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

STUDENT, Petitioner, Vs. GARDEN GROVE UNIFIED SCHOOL DISTRICT, Respondent.	OAH No. N2005060648

DECISION

This matter was scheduled to commence before Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, Special Education Division, at Garden Grove, California on January 9, 2006. On January 9, 2006, Jabari Willis Esq. appeared on behalf of respondent to request a continuance of the hearing because Justin R. Shinnefield, counsel assigned to represent respondent, had suffered a back injury and was unavailable for hearing.[1] Student's counsel, N. Jane DuBovey, Esq., opposed respondent's continuance motion. After hearing argument by the attorneys, the ALJ continued the matter for 24 hours, for good cause, so that another attorney from the

[1] Mr. Willis and Mr. Shinnefield are both attorneys with the law firm representing respondent, Atkinson, Andelson, Loya, Ruud & Romo, a Professional Corporation.

law firm representing respondent could be assigned to the matter. Consequently, the matter came on regularly for hearing on January 10, 11, 12, 13, 23, 24, and 25, 2006.

N. Jane Dubovy, Esq. represented student, who appeared by and through his aunt, who has had educational custody over student since October 20, 2003.

Brian Sciacca, Esq. and Jabari Willis, Esq. represented the Garden Grove Unified School District (respondent/district) on January 10, 11, 12, and 13, 2006. The matter did not finish by the end of the business day on January 13, 2006 and was continued for good cause until January 23, 2006.

Justin R. Shinnefield, Esq. represented the district on January 23, 24, and 25, 2006.

Oral and documentary evidence was received, the record was left open, and the matter was continued for good cause until February 6, 2006, so that the parties could submit written closing arguments/briefs.

PROCEDURAL-HISTORY

On June 14, 2005, student filed a request for due process, and a due process hearing was scheduled for July 7, 2005. On June 27, 2005, the parties agreed to take the matter off-calendar. On September 27, 2005, student requested that the matter be placed back on calendar. The due process hearing was scheduled to commence on January 9, 2006, however, it was continued for good cause until January 10, 2006, due to unavailability of respondent's attorney. On January 10, 2006, the due process hearing commenced and the 45-day period began to run. (Ed. Code § 56502, subd. (f).) The due process hearing occurred on January 10, 11, 12, and 13, 2006. The due process hearing was then was continued for good cause until January 23, 2006. The hearing reconvened on January 23, 2006 and lasted through January 25, 2006, before being continued for good cause so that the parties could provide written closing argument/briefs. As of January 25, 2006, seven of the 45-day time period for issuing a final decision had run,

leaving a balance of 38 days. The written closing arguments/briefs were received, read and considered, the matter was deemed submitted on February 6, 2006, and the remaining 38-day period for issuing a final decision commenced.

ISSUES

The following issues were raised by the instant petition:

1. Was student properly assessed in all areas of suspected disability?

2. Did the district deny student a free and appropriate public education (FAPE) by violating the procedural requirements of state law and the federal Individuals with Disabilities Education Act (IDEA) relative to development of student's initial, September 12, Individual Education Program (IEP), and the June 9, 2004 addendum to the September 12, 2003, IEP?

3. Did the district fail to provide student a FAPE during the 2003-2004, 2004-2005, and 2005-2006 school years?

4. Does the Office of Administrative Hearings have jurisdiction to enforce the corrective measures ordered by the California Department of Education as the result of a2004 compliance investigation action?

FACTUAL FINDINGS

1. Student, whose date of birth is June 6, 1994, is an eleven-year-old male.

2. Student was receiving special education and related services from Tehachapi Unified School District (Tehachapi) during the 2002-2003 school year, based on diagnoses of autism and attention deficit hyperactivity disorder (ADHD). Just prior to September of 2003, student moved from the Tehachapi school district to the Garden Grove Unified School District, and on October 20, 2003, student's aunt was given guardianship over student's educational rights.

3. On August 28, 2003, student moved from Tehachapi and began living with his father and his aunt in the Garden Grove area. On August 29, 2003, student's aunt registered student at a district school, Cook school (Cook). District personnel told student's aunt that they needed a current IEP. Student's aunt obtained a current IEP from Tehachapi and provided a copy of the IEP to district personnel on September 2, 2003. That same day, student's aunt was told that there would be a meeting on September 12, 2003, to discuss student's placement. According to student's aunt, she was not notified that the September 12, 2003 meeting was actually an IEP meeting, however, at the time, student's father still had full custody of student; student's aunt had not yet been appointed as guardian of student's educational rights. On September 12, 2003, the district conducted an IEP meeting to determine an appropriate placement for student and to develop and implement appropriate programs, supports and/or interventions. Student's father and his aunt attended the IEP meeting, participated in the meeting, and signed that they consented with the IEP development and the recommended placement. The IEP documents indicate that student's father and aunt requested that student be fully included in a regular education second-grade classroom setting "as per current IEP." The "current IEP" was the June 5, 2002 IEP from Tehachapi. That IEP provided that student receive the following relevant services, supports and accommodations: instructional assistant support to provide help with transitions and instruction; shortened assignments; preferred seating; larger table; full inclusion in a general education classroom; 90 percent of the time in general education and 10 percent of the time in special education; resource specialist program (RSP); speech and language (S&L) two times per week for 20 minutes each session; occupational therapy (OT) three times per week for 30 minutes each session; physical therapy (PT) three times per week for 30 minutes per session; and the presence of a community college counselor in the classroom to "provide help." Based on the IEP from Tehachapi, the

participants at student's September 12, 2003 district IEP meeting agreed to the following services, supports and accommodations: an aide/instructional assistant to provide help with student's transition and classroom instruction for three and one-half hours per day on a 30-day trial basis; full inclusion in a general education classroom; up to 15 percent of the time in special education; RSP; S&L two times per week for 30 minutes each session; OT three times per week for 30 minutes each session; and PT three times per week for 30 minutes per session. A comparison of the Tehachapi IEP and the district's IEP reveals that the district's program was a continuation of the programs provided by Tehachapi. The district's offer was clear and cohesive and contained sufficient detail to allow student's father and aunt to meaningfully participate in the IEP process. The district's September 12, 2003 IEP process resulted in provision of services, supports, and accommodations to student which were reasonably anticipated to provide student with a FAPE.

4. On October 17, 2003, another IEP meeting was held to assess the appropriateness of student's placement. Although student's aunt had not yet obtained guardianship she was, nonetheless, notified of the IEP meeting, which she attended. Student's aunt fully participated in the IEP meeting. Student's aunt deferred signing the IEP document until October 31, 2003, after she had been awarded educational guardianship. When she signed the IEP, student's aunt indicated that she agreed with the IEP "except OT." Ultimately, on November 28, 2003, student's aunt filed a compliance complaint with the California Department of Education (the department). The department investigated student's complaints and, in a February 2, 2004 compliance investigation report, the department ordered that the district take certain "required corrective actions," including the resumption of OT and PT services. The district requested reconsideration. As of the date of the instant hearing, the department had not yet ruled on the district's reconsideration motion.

5. During the 2003-2004 school year student progressed both academically and socially in his second-grade class. At first, it was difficult for student to complete academic tasks, and socially, he was "really dependent" on his teacher. As of January 15, 2004, student was showing growth academically although he still needed "supports and accommodations." Socially, student seemed more comfortable with the other students in his class; he communicated with them more and participated in small group interactions. During recess, however, student did not interact with the other children. Student seemed interested in what the other children were doing during recess, but he did not participate with them in any activities. On March 4, 2004, an IEP meeting was held to discuss student's "service levels." The IEP meeting participants discussed adding some aide time in the morning, before class began, to prepare student for the day's reading and math activities. As a result of the discussions the following aide services were added to the three and one-half hours of aide time student was already receiving: 30 minutes of aide services in the morning, before class; and one hour of aide services during classroom reading comprehension time. Consequently, student began receiving five-hours of aide support during his school day. Student's aunt attended the March 4, 2004 IEP meeting, participated in the meeting, and agreed with the recommended level of aide services. On May 24, 2004, another IEP meeting was held to discuss OT. There was an education advocate and an attorney present to assist student's aunt during the May 24, 2004 IEP meeting. As a result of the meeting student's aunt wanted the district to switch provision of OT services from the district to a private provider. The IEP team agreed to the requested switch in OT services. An overall assessment of student's progress during the second grade (2003-2004) reveals that student progressed well both academically and socially. According to student's second-grade teacher, she saw a "tremendous change" in student. The classroom accommodations helped student "grow." Student's progress during the 2003-2004 school-year is reflected on his report

card, by his teacher's observations, and by his progress in meeting the academic and social goals established by his then current IEP.

6. Student's aunt lived near the school. She could see the playground area where the children had recess and she occasionally saw student on the playground during recess. He did not seem to be actively participating in recess activities with the other children. Student's aunt noticed that student would stand by the swings or tether-ball pole in isolation. He did not seek out other children and try *to* engage them in play. Consequently, student's aunt began considering some type of social/emotional interventions/accommodations. Student's aunt became aware of "recreational therapy" and, on December 3, 2004, she sent a letter to the district requesting a "recreational therapy assessment" for student. On December 17, 2004, the district responded to student's aunt's request for a recreational therapy assessment. In pertinent part, the district informed student's aunt:

> The District maintains that it has assessed in all suspected areas of disability and has provided services to meet the unique needs of [student] based on those assessments. Based upon the District's assessments, the IEP process, and the methodologies and programs offered, the District maintains that it has appropriately met its obligation to offer FAPE (free and appropriate public education) for [student]. The District has addressed [student's] needs for strategies and coping skills with peers at school through adapted P.E. and Intensive Behavioral Instruction (IBI) programs. (Student's Exhibit 36.)

By letter, dated December 27, 2004, student's aunt advised the district that, based on student's "unique needs," she believed a recreational therapy assessment was warranted. Student's aunt stated: "This letter is to notify you I am going forward with the assessment for Recreational Therapy and will seek reimbursement from the district." (Student's Exhibit 37.) On January 12, 2005, student's aunt notified the district that student would be "receiving a Recreational Therapy assessment on Friday, January 14, 2005." (Student's Exhibit 40.) The recreational therapy assessment was conducted by Cynthia D. Ferber, C.T.R.S., on January 14, 2005. Ms. Ferber's therapy evaluation report, dated January 22, 2005, was shared with the district. In fact, Ms. Ferber attended student's February 17, 2005 and March 4, 2005 IEP meetings, presented the results of her assessment, answered questions, and made program recommendations. Student's aunt paid Ms. Ferber $700.00 for the therapy assessment.

7. The district's IBI Supervisor agreed with the recreational therapist's recommendation to provide support for student during the less structured, non-academic, portions of the school-day. In a report, dated February 16, 2005, the district's IBI Supervisor noted that student's "current need for intensive behavioral instruction is in the area of socialization." In pertinent part, the IBI supervisor states:

> It is the recommendation of this IBI supervisor that [student's] IBI services be shifted from the academic portions of his day to those involving social-play interactions with his peers. These services would be rendered as follows: IBI support will be on the school campus to monitor [student's] behavior before school (for the duration of the 15 minute arrival playground period), during all recess periods, and lunch. The IBI caseworker will intervene when [student's] behavior consists of any of the following: 1.) Inappropriate

proximity to others, 2.) Inappropriate physical contact with others, 3.) Preservation on feedback. This intervention would include social stories on appropriate behavior and responses to situations, and/or of role-play activities to give [student] examples of appropriate actions. (District's Exhibit 32.)

8. During the February 17, 2005 and March 4, 2005 IEP meetings Ms. Ferber and the district's IBI Supervisor presented their reports and recommendations. Student's aunt was intent on having a recreational therapist provide services to student so she disagreed with the district's recommendation that social and emotional support be provided by IBI aides, as recommended in the IBI Supervisor's report. Ultimately, as a result of the February 17, 2005 and March 4, 2005 triennial IEP meetings, the IEP team decided to provide student with IBI aide support during recess and lunch. Student's aunt agreed with the IEP except for the IBI recommendations. Student's aunt characterized her disagreement as follows: "RE: IBI/Social Recomm. I request service & goals& obj. be implemented per R.T. report of Ferber & request IBI & aid[e] remain as currently implemented." (Student's Exhibit 47.) The February 17, 2005, triennial IEP document contains social adaptation and recreational/leisure goals and objectives. Although student's aunt and the recreational therapist believe that student's social and recreational/leisure goals and objectives can only be met through a recreational therapy program supervised by a recreational therapist, the ALJ finds otherwise. Student's unique needs in the area of socialization, recreation, and leisure can be met by implementing the district's IBI Supervisor's February 16, 2005 recommendations. Although there are theoretical and methodological differences in the approaches used by a recreational therapist and someone using IBI techniques, there is no basis for finding that one approach is more valid than the other. The district has adequately assessed student's unique needs in the social, recreation, and leisure areas and student's

current IEP contains goals, objectives, accommodations and services designed to address student's unique needs and provide student with a FAPE.

9. In addition to the recreational assessment, student's aunt had the following private assessments of student performed: an August, 2005, speech and language assessment by speech and language pathologist Judy M. Segal; and an October, 2005, audiological assessment by audiologist Maria K. Abramson. Student's aunt notified the district on July 29, 2005, that she disagreed with the district's speech and language evaluation "as it did not adequately address pragmatics and any possible processing issues." Student's aunt then advised the district that she would be obtaining an independent speech assessment for student and that she would be seeking reimbursement of the costs from the district. There is no indication that the district objected to student's aunt's decision to seek a second opinion concerning student's speech and language difficulties. Student's aunt obtained the speech and language assessment from Judy M. Segal. Student's aunt paid Ms. Segal $1,500.00 for the assessment. Student's aunt also obtained an audiololgical assessment for which she was billed, and paid $485.00; however, student's aunt did not inform the district in advance of her plans to have student assessed by an audiologist, nor did she share the results of the assessment with district personnel.

10. Insufficient evidence was presented concerning the level and nature of compensatory education, if any, which would be appropriate should the ALJ conclude that student was denied a FAPE.

LEGAL CONCLUSIONS

1. Title 34, Code of Federal Regulations, section 300.502, provides that parents of a child with a disability have the right to obtain an independent educational evaluation of their child at public expense if the parents disagree with an evaluation obtained by the public agency. Pursuant to title 34, Code of Federal Regulations, section

300.502, once a parent or guardian requests an independent evaluation the public agency must either initiate a hearing under title 34, Code of Federal Regulations, section 300.507, to show that its evaluation is appropriate; or ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under section 300.507 that the evaluation obtained by the parent or guardian did not meet agency criteria. In the present instance, as set forth in Findings 6 and 9, student's aunt expressed disagreement with the district's evaluations/assessments and requested a recreational therapy assessment and a speech and language assessment; consequently, the district was obligated to either initiate a hearing to prove its assessments were appropriate, or demonstrate in a hearing that the private evaluations did not meet agency criteria; otherwise, the district was, and is, obligated to pay for the private assessments. In the present instance, the district did not formally challenge the private assessments in a timely manner. Student's aunt requested the recreational therapy assessment on December 27, 2004 and the speech and language assessment on July 29, 2005. Instead of filing for due process, the district allowed student's aunt to obtain the independent assessments; accordingly, it is only fair and equitable that the district reimburse student's aunt for the costs of the recreational therapy assessment and the speech and language assessment in the amounts of $700.00 and $1,500.00, respectively. The same is not true regarding the audiological assessment. As set forth in Finding 9, student's aunt did not give the district the opportunity to formally challenge student's aunt's request for an audiological assessment, as student's aunt did not notify the district of her intention to obtain the assessment. Consequently, student's aunt assumed the risk that she would not be reimbursed for that assessment and her request for reimbursement is denied.

2. As a result of Findings 2, 3, 4, 5, 6, 7, 9, and 9, the ALJ concludes that, to date, student has been appropriately assessed/evaluated in all areas of suspected needs/disabilities.

3. Under both state law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a FAPE. (20 U.S.C. § 1400; Ed. Code § 56000.) The term "FAPE" means special education and related services that are available to the student at no cost to the parents, that meet state educational standards, and that conform to the student's individualized education program (IEP). (20 U.S.C. § 1401(9).) "Special education" is defined as specifically designed instruction at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).) The facts of the instant case, considered in their entirety, reveal that, except for implementing the IBI supervisor's recommendations, the district provided student with a FAPE.[2]

4. As noted in Legal Conclusion 3, student has been provided a FAPE; therefore, there is no basis for student's claim that the district must provide some form of compensatory education. Compensatory education is only required to remedy past denials of a FAPE by helping a student catch-up with missed educational opportunities. In the present instance, since student was provided a FAPE, there is nothing to compensate for. Additionally, as set forth in Finding 10, insufficient evidence was presented to establish the need for any compensatory education.

5. As set forth in Finding 6, on November 28, 2003, student filed a compliance complaint with the department. The department investigated student's complaints and, in a February 2, 2004 compliance investigation report, the department ordered that the district take certain "required corrective actions." The district requested reconsideration and the department has not yet issued a ruling on the request for

[2] As noted in Finding 8, the district could not implement the IBI supervisor's recommendations due to student's aunt's opposition to the proposals.

reconsideration. Even though the compliance issues are still pending before the department, student requests the ALJ to order the district to comply with the order of compliance contained in the February 2, 2004 investigation report. However, as the district properly noted in its closing brief, the Office of Administrative Hearings lacks jurisdiction to enforce decisions issued in response to a state compliance complaint. California Education Code section 56501, subdivision (a), provides that a due process hearing may be initiated under the following circumstances: (1) There is a proposal to initiate or change the identification, assessment, or educational placement of a child or the provision of a FAPE to a child; (2) There is a refusal to initiate or change the identification, assessment, or educational placement of a child, or the provision of a FAPE to a child; (3) The parent or guardian of a child refuses to consent to an assessment; or (4) There is a disagreement between a parent or guardian and a district, special education local plan area, or county office regarding the availability of a program appropriate for the child, including the question of financial responsibility, as specified in subsection (b) of Section 300.403 of Title 34 of the Code of Federal Regulations. The Ninth Circuit has held that jurisdiction of the hearing office (now the Office of Administrative Hearings) is limited to the circumstances enumerated in the Education Code. (See *Wyner* v. *Manhattan Beach Unified School Distinct* (9th Cir. 2000) 223 F.3d 1026.) Since enforcement of a decision issued in response to a state compliance complaint is not one of the circumstances listed in the Education Code for which a hearing may be requested, OAH lacks jurisdiction to enforce the compliance order. Even, assuming arguendo, OAH could exercise concurrent jurisdiction over the issues involved in the compliance complaint and the resulting order, the ALJ in the instant action concludes that exercise of jurisdiction would be inappropriate because the compliance issues are still pending before the department.

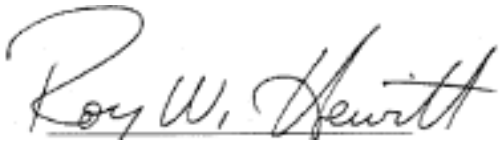
6. California Education Code section 56507, subdivision (d), requires that the extent to which each party prevailed on each issue heard and decided must be indicated in the hearing decision. In the present case, the district prevailed on all major issues. Student prevailed on the sub-issue concerning reimbursement for independent evaluations obtained by his aunt.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. The district shall pay student's aunt a total amount of $2,200.00 as reimbursement for the costs of the recreational therapy assessment and the speech and language assessment. In all other respects, student's petition is denied.

Dated: March 13, 2006



ROY W. HEWITT
Administrative Law Judge
Special Education Division
Office of Administrative Hearings

Note: Pursuant to California Education Code section 56505, subdivision (k), the parties have a right to appeal this Decision to a court of competent jurisdiction within 90 days of receipt of this Decision.