

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

STUDENT,

Petitioner,

OAH CASE NO. N2006070550

v.

SAN MATEO UNION HIGH SCHOOL
DISTRICT,

Respondent.

DECISION

Administrative Law Judge (ALJ) Suzanne Brown, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on December 18-20, 2006, in San Mateo, California.

Attorney Susan Foley represented the Petitioner Student. Student's mother attended the hearing on Student's behalf. Legal assistant Linda Hughes also attended the hearing.

Attorney Laurie Reynolds represented Respondent San Mateo Union High School District (District). Marvin Meyers, Director of Special Education, attended the hearing on the District's behalf. Attorney Emily Ross also attended the first day of hearing.

On July 19, 2006, Student filed with OAH a due process hearing complaint (Complaint). On August 25, 2006, OAH continued the initial hearing date, which had been scheduled for September 13, 2006. Following a trial setting conference (TSC) on September 26, 2006, OAH rescheduled the hearing for December 18-21, 2006.

At the hearing on December 18, 19, and 20, 2006, the ALJ received sworn

testimony and documentary evidence.¹ Upon receipt of the written closing arguments on January 8, 2007, the record was closed and the matter was submitted.

ISSUES

1. Did the District deny Student a free appropriate public education (FAPE) from July 19, 2003, through the 2005-2006 school year by failing to:
 - a. assess Student's behavioral needs; and
 - b. meet Student's unique needs for behavioral and mental health services?
2. Did the District deny Student a FAPE from November 12, 2003, through the 2005-2006 school year by failing to:
 - a. have a school psychologist attend the November 12, 2003 IEP team meeting;
 - b. assess Student in the areas of behavior, speech and language, and academics;
 - c. provide adequate present levels of performance in the November 12, 2003 IEP in the areas of behavior, speech and language, and academics, which denied Student educational opportunity and his parent an opportunity to participate in the decision-making process;
 - d. include adequate goals in the November 12, 2003 IEP in the areas of behavior, speech and language, academics, and mental health, which denied Student educational opportunity and his parent an opportunity to participate in the decision-making process; and
 - e. meet Student's unique speech and language needs in the areas of dysfluency, and expressive, receptive and pragmatic language skills?
3. If the District denied Student a FAPE, is the Student's mother entitled to

¹ Pursuant to discussion on the final day of hearing, the curriculum vitae of Dr. Patrick Conway is also admitted into evidence as Student's exhibit 13.

reimbursement for private school placements from March 2004 to June 2006, and related transportation costs?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Student is nineteen years old and, during all times at issue in this case, was a resident within the boundaries of the District. He was eligible for special education services due to a primary disability of specific learning disability (SLD), and also met the criteria for speech-language impairment (SLI). In June 2006, he received a high school diploma from Mount Bachelor Academy, a private residential school in Oregon.

FACTUAL BACKGROUND PRIOR TO JULY 2003

2. For his elementary school years, Student attended public schools, where he was found eligible for special education beginning in third grade. Student continued to be eligible for special education in middle school, which he attended in the San Mateo-Foster City School District. When he entered the San Mateo Union High School District for ninth grade, his IEP provided that his primary disability was SLD, with a secondary disability of SLI.

3. For the 2002-2003 school year, Student attended ninth grade at the District's Hillsdale High School (Hillsdale). Student's triennial reassessment was due in November 2002. In September 2002, District school psychologist Christina Hadley reviewed Student's school records and spoke with his teachers. Pam Rianda, Student's counselor and SDC teacher for three classes, tested Student's academic levels by administering three diagnostic tests, including the Wide Range Achievement Test (WRAT), to measure his academic levels.² However, Ms. Hadley and Ms. Rianda agreed

² Also in September 2002, Ms. Rianda's classroom assistant conducted a

that additional retesting was not necessary because Student's eligibility remained the same. For this reason, Ms. Hadley recommended to Student's mother that the District not conduct further retesting, and Mother did not request any additional testing.

4. On October 4, 2002, Student's IEP team convened for Student's triennial review. The team members agreed that Student's eligibility remained the same, and that his placement and designated instruction and services (DIS) would remain the same: special day class (SDC) placement for three to four classes; general education for elective classes, physical education, and lunch; and DIS of speech-language therapy for three sessions per month.³ The IEP also included accommodations such as extended time on tests and the opportunity to give oral presentations in private with the teacher. The IEP notes reflect Student's problems with attendance, punctuality, motivation, anger, and defiant behaviors; the IEP team members agreed to refer Student to the school's anger management group.

5. On October 17, 2002, Ms. Rianda completed the form to refer Student to the school safety advocate, for participation in the anger management group. On November 12, 2002, the IEP team convened to develop a behavior support plan (BSP) to address Student's problem behaviors in the classroom. In January 2003, Student completed his first semester of ninth grade with a grade point average (GPA) of 1.0.

6. In a letter dated April 8, 2003, Student's mother requested an IEP meeting to discuss changing Student's classroom placement and counselor, due to concerns about Student's ability to work with Ms. Rianda. On May 1, 2003, the IEP team convened to discuss the proposed changes. After discussion of how Student was performing at

classroom observation of Student.

³ For the second semester, Student attended a general education English class instead of a special education class.

school, the IEP team members, including Student's mother, agreed not to change Student's placement or counselor. Notes of the meeting indicate that Student's negative behaviors remained significant and continued to interfere with his educational progress. During the discussion, Student's mother indicated that Student was in therapy with a private therapist.

7. On May 15, 2003, Student was arrested for stealing beer from a supermarket in San Mateo. This incident led to subsequent prosecution in the Juvenile Court; as discussed further below, in March 2004, the Juvenile Court adjudged Student to be a ward of the court. In June 2003, Student completed his second semester of ninth grade with a GPA of 0.667.

SUMMER 2003

8. In July and August 2003, Student attended a summer school English class and earned a "C" grade, which raised his overall GPA. His disciplinary record does not reflect any disciplinary referrals during this summer.

2003-2004 SCHOOL YEAR

9. For the 2003-2004 school year, Student was in tenth grade at Hillsdale. Special education teacher Jessica Hahn taught two of Student's SDC classes, and was also his counselor. Student got along well with Ms. Hahn and demonstrated improved behavior at school. During this time period, Student did not receive any disciplinary referrals related to disruptive behavior, verbal harassment of other students, or related behaviors he had manifested in ninth grade. Instead, his main behavioral problem in tenth grade was repeated truancy.

10. Student's IEP team convened for its annual meeting on November 13, 2003. The IEP notes indicate that Student was failing all of his classes due to excessive absences. Student's speech therapist reported that Student had made no progress on his

speech goals because he failed to attend his speech therapy sessions. Due to Student's attendance problem, the IEP team changed his DIS from weekly speech therapy to speech consultation, to maximize his time spent in his classes. The IEP team also developed a BSP to address Student's truancy. The District members of the IEP team were not aware of the May 2003 theft or Student's involvement with the Juvenile Court system.

11. In January 2004, Student completed his first semester of tenth grade with a GPA of 1.187; he received two Cs, two Ds, a D-, and an F. On March 4, 2004, the Juvenile Court sustained the charge of petty theft, and adjudged Student to be a ward of the court pursuant to California Welfare & Institutions Code section 602. The Court sentenced Student to 60 days of detention in Juvenile Hall, but stayed that sentence and instead allowed Student to attend Rocky Mountain Academy at his parents' expense.⁴ In mid-March 2004, Student left California to attend the Ascent Therapeutic Adventure Program (Ascent), a six- week wilderness program located in Idaho. The Ascent program included counseling, physical education, cooking, wilderness training, and English/journal writing, but did not include other academic classes.

12. Thereafter, Student did not return to attending school in the District. On or about March 22, 2004, Student's mother telephoned Ms. Hahn to inform her that Student would not be returning to Ms. Hahn's class because he was attending the Ascent program in Idaho, and would thereafter be attending Rocky Mountain Academy over the summer.

13. At Ascent, Student revealed that previously he had been regularly smoking marijuana and drinking alcohol. In May 2004, Student completed the Ascent program.

⁴ The Juvenile Court's Findings and Orders included additional orders, such as that Student pay a restitution fine to the supermarket in the amount of \$25.

The Ascent staff recommended that attendance at CEDU High School (CEDU) would be more appropriate for Student than Rocky Mountain Academy.⁵ The Juvenile Court accepted that recommendation and ordered Student to attend CEDU in San Bernardino County, California. Student attended CEDU from May 2004 to March 2005.

2004-2005 AND 2005-2006 SCHOOL YEARS

14. Student remained at CEDU until approximately March 26, 2005, when the school closed due to bankruptcy. As a result, Student left CEDU and returned to his family's home in San Mateo. He remained at home for several weeks while his mother, in consultation with his probation officer, Patricia Pritchard, attempted to locate a new placement for him. Student's mother did not ask the District to find a placement or otherwise notify the District about the need for a placement. In May 2005, Student began attending Mount Bachelor Academy (Mt. Bachelor), a private residential school in Oregon. Initially, Student was not motivated to do his academic work at Mt. Bachelor, but his motivation changed after a telephone conversation with his probation officer in California. In June 2006, Student received a high school diploma from Mt. Bachelor. Thereafter, he returned to his family's home in San Mateo and began attending community college and working part-time at a supermarket.

15. Throughout the period of Student's attendance at Ascent, CEDU, and Mt. Bachelor, Student's mother did not ask the District to fund Student's residential placements. In July 2006, Student's due process complaint notified the District that Student's mother was seeking reimbursement for the costs of the residential placements, including related transportation expenses.

⁵ Ascent, Rocky Mountain Academy, and CEDU High School were all operated by the same company, the CEDU organization.

DISTRICT'S ASSESSMENT OF STUDENT'S NEEDS REGARDING BEHAVIOR

16. Student contends generally that the District failed to assess his behavioral needs. Specifically, Student alleges that the District failed to conduct an environmental assessment prior to drafting the November 2002 BSP, causing the IEP team to draft that BSP without sufficient information about how Student's "undesirable behaviors were functioning for him." A pupil must be assessed in all areas related to his or her suspected disability. Preliminarily, it bears repeating that any failure to assess is at issue only to the extent that it affected the Student on or after July 19, 2003. It is unclear whether the District conducted the environmental assessment in November 2002.⁶ However, the team members at the November 2002 meeting identified Student's behavior problems, such as disruptive behavior and verbal harassment of other students, and drafted a BSP to address those behaviors. Pursuant to Factual Findings 8 and 9, at least by the beginning of the 2003-2004 school year, Student's disruptive behaviors had significantly decreased. In light of all evidence, any issue regarding the November 2002 environmental assessment did not constitute a failure to assess Student's behavioral needs as of July 2003.

17. The remaining question is whether the District was legally obligated to conduct further assessment of Student's behavioral needs related to his truancy. Student's Complaint alleges that the District should have conducted a functional analysis assessment (FAA) or a functional behavioral assessment (FBA). Student's behavior was

⁶ Ms. Rianda testified that she did not recall whether she had conducted the environmental assessment in 2002, or whether another District employee had. Given that Ms. Rianda testified about this topic approximately four years after the completion of the assessment plan, her lack of recollection is not particularly indicative of whether or not District staff conducted the assessment.

not self- injurious, assaultive, or the cause of serious property damage, and thus did not constitute a “serious behavior problem” requiring an FAA and behavioral intervention plan (BIP). However, pursuant to Factual Findings 9 and 10, Student’s failure to attend school was a significant problem in fall 2003, and it significantly impeded his learning. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, “strategies, including positive behavioral interventions, strategies, and supports to address that behavior.” In November 2003, the team members identified Student’s truancy behaviors and, through drafting the BSP, identified strategies to address those behaviors. Although an FBA concerning Student’s truancy behaviors would likely have been beneficial, the law did not require the District to conduct an FBA, and Student did not establish that an FBA was required. (Cf. 34 C.F.R. § 300.520(b)(1)(i) (1999).) Thus, the absence of an FAA or FBA did not constitute a failure to assess Student’s behavioral needs.

ADDRESSING STUDENT’S UNIQUE NEEDS FOR BEHAVIORAL AND MENTAL HEALTH SERVICES

18. As discussed above, as of July 2003, Student’s primary behavioral problem was his failure to attend school. Student needed to attend school in order to receive educational benefit, and there is no dispute that he needed behavioral interventions to address his truancy behaviors. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, “strategies, including positive behavioral interventions, strategies, and supports to address that behavior.” Although school authorities are not necessarily able to compel teenage students to attend school, a program for a truant special education student generally should include at least some aspect designed to address attendance. (See, e.g., *Board of Educ. of Oak Park and River Forest High Sch. Dist. v. Illinois State Bd. of Educ. and Kelly E.*, 21 F.Supp.2d 862, 877 (N.D. Ill. 1998).)

19. The District argues that the behavioral interventions it provided pursuant to the November 2003 BSP were designed to address his truancy behaviors and thereby allow him to receive educational benefit. In contrast, Student contends that the District's interventions were insufficient; however, other than mental health services, at hearing Student did not identify what behavioral interventions the District should have utilized instead. The November 2003 BSP included a daily check on Student's planner, one-to-one work on assignments, a weekly progress report, and positive reinforcement for attendance. Ms. Hahn also sent a referral for Student to Glenn Bautista, a County probation officer who handled truancy issues at Hillsdale.⁷ On various occasions when Student did not show up for her class, Ms. Hahn would call Student on his cell phone to tell him to come to class.⁸ Ms. Hahn also telephoned Student's mother on some occasions when Student was not in school.

20. After implementation of the BSP, Student's attendance improved somewhat. In January 2004, Student completed his first semester of tenth grade with a GPA of 1.187; he received two Cs, two Ds, a D-, and an F. Testimony from Ms. Hahn established that, given that Student had been failing all of his classes as of mid-November 2003, these grades demonstrated improved attendance and performance.

21. A local educational agency (LEA) may refer a pupil for community mental health services when the pupil has emotional or behavioral characteristics that: (1) are observed by qualified educational staff in educational settings and other settings as

⁷ The referral to Mr. Bautista for truancy was separate from Student's Juvenile Court probation related to the May 2003 supermarket theft

⁸ Student's mother also tried to improve Student's school attendance. For example, she drove Student to school in the mornings, and would periodically call Student on his cell phone during the day to check that he was in school

appropriate; (2) impede the pupil from benefiting from educational services; (3) are significant as indicated by their rate or occurrence and tendency; and (4) are associated with a condition that cannot be described solely as a social maladjustment or a temporary adjustment problem, and cannot be addressed with short-term counseling. Moreover, the LEA must first have provided appropriate services, such as counseling or behavioral intervention, and the IEP team has determined that the services do not meet the individual needs of the pupil, unless the IEP has documented that such services would be inadequate or inappropriate.

22. During the time period at issue, the significant, frequent behavior that was impeding Student from benefiting from his education was truancy. By itself, truancy is not associated with a condition requiring mental health services. Testimony from Student's teachers established that they did not observe Student exhibit behaviors that would have suggested a need for mental health services. While the witnesses who worked with Student in his private placements following his withdrawal from Hillsdale testified that Student would have needed mental health services at Hillsdale, these opinions were speculative. None of these witnesses were familiar with Student's placement or services at Hillsdale. Moreover, Mr. Moffitt and Dr. Conway both worked with Student more than two years after he left Hillsdale, and were not knowledgeable about his functioning during the 2003-2004 school year. In light of all evidence, the BSP interventions and referral to the truancy officer were designed to address Student's truancy behaviors, and the evidence did not establish that he needed mental health services.⁹ While Student may have benefited from additional measures, the lack thereof

⁹ The District also points to Student's receipt of on-site counseling following the October 2002 referral to the school safety advocate. However, it is not clear whether those services were made available to Student during the 2003-2004 school year

did not constitute a denial of FAPE.

ATTENDANCE AT NOVEMBER 12, 2003 IEP MEETING

23. At the November 12, 2003 IEP meeting, the team members in attendance included Ms. Hahn, Ms. Rianda, speech-language pathologist Lisa Fox, a District administrative representative, Student, and Student's mother. Student contends that the failure to have a school psychologist attend the meeting constituted a procedural violation because the IEP members in attendance lacked experience and training in behavior modification. However, Ms. Hahn and Ms. Rianda both established in their testimony that their education and training included training in drafting BSPs. While a school psychologist's participation in drafting a BSP would likely have been helpful, neither state nor federal law required it.

24. Regarding a school psychologist's attendance at IEP meetings, the California Education Code provides that:

For a pupil suspected of having a learning disability, at least one member of the [IEP] team shall be qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech- language pathologist, or remedial reading teacher.

25. However, the Code of Federal Regulations clarifies that a school psychologist's attendance is required only when determining eligibility under the SLD category. Because Student's SLD eligibility had already been established and was not in question, the November 2003 IEP team did not need to include a school psychologist. Additionally, other members of the IEP team were qualified to conduct individual diagnostic examinations. Hence, the absence of any school psychologist at the November 2003 IEP meeting was not a procedural violation. Given that no violation

occurred, this Decision need not address whether the alleged violation caused a loss of educational opportunity or significantly interfered with the parent's participation in the IEP process.

PRESENT LEVELS OF PERFORMANCE IN NOVEMBER 13, 2003 IEP

26. Student contends that the District denied him a FAPE when it failed to ascertain his present levels of performance. An annual IEP shall contain a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his or her involvement and progress in the general education curriculum. The November 2003 IEP contains limited information about Student's present levels of performance. The first page lists some information, such as Student's strengths/preferences/interests, his levels of motor development and social/emotional development, his scores on the CAT-6 and California Standards Test, and his areas of need to be addressed in goals and objectives. The IEP document also contained individual reports from each of Student's teachers and his speech therapist, each of whom reported that Student was failing and/or not making progress due to excessive absences. However, the IEP document does not contain any other specific information about Student's present levels; for example, regarding academic assessments, the IEP notes state that "Current testing has not been performed due to excessive absences. Please see academic assessments from [Student's] last annual IEP." Similarly, the goals and objectives developed at this meeting contain either no baseline data or a symbol for "none."

27. Hence, while the IEP contained some information about Student's present levels of performance, the absence of some details constituted a technical violation of the statutes. However, Student failed to establish that this violation denied him a FAPE. Student's teachers and speech therapist established that they were familiar with Student's needs from working with him in the past and seeing him occasionally in fall 2003, and

therefore were able to make knowledgeable recommendations about his proposed program. There was no evidence regarding how the lack of information caused Student to lose educational opportunity or significantly interfered with his parent's right to participate in the IEP process.

DISTRICT'S ASSESSMENT OF STUDENT IN AREA OF SPEECH-LANGUAGE AND ACADEMICS

28. During the time period at issue, the law provided that special education pupils must be reassessed every three years or more frequently, if conditions warrant, or if the pupil's parent or teacher requests a new assessment. A pupil must be assessed in all areas related to his or her suspected disability. As determined in Factual Finding 3, District staff conducted academic testing of Student in September 2002, as part of his triennial reassessment. The evidence did not establish that conditions warranted reassessment in November 2003, and Student's mother did not request reassessment.

GOALS IN NOVEMBER 13, 2003 IEP

29. Student's Complaint alleged that the November 2003 IEP goals were inadequate, but thereafter Student failed to present any evidence or argument on this point. In or about November 2003, Student had unique educational needs in math skills, written language, dysfluency, and behavior related to school attendance, motivation, and completing assignments. The November 13, 2003 IEP contained goals and objectives in literacy skills/written language, academic responsibility (including attendance), math skills (including completion of math assignments), and dysfluency. Additionally, the BSP contained a goal for "cooperative and positive attendance."

30. There was no testimony, documentary evidence, or argument regarding how the November 13, 2003 goals were inadequate, or how any alleged inadequacy in the goals denied Student educational opportunity or significantly interfered with the

parent's participation in the IEP process. Hence, Student failed to establish that the goals denied him a FAPE.

ADDRESSING STUDENT'S NEEDS IN SPEECH AND LANGUAGE

31. Student's Complaint contends generally that the District's offer and provision of speech-language services was not designed to address his needs in the areas of dysfluency, and expressive, receptive and pragmatic language skills; however, at hearing the only evidence and argument concerned the November 2003 change from direct speech therapy services to consultation. Student had moderate to severe speech dysfluency, wherein he exhibited stuttering and some secondary stuttering characteristics, and had received speech- language therapy throughout his years of attendance at public schools. Pursuant to the October 2002 and May 2003 IEPs, the District offered Student three sessions per month of direct speech-language therapy. However, as of November 13, 2003, he had attended only two speech sessions since the beginning of the school year.

32. Because of Student's frequent absences from school, at the November 2003 IEP the District offered only speech-language consultation, instead of direct therapy. District speech-language pathologist Lisa Fox established that, because of Student's truancy problem, Student needed to maximize his attendance at his classes and therefore should not leave class to attend speech therapy. The team agreed that speech therapy would resume once Student had returned to regular and consistent school attendance. Given Student's frequent absences from school, being pulled out of academic classes to attend speech therapy no longer facilitated his overall educational needs. Moreover, because Student already knew from years of speech therapy what strategies to use to avoid stuttering, this "therapeutic pause" in direct speech therapy would only minimally impact his ability to improve his speech fluency. Ms. Fox was a credible and persuasive witness, and there was no evidence to the contrary regarding this issue. Accordingly, the

November 2003 offer of speech consultation instead of direct therapy did not constitute a denial of FAPE.

REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENTS

33. Even if this Decision had determined that the District denied Student a FAPE, the reimbursement sought by Student's parent could not be awarded in full, if any award were made. First, some evidence regarding the appropriateness of the private placements was problematic; in particular, there was very little evidence regarding the appropriateness of the CEDU placement, and none of the private placements addressed Student's needs in the area of speech and dysfluency. However, the greater problem is that, for the entire length of Student's attendance at the private schools, the parent failed to notify the District of her intent to seek reimbursement from the District for Student's private placements.

34. As reflected in the November 2003 IEP document, the District provided Student's mother with a copy of the Notice of Procedural Safeguards. Page 5 of the June 2003 version of the Notice contains the provision regarding how parents may be denied reimbursement for failure to notify the school district of the parent's rejection of the school's proposed placement and the parent's intent to enroll the child in a private school at public expense. Student did not allege that any of the exceptions to this requirement were applicable. Student's mother was a credible and sincere witness who established that she simply had not read, or did not recall reading, this provision in the Notice of Procedural Safeguards. Nevertheless, the lack of notice to the District cannot be easily waived. As one appellate court opinion explained:

The purpose of the notice requirement is to give public school districts the opportunity to provide FAPE before a child leaves public school and enrolls in private school.

[Citations omitted.] Once a child's parents have unilaterally removed the child from public school, subsequent notice almost a year after removal does little good.

(*Greenland School District v. Amy N.*, (1st Cir. 2004) 358 F.3d 150, 160.)

35. In the present case, the lack of notice meant that the District had no opportunity to consider the parent's dissatisfaction with the placement it offered for the 2003-2004 school year. Even more significantly, the District had no opportunity to offer placements for the 2004-2005 or 2005-2006 school years following Student's withdrawal from the District. As the courts have consistently recognized, Congress did not intend to hold school districts liable for the costs of private placements under such circumstances. (See, e.g., *Greenville*, *supra*, 358 F.3d at 160; *Frank G. v. Bd. of Educ.* (2d Cir. 2006) 459 F.3d 356, 376; *Bernardsville Bd. of Educ. v. J.H.* (3d Cir. 1994) 42 F.3d 149, 158.)

LEGAL CONCLUSIONS

APPLICABLE LAW

1. The IDEA was amended effective July 1, 2005. Both case law and the rules of statutory construction dictate that the applicable law is the statute in place at the time the IEPs were developed. (See *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 n. 1 (citing *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1148 n. 2).) Hence, for the time period from July 19, 2003, until July 1, 2005, this Decision relies upon the prior (1997) version of the IDEA, which was the version in effect during that time period. (See *Lawrence Twnshp. Bd. of Education v. State of New Jersey* (3d Cir. 2005) 417 F.3d 368, 370 (amendments to the IDEA have prospective application only).)

2. Under the IDEA, children with disabilities have the right to a FAPE. (20U.S.C. § 1400(d).) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the State educational standards,

and conform to the child's IEP. (20 U.S.C. § 1401(8).) "Special education" is defined as specially designed instruction, at no cost to the parents, that is provided to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(25).) "Related services" or DIS means transportation and other developmental, corrective and supportive services as may be required to assist the child to benefit from special education. (20 U.S.C. § 1401(22); Ed. Code, § 56363, subd. (a).)

3. There are two parts to the legal analysis in suits brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. of Educ. of the Hendrick Hudson Sch. Dist v. Rowley*, (1982) 458U.S. 176, 200 [102 S.Ct. 3034].) Second, the court must assess whether the IEP developed through those procedures was designed to meet the child's unique needs, reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Rowley*, 458 U.S. at pp.206-07.)

4. In the *Rowley* opinion, the United States Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the violations caused a loss of educational opportunity to the student or significantly infringed on the parents' right to participate in the IEP process. (See *M.L. v. Federal Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, 646; *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

5. Regarding substantive appropriateness under the IDEA, the Supreme Court's *Rowley* opinion addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the IDEA's requirements. The Court determined that a student's IEP must be designed to meet the unique needs of the student, be reasonably calculated to provide the student with some educational benefit,

and comport with the student's IEP. However, the Court determined 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. (*Rowley*, 458 U.S. 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.200.)

6. Moreover, the *Rowley* opinion established that, as long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley*, 458 U.S. at p.208.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84 (citing *Roland M. v. Concord Sch. Comm.* (1st Cir. 1990) 910F.2d 983, 993).)

7. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's program was designed to address Student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if Student's parent preferred another program

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

9. A pupil must be assessed in all areas related to his or her suspected

disability. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code, § 56320, subds. (e), (f).) A reassessment shall occur at least once every three years, unless the parent and LEA agree in writing that a reassessment is unnecessary. (Ed. Code, § 56381, subd. (a).) However, if the IEP team determines that no additional data is needed to determine the pupil's eligibility and educational needs, the LEA is required to notify the pupil's parents of that determination, the reasons for it, and the parents' right to request a reassessment. (Ed. Code, § 56381, subd. (d); 34 C.F.R. § 300.533(d) (1999).) In such circumstances, the LEA is not required to conduct a reassessment, unless requested by the pupil's parents. (*Id.*)

10. An annual IEP shall contain a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his or her involvement and progress in the general education curriculum. (Ed. Code, § 56345, subd. (a)(1); 20 U.S.C. § 1414(d)(1)(A)(i).) An annual IEP must also contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (Ed. Code, § 56345, subd. (a)(2); 20 U.S.C. § 1414(d)(1)(A)(iii).)

11. California Education Code section 56341 and Code of Federal Regulations, title 34, section 300.344 identify the required members of an IEP team. Education Code section 56341 provides that, for a pupil suspected of having a learning disability, at least one member of the IEP team shall be qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher. (Ed. Code, § 56341, subd. (c).) However, section 300.540 of title 34 of the Code of Federal Regulations clarifies that a school psychologist's attendance is required only when determining eligibility under the SLD category.

12. In the case of a child whose behavior impedes his or her learning or that of

others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414 (d)(3)(B)(i) (IDEA 1997); 34 C.F.R. § 300.346(a)(2)(i) (1999); Ed. Code, § 56341.1, subd. (b)(1).) The IDEA also requires that, in response to certain disciplinary actions, the IEP team must develop or revise a functional behavioral assessment (FBA). (34 C.F.R. §300.520(b)(1)(i) (1999).) California law requires that an LEA conduct a functional analysis assessment (FAA), resulting in a behavioral intervention plan (BIP), whenever a student develops a "serious behavior problem." (Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052.) A "serious behavior problem" is defined as when a student exhibits behaviors that are self- injurious, assaultive, or the cause of serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the pupil's IEP are found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (aa).)

13. An LEA may refer a pupil for community mental health services when the pupil has emotional or behavioral characteristics that: (1) are observed by qualified educational staff in educational settings and other settings as appropriate; (2) impede the pupil from benefiting from educational services; (3) are significant as indicated by their rate or occurrence and tendency; and (4) are associated with a condition that cannot be described solely as a social maladjustment or a temporary adjustment problem, and cannot be addressed with short-term counseling. (Cal. Code Regs., tit. 5, § 7576, subd. (b)(3).) Moreover, the LEA must first have provided appropriate services, such as counseling or behavioral intervention, and the IEP team has determined that the services do not meet the individual needs of the pupil, unless the IEP has documented that such services would be inadequate or inappropriate. (Cal. Code Regs., tit. 5, § 7576, subd. (b)(5).)

14. In an administrative hearing, the petitioner has the burden of proving the

essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163L.Ed.2d 387].)

15. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of the Town of Burlington v. Dept. of Education* (1985) 471 U.S. 359, 369-370; *Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. (*Florence County Sch. Dist., Four v. Carter* (1993) 114 S.Ct. 361.) Additionally, the Ninth Circuit has clarified that when a student's unilateral placement is necessitated by "medical, social, or emotional problems . . . apart from the learning process," the responsible local educational agency is not obligated to pay for that placement. (*Clovis Unified Sch. Dist. v. Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990).)

16. Reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove their child from public school before they do so. (20 U.S.C. §1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.403(d) (1999); 34 C.F.R. § 300.148(d)(2006); Ed. Code, § 56176.) Pursuant to these provisions, parents must provide such notice at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, or by written notice ten business days prior to the removal of the child from the public school.¹⁰ (*Id.*)

¹⁰The IDEA also contains exceptions to this notice requirement, such as when the parents are illiterate or the child will face physical or serious emotional harm by providing notice. (20 U.S.C. § 1412(a)(10)(C)(iv).)

DETERMINATION OF ISSUES

ISSUE 1(A): DID THE DISTRICT DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) FROM JULY 19, 2003, THROUGH THE 2005-2006 SCHOOL YEAR BY FAILING TO ASSESS STUDENT'S BEHAVIORAL NEEDS?

15. Based on Factual Findings 16-17, and Legal Conclusions 3, 9, and 12 through 14, the Student did not establish that the District denied him a FAPE on this basis.

ISSUE 1(B): DID THE DISTRICT DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) FROM JULY 19, 2003, THROUGH THE 2005-2006 SCHOOL YEAR BY FAILING TO MEET STUDENT'S UNIQUE NEEDS FOR BEHAVIORAL AND MENTAL HEALTH SERVICES?

16. Based on Factual Findings 18-22 and Legal Conclusions 3, 5-8, 13, and 14, the Student did not establish that the District denied him a FAPE on this basis.

ISSUE 2(A): DID THE DISTRICT DENY STUDENT A FAPE FROM NOVEMBER 12, 2003, THROUGH THE 2005-2006 SCHOOL YEAR BY FAILING TO HAVE A SCHOOL PSYCHOLOGIST ATTEND THE NOVEMBER 12, 2003 IEP TEAM MEETING?

17. Based on Factual Findings 23-25 and Legal Conclusions 3, 4, 11, and 14, the Student did not establish that the District denied him a FAPE on this basis.

ISSUE 2(B): DID THE DISTRICT DENY STUDENT A FAPE FROM NOVEMBER 12, 2003, THROUGH THE 2005-2006 SCHOOL YEAR BY FAILING TO ASSESS STUDENT IN THE AREAS OF BEHAVIOR, SPEECH AND LANGUAGE, AND ACADEMICS?

18. Based on Factual Findings 16-17 and 28, and Legal Conclusions 9, 12, and 14, the Student did not establish that the District denied him a FAPE on this basis.

ISSUE 2(C): DID THE DISTRICT DENY STUDENT A FAPE FROM NOVEMBER 12, 2003, THROUGH THE 2005-2006 SCHOOL YEAR BY FAILING TO PROVIDE ADEQUATE PRESENT LEVELS OF PERFORMANCE IN THE NOVEMBER 12, 2003 IEP IN THE AREAS OF BEHAVIOR, SPEECH AND LANGUAGE, AND ACADEMICS, WHICH DENIED STUDENT EDUCATIONAL OPPORTUNITY AND HIS PARENT AN OPPORTUNITY TO PARTICIPATE IN THE DECISION-MAKING PROCESS?

19. Based on Factual Findings 26-27 and Legal Conclusions 3, 4, 10, and 14, the Student did not establish that the District denied him a FAPE on this basis.

ISSUE 2(D): DID THE DISTRICT DENY STUDENT A FAPE FROM NOVEMBER 12, 2003, THROUGH THE 2005-2006 SCHOOL YEAR BY FAILING TO INCLUDE ADEQUATE GOALS IN THE NOVEMBER 12, 2003 IEP IN THE AREAS OF BEHAVIOR, SPEECH AND LANGUAGE, ACADEMICS, AND MENTAL HEALTH, WHICH DENIED STUDENT EDUCATIONAL OPPORTUNITY AND HIS PARENT AN OPPORTUNITY TO PARTICIPATE IN THE DECISION- MAKING PROCESS?

20. Based on Factual Findings 29-30 and Legal Conclusions 3-8, 10, and 14, the Student did not establish that the District denied him a FAPE on this basis.

ISSUE 2(E): DID THE DISTRICT DENY STUDENT A FAPE FROM NOVEMBER 12, 2003, THROUGH THE 2005-2006 SCHOOL YEAR BY FAILING TO MEET STUDENT'S UNIQUE SPEECH AND LANGUAGE NEEDS IN THE AREAS OF DYSFLUENCY, AND EXPRESSIVE, RECEPTIVE AND PRAGMATIC LANGUAGE SKILLS?

21. Based on Factual Findings 31-32 and Legal Conclusions 3, 5-8, and 14, the Student did not establish that the District denied him a FAPE on this basis.

ISSUE 3: IF THE DISTRICT DENIED STUDENT A FAPE, IS THE STUDENT'S MOTHER ENTITLED TO REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENTS FROM MARCH 2004 TO JUNE 2006, AND RELATED TRANSPORTATION COSTS?

22. Based on Factual Findings 8-35 and Legal Conclusions 3-16, the Student's mother is not entitled to reimbursement for the private school placements or related

transportation costs.

ORDER

All of Student's claims for relief are denied.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: February 8, 2007



SUZANNE B. BROWN
Administrative Law Judge
Office of Administrative Hearings
Special Education Division