

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020011090

PARENT ON BEHALF OF STUDENT,

v.

BELLFLOWER UNIFIED SCHOOL DISTRICT.

DECISION

JULY 07, 2020

On January 28, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming Bellflower Unified School District. At the Prehearing Conference on March 16, 2020, OAH granted a continuance at the parties' request. Administrative Law Judge Cararea Lucier heard this matter by videoconference on May 12, 13, 14, and 15, 2020.

Hamlet Yarijanian and Marian Saad represented Parent on behalf of Student. Parent attended all hearing days on Student's behalf. Richard D. Brady and Marcia P.

Brady represented Bellflower Unified School District. Matthew Adair, Program Administrator, attended all hearing days on Bellflower's behalf.

At the parties' request, the matter was continued to June 15, 2020, for written closing briefs. The record was closed, and the matter was submitted on June 15, 2020.

ISSUES

1. Did Bellflower deny Student a free appropriate public education, referred to as a FAPE, by failing to refer Student for an assessment of a suspected disability in the area of educationally related mental health services?
2. Did Bellflower deny Student a FAPE by failing to appropriately assess Student in the area of psycho-education on April 18, 2018?
3. Did Bellflower deny Student a FAPE by failing to refer Student for an assessment of a suspected disability in the area of speech and language?
4. Did Bellflower deny Student a FAPE by failing to provide Student speech and language as a related service to help support her communicative and pragmatic goals pursuant to Student's April 18, 2018 Individualized Education Program, referred to as an IEP?
5. Did Bellflower deny Student a FAPE from January 28, 2018, through April 18, 2018, by not providing Student with goals reasonably calculated to ensure meaningful educational benefit?
6. Did Bellflower deny Student a FAPE from January 28, 2018, through April 18, 2018, by failing to call an IEP, team meeting to revise the goals and services?

7. Did Bellflower deny Student a FAPE in the April 18, 2018, IEP, as amended on October 3, 2018, by failing to offer her the following, which were needed to sufficiently provide Student with some educational benefit:
 - a. Appropriate present levels of performance;
 - b. Appropriate goals in the areas of:
 - i. Social emotional; and
 - ii. Functional skills; and
 - c. Adequate services in the areas of:
 - i. Counseling; and
 - ii. Functional skills.

Student withdrew the previously identified issues 7(b)(ii) and 7(c)(ii), relating to goals and services in the area of transition, on May 13, 2020.

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student had the burden of proof in this matter. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 17 years old and in twelfth grade at the time of hearing. Student resided within Bellflower's geographic boundaries at all relevant times. Student was eligible for special education under the categories of Autism and, at various times, Speech or Language Impairment.

ISSUE 1: DID BELLFLOWER DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION, REFERRED TO AS A FAPE, BY FAILING TO REFER STUDENT FOR AN ASSESSMENT OF A SUSPECTED DISABILITY IN THE AREA OF EDUCATIONALLY RELATED MENTAL HEALTH SERVICES?

Student contends that Bellflower was on notice that Student may have a suspected mental health disorder when Student did not attend school at the beginning of her eleventh grade year, for the 2018-2019 school year, and following the February 4, 2019 IEP. Student also asserts that Student had a history of emotional challenges.

Bellflower contends it did not have reason to suspect a disability in the area of mental health. Bellflower asserts that prior to the 2018-2019 school year, when Student stopped attending, Student was happy and doing well in school. Bellflower contends that Student's boredom at attending high school does not in itself suggest a disability. Furthermore, Bellflower contends that truancy does not automatically mandate a mental health assessment when the reason for her truancy was known.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an individualized education program, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (*Endrew F.*))

In California, the term "assessment" has the same meaning as the term "evaluation" in the IDEA. (Ed. Code, § 56302.5.) These terms are used interchangeably in this Decision.

A district must ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) The assessment must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the child is classified. (34 C.F.R. § 300.304(c)(6); See *Letter to Baus* (2015 OSEP) 65 IDELR 81 [right to request an independent evaluation in an area district failed to assess].) A student's unique educational needs are to be broadly construed to include academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle School Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1501 reversed in part on other grounds by *Schaffer, supra*, 546 U.S. at pp. 56-58.) The "educational benefit" to be provided to a student requiring special education is not limited to addressing the student's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.)

A disability is "suspected," and a student must be assessed, when the district is on notice that the student has shown symptoms of that particular disability or disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119, cert. den. (Apr. 17, 2017) 137 S.Ct. 1578 (*Timothy O.*)) Notice may come in the form of concerns expressed by parents about the student's symptoms, opinions expressed by informed outside experts, or other less formal indicators, such as the student's behavior. (*Id.* at pp. 1120-1121 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796 and *N.B., supra*, 541 F.3d at 1202.]) The threshold for suspecting that a child has a disability is relatively low. (*Dept. of Educ. v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d. 1190, 1195. (*Cari Rae S.*))

Once a school district is on notice that a student may have a qualifying disability, it must formally assess the student in all areas of the disability "using the thorough and reliable procedures specified in the [IDEA]." (*Timothy O., supra*, 822 F.3d 1105, 1119.) "A school district cannot disregard a non-frivolous suspicion of which it becomes aware simply because of the subjective views of its staff, nor can it dispel this suspicion through informal observation." (*Id.* at p.1121.)

In analyzing a failure to assess claim, the actions of a school district with respect to whether it had knowledge of, or reason to suspect a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

A district's failure to conduct appropriate assessments or to assess in all areas of suspected disability constitutes a procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032-1033 (*Park*); *Timothy O., supra*, 822 F.3d 1105, 1118.)

While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, superseded on other grounds by statute (*Target Range*)). A procedural error results in a denial of a FAPE only if the violation:

- impeded the student's right to a FAPE;
- significantly impeded the parent's opportunity to participate in the decision making process; or

- caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subds. (f)(2) & (j); *Target Range, supra*, 960 F.2d at p. 1484; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.)

The Ninth Circuit has held that a procedural error resulting in a loss of an educational opportunity denies a student a FAPE. (*Doug. C. v. Hawaii Department of Education* (9th Cir. 2013) 720 F.3d 1038, 1047 (*Doug C.*)) "A procedural error results in the denial of an educational opportunity where, absent the error, there is a 'strong likelihood' that alternative educational possibilities for the student 'would have been better considered.'" (*Ibid.*, quoting concurring opinion of Judge Gould in *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 657.)

The term "educationally related mental health services," also sometimes referred to as ERMHS, is not defined by law. Bellflower uses the term to refer to mental health services that are more intensive than counseling provided by school psychologists and school counselors on school sites. This Decision uses the terms "educationally related mental health services assessment" and "mental health assessment" interchangeably.

Student did not show symptoms of a mental health disability, such that she required assessment, from January 28, 2018, through October 2, 2018. Parent's testimony that Student had a history of mental health symptoms and social emotional difficulties was not persuasive. Parent had significant difficulty recalling events which diminished the credibility of his testimony. Even when prompted by his own counsel and directed toward a specific document, Parent had trouble recalling basic information about meetings he attended. Parent's testimony is therefore given little weight, except for instances in which his testimony is supported by documentary evidence.

Student's IEP of April 17, 2017, states that Student was a happy young woman who enjoyed coming to school most of the time. She had one incident of getting upset and crying at the beginning of the 2016-2017 school year. She enjoyed community based instruction, and her job of delivering mail to teachers on campus.

Parent and school staff agreed that Student had a great tenth grade year, during the 2017-2018 school year. Parent testified that Student attended her classes and that her teachers told him she had good conduct. Student's transcript showed she was absent only four times during the 2017-2018 school year. At Student's annual IEP team meeting of April 18, 2018, Parent agreed with the comment from the general education teacher that Student was doing well, followed directions, and successfully completed projects. The team discussed a concern about Student's social development, but Parent told the team Student enjoys time alone. Parent did not alert Bellflower to any concerns with Student's mental health at the IEP team meeting of April 18, 2018. Rather, as documented in the IEP and confirmed by Parent's testimony, Parent told the IEP team he had no concerns at that time and that he was pleased with Student's progress.

During the summer of 2018, Student became sad and asked Parent to change her school. She told him that school was boring. Parent was concerned that Student could not tell him specifically why she did not want to go back to school, due to her limited communication skills. Parent investigated programs in neighboring school districts as well as homeschooling options.

Student did not attend Mayfair High School at the beginning of her eleventh grade year. Kelly Young, School Counselor, testified that Parent contacted her to ask about homeschooling or programs in other school districts because Student did not want to go to school at Mayfair High School.

On October 3, 2018, Bellflower convened an IEP team meeting to discuss Student's non-attendance. Student and Parent both attended the meeting. Parent told the team that Student did not want to attend Mayfair anymore. Parent told the team that Student found school boring. He did not share any other concerns with her emotional state or communication. Ms. Young persuasively testified that at the IEP team meeting, everyone was concerned and wanted to see what they could do differently. However, the team did not refer Student for an assessment or offer her counseling. The team agreed to give Student a shortened day with only preferred classes as an incentive to get her back to school. Student chose computers, art, and photography.

Student began attending Mayfair High School again following the IEP team meeting of October 3, 2018. Student was happy to wake up early and go to Mayfair to attend the three classes she chose. Parent would bring Student to school, and school staff or a peer would escort her to class. Student was comfortable going to school. She did not say she was bored or ask for a different school. Her attendance was good, and she came most days to attend school for her three-period schedule.

Following Student's success with the shortened day, Bellflower sought to lengthen her school day to five periods. The district convened an IEP team meeting to discuss her schedule on February 4, 2019. Student and Parent both attended this meeting. Parent also brought two individuals from Harbor Regional Center to help support him, and Student's grandmother. Parent testified that he brought the Regional Center coordinators because he was desperate for help and wanted to push the school for more services, including counselling and speech and language therapy. Parent and the Regional Center coordinators stressed that Student did not want to attend school for the full school day. Parent told the team that Student complained about school and

told him it was boring to be at school. Parent also requested counseling for Student, and the school counselor agreed to make a referral.

Marcella Harvin, Program Administrator, credibly testified about the February 4, 2019, IEP team meeting, which she attended. Ms. Harvin presented as a candid and careful witness. Ms. Harvin recalled that Parent told the IEP team that Student would cry a lot, become emotional, and that he could not make her come to school.

Student attended Mayfair High School the day after the February 4, 2019 IEP team meeting, but stopped attending school completely after that point. Bellflower tried to convene Student's annual IEP team meeting in April of 2019, but Parent refused to participate.

Bellflower should have initiated a mental health assessment at the IEP team meeting of October 3, 2018. Student's behavior of not attending school was uncharacteristic of her. It was incumbent upon Bellflower to investigate the reasons for Student's behavior, especially since she has limited communication skills, and her non-attendance prevented her from accessing her education. Even when Student attended for the three-period school day, she was not accessing academic or community based instruction, which she required to receive a FAPE. The threshold for suspecting a disability is low. Student's non-attendance and Parent's expressed concerns about Student's struggles, especially considering that Student had displayed no issues at the end of the tenth grade, put Bellflower on notice that Student might have a suspected disability in the areas of mental health and social emotional functioning.

Many of Bellflower's staff did not believe that Student had a mental health concern at the time of the February 4, 2019, IEP. However, it was unreasonable to wait until it had confirmation of a diagnosed mental health disorder. (*Timothy O., supra*, 822

F.3d 1105, 1121: “if a school district is on notice that a child may have a particular disorder, it *must* assess that child for that disorder, regardless of the subjective views of its staff members concerning the likely outcome of such an assessment.” (emphasis in the original.)

At the time of the hearing, Student’s expert psychologist, Abbe Barron, Psy.D., testified that in her opinion Student’s non-attendance should have suggested Student had a generalized anxiety disorder. In contrast, Ms. Young believed there were no red flags. Student attended the February 2019 meeting and did not cry. Sandra Gagliardino, School Psychologist, was adamant that nothing about Student’s behavior triggered a mental health assessment, as Student did not have aggressive or self-injurious behaviors. During the time Student attended school during the 2018-2019 school year, Student did not appear depressed. She did not appear to have problems with a particular teacher or student. She did not elope or bolt from the school campus.

However, Student’s behaviors of crying and becoming emotional daily and refusing to participate in her special day class were uncharacteristic for her, which should have alerted Bellflower as to the need to assess in the area of mental health. In previous years Student was happy to come to school and participate in the activities of her class. Now, Student was not accessing her education. Once Bellflower learned that Student was exhibiting symptoms of a possible mental health disorder that impacted her education, Bellflower had the duty to assess her. Bellflower’s failure to assess Student is a procedural violation of the IDEA that denied her a FAPE because without an assessment investigating Student’s behaviors of school refusal, Bellflower could not successfully address her non-attendance and Student was deprived of educational benefits of her school program.

Student did not require a mental health assessment from January 28, 2018, through October 2, 2018, as Bellflower was not aware of any symptoms or behaviors that would have triggered Bellflower's obligation to assess her. However, Student's behaviors of refusing to attend school, as discussed at the October 3, 2018 IEP team meeting, met the low threshold for suspecting a disability established in *Cari Rea S.* such that it triggered Bellflower's obligation to assess. Bellflower denied Student a FAPE by failing to refer her for a mental health assessment from October 3, 2018, through January 28, 2020.

ISSUE 2: DID BELLFLOWER DENY STUDENT A FAPE BY FAILING TO APPROPRIATELY ASSESS STUDENT IN THE AREA OF PSYCHO-EDUCATION ON APRIL 18, 2018?

Student contends that Bellflower failed to appropriately assess Student in the April 18, 2018, psycho-educational assessment by Ms. Gagliardino. Student contends that the April 18, 2018, assessment failed to provide current developmental information to the IEP team and did not include observations of Student, teacher interviews, or standardized testing of Student's suspected disabilities. Student also contends that the psycho-educational assessment failed to assess Student's social emotional needs, and did not test for other suspected disabilities such as a learning disability.

Bellflower contends that its psycho-educational re-assessment of Student complied with the requirements of the IDEA and the California Education Code, and was therefore appropriate.

A reassessment must occur not more frequently than once a year, unless the parent and the district agree otherwise, and must occur at least once every three years,

unless the parent and the district agree, in writing, that a reassessment is unnecessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment performed every three years is commonly referred to as a triennial assessment.

A district must ensure that an evaluation is sufficiently comprehensive to identify all of the student's needs for special education and related services, whether or not commonly linked to the identified disability category. (20 U.S.C. §1414(b)(3); 34 C.F.R. § 300.304(b)(1)(ii) &(c)(6).); *Letter to Baus* (2015 OSEP) 65 IDELR 81.)

In *Timothy O.*, the Ninth Circuit held, "the IDEA and its accompanying regulations contain an extensive set of procedural requirements that are designed to ensure that this initial evaluation (as well as any subsequent reevaluations) achieves a complete result that can be reliably used to create an appropriate and individualized educational plan tailored to the needs of the child." (*Timothy O., supra*, 822 F.3d 1105, 1110.)

A school district's assessments must use sound and reliable methods to yield accurate data to inform the IEP team. (See *Timothy O., supra*, 822 F.3d 1105, 1123-1124.) The Supreme Court noted that "An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv)." (*Andrew F., supra*, 137 S. Ct. at 999.) The failure to obtain critical assessment information about a student "render[s] the accomplishment of the IDEA's goals - and the achievement of a FAPE - impossible." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1210 (*N.B.*) quoting *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 894.)

Under California law, an assessment must be provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally. (Ed. Code, § 56320, subd. (b). Tests must be selected and administered to best ensure that a student with impaired sensory, manual, or speaking skills produces test results that demonstrate the student's aptitude and achievement level rather than the child's impairment. (Ed. Code, § 56320, subd. (d).)

Reassessments must be conducted by persons competent to perform them, as determined by the local educational agency. (20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c)(1)(iv); Ed. Code, § 56322.) Any psychological assessments of pupils must be made in accordance with Education Code section 56320 and must be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code §§ 56322, 56324, subd. (a).)

Sandra Gagliardino, a credentialed school psychologist, performed Student's triennial psycho-educational re-assessments in 2015 and 2018. Ms. Gagliardino received an Associate's Degree in Psychology from Cerritos College. She received a Bachelor of Arts degree in Psychology from Chapman University, and a Master of Arts degree in School Psychology from National University. Ms. Gagliardino has worked as a School Psychologist at Bellflower for 14 years.

Ms. Gagliardino met the legal qualifications to conduct a psycho-educational assessment of Student. However, Ms. Gagliardino presented as an angry and defensive witness on the topic of her assessment. Her testimony was sometimes contradicted by

documentary evidence or other district witnesses. As such, Ms. Gagliardino's testimony is given only moderate weight.

Bellflower failed in its responsibility to conduct a comprehensive assessment of Student's eligibility for special education as part of the triennial assessment process. At the time of the assessment, Student qualified for special education under the categories of Speech or Language Impairment and Autism. Student had been found eligible for special education under the category of Autism in 2009. In conducting her triennial re-assessment, Ms. Gagliardino did not assess Student in the areas of Autism, or autistic-like behaviors, under the theory that "She's been autistic. That's not going to change." Ms. Gagliardino did not appear to differentiate between a medical diagnosis of Autism and eligibility for special education under the category of Autism. Notably, Bellflower had not assessed Student in the area of Autism in the prior nine years. Ms. Gagliardino also did not test Student's cognitive abilities, academic achievement, or processing, and as such could not bring the team any information to consider whether Student may qualify for special education as a child with a learning disability or an intellectual disability.

Bellflower also failed to test Student in all areas of suspected disability to get current and accurate information. Historically, Student has presented deficits in the areas of cognitive, academic, communication, autistic-like behaviors, social-emotional functioning, gross motor, functional skills, and social skills. Ms. Gagliardino believed that triennial assessments did not require testing, and did not conduct any standardized assessments of Student in any of these areas. By failing to administer standardized test instruments, Ms. Gagliardino was unable to provide current and accurate information on Student's multiple identified areas of deficit. Without this information, the April 18,

2018 IEP team could not make informed decisions regarding the full extent of Student's need for special education and related services, or supports and accommodations.

Finally, Bellflower's April 2018 psych-educational re-assessment did not present current or reliable information about Student's functioning in the school environment. Rather than collecting current information through observations or teacher interviews, Ms. Gagliardino recycled a summary of informal comments from the outdated present levels of performance in Student's annual IEP of April 2017. Ms. Gagliardino did ask Student's teacher and parent to complete a rating scale for adaptive behavior. However, Ms. Gagliardino used an outdated version of the rating scale and failed to report the outcome of the rating scale in a way that differentiated the input of Student's teacher and Parent, leaving it unclear if the behaviors reported were exhibited during structured or unstructured times, or in the school or home setting.

Bellflower's April 2018 triennial assessment fell far short of legal standards, such that it failed in its essential purpose to provide current, accurate information to inform the development of Student's IEP. It was not comprehensive, and failed to achieve "a complete result that can be reliably used to create an appropriate and individualized educational plan tailored to the needs of the child." (*Timothy O.*, *supra*, 822 F.3d 1105, 1110.) This procedural error significantly impeded Student's right to a FAPE, thereby substantively denying her a FAPE. Student's expert, Dr. Abbe Barron, persuasively testified that with an appropriate psycho-educational assessment, Student's IEP team would have discussed alternative educational goals, services, and placement. Student met her burden of proof that Bellflower denied Student a FAPE by failing to appropriately assess Student in the area of psycho-education on April 18, 2018.

ISSUE 3: DID BELLFLOWER DENY STUDENT A FAPE BY FAILING TO REFER STUDENT FOR AN ASSESSMENT OF A SUSPECTED DISABILITY IN THE AREA OF SPEECH AND LANGUAGE?

Student contends that Bellflower had notice of Student's need for a speech and language assessment during the time period at issue due to her eligibility under the category of Speech or Language Impairment and her long history of communication deficits. Student further contends that Bellflower removed Student's eligibility under Speech or Language Impairment in 2018 without assessing Student.

Bellflower contends that in 2015 the IEP team agreed that Student no longer needed speech and language goals and services. Bellflower asserts that that nothing had changed since 2015 to give Bellflower reason to suspect that Student had a disability in speech and language.

Student had a well-documented history of a speech and language disorder. Student became eligible for special education and related services at the age of 4 years old, under the eligibility category of Autism. In 2012, during her fourth grade year, Bellflower determined that Student was also eligible under the category of Speech or Language Impairment, and this eligibility was added to her IEP. Student received speech and language as a related service from Kindergarten through seventh grade, in addition to her placement in a moderate/severe special day class.

Bellflower most recently assessed Student in the area of speech and language in 2012, during Student's fourth grade year. Student demonstrated severe delays in communication. Student scored in the 1st percentile in expressive language, and in the 2nd percentile in receptive language. The assessor recommended that Student continue

to receive direct speech and language services, with goals in the areas of morphology, syntax, and vocabulary development.

Bellflower did not assess Student in the area of speech and language as part of its 2015 triennial review. At the triennial review IEP team meeting of April 24, 2015, the IEP team reported that Student relied on her classmates to answer questions. Student had difficulty using complete sentences when communicating. She did not initiate conversation, but could answer questions or engage with peers in social activities.

Student did not use meaningful language, but frequently responded with the phrase "rainbow babbles." Although she tried very hard, Student was prompt-dependent in her communications and echolalic. She did not meet her speech goals from the previous year.

Bellflower eliminated speech and language as a service for Student in the April 24, 2015 IEP, despite team member's recommendations that Student continue to receive direct speech and language as a related service. Parent wanted Student to continue receiving speech services. He agreed to contact the Speech and Language Pathologist during the meeting, as she was not physically present. Parent ultimately consented to dismissing Student from speech services upon the recommendation of the Speech and Language Pathologist because he believed that Bellflower did not have the budget to provide speech services to Student.

Bellflower knew of Student's significant speech and language deficits at all times relevant to this matter. (See *Adams, supra*, 195 F.3d 1141, 1149.) At Student's annual IEP team meeting of April 17, 2017, Parent told the team that his main concern was Student's communication. In the April 17, 2017 IEP, Bellflower continued to find Student

eligible under the category of Speech or Language Impaired, and offered her goals in the areas of communication and social skills.

Similarly, Bellflower continued to offer Student goals in the areas of speech and social skills in her annual IEP of April 18, 2018. Student's Individual Transition Plan, attached to her IEP of April 18, 2018, states that, "One of the skills [Student] needs is to be able to communicate better." Additionally, the results of the rating scale Ms. Gagliardino used in her April 18, 2018, assessment showed that Student's communication and social skills were below expectancy for her age.

Parent obtained a private speech and language evaluation from Susan Hollar in November of 2019. Ms. Hollar is a licensed Speech Pathologist. She has a Bachelor of Science degree from the University of Michigan. Ms. Hollar has a Master of Science degree from California State University, Northridge, in Communicative Disorders and Sciences. She has completed a Post-Graduate Fellowship at the University of Southern California affiliated program at Children's Hospital in Neurodevelopmental Disorders in Children. Ms. Hollar has worked as a Speech Pathologist for 24 years, and is currently in private practice at Hollar Speech/Language Services. She has conducted over 500 speech and language evaluations over her career.

Student demonstrated severe communication disabilities during Ms. Hollar's assessment. She often needed three or four repetitions before understanding a task and her response time was very slow. She responded to direct questions, but struggled to maintain a conversation and used limited eye contact and gestures. Ms. Hollar diagnosed Student with receptive/expressive/pragmatic language disorder and auditory processing abnormalities.

Student scored in the deficient range, less than 0.1 percentile, in a standardized test of receptive language. This indicated that Student has severe challenges with comprehension of language and understanding what is being communicated to her. Because educational environments rely heavily on understanding words for directions and presentation of new material, Student's deficits in receptive communication impacted her access to education. Ms. Holler testified convincingly that Student would have exhibited receptive language delays in 2018 and 2019, had she been assessed for language deficits.

Student also scored in the deficient range in the area of expressive language. Expressive language involves the output of language such as re-telling a story, vocabulary, describing skills, and discourse skills such as explaining, persuading, informing, and comparing/contrasting. Student's deficit in expressive language meant that she had difficulty using age-appropriate language. Ms. Holler testified persuasively that Student would have demonstrated a severe deficit in expressive language in 2018 and 2019 observable to teachers and school staff, experiencing difficulty with numerous parts of her school day, including responding to teacher questions, small group work, and generating narratives or essays.

Finally, Student scored in the deficient range in the area of pragmatics on both a standardized test and a clinical assessment. Pragmatics is the social use of language. Student's deficits in pragmatics meant that she had significant difficulties understanding nonverbal cues from others in the classroom environment, including teachers and peers. Student's difficulty with pragmatic language negatively impacted her ability to participate in small groups and to understand literature. Student's severe deficits in receptive, expressive and pragmatic language would have been readily observable to

teachers and school staff, and would have been identified if Student had been assessed by Bellflower in 2018 or 2019.

Ms. Hollar's assessment does not necessarily reflect Student's exact language functioning in her educational environment for the time period at issue. She assessed Student in 2019, when Student had not attended school for 9 months. Ms. Hollar did not observe Student in an educational environment or speak with Student's teachers from Mayfair High School. Nevertheless, Ms. Hollar's assessment is consistent with the information throughout Student's educational career that Student is an individual with significant speech and language deficits.

Bellflower's failure to assess Student in the area of speech and language is a procedural violation that rises to the level of a substantive denial of FAPE because had Bellflower assessed in this area, it would have considered additional goals and services for Student, including speech therapy. Further, this failure prevented Parent from having important information to participate in the educational decision making process. Student met her burden of proof that Bellflower denied Student a FAPE by failing to refer Student for a speech and language evaluation for the time period at issue.

ISSUE 4: DID BELLFLOWER DENY STUDENT A FAPE BY FAILING TO PROVIDE STUDENT SPEECH AND LANGUAGE AS A RELATED SERVICE TO HELP SUPPORT HER COMMUNICATIVE AND PRAGMATIC GOALS PURSUANT TO STUDENT'S APRIL 18, 2018 IEP?

Student contends that Student required speech and language services as a direct related service in her IEP. Student further contends that Bellflower's failure to provide

speech and language services resulted in a regression of Student's communicative skills and contributed to Student's lack of attendance during the 2018-2019 school year.

Bellflower contends that in 2018, Student did not have a disability in the area of speech and language and that Student did not require speech goals and direct speech services. Bellflower asserts that Student's classroom placement included embedded services in speech and language, and that Student did not require additional services.

A related service is one that is required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. a.) Related services typically consist of individualized services tailored to address a disabled pupil's particular needs. (*C. G. v. Five Town Community School* (1st Cir. 2008) 513 F. 3d 279, 285). Related services include developmental, corrective and supportive services which are required to assist a special needs pupil to benefit from special education. Related services include social work services in schools preparing a social or developmental history on the student, group or individual counseling with the child and family, partnering with parents and others on the problems in a child's living situation at home, school and community that affects the student's adjustment in school, mobilizing school and community resources to enable the child to learn effectively, and assisting in the development of positive behavioral intervention strategies. (20 U.S.C. § 1401(a)(26); 34 C.F.R. § 300.34(a), (c)(14)(i) –(iv), (2006); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].)

Bellflower failed to provide Student with speech and language services to support the communicative and pragmatic goals in Student's April 18, 2018 IEP. Bellflower developed two speech and pragmatic language goals in Student's IEP of April 18, 2018.

The first goal tasked Student with describing five ways in how two people were similar. The second goal was in the area of pragmatic communication and social skills. It required Student to maintain eye contact or show attention for the duration of a five-minute group activity, such as a table game or group game. Ms. Harvin, Program Administrator, and Ms. Young, School Counselor, testified that Student did not receive speech and language as a related service to support the goals in Student's IEP of April 18, 2018.

Two of Bellflower's witnesses, Ms. Gagliardino and Anne-Marie Sharp, Adapted Physical Education Specialist, suggested that Student did not need direct speech therapy because Student received speech services that were embedded in the special day class. This testimony was disingenuous. Ms. Sharp could not recall observing a speech therapist working directly with Student in the classroom, although she testified that she visited the classroom frequently. Additionally, she could not recall the name of a speech and language pathologist at Mayfair High School during the relevant time period. Ms. Gagliardino's suggestion that conversation was encouraged in the classroom by the teacher, and that this served as an adequate substitute for speech therapy for Student, was equally unpersuasive.

Student has had significant speech and language deficits for the entirety of her educational career. Ms. Hollar's testimony that Student required speech and language as a direct service to implement her April 18, 2018 IEP goals was highly persuasive. Ms. Hollar's demeanor was calm and thoughtful, and her expert opinion regarding Student's need for services was based upon an exhaustive review of Student's educational records as well as her own assessment of Student in November of 2019. Student's exact speech and language needs at the time of the April 18, 2018, IEP are not clear due to Bellflower's failure to assess Student in this area, as discussed in Issue Three,

but the overwhelming evidence at hearing suggested that Student had severe deficits in this area and required direct, formal speech services.

Student did not receive formal, direct speech and language services following the April 18, 2018 IEP, and the embedded speech services in Student's special day class were not sufficient to enable Student to make progress on her goals. Bellflower's error denied Student a FAPE by depriving her of the educational benefits of speech and language services, which she required. Student met her burden of proof that Bellflower's failure to provide speech services in the April 18, 2018 IEP, to support her goals, denied Student a FAPE.

ISSUE 5: DID BELLFLOWER DENY STUDENT A FAPE FROM JANUARY 28, 2018, THROUGH APRIL 18, 2018, BY NOT PROVIDING STUDENT WITH GOALS REASONABLY CALCULATED TO ENSURE MEANINGFUL EDUCATIONAL BENEFITS?

Student contends that the IEP goals in the April 17, 2017 IEP did not have appropriate baseline information, and so Student was not working on appropriate academic goals. Student argues that the April 2017 annual goals were implemented during a portion of time within the statute of limitations, that is, January 28, 2018 through Student's annual IEP on April 18, 2018, and so are subject to challenge as insufficient.

Bellflower contends that the goals in Student's April 17, 2017 IEP were appropriate and that there was no reason to modify the goals prior to the April 18, 2018 IEP team meeting.

An individualized education program for a disabled child is measured at the time that it was created. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Tracy N. v. Dept. of Educ., State of Hawaii* (D.Hawaii 2010) 715 F.Supp.2d 1093, 1112.) This evaluation standard is known as the "snapshot rule." (*J.W. v. Fresno* (9th Cir. 2010) 626 F.3d 431, 439.)

While the adequacy of the IEP document is evaluated from the perspective of the IEP team at the time it was written, the implementation of the educational program is an ongoing, dynamic activity, which obviously must be evaluated as such. (*O'Toole v. Olathe Unified School Dist. No. 233* (10th Cir. 1998) 144 F.3d 692, 702.) Incidents occurring within the statute of limitations for failure to implement an IEP as written, or of notice of the need to reassess or modify an IEP, will support a due process claim. However, a parent may not bring a due process claim challenging the appropriateness of an IEP that was created outside the statute of limitations in the absence of an implementation issue, although the IEP document is in effect within the statute of limitations, as special education law does not recognize the doctrine of continuing violations as an exception to the two-year statute of limitations. (*K.P. v. Salinas Union High Sch. Dist.* (N.D.Cal., April 8, 2016, No. 5:08-CV-03076-HRL) 2016 WL 1394377 [nonpub. opn.], pp. 10-11; See *J.L. v. Ambridge Area School Dist.* (W.D.Pa. 2008) 622 F.Supp.2d 257, 268-269; *E.F. v. Newport Mesa Unified School Dist.* (C.D. Cal., June 23, 2015, No. SACV 14-00455-CJC(RNBx)) 2015 WL 3867982, *8, fn. 6.)

The April 17, 2017 IEP was drafted more than two years before Student's complaint was filed, and any claim regarding the appropriateness of the goals in that document is time barred. Student does not contend a failure to implement the April 17, 2017 annual goals. Student does not allege any exceptions to the statute of limitations

apply. Accordingly, Student's claim that the April 17, 2017 goals were not reasonably calculated to ensure meaningful educational benefit is time barred.

ISSUE 6: DID BELLFLOWER DENY STUDENT A FAPE FROM JANUARY 28, 2018, THROUGH APRIL 18, 2018, BY FAILING TO CALL AN IEP TEAM MEETING TO REVISE THE GOALS AND SERVICES?

Student contends that Bellflower should have tracked Student's progress on academic goals, and realized during its triennial assessment of Student prior to the April 18, 2018 IEP that it erroneously exited Student from speech and language services in 2015. Student asserts that Bellflower should have immediately convened an IEP team meeting to address Student's lack of academic progress, and need for speech services.

Bellflower contends that nothing triggered Bellflower's obligation to convene an IEP team meeting between January 28, 2018, and April 18, 2018. Bellflower contends that in that three-month period Student did not have a formal assessment, Student did not demonstrate a lack of progress, and neither a teacher nor Parent requested a meeting.

An IEP team must review a student's IEP at least annually to review the pupil's progress, to determine whether the annual goals are being achieved, and revise the IEP as appropriate, taking into account among other matters, whether there is a lack of expected progress toward the annual goals. (34 C.F.R. § 300.324(b)(1)(ii)(a); Ed. Code, § 56341.1, subd. (d)(1).)

A public agency must conduct meetings to review a child's IEP at least once per year, although is not prohibited from convening additional meetings. (34 C.F.R. § 300(b)(1)(i).) In addition to the requirement that an IEP be reviewed at least annually,

an IEP team meeting must be convened whenever a pupil has received and initial formal assessment or re-assessment; the pupil demonstrates a lack of anticipated progress; or the parent or teacher requests a meeting to develop, review, or revise the IEP. (Ed. Code, § 56343.)

Student failed to meet her burden of proof that Bellflower denied Student a FAPE by failing to call an IEP team meeting to revise the goals and services from January 28, 2018, through April 18, 2018. Neither Parent nor her teachers requested a meeting. Student did not provide any testimony from Student's teachers from this time period.

Student met all of her annual goals during this time period, with the exception of an Adapted Physical Education goal which required her to do curl ups. Nothing in this time period triggered Bellflower's obligation to call an IEP team meeting to revise her goals and services.

Student's argument that Bellflower would have been required to hold an IEP team meeting if Student was not meeting the periodic short-term objectives in her goals was unpersuasive. Student's interpretation of California law to require Bellflower to convene an IEP team meeting every time Student missed an objective or was not on target to meet a goal, as a *per se* lack of anticipated progress, is unreasonable and inconsistent with the IDEA. First, both the IDEA and California law require IEP review of annual goals, not of the objectives listed to achieve those goals. Second, the California legislature mandated review for lack of progress, without reference to whether objectives were met, and the legislature is presumed to have meant exactly what it said. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1081.) Third, the IDEA does not contemplate that all annual goals will be achieved. The U.S. Department of Education regulations implementing the IDEA expressly provide that one of the purposes of the annual IEP

review is to determine whether annual goals are being achieved and, if not, to revise the IEP to address any lack of expected progress toward those goals. (34 C.F.R. § 300.324(b)(1)(ii)(A).)

Student did not meet her burden of proving that she was denied a FAPE because Bellflower did not call an IEP team meeting between January 28, 2018 and April 28, 2018 to revise Student's goals and services.

ISSUE 7: DID BELLFLOWER DENY STUDENT A FAPE IN THE APRIL 18, 2018, IEP, AS AMENDED ON OCTOBER 3, 2018, BY FAILING TO OFFER HER THE FOLLOWING, WHICH WERE NEEDED TO SUFFICIENTLY PROVIDE STUDENT WITH SOME EDUCATIONAL BENEFIT: APPROPRIATE PRESENT LEVELS OF PERFORMANCE; APPROPRIATE GOALS IN THE AREAS OF SOCIAL EMOTIONAL AND FUNCTIONAL SKILLS; AND ADEQUATE SERVICES IN THE AREAS OF COUNSELING AND FUNCTIONAL SKILLS?

APPROPRIATE PRESENT LEVELS OF PERFORMANCE

Student contends that Bellflower copied and pasted the present levels of performance section from Student's April 17, 2017 IEP, into Student's April 18, 2018 IEP. Student also contends that Bellflower failed to update Student's IEP in the area of social emotional functioning at the IEP of October 3, 2018.

Bellflower contends that the April 18, 2018, IEP team discussed Student's present levels of performance and had sufficient information to create an appropriate IEP for Student.

An IEP must include a “statement of the individual’s present levels of academic achievement and functional performance.” (Ed. Code § 56345 subd. (a)(1); 34 C.F.R § 300.320.) Implicit within this law, and explicit in case law, is that present levels must be accurate and reflect current achievement and functioning of the student. In *Andrew F.*, the Supreme Court held that IEP teams must give, “careful consideration to the child’s present levels of achievement, disability, and potential for growth.” (*Andrew F., supra*, 137 S. Ct. at 999.)

Present levels are the foundation for annual goals and special education services. (See *Student. Bakersfield City Sch. District*, OAH Case No. 2008070167, 20 (October 22, 2018): “The statement of present levels essentially creates a baseline for designing educational programming and measuring future progress.”) In *Andrew F.* the Supreme rejected the suggestion that present levels are part of a mere checklist of procedural obligations:

“The school district protests that these provisions impose only procedural requirements -- a checklist of items the IEP must address -- not a substantive standard enforceable in court...But the procedures are there for a reason, and their focus provides insight into what it means, for purposes of the FAPE definition, to ‘meet the unique needs’ of a child with a disability. §§ 1401(9), (29).” (*Andrew F., supra*, 137 S.Ct. at 1000.)

Under California regulations, an IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040(c).)

Bellflower failed to include appropriate present levels of performance in Student’s April 18, 2018 annual IEP. The present levels of performance did not reflect current,

accurate information about Student. Taken as a whole, Student's present levels of performance in her April 2018 IEP appear cut and pasted from Ms. Gagliardino's April 18, 2018 triennial assessment of Student, as they are substantially identical, even with respect to typographical errors. Bellflower's reliance on Ms. Gagliardino's assessment caused Student's 2018 IEP to include outdated information, because, as discussed above, Ms. Gagliardino's assessment primarily consisted of re-stating Student's present levels of performance from her annual IEP of April 2017. Further, Ms. Gagliardino did not conduct a comprehensive assessment of Student, which deprived the IEP team of current and accurate information about Student's abilities in April 2018.

Ms. Hollar persuasively testified that Student had severe communication difficulties in the areas of receptive language, expressive language, and pragmatics, which Bellflower should have known at the time of the April 18, 2018 IEP, but Bellflower did not include this information in Student's present levels of performance. Dr. Barron persuasively testified that Student had numerous educational deficits that Bellflower should have known, and should have included in the present levels of her April 18, 2018 IEP, including in the areas of reading, writing, mathematics, communication, motor and coordination, attention and concentration, problem solving, and social emotional. Both experts opined that Bellflower's failure to include this information in the present levels or performance caused the team to omit goals and services Student required to receive a FAPE. Dr. Barron also posited that had the team considered reliable information about Student's abilities they would have actively considered a less restrictive placement than the moderate/severe special day class.

In addition to relying on a flawed assessment report, Bellflower did not consider Student's progress reports on her previous goals in drafting her present levels of performance. For example, in the area of vocational, Student's present levels of

performance in her 2018 annual IEP is identical to that of her 2017 annual IEP: "This school year, [Student] appears to transition well with her schedule (going to different classes), maneuvering the campus and changing for APE. She is responsible for delivering mail to teachers on campus. She seems to enjoy the activity. [Student] enjoys community based instruction (CBI). She will order her food or purchase items (complete transaction – handling money, waiting for change and taking item/food). She continues to need prompts when crossing the street. She is able to follow directions and wait her turn."

The April 2018 IEP does not include new information about Student's vocational abilities reported in her progress reports on her April 2017 goals, including that by April 2018, Student could use a computer or tablet to access the internet to answer five questions about an area of career interest with 80 percent accuracy. Failing to include this information in the present levels negatively impacted the team's ability to develop appropriate vocational goals. The vocational goal the team developed in the April 2018 IEP required her to use a computer to access the internet to answer five questions about an area of career interest with 75 percent accuracy. She could already do this task, but the present levels in the April 2018 IEP failed to inform the team of this fact.

Bellflower's procedural error in failing to include accurate and current present levels of performance in every area frustrated the team's ability to develop appropriate goals, services, and placement. Student's baselines for her IEP goals had little relationship to the present levels of performance. As such, Student's April 2018 IEP did not show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (See Cal. Code Regs., tit. 5, § 3040(c).) The team was unable to create a baseline for designing educational programming and measuring future progress, which impeded Student's right to a FAPE. Further, Parent

lacked information to participate meaningfully in the educational decision making process. Student met her burden of proof that Bellflower denied Student a FAPE by failing to include current and accurate present levels of performance in Student's April 18, 2018 IEP.

APPROPRIATE GOALS IN THE AREAS OF SOCIAL EMOTIONAL AND FUNCTIONAL SKILLS

Student contends that, Student has unique needs in the areas of reading decoding, reading fluency, reading and passage comprehension, word recognition, math problem solving, math calculation, math fluency, spelling, grammar, and written expression, which would have existed in April 2018. Bellflower did not offer Student goals in all of these areas at the IEP of April 18, 2018, as amended October 3, 2018. Student also contends that Bellflower should have provided Student with additional social emotional goals.

Bellflower contends that it provided Student with appropriate goals in the IEP of April 18, 2018.

An annual IEP must contain a statement of measurable annual goals designed to:

1. meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and
2. meet each of the pupil's other educational needs that result from the individual's disability.

(20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345(a)(2).)

Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344; See *Adams, supra*, 195 F.3d 1141: An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight.)

As discussed in Issues 2, 3, and 7(a), Bellflower failed to assess Student in all areas of suspected disability and failed to include appropriate present levels of performance in Student's IEP of April 18, 2018. The IEP team was unable to create a baseline for designing educational programming and measuring future progress, and therefore could not develop appropriate goals for Student's April 18, 2018 IEP. Dr. Barron persuasively testified that at the time of the April 18, 2018 IEP, Student required goals in the areas of reading decoding, reading fluency, reading and passage comprehension, word recognition, math problem solving, math calculation, math fluency, spelling, grammar, written expression, and social emotional, which Bellflower failed to offer Student. Dr. Barron's expert opinion of Student's needs in April of 2018 was based upon her thorough analysis of Student's records from Kindergarten through eleventh grade, in addition to her assessment in November of 2019. Dr. Barron opined that Student had both more deficits and more ability than Bellflower recognized through its offer of goals in the IEP of April 18, 2018.

Bellflower's failure to offer Student appropriate IEP goals deprived her of educational benefit because, consequentially, she was not provided with curriculum, services, and placement that would enable to allow her to make appropriate progress in light of her circumstances. Student met her burden of proof that Bellflower denied Student a FAPE by failing to provide her with goals reasonably calculated to ensure meaningful educational benefits in her IEP of April 18, 2018.

ADEQUATE SERVICES IN THE AREAS OF COUNSELING AND FUNCTIONAL SKILLS

Student contends that at the time of the April 18, 2018, IEP Student required counseling. Student asserts that Bellflower placed the onus on Student to seek out counseling services on an as-needed basis, despite her difficulties initiating communication. Student also asserts that after Student stopped attending school at the beginning of the 2018-2019 school year, Bellflower should have offered her counseling as a related service. Student did not address the issue of functional skills services at hearing or in her closing brief.

Bellflower contends that it offered Student counseling in the April 18, 2018 IEP, because the team agreed that Student could speak to the school psychologist at any time. Bellflower further contends that Student's classroom placement provided her with supports in the area of social emotional and functional skills.

At hearing, Student did not present any evidence or testimony regarding her need for services in the area of functional skills in April or October of 2018. Student also did not address this issue in her closing brief. Student did not meet her burden of

proof with respect to whether Bellflower provided Student with adequate services in the areas of functional skills.

With respect to counseling, Bellflower should have offered Student counseling at the October 3, 2018 IEP team meeting. Ms. Gagliardino explained that students at Mayfair High School can be provided with counseling as a related service based upon individual need. Students might receive counseling if they are having conflict with teachers or peers, anxiety about test-taking, or need help making better choices. Bellflower does not require an assessment before providing counseling as a related service, but leaves the decision to the IEP team based upon a student's needs. Contrary to Bellflower's argument in its closing brief, it did not offer Student counseling in her April 18, 2018 annual IEP. At the October 3, 2018 IEP, Bellflower should have offered Student counseling to address her non-attendance, whether it was caused by anxiety, conflicts with peers, or simply a poor choice. Even though Student was happy to attend the three-period schedule, she was still missing academic instruction and community based instruction, and was not receive a FAPE during that time. Counseling services would have helped explore the reasons for Student's non-attendance and helped the IEP team support her transition back to a full schedule so that she could receive a FAPE. Ms. Hollar testified that although Student had limited communication skills, she could benefit from counseling.

Bellflower's failure to offer and provide counseling deprived Student of educational benefit because without the service Student could not explain or process her reasons for refusing to attend school, and stopped attending all together on February 5, 2019. Student met her burden of proof that Bellflower denied Student a FAPE by failing to provide counseling at the April 18, 2018 IEP, as amended on October 3, 2018.

CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

Issue 1: Bellflower denied Student a FAPE from October 3, 2018, through January 28, 2020, by failing to refer Student for an assessment of a suspected disability in the area of educationally related mental health services. Student substantially prevailed on Issue 1.

Issue 2: Bellflower denied Student a FAPE by failing to appropriately assess Student in the area of psycho-education on April 18, 2018. Student prevailed on Issue 2.

Issue 3: Bellflower denied Student a FAPE for the relevant time period when it failed to refer Student for an assessment of a suspected disability in the area of speech and language. Student prevailed on Issue 3.

Issue 4: Bellflower denied Student a FAPE by failing to provide speech and language as a related service to help support her communicative and pragmatic goals pursuant to Student's April 18, 2018, IEP. Student prevailed on Issue 4.

Issue 5: Bellflower did not deny Student a FAPE from January 28, 2018, through April 18, 2018, by not providing Student with goals reasonably calculated to ensure meaningful educational benefit. Bellflower prevailed on Issue 5.

Issue 6: Bellflower did not deny Student a FAPE from January 28, 2018, through April 18, 2018, by failing to call an IEP team meeting to revise the goals and services. Bellflower prevailed on Issue 6.

Issue 7, subsection a: Bellflower denied Student a FAPE in the April 18, 2018, IEP, as amended on October 3, 2018, by failing to include appropriate present levels of performance. Student prevailed on Issue 7, subsection a.

Issue 7, subsection b: Bellflower denied Student a FAPE in the April 18, 2018, IEP, as amended on October 3, 2018, by failing to offer her appropriate goals in the areas of social/emotional and functional skills. Student prevailed on Issue 7, subsection b.

Issue 7, subsection c: Bellflower did not deny Student a FAPE in the April 18, 2018, IEP, as amended on October 3, 2018, by failing to offer her adequate services in the area of functional skills. Bellflower did deny Student a FAPE in the April 18, 2018, IEP, as amended October 3, 2018, by failing to offer her adequate services in the area of counseling. Bellflower and Student each partially prevailed on Issue 7, subsection c.

REMEDIES

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); *see School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*)). This broad equitable authority extends to an Administrative Law Judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168] (*Forest Grove*)).

In remedying a FAPE denial, the student is entitled to relief that is appropriate in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3).) The purpose of the IDEA is to provide students with disabilities a free appropriate public

education which emphasizes special education and related services to meet their unique needs. (*Burlington, supra*, 471 U.S. 359, 374.) Appropriate relief means relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1497 (*Puyallup*.) The award must be fact-specific and be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child when the school district has failed to provide a FAPE. (*Burlington, supra*, 471 U.S. at p. 369-371.; *Puyallup, supra*, 31 F.3d 1489, 1496.) An independent educational evaluation at public expense may be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-23.)

A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Park, supra*, 464 F.3d at p. 1033.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265; *Orange Unified School Dist. v. C.K.* (C.D.Cal. June 4, 2012, No. SACV 11-1253 JVS(MLGx)) 2012 WL 2478389, *12.) An award of compensatory education need not provide a day-for-day compensation. (*Puyallup, supra*, 31 F.3d 1489, 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.)

Bellflower denied Student a FAPE by failing to refer Student for an assessment in the area of speech and language and by failing to conduct an appropriate psycho-educational evaluation. Student proved that she incurred costs of \$5,000.00 for a private Psycho-educational Assessment by Dr. Abbe Barron, dated November 18, 2019. Student also proved she incurred costs of \$2,600.00 for a private Speech and Language Evaluation by Susan Hollar, dated November 18, 2019. Bellflower shall reimburse Student in the amount of \$7,600.00 as a remedy for its failure to appropriately assess in the areas of speech and language and psycho-education.

Bellflower denied Student a FAPE by failing to refer Student for a mental health assessment in October 2018. Student is entitled to an independent educational evaluation in the area of educationally-related mental health services.

Bellflower denied Student a FAPE by failing to provide speech and language and counseling services, and by failing to include current and accurate present levels of performance, and offer appropriate goals, in the April 18, 2018 IEP. That IEP was in place through the filing of Student's complaint on January 28, 2020. In awarding an equitable remedy, the conduct of both parties may be considered.

Parent clearly loved his daughter and was concerned for her well-being, but he acted unreasonably at times during this dispute. Parent did not take Student to school from the beginning of the school year in the fall of 2018, nor did he reach out to the school to get assistance in getting Student to attend. Of most concern, Parent once again stopped bringing Student to school after February 5, 2019, and refused to participate in an IEP team meeting.

Matthew Adair, Program Administrator, testified credibly that from February 26, 2019, through December 26, 2019, Bellflower tried diligently to schedule an IEP team

meeting for Student. Bellflower sent numerous communications to Parent and his attorney throughout this period offering a myriad of options for IEP team meetings. Parent canceled scheduled meetings at the last minute, and was generally uncommunicative and uncooperative with the IEP team process, which he viewed as a waste of time.

Parent refused to participate in an IEP team meeting with Bellflower until private assessments from Dr. Barron and Ms. Hollar were available. While reasonable for Parent to seek private assessments of Student, it was not reasonable of Parent to refuse to participate in the IEP process, especially when Student was not accessing any educational services. During this time Student was at home and not receiving any private or public educational services to address her significant educational needs.

Dr. Barron's testimony that Student could not attend school during this period due to anxiety was not persuasive. In Dr. Barron's testing, Student denied that she was anxious. She reported she was not bothered by sadness, nervousness, or worry. Student continued to go out into the community. Notably, Student was happy to attend Mayfair High School for three periods, from October 2018 through February 2019, which suggested that Student could have attended school if Parent had continued to bring her and worked with the IEP team to accommodate her needs. Therefore, Bellflower will not be penalized for Student's lack of educational services from February 5, 2019, through January 27, 2020.

Student is entitled to compensatory speech and language services for Bellflower's failure to provide services from April 18, 2018 through June 14, 2018, and from October 3, 2018, through February 5, 2019. Ms. Hollar credibly testified that all Student's speech and language needs could be addressed with two group session per

week of 45 minutes each, and one 45-minute individual session. The group sessions would address all of Student's needs in the areas of social pragmatics, narratives, retelling events, and conversation. Student attended Mayfair High School for approximately 23 weeks following the April 18, 2018 IEP and until she stopped attending school altogether on February 5, 2019. 135 minutes of speech therapy per week multiplied by 23 weeks equals three,105 minutes, or 51.75 hours, of speech services necessary to meet Student's receptive, expressive and pragmatic language needs. Student is awarded 52 hours of speech and language services by a non-public agency of Parent's choice, within Bellflower's SELPA criteria. However, no more than 26 hours may be used for individual sessions based on Dr. Hollar's opinion regarding Student's need for group sessions.

Student is entitled to compensatory education for Bellflower's failure to provide Student with accurate and current present levels of performance and appropriate goals in the April 18, 2018 IEP. Bellflower's neglect to provide appropriate baseline information in every area is a significant error that made it impossible for the team to develop an appropriate IEP. Additionally, Student is entitled to compensatory services in the area of counseling due to Bellflower's failure to offer counseling at the October 3, 2018 IEP team meeting.

Anne Perry, Director of the Lindamood Bell center in Pasadena, California, recommended that Student receive 800-1200 hours of services from Lindamood Bell as compensatory education. Ms. Hollar and Dr. Barron also recommended Lindamood Bell services as an appropriate intervention for Student. Ms. Perry freely acknowledged that the programs she was recommending would only address Student's reading and language skills, and that no services would be provided by a credentialed speech and language pathologist. However, Lindamood Bell services would not address Student's

needs in the area of math or social emotional functioning, and therefore would not be an appropriate remedy.

An award of compensatory education need not provide a day-for-day compensation. As shown by Student's most recent IEP of February 26, 2020, Parent and Bellflower currently agree that Student's educational needs can be met through five hours per week of individualized specialized academic instruction through a non-public agency, plus one hour per week of counseling and speech. Compensatory speech services are awarded as described above. Student attended Mayfair High School for 23 weeks following the April 18, 2018 IEP and until she stopped attending school altogether on February 5, 2019. Using the six hours per week as a guideline, including five hours per week of specialized academic instruction and one hour per week of counseling, for the 23 weeks Student attended school following the April 18, 2018 IEP, in which Student did not receive a FAPE, Student is awarded 138 hours of compensatory education to be used in any educationally-related area of Parent's choice, by a non-public agency of Parent's choice, within Bellflower's SELPA criteria.

ORDER

1. Within 60 days of this Decision, Bellflower shall reimburse Student in the amount of \$7,600.00 for the private assessments by Dr. Barron and Ms. Hollar. No further proof of payment by Parent is required as sufficient proof was submitted at hearing.
2. Parent shall select an independent educational evaluation provider, within Bellflower's SELPA criteria, to conduct an assessment in the area of educationally related mental health services. Within 30 days of being notified by Parent of the

selected independent assessor, Bellflower shall contract with that independent assessor.

3. Within 30 days of being notified of Parent's selection, Bellflower shall contract with a non-public agency of Parent's choice, within Bellflower's SELPA criteria, to provide 52 hours of speech and language services. No more than 26 hours may be used for individual speech and language services. Any compensatory speech services not used by December 31, 2021, shall be forfeited by Student.
4. Within 30 days of being notified of Parent's selection, Bellflower shall contract with a non-public agency of Parent's choice to provide 138 hours of compensatory education to be used in any educationally-related area of Parent's choice, within Bellflower's SELPA criteria. Any compensatory education services not used by December 31, 2021, shall be forfeited by Student.
5. All other requests for relief are denied.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

Cararea Lucier

Administrative Law Judge

Office of Administrative Hearings