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

In the Matter of: STUDENT, Petitioner, v. TEHACHAPI UNIFIED SCHOOL DISTRICT, Respondent.	OAH NO. N 2005120939

DECISION

Administrative Law Judge (ALJ), Trevor Skarda, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on May 16, 17, 18, and 19, 2006, in Tehachapi, California.

Petitioner Student (Student) was represented by attorney Joel Aaronson. Petitioner's parents, Mother and Father, each attended the hearing on Student's behalf. Student, who is an adult, attended the hearing.

Respondent Tehachapi Unified School District (District) was represented by attorney A. Christopher Duran. Marian Stephens, Ph.D., the Superintendent of the District, was present on behalf of the District.

Student called the following witnesses to testify: Lisa Barron, school psychologist in a nearby school district, the Antelope Valley Union H.S. District; Sharon Owen, school psychologist in the District; Dr. Marian Stephens; Kurt Kuekes, Ph.D., Student's expert witness; Mother; Student.

District called the following witnesses to testify: Grace Strong, regular education teacher; Sheri Dees; regular education teacher; Stuart Mackie, regular education teacher; Carol Horst, regular education teacher; Randall Jackson, regular education teacher; Sharon Sterk, regular education teacher; Dennis Costa, special education teacher.

On January 20, 2006, Student filed an amended request for a due process hearing.[1] On May 5, 2006, ALJ Elsa H. Jones conducted a telephonic prehearing conference. On May 8, 2006, ALJ Jones issued a prehearing conference order. Sworn testimony and documentary evidence were received at the hearing on May 16, 17, 18, and 19, 2006. Upon receipt of the written closing arguments, the record was closed on June 12, 2006, and the matter was submitted.

ISSUES[2]

1. Did the District fail to fulfill its child-find obligations to Student from November 13, 2002, through May 13, 2005?[3]

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[1] The original request was filed with OAH's predecessor, the California Special Education Hearing Office (CSEHO), on April 7, 2005. In January 2006, the District filed a motion for judgment on the pleadings. Student filed the amended complaint that is the subject of this due process hearing in lieu of an opposition to the District's motion for judgment on the pleadings. Thereafter, the District objected to the sufficiency of the amended complaint. That objection was overruled on February 6, 2006.

[2] For purposes of clarity and organization, the ALJ has reorganized Student's issues as identified in Petitioner's amended due process hearing request that were clarified at the prehearing telephonic conference and again at the beginning of the due process hearing.

[3] Student withdrew his contention for the period from November 13, 2002 to September 2003, in the middle of the hearing.

2. Was Student eligible for special education and related services from November 13, 2002, through May 13, 2005, under the category of other health impairment (OHI), and if so, did the District deny Student a FAPE during that period by failing to provide Student with special education and related services?
3. Did the District fail to offer and/or provide Student a FAPE from May 13, 2005, through the date of this decision because of its failure to offer the following:

(a) an opportunity class;[4]

(b) an independent study program;

(c) one-to-one tutoring?

4. Was Student eligible for extended school year (ESY) services during the summer of 2005, and was the District's failure to offer ESY services a FAPE denial?
5. If Student prevails on any or all of Issues 2 through 4, above, is Student entitled to 324 hours of intensive educational instruction, conditioned upon Student's attendance at a community college?

CONTENTIONS OF THE PARTIES

Student contends that the District should have referred Student for a special education assessment beginning in September 2003, in large part, because of failing grades and attendance problems. The District's position is that it fulfilled its global "child-find" responsibilities – districts are required to have a continuous child-find system designed to locate children who may be eligible for special education and related services – and that it

[4] Student's requested an "opportunity class" in his original complaint. After the hearing commenced and District witnesses testified that there was no such class, Student revised his request and explained that Student required a "success skills" class in order to receive a FAPE.

also had no individual duty to refer Student for an assessment during the time period at issue.

Student contends that, from September 2003 through May 2005, Student was eligible for special education and related services as a child with an "other health impairment." Because the District found him eligible in May 2005, and provided no special education services before that date, the District denied Student a FAPE. Student argues that when the District found him eligible in May 2005, the IEP was not a FAPE because Student required one-on-one tutoring, an opportunity or "success skills" class, and/or independent study. The District argues that, although it found Student eligible in May 2005, Student was never eligible for special education and related services.

Student contends that he required extended school year (ESY) services in order to receive a FAPE. Student argues that, because he was credit deficient and in danger of not matriculating with his class, he should have received summer school. The District contends that Student was not eligible for ESY.

Student contends that because of the FAPE denials discussed above, Student requires compensatory services.

FACTUAL FINDINGS

1. Student is an eighteen-year-old adult student who resides with his parents within the geographical boundaries of the District. He voluntarily removed himself from school in October 2005, and has not returned since.

THE DISTRICT'S CONTINUOUS CHILD-FIND SYSTEM

2. Superintendent Dr. Marian Stephens testimony established that the District has written policies and procedures, including written notice to all parents of their rights and the procedures for initiating a referral for special education. Every year the District sends written notices to all parents and published notices in the local newspapers. The

notices describe the special education referral process. Teachers and other special education staff receive periodic training regarding the special education referral process.

3. Student failed to establish that the District's continuous child-find system was inappropriate from November 2002 to May 2005.

CHILD-FIND FROM NOVEMBER 13, 2002 TO SEPTEMBER 2003

4. During the hearing, after several witnesses had testified, Student's attorney withdrew all contentions/issues covering the period from November 13, 2002, to September 2003. Student lived with his grandparents in Germany during this period.[5]

CHILD-FIND DURING THE 2003 - 2004 SCHOOL YEAR

5. Student alleges that the District had a duty to locate and assess him for special education eligibility during this time period, primarily because of Student's multiple failing grades and poor attendance.

6. Student was first assessed and found ineligible for special education and related services before the 2001-2002 school year (the eighth grade). In the spring of 2001, Student's parents requested that he be assessed. The District assessed Student in May 2001. An individualized education program (IEP) team meeting convened on June 11, 2001, to review the May 2001 assessment and to discuss Student's eligibility. Despite failing grades and retention (Student repeated the seventh grade) the IEP team determined that Student was not eligible for special education and related services.

7. Student returned from Germany in the summer of 2003. He enrolled in the District on August 25, 2003. Student attended the tenth grade at Tehachapi High School beginning in September 2003.

[5] The District had an obligation to locate and assess Student when he was living with his grandparents in Germany.

8. Student received poor grades during the 2003-2004 school year. His first semester grade point average (GPA) was 1.667; Student failed Biology and he received marks of "D" in Algebra and Geometry. Student received marks of "C" in English and World History. Student's mark of "A" was in his favorite subject, Soccer. Student's second semester GPA was 1.33; he failed Geometry and World History, and received marks of "D" in Algebra and Life Science. Student's only A was, as before, in his Soccer class. Student received poor grades because he did not turn in homework and was frequently tardy or absent.

9. In July 2003, Student was evaluated by F. Donald Yutzler, Ph.D., a clinical psychologist. The previous year, Student had been diagnosed with Attention Deficit Disorder (ADD) in Germany. Dr. Yutzler also diagnosed Student with ADD, without hyperactivity. Thereafter, Dr. Yutzler provided "family therapy" to Student approximately once per month through February 2006. Dr. Yutzler's diagnosis was not shared with the District until May of 2004.

10. In February 2004, Student took the California High School Exit Examination (CAHSEE) for the first time and passed. In the areas of Algebra I, Probability and Statistics, Measurement and Geometry, Word Analysis and Literary Response and Analysis, Student answered all of the test questions correctly. Student's lowest percentage of correct answers, fifty percent, on the "Writing Strategies" portion of the CAHSEE constituted a passing score.

11. In May 2004, Dr. Yutzler completed a document titled "504 Accommodation Recommendations" which was forwarded to the District for use in development of a 504 plan for Student.[6] Dr. Yutzler recommended only minor accommodations. For instance, he

[6] A "504 plan" is a document created pursuant to the federal anti-discrimination law commonly known as Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; implementing regulations at 34 C.F.R. § 104.1 et. seq.) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments which substantially limit a major life activity (such as learning).

recommended that teachers "cue" student to copy assignments from the board and make sure Student understands directions, and that parents are notified of Student's homework assignments on a daily basis.

12. In late May of 2004, after first learning of Dr. Yutzler's diagnosis, the District convened a 504 meeting and developed a 504 plan for Student. The 504 team adopted some, but not all, of Dr. Yutzler's recommendations. Student's parents signed the 504 plan.

13. Although Student's parents had previously referred Student for an evaluation to determine Student's eligibility for special education and related services, they did not request an evaluation of Student during the 2003-2004 school year.

14. Student's teachers did not refer Student for an evaluation during the 2003-2004 school year.

15. Student failed to establish that the District had a duty to initiate a referral for special education and related services during the 2003-2004 school year. First, Student had been assessed just two years prior, and had been found ineligible for special education and related services. Moreover, although Student's grades were low, he was able to pass the CAHSEE. Additionally, Student's treating psychologist, teacher and parents did not consider referral of Student for a special education assessment. Instead, Student's treating psychologist referred Student for a Section 504 meeting, and the District developed a 504 plan for Student. The 504 plan included only minor accommodations and modifications.

CHILD-FIND DURING THE 2004-2005 SCHOOL YEAR

16. On August 20, 2004, two weeks before the beginning of the 2004-2005 school year, the District presented Student's parents with a proposed assessment plan. The District developed the assessment plan because Student's parents had expressed concerns about the 504 plan of May 2004.

17. On August 24, 2004, Student's parents rejected the District's assessment plan, indicating that they did not desire to have their son assessed for special education-eligibility at the time.

18. On September 9, 2004, Student's parents requested a follow-up 504 meeting to revise the 504 plan developed and agreed to in May 2004. Student's requested the meeting because they believed the previous 504 plan was inadequate.

19. Student's parents requested that the District assess Student's eligibility for special education and related services on September 27, 2004.

20. On September 29, 2004, the District drafted an assessment plan and submitted it to Student's parents. The assessment plan indicates that Student's suspected areas of disability were OHI and/or specific learning disability (SLD). Student's parents consented to the assessment plan the same day.

21. Thereafter, District assessed Student and convened an IEP team meeting to discuss the results of the assessment. Student did not allege at the hearing that the IEP team meeting, held in November 2004, was untimely, nor did he allege that the District failed to assess Student in all areas of suspected disability.[7]

22. Student failed to establish that the District had a legal duty to initiate a referral for special education and related services during the 2004-2005 school year. As explained above, the District fulfilled its child find obligations when it submitted an assessment plan to Student's parents in August 2004. After Student's parents initiated a referral at the end of September 2004, the District no longer had a child-find obligation. At

[7] Although Student alleges in his closing brief that the District failed to conduct an appropriate assessment of Student, he failed to raise this issue in his original request for a hearing, at the prehearing conference, or at the outset of the hearing. Accordingly, this decision does not address whether the District's initial assessment in the fall of 2004 was appropriate.

that point, the District's obligation was to timely assess Student in all areas of suspected disability. (Ed. Code § 56320.)

ELIGIBILITY UNDER THE CATEGORY OF OHI UP TO NOVEMBER 18, 2004

23. As discussed above, Student withdrew contentions/issues for the period from November 13, 2002 through August 2003, the period during which Student resided with his grandparents in Germany.

24. The Student failed to establish that Student was eligible under the category of OHI from September 2003 through November 2004. As determined above, the District did not fail to fulfill its child-find obligations during this period. Accordingly, Student was not eligible until, at the earliest, November 18, 2004, when the District held an IEP team meeting to discuss the parent-requested eligibility assessment.

ELIGIBILITY UNDER THE CATEGORY OF OHI AFTER NOVEMBER 18, 2004

25. Student argues that the District erred when it found Student ineligible for special education and related services under the category of OHI at the November 18, 2004 IEP team meeting.

26. School psychologist Lisa Barron performed the psycho-educational portion of Student's initial evaluation in October and November of 2004. Ms. Barron was an independent assessor; she was an employee of the Antelope Valley Union High School retained by the District. She interviewed Student as well as his mother. Ms. Barron also obtained input from Student's then-current teachers at Tehachapi High School. Finally, Ms. Barron assessed Student using a variety of standardized tests. Ms. Barron prepared a thorough report of her assessment results, which was shared with the IEP team on November 18, 2004.

27. Special education teacher Dennis Costa assessed Student' academic achievement in preparation for the November 2004 IEP team meeting. In addition to

administering the Woodcock-Johnson III Tests of Achievement (WJ-III), Mr. Costa observed Student in one of his regular education classes. Mr. Costa prepared a report which was shared with the IEP team on November 18, 2004.

28. On November 2, 2004, Student's mother completed a "parent questionnaire" given to her by one of the assessors. Mother reported, in relevant part, that Student spends between 10 and 30 minutes completing homework each night.

29. As discussed in Legal Conclusion 10, a child must meet three criteria to be eligible as OHI: (1) the child must have limited strength, vitality, or alertness due to a chronic or acute health problem, (2) the chronic or acute health problem must adversely affect the child's educational performance, and (3) the child must need instruction, services, or both which cannot be provided with modification of the regular school program. Student established that he had a chronic health problem (ADD) which caused "limited alertness" as of November 18, 2004.[8] As found above, Dr. Yutzler diagnosed Student with ADD in July 2004. Student's expert witness, Clinical Psychologist Kurt Kuekes, Ph.D., established that Student's long-standing ADD caused processing deficits in the area of attention. His opinion on this point was supported by both the testimony and assessment report of Lisa Barron. Ms. Barron found that his ADD caused inattention.

30. The next question is whether Student's ADD "adversely affected" his educational performance. It was undisputed by the parties that Student's extremely poor grades were caused by his failure to complete homework and his attendance problems. The crux of the dispute was whether Student's ADD caused his homework and attendance problems, or if some other factor, such as motivation, was the cause.

31. Dr. Kuekes testified that, based upon his review of Student's educational records and Dr. Yutzler's therapy notes, Student's condition affected his educational

[8] The law also requires that the disability not be "temporary in nature." There was no dispute that the pertinent condition – ADD – was long-standing.

performance because it caused him to be frequently tardy and/or absent. ADD also affected Student's "executive functioning" skills, according to Dr. Kuekes, and in turn, resulted in poor organization skills and Student's failure to complete his homework. Student was eligible at least as early as November 2004 in Dr. Kuekes' opinion, and thus, the District erred when it found him ineligible. Dr. Kuekes' opinion was supported by the fact the District found Student eligible six months after the November 2004 IEP team meeting.[9]

32. The District's expert witnesses, Ms. Barron and a second school psychologist, Sharon Owen, established that Student's lack of motivation resulted in his extremely poor educational performance, not his ADD.

33. The opinion of Ms. Barron and Ms. Owen was given more weight than that of Dr. Kuekes. Dr. Kuekes never formally assessed Student; Ms. Barron administered multiple standardized tests. Moreover, Ms. Barron and Ms. Owen communicated with Student's teachers, while Dr. Kuekes did not. Additionally, Ms. Barron and Ms. Owen's opinion was supported by the testimony of Student's teachers. The consensus of Student's teachers was that Student was capable of arriving to class on time and of completing the homework, but refused to do so. The consensus of his teachers was that he performed ably on tasks that interested him, such as technical drawing, and refused to perform on tasks that did not interest him.[10]

34. Moreover, Ms. Owen and Ms. Barron's opinion was supported by Student's testimony. Student, who has played competitive soccer for many years, testified that he would lose track of time and thus, was tardy to his academic classes. However, Student

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[9] The District did not assess Student during the interim period. There was also no evidence that Student's condition worsened in the interim period.

[10] It was undisputed that Student was and is an extremely intelligent young man – Student's intelligence quotient (IQ) is in the superior range.

testified that he was never late to soccer practices or matches. Homework, according to Student, has not been a priority.

35. Regarding the fact that the District found Student eligible six months later in May 2005, the testimony of Ms. Owen established that the District's decision to find Student eligible in May 2005 was not the decision of the majority of the District members of the IEP team at the time. Rather, the then-special education director, Dr. Michael Barricklow influenced the District members of the IEP team, including Ms. Owens, to find Student eligible because Student's parents had threatened litigation.

36. It has been found that Student's ADD did not adversely affect his educational performance and that his motivation was the primary factor behind his failing grades. As such, Student was not eligible for special education and related services as a student with an OHI as of November 2004. Nonetheless, assuming *arguendo* that Student's ADD adversely affected his academic performance, the next question would be whether Student required instruction, services, or both which could not have been provided with modification of the regular school program.

37. The testimony of Dennis Costa, Student's special education teacher, established that Student did not require special education services or instruction. Mr. Costa taught Student's resource specialist program (RSP) study skills class in the fall of 2005 up to the day that Student withdrew from school. He explained that his study skills class was unnecessary because Student was capable of organizing and completing his homework without assistance. Student simply refused to do the work.

38. Mr. Costa's testimony was supported by Student's experience. In November and December 2004, the District and parents agreed to allow Student to attend a special education RSP class at Tehachapi High School – a trial run to determine if such a class would be helpful. Student reported to the IEP team in December 2004 after the trial period that the RSP class was not helpful.

39. In sum, it has been found above that Student's ADD did not adversely affect his educational performance and that Student did not require special education and related services. As a result, Student was not eligible under the category of OHI as of November 13, 2004.

FAPE FROM NOVEMBER 13, 2003, THROUGH MAY13, 2005

40. Student was not eligible for special education and related services from November 13, 2002 through May 13, 2005. Accordingly, the District did not deny Student a FAPE during this period.

FAPE AFTER MAY 13, 2005

41. The IEP team met again on May 13, 2005, to discuss whether Student was eligible for special education and related services. The IEP team found Student eligible under the category of OHI, developed an IEP which was signed by Student, his parents and the District. Student alleges that the May 13, 2005 IEP was not a FAPE.

42. The District states, as an affirmative defense, that Student was not entitled to a FAPE because he did not meet the eligibility criteria under the category of OHI as of May 13, 2005, even though it developed and signed the IEP that states that he ***was*** eligible. The District members of the IEP team agreed to find Student eligible because Student's parents threatened litigation. Nonetheless, the District provided no legal authority, and the ALJ is not aware of any, in support of this affirmative defense. Because the District found Student eligible for special education and related services, and Student's parents consented to this determination, he was eligible for special education and related services as of May 13, 2005.

43. As discussed in Legal Conclusions 1, 2, 3 and 4, Student's placement and services must have been (1) designed to meet his unique educational needs, (2) reasonably calculated to provide him with some educational benefit, and (3) provided in conformity

with the May 13, 2005 IEP.[11] Student failed to establish that the May 13, 2005 IEP was not designed to meet his unique educational needs. Student had unique needs in the areas of organization and homework completion. The team drafted agreed-upon annual goals and short-term objectives at the IEP team meeting based upon the input of all members of the IEP team. The goals address Student's difficulties with organization and homework. The organization skills goal was that "[Student] will learn organization skills and time management skills, which will allow him to be successful in the resource and special education setting." The homework goal was that "[Student] will complete 95% of assignments in his [general education] classes as measured by observation maintaining for a period of 9 weeks and implemented by the resource specialist."[12]

44. Likewise, Student failed to establish that the May 13, 2005 IEP was not reasonably calculated to provide Student with some educational benefit. Student provided no persuasive evidence establishing that one period of RSP study skills taught by a qualified teacher was inadequate, i.e., that Student would not be able to achieve his agreed-upon goals in one years time. In contrast, the District established that the IEP *was* reasonably calculated to provide Student with some educational benefit. Mr. Costa's testimony established his RSP study skill class would have allowed Student to achieve his annual goals in one year's time, but only if Student chose to do the requisite class work and homework.[13]

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[11] The IEP must also be implemented in the "least restrictive environment" (LRE). The LRE requirement is met when a child is educated with his typically developing, non-disabled peers to the maximum extent appropriate. LRE was not at issue in the present hearing.

[12] Student did not allege that the goals and objectives were inappropriate or that they were in sufficient, i.e., that they failed to address all of Student's unique needs.

[13] Student has expressed no interest in completing the necessary homework and class work. Student has shown little if any interest in obtaining the necessary credits to

> What [the student] definitely did need was an understanding that the responsibility for [his] action lies with [him] and the knowledge that good choices usually open good doors and bad choices usually open bad doors. For the [school district's] part, this Court finds that they did make a free appropriate public education "available" to Robert, which is all that they are required to do under the IDEA. See 20 U.S.C. § 1412(a)(1)(A). Schools are not required to force or motivate students to take advantage of the education they offer -- this is the parents' role. Schools are also not required to spoon-feed students or to maximize their potential. They simply must offer a program that is reasonably calculated to confer an educational benefit upon the student. [The district] clearly fulfilled this responsibility in [student's] case as evidenced by, inter alia, [student] achieving academic distinction on his sophomore year TAAS test.

45. Finally, Student failed to establish that the District did not provide services in conformity with the May 13, 2005 IEP up to the date that Student withdrew himself from

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graduate with a regular high school diploma, despite his high I.Q., and the fact that he has already passed the CAHSEE. Indeed, Student testified that he would not return to school. While the District's obligation – one that it fulfilled – was to make a FAPE available to Student, it is unclear what, if anything, it could have offered in the form of instruction or services or both that would have altered Student's poor attitude. In a remarkably similar fact pattern, the United States District Court for the Western District of Texas held that a school district has no duty to force or motivate an unmotivated but capable student to succeed academically:

school (October 2005). Mr. Costa's testimony established that he implemented the IEP as written.

46. In sum, Student's IEP was a FAPE. It was designed to meet his unique needs, reasonably calculated to provide him with some educational benefit. Moreover, services were provided in conformity with the May 13, 2005 IEP up to the date Student withdrew from school.

47. As discussed in Legal Conclusion 4, the ALJ's FAPE analysis must focus on the adequacy of the district's proposed program, not on the program preferred by the parents. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) Because it has been determined above that the District made a FAPE available to Student, it is not necessary to discuss Student's preferred program and services, including his request for one-on-one tutoring, the success skills class, and/or independent study.[14]

EXTENDED SCHOOL YEAR SERVICES

48. As discussed in Legal Conclusion 10, ESY services are required when "interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition." (Cal. Code Regs. tit. 5, § 3043.) Student argued

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(Austin Ind. Sch. Dist. v. Robert M., 168 F. Supp. 2d 635, 640 (D. Tex. 2001).)

[14] The ALJ notes that the success skills class requested by Student is not a special education class. It is a regular education class. The fact that Student believed that a regular education class was necessary to provide Student with a FAPE is further evidence that Student was never eligible for special education. Moreover, it is unclear how Student could succeed in independent study which requires self-motivation.

that he required ESY services during the summer of 2005 because he was credit and as such, would not matriculate with his peers.

49. Student failed to establish that the interruption in services over the summer of 2005 was likely to cause regression, or that Student had a limited ability to recoup after periods without services. Indeed, Student managed to retain enough information, despite his consistent failure to complete the requisite written work or to attend class, to pass the high school exist exam as a sophomore. Student was not entitled to ESY services.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA), and the Individuals with Disabilities in Education Improvement Act of 2004 (IDEIA), 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. (Cal. Educ. Code § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the State educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1401(8)(IDEA 1997); 20 U.S.C. § 1402(9)(IDEIA 2004).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(25)(IDEA 1997); 20 U.S.C. § 1402(29) (IDEIA 2004).)

2. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, 102 S.C. 3034, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must 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. (*Id.* at 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at 201.)

3. The Supreme Court in *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the procedural inadequacies impeded the child's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); see *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

4. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district's program was designed to address Student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if Student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit.

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

6. Petitioner has the burden of proving at an administrative hearing the essential elements of his claim. (*Schaffer v Weast* (2005) 546 U.S.____[126 S.Ct. 528, 163 L.Ed

2d 387].) However, regardless of the applicable burden of proof, or any presumptions regarding the appropriateness of an IEP, as discussed below, the District established that they complied with the IDEA and concomitant State special education laws.

7. The IDEA and State law impose an affirmative duty on school districts to ensure that all disabled children who are in need of special education and related services are "identified, located, and evaluated." (20 U.S.C. § 1412(a)(3); Ed. Code § 56300). Districts are required to establish written policies and procedures for a continuous child-find system. (Ed. Code § 56301.) A district's duty is not dependent on any request by the parent for special education testing or referral for services. The duty arises with the district's knowledge of facts tending to establish a suspected disability and the need for IDEA special education services. Under State law, a child may be referred for special education only after the resources of the regular education program have been considered and, where appropriate, utilized. (Cal. Educ. Code § 56303.)

8. A "child with a disability" is a child with mental retardation, hearing impairments, speech or language impairments, visual impairments, emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities who, by reason thereof, needs instruction, services, or both which cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); Ed. Code § 56026, subd. (a), (b).)

9. To meet the eligibility requirements for special education as a child with an other health impairment (OHI), the student must have "limited strength, vitality or alertness, due to chronic or acute health problems, including but not limited to a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, severe asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases, and hematological disorders such as sickle cell anemia and hemophilia which adversely affects a pupil's educational performance. In accordance with Section 56026(e) of the Education Code, such physical disabilities shall not be temporary in nature as defined by

Section 3001(v)." (Cal. Code Regs. tit. 5, § 3030(f); see also 34 C.F.R. § 300.7(c)(9).) Additionally, as stated earlier, a child is a "child with a disability" for purposes of the IDEA only if, because of the disability, the child needs instruction, services, or both which cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3) (A); Ed. Code § 56026(a), (b).)

10. Thus, to be eligible for special education and related services under the OHI category, a child must meet three criteria: (1) the child must have limited strength, vitality, or alertness due to a chronic or acute health problem, (2) the chronic or acute health problem must adversely affect the child's educational performance, and (3) the child must need instruction, services, or both which cannot be provided with modification of the regular school program.

11. A school district is required to provide a special education student with extended school year services (ESY) services when the student requires special education and related services in excess of the regular academic year or the IEP team has determined that the student needs ESY services. "Extended year" means the period of time between the close of one academic year and the beginning of the succeeding academic year. Students eligible for ESY include the following:

> Such individuals shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition.

(Cal. Code Regs. tit. 5, § 3043.)

DETERMINATION OF ISSUES

ISSUE 1: Did the District fail to fulfill its child-find obligations to Student from November 13, 2002, through May 13, 2005?

12. As discussed in Legal Conclusion 7, the District is required to have in place a continuous child-find system, which must include written policies and procedures and written notice to all parents of the procedures for initiating a referral for a special education assessment. As determined in Factual Finding 2 and 3, the District has an established and appropriate child-find system.

13. Moreover, as determined in Factual Findings 4, 15, and 22 and Legal Conclusion 8, the District had no obligation to initiate a referral for special education for Student during the relevant time period (November 13, 2002 through May 13, 2005). As determined in Factual Finding 4, Student withdrew his contention for the period from November 2002 through August 2002. As determined in Factual Finding 15, the District had no knowledge of facts tending to establish that Student needed special education and related services and therefore no duty to refer Student for an assessment from September 2002 through the end of the 2002-2003 school year. While Student's educational performance was extremely poor during the 10th grade, he was able to pass the CAHSEE as a sophomore with excellent scores on his first attempt. Moreover, his treating psychologist, the District and his parents believed that a Section 504 Plan, i.e., accommodations and modifications, were all that were necessary to address Student's ADD, and none referred him for a special education evaluation. Regarding the 2004-2005 school year, as determined in Factual Finding 16, the District referred Student for an evaluation in August 2004, parents rejected the District's proposed assessment plan, and then made their own referral about one month later. As determined in Factual Finding 22, District's obligation was to assess Student in all areas of suspected disability after the parents signed the assessment plan – the District no longer had a "child-find" duty. (Ed. Code §56320.)

ISSUE 2: Was Student eligible for special education and related services from November 13, 2002, through May 13, 2005, under the category of other health impairment (OHI), and if so, did the District deny Student a FAPE during that period by failing to provide Student with special education and related services?

14. As discussed in Legal Conclusion 8, 9 and 10, to be eligible for special education and related services under the OHI category, a child must meet three criteria: (1) the child must have limited strength, vitality, or alertness due to a chronic or acute health problem, (2) the chronic or acute health problem must adversely affect the child's educational performance, and (3) the child must need instruction, services, or both which cannot be provided with modification of the regular school program. As determined in Factual Findings 23 and 24, and 39, Student did not meet the eligibility criteria for OHI at any time before May 13, 2005. For the period from November 13, 2002 through November 2004, the District had no duty to assess Student and he was therefore not eligible under any category, including but not limited to OHI. For the period from November 2004 through May 13, 2005, as determined in Factual Finding 39, Student did not meet the second OHI requirement listed above. His motivation, not his ADD, adversely affected his educational performance. Additionally, Student did not meet the third requirement because he did not require instruction or services that could not have been provided through modification of his regular school program. Accordingly, Student was not eligible under the category OHI from November 2004 through May 13, 2005.

ISSUE 3: Did the District fail to offer and/or provide Student a FAPE from May 13, 2005, through the date of this decision?

15. As discussed above in Legal Conclusion 1, 2, 3 and 4, Student's placement and services must have been (1) designed to meet his unique educational needs, (2) reasonably calculated to provide him with some educational benefit, and (3) provided in conformity with the May 13, 2005 IEP. As determined in Factual Finding 46, the May 13,

2005 IEP met all three requirements. Therefore, the District offered Student a FAPE from May 13, 2005, through the date of this decision.

ISSUE 4: Was Student eligible for extended school year (ESY) services during the summer of 2005, and was the District's failure to offer ESY services a FAPE denial?

16. As determined in Factual Findings 48 and 49 and as discussed in Legal Conclusion 11, Student was not eligible for ESY during the summer of 2005.

ISSUE 5: If Student prevails on any or both of Issues 2 through 4, above, is Student entitled to 324 hours of intensive educational instruction, conditioned upon Student's attendance at a community college?

17. Student did not prevail on any of Issues 2 through 4. Accordingly, Student is not entitled to any of the relief he seeks.

ORDER

All of Student's requests for relief are denied.

PREVAILING PARTY

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

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. (Cal. Ed. Code § 56505, subd. (k).)

IT IS SO ORDERED THIS 28th DAY OF June 2006.

TREVOR SKARDA

Administrative Law Judge

Office of Administrative Hearings

Special Education Division