

California Hearing Officer Decisions

By Ruth Colker*

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I. INTRODUCTION

In the course of writing the book, *Disabled Education*,¹ I read about 100 hearing officer decisions in five different jurisdictions that were resolved under the Individuals with Disabilities Education Act (IDEA).² California was one of those jurisdictions. In this paper, I will generally discuss the trends that I found in each of those jurisdictions and reflect on how the California hearing officer decisions compared to decisions rendered in the other jurisdictions (New Jersey, Florida, Ohio, and the District of Columbia).

Although I will report overall win-loss rates before hearing officers in the following paragraph, one should be cautious about drawing conclusions from win-loss rates.³ Even if plaintiffs prevail one hundred percent of the time, it is impossible to know what results were reached in cases that were settled. Similarly, if plaintiffs always lose, it is impossible to know if that is because they only choose to litigate truly weak cases and settle many strong cases with quite favorable results. Because the IDEA encourages alternative dispute resolution,⁴ it is especially difficult to know what to conclude by looking exclusively at litigated cases. Nonetheless, settlement

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¹ RUTH COLKER, *DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT* (forthcoming 2013).

² 20 U.S.C. §§ 1400–1482 (2012). Under the IDEA, a parent can file a complaint with the State educational agency if he or she believes the school district is not complying with the IDEA. *Id.* § 1415. If the dispute cannot be resolved voluntarily through a resolution session or mediation then a state-level hearing officer resolves it. *See id.* (procedural safeguards).

³ For discussion of some of the factors that should cause one to be cautious in interpreting win-loss rates, see Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999).

⁴ *See* 20 U.S.C. §§ 1415(e), (f)(1)(B) (2012).

occurs under the shadow of the law. If parents perceive that they are likely to be able to win at a due process hearing, then they might be more willing to hold out for a highly favorable settlement than if they understand that parents virtually never win. Because hearing officer decisions, but not settlements, are public records, one must expect that hearing officer decisions influence the content of settlements. This factor is especially salient in California because hearing officers also serve as mediators (in cases in which they are not the hearing officer) and might use the technique of “reality check” to help resolve disputes in ways that reflect decisions they have rendered in similar matters. Further, California has the most user-friendly hearing officer database in the country,⁵ making it especially easy for litigants to follow its decisions.

The overall win/loss rate in California is typical of the other jurisdictions I examined in a broad, global sense, but with the caveat that the parent victories were often partial in California. I categorized a case as “pro-parent” if the parent prevailed on *any* ground; it was typical for parents to prevail on only one out of many claims in California so these “victories” are often quite partial. Parents or guardians prevailed, at least in part, in 35 of 101 cases (34.6%) in California decided between May 3, 2010 and June 20, 2011. Parents prevailed in 32.7% of cases that went to the merits in Ohio, 15.1% of cases in Florida (but with a very high rate of voluntary resolution), 5.4% of regular petitions in New Jersey, 17.2% of emergent relief petitions in New Jersey, and 57% of cases in the District of Columbia.⁶ Other than the D.C. decisions, I therefore found that the hearing officer decisions were disproportionately pro-school district. The burden of proof placed on parents often made it difficult for them to prevail even when it appeared they had some strong arguments. I argue in Part II that these hearing officers are often placing a higher burden of proof on parents than contemplated by the Supreme Court in *Schaffer v. Weast*.⁷

⁵ See *Special Education Decisions & Orders*, CAL. DEP’T EDUC., <http://www.dgs.ca.gov/oah/SpecialEducation/searchDO.aspx> (last visited Jan. 9, 2013).

⁶ For further discussion, see RUTH COLKER, *DISABLED EDUCATION* 109–216 (forthcoming 2013).

⁷ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005).

The Supreme Court in *Schaffer* expected that certain conditions of fairness would be present when it allocated the burden of proof on parents. Specifically, it anticipated that parents would have full access to records and reports to counter the school district's "firepower."⁸ It also expected hearing officers to conduct hearings flexibly so that parents who were not represented by a lawyer or did not speak English would be able to prevail.⁹ In Part II, I argue that some California decisions do not seem consistent with those fairness considerations. Of the twenty California cases in which a lawyer did not represent parents, the parents prevailed in only one case.¹⁰ Of the seven cases involving use of a foreign language interpreter, only one parent prevailed.¹¹ Greater attention to issues of fairness might cause parents to have a higher success rate.

Parents in California have particular difficulty prevailing when they seek to argue that the school district's proposed educational program is inadequate. This issue is governed by the Supreme Court's decision in *Board of Education v. Rowley*¹² and will be discussed in Part III. Part III will also focus on the decision in *J.L. v. Mercer Island School District*,¹³ which sets the standard for courts to follow in the Ninth Circuit in these kinds of cases. By examining the factual record and appellate ruling closely in both *Rowley* and *Mercer Island*, I argue that neither the Supreme Court nor the Ninth Circuit intended to impose an overly difficult burden of proof on parents to demonstrate the inadequacy of educational programs.

⁸ *Id.* at 61.

⁹ "IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence. IDEA, in fact, requires state authorities to organize hearings in a way that guarantees parents and children [IDEA's] procedural protections." *Id.*

¹⁰ See Parent *ex rel.* Student v. Desert Sands Unified Sch. Dist., No. 2010100854 (OAH Cal. Apr. 8, 2011) (June R. Lehrman, ALJ), available at http://www.documents.dgs.ca.gov/oah/seho_decisions/2010100854.pdf (last visited Jan. 9, 2013).

¹¹ See Coachella Valley Unified Sch. Dist. v. Parents *ex rel.* Student, OAH Case No. 2010060472 (Dec. 27, 2010) (Robert F. Helfand, ALJ), available at http://www.documents.dgs.ca.gov/oah/seho_decisions/2010060472.pdf (last visited Jan. 9, 2013).

¹² 458 U.S. 176 (1982).

¹³ 575 F.3d 1025 (9th Cir. 2009).

The final hurdle faced by parents in California is the difficulty of persuading the hearing officer to order a remedy when a procedural violation has occurred.¹⁴ In Part IV, I discuss the legal standard that applies to these cases and describe some California district court cases that have concluded that a remedy is appropriate for a procedural violation. In some of these cases, the district court overruled the hearing officer to order a remedy. Hearing officers often interpret their authority too narrowly in determining whether to order a remedy when a procedural error has occurred.

As this article will reflect, California is a jurisdiction that is ripe for extensive analysis because its decisions are readily available in a word-searchable database. It also has a fairly high number of cases decided on an annual basis so that meaningful conclusions can be drawn from the cases. It would be helpful if other states offered such transparency in their special education decisions so that we could have a more accurate picture of the national landscape in the field of special education law.

II. BURDEN OF PROOF

A. *Schaffer v. Weast*

The rules regarding burden of proof derive from the Supreme Court's decision in *Schaffer v. Weast*.¹⁵ The Court noted that the term "burden of proof" encompasses two burdens—the burden of persuasion (i.e., who loses if the evidence is closely balanced) and the burden of production (i.e., the obligation to come forward with evidence at different points in the proceeding).¹⁶ The *Schaffer* case only involved the "burden of persuasion" aspect of the burden of proof—who wins if the evidence is closely balanced. The Court held that the burden of persuasion in an administrative hearing challenging an individual education program (IEP) is placed upon the party seeking relief.¹⁷

¹⁴ See 20 U.S.C. § 1415(f)(3)(E)(ii) (2012).

¹⁵ 546 U.S. 49 (2005).

¹⁶ *Id.* at 56.

¹⁷ *Id.* at 62.

The Court acknowledged that the rule usually placed the burden of persuasion on the parent but also noted it could be on the school district when it is the moving party seeking “to change an existing IEP . . . or if parents refuse to allow their child to be evaluated.”¹⁸ In my sample of 101 California decisions, there were twenty-six cases where the school district bore the burden of proof.¹⁹ Parents only prevailed in three of those cases (11.5 %), an even lower success rate than when parents had the burden of proof.²⁰ Those numbers do not necessarily mean that the hearing officer was incorrectly allocating the burden of proof but they do suggest that close examination of whether hearing officers are truly imposing the burden of proof on school districts in those cases is warranted. A close examination of the *Schaffer* decision provides a basis for arguing that California hearing officers are often making it too difficult for parents to prevail in special education cases, because they are not applying the fairness considerations emphasized by the *Schaffer* Court.

The *Schaffer* case involved a seventh grade boy, Brian Schaffer, who had attended a private school from prekindergarten to seventh grade.²¹ When the private school concluded that it could no longer offer Brian an appropriate education, his parents contacted the local public school district to have Brian classified as disabled and to receive an education funded by the school district.²² The parents and the school district agreed that Brian was disabled but could not agree on the content of his IEP.²³ The school district proposed one of two public school placements; his parents insisted that the only appropriate placement was another private school.²⁴ Their disagreement involved the issue of what should be the content of the first IEP drafted by the school district in consultation with Brian’s

¹⁸ *Id.* at 53.

¹⁹ See COLKER, *supra* note 6.

²⁰ *Id.*

²¹ *Schaffer*, 546 U.S. at 54. See generally *Brian S. v. Vance*, 86 F. Supp. 2d 538 (D. Md. 2000) (appeal from Administrative Law Judge decision in *Schaffer v. Weast*).

²² *Schaffer*, 546 U.S. at 54–55.

²³ *Id.*

²⁴ *Id.* at 55.

parents.²⁵ When the parties could not come to an agreement, Brian's parents initiated a due process hearing challenging the school district's proposed IEP and seeking reimbursement for unilaterally sending Brian to a private school.²⁶

At the hearing, the administrative law judge (ALJ) held that the parents bore the burden of proof and, in a close case, ruled in favor of the school district.²⁷ On appeal, the district court reversed and remanded, holding that the burden of proof should have been placed on the school district.²⁸ On remand, the hearing officer ruled in favor of the parents, concluding that the burden of proof was dispositive to the outcome of the case.²⁹ Ultimately, the Fourth Circuit and the United States Supreme Court ruled that the district court was wrong to conclude that the burden of proof was on the school district in this kind of case.³⁰ Because the hearing officer had found that the allocation of the burden of proof was dispositive to the outcome in this case, the school district prevailed in light of the Supreme Court's decision.³¹

But the more important question from the *Schaffer* case is the following: what did the Court mean by the weight of the burden of proof that should be placed on the party seeking relief (in this case, the parents), and how does that holding relate to cases being decided in California?

In deciding to allocate the burden of proof on the moving party, the Supreme Court emphasized that the statute's procedural safeguards are designed so that parents "are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition."³² The Court emphasized that "IDEA hearings are deliberately informal and intended to give ALJs the flexibility that

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Schaffer*, 546 U.S. at 55.

²⁸ *Id.*

²⁹ *Weast v. Schaffer*, 240 F. Supp. 2d 396, 397 n. 2 (D. Md. 2002), *rev'd*, *Weast v. Schaffer*, 377 F.3d 449 (4th Cir. 2004).

³⁰ *See Weast v. Schaffer*, 377 F.3d 449 (4th Cir. 2004); *Schaffer v. Weast*, 546 U.S. 49 (2005).

³¹ *Schaffer*, 546 U.S. at 62.

³² *Id.* at 61.

they need to ensure that each side can fairly present its evidence. IDEA, in fact, requires state authorities to organize hearings in a way that guarantees parents and children the procedural protections of the Act.”³³

The ALJ should, therefore, conduct the hearing in a way that gives the moving party a realistic opportunity to prevail. One particularly important rule is that parents can use record reviews and an independent educational evaluation (IEE) to overcome what otherwise would be characterized as the school district’s “natural advantage” in these cases. The *Schaffer* Court emphasized the importance of these rules:

[P]arents have the right to review all records that the school possesses in relation to their child. They also have the right to an “independent educational evaluation of the[ir] child.” The regulations clarify this entitlement by providing that a “parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.” IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.³⁴

The Supreme Court described both record reviews and independent educational evaluations as “rights” even though the IDEA provides that school districts can contest a parent’s request for an independent educational evaluation.³⁵ When parents do not have full access to educational records and independent educational evaluations, it is

³³ *Id.*

³⁴ *Id.* at 60–61 (citations omitted).

³⁵ See 34 C.F.R. § 300.502(b)(2)(i) (2012) (providing that a school district may refuse to pay for the parent’s independent educational evaluation if it files a due process complaint and demonstrates that its evaluation was “appropriate”).

possible that the Court does not consider it appropriate to allocate the burden of proof on the parent as the moving party.

Parents in California seem to have difficulty obtaining full access to educational records and independent educational evaluations. During the time period that I investigated, the school district opposed the parents' request for an independent educational evaluation in nine cases.³⁶ In three of these cases, the parents used a Spanish-language interpreter, raising some concerns about the parents' full access to educational records.³⁷ The school district was the petitioner in each of those cases and the hearing officer correctly allocated the burden of proof on the school district.³⁸ Despite the district having the burden of proof, the parents only prevailed in one of those cases (11.1%) and, even in that case, the parents did not prevail entirely.³⁹ The hearing officer ordered an evaluation at public expense in the areas of assistive technology and psycho-education but not in the area of speech and language, where the Spanish-speaking parents had the most concern.⁴⁰

Because settlements are rendered under the shadow of the law, I suspect that school districts feel emboldened in California to challenge IEE requests because of this pattern of prevailing before hearing officers at due process hearings, despite having the burden of proof. I wonder if the *Schaffer* Court would have allocated the burden of proof on parents, had the Court known the low likelihood of the parents' success when the school district challenges the parents' request for an IEE, as found in California. In sum, the *Schaffer* Court emphasized that the IDEA's procedural protections were created to "ensure that the school bears no unique informational advantage."⁴¹ The ALJ has the obligation to ensure that the due process hearing is held in a sufficiently flexible way to accomplish justice.⁴² Examples of flexibility would include generous application of rules regarding access to school records, requests for independent

³⁶ See COLKER, *supra* note 6, at 183–206.

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *id.* See also *Coachella Valley Unified Sch. Dist.*, *supra* note 11.

⁴⁰ *Coachella Valley Unified Sch. Dist.*, *supra* note 11, at 30.

⁴¹ *Schaffer*, 546 U.S. at 61.

⁴² See *id.*

educational evaluations, and assurance that English-language issues are not impairing procedural due process.

B. Independent Educational Evaluation Example

As discussed above, the Supreme Court presumed that parents would have complete access to educational records and an independent educational evaluation when it decided to place the burden of proof on parents when they challenge an IEP as inappropriate.⁴³ One California case highlights the difficulty for many parents in obtaining that kind of “firepower.”⁴⁴

“Kathleen” Short-Nagel was in first grade when it became apparent to her parents and the school district she was struggling in school.⁴⁵ At the end of the school year, on June 3, 2009, the school district convened a “Student Study Team” (SST) to discuss her difficulties and challenges.⁴⁶ The team recommended modifications and an action plan, including one-on-one assistance.⁴⁷ The ALJ opinion then stated that the action plan was implemented during the 2010-2011 school year.⁴⁸ However, the plan should have been implemented during the 2009–2010 school year. The reference to the 2010-2011 school year was a mistake in the ALJ’s opinion.

Because of continued difficulties in school, the SST referred Kathleen for an initial special education assessment on February 17,

⁴³ See *supra* text accompanying note 8.

⁴⁴ See *L.A. Unified Sch. Dist. v. Parent ex rel. Student*, OAH Case No. 2010100865 (Feb. 3 2011) (Eileen M. Cohn, ALJ), *available at* http://www.documents.dgs.ca.gov/oah/seho_decisions/2010100865.Appellate%20History.pdf (last visited Jan. 9, 2013), *rev’d sub nom*, *K.S.N. v. L.A. Unified Sch. Dist.*, No. CV 11-3270 CBM (MANx) (Mar. 20, 2012) [hereinafter *Short-Nagel ALJ Opinion*]. See also *K.S.N. v. L.A. Unified Sch. Dist.*, No. CV 11-3270 CBM (MANx) (C.D. Cal. Mar. 20, 2012), *available at* http://www.documents.dgs.ca.gov/oah/seho_decisions/2010100865-%20USDC%20Order%20Reversing%20ALJ's%20Decision.pdf (last visited Jan. 9, 2013) [hereinafter *Short-Nagel District Court Opinion*].

⁴⁵ *Id.* at 2. The opinions do not provide the student’s first name. To humanize the discussion, I have named her “Kathleen.”

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

2010.⁴⁹ At the time of the assessment, Kathleen was receiving in-school pullout intervention classes for reading and writing; bi-weekly private tutoring funded by her parents; small group, individual, and modified instruction and expectations; extended time; preferential seating; repetition of directions; and breaking assignments into smaller components.⁵⁰ As a result of the February 17, 2010 meeting and Kathleen's continued difficulties in school, the school district agreed to conduct an IDEA eligibility assessment and, if appropriate, hold an IEP meeting.⁵¹

The school district assigned its psychologist, Karen Menzie, to write the eligibility evaluation.⁵² She conducted evaluations of Kathleen and wrote her report on March 23, 2010.⁵³ The school district also asked special education teacher, Barbara Zafran, to conduct some evaluations.⁵⁴ Zafran completed her evaluations on March 19, 23, and 24, 2010,⁵⁵ with two of those testing dates occurring *after* Menzie had written her eligibility evaluation. Menzie concluded that Kathleen qualified as a student with a specific learning disability, primarily on the basis of her score on one subtest of a visual processing test.⁵⁶

The school district held an IEP meeting on April 29, 2010.⁵⁷ The topic of the IEP meeting was both the eligibility decision and the IEP for Kathleen.⁵⁸ In California, school districts often combine the eligibility and IEP meetings, providing little time for the team to write the IEP. The IEP team considered two possible areas of suspected disability (attention deficit disorder and specific learning disability) at the April 29, 2010 meeting.⁵⁹ "The IEP team determined that [the] [s]tudent was eligible for special education as a pupil with a specific learning disability due to deficits in oral and

⁴⁹ *Id.* at 2.

⁵⁰ *Id.* at 6.

⁵¹ *Id.* at 3.

⁵² *Id.* at 4.

⁵³ *Id.*

⁵⁴ *Id.* at 3.

⁵⁵ *Id.*

⁵⁶ *Id.* at 13.

⁵⁷ *Id.* at 15.

⁵⁸ *Id.*

⁵⁹ *Id.* at 15.

visual processing.”⁶⁰ Nothing in the ALJ opinion indicated that the IEP team approved the IEP at that meeting (or if one was approved at all).

Kathleen’s mother saw the assessment for the first time just before the April meeting, and she did not disagree with the adequacy of the school district’s assessment at that meeting. Nonetheless, she had increasing concerns that the district did not fully understand the nature of her daughter’s visual processing disorder and sought further information from the district. After the district made the odd suggestion that she see an *eye doctor* to learn more about her daughter’s neurological, visual processing deficit, she consulted with a lawyer about her next appropriate step. Her lawyer suggested she request an IEP meeting and seek a school-funded independent educational evaluation. On September 27, 2010, Kathleen’s mother requested an IEP meeting to register her disagreement with the assessment report and, immediately thereafter, provided a written request for an IEE at the district’s expense.⁶¹

Rather than comply with this request, the district filed a Due Process Hearing Request on October 19, 2010 in which it argued that Menzie’s assessment was appropriate and, therefore, the district did not need to pay for Kathleen’s IEE.⁶² After a failed, expedited mediation attempt, a due process hearing was held. The ALJ decision in the case was not rendered until February 3, 2011⁶³ because a continuance was granted on November 4, 2010 at the request of the parents.⁶⁴ Although Congress specifies that these cases be decided quickly,⁶⁵ in practice, that rule is frequently not followed. Kathleen’s parents could not participate in the due process hearing until they had retained an expert who could review the school district’s evaluation closely.⁶⁶ The ALJ ruled in favor of the school district⁶⁷ and Kathleen’s parents appealed the ALJ decision to a

⁶⁰ *Id.*

⁶¹ *See id.* at 15.

⁶² *See id.*

⁶³ *See id.* at 26.

⁶⁴ *Id.* at 1.

⁶⁵ *See* 20 U.S.C. § 1415(f) (2012).

⁶⁶ *See Short-Nagel ALJ Opinion, supra* note 44, at 16.

⁶⁷ *Id.* at 25.

federal district court.⁶⁸ The federal district court judge ruled in their favor on March 20, 2012, more than a year later.⁶⁹ The district court judge found that the IEE should commence within thirty days of the order so that the results of the assessment could be used to formulate an IEP for the 2012–2013 school year, when Kathleen would be in fifth grade.⁷⁰

The school district had the burden of proof at the due process hearing to demonstrate that its assessment was adequate.⁷¹ As the Supreme Court explained in *Schaffer*, the expectation is that the district will pay for the parents' educational evaluation of their child when the parents seek to contest the eligibility classification or the adequacy of the IEP, because the parent, who would have the burden of proof in such challenges, needs to have the same "firepower" as the school district.⁷²

In this case, like many cases in which the district is not able to demonstrate that its evaluation was adequate, the parent retained an expert as well as a lawyer (the child's mother is also licensed to practice law in California, although she does not practice in the field of special education). In fact, in every case that I read in which the ALJ or the federal judge found the district's evaluation to be inadequate, the parents hired both an expert and a lawyer.⁷³ That practice is unfortunate because it turns the IEE process on its head—parents can only succeed in forcing an objecting district to pay for an IEE if the parents pay for the expenses of an expert.

In order to maintain any semblance of fairness, a parent should not be expected to hire an expert to conduct a full psycho-educational evaluation. The parents' expert should merely assist the parents in arguing that the district's evaluation is not adequate in a context in which the district, not the parent, has the burden of proof. The ALJ, in this case, claimed to place the burden of proof on the district but, in reality, seemed to place a heavy burden of proof on the parents. For example, the ALJ considered whether the parents'

⁶⁸ *Id.* at 4.

⁶⁹ *Id.* at 12.

⁷⁰ *Id.*

⁷¹ *Id.* at 20.

⁷² *Schaffer v. Weast*, 546 U.S. 49, 61 (2005).

⁷³ See COLKER, *supra* note 6, at 183–206.

expert had met Kathleen in evaluating the credibility of the parents' expert.⁷⁴ But whether the parents' expert had met Kathleen is not relevant to the issue of whether the *district* had conducted an appropriate evaluation. Rather than place the burden of proof on the district to show its evaluation was appropriate, the ALJ compared the parents' evaluation with the district's evaluation and decided which was more thorough:

[The school psychologist's] report was not perfect. However, [her] testimony was honest and she capably explained the foundation for her opinion. When weighed against Student's criticisms, [the school psychologist's] report and testimony were given more weight [than Student's expert] due to her direct observation of Student, her reliance upon extensive school records, and her demonstrated ability to apply her experience and make a reasoned judgment as to the source of Student's deficits.⁷⁵

Because the school district had the burden of proof, it should have had to *demonstrate* that its report met the statutory requirements. The parents should not even have to use an expert to prevail.

The ALJ lost sight of the bigger picture—if the parents prevailed, then the district would have had to pay the parents' expert to conduct a full and appropriate IEE. The parents should not have to pay to conduct a full evaluation in order for the ALJ to conclude that the district did not conduct an appropriate evaluation. The ALJ's opinion was overturned, in part, by the district court, but the district court did not acknowledge the extent to which the ALJ had misallocated the burden of proof or that the school district's evaluation was inappropriate.⁷⁶

The school district's evaluation had a tremendous number of problems that, cumulatively, made it impossible to know the correct eligibility classification, or what kind of program should be put in place to assist Kathleen. I will discuss these problems with reference to the relevant statutory and regulatory requirements.

⁷⁴ *Short-Nagel ALJ Opinion*, *supra* note 44, at 16.

⁷⁵ *Id.* at 13–14.

⁷⁶ *See id.*

1. Problem One

The school district must provide a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.⁷⁷ Kathleen's parents did not receive the report until just before the April 29, 2010 IEP meeting.⁷⁸ Further, when her lawyer subpoenaed the entire assessment file, the district's records were found to be missing much of the raw data that formed the foundation for the school psychologist's report, making it impossible for the district to demonstrate that it had administered and scored the tests correctly.⁷⁹ Because Zafran, the special education teacher, had found one error in reporting one of the scores,⁸⁰ there was some evidence of sloppiness on the district's part in record keeping. Further, the subpoenaed report was different than the one that the parents received prior to the April 29, 2010 meeting because of an error in Kathleen's classroom grades.⁸¹ The school's inability to produce complete and accurate test results should have been a factor in concluding whether their testing was adequate.

2. Problem Two

Assessments are supposed to be used for the purposes for which the assessments or measures are valid and reliable.⁸² The school psychologist administered the TVPS-3 for the purpose of determining whether Kathleen had a visual processing deficit.⁸³ Her low score on one subpart of this test was the primary basis upon which the school psychologist concluded that Kathleen's problems in school were due to a deficit in "visual closure."⁸⁴ The parents' expert testified that the TVPS-3 is not considered to be a reliable assessment

⁷⁷ 34 C.F.R. § 300.306(a)(2) (2012).

⁷⁸ *Short-Nagel ALJ Opinion*, *supra* note 44, at 14.

⁷⁹ *Id.* at 15.

⁸⁰ *Id.* at 14.

⁸¹ *Id.*

⁸² 34 C.F.R. § 300.304(c)(iii) (2012).

⁸³ *Short-Nagel ALJ Opinion*, *supra* note 44, at 7.

⁸⁴ *Id.* at 16.

tool by the Buros Mental Measurement Yearbook, a reference book used by clinical psychologists to confirm the validity and reliability of assessment instruments.⁸⁵ In fact, the review cited by the parents' expert stated that "the use of this instrument beyond research purposes cannot be recommended, because of the absence of useful reliability and validity information"⁸⁶ Specifically, the review stated that "[i]nterpretation of individual subtest scores or index scores also cannot be recommended, as these scores have not been demonstrated to be psychometrically differentiable."⁸⁷ Thus, the test is overall not considered valid or reliable and, more specifically, it is not valid or reliable to use one subscore to draw this type of conclusion. Nonetheless, the ALJ concluded: "based upon her close observation of Student during the administration of TVPS-3, Ms. Menzie obtained reliable test results."⁸⁸ Menzie's "close observation" should not substitute for the requirement to use valid and reliable measures especially because the IDEA regulations also state that an examiner should "[n]ot use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability"⁸⁹ "Close observation" without *any* acceptable diagnostic tool cannot be the sole basis for a disability classification. However, the conclusion that Kathleen had a visual perceptual deficit was key to Menzie's entire report.

3. Problem Three

Assessments are supposed to be administered in accordance with any instructions provided by the producer of the assessments.⁹⁰ The school psychologist administered the basic battery of the

⁸⁵ *Id.* at 18.

⁸⁶ Phillip L. Ackerman, *Review of the Test of Visual Perceptual Skills, 3rd Edition* in Mental Measurements Yearbook with Tests in Print, available at <http://web.ebscohost.com/ehost/detail?sid=28e2f981-10b1-4501-959e-85b88d0d1e8b%40sessionmgr104&vid=1&hid=126&bdata=JnNpdGU9ZWWhvc3QtbGl2ZQ%3d%3d#db=mmt&AN=TIP18173428> (last visited Jan. 9, 2013).

⁸⁷ *Id.* at 4.

⁸⁸ *Short-Nagel ALJ Opinion*, *supra* note 44, at 24.

⁸⁹ 34 C.F.R. § 300.304(b)(2) (2012).

⁹⁰ 34 C.F.R. § 300.304(c)(1)(v) (2012).

Cognitive Assessment System (CAS).⁹¹ This test was supposed to measure Kathleen's utilization of her mental process while she focused on a particular stimulus and ignored other stimuli.⁹² Because it was the only test that the district administered that supposedly would have provided some data on whether she had attention deficit hyperactivity disorder (ADHD),⁹³ the test results were quite important. Further, the test instructions insisted that test administrators follow the instructions precisely, because any alteration could compromise the accuracy of the scores.⁹⁴ Nonetheless, the school psychologist showed Kathleen how to cross out wrong answers so that she could correct her answers and also demonstrated to Kathleen how to complete one type of question.⁹⁵ This extra assistance drew into question the reliability of the test results because it could have raised her score.

4. Problem Four

Similarly, the school psychologist failed to follow instructions when she administered the BASC-2—a test of social skills. She administered it to Kathleen's mother over a telephone while Kathleen's mother shopped at a mall, and did not try to administer it to Kathleen's father or grandmother who were important caregivers.⁹⁶ Thus, the test's administration was contrary to the instruction manual's suggestion to offer it in a “controlled setting.”⁹⁷

5. Problem Five

Additionally, a child is supposed to be assessed “in all areas related to the suspected disability”⁹⁸ Here, there was consistent, but overlooked, evidence that Kathleen might have ADHD. When

⁹¹ *Short-Nagel ALJ Opinion*, *supra* note 44, at 6.

⁹² *Id.*

⁹³ *Id.* at 12.

⁹⁴ *Id.* at 18.

⁹⁵ *Id.* at 12–13.

⁹⁶ *Id.* at 18.

⁹⁷ *Id.* at 19.

⁹⁸ 34 C.F.R. § 300.304(c)(4) (2012).

Kathleen's mother paid for a private evaluation of Kathleen in kindergarten, the examiner concluded Kathleen did not meet the criteria for ADHD.⁹⁹ Evidence of Kathleen being "unfocused or inattentive" was explained as a visual processing deficit rather than ADHD.¹⁰⁰ Similarly, the school psychologist overlooked a low subscore on the CAS, which was supposed to be reflective of an executive dysfunction.¹⁰¹ Instead of interpreting that evidence as a suggestion to administer a proper test for ADHD, the school psychologist refused to test for ADHD because of the lack of "clinically significant indications of attention issues from the BASC-2 rating scales, or from her observations"¹⁰² But that approach puts the cart before the horse. On the other hand, since the SST had considered ADHD to be a *possibility*,¹⁰³ Kathleen should have been validly assessed. The haphazard administration of the BASC-2, a test not designed to make a proper diagnosis of ADHD, did not meet the statutory standard for determining whether Kathleen had ADHD. Moreover, even her observational basis was deficient because, as the school psychologist admitted, she never visited Kathleen in the classroom during a language arts lesson that involved reading (Kathleen's area of academic weakness) to assess her attention and behavior.¹⁰⁴ In other words, there was no valid observational or assessment data in support of her decision not to test for ADHD.

6. District Court Reversal of ALJ Decision

Notwithstanding these and other problems with the school psychologist's report, the ALJ found the differences in opinion between the school psychologist and the parents' expert were based on "differences in their respective professional judgment as to the conclusions reached from test data, record, and classroom

⁹⁹ *Short-Nagel ALJ Opinion*, *supra* note 44, at 5.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 12.

¹⁰⁴ *Id.* at 13.

observations. Despite her apparent competence and candor, [parents'] expert testimony was not persuasive."¹⁰⁵

This decision was overturned on appeal, although the district court judge did not find that each of the problems discussed above demonstrated that the school district's evaluation was inappropriate.¹⁰⁶ Possibly, the judge did not issue a broader decision because of the limited scope of review available to a district court judge. Although a district court judge is supposed to conduct a "de novo review" of the administrative record, a judge is also supposed to give "due weight" to the decision of the ALJ.¹⁰⁷

The district court judge agreed with Problem One and found "that the missing files weigh in favor of the district funding an Independent Educational Evaluation."¹⁰⁸ Further, the judge partially agreed with Problem Five and found that the "insufficient classroom observation weighs in favor of the district funding an Independent Educational Evaluation."¹⁰⁹ In addition, the judge agreed with Problem Four and found that "the uncontrolled and distracted nature of the BASC-2 interview with Mother . . . weigh[ed] in favor of the district funding an Independent Educational Examination."¹¹⁰ However, the judge also described the "irregularities" as "not as problematic."¹¹¹

The district court judge did not fully agree with Problem Five and concluded: "while it appears that the District did evaluate Student in all possible areas, there are areas in which the District spent an insufficient amount of resources."¹¹² But, the judge never explained how the court evaluated Kathleen in the area of ADHD *at all* because of the faulty administration of the tests inaccurately tested for ADHD. Further, the judge did not discuss Problem Two—the use

¹⁰⁵ *Id.* at 19.

¹⁰⁶ See *Short-Nagel District Court Opinion*, *supra* note 44.

¹⁰⁷ See generally *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307 (9th Cir. 1987).

¹⁰⁸ *Short-Nagel District Court Opinion*, *supra* note 44, at 7; see also *supra* Part II.B.1.

¹⁰⁹ *Short-Nagel District Court Opinion*, *supra* note 44, at 8; see also *supra* Part II.B.5.

¹¹⁰ *Id.* at 9; see also *supra* Part II.B.4.

¹¹¹ *Short-Nagel District Court Opinion*, *supra* note 44, at 9.

¹¹² *Id.* at 11; see also *supra* Part II.B.5.

of inappropriate testing instruments—because Kathleen’s parents’ lawyer did not emphasize that problem on appeal. Therefore, following this decision, the school district may consider it appropriate to still administer the TVPS-3 for children with alleged visual processing deficits.

More troubling was the district court judge’s refusal to conclude that the ALJ inappropriately allocated the burden of proof with the language “weighing” the testimony of each of the experts.¹¹³ Instead, the district court judge interpreted that language to mean that the ALJ was merely making a “credibility determination” regarding the witnesses.¹¹⁴ This was not a case where a plaintiff and a defendant’s experts witnessed a traffic accident and the court was trying to figure out who to believe. Instead, here, the ALJ talked about “weighing” the experts’ testimony in the same sentence that also criticized the parents’ expert for not meeting Kathleen.¹¹⁵ But, the parents’ expert did not suggest that she had met Kathleen or had an independent basis for offering an evaluation based on personally-conducted assessments. The use of the word “weighing” by the ALJ suggested that she expected to hear that kind of direct testimony from the parents’ expert rather than confine the case to whether the school district had met *its* obligation to test Kathleen appropriately.¹¹⁶

Accordingly, the hearing officer placed nearly an impossible burden of proof on Kathleen’s parents in order to obtain an educational evaluation at public expense. Kathleen’s mother, a lawyer, hired a lawyer to represent her family at the due process hearing. Also, the family hired an expert who conducted an extremely thorough review of the school psychologist’s report.¹¹⁷ Since Kathleen’s family was unable to prevail before the ALJ, they appealed the decision to a federal district court judge and won a year later.¹¹⁸ Meanwhile, Kathleen, who was in second grade at the beginning of this process, would be in fifth grade by the time an IEP based on an appropriate evaluation would take place. An IEE

¹¹³ See *Short-Nagel District Court Opinion*, *supra* note 44, at 9–10.

¹¹⁴ *Id.* at 10.

¹¹⁵ *Id.* at 14.

¹¹⁶ See *id.*

¹¹⁷ See *id.* at 16.

¹¹⁸ See *id.*

requirement cannot provide parents equal “firepower” to sue school districts if it takes three years to force the school district to pay for the IEE. Further, by refusing to find that the ALJ misallocated the burden of proof, the district court did a poor job of preventing this problem in the future.

A proper evaluation is extremely important in an IEP case. Kathleen’s health insurance plan would not cover a complete psycho-educational evaluation, and her parents did not have the approximately five thousand dollars that it would cost to hire a private consultant to conduct one. Because of the strength of their case and Kathleen’s mother’s relationship to the legal community, they could find a lawyer to take their case. But, what about the other children whose parents are not able to secure a lawyer and expert to challenge the denial of an IEE? They will not have equal “firepower” if they seek to challenge an IEP. Without more rulings by the ALJ in favor of parents, we can expect California school districts to continue to resist IEE requests.

C. Other Fairness Considerations

The previous example involved a girl from a middle-class family; her parents only were able to obtain an IEE at public expense by appealing an adverse ALJ decision to a federal district court in a multi-year process. Families from less advantaged circumstances, such as those in poverty, or those non-English speakers with less education, face much greater difficulties in obtaining an adequate education plan.

The following case reflects the difficulties for children who have parents who are poor, do not speak English as their primary language, and are disabled. This case involves an eight-year-old boy, “Pedro.”¹¹⁹ Pedro lived with his mother (who was cognitively impaired), his infant sister, and grandmother (who was his legal guardian).¹²⁰

¹¹⁹ See Parent *ex rel.* Student v. L.A. Unified Sch. Dist., OAH Case No. 2011010405 (May 9, 2011) (Judith L. Pasewark, ALJ), available at http://www.documents.dgs.ca.gov/oah/seho_decisions/2011010405.pdf (last visited Jan. 9, 2013). The opinions do not provide a name for the child; I have named him “Pedro” to humanize him.

¹²⁰ *Id.* at 2.

His Spanish-speaking grandmother filed a due process complaint via an interpreter on January 4, 2011 against the Los Angeles Unified School District on Pedro's behalf.¹²¹ An advocate for individuals with developmental disabilities accompanied Pedro's grandmother to the one-day hearing, but Pedro's grandmother was not accompanied by a lawyer.¹²² The advocate was present to serve as a witness with regard to Pedro's mother's disabilities. Pedro's mother did not attend the hearing; his grandmother was the educational rights holder.¹²³ Like many cases where a lawyer does not represent the parent or guardian, the record is somewhat sparse. However, the record does suggest that the school district was not complying with the IDEA even for issues not raised at the hearing.¹²⁴ Moreover, it appears that the hearing officer applied the IDEA narrowly to rule in favor of the district. This case illustrates the need for fairness so that the parent or guardian of a child has a reasonable chance of prevailing in light of the school district's greater resources. Procedural protections should be fully available to children and their parents even if they need to use an interpreter.

Pedro was born to a mother who was cognitively impaired and grew up in a household that included his grandmother (who was his legal guardian) and his baby sister, who was born when he was about six years old.¹²⁵ The family was primarily Spanish speaking, and Pedro was non-verbal, even at the age of six.¹²⁶ At the age of three, the school district classified Pedro as "developmentally delayed," and he received special education services, which also included home to school transportation.¹²⁷

¹²¹ *Id.* at 1.

¹²² *Id.*

¹²³ *See id.*

¹²⁴ For example, it is not clear why a child, who the school district says can walk safely to a nearby grade school on his own, was placed in a segregated educational environment not at his neighborhood school. The IDEA requires that children be placed in the most integrated environment possible. *See generally* 20 U.S.C. § 1412 (a)(5) (2012).

¹²⁵ *See Parent ex rel. Student v. L.A. Unified Sch. Dist.*, *supra* note 119, at 2.

¹²⁶ *Id.*

¹²⁷ *Id.*

When Pedro turned six, at the end of kindergarten, he was no longer eligible to receive services under the “developmental delay” category.¹²⁸ As a result, the school district completed an assessment and prepared a report on June 1, 2009 that placed him in one of the school-age categories.¹²⁹ The report classified Pedro as having a Specific Learning Disability and a Speech and Language Impairment.¹³⁰ The school district should have convened an IEP meeting within thirty days of the June report to prepare an IEP that would have been in effect for first grade.¹³¹ The record did not indicate on what date the IEP team met to prepare his new IEP, but his second annual IEP meeting was held on November 15, 2010.¹³² Because IEP meetings are held once a year, presumably, the first meeting was held a year ago on November 15, 2009, four months later than required under the IDEA and three months after the beginning of the school year. This delay, which was never mentioned in the hearing officer’s opinion, suggests that the school district did not strictly comply with the law.

Pedro’s grandmother filed a due process request on January 4, 2011 because she objected to a change in transportation services recommended by the school district.¹³³ The school district wanted to change Pedro’s transportation services so that it would transport Pedro to Grape Elementary from his local grade school rather than from his home.¹³⁴ His grandmother refused to consent to that change because she considered it too difficult and unsafe for Pedro to walk to the local grade school without a family member.¹³⁵ The parties went to mediation in February 2011 and failed to come to a resolution of

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 2.

¹³¹ See 34 C.F.R. § 300.323(c) (2012) (“A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services . . .”).

¹³² Parent *ex rel.* Student v. L.A. Unified Sch. Dist., *supra* note 119, at 2.

¹³³ *Id.* at 1.

¹³⁴ *Id.* at 2–3.

¹³⁵ *Id.* at 3.

the case.¹³⁶ The record indicated that they agreed to a continuance so the case was heard on April 12, 2011 rather than February 18, 2011.¹³⁷ The record does not indicate whether the school district agreed to a “stay put” order to maintain the service pending the outcome of the hearing. The grandmother did not file a motion for a “stay put” order. Nonetheless, the school district may have voluntarily agreed to a “stay put” status quo so that the delay in the hearing did not negatively impact Pedro.

On page two of the decision, the hearing officer stated that Pedro was assigned to Grape Elementary School for his special education services; in the contested IEP, the district asked Pedro to walk to his local elementary school, 68 Street Elementary School, to receive transportation to Grape Elementary.¹³⁸ However, on page three and throughout the rest of the case, the hearing officer described the local elementary (where Pedro was asked to walk in order to catch the bus to Grape Elementary) as being Compton Elementary.¹³⁹ The hearing officer opinion does not explain this discrepancy. This discrepancy is unfortunate because the identity of the elementary school was a very important element in the case. The hearing officer concluded that the local elementary school is only six or seven blocks from Pedro’s home.¹⁴⁰ Further, the hearing officer concluded “there are no hazards on the short walk down residential streets to Compton Elementary.”¹⁴¹ The accurate identity of the local elementary school was relevant to those conclusions. More importantly, one must wonder how much specific attention the hearing officer or school district gave to the dangers of the walk itself because the correct address was not clarified in the record. I looked at these various elementary schools on a map, and they are within several blocks of an interstate highway in the Watts neighborhood. The picture of an easy walk through residential streets may therefore be highly inaccurate and is relevant to the question of whether Pedro

¹³⁶ The statute requires parties to participate in a resolution meeting or a mediation. *See generally* 20 U.S.C. § 1415(e). *See also* 34 C.F.R. § 300.506, 300.510 (describing time table for those processes).

¹³⁷ *Parent ex rel. Student v. L.A. Unified Sch. Dist.*, *supra* note 119, at 1.

¹³⁸ *Id.* at 2.

¹³⁹ *Id.* at 3, 6, 8.

¹⁴⁰ *Id.* at 3.

¹⁴¹ *Id.* at 6.

can safely walk to the local elementary school where he would then have to wait for a bus. Did the district really consider Pedro's safety as he walked to school or simply refuse to budge on this issue because it was highly confident it could prevail at a due process hearing at which it knew the grandmother would proceed *pro se*?

This case also reflects an overly rigid interpretation of the parents or guardians' burden of proof. In *Schaffer*, the Supreme Court emphasized that "IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence. IDEA, in fact, requires state authorities to organize hearings in a way that guarantees parents and children the procedural protections of the Act."¹⁴²

In Pedro's case, the ALJ should have operated the hearing in a way that gave the grandmother a realistic opportunity to prevail. She was provided with a Spanish-language interpreter¹⁴³ and given the opportunity to present four witnesses.¹⁴⁴ Even though her witnesses provided extensive evidence that it would be dangerous for Pedro to walk to the local elementary school¹⁴⁵ (and the school district offered no contradictory evidence from anyone who had seen him attempt to walk to school), the hearing officer concluded that the grandmother had not met her burden of proof.¹⁴⁶ Although the grandmother was technically allowed to *present* her evidence, nevertheless, the burden of proof was not allocated properly. She should have prevailed because, as the *Schaffer* Court indicated, she had "legitimate grievances."¹⁴⁷

Pedro's grandmother offered significant evidence in favor of keeping the present level of transportation services. Pedro's mother had indicated at the IEP meeting that Pedro "has a disregard for danger, and tries to cross the street by himself. When Mother tries to correct him or hold his hand, Student hits or bites her, and cries a lot on the way home. As a result, Mother considers Student to be a

¹⁴² *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 61 (2005).

¹⁴³ *Parent ex rel. Student v. L.A. Unified Sch. Dist.*, *supra* note 119, at 1.

¹⁴⁴ *Id.* at 2.

¹⁴⁵ *Id.* at 3.

¹⁴⁶ *Id.* at 8.

¹⁴⁷ *Schaffer*, 546 U.S. at 60.

danger to himself and others.”¹⁴⁸ An advocate for individuals with developmental disabilities, who frequently came to Pedro’s home, testified that Pedro throws “tantrums, kicks, screams and bites, while indicating he does not want to go to school.”¹⁴⁹ Pedro’s maternal aunt testified that Pedro “gets very frustrated with change and will lose control . . . When Student has to walk, he runs, and Mother cannot catch him nor can Grandmother run after him.”¹⁵⁰ She also testified that the “family is very worried that Student’s behavior at home is getting worse. He is now threatening to kill people.”¹⁵¹ Pedro’s Grandmother agreed with the other witnesses and testified “that the school bus does not always get to Compton Elementary on time. Sometimes she has to wait for the bus. Other times Student’s behavior makes him miss the bus, and she must transport Student to Grape Elementary, which is a 10-12 minute ride by the public Metro bus.”¹⁵²

The school district offered no evidence that contradicted the challenges that the family would face in walking Pedro to Compton Elementary on a daily basis. All their witnesses commented on Pedro’s behavior after he arrived at school.¹⁵³ The district offered no testimony that disputed the veracity of the Grandmother’s witnesses. Pedro’s grandmother, without assistance of counsel, therefore, seems to have done a good job putting together four witnesses who testified that it would be dangerous for Pedro to walk to Compton Elementary to catch a bus to Grape Elementary and that his resistance to change posed special dangers to this change in his services.¹⁵⁴ But, like nearly every other parent or guardian in California who proceeded on a *pro se* basis during my period of investigation, she failed. With a fairer understanding of the burden of proof, especially in cases where a school district is trying to change a particular service that it offers, parents should sometimes be able to prevail even without the assistance of legal counsel.

¹⁴⁸ Parent *ex rel.* Student v. L.A. Unified Sch. Dist., *supra* note 119, at 3.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 4–6.

¹⁵⁴ See *supra* note 154 and accompanying text.

The *Schaffer* Court, as discussed above, suggested that the burden of proof on parents is lighter when a case involves the school district trying to *change* an existing rule or policy.¹⁵⁵ While noting that Congress did not require a child to be given the parents' preferred educational placement during the pendency of *all* disputes, it recognized that the "stay-put" provision applies when parents challenge a school district decision to *change* an existing rule or policy.¹⁵⁶ In other words, through the stay-put rule, Congress did presume the validity of the parent's position when the parent was seeking to maintain the status quo, like in Pedro's case. Thus, Congress would not intend for the burden of proof, even if it is allocated to the parent, to be very high when the parent is seeking to preserve the status quo. Consistent with *Schaffer*, the grandmother should not have had a significant burden of proof in Pedro's case. Because the district had conceded in the past that such a service was appropriate, it should not require much evidence to show that it was still appropriate.

The *Schaffer* burden of proof rule was premised on a large set of assumptions about the procedural fairness found in the IDEA that could help parents overcome their information disadvantage.¹⁵⁷ Thus, it is important for hearing officers to use their discretion in a sufficiently flexible manner to help attain procedural fairness. The means to allocate the burden of proof on issues such as independent educational evaluations and continuation of services can be important to that broader sense of procedural fairness. The Supreme Court intended hearing officers to apply burden of proof rules within the larger context of providing procedural fairness. As the previous two examples demonstrate, that is not always happening in California.

III. ROWLEY

A. *General Considerations*

The next case that is worthy of careful consideration because it is often cited in California hearing officer's decisions is *Board of*

¹⁵⁵ See *supra* note 18 and accompanying text.

¹⁵⁶ *Schaffer*, 546 U.S. at 65 n. 1.

¹⁵⁷ See *supra* Part II.A.

Education v. Rowley.¹⁵⁸ That decision only applies to the issue of the adequacy of an IEP and was never intended to protect a district from an IEP challenge merely because the child is advancing from grade to grade. To understand the scope of the *Rowley* decision, it is helpful to remember the facts.¹⁵⁹

Amy Rowley was born deaf.¹⁶⁰ Before starting kindergarten, she knew sign language, as well as some lip reading.¹⁶¹ She began kindergarten shortly after Congress passed the Education for All Handicapped Children Act (EAHCA), and her parents were very committed to her receiving a public education with nondisabled children at the local public school rather than a school for the deaf, like her father had attended and where her mother had previously worked.¹⁶² The school system had some experience with the Rowley family before Amy started school and had even installed a teletype machine in the school office so they could call the Rowleys when issues arose involving their older child.¹⁶³ Although the school district's first response when contacted by the Rowleys may have been to suggest Amy attend the school for the deaf, it shifted gears pretty quickly when Amy's parents suggested otherwise.¹⁶⁴ The district contacted the state of New York to learn what kinds of services it should provide Amy so she could receive the education guaranteed by the EAHCA.¹⁶⁵

The Rowleys and the school district readily agreed on a range of services for Amy.¹⁶⁶ For example, in first grade, she would

¹⁵⁸ 458 U.S. 176 (1982).

¹⁵⁹ See generally *Rowley Archives*, ADA COORDINATOR'S OFFICE, THE OHIO STATE UNIVERSITY, available at <http://ada.osu.edu/rowley> (last visited Jan. 11, 2013); Amy Rowley, *25 Years Later: Board of Education v. Rowley: A Look At The Past And Looking Towards The Future, Putting the Pieces Together: Proceedings of the PEPNet 2008 Conference*, PEPNET (Apr. 15–18, 2008), available at <http://www.pepnet.org/sites/default/files/91%20Conf%20proceedings%202008.pdf> (last visited Jan. 9, 2013).

¹⁶⁰ Rowley, *supra* note 159, at 43.

¹⁶¹ See *Rowley Archives*, *supra* note 159.

¹⁶² See Rowley, *supra* note 159, at 42–44.

¹⁶³ *Id.* at 44.

¹⁶⁴ *Id.* at 48.

¹⁶⁵ See *Rowley Archives*, *supra* note 159.

¹⁶⁶ Bd. of Educ. v. Rowley, 458 U.S. 176, 184 (1982).

receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours per week.¹⁶⁷ She would also receive use of a FM amplification device.¹⁶⁸ Their point of disagreement stemmed over the issue of whether Amy should receive a sign language interpreter to facilitate communication between the teacher and Amy, and between Amy and the rest of the class.¹⁶⁹

Amy's parents began pushing for Amy to receive sign language interpreter services beginning in kindergarten.¹⁷⁰ When the school district communicated with the state about the need for such services, the state told the school district that such services were not necessary for a deaf child who had some lip-reading skills.¹⁷¹ Nonetheless, Amy's parents insisted that Amy receive such services.¹⁷²

In response to these parental requests, the school district agreed to conduct a trial with a sign language interpreter in February, while Amy was in kindergarten.¹⁷³ The interpreter was supposed to assist Amy for four weeks and then the school district would evaluate the effectiveness of the services.¹⁷⁴ Instead, the interpreter participated in the classroom for two weeks and suggested that the trial end because it was clear that Amy was not benefitting from the services.¹⁷⁵ In an undated report, the interpreter noted that Amy "resisted" his attempts to interpret for her except during the story-telling period for twenty minutes a day.¹⁷⁶ The interpreter reported that Amy's teacher used sign language sometimes and also used visual cues to indicate the "primary happenings" in the classroom (such as a request to lower their voices).¹⁷⁷ Although the interpreter observed that Amy did "not get everything," he also found that she

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 184–85.

¹⁷⁰ Rowley, *supra* note 159, at 44.

¹⁷¹ See Rowley Archives, *supra* note 159.

¹⁷² See Rowley, *supra* note 159, at 44.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Evaluation by Jack Janik, Interpreter for weeks of February 27 to March 3, & March 6 to March 10, available in Rowley Archives, *supra* note 159.

¹⁷⁷ *Id.*

would ask people to repeat information she had missed.¹⁷⁸ He described her teacher as “one in a million.”¹⁷⁹ He concluded:

I would like to say that as far as interpretive services are concerned, they are not needed at this time. However, this does not rule out the fact that an interpreter will be needed at a future date when the classroom work becomes more involved and large group discussion becomes the rule.¹⁸⁰

The school district did not convene an IEP meeting to discuss these results until October of Amy’s first grade.¹⁸¹ Based on the fact that the district found Amy did not benefit from the interpreter services in kindergarten, the school committee members recommended that Amy receive the services “mandated by the state” and that they then “see how she continues to perform.”¹⁸² In other words, the Committee recommended that the school district institute a plan that conformed to the state minimum requirements for a deaf child, in light of the interpreter’s report, but reconsider that plan on a yearly basis in light of Amy’s evolving educational needs. That view was consistent with the interpreter’s observation that an interpreter was not needed “at this time.”¹⁸³ After all, she was only in kindergarten when the trial was conducted.¹⁸⁴ No one was suggesting that Amy could be successfully educated throughout her schooling without an interpreter.

When Amy’s parents filed for a due process hearing in October of Amy’s first grade year, the only issue was the validity of the IEP that had been written based on the information then available, including Amy’s aptitude and academic progress and the results of

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See *Rowley Archives*, *supra* note 159.

¹⁸² District Committee on Handicapped Notes, dated October 3, 1978, available in *Rowley Archives*, *supra* note 159.

¹⁸³ See *supra* text accompanying note 180.

¹⁸⁴ See *supra* text accompanying note 173.

the kindergarten trial.¹⁸⁵ Based on this evidence, both the hearing officer and the New York Commission on Education concluded that Amy had received a “free appropriate public education” as required by the EAHCA.¹⁸⁶ Relying on regulations promulgated to interpret a different statute (Section 504), the district court reversed, concluding that Amy was “not learning as much, or performing as well academically, as she would without her handicap . . .” because “she understands considerably less of what goes on in class than she could if she were not deaf.”¹⁸⁷ Oddly, these findings were not connected to the service Amy requested—a sign language interpreter. Based on the kindergarten trial, little evidence supported the conclusion that Amy would understand more and learn more if an interpreter were present. In fact, her stubborn attempts to ignore the interpreter¹⁸⁸ (who actually frightened and annoyed her) supported the argument that her kindergarten interpreter hindered her educational progress.

The Supreme Court reversed the lower court, finding that it erred when it held that “the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided non-handicapped children.”¹⁸⁹ The Court then went on to define what it thought Congress meant by a “free appropriate public education” (FAPE) if it did not require the “maximization” standard.¹⁹⁰

Before addressing the Court’s holding in *Rowley*, it is important to remember what the case was *not* about. This case was not about whether the district conducted a proper evaluation to determine the scope of Amy’s disabilities. This case was not about whether the district should have classified Amy as disabled. Nonetheless, hearing officers often cite *Rowley* when evaluating a school district’s compliance with its Child Find obligations. That is an incorrect use of *Rowley*. Even though a district need not “maximize” a child’s education, it does have the responsibility to

¹⁸⁵ See Appendix E, Petition for Writ of Certiorari, *Rowley*, 458 U.S. 176 (No. 80-1002).

¹⁸⁶ *Id.*

¹⁸⁷ Bd. of Educ. v. *Rowley*, 458 U.S. 176, 185 (1982).

¹⁸⁸ See *Rowley Archives*, *supra* note 159.

¹⁸⁹ *Rowley*, 458 U.S. at 200.

¹⁹⁰ *Id.* at 187–91.

make sure that a “child is assessed in all areas of suspected disability.”¹⁹¹

Returning to how the Court defined the appropriate standard in *Rowley* as something lower than the “maximization” standard, it said that the State satisfied its FAPE requirement by

providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State’s educational standards, must approximate the grade levels used in the State’s regular education, and must comport with the child’s IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.¹⁹²

The Court emphasized the importance of the “personalized instruction and related services.”¹⁹³ It mentioned the “personalized instruction” twice within that paragraph.¹⁹⁴ However, hearing officers often emphasize the “passing marks” passage rather than the “personalized instruction” passage. The record of Amy receiving eight hours a week of individualized instruction and an FM system was very important to the Court concluding she was receiving an adequate IEP. Had she not been receiving those additional services, it is unlikely that her record of advancing from grade-to-grade would have been sufficient to conclude that the IEP was adequate.

Hearing officers should, therefore, not cite the “some educational benefit” from *Rowley* as if “some” is a ceiling. Read in

¹⁹¹ 20 U.S.C. § 1414(b)(3)(B) (2012).

¹⁹² *Rowley*, 458 U.S. at 203–04.

¹⁹³ *Id.* at 210.

¹⁹⁴ *Id.*

context, the Court stated that a school district must offer at least “some” educational benefit because it would make no sense to have educational dollars flow to a school district and then have the child receive “no benefit from that education.”¹⁹⁵ But the Court deleted the word “some” when it went on to describe the minimum level of educational benefit that must be provided. It said that the “basic floor of opportunity” consists of “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”¹⁹⁶ Again, as in the passage quoted above, the Court focused on the importance of access to “specialized instruction and related services.”¹⁹⁷ Similarly, the sentence concerning the “basic floor of opportunity” from *Rowley* focuses on the importance of specialized instruction and related services.¹⁹⁸ Hearing officers should not emphasize the term “basic” and ignore the need for specialized instruction and related services.

The *Rowley* Court was careful *not* to define one educational standard that constitutes the “floor” for all children. It stated: “We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.”¹⁹⁹ Instead, the Court went on to apply the legal standard to the facts in *Rowley*. The case was fairly easy under the applicable standard. Not only was Amy receiving what the Court characterized as “substantial specialized instruction,”²⁰⁰ there was not even any strong evidence in the record that her performance in kindergarten or first grade would have been stronger had she had access to a sign language interpreter. Further, the Court noted in an often-ignored footnote that: “We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school is automatically receiving a ‘free appropriate public education.’”²⁰¹ In this case, however, we find Amy’s academic progress, “*when considered with the special services and professional consideration*

¹⁹⁵ *Id.* at 201.

¹⁹⁶ *Id.*

¹⁹⁷ *Rowley*, 458 U.S. at 201.

¹⁹⁸ *Id.* at 200.

¹⁹⁹ *Id.* at 202.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 203 n. 25.

accorded by the Furnace Woods school administrators, to be dispositive.”²⁰² It would therefore be a misinterpretation of *Rowley* to emphasize grade-to-grade advancement rather than the scope of services being offered in determining whether an education is “adequate.”

By the time Amy Rowley reached fifth grade, her parents had moved to a new school district that voluntarily agreed to provide her with a sign language interpreter as part of her free public education.²⁰³ Presumably, that district concluded that Amy could not attain adequate educational benefit without a sign language interpreter, given the greater difficulty of the academic material. But that was not the record that the *Rowley* Court assessed.

Congress’s amendments to the IDEA, subsequent to the *Rowley* decision, are consistent with a broad interpretation of *Rowley*’s educational benefit standard. The IDEA’s current findings state that education for children with disabilities can be made more effective by “having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible”²⁰⁴ Although Congress did not overrule *Rowley* by requiring an education to “maximize” a child’s potential, it has instructed school districts to raise its educational expectations for children with disabilities. The Department of Education (“DOE”) has also codified the often-ignored *Rowley* footnote with the statement that children can be classified as disabled under the IDEA (and therefore entitled to a FAPE) “even though they are advancing from grade to grade.”²⁰⁵ Mere grade-to-grade advancement, under the language of *Rowley* or the DOE regulations, is therefore not sufficient evidence of a FAPE. The proper determination of FAPE can only be made on the basis of an individualized assessment of the specialized instruction and related services offered to the child in light of his or her disabilities.

²⁰² *Rowley*, 458 U.S. at 203 n. 25 (emphasis added).

²⁰³ *Rowley*, *supra* note 159, at 50.

²⁰⁴ 20 U.S.C. § 1400(c)(5)(A) (2012).

²⁰⁵ 34 C.F.R. § 300.111(c)(2) (2012).

B. Mercer Island

The Third and Sixth Circuits have interpreted the *Rowley* standard to support a “meaningful” educational benefit standard²⁰⁶ under which one would measure educational benefit “in relation to the potential of the child at issue.”²⁰⁷ California hearing officers rarely, if ever, use the adjective “meaningful” to describe the amount of educational benefit that must be accorded under the IDEA in order for an IEP to be adequate because of the Ninth Circuit’s decision in *J.L. v. Mercer Island School District*.²⁰⁸ Thus, it makes sense to look at that case closely to see that it does not stand for a narrow reading of the “adequate educational benefit” standard in *Rowley*.

Mercer Island was a case in which parents sought reimbursement for the expense of sending their child to a private, residential school in Massachusetts.²⁰⁹ After ten days of hearing, and re-argument in light of the Supreme Court’s decision in *Schaffer v. Weast*, the hearing officer in Washington State allowed the parents to present some additional evidence and ruled for the Mercer Island School District.²¹⁰ The complicated case involved a battle of the experts, in which the parents argued that their child was making little or no educational progress within the school district, and could only make adequate progress at the residential private school.²¹¹ By contrast, the school district argued that the child was making adequate educational progress and would not make better progress at the private school.²¹² The fundamental legal issue in the case was the meaning of an “adequate” education under *Rowley*, especially in light of the Supreme Court’s recent determination that the burden of proof

²⁰⁶ See, e.g., *T.R. ex rel. N.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000); *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004).

²⁰⁷ *Deal*, 392 F.3d at 862.

²⁰⁸ 575 F.3d 1025 (9th Cir. 2009).

²⁰⁹ *Id.* at 1030.

²¹⁰ In the Matter of Mercer Island Sch. Dist., Special Education Case, No. 2005-SE-0078 (Jan. 20, 2006) (Mattie Harvin-Woode, ALJ), available at <http://www.k12.wa.us/ProfPractices/adminresources/SpecEdFindings.aspx> (last visited Jan. 9, 2013).

²¹¹ See generally *Mercer Island*, 575 F.3d 1025.

²¹² *Id.*

was on the parents to demonstrate that the education offered by the school district was inadequate.²¹³ Because the Ninth Circuit had been placing the burden of proof on the school districts in such cases, this case was one of the first cases decided by the hearing officer under the new rules.²¹⁴ The hearing officer cited *Rowley* and the post-*Rowley* cases to make the long-established point that the “school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer.”²¹⁵

The hearing officer only cited cases decided before 1997 in describing the meaning of the term “adequate education.”²¹⁶ On appeal, the parents’ attorney emphasized language in the 1997 IDEA Amendments to argue that the school district did not offer their child an education that could lead to independent functioning because it set too low a standard for her reading and writing abilities.²¹⁷ They never asked the court to rule that the 1997 Amendments had overturned *Rowley*, nor did they argue that the 1997 Amendments were a new statute.

Unfortunately, the federal district court judge misunderstood the legislative history underlying the IDEA.²¹⁸ She thought that the Education for Handicapped Children Act (EHCA) and the Individuals with Disabilities Education Act were different statutes, not realizing that Congress merely renamed the EHCA to IDEA in 1990 to conform to the language used in the Americans with Disabilities Act.²¹⁹ Thus, she mistakenly concluded that Congress overturned the *Rowley* decision through enactment of the 1997 version of the IDEA.²²⁰ Citing to the findings for the 1997 Act, she

²¹³ *Id.* at 1027.

²¹⁴ In the Matter of Mercer Island Sch. Dist., *supra* note 210, at 47.

²¹⁵ *Id.* at 57.

²¹⁶ *See generally id.*

²¹⁷ Plaintiffs’ Opening Brief, *J.L. v. Mercer Island School Dist.*, No. 2:06-cv-00494-MJP (W.D. Wash. Sept. 12, 2006), *available at* <http://www.harborhouselaw.com/law/plead/wa.mercer.brief.pdf> (last visited Jan. 9, 2013).

²¹⁸ *J.L. v. Mercer Island School Dist.*, No. CO6-494P, 2006 WL 3628033 (W.D. Wash. Dec. 8, 2006).

²¹⁹ *Id.* at *4.

²²⁰ *Id.*

says that those findings are “such a significant departure from the previous legislative scheme that any citation to pre-1997 case law on special education is suspect.”²²¹ That statement was simply wrong, because there is no statement in the legislative history that indicates that Congress was overturning *Rowley* through any of its Amendments to the EHCA or IDEA.²²² The courts never conclude that Congress impliedly overturns Supreme Court interpretations of statutes. Because the district court judge was *so* wrong on the appropriate legal standard, the court of appeals had to reverse her decision.²²³

Nonetheless, it is important not to overstate the Ninth Circuit’s holding in *Mercer Island*. The Ninth Circuit recognized that there has been some inconsistency in the Ninth Circuit on the issue of how to define the required educational benefit but said that the “educational benefit,” “some educational benefit” and “meaningful” educational benefit standards all “refer to the same standard.”²²⁴ Thus, it did not disavow the approach taken in the Third and Sixth Circuits where the “meaningful” educational standard is dominant, but also recognized that it was wrong to interpret the 1997 IDEA Amendments as overturning *Rowley*.²²⁵ No other circuit has held that Congress has overturned *Rowley*, and the Ninth Circuit would have been on weak ground if it had agreed with the district court judge on that point. But it is also wrong to interpret the Ninth Circuit’s decision as invalidating the “meaningful” educational standard approach.

A good example of a correct application of the “meaningful” educational progress standard can be found in the California ALJ opinion in *Parents v. Bellflower Unified School District*.²²⁶ This complicated case involved a child, “Edward,” who was originally classified as having a speech and language impairment but was

²²¹ *Id.*

²²² See COLKER, *supra* note 6, at 93–103.

²²³ See *J.L. v. Mercer Island School Dist.*, 592 F.3d 938 (9th Cir. 2010).

²²⁴ *Id.* at 951 n. 10.

²²⁵ *Id.* at 951.

²²⁶ *Parents ex rel. Student v. Bellflower Unified School District*, OAH Case No. 2009080509 (Jan. 26, 2010) (Peter Paul Castillo, ALJ), http://www.documents.dgs.ca.gov/oah/seho_decisions/2009080509.pdf (last visited Jan. 9, 2013) [hereinafter *Bellflower ALJ Opinion*].

actually autistic with a significant cognitive impairment.²²⁷ During the time period when Edward was only classified as having a speech and language impairment, he was receiving a 30-minute speech and language session, two times a week, in a small group with two to three students.²²⁸ Despite receiving these intensive services, the school district's speech and language pathologist determined that his receptive language was in the second percentile, and his auditory comprehension was in the seventh percentile. The ALJ opinion reported that Edward had "progressed" with respect to his receptive language since his initial assessment about a year earlier; his auditory comprehension increased from a standard score of 71 in October 2006 to a 77 in February 2008.²²⁹ With respect to his expressive speech, the school district's speech and language pathologist reported that Edward scored in the first percentile;²³⁰ the ALJ found that this score reflected that he did not fall further behind his peers despite a record of numerous absences from school.²³¹ Despite this report, the school district recommended reducing Edward's speech and language therapy to fifty minutes per week, kept his original goals, and did not recommend any individual speech and language sessions.²³² The school district only agreed to increase the speech and language therapy to seventy-five minutes, including fifty minutes of individual therapy, after his parents obtained a private evaluation about six months later.

While recognizing that Edward did not fall further behind his peers with respect to expressive speech and made some minor improvement in receptive speech, the ALJ concluded that he had not made "meaningful" progress during this time period.²³³ The ALJ concluded that the school district had "failed to provide Student with sufficient speech and language services to permit Student to make meaningful educational progress until the District increased these

²²⁷ See generally *id.* The hearing officer opinion does not provide a name for the child. I have called him "Edward" to humanize the record.

²²⁸ *Id.* at 19.

²²⁹ *Id.* at 21.

²³⁰ *Id.* at 20.

²³¹ *Id.* at 21.

²³² *Id.* at 20.

²³³ *Id.* at 41.

services.”²³⁴ The evidence in this case that the school district had not provided appropriate speech and language services was so strong that the school district conceded, on appeal, that the student needed individual sessions.²³⁵ It only defended the change from sixty minutes to fifty minutes, arguing that there was no showing of harm from a ten-minute per week reduction in services.²³⁶ Although the parents had the burden of proof to demonstrate that the IEP was inadequate, the district court judge affirmed the ALJ decision in favor of the parents, in part, because the school district offered no evidence at the IEP meeting or in court as to why it *reduced* the services for a child who was already not making meaningful progress.²³⁷ Thus, the district court judge correctly interpreted *Schaffer v. Weast* in not imposing an overly harsh burden of proof on the parents. The combination of a correct reading of the definition of an adequate educational plan and the parents’ burden of proof resulted in a favorable decision for Edward.

Although Edward’s parents prevailed in this case, it is important to notice the considerable efforts they had to employ in order to obtain a successful outcome. They challenged the school district’s proposed IEP, brought a due process complaint, and then defended the successful ALJ opinion on appeal to the district court.²³⁸ They needed to pursue this multi-year process in order to prevent the school district from *reducing* the services being provided to a child who was making virtually no academic progress. They hired a lawyer and obtained a private evaluation to contest the school district’s actions.²³⁹ One can imagine that many parents would not have the resources to challenge a school district’s conduct in such a case.

²³⁴ *Id.*

²³⁵ *Bellflower Unified Sch. Dist. v. Velez ex rel. E.V.*, No. CV 10-1065-GHK (RCx), 9 (C.D. Cal. March 15, 2011), *available at* http://www.documents.dgs.ca.gov/oah/seho_decisions/2009080509%20USDC%20minutes.pdf (last visited Jan. 9, 2013) [hereinafter *Bellflower District Court Opinion*].

²³⁶ *Id.* at 10.

²³⁷ *Id.*

²³⁸ *See id.*

²³⁹ *Id.*

IV. REMEDIES FOR PROCEDURAL ERRORS

The final, important problem that is worthy of extensive discussion is the grounds upon which an ALJ can grant relief when a procedural error has occurred. The regulations provide that:

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies—

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (iii) Caused a deprivation of educational benefit.²⁴⁰

The regulations do not *require* a finding that a procedural violation led to a denial of FAPE; they merely say that a hearing officer *may* find that the procedural violation led to a denial of a FAPE.²⁴¹ Because of the discretion that appellate courts must give to hearing officer decisions, it is therefore not surprising that hearing officers need not worry that their discretionary decision will often be overturned on appeal. Nonetheless, the reluctance of hearing officers to conclude that a procedural violation resulted in the denial of a FAPE is inconsistent with the Supreme Court's emphasis in both *Rowley* and *Schaffer* on the importance of procedural compliance to the IDEA. In order for California hearing officers to start to determine that procedural violations have resulted in a denial of a FAPE, it would be helpful to know what kinds of procedural inadequacies have led other courts to determine there was a denial of FAPE. Three examples are discussed below. Two of the examples are from California cases in which the district court judge overruled the ALJ because the ALJ failed to conclude that the procedural violation caused a denial of FAPE.

²⁴⁰ 34 C.F.R. § 300.513(2) (2012).

²⁴¹ *Id.*

A. *Impeded the Child's Right to a FAPE*

A good example of a procedural problem impeding a child's right to a FAPE can be found in Edward's case against the Bellflower Unified School District in which both the ALJ and the district court judge concluded that the procedural violations resulted in a denial of FAPE.²⁴² This is a case in which the School District made many errors, including the unilateral reduction in the amount of speech and language services.²⁴³ Because the school district could offer no explanation for this reduction, the error caused Edward not to receive a FAPE.²⁴⁴ Another error was that the school district did not test Edward for autism until his parents provided them with a comprehensive assessment suggesting autism.²⁴⁵ The ALJ found in favor of the parents on this issue even though the school district had a basis for not testing for autism—that the parents kept insisting that they did not believe their child was autistic even after their pediatrician had diagnosed Edward as autistic.²⁴⁶ The ALJ found that the pediatrician's diagnosis coupled with Edward's display of behaviors that were consistent with an autism diagnosis should have triggered an autism assessment by the school district.²⁴⁷ The ALJ found that the school district had the obligation to assess Edward in all areas of suspected disability irrespective of the parents' beliefs about the appropriate diagnosis.²⁴⁸ Further, the ALJ found that the failure to assess Edward with respect to autistic-like behaviors "denied him a FAPE," because his existing IEP did not take into account his full set of disabilities.²⁴⁹

The district court judge agreed with the ALJ's conclusion that the school district failed to assess Edward for special education services related to autism.²⁵⁰ But the judge also followed the

²⁴² See *Bellflower ALJ Opinion*, *supra* note 226; *Bellflower District Court Opinion*, *supra* note 235.

²⁴³ *Bellflower ALJ Opinion*, *supra* note 226, at 41.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 7–8.

²⁴⁶ *Id.* at 11–12.

²⁴⁷ *Id.* at 37–38.

²⁴⁸ *Id.* at 37.

²⁴⁹ *Id.* at 38.

²⁵⁰ *Bellflower District Court Opinion*, *supra* note 235, at 4.

statutory requirements more closely and specifically found that this procedural error caused a loss of educational opportunity by substantively denying Edward a FAPE.²⁵¹ The judge said:

Although the ALJ did not explicitly conduct this harmless error analysis for determining whether the failure to assess denied Student a FAPE, his subsequent conclusions that Student's February 2008 and March 2009 IEPs substantively denied him a FAPE are tantamount to a finding that the failure to assess was not harmless. We agree with these factual findings, and we conclude that the District's failure to assess resulted in the loss of educational opportunity.²⁵²

This clarification by the district court judge is relatively minor but, from a precedential standpoint, is helpful to lawyers who are looking for cases in which an express finding of educational harm from a procedural error has occurred. Thus, it is fortunate that the judge clarified the legal issues. This case can serve as a model for the kind of case in which a procedural error can give rise to a remedial order—a failure to identify a disability can result in an inappropriate educational plan.

B. Denied an Opportunity to Meaningfully Participate

The denial of an opportunity to participate meaningfully is an issue frequently raised by parents because of their sense that the school district predetermined the IEP without considering the available evidence. This feeling of frustration may be particularly commonplace in California because school districts seem to often combine the eligibility meeting with the IEP meeting. Because school personnel have only a limited amount of time to attend an IEP meeting, one would expect that this process leads to rushed meetings at which parents may not feel like they can offer sufficient input.

²⁵¹ *Id.* at 5–6.

²⁵² *Id.*

An example of a case from the Los Angeles Unified School District, *J.P. v. Los Angeles Unified School District*,²⁵³ where this combined eligibility/IEP model was used, can show how it can cause harm to the child, especially when important issues are not resolved at the sole IEP meeting that is scheduled. The ALJ's opinion was overturned by the district court, also showing how difficult it can be for parents to enforce their rights.²⁵⁴ They may need to go through two stages of a multi-year process to attain justice.

This case involved a boy, who I will call "John," who had attended second through sixth grade at a private school.²⁵⁵ Despite having high cognitive aptitude, John was struggling in school and having quite significant difficulties with social interactions.²⁵⁶ Based on the advice of the private psychologist they had hired, his parents decided to contact the school district for assistance in educating their son.²⁵⁷ An eligibility/IEP meeting was held on June 10, 2008 at which the team agreed that John was eligible for special education in the autism category.²⁵⁸ The school district agreed to send John's parents a list of three schools to consider for their son in the fall because the IEP team had agreed that he needed to attend a nonpublic school.²⁵⁹ The IEP would not be finalized until the parents visited the proposed schools.²⁶⁰ Although the district usually takes two weeks to send the potential list to the parents, it did not send the list

²⁵³ Case No. CV 09-01083 MMM (MANx) (C.D. Cal. Feb. 16, 2011), available at <http://www.californiaspeciallaw.com/wiki/appeals/jp-v-laUSD.pdf> (last visited Jan. 9, 2013).

²⁵⁴ *Id.* at 65.

²⁵⁵ *Id.* at 2.

²⁵⁶ *Id.* at 3.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 16. See also generally *Parents ex rel. Student v. L.A. Unified Sch. Dist.*, OAH Case No. 2008080771 (Nov. 7, 2008) (Glynda B. Gomez, ALJ), available at http://www.documents.dgs.ca.gov/oah/seho_decisions/2008080771.pdf (last visited Jan. 9, 2013).

²⁵⁹ *Id.* at 16.

²⁶⁰ *J.P. v. L.A. Unified Sch. Dist.*, *supra* note 253, at 18.

until August 6, 2008.²⁶¹ It did not communicate with John's parents about the names of the schools that would go on that list.²⁶²

The three schools were not in session when John's mother received this information in August.²⁶³ She reviewed information about two of the schools online and decided they were not acceptable.²⁶⁴ In one school, John would have been the only seventh grader, and the emphasis of the school seemed to be behavior.²⁶⁵ In the other school, 53% of the students had been designated as emotionally disturbed.²⁶⁶ John's mother attended an open house informational session at the third school.²⁶⁷ She also visited the school twice and concluded it was not appropriate for John because the principal discouraged the use of computers, the students appeared to have severe social problems, and her son was more high functioning than the other children in the program.²⁶⁸ She sent a letter to the school district informing it that she would enroll her son at a private school not on their list—Bridges Academy—because of her disagreement with the appropriateness of the educational programs suggested by the school district.²⁶⁹ After receiving that letter, the district sent a letter to John's parents identifying a single, appropriate placement (after the school year had already begun).²⁷⁰ The person who sent that letter had not participated in the IEP meeting.²⁷¹ The letter provided no explanation for the district's decisions.²⁷²

At the due process hearing, John's parents argued that the school district had not allowed them to meaningfully participate in the selection of a school because the IEP never identified a specific program, and the list of potential schools did not arrive until a few

²⁶¹ *Id.* at 21, 22.

²⁶² *Id.* at 62.

²⁶³ *Id.* at 61–62.

²⁶⁴ *Id.* at 24.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 26–27.

²⁶⁹ *Id.* at 27.

²⁷⁰ *Id.* at 28.

²⁷¹ *Id.* at 28, 54.

²⁷² *Id.* at 23.

weeks before the beginning of the school year.²⁷³ The school district, by contrast, argued that the parents did not participate in good faith.²⁷⁴ They had paid a non-refundable tuition to a private school before receiving the list of schools from the district in August.²⁷⁵ The school district argued that the parents “were merely seeking funding for a placement choice that they had made prior to the IEP meeting.”²⁷⁶ The hearing officer ruled for the district, concluding that it was not a procedural failure for the school district to fail to make a specific offer of placement in a timely fashion.²⁷⁷

The district court overruled the hearing officer, finding that the school district’s actions precluded John’s parents from meaningfully participating in the process.²⁷⁸ The district court judge identified the following problems:

- Only a single IEP meeting occurred; there was no evidence of any meaningful discussion of placement options at that time.²⁷⁹
- The August letter was sent by a district employee who did not participate in the IEP meeting.²⁸⁰
- No final IEP meeting was ever convened to justify the September, single-offer placement letter. The person who wrote that letter had not attended the June IEP meeting.²⁸¹
- The multiple-placement offer placed an undue burden on the parent to ferret out potentially inappropriate placements, which infringes on the parents’ right to participate.²⁸²
- The school district failed to provide a formal, written offer (even by the time the ALJ rendered her decision).²⁸³

²⁷³ *Id.* at 62.

²⁷⁴ *Id.* at 36.

²⁷⁵ *Id.* at 5.

²⁷⁶ *Parents v. L.A. Unified Sch. Dist.*, *supra* note 258, at 19.

²⁷⁷ *Id.* at 19..

²⁷⁸ *J.P. v. L.A. Unified Sch. Dist.*, *supra* note 253, at 54–55.

²⁷⁹ *Id.* at 54.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

The difference of opinion between the ALJ and the district court judge seems to involve the issue of the parents' good faith. The hearing officer seemed willing to allow the district to offer the parents less opportunity to participate because of their supposed determination to send their child to a specific private school.²⁸⁴

The hearing officer's decision is surprising in light of the testimony that the parents' lawyer elicited from the school district representative who sent the August and September letters about school placement options.²⁸⁵ The school district representative testified:

that she had not followed district policy that required that she collaborate with the parents, provide support to the parents in making a selection, arrange visits to the [private] options, and explain to the parents the intake and admissions procedures at the potential [private] placements . . . [she also] conceded that a seven-week delay in receiving an offer of placement was an unusually long amount of time.²⁸⁶

Oddly, the school district claimed that it was not aware of the parents' determination to send their child to another private school during the time when it was stalling to put together an offer of a placement.²⁸⁷ So, its explanation for providing the parents a lack of an opportunity to participate was a *post hoc* explanation. Thus, if that process was typical for the School District, the District Court judge's ruling should help guide the School District prospectively with respect to how it works with parents to select an appropriate school placement. The district court judge was very clear: "the error was not technical, the error was not harmless, and J.P.'s parents were prejudiced."²⁸⁸ But it took a multi-year process for the parents to finally prevail on appeal.

²⁸⁴ *Parents v. L.A. Unified Sch. Dist.*, *supra* note 258, at 19.

²⁸⁵ *J.P. v. L.A. Unified Sch. Dist.*, *supra* note 253, at 62.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 27.

²⁸⁸ *Id.* at 55.

C. Caused a Deprivation of Educational Benefit

This category is similar to the first category except that it tends to apply when a child is not even on an IEP due to the school district's procedural errors. Thus, the child is not able to receive the kind of educational benefits that would be available under an IEP.

A 2009 California case provides an example of when procedural errors caused a deprivation of educational benefits.²⁸⁹ Due to academic and behavioral problems in school, the school district held eligibility meetings in February 2005, June 2006, and December 2006.²⁹⁰ At each meeting, the district concluded that "William" was ineligible for special education services.²⁹¹ Meanwhile, William repeated first grade; a Section 504 plan was put in place for William under which he was only expected to complete 50% of class work, and a behavior plan was also put in place.²⁹² Even with these rules in place, he completed about half of the required work (or 25% of the work altogether).²⁹³ In particular, he very much disliked writing and completed few writing assignments.²⁹⁴

William's parents thought he had ADHD and a writing impairment and that these impairments were having an adverse effect on his educational performance.²⁹⁵ They filed a due process complaint on June 20, 2007, at the end of his third grade.²⁹⁶ The ALJ ruled that the school district had complied with its Child Find obligations and that, even if William had a specific learning disability

²⁸⁹ See *W.H. ex rel. B.H. v. Clovis Unified Sch. Dist.*, No. CV F 08-0374 LJO DLB, 2009 WL 1605356 (E.D. Cal. June 8, 2009) [hereinafter *Clovis District Court Opinion*]. See also *Student v. Clovis Unified Sch. Dist.*, OAH Case No. N 2007060634, at 6 (Dec. 17, 2007) (Debra Huston, ALJ), available at http://www.documents.dgs.ca.gov/oah/seho_decisions/2007060634.pdf (last visited Jan. 9, 2013) [hereinafter *Clovis ALJ Opinion*].

²⁹⁰ *Clovis District Court Opinion*, *supra* note 289, at *3.

²⁹¹ *Id.* The child's name is not in the court's opinion. I have given him a name to humanize the discussion.

²⁹² *Id.* at *2.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at *2.

²⁹⁶ See *id.* at *3.

or other health impairment, he did not need special education and related services.²⁹⁷ William's parents appealed that determination, and a district court judge reversed the ALJ, in part, in a decision on June 8, 2009, at the end of William's fifth grade.²⁹⁸ The district court judge ruled that the "[d]istrict failed to assess Student in the area of writing and failed [to provide Student a FAPE based on its failure to identify him] as eligible for special education and related services under the category of [Other Health Impairment]."²⁹⁹ The procedural ground for relief was the deprivation of an education benefit (IEP) caused by a failure to identify William as disabled.³⁰⁰ Unlike the category one case involving Edward, the school district was not following an existing IEP; the procedural violations caused William not to have an IEP at all. A close examination of the record shows how difficult it is for parents to have the necessary "firepower" to win this kind of case.

William was identified as having ADHD in 2003, prior to beginning first grade at a public elementary school within his school district.³⁰¹ He repeated first grade so he attended first grade in both 2003–2004 and in 2004–2005.³⁰² The school district first assessed William in January and February of 2005 and held an eligibility meeting on February 22, 2005.³⁰³ The team determined that William was not eligible for special education and related services because he was making adequate progress in the regular classroom, but it also convened a Section 504 meeting (with the same group of people) and created an accommodation plan for him.³⁰⁴

The February 2005 evaluation indicated that William received a standard score of 79 on the visual motor-integration evaluation, placing him in the sixth percentile.³⁰⁵ Although that score could have been the basis for the conclusion that he had a learning disability in

²⁹⁷ *Id.*

²⁹⁸ *See id.* at *25–26.

²⁹⁹ *Id.* at *25.

³⁰⁰ *Id.* at *3–4.

³⁰¹ *Clovis ALJ Opinion*, *supra* note 289, at 3.

³⁰² *Id.* at 6.

³⁰³ *Id.*

³⁰⁴ *Id.* at 7.

³⁰⁵ *Id.* at 9.

writing, the school psychologist concluded that his writing problems were “behaviorally based” because he simply refused to write.³⁰⁶ The February 2005 evaluation also indicated that William had a standard score of 83, which is the thirteenth percentile, on a test of working memory.³⁰⁷ Although a low working memory score can be an indication that a student’s ADHD is having an adverse educational effect, the school district did not consider that score sufficient to qualify William as disabled under IDEA.³⁰⁸ The February 2005 evaluation also included an assessment in the area of social/emotional functioning.³⁰⁹ These scores reportedly placed William in the “at risk” range with respect to adaptive skills, depression and hyperactivity.³¹⁰ William’s parents’ expert testified at the due process hearing that there were numerous scoring errors with this instrument, and the ALJ observed: “Overall, [the school psychologist] did not know what the difference in Student’s BASC scores would be in the absence of the errors.”³¹¹ Despite these low scores, significant behavioral problems in the classroom, and errors in reporting test results, the ALJ concluded that the school district had no obligation to evaluate William for a behavioral disability prior to April 2006.³¹²

The ALJ opinion does not describe William’s Section 504 plan but the district court opinion states that, under the Section 504 plan, William was only required to complete 50% of the schoolwork assigned during the 2005–2006 school year (second grade).³¹³ Despite this accommodation, he only completed 50% of his accommodated work—in other words, he was completing about 25% of the work assigned to the second grade class.³¹⁴ Because William was struggling with writing, the Section 504 team met in October

³⁰⁶ *Id.* at 9.

³⁰⁷ *Id.* at 11.

³⁰⁸ *Id.* at 3.

³⁰⁹ *Id.* at 46.

³¹⁰ *Id.* at 11–12.

³¹¹ *Id.* at 12 n. 8.

³¹² *Id.* at 13.

³¹³ *Clovis District Court Opinion*, *supra* note 289, at *2.

³¹⁴ *Id.*

2005 to discuss whether William had a written language disorder.³¹⁵ Rather than suggesting testing to determine if William had a language disorder, the team relied on his second grade teacher's report that he was "probably at grade level" based on the few writing projects that William would complete.³¹⁶

Meanwhile, William began having behavioral problems. He was behaving aggressively towards other children, having tantrums in class, and not completing class work. The school district put in place a behavior support plan in February 2006; the support plan stated that his behaviors were interfering with his learning.³¹⁷ The school district began to suggest to William's parents that William might qualify as eligible for special education under the category of "emotional disturbance."³¹⁸

The school district agreed to assess William for special education eligibility in April 2006,³¹⁹ but its assessment plan was quite incomplete because it was based on the assumption that his problems in school were primarily due to an emotional disturbance. Thus, the school district did not assess William for a deficit in visual-motor integration despite the low score from the 2005 assessment in that area. Nonetheless, a private psychologist had administered a visual-motor integration test to William in November 2005, and he had obtained a standard score of 85, within the average range.³²⁰ Based on these test results, the ALJ concluded (and the district court affirmed) that the district "had no reason to suspect that Student had a disability in the area of visual-motor integration"³²¹ Unfortunately, this conclusion confuses the issue of whether there is any reason to "suspect" a disability with the substantive result after such an evaluation is completed. The change in William's standard score from 79 to 85 is likely within the confidence interval for the standard error of measurement of the testing instrument.³²² An 85 is

³¹⁵ *Id.* at *16.

³¹⁶ *Id.*

³¹⁷ *Clovis ALJ Opinion*, *supra* note 289, at 8–9.

³¹⁸ *Id.* at 9.

³¹⁹ *Id.*

³²⁰ *Id.* at 10.

³²¹ *Id.* See also *Clovis District Court Opinion*, *supra* note 289, at *16.

³²² See generally *Technical Assistance Paper: Standard Error of Measurement (SE_m)*, BUREAU OF EXCEPTIONAL EDUCATION AND STUDENT

exactly one standard deviation below the mean (100) and is barely within what can be called the “average” range. Later tests may have concluded that William did not have a visual-motor disability, but the legal question should have been whether there was any reason to *suspect* that William had a visual-motor deficit in April 2006 when the school district agreed to conduct additional testing. And such evidence did exist from both the scores of 79 and 85 within the last six months.

The April 2006 evaluation did include an attempt to evaluate William’s writing.³²³ One reason for not conducting this assessment until that time was that he was receiving grades of A and B in his classes;³²⁴ but that observation ignored that he was only completing about 25% of the class work. In fact, William was producing very little writing in class.³²⁵ The scope of his writing problems should have triggered an evaluation before April 2006.

The writing evaluation that was conducted as part of the April 2006 assessment was woefully incomplete. The school district’s resource specialist tried to get William to produce a writing sample in May 2006 but was unable to do so.³²⁶ The school district primarily based its evaluation of William’s writing abilities on his average score of 104 from the Woodcock-Johnson assessment, but that assessment did not require William to produce any sustained writing; it only required him to fill in the blanks and write simple sentences.³²⁷ The school district also had *one* piece of writing that William had produced at school on a favorite topic and with tremendous assistance from the school psychologist³²⁸—a three-paragraph, nine-sentence writing sample describing his favorite Pokémon character.³²⁹

The ALJ explained why she considered it appropriate for the school district not to conduct a thorough writing assessment in the

SERVICES, available at <http://www.fldoe.org/ese/pdf/y1996-7.pdf> (last visited Jan. 9, 2013).

³²³ *Clovis ALJ Opinion*, *supra* note 289, at 24.

³²⁴ *Id.* at 10; *Clovis District Court Opinion*, *supra* note 289, at *17.

³²⁵ *See Clovis District Court Opinion*, *supra* note 289, at *16.

³²⁶ *Id.*

³²⁷ *Id.* at *18.

³²⁸ *Id.* at *16.

³²⁹ *Clovis ALJ Opinion*, *supra* note 289, at 25.

fall of 2006 and spring of 2007. She placed weight on William's proficient score on the spring 2007 STAR exam³³⁰ even though that exam was exclusively a fill-in-the-bubble examination, did not require students to write,³³¹ and was taken under conditions of accommodation. She also placed much weight on the Pokémon writing sample that she described as having been written "without any help,"³³² ignoring the extensive assistance offered by the school psychologist to get him to complete that piece of writing.³³³ Finally, she ignored the evidence that William's writing had deteriorated even further in third grade because he "rarely produced written work in the classroom."³³⁴ Despite the absence of much evidence that William could produce grade-level writing, the ALJ credited testimony from the school psychologist that William was "capable" of doing grade-level work and that his failure to complete work was "his choice."³³⁵

The district court judge was quite critical of the ALJ's determination that William's difficulties in writing were simply a result of his "choice."³³⁶ That conclusion ignored evidence that William would "freeze up" or "shut down" when he tried to write and that he often could not even write on a topic that he enjoyed greatly.³³⁷ Similarly, it ignored his mother's testimony that he could not write even if he wanted to do so. The district court judge concluded: "At best, Student's ability to write was inconsistent and based partly on his behavior. For these reasons, writing expression was an area of suspected disability for Student, and District's child find obligation was triggered at the beginning of the relevant time period and continued throughout."³³⁸

One reason that the ALJ and the district court reached different conclusions about the adequacy of the writing evaluation is that they gave different weight to William's expert's testimony.

³³⁰ *Id.* at 16.

³³¹ *Clovis District Court Opinion*, *supra* note 289, at *17.

³³² *Clovis ALJ Opinion*, *supra* note 289, at 25.

³³³ *Clovis District Court Opinion*, *supra* note 289, at *16.

³³⁴ *Id.* at *17.

³³⁵ *Clovis ALJ Opinion*, *supra* note 289, at 16.

³³⁶ *See Clovis District Court Opinion*, *supra* note 289, at *17.

³³⁷ *Id.*

³³⁸ *Id.* at *17.

William's expert, Dr. Patterson, testified that William was unable to sustain writing effort.³³⁹ The ALJ discredited Patterson's testimony because he was unaware of the Pokémon writing sample and had not spoken with William's teachers or observed William in the classroom.³⁴⁰ These are the same kinds of errors that the Los Angeles School District raised in the case involving Kathleen—they criticized Kathleen's expert for not having personally tested her in a case involving the adequacy of the school district's evaluation.³⁴¹ But in a case involving the *adequacy* of the school district's evaluation—where the parents are seeking an independent educational evaluation or a violation of the district's child-find obligations, the parent's expert need *not* have evaluated the child at all. The parent's expert can merely review the testing done by the school district. In William's case, the expert *did* conduct an extensive evaluation of William and concluded he had ADHD and a disorder of written expression.³⁴² But William's parents should have been able to prevail merely by attacking the school district's sloppy evaluation rather than conducting an evaluation of their own. Hence, the district court concluded:

[t]he testimony of every witness supported Dr. Patterson's expert opinion that Student is unable to sustain writing effort. Thus, Student's single writing sample does not negate Dr. Patterson's professional opinion, even if he was unaware of it. In evaluating Student's written expression, District ignored the undisputed evidence that Student rarely produced written work in the classroom. The overwhelming and consistent testimony from all witnesses is that Student is impaired in written expression, sustained writing, and the initiation of writing.³⁴³

The district court judge was correct to conclude that the school district had sufficient evidence of William's writing

³³⁹ See *Clovis ALJ Opinion*, *supra* note 289, at 33.

³⁴⁰ *Id.* at 26.

³⁴¹ See *supra* notes 115–116 and accompanying text.

³⁴² *Clovis ALJ Opinion*, *supra* note 289, at 26 n. 13.

³⁴³ *Clovis District Court Opinion*, *supra* note 289, at *18.

difficulties to justify a full writing assessment. But William's witnesses need not have proved that William was *actually impaired* in written expression to justify an assessment. The district court's discussion confuses the question of whether an assessment should occur with the issue of whether the child is actually disabled.

Although William's parents eventually prevailed on this issue in the district court, it is important to emphasize how difficult it was for them to prevail. They filed the due process complaint on June 20, 2007 after more than two years of pressing the school district to identify their child as having a disorder in written expression.³⁴⁴ Their original due process hearing was scheduled for August 28, 2007, but they had to ask for a continuance because they could not get Dr. Patterson to evaluate William until August 25, 2007.³⁴⁵ The due process hearing was rescheduled for September 13, 2007, but William's parents were not able to use Dr. Patterson as an expert at that time because they had not yet shared his report with the school district.³⁴⁶ They had to ask for another continuance until October 15, 2007 so that they could share his report.³⁴⁷

The ALJ issued a decision in favor of the school district on December 17, 2007, about six months after William's parents filed their due process complaint.³⁴⁸ That decision was not overturned until June 8, 2009, when he would have completed fifth grade.³⁴⁹ And the district court merely remanded the case back to the ALJ.³⁵⁰ It is quite possible that William did not receive special education services in the area of writing for third, fourth, and fifth grades based on the ALJ's decision from 2007.

Nonetheless, the case reflects the district court (but not the ALJ) concluding that the "failure to assess Student in his writing, including determining all aspects of Student's difficulty with written expression, deprived Student of educational benefits"³⁵¹—the third

³⁴⁴ See *Clovis ALJ Opinion*, *supra* note 289, at 1.

³⁴⁵ *Id.* at 4.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 5.

³⁴⁸ See generally *id.*

³⁴⁹ See *Clovis District Court Opinion*, *supra* note 289.

³⁵⁰ *Id.* at *25.

³⁵¹ *Id.* at *18.

type of procedural error for which one can get relief under the IDEA. But, as with other cases discussed above, the parents only prevailed after pursuing a multi-year litigation process.

V. CONCLUSION

In California, as in many other jurisdictions that I examined, it is very difficult for parents to prevail at a due process hearing. Hearing officers impose a high burden of proof on parents and construe *Rowley* so as to make it very difficult to challenge the adequacy of an IEP. School districts in California also seem to be quite litigious, even challenging the child's right to an Independent Education Evaluation. I hope that closer attention to the Supreme Court's rulings in *Schaffer* and *Rowley*, along with closer consideration of situations in which relief can be ordered based on procedural violations, will cause parents to have a better chance of prevailing in California and elsewhere in the future.