

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020010176

PARENT ON BEHALF OF STUDENT,

v.

CHAFFEY JOINT UNION HIGH SCHOOL DISTRICT.

DECISION

JUNE 18, 2020

On January 6, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student naming Chaffey Joint Union High School District, called Chaffey. Administrative Law Judge Sabrina Kong heard this matter in Rancho Cucamonga, California on March 3, 5, 12, and 16, 2020, and by videoconference on May 6, 2020.

Attorney Diana Renteria represented Student. Parent attended all hearing days on Student's behalf. An interpreter interpreted for Parent on all hearing days. Attorney Jonathan Read represented Chaffey. Chaffey's Special Education Director Kelly Whelan

attended all hearing days on Chaffey's behalf. West End Special Education Local Plan Area's Program Manager Royal Lord also attended all hearing days.

At the parties' request the matter was continued to June 4, 2020 for written closing briefs. The record was closed, and the matter was submitted on June 4, 2020.

A free appropriate public education will be referred to as a FAPE. An individualized education program will be referred to as an IEP.

STUDENT'S ISSUES

1. Did Chaffey deny Student a FAPE by failing to timely assess Student after Parent's April 9, 2018 written request for assessment?
2. Did Chaffey deny Student a FAPE by placing Student in an English language development program before conducting any special education eligibility assessments?
3. Did Chaffey deny Student a FAPE by failing to assess Student's vision based on any teacher's awareness of his visual impairment?
4. Did Chaffey deny Student a FAPE by failing to conduct an appropriate psychoeducational assessment based on the May 14, 2019 signed assessment plan?
5. Did Chaffey deny Student a FAPE by failing to conduct an appropriate speech and language assessment based on the May 14, 2019 signed assessment plan?
6. Did Chaffey deny Student a FAPE failing to conduct an appropriate health assessment based on the May 14, 2019 signed assessment plan?
7. Did Chaffey deny Student a FAPE by failing in the October 2, 2019 IEP team meeting to allow Parent and/or independent assessors to speak, ask questions, or

comment, and/or continuing to conduct the meeting after Parent, Student's representatives and/or independent assessors were telephonically disconnected?

8. Did Chaffey deny Student a FAPE by failing in the October 2, 2019 IEP team meeting to find Student eligible for special education and related services and offer an appropriate program of special education and related services?

JURISDICTION

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in

the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student has the burden of proof as to his 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).)

Student was 19 years old at the time of the hearing. He enrolled in Chaffey High School as a 17 year-old, 11th grade general education student after immigrating from Honduras. Parent mistakenly thought Student was to be enrolled in the 10th grade. Despite attorney argument that Student enrolled as a 10th grader and Chaffey inexplicably and inappropriately promoted him from 10th to 12th grade, this was unsupported by any evidence, and unpersuasive. Chaffey successfully rebutted Student's argument by showing that placing Student in the 11th grade was appropriate based on his age. At the time he enrolled in Chaffey, Student had not attended school since the sixth grade. Upon enrollment, Chaffey placed Student in the Newcomer English Language Development Program at Chaffey High School because he had no English skills. Student's primary language was a Mayan dialect of Spanish spoken in Honduras. Student attended the last month of the 2017-2018 school year after enrollment at Chaffey. Student was enrolled in the 12th grade in the 2018-2019 school year with four English language development courses. He repeated the 12th grade as a fifth year senior in the 2019-2020 school year with two English language development courses and Spanish supported general education courses. Student stopped attending school in October 2019. Student did not graduate high school. Student resided within

Chaffey's geographic boundaries at all relevant times. Student was not eligible for special education at the time of the hearing.

ISSUE 1: DID CHAFFEY DENY STUDENT A FAPE BY FAILING TO TIMELY ASSESS STUDENT AFTER PARENT'S APRIL 9, 2018 WRITTEN REQUEST FOR ASSESSMENT?

Student contends that Chaffey failed to timely provide Parent with an assessment plan and assess Student following an email from non-attorney advocate James Peters on April 9, 2018. Peters' email informed Special Education Director Whelan that two unnamed students enrolling the next day at Los Osos High School needed special education assessments. Chaffey contends that Peters' email was not a request to assess Student.

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

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the*

Hendrick Hudson Central School Dist. v. Rowley (1982) 458 U.S. 176, 201-204 (*Rowley*);
Endrew F. v. Douglas County School Dist. RE-1 (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

Pursuant to California special education law and the IDEA, school districts have an affirmative, ongoing duty to identify, locate, and evaluate all children with disabilities residing within their boundaries. (20 U.S.C. § 1412(a)(3); Ed. Code, § 56300 et seq.) This ongoing duty is referred to as “child find.” The district’s duty is not dependent on any request by the parent for special education testing or referral for services. (*Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.) A district’s child find obligation toward a specific child is triggered where there is knowledge of, or reason to suspect, a disability, and reason to suspect that a student may need special education services to address that disability. (*Dept. of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at pp. 1195.) A district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

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 (*Timothy O.*).

The actions of a school district with respect to whether it had knowledge of, or reason to suspect a disability, and that special education services may be necessary to address the disability must be evaluated in light of information that the district knew, or

had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, (citing *Fuhrmann v. East Hanover Bd. of Ed.* (3rd Cir. 1993) 993 F.2d 1031).)

The relationship between the duty to assess, the duty to provide special education services, and the duty to utilize general education resources where appropriate was summarized in *Los Angeles Unified School District v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 819-820:

To prevent districts from 'over-identifying' students as disabled, Congress mandated that states develop effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education. (20 U.S.C. § 1400(c)(5)(f).) Schools, however, are charged with the 'child find' duty of locating, identifying and assessing all children who reside within its boundaries who are in need of special education and related services. (20 U.S.C. § 1400(a)(3); [Ed. Code, §§ 56300-56303].) If a school district suspects that a general education student may have a disability, it must conduct a special education assessment to determine whether the student qualifies for special education services. (20 U.S.C. § 1414(a)(1)(a); [Ed. Code, § 56320].) However, a student 'shall be referred for special education instruction and services only after the resources of the regular education program have been considered, and, where appropriate, utilized.' ([Ed. Code, § 56303].)

Although a district is required to consider and utilize the resources of its regular education first, it may not delay its assessment of a student with a suspected disability on the basis that it is utilizing a response to intervention approach to accommodate the

student in the regular education program. A district may deny a request to evaluate a student if it does not suspect a disability, but it must notify the parent of the basis of the decision and that basis cannot be that the district is waiting to see how the student responds to general education interventions. (Office of Special Education Programs (OSEP) *Memorandum to State Directors of Special Education*, (January 21, 2011) 56 IDELR 50.)

States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483, superseded by statute on other grounds, as stated in *R.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007), 496 F.3d 932, 939.) (*Target Range*). Citing *Rowley, supra*, the Ninth Circuit recognized the importance of adherence to the procedural requirements of the IDEA, but indicated that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at pp. 1484.) Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP process. (*Ibid.*) These requirements are also found in the IDEA and California Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE if the violation:

1. impeded the child's right to a FAPE;
2. significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child; or
3. caused a deprivation of educational benefits.

(20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); *See Target Range, supra*, 960 F.2d at 1484.)

The April 9, 2018 email from Peters to Whelan did not constitute a request for assessment because it did not identify Student by name, or state that Peters had authority to act, or was acting, on Student's behalf. The email did not refer to ANY person by name, or specifically inform Chaffey that Peters was a legal representative of a specific person. The email generally stated that two students who were not yet enrolled or registered with Chaffey needed to be assessed upon enrollment. That same day Whelan emailed Peters to request the grade level of these unnamed students and if they had an IEP, but Peters never responded.

On April 10, 2018, Peters emailed three pages to Whelan: Student's birth certificate, Student's sixth grade Honduran report card, and Student's immigration document. None of the three pages referenced a request for assessment. Student did not show that the April 9, and 10, 2018 emails reasonably put Chaffey on notice that they were related in any way, or that Student needed special education assessment.

Peters represented other students in Chaffey, including Parent and her husband's biological child. Peters spoke with Whelan about another Chaffey student on April 9, 2018, and mentioned that Parent had two relatives who would be enrolling in Chaffey. However, Peters did not identify Student by name during the April 9, 2018 conversation about a different student unrelated to this family, or in the April 9, 2018 email. Peters did not inform Whelan that he represented Student, or specifically state that Student required special education assessment. At the time of these April 9, 2018 communications, Student did not reside within Chaffey's boundaries, was not in Parent's custody, and was completing the immigration process. It would be unreasonable to

expect Whelan to divine that Peters' non-specific communications about unnamed future enrollees triggered a duty to assess Student for special education when he finally enrolled weeks later. The evidence did not support that Student, or anyone acting on Student's behalf, requested special education assessment on April 9, 2018. Parent did not request that Chaffey assess Student for special education until over a year later, in April 2019.

Student did not meet his burden of proving that Chaffey failed to timely assess pursuant to Parent's April 9, 2018 written request for assessment, because the April 9, 2018 email was not a request to assess Student for special education.

ISSUE 2: DID CHAFFEY DENY STUDENT A FAPE BY PLACING STUDENT IN AN ENGLISH LANGUAGE DEVELOPMENT PROGRAM BEFORE CONDUCTING ANY SPECIAL EDUCATION ELIGIBILITY ASSESSMENTS?

Student contends that Chaffey should have assessed him for special education eligibility before placing him in an English language development program. Chaffey contends that Student had no English abilities and limited formal school instruction when he enrolled at Chaffey. Therefore, the Newcomer English Language Development Program was the appropriate placement for Student. Chaffey had no reason to suspect that Student might require a special education assessment when he enrolled at Chaffey.

Student did not inform Chaffey that Student had an IEP, required testing, or was otherwise a student with special needs. Peters' general reference that two future enrollees would require special education assessment was insufficient to put Chaffey on notice that one of them was Student. Chaffey could not reasonably be expected to connect and conclude that one of the unnamed enrollees Peters said would be enrolling

on April 10, 2018, was Student, particularly as Student enrolled approximately two weeks later.

Student was primarily a Spanish speaker and had not been in school since the sixth grade in Honduras. At the time of his enrollment, Chaffey did not have any information triggering a need to assess Student for special education. The evidence showed that the Newcomer English Language Development Program was an appropriate placement for Student. The Newcomer English Language Development Program provided English development supports and social, custom, and cultural education in adapting to life in the United States for students who recently came to the United States. It taught the newcomer students how to communicate and learn in a new language. Neither Parent, nor the enrollment documents Parent filled out put Chaffey on notice that Student had any special education needs, or could not access the general education curriculum with appropriate English language supports. Parent indicated in different pages of the Spanish and English enrollment documents that Student was not seeking special education services, including circling no when asked if Student had ever received special education services. Parent indicated that Student needed counseling and English language development services in the enrollment documents, and Chaffey provided both to Student upon enrollment as a general education student.

High School counselor Jose Rangel also met with Student upon enrollment to determine his English language skills and educational needs. Rangel, a fluent Spanish speaker, worked primarily with non-English speaking newcomers and immigrants at Chaffey and had experience working with special needs students. Rangel held a master's degree in education and in educational counseling, and was qualified to opine on Student's educational needs upon enrollment. Rangel opined that in the spring of

2018, Student presented typically as a non-English speaking newcomer, describing Student as a little nervous. Rangel also opined that his observation and interview with Student upon enrollment were consistent with the enrollment documents Parent filled out as neither led Chaffey to suspect that Student had a disability requiring special education and related services. Based on information Chaffey had about Student upon enrollment, it appropriately provided counseling and English language development services to Student as part of the general education curriculum. Student did not show that Chaffey needed to provide him these two services, or any other services, in the special education context. Chaffey properly placed Student in the Newcomer English Language Development Program, a general education program for students who were not proficient in English.

Student did not meet his burden of proving that Chaffey needed to assess Student for special education before placing him in the Newcomer English Language Development Program.

ISSUE 3: DID CHAFFEY DENY STUDENT A FAPE BY FAILING TO ASSESS STUDENT'S VISION BASED ON ANY TEACHER'S AWARENESS OF HIS VISUAL IMPAIRMENT?

Student contends that Chaffey should have assessed Student's vision when Parent informed a teacher in October 2018 that Student could not see out of one eye and needed glasses. Chaffey contends that Student's vision difficulties did not trigger assessment because his vision did not impair school access or classroom function and could be corrected with glasses.

The IDEA defines a child with a disability as a child with delineated disabilities, including “visual impairments,” who, by reason thereof, needs special education and related services. (20 U.S.C. §1401(3)(i) and (ii).) Federal and State regulations interpreting the IDEA define “visual impairment, including blindness, as “an impairment in vision that, even with correction, adversely affects a child’s educational performance.” (34 C.F.R § 300.8(c)(13); Cal. Code Regs., tit. 5, § 3030, subd. (b)(13).) The impairment must require instruction and services which cannot be provided with modification of the regular school program. (Ed. Code, § 56026, subds. (a) and (b).))

Parent circled “no” in the enrollment documents when asked if Student had any vision problems, or if Student needed glasses or contact lens. Although Student had been prescribed glasses in May 2018, Chaffey first became aware of this when Parent told one of his Newcomer English Language Development Program teachers, Ellen Tremblay, in October 2018. In an October 16, 2018 telephone discussion about Student’s tardiness, Parent informed Tremblay that Student could not see out of one eye and needed to wear his glasses. Student did not wear glasses in class, and did not exhibit vision difficulties affecting his classwork without them.

Tremblay taught Student multiple classes in the Newcomer English Language Development Program in the 2017-2018 and 2018-and 2019 school years, and had experience working with English language development students. She opined at hearing that Student did not act or move any differently than other newcomer students in her classes even without wearing glasses. For example, Student did not bump into objects (as reported by Student’s uncle) or hover closely to his deskwork. Student never exhibited any characteristics which caused Tremblay to suspect that Student’s vision adversely affected his education, or that he needed a vision assessment. Tremblay’s

opinion was persuasive because it was consistent with Parent's report to Tremblay that Student's vision difficulties were corrected with glasses. Tremblay's opinion was also consistent with other teachers' reports that Student was capable of classwork as a typical student without any program modification. Although Student argued that his poor vision caused him to earn bad grades, this was conclusory and unsupported by the evidence. Student's teachers all reported that Student was capable of accessing the Newcomer English Language Development Program, and that he received poor grades because he spoke less English than others in the class, was at times uninterested in doing classwork, and preferred to socialize. The evidence also showed that Student's grades fluctuated with his school attendance, improving when he attended class, and worsening when attendance plummeted. The evidence did not support that Student's poor grades were attributable to his vision difficulties. Student did not demonstrate that Chaffey had knowledge of, or reason to suspect, that he had a vision impairment that adversely impacted his access to education, or that special education services might be necessary to address a disability related to vision impairment.

Student did not meet his burden of proving that Chaffey had reason to suspect a vision impairment triggering a duty to assess in that area before April 2019, when Parent requested special education assessment.

ISSUE 4: DID CHAFFEY DENY STUDENT A FAPE BY FAILING TO CONDUCT AN APPROPRIATE PSYCHOEDUCATIONAL ASSESSMENT BASED ON THE MAY 14, 2019 SIGNED ASSESSMENT PLAN?

Student contends that Chaffey's psycho-educational assessment was inappropriate because it did not find Student eligible for special education. Chaffey contends that it properly assessed all of Student's needs.

A request for an initial evaluation to determine whether a student is a child with a disability in need of special education and services can be made by either the parent or a public agency, such as a school district. (34 C.F.R. § 300.301(b).) Assessments are required to determine eligibility for special education, and what type, frequency, and duration of specialized instruction and related services are required. In evaluating a child for special education eligibility and prior to the development of an IEP, a district must assess him in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).)

A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033.) A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that particular disability or disorder. (See *Timothy O., supra*, 822 F.3d at 1119).

The assessment must be conducted in a way that:

1. uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent;
2. does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and
3. uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

The assessments used must be:

1. selected and administered so as not to be discriminatory on a racial or cultural basis;
2. provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally;
3. used for purposes for which the assessments are valid and reliable;
4. administered by trained and knowledgeable personnel; and
5. administered in accordance with any instructions provided by the producer of such assessments.

(20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subs. (a) & (b), 56381, subd. (h).)

The determination of what tests are required is made based on information known at the time. (See *Vasherese v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where the concern prompting the assessment was reading

skills deficit].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).) Assessors must be knowledgeable about the student's suspected disability and must pay attention to student's unique educational needs such as the need for specialized services, materials, and equipment. (Ed. Code, § 56320, subd. (g).)

The personnel who assess the student shall prepare a written report that shall include, without limitation, the following:

1. whether the student may need special education and related services;
2. the basis for making that determination;
3. the relevant behavior noted during observation of the student in an appropriate setting;
4. the relationship of that behavior to the student's academic and social functioning;
5. the educationally relevant health, development, and medical findings, if any;
6. if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and
7. consistent with superintendent guidelines for low incidence disabilities (those affecting less than one percent of the total statewide enrollment in grades kindergarten through 12), the need for specialized services, materials, and equipment.

(Ed. Code, § 56327.)

Federal law uses the term "evaluation" instead of the term "assessment" used by California law, but the two terms have the same meaning and are used interchangeably in this Decision.

Parent requested a special education assessment in the spring of 2019. Experienced and qualified certified school psychologists administered standardized tests, observed Student both in the classroom and during assessment, interviewed teachers, obtained information from Parent about Student, and reviewed records, including a Honduran report card, in conducting the psychoeducational assessment. School psychologist Isela Arce, who was bilingual, assessed Student in both English and in Student's native language, Spanish. She administered the:

- Nonverbal Intelligence Test, Second Edition;
- Kaufman Assessment Battery for Children, Second Edition;
- Bateria Achievement, Fourth Edition, in Spanish; and
- Bateria Cognitive, Fourth Edition, in Spanish.

School psychologist Dr. Saul Rivera administered the Developmental Test of Visual Perception for Adolescent and Adult, and the following questionnaires:

- Behavior Assessment for Children, Third Edition;
- Children's Depression Inventory, Second Edition;
- Adaptive Behavior Assessment System, Third Edition; and
- Rating Scale of Impairment.

All of the enumerated assessments were standardized, and used for the purpose intended, administered by knowledgeable personnel trained and qualified to administer these assessments. The assessments were non-discriminatory and administered in accordance with instructions. Rivera selected and scored all the assessments including the ones administered by Arce, and prepared the psychoeducational report. Because of Student's excessive absences, two school psychologists assessed Student based on

availability of the assessors whenever Student attended class. Questionnaires were provided to Parent in both English and Spanish.

Chaffey used multiple standardized assessments, the Nonverbal Intelligence Test, the Kaufman, and the Bateria Achievement and Cognitive tests to cross-validate Student's intellectual ability. Chaffey used the Developmental Test of Visual Perception to obtain comprehensive information about Student's functional vision in addition to a vision acuity test. Further, Chaffey used the Behavior Assessment for Children, Children's Depression Inventory, and Adaptive Behavior Assessment System, and Rating Scale of Impairment to obtain information on Student's social, emotional, and behavioral function. Some of the questionnaires about Student's home and function in the community were not given to teachers, but given to Parent as only Parent had information about Student's home and community behaviors.

The standardized test scores showed that Student's intellectual ability fell in the low average to below average range. However, Rivera opined that the standardized tests scores did not accurately reflect Student's intellectual or academic ability. Rivera concluded that Student's low standardized test scores primarily resulted from environmental and cultural disadvantages, limited English and Spanish proficiency, and significant lack of instruction in reading and math because of his five-year gap in formal education in Honduras. Further, Rivera opined that the standardized sample group did not include individuals speaking a Mayan Spanish dialect used in Honduras and/or had a significant educational gap.

Rivera considered the environmental and cultural disadvantages Student experienced as the disruptions and adjustment of having been separated from his biological parents when he was ten years old; left in the care of a grandparent for seven

years, and an aunt for one year; and bus traveled to the United States where he remained in an immigration detention facility for months before being placed with Parent in the spring of 2018. Rivera opined that Student's extensive five-year gap in formal education before enrollment in Chaffey significantly impacted his understanding for daily structure and simple activities sequencing as he did not have the continuous reading and math instruction that typical 18 year-olds would have had. Rivera and Tremblay both opined that Student lacked the structured academic skills for transitioning into an American 11th grade education which Student only started to develop when he enrolled at Chaffey. For example, Student had difficulty with organization skills such as knowing when to ask for help, when to take notes, and following through with homework.

Rivera opined that Student's limited English proficiency impacted his standardized assessment and academic performance. Rivera relied on bilingual research of Basic Interpersonal Communication Skills, known as BICS, and Cognitive Academic Language Proficiency, known as CALP when evaluating Student's English language development level. According to the BICS guidelines, individuals typically require one to three years, and an average of two years, to develop highly contextualized, and cognitively undemanding English language skills sufficient for informal social setting communication, such as when speaking with friends. However, they are typically insufficient to meet the linguistic demands of an academic classroom setting. According to the CALP guidelines, individuals typically require five to seven years, or longer, of formal language instruction to develop the complex vocabulary needed to meet the academic language demands of an academic classroom setting. Student earned poor grades because he was still in his first year of learning English in the 2018-2019 school year, including during the spring of 2019 when he took the standardized assessments.

Rivera explained that Student's lower standardized test scores and academic performance were consistent with the BICS and CALP guidelines and reflective of his English/bilingual language developmental level. Tremblay also confirmed Rivera's opinion. She explained that Student could not read any English, and the extent of his spoken English was no more than "hello" when he enrolled at Chaffey during the last month of the 2017-2018 school year.

Rivera opined that Student's limited Spanish proficiency also impacted his standardized assessment and academic performance. In addition to having had only a sixth-grade education in Honduras, Chaffey's Spanish speaking experts, including Rivera, concluded that Student performed poorly in Spanish standardized intelligence assessments because he spoke a Mayan dialect of Spanish. Both Rivera and speech and language pathologist Claudia Ceballos opined that the Mayan dialect of Spanish was particular to Honduras, and had its own and different vocabulary and pronunciations. Ceballos also opined that this Mayan dialect made it difficult for her and other Spanish speakers, who did not speak the Mayan dialect, to understand and communicate with Student in Spanish.

Per Chaffey's experts, Student did not score well in Spanish standardized assessments because he did not have the Spanish skills used during the standardized assessment because it was so different than that of the Mayan dialect. Further, the significant gap in his education placed Student at a disadvantage when compared to the standardized sample who had continuous instruction in reading and math well beyond the sixth grade.

Rivera also explained that the Nonverbal Intelligence Test with its visual tasks, simple perception and complex reasoning were typically better measures of intelligence

for students with English difficulties. However, Rivera opined that because math reasoning and attention were heavily weighted components of the Nonverbal Intelligence Test, Student's lack of math instruction beyond sixth grade, and subsequent five-year academic instruction gap caused Student to perform poorly on the Nonverbal Intelligence test compared to same-aged peers. Rivera opined that Student did not lack intellectual ability, but lacked the formal education instruction and structure needed for development of attention and reasoning skills needed to do well on even non-verbal standardized test.

Rivera concluded that Student was capable of functioning higher intellectually than the overall standardized test scores suggested because Student scored in the high average range in a few subtests of the Bateria Achievement including in one where he scored a high 127 points. Considering Student's standardized subtests scores ranged widely and atypically from well above average to well below average in multiple academic and processing areas, Rivera concluded that standardized tests including the Nonverbal Test of Intelligence, the Kaufman, and the Bateria Achievement and Cognitive tests underestimated Student's intellectual ability. Rivera concluded that Student's "over-achievement in many domains" of standardized testing confirmed that the standardized assessments were not accurate when viewed alone without considering other significant factors in his profile. For example, Student could formulate basic sentences in Spanish with adequate grammar. Student was also able to formulate sentences in English, but made more grammatical and spelling errors than he did in Spanish. Rivera opined that to accurately determine Student's intellectual and academic abilities, the standardized test scores must be viewed with Student's classroom performance and the environmental and cultural disadvantages, and limited English and Spanish proficiency along with the significant education gap Student had experienced.

Student scored in the low average range on the motor reduced visual perception index, and was capable of producing a legible writing sample with good organizational boundaries, and consistent letter and word spacing. Therefore, Rivera concluded Student had adequate visual perception abilities. Student could copy figures and shapes, but was unable to do so quickly which resulted in below average scores in the general visual perception and visual-motor integration areas. However, Rivera opined because Student did not wear glasses throughout the assessments, his vision acuity also impacted his speed and his standardized tests performance.

Rivera sent Parent, Student and four teachers questionnaires to assess Student's social, emotional, behavioral, and adaptive functioning on standardized rating scales. Rivera explained that clinically significant scores in the Behavior Assessment System and the Rating Scales of Impairment suggested a high level of maladjustment; and at-risk scores suggested the potential for developing a problem which could need monitoring or formal treatment. Rivera opined that the presence of clinically significant and at-risk ratings in attention, work completion, and academics in the questionnaire responses did not suggest that Student needed special education interventions, but areas where Student needed monitoring and/or general education interventions. Rivera concluded from the satisfactory personality rating in Student's Honduras sixth grade report card that Student had no history of behavioral or emotional issues.

Student's responses in the Children's Depression Inventory measuring depression and emotional and functional problems confirmed that Student did not suffer from depression or related behaviors. Student reported dizziness and lightheadedness as symptoms of depression. In an interview during the psychoeducational assessment, Rivera determined that Student's reports of depression resulted from a

misinterpretation of the word. Student demonstrated typical enjoyment and emotions with peers and teachers, and had good eating and sleeping habits. Student had positive relationships with Parent, his uncle/Parent's husband, and cousins. Student enjoyed soccer and trips to the park. The Depression Inventory results were consistent with Rivera's school observations and supported his conclusion that Student did not demonstrate signs of depression or emotional issues.

Further, Rivera opined that Student's self-rating reflected overly negative responses, inattentiveness to question content, fake good responses, and inconsistencies as validated within the ratings scales. While Parent rated Student to be at-risk and clinically significant in all areas, most of the teachers rated Student in the average range in aggression, anger, coercive behaviors, conduct, atypicality, withdrawal, emotional negativity, and without the probability of an emotional or behavioral disturbance. All of the teachers considered Student to be normal regarding anxiety, depression, somatization, and emotional self-control.

Despite contending that Chaffey's psychoeducational assessment was inappropriate, Student did not prove that any aspect of the psychoeducational assessment was deficient. Student's expert psychologist Dr. David Paltin opined unequivocally that Chaffey's school psychologist Rivera selected, administered, and scored the standardized assessments used in the psychoeducational assessment appropriately. Paltin did not opine that the psychoeducational assessment was inappropriate, but disagreed with the conclusion that Student was not eligible for special education from the assessment results.

Paltin did not conduct any standardized testing of Student. Paltin's opinions were based primarily on review of Chaffey's assessments and conclusions, a classroom

observation of Student, and an interview of Student, with his uncle as the interpreter because Paltin did not speak Spanish. Paltin observed Student taking longer to finish an assigned task than other students in the classroom and concluded that Student had attention “differences”. He opined that Student had been distracted by the need to assemble materials for task completion, and by others walking around. Paltin did not opine that the attention differences or distractions adversely affected Student’s access to the Newcomer English Language Development Program. Paltin conceded that Student made progress in school, but that he was not asked to evaluate, and did not evaluate, Student’s ability to function in the school environment with general education supports. Paltin was also not an English acquisition trajectory/development expert, had no knowledge of the level of Student’s English skills/exposure, or that Student had a five-year gap in education, and did not consider those factors, or opine on those issues. None of Student’s experts contradicted or rebutted Rivera’s opinion on the impact of BICS and CALP, or the environmental and cultural disadvantages Student experienced on Student’s standardized test performance, or language development.

Paltin opined that Student should qualify for special education because Student scored low on some standardized assessments, including on the psychoeducational assessment. Paltin opined that Rivera should have conducted further testing if Rivera could not conclude that the low standardized scores qualified Student for special education. However, Paltin was non-specific about what further testing could have been conducted beyond the variety of testing tools and strategies Chaffey already employed to gather relevant functional, developmental, emotional, and academic information about Student. Paltin’s non-specific opinion that more testing should be conducted was unpersuasive to prove that Chaffey’s psychoeducational assessment was inappropriately conducted. Further, because Paltin was not a school psychologist, was unaware that, or

how, Student's English development had been impacted by a five-year education gap, his opinion was not as persuasive as Chaffey's experts Rivera and Tremblay with expertise in English acquisition development. Rivera also interviewed Student directly in Spanish. Paltin had to rely on the uncle's interpretation of Student's responses which was not as reliable as Rivera's direct interview with Student. Finally, as a school psychologist who conducted the standardized assessments and evaluated Student specifically as to Student's abilities to function in the school environment with general education supports of an English language learner, Rivera's opinion was more persuasive to Student's educational needs.

Student did not meet his burden of proving that Chaffey's psychoeducational assessment was inappropriate.

ISSUE 5: DID CHAFFEY DENY STUDENT A FAPE BY FAILING TO CONDUCT AN APPROPRIATE SPEECH AND LANGUAGE ASSESSMENT BASED ON THE MAY 14, 2019 SIGNED ASSESSMENT PLAN?

Student contends that Chaffey's speech and language assessment was inappropriate because it did not find Student eligible for special education. Chaffey contends that it properly assessed all of Student's needs.

Experienced, qualified, and certified speech and language pathologists, Claudia Ceballos and Rhea Lynch assessed Student's speech and language needs. Ceballos was a Spanish speaker with personal experience with the Honduran dialect of Spanish. Ceballos conducted the Spanish and bilingual portion of the assessment. Ceballos persuasively explained that the bilingual standardized tests were properly used to assess Student because Spanish was Student's primary language. Lynch conducted

the English portion of the assessment to determine the extent of Student's English language skills. They administered standardized tests, observed Student, evaluated Student's informal speech sample, interviewed teachers, and reviewed records in conducting the speech and language assessment. Ceballos attempted on multiple occasions to obtain information from Parent about Student's background. Ceballos called and left voicemails on Parent's multiple telephone numbers, sent emails to Parent in English and Spanish, and sent rating scales home to Parent on at least three occasions to elicit parental participation. Parent did not respond. Further, neither Parent, nor Student, had information about Student's developmental or medical history beyond a sixth grade Honduran report card because Student had been separated from his biological parents when he was young. During enrollment, Parent had left blank the portion of the documents requesting information on Student's history. Although Student's attorney argued that the speech and language assessment was inappropriate because Ceballos did not obtain information from Parent, the evidence did not support that argument. Attorney's argument was not evidence. Student did not show what more Ceballos could have done to obtain information from Parent, or what other information Parent could have provided that Chaffey needed to consider in its assessment without which the assessment would be inappropriate.

Chaffey administered the following standardized assessments:

- Bilingual Articulation and Phonology Assessment;
- Expressive Vocabulary Test, Second Edition;
- Peabody Picture Vocabulary Test, Fourth Edition;
- Receptive One-Word Picture Vocabulary Test, Spanish-Bilingual Edition;
- Expressive One-Word Picture Vocabulary Test, Spanish-Bilingual Edition; and
- Clinical Evaluation of Language Fundamentals, Fourth Edition, Spanish Edition.

The speech pathologists used multiple standardized and non-discriminatory assessments in both English and Spanish. They administered, selected, and scored all the assessments appropriately in accordance with instructions, and prepared the speech and language assessment report.

Paltin did not opine that the speech and language assessment instruments were inappropriately selected, scored, or conducted. Paltin did note some issues in the speech and language assessment report that he believed were atypical. Paltin was not a speech and language pathologist. Therefore, Paltin's criticisms of the speech and language assessment were not accorded as much weight as the opinions of licensed speech and language pathologist Ceballos.

Paltin opined that assessments typically include a confidence interval that takes into account factors influencing the resulting test scores, but Chaffey's speech and language assessment report did not include a confidence interval. However, Paltin did not conclude that the absence of a specific confidence interval rendered Chaffey's speech and language assessment unreliable, just atypical. Paltin likewise opined that typically an assessor includes standard scores for all assessments, but that Chaffey did not include standard scores for one of the tests. However, Paltin did not conclude that the absence of standard scores for the Peabody Picture Vocabulary Test rendered Chaffey's speech and language assessment unreliable, just atypical.

At hearing, Ceballos explained that the Peabody was administered to determine Student's baseline English abilities by showing Student pictures and having him identify the pictures in English. Ceballos opined that because the entire Peabody was not administered, but only the part which involved pictorial identification, it was appropriate

to report Student's performance without the standardized scores. Student did not dispute or rebut Ceballos' opinion.

Paltin did not opine that the speech and language assessment was inappropriately conducted, but that he disagreed with Chaffey's conclusion that Student did not qualify for special education based on those results. Paltin opined generally that Student should be eligible for special education because of his low scores on standardized tests, including on the speech and language assessment. Paltin also opined that Chaffey should have conducted more testing of Student before concluding that Student was not eligible for special education. However, Paltin did not specify what testing other than that administered by Chaffey's speech and language pathologists should have been conducted. Despite contending that Chaffey's speech and language assessment was inappropriate, Student did not rebut Chaffey's showing that its speech and language assessment was properly conducted.

Student did not meet his burden of proving that Chaffey's speech and language assessment was inappropriate.

ISSUE 6: DID CHAFFEY DENY STUDENT A FAPE BY FAILING TO CONDUCT AN APPROPRIATE HEALTH ASSESSMENT BASED ON THE MAY 14, 2019 SIGNED ASSESSMENT PLAN?

Student contends that Chaffey's health assessment was inappropriate because it did not include a comprehensive functional vision assessment. Chaffey contends that it properly assessed Student's functional vision as part of its psychoeducational assessment.

The IDEA defines a child with a disability as a child with delineated disabilities, including visual impairments, who, by reason thereof, needs special education and related services. (20 U.S.C. § 1401(3)(i) and (ii).) Federal and State regulations interpreting the IDEA define visual impairment, including blindness, as an impairment in vision that, even with correction, adversely affects a child's educational performance. (34 C.F.R § 300.8(c)(13); Cal. Code Regs., tit. 5, § 3030, subd. (b)(13).) The impairment must require instruction and services which cannot be provided with modification of the regular school program. (Ed. Code, § 56026, subds. (a) and (b).))

Student did not show that Chaffey failed to conduct a comprehensive health assessment, or that it failed to assess any functional aspects of Student's vision. Although Student alleged that Chaffey did not conduct an appropriate health assessment, Student did not present any evidence that any aspect of the health assessment was inappropriate, other than vision.

Student's vision expert Dr. Beth Ballinger opined that the health assessment was inappropriate because it only evaluated Student's vision acuity, and not Student's functional vision abilities. Her opinion was unpersuasive because the evidence showed that Chaffey comprehensively assessed Student's functional vision as part of its psychoeducational assessment. The lack of a functional vision component in the health assessment did not render it inappropriate. Student did not show that functional vision needed to be assessed only as a part of the health assessment.

School nurse Patricia Murphy conducted a health assessment which included a vision acuity assessment. Student failed his vision acuity test because he was not wearing his glasses. 20/20 was perfect vision. Murphy concluded that without glasses Student's vision acuity in both eyes were 20/30 for far vision, and 20/40 for near vision.

Murphy also concluded that Student's right eye was 20/40 and left eye was 20/40 for near vision, and that Student's right and left eyes were each 20/200 for far vision without glasses. Ballinger's visual acuity results were similar to those obtained by Murphy. Ballinger did not dispute the accuracy of Murphy's conclusions as to Student's vision acuity.

School psychologist Rivera assessed Student's functional vision with standardized tests including the Developmental Test of Visual Impairment to identify visual impairment, and to determine visual perceptual integration ability. Student scored in the low average range on the motor reduced visual perception index, and could produce a legible writing sample with good organizational boundaries, and consistent letter and word spacing. Therefore, Rivera concluded Student had adequate visual perception abilities. Specifically, Rivera opined that Student could visually process and mentally manipulate information. Although Student was capable of copying figures and shapes, he was unable to do so quickly which resulted in his below average scores in the general visual perception and visual-motor integration areas. However, Rivera opined that Student did not wear glasses throughout the assessments, so his vision acuity also impacted his speed and his scores on the standardized tests.

The evidence showed that Chaffey's psychoeducational and vision acuity testing results from the health assessment yielded a comprehensive profile of Student's functional vision abilities. Some of Ballinger's standardized assessment scores of Student's functional visual skills were lower than the scores obtained by Rivera's functional visual assessments. However, Ballinger did not opine that her assessments results were more accurate than that of Rivera's, or that any aspect of Rivera's functional vision assessments of Student was inappropriate. Ballinger opined that Student should

qualify for special education under visual impairment because Student had low standardized test scores, had visual motor and perceptual processing needs, and could benefit from vision therapy to increase eye comfort. Ballinger did not consider that Student's visual motor and perceptual processing needs could be addressed in the general education context. Ballinger did not dispute that Student was capable of visually processing and mentally manipulating information.

Student also argued that the assessment plan was inappropriate because it did not specifically state that vision would be assessed. Student did not present any evidence to support Chaffey was required to specifically identify vision as a separate category as opposed to assessing it as part of its health and psychoeducational assessment. Student also argued that Murphy's use of a Spanish interpreter during the vision acuity test without noting it on the health assessment report was inappropriate. Even if Student were successful in showing that Chaffey's failure to identify vision as a separate category in the assessment plan and Murphy's failure to note on the health report that she used a Spanish interpreter were procedural violations, Student did not show that this procedural violation prevented parental participation, deprived Student educational benefits, or resulted in a FAPE denial. The evidence showed that Chaffey assessed Student in all areas of need and held an IEP team meeting to discuss the results with Parent.

Student did not meet his burden of proving that Chaffey's health assessment was inappropriate.

ISSUE 7: DID CHAFFEY DENY STUDENT A FAPE BY FAILING IN THE OCTOBER 2, 2019 IEP TEAM MEETING TO ALLOW PARENT AND/OR INDEPENDENT ASSESSORS TO SPEAK, ASK QUESTIONS, OR COMMENT, AND/OR CONTINUING TO CONDUCT THE MEETING AFTER PARENT, STUDENT'S REPRESENTATIVES AND/OR INDEPENDENT ASSESSORS WERE TELEPHONICALLY DISCONNECTED?

Student contends that Chaffey denied parental participation in the October 2, 2019 IEP team meeting by proceeding with the IEP team meeting after Parent and advocate were telephonically disconnected. Chaffey contends that Peters who controlled both Parent and the experts' participation was upset, hung up, and chose not to participate in the IEP team meeting.

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

Student did not present any evidence to support that Chaffey denied parental participation in any way at the October 2, 2019 IEP team meeting. Although Student

argued that Chaffey did not allow Student's independent assessors to speak and proceeded with the meeting when Parent and Peters were disconnected, Student did not present any witness testimony or evidence to support his allegations beyond attorney argument. Attorney's argument was not evidence.

Chaffey rebutted Student's contentions with credible testimony from Ceballos and its IEP facilitator Monica McCort. Both McCort and Ceballos testified that during the October 2, 2019 IEP team meeting, Peters became upset, hostile, and hung up when asked to hold questions until the end of Rivera's assessment findings presentation. McCort and the Chaffey IEP team attempted unsuccessfully to reach Peters and Parent by phone several times. The Chaffey IEP team also left a message on Peters' voicemail. McCort also checked with front office and determined that the phone system had been functioning properly and confirmed that Peters and Parent had not called back. The Chaffey IEP team members attempted to reconnect with Peters and Parent and waited a reasonable time after Peters hung up for him to respond to the voicemail message and rejoin the meeting. When Peters did not call back, the Chaffey IEP team members reasonably concluded that he and Parent chose not to participate and proceeded with the IEP team meeting. Student did not rebut Chaffey's witnesses with any evidence.

Chaffey also showed that Peters controlled both Ballinger's and Paltin's participation in the October 2, 2019 IEP team meeting. Paltin shared at hearing that he was connected into the IEP team meeting by Peters. Ballinger did not recall being invited to any IEP team meeting about Student. This was consistent with McCort's recollection that Peters elected not to invite Ballinger to the October 2, 2019 IEP team meeting. McCort shared that she had called Ballinger shortly before the October 2, 2019 IEP team inviting Ballinger to join the IEP team meeting. Ballinger informed McCort that she would be available for two hours and would participate by

calling Peters herself, declining to be connected to the IEP team meeting by McCort. At the beginning of the October 2, 2019 IEP team when McCort asked Peters about Ballinger's participation and shared Ballinger's availability, Peters advised McCort that Ballinger was unavailable to participate in the IEP team meeting.

McCort was worried that Peters would hang up during the October 2, 2019 IEP team meeting because Peters did so during another IEP team meeting with Parent and another student. Therefore, before the October 2, 2019 IEP team meeting, McCort specifically requested that Peters complete the IEP team meeting, and not hang up.

McCort did not attribute Peters' hang up on October 2, 2019 to technical difficulties. Student did not offer any evidence to contradict McCort's opinion other than attorney argument. Attorney's argument was not evidence. Chaffey showed that it provided Peters and Parent their preferred telephonic IEP forum with members of the Chaffey IEP team including its assessors, a counselor, a general education teacher, a special education adviser, and a Spanish interpreter.

Chaffey did all it could to invite Ballinger and repeatedly called Peters and Parent to elicit their input and participation at the IEP team meeting. Peters controlled Parent's and Student's experts' participation. Peters and Parent hung up and elected not to participate in the October 2, 2019 IEP team meeting. Chaffey's assessors were present and ready to explain their reports, findings, the basis of their findings, including the educational implications of the assessment results on October 2, 2019, and did so. Had Peters and Parent not hung up and/or called back, they could have discussed and meaningfully participated during the October 2, 2019 IEP team meeting. The evidence did not show that Peters and/or Parent made any effort to participate in an IEP team meeting about Student either that day, or any other day. Their decision to hang up, and

not participate did not change the fact that Chaffey met its obligations to include Peters, Parent, and Student's experts in the October 2, 2019 IEP team meeting. McCort was persuasive because Student did not contradict any of her opinions with any evidence. Student argued that Peters did not hang up, but the "disconnection" resulted from technical difficulties, which was unsupported by the evidence and thoroughly unpersuasive under the totality of evidence Chaffey presented on this issue. Student did not present one witness supporting his contention of technical difficulties, or rebut Chaffey's evidence that Peters, who controlled Parent and the experts' participation, was upset, hung up, and chose not to call back during the October 2, 2019 IEP team meeting.

Student did not meet his burden of proving that Chaffey significantly interfered with Parent's opportunity to participate in the IEP process, or that Chaffey denied Student a FAPE because it proceeded with the October 2, 2019 IEP team meeting after Peters and Parent hung up and elected not to participate.

ISSUE 8: DID CHAFFEY DENY STUDENT A FAPE BY FAILING IN THE OCTOBER 2, 2019 IEP TEAM MEETING TO FIND STUDENT ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES AND OFFER AN APPROPRIATE PROGRAM OF SPECIAL EDUCATION AND RELATED SERVICES?

Student contends that Chaffey should have found Student eligible for special education in the October 2, 2019 IEP team meeting because of low standardized assessment scores. Chaffey contends that it appropriately found that Student did not qualify for special education under any category because Student's education access

was not impacted by any disability. Chaffey also contends that Student's grades and progress were impacted by environmental and cultural disadvantages as a newcomer to the United States with a significant five-year education gap.

STUDENT DID NOT QUALIFY FOR SPECIAL EDUCATION UNDER SPECIFIC LEARNING DISORDER OR INTELLECTUAL DISABILITY

In interpreting evaluation data for the purpose of determining if a child is a child with a disability under § 300.8, and the educational needs of the child, each public agency must:

- Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
- Ensure that information obtained from all of these sources is documented and carefully considered. (34 C.F.R. § 300.306 (c) (1).)

Pupils whose educational needs are due primarily to limited English proficiency; a lack of instruction in reading or mathematics, or environmental, cultural, or economic factors are not individuals with exceptions needs unless the student otherwise meets special education eligibility requirements. (Ed. Code, § 56026, subd. (e).)

A child qualifies for special education under the category of specific learning disability if he or she has a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. (Ed. Code, § 56337, subd. (a).) Basic psychological processes

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

A district may take into consideration whether a pupil has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning by computing and measuring mathematical differences between ability and achievement scores on standardized testing (the severe discrepancy approach). (Ed. Code, § 56337, subd. (b).) If standardized tests are considered valid for a student, a severe discrepancy is demonstrated by comparing standardized achievement and ability test scores and finding that they are more than 1.5 standard deviations apart, or test scores differences that are 22 points, or more, apart, taking into account a standard error measurement of up to four points. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subs. (c) and (e); Cal. Code Regs., tit. 5, § 3030.)

Specific learning disability eligibility does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of emotional disturbance, or of environmental, cultural, or economic disadvantage, or limited English proficiency. (Ed. Code, §56337, subd. (a); (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) In addition, a discrepancy shall not be primarily the result of limited school experience or poor school attendance. (Cal. Code Regs., tit. 5, § 3030.)

In deciding whether a student needs special education, courts apply the *Rowley* standard to determine whether the student can receive some educational benefit from

the general education classroom. (*Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1106-1107 [decided under former Ed. Code, § 56337].) A child may have a specific learning disability, yet not be found eligible for special education, because the child's needs can be met with modification of the general education classroom. (*Id.*)

Intellectual disability means significantly sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(6).)

Rivera opined that Student did not qualify for special education under a specific learning disorder or an intellectual disability. Some of Student's standardized test scores for overall cognitive ability were in the average to well below average range. However, Student also performed in the well above average to average range in a few cognitive tests. Rivera opined that it would have been impossible for Student to score well above average in any cognitive test if his cognitive ability were actually in the well below average range. The fact that Student did so showed that he had a higher cognitive ability which could not be accurately measured by standardized tests alone. Rivera opined that Student's standardized test scores must be viewed with the environmental and cultural disadvantages as a newcomer to the United States with limited English and Spanish proficiency; speaking a Mayan dialect of Spanish unfamiliar to most Spanish speakers at Chaffey; and with limited reading and math instruction because of a significant five-year education gap. His opinion was persuasive because these were specifically enumerated factors under special education law including Education Code section 56337, subdivision (a) that a specific learning disorder must not include a learning problem primarily resulting from "environmental, cultural, or economic disadvantage, or limited English proficiency" or "limited school experience or

poor school attendance.” (Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030.) Student disregarded this crucial aspect of special education law, and unpersuasively used low assessment scores as the sole criterion for concluding Student had a disability.

Even if one were to accept Paltin’s opinion that the standardized tests alone were reflective of Student cognitive ability, Student still would not qualify for a specific learning disorder special education eligibility because no discrepancies existed between Student’s intellectual capabilities and achievement. The difference between Student’s lowest academic achievement score of 55 in story completion, and score of 62 from the Kaufman Nonverbal Index was a total of 7 points. If Chaffey used the difference between Student’s lowest score of 58 in broad math from the Bateria Achievement, and the General Intellectual Ability score of 64 from the Bateria Cognitive, the difference would be a total of six points. If Chaffey used the score of 66 from the Nonverbal Intelligence Test, to Student’s lowest achievement score in any standardized test, the difference would likewise be insignificant. To be eligible for special education as a student with a specific learning disorder, even assuming the standardized assessment scores alone validly reflected Student’s ability, the difference between academic achievement and cognitive ability must be 22 points or greater. Student did not exhibit a severe discrepancy between academic achievement and cognitive abilities needed to meet the definition of a specific learning disability.

Similarly, Student did not show he qualified for special education because of an intellectual disability. Student did not have significantly sub-average general intellectual functioning, or any adaptive behavior deficits which adversely affected Student’s educational performance. Chaffey’s standardized testing showed that Student demonstrated “over-achievement in many domains” including standardized scores that were well above average. Student’s attendance records and grades at Chaffey showed

that when he attended class, he was capable of progress, did well, and benefitted from the Newcomer English Language Development Program.

Even if Student had a specific learning disability or an intellectual disability, he did not show that his needs could not be met in the general education classroom with either general education interventions or modifications. Tremblay opined that Student did not require any modifications to the general education curriculum in his Newcomer English Development Program. Student did not rebut this. The only Student expert who made recommendations as to Student's classroom access was Ballinger; and all of Ballinger's recommendations were general education interventions which did not require any modification of the curriculum.

Student's grades improved from mostly Fs, one D, and one B in the first semester/first quarter progress report to mostly Cs, one F, one D, and an A by the second semester/third quarter progress report of the 2018-2019 school year—demonstrating that Student was capable of progress and performing academically. The evidence showed that in the first semester of the 2018-2019 school year, Student struggled because he was not only learning English, but also familiarizing himself with the structure of attending school. Rivera and Tremblay opined that Student faced significant challenges related to English language acquisition because he did not read or speak English when he enrolled at Chaffey. Student also progressed slower than his peers in the Newcomer English Language Development Program because of his significant education gap which his peers did not experience. The evidence also showed that Student's grades improved by the beginning of the second semester/third quarter progress report which was also when he attended school more often. However, by the fourth quarter of the 2018-2019 school year, Student's grades fell to all Fs because of excessive absences. Student missed approximately one month of classroom instruction

during the 2018-2019 school year, between excused and unexcused absences. Student was truant because of doctors' appointments and because he was unmotivated- -including mistakenly thinking he would no longer attend school at Chaffey after the fourth quarter of the 2018-2019 school year. Excessive absences also negatively impacted Student's academic performance and grades and progress at Chaffey.

Student's attorney argument that Student's increased attendance did not correspond to Student earning better grades was unsupported by evidence. Attorney's argument was not evidence. Student's attendance data and corresponding grades were exhaustively, and persuasively explained by several witnesses. The evidence showed that Student was capable of performing academically at Chaffey when he attended school, and that Student was not impacted by a specific learning disorder, or an intellectual disability.

Student's experts did not contradict Rivera's opinions except with the general opinion that Student should have qualified for special education using the sole criterion that some of his standardized assessment scores were low. Although Student's expert Paltin opined that standardized assessments accounted for educational factors of same aged individuals as Student, even Paltin conceded that the standardized assessment sample group did not include any persons who was 18 years old, with only a sixth grade education. Paltin did not address the pervasive environmental and cultural disadvantages of Student as a newcomer to the United States with limited English and Spanish proficiency; speaking a Mayan dialect of Spanish that other Spanish speakers were unfamiliar; and with a significant five-year education gap. These considerations are required when determining whether Student qualified for special education.

Paltin's opinion was less persuasive than Rivera's opinion which resulted from a comprehensive review of Student's profile, as required under the IDEA, instead of just considering the low standardized test scores in a vacuum. Paltin recommended that more non-specific standardized assessments be conducted to reconcile the wide range of Student's standardized scores, but did not explain why they were required when Rivera already conducted multiple standardized tests to cross-validate the results. More standardized assessments would be unproductive if Student's comprehensive background and academic experience were disregarded. Paltin's opinion that Chaffey should have conducted more assessments, and that Student's low standardized test scores alone should have qualified him for special education was therefore unsupported, one-dimensional, and unpersuasive.

Student did not meet his burden of proving that he qualified for special education under the categories of specific learning disorder, or intellectual disability.

STUDENT DID NOT QUALIFY FOR SPECIAL EDUCATION UNDER THE OTHER HEALTH IMPAIRMENT CATEGORY FOR VISION IMPAIRMENT

Other health impairment is defined as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that...is due to chronic or acute health problems...and [they a]dversely affects a child's educational performance." (34 C.F.R. § 300.8(c)(9); see also Cal. Code Regs., tit. 5, § 3030, subd. (b)(9).) The IDEA defines a child with a disability as a child with delineated disabilities, including "visual impairments," who, by reason thereof, needs special education and related services. (20 U.S.C. §1401(3)(i) and (ii).) Federal and State regulations interpreting the IDEA define "visual impairment, including blindness, as "an impairment in vision that, even with

correction, adversely affects a child's educational performance." (34 C.F.R § 300.8(c)(13); Cal. Code Regs., tit. 5, § 3030, subd. (b)(13).) The impairment must require instruction and services which cannot be provided with modification of the regular school program. (Ed. Code, § 56026, subds. (a) and (b).))

The Office of Special Education Programs, referred to as OSEP, guidance issued in 2014 reasoned that the IDEA's use of the term "visual impairment" was broad enough to encompass any impairment in vision, regardless of severity; therefore, States could not exclude from the definition such conditions as convergence insufficiency "which *could* affect a child's ability to read, and therefore, the child's educational performance". (*Letter to Kotler* (OSEP Nov. 12, 2014) 65 IDELR 21, p. 2 (italics added).) OSEP guidance issued in 2017 reiterated that States could not exclude particular vision conditions from the definition of visual impairment. (*Eligibility Determinations for Children Suspected of Having Visual Impairment Including Blindness under the IDEA* (OSEP May 22, 2017) OSEP 17-05; 70 IDELR 23, p. 2 (2017 OSEP Memorandum).) The 2017 OSEP memorandum instructed States to have a group of qualified professionals and the parent draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher's recommendations to determine whether the child requires special education or related services. (*Id.* at p. 3.) OSEP stressed that evaluations of a child's vision status should be thorough and rigorous, include data-based media assessment, and be based on a range of learning modalities (including auditory, tactile and visual), in addition to a functional visual assessment. (*Ibid.*) The assessment should include the nature and extent of the child's visual impairment and its effect on the child's ability to learn to read, write, do mathematical calculations and use computers and other assistive technology, as well as the child's ability to be involved in and make progress in the general curriculum. (*Ibid.*)

The OSEP 2017 memorandum also reiterated that, for eligibility under visual impairment, an additional analysis of any visual condition needed to be taken to determine whether the impairment, even with correction, adversely affected the child's educational performance such that the child required special education and related services. (*Ibid.*) (See *D.R. v. Antelope Valley Union High School Dist.* (C.D. Cal. 2010) 736 F.Supp. 2d. 1132, 1142-43 [provision of extra time, extra books, and special seating constituted modifications rather than special education].) The OSEP guidance acknowledged that States are not only responsible for implementing procedures to ensure that all eligible children with disabilities are identified, evaluated, and provided with a FAPE; but that States are responsible for ensuring that IDEA special education funds are not used to serve children who do not meet the definition of a "child with a disability." (*Letter to Kotler, supra*, 65 IDELR 21 at p. 3.) The IDEA does not require that school districts provide vision therapy to every student who may benefit from it. (See also, *Crown Point Community School Corporation* (SEA 2000) 32 IDELR 77 ("*Crown Point*") [The reviewing agency concluded that a student with reduced vision from amblyopia, visual discomfort from a focusing dysfunction, concentration loss, and blurry vision did not qualify for special education eligibility under vision impairment because these factors did not affect his education.]

Ballinger opined that Student should qualify for special education under other health/vision impairment because he had visual motor and perceptual abilities processing needs, and his functional vision assessment scores were low. Ballinger explained that Student's amblyopic right eye (also referred to as a lazy eye) affected his ability to coordinate with the left, non-lazy eye. She opined that the lazy right eye and left, non-lazy eye disparities disrupted Student's visual clarity, accuracy, and speed. For example, Student's lazy eye affected his ability to read/scan text quickly without losing

his place. Ballinger observed Student in the classroom without his glasses as part of her assessment, and attributed her observed behaviors to Student's vision needs. Her school recommendations for Student included:

- Having fewer information on one page;
- Using index cards to isolate pieces of information on a page;
- Sitting closer to the board;
- Maintaining a Harmon distance, known as the distance between the elbow to second knuckle, when working;
- Using a slanted board or surface;
- A movement free environment to limit peripheral distractions during academic tasks;
- No Scan Tron tests; and
- More academic support from teachers.

Ballinger's report that Student bumped into things was unpersuasive because she had no personal knowledge and merely reported what Student's uncle told her as part of his concerns. Ballinger's conclusion that Student's eye rubbing, hovering closer to the paper, and body turning behaviors were solely because of vision difficulties was unpersuasive in light of the examples, and observations from different teachers that Student appropriately accessed classroom curriculum and the school campus. Tremblay, Rivera, and Lynch who observed Student during assessment, in class, and at lunch, opined that Student did not act differently than other students. For example, even without glasses Student moved around the classroom and the campus as a typical student would. Rivera observed Student reading the classroom board and menu items at lunch successfully without his glasses. Similarly, Lynch observed Student copying words from the board without difficulty while seated in the front row. Even if Ballinger's

classroom observation of Student's behaviors were attributable solely to Student's vision difficulties, those difficulties could be corrected with glasses, and did not affect his education.

Ballinger conceded that Student was capable of using fully corrected lens comfortably for approximately two hours during assessment before needing a break, but concluded that Student would benefit from vision therapy which would improve Student's lazy eye coordination, and ease visual fatigue. However, as *Crown Point* illustrated, benefitting from vision therapy, through lazy eye coordination or increasing eye comfort, was insufficient to qualify Student for special education. Ballinger conflated having visual needs or mere benefit from vision therapy to having a vision impairment. By definition, the existence of a vision impairment mandated a finding of visual needs which, even with correction, adversely affected Student's educational performance AND required instruction and services which could not be provided with modification of the regular school program. Ballinger's opinion was incomplete and contradicted The IDEA's definition of vision impairment for special education eligibility. Despite some low scores on standardized functional vision assessments, Student was capable of producing a legible writing sample with good organizational boundaries, consistent letter and word spacing, and capable of copying figures and shapes. His vision needs could be corrected with glasses. Therefore, Rivera persuasively concluded Student had adequate visual perception abilities. Student was capable of seeing, processing what he sees, and integrating that information with motor activities including writing, but just did it slower which Rivera attributed to Student not wearing his glasses and other factors in his background and educational experience. Chaffey showed that Student's ability to read, write, calculate math and progress in the Newcomer English Language Development Program was not impacted by a visual disability, but impacted

by environmental and cultural disadvantages, limited English and Spanish proficiency, a significant five-year education gap and absences while at Chaffey. Chaffey also showed that when Student attended school more often, he progressed and his grades improved. Student did not rebut Chaffey's showing.

Rivera was a credentialed school psychologist whose expertise related to information processing by the brain. Ballinger was an optometrist whose expertise related primarily to eye functions. Therefore, Ballinger's conclusions about how Student's brain processed the information that was taken in visually and integrated it with muscle movements, and how delays in that brain process impacted Student's educational needs, were given less weight than those of Rivera's as they were outside her specific optometric expertise.

Lastly, all of Ballinger's school recommendations for Student could be provided in the general education environment, without Student qualifying for special education. Tremblay had already provided Student with some of Ballinger's' school recommendations such as extra time, one-to-one and small group instruction including after school tutoring, and preferential seating as part of his general education curriculum.

Student did not prove that Student had a visual impairment requiring special education. This Decision did not conclude whether Chaffey needed to provide vision therapy for Student outside of special education.

STUDENT DID NOT QUALIFY FOR SPECIAL EDUCATION UNDER SPEECH AND LANGUAGE IMPAIRMENT

A student is eligible for special education and related services under the category of speech and language impairment if he or she demonstrates difficulty understanding or using spoken language under a 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.) The criteria are:

- a. Articulation disorder: the child displays reduced intelligibility or an inability to use the speech mechanism which significantly interferes with communication and attracts adverse attention;
- b. Abnormal voice: a child has an abnormal voice, which is characterized by persistent, defective voice quality, pitch, or loudness;
- c. Fluency Disorders: a child has a fluency disorder when the flow of verbal expression including rate and rhythm adversely affects communication between the pupil and listener; and
- d. Language Disorder: the pupil has an expressive or receptive language disorder, in pertinent part, when he or she scores at least 1.5 standard deviations below the mean, or below the seventh percentile, for his or her chronological age or developmental level, on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics.

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

Student did not demonstrate that he had an articulation, voice, fluency, or language disorder requiring special education. Chaffey showed that Student had the proper oral motor function and musculature for appropriate speech production. Chaffey also showed that Student had appropriate pragmatic language skills. Student initiated conversation, asked questions, and commented appropriately, and demonstrated appropriate body language during assessment and in the classroom.

Ceballos opined that Student showed proper voice quality, pitch, loudness, and rhythm and was capable of properly producing sounds and articulating consonants in words without errors. Ceballos explained that the Mayan Spanish dialect typically called for the omission of consonants and faster speech. Therefore, when Student omitted consonants in two words in conversation during assessment, she concluded it was not indicative of an articulation issue but a characteristic of Student's spoken Mayan dialect of Spanish. She also opined that the spoken Mayan dialect of Spanish sometimes used a different vocabulary than the Spanish she and other Chaffey Spanish assessors and teachers used. Although Ceballos was familiar with the characteristics of the Mayan dialect of Spanish, she was not fluent in that dialect. This difference between the Mayan dialect of Spanish spoken by Student and the Spanish spoken by Ceballos and other Chaffey Spanish assessors and teachers also impacted Student's ability to understand them in Spanish, and vice versa, both in the classroom and during assessment. Ceballos persuasively opined that this comprehension difficulty of and by Student's was attributable to the Mayan dialect and not because of Student's articulation, voice, or fluency deficiencies.

Ceballos opined that Student had adequate conversational skills, stating that Student could formulate grammatically correct sentences, understand age-appropriate conversation, and define vocabulary. For example, Student used three to 12 word

sentences which expanded when discussing music, soccer, or Student's other interests. Ceballos opined that Student had difficulty understanding the relationship between words which Ceballos attributed to the significant five-year education gap. For example, Student had a hard time picking and explaining the similarities between two words when given four words. As a result, Student scored below average, mostly in the single digit percentile, in some of the standardized speech and language tests. However, Student scored average in the word definitions subtest of the Clinical Examination of Language Fundamentals and in the Expressive Vocabulary Test. This demonstrated that Student could express himself appropriately, using different parts of speech in English. Student could also select a picture that illustrated the spoken English word and scored average in the Peabody Picture Vocabulary Test. Ceballos concluded that Student's low standardized speech and language scores were appropriate and reflective of the environmental and cultural disadvantages as a newcomer to the United States with limited English and Spanish proficiency; and significant lack of academic exposure, and not factors indicative of a speech and language impairment.

Chaffey also reasonably attributed Student's academic progress to his lack of motivation and poor school attendance. Student's grades improved during the third quarter when he attended classes regularly, and fell during the fourth quarter of the 2018-2019 school year when his attendance decreased. This showed that Student was capable of performing academically at Chaffey when he attended school, and that his education was not impacted by a speech and language disability.

None of Student's experts contradicted Ceballos' opinions. None of Student's experts were speech and language pathologists. Paltin opined that Chaffey should conduct more testing before concluding that Student was not eligible for special education, but he did not specify what testing other than those administered by

Chaffey's speech and language pathologists or other assessors should have been conducted.

Paltin also opined that standardized assessments accounted for educational factors of same aged individuals. However, Paltin did not address the pervasive environmental and cultural disadvantages Student experienced as a newcomer to the United States with limited English and Spanish proficiency and with a significant five-year education gap. Paltin conceded that these aspects of Student's profile were not included in the sample group in standardized assessments. Therefore, Paltin's opinion that Chaffey should have conducted more assessments and that Student's low standardized test scores alone should qualify him for special education was unpersuasive. Chaffey's experts, including Ceballos, reviewed Student's profile more comprehensively, as required under the IDEA, instead of just considering the one-dimensional low standardized test scores as Student's expert did.

Student did not meet his burden of proving that he qualified for special education under the category of speech and language disorder.

STUDENT DID NOT QUALIFY FOR SPECIAL EDUCATION UNDER THE CATEGORIES OF OTHER HEALTH IMPAIRMENT, OR EMOTIONAL DISTURBANCE

Other health impairment is defined as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that...is due to chronic or acute health problems such as...attention deficit hyperactivity disorder...and [a]dversely

affects a child's educational performance." (34 C.F.R. § 300.8(c)(9); see also Cal. Code Regs., tit. 5, § 3030, subd. (b)(9).)

Emotional disturbance means a condition exhibiting one or more of the following characteristics that over a long period of time and to a marked degree adversely affects a child's educational performance:

- a. An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- b. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- c. Inappropriate types of behavior or feelings under normal circumstances.
- d. A general pervasive mood of unhappiness or depression.
- e. A tendency to develop physical symptoms or fears associated with personal or school problems.
- f. Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

(Cal. Code Regs., tit. 5, § 3030, subd. (b)(4).)

Attention Deficit Hyperactivity Disorder will be referred to as ADHD. Student did not present any evidence at hearing, to support that Student qualified for special education under ADHD, or emotional disturbance. Student did not present any evidence of other diagnosed health problems to qualify Student for special education under other categories of other health impairments.

Student did not show that his attention issues limited his strength, vitality or alertness by making him easily distractible, unable to sustain attention, or that it affected his educational performance without special education and related services. Although standardized questionnaire responses reported that Student had work completion, organization, and adaptive challenges showing attention issues, Student did not show that he was unable to access the English Newcomer Development Program, or that those attention issues could not be met with general education accommodations. Rivera opined that English language learners typically manifested characteristics of inattentive, hyperactive, impulsive, distractible, disruptive, disorganized, and forgetful behaviors, along with a tendency to be slow in starting and finishing tasks as part of the acculturation and adaptive process. The English Newcomer Development Program provided educational and acculturation supports to newcomers to manage these characteristics while transitioning into a new school, home, and community. Rivera recommended preferential seating, repetition of instructions, teaching and reinforcement of study and organization skills and strategies, using praise, chunking, and incentives for assignment completion as general education accommodations for Student.

Rivera opined that Student had intact skills in all areas, but required review and repetition in learning math and other academic subjects because of his significant lack of education, and needs for English and cultural development. Tremblay opined that Student was capable of performing classwork when he attended class. For example, Student scored a six to eight out of ten in vocabulary tests, and a 44 out of 50 in an English chapter test in Tremblay's class. Student did well in Tremblay's poetry lesson requiring Student to write and share a poem or song in Spanish about immigration, pride for, and missing Honduras. Tremblay shared that because Student was interested

in the subject matter, he was motivated and participated in discussions and completed the assignment. Student's math, biology, and Spanish II teachers' opinions were also consistent with Tremblay's opinion that motivation and interest affected Student's classwork. Chaffey showed that despite having had significantly less educational experience than the typical English language learner causing him to progress slower, Student was indistinguishable from the rest of his peers in the English Newcomer Development Program. None of this was addressed, or contradicted, by Student's experts. Student did not qualify for special education based on ADHD, or attention issues under the other health impairment category.

The evidence showed that Student did not have a pervasive or intense emotional condition which adversely affected his access to the English Newcomer Development Program. Most of the teachers rated Student in the average range in aggression, anger, coercive behaviors, conduct, atypicality, withdrawal, emotional negativity, and without the probability of an emotional or behavioral disturbance. Student's responses in the Children's Depression Inventory measuring depression and emotional and functional problems also confirmed that Student did not suffer from depression or related behaviors. Student appropriately expressed his emotions with peers and teachers. Student had positive familial relationships at home. Student also demonstrated typical enjoyment and emotions with peers and teachers, and had good eating and sleeping habits which were consistent with Rivera's and teachers' observations and conclusion that Student did not demonstrate signs of depression or emotional issues. All of the teachers considered Student to be normal regarding anxiety, depression, somatization, and emotional self-control in the standardized questionnaires.

Parent's behavior rating responses showed that Student had considerable impairment and functioned well below average in self-care and self-direction; moderate

impairment in social, domestic and family interactions. Rivera explained that Parent's responses to the behavior rating questionnaires were likely low because the expectations and skills for functioning in the United States home setting were significantly different from the less structured setting in Honduras which Student had spent his first 17 years. Parent reported some adaptive behaviors at home that did not impact Student's ability to function in school; for example, that he never cleared the table after a meal, did not clean his room, did not pick up trash, and was lax with hygiene and washing his hands after using the bathroom. Teachers did not have information as to Student's function at home and in the community, but Rivera's and teachers' observations cross-validated findings that Student could manage demands at school similar to that of his peers. Rivera and teachers reported that at school Student navigated the campus from lunch to the class independently, and joked and socialized with peers appropriately. Student arrived for class early, took out his Chromebook, and prepared for class without prompting. At school, Student also independently managed toileting, personal hygiene including dressing impeccably without prompting.

Rivera opined persuasively that school observations were more relevant to Student's function in the school setting. Student's grades and progress at Chaffey was affected by the environmental and cultural disadvantages as a newcomer to the United States with limited English and Spanish proficiency; and with a significant five-year education gap. These factors did not qualify him for special education under the emotional disturbance category.

None of Student's experts considered the typical characteristics of English language learners, or how Student's needs could be addressed through general education interventions. Instead, they relied solely on low standardized test scores to conclude that he should qualify for special education. Their one-dimensional

conclusions of special education eligibility were unpersuasive because it was based on an incomplete analysis of Student's abilities and the challenges he experienced in a new country, learning a new language with a significant education instruction gap. Student did not show that he had ADHD, attention, emotional or adaptive issues that could not be met with general education accommodations. The totality of evidence showed that despite Student's low standardized test scores, Student progressed and was capable of doing well academically in the Newcomer English Language Development Program when he attended class. The evidence showed that Student required increased exposure to and academic instruction in the school environment, not special education services.

Student did not meet his burden of proving that he qualified for special education under the category of other health impairment, or emotional disturbance.

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: Chaffey did not deny Student a FAPE by failing to timely assess Student after Parent's April 9, 2018 written request for assessment. Chaffey prevailed on Issue 1.

Issue 2: Chaffey did not deny Student a FAPE by placing Student in an English language development program before conducting any special education eligibility assessments. Chaffey prevailed on Issue 2.

Issue 3: Chaffey did not deny Student a FAPE by failing to assess Student's vision based on any teacher's awareness of his visual impairment. Chaffey prevailed on Issue 3.

Issue 4: Chaffey did not deny Student a FAPE by failing to conduct an appropriate psychoeducational assessment based on the May 14, 2019 signed assessment plan. Chaffey prevailed on Issue 4.

Issue 5: Chaffey did not deny Student a FAPE by failing to conduct an appropriate speech and language assessment based on the May 14, 2019 signed assessment plan. Chaffey prevailed on Issue 5.

Issue 6: Chaffey did not deny Student a FAPE failing to conduct an appropriate health assessment based on the May 14, 2019 signed assessment plan. Chaffey prevailed on Issue 6.

Issue 7: Chaffey did not deny Student a FAPE by failing in the October 2, 2019 IEP team meeting to allow Parent and/or independent assessors to speak, ask questions, or comment, and/or continuing to conduct the meeting after Parent, Student's representatives and /or independent assessors were telephonically disconnected. Chaffey prevailed on Issue 7.

Issue 8: Chaffey did not deny Student a FAPE by failing in the October 2, 2019 IEP team meeting to find Student eligible for special education and related services and offer an appropriate program of special education and related services. Chaffey prevailed on Issue 8.

ORDER

All Student's requests for relief are denied.

RIGHT TO APPEAL THIS DECISION

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

/s/

Sabrina Kong

Administrative Law Judge

Office of Administrative Hearings