

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

In the Matter of:

STUDENT,

Petitioner,

v.

GARDEN GROVE UNIFIED SCHOOL  
DISTRICT,

Respondent.

OAH CASE NO. N 2005070363

**DECISION**

Administrative Law Judge (ALJ) Susan A. Ruff of the Office of Administrative Hearings, Special Education Division, State of California, heard this matter on May 2, 3, 15, 16, 17, 18, and 19, 2006, and August 8, 9, 10 and 15, 2006, in Garden Grove, California.

Tania L. Whiteleather, Esq., represented Petitioner (Student) at the hearing. Student's mother was present during most of the hearing. Student's father was also present for part of the hearing. Student was not present.

Patrick J. Balucan, Esq., of Atkinson, Andelson, Loya, Ruud & Romo, represented respondent Garden Grove Unified School District (District). James Carter, Special Education Program Supervisor for the District, was present for most of the hearing on behalf of the District. Gary Lewis, Assistant Superintendent, and Lynne Saito also appeared on behalf of the District for part of the hearing.

**PROCEDURAL BACKGROUND**

This case has a long history with the California Special Education Hearing Office (SEHO). Student's request for a due process hearing was filed with SEHO in August 2004.

Shortly after the case was filed, the parties requested that the hearing be taken off calendar to attempt mediation. After being continued several times for various reasons, the hearing ultimately began before the Office of Administrative Hearings on May 2, 2006.<sup>1</sup> The matter was submitted on September 5, 2006, upon the filing of written closing argument by the parties.

## ISSUES

1. Did the District appropriately and fully assess Student in all areas of suspected disability for the three years preceding the filing of the due process request in August 2004? Student contends there are three areas in which the District failed to properly assess Student: behavior, auditory processing (prior to February 2004), and speech and language (after February 2004).
2. Did the District provide appropriate placement and services to Student to meet his unique educational needs?
3. Did the District commit procedural violations which resulted in substantial denials of a Free Appropriate Public Education (FAPE) for Student?<sup>2</sup>
4. Did the District create appropriate goals and objectives for Student's IEPs?
5. Are Student's parents entitled to reimbursement for the tutoring, placement and services, including supplies/materials, and transportation costs, as well as the costs of their independent evaluation by Lindamood-Bell?<sup>3</sup>

---

<sup>1</sup> The Office of Administrative Hearings took over all pending SEHO cases as of July 2005.

<sup>2</sup> There were 20 separate procedural violations alleged in Student's Second Amended Issues for Due Process Hearing filed in November 2005. Rather than list each of the procedural issues here, they will be addressed in the Factual Findings and Legal Conclusions for the individual school year(s) to which they relate.

## FACTUAL FINDINGS

### STIPULATIONS OF THE PARTIES

1. During the hearing, the parties entered into the following stipulations:
  - a. The Student has at all times relevant to this case been a resident of the Garden Grove School District.
  - b. The District has not conducted any speech and language assessment of the Student since 2004.

---

<sup>3</sup> Student also raised a sixth issue: "Did the actions of Respondent, in denying Student a FAPE, result in a denial of his rights under 42 U.S.C. 1983, section 504, ADA, No Child Left behind, and FERPA." That issue was dismissed at the pre-hearing conference, because it was beyond the jurisdiction of the Office of Administrative Hearings.

On April 18, 2006, Student attempted to add three issues to the case, but those issues were dismissed at the pre-hearing conference by ALJ James Goff because Student had not complied with the code provisions related to amendments. (20 U.S.C. § 1415(c)(2)(E)(i)(ii); Ed. Code, § 56502, subd. (e).) Student renewed the request to add the three issues on the first day of hearing, but that request was denied. However, two of these issues, involving the March 2005 IEP, had previously been noticed in the procedural violations listed in Student's Second Amended Issues for Due Process Hearing filed in November 2005, prior to the pre-hearing conference. Evidence regarding the March 2005 IEP was introduced at hearing without objection from the District. Both sides elicited testimony relating to that IEP during the hearing and both sides addressed that IEP in their closing briefs. For this reason, the March 2005 IEP will be addressed in this decision, notwithstanding ALJ Goff's pre-hearing conference order.

## STUDENT'S DISABILITIES AND UNIQUE NEEDS

2. Student is a 12-year-old boy born on January 19, 1994. During the four school years at issue in this case while Student was in the first through fourth grades (between August 2001 and June 2005), his disabilities included, among other things, problems with auditory processing, selective mutism/shut downs, and Attention Deficit Hyperactivity Disorder (ADHD). His areas of unique need included difficulties with reading and writing, auditory processing, and speech and language. He also had problems with mathematical word problems. He did not have difficulty dealing with mathematical calculations based on rote memorization of "math facts."

3. Selective mutism is a psychological disorder of childhood characterized by a persistent inability or refusal to speak in certain social situations (such as school) and not in others. Student was diagnosed as having selective mutism by a registered nurse/marriage and family therapist working for Kaiser Permanente in April 2001. In Student's case, the selective mutism was caused by anxiety. Student would "shut down" and refuse to participate in class for varying lengths of time. When Student was anxious, when he did not know an answer to a question, when he was afraid he would give the wrong answer, or when he perceived a school lesson as being too difficult, he would lower his eyes and refuse to speak. This made it very difficult to accurately assess Student's cognitive abilities, because he would often refuse to respond to questions during assessments and tests. His verbal cognition scores could be grossly disproportionate to his non-verbal scores on cognitive tests as a result.<sup>4</sup>

---

<sup>4</sup> Some witnesses who testified at the hearing addressed Student's selective mutism and his "shut downs" as two separate disabilities, while other witnesses treated them as the same disability. Because the evidence indicated that they stemmed from the same cause and had the same effect on Student's ability to access his education and make educational progress, they will be treated interchangeably for purposes of this decision. There is no dispute that Student suffered from shut downs in which he refused to speak and refused to

4. Because Student's selective mutism/shut downs were caused, at least in part, by his level of anxiety, Student had unique behavioral needs that affected his academic achievement. In addition, Student's anxiety, at times, manifested itself in motor "tics." These "tics" are involuntary facial movements in which Student's face twitches and he seems to squint or blink rapidly. These tics come or go, depending on Student's anxiety level. In the past, the tics usually began while Student was at school, but would sometimes carry over to his home. Student's "tics" lessened considerably after he began attending the Prentice School (Prentice) in March 2004, during his third grade year. They began again when he started fourth grade at Prentice (the 2004-2005 school year), but they had mostly ceased by the end of the first month of his fourth grade year.

5. The District disputes whether Student's selective mutism/shut downs and his facial tics affected his education. The evidence supports a finding that Student's facial tics did not directly interfere with his education, but they are symptomatic of his anxiety and behavioral difficulties, which did interfere with his education. The evidence supports a finding that Student's shut downs directly interfered with his education. When he shut down in class, he would miss whatever was occurring for as long as the behavior lasted. In order to address this behavior, he was sometimes sent out of the classroom, further interrupting his studies. In addition, his ability to take and pass tests was affected by the shut downs. For example, almost every assessment given to Student during the four years in issue in this case was affected by his refusal to respond when he perceived a question as too tough.

6. An auditory processing disorder, such as the one affecting Student, was described by audiologist Rose-Marie Davis as an "input disorder that results in a

---

participate in class. Whether or not these shut downs are properly categorized under the label "selective mutism," they were still a disability that created unique behavioral needs on the part of Student.

misrepresentation of acoustic information.” Information that a child hears has to be understood, stored, retrieved, and processed by the child. Children who have trouble synthesizing information they hear, separating that information from other auditory distractions, and retrieving the information will have more difficulty in their studies. As a result of his auditory processing deficit, Student had difficulty following spoken directions. It took him a longer time in class to understand the directions given by a teacher and to process those directions in order to follow them. Any other noise in the classroom made it difficult for him to hear, understand and follow the teacher’s directions.

7. Both Student’s auditory processing disorder and his selective mutism/shut downs had a detrimental affect on his ability to make educational progress.

#### STUDENT’S COGNITIVE ABILITY

8. The parties contest the level of Student’s cognitive ability. Because Student’s cognitive ability directly relates to his unique needs and the level of educational progress he could be expected to make, it is necessary to review the evidence regarding that issue at the outset of this decision.

9. There were three cognitive assessments done of Student. Between November 27, 2000 and January 8, 2001, Marguerite Brooks, a school psychologist working for the District, tested Student using the Wechsler Intelligence Scale for Children – Third Edition (WISC-III). According to her test results, Student had a verbal IQ of 83, a performance IQ of 98 and a full-scale IQ of 89. This placed Student in the “low average” range of intelligence.

10. During the week of December 16, 2002, approximately two years later, John Cressey, an Education Specialist with the State of California, Department of Education, Diagnostic Center Southern California (Diagnostic Center), tested Student using the WISC-III. Once again, he found Student to be in the low average range of intelligence, with a verbal comprehension score of 79, perceptual organization score of 86, freedom from distractibility score of 81 and a processing speed score of 99.

11. Approximately a year later, in January 2004, in connection with Student's triennial review, Brian Inouye, a school psychologist working for the District, tested Student using the WISC-III. According to his test results, Student's verbal IQ score was 58, in the mentally retarded range, and his performance IQ score was 93, in the low average range. Based on these two results, Inouye concluded that Student's full scale IQ score was 73, in the "below average" range. Because Student's verbal IQ score differed so greatly from his performance IQ score and his previous WISC-III scores, Inouye viewed the test results with caution. Therefore, he also administered the Comprehensive Test of Nonverbal Intelligence (CTONI) to Student and the Children's Memory Scale (CMS) to Student.

12. The CTONI measures nonverbal intelligence using pictures and geometric shapes. There are three quotients derived from the test – the nonverbal intelligence quotient (NIQ), the pictorial nonverbal intelligence quotient (PNIQ) and the Geometric Nonverbal Intelligence Quotient (GNIQ). Student scored 77 in the NIQ, 81 in the PNIQ, and 76 in the GNIQ, all of which were in the below average range.

13. The CMS measures a child's memory and learning skills in three domains: visual, verbal, and attention/concentration. Student scored in the average range (94) in the visual-immediate index, but far below average (50) in the verbal-immediate index. His visual-delayed score was 78, in the below average range, and his verbal-delayed score was 50, significantly far below average.

14. Based on all three of these tests, Inouye felt that Student's cognitive ability fell within the "below average" range, not the "low average" range previously determined in the two prior cognitive tests.

15. The parties dispute the reliability of Inouye's opinion. The District contends that, although the initial verbal IQ score Inouye obtained on the WISC-III could not be trusted, the results of the CTONI and the CMS supported Inouye's conclusion that Student's cognitive abilities were below average.

16. Student's expert Dr. Christine Davidson, on the other hand, testified that Inouye's method for determining the full scale IQ score of 73 was improper. In her opinion, once Inouye realized that the verbal IQ score was invalid, he should not have averaged the two scores to come up with the full scale IQ of 73. In her opinion, based on Student's prior WISC-III scores and his abilities on the achievement tests given to him, his cognitive ability was in the average range and possibly even the upper end of average (because of his high scores in math).

17. Neither Davidson's nor Inouye's testimony was fully persuasive in this matter. Dr. Davidson has more expertise – she has a doctorate in education and has practiced as an educational psychologist for many years. She has also worked as a school psychologist for Long Beach Unified School District and as Director of Special Education and Assistant Superintendent for Tustin Unified School District, although her testimony as an expert witness since leaving her employment with Tustin has been entirely on behalf of students. However, despite her expertise, Dr. Davidson's opinion that Student might be in upper end of average intelligence is contrary to every other piece of evidence in this case.<sup>5</sup>

18. Mr. Inouye, on the other hand, does not possess the education or experience of Dr. Davidson. He has a master's degree in educational psychology and a pupil personnel services school psychology credential (PPS credential). He has been working as a school psychologist since approximately 2000, and has worked for the District since August 2002. At the time he administered the tests to Student, he had been working as a school psychologist for only a few years. When Inouye tested Student, Student's anxiety (selective mutism/shut downs) and his auditory processing deficits clearly affected Student's scores on both the WISC-III and the CMS. The evidence established that a good rapport between

---

<sup>5</sup> Furthermore, Dr. Davidson testified only as a rebuttal witness on the final day of hearing, not during the Student's case-in-chief, so there was no opportunity for any District witnesses to address her opinions.



Student and the person giving the test was critical – if Student felt anxious, he would shut down and his scores would be inaccurate. Student clearly did not have a good rapport with Inouye – the verbal IQ score of 58, which was grossly out of proportion to Student’s actual abilities and with every other test he had taken, is a strong indication of that lack of rapport. Given that lack of rapport, Inouye’s conclusion that Student’s cognitive abilities fell below average is not persuasive. Even Inouye admitted that Student was not mentally retarded.

19. The most persuasive witness regarding Student’s cognitive abilities was Dr. Cressey, the educational specialist from the Diagnostic Center. Dr. Cressey received his Ph.D. from University of California at Berkeley in Special Education. He has worked in the field of education since the 1960’s and has been with the Diagnostic Center for the past 14 years. He is certified to teach English and has a special educational credential. Cressey was neutral in this dispute, neither a hired expert for the Student nor a District employee. In addition, it was clear that Cressey had a good rapport with Student during his tests – the achievement scores for Student on the Woodcock-Johnson III test that Cressey administered were actually higher than those Student exhibited in his daily school work. Cressey’s conclusion that Student’s cognitive ability was in the low average range is supported by the other tests administered to Student. The evidence supports a finding that Student’s cognitive abilities were in the low average range and remained so, even during the 2003-2004 school year, at the time of Inouye’s assessment.

**DID THE DISTRICT FAIL TO ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY DURING THE 2001- 2002 SCHOOL YEAR? (STUDENT IN FIRST GRADE)**

20. The law requires a school district to assess a student in all areas of suspected disability. Student contends that, during the 2001-2002 school year, the District failed to assess Student in two suspected areas of disability – behavior and auditory processing. In order to determine whether the District failed to assess Student in these two areas, it is necessary to review the chronology of this matter beginning with the prior year to

determine what assessments were done and what the District knew about Student's suspected areas of disability.

21. During the 2000-2001 school year, Student attended a first grade regular education class at Barker Elementary School within the District. In October 2000, the District sent a letter to Student's parents stating that Student was "experiencing difficulties in the area(s) of academic and behavior which is (are) interfering with school success." Student was referred for an assessment to see if he qualified for special education services. The District conducted assessments in many areas, including academic performance, psychomotor ability, social/emotional/adaptive behavior, language/communication development, intellectual/cognitive ability, health and development and career/vocational ability.

22. The assessment plan signed by Student's mother on November 8, 2000, did not call for Student to be assessed in the "audiological/vision/low vision" category. The purpose of that category of assessment is to "identify educationally significant hearing loss, auditory disorders, and/or vision loss." The assessment report generated as a result of the assessments noted: "(v)ision screened recently (12-00) at 30/30 and hearing was within norms."

23. The social adaptation portion of the assessment report found that Student "can be moody, withdrawn, sullen, cries easily. [Student] has difficulty focusing on tasks without urging and loses his place easily. Reassurance and reinforcement are needed, since [Student] is unsure of his efforts (accuracy/correctness, etc.). In the classroom, [Student] seems to need to engage the person next to him, which can detract from concentration. Self-esteem seems very fragile."

24. The assessment summary found that Student was in the average range of cognition, but was "achieving significantly below his cognitive ability in the academic area of reading. Processing weaknesses are evident in the areas of...auditory processing..." The assessment concluded that Student should be eligible for special education services under

the categories of "language/speech disorder" and "learning disorder." The speech and language assessment of Student, completed on January 9, 2001, found "expressive language" scores significantly below grade level and recommended, among other things, strategies for developing auditory processing and word finding skills in the classroom.

25. An Individualized Education Program (IEP) meeting was held on January 23, 2001. At that time, Student was scoring below grade level in all subjects in the regular classroom. The IEP team found that the Student was eligible for special education services under the categories of language/speech disorder and learning disorder. The IEP team agreed that Student be placed in a general education class with special education services in reading provided by the resource center for 20 percent of his educational day, as well as speech/language services. The IEP team met again on February 20, 2001, and added speech language goals to the IEP.

26. The checklist for "Identification of a Specific Learning Disability" attached to the IEP found that Student had a severe discrepancy between intellectual ability and achievement that was directly related to a processing disorder in the areas of "Attention," "Auditory Processing," "Sensory Motor Skills," and "Cognitive Abilities, including association, conceptualization and expression."

27. On April 3, 2001, the IEP team met again and issued an addendum to the IEP. The notes to that addendum stated that the Student "does not participate in class. He is unable to work independently in any academic area." The team recommended that he repeat first grade.

28. The decision to retain Student in first grade was based on his anxiety level. The District personnel did not believe Student needed additional services in order to meet grade level standards. Instead, they felt that he needed to stay calm and not have the pressure of moving on to second grade work. Student's anxiety level tended to rise or fall depending on how difficult the work was for him. The District personnel felt that retaining him in first grade would help him meet the state's academic standards.

29. The District personnel also felt that Student should not attend summer school that year because of his anxiety and selective mutism. There was no Extended School Year (ESY) or summer school program offered at Barker Elementary School. The District was worried about Student's anxiety level if he went to a different school for a summer school program. The parents signed a document declining summer school services on May 1, 2001.

30. In Student's achievement test on April 29, 2001, Student scored in the average range in math, but below average in reading, language and spelling.

31. In approximately May or June 2001, the District received a copy of the Kaiser Permanente report, referred to in Factual Finding 3, which made a diagnosis of selective mutism. The report recommended that Student be referred for an AB 882-3632 assessment. The term "AB 882-3632" involves a referral made by the District to a county mental health agency, in this case the County of Orange Health Care Agency (OCMH). A referral of this type requests that the mental health agency assess a child to see if the child needs counseling or other mental health services.

32. On May 3, 2001, Lorraine Rae, the principal of Barker Elementary School, sent an email to Sue McClellan, Student's special education case manager at that time. In the email, Rae explained that the Student "needs to be reviewed for the AB882 – to see if he qualifies."

33. McClellan sent a responsive email to Rae in which McClellan asked whether Student is "having serious behavior problems at school that are impeding his learning? If so, has there be [sic] a behavior plan in effect for a while?" She wrote that before they could make an AB882 referral, they needed to do "everything possible" at school first, including a behavior plan, counseling through the school's "Straight Talk" program, and developing goals related to social adaptation in his IEP. She stated that the parents' insurance "is usually the first choice for counseling services."

34. On May 3, 2001, Rae followed up with a memorandum to “Sandy, Linda and Judy” stating that the Student “will not be going through the district for the AB882 due to the fact that the [parents] have insurance. [Student] will be going to counseling for selective mutism.” Student’s parents began providing private counseling to Student through their insurance around this time.

35. Straight Talk is a District program in which interns come into the school to provide counseling services to students, under the supervision of the child welfare and attendance department of the District. There is a factual dispute as to whether the District offered Student counseling services under the Straight Talk program. Rae testified that she verbally offered Straight Talk to Student’s parents, but the parents did not agree to the service. Instead, the parents told Rae that they wanted to go through their own insurance for counseling services for the Student. Student’s mother, on the other hand, testified that no offer of Straight Talk was ever made.

36. The evidence does not support a finding that Straight Talk was offered to Student. It was never discussed in an IEP meeting and was not offered in writing to Student. Even if Rae did informally mention Straight Talk to Student’s parents, it does not constitute an offer of counseling or mental health services by the District. No behavioral assessment determined that Straight Talk would be appropriate to meet Student’s unique needs and no IEP team made a determination that it was appropriate. District personnel were still – to use Rae’s words – in the information gathering phase of their evaluation of the Student’s selective mutism at that time. No mental health assessment was conducted, no referral to OCMH for an assessment was made, and no behavior support plan was established for Student.

37. Student’s grades in his final report card for the year reflected his poor academic performance and inability to achieve grade level work.

## 2001-2002 SCHOOL YEAR (REPEATED YEAR IN FIRST GRADE)

38. On January 31, 2002, Student's IEP team met for his annual IEP. Student was working with a private tutor hired by his parents at home, and Student's work for the tutor was better than his work at school. The IEP team decided they needed more information to begin writing goals and set a follow-up meeting on February 22, 2002.

39. Despite being retained in first grade, Student continued to have academic and anxiety problems during the early part of his repeated first grade year. Although District personnel reported that he met his IEP goals from the previous year, his reading and writing remained below first grade level. His episodes of selective mutism/shut downs continued.

40. Student exhibited auditory processing deficits during his participation in the resource program. He had difficulty remembering things from one day to the next. He was unable to process information quickly. Judith Edwards, who was Student's special education teacher in the resource center during first and second grades, recognized these problems. Edwards has been a resource specialist for twenty years and is familiar with children with auditory processing defects.

41. Edwards employed strategies in the classroom to try to assist with Student's auditory processing deficits. She would work on giving him directions, starting with one step directions and then moving on to two step directions. She did a lot of picture sequencing and working on open ended questions, such as "What is your favorite ride at Disneyland?"

42. Student failed to make appropriate academic progress during the first half of his retained year in first grade. On February 6, 2002, Rae wrote an email to McClellan in which she stated: "The student has selective mutism. He has been retained in first and now repeating first and we so no progress to slipping. [sic] However, he goes to a tutor and according to parents [Student] is doing fine. Judy is trying more strategies with him, but she

was asking questions (the mom) regarding district help with his issue and on and on and Marguerite was trying to placate them and so on and so on.”

When asked at hearing what she meant by “we so no progress to slipping,” Rae could not remember what she had meant by the words. However, she denied that she had intended to write “we see no progress to slipping.” Instead she testified that she meant they wanted to “be careful of progress and slipping so that the student is not slipping and making sure that everything stays ok.”

Rae’s recollection is at odds with the apparent meaning of the words she wrote at the time. Her recollection is also at odds with the report of the IEP team two weeks later that Student was “unable to perform academic tasks that he could perform in June 2001.” (See Factual Finding 43.)

The evidence supports a finding that Student was not making educational progress as of February 2002, despite having been retained in the first grade, and the District was aware of the fact that he was making no progress.

43. The continued IEP meeting was held on February 22, 2002. The IEP team found that Student met the eligibility requirements for special education under the category of “learning disorder.” The team reported that Student was below grade level in all academic areas, and could not even perform some academic tasks that he had been able to do in June 2001. Student was at a “pre-primer” level in reading and the team was concerned that he would “be frustrated with the level of the work in a 2nd grade class.” The team recommended that Student be mainstreamed in a general education class for 68 percent of the school day and receive assistance from the resource specialist program in reading and language arts for the rest. The meeting discussion notes stated that Student “seems to have an auditory processing deficit and this is affecting his ability to remember things from one day to the next.” The IEP team noted “selective mutism” in the report under health, but did not recommend any assessments in selective mutism, auditory processing or behavior.

44. The IEP team discussed a special day class placement, but the parents did not believe that was appropriate. The parents' private psychologist requested an assessment by the Lindamood-Bell program. The District personnel refused to fund the assessment on the basis that the District had programs using similar strategies to Lindamood-Bell. The IEP team agreed that an assessment would be conducted by District personnel to determine Student's needs in this regard. The IEP team would meet again after it was done.

45. On March 21, 2002, Traci Hoff, a special education program facilitator for the District, conducted the assessment called for in the February 2002 IEP. At the hearing, Hoff related that she assessed Student's reading using the Comprehensive Literacy Assessment (CLA), but no test results were entered into evidence or produced to Student in response to Student's various document requests. Hoff explained that the CLA is a curriculum based test designed to help evaluate a child's reading status. The assessment considers factors such as the child's ability to decode words and process sounds in order to help determine if there are gaps in the child's reading education. The CLA helps determine what types of instruction the child needs. The CLA is not a standardized or normed test and is not a diagnostic tool to determine a specific learning disability, although it can indicate whether other assessments are necessary to determine if a child qualifies for special education services. Hoff did not determine what Student's grade level equivalent was for any of the subparts of the test, but instead concentrated on the skills Student needed to rise to grade level.

46. During Hoff's assessment, Student refused to perform part of the test which required Student to tell a story based on a series of four pictures provided by the examiner. Hoff did not know why Student refused to perform that portion of the test. It was not Hoff's task to determine why. She did not recommend another assessment based on this conduct. Hoff concluded that Student needed extra assistance in the area of reading. Student was not reading at grade level and could not read independently with comprehension.



47. Hoff did not prepare a report of her assessment. Instead a one-page summary of the assessment was prepared by someone else based on information provided by Hoff.

48. On April 10, 2002, the parties held an IEP team meeting to discuss the results of Hoff's assessment. Hoff attended the meeting and discussed her assessment. Student's teacher reported that Student's behavior was "deteriorating due to the difficulty of the classwork." The IEP team agreed to reduce the amount of Student's time in a regular education class to 51 percent of his day. The District personnel also recommended a special day class (SDC) placement for Student to begin in September 2002. In that SDC placement, Student would only be mainstreamed for 20 percent of his educational day. The District personnel believed an SDC placement would assist Student because the class size was smaller and Student would have more adult support in the classroom. Student's parents requested an opportunity to visit the proposed SDC placement.

49. Student's parents subsequently visited the proposed SDC placement and did not feel it was appropriate for Student. Most of the children in the class were at a much lower academic level of work than Student and some had severe behavior problems. Because of the misbehaving pupils, the class was loud and would not be an environment that would help Student make educational progress.

50. During the IEP meeting, student's parents asked about summer school, but the District personnel felt that Student "would not benefit from the gen. ed. summer school program." The District personnel felt that, because of Student's anxiety and selective mutism, the switch to a summer school class at another school would cause him more anxiety. The District did not offer Student any special education ESY services.

51. Student's parents requested an assessment of Student by the Diagnostic Center. The Diagnostic Center is run by the California Department of Education. Its services are offered exclusively to California school districts and offices of education when local assessment opportunities have been exhausted but the district personnel have remaining, educationally-related diagnostic questions.

52. The notes to the IEP meeting state that the District's program specialist "doesn't feel that we need the services of the Diagnostic Center." Despite that notation, the District consented to a Diagnostic Center referral for an assessment. On May 9, 2002, the District sent in the referral packet along with a cover letter stating that the "IEP Team did not feel that this student is in need of the detailed Center based assessment by your multidisciplinary team, but the advocate and the parent asked that we submit a referral packet." Not surprisingly, given the District's equivocal referral, the Diagnostic Center denied the application for the assessment on June 11, 2002.

53. Student's report card for the 2001-2002 school year shows only a few areas (such as mathematics) in which Student was learning at grade level. In most areas he was "approaching" grade level or below grade level.

54. The evidence supports a finding that the District failed to assess Student in all areas of suspected disability during the 2001-2002 school year. When Student failed to make educational progress by the February 2002 IEP meeting, the District – knowing that his selective mutism/shut downs were due to anxiety and were impacting his education, and knowing that the private counseling supplied by Student's parents had not lessened the problem – had sufficient knowledge that Student's behavior had not been adequately addressed. At that point, the District should have conducted additional assessments to find out why the District's placement and services were not permitting Student to make educational progress.

55. The assessment by Traci Hoff was designed to determine the gaps in Student's reading, not to determine the reason he failed to make progress or what services he needed to make progress. It was not a true assessment to determine his needs. Even the District's offer of the SDC for the following year was made without the benefit of a behavioral assessment to determine whether Student's anxiety and selective mutism would improve in an SDC setting.

56. The District contends that Student's behavior "did not escalate to the point that it needed to be addressed by a behavior assessment." However, the District focuses only on the ADHD and Student's disruptive classroom behaviors. Those were sufficiently addressed by medication. It was Student's anxiety-related behaviors – his selective mutism and shut downs – that affected his educational progress and were not addressed by the District's program. The District should have assessed Student regarding those behaviors.

57. The evidence does not support a finding that the District failed to assess in all areas of suspected disability because the District did not conduct an auditory processing assessment. By the end of the 2001-2002 school year, the District had already identified Student's disability in auditory processing in past assessments and was addressing that weakness during the resource center program. There was nothing known by the District at the time to suggest a separate auditory processing assessment was necessary. Student was retained in first grade due to anxiety and behavior issues, not due to the failure to provide services to overcome his auditory processing deficit.

#### DID THE DISTRICT FAIL TO CREATE APPROPRIATE GOALS AND OBJECTIVES FOR STUDENT'S IEPs DURING THE 2001-2002 SCHOOL YEAR?

58. There were two IEPs held for Student during the 2001-2002 school year. Student contends that the District failed to create appropriate goals and objectives for these two IEPs, because the goals lacked baselines, were not objectively measurable, were not written to appropriate annual levels and did not meet or address all of Student's unique educational needs. Student also contends that the District committed procedural violations related to goals and objectives by failing to review past goals for Student at the April 2002 IEP meeting and failing to write goals and objectives for all Student's needs (i.e. auditory processing and selective mutism).

59. The February 22, 2002 IEP contained a page setting forth Student's "present levels of performance," but did not have "baselines" establishing Student's current performance for each of the specific goals and objectives written. The District wrote goals

for Student in the areas of reading (phonemic awareness, decoding and word recognition) and communication.

60. The goals called for Student to be performing work at approximately the first grade, tenth month level, by February 2003 (when Student would be in second grade). The evidence supports a finding that the goals in the IEP were objectively measurable and were written to appropriate annual levels, given Student's slow progress at the time. There was no legal requirement that each individual goal recite a "baseline." Student's progress could be measured according to the nature of the tasks described in the benchmarks for the goal. For example, one goal stated that Student "will be able to read long vowel words 75% of the time." This is a very specific goal, easily measurable. While it would have been helpful to know what percent of the time he could read long vowel words at the start of the IEP, Student's teachers could still objectively measure this goal, so the failure to list a "baseline" is not a procedural violation.<sup>6</sup>

61. However, none of the goals related to social/emotional areas, Student's behavior, or selective mutism/shut downs. As stated above in Factual Findings 1 - 57, the District had actual knowledge that Student had unique needs in the area of behavior and knew that Student's anxiety-caused behaviors were affecting his educational progress. His IEP should have contained goals and objectives in this area.

62. During the April 2002 IEP meeting, the IEP team did not review Student's goals and objectives from the February IEP meeting to determine whether Student was progressing in those goals. Because this was a special meeting to discuss the assessment

---

<sup>6</sup> Student's reliance on the case of *Evans v. Board of Education of the Rhinebeck Central School District* (S.D.N.Y. 1996) 930 F.Supp. 83, does not change this result. In that case, the IEP just listed test scores without discussing the Student's areas of deficit. In addition, the scores were over a year old and omitted critical areas related to Student's unique needs, such as Student's problems with spelling.

conducted by Hoff, there was no requirement for the IEP Team to review past goals. The evidence does not support a finding that there was a procedural violation in this respect.

63. The evidence supports a finding that the District failed to create appropriate goals and objectives in Student's February and April 2002 IEPs because the District failed to address all Student's areas of unique need by failing to have any social/emotional goals and objectives related to Student's behavior (shut downs/selective mutism).

#### DID THE DISTRICT FAIL TO PROVIDE STUDENT WITH APPROPRIATE PLACEMENT AND SERVICES FOR THE 2001-2002 SCHOOL YEAR?

64. As set forth above in Factual Findings 1 - 63, the evidence supports a finding that Student's special education services did not address all his areas of unique need (his behavior and selective mutism) and failed to provide him with educational benefit during the 2001-2002 school year.

65. The District failed to assess Student for his behavioral needs, provide goals for those needs or provide any school-based counseling or behavior support plan to address those needs. As set forth in Factual Findings 38 - 53, by the end of his retained year in first grade, Student failed to achieve grade level work in most areas. Student's IEP goals, which were supposed to be achieved by the following February, half-way through his second grade year, only called for him to be doing first grade level work. District personnel recommended that Student be placed in an SDC for the following year, a more restrictive environment than his current placement. In addition, Student's anxiety levels continued unabated, his selective mutism and "shut downs" continued, and his behavior in other areas deteriorated. Student's anxiety-based behavioral problems prevented him from attending an ESY program which might have assisted him with retaining skills during the following summer.

The evidence supports a finding that the District's failure to address Student's unique behavioral needs during the 2001-2002 school year denied Student a free, appropriate public education.

DID THE DISTRICT COMMIT PROCEDURAL VIOLATIONS DURING THE 2001-2002 SCHOOL YEAR THAT LED TO A DENIAL OF A FREE APPROPRIATE PUBLIC EDUCATION (FAPE)?

66. Student contends that the District committed procedural violations by failing to provide documentation and an assessment report for the assessment completed by Traci Hoff in March 2002. The evidence supports a finding that the District failed to provide an assessment report that met the requirements of the code for Hoff's assessment. As set forth in Factual Findings 44 - 48 above, only a one-page summary sheet of Hoff's assessment (not prepared by Hoff) was provided to Student's parents prior to the April 10, 2002 IEP meeting. Contrary to the District's contentions, Hoff's assessment was intended by the IEP team to be an assessment, not merely informal "assessment observations." Hoff's assessment was conducted in response to the IEP team's agreement that an assessment would be provided by District personnel instead of the Lindamood-Bell assessment requested by Student's parents.

67. However, the evidence does not support a finding that this procedural violation caused a denial of FAPE to Student. Traci Hoff was present at the April IEP meeting, so Student's parents had a full opportunity to hear her report and discuss any concerns. Under these circumstances, the failure to provide a written assessment report containing all the specific requirements of the code did not seriously infringe on the parents' opportunity to participate in the IEP process or result in loss of educational opportunities for Student. (*W.G.v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484; 20 U.S.C. § 1415(f)(3)(E)(ii).)

68. The evidence does not support a finding that the District failed to provide documentation of Hoff's assessment to Student's parents. Hoff testified that every document she produced as part of her assessment was attached to the summary and provided to Student's counsel. There was no procedural violation.

69. Student contends that the District committed a procedural violation by failing to have someone at Student's IEP meetings "who was knowledgeable about his diagnoses

of TICS and selective mutism....” The evidence supports a finding that the District committed a procedural violation by failing to have someone at the IEP meetings who was knowledgeable about Student’s selective mutism. Because the District failed to properly assess Student’s behavior in this regard, the District had no one capable of speaking to Student’s unique behavioral needs at Student’s IEP meetings. The efforts by District staff to research selective mutism might have been sufficient under other circumstances, but in this case that research could not replace the expertise gained during an assessment. The lack of a knowledgeable person at the IEP meetings to address Student’s selective mutism led to the failure to create proper goals relating to that behavior and ultimately resulted in a loss of educational opportunities for Student, denying Student a FAPE.

However, the evidence does not support a finding that the District committed a procedural violation by failing to have someone at the IEP meetings who was knowledgeable about Student’s motor “tics.” Student’s “tics” did not interfere with his education. Instead, they were a symptom of the more serious problem – his anxiety.

**DID THE DISTRICT FAIL TO ASSESS STUDENT IN ALL SUSPECTED AREAS OF DISABILITY DURING THE 2002- 2003 SCHOOL YEAR? (STUDENT IN SECOND GRADE)**

70. Student contends that the District failed to assess Student in all areas of suspected disability during the 2002-2003 school year, because the District failed to assess Student in the areas of behavior and auditory processing. To determine whether the District adequately assessed Student, it is necessary to review the events of the 2002-2003 school year and the assessments conducted during that year.

71. On August 20, 2002, Student’s parents and the District entered into an interim mediation agreement in which the District agreed to resubmit the referral to Diagnostic Center and agreed to place Student back in a general education class at Barker Elementary School for the 2002-2003 school year, with resource center services, instead of the SDC recommended by the District during the April 2002 IEP.

72. On August 22, 2002, the District resubmitted the previous referral to the Diagnostic Center, this time asking the Diagnostic Center to “address the intellectual, cognitive, as well as the written and oral language areas of concern and the impact of these variables on his educational success. Teaching strategies suggested curriculum and support needed in the classroom would be most welcomed by both the district and the family.”

73. In September 2002, Student’s regular education teacher conducted a Comprehensive Literacy Assessment of Student. Student did not meet grade level standards for any category in the assessment. The teacher who conducted the assessment noted in a letter to Student’s parents that Student was too restless to finish part of the test. He was not able to pass “level 7” in reading which was a decrease from the previous school year in which he could pass “level 8.” A student was expected to be reading at “level 18” by the end of first grade. However, on September 18, 2002, the resource center teacher reported that Student had been able to read a “level 14” story, although she was uncertain whether he could do so in a regular classroom.

74. Student’s progress report dated October 25, 2002, stated that Student “is making progress at this time but still requires modifications to work in grade level material.”

75. During the week of December 16, 2002, the Diagnostic Center assessed Student. The specific questions addressed in the Diagnostic Center’s evaluation included: “1) Does [Student] have any medical-neurological basis for his learning difficulties, and, if so, are medical interventions recommended; 2) In the area of cognitive-intellectual development, what are [Student’s] current level, strengths and weaknesses, and the educational implications thereof; 3) In the areas of communication skill development, what is [Student’s] current level, including strengths, weaknesses, and the educational implications thereof; 4) What are [Student’s] current levels, strengths and weaknesses in academic areas? What related educational interventions are suggested to his IEP team?”

76. The Diagnostic Center team that conducted the assessment included an educational specialist, a school psychologist, a speech-language pathologist, a



developmental pediatrician and a registered nurse. The team concluded that Student's language and learning problems were neurologically based, but did not fit into a specific category of neurological disorders. He also had ADHD, for which medication was recommended. The assessment found that Student's cognition was in the "low average range."

In conducting the adaptive and social behavior portion of the assessment, the team found that Student had "moderately serious" maladaptive behaviors "that suggest a need for 'limited behavioral supports.'" The behaviors included anxiety associated with learning, refusing tasks and shutting down when tasks became difficult. In the "Fast Facts" summary in the report it stated that the District should provide "a Behavioral Support Plan emphasizing positive supports to address his ADHD, and insure this is shared with all adults working with him." The report also recommended "school based" counseling "to augment, not replace, any other mental health services that are needed." The school based counseling would assist Student's "efforts at coping with stressful situations at school," reinforce social skills, teach self-advocacy and disability awareness, and "[p]rovide a place of refuge when school problems become overwhelming."

77. In the area of communication development, the assessment found that Student's "listening comprehension and oral expression are in the very poor range, and are substantially below his level of cognitive functioning."

78 The assessment made very specific recommendations for the District personnel to follow when dealing with Student's "shut downs," his conversational difficulties, and his difficulty with appropriate social behaviors.

79. The Diagnostic Center did not specifically focus on auditory processing in the assessment, but auditory processing was part of the global assessment the team did. They concluded that Student's auditory reasoning was compromised and that Student had a deficit in language processing. Language processing is the ability of a child to use and understand language. It is related to auditory processing. Some of the recommendations

for classroom interventions suggested in the Diagnostic Center report addressed Student's auditory processing needs.

80. The Diagnostic Center's assessment of Student's academic achievement found Student's phonological and independent reading skills to be at beginning to mid second grade levels, but his reading comprehension was an area of difficulty and ability to answer "who," "what," "when," "where," and "why" questions about a story was limited. His mathematical abilities were at or near grade level.

81. The medical evaluation portion of the assessment concluded that Student's problem with selective mutism had improved from the previous year, but his ADHD had become more apparent. The report also noted recurring facial "tics." The assessor recommended that Student be evaluated by his pediatrician for medication for ADHD.

82. On January 31, 2003, Student's teacher reported that Student had difficulty completing assignments independently and "seems to have most difficulty processing information." On February 18, 2003, Student's general education teacher sent the parents a Student Progress Report which noted that Student's "progress is below grade level standards."

83. On February 28, 2003, the Diagnostic Center sent its assessment report to the District, containing the findings noted above.

84. On March 5, 2003, Student's annual review IEP was held. Student's parents attended the IEP and agreed to the placement and services. The IEP team found that Student was eligible for special education under the categories of language/speech disorder and learning disorder. The IEP team recommended placement of Student in a general education classroom for 51 percent of his educational day, with participation in the resource center program for 49 percent of his day in math, reading/language arts, and communication. The IEP also called for Student to receive speech/language therapy. Under "present levels of performance," the IEP noted that, although the Diagnostic Center found

Student close to grade level, "in the classroom situation [Student's] performance is significantly below grade level."

85. The District personnel thereafter implemented most of the Diagnostic Center recommendations in Student's educational program, with the exception of the recommendations for school based counseling and a behavior support plan. Student's ADHD was treated through medication which improved his ADHD symptoms. However, Student's selective mutism/shut downs continued.

86. Student's second trimester report card issued on March 14, 2003, showed that he was improving in many areas, and was approaching grade level. This was contrary to the findings of the IEP team only eleven days before that Student was "significantly" below grade level.

87. On April 7, 2003, Student's parents sent a written request to the District for four assessments: "1) Central Auditory Processing Assessment; 2) Linda Mood Bell Assessment (full); 3) Non-Verbal Cognitive Ability, Leiter or C-Toni; and 4) OT Assessment."

88. On May 15, 2003, an addendum IEP was held to address speech and language issues. This IEP meeting was necessary because Student's speech/language pathologist could not be present at the March IEP. The IEP team drafted goals and objectives relating to communication for Student's IEP.

89. On June 17, 2003, the Diagnostic Center sent the District a follow-up report. The purpose of the report was to clarify issues for educational planning and the Diagnostic Center's recommendations. The report noted that Student's medication had enabled him to make "remarkable improvement in his overall ability to attend and focus in the classroom...." The report also noted that he was making "recognizable progress" in reading, but Student still did not read well enough to "independently derive much information from a longer reading passage."

The report noted that some of the symptoms of Student's ADHD had been successfully treated with medication, but Student "continues to demonstrate 'behavioral

difficulties that impede his learning' which necessitates the development of a Behavior Support Plan...." The "behavior of primary concern" was his tendency to shut down as a means of withdrawing from or avoiding tasks. The Behavior Support Plan (BSP) would be designed to "support his participation" and reduce the frequency of his shut downs. The assessor recognized that many of the interventions of such a BSP were already being implemented by District staff without a plan, but they needed to specify and teach "replacement" behaviors to be used by Student in place of the shut downs. The report included a sample BSP to assist District personnel in drafting one for Student. In order to facilitate the BSP, the report also suggested developing a communication log between school and home, discussing the number of times "shut downs" occur, and the success of various behavior modification strategies.

90. Student's end of the year report card showed that he was at grade level in some areas and was "approaching" grade level in most others. Student's general education teacher observed at hearing that Student made academic progress in her classroom. She also noted behavioral progress after Student was medicated for his ADHD. In her opinion, his behavior did not impact his ability to make educational progress in her class.

91. The evidence does not support a finding that the District failed to assess Student in all areas of disability during the 2002-2003 school year. The Diagnostic Center assessment was thorough, comprehensive and addressed both Student's behavior and his auditory processing issues. Even if it was not labeled an auditory processing evaluation, it clearly evaluated auditory processing needs and made recommendations related to auditory processing. It also addressed Student's behavior problems and tendency to "shut down."

92. When Student sent the District a request for an auditory processing assessment on April 7, 2003, the District did not need to conduct such an assessment – the area of auditory processing had been adequately covered by the Diagnostic Center assessment.

## DID RESPONDENT CREATE APPROPRIATE GOALS AND OBJECTIVES FOR STUDENT'S IEPs DURING THE 2002- 2003 SCHOOL YEAR?

93. The District held two IEPs during the 2002-2003 school year, the annual IEP on March 5, 2003, and an Addendum IEP held on May 15, 2003, to deal with speech and language issues. (See Factual Finding 88.)

94. The March 5, 2003 IEP report contained a page that listed Student's "present levels of performance," but the individual goals and objectives did not contain "baselines" setting forth specifically how Student performed at his individual tasks. The IEP team created goals for Student in the areas of reading comprehension (including responding to "who," "what," "when," "where" and "how" questions); mathematics (number sense), writing applications (including written narratives), and "decoding and word recognition." These goals and objectives corresponded to the areas of needs determined in the Diagnostic Center assessment. No direct behavioral goals were set for Student, but the goal regarding "wh" questions related in part to Student's selective mutism/shut downs, because Student had a very difficult time responding to open-ended questions of that type.

95. At the May 15, 2003 IEP, the IEP team set additional goals for Student in expressive language and articulation. The District's speech language pathologist spoke with the speech language pathologist from the Diagnostic Center prior to drafting goals, and the goals were consistent with the speech and language needs recognized by the Diagnostic Center assessment. No behavioral goals were set for Student at this meeting. During the meeting, Student's advocate asked how "present levels were determined" in Student's goals. The District personnel replied that "present levels of functioning were presented in the results from [the Diagnostic Center] in conjunction with the levels of attainment of previous year's goals/objectives."

96. The evidence supports a finding that the goals and objectives set by the IEP team during the March and May 2003 IEP meetings were objectively measurable and were designed to meet Student's educational needs as determined by the Diagnostic Center

assessment. They were specifically designed to remediate the areas in which Student had ongoing problems. Even though they were set to accomplish objectives that state standards considered "first grade" or "second grade" level, that did not mean they were not written to appropriate annual levels. According to the Diagnostic Center report, Student functioned near grade level in many areas, but still needed support in certain specified tasks. The goals and objectives addressed those tasks.

97. However, the evidence does not support a finding that the goals and objectives were designed to meet all of Student's unique educational needs. As with the year before, the District included no goals related to behavior or selective mutism/shut downs, except indirectly in some of the goals regarding open-ended questions. The February Diagnostic Center report discussed the need for a BSP and the need for school-based counseling. The District was already on notice that behavior was an ongoing problem for Student from the events of the prior two years. The Diagnostic Center report should have been a further indication of the need for behavioral goals. The District knew that both Student's behavior and his academic achievement were lower at school than they were when Student was tested at the Diagnostic Center or when he was with his tutor at home. Student had unique behavioral needs that affected his educational performance at school. His IEP goals should have addressed those unique behavioral needs.

Even after June 17, 2003, when the Diagnostic Center sent its follow-up report recommending a BSP relating specifically to Student's "shut downs," the District did nothing to draft behavioral goals or develop a BSP.

#### DID THE DISTRICT FAIL TO PROVIDE STUDENT WITH APPROPRIATE PLACEMENT AND SERVICES FOR THE 2002-2003 SCHOOL YEAR?

98. As set forth in Factual Findings 71 - 90, the evidence supports a finding that Student made academic progress during the 2002-2003 school year. At the end of his first grade year, he was not at grade level, but by the time the Diagnostic Center assessed him in December of 2002, he was doing grade level (second grade) work in many areas.

Although he never fully caught up with his grade level or his same-age peers during the year, he had made academic progress from his previous year and his report card at the end of the year showed he was approaching grade level.

99. The evidence also supports a finding that Student's placement and services, at least at the beginning of the 2002-2003 school year were the result of a mediation agreement between the District and Student's parents. Although it was only an interim agreement, not a final agreement and did not make any findings regarding FAPE, it still shows the agreement of the parties that the placement in a general education class at Barker Elementary School with resource center support was the appropriate placement for Student.

100. However, the evidence supports a finding that Student's special education services were not designed to meet all of Student's educational needs. Student continued to have behavioral problems. Although Student's ADHD-related behavior problems were controlled with medication, Student exhibited motor "tics" related to anxiety and continued to have problems with selective mutism/shut downs. Despite the recommendations of the Diagnostic Center, no BSP or school-based counseling services were offered to Student. Even though the Diagnostic Center recognized that behavioral support and counseling were necessary to address Student's unique needs, no goals related to behavior/selective mutism were written into Student's IEP. The District personnel dutifully complied with the specific, day-to-day, classroom recommendations made by the Diagnostic Center, but they missed two of the most critical overall recommendations. Addressing Student's anxiety might have enabled the District to offer Student ESY services, which would have prevented regression by Student at the start of the new school year.<sup>7</sup>

---

<sup>7</sup> However, no finding is made that the District denied Student a FAPE because of the failure to offer ESY services. The IEP team's ongoing concerns about Student's anxiety if he was sent to a new school during the summer were very sensible in light of Student's situation. It is not possible to state, based on the evidence introduced at hearing, whether

101. The evidence supports a finding that the District failed to provide placement and services designed to meet Student's behavioral needs throughout the entire 2002-2003 school year, even though the Diagnostic Center's recommendation for a BSP to address motor "tics" and selective mutism was not received by the District until June 2003, at or near the end of the school year. The District already had knowledge of Student's behavioral needs from the previous years. Those needs only grew more apparent during Student's second grade year when the Diagnostic Center made its recommendations.

DID THE DISTRICT COMMIT ANY PROCEDURAL VIOLATIONS DURING THE 2002-2003 SCHOOL YEAR THAT RESULTED IN A DENIAL OF FAPE FOR STUDENT.

102. Student contends that the District committed a procedural violation by failing to obtain appropriate evaluations for medical concerns (tics and selective mutism). The evidence does not support a finding that there was a procedural violation in this regard. As set forth in Factual Findings 75 – 81, the Diagnostic Center evaluators included a pediatrician and a registered nurse. The report specifically discussed Student's tics and "shut downs" and made extensive recommendations for classroom interventions. There was no need for further evaluations.

103. The evidence also does not support a finding that the District committed a procedural violation by failing to have someone at the IEP meetings who was knowledgeable about Student's diagnoses of tics and selective mutism. Unlike the prior year, during the 2002-2003 school year the Diagnostic Center conducted a full evaluation of Student. Diagnostic Center personnel do not consider themselves part of an IEP team and will not attend IEP meetings. To obtain input on these issues, the District held a separate meeting between Diagnostic Center personnel and the IEP team (including Student's mother) on the same day as one of the IEP meetings. In addition, District

---

Student could have attended ESY classes had the District properly addressed his behavioral needs.



personnel engaged in telephonic consultations with the Diagnostic Center experts regarding the assessment and Student's needs. This was sufficient to give the District personnel the expertise to address Student's disabilities. There was no procedural violation from the absence of Diagnostic Center personnel at the IEP meeting.

104. Student also contends that the District committed a procedural violation by failing to implement the communication log agreed to during the May 15, 2003 addendum IEP meeting. The evidence shows that the IEP team agreed that a communication log would be developed between the speech-language pathologist and the parent. This was confirmed in a handwritten letter from Student's advocate attached to the IEP. Part of the letter stated: "A Communication Log will be developed between the parent, Speech & Lang. & RSP teacher. The purpose of which is to also collect data on possible insight to the reasons [Student] shuts down."

105. The evidence does not support Student's contention on this issue. The communication log for Student's third grade year was entered into evidence at the hearing. Student's closing brief argues that the log was not implemented until September 2003 (the third grade year), but the evidence does not support this assertion. Student's mother testified that the log was implemented for a "couple of months" during Student's second grade year. That "couple of months" would cover the time from the May 15 IEP meeting until the end of the school year. There is a hearsay statement in a letter from Student's advocate attached to the November 10, 2003 IEP which states that the communication log had not been implemented during the prior year, but that is the sole evidence that it was not implemented. That hearsay statement is countered by the District's IEP notes which state that the communication log "has continued into this year."

No copy of a communication log from Student's second grade year was entered into evidence at the hearing. However, that does not prove the log never existed. The third grade log was entered into evidence by Student only during Student's rebuttal case on the final day of the hearing (over the District's objection to the document).

The evidence does not support a finding that the District failed to implement the communication log. There was no procedural violation in this respect.

106. Student raises a “procedural” issue that the District failed to implement the recommendations made in the Diagnostic Center assessment. This issue more properly relates to Student’s substantive FAPE claims. There is no procedural requirement that an IEP team must implement every single recommendation made by every assessor. As Dr. Cressey testified, Diagnostic Center recommendations are made to assist with a child’s education, but are not mandatory or binding on a District. Instead, it is the duty of the IEP team to determine which of the recommendations should be followed and how they should be implemented. The same applies to Student’s claim that the District “failed to make any offer of FAPE” following Student’s placement at Prentice. The District made an offer in the June 2004 IEP; whether that offer constituted FAPE is a substantive issue, not a procedural issue.

107. The case of *Norton School Committee v. Massachusetts Department of Education* (D. Mass. 1991) 768 F.Supp. 900, 908, relied upon by Student, does not change this. That case did not hold that a failure to implement the recommendations of an assessment constituted a procedural violation. Instead, the court considered the assessments and the failure to implement the terms of the assessment in connection with the issue of whether substantive FAPE was offered. The Diagnostic Center recommendations have already been considered from a substantive point of view in connection with the failure to provide appropriate placement and services in Factual Findings 98 – 101, above.

**DID THE DISTRICT FAIL TO ASSESS STUDENT IN ALL SUSPECTED AREAS OF DISABILITY DURING THE 2003- 2004 SCHOOL YEAR? (STUDENT IN THIRD GRADE)**

108. Student contends that, during the 2003-2004 school year, the District failed to assess Student in all areas of suspected disability because the District: 1) failed to conduct a

behavioral assessment; 2) failed to conduct an auditory processing assessment prior to January 2004; and 3) failed to conduct a speech/language assessment after January 2004.

109. During the fall of 2003, Student began attending the "Benchmark" class, a general education class designed for students who need extra help with reading. He also continued to receive special education through the resource center program for 49 percent of his educational day, as well as speech and language services.

110. Student's Assessment Results, Grade 1-3, dated October 10, 2003, found Student was "below basic" in reading and "basic" in math.

111. On November 1, 2003, a special review IEP meeting was held. The IEP Team found Student eligible for special education under the category of learning disorder. The purpose of the meeting was to determine whether the amount of time that Student was pulled from his Benchmark class for special education services was appropriate. The IEP Team determined that Student was making progress in the Benchmark class. The team determined that he should stay in that class for the entire morning, participate in the "Language!" program through the resource center after lunch and then return to his general education Benchmark class after that.

Student's mother expressed concerns that Student was not receiving services in areas with which he needed help and that the Diagnostic Center recommendations were not being followed. Student's advocate suggested that Student receive the Lindamood-Bell program and District personnel explained that the "Language!" program included many elements of the Lindamood-Bell method of teaching.

112. The "Language!" program is an intense reading and language arts program, designed to fill in the gaps in a child's education. It is a state-approved program intended to bring a Student to grade level in reading in approximately two years. It is similar to the Lindamood-Bell program in that they both employ multi-sensory methods of teaching and start with an emphasis in phonemic awareness. The "Language!" program is comprehensive, while the Lindamood-Bell program is broken down into separate components.

113. On December 8, 2003, Student's regular education teacher filled out Student's first trimester report card. Student grades had dropped slightly from the previous year, and he was "approaching grade level" in most subjects, including a few of the ones in which he had been at grade level the year before. However, Student met most of his IEP goals.

114. On December 9, 2003, James Carter, a program specialist for the District, sent an assessment plan to Student's parents for an auditory processing evaluation pursuant to an interim mediation agreement in Special Education Case No. SN02-01333. Student's mother signed the assessment plan on December 19, 2003.

115. On December 19, 2003, Student's parents sent a letter requesting mental health services for Student "by an individual who has knowledge in Selective Mutism."

116. In January 2004, the District prepared an assessment plan in preparation for Student's triennial review. The plan called for a comprehensive assessment in the areas of academic performance, social/emotional/adaptive behavior, psychomotor ability, language/communication development, intellectual/cognitive ability, and health and development. Student's mother signed that assessment plan on January 12, 2004.

117. On January 15, 2004, the District held a special review meeting with Student's mother for purposes of making a referral for a mental health assessment to satisfy Student's request for mental health services by individual with knowledge of selective mutism. The District did not hold a formal IEP meeting to discuss the request. Instead, the District held the review meeting in order to expedite the referral. The meeting was documented on an IEP form because of OCMH requirements. No referral was sent at that time, because Student's mother had not signed her agreement to the referral.

118. On January 28, 2004, Student's mother, at the District's request, signed a "Waiver of Time Limit" for the time to hold an IEP after an assessment. Her note at the bottom stated: "Although we are not happy about delaying the IEP, in the spirit of cooperation we will agree to this. But we will not agree to delay this any longer. We would like to have the IEP on Mon., 2/23/04 at 2:30."

119. In January and February 2004, assessments were conducted in accordance with the assessment plan signed by Student's mother on January 12, 2004. The District's speech pathologist assessed Student and found that Student continued to qualify for special education in the areas of articulation and expressive/receptive language. She recommended that speech/language services be provided in a small group setting "where he can volunteer answers/responses rather than individual sessions where he feels pressured to perform."

120. On January 21 and 23, 2004, in connection with Student's triennial review, school psychologist Brian Inouye conducted a psychoeducational assessment of Student and prepared a report of his findings. As stated in Factual Findings 11 – 19, Inouye administered the WISC-III to Student and determined that Student's cognition was in the "below average to average" range. Inouye noted that Student would not verbally state that he did not know an answer, but instead would remain silent.

121 Inouye also administered the Woodcock Johnson Test of Achievement–III (WJ-III) to Student. He found that Student's broad reading score was in the low average range. His passage comprehension was in the below average range, while his basic reading and decoding of words was in the low average range. His math skills were generally within the average range (except for math fluency which was above average). His written language skills were in the low average range.

122. Based on Inouye's findings regarding Student's cognitive ability, he concluded that there was no longer a significant discrepancy between Student's cognitive ability and his achievement. Inouye concluded that Student "does not meet the eligibility as a student with a learning disorder...."

123. In late January and early February 2004, in accordance with the mediation agreement of the parties, audiologist Rose-Marie Davis conducted an auditory processing assessment of Student. She concluded that Student had an "Auditory Processing Deficit-Integration Type," which made it difficult for him to hear speech clearly in a noisy

background. She recommended that modifications be made to Student's learning environment to "improve his acoustic access to information," including "FM amplification use, preferential seating, small classroom size and quiet study areas." She also recommended various teaching strategies to address his needs, as well as areas in which he would benefit from compensatory strategies to overcome his deficits.

124. Student's progress report dated February 8, 2004, showed that he continued to be below grade level in grammar, approached grade level in reading, had trouble with math word problems and was good at addition, subtraction and multiplication.

125. On February 23, 2004, Student's triennial review IEP meeting was held. The IEP Team found that he qualified for special education under the category of speech and language impaired. The team discussed Student's continuing problems with motor tics, and district personnel reported that he was more willing to participate in class than he had been in the past. Student had achieved all goals from his IEP except for the one dealing with subtraction.

126. The IEP team agreed that a mental health (AB 3632) referral should be made for Student. The IEP notes stated that: "Although the initial parent request was written in December 2003, this is the first mutually convenient opportunity for the IEP team to complete the referral process."

127. Draft goals and objectives were sent home with Student's mother, but the IEP team decided to wait to finalize the goals until the audiologist could be present to discuss her assessment report. Because the team expected to meet for another IEP, no offer of placement was made. Student continued with the placement set forth in his prior IEP.

128. On February 25, 2004, Student's parents gave notice to the District that the parents did not believe the District had made an offer of FAPE to Student. They stated that Student would begin attending Prentice School starting March 3, 2004, and that the parents would seek reimbursement from the District for the placement. The parents also requested that the District continue speech and language services to Student.

129. On February 26, 2004, the District sent the referral to OCMH. The referral letter stated, in part: “[Student] has a reported history of selective mutism. He has reportedly received a psychiatric evaluation from Kaiser in the past. [Student] reportedly takes Adderall to address an Attention Deficit Disorder. The parents are requesting ‘mental health services’ ‘by an individual who has knowledge in selective mutism.’”

130. On March 1, 2004, the District wrote a response to the letter of Student’s parents notifying the District about the Prentice School placement. The District’s letter explained that the District had offered FAPE, that Student had made educational progress, and that the Prentice School placement would not be reimbursed by the District.

131. On March 8, 2004, OCMH sent the District’s referral back because it was missing information. The OCMH letter noted that Student had met all his IEP goals except one, and that the referral was lacking, among other things, a “description of the emotional or behavioral characteristics that impede the pupil from benefiting from educational services.” The District made no attempt to follow up on that letter or provide additional information to OCMH. District representatives believed that OCMH had denied the referral because Student did not need mental health counseling in order to access his education. The District personnel did not contact Student’s parents about the denial or send a copy of the letter to Student’s parents, because they believed that the parents had received a copy of the denial letter. The letter was addressed to a District special education coordinator. There was no “cc” notation on the letter or any other indication that it had been sent to Student’s parents.

132. On March 11, 2004, the Prentice School conducted a screening test of Student. Student’s scores indicated the following grade equivalents for him: Basic reading 2.4, reading comprehension 1.8, spelling 2.8, mathematics reasoning 1.9 and numerical operations 4.3.

133. On April 22, 2004, an IEP meeting was held for Student. This was not the continuation of the February 2004 triennial IEP. Instead, according to the IEP form, the

meeting was both an "annual" IEP and "addendum SLP services." The notes of the meeting state that the purpose of the meeting was to arrange for speech and language services to be provided by the District, while Student was attending Prentice School. The District offered speech and language services on Thursdays from 8:45 a.m. to 9:15 a.m. twice a month and from 8:45 a.m. to 10:00 a.m. twice a month. All services were to be given at Barker Elementary School. Student's mother requested services after 3:00 p.m., when Student finished his day at Prentice, but the District's speech language pathologist was not available after 3:00 p.m. so that request was denied by the District. No District-provided speech/language services were ever accessed by Student while Student attended Prentice School. No teacher from Prentice was invited to the IEP meeting or attended the meeting.

134. The notes indicated that the triennial review that began on February 23, 2004, had yet to be completed. Student's mother wrote at the bottom of the notes that she had requested the triennial review be completed earlier. Student's mother would not sign the IEP until she had spoken to her attorney.

135. The IEP team did not review any of Student's past goals and objectives or set any new goals and objectives. The IEP did not offer any placement or services besides the speech and language services discussed above.

136. On May 10, 2004, the District sent Student's parents a notice that the continued triennial review meeting would be held on June 3, 2004, at 8:00 a.m. District personnel testified that the District was unable to hold the continuation of the triennial review earlier than June 3, 2004, because of scheduling conflicts, and that June 3, 2004, was the first mutually agreeable date that was available for all the IEP team members. However, the evidence does not support a finding that the District made a good faith attempt to schedule the continued meeting at an earlier date. Instead, the evidence is devoid of any document or testimony regarding any attempts made by the District personnel to notice or schedule an earlier meeting. Mr. Carter testified that Student's mother was only available on Tuesdays and Thursdays, but he provided no explanation why District personnel were



unavailable on any Tuesdays or Thursdays between February and June. Student's mother testified that she received no written or oral communications about trying to reschedule the meeting earlier than June 2004.

137. On June 3, 2004, the continuation of the triennial review IEP was held. No teacher from Prentice School was present at the meeting. Neither the District nor Student's parents invited anyone from the Prentice School to attend the IEP meeting. The notes to the meeting reflect that: "Advocate inquired if the staff from Prentice was invited to this meeting, and it was indicated that the District did not invite them as this was a continuation of the triennial review, and the District did not see the need to invite Prentice staff since [Student] was attending GGUSD at the time of the evaluation." District personnel telephoned Prentice School during the meeting, but neither Student's Prentice teacher nor administrator were available to participate by telephone in the IEP at that time.

138. The IEP team recommended a general education placement with services provided in the resource center program for 19 percent of Student's educational day, with additional speech/language and auditory processing instruction. The IEP team adopted the goals and objectives from the February 2004 IEP and added goals related to speech/language and auditory processing. Student's mother and advocate expressed concerns that the goals and objectives in the IEP might not reflect Student's present levels of functioning because of the progress he was making at Prentice. Subsequent to the meeting, the advocate sent a letter to the District expressing concern over the lack of a representative from Prentice.

139. The evidence supports a finding that the District failed to assess Student in all areas of suspected disability during the 2003-2004 school year because the District failed to conduct a behavioral assessment. By the 2003-2004 school year, it was clear that Student had unique needs in the area of behavior that were not being addressed in the District's placement and services. Student's shut downs and motor tics continued. The Diagnostic Center had recommended a behavior support plan to address those issues. Student's

parents even made a written request for a mental health services to the District in December 2003. Although the District sent a referral to OCMH, when OCMH refused the referral, the District dropped the matter. The District should either have followed the Diagnostic Center's recommendation for a behavior support plan or conducted another behavioral assessment to determine what steps should be taken. Although triennial assessments were done, they did not focus on key behavior – Student's continued selective mutism/shut downs.

140. The evidence does not support a finding that the District failed to assess in all areas of suspected disability because it failed to conduct a speech and language assessment after January 2004. Student has presented no evidence that the speech and language assessment conducted in January 2004 was inadequate or that circumstances changed during the rest of the 2003-2004 school year to require another assessment.

141. The evidence does not support a finding that the District failed to assess in all suspected areas of disability because it failed to conduct an auditory processing assessment. As set forth in Factual Findings 91 – 92, the Diagnostic Center assessment from the prior school year covered auditory processing and made recommendations to address Student's needs in that regard. The District ultimately agreed to a separate assessment in that area as a result of the parties' mediation agreement. That assessment was conducted and a report prepared. There was no failure to assess.

#### DID RESPONDENT CREATE APPROPRIATE GOALS AND OBJECTIVES FOR STUDENT'S IEPs DURING THE 2003- 2004 SCHOOL YEAR?

142. There were four IEP meetings held during the 2003-2004 school year. The November 2003 IEP was a special IEP called to review the time Student spent in the Benchmark program and the team did not draft goals and objectives. Goals and objectives were drafted for the February 2004 IEP, but they were never adopted because the IEP was not completed. At the April 2004 IEP, which was labeled the "annual" IEP, the IEP team

discussed only the speech language services at Prentice and did not draft goals and objectives.

143. The June 2004 IEP adopted the goals and objectives drafted at the February IEP and added goals relating to speech language and auditory processing. As before, these goals did not include goals related to behavior and therefore did not address all of Student's unique needs. In addition, the goals from the February 2004 IEP meeting were not updated at the June 2004 meeting. Because four months had passed from the IEP where these goals were drafted, the District should have determined if they were still appropriate goals. For example, Student might have met those goals in four months, in which case new goals should have been drafted. Because the District did not make any meaningful attempt to obtain information from Prentice, District personnel had no reliable information on how well Student had progressed.

144. The evidence supports a finding that the goals drafted by the District did not address all of Student's unique needs and were not created based on Student's current levels of performance as of the June 2004 IEP meeting.<sup>8</sup>

#### DID THE DISTRICT FAIL TO PROVIDE STUDENT WITH APPROPRIATE PLACEMENT AND SERVICES FOR THE 2003-2004 SCHOOL YEAR?

145. The evidence supports a finding that the District failed to provide appropriate special education services during the 2003-2004 school year. As set forth in Factual Finding 89, in June 2003, the Diagnostic Center stated unequivocally that a BSP was needed to address Student's shut downs and motor tics. The Diagnostic Center even included a sample of a BSP to let the District know precisely what was required. Despite that clear recommendation, the District never prepared a BSP for Student. Student's selective

---

<sup>8</sup> For this reason it is unnecessary to address Student's separate procedural issues regarding whether the IEPs should have contained goals related to auditory processing, selective mutism and written expression

mutism/shut downs affected Student's educational program constantly. They even affected Inouye's findings in the triennial assessment.

146. The District compounded the situation by taking four months to complete an annual IEP for Student after February 2004. The District made no offer of FAPE to Student for over four months. When the District finally did make an offer of FAPE, it still made no attempt to address Student's behavioral issues.

147. While the test scores showed that Student had made some educational progress, he never reached grade level. His reading comprehension continued to be significantly below both his grade level and his cognitive abilities. His IEP goals, which were adopted by the team at the end of Student's third grade year, called for Student to be performing beginning third grade level work or even second grade level work by the middle of fourth grade. Because the District never provided services to address Student's critical behavioral needs, the District failed to provide Student with a FAPE.

#### DID THE DISTRICT COMMIT PROCEDURAL VIOLATIONS THAT LED TO A DENIAL OF FAPE DURING THE 2003-2004 SCHOOL YEAR?

148. Student contends that the District committed procedural violations by failing to hold an IEP meeting to review the Lindamood-Bell assessment obtained by Student's parents and by failing to have anyone at an IEP meeting who could interpret the results of that assessment. The evidence does not support these contentions.

149. On December 10, 2003, Student was tested by an employee of the Lindamood- Bell program. Student's parents paid Lindamood-Bell \$645.00 for that testing. The parties dispute whether a copy of this test was provided to the District prior to the filing of Student's request for this due process hearing. Student's advocate testified that it was her custom and practice to fax assessments to the District as soon as she received them, but she did not have a specific recollection of faxing this one and no fax cover sheet was entered into evidence. She recalled discussing Lindamood-Bell testing at an IEP meeting, but did not recall any specifics about when that discussion occurred. Student's

mother testified that she brought the assessment to an IEP meeting. James Carter, the District's special education program supervisor who was Student's case manager at the time, testified that he never saw the Lindamood-Bell assessment until after the beginning of the due process proceeding. Other District witnesses had no recollection of seeing the document.

150. The evidence does not support a finding that the Lindamood-Bell assessment was given to the District prior to the start of the due process proceeding. There is no mention of the test results in the February, April or June IEP meeting notes. These notes are written by District personnel, so the absence is not conclusive. However, the evidence shows that Student's advocate was very careful to document Student's concerns in writing either during or after the IEP meetings during the 2003-2004 school year. For example, Student's advocate attached a letter to the November 2003 IEP expressing the parents' concerns and wrote a two-page handwritten letter after the June 2004 IEP meeting expressing concerns about what happened during the meeting. Not once does she discuss the Lindamood-Bell assessment. Even when Student's advocate did not attend the April 2004 IEP meeting, Student's mother wrote her concerns on the signature page. Once again, no mention was made of the Lindamood-Bell assessment.

151. Student has the burden of proof in this due process proceeding and has failed to meet that burden with respect to the Lindamood-Bell assessment. Although there is some evidence that the assessment was provided to the District personnel or discussed with them at an IEP meeting, it is not sufficient. The weight of the evidence does not support a finding that the assessment was provided to the District personnel prior to the filing of the due process proceeding in August 2004. If the District personnel did not know about the Lindamood-Bell assessment, the District could not have held an IEP meeting to review that assessment or had someone knowledgeable about Lindamood-Bell present at a meeting to review the assessment. There was no procedural violation as to those two issues.

152. Student contends that the District failed to follow the "prior notice" requirements of the Code of Federal Regulations with respect to Student's request for Lindamood-Bell services. At the November 10, 2003 IEP meeting Student's parents made a request for Lindamood-Bell services for Student. The District responded to the parent's request during the IEP meeting, but did not thereafter send a written notice to Student's parents in response to the written letter attached by Student's advocate to the IEP. At the time, Code of Federal Regulations, title 34, section 300.503 required a district to provide the child's parents a written notice that complies with the requirements of that section whenever the district "[r]efuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child." (34 C.F.R. § 300.503(a)(1)(ii).)

153. There is no evidence of any District written response to the advocate's request, except the notes of the discussion at the IEP meeting. Student's mother and advocate testified that they never received any written notice which met the legal requirements. District's witness Carter testified that, to the best of his recollection, no written notice was sent after the November 10, 2003 IEP meeting. The evidence supports a finding that the District failed to provide the required written notice when it refused Student's request for Lindamood-Bell services. The failure to comply with the legal requirements constituted a procedural violation.

However, the evidence does not support a finding that this procedural violation resulted in a denial of FAPE for Student. The subject of Lindamood-Bell was a constant source of dispute between Student's parents and the District. The District had made it very clear in the past that the District considered its "Language!" program to be the equivalent of the Lindamood-Bell program, so no Lindamood-Bell services were necessary. The subject was even discussed during the November 10, 2003 IEP meeting. The failure to send Student's parents yet another notice that the District would not fund Lindamood-Bell

services did not seriously infringe on the parents' opportunity to participate in the IEP process or result in loss of educational opportunities for Student.<sup>9</sup>

154. Student also raises contentions of numerous procedural violations with respect to the February, April and June 2004 IEPs. Several of these turn on the question of which of these three IEPs constituted Student's "annual" IEP. The boxes checked on the February and June IEPs indicate that the purpose of these IEPs was a review of the triennial assessments, while the April IEP was marked as the "annual" review and an addendum for speech and language services. However, District representative James Carter testified that the checked boxes on the IEPs were incorrect, and that the February and June IEPs were intended to be the annual IEPs for Student, while the April IEP was a special IEP for the purpose of providing speech language services to Student at the private school.

155. The evidence supports a finding that the IEP which was begun in February 2004 IEP and finished in June 2004 was intended to be the "annual" IEP. That was the IEP in which the offer for placement was ultimately made and the goals and objectives established. The April IEP, no matter what box was checked on the document or what it was called, dealt only with speech and language services at the private school. Just because the District personnel erred in checking boxes on the front of the IEP form does not change the reality of what occurred at the meetings.

156. Once it is established that the February 2004 IEP was supposed to be Student's annual IEP, it becomes plain that the District committed procedural errors with respect to that IEP meeting. The evidence supports a finding that the District failed to hold the IEP in a timely manner and failed to complete it in a reasonable time. The law requires the District to review a child's IEP annually. In this case, Student's parents agreed to waive

---

<sup>9</sup> It is not clear whether Student also claims the District failed to give prior notice for any requests Student made for Lindamood-Bell services prior to November 2003, but if so, the same analysis applies.

the time limit until February 23, 2004, but no longer. The IEP team should have decided Student's placement and services at that time. If the audiologist who conducted the auditory processing assessment could not attend the IEP, it would have been reasonable to seek a short delay. However, a four- month delay until June was not reasonable and prevented the team from making any offer of FAPE for almost the entire second half of the school year. As set forth in Factual Finding 136, this delay was entirely the District's doing. The District presented no evidence whatsoever of attempts to reschedule the meeting prior to June.

The District's failure to complete the annual review within the statutory time and to finish it within a reasonable time constitute procedural violations of special education law. Because the District's actions left Student without any offer of FAPE for the second half of the 2003-2004 school year, the procedural violations seriously infringed on the parent's opportunity to participate in the IEP process, resulted in loss of educational opportunities for Student, and constituted a denial of FAPE.

157. Student contends that the District's failure to have a teacher from Prentice School at the June IEP meeting or at least to obtain information from the Prentice School for the June IEP meeting also constituted a procedural violation. There is no dispute that no teacher from Prentice attended the IEP meeting or was invited by the parties. There is also no dispute that without input from Prentice, the IEP team did not have current information about Student's educational progress. The Prentice witnesses testified that Prentice teachers do not attend IEP meetings unless the District is paying for the placement, but will participate telephonically or provide documentation. The District argues that it had no obligation to invite a private school teacher and that the case relied upon by Student (*Shapiro v. Paradise Valley Unified School District* (9th Cir. 2003) 317 F.3d 1072) was based on an older version of the law which was superseded by statutory amendment. To support this argument, the District cites to an Office of Administrative Hearings case dealing with an



interim IEP meeting held because the child was transferring from one school district to another. That case is factually distinguishable from the current case.

The District cites to no other authority stating that *Shapiro* is no longer good law. Although the law has changed since *Shapiro*, during the school years in question, the law still required a current teacher. An IEP team must include "at least one regular education teacher *of such child*" and "at least one special education teacher...*of such child*..." (20 U.S.C. § 1414(d)(1)(B) (emphasis added).) No teacher "of such child" participated in Student's June 2004 IEP or provided any information. The District personnel at the meeting had not taught Student for four months. The IEP team adopted four month old goals and did not know Student's current educational progress. The absence of information from Prentice resulted in a loss of educational opportunity for Student and a denial of FAPE.

158. Student contends that the District failed to review Student's past goals at the April 2004 IEP meeting and failed to create goals and objectives at that IEP meeting. As set forth in Factual Findings number 154 - 155, the April 2004 IEP was not the annual IEP, so there was no need to review past goals or create new goals at that time. There was no procedural violation based on the District's failure to do so.

159. Finally, Student contends that the District failed to provide Student's parents with copies of documents/educational records requested by the parents and that the District failed to provide documents requested during the June 2004 IEP.

160. Student's parents made two requests for records during the 2003-2004 school year. In November 2003, Student's parents made a detailed request for most, if not all, of the documents the District possessed regarding Student. On June 3, 2004, either during the IEP meeting or shortly thereafter, Student's parents made a request for copies of correspondence between the District and Orange County Mental Health regarding the District's referral. On June 18, 2004, the District sent a letter to Student's parents explaining that Orange County Mental Health had turned down the referral for a mental health evaluation and enclosing the requested documentation. The District's response to the

parents request was not within the five day limit set forth in Education Code section 56504. The evidence supports a finding that the District committed a procedural violation with respect to the parents' request for the OCMH letter. However, the short delay did not seriously infringe on the parents' opportunity to participate in the IEP process or result in loss of educational opportunities for Student, and there was no denial of FAPE.

161. The evidence also supports a finding that the District failed to comply with the parents' request for all the records made in November 2003. District witnesses testified there were periodic tests given as part of the "Language!" program. Those tests were not provided to the parents despite the November 2003 request and a follow-up request made by Student's mother in the communication log.<sup>10</sup>

DID THE DISTRICT COMMIT PROCEDURAL VIOLATIONS DURING THE 2004-2005 SCHOOL YEAR WHICH DENIED STUDENT A FAPE? (STUDENT IN FOURTH GRADE AT PRENTICE SCHOOL)

162. During the 2004-2005 school year, Student attended the Prentice School, paid for by Student's parents. This private placement was the result of a dispute between Student's parents and the District, and the District still had an obligation to hold IEP meetings and make an offer of FAPE to Student. Student contends that the District failed to give proper notice of the March 2005 IEP meeting and improperly held that meeting without Student's parents in attendance. A review of the evidence supports Student's contentions.

163. On February 24, 2005, Student's parents sent a letter to the District. In the letter they explained that Student would be evaluated for progress in March at Prentice

---

<sup>10</sup> Whether the failure to produce these records constituted a procedural violation and a denial of FAPE is discussed in the Legal Conclusions, *infra*, in connection with the discussion of Student's request for sanctions.

School. They agreed to waive the time limit for conducting Student's annual IEP until after that evaluation.

164. On Friday, March 11, 2005, James Carter drafted a return letter to the parents stating that the District wished to go forward with the IEP despite the parents' agreement to waive the time limit. The letter stated that the IEP was scheduled for Monday, March 21, 2005, at 8:00 a.m. at Stanley Elementary School. Mr. Carter directed his secretary to mail the letter to Student's parents along with a formal notice of the same IEP meeting.

165. On Tuesday, March 15, 2005, Mr. Carter's secretary sent Mr. Carter's letter and the formal notice of the IEP meeting to Student's parents to sign and return. The letter and notice were sent to Student's parents by certified mail, return receipt requested. Student's parents were not home when the certified letter was delivered during the week, and were unable to sign for it. Because of their work schedules, Student's parents could not sign for and retrieve the certified letter until Saturday, March 19, 2005, two days before the Monday IEP meeting. Student's mother attempted to contact her advocate prior to the IEP meeting but was unable to reach the advocate over the weekend. She did not contact the District to say that she could not attend, because she had hoped that she could contact her advocate and attend the meeting.

166. Student's parents did not attend the 8:00 a.m. meeting on March 21, 2005. Student's mother drove Student to school at 7:20 a.m. that morning. The IEP went forward without Student's parents or Student's advocate in attendance. The District personnel made no other attempt to secure the attendance of Student's parents at the IEP meeting besides the notice sent six days before the meeting, nor did the District personnel document any attempts to contact the parents about the meeting other than that March 15 written notice.

167. The IEP team made the same recommendations regarding placement and services as in the previous IEP, but concluded that the team did not have sufficient information regarding Student's present levels of performance to draft goals and objectives.

168. On April 22, 2005, Student's parents made another request for records. The request was similar to the one made in 2003, but requested records after November 1, 2003.

169. The evidence supports a finding that the District failed to give proper notice to Student's parents of the March, 21, 2005 IEP meeting. California Education Code section 56341.5 mandates a District to take steps to ensure that at least one of Student's parents attends the IEP meeting. The letter from Mr. Carter and the written notice, sent only six days before the IEP meeting -- the sole attempt made by the District personnel to notify Student's parents about this meeting -- was not sufficient notice of the meeting. The District then compounded the problem by failing to make any other attempts to contact Student's parents and by holding the IEP meeting without them.

170. This was contrary to the cooperative IEP process envisioned by the law. The parents' request to extend the time for the meeting was very reasonable -- it made sense to hold the IEP meeting after evaluations from Prentice School were completed. The District provides no rationale for why the IEP meeting had to be held in March despite the parents' waiver. These were not parents who continually delayed or cancelled IEP meetings. They had attended every scheduled IEP meeting held by the District and had been cooperative the prior year when the District asked them to waive the time for an IEP meeting.

171. The District also violated Education Code section 56341.5 by holding the March 21, 2005 IEP meeting without one of Student's parents in attendance. As stated above, at least one of these parents had attended every past IEP meeting. When they did not appear at the March 21, 2005 IEP meeting or contact the District prior to the meeting, it should have been a warning to the District personnel that the parents had not timely received the notice. Education Code section 56341.5, subdivision (h), contemplates multiple attempts made by a District to secure parental attendance. The section only permits an IEP meeting to go forward "if the local education agency is unable to convince the parent or guardian that he or she should attend." In that event, the District is required to maintain "a

record of its *attempts* to arrange a mutually agreed-upon time and place....” (Ed. Code, § 56341.5, subd. (h), (emphasis added).)<sup>11</sup> The specific language of the code requires multiple attempts to reach the parents before the IEP meeting is held in their absence.

172. The March 21, 2005 IEP does not document any other attempts to contact these parents besides the untimely written notice. This is precisely the situation the Legislature wished to avoid when it enacted Education Code section 56341.5 – a hastily assembled IEP meeting on short notice, against parental wishes, which is conducted in the parents’ absence.

173. These two procedural violations – improper notice and conducting the IEP meeting in the parents’ absence – seriously infringed on the parents’ opportunity to participate in the decision making process regarding the provision of a free appropriate public education to their child and constituted a denial of FAPE. (*W.G., supra*, 960 F.2d 1479, 1484; 20 U.S.C. § 1415(f)(3)(E)(ii); 20 U.S.C. § 1415(f)(3)(E)(ii).) Indeed, these procedural violations strike at the very heart of the IEP process. As the Ninth Circuit recently reminded us: “Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA.” (*Shapiro, supra*, 317 F.3d 1072, 1077, quoting from *Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 892.)

174. Without proper notice and parental involvement, no valid offer of FAPE could have been made at the March 21, 2005 IEP, so there is no need to address the substantive issues related to the offer of FAPE in the March 21, 2005 IEP. In addition, there is no need to address the remaining procedural issues raised in Student’s due process request as to that school year.<sup>12</sup>

---

<sup>11</sup> During the school years at issue in this case, Education Code section 56341.5, subdivision (g), contained the relevant language.

<sup>12</sup> Student’s written closing argument discusses the need for a new speech and language assessment during 2005, but that was not at issue in this case. Student’s issue

## THE PRENTICE SCHOOL AND EDUCATIONAL COSTS PAID BY STUDENT'S PARENTS

175. During the years at issue in this case, the Prentice School was a certified, non-public school (NPS) which focused on teaching children who had difficulty with words and language.<sup>13</sup> The school uses the Slingerland method of teaching, a multi-sensory approach to language arts. The school provides services to pupils who have speech and language disabilities as well as auditory processing difficulties. Prentice class sizes are smaller than typical public school classes, so there is less background noise. Student's teachers at Prentice engaged in activities to help lessen Student's anxiety and address his auditory processing needs. For example, the Prentice teachers arranged signals for Student to let him know when he would be expected to speak. They also taught him to give verbal responses, such as "I don't know," instead of shutting down. At times, the teacher would let Student give a very quiet answer, just to her. Since Student began attending Prentice

---

regarding assessments in both Student's Second Amended Issues for Due Process Hearing and in the Prehearing Conference Order stated: "Has Respondent District appropriately and fully assessed [Student] in all areas of suspected disability for the three years preceding the filing of the due process hearing request, in August, 2004." (Emphasis added.) "Three years preceding" the date of filing the due process hearing request in August 2004, does not include the 2004-2005 school year. However, even if the issue had been properly raised, the evidence does not support a finding that the District failed to assess during the 2004-2005 school year. To the contrary, the evidence shows that the District sent out an assessment plan to Student's mother in March 2005, but Student's mother refused to sign it.

<sup>13</sup> Questions were raised at hearing about whether Prentice is in danger of losing its NPS status. However, because Student's current placement is not at issue in this case, just reimbursement to the parents for educational expenses already paid, there is no need to make a factual finding on that issue. The District does not dispute that Prentice was a certified NPS during the two school years in question.

School, his shut downs have grown less frequent and his motor tics have virtually disappeared. Although Student never completely caught up with his grade level by the end of the 2004-2005 school year, he did make educational progress and was approaching grade level.

176. The evidence does not support a finding regarding how much Student's parents actually paid for the Prentice School tuition during the 2003-2004 school year and 2004-2005 school year. The executive director of Prentice School testified that Prentice charges parents \$15,500.00 per year for tuition. Prentice charges more when a school district funds a child's education, rather than the parents, because of additional costs associated with special education coordination, clerical time and similar matters. However, it is not clear whether the \$15,500.00 tuition was the same during the two school years at issue in this case and whether Student's parents received a discount in tuition during the 2003-2004 school year because Student did not attend the full year. No Prentice invoices or proof of payment by Student's parents was introduced into evidence during the hearing. Student did not submit any evidence at the hearing regarding money paid by Student's parents for supplies/materials or transportation costs in connection with the Prentice School education.

177. The evidence supports a finding that the Prentice School was an appropriate placement for Student during the 2003-2004 and 2004-2005 school years. Upon proof of the actual money paid by Student's parents for the Prentice School tuition during the 2003-2004 and 2004-2005 school years (through invoices sent by Prentice, as well as receipts, cancelled checks or other proof of payment by Student's parents), the District must reimburse the parents for those actual amounts paid.

178. Student's parents paid \$645.00 for the Lindamood-Bell testing done in December 2003. They also paid for a private tutor during Student's repeated year of first grade and part of second grade. The tutor charged approximately \$50.00 to \$75.00 dollars per week, depending on whether the tutor worked two or three days that week. At some

point during Student's second grade year, Student began receiving free tutoring through a church. Student's mother could not remember specifically when the free tutoring began, but thought it was during mid-second grade. No invoices, cancelled checks or other documents were admitted into evidence to support the actual amounts that Student's parents paid to the tutor.

## LEGAL CONCLUSIONS

### APPLICABLE LAW

1. Pursuant to the Individuals with Disabilities in Education Act (IDEA), and, effective July 1, 2005, the Individuals with Disabilities in Education Improvement Act (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. (Ed. 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. § 1401(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. § 1401(29) (IDEIA 2004).)

2. The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(22) (IDEA 1997); 20 U.S.C. § 1401(26)(IDEIA 2004).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements 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 pp. 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 p. 201.)

4. To determine whether a district offered a 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 1307, 1314.) If the school district's program was designed to address a student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. Actions of school districts "cannot ... be judged exclusively in hindsight," but instead on "what was, and 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, quoting from *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

5. The heart of a student's special education is the IEP. At the time of the school years in issue in this case, Education Code section 56345 provided, in part, that an IEP "is a written statement determined in a meeting of the individualized education program team and shall include, but not be limited to, all of the following: (1) The present levels of the pupil's educational performance...(2) The measurable annual goals, including benchmarks or short term objectives...(7) Appropriate objective criteria, evaluation procedures, and schedules for determining, at least on an annual basis, whether the annual goals are being achieved...." (See also 20 U.S.C. § 1414(d)(1)(A).) The IEP must include several things, including a "statement of the child's present levels of educational performance," and "[h]ow the child's disability affects the child's involvement and progress in the general

curriculum....” (34 C.F.R. § 300.347(a).)<sup>14</sup> It must also include a “statement of measurable annual goals, including benchmarks or short-term objectives,” related to meeting the child’s needs to enable the child to progress in the general curriculum and meeting the child’s other educational needs that result from his or her disability, and a statement of how the child’s progress toward those goals will be measured and how the parents will be regularly informed of the child’s progress toward the goals. (34 C.F.R. § 300.347(a)(2),(7).)

6. A school district is required to comply with the procedural provisions of the IDEA and state education laws. However, procedural violations by a school district only result in a denial of FAPE if they “seriously infringe the parents’ opportunity to participate in the IEP formulation process” or result in the loss of educational opportunity. (*W.G., supra*, 960 F.2d at p. 1484; see also 20 U.S.C. § 1415(f)(3)(E)(ii).)

7. The law establishes requirements for the IEP team and the IEP process. An IEP team must consist of one or both of the student’s parents, not less than one regular education teacher of the student, if the student is or may be participating in the regular education program, not less than one special education teacher of the student, a representative of the local education agency, an individual who can interpret the instructional implications of the assessment results, the student, whenever appropriate, and at the discretion of the parent, guardian, or the local education agency, “other individuals who have knowledge or special expertise regarding the pupil, including related services personnel, as appropriate.” (Ed. Code, § 56341, subd. (b).)

8. School districts are required to “take steps to ensure” that at least one of a student’s parents is present at an IEP meeting “or are afforded the opportunity to participate.” (Ed. Code, § 56341.5, subd. (a).) The district is required to notify the parents of the IEP meeting “early enough to ensure an opportunity to attend” (Ed. Code, § 56341.5,

---

<sup>14</sup> All citations to the Code of Federal Regulations contained herein are to the pre-2006 version of the regulations

subd. (b)) and schedule the meeting “at a mutually agreed upon time and place.” (Ed. Code, § 56341.5, subd. (c).) A meeting may be conducted without a parent or guardian in attendance if the local education agency “is unable to convince the parent or guardian that he or she should attend. In this event, the local education agency shall maintain a record of its attempts to arrange a mutually agreed-upon time and place....” (Ed Code, § 56341.5, subd. (h), (formerly (g).)

9. The law does not require a district to pay for special education or services if the district offered FAPE to a child and the parents unilaterally chose to place the child in a private school or facility. However, the district can be ordered to reimburse the parents for the private placement if the district failed to offer FAPE to the child prior to that enrollment and if the private placement is appropriate. (*Shapiro, supra*, 317 F.3d 1072; 34 C.F.R. § 300.403(c).)

10. The parents of a child with a disability “must be afforded, in accordance with the procedures of §§ 300.562 – 300.569, an opportunity to...(1) Inspect and review all education records with respect to...(i) The identification, evaluation, and educational placement of the child; and (ii) The provision of FAPE to the child....” (34 C.F.R. § 300.501(a).) California law provides similar records production requirements. (Ed. Code, §§ 56043; 56504.)

11. Title 20, United States Code, section 1414, subdivision (d)(3)(B)(i) states that an IEP team shall “in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior....”<sup>15</sup>

12. A district is required to assess a child in all areas of suspected disability, and no single procedure may be used as the sole criterion for determining whether the child

---

<sup>15</sup> The former version of Title 20 United States Code section 1414, in effect at the time of the school years in question in this case, contained similar language.

has a disability or for determining an appropriate educational program for the child. (20 U.S.C. § 1414(b)(2), (3); Ed. Code, § 56320, subd. (e), (f).) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3); Ed. Code, § 56320, subd. (b).) If the parent or guardian obtains an individual educational assessment, a district is required to consider the assessment. (Ed. Code, § 56329, subd. (c).)

13. The burden of proof in this proceeding is on the party seeking relief, in this case the Student. (*Schaffer v. Weast* (2005) 546 U.S. \_\_\_\_\_ [126 S. Ct. 528].)

## DETERMINATION OF ISSUES

14. *Did the District appropriately and fully assess Student in all areas of suspected disability for the three years preceding the filing of the due process request, in August 2004?*

- a. As set forth in Factual Findings 2 – 57 and Legal Conclusion 12, Student has met his burden of proving that the District failed to assess him in all areas of suspected disability during the 2001-2002 school year on the basis that the District failed to conduct a behavioral assessment regarding Student's selective mutism/shut downs. Student did not meet his burden of proving that the District failed to assess him in the area of auditory processing.
- b. As set forth in Factual Findings 70 – 92 and Legal Conclusion 12, Student did not meet his burden of proving that the District failed to assess him in all areas of suspected disability during the 2002-2003 school year.
- c. As set forth in Factual Findings 108 – 141 and Legal Conclusion 12, Student has met his burden of proving that the District failed to assess him in all areas of suspected disability during the 2003-2004 school year on the basis that the District failed to conduct a behavioral assessment regarding Student's selective mutism/shut downs. Student did not meet his burden of proving that the District failed to assess him in the areas of auditory processing or speech and language.

15. *Did the District provide appropriate placement and services to Student to meet his unique educational needs?*

- a. As set forth in Factual Findings 64 – 65 and Legal Conclusions 1 – 5, Student met his burden of proving that the District failed to provide placement and services to address all of Student’s unique educational needs, in particular, his behavior (selective mutism/ shut downs) during the 2001-2002 school year.
- b. As set forth in Factual Findings 98 - 101 and Legal Conclusions 1 – 5, Student met his burden of proving that the District failed to provide placement and services to address all of Student’s unique educational needs, in particular, his behavior (selective mutism/ shut downs) during the 2002-2003 school year.
- c. As set forth in Factual Findings 145 - 147 and Legal Conclusions 1 – 5, Student met his burden of proving that the District failed to offer or provide placement and services to address all of Student’s unique educational needs, in particular, his behavior (selective mutism/ shut downs) during the 2003-2004 school year.<sup>16</sup>

16. *Did the District commit procedural violations which resulted in substantial denials of a Free Appropriate Public Education (FAPE) for Student?*

- a. As set forth in Factual Findings 66 - 69, Student met his burden of showing that the District committed a procedural violation which resulted in a denial of FAPE during the 2001-2002 school year by failing to have an individual at the IEP meetings who was knowledgeable about Student’s selective mutism/shut downs. Student failed to meet his burden of proving that the District committed any

---

<sup>16</sup> As stated above in Factual Findings 173-174, the District’s procedural violations during the 2004-2005 school year denied Student a FAPE and make it unnecessary to address the issue of the placement and services offered during that year. It is also unnecessary to address the issue of goals and objectives during that school year as discussed in Legal Conclusion 17 below.

other procedural errors that resulted in a denial of FAPE during the 2001-2002 school year.

- b. As set forth in Factual Findings 102-107, Student failed to meet his burden of showing that the District committed any procedural violations which resulted in a denial of FAPE during the 2002-2003 school year.
- c. As set forth in Factual Findings 148-161, Student met his burden of proving that the District committed procedural violations which resulted in a denial of FAPE during the 2003-2004 school year by failing to hold and complete the annual/triennial IEP in a timely manner and by failing to have Student's current Prentice teacher or at least current information from Prentice available at the meeting. Aside from the issue of records production, which will be discussed in Legal Conclusions 18 - 23 below, Student failed to meet his burden to prove that the District committed any other procedural violations during the 2003-2004 school year.
- d. As set forth in Factual Findings 162-174, Student met his burden of proving that the District committed procedural violations that resulted in a denial of FAPE during the 2004-2005 school year when the District failed to provide proper notice of an IEP meeting and held the meeting in the parents' absence. These two violations seriously infringed on the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to their child and constituted a denial of FAPE. Because of the serious nature of these two violations, it is not necessary to address any of the remaining procedural violations alleged by Student for that school year.

17. *Did the District create appropriate goals and objectives for Student's IEPs?*

As set forth in Factual Findings 58-63, 93-97 and 142-147, Student met his burden of proving that the District failed to create appropriate goals and objectives for Student's IEPs during the 2001-2002, 2002-2003, and 2003-2004 school years by failing to create goals

and objectives designed to meet all of Student's educational needs, in particular his selective mutism/shut downs.

#### RECORDS REQUESTS AND DOCUMENT PRODUCTION

18. Student raised a procedural issue that the District "failed to provide the parents with copies of documents/educational records as repeatedly requested." At the start of Student's rebuttal case on the final day of hearing, August 15, 2006, the Student also submitted a document entitled "Petitioner's Motion to ALJ to Initiate Sanctions for Failure to Provide Documents to Parent."<sup>17</sup> These two issues will be dealt with together, since they involve the same documents.

19. Student's request for sanctions is based on a "spoliation of evidence" theory. It is uncertain whether that is a proper basis for sanctions in a special education case. However, it is not necessary to decide this issue, because, even if the theory is applicable, the circumstances of this case do not support an order for sanctions.

20. The documents in question are copies of tests given periodically as part of Student's instruction in the "Language!" program. As set forth in Factual Findings 160-161, these documents existed during the 2003-2004 school year, but were never provided to Student's parents. Counsel for the District reported during the hearing that his client is unable to locate those records at the present time.

21. California Education Code section 56043, subdivision (n), (formerly subdivision (l)), provides that Student's parents shall have the right to examine "all school records of the child and to receive copies within five calendar days after a request...." The words "all school records" mean just what they state – all records are accessible to parents. The District argues that these "Language!" program tests are like a spelling test given to a Student as part of the classroom work, not a formal assessment for IDEA purposes.

---

<sup>17</sup> The moving papers were marked as Exhibit JJJJ, solely for identification for the record.

However, that does not excuse the failure to produce those documents after a request was made. These were not teacher notes or lesson plans – they were tests given to Student that reflected how well Student was performing in special education instruction. Student’s parents made a records request in November 2003, when these test records would still have been in existence. On March 1, 2004, Student’s mother asked the teacher for copies of tests (including spelling and math tests) in the communication log. Student’s mother made another records request in April 2005.

22. Given all those requests, the District should have produced all of Student’s records to Student’s parents and should have known to save the records that had not been produced. There is no excuse for the District to have thrown away Student’s tests in the “Language!” program under those circumstances.

23. The District’s failure to produce all of Student’s records to Student’s parents constituted a procedural violation. In 2003 – 2004, when Student’s parents were disputing the District’s offer of FAPE and had pulled Student from the District’s program, the failure to produce records significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a free appropriate public education to their child and constituted a denial of FAPE.

24. However, there is no reason to impose sanctions in this case. While the District may have erred in believing it had no duty to retain and produce what it thought of as “spelling tests,” there is no indication that the District deliberately destroyed the records. Further, there is no prejudice to Student’s parents in their ability to try this due process case from the failure to produce the documents. Student has proven that the District failed to provide Student with a FAPE during the 2003-2004 and 2004-2005 school years without the benefit of these records. The request for sanctions is denied.



Are Student's parents entitled to reimbursement for the tutoring, placement and services, including supplies/materials, and transportation costs, as well as the costs of their independent evaluation by Lindamood-Bell?

25. Student successfully met his burden of proving that the District failed to provide Student with a FAPE during any of the school years in question. Despite Student's ongoing shut downs and the motor tics which indicated his level of anxiety and despite the Diagnostic Center recommendations, the District never set up a BSP for Student or even created behavior-related goals and objectives. Apparently the District believed that, as long as the Student was not disruptive in the class or on the playground, his behavior did not need to be addressed. Even if the District's opinion in this regard might have been excused initially, once the Diagnostic Center recommended a BSP and even attached a sample plan to assist the District, there was no excuse for the District to ignore this issue any longer.

26. Then the District compounded this problem with a psychoeducational assessment in early 2004 that was clearly flawed and led the District to change Student's eligibility categories for special education. At that point, Student's parents had more than enough reason to believe that the District's program was not providing and would not provide an appropriate education to their son. Their action in placing Student in the Prentice School was very reasonable under the circumstances and has benefited their son psychologically and educationally.

27. Once Student began attending Prentice, the District began to neglect the requirements of the law regarding Student's IEPs. The District waited four months to complete Student's 2003-2004 IEP, leaving Student without any offer of FAPE for much of the school year. The following year, the District deliberately scheduled an IEP meeting against parental wishes, with barely any notice, and made no other attempts to contact the parents when they did not attend. Student's parents were justified in keeping their son at the private school.

28. As discussed above in Factual Findings 175-177, the Prentice School was an appropriate placement for Student during the 2003-2004 and 2004-2005 school years.

Upon proof of the actual money paid by Student's parents for the Prentice School tuition during the 2003-2004 and 2004-2005 school years (through invoices sent by Prentice, as well as receipts, cancelled checks or other proof of payment by Student's parents), the District must reimburse the parents for those actual amounts paid.

29. The District is not obligated to reimburse Student's parents for the cost of the Lindamood-Bell assessment. As established in Factual Findings 148 – 151, the assessment was never given to the District. Further, there is no evidence that Student ever attended the Lindamood-Bell program or that the assessment had any significance in Student's education.

30. With respect to tutoring, Student submitted no cancelled checks, invoices or bills into evidence. Student's mother testified to some general amounts that she paid per week, but she could not remember specifically how much was paid, how many tutoring sessions occurred or the date when Student began receiving tutoring free of charge. Reimbursement is based on equitable considerations. It would not be equitable to require the District to reimburse Student's parents for tutoring costs under these circumstances.

## ORDER

The Student's request for relief against the District is granted in part and denied in part. Within thirty (30) days of the date of this order, Student's parents will submit documents to the District establishing the tuition costs of the Prentice school for the 2003-2004 and 2004-2005 school years that were actually billed by the school and paid for by Student's parents. Within sixty (60) days after the end of that thirty (30) day period, the District will pay to Student's parents the actual costs paid by Student's parents for the tuition, as documented by Student's parents in accordance with this order.

## 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:

For the 2001-2002 school year, Student prevailed on the issue of assessments related to behavior, but did not prevail on the issue of assessments related to auditory processing. Student prevailed on the issue of appropriate placement and services and the issue of goals and objectives. Student prevailed on the procedural issue regarding the failure to have someone knowledgeable about selective mutism/shut downs at the IEP meetings. The District prevailed on all other alleged procedural violations.

For the 2002-2003 school year, Student prevailed on the issues regarding appropriate placement and services and goals and objectives. The District prevailed on the issue of assessments and procedural violations.

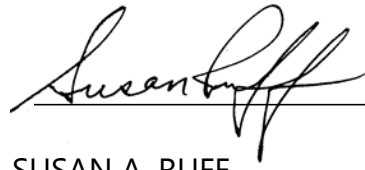
For the 2003-2004 school year, Student prevailed on the issue of assessments related to behavior, but did not prevail on the issue of assessments related to auditory processing and speech/language. Student prevailed on the issue of appropriate placement and services and the issue of goals and objectives. Student prevailed on the procedural issues related to the failure to timely hold and complete the annual/triennial IEP and the failure to have Student's private school teacher at the IEP. Student also prevailed on the issue of the District's failure to comply with Student's November 2003 request for records. The District prevailed on the remaining procedural issues.

For the 2004-2005 school year, Student prevailed on all issues.

## 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 90 days of receipt of this Decision in accordance with California Education Code section 56505, subdivision (k).

Dated: September 27, 2006



---

SUSAN A. RUFF

Administrative Law Judge

Special Education Division

Office of Administrative Hearings