

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the matter of :

STUDENT,

Petitioner,

Case No. N 2005090908

vs.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondent.

DECISION

Martha J. Rosett, Administrative Law Judge (ALJ) for the Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on January 10, 11, 12, 30th and 31st, 2006, at the offices of the Los Angeles Unified School District in Los Angeles, California.

Petitioner Student (Student) was present at the hearing on all days but January 30, 2006. Student was represented by her mother (Mother). Respondent Los Angeles Unified School District (District) was represented by its attorney, My T. Huynh. Also present throughout the hearing were District Due Process Specialist Cynthia Shimizu and District Paralegal Rita Turner.

Oral and documentary evidence was received. The record was held open for written closing and reply arguments, which were submitted by Student on February 10

and 17 and by Respondent on February 10 and 16, respectively. The record was closed and the matter was submitted for decision on February 17, 2006.

On March 24, 2006, OAH received additional documentation from Petitioner. The new evidence consisted of test scores from the Lindamood-Bell reading program, dated February 2006. This evidence was marked for identification as Petitioner's Exhibit "P19". Respondent submitted written objection to the admission of "P19". Respondent's objection was marked for identification as Respondent's Exhibit "R 10". To summarize, Respondent objected on several grounds: (1) The evidence was offered after the record had been closed, and without providing Respondent an opportunity to challenge the evidence or question witnesses proposing to introduce it into evidence; (2) at the close of hearing, the issue of admitting any further evidence was addressed and Petitioner's request for permission to do so was denied; and (3) the proposed exhibit was not provided to Respondent at least five days before hearing, in violation of 20 U.S.C. Section 1415(f)(2)(A) and California Education Code Section 56505(e)(7). Respondent's objections are sustained. No new evidence will be considered at this time.

ISSUES

The issue to be determined is whether or not District denied Student a free and appropriate public education (FAPE) for the 2005-2006 school year by failing to design an educational program to meet her individual and unique needs when it failed to (1) offer Student intensive tutoring in the Lindamood-Bell reading program to address her processing problems; and (2) implement Student's Individualized Education Program (IEP) with respect to Designated Instruction and Services (DIS) as to counseling.

FACTUAL FINDINGS

PROCEDURAL BACKGROUND

1. On September 29, 2005,¹ a two page Due Process Complaint was filed with OAH in Sacramento. On or about October 5, 2005, Student filed an amended Due Process Complaint, which included the original two pages, with additional handwritten notes, a copy of the parental participation page of the August 9, 2005 IEP, and a handwritten fax cover letter from Student's mother.

2. On September 29, 2005, Respondent filed a motion to join Inglewood Unified School District (Inglewood). This motion was denied on October 14, 2005, and a motion to reconsider it was denied on December 16, 2005.

3. On November 1, 2005, Notice of Due Process Hearing and Mediation was issued and hearing was set for November 23, 2005. On November 10, 2005, Respondent moved for a continuance, and hearing was reset, to commence on January 10, 2006, for three days.

4. Hearing was held on January 10, 11 and 12, 2006. Additional dates were needed to complete the matter, and two additional days of hearing were held on January 30 and 31st, 2006. As set forth above, following submission of written closing

¹ Reference is made in LAUSD and Student's various motions to the Due Process complaint having been filed with the Special Education Hearing Office (SEHO) prior to September 29, 2005. However, there is no direct evidence in the file, nor was there clear testimony at hearing, on this point. Therefore, the date that the Due Process complaint was filed with the OAH in Sacramento, September 29, 2005, is recited herein as the earliest date of filing.

arguments and replies, the record was closed and the matter was submitted for decision on February 17, 2006.

FACTS

5. Student is a nineteen year-old² pupil at Summit View School (Summit View), a non-public school with programs designed for special education students. She is eligible for special education services under the classification of Specific Learning Disabled (SLD), and was originally placed in Summit View as a tenth grader while she was a student residing within Inglewood. In the late spring of 2005, Student moved into the District, which led to a renewed IEP process. Although Student moved into the District, she did not change schools, but remained at Summit View.

6. On July 12, 2005, the District conducted an interim "30 day" IEP meeting to determine Student's then current level of performance and placement. Student and her mother attended, along with District psychologist and non-public school special education liaison Ms. Jacobowitz; special education teacher Mr. Davies; Student's counselor, Ms. Eskin; and administrator Barbara Rodney. In developing the July 12, 2005 IEP, the District looked to the most recent IEP in place when Student left Inglewood, and carried over the eligibility classification of SLD and placement at Summit View, along with the educational goals and related supports and services. The interim District IEP called for continued placement at Summit View, transportation, extended school year, and DIS counseling for 60 minutes per week. In the Inglewood March 2005 IEP, there was an agreement to re-assess Student to determine eligibility classification for special education; this re-assessment agreement was not picked up in the District's July 2005 IEP. However, Student and parent participated in the July 12, 2005 IEP, and expressed no

² Student turned 19 in February 2006, while these proceedings were pending

concern over the failure to include the re-assessment. Student signed the IEP on July 12, 2005, indicating her agreement.

7. On August 9, 2005, the District held an IEP team meeting. The purpose of the meeting was to perform an annual review of Inglewood's last IEP. Student's then present levels of academic achievement and functional performance were reviewed by looking at her grades, progress reports, test scores, and evaluations by teachers and service providers. Previous educational goals were reviewed.

- a. The IEP team consisted of Student and her mother, and the same school and District personnel who attended the July 2005 IEP, with the exception that Kathy Coleman attended as the administrator, rather than Barbara Rodney.
- b. In terms of written language and reading comprehension goals, as of the August 2005 IEP, the incremental benchmarks and objectives set forth in the 2004-2005 Inglewood IEP were met, although not all of the final goals were achieved. Student was passing all of her classes and it was noted that progress was made in the curriculum.
- c. In terms of unique needs, the August 2005 IEP notes that Student's learning disability impacts her ability to meet District grade level standards, "...with deficits in the areas of attention, oral expression, auditory processing, and visual-motor integration." Student has problems with understanding curriculum, memorizing and organizing information. With regards to unique social-emotional needs, Student suffers from symptoms of anger and depression which inhibit her from comprehending information, staying on task, and completing assignments. Student receives one-on-one counseling with a school therapist, once a week for sixty minutes per week.
- d. In the August 9, 2005 IEP, the District offered an educational program that included continued placement at Summit View, with accommodations to

include small classes, individualized instruction, preferential seating, extended time, use of computer/software and calculator as allowed, note taking support, limited distractions, class notes, shortened assignments, chunking down of assignments, graphic organizers, a reader, ear phones as needed, a tape recorder, books on tape, and step cards for math. In addition, the offer included an extended school year, transportation and DIS counseling for 60 minutes a week.

8. During the August 9 IEP meeting, Student and her mother had many questions and expressed concerns regarding Student's processing deficits and how they were being addressed. Student's mother did not think Student was making adequate academic progress, particularly as related to Student's reading and writing. She was particularly concerned with Student's low scores on standardized achievement tests³, which appeared to indicate that Student was performing at more than two years below grade level. Among the topics discussed at the IEP meeting was the Lindamood-Bell reading program, which Student and her mother felt was necessary to address Student's unique needs.⁴ The IEP team disagreed. They explained various interventions and accommodations which were included in the IEP report. They felt that Student was

³ See Finding 13 for more details on the Woodcock-Johnson III Tests of Achievement.

⁴ Neither the July 12 nor the August 9 IEP written reports specifically mention discussion of Lindamood-Bell or intensive tutoring in reading. The space provided in the August 9 IEP for the family's specific concerns was not filled in, other than a handwritten annotation by Ms. Jacobowitz to "fill in concerns." However, the parties testified that Lindamood-Bell was among the topics discussed during the IEP process, either in July and/or August.

making adequate academic progress, as reflected in her performance in school. Her academic performance was, however, negatively impacted by her failure to consistently do her homework and related failure to utilize the services available, including one-on-one assistance from her classroom teachers. Student, her mother and the District were not able to come to an agreement and Student did not sign the IEP at the end of the meeting.

9. On September 6, 2005, Student signed page 10 of the IEP, marking the box indicating that she disagreed with the specific instruction and services offered. She did not mark any of the other three boxes on the page, and therefore expressed no disagreement with the assessment, the eligibility or the instructional setting.

10. Subsequently, Ms. Jacobowitz assisted Student in filling out a Due Process Request complaint form, which was filed with OAH in Sacramento on September 29, 2005. Student expressed concern that she was not receiving services originally agreed to in the Inglewood IEP. She thought the District IEP should set forth more detail regarding specific instructional aids to be implemented to assist her with her "processing deficit." She wanted supports such as tutoring in the Lindamood-Bell reading program, and books on tape. Student reviewed the form with her mother, who added some handwritten notes: "*Wants/needs intensive tutoring w/Lindamood Bell processing to get reading from current 4.7comprehension to grade level (12th).*" This second version of the Due Process Request form, with a copy of page 10 of the August 9, 2005 IEP attached, was submitted to OAH on October 5, 2005.

11. Student requests intensive tutoring in the Lindamood-Bell reading program, which she argues is necessary for her to access the curriculum. At hearing, Student described her educational history, having attended five different schools between second grade and the time she entered Summit View in tenth grade. Student participated in the Lindamood-Bell program in 2002 and 2003. During that time, she was

able to improve her reading and comprehension skills substantially, and found the methodology to be very effective for her, in ways that no other program had been. Student attributes her current difficulty completing homework assignments to her inability to comprehend the content. She says that her inability to understand what she is reading frustrates her and causes her not to try. She believes that the Lindamood-Bell reading program would help her progress in the general curriculum.

12. At hearing, the District offered testimony of school personnel who described the educational program offered by the District, and why they were of the opinion that the Lindamood-Bell program would not be appropriate for Student.

13. Michael Davies is Student's case manager for IEP purposes, and was Student's 10th grade biology and reading teacher at Summit View. Mr. Davies has taught in special education for eight years and is qualified to administer and interpret academic assessments. He has a Master's Degree in Educational Psychology and a Pupil Personnel Credential in Special Education. He is also currently working on a second Master's Degree in Special Education. Mr. Davies is very familiar with Student and her academic performance and described how Student's present levels of academic performance and goals were assessed for the August 2005 IEP. The evaluation included a review of progress reports from Student's teachers, as well as the results of a battery of Woodcock-Johnson III standardized achievement tests he administered on August 3 and 4, 2005⁵.

- a. Student's present levels of performance were gleaned by Mr. Davies from discussions with Student's reading, English and math teachers, and from

⁵ This was fewer than 15 days before the IEP meeting. However, it was more than 30 days prior to Student's signing the IEP on September 6, 2005. Written consent to the assessment was signed on August 4, 2005, after the testing had commenced.

- progress reports. In the area of reading comprehension, Student was described as a "good reader," who works well in class, and "has volunteered to read her work aloud" on several occasions. "She can effectively use prior knowledge and her own experience to draw inferences and generalize about a short story or text." Her year end, eleventh grade report card, indicates that as of May 2005, Student earned an A - in reading, one of her highest grades.
- b. Mr. Davies addressed Mother's impression that Student was reading at a "4.7 comprehension". At hearing, Mother explained that she based her belief that Student was reading at a 4.7 grade level in large part on the results of the Woodcock Johnson achievement tests Mr. Davies administered to Student prior to the August IEP. Student's score on the "Letter-Word Identification" section, one sub-part of several, was assessed as being at the 4.7 grade level. Mr. Davies explained how the Woodcock Johnson test results are interpreted. He emphasized that focusing on one number, out of all the clusters of scores on the Woodcock Johnson tests, was not an accurate way to interpret Student's abilities. In the area of "Passage Comprehension," for example, Student scored at the 10th grade level. In addition, Student has consistently scored lower in "Letter-Word Identification" over the years. "Letter-Word Identification", has to do with decoding skills, which relate to the area of processing deficits, the basis for Student's classification of "learning disabled." Student's scores on this particular component might not be expected to improve substantially over time. In this case, Mr. Davies also took into consideration Student's demeanor on the days she was tested, that she seemed to be fatigued and not performing at her best. Finally, Mr. Davies emphasized that the Woodcock-Johnson scores are but one assessment tool used to make a more complete assessment of Student's academic abilities,

and therefore does not reflect a full picture of her reading comprehension skills overall.

- c. Based on his familiarity with Student, and the comments and progress reports from her classroom teachers, Mr. Davies finds Student to have stronger academic skills than reflected in the Woodcock Johnson scores. He finds that, in the area of reading comprehension, Student's abilities are within two or three years of grade level, which is within the average range for special education students. He thinks that Student would benefit from additional work in reading, developing academic skills and completing her homework assignments. Student knows she can, and does, come to her teachers for help when she does not understand an assignment or for other assistance with her homework. Mr. Davies also noted that if Student is not really interested in a class, she will not give it her best effort.
- d. Mr. Davies is familiar with the Lindamood-Bell reading program. He does not think that Student has difficulties with phonemic awareness or with synthesizing information, two areas of emphasis in the Lindamood-Bell program. Mr. Davies does not believe that providing Student with Lindamood-Bell reading program sessions is necessary for Student to access the curriculum, and thinks that the educational program offered by Summit View is appropriate.
- e. Mr. Davies testified in a straightforward, non-judgmental way. He presented himself to be a very knowledgeable, capable, and committed special education teacher and advisor. He demonstrated tremendous respect and regard for Student, and she for him. There is no reason to question his judgment with regards to assessing what program would appropriately meet Student's educational needs.

14. Nancy Rosenfelt is the director of Summit View. Her educational background includes a Bachelor's Degree in Special Education, two Master's Degrees (one in emotional disturbances and one in administration), and five Special Education credentials. She has worked in the field of Special Education for thirty-four years, fourteen of which involved classroom teaching. Ms. Rosenfelt appears to have a warm and cordial relationship with Student. Although Ms. Rosenfelt did not participate in Student's IEPs, she knows Student fairly well through their interactions over the past three years, and is familiar with Student's academic records. According to Ms. Rosenfelt, Student is, by choice, taking same grade-level classes, including chemistry, and is passing, demonstrating that she has the capability to read sufficiently to access the curriculum successfully. Ms. Rosenfelt does not think that the Lindamood-Bell reading program is necessary to assist Student in accessing the curriculum. Ms. Rosenfelt thinks Student is making adequate educational progress in her curriculum and is progressing towards a diploma. Ms. Rosenfelt is of the opinion that Student has the ability to get caught up with the program supports set forth in the August 9, 2005 IEP, and that the educational program as offered is appropriate to meet Student's unique needs. Ms. Rosenfelt is very knowledgeable and experienced in the field of special education and is very capable of assessing the needs of the students in her schools. Her opinion is given due weight.

15. Lainie Maslan has been Student's English teacher since September 2005, and believes that the educational program offered at Summit View is appropriate. Although she was not on the IEP team, Ms. Maslan described in detail methods she uses in her classes, including the special accommodations described in Student's IEPs, all of which are designed to meet the unique needs of students with specific learning disabilities. Techniques Ms. Maslan employs in her classes include providing oral explanations, as well as written outlines, to the students. She reviews vocabulary in

advance, pauses in class during readings to discuss passages, and typically reads passages aloud herself, with students following along in their own books. The classroom structure includes small class size and preferential seating for improving students' abilities to see, hear, participate, and pay attention. Other interventions, as listed in the IEP, include "chunking down" of assignments (breaking them up into small parts) and books on tape. She is available to all students before and after school, as well as during her breaks, to provide one-on-one attention, when students need extra assistance.

In terms of Student's performance during the fall semester of 2005, Ms. Maslan finds that Student does a good job processing, and is not weak in the area of reading comprehension. Student is on track to pass her class if she keeps up with the work. At the time of the hearing, the class was reading George Orwell's *1984*, a challenging piece of literature which is of the type to be included in the general education curriculum. Ms. Maslan found Student's comprehension of the book to be excellent, and she was able to grasp characters and motivation. As of Student's December 2005 progress report, she was earning a C + in Ms. Maslan's class. Ms. Maslan finds that Student's difficulties stem from her problems with following through and staying on task, rather than from problems with reading comprehension. Student can be distracted, and although she completes assignments in class, she does not always turn in her homework on time. Nor does she consistently take responsibility for bringing her books to class or using books on tape to review at home. In sum, Ms. Maslan believes that Student should be focusing on learning how to do well with the skills she has. She needs to work on her self-advocacy and time management skills. This assessment is consistent with that reflected in the progress reports and evaluations by other teachers submitted at hearing.

16. Student's grades as of the time of the August 2005 IEP were reflected in May 2005 Progress Reports. She received an A - in reading, and her eleventh grade

reading teacher, Mr. Babbitt, reported that she was "slowly" making progress with reading comprehension and understanding language as a whole. In English, Student got a C -, a passing grade. Her grade was negatively impacted by her failure to turn in assignments on time, thus missing important deadlines. Her teacher commented that, "Student needs to put forth more effort." In the 2004-2005 school year, Student missed 11 out of 158 days of her English class, and was tardy 4 times. This is contrasted with Student not having missed or been late for a single reading class, also out of 158, the class in which she received an A -. In terms of the 2005-2006 school year, as of December 2005, Student was earning an A + in reading and a C + in her English class with Ms. Maslan. Her reading teacher commented that Student, "likes to participate in class... She has good phonemic skills."

17. Student and Mother argued that Student's grades and performance on standardized tests suggest that she needs additional, intensive tutoring in reading. Mother, in particular, is dissatisfied with Student's academic performance. However, Student and Mother did not present any expert testimony or evidence to support the claim that Student needs access to the Lindamood-Bell reading program.⁶

⁶ Dr Ruth McConnell, a family friend who is both a high school teacher and a licensed psychologist, testified about her interactions with Student and Mother. It was she who recommended that the family try the Lindamood- Bell program, back in 2002. Dr. McConnell did not perform any educational testing on Student. Although she has expertise as a psychologist and as a teacher, she testified in her capacity as a friend and not as an expert witness. She believes Student would benefit from the Lindamood-Bell program, but did not express an opinion as to whether or not that program would be necessary in order for Student to access the educational curriculum.

18. As reflected in testimony at hearing and progress reports, Student's teachers find that Student has shown consistently that she can read fluently, break-down ideas and read aloud with proper intonation, pacing and pronunciation. The school and District personnel on the IEP team were in agreement that the Lindamood-Bell reading program is not a service that is necessary in order to allow Student to access the curriculum.

19. Student's counselor, Tiffany Sullivan, is a registered clinical social worker who has a Master's Degree in Social Work, with an emphasis in children and family. She has seen Student in counseling since Spring of 2005. With Student's permission and consent, Ms. Sullivan testified at hearing about the DIS counseling services. DIS services are services offered in addition to the general curriculum, designed to enable special education students to access the curriculum, and tailored to meet the unique needs of the individual student. Student meets with Ms. Sullivan for 60 minutes per week (one class period) to address Student's symptoms of anger and depression and her difficulties staying on task, completing assignments and managing her time. The weekly counseling sessions utilize conversation and motivational therapy to assist Student in setting and achieving goals. Life issues are discussed, as are strategies to cope with social and academic challenges. As of the date of hearing, since the start of the 2005-2006 academic year, Student has attended the DIS counseling sessions every week but two: one week she was absent and the other week the therapist was sick. The time has not been made up yet, but will be.

At Student's request, in early Fall, Ms. Sullivan assisted her in registering for the SAT on-line, purchasing preparation books, and setting a practice test schedule. Ms. Sullivan also graded two of Student's practice exams with her. There were seven or eight sessions between September and November, when Student took the SAT exam, and a total of 14 sessions as of the time of hearing in January. Ms. Sullivan estimates that

approximately one hour of this time, cumulatively, was spent on assisting Student with preparing for the SAT. High school seniors typically and appropriately are thinking about the future, and are worried about performance on the entrance exams. Test preparation skills also relate to time management, achieving goals and coping strategies. In Student's case, Ms. Sullivan views it as a positive indication that Student is learning to seek out people she trusts to confide in and to ask for assistance. Student easily gets along with others and is learning to recognize triggers to her anger and depression. Family relationships and relationships with peers, as well as not understanding academic material, sometimes overwhelm Student. In her counseling, she has been learning and demonstrating improvement in her coping strategies and life skills.

20. The stated purpose of the counseling, as set forth in the IEP, was to "address anger and depression" that was impeding Student's academic performance. When she entered Summit View, Student had a history of social problems with other students and, to a degree, with teachers. Since entering Summit View and attending DIS, she has developed in her social skills and gets along well with other students and teachers. Teachers all seem to hold Student in high esteem, even though they would like to see her do her homework and come to them more for assistance when needed. While these proceedings were pending, Student was selected by her peers as Homecoming Queen of Summit View.

21. Student tried to explain the connection between her reading difficulties and her ability to understand and complete her school work and assignments. Sometimes, when she has to struggle to understand, Student still gets frustrated and stops trying. However, this explanation is not entirely persuasive, or is at least incomplete. While focusing on the school program's shortcoming, Student did not offer meaningful insight into ways in which she might improve her own study habits.

22. Student attended and participated in all but one of the five days of hearing. Though her mother acted as her advocate, they worked together as a team. Student appeared to be attentive and following along throughout the proceedings, offering assistance to her mother in staying on track, organizing documents and the like. She behaved, at all times, like the adult that she has become.

APPLICABLE LAW

1. The Individuals with Disabilities Education Act (IDEA), seeks to ensure that all children with disabilities have available to them a free appropriate public education (FAPE). (20 U.S.C. § 1400 (d)(1)(A)) Pursuant to the IDEA, and State special education law, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code § 56040(a))

2. School districts must create an individualized education program (IEP) for each disabled child. (20 U.S.C. § 1414(d); Ed. Code § 56340 *et seq.*) If parents believe their child's IEP is inappropriate, they may request an impartial due process hearing. (20 U.S.C. 1415(f); Ed. Code §56501(a).) Once a child is identified as having a disability, the local education agency must identify the unique educational needs of that child by appropriate assessment, create annual goals and short-term benchmarks to meet those needs, and determine specific services to be provided. (20 U.S.C. Section 1412; Ed. Code §56345) The IDEA leaves to each State the responsibility for developing and implementing educational programs for disabled children, but imposes significant requirements in the discharge of that responsibility. (*Board of Ed. Of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, (1982) 458 U.S.176, 183.) The statute establishes a cooperative process between parents and schools. *Rowley, supra* at 205-206. The central vehicle for this collaboration is the IEP process. (*Schaffer v. Weast*, (2005) 126 S.Ct.528, 532.)

3. Parents and guardians play a significant role in the IEP process. They must be informed about and consent to evaluations of their child, must be included as members of the IEP teams, and have the right to examine any records relating to their child. In addition, parents have the right to obtain an independent evaluation of their child. (20 U.S.C. §1415(b) (1).) The California Education Code provides for the transfer of rights afforded parents of special education students to the students themselves when they turn 18. When a special education student reaches the age of 18, with the exception of an individual who has been determined to be incompetent under state law, the local educational agency shall provide any notice of procedural safeguards required by this part to both the individual and the parents of the individual. All other rights accorded to a parent under this part shall transfer to the individual with exceptional needs. (Ed. Code Section 56041.5)

4. A student's IEP must be designed to meet the student's unique needs and be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Board Of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 200.) In addition to providing specially designed instruction, the District must provide related supportive services as may be required, to assist the student to benefit from special education. A school district must provide "a basic floor of opportunity...[consisting] of access to specialized instruction and related services which are individually designed to provide educational benefit to the [child with a disability]." (*Rowley*, 458 U.S. 176 at 201.) The intent of the IDEA is to "open the door of public education" to children with disabilities; it does not "guarantee any particular level of education once inside." (*Id.* At p. 192.) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education

that maximizes the child's potential. (*Rowley, supra*, 458 U.S. at pp. 197, 200; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

5. Federal special education law requires states to establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which he is entitled and that parents are involved in the formulation of the student's educational program. (*W.G. v. Bd. Of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483.) However, procedural flaws do not automatically require a finding of a denial of FAPE (*Rowley, supra*, 458 U.S. 197; *W.G. v. Bd. Of Trustees*, 960 F.2d 1479, 1484.) Therefore, the inquiry in special education cases is twofold. The first question is whether the school district has complied with the procedures set forth in the IDEA. The second is whether the IEP developed through the procedures is reasonably calculated to enable the student to receive an educational benefit.

6. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)⁷ "An IEP is a snapshot, not a retrospective." (*Id.* at p.1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district, not on the alternative

⁷ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals has applied the analysis in *Adams* to other issues concerning an IEP (See *Christopher S. v. Stanislaus County Off. Of Education* (9th Cir. 2004) 384 F.3d 1205, 1212), and District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (*Pitchford v. Salem-Keizer School Dist. No. 24J* (D.Or. 2001) 155 F. Supp.2d 1213, 1236).

preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987), *supra*, 811 F.2d at p. 1314.)

7. To summarize *Rowley* and its progeny, in order to constitute an offer of FAPE, the educational program offered by the District must meet the following four substantive requirements: (1) be designed to meet the student's educational needs; (2) be reasonably calculated to provide the student with some educational benefit; (3) comport with the student's IEP; and (4) provide the student with an education in the least restrictive environment.

8. Student, as the petitioner, has the burden of proving her contentions at the hearing. (*Schaffer v. Weast*, (2005) 126 S.Ct. 528.)

LEGAL CONCLUSIONS

1. The District did not deny Student a free and appropriate public education (FAPE) for the 2005-2006 school years by failing to offer Student intensive tutoring in the Lindamood-Bell reading program to address her processing deficits. Rather, the District did offer Student a FAPE for the 2005-2006 school year. As to issues of reading comprehension, Student did not establish that the reading program offered by the school was deficient.

- a. As set forth in Factual Findings 6, 7, 8, 9, 13, 16 and 18 above, the District developed and offered Student an educational program designed to meet Student's unique educational needs. Summit View is a non-public school with an entire educational program, curriculum and methodologies specially designed to meet the needs of students with specific learning disabilities. Through her placement at this non-public school, Student receives a premium level of special education programs, small class sizes, and special services all addressing her unique needs, at public expense.

- b. As set forth in Factual Findings 7, 13, 14, 15 and 16 above, the curriculum, teaching methods and special services offered at Summit View are all reasonably calculated to provide, and do in fact provide, Student with a clear educational benefit. The teachers and professional staff at Summit View are trained in special education, and the programs at Summit View are carefully designed to provide Student and her classmates with even more than the "basic floor of opportunity," required under the law. Student has progressed in the curriculum, passing her courses and moving forward, on track towards her high school diploma.
- c. As set forth in Factual Findings 7, 13, 14, and 15 above, the District offered a program that comported with Student's IEP. Under the California Education Code, the District is responsible for providing the services delineated in the IEP. However, the Legislature recognizes that some pupils may not meet or exceed the growth projected in the IEP's annual goals and objectives. (Ed. Code Section 56345(c).)
- d. Educational methodology choices are left to the discretion of the local education agency, so long as the program offered provides the student with a FAPE. To constitute a FAPE, the program must be designed to address Student's unique needs. (*Rowley*, 458 U.S. at 207-208.) The District is not required to provide an alternative, such as the Lindamood-Bell reading program, or any other specific alternatives preferred by the Student or her family. In this case, Summit View school personnel established that they offered other methodologies and programs that could, and did in fact, meet Student's needs in regards to reading.
- e. As to reading comprehension, the evidence showed that Student received appropriate instruction as well as the opportunity to utilize that instruction

and reinforce her reading comprehension skills. Student failed to establish that her reading comprehension is at a 4.7 grade level, as alleged in the Due Process complaint and at hearing. The District successfully refuted this claim, as set forth in Factual Findings 13, 15 and 16 above. Student also failed to establish that she requires intensive tutoring in the Lindamood-Bell program in order to access the curriculum.

2. The District did not deny Student a FAPE for the 2005-2006 school year by failing to implement the August 2005 IEP as to DIS counseling services. As set forth in Factual Findings 7, 19 and 20 above, the evidence established that the IEP was implemented in regards to the DIS counseling, both in terms of the number of hours called for and in terms of the goals and objectives set forth in the IEP. "Designated Instruction and Services" means specially designed instruction and related services as may be required to assist a pupil with a disability to benefit educationally. 20 U.S.C. Section 1401(26)(A); 5 C.C.R. Section 60010(h). "Necessary to benefit from special education" means a service that assists the pupil with a disability in progressing toward the goals and objectives listed in the IEP. 5 C.C.R. Section 60010 (m). The stated purpose of the counseling, as set forth in the IEP, was to address "symptoms of anger and depression" which were impeding Student's academic performance. As set forth above in Factual Findings 19 and 20, not only has her DIS counseling comported with the IEP, but Student is making demonstrable progress towards her social-emotional goals for the year.

3. During the course of the Due Process hearing and related proceedings, Petitioner's mother raised, for the first time, allegations of procedural violations by the District. For example, the written consent for the assessment performed on August 3, 2005 was obtained on August 4, 2005, after the assessment was done. However, Student is and was over the age of 18 at the time of the assessment by Mr. Davies, and therefore

had educational decision making rights and was able to consent (or object) without parental consent. In addition, Mother complained that the District did not provide Student with 15 days notice to consider the results of the assessment performed by Mr. Davies before holding the IEP meeting on August 9, 2005. However, Student and her mother did have a chance to review the results of the assessment, and did express their concern verbally about Student's progress. They did not sign-off acknowledging their disagreement until a month later, during which time they were able to review the records. (See Factual Findings 9 and 13 above.)

In sum, the District did not commit procedural violations of a serious enough nature to result in a denial of FAPE. Not every procedural violation necessarily results in a denial of FAPE. In this case, neither Student nor her mother was denied an opportunity to meaningfully participate in the IEP process. In addition, no claim has been made in the Due Process Request or in arguments made since the Due Process Request was filed that suggests that Student was harmed by these alleged violations.

ORDER

Student's request for relief is hereby denied.

PREVAILING PARTY

Pursuant to California Education Code § 56507(d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: The District prevailed on all issues heard.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this

decision. California Education Code § 56505, subdivision (k).

April 19, 2006

Martha J. Rosett
Administrative Law Judge
Office of Administrative Hearings
Special Education Division