

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022030740

PARENT ON BEHALF OF STUDENT,

v.

RIVERSIDE UNIFIED SCHOOL DISTRICT.

DECISION

October 20, 2022

On March 22, 2022, Parent on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Riverside Unified School District. OAH granted Student's motion to amend the complaint. The first amended complaint was deemed filed on June 7, 2022. OAH continued the matter for good cause on June 23, 2022.

Administrative Law Judge Rommel P. Cruz heard this matter by videoconference on August 2, 3, 4, 8, 9, 10, 11, 12, 15, and 16, 2022.

Attorney Hamlet Yarijanian represented Student. Parent attended the hearing on August 2, 3, 4, 8, and 9, 2022, on Student's behalf. Student did not attend the hearing.

Attorney Cathy Holmes represented Riverside Unified. Special Education Coordinator Cynthia Hartshorn attended each day of hearing on behalf of Riverside Unified.

At the parties' request, the matter was continued to September 19, 2022, for written closing briefs. The record was closed, and the matter was submitted for decision on September 19, 2022.

ISSUES

The following are the issues heard and decided in this matter. A free appropriate public education is referred to as a FAPE. An individualized education program is called an IEP. Issue 2 was revised to reflect the accurate date of the speech and language assessment at issue.

1. Did Riverside Unified deny Student a FAPE by failing to refer Student for a comprehensive special education assessment in violation of its child find obligation when Riverside Unified became aware of Student's academic struggles starting in the 2019-2020 school year?
2. Did Riverside Unified deny Student a FAPE by failing to comprehensively assess Student in the January 5, 2022 speech and language assessment?
3. Did Riverside Unified deny Student a FAPE by failing to find Student eligible for special education under the category of specific learning disability at the May 13, 2022 IEP team meeting?

4. Did Riverside Unified deny Student a FAPE by failing to find Student eligible for special education under the category of speech and language impairment at the May 13, 2022 IEP team meeting?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, called IDEA, 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 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 to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511 (2006); 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. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

At the hearing, the party filing the complaint has the burden of proof by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126

S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review in IDEA administrative hearing decisions is preponderance of the evidence].) Here, Student requested the hearing and had the burden of proof as to the issues. 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).)

At the time of the hearing, Student was 10 years old, had completed the fourth grade and had not been found eligible for special education and related services. She resided within Riverside Unified's geographic boundaries at all relevant times.

ISSUE 1: DID RIVERSIDE UNIFIED VIOLATE ITS CHILD FIND OBLIGATION BY FAILING TO REFER STUDENT FOR A SPECIAL EDUCATION ASSESSMENT STARTING IN THE 2019-2020 SCHOOL YEAR?

Student contends Riverside Unified failed to refer her for special education assessments starting in the 2020-2021 school year, when Riverside Unified was first made aware that Student had a vision problem, was performing poorly on academic achievement tests, and after Parent sought additional support for Student. Riverside Unified contends Student's academic and functional performance gave no reason to suspect she had a disability that may have required special education prior to Riverside Unified completing its initial assessment of Student for special education.

The IDEA places an affirmative, ongoing duty on the state and school districts to identify, locate, and evaluate all children with disabilities residing in the state that need special education and related services. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); Ed.

Code § 56301, subd. (a).) This duty is commonly referred to as child find. California describes children with disabilities who may need special education and related services as individuals with exceptional needs. (Ed. Code, § 56026.)

A school district's child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect, a disability, and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1194 (*Cari Rae S.*)) The school district's duty for child find is not dependent on any request by the parent for special education testing or services. (*Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.)

The threshold for suspecting that a child has a disability is relatively low. (*Cari Rae S., supra*, at p. 1195.) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*) An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

If a school district has notice that a child has exhibited symptoms of a disability covered under the IDEA, it must assess the child for special education, and cannot circumvent that responsibility by way of informal observations or the subjective opinion of a staff member. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1121.) A school district's obligation to assess for possible exceptional needs applies even if the child is advancing from grade to grade. (Ed. Code, § 56301, subd (b)(1).) 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, and not based upon hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, (citing *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031,1041.)

Here, Student failed to prove Riverside Unified violated its child find obligation by not referring Student for a comprehensive assessment for special education and related services from March 22, 2020. The statute of limitations in California is two years, consistent with federal law. (Ed. Code, § 56505, subd. (j); see also 20 U.S.C. § 1415(f)(3)(C).) Student does not claim an exception to the two-years statute of limitations. Accordingly, Issue 1 is limited to a period of two years prior to March 2, 2022, the date of filing of Student's initial complaint in this matter, although facts that occurred before this date are relevant to whether Riverside Unified should have assessed Student sooner.

A review of Student's academic achievement prior to Student's initial assessment for special education gave no reason for Riverside Unified to suspect Student had a disability that may have required special education. Student performed at or above grade level in all academic and functional areas during kindergarten and first grade. She received excellent marks in her academic efforts, staying on task, completing assignments on time, and collaborating with others.

In the 2019-2020 school year, for Student's second grade, Student continued to do well in all areas, with the exception of foundational reading skills. Foundational reading skills include applying grade-level phonics, word analysis, and fluency to support reading comprehension. Student's teacher graded her a 2 in foundational

reading skills in each trimester, indicating that Student demonstrated partial evidence of meeting grade-level standards. However, in all other areas of reading, she was meeting grade-level standards.

In addition, Student was meeting grade-level standards in writing, language structure, and vocabulary. She performed well in history and science. Student was proficient in math operations and algebraic thinking, and demonstrated adequate skills in all other areas of math. During the 2019-2020 school year, Riverside Unified had no reason to suspect Student had a disability that may have required special education in light of her overall good performance, despite subpar performance in a narrow area of foundational reading skills.

From the start of the 2020-2021 school year to the time Parent requested a special education assessment, Riverside Unified had no knowledge of, or had reason to suspect that, Student had a disability that may have required special education and related services. For the 2020-2021 school year, Riverside Unified schools were closed due to the COVID-19 pandemic, and all students were on a distance learning program. Student was now in third grade. On October 7, 2020, Parent sent Riverside Unified a letter dated that same day from Student's pediatric ophthalmologist, Charlotte Gore, MD, advising that Student had an eye condition, and recommended a bigger font for Student's work.

In response to Dr. Gore's letter, and reports by Parent that Student was having difficulty viewing lessons on the computer during distance learning, Riverside Unified convened a student success team meeting by videoconference on December 7, 2020. Among those in attendance were Parent, assistant principal Nachele Goar, Student's third grade teacher, and teacher for the visually impaired Stacy Feltner-Johnson.

Parent testified that she made a verbal request for an IEP for Student sometime in September 2020, to school principal Dr. Hector Alegria and assistant principal Goar. In addition, Parent testified that Riverside Unified failed to notify her about the December 7, 2020 student study team meeting, and therefore, was denied the opportunity to attend the meeting.

However, the testimony of more credible witnesses contradicted Parent's testimony. Dr. Alegria and Goar persuasively testified that Parent made no request for an IEP at the start of, or at any point during, the 2020-2021 school year.

Moreover, Parent's statements indicated that Parent would not have requested an IEP for Student in 2020-2021. In March 2021, Parent told Feltner-Johnson in a phone conversation that Parent did not want Student to receive special education. Parent made a similar report to Dr. Alegria around the same time, sharing her concern that she did not want Student labeled as a special education student.

In addition, Parent was notified of, and attended, the December 7, 2020 student success team meeting. Riverside Unified emailed Parent an invitation with a link to a student success team meeting to be held by videoconference on December 7, 2020, from 1:00 PM to 2:00 PM. At the hearing, Parent confirmed her email address was correct on the invitation. The invitation had a green check mark next to Parent's email address, indicating Parent intended to attend the meeting.

Furthermore, Feltner-Johnson and Goar both recalled at the hearing that Parent attended the December 7, 2020 student success team meeting by video. Feltner-Johnson testified that Parent shared concerns with the team and Parent reported that she would

get back to the team about additional medical information regarding Student's eye condition. When pressed by the Administrative Law Judge, Feltner-Johnson's recollection that Parent participated in the meeting was certain, and credible.

Goar also credibly recalled Parent participating in the December 7, 2020 student success team meeting. In response to questions unrelated to Parent's attendance, Goar casually described Parent's participation at the meeting. For example, when asked about the Feltner-Johnson's question to Parent regarding Student's vision acuity, Goar recalled Parent explaining that Parent did not have the information for the team at the time and that Parent would get that information to the team at a later date. Feltner-Johnson's and Goar's testimony credibly established that Parent participated in the December 7, 2020 student success team meeting, contrary to Parent's testimony.

At the December 7, 2020 student success team meeting, Student's teacher described Student as an excellent reader. A recent reading assessment indicated she was reading at a level equivalent to a student seven months into fourth grade and her reading accuracy was strong. Also, Student received a perfect score on a November 4, 2020 math test.

At the student success team meeting, Student's teacher shared his concerns about Student's vision, her ability to complete academic assessments, and the impact on Student's overall self-esteem. At the meeting, Parent expressed concern about Student's ability to use computer applications to enlarge images and texts on the computer to allow Student to better see the reading program. Parent shared that Student got frustrated when Student could not see the text. Parent also shared that Student had a lazy eye and required surgery for both eyes. Parent also explained that Student performed better in math when Student was shown one problem at a time.

Parent did not report at the meeting concerns regarding Student's spelling, writing, and math, contrary to her testimony that she reported these concerns to Riverside Unified at the time. Furthermore, Parent did not request at the meeting an IEP or an assessment of Student for special education.

The student success team offered strategies to support Student's vision needs. The strategies included

- giving Student paper and pencil reading assessments,
- showing her one problem at a time on math assessments, and
- allowing Parent to read to Student question-and-answer problems on reading assessments.

As a follow up, Riverside Unified's student success team members recommended that additional supports could be considered once Riverside Unified received more information about Student's eye condition from her doctor. Feltner-Johnson persuasively opined the accommodations put in place by the student success team to support Student's vision needs were appropriate, and not enough was known about Student's eye condition to warrant an assessment for special education.

Parent testified that she provided Riverside Unified a copy of a signed medical release in January 2021, to allow Riverside Unified to obtain records from Student's ophthalmologist. Feltner-Johnson credibly testified that did not happen, and no release was signed by Parent until January 2022. No documentary evidence corroborated Parent's account that she provided Riverside Unified with a signed medical release prior to January 2022.

The only additional information Parent provided Riverside Unified during the 2020-2021 school year about Student's eye condition was another letter from Dr. Gore dated April 28, 2021. The letter advised that Student would have eye surgery on May 6, 2021, would need a week to recovery, and that her absence should be excused. Student underwent eye surgery on May 6, 2021. Her lazy eye and near vision were corrected, and Student was prescribed glasses to correct her distance vision. Student was absent from distance learning for 14 days, from May 4 to 21, 2021. The last day of instruction for the 2020-2021 school year was May 26, 2021.

Student's classroom performance during the 2020-2021 school year gave Riverside Unified no reason to suspect Student had a disability that may have required special education. By the final semester of the 2020-2021 school year, Student understood and applied grade-level phonics, word analysis, and fluency skills to support her reading comprehension. For her grade level, her writing was organized and focused, she wrote and spoke with proper grammar, and used proper capitalization, punctuation, spelling, and penmanship.

In the area of math, Student understood the relationship between multiplication and division, and performed multiplication and division as expected. She did well in geometry and math problem solving. Student also earned high marks for

- academic effort,
- following school and class rules,
- completing assignments,
- organization, and
- working collaboratively in a group.

Student was in fourth grade during the 2021-2022 school year, which began August 9, 2021. She was placed in Dannylle Towner-Silva's combo class for in-person instruction, comprised of 11 fourth graders and 20 fifth graders. Student was absent from school from August 17 to September 1, 2021, a total of 12 days.

Parent testified that she again made a verbal request for an IEP for Student to Dr. Alegria and Goar at the beginning of the 2021-2022 school year. That did not happen. Both Dr. Alegria and Goar persuasively testified that Parent made no request for an IEP, either verbally or in writing, at the beginning of the 2021-2022 school year.

Student's performance on screening assessments administered at the beginning of the 2021-2022 school year showed deficits in math computation and problem solving. Assessments also revealed Student required additional instruction in phonics, grammar, and spelling. In response, Towner-Silva referred Student for intervention supports.

Riverside Unified utilized a three-tiered system of supports to provide students with additional academic help. The first tier, referred to as tier one interventions, were supports available to all students. Tier one interventions were on-the-spot supports provided by classroom teachers as needed during lessons, which could include offering graphic organizers, word banks and sentence frames to assist in writing, or reviewing more complex vocabulary before lessons, among other means of help.

The second level of interventions, referred to as tier two, were supports targeted to a student's specific needs, and provided in smaller groups of six to eight students. Tier two interventions were provided by the classroom teacher or an intervention teacher, and took place in the regular classroom or in a separate location. Small groups offered students more individualized attention from the teacher, and opportunities for

more engagement in the lesson. The third and final level of interventions, referred to as tier three, were more intensive individualized supports offered to students with IEPs, sometimes in addition to the services and supports in the IEP.

From October 2021 to March 2022, Riverside Unified provided Student tier two interventions three times a week to work on phonics, reading, spelling, and grammar, and two times a week for math. The intervention sessions were 30 minutes each, consisted of a group of six students total, and occurred outside the regular classroom. The sessions were taught by two intervention teachers, one for English language arts, and another for math.

On October 5, 2021, Parent provided Riverside Unified with a letter from Dr. Gore dated October 1, 2021. Dr. Gore wrote that Student was having trouble with school on the computer. Dr. Gore reported that Student did not require glasses to use the computer, but needed glasses to see for distance. Dr. Gore opined that Student would benefit from larger font and a tutor to help her with school assignments.

In response to Student's vision issues, Riverside Unified scheduled a student success team meeting for October 20, 2021. Parent was provided written notice of the meeting on October 7, 2021.

A written response by Parent was admitted into evidence by Student. The response was dated October 1, 2021, and stated that Parent could not attend the student success team meeting on October 20, 2021, and requested the meeting be held a different day and a time after 3:30 p.m.. Parent also wrote that she did not give consent to have the meeting without her and that she wanted to attend.

However, Riverside Unified never received the written response. Goar credibly testified that Riverside Unified had no record of Parent's October 1, 2021 written response. In addition, Goar testified, and noted in the October 20, 2021 student success team summary form, that Goar called Parent on October 12, 2021, to inquire if Parent would attend the October 20, 2021 student success team meeting. Parent confirmed receiving the meeting invitation, shared that her attorney advised her not to sign anything, and that her attorney would be filing paperwork that week.

The scheduled student success team meeting occurred on October 20, 2021. Among those who attended the meeting were

- Goar,
- Towner-Silva,
- Feltner-Johnson,
- school psychologist Laurie Werk, and
- resource specialist teacher Paula Chung.

Parent did not attend.

At the October 20, 2021 student success team meeting, Towner-Silva shared that Student's reading level was equivalent to a student four months into fourth grade based on a reading assessment she administered to Student earlier that day. Towner-Silva also reported that Student's reading comprehension and vocabulary improved since the start of the school year from a score of 50 percent on a test she took at home, to scores of 80 to 100 percent on subsequent tests taken at school.

In writing, Student's ability to write to a prompt, collect and expand on information, and provide details to support a claim also improved from earlier in the school year. Her scores improved from 25 percent to 75 percent.

Similar improvements were seen in math. Student's performance on math tests improved from 45 to 50 percent on the first two tests, to 70 to 80 percent on the following tests.

Towner-Silva also shared that following a reading test, Towner-Silva asked Student to take a second but different reading test, and asked Student to enlarge the fonts on the second test by zooming-in on the computer. Student's score from the first test to the second test improved one grade level. Student told Towner-Silva that her glasses helped in class, but Student did not consistently bring her glasses to school.

Strategies and interventions offered to Student by the student success team included

- allowing Student to use one of five ways to magnify text on the computer,
- giving her access to a text-to-speech application to read online material, and
- providing her with text in both digital and print for English language arts, math, and social studies.

Student was also allowed to move around the classroom to better see instructional materials. In math, Student received daily small group instruction with no more than 10 students by Towner-Silva. The student success team also confirmed that Student would continue to receive tier two reading interventions in a small group, three times per week, for 30 minutes each session.

On October 20, 2021, Student's attorney sent Riverside Unified a letter which sought a comprehensive assessment of Student for special education. In response, Riverside Unified timely sent Parent an assessment plan. The assessment plan offered to assess Student's

- academic achievement;
- communication development;
- vision, hearing, and health;
- functional vision;
- social, adaptive, behavioral, and emotional functioning;
- cognitive development and processing; and
- perceptual and motor development.

On November 2, 2021, Parent consented to the assessment plan.

Riverside Unified timely assessed Student and reviewed the assessment reports at the January 5 and 26, 2022 IEP team meetings, but did not find Student eligible for special education at that time. Riverside Unified's IEP team members determined Student did not meet the criteria for a specific learning disability, nor the criteria for a speech and language impairment.

Prior to Student's initial assessment for special education, the evidence established that Riverside Unified did not know, and did not have reason to suspect, that Student had a disability that may have required special education. Student's vision problems were properly accommodated by Riverside Unified, and her vision did not impede her ability to access her lessons following surgery and with the use of glasses. Student's academic achievement was at age and grade level throughout second and

third grade. She had no behavioral, social, or emotional difficulties in school. She studied hard in class, listened, completed assignments on time, and worked well with her peers.

Furthermore, Student's academic struggles at the start of the 2021-2022 school year was not enough to refer her for a special education assessment. Student was absent for 14 days of the last month of school for the 2020-2021 school year, and following the summer break, missed an additional 12 days in the first four weeks of school to start the 2021-2022 school year. Consequently, Student's academic struggles early in the 2021-2022 school year were not unexpected. However, with more consistent school attendance following her return to school on September 2, 2021, and receiving a number of tier one and two interventions in October 2021, Student showed improvement in reading, writing, and math.

Student contends that Riverside Unified violated its child find duty by failing to find her eligible for special education at the IEP team meetings held on January 5, 26, and May 13, 2022. However, Student's Issue 1 is limited to an alleged failure to refer Student for a comprehensive special education assessment, not an alleged failure to find her eligible for special education on or before May 13, 2022.

Furthermore, child find does not guarantee eligibility for special education and related services under the IDEA. (See *Parent on behalf of Student v. Fremont Unified Sch. Dist.*, (August 20, 2021) OAH Case No. 2021050534, p. 31.) Child find is a process of locating and screening children who are potentially in need of special education and related services. Once a child is identified for screening, the school district must then

conduct an initial evaluation of the child's eligibility for special education. (34 C.F.R. § 300.301; Ed. Code, § 56302.1.) The legal appropriateness of evaluations and special education eligibility determinations are not under the umbrella of child find, and are controlled by other special education statutes and regulations, such as those discussed in Issues 2, 3, and 4. Accordingly, Riverside Unified's child find duty was met once it completed its initial assessment of Student for special education in January 2022.

Student failed to prove that Riverside Unified violated its child find obligation by not referring her for a special education assessment prior to Student's initial assessment for special education in January 2022. Parent did not request an IEP for Student. A preponderance of the evidence established Riverside Unified properly fulfilled its child find obligation by timely assessing Student following the written request by Student's attorney on October 20, 2021, and that an assessment for special education was not warranted at any time prior. Accordingly, Student failed to meet her burden of proving Riverside Unified denied her a FAPE by violating its child find obligation in failing to refer her for a comprehensive special education assessment.

ISSUE 2: DID RIVERSIDE UNIFIED'S JANUARY 5, 2022 SPEECH AND LANGUAGE ASSESSMENT FAIL TO COMPREHENSIVELY ASSESS STUDENT?

Student contends Riverside Unified's January 5, 2022 speech and language assessment was legally deficient because

- the assessor failed to interview Parent,
- improperly scored Student's test results,

- failed to administer a sufficient number of subtests to calculate index scores, and
- failed to report observations of Student and the assessor's analysis of Student's written language abilities.

Riverside Unified contends the January 5, 2022 speech and language assessment met all legal requirements, and did not deny Student a FAPE.

A school district must conduct a full and individual initial evaluation of the child before finding the child eligible for special education and related services. (20 U.S.C. § 1414(a)(1); Ed. Code, § 56320.) A school district is also required to ensure the evaluation is sufficiently comprehensive to identify the child's needs for special education and related services, whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).)

In addition, school districts are required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that would assist in determining the educational needs of a child. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) Assessments and other evaluation materials must include those that are tailored to assess specific areas of educational need. (34 C.F.R. § 300.304(c)(2).)

Furthermore, assessments must be conducted by individuals who are competent to perform the assessment. (Ed. Code, § 56322.) An assessment of a child's ability to understand and use spoken language shall be assessed by a language, speech, and hearing specialist to determine the student's eligibility for special education as a result of a language or speech disorder. (Ed. Code, § 56333.)

Tests and assessment materials must be selected and administered so as not to be racially, culturally, or sexually discriminatory. (20 U.S.C. § 1414(a)(3)(A)(i); Ed. Code, § 56320, subd. (a).) The materials must also be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(ii); Ed. Code, § 56320, subd. (a).) In addition, an assessor must produce a written report of each assessment that includes:

- whether the student may need special education and related services;
- the basis for making that determination;
- the relevant behavior noted during the observation of the student in an appropriate setting;
- the relationship of that behavior to the student's academic and social functioning;
- the educationally relevant health and development, and medical findings, if any;
- a determination of the effects of environmental, cultural, or economic disadvantage; and
- consistent with the superintendent guidelines for low incidence disabilities, the need for specialized services, materials, and equipment. (Ed. Code, § 56327.)

A school district's failure to properly assess is a procedural violation of the IDEA. (*Cari Rae S., supra*, 158 F.Supp. 2d at p. 1196; *Park v. Anaheim Union High School Dist., et. al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033 (*Park*)). However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision-making process

regarding the provision of a FAPE to the parent's child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

Riverside Unified failed to conduct a comprehensive speech and language assessment of Student. The January 5, 2022 speech and language assessment

- failed to obtain relevant information of Student's language skills,
- failed to consider relevant information from Parent,
- failed to report Student's written language abilities, and
- failed to report the assessor's observations of Student at school.

A preponderance of evidence demonstrated that the assessment's failures deprived the IEP team, and Parent, of critical information to make an informed decision regarding Student's communication needs, and her eligibility for special education under the category of speech and language impairment.

Riverside Unified's speech-language pathologist Megan Wallace assessed Student's communication development in December 2021. Wallace's findings, conclusions, and recommendations were presented in a written report dated January 5, 2022, and presented at the IEP team meetings on January 5 and 26, 2022.

Speech-language pathologist Susan Hollar was hired by Parent following the January 26, 2022 IEP team meeting to assess Student's communication development. Hollar had 26 years of experience as a speech-language pathologist, with 21 years in private practice. She had a 1996 master's degree in communicative disorders and sciences, and conducted over 600 assessments in her career. She documented her

findings, conclusions, and recommendations in a written report dated April 25, 2022. Hollar testified knowledgably regarding the administration and interpretation of assessment measures, and therefore, credible and persuasive in those regards.

The January 5, 2022 speech and language assessment did not report inaccurate scores. Hollar testified that Student demonstrated articulation distortions, but she did not know if Wallace failed to accurately score those distortions as errors. No evidence was offered to substantiate Student's claim that Wallace incorrectly scored Student's articulation distortions.

In addition, Wallace properly scored Student's results on the oral expression subtest of the Oral and Written Language Scales Test, Second Edition, referred to as OWLS-2. Based on Student's age, the subtest instructed Wallace to start on item 45. However, Wallace started on item 40, and Student responded correctly, to items 40 to 44. Regardless, Wallace explained at the hearing that she followed the test instructions correctly and added the first 44 items with Student's 30 correct answers for items 45 to 82, for a raw score of 74. Student offered no evidence demonstrating Wallace failed to accurately calculate the raw score, or what the raw score should have been without Wallace's error. Accordingly, Student failed to demonstrate that her raw score on the oral expression subtest was inflated, or that the standard score obtained by Wallace was inaccurate. Furthermore, Student also failed to prove how Wallace's failure to follow verbatim the OWLS-2 instructions in recording responses invalidated her findings on the OWLS-2.

However, the evidence established that Wallace failed to calculate more reliable index scores on the Clinical Evaluation of Language Fundamental, Fifth Edition, referred to as CELF-5. The CELF-5 was tailored to measure receptive and expressive language abilities.

Wallace administered only three of 11 subtests on the CELF-5. Wallace failed to administer enough subtests to obtain index scores for

- core language,
- receptive language,
- expressive language,
- language structure,
- language context, and
- language memory.

An index, also called a composite, score is a combination of subtests scores, and are generally considered more reliable measures of a student's overall ability in a particular area than disparate subtests.

Hollar testified that best practice is to rely on composite scores rather than subtest scores. Riverside Unified's program specialist Shanell Hawkins and resource specialist Monica Bullock also opined that relying on composite scores, more than subtests scores, was best practice. Hollar persuasively explained that a student's performance on one subtest could be misleading, and that a composite score was a more reliable measure of an overall ability in a particular area. Accordingly, Wallace's reliance on three CELF-5 subtests drew a general conclusion of Student's overall

receptive and expressive language skills that did not accurately report Student's abilities. Therefore, Wallace's assessment failed to provide a reliably comprehensive analysis of Student's receptive and expressive language abilities.

Furthermore, Wallace failed to consider Parent's concerns. The only information Wallace considered for her assessment were concerns Parent shared at the December 7, 2020 student success team meeting regarding Student's vision. However, Parent completed a questionnaire as part of Riverside Unified's psychoeducational assessment completed by school psychologist Werk on November 29, 2021, where Parent reported concerns about Student's performance in written expression, oral expression, and listening comprehension, among other academic areas. Parent also testified that Student could only answer yes or no questions, answered with one or two words, and could not write complete sentences.

However, Wallace failed to interview Parent or gather current information from Parent to investigate Parent's concerns at the time of the assessment. Wallace's failure resulted in a speech and language assessment that was inadequate in scope and depth, and failed to consider input from Parent on Student's communication needs.

Furthermore, Wallace failed to report her analysis of Student's written language abilities. Wallace did not administer the written expression subtest of the OWLS-2, despite Towner-Silva's report of Student's struggles with spelling and grammar. Instead, Wallace testified that she relied on resource specialist Paula Chung's assessment of Student's written language abilities. On November 10, 2021, Chung administered a standardized test to assess Student's academic achievement. Chung summarized her findings in a written report dated January 5, 2022. Wallace testified that she analyzed

the results of the achievement test of written language skills, but failed to include her analysis in her assessment report or discuss her analysis and findings at the IEP team meetings.

Also, Wallace failed to report her two school observations of Student, one in the classroom, the other during lunch and recess. Wallace did not include her observations in her written assessment report, and failed to report her observations at the January 5 and 26, 2022 IEP team meetings. Wallace testified that she ordinarily included her observations in her reports, and she acknowledged the significance of that oversight. She opined that reporting her observation was important as it provided parents and IEP team members an understanding of how a child's language was functioning inside and outside the classroom. Wallace also opined that reporting her observations helped others understand her assessment findings. That did not happen here, and Wallace's failure to report her observations was a lost opportunity to help the IEP team, and Parent, to better understand Student's functional language skills in the school setting.

A preponderance of the evidence established that Riverside Unified's January 5, 2022 speech and language assessment failed to provide a sufficiently comprehensive analysis of Student's speech and language abilities. The assessment failed to gather relevant information from measurement tools and Parent. Furthermore, the report failed to include Wallace's analysis of Student's written language abilities and her observations of Student, that would have informed Parent about Student's ability to use language at school from the perspective of a speech-language pathologist.

Therefore, the assessment deprived Parent of critical information to meaningfully participate in the IEP process to make an informed decision of whether Student qualified for special education and related services based on a language disorder. Accordingly,

Student proved by a preponderance of the evidence that Riverside Unified denied Student a FAPE by failing to comprehensively assess Student in the January 5, 2022 speech and language assessment.

ISSUE 3: DID STUDENT QUALIFY FOR SPECIAL EDUCATION UNDER THE CATEGORY OF SPECIFIC LEARNING DISABILITY AT THE MAY 13, 2022 IEP TEAM MEETING?

Student contends she qualified for special education based on her inadequate achievement in the areas of listening comprehension, oral expression, basic reading skill, reading fluency, math reasoning, and written expression that resulted from weaknesses in her phonological awareness and short-term memory. As a result, Student contends Riverside Unified denied her a FAPE by failing to qualify her for special education under the category of specific learning disability at the May 13, 2022 IEP team meeting. Riverside Unified contends Student did not qualify for special education under the category of specific learning disability at the May 13, 2022 IEP team meeting.

For a child to be eligible for special education in California, the child must have a disability as defined by state and federal law. (20 U.S.C. § 1401(2)(A); Ed. Code, § 56026, subd. (d); 34 C.F.R. § 300.8.) Section 3030 of Title 5 of the California Code of Regulations defines the various eligibility categories under California law. A student is eligible for special education and related services if the student is a child with a disability who, by reason of their disability, needs special education and related services. (20 U.S.C. § 1401(3)(A)(ii); 34 C.F.R. § 300.8(a)(l); Ed. Code, § 56026, subds. (a) and (b); Cal Code Regs., tit. 5, §3030, subd. (a).)

In California, a specific learning disability is one of 13 categories under which a student may demonstrate a degree of impairment requiring special education. (Cal. Code Regs., tit. 5, § 3030, subds. (a), (b)(1)-(13).) A specific learning disability is defined as a disorder in one or more of the basic psychological processes involved in understanding or using written or spoken language, which may manifest itself in the imperfect ability to

- listen,
- think,
- speak,
- read,
- write,
- spell, or
- perform mathematical calculations. (20 U.S.C. § 1401 (30)(A); 34 C.F.R. § 300.8(c)(1); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).)

The basic psychological processes include

- attention,
- visual processing,
- auditory processing,
- phonological processing,
- sensory-motor skills,
- cognitive abilities including association, conceptualization, and expression. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).)

Disorders affecting these processes include perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (20 U.S.C. § 1401(30)(B); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) Specific learning disabilities do not include learning problems that are primarily the result of

- visual, hearing, or motor disabilities,
- intellectual disability,
- emotional disturbance, or
- environmental, cultural, or economic disadvantage. (20 U.S.C. § 1401(30)(C); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).)

An assessment for, or an existing diagnosis of, a processing disorder is not required to determine that a student has a specific learning disability. (See 34 C.F.R. § 300.309; Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B).) The United States Department of Education in its comments to 2006 IDEA regulations rejected suggestions that the criteria for finding a specific learning disability should require documentation of a basic psychological processing disorder. The Department explained:

The Department does not believe an assessment of psychological or cognitive processing should be required in determining whether a child has [a specific learning disability]. There is no current evidence that such assessments are necessary or sufficient for identifying [a specific learning disability.] Further, in many cases, these assessments have not been used to make appropriate intervention decisions.

(United States Department of Education, Office of Special Education and Rehabilitative Services (OSERS), Analysis of Comments and Changes to 2006 IDEA part B Regulations,

71 Fed.Reg. 46591, 46651 (Aug. 14, 2006) (Comments to 2006 IDEA Regulations).) The Department noted a research consensus as of 2002 that processing deficits should be eliminated from the criteria for classification. (*Ibid.*) The Department also noted that the IDEA's implementing regulations permit, but do not require, a district to use a pattern of strengths and weaknesses methodology that includes testing of psychological or cognitive processing. (*Ibid.*)

The implementing regulations specify additional procedures for identifying students with specific learning disabilities that include procedures for assessments, and also procedures that must be followed by the IEP team determining whether the child has a specific learning disability. (See 34 C.F.R. §§ 300.307- 300.311; Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)5.) With respect to assessments, a school district may use any of three specified methods of assessment. (34 C.F.R. §§ 300.307 and 300.309; Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B) & (C).) The assessment must include an observation of the student in the student's learning environment to document the student's academic performance and behavior in the areas of difficulty. (34 C.F.R. § 300.310; Ed. Code, § 56341, subd. (c).)

The pattern of strengths and weaknesses methodology is one of three assessment methods referenced in the IDEA, California Education Code, and their implementing regulations. The other two methods are the severe discrepancy method and the response to intervention method. The severe discrepancy method looks for a specified statistical difference between a student's standardized test scores in intellectual ability, and the student's standardized test scores in one or more specified areas of academic achievement. (See Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B)1.) If the standardized tests do not reveal the required statistical difference, the IEP team determining eligibility may still find that a severe discrepancy exists if it documents that

a discrepancy between ability and achievement exists as a result of a disorder in one or more of the basic psychological processes. (*Id.*, at subd. (b)(10)(B)(3).) The response to intervention method looks at whether a student made sufficient progress to meet age or State-approved grade-level standards in one or more specified areas of academic achievement when provided a program of scientific, research-based interventions. (*Id.*, at subd. (b)(10)(C)2(ii).)

In California, an assessment for a specific learning disability requires the use of at least one of the three methods, but determining whether a student has a specific learning disability may not be solely based on any of the methods. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B) and (C).) The severe discrepancy, response to intervention, and pattern of strengths and weaknesses methodologies are each considered a single measure or assessment, and just one component of an overall comprehensive evaluation of a child suspected of having a specific learning disability. (United States Department of Education Office of Special Education Programs, *Letter to Prifitera*, (OSEP, March 1, 2007).) In regard to a specific learning disability, an overall comprehensive evaluation requires using a variety of data gathering tools and strategies in addition to a severe discrepancy, response to intervention, and pattern of strengths and weaknesses assessment methodology. (*Ibid.*; United States Department of Education Office of Special Education Programs (OSEP), *Letter to Zirkel*, (OSEP, December 11, 2008); *M.M. v. Lafayette School Dist.* (9th Cir. 2014) 767 F.3d 842, 853 [approving using data acquired through a student's participation in a response to intervention program to corroborate the results of a severe discrepancy assessment].)

To determine that a student has a specific learning disability using a pattern of strengths and weaknesses methodology, the assessment must find data indicating the student is not achieving adequately for the child's age or is failing to meet State-approved grade-level standards in one or more of the eight areas of

- oral expression,
- listening comprehension,
- written expression,
- basic reading skill,
- reading fluency skills,
- reading comprehension,
- mathematics calculation, or
- mathematics problem solving. (34 C.F.R. § 300.309(a)(1); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)1.)

If the assessment finds the student is not achieving adequately despite appropriate experiences and instruction, the assessment must find the student exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the IEP team to be relevant to the identification of a specific learning disability, using appropriate assessments. (34 C.F.R. § 300.309(a)(2)(ii); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)(2)(ii).)

Performance refers to the results of standardized assessments in areas of basic psychological processes, including attention, visual processing, auditory processing,

phonological processing, sensory-motor skills, and cognitive abilities. (See Comments to 2006 IDEA Regulations, 71 Fed.Reg. 46591, 46654 (Aug. 14, 2006).) Achievement refers to the results of standardized assessments of academic skills in

- oral expression,
- listening comprehension,
- written expression,
- basic reading skill,
- reading fluency skills,
- reading comprehension,
- mathematics calculation, and
- mathematics problem solving. (See Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)(1).)

State-approved grade-level standards mean state academic performance benchmarks for children at each grade level, such as California's Common Core State Standards. (See Comments to 2006 IDEA Regulations, 71 Fed.Reg. 46591, 46652 (Aug. 14, 2006).)

Intellectual development refers to a standard of intellectual development such as that commonly measured by IQ tests. (See Comments to 2006 IDEA Regulations, 71 Fed.Reg. 46591, 46651 (Aug. 14, 2006).)

The assessment must find that any underachievement or pattern of strengths and weaknesses exhibited by the student is not primarily the result of a visual, hearing, or motor disability, intellectual disability, emotional disturbance, cultural factors, environmental or economic disadvantage, or limited English proficiency. (34 C.F.R. 300.309(a)(3); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)(3).)

Finally, to rule out lack of appropriate instruction in reading or math as the cause of any underachievement, the assessment must find data demonstrating that prior to, or as a part of, the referral process, the student was provided appropriate instruction in a regular education setting, delivered by qualified personnel. (34 C.F.R. § 300.309(b); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)(4).) The assessment must also find data-based documentation of repeated assessments of the student's achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the parent. (*Ibid.*)

The regulations leave it to the IEP team to decide what strengths and weaknesses in performance or achievement are relevant to the identification of a specific learning disability, and whether the strengths and weaknesses should be evaluated relative to age and State-approved grade-level standards or intellectual development. The regulations also allow the IEP team to decide what pattern in strengths and weaknesses is relevant to the identification of a specific learning disability, and what assessments of basic psychological processes and academic skills should be used to look for the pattern. (34 C.F.R. § 300.309(a)(2)(ii); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)(2)(ii).) In response to commenter concerns that section 300.309(a)(2)(ii) did not sufficiently define pattern of strengths and weaknesses, the Department of Education explained that patterns of strengths and weaknesses commonly refer to the examination of profiles across different tests used historically in the identification of children with a specific learning disability. The meaning of pattern of strengths and weaknesses did not need to be clarified in the regulations. (Comments to 2006 IDEA Regulations, 71 Fed.Reg. 46591, 46654 (Aug. 14, 2006).)

Here, the evidence established that Student had a weakness in phonological processing and short-term memory. Phonological processing involves the brain's ability to interpret sounds effectively and efficiently, which may adversely impact a child's achievement in basic reading, spelling, oral expression and listening comprehension.

Short-term memory is the ability to hold information in the immediate memory for about 10 to 30 seconds, often while using working memory to keep track of, use, and manipulate information. Working memory is the narrow ability to actively use stored information. Deficits in short-term memory can result in difficulties in

- absorbing instruction,
- following multi-step directions,
- understanding the broader picture,
- memorizing rote information, and
- performing mental math calculations.

Despite Student's weaknesses in phonological processing and short-term memory, she was not inadequately achieving commensurate with her age, grade-level standards, or intellectual development, in the areas of listening comprehension, basic reading skill, oral expression and reading fluency. However, Student proved by a preponderance of the evidence a pattern of weaknesses between her underachievement in written expression and math problem solving, and her phonological processing and short-term memory deficits. Student also proved that she required special education to address her academic deficits, and therefore, qualified for special education and related services at the May 13, 2022 IEP team meeting as a child with a specific learning disability.

Riverside Unified used the severe discrepancy methodology as its primary method of assessing a child for a specific learning disability. School psychologist Werk conducted a psychoeducational assessment of Student. Her report dated November 29, 2021, was reviewed by the IEP team at the January 5, and 26, 2022 team meetings.

Werk obtained an estimate of Student's overall intellectual ability using a cognitive test, with a fluid crystalized index standard score of Student's estimated overall intellectual ability in the below average range. Werk also calculated a nonverbal index that relied on measures that were not dependent on Student's use of language, and consisted of subtests in the areas of fluid reasoning, visual processing, and visual short-term memory. Student's standard score on the nonverbal index was below average compared to peers her age.

Werk compared Student's estimated overall intellectual ability with Student's academic achievement. Academically, Student had below average to average skills based on the results of standardized academic achievement tests. As a result, Werk opined in her report, and at the January 26, 2022 IEP team meeting, that Student did not demonstrate a severe discrepancy between her cognitive ability and her academic achievement, and therefore, did not qualify for special education under the category of a specific learning disability.

At the January 26, 2022 IEP team meeting, Parent voiced her disagreement with Riverside Unified's assessments and its decision to find Student ineligible for special education under the categories of specific learning disability and speech and language impairment. In response, Parent obtained independent assessments in the areas of speech and language and psychoeducation.

An IEP team meeting was convened on May 13, 2022, to review the independent assessment reports. An independent psychoeducational assessment was conducted by Marlen Barbee, Ph.D. The IEP team also reviewed Hollar's April 25, 2022 speech and language assessment report.

Dr. Barbee had a master's degree in education and counseling, and a 2010 doctorate degree in educational psychology. She was a licensed educational psychologist, and credentialed as a school psychologist and a multi-subject teacher. Dr. Barbee taught elementary school for six years and was a school psychologist from 2001 to February 2021. She was also in private practice since 2010, and conducted assessments at the request of school districts and parents. Dr. Barbee conducted approximately 1,600 assessments as a school psychologist, and about 400 independent educational assessments in private practice.

Dr. Barbee used the patterns of strengths and weaknesses model to assess Student's eligibility for special education. She reviewed Student's educational records, including

- Werk's November 29, 2021 psychoeducational assessment report,
- Chung's January 5, 2022 educational evaluation report,
- Wallace's January 5, 2022 speech and language report, and
- a vision and learning media assessment report by Feltner-Johnson.

She also reviewed Student's report cards and attendance records. In addition, Dr. Barbee interviewed Parent and Student, and obtained a rating of Student's reading, writing, and math skills from Towner-Silva. Dr. Barbee also assessed Student's academic achievement using a nationally norm-referenced academic achievement test that compared a student's performance to peers in kindergarten to 12th grade.

Dr. Barbee found Student eligible for special education due to a specific learning disability based on a pattern of Student's strengths and weaknesses in academic achievement and cognitive abilities. Dr. Barbee's findings, conclusions, and recommendations were presented in a written report dated April 12, 2022.

Among those present at the May 13, 2022 IEP team meeting were

- Parent,
- Dr. Barbee,
- Hollar,
- Goar,
- Dr. Alegria,
- Werk,
- Towner-Silva,
- Wallace,
- Feltner-Johnson, and
- Bullock.

Dr. Barbee and Hollar presented their assessment reports. Following their presentations, the IEP team discussed Student's eligibility for special education. Riverside Unified's IEP team members determined Student still did not qualify for special education and related services under the categories of specific learning disability or speech and language impairment.

STUDENT'S RELATIVE STRENGTHS

Academically, reading comprehension was a relative strength for Student. Standardized test measures showed Student's reading comprehension skills were on par

with peers her age. At the hearing, Werk, Dr. Barbee, and Hollar each opined that reading comprehension was an area of relative strength for Student. Werk opined that despite Student's weakness in phonological awareness, as discussed below, Student was able to find a way to understand what she read.

In addition, results of standardized testing established Student had relative strengths in the areas of acquired knowledge, long-term memory, and processing speed. Acquired knowledge, also known as crystalized knowledge, referred to a student's accumulated knowledge, including the ability to use and understand verbal language, and demonstrate general knowledge about the world. Student's crystalized knowledge was on par with peers her age. Werk opined that in school Student's strong verbal skills enabled Student to ask and answer questions, and participate in discussions.

Long-term memory, also referred to as long-term storage and retrieval, was also a relative Strength for Student. Intact long-term memory enabled students to apply learned information to new problems. Werk and Dr. Barbee found Student to have average abilities to retain information over time, and both assessors opined long-term memory as an area of relative strength for Student.

In addition, Student could sustain attention and process information as quickly as same-aged peers. Students rely on processing speed to quickly and accurately read, solve math problems, accurately perceive relationships between ideas, and timely complete tasks. Werk and Dr. Barbee opined Student's processing speed was an area of relative strength.

LISTENING COMPREHENSION, BASIC READING SKILL, ORAL EXPRESSION, AND READING FLUENCY

Student failed to prove she was not adequately performing for her age or grade level in the areas of listening comprehension, basic reading skill, oral expression, and reading fluency. The evidence also failed to prove that she required special education to address these areas in light of her overall testing and classroom performances.

Dr. Barbee testified knowledgably about identifying cognitive processing strengths and weakness, and the relationship between processing abilities and academic skills. In those regards, her testimony was credible and persuasive. However, her determination that Student had academic deficits in the areas of listening comprehension, basic reading skill, oral expression, and reading fluency that warranted special education was not. A comprehensive review of Student's academic skills as of May 2022, based on Student's performance on classroom assignments and periodic assessments, and reports and observations by Towner-Silva and assessors, demonstrated otherwise.

In the area of listening comprehension, Student's performance on standardized tests of listening comprehension were mixed even though she had a relative weakness in auditory processing. Listening comprehension is the process of hearing and encoding information to understand spoken language. Student performed in the average range on the listening comprehension subtest administered by Wallace. In contrast, Student performed poorly on Hollar's and Dr. Barbee's listening comprehension assessments. Hollar measured Student's ability to listen to orally presented passages and recall information about the passages. Student's standard score fell in the below average range.

Dr. Barbee also found Student's listening comprehension skills to be poor. Dr. Barbee measured Student's listening comprehension skills at the word, sentence, and passage levels. Student's performance was in the low range.

However, other evidence established that Student had adequate listening comprehension for accessing her education. Hollar reported she often had to repeat test instructions to Student, but Student was able to listen and respond appropriately when interviewed by Dr. Barbee. In addition, neither Werk, Wallace, Feltner-Johnson, nor Chung reported any difficulties by Student in listening and following instructions during testing.

In the classroom, Student demonstrated adequate listening comprehension skills. Student followed lessons and answered questions in the classroom. Though Student reported to Hollar that Student had trouble following along with conversations, she did not report those same difficulties to any other assessor. Student appropriately interacted with her peers. Her social pragmatics language skills were in the average range based on a standardized assessment given by Hollar. Furthermore, she met grade level standards each semester of the 2021-2022 school year in the area of speaking and listening, demonstrating grade-level skills in the ability to actively listen, collaborate, and present ideas effectively.

Student reported to Hollar she had difficulty following multistep directions, which Towner-Silva observed in the classroom when Student was given three or more complex steps. However, the evidence failed to demonstrate that Student required special education to help her follow complex multi-step directions, or that general education supports under the multi-tiered system of supports would not be successful in allowing Student to access the curriculum. Student failed to prove she was inadequately

achieving in the area of listening comprehension and that she required special education to address listening comprehension skills in light of her weak auditory processing.

In basic reading skill, Student consistently performed in the low average range on standardized tests that measured her ability to recognize words, decode, identify and blend sounds, and knowledge of sounds and letters, which was consistent with the low average cognitive ability. On tests of word attack and oral reading skills, Student's scores fell in the low average range compared to peers her age

As discussed in Issue 1, from October 2021 to March 2022, Student received tier two interventions to help her in phonics, spelling, grammar and math. By May 13, 2022, a preponderance of the evidence demonstrated Student's basic reading skills were at grade-level, despite her weakness in phonological processing. Periodic classroom assessments on mastery of state reading standards showed that Student was meeting grade-level standards in understanding and applying grade-level phonics and words analysis skills in decoding words. She also demonstrated grade-level ability to use combined knowledge of all letter and sound correspondences, syllabication patterns, and morphology to accurately read unfamiliar multisyllabic words in context and out of context.

Student's report card grades reflected grade-level foundational reading skills. She received marks of 3 for each trimester of the 2021-2022 school year in the area of foundational reading skills. Student's foundational skills grade reflected her knowledge and application of grade-level phonics, word analysis, and fluency skills to support reading comprehension. A mark of 3 meant she demonstrated the ability to adequately

perform at grade level. Towner-Silva rated Student's letter and word recognition skills and phonemic awareness at grade level as part of Dr. Barbee's psychoeducational assessment.

A preponderance of the evidence established that at the time of the May 13, 2022 IEP team meeting, Student was adequately performing in the area of basic reading skill based on her age and grade-level standards. Accordingly, Student failed to prove she required special education to support auditory processing impacts on basic reading skills.

Moreover, Student was not inadequately achieving in the area of oral expression. Student scored in the low average range in an achievement test of oral expression skills at the word and sentence levels. In observations by teachers and assessors, Student could orally express herself adequately with peers and adults. She successfully participated in classroom discussions and two oral presentations. She received marks of 3s throughout the fourth grade for speaking and listening. No persuasive evidence was offered to establish that Student could not adequately express herself orally in the classroom. Accordingly, Student failed to meet her burden of proving Student qualified for special education due to deficits in oral expression.

Furthermore, the evidence failed to establish Student's reading fluency was an area of need. At the January 5, 2022 IEP team meeting, Towner-Silva reported that Student was expected to read 134 words per minute, but could only read 107 words per minute. Student's performance on standardized tests showed low average abilities in the area of reading fluency. Neither Werk nor Chung identified reading fluency to be an area of deficit. On the other hand, Dr. Barbee concluded in her report, and in testimony,

that Student had a significant academic achievement deficit in the area of reading fluency, despite her written report showing that Student's oral reading accuracy and reading rate were similar to grade equivalent peers.

However, by May 13, 2022, Student demonstrated grade-level skills in reading fluency. Periodic reading assessments of mastery of state reading standards showed Student adequately read with sufficient accuracy and fluency to support reading comprehension. The evidence established that Student's rate of reading, which was temporarily behind that of her peers, did not adversely impact her reading comprehension, or any other academic area.

In sum, the evidence did not establish that Student was achieving inadequately for her age or grade-level in the areas of listening comprehension, basic reading skill, oral expression, and reading fluency at the time of the May 13, 2022 IEP team meeting, or that she required special education and related services to address those areas. Accordingly, Student failed to prove she qualified for special education and related services due to a specific learning disability in the areas of listening comprehension, basic reading skill, oral expression and reading fluency.

PATTERNS OF WEAKNESSES INDICATIVE OF A SPECIFIC LEARNING DISABILITY

Student proved by a preponderance of the evidence that she was underachieving for her age and grade level, in the areas of written expression and math problem solving. A preponderance of the evidence also established a pattern between Student's phonological processing and short-term memory deficits and her inadequate achievement in those academic areas.

Student's underachievement in the areas of written expression and math problem solving were not the result of a visual, hearing, or motor disability. Student's ability to see at a distance was correctable with glasses, and she could see the smallest font on a test booklet without glasses. The evidence demonstrated that as of the May 13, 2022 IEP team meeting, her vision did not impede her academic performance. She also passed her hearing screening on November 21, 2021. She had no mobility issues.

In addition, Student's academic struggles were not primarily due to

- an intellectual disability,
- emotional disturbance,
- cultural factors,
- environmental or economic disadvantage, or
- limited English fluency.

Student had low average intellectual ability, and Student's social emotional functioning did not interfere with her ability to access her education. Moreover, Student's primary language was English, and no evidence was offered to demonstrate that cultural factors, nor environmental or economic disadvantages, played a primary role in her academic underachievement.

The evidence also demonstrated that by May 13, 2022, Student had received appropriate instruction in the regular education setting. Riverside Unified argues that Student's lack of attendance and need for more time and practice to acquire skills due to her slower rate of learning, explained her academic deficits and slower progress. The argument was not persuasive. Student's academic struggles at the beginning of the 2021-2022 school year were, more likely than not, due to absences. Student missed 14 days of distance learning in the last month of the 2020-2021 school year, and

following the summer break, was absent an additional 12 days in the first four weeks of school to start the 2021-2022 school year. However, Student's attendance improved after returning to school on September 2, 2021. She missed two days of school from September 2 to October 31, 2021, and seven days of school from November 1, 2021, to May 13, 2022. In addition, Riverside Unified provided her additional instruction through tier two interventions from October 2021 to March 2022, in English language arts and math to help her recoup for lost academic instruction.

Furthermore, Riverside Unified's contention that the impact of COVID-19 resulted in depressed performances by students nationwide was not persuasive in Student's case. Student's strong marks for the third grade during the COVID-19-related school closures showed she made adequate academic progress in all areas. Accordingly, a lack of instruction was not the primary reason for Student's underachievement.

Riverside also asserts that Student's low academic performances were commensurate with her estimated overall low average intellectual abilities. Therefore, Riverside Unified argues that Student's low skills did not result from a learning disability, but instead, Student required more time and practice to acquire skills due to her slower rate of learning. That argument was not persuasive either. Student's overall intellectual ability was just one factor to gage Student's potential for learning. As discussed in Issue 1, Student's strong grades given by Riverside Unified's teachers in the second and third grades demonstrated that Student could perform at or above expected grade-level standards in all academic and functional areas. There was no evidence offered that she required additional time or practice compared to her peers to acquire grade-level skills in second and third grade.

In addition, Student's grades did not improve despite her increased attendance and additional tier two supports for nearly six months during her fourth-grade year. Student's improved attendance and the additional intensive supports would logically infer that she received additional instruction and increased opportunities for practice. Yet, by May 13, 2022, she continued to struggle with spelling, grammar use, and math problem solving. Accordingly, her academic struggles at the time of the May 13, 2022 IEP team meeting, could not be attributed solely to her estimated overall intellectual ability, school absences, or a year of distance learning.

WRITTEN EXPRESSION DEFICITS

The evidence established that at the time of the May 13, 2022 IEP team meeting, Student was underachieving in the area of written expression. The evidence also established her underachievement in written expression was, more likely than not, the result of her weakness in phonological processing and short-term memory.

Student had a significant weakness in phonological processing. Student's awareness of, and ability to understand sounds in spoken language, which involves blending, segmenting and manipulating speech sounds, was specifically assessed by Werk. Werk concluded that phonological processing was an area of weakness for Student. Werk opined that Student may have difficulty blending and manipulating sounds, skills fundamental to basic reading and spelling. As a result, Student could have difficulty

- acquiring phonic skills, sounding out words,
- using phonetic strategies,
- spelling,

- taking notes accurately, and
- reading word problems.

At the hearing, Werk added that a deficit in phonemic awareness would impact spelling due to a child's difficulty in understanding relationships between sounds and letters.

Student's phonological processing weakness was confirmed by Dr. Barbee, who defined auditory processing as the encoding, synthesizing, and discrimination of auditory stimuli. She administered two subtests to obtain a composite score, which ranked in the third percentile compared to same-aged peers. Dr. Barbee described Student's auditory processing proficiency as limited. Student also scored in the third percentile in a related test of auditory short-term memory, an ability which Dr. Barbee also described as limited.

Hollar also assessed Student's ability to understand sounds of spoken language using a test standardized to identify language/literacy disorders, determine patterns of strengths and weaknesses, and track language skills over time. Student scored very low, demonstrating a significant deficit in her awareness of individual speech sounds and in the ability to perceive and reproduce the phonological structure of words when speaking. Hollar opined that these deficits impeded Student's ability to accurately decode and spell. In sum, Student's phonological processing was an area of significant weakness based on her performances on standardized testing.

In addition, Werk and Dr. Barbee both identified Student's short-term memory as an area of weakness. Werk and Dr. Barbee assessed Student's short-term memory, and both assessors concluded that short-term memory was an area of weakness for Student based on test results. Werk opined that as a result of Student's weak short-term memory, Student could struggle remembering sounds when decoding and spelling

single and multisyllabic words. Student could also struggle to keep her place when solving multi-step math problems, remembering multi-step problems, and extracting information to be used in word problems. In addition, Student could unnecessarily repeat words and concepts, and struggle to stay on topic when writing due to poor short-term memory.

As a result of her poor phonological processing and short-term memory, Student's writing skills were mixed. When assessed by Chung in writing responses to a variety of demands on a test that was not timed and did not penalize for spelling or grammatical errors, Student scored in the high average range. Student performed in the average range when asked by Chung to write as many simple sentences as possible within five minutes using three words given to describe a picture associated with the words. However, when Student's spelling and grammar were scored, her writing performances on standardized measures fell in the low average.

A spelling of sounds test measured spelling ability, but also focused on phonological knowledge and use of correct sound and symbol relationship when writing. Student had to listen and write sounds presented, which became more difficult when Student was asked to spell nonsense or nonwords. Student scored in the low average range.

Despite receiving tier two interventions to support her spelling and grammar use, Student's spelling and grammar did not improve over the Spring of 2022. At the January 5, 2022 IEP team meeting, Towner-Silva reported that Student continued to struggle with spelling, and to consistently use correct punctuations and grammar.

Standardized tests administered following the January 26, 2022 IEP team meeting showed Student's continued difficulties in spelling, grammar, and punctuations.

Dr. Barbee testified that Student's deficit in phonological awareness was clearly evident in Student's spelling, and Student had considerable challenges associating sounds with words. For example, during a spelling subtest Student was asked to spell "suspect" and she spelled "spit". Dr. Barbee persuasively opined that Student simply did not have the ability to write the word as she heard it.

Student's spelling and grammar difficulties were also evident in an essay composition subtest that measured spontaneous writing fluency at the discourse level and scored for semantics, grammar, and mechanics, along with content and organization. Student had 10 minutes to write about her favorite game. Student scored in the low average range, but demonstrated poor spelling, along with lack of capitalizations, grammar and punctuation that made it difficult to read. Student used just one period at the end of the essay. Her sentences were simple, using mostly single syllable words, and lacked details. Although Student's standard score was in the low average range, at the hearing, Towner-Silva opined that the essay did not meet fourth-grade level standards due to errors in conventions involving spelling, sentence structure, and punctuations, which impeded a reader's ability to understand the writing. Towner-Silva testified she would have expected fewer spelling errors and more complete sentences in the essay.

After five months of tier two intervention supports targeting Student's deficits in spelling and grammar, the evidence demonstrated that Student did not make meaningful improvements in those areas. In comparing Student's essay composition during Dr. Barbee's testing to her handwritten essay dated November 15, 2021, no discernable improvement in Student's spelling or grammar could be observed. Further,

Student's use of capitalizations and punctuations continued to be poor. Student could not spell and use proper grammar, capitalization, and punctuations at grade level without the assistance of a program to correct spelling and grammar.

At the time of the May 13, 2022 IEP team meeting, Student's spelling, and grammar had not improved. As part of Dr. Barbee's assessment, Towner-Silva rated Student's vocabulary, sentence complexity, and spelling at below grade level. Towner-Silva also rated Student below grade level in overall writing proficiency. Towner-Silva commented in her ratings that Student "needed more work" in spelling, and the use of capitalizations, and grammar. Towner-Silva testified that at the time of the May 13, 2022 IEP team meeting, Student's spelling and grammar continued to be areas of concern. Evidently, general education instruction and six months of tier two intervention supports failed to improve Student's spelling or grammar.

A preponderance of the evidence established a pattern of weaknesses in Student's phonological processing and short-term memory and inadequate achievement in written expression, specifically in spelling and grammar. At the hearing, Dr. Barbee persuasively opined that Student's weakness in phonological processing impaired Student's ability to comprehend short and long segments of sound, and to manipulate sounds, which negatively impacted Student's ability to correctly spell words. Dr. Barbee also opined that Student's short-term memory deficit made it difficult for Student to hold onto information, while focusing on correct spelling and proper grammar and punctuations. Therefore, her spelling and sentence structures suffered. Dr. Barbee recommended Student receive research-based phonological awareness instruction.

Riverside Unified argues that Student's spelling difficulties did not impact her viewpoint or her summary of the text, and that spelling was just one element that factored into a student's overall written expression ability. Riverside Unified further argues that neither spelling nor grammar, standing alone, represented an area of special education eligibility.

Though spelling and grammar are just two of many components involved in writing, they are critical ones. A student must not only demonstrate the ability to express and support a viewpoint in writing, but must do so in a way that allows a reader to understand that viewpoint. Student could not adequately express herself in writing in a way that could be easily understood. Her poor spelling and use of grammar, along with her inconsistent use of capitalization and punctuations made it difficult for a reader to understand her. Student's weakness in phonological processing and short-term memory resulted in an inability to discern and spell words, and use proper grammar, resulting in significant writing deficits.

As of the May 13, 2022 IEP team meeting, the information available established that Student had a specific learning disability in the area of written expression that required special education. The evidence demonstrated that tier two interventions were inadequate to support Student's writing needs, and that more intensive specialized instruction was needed to remediate Student's writing deficits. Accordingly, Student proved by a preponderance of the evidence that Riverside Unified denied her a FAPE by failing to find her eligible for special education at the May 13, 2022 IEP team meeting based on a specific learning disability in the area of written expression.

MATH PROBLEM SOLVING DEFICIT

Student's performance in the classroom and on academic achievement measures demonstrated a weakness in her math problem solving skills. One subtest administered by Werk asked Student to analyze and solve math problems that were both orally and visually presented. Student had to recognize the procedure to follow, perform simple calculations, while differentiating between essential and nonessential details. It was not timed. Student received a standard score in the average range. Student performed in the low average range on a test that measured her ability to use number sense reasoning and critical thinking skills.

Dr. Barbee obtained similar results. Dr. Barbee measured a range of math problem solving skills that required the application of mathematical principals to real-life situations. Student scored in the low average range.

Student's math struggles were observed in the classroom. As discussed in Issue 1, Student received nearly six months of tier two math intervention supports during fourth grade to help her with math computation and math problem solving. However, Student continued to struggle with math problem solving at the time of the May 13, 2022 IEP team meeting. Student was graded at below grade level for each trimester of the 2021-2022 school year in the area of mathematical practices that graded her performance in problem solving, reasoning, and communication. She also received below grade level marks in the second and third trimesters for operations and algebraic thinking, for her ability to solve multi-step word problems using all four mathematical operations. Towner-Silva reported to Dr. Barbee that Student's ability to

successfully perform story or word mathematical problems remained below grade level standards. Therefore, a preponderance of the evidence established that general education instruction and supports through the first two tiers of the multi-tiered system of supports, were inadequate to address Student's math problem solving deficits.

A preponderance of the evidence also established that Student's inability to adequately achieve in the area of math problem solving was due to her deficit in short-term memory. Werk opined that students with short-term memory problems may struggle to solve multi-step math problems, remembering multistep problems, and extracting information to be used in word problems. Dr. Barbee persuasively opined at hearing that short-term memory problems could impact a student's math reasoning skills which was necessary to successfully solve math problem.

Student's inability to perform at grade level in solving math problems was attributed to her deficit in short-term memory, which, more likely than not, impeded Student's ability to remember and keep her place in solving multi-step math problems, and extracting information to solve math word problems. Tier two intervention supports were inadequate, and specialized academic instruction recommended by Dr. Barbee was needed to address Student's math problem solving needs. Accordingly, Student proved by a preponderance of the evidence that Riverside Unified denied her a FAPE by not finding her eligible for special education due to specific learning disability in the area of mathematics problem solving at the May 13, 2022 IEP team meeting.

ISSUE 4: DID STUDENT QUALIFY FOR SPECIAL EDUCATION AND RELATED SERVICES UNDER THE CATEGORY OF SPEECH AND LANGUAGE IMPAIRMENT AT THE MAY 13, 2022 IEP TEAM MEETING?

Student contends she had an expressive and receptive language disorder and speech disorder that adversely impacted her academic performance. Therefore, Student argues she qualified for special education at the May 13, 2022 IEP team meeting under the category of speech and language impairment. Riverside Unified contends Student did not qualify for special education and related services at the May 13, 2022 IEP team meeting due to a speech or language disorder.

A student is eligible for special education and related services under the category of language or speech disorder if the student demonstrates difficulty understanding or using spoken language under specified criteria and to such an extent that it adversely affects his or her educational performance, which cannot be corrected without special education. (Ed. Code, § 56333; Cal. Code Regs., tit. 5, § 3030, subd. (b)(11).)

To be eligible for special education and related services, a student's difficulty understanding or using spoken language shall be assessed by a language, speech, and hearing specialist who determines that such difficulty results from:

- Articulation disorders, resulting in reduced intelligibility or an inability to use speech mechanism such that the student's product of speech significantly interferes with communication and attracts adverse attention;
- An abnormal voice, characterized by persistent, defective voice quality, pitch, or loudness;

- Difficulties with fluency which result in an abnormal flow of verbal expression, including rate and rhythm, that adversely affects communication between the student and listener;
- In appropriate or inadequate acquisition, comprehension, or expression of spoken language such that the student's language performance level is found to be significantly below the language performance level of peers; or
- Hearing loss which results in a language or speech disorder that significantly affects the student's educational performance.

(Ed. Code, § 56333, subds (a)-(e); Cal. Code Regs., tit. 5, § 3030, subd. (b)(11).)

Significant interference in communication occurs when the student's production of single or multiple speech sounds on a developmental scale of articulation competency is below that expected for the student's chronological age or developmental level, and which adversely affects educational performance. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(11)(A).)

Furthermore, a student has an expressive or receptive language disorder if the student scores at least 1.5 standard deviations below the mean, or below the seventh percentile, for the student's chronological age or developmental level on two or more standardized tests in the areas of morphology, syntax, semantics, or pragmatics. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(11)(D).) A student will also be found to have an expressive or receptive language disorder if the student scores at least 1.5 standard deviations below the mean, or below the seventh percentile, for the student's chronological age or developmental level, on one or more standardized tests in the

areas of morphology, syntax, semantics, or pragmatics, and displays inappropriate or inadequate usage of expressive or receptive language as measured by a spontaneous or elicited language sample of no less than 50 utterances. (*Ibid.*)

ARTICULATION

Student failed to prove she had an articulation disorder. Her articulation did not significantly interfere with her communication, or attract adverse attention to her. Hollar and Wallace both found Student's oral and motor function to be adequate for speech production. Student's voice and rate of speech was normal.

In addition, Student's performances in the classroom and on standardized testing demonstrated that she had articulation distortions that were mild, not moderate, and did not require special education and related services. Wallace's testimony in this area was knowledgeable, confident, and consistent with the accounts of other observers, and therefore, credible and persuasive.

Hollar assessed Student's ability to articulate consonant sounds in a word in response to a picture shown, and found Student's performance to be poor. Hollar observed Student struggle to produce the /s/ and /sh/ phonemes and consistently said the /d/ phoneme instead of /th/ phoneme. As a result, Hollar opined Student had a moderate speech disorder.

However, other test results and observations demonstrated Student's articulation distortions were mild, not moderate, and did not adversely affect her communication. Wallace assessed Student and found similar articulation difficulties as Hollar. Student protruded her tongue slightly at times when producing words with /s/ and /z/

phonemes. When stating a word, Student also substituted the /f/ or /d/ phonemes for the /th/ phoneme. However, Student performed in the average range in the ability to accurately produce the sounds of the beginning, middle, and end of a word, and in the low average range in the ability to produce speech sounds in a sentence. Wallace found that Student could produce the /th/ phoneme correctly when Wallace modeled the speech, and Student was also able to self-correct when she mispronounced that phoneme. Wallace found this to be significant, and persuasively opined that because Student had the ability to produce the /s/ and /th/ phonemes correctly, compared to a student who could not, Student only required practice to improve her consistency.

In addition, Wallace found Student's articulation during conversation to be intelligible. Student spoke easily and readily in conversation with Wallace during testing. Other assessors shared similar experiences. Neither Werk, Feltner-Johnson, nor Chung reported difficulty understanding Student during their assessments. Dr. Barbee also found Student was easy to understand during testing. At the May 13, 2022 IEP team meeting, Dr. Barbee shared that Student had articulation errors, but demonstrated adequate verbal and nonverbal communication.

Student's articulation did not adversely affect her educational performance. Student successfully delivered oral presentations that her peers understood. Towner-Silva and classmates understood Student when Student spoke. Student received grade level marks in each trimester of the 2021-2022 school year in the area of speaking.

Student's articulation did not reduce her intelligibility, did not interfere with her ability to communicate, or attract adverse attention. Her articulation did not adversely affect her educational performance, and she did not require special education to

address minor articulation distortions that could be self-corrected. Wallace credibly opined Student's articulation difficulties to be mild that could be addressed through modeling and practice, without the need for remediation by a speech specialist. Accordingly, Student failed to meet her burden of proving she was eligible for special education and related services as a child with a speech and language impairment due to an articulation disorder.

LANGUAGE DISORDER

Student failed to prove she met the specified criteria for an expressive or receptive language disorder to qualify for special education and related services. The evidence failed to show Student performed at least 1.5 standard deviations below the mean, or below the seventh percentile, on two or more standardized tests in the areas of morphology, syntax, semantics, and pragmatics. In addition, the evidence did not prove that Student displayed inappropriate or inadequate usage of expressive or receptive language as measured by a spontaneous or elicited language sample of no less than 50 utterances.

As discussed in Issue 3, Student's composite standard score in the sound word composite was in the very low range, which was more than 1.5 standard deviations below the mean, and below the seventh percentile compared to same-aged peers. Hollar opined that the low score indicated very low abilities in the area of phonology and word structure knowledge. However, no additional standardized test results demonstrated Student performed at least 1.5 standard deviations below the mean, or below the seventh percentile, for Student's chronological age or developmental level in the area of morphology, syntax, semantics, or pragmatics.

Hollar tested Student's language in three groups of subtests, including oral language at the sentence/discourse levels, written language at the sound/word level, and written language at the sentence/discourse levels. Student's performance in a number of those subtests fell below the seventh percentile. However, as discussed in Issue 2, subtests scores are less reliable than composite scores when analyzing overall abilities in a particular area. Accordingly, Student's subtest scores were not persuasive in determining her overall expressive and receptive language abilities.

Hollar also generated composite scores using the subtest results. Student's composite scores were in the very low range in sentence discourse, oral composite, and written composite. Based on these composite scores, Hollar concluded Student had an oral written language disorder. Hollar explained at the May 13, 2022 IEP team meeting that her diagnosis of Student's oral written language disorder was consistent with a language based specific learning disability.

However, Hollar failed to explain in her report, at the May 13, 2022 IEP team meeting, and at hearing, the significance of the three additional composite scores in relation to Student's skills in morphology, syntax, semantics, or pragmatics, rather than a specific learning disability. Accordingly, without a clear explanation, the significance of the scores was reduced to speculation, and thus unpersuasive for purposes of determining whether Student had an expressive or receptive language disorder as defined by California special education law.

Further, Student's scores on subtests of several test instruments that were below the seventh percentile did not establish Student had a qualifying language disorder. One instrument assessed Student's listening comprehension, and the evidence failed to show a connection between that and Student's skills in morphology, syntax, semantics,

or pragmatics. Accordingly, Student's performance on that instrument was not persuasive in determining Student's eligibility under the specified criteria for an expressive or receptive language disorder.

In addition, Hollar failed to obtain language samples of at least 50 utterances. Student provided two language samples that were scored for

- length,
- intelligibility,
- narrative structure,
- syntax,
- morphology,
- semantics,
- verbal facility, and
- errors.

Student scored in the low average range in narrative comprehension and in the poor range for oral production, but the two language samples were only 30 and 12 utterances in length. As a result, Student's performance on an insufficient number of utterances in Student's language samples was not persuasive in determining if she had an expressive or receptive language disorder.

Hollar also assessed Student's ability to understand the deeper meaning of vocabulary and syntax. Student performed very poorly on two subtests and average on two other subtests, but the supralinguistic index, which comprised of the four subtests, placed Student in the 10th percentile. Accordingly, because Student did not score

below the seventh percentile on the more reliable index score of vocabulary and syntax, Student did not meet the criteria for an expressive or receptive language disorder.

Hollar administered additional measures, with results that did not support a finding that Student met the criteria for a language disorder. She assessed Student's skills in the areas of making inferences, sequencing, negative questions, problem-solving, predicting, and determining causes, and Student scored in the eighth percentile for peers her age.

In an assessment of Student's strengths and weaknesses in the area of pragmatic language, her pragmatic judgement and core pragmatic index scores fell in the 45th percentile and 42nd percentile respectively compared to same-aged peers. Hollar testified that Student's pragmatic language abilities were not an area of concern.

Student failed to prove she met the specified criteria for an expressive or receptive language disorder. The evidence did not establish that Student's performance on two or more standardized tests were at least 1.5 standard deviations below mean, or below the seventh percentile, for her age or developmental level, in the areas of morphology, syntax, semantics, or pragmatics. In addition, the evidence failed to demonstrate she displayed inappropriate or inadequate usage of expressive or receptive language based on a language sample of 50 or more utterances.

In sum, the evidence failed to prove Student met special education eligibility criteria for a speech and language impairment. Student failed to prove she had an articulation disorder that adversely affected her educational performance which could not be corrected without special education. In addition, Student failed to prove she had an expressive or receptive language disorder as defined by California special education law, and that her language performance level was significantly below the language

performance level of her peers. Accordingly, Student failed to meet her burden of proving Riverside Unified denied her a FAPE by not finding her eligible for special education under the category of speech and language impairment at the May 13, 2022 IEP team meeting.

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:

Riverside Unified did not deny Student a FAPE by failing to refer Student for a comprehensive special education assessment in violation of its child find obligation when Riverside Unified became aware of Student's academic struggles starting in the 2019-2020 school year.

Riverside Unified prevailed on Issue 1.

ISSUE 2:

Riverside Unified denied Student a FAPE by failing to comprehensively assess Student in the January 5, 2022 speech and language assessment.

Student prevailed on Issue 2.

ISSUE 3:

Riverside Unified denied Student a FAPE by failing to find Student eligible for special education under the category of specific learning disability at the May 13, 2022 IEP team meeting.

Student prevailed on Issue 3.

ISSUE 4:

Riverside Unified did not deny Student a FAPE by failing to find Student eligible for special education under the category of speech and language impairment at the May 13, 2022 IEP team meeting.

Riverside Unified prevailed on Issue 4.

REMEDIES

Student failed to prove Riverside Unified violated its child find obligation during the relevant period. She also failed to prove that Riverside Unified denied her a FAPE by finding her ineligible for special education and related services under the category of speech and language impairment at the May 13, 2022 IEP team meeting.

Student did prove Riverside Unified failed to comprehensively assess her in the January 5, 2022 speech and language assessment, which denied her a FAPE by significantly impeding parent's opportunity to participate in decision making regarding Student's educational program. Student also proved Riverside Unified denied her a FAPE by failing to find her eligible for special education and related services under the category of specific learning disability at the May 13, 2022 IEP team meeting.

As remedies, Student seeks findings that she is eligible for special education under the categories of specific learning disability and speech and language impairment. Student also requests Riverside Unified reimburse Parent for costs associated with Dr. Barbee's and Hollar's independent educational evaluations. Lastly, Student seeks compensatory educational services for reading, writing, and math in the amount of 240 hours, and compensatory speech and language services in the amount of 100 hours, both to be provided by nonpublic agencies. Riverside Unified contends Student is not entitled to any remedy.

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].) When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. at pp. 369-370.) Remedies under the IDEA are based on equitable considerations and the evidence established at the hearing. (*Id.* at p. 374.)

Parents may be entitled to reimbursement for the costs of placement or services that they independently obtained for their child when the school district failed to provide a FAPE. (*Burlington, supra*, 471 U.S. at p. 374; *Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*)). In assessing the propriety of reimbursement, the conduct of the parties must be reviewed. (*Puyallup, supra*, 31 F.3d

at p. 1496.) In addition, an independent educational evaluation at public expense may also 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.)

An ALJ may also award compensatory education as a form of equitable relief. (*Park, supra*, 464 F.3d 1025, 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. Bd. of Educ.* (D.Conn. 2008) 531 F.Supp.2d 245, 265; *Orange Unified Sch. Dist. v. C.K.* (C.D. Cal. June 4, 2012, No. SACV 11-1253 JVS(MLGx)) 2012 WL 2478389, *12.) 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 v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) Compensatory education awards depend upon the needs of the disabled child and can take different forms. (*R.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1126.) Typically, an award of compensatory education involves extra schooling, in which case generalized awards are not appropriate. (*Puyallup, supra*, 31 F.3d at p. 1497.) Day-for-day compensation for time missed is not required, and appropriate relief should be designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Ibid.*)

REIMBURSEMENT FOR INDEPENDENT EDUCATIONAL EVALUATIONS

The IDEA permits parents to obtain independent educational evaluations under certain circumstances if the parents disagree with a school district assessment. Although that statutory provision does not apply here, it does offer factors to consider

in determining the appropriate extent of reimbursement for assessments obtained by Parent after her disagreement with Riverside Unified's assessments. (See 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c).) An independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent evaluation. (20 U.S.C. 1415(b)(1); 34 C.F.R. § 300.502(b)(1) and (b)(2); Ed. Code §§ 56329, subd. (b), 56506, subd. (c).)

School districts must provide parents with information about where the independent educational evaluation may be obtained, as well as the school district criteria applicable for independent educational evaluations. (34 C.F.R. § 300.502(a)(2); see United States Department of Education Office of Special Education Program, *Letter to Bluhm*, (OSEP, July 2, 1980).) To avoid unreasonable charges for independent educational evaluations, a school district may establish maximum allowable charges for specific tests. (United States Department of Education Office of Special Education and Rehabilitative Services, *Letter to Kirby*, (OSERS, May 4, 1989).)

A district may provide parents with a list of pre-approved assessors, but there is no requirement that the parent select an evaluator from the district-created list. (United States Department of Education Office of Special Education and Rehabilitative Services, *Letter to Parker* (OSERS, February 20, 2004).) When enforcing independent educational evaluation criteria, the district must allow parents the opportunity to select a qualified evaluator who is not on the list, but who meets the criteria set by the public agency. (*Ibid.*)

Student seeks reimbursement for both the psychoeducational assessment by Dr. Barbee and the speech and language assessment by Hollar as remedies. Here, Riverside Unified's January 5, 2022 speech and language assessment was legally deficient and impeded Parent's ability to meaningfully participate in the IEP process. In addition, Student qualified for special education and related services under the category of specific learning disability, contrary to Riverside Unified's findings, based on Dr. Barbee's assessment and analysis of Student's patterns of strengths and weaknesses.

Parent disagreed with Riverside Unified's assessment results at the January 26, 2022 IEP team meeting. Subsequently, Parent hired Hollar to conduct an independent speech and language evaluation and Dr. Barbee to conduct an independent psychoeducational evaluation. However, Parent did not request from Riverside Unified publicly funded independent educational evaluations in the areas of speech and language or psychoeducation prior to Parent hiring Hollar and Dr. Barbee. Special education coordinator Hartshorn testified that Hollar's and Dr. Barbee's evaluations did not meet Riverside Unified's criteria for independent educational evaluations. Hartshorn explained that Hollar's and Dr. Barbee's evaluations exceeded Riverside Unified's criteria for cost, and both assessors were located beyond Riverside Unified's distance criteria of 30 miles. Consequently, Riverside Unified was denied the opportunity to provide Parent with its criteria for independent educational evaluations, and its list of preapproved assessors who met Riverside Unified's cost and distance criteria for conducting speech and language and psychoeducational evaluations.

However, no evidence was offered establishing Riverside Unified's maximum allowable charge for independent educational evaluations. Student provided proof

of costs for Hollar's evaluation in the amount of \$2,600. Student also provided proof of cost for Dr. Barbee's evaluation in the amount of \$5,000. Parent had not paid for either evaluation at the time of the hearing.

The conduct of the parties must be considered when determining an appropriate relief. In weighing Riverside Unified's failure to conduct a comprehensive speech and language assessment, against Parent's failure to request an independent speech and language evaluation from Riverside Unified prior to hiring Hollar, the balance of the equities entitles Student to reimbursement for Hollar's speech and language evaluation, up to the maximum allowable charge set by Riverside Unified for a publicly funded independent speech and language evaluation.

A similar balancing is required for Dr. Barbee's independent psychoeducational evaluation. Parent did not seek a publicly funded independent psychoeducational evaluation prior to hiring Dr. Barbee. Student also did not challenge the adequacy of Riverside Unified's November 21, 2021 psychoeducational evaluation and evaluation report in due process. However, Dr. Barbee's psychoeducational evaluation was instrumental in identifying Student's specific learning disabilities in the areas of written expression and math problem solving under the patterns of strengths and weaknesses model, which Riverside Unified did not utilize. Accordingly, a balancing of the equities entitles Student to reimbursement for Dr. Barbee's evaluation in the amount not to exceed Riverside Unified's maximum allowable charge for a publicly funded independent psychoeducational evaluation.

COMPENSATORY EDUCATIONAL SERVICES

Student failed to prove Riverside Unified violated its child find duty. However, Student proved she qualified for special education at the May 13, 2022 IEP team meeting due to a specific learning disability. Dr. Barbee recommended that Student would have required one and half hours each day of specialized academic instruction for four to five days a week to address the areas of basic reading skill, reading fluency, math reasoning, and written expression. However, Student only proved she required special education to address her deficits in written expression and math problem solving. Accordingly, one hour each day of specialized academic instruction is reasonable to account for lost instruction to address Student's deficits in written expression and math problem solving.

Parent disenrolled Student from Riverside Unified prior to the start of the 2022-2023 school year. Riverside Unified's last day of instruction for the 2021-2022 school year was May 25, 2022. Student did not prove she required extended school year services during the Summer of 2022. There were eight school days between the May 13, 2022 IEP team meeting and last day of school. Accordingly, Student is entitled to eight hours of compensatory academic services to make up for lost specialized academic instruction that she would have received had Riverside Unified offered Student an IEP on May 13, 2022.

On the other hand, Student failed to prove she qualified for special education and related services under the category of speech and language impairment at the May 13, 2022 IEP team meeting. Accordingly, Student is not entitled to compensatory speech and language services.

ORDER

1. Student qualified for special education and related services under the category of specific learning disability, at the May 13, 2022 IEP team meeting.
2. Riverside Unified shall reimburse Parent for costs associated with Hollar's independent speech and language evaluation in the amount of \$2,600, or the maximum allowable charge set by Riverside Unified for independent speech and language evaluations, whichever is less. Student shall provide Riverside Unified with proof of payment. Riverside Unified shall reimburse Parent within 45 days of receiving the proof of payment.
3. Riverside Unified shall reimburse Parent for costs associated with Dr. Barbee's independent psychoeducational evaluation in the amount of \$5,000, or the maximum allowable charge set by Riverside Unified for independent psychoeducational evaluations, whichever is less. Student shall provide Riverside Unified with proof of payment. Riverside Unified shall reimburse Parent within 45 days of receiving the proof of payment.
4. Riverside Unified shall contract directly with a certified nonpublic agency of Parent's choice to provide Student eight hours of academic instruction.
5. Within 10 days of Parent providing Riverside Unified of the academic instruction provider's contact information, Riverside Unified shall contact the selected provider to initiate the service contract. The provider and Parent shall determine the appropriate schedule and location for service delivery. Student shall be allowed to access these service hours through October 30, 2023.
6. All other relief sought by Student is 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.

/s/

Rommel P. Cruz

Administrative Law Judge

Office of Administrative Hearings