

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020030672

PARENT ON BEHALF OF STUDENT,

v.

MOUNTAIN VIEW-LOS ALTOS UNION HIGH SCHOOL DISTRICT.

DECISION

AUGUST 28, 2020

On March 18, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Mountain View-Los Altos Union High School District. The school district is often referred to as Mountain View. Administrative Law Judge, Ted Mann, heard this matter in Los Angeles, California by video and audio conference on June 23, 24, 25, 30, and July 1 and 2, 2020.

Attorney Colleen Snyder represented Student. Student's mother attended each hearing day on Student's behalf, and will hereafter be referred to as Parent. Attorney Laurie Reynolds represented Mountain View. Kristen Hardy, Mountain View

Special Education Director, attended each day of the hearing days on Mountain View's behalf.

At the parties' request the matter was continued until August 3, 2020 for written closing briefs. The briefs were timely filed, the record closed, and the matter submitted on August 3, 2020.

ISSUES

1. Did Mountain View deny Student a free appropriate public education, referred to as a FAPE, by failing to timely respond to Parent's May 2018 request for assessment?
2. Did Mountain View deny Student a FAPE by failing to conduct an appropriate psychoeducational evaluation prior to the September 18, 2018 individualized education program, referred to as an IEP, team meeting?
3. Did Mountain View deny Student a FAPE by failing to invite all necessary members to the IEP team meetings held regarding Student in:
 - a. September 2018?
 - b. May 2019?
4. Did Mountain View deny Student a FAPE, during the 2017-2018, 2018-2019, and 2019-2020 school years by failing to identify her as a student eligible for special education and offering her an appropriate IEP?
5. Did Mountain View deny Student a FAPE at the September 2018 and May 2019 IEP team meetings by failing to offer Student an IEP?

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 free appropriate public education 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, adult students, and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 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, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. §1415(i)(2)(C)(iii).) Student had the burden of proof. The factual statements below constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. sec. 1415(h)(4); Ed. Code, sec. 56505, subd. (e)(5).)

Student was 18 years old at the time of the hearing and had recently graduated from Thompson Falls High School in Montana with a regular high school diploma. Student resided with Parent within Mountain View's geographic boundaries until at least May 17, 2018. Student was not found eligible for special education prior to her graduation.

ISSUE 1: DID MOUNTAIN VIEW DENY STUDENT A FAPE BY FAILING TO TIMELY RESPOND TO PARENT'S MAY 2018 REQUEST FOR ASSESSMENT?

Student contends that Mountain View failed to timely respond to Parent's request for an assessment, and as a result Student was denied a FAPE. Mountain View contends that it did not fail to timely respond, or if it did, that any delay did not rise to the level of a FAPE denial.

When a student is referred for special education assessment, the school district must provide the student's parent with a written proposed assessment plan within 15 days of the referral, not counting days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days from the date of receipt of the referral. (Ed. Code, § 56321, subd. (a).) The parent has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, § 56321, subd. (c)(4).) The district has 60 days from the date it receives the parent's written consent, excluding days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days, to complete the assessments and develop an initial IEP, unless the parent agrees in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f), 56302.1, subd. (a).)

A school district's failure to timely conduct appropriate assessments may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist., et al. supra*, 464 F.3d at p. 1031-1033.) A procedural violation results in liability for denial of a FAPE only if the violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

On May 1, 2018, Parent requested by e-mail to Mountain View's acting Director of Special Education that Student be evaluated for eligibility for special education. Parent requested that Student be evaluated for potential eligibilities including emotional disturbance, specific learning disability, and other health impairment, and referred to Student's diagnoses of depression, anxiety, and attention deficit hyperactivity disorder. On May 18, 2028, Mountain View's acting Director of Special Education confirmed having sent an assessment plan to Parent. The assessment plan was three days late.

On May 17, 2018, Student was transported to the Second Nature Wilderness Program in Utah and began participating in that program. The last day of school for the 2017-2018 school year was June 1, 2018.

On June 14, 2018, Mountain View sent an e-mail to Parent enclosing a copy of the initial assessment plan for Student. The assessment plan, entitled initial psycho-educational evaluation, proposed assessing Student in the areas of academic achievement, health, intellectual development, motor development, social/emotional, adaptive/behavior, and post-secondary transition. The assessment plan described obtaining observations, interviews, conducting a review of records, and teacher input. The assessment was to be conducted by a school psychologist and an educational specialist. Parent signed the plan on June 14, 2018.

On August 2, 2018, Student transitioned to a residential program, Explorations, in Montana. Thereafter, Student lived in a group home with Explorations director, Penny James, and enrolled in a comprehensive public high school, Thompson Falls High School, for the 2018 – 2019 school year.

The assessment was conducted over the summer break and was presented at an IEP team meeting on September 14, 2018 IEP, once Mountain View resumed classes in the fall, beginning on August 20, 2018.

Here, Student did not prove any delay by Mountain View in conducting an assessment after Mother's May 1, 2018 request resulted in a denial of FAPE to Student. Student was appropriately assessed and was not eligible for special education at the September 2018 IEP, and again at the May 2019 IEP. Absent eligibility, even if there was a procedural violation of three days, the delay did not impede Student's right to a FAPE or cause a deprivation of educational benefits, nor did it impede Parent's opportunity to participate in the decision-making process, because Student was not eligible for special education.

ISSUE 2: DID MOUNTAIN VIEW DENY STUDENT A FAPE BY FAILING TO CONDUCT AN APPROPRIATE PSYCHOEDUCATIONAL EVALUATION PRIOR TO THE SEPTEMBER 18, 2018 IEP TEAM MEETING?

Student contends Mountain View failed to conduct an appropriate psychoeducational evaluation prior to the September 18, 2018 IEP team meeting. According to Student, Mountain View did not meet the minimum legal requirements for an evaluation, and Student is entitled to an independent educational evaluation at public expense.

Mountain View contends its evaluation met the legal requirements for an evaluation, and was properly the basis for the September 18, 2018 and May 14, 2019 IEP teams' decision making with regard to Student's eligibility.

For purposes of evaluating a child for special education eligibility, the district must ensure that “the child is assessed in all areas of suspected disability.” (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158.) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify the child’s needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).)

A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is eligible for special education services. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304 (b)(1).) The assessments used must be:

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

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

The personnel who assesses the student shall prepare a written report that shall include the following:

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

The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

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., et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

Mountain View contracted with Michelle Nutter, Ph.D. to conduct Student's psycho-educational assessment. Mountain View had previously contracted with Dr. Nutter for what they viewed as more complex cases, and also to provide a non-district perspective on the Student. Dr. Nutter earned a bachelor's degree in liberal studies, a master's degree in special education from the University of Oregon in 2002, and a Ph.D. in educational policy and management as a school psychologist in 2003. She obtained a post-graduate certificate in school neuro-psychology in 2015. She held a pupil

personnel services credential, obtained in 2003, a multiple subject teaching credential, and a cross-cultural language academic development certification, both obtained in 1997. She had worked as a school psychologist since 2003, and worked for another district as a school psychologist at the time of the hearing.

Her education, credentials, and experience qualified her to conduct Student's psychoeducational assessment, administer standardized tests, interpret the results, and prepare the report. She testified at the hearing.

Dr. Nutter completed her report of her evaluation on September 13, 2018. The report was based upon her review of available records, teacher reports, her in-person testing in Montana, observation, an interview with Student, Parent input, information from Thompson Falls High School, the Explorations program, the Second Nature wilderness program, and the use of standardized assessment measures. She also considered Student's academic testing completed by Erica Starks, a Mountain View special education teacher.

Starks held a master's degree in special education and a mild-moderate special education credential, cross-cultural language academic development certification, and certification for autism. She had worked as a special education coordinator for two different districts, obtained a Ph.D., and administered approximately 300 academic assessments to students over her career. Her education, credentials, and experience qualified her to conduct the academic assessment portion of the psycho-educational assessment of Student. Starks testified at the hearing.

The assessment tools were selected and administered so as not to be discriminatory on a racial or cultural basis. They were provided in a language and form most likely to yield accurate information on what Student knew and could do

academically, developmentally and functionally. The assessors used technically sound testing instruments that demonstrated the effect that cognitive, behavioral, physical, and developmental factors had on Student's functioning. Other than an issue on two social-emotional assessment tools, which did not substantively affect the evaluation, all assessment tools were used for their intended purpose, were valid and reliable, and administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessment.

Dr. Nutter gathered information from Parent. She reviewed Student's available educational records from Mountain View for grades seven and later, as prior years had been sent to Montana as part of Student's cumulative file. She reviewed and summarized records from an intensive outpatient program that Student attended for approximately six weeks from March 12, 2018 through April 30, 2018. She reviewed and summarized a report, dated August 17, 2018, from Dr. Coady Schueler, the psychologist who treated Student at the Second Nature program. She summarized her interviews with director Penny James from Explorations, and principal Rich Ferris from Thompson Falls High School. Dr. Nutter also observed Student during her eight hours of interview, observation, and testing that she conducted at Explorations in Montana on August 24, 2018.

Student had an unremarkable history as an infant, toddler, and during her early education. In her fourth grade year, she began to experience emotional upset due to significant family discord, and she began to develop a difficult, emotionally-fraught relationship with her mother at this time. The relationship continued to generate increasing anger, discord, and difficulties for Student until she departed for Utah in May 2018. Student also experienced conflict with her mother over her enrollment in multiple schools. She was noted to have some issues with attention and behavior at

school from approximately fourth grade. Despite some issues at school, Student earned reasonably good grades in academic classes in seventh and eighth grade with primarily Bs and Cs, and an occasional A.

Student transitioned well to high school in ninth grade, but began to experience more anxiety and depression, including suicidal ideation, as the year wore on. Her increasing unhappiness coincided with continuing conflict at home, increasing difficulty with schoolwork, and falling grades. She earned a grade point average of 3.17 in the first semester of ninth grade, largely consistent with her prior academic performance. During the second semester of ninth grade, Student began using alcohol and marijuana, but nonetheless finished the semester with a 3.00 grade point average.

During her tenth grade year, Student's struggles escalated, and she began to go to school intoxicated. Conflict at home along with drug use became more prevalent, and she developed an increasingly hostile and angry relationship with her mother. She lost interest in school and began to feel increasingly overwhelmed. Her pediatrician diagnosed her with anxiety. Parent reached out to Mountain View during the first semester, and a 504 team meeting was held in October of 2017 to evaluate Student for accommodations and determine whether there was a need to evaluate Student for special education. At that time, Student received a 504 plan that allowed her more time on test, assignments, and homework, as those areas were identified as needing some accommodation.

Student began to have increased suicidal ideation as the year continued, and was accepted into an outpatient therapy program in March 2018 to address her drug use and suicidal ideation. Her treating psychologist, Dr. Parnes, diagnosed Student with major depressive disorder and generalized anxiety disorder, and noted an increase in suicidal ideation following conflict with the mother. Student was not an active or willing

participant in the outpatient program, and she was eventually separated from the program, with Dr. Parnes recommending that she be enrolled in a wilderness program.

Student was professionally transported to Second Nature on May 17, 2018. The program was centered at a wilderness basecamp, with participants out on the trail for four days a week. She was initially anxious, angry, and resentful, with limited insight into the nature of her struggles and minimal accountability for her actions. However, Student progressed in engagement, participation, self-regulation, and accountability over the course of her participation in the program, with her work ethic in personal and social matters improving markedly. Student was open to intervention and practiced skills, and participated in treatment in the areas of depression, defiance, substance abuse, and her relationship with her mother. She was recommended for discharge on August 1, 2018 with Dr. Schueler noting a marked improvement in Student, overall, but serious concerns about her returning to her home environment as it posed a significant risk for regression. Dr. Schueler recommended Student transition to a therapeutic boarding school and continue with individual, group, and family therapy, as well as treatment for substance abuse.

Student transitioned to Explorations, a sober-living, therapeutic, non-educational facility. At the time of assessment, Student had settled in well at Explorations, and did not present as sad or depressed. James noted that Student had a very strained relationship with her mother and did not miss that part of her home life. Student was a reliable member of the facility community, completing her chores, and was generally pleasant and enjoyable. She joined the cross-country team at Thompson Falls, and struck up friendships with her teammates.

Student also transitioned well to Thompson Falls and was described by Ferris as social and outgoing. At the time of assessment, Student was able to learn grade level

material, complete class assignments, and make adequate progress toward academic standards without accommodations or specialized academic support.

Dr. Nutter observed that Student presented as a happy teenager during her eight hours with her. Student was comfortable with the testing, easily established rapport with the assessor, and was forthcoming with information. Dr. Nutter noted some difficulties maintaining attention over time as Student's attention fluctuated within and across tasks, particularly auditory tasks. Student demonstrated a sense of humor and an appropriate emotional range during the assessment.

ACADEMIC ACHIEVEMENT AND POTENTIAL

Dr. Nutter assessed Student for academic potential and intellectual ability level using an age-appropriate standardized intelligence scale. Student performed from low-average to high-average across subtests, and earned an overall composite score in the average range.

Dr. Nutter relied on the academic achievement assessment scores obtained by Starks during her trip to Utah on July 17, 2018, while Student was attending the Second Nature program. Starks's observations during the testing in the Utah wilderness were consistent with Dr. Nutter's observations, finding Student communicative, engaged, and broadly attentive. Starks administered a standardized test of academic achievement. Student's performance ranged from the low-average to high-average, with broad achievement in the average range. Student evidenced some difficulties with reading comprehension, particularly higher level comprehension rather than more literal understanding, with a score in the low average range. Dr. Nutter administered the subtest of another subsidized achievement test to further test Student's reading comprehension, and Student once again scored in the low-average range. Dr. Nutter

did not find this one area of low-average ability to be concerning or indicative of a learning disorder.

Dr. Nutter assessed Student for auditory and visual processing and attention. She found that Student tested in the average range, although she did evidence some attentional issues. Student's visual processing was an area of relative strength and her visual-motor integration was in the low-average range, weighed down somewhat by attentional issues that lowered her otherwise average score. Student's scores on an attention deficit disorder scale also indicated significant issues with attention.

SOCIAL-EMOTIONAL FUNCTIONING

Dr. Nutter assessed Student's social-emotional functioning using an in-depth interview along with several self-report scale assessments. One scale was designed to yield information about Student's social and emotional adjustment, behavior, academic functioning, and attention, at home and in a school environment. Student's responses demonstrated she continued to have feelings of anger, sadness, and anxiety related to the home setting. Parent completed a parent questionnaire, endorsing significant concerns regarding Student across multiple domains of social-emotional functioning.

Student answered the scale questions from the perspective of still living at home and attending Los Altos High School. As discussed at Issue 4, below, this possible deviation from test protocol did not invalidate the particular assessment measures, rather it allowed Dr. Nutter to get a more relevant picture of Student's struggles at home and Mountain View, as Student was doing quite well at Explorations at the time she completed the scales. Dr. Nutter's rationale for using the home setting was logical and she provided ample rationale for conducting the assessment in this manner.

SUMMARY AND RECOMMENDATIONS

Dr. Nutter summarized her findings and provided an analysis of whether Student qualified for special education under any of three eligibility categories, specifically emotional disturbance, other health impairment, and or specific learning disability. She found that Student had many intellectual and academic strengths, along with some weaknesses. She also found that Student was able to function academically, socially, and emotionally in general education in a comprehensive public high school such as Thompson Falls while living at Explorations, where Student was not subject to the depression and anxiety of her home life and its carry-over effect on her educational performance.

Dr. Nutter evaluated Student's eligibility under the category of emotional disturbance. She found that Student did not exhibit one or more of the five qualifying characteristics of emotional disturbance over a long period of time and to a marked degree such as to adversely affect educational performance, and not be capable of being addressed solely within the general education setting. She found that Student's pervasive mood of unhappiness or depression resolved rapidly once Student was removed from the home setting, and that Student was generally happy and social at Thompson Falls, able to form social relationships and behave appropriately, and able to perform to expectations in general education at a comprehensive public high school.

Dr. Nutter evaluated Student's eligibility under the category of other health impairment and found that Student did not meet the eligibility criteria. Student did not have limited strength, vitality, and or alertness, including heightened alertness to environmental stimuli, that resulted in limited alertness with respect to the educational environment due to chronic or acute health problems that adversely affected Student's educational performance. Critically, at the time of the assessment, Student was

demonstrating the ability to access core instruction and learn grade-level material at Thompson Falls without educational supports.

Dr. Nutter evaluated Student's eligibility under the category of specific learning disability. Student did not have a statistically significant discrepancy between performance and potential, combined with a processing disorder and the inability to correct the discrepancy in performance in the general education classroom. Although Dr. Nutter found that her assessment indicated a processing disorder in the area of attention, and a weakness in the area of reading, she concluded that Student did not qualify under the specific learning disability eligibility criteria as Student was able to access the core curriculum and perform to expectations at Thompson Falls.

Student was assessed in all areas of suspected disability, including academic achievement, health, intellectual development, and social/emotional. A broad variety of assessment tools and methods were utilized to obtain comprehensive, valid, meaningful data on Student's academic, developmental, and functional abilities, capabilities, and difficulties. Assessments included, but were not limited to review of records, interviews with parent and Student, objective assessment tools, the use of assessment scales completed by Student and Parent, and observations of Student.

The assessments were selected and administered so as not to be racially, culturally, or sexually discriminatory, and were provided and administered in Student's primary language of English. The assessments were selected and used for the purposes for which the assessments or measures were valid and reliable, were tailored to Student's specific areas of possible educational need, and were technically sound and reliable. The assessors were highly qualified, trained, and experienced in administering the assessments utilized, and were knowledgeable about Student and her areas of possible disability.

The judgment and recommendations of Dr. Nutter, as related in the assessment report, were logical, well-considered, and evaluative. The assessor considered the wealth of information she assembled in reaching reasonable conclusions regarding Student's potential eligibility, and in concluding that Student did not meet the eligibility requirements for emotional disturbance, other health impaired or specific learning disability.

Student did not prove Mountain View's psycho-educational assessment was not appropriate. The psycho-educational assessment met the legal requirements to evaluate Student for her possible eligibility for special education under the three categories of suspected disability and provided a solid foundation for the IEP teams' later determination that Student was not eligible for special education.

ISSUE 3: DID MOUNTAIN VIEW DENY STUDENT A FAPE BY FAILING TO INVITE ALL NECESSARY MEMBERS TO THE SEPTEMBER 2018 AND MAY 2019 IEP TEAM MEETINGS?

Students contends that Mountain View did not include all necessary members of the IEP team meetings in September 2018 and May 2019, in particular potential attendees from Utah or Montana. Mountain View contends that the two IEP teams it assembled met the legal requirements for IEP teams.

An IEP team must include the following: At least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results; and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district; and when appropriate, the

student. (20 U.S.C. § 1414(d)(1)(B); Ed. Code, § 56341, subd. (b).) It is only necessary for a general education teacher who has instructed the child in the past or who may instruct the child in the future to be present at the IEP team meeting. (*R.B. v. Napa Valley Unified School Dist.*, (9th Cir. 2007) 496 F.3d 932, 938-940.) The omission of a statutorily required participant from the IEP team is harmless if the student is ineligible for IDEA benefits. (*Id.* at p. 943.)

The participants in the September 17, 2018 IEP team meeting included Parent, a Mountain View representative, Mountain View general education teacher, Jasmine Mark, Mountain View special education teacher, Erica Starks, and school psychologist, Dr. Nutter. The Mountain View representative was familiar with the special education programs and services available at Mountain View, as she was the Director of Special Education for the Mountain View. Mark had been Student's tenth grade general education English teacher for several months. Starks was both a special education teacher and had travelled to Utah to administer Student's academic assessment. Dr. Nutter had undertaken the psycho-educational assessment, prepared the report, and was qualified to interpret the instructional implications of assessment results.

Student contends that individuals from Second Nature, Explorations, or Thompson Falls were necessary for the IEP team and should have been invited by Mountain View. However, not only had Dr. Nutter been in contact with each of them, and thoroughly summarized the information in her report, but nothing prevented Student from inviting anyone of her choosing to the IEP meeting. Her choice not to do so cannot now be held against Mountain View. Student did not prove Mountain View did not meet the minimal legal requirements for an IEP team.

The May 16, 2019, IEP team meeting was also attended by Parent, the same Mountain View representative, Tim Farrell, a Mountain View general education teacher, Starks, and Dr. Nutter, by telephone. Once again, Student contends that other individuals from Explorations or Thompson Falls should have been invited by Mountain View. However, as in 2018, the IEP team met the legal requirements for necessary participants.

Both IEP team meetings met the basic legal requirements for required members. Student did not prove that other individuals were required in order for the two IEP team meetings to provide Student and Parent the required procedural FAPE.

ISSUE 4: DID MOUNTAIN VIEW DENY STUDENT A FAPE, DURING THE 2017-2018, 2018-2019, AND 2019-2020 SCHOOL YEARS BY FAILING TO IDENTIFY HER AS A STUDENT ELIGIBLE FOR SPECIAL EDUCATION AND OFFERING HER AN APPROPRIATE IEP?

Student contends that Mountain View failed to find her eligible for special education and offer her an appropriate placement and services in the IEPs dated September 2018 and May 2019. Student contends that Student should have been found eligible under one of more of the eligibility categories of emotional disturbance, other health impaired, or specific learning disability.

Mountain View contends it properly considered the available information, including the psycho-educational report prepared by Dr. Nutter, and correctly found that Student was not eligible for special education in either 2018 or 2019. According to Mountain View, Student demonstrated that she could adequately access her education at Thompson Falls High School without the support of special education.

A student is eligible for special education and related services if they are a “child with a disability” such as intellectual disability, hearing impairment, speech or language impairment, visual impairment, emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and as a result thereof, needs special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b).)

California law, which refers to students with disabilities as “individuals with exceptional needs,” defines an individual with exceptional needs as one who, because of a disability, requires instruction and services which cannot be provided with modification of the regular school program to ensure that the individual is provided a FAPE. (Ed. Code, § 56026, subd. (b).) A pupil 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.) Special education is “specially designed instruction...to meet the unique needs of individuals with special needs...” (Ed. Code, § 56031.) Related services mean transportation and such developmental, corrective, and other supportive services “as may be required to assist an individual with exceptional needs to benefit from special education.” (Ed. Code, § 56363 (emphasis added).)

Emotional Disturbance

Title 5 California Code of Regulations, section 3030(b)(4) defines emotional disturbance, for purposes of special education eligibility, as a condition exhibiting one or more defined characteristics, over a long period of time and to a marked degree, that adversely affect a child’s educational performance.

Those include:

- an inability to learn that cannot be explained by intellectual, sensory or health factors;
- an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- inappropriate types of behavior or feelings under normal circumstances;
- a general pervasive mood of unhappiness or depression; or
- a tendency to develop physical symptoms or fears associated with personal or school problems.

Other Health Impairment

For eligibility purposes, "other health impairment" is defined, in relevant part, 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. (f).) As with other eligibility categories, a student within the definition of other health impairment must demonstrate that the degree of their impairment requires special education. (Cal. Code Regs., tit. 5, § 3030, subd. (a).)

California law recognizes that attention deficit hyperactivity disorder may be an underlying processing deficit for eligibility under the categories of other health impairment and specific learning disability. A student "whose educational performance is adversely affected by a suspected or diagnosed attention deficit disorder or attention deficit hyperactivity disorder," and who also meets the eligibility criteria for other health

impairment or specific learning disability is entitled to special education and related services. (Ed. Code, § 56339, subd. (a).)

Specific Learning Disability

A student has a 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 specific learning disability may also include disability within the function of vision which results in visual perceptual or visual motor dysfunction. (Ed. Code, § 56338.)

A school district may determine whether a student has a specific learning disability by taking 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.” (Ed. Code, § 56337, subd. (b) (emphasis added).) The decision as to whether or not a severe discrepancy exists must take into account all relevant material which is available on the pupil, and no single score or product of scores, test or procedure shall be used as the sole criterion for the decisions of the IEP team as to the pupil’s eligibility for special education. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B).)

When standardized tests are considered to be valid for a specific student, a severe discrepancy is shown by measuring mathematical differences between ability and achievement scores on standardized testing. (*Ibid.* at subd. (b)(10)(B)(1).) California regulations provide a formula for determining a severe discrepancy: a severe discrepancy is demonstrated by: first, converting into common standard scores, using a mean of 100 and standard deviation of 15, the achievement test score and the ability test score to be compared; second, computing the difference between these common standard scores; and third, comparing this computed difference to the standard criterion which is the product of 1.5 multiplied by the standard deviation of the distribution of computed differences of students taking these achievement and ability tests. A computed difference which equals or exceeds this standard criterion, adjusted by one standard error of measurement, the adjustment not to exceed 4 common standard score point, indicates a severe discrepancy when such discrepancy is corroborated by other assessment data which may include other tests, scales, instruments, observations and work samples as appropriate. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B)(1).) This severe discrepancy formula is typically interpreted as requiring a difference in cognitive and achievement scores of 22 points.

A student with a disability in a basic psychological process and a discrepancy between cognitive ability and academic achievement, must also demonstrate that the degree of impairment requires special education. (20 U.S.C. § 1401(3)(A); Cal. Code Regs., tit. 5, § 3030, subd. (a); *M.P. v. Santa Monica Malibu Unified School District* (C.D. Cal. 2008) 633 F.Supp.2d 1089, 1103.)

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 IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

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

The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight ... an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

At the September 18, 2018 IEP team meeting, the IEP team considered Dr. Nutter's report, including Starks academic assessment. The IEP team also considered then current information regarding Student provided by Thompson Falls High School Principal, Rich Ferris, and Explorations Director, Penny James, along with Parent's participation and input. The team considered each of the three areas of eligibility for Student and agreed with Dr. Nutter's recommendation and conclusions, finding Student not eligible for special education under any of the three areas. Student's ability to perform well at Thompson Falls on a comprehensive public campus with no accommodations or supports was a significant factor in support of the team's conclusion, along with her reacquisition of emotional stability and affect.

At the May 14, 2019 IEP team meeting, the team discussed Dr. Medina's report, described below, and considered Dr. Nutter's discussion of that report. The team also considered Farrell's review of Student's solid performance at Thompson Falls High School over the three preceding quarters, including two quarters with a B grade point average, and one with an A- grade point average. Student was reported to have a 504 plan in place, but rarely accessed the accommodations other than for extra time. Student was also reported to have successfully participated in track, softball, and other extracurricular activities in addition to her academic success at Thompson Falls. The team, continued to find Student not eligible for special education under any of the three potential areas of disability.

Student contends that she should be eligible for a special education placement and services under one of more of the eligibility categories of emotional disturbance, other health impairment, and/or specific learning disability. Student further contends that her eligibility for special education has resulted in a denial of FAPE arising from Mountain View's failure to find her eligible for special education or place her in a special education program with accompanying services. Student contends that her parental placement in the Utah and Montana programs was appropriate and provided her with a FAPE.

Student critiques Dr. Nutter's conclusions regarding Student's eligibility, including specific criticisms of testing methodology levelled by Student's retained expert, Dr. Paula Solomon, a clinical psychologist. Student also presented a report written by Nicole Medina, Psy.D. that purported to make both diagnostic and educationally-related psychological findings regarding Student's psychological diagnoses and educational needs. Student provided evidence that she was doing well and making progress in Montana with the therapeutic program at Explorations, including tutoring and

counseling, combined with attendance at a public high school in a general education program. Student had also been provided with a 504 plan at Thompson Falls, providing accommodations similar to those provided in her Mountain View 504 plan from October 2017.

The testimony of Dr. Solomon, in essence that Dr. Nutter's use of the Behavior Assessment Scale for Children and the Children's Depression Inventory results was improper or a misinterpretation was not persuasive. The information from those assessments was not rendered unusable or otherwise misinterpreted by Dr. Nutter. There was no evidence that Student was confused or misdirected by Dr. Nutter's instructions. Instead, Dr. Nutter used her training and expertise to evaluate Student and to interpret the results of the two assessments as part of the larger picture of Student based upon the totality of the information from multiple sources and based upon multiple methods.

The report from Dr. Medina was similarly unpersuasive. The report indicated she was licensed in Utah. There was no indication that Dr. Medina was licensed in Montana or otherwise permitted to practice there. Dr. Medina's report is a clinical report, without colorable relation to the educational issues at the heart of Student's claims in this matter. There was no evidence presented by Student that Dr. Medina had any training, background, or expertise in any area of education, including the evaluation of a pupil for eligibility under the IDEA. Dr. Medina did not testify at the hearing. As such, the report was given little weight in disputing Dr. Nutter's findings or conclusions.

Student contends that the after-school tutoring and study hall she received at Explorations, and the other individual and family counseling she received there, were necessary for her success at Thompson Falls. However, Student failed to show that either tutoring or counseling were necessary for her to access her education at

Thompson Falls, or that the tutoring or counseling was more than what was provided to general education students.

The weight of the testimony supported Dr. Nutter's findings and conclusions that Student was not eligible for special education. Student did not prove the IEP team should have found Student eligible for special education at the September 18, 2018 IEP team meeting or the May 14, 2019 IEP team meeting.

ISSUE 5: DID MOUNTAIN VIEW DENY STUDENT A FAPE DURING THE 2017-2018, 2018-2019, AND 2019-2020 SCHOOL YEARS BY FAILING TO OFFER STUDENT AN APPROPRIATE IEP?

Student contends that Mountain View denied her a FAPE by failing to offer her an IEP with appropriate goals in all areas of need; services, accommodations and modifications; appropriate educational placement; and an extended school year program and services. Mountain View contends that Student had never been eligible for special education, and any delay that may have occurred in determining Student's potential eligibility was not a material delay because of Student's lack of eligibility.

Student claims her grades in ninth grade and her increasing struggle with grades during tenth grade, along with her worsening mental health, including suicidal ideation and substance abuse showed she potentially needed the specialized instruction or services alleged. This argument is not persuasive here because Student was appropriately assessed and found not to be eligible for special education. She was successfully accessing her education using the resources of a regular education program. Student did not prove Mountain View denied Student a FAPE at the September 2018 and May 2019 IEP team meetings by failing to offer Student an appropriate IEP.

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.

1. Student did not prove Mountain View denied Student a FAPE by failing to timely respond to Parent's May 2018 request for assessment. Mountain View prevailed on Issue 1.
2. Student did not prove Mountain View denied Student a FAPE by failing to conduct an appropriate psychoeducational evaluation prior to the September 18, 2018 IEP team meeting. Mountain View prevailed on Issue 2.
3. Student did not prove Mountain View denied Student a FAPE by failing to invite all necessary members to the IEP team meetings held regarding Student in September 2018 and May 2019. Mountain View prevailed on Issue 3.
4. Student did not prove Mountain View denied Student a FAPE by failing to offer Student an IEP at the September 2018 and May 2019 IEP team meetings. Mountain View prevailed on Issue 4.
5. Student did not prove Mountain View denied Student a FAPE during the 2017-2018, 2018-2019, and 2019-2020 school years by failing to offer Student an appropriate IEP. Mountain View prevailed on Issue 5.
- 6.

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 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

TED MANN

Administrative Law Judge

Office of Administrative Hearings