WHAT CAN I DO TO GET YOU INTO FAPE TODAY?

Presentation by Darren J. Bogié
August 1, 2014

USING TECHNIQUES FROM THE WORLD OF SALES TO HOLD A SUCCESSFUL AND LEGALLY COMPLIANT IEP TEAM MEETING

INTRODUCTION

The materials provided are intended to cover two main points. The first portion of the materials is a brief outline of the legal requirements for an IEP team meeting. The second portion of the materials entitled "What Can I Do to Get You Into FAPE Today" provides some techniques adopted from sales training that can be utilized to assist an IEP team meeting facilitator in engaging parents in the IEP team process.

The information in these materials is necessarily general and its application to a particular set of facts and circumstances may vary. For this reason, these materials and the presentation associated with them do not constitute legal advice.

For brevity, all references to code sections are to the California Code of Education. The terms "district" and "county office of education" are interchangeable. All references to "parent" (both singular or plural) include parents, guardians, and educational rights holders.

Due to the factual complexity and variety of most special education cases, and the inconsistency between state and federal law, we recommend that districts consult with legal counsel as early as possible when it appears that a special education case is headed toward litigation. To control legal costs, many districts coordinate all contacts with legal counsel through a single individual, such as the Special Education Director. School personnel should follow the district's practice or policy about contacting the district's legal counsel.

THE LEGAL ASPECTS OF AN IEP TEAM MEETING

A. IEP Components.

The IEP is a written document detailing, in relevant part:

1. The student's current levels of academic and functional performance, including the manner in which the disability of the individual affects his or her involvement and progress in the regular education curriculum (for preschool children, how the disability affects the child's participation in appropriate activities);

2. A statement of measurable academic and functional goals designed to meet the child's educational needs and enable the child to make progress;

3. A description of how the goals will be measured;

4. A statement of the special education and related services to be provided to the student based on peer-reviewed research to the extent practicable;

5. The beginning date along with the anticipated frequency, location, and duration of the special education and related services (be sure to state on IEP that the student will not receive services during scheduled school holidays or vacations);

6. An explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activities.

(34 C.F.R., Section 300.320(a); Section 56345(a))

> "In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. 20 U.S.C., Section 1414(d)(3)(A)) Nevertheless, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate." (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education . . . designed according to the parent's desires."], citing *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176)

B. IEP Team Participants.

Section 56341 identifies the legally required participants at an IEP team meeting, which include:

1. One or both of the pupil's parents, their representatives, or both.

2. At least one regular education teacher of the student, if the student is or may be participating in the regular education environment. If the student has more than one regular education teacher, the district may designate one regular education teacher to represent the others. The regular education teacher is to participate in development, review, and revision of the IEP, including assisting in determining appropriate positive behavioral interventions and strategies for the pupil, supplementary aids and services, and program modifications or supports for school personnel that will be provided for the pupil.

3. At least one special education teacher of the pupil, or if appropriate, at least one special education provider of the pupil.

4. A district, SELPA, or county office representative who is qualified to provide or supervise the provision of special education and knowledgeable about the general curriculum and availability of district/county resources.

5. An individual who conducted an assessment of the pupil or who is knowledgeable about the assessment procedures used, familiar with the assessment results or recommendations, and qualified to interpret the instructional implications of the assessment results. This individual may also serve as a team member in the categories described in Items 1-4 above.

6. Other individuals with knowledge or special expertise about the pupil, including related services personnel, may be invited by either the parents or the district.

7. The pupil, as appropriate.

8. For pupils suspected of having a specific learning disability, at least one member of the team must be qualified to conduct individual diagnostic examinations of children (e.g., school psychologist, speech-language pathologist, or remedial reading teacher). At least one team member other than the pupil's regular teacher must observe the pupil's academic performance in the regular classroom setting.

9. If a purpose of the meeting is to discuss transition needs or services, the district must invite the pupil, and if the pupil does not attend the meeting, the district must ensure that the pupil's preferences and interests are considered. In addition, when implementing transition requirements for pupils age 16 and older, the district must invite, with the consent of the parents or student who has reached the age of majority, a representative of the entity that is likely to be responsible for providing or paying for transition services, and if that agency does not attend, the district must take other steps to obtain the participation of the other agency in the planning of any transition services.

10. In addition, mental health service providers and Department of Mental Health representatives should be invited to IEP meetings involving pupils who receive AB services, especially those for whom residential placement will be at issue.

11. Districts are not prohibited from inviting legal counsel to IEP meetings but hearing officers have noted that the presence of attorneys may make the meeting impermissibly adversarial.

C. IEP Team Authority.

Pursuant to Section 56342, an IEP team, and only an IEP team, is authorized to:

- Review assessment results;
- Determine eligibility;
- Determine content of the IEP;
- Consider local transportation policies and criteria; and
- Make program placement recommendations.

As a consequence of this statutory requirement, no agreement with parents involving review of assessment results, eligibility, program content, transportation, or placement can be legally made outside the IEP team setting. In California, "placement" has been defined as meaning the physical location where any special education or related services are delivered. (Title 5 C.C.R. Section 3042) This means that in California, a request for a change in service provider, teacher, or school may constitute a request for change in placement, requiring IEP team consideration, if the request involves a change in the physical location where special education or related services are delivered. A district cannot change a student's placement without an IEP and consent to that IEP.

Often, a parent's request for a change does not occur during an IEP meeting but will arise from oral or written communications to school personnel. ***Whether the request is oral or written, the district should promptly respond in writing, notifying the parent of the need to convene an IEP team meeting to consider the request.***

D. Informed Parental Consent.

1. Initial Assessments. A district must obtain informed parental consent before conducting an initial assessment. A district must generally obtain informed parental consent before conducting an initial assessment to determine whether the child is eligible for special education. (Section 56321(c)-(d)) Informed consent means that the parent has been fully advised of all information relevant to the activity for which consent is sought, understands and agrees in writing to the activity for which the consent is sought, and the consent describes the activity and lists required records, if any, that are to be released, and to whom they will be released. Further, the consenting parent understands that consent is voluntary

and may be revoked at any time. (Section 56021.1) A district must make reasonable efforts to obtain informed consent, but if a parent refuses, the district may request a due process hearing to attempt to override the parent's lack of consent to an initial assessment. (Section 56321)

2. Initiation of Special Education Services. A district must also obtain informed parental consent prior to initiation of special education services to a child. Unlike with an initial assessment, a district may not attempt to override a parent's refusal to consent to the initial provision of services by requesting a due process hearing. (Section 56346 (b))

3. Implementation, Change, or Termination of Special Education Services. Under both state and federal law, a district is legally powerless to implement, change, or terminate a child's program, placement, or services without written parental consent. (Section 56346(a)) On occasion, parents refuse to provide consent at the time consent is requested; sometimes, parents withhold consent while they "review" an IEP; sometimes, parents initially give consent, but later revoke it.

   Regardless of how a lack of parental consent arises, the rule is the same if the proposed program or part of the proposed program to which the parent does not consent is necessary to provide a FAPE. If parents refuse consent to all or a part of a program that is necessary to provide a FAPE, the district has no choice but to immediately: (1) provide only the last-agreed to program, placement, and services, if one exists; and (2) file for a due process hearing or pre-hearing mediation conference. (Section 56346(f))

4. Partial Consent. A parent can consent to parts of an IEP plan. Unless two parts of an IEP are inextricably tied together, a parent can agree to one part and not another. For example, a parent can agree with the goals and objectives but not agree to placement in an SDC class. For example, if a student is in general education and RSP, and the parents only agree to new goals and objectives but not a new placement, the new goals and objectives would have to be implemented in the last agreed upon educational placement.

   We recommend that districts notify parents in writing that the district can provide only the last agreed to program, placement, and services.

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5. Revocation of Consent. Parents may revoke consent to the provision of special education and related services. Parental revocation of consent for special education and related services is all or nothing, which means that if parents wish to revoke consent, their child will no longer receive any special education or related services and will not receive any protections afforded to the child by IDEA or California law as a special needs student. Therefore, the child may be disciplined and treated like a general education student. (34 C.F.R. Section 300.300) The revocation of consent must be in writing and a district is required to provide prior written notice to the parent after the district receives written revocation of consent.

If the parents later change their minds and request special education services for their child, the district must treat the parents' request as an initial request for services.

6. Partial Revocation of Consent. In situations where the parents disagree with provision of a particular special education or related service and the parents and district agree that the child would receive FAPE if the child did not receive that service, the district should remove the service from the child's IEP.

   Federal regulations and their accompanying comments unfortunately do not clearly resolve the issue of partial revocation of parental consent. One comment to the federal regulations (comments do not carry the force of law but are persuasive authority by the Office of Administrative Hearings) states that if the parents and district disagree about whether the child would be provided with FAPE if the child did not receive a particular special education or related service, the parents may file for a due process hearing or pre-hearing mediation conference.

   California law also does not clearly resolve the issue of partial revocation of parental consent. California law does state that if parents refuse consent to all or a part of a program necessary to provide a FAPE, the district has no choice but to immediately (1) provide only the last-agreed to program, placement, and services, if they exist, and (2) file for a due process hearing or pre-hearing mediation conference. (Section 56346(f))

   We recommend that districts contact legal counsel to obtain assistance in resolving an issue of partial parent consent or partial parent revocation of consent.

7. Consolidation of IEP Meetings. IEP team meetings should be consolidated if possible. To the extent possible, the district should encourage consolidation of reassessment meetings for the student with other IEP team meetings. (Section 56381(j))

E. Placement Offers.

1. Parents must be informed of the range of available placement options, but an offer of multiple placements violates the IDEA. As a part of the IEP process, a district must inform parents of all available alternative programs. (Section 56506(d))

2. In making a placement offer, the district must make a specific, clear, coherent, and detailed written offer of placement designed to meet a student's unique and individual needs, provide the student with educational benefit, and conform with the student's IEP. An offer of multiple placements, or a smorgasbord approach, violates the IDEA. The Ninth Circuit Court of Appeals has held that the IDEA requires a district to make a formal, written offer of placement which is specific, clear, coherent, and detailed. (*Union School District v. Smith*, 15 F.3d 1519 (9th Cir. 1994))

3. California Code of Regulations, Title 5, Section 3042, defines "placement" as "that unique combination of facilities, personnel, location, or equipment necessary to provide instructional services to an individual with exceptional needs, in any one or a combination of public, private, home and hospital, or residential settings."

   In the *Union* case, the Ninth Circuit noted that reasons for requiring a formal, written offer include providing parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer. However, the parent's right to a formal, written offer does not mean that a change in location of a program amounts to a change in placement, or that the district failed to make a clear, written offer of placement.

   Although a district's offer of placement must be specific and clear, the IEP need not state the specific classroom within the designated school or other facility or specific teachers assigned to those classrooms. While the IEP team may make such decisions, the IDEA also permits districts to treat these matters as administrative decisions to be made by school personnel. (*Letter to Wessels*, 16 IDELR 735 (OSEP 1990))

4. A district must have an IEP in effect for each special needs pupil at the beginning of each school year. In many instances, an annual IEP is held at the end of a school year but the parent does not sign until after the start of the following school year. What is important is that the district makes, at the very least, a final offer of FAPE prior to the start of the following school year. (Section 56344(c); 34 C.F.R. Section 300.323(a)) Section H of these materials provides more information on how to proceed when a parent does not consent to an IEP. It is also important to note that if the new school year starts and the parents have not signed the IEP, the district must continue to implement the last agreed-upon placement, goals/objectives.

F. Placement Consideration: Least Restrictive Environment.

A perennial subject of IEP team consideration—and due process hearings—is whether and to what extent a student with a disability can be educated appropriately in the regular education environment with supplemental supports and services. In California, that issue will be analyzed by administrative law judges and courts based on a four-factor balancing test. School personnel responsible for making placement offers should be familiar with the four factors and should articulate those factors in discussing placement with the parent. Where appropriate on the facts of a particular case, school personnel should document on IEP forms that district representatives on the IEP team considered those factors in arriving at a placement offer. The types of cases where IEP documentation should be considered are those where the issue of least restrictive environment is a close one, or where the placements in dispute differ in their restrictiveness. The most common example occurs when one party is proposing RSP and the other party is proposing an SDC.

The four factors are:

1. The educational benefits of placement full-time in a regular education class, which includes consideration of whether (a) based on the student's functional levels and those of the student's typically developing peers, the student would simply be present but unable to participate in the regular education class if placed there for academic instruction; and (b) the student needs a significant amount of specialized instruction not typically available in a regular education class to benefit from the education, such as individualized instruction presented in short segments with frequent repetition and prompting;

2. The nonacademic benefits of such placement, such as a benefit from language and behavior models provided by nondisabled children;

3. The effect the student has or will have on the teacher and children in the regular education class, such as whether the disabled child may be disruptive to other children or unreasonably occupy the teacher's time to the detriment of other students; and

4. The costs of main streaming the student.

G. Methodology.

As long as a district provides an appropriate education, methodology is left up to the district's discretion. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176) This rule is applied mostly in situations involving disputes about methodologies for educating children with autism. The Office of Administrative Hearings has held that courts are ill-equipped to second guess reasonable choices that districts have made among appropriate instructional methods. Although a district has the ability to select the methodology to be used in the educational program offered to a student, it also has the obligation to accurately describe it to the parents and it should be based on peer-reviewed research to the extent practicable. ***Without an accurate description at the IEP meeting, it is impossible for the parents to make an informed decision regarding the offer of placement.***

H. Extended School Year.

A school district is required to provide a special education student with extended school year ("ESY") services when the student requires special education and related services during other than the regular academic year or the IEP team has determined that the student needs ESY services. "Extended school year" refers to the period of time between the close of one academic year and the beginning of the succeeding academic year.

Students eligible for ESY include individuals with handicaps likely to continue indefinitely, or for a prolonged period, and for whom the interruption of educational programming may cause regression coupled with limited recoupment capacity which may make it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of the student's handicapping condition. (Cal. Code Regs. Title 5, Section 3043)

Lack of clear evidence of such factors may not be used to deny an individual an ESY program if the IEP team determines the need for such a program and includes it in the IEP.

An extended year program must be provided for a minimum of 20 instructional days, including holidays.

Under the IDEA, districts are required to provide ESY services as necessary in order to provide a child with a FAPE as determined by the IEP team. (34 C.F.R., Section 300.309(a)) "ESY services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." (*MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523 (4th Cir. 2002))

> "If the child benefits meaningfully within his potential from instruction under a proper IEP over a regular school year, then ESY service may not be required under the Act unless the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an [ESY]." (*N.B. v. Hellgate Elem. Sch. Dist*., 541 F.3d 1202 (Ninth Circuit 2008) (quoting *Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir. 1990))

It is extremely important that the IEP team thoughtfully complete the ESY analysis and document in the IEP notes the team's analysis and discussion as to whether the pupil meets the criteria for ESY services.

I. Staff Meetings Prior to IEP Meetings (No Predetermination of FAPE/Placement).

In many instances, a district may hold a pre-IEP meeting with school staff members. The purpose of a pre-IEP meeting is usually to discuss assessment results, present levels of performance and progress toward annual goals, or a specific request made by the student's parents, such as a request for CARD services. Other reasons to hold a pre-IEP meeting are:

1. To discuss a parent's request for a 1:1 aide, the need for an aide in the general education classroom, and the functions of an aide in the general education classroom.

2. If the district has "unpredictable" staff members who are part of the IEP team.

3. To discuss unusual requests by parents, such as auditory-verbal therapy for a student with a cochlear implant.

4. To brainstorm potential ways to meet a student's needs if the district faces unusual challenges, such as lack of funding, personnel, or service providers.

5. If the parents have hired an advocate or lawyer.

In particularly contentious matters, holding a pre-IEP meeting is important as it allows IEP team members to openly and honestly discuss any issues involving a child and make a thoughtful analysis of FAPE for the child. Although district staff members can discuss their opinions regarding an appropriate offer of FAPE, the district should not make a definitive decision regarding its offer of FAPE prior to an IEP meeting as that could be deemed a predetermination of FAPE.

The Ninth Circuit has held that predetermination prior to an IEP meeting occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. Thus, a district violates the IDEA procedures if it independently develops an IEP without meaningful parental participation and then simply presents the IEP to the parents for ratification. (*H.B. v. Las Virgenes Unified Sch. Dist*., 48 IDELR 31 (9th Cir. 2007)

Many districts prepare a draft IEP prior to an IEP meeting, which includes goals written in preparation for the IEP meeting. It is very important that any draft IEP be marked "DRAFT" on each page, which helps make very clear to the parents that the IEP is only a draft to be used to assist the IEP team in creating the final IEP. This also avoids confusion about which pages are part of the draft or final IEP.

J. Meaningful Parent Participation.

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of FAPE. (Section 56500.4) A parent has meaningfully participated in the development of an IEP when "the parent is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP." (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688; *Fuhrmann v. East Hanover Bd. of Educ*. (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way])

K. IEP Amendment Versus Continuance of IEP Meeting.

One of the most important duties of the district at an IEP meeting is to make and finalize its offer of FAPE. There are many instances where an annual IEP meeting cannot be completed in one sitting, and in those instances continuance of the meeting is appropriate. However, an IEP meeting should not be continued unnecessarily. After the district finalizes its offer of FAPE, many times a parent requests an IEP meeting to discuss any concerns/issues the parent has with the district's offer. The district then has 30 days (excluding school vacation in excess of five days) from the date of receipt of the parent's request to schedule an IEP meeting. The IEP meeting should not be treated as a continuance of the annual IEP meeting as an administrative law judge may perceive the district's offer of FAPE as not being final. The meeting may be called a "special review" meeting to discuss the parent's concerns; however, it cannot be treated as an amendment meeting unless the annual IEP was signed by the parent.

After the annual IEP meeting for the school year has resulted in an IEP, amendments to the existing IEP can be made without convening the whole IEP team and without redrafting the entire document. An amendment created in this manner requires only that the amendment be reduced to written form and signed by the parent and district representative. The IEP and its amendments are viewed together as one document. An IEP amendment is used to amend or modify a student's existing IEP. (Section 56380.1) The notes attached to the IEP amendment should clearly state the basis for the IEP amendment and why revisions to the IEP are being made.

If an IEP amendment is created, the district is legally obligated to notify the student's IEP team of the changes made to the student's IEP. Also, the IEP amendment and notes should be attached to the current IEP.

L. Transfer Students.

When a student transfers into a district from another district not operating programs under the same local plan (SELPA) in which the student was last enrolled in a special education program within the same academic year, the district must ensure that the pupil is **IMMEDIATELY** provided an interim placement for a period **not to exceed 30 days**. (Section 56325) The interim placement must be in conformity with an IEP, unless a parent agrees otherwise. The IEP implemented during the interim placement may be either the pupil's existing IEP, implemented to the extent possible within existing resources, or include services comparable to those described in the previously approved IEP. This placement can be implemented without an assessment of the student and also without a signed IEP. The district must consult with the parents when offering an interim placement.

Before the expiration of the 30-day period, the interim placement must be reviewed by the IEP team and a final recommendation made by the team. The team may utilize information, records, and reports from the district or county program from which the pupil transferred.

In the case of a student with an IEP who transfers into a district from another district under the same SELPA in the same academic year, the new district must continue, without delay, to provide services comparable to those described in the existing, approved IEP, unless the parent and district agree to develop, adopt, and implement a new IEP.

Contact legal counsel immediately if a student transfers into the district from a noncertified nonpublic school. That student's placement is probably the responsibility of the former district that made the initial placement.

WHAT CAN I DO TO GET YOU INTO FAPE TODAY

(IDEAS AND TECHNIQUES FROM THE WORLD OF SALES THAT CAN BE UTILIZED IN IEP TEAM MEETINGS)

The following discussion of the use of sales techniques is intended to provide fresh insights into typical issues that can arise at an IEP team meeting. The discussion provided should be viewed with the understanding that the central concepts embodied in the sales techniques discussed are intended to be means by which a facilitator can elicit parent input in the development of an IEP that is appropriate and tailored to the unique needs of the child. The language of sales is used to illustrate key concepts and all discussion of sales should be viewed in the limited context of an allegorical teaching tool and not be taken literally.

By its very nature, including both the legal requirements and interpersonal dynamics involved, the development of a child's IEP goes well beyond and should never be viewed as, a mere sales transaction.

A. Making the Offer of FAPE.

Remember the district's offer should be specific, clear, concise, definite and in writing. Failure to provide a definite written offer is a violation of FAPE. (*Parent v. Natomas Unified School District*, OAH Case no. 2012070797) When making the district's offer, the two biggest secrets to obtaining a "yes" are simple:

1. The No. 1 Secret Key to Closing the Sale (or Getting Parental Consent) Is Simple — Just Ask!

In his December 5, 2005 column in *Entrepreneur*, sales guru Tom Hopkins explained the number one impediment to sales (and it was not customer objections). Mr. Hopkins' company conducted a survey asking people who were not persuaded to buy why they didn't go ahead with what his sales people offered. The survey revealed that the most common reason a potential customer did not buy was simple: ***they were never asked*.**

Mr. Hopkins found his sales people would assume that after the presentation a prospective customer would just enthusiastically jump right in to buy and if the prospect did not, the salesperson would lose confidence and not ask for the sale.

Interestingly, this failure to ask also occurs in the context of an IEP team meeting as well. Picture this scenario: the IEP team has fully reviewed the assessments, present levels, least restrictive environment and potential related services but the parent does not jump in with immediate enthusiastic consent to the district's proposed program and then the meeting just stalls with the parent signing "in attendance only."

Failure to make a clear offer can be a procedural violation that denies FAPE. Therefore, be sure to clearly reiterate the district's offer (and have this offer summarized in the notes) then ask a closing questing such as "how do you feel about this placement?" Best case, you will get the parents' agreement to the district's offer. Worst case, you will start to elicit what the parents' objections actually are and insure that there is parental participation at the IEP team meeting.

2. The Second Secret is Wait for the Client's Response — Why? Silence Is Crucial to Obtaining Parental Consent.

In his April 4, 2005 column, Mr. Hopkins explained the second biggest impediment to sales. Besides not asking for the sale, the second most common problem is to keep talking instead of getting the final agreement. This is known as "unselling" the customer. The secret to not unselling a customer is simple; ***when you ask a closing question wait and let the parent consider the offer and respond. By rushing in with additional terms, you may prematurely derail an appropriate offer of FAPE.***

The following illustration shows why this is so important. After her pitch, a salesperson asks if the prospect will buy and the prospect hesitates for a few moments, wondering when they should take delivery. The salesperson becomes uncomfortable with the silence and ***assumes*** the prospect is questioning the price. The salesperson blurts out that he'll give them another 20 percent off the total price, when price wasn't the issue. Now the prospect assumes the product was originally overpriced and may begin to doubt other aspects of the offer.

This scenario can play out in the IEP context as well. For example, the district makes a complex placement offer that includes speech, OT and transportation. In response to the offer, the parent hesitates for a few moments thinking about the bus pick-up time and if it might work better for her family's schedule if she transported the student to school. The district representative gets uncomfortable and ***assumes*** parent thinks the amount of OT is too low so she blurts out "we can add 30 minutes to the OT per week" when more OT wasn't the issue and was not what the IEP team believed was necessary for the child.

This sort of misstep can cause a parent to lose confidence in the district's offer and lead the parent to assume the placement and services offered are not really tailored to his/her child's specific needs.

After asking for parental consent, be prepared to wait for the parents' answer. This can take from 10 to 40 seconds. Don't get uncomfortable with the silence and don't assume you will know what the parents' objections will be. Use the silence to either elicit consent or to get the parents to express what the objection to the district's offer is.

B. Turning Objections into Opportunities for Parental Input.

In many sales training courses or books on improving selling skills, you will hear about "handling" objections. Usually objections are represented as obstacles to the salesperson's ability to close a sale.

In the context of an IEP team meeting, there is the natural temptation to think of a parent's objection to the district's offer similarly; as an obstacle to developing an IEP.

Sales coach Tony Pirandello provides a different way of thinking about objections that is very useful in the context of IEP team meetings. According to Mr. Pirandello,

> "An objection means the buyer cares enough about you and the sale to want to explore it with you. They're telling you about a concern they have, in the hopes you'll help them resolve it. Your enemy is not the customer; your enemy is disengagement, and an objection demonstrates that the customer is very much engaged."

In the context of an IEP team meeting, a parental objection shows that the parent cares enough to want to explore the district's offer and is very much engaged in the process. Given that parental input is required in the development of an IEP (Section 56500.4), working through an objection is not necessarily a bad thing but shows that there was full parent participation at the IEP team meeting. In fact, since the goal of the IEP team meeting is to arrive at an offer of FAPE that is individually tailored to the need of the child, parent objections can be valuable opportunities.

When dealing with an objection consider the following steps:

1. Accept the objection at face value. Generally, don't argue points tit for tat; this will only serve to irritate the parent.

2. Adjust your body language to insure the parent understands you are paying full attention to his/her concerns.

3. Analyze the objection. Is it reasonable? Is the objection based on issues with the offer presented or does it reveal a broader relationship issue that the parent has with the district which cannot be addressed at an IEP team meeting?

4. Ask follow up questions. Sometimes the objection presented is not the real one or an unreasonable objection, that with further explanation can be redefined into an issue that the district can address. Finally, in the case of a parent with truly unreasonable objections asking follow up questions can help document just how unreasonable the parent is.

G. M. and R. M., a minor child by and through her mother G.M., Plaintiffs - Appellants, v. SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT, Defendant - Appellee.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
2014 U.S. App. LEXIS 13766
May 16, 2014, Argued and Submitted, Pasadena, California
July 18, 2014, Filed

OPINION * This disposition is not appropriate for publication and is not precedent

Appellants G.M. ("Mother") and R.M. ("Student") appeal the district court's decision, which affirmed an Administrative Law Judge's determination that except as provided by 9th Cir. R. 36-3. Saddleback Valley Unified School District ("School District") did not violate its "child find" obligation with respect to Student, nor did it fail to provide Student with a Free and Appropriate Public Education ("FAPE"). In addition to ruling on the merits of plaintiffs' claims, the district court also solicited a request for an award of attorneys' fees from the School District based on its conclusion that plaintiffs' claims were frivolous or presented for an improper purpose.

Though a close and novel question, the district court did not err in concluding that the School District complied with its child find duty with respect to Student because it took steps to "identif[y], locate[], and evaluate[]" Student. *Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1181, 1183 (9th Cir. 2010) (quoting 20 U.S.C. § 1412(a)(3)(A)).

Nor did the district court err when it concluded that [*3] the School District also met its obligation to provide a FAPE to Student. 20 U.S.C. § 1412(a)(1). The School District drafted an individualized education plan ("IEP") "reasonably calculated to confer an educational benefit on the child." *JG v. Douglas Cnty. Sch. Dist.*, 552 F.3d 786, 801 (9th Cir. 2008). While the IEP may not have been perfect, it did "take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (internal quotation marks omitted).

However, the district court's solicitation of a motion for attorneys' fees from the School District on this record was questionable. Congress amended the IDEA in 2004 to allow prevailing school districts to obtain attorneys' fees from the plaintiffs if the litigation was "frivolous, unreasonable, or without foundation," or "presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 U.S.C. § 1415(i)(3)(B)(i)(II), (III). The district court's order makes clear that it solicited "a future motion for attorney's fees from [the] District" [*4] because it had already concluded that plaintiffs' claims were frivolous. The question of whether the School District violated its child find duties was close, and one of first impression for our circuit,[1] especially given that Student's school counselor had been advised of Student's diagnosis of "major depressive disorder" as of at least October 15, 2009. The question of whether the School District failed to provide a FAPE was, at a minimum, legally cognizable. *See R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1126 (9th Cir. 2011) ("Lawyers would be improperly discouraged from taking on potentially meritorious IDEA cases if they risked being saddled with a six-figure judgment for bringing a suit where they have a plausible, though ultimately unsuccessful, argument, as here."). We remand in part to the district court so it may consider whether it should have solicited the request of attorneys' fees from the district.[2]

1 We have not yet articulated a test for when the child find obligation is triggered. The parties and the district court rely upon a test articulated by a Hawaii district court. *See Dept. of Educ., Haw. v. Cari Rae S.*, 158 F. Supp. 2d 1190 (D. Haw. 2001) [*5] ("[T]he child-find duty is triggered when the [district] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability.") (internal quotation marks omitted). The Sixth and Third Circuits have promulgated tests that differ significantly from the *Cari Rae* standard. *See D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012) (noting that "Child Find does not demand that schools conduct a formal evaluation of every struggling student"); *Bd. of Educ. of Fayette Cnty., Ky. v. L.M.*, 478 F.3d 307, 314 (6th Cir. 2007) (holding that the individual claiming a child find violation must demonstrate "that school officials overlooked clear signs of disability and were negligent in failing to order testing or that there was no rational justification for not deciding to evaluate").

2 Plaintiffs' failed to appeal the November 26, 2012 order granting the School District's motion for attorneys' fees, so we lack jurisdiction over the actual amount awarded.

Each side shall bear its own costs.

AFFIRMED; REMANDED.

E.M., a minor, by and through his parents, E.M. and E.M., Plaintiff-Appellant, v. PAJARO VALLEY UNIFIED SCHOOL DISTRICT OFFICE OF ADMINISTRATIVE HEARINGS, Defendant-Appellee.

No. 12-15743
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
2014 U.S. App. LEXIS 13428
April 7, 2014, Argued and Submitted, San Francisco, California
July 15, 2014, Filed

SUMMARY[**]

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Education Law

The panel affirmed the district court's judgment on remand in an action brought by a student, by and through his parents, under the Individuals with Disabilities Education Improvement Act of 2004.

The student's school district determined in 2005 that, despite his learning disability of auditory processing disorder or central auditory processing disorder, the student was not eligible for special education services. In 2008, as a result of further testing procured by his parents, the school district determined that the student did qualify for special education. Shortly thereafter, he moved to another school district, which also recognized that he qualified for special education.

The panel held that the student failed to show that the school district acted unreasonably in determining in 2005 that he did not qualify for special education services under the "specific learning [*2] disability" category because he lacked the required severe discrepancy between his intellectual ability and his achievement.

The Department of Education, as amicus curiae, took the position that a central auditory processing disorder is eligible for consideration for benefits under the "other health impairment" category. The panel held that this position merited deference. The panel nonetheless determined that the student failed to show that the school district acted unreasonably in not considering him for benefits under the "other health impairment" category in 2005.

OPINION

CALLAHAN, Circuit Judge:

In 2004, before E.M. entered the fourth grade, he was first tested for a learning disability. Through this lengthy litigation it has been established that E.M. has an auditory processing disorder or a central auditory processing disorder. However, in the fall of 2004 and the spring of 2005, E.M.'s school district, the Pajaro Valley Unified School District ("PVUSD") tested E.M. and determined that, despite his learning disability, E.M. was not eligible for special education services. Subsequently, as a result of further testing procured by E.M.'s parents, PVUSD determined in February 2008 that E.M. did qualify for special education. Shortly thereafter, E.M. moved to another school district which also recognized that he qualified for special education.

Meanwhile, E.M. filed an administrative complaint with the Special Education Division of the California Office of Administrative Hearings. When the Administrative Law Judge ("ALJ") issued a decision in favor of PVUSD, E.M., through his parents (the "Plaintiffs"), filed a complaint in the United States District Court for the Northern District [*4] of California alleging that E.M. had been denied a "Free and Appropriate Public Education" as set forth in the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). 20 U.S.C. §§ 1400, *et seq*. The district court granted summary judgment in favor of PVUSD, Plaintiffs appealed, and we issued an opinion affirming in part, reversing in part and remanding. *E.M. v. Pajaro Valley Unified Sch. Dist*., 652 F.3d 999 (9th Cir. 2011). On remand the district court again denied Plaintiffs any relief and further ruled that E.M.'s central auditory processing disorder could not be considered an "other health impairment" under the applicable federal and state regulations. *See* 34 C.F.R. § 300.7(c)(9) (2005); Cal. Code Regs. Tit. 5, § 3030(f) (2005).[1]

1 Both the federal and state regulations have been subsequently amended.

On this appeal we address three primary issues. First, we conclude that Plaintiffs have failed to show that PVUSD acted unreasonably in determining in 2005 that E.M. did not qualify for special education services under the "specific learning disability" category. *See* 20 U.S.C. § 1401(3)(A). Second, we conclude that the Department of Education's position that a central [*5] auditory processing disorder is eligible for consideration for benefits under the "other health impairment" category merits deference. Finally, we determine that Plaintiffs have failed to show that PVUSD acted unreasonably in not considering E.M. for benefits under the "other health impairment" category in 2005. Accordingly, we affirm the denial of relief to Plaintiffs.

I

A. PVUSD's Initial Assessment of E.M.

E.M. enrolled in PVUSD as a kindergarten student in 1999. Plaintiffs assert that E.M. struggled at school and that PVUSD should have referred him for a special education assessment as early as December 2002, pursuant to its "child find" obligation. This provision of the IDEA requires school districts to identify children with disabilities and to ensure that each child is evaluated and provided appropriate special education services.[2]

2 20 U.S.C. § 1412(a)(3)(A) states:

> All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, [*6] located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

In the summer of 2004, before E.M. entered the fifth grade, Plaintiffs had E.M. tested by psychologist Dr. Roz Wright, who administered the Weschsler Intelligence Scale for Children (3d ed.) and the Woodcock Johnson Tests of Achievement-III ("WISC"). Dr. Wright estimated E.M.'s intelligence quotient ("IQ") to be 104, based on the test. Plaintiffs then requested that PVUSD evaluate E.M. and submitted Dr. Wright's assessment.

In October 2004, PVUSD convened a meeting of E.M.'s Individualized Education Program ("IEP") team. In addition to Dr. Wright's assessment, the IEP team considered the results of additional tests administered by Leslie Viall, PVUSD's psychologist.

Ms. Viall, who had more than fifteen years of experience administering educational assessments of children, testified that she thought the WISC score of 104 was a valid measure of E.M.'s intellectual ability. She stated that in October 2004, she had given E.M. the Kaufman Assessment Battery for Children test ("K-ABC" test) and that E.M. [*7] had obtained a higher score of 111. Ms. Viall explained that she administered the K-ABC test because the parents' assessor, Dr. Wright, had recently administered the WISC test and that re-administering the same test less than four months later would have produced an invalid score. When the K-ABC test produced a significantly higher score, Ms. Viall administered a third intelligence test, the Test of Nonverbal Intelligence ("TONI"), on which E.M. scored a 98. Because E.M.'s TONI score was consistent with his performance on the WISC, rather than the higher score on the K-ABC, Ms. Viall determined that 104 was the most reliable measure of E.M.'s intellectual ability.

In 2005, to qualify for special education under the "specific learning disability" (sometimes referred to as "SLD") category in California, a child had to meet three requirements: (1) "there must be a severe discrepancy between intellectual ability and achievement in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematics calculation, or mathematical reasoning"; (2) "the severe discrepancy must be due to a disorder in one or more of the basic psychological processes [*8] and must not be primarily the result of an environmental, cultural, or economic disadvantage"; and (3) "the discrepancy cannot be ameliorated through other regular or categorical services offered within the regular education program." Cal. Educ. Code § 56337 (2005).

PVUSD determined that E.M. had not demonstrated the requisite "severe discrepancy between intellectual ability and achievement." The applicable California regulations defined a severe discrepancy as a difference of at least 22.5 points, adjusted by 4 points, between a child's ability and performance. Faced with three scores, 111 on the K-ABC, 104 on the WISC, and 98 on the TONI, PVUSD opted to use the middle score, 104 on the WISC. E.M.'s lowest standard score in any academic area was 87 on listening comprehension. The discrepancy between 87 and 104 was only 17 points, not sufficient to constitute a severe discrepancy.

B. Plaintiffs' Initial Proceedings Before the Administrative Law Judge and the District Court

When PVUSD denied E.M. special education benefits, Plaintiffs filed an administrative complaint with the Special Education Division of the California Office of Administrative Hearings. A hearing was held, and on May [*9] 2006, the ALJ issued a final decision denying Plaintiffs any relief.

Plaintiffs then commenced this action in the United States District Court for the Northern District of California. In October 2007, the district court denied cross-motions for summary judgment and remanded the case to the ALJ. The ALJ was asked to "set forth more completely his reasoning as to why the WISC test was favored over the K-ABC, as well as his approach to evaluating all of the quantitative test data in light of the mixed results of that data."

Meanwhile, Plaintiffs had E.M. tested by Dr. Cheryl

Jacques, who estimated his IQ to be 110. PVUSD then retested E.M. for eligibility for special education and found E.M.'s IQ to be 114. This led PVUSD to determine in February 2008 that E.M. was eligible for special education benefits. Shortly thereafter, E.M. moved to the Fullerton Joint Union High School District, which also determined that he was eligible for special education services.

On remand, the ALJ again determined that Plaintiffs were not entitled to any relief. Plaintiffs appealed to the district court.

On August 27, 2009, the district court granted PVUSD's motion for summary judgment. In doing so, the court [*10] first agreed with the ALJ that Ms. Viall was credible and her reasoning persuasive.[3] The court noted the irony that PVUSD relied on the diagnostic score provided by Plaintiffs, while Plaintiffs claimed that PVUSD should have used its own KABC scores. The district court further agreed with the ALJ that PVUSD had administered multiple tests to E.M. and had used the totality of the results to arrive at its ultimate determination of ineligibility.

> 3 The district court noted that Ms. Viall had stated that she felt "the WISC is a test of choice and it showed consistency with the TONI, and [I] didn't use the full scale score because of [E.M.'s] bilingual background, so it seemed more valid to use the performance score." The court also observed that Ms. Viall had indicated that she thought E.M.'s score on the K-ABC was inflated because it was not consistent with the WISC or TONI scores, and testified that she "no longer used the K-ABC because she had found that the test failed to provide 'good information for looking at student's processing.'" The court further observed that "Ms. Viall had conferred with other educators, who had confirmed the possibility of inflated K-ABC scores, and at the [*11] time of the due process hearing she believed that 'the WISC is a much more researched and much more reliable and valid measure.'" The court discounted Dr. Wright's testimony to a certain extent because she did not observe E.M. in the classroom, review his school records, or speak with his teachers, and Dr. Wright's assessment "was intended to serve an entirely different purpose, namely a finding of eligibility under the ADA that would be relevant to the family's immigration proceedings."

The district court further noted that "viewed as a whole, the observational and anecdotal evidence describes a student who was distracted easily but who also responded to various forms of classroom intervention." It opined that had E.M. "been able to complete assignments and homework on a more consistent basis, it seems likely that he would have been a consistently average to above-average performer."

Finally, addressing Plaintiffs' allegation that PVUSD failed to perform assessments with respect to E.M.'s auditory processing, hearing and behavior, the district court commented that at least one auditory processing test was administered by Ms. Viall, and that PVUSD's resource specialist "conducted the [*12] Brigance test in both Spanish and English as part of the initial assessment, and this test arguably addresses auditory processing through a subtest involving sentence repetition."[4]

> 4 The district court related that "Ms. Viall testified that E.M. did not appear to suffer from auditory processing difficulties because he started tasks immediately when given oral instructions, and the WISC-III assessment had not shown a processing disorder." She further stated that "the fact that E.M. had progressed to an A-level student in certain academic areas, as well as his improvement in standardized math skills to the basic level, are highly probative of an ability to succeed in the regular classroom environment."

C. Plaintiffs' Initial Appeal to the Ninth Circuit

Plaintiffs appealed, and we issued an opinion affirming in part and reversing in part. *E.M. v. Pajaro Valley Unified Sch. Dist*., 652 F.3d 999 (9th Cir. 2011). We recognized that "school districts have discretion in selecting the diagnostic tests they use to determine special education eligibility." *Id*. at 1003. Noting the different tests used to evaluate E.M., we held that a school district, "considering all relevant material available on [*13] a pupil, must make a reasonable choice between valid but conflicting test results in determining whether a 'severe discrepancy' exists." *Id*. at 1004.

We did not determine whether PVUSD's choice was reasonable because we determined that the district court had erred in excluding Dr. Jacques's 2007 report.[5] *Id*. at 1006. Accordingly, the district court was instructed on remand to consider whether Dr. Jacques's report, as well as PVUSD's 2008 assessment of E.M., were "relevant to the determination whether PVUSD met its obligations to E.M." *Id*.

> 5 We explained:
>
> > The district court excluded Dr. Jacques's report as not "necessary to evaluate the ALJ's determination." The proper inquiry was whether the report was

> relevant, non-cumulative, and otherwise admissible.

652 F.3d at 1006.

We then held, over a dissent, that Plaintiffs had not waived their assertion that the district court should have considered whether E.M.'s auditory processing disorder qualified him for special education as a child with an "other health impairment." *Id*. at 1006. We remanded the case to the district court "for a determination whether, during all relevant times, PVUSD met its affirmative obligation to locate, evaluate, and [*14] identify E.M. as a child with an other health impairment or a specific learning disability related to his auditory processing disorder." *Id* at 1007.

D. The District Court's Opinion on Remand

On remand, the district court read our opinion as holding that "E.M. had a 'disorder in a basic psychological process,' specifically, 'an auditory processing disorder.'" However, the court found that we had not reached "the issue of whether PVUSD's choice among test scores was reasonable; rather [we] remanded the matter for further consideration of that issue." The district court proceeded to determine whether Plaintiffs had shown that there was a "severe discrepancy" between E.M.'s intellectual ability and his achievement.

The district court noted that all agree that E.M.'s lowest academic standard score was 87. The court then reviewed the three test scores, and concluded that the ALJ's use of the WISC's score of 104, and the consequential finding that there was no severe discrepancy (only 17 points difference), were "thorough and careful" and entitled to deference. The court further conducted its own de novo review of the evidence in the administrative record, and concluded that Plaintiffs had not [*15] met their burden of showing that it was unreasonable for PVUSD to use the WISC test score.

The district court agreed with the ALJ that the school psychologist's testimony was more persuasive than Dr. Wright's perspective because of her experience administrating educational assessments to children and her actual knowledge of E.M.[6] The court further found that neither Dr. Jacques's report nor the PVUSD's 2008 assessment of E.M. altered its determination that PVUSD's 2005 assessment of E.M. was not unreasonable.

6 The ALJ had reasoned:

> Leslie Viall's testimony established that the performance score on the WISC-III of 104 is the valid measure of [E.M.'s] intellectual ability. Ms. Viall is a credentialed school psychologist with more than 15 years' experience administering educational assessments to children. She testified that the WISC is the most common intelligence quotient test administered to children, as well as the best predictor of school performance. Ms. Viall administered the K-ABC when she assessed [E.M.] in October 2004 only because the parents' assessor, Dr. Wright, had recently administered the WISC-III. If Ms. Viall had administered the WISC-III less than four months after Dr. [*16] Wright's administration, Ms. Viall would have obtained an invalid score. When Ms. Viall obtained a significantly higher score on the K-ABC (111), she administered another intelligence test, the [TONI,] to obtain more information. [E.M.'s] TONI score of 98 was consistent with [E.M.'s] performance score on the WISC-III, not the inflated score on the K-ABC.

Turning to the issue of whether E.M. could qualify for special education on the basis of having an "other health impairment," the district court noted that 20 U.S.C. § 1401(3)(A)(i) listed nine defined categories such as "intellectual disabilities," "autism," and "specific learning disabilities," and a tenth category described broadly as "other health impairment." At the time of the PVUSD assessment, "other health impairment" (sometimes referred to as "OHI") was defined as follows:

> Other health impairment means having limited strength, vitality or alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that --
>
> (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, [*17] hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and
>
> (ii) Adversely affects a child's educational performance.

34 C.F.R. § 300.7(c)(9)).

Despite Plaintiffs' contrary assertion, the district court did not find any decisions by courts or hearing officers specifically holding that auditory processing disorders qualify as OHIs. Accordingly, the court approached the question as a matter of first impression, using canons of construction. The court determined that "specific learning disability" and "other health impairment" concerned two different categories of impairment.[7] The district court, noting that the statute included a non-exhaustive list, employed the dictionary meaning of "other" as "another," and concluded that because a qualifying auditory processing disorder is a "specific learning disability," "it necessarily follows that an auditory processing disorder cannot at the same time be an 'other health impairment.'" The court expressed concern that a contrary finding would render superfluous the requirement of showing severe discrepancy to qualify for benefits under the "specific learning disability" category.[8]

7 The district court explained:

> In [*18] the regulations, "specific learning disability" is defined to mean "a disorder in one or more of the basic psychological processes involved in understanding or in using language," *see* 34 C.F.R. § 300.7(c)(10) (2005); Cal. Code Regs. tit. 5, § 3030(j) (2005), provided such disorder results in a "severe discrepancy between [the child's] intellectual ability and achievement," *see* Cal. Code Regs. tit. 5, § 3030(j) (2005); *see also* Cal. Educ. Code § 56337 (2005). A "specific learning disability" thus is "specific" to disorders adversely affecting the processing of the written and/or spoken word. As is set forth in the applicable regulations, such processing disorders expressly include "auditory processing" disorders. *See* Cal. Code Regs. tit. 5, § 3030(j)(1) (2005).

As defined in the regulations, an "other health impairment" is a "chronic and acute health problem" that "[a]dversely affects a child's educational performance." *See* 34 C.F.R. § 300.7(c)(9) (2005); *see also* Cal. Code Regs. tit. 5, § 3030(f) (2005) (providing pupil is entitled to special education where pupil has "chronic and acute health problem[ ]" that "adversely affects a pupil's educational performance").

8 The district court [*19] reasoned:

> A contrary finding would effectively negate and render superfluous the statutory and regulatory provisions that a "disorder in a basic psychological process" qualifies as a "specific learning disability" only if, as a result of such disorder, a "severe discrepancy" exists between the child's intellectual ability and academic achievement. *See* Cal. Educ. Code § 56337 (2005); Cal. Code Regs. tit. 5, § 3030(j) (2005); *see also Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976) (holding "in the construction of administrative regulations, as well as statutes, it is presumed that every phrase serves a legitimate purpose and, therefore, constructions which render regulatory provisions superfluous are to be avoided"). If a "specific learning disability" were deemed to constitute an "other health impairment" as well, a child with a specific learning disability would need to show only a generalized "adverse[ ]" effect on academic performance. *See* 34 C.F.R. § 300.7(c)(9) (2005). As PVUSD argued at the hearing, and E.M. did not dispute, the "adversely affects" standard and the "severe discrepancy" standard are different. E.M. fails to explain why Congress, for purposes of the IDEA, would [*20] have intended the same impairment be assessed under two tests of differing magnitude.

Having concluded that PVUSD had reasonably determined that Plaintiffs had failed to show a "severe discrepancy" between E.M.'s intellectual ability and academic achievement in 2005, and that E.M.'s auditory processing disorder could not be an "other health impairment," the district court granted judgment in favor of PVUSD. Plaintiffs filed a timely notice of appeal.

II

A district court's compliance with our mandate is

reviewed de novo. *United States v. Paul*, 561 F.3d 970, 973 (9th Cir. 2009); *United States v. Kellington*, 217 F.3d 1084, 1092 (9th Cir. 2000). We also review de novo "the district court's decision that the school district complied with the IDEA." *K.D. v. Dep't of Education*, 665 F.3d 1110, 1117 (9th Cir. 2011); *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1207 (9th Cir. 2008). However, we give "due weight to judgments of education policy when reviewing state hearings and must take care to not substitute [our] own notions of sound educational policy for those of the school authorities [we] review." *K.D.*, 665 F.3d at 1117 (internal quotation marks omitted). Although "[t]he extent [*21] of deference given to the state hearing officer's determination is within our discretion," "[w]e give deference to the state hearing officer's findings particularly when, as here, they are thorough and careful." *Id.; see also Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994).

In *K.D.*, we further reiterated that: (1) we review "the district court's factual determinations for clear error, even when based on the administrative record"; (2) a "finding of fact is clearly erroneous when the evidence in the record supports the finding but the reviewing court is left with a definite and firm conviction that a mistake has been committed"; and (3) the party "challenging the district court's ruling, bears the burden of proof on appeal." 665 F.3d at 1117 (internal quotation marks omitted).

III

A. The District Court Complied with Our Mandate

Initially, we affirm that the district court order is consistent with our mandate. Plaintiffs argue that we had found that E.M. had a specific learning disability, that we held that the district court should apply more of a de novo standard of review, and that the ALJ should not have relied on the testimony of PVUSD's psychologist. We held that E.M. [*22] had alleged an auditory processing disorder, but we did not reach the question of whether Plaintiffs had shown that E.M. had qualified for special education benefits under the "specific learning disability" category. Our opinion did not alter the standard of review or make any factual determinations as to any witness's credibility. Rather, we remanded for a determination whether "PVUSD met its affirmative obligation to locate, evaluate, and identify E.M. as a child with an other health impairment or a specific learning disability related to his auditory processing disorder." *E.M.*, 652 F.3d at 1007. The district court did this in compliance with our mandate.

B. Plaintiffs Have Not Shown that PVUSD Unreasonably Found that E.M. Lacked the Severe Discrepancy Between His Achievement and Academic Test Scores Then Required to Qualify for Benefits Under the "Specific Learning Disability" Category

In *Schaffer v. Weast*, 546 U.S. 49, 56-58, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005), the Supreme Court clarified that under the IDEA, the burden of persuasion rests with the party seeking relief. Here, all appear to agree that E.M.'s achievement score in 2004 was 87, and that then applicable state regulations required a difference of [*23] 22.5 points between E.M.'s achievement and ability scores. Thus, to prevail on their claims that E.M. was entitled to special education benefits under the "specific learning disability" category, Plaintiffs have to show that it was unreasonable for PVUSD to use any test results other than E.M.'s score on the K-ABC test. This they have failed to do.

In challenging PVUSD's use of the WISC test, Plaintiffs argue that: (1) the school psychologist, Ms. Viall testified that the K-ABC test was a good cognitive test; (2) although Ms. Viall testified that other colleagues thought the scores on the K-ABC test can be inflated, she "was never able to identify which colleagues and what their credentials were"; and (3) Ms. Viall's belief that E.M.'s score on the K-ABC test was high was a product of her unreasonably low expectations. Plaintiffs assert that at least one authoritative article in a peer reviewed journal identified the K-ABC test as the best predictor of achievement of all cognitive tests. They also submitted a declaration from Dr. Kaufman, who authored both portions of the WISC test and the K-ABC test, favoring the use of the K-ABC test and noting that it was not appropriate to substitute [*24] a brief test such as the TONI for comprehensive tests such as the K-ABC. In addition, Dr. Wright, who administered the WISC test, testified that E.M. had been unusually distracted when he took the test.

Plaintiffs also contend that Dr. Jacques's report supports their positions that: (1) E.M. had a long history of auditory processing disorder symptoms; (2) PVUSD was on notice that E.M. had a learning disability; and (3) E.M. had a long history of school failures. Plaintiffs point to Dr. Jacques's statement that she found it "puzzling" that the district did not find E.M. eligible for special education services in 2005.

Plaintiffs have shown that PVUSD could have used E.M.'s K-ABC score, but they have not shown that PVUSD acted unreasonably in using his WISC score. The record shows that Dr. Wright gave E.M. the WISC test in the summer of 2004 and that E.M. scored a 104 on that test. Plaintiffs then asked PVUSD to test E.M. for a learning disability. PVUSD did so. The school psychologist administered the K-ABC test because re-administering the WISC test would not have produced a reliable score. E.M. scored 111 on the K-ABC test. Ms. Viall, noting the disparity between the test scores and [*25] having concerns both about K-ABC test scores in general and E.M.'s score in particular, administered a

third test. On the TONI test, E.M. scored 98. PVUSD considered all three test results and then decided to use the middle score, the one submitted by Plaintiffs. This course of action has the indicia of reasonableness.

Plaintiffs' evidence and arguments do not undermine the reasonableness of PVUSD's decision. Plaintiffs presented evidence such as Dr. Kaufman's declaration praising the K-ABC test, but not evidence that the other two tests were not well-respected tests for cognitive ability or that it was unreasonable to average test scores from different tests. Moreover, none of the later developed information -- Dr. Jacques's report, the 2008 assessment, or the later assessments by E.M.'s new school district -- bear on PVUSD's 2005 determination because they do not undermine E.M.'s test scores on the WISC and TONI. The later developed evidence does indicate that E.M. had a learning disability in 2004, but PVUSD did not deny that he had a disability. Rather, it denied relief because there was not a 22.5 point discrepancy between E.M.'s tested ability and performance. Subsequently, when [*26] E.M. was retested and reevaluated, PVUSD in 2008 determined that he was eligible for special educational benefits.[9]

> 9 Dr. Jacques's report included the following comment:
>
> > Why has the gap widened between [E.M.'s] measured IQ scores and his achievement scores? The current testing used the most recent versions and normative updates, and because of the proposed population advances in knowledge, the updated tests are harder. Probably more importantly for [E.M.], the increased academic load in middle school and the cumulative experiences of failure have contributed to a widening gap in his intelligence and his achievement levels.

In *Schaffer*, 546 U.S. at 62, the Supreme Court held that the party challenging the district court's ruling bears the burden of proof on appeal, and in *K.D.*, 665 F.3d at 1117, we held that we review the district court's factual determinations for clear error. In *E.M.*, we reiterated that "school districts have discretion in selecting the diagnostic tests they use to determine special education eligibility." 652 F.3d at 1003. Applying these standards, we conclude that the record, developed over at least seven years, does not show that PVUSD unreasonably denied E.M. special [*27] education benefits in 2005 under the "specific learning disability" category. Accordingly, the district court's determination of this issue must be affirmed.

C. We Defer to the Department of Education's Position that a Child With a Disability May Be Eligible for Special Educational Benefits Under More Than One Category

Although we held in *E.M.*, 652 F.3d at 1007, that Plaintiffs had not waived their contention that E.M.'s auditory processing disorder could qualify him for special education as a child with an "other health impairment," the merits of this contention had not been previously addressed. In addressing the contention in the first instance, the district court did not have the benefit of the perspective of the Department of Education ("DOE"). On appeal, the DOE has participated as an amicus curiae. Thus, in reviewing the district court's reading of 20 U.S.C. § 1401(3)(A)(i), we have the benefit of the views of the agency charged by Congress with administering the IDEA. *See* 20 U.S.C. §§ 1406, 1416.[10]

> 10 Section 1406 authorizes the Secretary of Education to issue certain regulations "necessary to ensure that there is compliance" with the IDEA. Section 1416 authorizes the Secretary [*28] to monitor, review and enforce the implementation of the IDEA.

In 1991, the DOE issued a Joint Policy Memorandum that explained that a child with attention deficit disorder or attention deficit hyperactivity disorder might qualify for special education benefits under one of three categories of the IDEA's definition of "child with a disability" -- "other health impairment," "specific learning disability," or "serious emotional disturbance." 18 IDELR 116 (Sept. 16, 1991). In 1994, the DOE's Office of Special Education Programs issued a letter explaining that a child with chronic fatigue syndrome could qualify for special education under the "other health impairment" category or under another category if the child met the criteria for that category. Letter to Fazio, 21 IDELR 572 (Apr. 26, 1994). The DOE asserts that while these documents do not address auditory processing disorders, they reflect the Secretary's position that a particular condition may qualify for benefits under more than one of the IDEA categories.

The DOE asserts that its interpretation of a "child with a disability" is consistent with the history and purpose of the IDEA. Congress first enacted the IDEA in 1970 "to reverse [*29] this history of neglect" of disabled children in the United States. *Schaffer*, 546 U.S. at 52. Congress subsequently expanded the definition of children with disabilities to include specific learning disabilities,[11] autism and traumatic brain injury,[12] and children between the ages of three and nine who experienced developmental delays.[13] These amendments

furthered the IDEA's overarching substantive goal "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A); *Forest Grove Sch. Dist. v. T.A*., 557 U.S. 230, 244-45, 129 S. Ct. 2484, 174 L. Ed. 2d 168 (2009) (noting the IDEA's express purpose as set forth in the statute and holding that "[a] reading of the Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services.").

> 11 *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 4(a)(1), 89 Stat. 773, 775.
>
> 12 *See* Education of the Handicapped Act Amendments of 1990, [*30] Pub. L. No. 101-476 § 101, 104 Stat. 1103.
>
> 13 *See* Individual with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, § 602(3)(B), 111 Stat. 37, 42-43.

The DOE further claims that its perspective is consistent with a State and local school district's duty under the "child find" provisions of the IDEA. *See* 20 U.S.C. § 1412(a)(3). The DOE argues that considering a child's condition under only one possible category of disability, when more than one might apply, elevates a myopic concern with the child's specific classification over determining the child's actual educational needs. *See Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997) (noting "whether Heather was described as cognitively disabled, other health impaired, or learning disabled is all beside the point. The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education."); *see also* 20 U.S.C. § 1412(a)(3)(B) ("Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is [*31] regarded as a child with a disability under this subchapter.").

Where a statute speaks clearly to the precise question at issue, we "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843.

The Supreme Court has noted that deference may be extended to an agency's perspective not only when it exercises its rulemaking authority, but also when an agency authorized to administer a statute interprets its own regulation or the statute by other means. In *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 178 L. Ed. 2d 716 (2011), the federal agency presented its position in an *amicus* brief and the Supreme Court held: "we defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Id*. at 880 (quoting *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997)). In *Capistrano Unified School District v. Wartenberg*, 59 F.3d 884 (9th Cir. 1995), [*32] the DOE clarified its position in a "letter to all chief state school officers," and we held that the agency was "entitled to deference in its interpretation of the statute, because the interpretation is based on a permissible construction of the existing statutory language." *Id*. at 894.

The Supreme Court has recognized that even where the express delegation of specific interpretive authority is implicit and the agency has not engaged in the process of rulemaking or adjudication, an agency's decision may still be entitled to *Chevron* deference. *United States v. Mead Corp*., 533 U.S. 218, 229-30, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). Moreover, even when an agency's decision does not qualify for *Chevron* deference, "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *Id*. at 234 (quoting *Skidmore v. Swift*, 323 U.S. 134, 139-40, 65 S. Ct. 161, 89 L. Ed. 124 (1994)). We need not determine whether DOE's policy letters and amicus brief command *Chevron* deference as we find its interpretation of the statute persuasive [*33] under *Skidmore*.

Here, as the district court's resort to a canon of construction implicitly admits, Congress' intent is not clear. Title 20 U.S.C. § 1401(3)(A)(i) offers a number of ways in which an individual can qualify as a "child with a disability." Some of the proffered categories are quite specific, for example: "orthopedic impairments," "autism," and "traumatic brain injury." Other categories appear to be relatively broad, such as "intellectual disabilities," "hearing impairments," and "serious emotional disturbance." It is not clear from the statute whether the category "other health impairments" was intended as an alternate category or an additional category. In other words, Congress did not indicate whether "other health impairments" was limited to disabilities that did not fit into any of the other listed categories or included disabilities that might also fit within another category.

Because Congress was not clear, we must consider

the DOE's interpretation. We find neither of the grounds advanced in support of a restricted interpretation of the statute to be persuasive. Certainly, the application of a canon of construction should yield to Congress' purpose in passing the IDEA [*34] of ensuring that all children with disabilities have available to them a free appropriate public education. 20 U.S.C. § 1400(d)(1)(A). Children with disabilities will be disadvantaged if they have to select one category to the exclusion of any other category. In many instances, neither the child nor the parents will initially know which category encompasses the child's disability. Indeed, compelling a selection of one category seems contrary to the school district's child find duty.

Upon further inspection, the second proffered ground, a fear that allowing a disability to qualify under more than one category will "negate and render superfluous" the distinct requirements for various categories, proves to be unfounded. As the DOE asserts and the district court found, the regulations that defined "specific learning disability" and "other health impairments" in California in 2005 pertained to two different categories of impairment with distinct criteria. Viewing the requirements side by side reveals their distinctiveness.

Specific Learning Disability	**Other Health Impairment**
Cal. Educ. Code § 56337 (2005)[14]	34 C.F.R. § 300.7(c)(9) (2005)
- severe discrepancy	- limited strength, vitality or alertness
- due to disorder of the basic psychological processes	- due to chronic or acute health problems
- cannot be otherwise ameliorated	- adversely affects child's educational performance

14 As [*35] noted, both the California Education Code and the Code of Federal Regulations have been amended since 2005.

A severe discrepancy, which all parties agreed in 2005 required a difference of 22.5 points between tested ability and performance, is not the same thing as a condition that limits "strength, vitality or alertness." Also, it appears that a "disorder of the basic psychological processes" is distinct from "chronic or acute health problems." Of course, a "disorder" could also be a "health problem," but presumably a child could be otherwise very healthy and still have a "disorder of the basic psychological processes." The third criterion was also different. An "other health impairment" only required a showing that the condition adversely affects the child's educational performance, whereas a "specific learning disability" required a showing that other educational tools were inadequate. Perhaps, as the district court found, the third criterion for an "other health impairment" might be easier to meet than the third criterion for a "specific learning disability," but the different provisions of the categories' other criteria indicate that an "other health impairment" is not necessarily [*36] easier to show than a "specific learning disability." Regardless of the comparative difficulty of qualifying for benefits under the different categories, the two categories definitely have different requirements and appear to address different facets of disabilities. Thus, the fact that a particular child might qualify under both categories is in no way contrary to or inconsistent with Congress' purposes in enacting the IDEA. A contrary position would create the possibility that a child with a disability could be denied special education benefits not because he did not qualify for benefits, but because the child, his parents, or the school district's initial selection of one category barred consideration of a more appropriate category.

The district court, faced with a question of first impression, reasonably turned to a canon of construction to interpret an ambiguous statute. On appeal we have the benefit of a presentation by the DOE, which is charged by Congress with enforcing the IDEA. Because Congress did not clearly address the issue, and because we determine that the DOE's interpretation of the statutes and regulations is reasonable and furthers the overall intent of the IDEA, [*37] we defer to the agency's interpretation. Accordingly, we hold that a "child with a disability" may seek to qualify for special education benefits under more than one of the categories listed in

20 U.S.C. § 1401(3)(A)(i).

D. Plaintiffs Have Not, and Cannot, Show that PVUSD Unreasonably Denied E.M. Special Education Benefits in 2005 Under the "Other Health Impairment" Category

Our decision that E.M. *may* qualify for special education services under the other health impairment category does not answer the question whether he *did* qualify for services in 2005, or more to the point, whether Plaintiffs can show that PVUSD unreasonably failed to extend special education benefits to E.M. in 2005 based on his "other health impairment." In a usual case, we would remand for the district court or the ALJ to determine such a factual question in the first instance. However, over the last eight years this matter has been before the ALJ twice, before the district court thrice, and is now before us a second time. E.M. has graduated from high school. Accordingly, judicial efficiency and fairness to all concerned recommend that we review the existing record to consider whether a remand would be futile and [*38] would needlessly prolong this litigation.

The record is not clear as to when the possibility of E.M. qualifying for educational benefits under the OHI category first arose. There is no indication that this possibility was specifically mentioned by anyone in 2004 or 2005. As we noted in our prior opinion, Plaintiffs' prayer in their January 2006 filing with California's Office of Administrative Hearings included the words "other health impairment." *E.M.*, 652 F.3d at 1006. However, the filing as a whole does not present any evidence or arguments that E.M. met the criteria for qualifying under the other health impairment category.[15]

> 15 The prayer in the initial complaint to the Office of Administrative Hearings read:
>
> > To be found eligible for special education and related services under the IDEA as a child primarily with a learning disability and also as a child having an other health impairment due to his auditory processing deficits as outlined in paragraphs 12, 18, 21 and 22 above.
>
> Paragraph 12 simply recites that, based on Dr. Wright's findings, Plaintiffs requested that E.M. be assessed for special education services. Paragraph 18 recites efforts by Dr. Wright in 2005 in support of E.M.'s [*39] request for benefits and concludes with the assertion that E.M. "qualified as a child with a learning disability with additional deficits in auditory processing." Paragraph 21 alleges that based on the assessments and observations of E.M., he "clearly met the criteria of a learning disability." Paragraph 22 reiterates that E.M. "has a learning disability and moreover a central auditory processing disorder." It states that the audiologist "found problems with short-term memory, language processing and an impairment in background noise," and that E.M.'s verbal responses "require changing an auditory input into a more complex output involving conscious thought and mediation by language processing." All of the paragraphs appear to address the criteria for a "specific learning disability" rather than for an "other health impairment."

A [*40] review of the ALJ's decisions show that all parties were focused on E.M.'s auditory processing disorder. The issues presented were broad, including whether PVUSD fulfilled its child find and search and serve obligations, whether PVUSD denied E.M. a free and appropriate public education and whether PVUSD failed to assess E.M. in all areas of suspected disability.

The ALJ's report concentrates on Plaintiffs' claim that E.M. was eligible for services under the "specific learning disability" category, but it also considered Plaintiffs' allegations that PVUSD failed to assess E.M. "[i]n the areas of auditory processing, hearing and behavior." The ALJ found that Ms. Viall administered the Spanish and English versions of a test that included a subtest for auditory processing and that Plaintiffs had failed to establish that PVUSD failed to assess E.M. "in the suspected area of disability of auditory processing."[16] As to testing for hearing, the ALJ noted that E.M.'s "initial evaluation report dated October 13, 2004, states that [E.M.] was screened for hearing problems" and that E.M. "passed the hearing screening." The ALJ found that Plaintiffs had failed to show that PVUSD had failed to assess [*41] E.M. in the area of hearing and commented: "[w]hile [E.M.] listed this as an issue, he presented no evidence in support of his claim that [PVUSD] failed to screen his hearing."

> 16 The ALJ further noted:
>
> > While [E.M.] subsequently obtained an assessment from a private audiologist who determined that [E.M.] had an auditory processing disorder (although as [PVUSD] correctly points out, her ultimate conclusion in that regard was vague) there was no persuasive evidence that Ms. Viall was not appropriately trained and qualified to administer the TAP-R, which, as determined

> above, tests "auditory processing." The fact that [E.M.] obtained a different result from a different test administrator does not detract from the fact that [PVUSD] did assess [E.M.] in the area of auditory processing.

As noted, the criteria for qualifying for special education benefits under the "other health impairment" category were (1) limited strength, vitality or alertness (2) due to chronic or acute health problems, that (3) adversely affects the child's educational performance. Here, there is no suggestion that E.M. had limited strength or vitality, but his auditory processing disorder might well have limited his "alertness." [*42] However, the record, rather than supporting this possible connection, indicates that when E.M. was tested for hearing, the results were normal, and that Plaintiffs failed to proffer any contrary evidence.

It is now too late to develop new evidence as to E.M.'s "alertness" in 2005. The existing evidence suggests that E.M. did not have limited "alertness." Ms. Viall and Nancy Navarro, the resource specialist who assessed E.M., reported that he was alert and responsive during assessment. E.M.'s fourth and fifth grade teacher testified that she believed E.M. was no more distractable than her other students, and his sixth grade teacher reported that after she worked with E.M. on his attention, his attention to tasks improved significantly. Moreover, there was evidence that none of his teachers, nor the speech and language therapists, thought that E.M. had trouble following oral directions. This evidence might not prove that E.M. was alert, but is more than sufficient, absent any contrary evidence from 2004 and 2005, to compel a finding that in 2005 PVUSD did not unreasonably fail to diagnose E.M. as having limited alertness.

Limited alertness is the criteria for eligibility for benefits under [*43] the "other health impairment" category that E.M. was most likely to meet. Because Plaintiffs have failed to show that PVUSD unreasonably failed to diagnose limited alertness, we need not consider whether there was evidence that E.M. met the other criteria for eligibility under the OHI category. Nonetheless, we note that our review of the record reveals nothing to suggest that E.M. suffered from chronic or acute health problems. Furthermore, even assuming that E.M. had limited alertness, there is scant evidence that this, rather than other causes, such as his failure to complete his homework, adversely affected his educational performance.

IV

We can hope that today, with the evolution of the law and improved testing, a child with a disability, such as E.M., will not have to wait three years to be determined eligible for special educational services. However, our task is to determine whether PVUSD's past determinations were unreasonable. We conclude that they were not.

PVUSD was not insensitive to Plaintiffs' request that E.M. be assessed. It formed an IEP team and had E.M. tested and evaluated. Morever, PVUSD did not deny E.M. benefits on the basis of some subjective evaluation or opinion, [*44] but because E.M.'s test scores did not show the severe discrepancy between his ability and achievement then required. Plaintiffs have not shown that PVUSD's decision was unreasonable.

We do agree with Plaintiffs and the Department of Education that a child with an auditory processing disorder, such as E.M., may seek special education services pursuant to more than one of the categories listed in 20 U.S.C. § 1401(3)(A). The DOE is charged by Congress with administering the IDEA and its interpretation of the statute is permissible and furthers Congress' intent in enacting the IDEA. Accordingly, we defer to its position. *See Mead Corp*., 533 U.S. at 234-35.

Finally, while we recognize that a child with an auditory processing disorder may qualify for special educational services under the "other health impairment" category, we conclude that Plaintiffs cannot show that PVUSD was unreasonable in 2005 in failing to diagnose E.M. under the OHI category. Our review of the record reveals a dearth of any evidence that in 2005 E.M.'s auditory processing disorder manifested itself by limiting E.M.'s alertness or that the disorder was due to chronic or acute health problems. Plaintiffs over the last [*45] eight years have broadly challenged PVUSD's alleged failure to fulfill its child find obligations and failure to assess E.M. in all areas of suspected disability. We doubt that Plaintiffs have any additional evidence concerning E.M.'s "other health impairment" in 2005 and question whether such evidence, if it exists, could now be admitted.

Accordingly, we **AFFIRM** the district court's judgment in favor of PVUSD.

Each side shall bear its own costs.

**ARLICIA SIMMONS, et al., Plaintiffs, v.
PITTSBURG UNIFIED SCHOOL DISTRICT, et al., Defendants.**

**Case No.: 4:13-cv-04446-KAW
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
2014 U.S. Dist. LEXIS 81085
June 11, 2014, Decided
June 11, 2014, Filed**

OPINION

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT AND REMANDING CASE FOR FURTHER PROCEEDINGS

Arlicia and Brianna Simmons ("Plaintiffs") commenced the above-captioned case on September 25, 2013. They seek judicial review of a June 3, 2013 decision in which an Administrative Law Judge ("ALJ") determined that neither Pittsburg Unified School District ("PUSD") nor Antioch Unified School District ("AUSD," collectively, "Defendants") denied Brianna a free appropriate public education ("FAPE"). The parties have filed cross-motions for summary judgment. Having considered the administrative [*2] record, the papers filed by the parties, and the arguments advanced by counsel during the hearing on the matter, the Court (1) GRANTS Plaintiffs' motion for summary judgment with respect to their failure to assess claim against PUSD and DENIES the motion with respect to claims asserted against AUSD, and (2) DENIES Defendants' motion for summary judgment as to the failure to assess claim against PUSD and GRANTS the motion with respect to claims asserted against AUSD. The motions are otherwise denied, and this case is REMANDED for further proceedings consistent with this order.

I. BACKGROUND

A. Factual background[1]

> 1 This factual background is based on the ALJ's decision, as the parties all refer to the factual background in the ALJ's decision in the background sections of their respective briefs.

In late January 2011, Brianna began experiencing cold-like symptoms. (Administrative Record ("AR") at 379.) Her condition eventually became so severe that she had to be hospitalized for two to three weeks in March 2011. *(Id.)* During this hospitalization, doctors diagnosed Brianna as possibly suffering from multiple sclerosis ("MS").[2] *(Id.)*

> 2 Brianna sought a second opinion, and in September 2011, doctors [*3] confirmed that Brianna suffered from relapsing remitting MS. AR at 379.

At the time, she was a sophomore at Antioch High School. (*Id.* at 380.) It is undisputed that prior to her diagnosis, Brianna was an ideal student. (*Id.* at 379.) She earned a 3.94 grade point average ("GPA") in the first semester of her freshman year, a 3.33 GPA in the second semester of her freshman year, and a 3.43 GPA in in the first semester of her sophomore year. (*Id.* at 378-79.) Brianna wished to study Architectural Design at either the University of California, Berkeley; the University of California, Los Angeles; the University of Southern California; or California Polytechnic, San Luis Obispo. (*Id.* at 379.)

Brianna's mother informed Antioch High School of Brianna's diagnosis on or about March 23, 2011. (*Id.* at 380.) Upon learning that information, the school's assistant principal researched the condition on the Internet and discovered that fatigue, pain, decreased strength, difficulty with stability when walking, and problems with vision focus were some of the recurring symptoms that might cause Brianna to miss school. *(Id.)*

Brianna was absent from school for over two months between February and early May 2011. [*4] (*Id.* at 381.) During that time, the school district considered the options available to assist Brianna, including in-home or in-hospital instruction or a 504 Plan.[3] *(Id.)* Brianna's mother informed the district that she did not want Brianna enrolled in in-home or in-hospital instruction, and an initial 504 Plan team meeting was held in April 2011. *(Id.)* On May 2, 2011, Brianna and her mother signed a 504 Plan, pursuant to which Brianna would receive the following accommodations: (i) preferential seating, (ii) extended time to take tests, (iii) the option of taking tests in an alternative location, (iv) extended time to complete written and typed assignments, and (v) extended time to get to class. *(Id.)*

> 3 A 504 Plan refers to a document created pursuant to the federal anti-discrimination law commonly referred to as Section 504 of the Rehabilitation Act of 1973. 34 C.F.R. § 104.1. Whereas any student with a disability may be entitled to a 504 Plan, the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. §§ 1400-1419, only applies to students

whose disabilities must be accommodated through special education services.

In addition to these formal accommodations, Brianna's teachers [*5] also made other arrangements. (*Id.* at 382.) For example, Brianna's art teacher allowed her to use a study room in the final period of modified schedule and offered to help her study for other classes. *(Id.)* Other teachers modified tests to reduce to eliminate the amount of writing Brianna needed to do and allowed her to demonstrate her competence in a subject without performing the tasks required of other students. *(Id.)* Oral examinations were administered in her Spanish class in lieu of written examinations. *(Id.)* She was excused from the laboratory component of her biology class. *(Id.)* She also had access to online tutoring in most subjects, a service available to all students. (*Id.* at 380.)

Even with these accommodations, Brianna's return to school in early May was difficult. (*Id.* at 380, 381.) She struggled to catch-up with assignments and tests she had missed. *(Id.)* She felt fatigued, had trouble walking, and found that it took three times longer to complete assignments.[4] *(Id.)* She could no longer participate in the Model United Nations program or in her Forensics class, because she lacked the stamina to participate in the activities, which ran until 7:00 p.m. *(Id.)*

4 At the time [*6] Brianna's mother informed the school of the MS diagnosis, however, no concerns were raised regarding Brianna's cognitive functioning. AR at 380. Brianna testified "I was weak but I could think." *Id.* at 381.

On May 11, 2011, Brianna passed the California High School Exit Examination. (*Id.* at 382.) On May 17, 2011, she contacted Antioch High School's assistant principal, explaining the difficulties she was experiencing and requesting that she be placed on independent study in her Biology class and that her school day end at noon. *(Id.)* The school placed Brianna on independent study in all subjects between May 18, 2011 and June 6, 2011. *(Id.)* Brianna was to return to school for final examinations scheduled the week of June 6 through June 10. *(Id.)* The exams were scheduled to end at noon each day. *(Id.)*

On May 31, 2011, Brianna's mother wrote to the assistant principal. *(Id.)* She explained that despite some physical setbacks, Brianna expected to finish outstanding assignments and make-up work in Spanish, English, and World History with a little more time. *(Id.)* She indicated that Brianna did not need any extensions in her Acting or Biology classes, but asked for tutoring in Geometry, which [*7] her math teacher agreed to provide. *(Id.)* She also requested whether Brianna's Forensics class had been dropped from her schedule. *(Id.)*

In a June 8, 2011 email, Brianna's mother informed the school that Brianna was sick and unable to attend school for her examinations in English and Geometry. *(Id.)* She requested an extension, to which the assistant principal responded that Brianna would be allowed to make up the work and that no grades or incompletes would be given in those classes. *(Id.)*

Brianna did not complete all of her assignments and examinations by June 10, 2011, the end of the school year. *(Id.)* After an email from Brianna's mother on June 17, 2011, the assistant principal asked Brianna's teachers to hold her grades in a "no-mark" status until she was able to take her final examinations and turn in outstanding assignments. *(Id.)*

Brianna never completed her final examinations. (*Id.* at 383.) When Brianna spoke with the assistant principal about her grades, he told her that teachers were waiting on certain assignments and final examinations. *(Id.)* After that conversation, Brianna did not take her remaining final examinations or provide the school with copies of the assignments she [*8] claimed she turned-in, assignments which Brianna never turned in or Antioch High School misplaced. *(Id.)* In January 2013, the assistant principal instructed Brianna's teachers to revise her grades for the Spring 2011 semester to reflect her level of competency in a subject, based on the tests and work she had completed. *(Id.)* Those grades culminated in a 2.571 GPA. *(Id.)*

In August 2011, Brianna withdrew from Antioch High School and enrolled in Pittsburg High School. (*Id.* at 383.) Pittsburg High School administrators were aware of Brianna's condition by the end of August 2011. (*Id.* at 383.) They also received a copy of the 504 Plan Antioch High School implemented during the 2010-2011 school year. *(Id.)*

On September 16, 2011, Brianna and her mother met with Pittsburg High School's principal and the student counselor to discuss Brianna's condition and her need for accommodations. *(Id.)* During that meeting, the attendees discussed Brianna's existing 504 Plan accommodations and Brianna's eligibility for an Individualized Education Program ("IEP").[5] (*Id.* at 384.) The school counselor replied that Brianna was not IEP-eligible and that the existing 504 Plan would remain in place. *(Id.)* At the [*9] time, the school principal was aware that Brianna suffered from MS and that she might require occupational therapy, psychological services, physical therapy, adaptive physical education, mobility services, or parent counseling and training. *(Id.)*

5 An IEP is a written document, prepared annually, that outlines the educational plan for the disabled student. 20 U.S.C. § 1414(d).

During the Fall semester 2011, a total of three 504 Plan meetings were held. *(Id.)* As a result of those

meetings, Brianna's 504 Plan was modified to include a half-day schedule, no penalty for morning tardiness, permission to leave each class five minutes early to make it easier to get to the next class in uncrowded hallways, access to the school elevator, preferential seating, an extra set of textbooks for each class, and assistance in getting notes for each class. (*Id.* at 384-85.)

During the 2011-2012 school year, Brianna missed 58 school days, experienced relapses approximately every three months, and was hospitalized in October 2011 and March 2012. (*Id.* at 385.) In the first half of the year, Brianna received an A in English, a C+ in Spanish, a B in History, an A in Architectural Design, and a B in Chemistry, [*10] with a 3.26 GPA. (*Id.* at 346.) For the Spring 2012 semester, she earned A-grades in Spanish and Chemistry, and an A+ in Architectural Design, cumulating in a 3.68 GPA for the semester. *(Id.)* She achieved this GPA only after dropping Algebra for its online equivalent, and being assigned new Spanish and Chemistry teachers. (*Id.* at 368.)

A. Procedural background

Brianna filed initial request for a due process hearing on November 19, 2012 and an amended request for a due process hearing on January 31, 2013. (*Id.* at 2-11, 38-52.) The Office of Administrative Hearings held a hearing on May 6, 7, and 8, 2013 in Pittsburg, California. *(Id.)* The ALJ granted the parties leave to file written closing arguments, and the matter was deemed submitted upon receipt of those materials on May 24, 2013. *(Id.)*

In a June 3, 2013 decision, the ALJ resolved all issues in favor of the school districts. (*Id.* at 377-400.) Those issues were: (1) whether Defendants denied Brianna a FAPE by failing to assess her eligibility for special education and related services under the category of other health impairment ("OHI"),[6] in violation of Defendants' child find duties; (2) whether Defendants denied Brianna a FAPE by [*11] failing to make Brianna eligible for special education and related services under the category of OHI; (3) whether Defendants denied Brianna a FAPE by failing to provide an appropriate educational program to meet her individual and unique needs; and (4) whether Defendants violated Brianna's and Brianna's parents' procedural rights by failing to provide her parents with a full and complete copy of Brianna's records. (*Id.* at 2.).

> 6 A student qualifies for special education and related services under the OHI category when she has limited strength, vitality or alertness due to chronic or acute health problems, which adversely affects her educational performance and "requires instruction and services which cannot be provided with modification of the regular school program. Cal. Educ. Code § 56026(b); Cal. Code Regs., tit. 5, § 3030(a), (b)(9); *see Hood v. Encinitas Union Sch. Dist.,* 486 F.3d 1099, 1109 (9th Cir. 2007) ("[A]s with all eligibility categories, the child's 'other health impairment' must require instruction, services, or both, which cannot be provided with modification of the regular school program per California Education Code § 56026(b).").

Plaintiffs appeal that decision [7] and [*12] pray that that this Court overturn the ALJ's decision, deem Brianna eligible for special education and related services, and award monetary damages, compensatory education, attorney's fees, and costs of suit. (Compl. ¶¶ 1-4, Dkt. No. 1.) The parties filed their cross-motions for summary judgment on April 10, 2014.[8] (Pl.'s Mot. Summ. J., Dkt. No. 46; Defs.' Mot. Summ. J., Dkt. No. 48.) The motions have been fully briefed. (Pl.'s Opp'n, Dkt. No. 50; Defs.' Opp'n, Dkt. No. 49; Pl.'s Reply, Dkt. No. 52; Defs.' Reply, Dkt. No. 51.) The Court held a hearing on the motions on May 15, 2014.

> 7 Brianna graduated with a regular education diploma on June 13, 2013. Her graduation does not moot this case. Her claims for compensatory education, attorney's fees, and cost of suit present an actual and live controversy. *See Dep't of Educ., State of Hawaii v. Cari Rae S.,* 158 F. Supp. 2d 1190, 1196 n. 3 (9th Cir. 2001).
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> 8 In support of her motion for summary judgment, Brianna submitted a declaration and a letter from her treating physician. Defendants object to the submissions, arguing that the materials are irrelevant and inadmissible. Defs.' Mot. Summ. J. at 2. The Court agrees. The information at issue [*13] concerns Brianna's current academic performance at the Academy of Art University, San Francisco and the current state of Brianna's MS. As such, it has no bearing on the issues resolved in this order. In addition, Plaintiffs have not moved to supplement the record with this information.

II. DISCUSSION

In order to "ensure that the rights of children with disabilities and parents of such children are protected, the IDEA guarantees children with disabilities a FAPE." 20 U.S.C. § 1400(d)(1); 34 C.F.R. §§ 300.1(b), 300.101. To that end, the IDEA "provides federal money to assist state and local agencies in educating handicapped children . . . ." *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 179, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). A state must "provide every qualified child with a FAPE that meets federal statutory requirements" in order to receive such funding. *Amanda J. v. Clark Cnty. Sch. Dist.,* 267 F.3d 877, 882 (9th Cir. 2001). States must create an IEP tailored to the

unique needs of a disabled child. 20 U.S.C. § 1412(a)(4).

"[T]he IDEA also includes procedural safeguards, which, if violated, may prevent a child from receiving a FAPE." *Id.* Parents have a right to participate in the [*14] development of their child's IEP. 20 U.S.C. § 1415(b)(1). They also have the right to present a complaint regarding the evaluation or educational placement of their child, which triggers an "impartial due process hearing." *Id.* §§ 1415(b)(6), 1415(f). Either party may challenge the outcome of an impartial due process hearing by bringing a civil action. *Id.* § 1415(i)(2)(A).

A court's inquiry in such civil actions is two-fold. *Doug C. v. Hawaii Dep't of Educ.,* 720 F.3d 1038, 1043 (9th Cir. 2013). The court first examines "whether the State complied with the procedures set forth in the Act." *Id.* (internal quotations and citations omitted). The court then considers whether the student's IEP "is reasonably calculated to enable the child to receive educational benefits." *Id.* (internal quotations and citations omitted). "A state must meet both requirements to comply with the obligations of the IDEA." *Id.* (citation omitted).

Harmless procedural errors do not constitute a denial of a FAPE, but "procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of [*15] a FAPE." *L.M. v. Capistrano Unified Sch. Dist.,* 556 F.3d 900, 910 (9th Cir. 2008). If a court identifies a procedural violation resulting in denial of a FAPE, the court need not address the second prong of the relevant inquiry. *Doug C.,* 720 F.3d at 1043 (internal quotations and citations omitted).

The party seeking judicial review of an ALJ's decision bears the burden of proof. *Hood,* 486 F.3d at 1103. Once a party has filed a complaint seeking such relief, the reviewing court "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of the party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C).

The preponderance of the evidence standard "is by no means an invitation to the courts to substitute their own notions of sound education policy for those of the school authorities which they review." *Rowley,* 458 U.S. 176 at 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690. Rather, "[b]ecause Congress intended states to have the primary responsibility of formulating each individual child's education, th[e] court must defer to their specialized knowledge and experience by [*16] giving due weight to the decisions of the states' administrative bodies." *Hood,* 486 F.3d at 1104 (internal quotations and citations omitted). A reviewing court affords "due weight" to the administrative proceedings by considering the findings "carefully and endeavor[ing] to respond to the hearing officer's resolution of each material issue." *Capistrano Unified Sch. Dist. v. Wartenberg,* 59 F.3d 884, 891 (9th Cir. 1995) (quoting *Gregory K. v. Longview Sch. Dist.,* 811 F.2d 1307, 1311 (9th Cir. 1987)). Substantial weight is placed on a hearing officer's decision if it "evinces . . . careful, impartial consideration of all the evidence and demonstrates [a] sensitivity to the complexity of the issues presented." *Cnty. of San Diego v. Cal. Special Educ. Hr'g Office,* 93 F.3d 1458, 1466 (9th Cir. 1996). A reviewing court, however, "is free to accept or reject the findings in part or in whole." *Wartenberg,* 59 F.3d at 891.

Plaintiffs argue that Defendants denied Brianna a FAPE by (1) failing to assess her in all areas of suspected disability in violation of their child find obligations, (2) failing to deem her eligible for special education and related services, and (3) failing to design a special [*17] education program to address her unique needs. (Pl.'s Mot. Summ. J. at 4.) The Court addresses these arguments below.[9]

> 9 As discussed in this order, certain conclusions by the ALJ prevented him from making findings crucial to the determination of whether PUSD failed to deem Brianna eligible for special education and related services and whether PUSD failed to design a special education program to address her unique needs. On remand, the ALJ shall make additional findings and address these additional issues as appropriate.

A. Child find

The IDEA places an affirmative, ongoing duty on states to identify, locate, and assess all children with disabilities who are in need of special education and related services. 20 U.S.C. § 1415(b). "This is known as the 'child find' requirement." *Compton Unified Sch. Dist. v. Addison,* 598 F.3d 1181, 1183 (9th Cir. 2010). It extends to highly mobile children, including migrant children, and children who are suspected of being a child with a disability and in need of special education, even if they are advancing from grade to grade. 34 C.F.R. § 300.111(c). The duty exists irrespective of whether a parent has requested special education testing or services. [*18] *Reid v. Dist. of Columbia,* 401 F.3d 516, 518, 365 U.S. App. D.C. 234 (D.D.C. 2005). A school district's failure to fulfill its child find obligations is a procedural violation of the IDEA. *Cari Rae S.,* 158 F. Supp. 2d at 1196.

The child find requirement is triggered when the state has reason to suspect that a child may have a disability and that special education services may be necessary to address that disability. *N.G. v. Dist. of Columbia,* 556 F. Supp. 2d 11, 26 (D.D.C. 2008) ("The

Court begins with the premise that the [c]hild [f]ind obligation extends to all children *suspected* of having a disability, not merely to those students who are ultimately determined to be disabled.") (citation omitted). The state has reason to suspect that a child may have a disability where: (1) there is a suspicion that a student has an impairment that is affecting the student's educational performance or (2) a parent requests special education services or an assessment of eligibility for special education services. Cal. Code Regs., tit. 5, § 3021(a); *Park v. Anaheim Union High Sch. Dist.,* 464 F.3d 1025, 1032 (9th Cir. 2006). Whether a school district had reason to suspect that a child may have a disability must be evaluated [*19] in light of the information the district knew, or had reason to know, at the relevant time, not in hindsight. *Adams v. State of Oregon,* 195 F.3d 1141, 1149 (9th Cir. 1999).

1. The ALJ did not err when he determined that AUSD did not violate its child find duty.

The ALJ determined that Brianna had not carried her burden to prove, by a preponderance of the evidence, that AUSD "had reason to suspect that [she] might be an individual with exceptional needs [10] under the category of OHI, and in need of special education." (AR at 12.) He concluded that given the short period between the onset of Brianna's MS to the end of the 2010-2011 school year, the information available to AUSD regarding Brianna's illness and Brianna's efforts to catch up on missed work was insufficient to give rise to a suspicion that she had exceptional needs requiring special education. (*Id.* at 17.) Thus, in the absence of a request for an assessment, AUSD was under no obligation to assess Brianna for special education and related services. *(Id.)*

> 10 The California Education Code uses the term "exceptional needs" whereas the relevant section of the IDEA uses the term "disability." *Compare* Cal. Educ. Code § 56301(a) *with* [*20] 20 U.S.C. § 1412(a)(3).

Plaintiffs argue that the ALJ erred on this point. (Pl.'s Mot. Summ. J. at 15.) They assert that AUSD had more than enough information to suspect that she was suffering from a disability and that she may have needed special education services to address that disability. *(Id.)* Plaintiffs maintain that AUSD knew MS is a chronic illness, that the assistant principal, upon researching MS on the Internet, knew it was a cyclical disease, that Brianna had a medical diagnosis of a recognized disability, that AUSD knew she would continue to miss school due to her illness, and that Brianna and her mother expressed the need for more help. *(Id.)* According to Plaintiffs, this triggered AUSD's child find duty. (*Id.* at 16.)

In opposition, AUSD argues that the ALJ correctly concluded that in the short time Brianna's 504 Plan was in place, it had insufficient time to suspect that any difficulties she had in catching up with her work was due to the amount of work or her disability. (Defs.' Mot. Summ. J. at 10.) AUSD also notes that Brianna did not attend classes from May 18, 2011 until the end of the school year, and that Brianna's mother's indication to the school that Brianna [*21] just needed "a little extra time" to complete her work indicated that Brianna's educational performance was not being affected. *(Id.)*

On this issue, the ALJ's findings are entitled to due weight and are supported by a preponderance of the evidence. The ALJ considered the information available to AUSD between March 23, 2011, when Brianna was first hospitalized, and the end of the school year, June 16, 2011. (AR at 393.) The ALJ found that AUSD knew Brianna had missed school because of her illness, that she was weak and had some issues with her vision. *(Id.)* The school district, however, also knew that her cognitive functioning was unimpaired and that her physician believed that she should return to a regular education classroom so that she could begin to learn how to cope with her illness.[11] *(Id.)* In addition, the ALJ noted that there was a total of 5 weeks between Brianna's return to school and the end of the school year. *(Id.)* The ALJ reasoned that this amount of time was insufficient to allow AUSD to determine whether Brianna's difficulties in making up missed work was due to her illness or simply the volume of work to be completed. *(Id.)* The ALJ also considered Brianna's mother's [*22] communication with the school, in which she stated that Brianna just needed "a little extra time," indicated that Brianna's educational performance was not being affected on a going forward basis. *(Id.)*

> 11 While the record shows that the regular education classroom was preferred, it was only because Brianna needed to learn mechanisms for coping with her illness, not because Brianna's academic performance would be unimpaired by her condition. AR at 380. In any event, the ALJ's emphasis on this point does not disturb this Court's determination that his findings are entitled to due weight.

On this record, the Court agrees. Given the length of time Brianna had been out of school, the volume of work she had missed and needed to complete, and her mother's representation that Brianna would be able to complete the outstanding assignments with additional time, AUSD did not have reason to suspect that Brianna was a student with exceptional needs under the category of OHI and in need of special education. As the ALJ reasoned, in the few weeks between the time Brianna returned to school and the end of the semester, there was insufficient time to allow AUSD to determine whether Brianna's difficulties [*23] in making up missed work was due to her illness or

simply the volume of work to be completed. Indeed, Brianna's mother testified: "Brianna's missed a substantial amount of school while she got sick and it was hard for her to catch up just because of the timing and it was in second semester, because she was ill and because she missed a lot of school, her grades plummeted." (OAH Hr'g Tr. 15:21-16:2, May 7, 2013.)

Thus, Plaintiffs' argument that the ALJ "blatantly ignore[d] evidence introduced at the hearing that the duty to assess was triggered because Brianna and Mrs. Simmons repeatedly asked AUSD for help, telling both the Principal and Assistant Principal that Brianna could not keep up and was falling farther and farther behind," is not persuasive. While Brianna and her mother testified that she needed more help, when viewing the record as a whole, this testimony alone is insufficient to disturb the ALJ's decision. Plaintiffs' additional contention that the ALJ's inconsistent references to Brianna's MS as both a "chronic" and a "temporary" condition constitute error are also unconvincing. Plaintiffs advance no argument explaining why this inconsistency means that the ALJ's decision [*24] is not supported by a preponderance of the evidence. In addition, to the extent Plaintiffs argue that the vice principal's knowledge that MS is a cyclical disease and that Brianna would experience flare-ups that would cause her to miss school on an ongoing basis, they do not explain why that alone, should have alerted AUSD that Brianna's MS was going to impact her educational performance.[12] Moreover, the dispute regarding Brianna's outstanding assignments and final examinations that arose during her last semester at AUSD makes such a showing all the less likely.

> 12 In this regard, Plaintiffs' additional argument that Brianna's MS alone, as a recognized disability that prevented her from attending school, triggered AUSD's duty to assess is not well-taken. The case, *Weixel v. Bd. of Educ. of the City of New York,* 287 F.3d 138 (2d Cir. 2002), that Plaintiffs cite in support of this argument was decided at the pleading stage, and so, is inapposite. Furthermore, such a position contradicts the definition of OHI. *See* Cal. Code Regs., tit. 5. § 3030(b)(9)(B) (listing adverse impact on child's educational performance as element of OHI).

Accordingly, the Court finds that the ALJ did not err when [*25] he determined that AUSD did not violate its child find duty by failing to assess Brianna's eligibility for special education and related services under the category of OHI.[13]

> 13 This conclusion moots consideration of Plaintiffs' additional claims against AUSD, namely, whether the school denied Brianna FAPE by failing to deem her eligible for special education and by failing to provide a special education program to address her needs.

2. The ALJ erred when he determined that PUSD's failure to assess Brianna was harmless.

With respect to PUSD, the ALJ found that Brianna proved, by a preponderance of the evidence, that the school committed a procedural violation of the IDEA by failing to assess her eligibility for special education and related services under the category of OHI. (AR at 394.) The ALJ also found that on September 16, 2011, when Brianna's mother asked whether Brianna was eligible for special education and related services, PUSD should have treated the inquiry as a request for an assessment and should have "begun preparing a plan to assess [Brianna]." *(Id.)* He further determined that even absent any such request, "the downward slide of [Brianna's] academic performance, despite [*26] her 504 Plan, was sufficient to cause [PUSD] to suspect that [Brianna's] MS symptoms were adversely affecting her educational performance on an ongoing basis, such that [Brianna] should have been assessed . . . ."[14] *(Id.)*

> 14 Though the ALJ's decision focuses on Brianna's mother's request for an assessment in September 2011, the record shows that there may have been at least three separate requests for an assessment: during the Fall 2011 semester, after an incident that occurred during the first week of school, *see* OAH Hr'g Tr. 67:12-70:7, May 6, 2013, at a 504 Plan meeting that occurred in October 2011 or November 2011, *see id.* 81:1-21, and during a meeting between Brianna and her school counselor that took place in December 2011 or January of 2012, *see id.* 81:22-83:3.

Notwithstanding these findings, the ALJ concluded that Brianna did not prove, by a preponderance of the evidence, that this procedural error impeded her right to a FAPE, significantly impeded a parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits. *(Id.)* On this basis, the ALJ determined that Brianna did not establish that PUSD's failure to assess her resulted [*27] in a denial of a FAPE. *(Id.)* He considered PUSD failure to assess to be harmless error. *(Id.)*

Plaintiffs argue that this harmless error determination is erroneous. (Pls.' Mot. Summ. J. at 9.) They challenge the ALJ's harmless error analysis, arguing that (1) the ALJ erred in concluding that Brianna's parents did in fact participate in the decision-making process and (2) the ALJ erred in determining that an assessment would have revealed that Brianna did not qualify for special education and related services. (*Id.* at 13, 18.) The Court addresses each point in turn.

a. PUSD's failure to assess significantly impeded Brianna's parents' opportunity to participate in the decision-making process.

The ALJ found that Brianna did not meet her burden to show that PUSD's failure to assess significantly impeded her parents' opportunity to participate in the decision-making process. (AR at 395.) The ALJ determined that if PUSD had conducted an assessment when Brianna's mother requested it in September 2011, the assessment would have been completed in November or December 2011. *(Id.)* He also found that even though PUSD did not conduct any such assessment, Brianna's parents had still "obtained substantial [*28] information about [Brianna's] needs" because they had obtained a neuropsychological assessment from UCSF on November 22, 2011. *(Id.)* The ALJ determined that while this assessment was not a psychoeducational assessment, "it provided detailed information concerning the effects of [Brianna's] illness, her needs, and recommended accommodations and modifications for [Brianna's] educational program." *(Id.)* He concluded that Brianna's parents "did, in fact, meaningfully participate in the decision-making process, and with parental input, PUSD ultimately provided [Brianna] with a 504 Plan that include[d] the types of accommodations that were recommended in the UCSF evaluation, and [Brianna] obtained her general education high school diploma."[15] The ALJ also found that Brianna "did not present evidence at the hearing from which it could be concluded that if PUSD had performed an assessment, [her p]arents would have had better information or more meaningful information in the decision-making process, particularly when, as discussed above, [Brianna] would not ultimately have been eligible for special education." *(Id.)*

> 15 It is unclear why the ALJ considered Brianna's graduation as a factor in his [*29] harmless error analysis. A schools' child find duty extends to children who are suspected of being a child with a disability and in need of special education, even if they are advancing from grade to grade. 34 C.F.R. § 300.111(c).

Plaintiffs' principal argument is that the ALJ erred in finding that PUSD's failure to assess did not constitute a denial of a FAPE because Brianna's parents were denied participation in the IEP process. (Pl.'s Mot. Summ. J. at 10.) They assert that the ALJ ignored that the IDEA mandates parental participation in the IEP process, including in decisions regarding eligibility, and overlooked the requirement that a school provide written notice if it elects not to assess or not to deem a child eligible for special education and related services and include the reasons for the denial. (*Id.* at 10.) Plaintiffs also contend that the ALJ erred (1) in finding that Brianna's parents participated in the decision-making process, (2) in determining that Brianna did not present evidence that her parents would have had better or more meaningful information if the school had performed an assessment, and (3) in concluding that Brianna would ultimately not have been eligible [*30] for special education and related services. (*Id.* at 14.)

In opposition, PUSD contends that the ALJ correctly concluded that PUSD's failure to assess Brianna was harmless because Brianna's parents had an opportunity to participate in the decision-making process, as they had the information provided in a November 2011 UCSF neuropsychological assessment, and because they had not demonstrated that additional assessment would have provided better or more meaningful information. (Def.'s Opp'n at 10, 11.)

Despite Defendants' contention to the contrary, the ALJ erred in finding that PUSD's failure to assess did not significantly impede Brianna's parents' opportunity to participate in the decision-making process. As Plaintiffs argue, the ALJ ignored the simple fact that Brianna's parents had no opportunity to participate in an IEP formulation process because PUSD declined to assess Brianna's eligibility for an IEP in the first place. Instead, it decided that the 504 accommodations in place at the time were sufficient, obviating the need for any special education assessment. As the ALJ himself acknowledged, this is contrary to controlling law. *See* AR at 390 ("Although a district is required to [*31] utilize the resources of its regular education program, where appropriate, to address a student's exceptional needs, it may not delay its assessment of a student with a suspected disability on the basis that it is utilizing a response to intervention approach to accommodate the student in a regular education program."); *see also Yankton Sch. Dist. v. Schramm,* 93 F.3d 1369, 1376 (8th Cir. 1996) ("Although an individual who is eligible for services under IDEA may also qualify for assistance under the Rehabilitation Act of 1973 . . . the school district is not free to choose which statute it prefers . . . .") (citation omitted); *Hacienda La Puente Unified Sch. Dist. v. Honig,* 976 F.2d 487, 492 (9th Cir. 1992) (rejecting the argument that a child must be identified as disabled or handicapped before the IDEA's procedural safeguards can be invoked); *see, e.g.,* Cal. Code Regs., tit. 5, § 3030 ("The decision as to whether or not the assessment results demonstrate that the degree of the child's impairment requires special education shall be made by the IEP team. . . . The IEP team shall take into account all the relevant material which is available to the child."). Defendants' proposed "wait and see" [*32] approach ignores that a child's parents' are essential members of the IEP team and are entitled to fully participate in the IEP process. *See Amanda J.,* 267 F.3d at 892 ("Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. An IEP which addresses the unique needs of the child cannot be developed if

those people who are most familiar with the child's needs are not involved or fully informed."). The Court, therefore, rejects PUSD's position that, while it improperly declined to commence the IEP process, Brianna's parents nonetheless had a meaningful opportunity to participate in the decision-making process.

Instead, the Court finds that Plaintiffs' position has merit, subject to a crucial qualification. During oral argument, Plaintiffs urged the Court to depart from the governing harmless error analysis in favor of the structural defect analysis articulated by the Honorable Arthur L. Alarcón in *M.L. v. Fed. Way Sch. Dist.,* 394 F.3d 634 (9th Cir. 2004) (plurality). Under the latter framework, certain procedural violations, standing alone, constitute a *per se* denial of a FAPE. *See id.* at 648. The Ninth Circuit, [*33] however, has expressly rejected the structural defect framework, reiterating that the harmless error analysis controls:

> Not all procedural flaws result in the denial of a FAPE. We have never adopted as precedent the structural defect approach discussed by Judge Alarcón in *M.L. v. Federal Way School District,* 394 F.3d 634 (9th Cir. 2005) (plurality). *See id.* at 652-52 (Gould, J., concurring). Our precedent is clear: a procedural violation may be harmless, and we must consider whether the procedural error either resulted in a loss of educational opportunity or significantly restricted parental participation.

L.M., 556 F.3d at 910. In light of controlling Ninth Circuit authority, then, the Court does not subscribe to the structural defect analysis Plaintiffs propose.

With this important caveat, the Court finds that Plaintiffs' position is otherwise persuasive. The Ninth Circuit has recognized that "[p]arental participation in the IEP and educational placement process is central to the IDEA's goal of protecting disabled students' rights and providing each disabled student with a FAPE." *Doug C.,* 720 F.3d at 1040; *see also* 20 U.S.C. § 1415(b)(1). Yet, the ALJ's decision ignores that PUSD "completely [*34] shut Brianna's parents out of the decision making process with regard to IDEA eligibility." (*See* Pl.'s Mot. Summ. J. at 13.) Despite the ALJ's finding to the contrary, the fact that Brianna's parents had the results of a neuropsychological assessment does not cure this error. While Plaintiffs challenge the ALJ's decision to rely on expert testimony on the topic of the neuropsychological assessment, *see* discussion *infra* Part II.A.2.b, they also argue the expert's own testimony shows that a neuropsychological assessment is not a suitable substitute for a psychoeducational assessment. (Pl.'s Mot. Summ. J. at 18.) The Court agrees.

The testifying expert, Nancy Sullivan, explained the difference between a psychoeducational assessment and a neuropsychological assessment as follows:

> The difference would be the purpose for the evaluation, so a neuropsychological assessment would be undertaken where more related to a medical condition or some type of neuropsychological issue, whether it be a head injury or some type of epilepsy, some of kind neuropsychological condition such as multiple sclerosis to determine the functioning of that person at that point in time, across the domains of development [*35] that we evaluate, so that would be cognition, memory, learning, executive functioning, attention, visual perception, language, and motor, we so would be looking at those -- how that person's functioning is across those domains of development to assess where they are in relation to the expectations based on their age, and you know, level of education, so they're looking at national norms and where they fall based on -- then the interpretation would be based on what we know about the particular medical condition that the person has and whether or not they're following the course that we would expect and, because I see children and adolescents, to be able to then counsel the parents or recommend further steps, whether it be treatment, whether it be going back to their school district, et cetera.
>
> A psychoeducational evaluation, when I do those, they tend to be more a question of -- I'm looking at the student from a learning perspective and looking at learning strengths and weaknesses and thinking about does -- is there something in the profile that we -- that I as an independent person, would be again recommending that the parents consider going back to the school and ask for them to review [*36] the report to consider eligibility for special education, so [with] a neuropsych evaluation, what I'm looking for is more diagnostic kind of material, whereas with a psychoeducational assessment, I'm still going to do my diagnostic thing, but I'm also going to be thinking about, is there something in this child's profile that I would think could be

> supported either through a 504 plan or through an IEP because I think they need some type of services that the school would provide[.]

(OAH Hr'g Tr. 141:6-142:17, May 7, 2013.)

Specifically with respect to the November 2011 UCSF assessment, the expert testified that it was not a complete neuropsychological assessment, but "a little bit more than a screening. . . . It looks like research protocol." (*Id.* 149:7-11.) She added that "if [she] were doing a comprehensive evaluation of any type, [she] would want to have the input from the school." (*Id.* 164:19-20.) She noted that there was nothing in the November 2011 UCSF assessment "that reference[d] contact with the school." (*Id.* 164:21-24.)

This testimony undermines the ALJ's finding that Brianna's parents had a meaningful opportunity to participate in the decision-making process and that they failed [*37] to demonstrate that they would have had additional or more meaningful information if PUSD had assessed Brianna. By the expert's own testimony, the assessments are designed to address different issues, they have different goals, and they involve different diagnostic tools. In light of these differences, the fact that Brianna's parents did not have the benefit of a comprehensive psychoeducational assessment significantly impeded their opportunity to participate in the decision-making process. True, the psychoeducational assessment may have informed them about the special education and related services that would have helped Brianna but may have just as easily revealed that Brianna did not require any special education or related services. But her parents were still entitled to that information.

Moreover, even if the neuropsychological assessment may have overlapped with some of the components of a neuropsychological assessment, that does not obviate the need for one, nor does it render PUSD's failure to complete one harmless. Indeed, even the failure to assess a student in a single area of suspected disability, *see, e.g., W.H. v. Clovis Unified Sch. Dist.,* No. CV F 08-0374 LJO DLB, 2009 U.S. Dist. LEXIS 47736, 2009 WL 1605356, at *18 (E.D. Cal. June 8, 2009) [*38] (failure to assess a child in the area of written expression constituted a procedural violation that deprived the child of educational benefits), or to timely provide portions of information concerning a child's impairment or disability, *see Amanda J.,* 267 F.3d at 891 (failure to timely disclose child's records to her parents, particularly evaluations indicating possible autism and suggesting further psychiatric evaluation was needed, constituted egregious procedural violations that denied the child a FAPE), can constitute a denial of a FAPE .

Here, Plaintiffs never received the information a psychoeducational assessment could have provided because PUSD did not assess Brianna. As a result, it significantly impeded her parents' opportunity to participate in the decision-making process. PUSD's failure to assess Brianna was, therefore, not harmless. It resulted in a denial of a FAPE. On this point, the ALJ's decision is reversed, and PUSD shall arrange for a comprehensive psychoeducational assessment at no cost to Plaintiffs.

b. The ALJ's determination that PUSD's failure to assess Brianna did not impede her right to a FAPE or deprive her of educational [*39] *benefits is erroneous.*

The ALJ also found that PUSD's failure to assess Brianna was harmless for the additional reason that it did not impede her right to a FAPE or deprive her of educational benefits under the IDEA. (AR at 395.) He reasoned:

> [T]he totality of the evidence, including the results of testing and the recommended accommodations and modifications contained in the UCSF Assessment, the testimony of Dr. Sullivan, and [Brianna's] academic success once her 504 plan was fully implemented by PUSD in the Spring 2012 and following semesters, indicates that [Brianna's] educational needs arising from her MS could have been met in the general education environment with appropriate accommodations provided in a 504 Plan. There, the preponderance of the evidence is that an assessment would have found that [Brianna] did not qualify under Education Code section 56026, subdivision (b), as an individual with exceptional needs requiring special education.

(Id.)

Brianna argues that this determination is erroneous because (1) the ALJ should not have relied on the UCSF assessment Brianna submitted at the administrative hearing, (2) the ALJ should not have relied on the testimony of Nancy Sullivan, [*40] (3) the ALJ erroneously relied on Brianna's academic performance in the spring 2012 without considering her needs, and (4) the ALJ ignored the snapshot rule. (*Id.* at 17, 18.)

Even assuming that the ALJ properly relied on the UCSF assessment, the testimony of Nancy Sullivan, and the snapshot rule, the ALJ's determination that Brianna would ultimately not have been eligible for special

education and related services as a student with exceptional needs is speculation and not supported by a preponderance of the evidence.

Setting aside the fact that Brianna could no longer participate in extracurricular activities such as the National Social for High School Scholars, and the Early Academic Outreach programs, two initiatives available to students who have demonstrated high scholastic achievement, *see* OAH Hr'g Tr. 90:7-16, May 6, 2013, the record shows that, contrary to the ALJ's finding, the 504 accommodations were not enough to meet Brianna's needs in the general education setting.

In her first semester of her junior year, Brianna was on the brink of failing Spanish, Algebra II, and Chemistry because she had missed too much school due to an MS flare-up. (OAH Hr'g Tr. 83:6-85:16, May 6, 2013.) [*41] When she asked those teachers for make-up work, they said it was too much and that Brianna would not be able to catch-up even if they provided it. *(Id.)* Brianna eventually took Algebra II for a second time as an online course, and PUSD changed her Chemistry and Spanish teachers. (*Id.* 87:10-89:23.)

At one point during the Fall 2011 semester, the school counselor suggested that Brianna go on independent study. (*Id.* 90:23-91:18.) Brianna testified that she did not continue the independent study program because the curriculum included fifth-grade math and third-grade English. (*Id.* 91:25.) That PUSD suggested such an alternative should have alerted them that the 504 Plan in place was insufficient to address Brianna's needs and that additional intervention was necessary, whether in the form of additional 504 accommodations or an IEP.

After the Fall 2011 semester, she dropped the first three periods of her schedule because she "could not handle mornings" due to the severity of her symptoms at that time of the day. (*Id.* 90:17-22; *see also* 38:11-24.) During her senior year, Brianna took some of her courses online and others at school. (*Id.* 132:16-20.) Her third quarter progress report for that [*42] school year reflected F grades in Pre-Calculus and Spanish, a C grade in Physics, and an A+ in English. (AR at 200.) When asked whether any of her online classes were advanced placement courses, she responded:

> No, they're for people who have to repeat and who have failed classes and you have to repeat them, so they give them to those students who need the help because they've been failing and for people like me who have adjusted schedules, but they're not advanced placement classes at all.

(*Id.* 144:17-22.) She explained that she was ineligible for honors classes and advanced placement classes at PUSD because of her grades. (*Id.* 144:23-26.)

In addition, the record reflects that Brianna experienced a number of other difficulties as she struggled to keep up with her academic challenges. Brianna testified that while at Pittsburg:

> [I]t's been very difficult because of the regular work that you have to do every day and then on top of that, constantly trying to make up the other work because of the days that I missed because of my illness, so it was kind of like a cycle.
>
> I would have to stay up late at night and work very hard and it's not -- which worsens my condition because I'm not rested and [*43] I'm overstressing, which makes me miss even more days, so it was just like a giant snowball going down, building on top of each other.

(OAH Hr'g Tr. 93:9-20, May 6, 2013.) When explaining the emotional impact of these challenges, she stated:

> It stressed me [out] a lot, gave me a lot of anxiety, triggering panic attacks,[16] and it made me very depressed, and I felt let down. Like, even though I was trying my hardest, I felt that they were still saying, well, that's not good enough.

Id. 93:21-94:1.

> 16 Brianna also testified that she was taking Lorazepam for her panic attacks. OAH Hr'g Tr. 50:2-7, May 6, 2013. She described the severity of those episodes as follows:
>
> > First they had me on one and then they upped me to four to try to calm me down because my -- I'd have really bad anxiety, to the point I would start to have panic attacks, and I took this a lot during the 11th grade year and my 10th grade year because I was always stressed and I was always scared and I would -- it would just be too much, so the Lozepram [*sic*] makes you kind of dizzy and also kind of like when you take drugs, like, the bad ones, it gave you kind of those side effects, so I was not able to go to school while I'd take [*44] one of those . . . .

> But it got to the point to where the panic attacks got so bad to where they were going to switch me to a stronger medication for my panic attacks because of the anxiety and the stress.

Id. 50:2-22.

Brianna's parents' also testified about how MS impacted Brianna's stamina. Her mother testified:

> Brianna struggles every day. She's never 100 percent. She doesn't get the headaches every day, but you know, it's frequent and she's never 100 percent pain free, and she's never 100 percent vitality, you know, compared to what she used to be before she got sick. She gets really fatigued really quickly. She doesn't have the stamina like she used to or like most teenagers her age.
>
> So we always have to take into consideration, when we take vacations or when we go on trips, that we have to build in rest times for her.

(OAH Hr'g Tr. 15:1-13, May 7, 2013.) Brianna's father's testimony was similar:

> When she was diagnosed with MS, it[] impacted her severely because she used to be a fun loving, bubbly kid, you know, a go-getter and stuff and then once she was diagnosed, you can tell -- it was like, you know, a person putting a pin in a balloon and all the air just start[ed] seeping out and [*45] she's just been, you know, down, depressed and stuff. . . .
>
> And now [as] far as with [how] MS has this impact on her, you know, and stuff like that, you know. It's almost just like, you know, you know, she can't -- you know, don't think that she was going to be able to go to school because of this, you know, because with the relapses that she has and things like that and it's always been -- it's a[n] impact with the relapse because she's missing school, can't be at school, and then trying to make up her work and stuff like that, you know, and that's very stressful, trying you know, [to] make up the work and stuff, but she's not able because she's not at school. She's always missing a lot of school and stuff like that.

(*Id.* 86:1-89:7.)

In light of all of the above, the preponderance of the evidence does not show that an assessment would have found that Brianna did not qualify for special education and related services as a student with exceptional needs under the category of OHI. More specifically, the preponderance of the evidence does not support the ALJ's determination that Brianna was not special education eligible because her 504 accommodations met her needs in the general education [*46] environment. As set forth above, even with her 504 accommodations, Brianna struggled considerably. Her MS caused her to miss school repeatedly. Her absences caused her to fall so far behind that even some of her teachers said she would never be able to catch up. She suffered from depression, experienced panic attacks, and was under incredible stress because of her academic difficulties. She could not attend school in the mornings, when her symptoms were most severe, so she would take online courses, with a remedial curriculum, because she had no other alternative. When Brianna missed school for a length of time following a flare-up, PUSD recommended that Brianna enroll in independent study, which based on Brianna's testimony, offered her a woefully deficient curriculum.

A comprehensive psychoeducational assessment will identify what, if any, additional services Brianna needed at the time the assessment should have been, but was not, completed. PUSD's failure to assess Brianna while she was enrolled at Pittsburg High School deprived her parents of that information as well as the opportunity to consider alternatives to the failing 504 Plan that might have been better suited to Brianna's [*47] unique situation. The evidence in the record suggests that Brianna continued to have needs associated with her MS that, despite 504 accommodations, adversely impacted her academic performance. This shows that the 504 accommodations PUSD implemented did not adequately address Brianna's needs. Indeed, PUSD, having failed to conduct an assessment, had not properly identified Brianna's needs in the first place. When reviewing the record as a whole, then, the preponderance of the evidence establishes that by failing to assess Brianna, PUSD substantially impeded Brianna's parents' participation in the IEP process and deprived Brianna of an educational benefit. For these reasons, PUSD's failure to assess Brianna is not harmless as a matter of law. It is a denial of a FAPE.

III. CONCLUSION

For the reasons set forth above, the Court GRANTS Plaintiffs' motion for summary judgment with respect to

their failure to assess claim against PUSD and DENIES the motion with respect to claims asserted against AUSD. Defendants' motion for summary judgment is DENIED as to the failure to assess claim against PUSD and GRANTED with respect to claims asserted against AUSD. The motions are otherwise denied, and [*48] this case is REMANDED to the ALJ for the further proceedings. After a proper psychoeducational assessment has been conducted at public expense, the ALJ shall make additional findings as to the issues he did not fully address in the first instance, including whether Brianna is entitled to compensatory education.

IT IS SO ORDERED.

Dated: June 11, 2014

/s/ Kandis A. Westmore

KANDIS A. WESTMORE

United States Magistrate Judge

G.M. ET AL. v. SADDLEBACK VALLEY SCHOOL DISTRICT

Case No. SACV 11-1449 DOC (MLGx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2012 U.S. Dist. LEXIS 169411

November 26, 2012, Decided
November 26, 2012, Filed

OPINION

CIVIL MINUTES -- GENERAL

PROCEEDINGS: (IN CHAMBERS): ORDER GRANTING IN PART DISTRICT'S MOTION FOR ATTORNEY'S FEES BUT REDUCING TOTAL FEES

Before the Court is a Motion for Attorneys' Fees filed by Saddleback Valley Unified School District ("District"). (Dkt. 29). After reviewing the moving papers and other filings the Court GRANTS IN PART District's Motion, but REDUCES the number of hours for which District may seek fees. [1]

> 1 The Court finds the matter appropriate for decision without oral argument. Fed R. Civ. P. 78; Local R. 7-15.

I. Background

The facts of this case are already well known by the parties after roughly two years of litigation and summarized by this Court in its August 1, 2012, Order ("Order") (Dkt. 27). In short, Plaintiffs R.M. ("Student") and G.M. ("Mother") filed suit pursuant to the Individual with Disabilities Education Act ("IDEA"), appealing an administrative decision ("Decision") issued by an Administrative Law Judge ("ALJ") that found in favor of District on all of the issues raised by Plaintiffs. In the August 1, 2012, Order, [*2] this Court affirmed the ALJ's Decision, denied Plaintiffs' appeal, denied all of Plaintiffs' requests for relief, and stated that the Court was willing to entertain a motion for attorneys' fees from District. Order (Dkt. 27) at 16-17.

In addition to the facts summarized in the August 1, 2012, Order, this Court includes a few additional facts to provide context for this Motion.

On April 10, 2010, Mother, via her then-advocate Jillian Bonnington, filed a Request for Due Process ("First Action") with the Office of Administrative Hearings ("OAH"), alleging that the District failed to meet its obligations to provide Student with a free appropriate public education ("FAPE") during the 2009/2010 school year. Owen Decl. (Dkt. 31) ¶ 3, Ex. A.

In the First Action, Student twice failed to appear or provide notice of her failure to appear at administrative hearings. [2]

> 2 District is not seeking reimbursement for any attorneys' fees related to the First Action filed by Plaintiffs. Mot. at 3 n.3. This Court includes this fact merely to provide context to explain this Court's conclusion that Mother's filing of the Present Action was for an improper purpose.

Mother then commenced the present action ("Present [*3] Action") by filing substantially the same complaint as in the First Action. Mother litigated the Present Action through counsel.

II. Discussion

In the present Motion, District seeks $57,813.50 in discounted attorneys' fees incurred while defending itself in the Present Action and on appeal, money which could otherwise have been used for public education and to provide special education services to students. The Court first concludes that District is entitled to fees because Mother's filing of and her attorney's continued litigation of the Present Action was frivolous, unreasonable, and lacked foundation and was done for the improper purpose of harassment and needlessly increasing costs. Next, the Court concludes that District's fees are reasonable after a slight reduction.

a. Law regarding frivolous and improper purpose prongs

A school district that is a "prevailing party" [3] in an action brought under 20 U.S.C. § 1415 may recover attorneys' fees either:

> (II) . . . against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly [*4] became frivolous, unreasonable, or

> without foundation; or
>
> (II) . . . against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the costs of litigation.

20 U.S.C. §§ 1415(i)(3)(B)(i)(II)-(III); 34 C.F.R. § 300.517(a). [4]

> 3 Plaintiffs do not dispute and this Court agrees that District is the prevailing party in the Present Action, having received a judgment in its favor both from the ALJ and this Court. *See* Opp'n at 1; AR, p. 34 ("Here, District prevailed on all issues."); Order (Dkt. 27) at 17 (inviting "District, as prevailing party, . . . to move for reimbursement for reasonably attorney's fees . . ."); *see also P.N. v. Seattle Sch. Dist. No. 1*, 474 F.3d 1165 (9th Cir. 2007) (noting that one of the ways to obtain prevailing party status is through a judgment on the merits in the party's favor).
>
> 4 Attorneys' fees that may be awarded under these Sections include fees incurred in preparing an attorneys' fees motion. *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1544 (9th Cir. 1992).

The purpose of a fee award under [*5] these Sections is to deter frivolous cases and unreasonably demanding or litigious parents and their attorneys. *See El Paso Independent Sch. Dist. v. Berry*, 400 Fed. Appx. 947, 2010 U.S. App. LEXIS 23153 (5th Cir. 2010) (holding that FAPE claim was frivolous where the attorney stonewalled the District and continued to seek services that the student no longer required).

District seeks fees under both the "frivolousness" prong, 20 U.S.C. § 1415(i)(3)(B)(i)(II), as well as the "improper purpose" prong, *id.* at § 1415(i)(3)(B)(i)(III). The Court addresses each in turn.

b. Frivolous prong

The Court first concludes that Mother's actions both below and on appeal demonstrate the unreasonableness and frivolity of the Present Action. Next, the Court rejects Mother's arguments to the contrary.

1. Mother's stonewalling of District's efforts to assess Student and legal positions on appeal show that the filing of and continued litigation of the Present Action was frivolous, unreasonable, and without foundation

District makes several arguments, one of which is that the Present Action and appeal were frivolous, unreasonable, and without foundation because Mother sought $70,000 for District's purported failure to assess Student [*6] for a disability or provide her with family therapy, yet it was Mother who stonewalled District's efforts to assess Student. In addition, Mother took unreasonable legal positions on appeal that were not supported by the plain language of the statute on which she relied or by citations to authority or the record.

i. Frivolous and unreasonable positions before the ALJ

Mother's theory of the case appears to have been that she was entitled to compensation for years of counseling, family therapy sessions, and tuition at for-profit and religious institutions in which Mother unilaterally placed Student because District: (1) had a "child-find duty" to assess Student for a disability based on District's knowledge of an unnamed depressive disorder and Student's subpar academic performance during the mere three months that Student attended District's school as a freshman (Order (Dkt. 27) at 11-14); or (2) denied Student an FAPE because District's IEP failed to pay for Student's counseling and family therapy (*id.* at 15).

Regarding Mother's theory that the child-find duty was triggered, this "action" was "frivolous" and "unreasonable" within the meaning of 20 U.S.C. § 1415(i)(3)(B)(i)(II) because [*7] Mother sued for a purported harm--failure to assess Student--that was entirely of Mother's own making. Mother stonewalled District to prevent its assessment of Student, including: (1) refusing to sign the referral paperwork for a mental health assessment by OCHCA (AR, pp. 14, 17, 31); (2) intentionally withholding information and records from District, including letters from private providers about their treatment of Student and recommendations (AR, pp. 14-15, 31) [5]; (3) refusing to allow the District to reassess Student to obtain current information (AR, pp. 17); (4) refusing to attend IEP Meetings (AR, p. 17); (5) failing to advise the District when Student returned from one for-profit institution, Sunrise, or that Mother had already decided to unilaterally place Student at another institution, Crean (AR, pp. 15-16); and (6) refusing to allow the District to communicate with Crean staff about Student's education, progress and present levels of performance (AR, p. 17).

> 5 Mother contends in her Surreply that she was free to sue District while also withholding information from it about Student because "no documents need be provided to the District until five business days before the due [*8] process." Surreply at 5 (citing Cal. Educ. Code § 56505(e)(7)). The discovery rules for a due process hearing are entirely beside the point. District's theory is that Mother must pay for fees because she sought relief for District's failure to

> assess Student when Mother would not allow District to assess Student. Nothing in the discovery rules permit Mother to have her cake and eat it too.

Regarding Mother's theory about the IEP, Mother's stonewalling described above also shows that this claim was frivolous and unreasonable because Mother sought a remedy--payment for counseling and family therapy sessions--which Mother had actively prevented District from providing earlier. Indeed, the ALJ found that:

> Mother's refusal to allow the mental health assessment made it impossible for District to have offered the individual, group, and family therapy, Student now contends were required to provide her a FAPE. More importantly, at no time did Student share any information with District that she had obtained from private sources such as the Sunrise discharge summary or Pearlman's assessment. Although Student's expert Perlman was concerned that the IEP offer did not contain counseling, even he acknowledged [*9] that District has appropriately sought to refer Student to OCHCA to obtain such services.

AR, p. 31; *see also* Mot. at 10.

In sum, this Court agrees with District that Mother took frivolous legal positions below by demanding that District compensate her for failing to assess Student or provide family therapy despite the fact that it was *Mother* who unilaterally withdrew Student from the state, failed to produce Student for assessment, and refused to provide information about Student to District. In this sense, District's theory that Mother's filing and her attorney's continued litigation was frivolous and unreasonable is akin to an argument that Mother would have been equitable estopped from seeking relief.

i. Frivolous and unreasonable positions on appeal

Examples of Mother's frivolous and unreasonable positions on appeal include her failure to even identify a qualifying disability that Student purportedly had or for which Student purportedly should have been assessed, failure to cite even persuasive authority to support her legal contentions, and gross mischaracterization of the ALJ's Decision. First, as this Court noted in its Order, Mother "never addresse[d] the issue of whether Student [*10] even qualifies as a student with a disability or what that disability is," which forced this Court to "simply assume[] without deciding that she has a qualifying disability" and to speculate based on the ALJ's Decision as to what that purported disability might be. Order (Dkt. 27) at 10 n.3. Second, as this Court observed in its Order, Mother's argument about District's child-find duty was "made in one paragraph and without citation to authority." *Id.* at 12 n.6. Mother also raised another argument that she failed to exhaust below and which was unsupported by the plain language of the statute on which she relied, Cal. Ed. Code § 56029(a). *Id.* at 12, 12 n.7. Finally, as this Court stated in its Order, Mother multiple times "grossly mischaracterize[d] the record" when arguing that the ALJ's factual findings should be ignored, such as "cherry pick[ing] one sentence" in the ALJ's Decision that, when read in context, demonstrated that the Decision contained no "inaccuracy." *Id.* at 6-7, 16.

Thus, this Court agrees with District that Mother's filing and her attorney's continued litigation of the Present Action were frivolous, unreasonable, and without foundation.

2. Mother's arguments are unpersuasive

Mother [*11] contends that the Present Action was not frivolous, unreasonable, or without foundation, relying on the Ninth Circuit's recent observation that "so long as the plaintiffs present evidence that, if believed by the fact-finder, would entitle them to relief, the case is per se not frivolous." *See R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1126 (9th Cir. 2011). As an initial matter, this Court notes that Mother's arguments go only to frivolity, and thus are insufficient to rebut District's contentions or this Court's finding of unreasonableness and lack of foundation. Regardless, this Court is not persuaded by Mother's arguments as to frivolity.

i. Mother identifies no fact dispute resolved against Mother which, had it been resolved in her favor, would have entitled her to relief

First, Mother argues that she presented evidence that would have entitled her to relief if only the ALJ or this Court had "believed" the evidence. Opp'n at 4-5. Specifically, Mother contends that she presented evidence to support the following factual conclusions: (1) Student "had a long history of mental health difficulties"; (2) on October 19, 2009--after only one month of attendance at District's school--District [*12] was "made aware of" an unnamed "major depressive disorder" via e-mail from the person treating Student; (3) on November 23, 2009--just before Thanksgiving break--Mother "made an express request for special education evaluation"; and (4) District "did not initiate" such an assessment before the beginning of winter break on December 19, 2009, nor by December 29, 2009, at which point Mother unilaterally withdrew Student from the state and placed her at Sunrise, which is a private, for-profit entity and not a certified California Non-Public School. *See* Opp'n at 4-

5; *see also* Order (Dkt. 27) at 3-4 (providing dates and detail).

By suggesting that the ALJ or this Court did not "believe" her evidence, Mother implies that there was a material fact dispute resolved against her that, had it been resolved in her favor, would have entitled her to relief. As with Mother's appeal, Mother's argument here once again grossly mischaracterizes the record and reasoning of the ALJ. The ALJ's Decision actually *contained* the factual conclusions mentioned above; however, the ALJ reasoned that these factual conclusions *did not entitle Mother to relief*. This Court agreed with the ALJ because Mother failed to cite [*13] authority to support her legal position and other authority contradicted her position. For example, Mother's argument that District's child-find duty was triggered was "made in one paragraph and without citation to authority." Order (Dkt. 27) at 11 n. 6. In addition, this Court explained that the "three months during which Student attended District were not sufficient for District to distinguish between symptoms of Student's disability and normal student behavior." *Id.* At 14. As this Court stated:

> Student's emotional disturbance disability is a type of disability for which a child find duty is triggered only if District has observed the student over a long period of time; three months is not a long period of time. Student's other health impairment disability is a type of disability for which a child find duty is triggered only if the District is aware of its chronic or acute nature; the record does not show that District was made aware of this nature in the three months during which student attended.

Id. at 14.

In sum, Mother's argument fails because the factual conclusions she claims the ALJ did not believe do not, in fact, "entitle [her] to relief." *See Prescott*, 631 F.3d at 1126; *see* [*14] *also Crane-McNab v. County of Merced*, 773 F. Supp. 2d 861, 882 (E.D. Cal. 2011) (explaining that, to present evidence that entitles a party to relief within the meaning of *Prescott*, the party must do more than present evidence that "support[s] one element of a claim").

i. Mother can not immunize herself from a finding of frivolity by creating immaterial fact disputes

Alternatively, Mother argues that *Prescott* should be read broadly to hold that, as a matter of law, no finding of frivolity is permitted where the litigation involved *any* fact dispute between the parent and district. *See* Opp'n at 3.

This Court rejects Mother's interpretation of *Prescott* as an invitation to waste judicial resources with impunity by preventing fee awards against a parent whose claim is supported only by implausible evidence or who creates immaterial fact disputes. *Prescott* disapproved of a finding of frivolity if a plaintiff presented "evidence that, if believed by the fact-finder, *would entitle* [plaintiff] *to relief*." *See R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1126 (9th Cir. 2011). *Prescott* did not hold that a parent's presentation of *any* evidence, regardless of how implausible or immaterial, would [*15] immunize a parent from a finding of frivolity. Indeed, as another court has recently observed, the statement in *Prescott* on which Mother relies does "not mean that a plaintiff could present completely false or nonsensical 'evidence' and avoid paying attorney's fees because, if believed, that evidence would entitle the plaintiff to relief." *Crane-McNab v. County of Merced*, 773 F. Supp. 2d 861, 882 (E.D. Cal. 2011). Such an interpretation of the word "frivolous" in the IDEA would be different than interpretations of the same word in the Federal Rules of Civil Procedure and other statutes.

Rather, this Court interprets the holding in *Prescott* that a finding of frivolity is barred where the resolution of a fact dispute in the parent's favor "would entitle [the parent] to relief" means that the parent presented *plausible* evidence that created a *material* fact dispute. *See R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1126 (9th Cir. 2011).

The first fact dispute Mother mentions is her contention that she did not withdraw her request for special education services. This argument is a red herring because, even assuming Mother presented plausible evidence below to support this contention, [*16] this fact dispute is not material. Liability in this case does not turn on this fact dispute; rather, this Court concluded that the "three months during which Student attended District were not sufficient for District to distinguish between symptoms of Student's disability and normal student behavior." Order (Dkt. 27) at 14.

The second "fact dispute" Mother identifies is her contention that "District failed to make the OCHCA referral at the IEP" and thus "the IEP did not meet Student's emotional health needs," resulting in District denying Student a Free Appropriate Public Education ("FAPE"). Surreply (Dkt. 46) at 2-3. First, even assuming Mother presented plausible evidence below to support this contention, there is no fact dispute because this contention is entirely consistent with District's theory that it could not assess Student because Mother stonewalled District's efforts to do so by, for example, "refus[ing] to consent to the OCHCA referral and assessment." *See* Order (Dkt. 27) at 16. Second, even if this is a fact dispute, it is not a material one because resolution in

Mother's favor would not have entitled her to relief. Rather, as this Court explained on appeal, Mother's theory [*17] was that the IEP denied Student an FAPE by failing to fund her family therapy sessions, and Mother "cite[d] no authority for the proposition that a public school must finance the family therapy sessions or other counseling for its depressed students." *Id.* at 14.

b. Improper purpose prong

Mother contends that the "improper purpose" prong is a "higher threshold" than the frivolous prong because the former requires both frivolousness and improper purpose, relying on the Ninth Circuit's observation that "as a matter of law, a non-frivolous claim is never filed for an improper purpose." Opp'n at 8 (quoting *R.P. v Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1126 (9th Cir. 2011). District does not dispute this contention. Regardless, this Court has already concluded in this order that Mother's action was frivolous.

This Court agrees with District that Mother's stonewalling, as described above, combined with her repeated failures to appear at two administrative hearings in the First Action and filing essentially the same complaint in the Present Action, shows that the Present Action was presented to harass, cause unnecessary delay, and to needlessly increase the costs of litigation.

Mother contends [*18] that her actions prior to obtaining counsel on August 25, 2010, are "irrelevant." Opp'n at 10. This contention profoundly misunderstands the plain language and purpose of the fee-shifting statutes. The plain language creates no safe haven for a parent who launches a frivolous attack on a school district merely because the attack is made more frustrating and meritless by the parent being pro se. Such a rule would ironically bar sanctions against those most deserving of them: parents whose claims are so meritless that no lawyers will take them.

Thus, this Court concludes that the Present Action was presented for any improper purpose, namely, to "harass," "cause unnecessary delay," and "needlessly increase the costs of litigation." *See* 20 U.S.C. § 1415(i)(3)(B)(i)(III).

X. District's attorneys' fees are reasonable

"The starting point for determining a reasonable fee is the 'lodestar' figure, which is the number of hours reasonably expended multiplied by a reasonable hourly rate." *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992).

District requests a total of $57,813.50 in attorneys' fees related to the underlying administrative hearing, the appeal before this Court and the preparation [*19] the present Motion. *See* Mot. at 12-31, Owen Decl. ¶¶ 11-22, Ex. G.

a. The number of hours reasonable once reduced slightly

The evidence shows that District's counsel worked 263.9 hours to defend District over the course of almost two years of litigation. This time includes hours spent preparing for and conducting a five-day administrative hearing before OAH. Such preparation included analysis of witnesses and exhibits, reviewing Student's exhibits and drafting witness outlines for twelve witnesses, and meeting with witnesses.

These hours reflect remarkable efficiency on the part of District and are eminently reasonable, especially given that Mother's own frivolous actions needlessly prolonged this litigation. Mother can not now complain about the costs District incurred on appeal when Mother first stonewalled District's efforts to assess Student's mental health and then filed an appeal arguing, without authority, that District's failure to provide family therapy denied Student an FAPE. *See City of Riverside v. Rivera*, 477 U.S. 561, 580 n. 11, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986) (losing party "cannot litigate tenaciously and then be heard to complain about the time necessary by the [opposing side] in response.").

Mother [*20] first contends that the bills do not sufficiently describe the task performed in order for Student to attack their accuracy. Opp'n at 11. District has cured any purported defect by providing copies of the bills with the description of services unredacted. *See* Owen Decl. (Dkt. 45) ¶ 2, Ex. A. Furthermore, the prodigious amount of work product that District filed with the ALJ and this Court demonstrate that these hours were not idly spent.

Mother next contends that the unredacted bills contain two "matters unrelated to either the instant matter or the due process hearing below." Surreply at 5. First, Mother contends that attorneys' fees should not be awarded for fees incurred in preparation for IEP meetings, citing a statute that provides that "[a]ttorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation . . . ." 20 U.S.C. § 1415(i)(3)(D)(ii). Mother argues that District's "[e]ntries which include work preparing for and meeting regarding an IEP meeting" are: 01/07/11, 01/10/11, 01/31/11, 02/03/11, 02/07/11, and 02/09/11. *Id.* [*21] In addition, Mother argues that the 07/19/11 entry "relate[s] to a subsequent due process matter which was never litigated." *Id.*

District does not dispute in its Reply that attorneys' fees are unavailable for attendance at and preparation for IEP meetings.

However, the Court declines Mother's invitation to

strike *all* hours containing a reference to the IEP meeting because the "affected entries" identified by Mother contain a multitude of other tasks unrelated to IEP meeting preparation. For example, the 2/9/11 entry describes the 4.9 hours of tasks as: "update evidence packet; confer with DePass re IEP Meeting and hearing; draft response to Student's reply in support of motion to continue; telephone conference with martin; draft PHC Statement; draft motion to strike proposed resolution number three." Owen Decl. (Dkt. 45) Ex. A at 24.

Instead, the Court REDUCES District's hours by 10.65 hours, which is equal to one half the hours billed in the affected entries (10.65 hours = .5 * (7.9 hours on 1/07/11 + .5 hours on 1/10/11 + 2.7 hours on 1/31/11 + 3.6 hours on 2/03/11 + 1.7 hours on 2/7/11 + 4.9 hours on 2/9/11).

Thus, the Court REDUCES the number of reasonable hours to 253.25, which is [*22] the difference between the 263.9 hours District seeks and the 10.65 hours that this Court reduces for affected entries (253.25 = 263.9 - 10.65). The Court holds that 253.25 hours is reasonable.

b. The hourly rate is below market and thus more than reasonable

Under the IDEA, reasonable attorneys' fee rates are "rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." 20 U.S.C. § 1415(i)(3)(C). An attorney's customary billing rate is *prima facie* evidence of reasonableness. *Islamic Ctr. v. Starkville*, 876 F.2d 465, 469 (9th Cir. 1989).

Mother does not dispute and this Court agrees with District that the hourly rate here is eminently reasonable because it is below the customary hourly rate of the primary attorneys who worked on this case. The two attorneys who primarily worked on this case billed at a discounted, composite rate of $215 per hour. Owen Decl. (Dkt. 31) ¶¶ 2, 16. Yet, Epiphany Owen's customarily hourly rates for 2010, 2011, and 2012, were $325, $330, and $335, respectively. *Id.* at ¶ 15. Similarly, Joseph Larsen's customary hourly rate for the periods when he was involved in this litigation in 2011 and 2012 was $260 [*23] and $270 per hour, respectively. *Id.* at ¶ 16.

Thus, the hourly rate was reasonable.

IV. Disposition

For the foregoing reasons, the Court GRANTS IN PART District's Motion for Attorneys' Fees, but REDUCES the number of hours for which District may seek attorneys' fees to 253.25 hours.

The Clerk shall serve a copy of this minute order on counsel for all parties in this action.