student, and the District members reviewed their determination that additional data was not required with Parent. The IEP team notes corroborate that Parent signed the testing waiver only after a review of data.

43. Student contends that the District's IEP team members attended his triennial meeting already convinced that he should not be tested. However, his claim that this shows impermissible predetermination is misplaced. There is no requirement that the review or determination be conducted as part of a meeting. The District is only obligated to ensure all team members, including Parent, review existing data, and then decide whether additional data is needed to determine eligibility and programming needs. The District may determine that question in advance of or without any meeting, so long as Parent's input is considered.

44. The District had no obligation to conduct a triennial assessment given the testing waiver, and the evidence demonstrated that the IEP team had sufficient data to determine Student's educational needs. Therefore, Student's claim that the District denied him a FAPE when it failed to conduct a timely triennial assessment fails.

Present Levels of Performance and Annual Goals

45. An annual IEP must include a statement of the student's present levels of academic achievement and functional performance, which create a baseline for designing educational programming, including the development of annual goals. The IEP must include a statement of measurable annual goals designed to meet the student's needs that result from his disability. A district has no obligation to write goals more frequently than annually absent special circumstances such as when a student fails to make progress towards his goals, his needs change, or new information becomes available.

46. Student contends that the District denied him a FAPE by failing to accurately measure his functioning and develop appropriate and measurable goals. As discussed above, by February 2011, Student no longer required a behavioral assessment and in October of 2011, the IEP team determined that it did not require additional data to determine his educational needs. Therefore, any contention that the failure to conduct an FAA or Student's 2011 triennial assessment deprived the October 2011 and October 2012 annual IEP teams of a complete, reliable and accurate picture of Student's needs and present levels, upon which to develop appropriate goals, fails.

Student's Successful Fifth Grade Year

47. Student performed at or above grade level in all subject areas in Mr. Horwitt's class from January 2011 through the end of that school year, and demonstrated good writing

and reading skills, and the ability to grasp math concepts quickly. Student had good fundamental skills although there were some difficulties with his multiplication tables. The District established that it is common for students not to master rote memorization of the tables, and that Student's multiplication delay was a minor issue which was easily overcome and did not constitute an area of need.

48. When Student first returned to Kitayama in January of 2011, he exhibited some disruptive behaviors such as blurting out in class, making inappropriate comments and gestures, and throwing things. Mr. Horwitt worked with Ms. Peterson on strategies to help Student be aware of why he was acting as he did, and his behaviors diminished dramatically after a few weeks. Student wanted to come to school every day, was happy and had friends, was a motivated learner and made remarkable progress.

49. By the time of the March 2011 IEP team meeting, Student had met or exceeded all his annual goals from his November 2010 IEP, including appropriately engaging in all class activities, maintaining appropriate voice volume and refraining from inappropriate language, demonstrating 100 percent compliance with directions, not engaging in inappropriate behaviors and being able to verbalize his feelings on the rare occasion he became frustrated. The team agreed to continue Student's BSP and his behavior goals to allow for data collection and ensure maintenance of progress given his recent return to a general education classroom.

50. There was no evidence that Student's goals were inappropriate or required revision based upon his early achievement of them; rather, the evidence showed Student was motivated to succeed in the general education class and made unexpected progress. Since the team did not identify any unaddressed areas of need, and the evidence showed that Student did not have any additional areas of need, there was no requirement to devise new goals, and no harm in maintaining the achieved goals. At the June 2011 IEP team meeting, neither the District nor Parent recommended any changes to Student's goals as he would need to demonstrate maintenance of his progress in the middle school setting. Parent agreed Student had a successful fifth grade year.

October 19, 2011 Triennial IEP Team Meeting

51. During the statutory time frame at issue, the District was first required to identify Student's present levels of performance and develop measurable goals at the October 2011 triennial meeting. The team discussed Student's present levels of academic achievement and functional performance including the areas of academics, communication, motor development, social/emotional/behavioral needs, vocational and living skills, and health. Most of Student's teachers, including his choir, P.E., Core, and math teachers, attended the triennial meeting and reported on Student's functioning.²⁶ Additionally, the

²⁶ A Core teacher is one who teaches two classes, usually English/language arts and history.

District provided written summaries of Student's present levels of performance, and Parent testified that she read and understood these at the meeting.

52. Student was functioning at or above grade level in reading, comprehension and grammar, and maintained a grade of "C" in an accelerated math class. Student's CST scores were advanced in both English/language arts and science, and proficient in math. Student continued to have no academic needs that had to be addressed in an IEP.

53. The triennial IEP team reviewed Student's progress on his six behavior goals from his November 2010 annual IEP. Student continued to demonstrate mastery of these goals.²⁷ Student's one area of need continued to be in the area of behavior, as he struggled to control his impulses to call out in class and to modulate his volume.

54. Mr. Piette devised a new behavior goal for Student to respond positively to teacher reminders to lower his voice and to ultimately self-monitor his volume level. The baseline for this goal identified that Student sometimes exhibited outbursts in less structured classes such as P.E. and choir. Short-term objectives for February, May and October 2012, clarified that Student would require a decreasing number of reminders per class period from three to one, and demonstrate 100 percent compliance as measured by teacher observation. This was a measurable goal.

55. Student introduced no evidence that his actual performance or functioning was any different from that reported. His present levels of performance were appropriately based on teachers' observations, grade reports, progress updates, Student's scores on the CST and curriculum testing, the school psychologist's review and consultations, and Student's cumulative file including his 2008 assessments. Student offered no evidence in support of his contention that his CST scores were unreliable because he was allowed, as an accommodation, to ask for clarification and to take breaks. There was no showing that Student ever required or utilized these accommodations.

56. Student contended that his anxiety about math, in particular multiplication tables, caused an adverse impact on his academics such that he had either a social/emotional or academic need for which he required a goal. Student failed to introduce any supporting evidence. The District established that anxiety about math is extremely common, and a goal would be indicated only if the anxiety was significant and had a negative impact on Student's academics. Mr. Piette interviewed Student's current and former math teachers and neither identified this as an area of need which negatively impacted Student's educational performance. At the time of the October 2011 IEP team meeting, there were no concerns about Student's social/emotional functioning or academic abilities.

²⁷ Student's contention that because the goals are annual, he can contest the wisdom of their formulation in November 2010 even though that IEP is beyond the statute of limitations is without merit in light of the "snapshot rule," which prohibits judging the validity of an IEP in hindsight.

October 15, 2012 Annual IEP Team Meeting

57. At Student's next annual IEP meeting on October 15, 2012, the team again reviewed Student's present levels of performance in all areas. Those reports were as positive as the reports a year earlier. Academically, Student had maintained a 3.5 grade point average for the 2011-2012 school year, and in October 2012, Student was performing at or above grade level in all academic areas, including math, and earning several "A's". On the CST, Student continued to score advanced in English/language arts and proficient in math, and on the North West Education Assessments (NWEA), a standardized adaptive test, he scored proficient in math and reading.

58. At this meeting, Parent expressed concern regarding Student's grade level and progress in math. At the time, Student was a seventh grader taking algebra, an eighth grade math class, which proved difficult for him. Even so, Student's algebra teacher described Student as performing above average and did not see math as an area of need.²⁸ The question of whether Student should remain in an advanced math class was not an IEP team or disability-related issue given his lack of academic needs. The team did not discuss any academic goals as Student did not require academic support based on teacher reports and his good grades.

59. In the area of behavior, Student maintained his clear record of no disciplinary referrals. However, he met his annual behavior goal of responding positively to teacher reminders to lower his voice and to self-monitor his volume in only one class, his choir class.²⁹ Student still required multiple reminders to not shout or make inappropriate comments in class, at a frequency of up to five times per period in his afternoon classes. Based upon this new baseline data, the team revised Student's behavior goal to call for Student to respond positively to two or three reminders to discontinue shouting or making inappropriate comments as measured by teacher observation and tracking with 100 percent compliance by January 2013. This goal was measurable and allowed the District to monitor Student's progress.

60. Student's present levels of performance were, once again, appropriately based on teachers' observations, grade reports, progress updates, Student's scores on the CST and curriculum testing, and the school psychologist's review and consultations. Parent did not dispute the accuracy of any reports, or identify how the reported present levels failed to

²⁸ Parent testified that she is currently concerned with Student's academics in that his grades recently slipped. However, Parent acknowledged that she had not previously informed the District that Student needed academic assistance, and the evidence did not show such a need.

²⁹ There was no evidence of whether the District provided quarterly written reports documenting Student's progress towards his 2011 annual goal. Student did not identify this as an issue for hearing and no factual findings are made in this regard.

reflect Student's actual performance, or claim that she was not provided with sufficient information. Student's present levels of performance were accurately measured.

61. Parent told the October 2012 IEP team of her concern that Student was struggling with homework completion, and the team addressed that issue. The District agreed that Student may benefit from help with organization and reminders to use his planner. However, Student's missing assignments did not have an adverse academic impact; his teachers did not consider this to be an area of need requiring intervention; and Student continued to receive good grades. Student did not establish that he needed a homework completion goal.³⁰

62. At hearing, Student attempted to show that the District failed to develop appropriate goals based upon Student's 2008 assessment which described his difficulty establishing and maintaining appropriate peer relationships and managing his anger. District witnesses established that goals are based upon current behaviors and current needs. Student presented very differently at his initial 2008 assessment than at the time of his 2011 and 2012 annual IEP team meetings. Student failed to establish he had any unaddressed needs or behaviors at the time of his annual reviews.

63. Student did not meet his burden of proof that the District denied him a FAPE by failing to accurately measure his present levels of performance and devise measureable goals in all areas of need from January 2011 through January 8, 2013. The District had no obligation to revisit Student's present levels of functioning or assess his need for new goals between the time of the October 2012 annual IEP meeting and the date Student filed his complaint for due process.

LEGAL CONCLUSIONS

Burden of Proof

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49, 58 [126 S.Ct. 528, 163 L.Ed.2d 387 (*Schaffer*)], the party who filed the request for due process has the burden of persuasion at the due process hearing. Student filed for this due process hearing and therefore bears the burden of persuasion as to all issues.

³⁰ At the October 2012 meeting, the IEP team suggested that Student start using a planner. Student argued in his closing brief that the District's implementation of the planner constituted a goal inappropriately devised outside of the IEP process, but the evidence showed it was simply a common strategy for disabled and nondisabled students alike. This was not identified as an issue for hearing.

Statute of Limitations

2. Congress intended to obtain timely and appropriate education for children with special needs and did not intend to encourage the filing of claims under the Individuals with Disabilities Education Act (IDEA) many years after the alleged wrongdoing occurred. (*Alexopoulos v. San Francisco Unified Sch. District* (9th Cir. 1987) 817 F.2d 551, 555-556.) A denial of a FAPE results in substantial harm to a student which must be remedied quickly. An extended delay in filing for relief under the IDEA would frustrate the federal policy of quick resolution of such claims. Consistent with federal law, due process complaints are subject to a two-year statute of limitations in California. (20 U.S.C. §§ 1415(b)(6)(B), 1415(f)(3)(C); 34 C.F.R. §§ 300.507(a)(2), 300.511(e) (2006); Ed. Code, § 56505, subd. (l).)³¹

3. In general, the law provides that any request for a due process hearing shall 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); Ed. Code, § 56505, subd. (l); *Draper v. Atlanta Independent Sch. System* (11th Cir. 2008) 518 F.3d 1275, 1288.) A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action. (*M.D. v. Southington Board of Educ.* (2d Cir. 2003) 334 F.3d 217, 221; *M.M. & E.M. v. Lafayette School Dist.* (N.D.Cal., Feb. 7, 2012, Nos. CV 09–4624, 10–04223 SI) 2012 WL 398773, at pp. 17-19.) In other words, the statute of limitations begins to run when a party is aware of the facts that would support a legal claim, not when a party learns that it has a legal claim. (*El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1032, 1039, citing *April Enter., Inc. v. KTTV and Metromedia, Inc.*, (1983)147 Cal.App.3d 805, 826.) In effect, this is usually calculated as two years prior to the date of filing the request for due process.

4. Both federal and California state law establish exceptions to the statute of limitations. These exceptions exist when a parent was prevented from filing a request for due process due to: (1) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or (2) the local educational agency's act of withholding information from the parent that it was required to provide. (20 U.S.C. § 1415(f)(3)(D); Ed. Code, § 56505, subd. (l).)

Provision of Interpreters and Notice of Rights

5. The IDEA requires districts to take “whatever action is necessary to ensure that the parent understands the proceedings of the IEP team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.” (34 C.F.R. § 300.322(e); Ed. Code, § 56341.5, subd. (i).) State and federal law require districts to provide the parent of a child eligible for special education with a copy of a notice of

³¹ All references to the federal regulations are to the 2006 promulgation of those regulations.

procedural safeguards upon initial referral, and thereafter at least once a year, as part of any assessment plan, and at other designated times. (20 U.S.C. § 1415(d)(1); 34 C.F.R. § 300.504(a); Ed. Code, § 56321, subd. (a).) The notice must include a full explanation of all procedural safeguards and be written in language understandable to the general public and provided in the native language of the parent or other mode of communication used by the parent. (20 U.S.C. § 1415(d)(2); 34 C.F.R. §§ 300.504(c) & (d), 300.503(c)(1).) If the parent's native language or mode of communication is not a written language, the district must take steps to ensure that the notice is translated orally or by other means to the parent, that the parent understands the content of the notice, and that the district documents compliance with these requirements in writing. (34 C.F.R. § 300.503(c)(2).) Furthermore, at each IEP team meeting, the district must inform a parent of state and federal procedural safeguards. (Ed. Code, § 56500.1, subd. (b).)

Determination of Application of Statute of Limitations: Is Student's claim that the District failed to provide him with a FAPE by failing to provide Parent with an ASL interpreter for Student's IEP team meetings before January 8, 2011, which violated Parent's procedural rights by preventing her from meaningfully participating in Student's educational decisions-making process, barred by the statute of limitations?

6. Pursuant to Factual Findings 3-12 and 21-22, and Legal Conclusions 1-3, the District provided Parent with the services of a certified ASL interpreter at every IEP team meeting. Student did not establish that Parent was prevented from understanding the IEP team meetings and therefore could not timely identify the basis for Student's claim. Student failed to prove that he was not aware of his claims at the time they arose. Based on Factual Findings 13-20 and Legal Conclusions 4-5, Student did not establish that the District withheld information that it was required to provide to Parent, namely a copy of her parental rights, thereby allowing him to bring his claim dating back to December 2008 pursuant to an exception to the statutory time limit. The District provided Parent with a notice of procedural safeguards at all required times, had no reason to suspect that Parent could not read the notice, and reminded her of her rights at each IEP team meeting. Therefore, Student's Issue One is time-barred as to claims arising prior to January 2011.

Procedural Violations

7. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-207, [102 S. Ct. 3034, 73 L.Ed.2d 690] (*Rowley*).) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

Consequences of Procedural Error

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

procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).

Parental Participation in the Decision-Making Process

9. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.322(a); Ed. Code, §§ 56304, 56341.5, subd. (a).) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (20 U.S.C. § 1414(e); Ed. Code, § 56342.5.) Accordingly, at the IEP team meeting parents have the right to present information in person or through a representative. (Ed. Code, § 56341.1, subd.(f).) “Among the most important procedural safeguards are those that protect the parents’ right to be involved in the development of their child’s educational plan.” (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

10. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d 1479, 1485; *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 (*Fuhrmann*)).) A parent has meaningfully participated in the development of an IEP when she is informed of her child’s problems, attends the IEP team meeting, expresses her disagreement with the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.)

*Determination of Issue One: Did the District fail to provide Parent with a sign language interpreter for the March 3, 2011 IEP team meeting, which violated Parent’s procedural rights, since it prevented Parent from meaningfully participating in Student’s educational decision-making process?*³²

11. Based on Factual Findings 5-6, 12 and 23, and Legal Conclusions 5-10, the District took necessary measures to ensure Parent’s meaningful participation in the March 3, 2011 IEP team meeting by providing the services of a certified ASL interpreter, providing Parent a copy of her procedural safeguards and parental rights, and inviting any questions. Finally, as determined by Factual Findings 24-25, during the March 3, 2011 IEP team

³² Student’s Issue One is revised in light of the conclusion in this Decision that issues arising prior to January 8, 2011, are barred by the statute of limitations.

meeting, Parent understood the discussions, was an active participant, and the District considered her concerns. Student failed to meet his burden of proof.

Elements of a FAPE

12. A student with a disability has the right to a FAPE under the IDEA and state law. (20 U.S.C. §§ 1400(d), 1412(a)(1)(A); 34 C.F.R. § 300.101; Ed. Code, § 56000, subd. (a).) FAPE is defined as special education and related services, that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student’s IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Ed. Code, § 56031, subd. (a); 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.)

13. In *Rowley*, the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student’s abilities. (*Rowley, supra*, 458 U.S. 176, at p. 198.) School districts are required to provide only a “basic floor of opportunity” that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950-53.) To provide a FAPE, a district’s proposed program must be specially designed to address the student’s unique needs, reasonably calculated to provide the student with some educational benefit, and must comport with the student’s IEP. (*Rowley, supra*, 458 U.S. 176, 188-89.)

Annual Reviews of IEP’s and Amendments

14. A school district must conduct an IEP team meeting for a special education student at least annually to review the IEP to determine whether the annual goals are being achieved, to make any necessary revisions to address any lack of expected progress, and to consider new information about the student. (20 U.S.C. § 1414(d)(4)(A); 34 C.F.R. § 300.324(b)(1); Ed. Code, §§ 56380, subd. (a)(1) & 56343, subd. (d); *Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055-56.)

15. Amendments to an existing IEP can be made without convening the whole IEP team, and without redrafting the entire document. (20 U.S.C. § 1414(d)(3)(D) & (F); 34 C.F.R. § 300.324(a)(4)(i) & (a)(6); Ed. Code, § 56380.1.) An amendment created in this manner must be reduced to written form and signed by the parent. The IEP and its amendment are viewed together as one document. (*Ibid.*)

Obligation to Address Behavioral Needs

16. In the case of a child whose behavior impedes his learning or that of others, the IEP team must consider, when appropriate, “the use of positive behavioral interventions, and supports and other strategies to address that behavior.” (20 U.S.C. § 1414(d)(3)(B)(i);

34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-68.)

17. In California, an FBA is a behavior assessment for less severe behaviors and may result in the development of a BSP. There are no California statutes or regulations related to FBA's. When a child exhibits "serious behavior problems," the district must conduct an FAA, which may result in a BIP. (Cal. Code Regs., tit. 5, §§ 3001, subd. (g), 3052(a) & (b).) Serious behavior problems are defined as behaviors which are self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the IEP are found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (ab).)

Procedural and Substantive Requirements of Reassessments

18. Assessments are required in order to determine eligibility for special education and what type, frequency and duration of specialized instruction and related services are required. In California, the term "assessment" shall have the same meaning as the term "evaluation" in the IDEA. (Ed. Code, § 56302.5) In evaluating a child for special education eligibility and prior to the development of an IEP, a district must assess him in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

19. A triennial assessment serves two separate but related purposes. First, it examines whether the child remains eligible for special education; second, it determines the child's unique needs which, in turn, could trigger a revision of the IEP. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The triennial consists of a review of existing information and may include additional assessments. (34 C.F.R. § 300.305 (a)(2).) A reassessment may also be performed if warranted by the child's educational or related services needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability is a procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

20. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(i); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent for a reassessment, the school district must provide proper notice to the student and his parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56329.) The notice consists of the proposed written assessment plan and a copy of the procedural safeguards under the IDEA and state law. (20 U.S.C. § 1414(b)(1); Ed. Code, §§ 56321,

subd. (a).) The assessment must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school vacations in excess of five schooldays and other specified days. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f)(1), 56302.1, subd. (a), and 56344, subd. (a).)

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

22. If the IEP team determines that no additional data is needed to determine whether the student continues to be eligible for special education and related services, the local educational agency shall notify the student's parents of that determination, the reasons for the determination, and the right of the parents to request an assessment to determine whether the student continues to have a qualifying disability and to determine the student's educational needs. (20 U.S.C. § 1414(c)(4)(A); 34 C.F.R. § 300.305 (d)(1); Ed. Code, § 56381, subd. (d).) The local educational agency shall not be required to conduct such an assessment unless requested to by the student's parents. (20 U.S.C. §1414(c)(4)(B); 34 C.F.R. § 300.305(d)(2); Ed. Code, § 56381(d).)

Informed Consent

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

Determination of Issue Two: From January 8, 2011, to January 8, 2013, did the District fail to assess Student in all areas of suspected disability by failing to conduct a timely triennial assessment and FBA or FAA?

24. As established by Factual Findings 26-30 and Legal Conclusions 14-18 and 20, the District had no obligation to conduct the previously agreed-upon behavior assessment. On February 1, 2011, within 60 days of providing consent for the District to

conduct a behavior assessment of Student, Parent consented to a subsequent IEP amendment which essentially cancelled the behavior assessment, due to Student's improved behavioral functioning. As determined in Factual Findings 31-32, from the date of the February 2011 amendment IEP to the date Student filed his request for hearing, Student did not exhibit any behaviors to put the District on notice that he was in need of additional behavior supports or assessment. Therefore, Student failed to prove that the District was required to conduct a behavior assessment during the relevant time period.

25. Pursuant to Factual Findings 33-39 and 42-44, and Legal Conclusions 19-23, in preparation for the October 2011 triennial IEP meeting, the District team members conducted a review of all relevant existing data on Student including Parental input, and determined that additional assessments were not required to determine Student's continued eligibility for special education and his educational needs. The IEP team, including Parent, reviewed existing data on Student during the triennial IEP meeting; the District informed Parent of the basis for its determination that no additional testing was needed, and Parent waived further testing.

26. As determined in Factual Findings 40-41 and Legal Conclusions 7-8, 19, and 23, the District's failure to discuss with Parent the purposes of a triennial assessment beyond an eligibility determination did not result in a denial of a FAPE. The IEP team had sufficient information to determine Student's educational needs and whether any program modifications were required. Based upon Parent's informed written consent to waive Student's 2011 triennial assessment, the District was not required to conduct a triennial assessment and Student's claim fails.

Determining Present Levels of Performance and Devising Measurable Annual Goals

27. Federal and state law specify that an annual IEP must contain a statement of the student's present levels of academic achievement and functional performance, including the manner in which the student's disability affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The IEP must contain a statement of measurable annual goals designed to: (1) meet the student's needs that result from his disability to enable the student to be involved in and progress in the general curriculum; and (2) meet each of the student's other educational needs that result from his disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the student's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(III); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

28. There is no requirement that the district revise a student's goals more frequently than annually absent special circumstances including the failure of the student to make expected progress, the availability of new assessment data, or information provided by

the parent regarding anticipated needs of the student. (20 U.S.C. § 1414(d)(4); 34 C.F.R. § 300.324 (b)(1).)

29. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (*Id.*, citing *Fuhrmann, supra*, 993 F.2d 1031, 1041.) This is known as the snapshot rule. The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

Determination of Issue Three: From January 8, 2011, to January 8, 2013, did the District deny Student a FAPE by failing to accurately measure Student’s present levels of performance and offer appropriate and measurable goals?

30. Based on Factual Findings 2, and 45-63, and Legal Conclusions 1, 12-13 and 27-29, the District accurately measured Student’s present levels of performance in all relevant areas and devised measurable goals at his October 2011 and October 2012 annual IEP team meetings. Student’s present levels were based upon teacher and grade reports, testing scores, interviews with Parent and Student and file reviews. Student did not prove that the District’s failure to conduct formal assessments rendered the reporting of his present levels inaccurate.

31. Student did not prove that he had unaddressed needs in the areas of academics, social/emotional wellbeing or homework completion for which the District was required to develop measurable goals. The IEP team appropriately identified Student’s one need to be in the area of behavior. Student did not meet his burden of proof that the District failed to devise appropriate goals. The District appropriately maintained behavioral goals from the November 2010 IEP and at his October 2011 and 2012 annual reviews developed a new measurable behavior goal to address Student’s then-current behavior need. Student did not prove that these behavior goals were not measurable.

ORDER

Student’s claims for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires this Decision to indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on each issue.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: July 24, 2013

/s/

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings