

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2008040864

DECISION

Administrative Law Judge Robert D. Iafe, of the Office of Administrative Hearings (OAH) for the State of California, heard this matter on June 16 and 17, 2008, in San Diego, California.

Father of Student, (Father), appeared on behalf of Student (Student). Sam Chavez, roommate of Father, also attended the hearing. Student did not appear during the hearing.

Patrick Frost, Assistant General Counsel, appeared for San Diego Unified School District (District). Allison Deal, Legal Intern for District, also attended the hearing. Sally Tucker, a coordinator for District, attended the first day of the hearing. Phyllis Trombi, District representative, attended the entire hearing.

PROCEDURAL BACKGROUND

Father submitted the request for due process hearing in this matter for filing on April 23, 2008. District submitted its notice of representation on the same day. On April 28, 2008, OAH gave notice setting the due process hearing to commence on June 16, 2008.

The administrative law judge (ALJ) opened the record on June 16, 2008. The ALJ received sworn testimony and documentary evidence during the two consecutive hearing days. The parties requested, and the ALJ granted, an extension of time to keep the record open for the filing of written closing argument by July 1, 2008. The parties timely filed their written closing argument and the ALJ closed the record on July 1, 2008.

ISSUES

Father raised the following issues for decision at the hearing as limited by the Prehearing Conference Order dated June 13, 2008:

- A. Did District deny Student a free and appropriate public education (FAPE), by committing any or all of the following procedural violations at the April 10, 2008, IEP team meeting:
 - 1. Denying parent meaningful participation by ignoring parental input;
 - 2. Stating it would agree not to change Student's placement if parent signed an agreement to "never appeal a suspension again";
 - 3. Denying parent meaningful participation because the vice principal improperly influenced various District members of the IEP team;
 - 4. Requiring parents to sign the individualized education program (IEP) within two days?
- B. Did District deny Student a FAPE by offering to change Student's placement from Carson Elementary School at the April 10, 2008, IEP team meeting?
- C. Is Student eligible under the category of emotionally disturbed?

PARTIES' CONTENTIONS

Student contends that the above-listed procedural violations at the April 10, 2008, IEP team meeting resulted in a denial of FAPE. Student also contends that District's proposal to move Student from her present placement in a special day class for

non-severe disabilities at Carson will deny her a FAPE. Student contends that the District's change of her eligibility category at the IEP team meeting from other health impaired (OHI) to emotionally disturbed (ED) was not proper. Student contends that she is eligible under the category OHI, not ED. Student further contends that she does not have attention deficit hyperactivity disorder (ADHD). She has "separation anxiety disorder" and this condition causes her to be eligible under the category OHI.

District contends that its IEP team meeting was not procedurally defective. District maintains that its offer of a special day class for emotionally disturbed students at Cubberly Elementary provides a FAPE for Student because it met Student's unique needs and that its proposed program was reasonably calculated to provide educational benefit to Student. District also contends that Student qualifies for special education as emotionally disturbed.

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Student is a 10-year-old girl in the fourth grade. According to the most recent IEP which is not in dispute, Student had been determined eligible for special education and related services under the disability category commonly referred to as other health impairment (OHI) based on an attention-deficit/hyperactivity disorder (ADHD). During the time period at issue, Student has resided with Father within the geographical boundaries of District.

BACKGROUND

2. During the 2007-2008 school year, Student attended District's Carson Elementary School (Carson) in a non-severe special day class (NS-SDC). Although the last agreed upon IEP was not offered into the record, portions of Student's initial IEP dated May 27, 2005, were provided to show the basis for the NS-SDC placement.

3. Student's initial special education placement was based in part on an assessment report prepared by District for the May 2005 IEP. The assessment report was dated April 27, 2005, and showed the results of a psychological evaluation of Student which included formal test results. In the area of cognitive functioning, the assessor administered the Matrix Analogies Test (MAT), a test of non-verbal problem solving. Student obtained a standard score of 104 on the MAT. This score placed her cognitive functioning in the average range. In the area of visual-motor integration, the assessor administered the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI), a structured copying test. Student obtained a standard score of 114 on the VMI. This score placed her near the upper end of the average range. In the area of auditory processing, the assessor attempted to administer the Test of Auditory Perceptual Skills – Revised. However, only one subtest was scored because Student would not comply with the assessor's requests. On the subtest for Auditory Number Memory Forward Student obtained a standard score of 82 placing her in the lower end of the average range. In the area of academics, Student obtained standard scores on the Woodcock-Johnson – III Tests of Achievement as follows: a 59 in broad reading, a 61 in broad written language, and an 80 in mathematics which were described as significantly below her cognitive potential.

4. The April 2005 assessment also investigated the area of attention. The assessor gave the Conners' Teacher Rating Scale – Revised (CTRS) to Student's then-current teacher. Results from the CTRS showed Student had highly elevated scores¹

¹ Student's scores on the Conners' Teacher Rating Scales - Revised included: a T-Score of 76 in the Oppositional Index; a T-Score of 85 in the Cognitive Problems/Inattention Index; a T-Score of 90 in the Hyperactivity Index; and a T-Score of

indicating a serious problem with attention-related issues. The assessor concluded that these scores, as well as information from anecdotal teacher reports and the assessor's own observations and impressions, indicated Student had ADHD.

5. With these assessment results, the psychological evaluation report concluded Student would be eligible for special education under the category of Other Health Impaired (OHI) due to her ADHD. The report also recommended Student be placed in a special day class setting due to her very low academic skills and her need for a highly structured learning environment. Finally, the assessment report concluded that Student's resistance to doing work may be based on feeling insecure and that she should not feel intimidated by the work she needs to do. Since she presented as a child with low self-esteem, the report recommended Student might benefit from the on-site therapy available to her at her school site. The IEP team apparently agreed with the assessment report findings: Student's IEP dated May 27, 2005, shows the team found Student eligible under the category of OHI due to her ADHD and placed Student in the NS-SDC for the school year beginning in September 2005.

6. In Student's initial IEP dated May 27, 2005, the team described how Student's disability affected her involvement and progress in the general curriculum as follows: "Student's impulsive behaviors and her ADHD causes her to be off tasks a great deal of the time; and her being off tasks has impacted the amount and quality of her academic learning." [sic] In this initial IEP, the team also identified two areas of need for Student. First, "[Student's] impulsive behaviors sometimes impacts her emotional/social relations with all to be strained." Second, Student's needs were shown as "distractible, depending on knowledge of subject, her attention to the topic is short." This same

90 in the Conners' ADHD Index. According to the testing materials, any score above a T-Score of 70 is considered a "markedly atypical problem."

information was available to the IEP team at Carson when it met on April 10, 2008, to discuss Student's placement for the coming year.

STUDENT'S EDUCATIONAL NEEDS DURING THE 2007-2008 SCHOOL YEAR

7. Student entered the fourth grade at Carson at the beginning of the 2007-2008 school year. Amy Johnson was Student's special education teacher and case manager. By the time of a parent-teacher conference in November 2007, Student had been struggling in class. On November 13, 2007, Father submitted a written request to Johnson for an IEP meeting asking for help with Student's education. Father asked for the meeting because he was also concerned about Student's academics at home. He explained Student was always nervous about not getting her homework done and she was always worried about what her teacher was going to say or do or whether she was going to get punished.

8. In response to Father's request, Johnson suggested the IEP team begin to consider Student's triennial evaluation which was due in May 2008 and she prepared an assessment plan with the school psychologist. By December 10, 2007, Father had signed his consent to the multidisciplinary assessment plan proposed by District. Johnson conducted the academic achievement portion of the assessment while the school psychologist conducted the intellectual development and the social/emotional/adaptive behavioral portions of the assessment.

Formal Psychoeducational Evaluation Report

9. For the academic assessment, Johnson chose the Woodcock-Johnson Tests of Achievement III (WJ-III), the CORE Phonics Survey, the Diagnostic Reading Analysis (DRA), and the Seeing Stars Sight Word test. Johnson reported that on the WJ-III, Student earned standard scores ranging from 62 to 89. Student had a broad reading standard score of 72, a math standard score of 83, and a broad written language

standard score of 71. On the CORE Phonics Survey, Student scored in the range of less than 70 percent, and therefore had difficulty, with decoding words with digraphs, diphthongs, irregular vowel patterns, and words with more than one syllable. Student's DRA results showed her to be reading at a level 20, which is an early- to mid-second grade level for independent reading, a mid- to late- second grade level for instructional reading, and a third grade level for frustration. On the Seeing Stars Sight Word test, Student was able to read 140 out of 200 sight words. From her assessment, Johnson determined Student's areas of need included reading comprehension, vocabulary, sentence structure, and math fluency.

10. School psychologist Melissa Cohen conducted the intellectual development and the social/emotional/adaptive behavioral portions of the assessment. Cohen has been with District for three years. Before working for District she did her internship with Long Beach Unified for one school year. Her primary responsibility for District involves special education assessments including both initial evaluations and triennial evaluations. In addition to evaluations, she consults with parents and school staff, helps teachers to develop behavior support plans, and does crisis counseling of students when needed. She has assessed approximately 50 to 55 students each year.

11. In assessing Student, Cohen administered a number of tests. In the area of intellectual development and processing, she chose the Wide Range Assessment of Memory and Learning (WRAML) because of a previous deficit in auditory memory skills. She chose the Universal Non-verbal Intelligence Test (UNIT) to gain an estimate of Student's cognitive functioning. She chose the Development Test of Visual Motor Integration to follow up on earlier testing in this area. In the area of social /emotional/adaptive behavioral, she chose to administer the Conners Rating Scales to both teacher and Father to investigate Student's attention skills. She chose the Behavioral Assessment System for Children (BASC) to gather information on Student's

behavior. She also used other tools including figure drawing, sentence completion, the Children's Depression Inventory, record review, observation and interviews.

12. Cohen prepared a written report of her assessment dated April 9, 2008. Student's nonverbal intelligence was largely in the average range with non-symbolic skills in the above average. Her auditory memory skills were in the extremely low to low average range while her visual memory skills were in the average range. Her visual-motor integration skills were in the above average range. Student has behavior concerns that were reported at home and at school. She has behaviors pertaining to hyperactivity, some problems with attentive behaviors, some behaviors that resemble ADHD behaviors, and some oppositional behaviors. She also displayed some aggression, conduct problems, and problems with adaptability, social skills, and leadership skills, observed both at school and at home.

13. From these results, Cohen explained that Student was having attention problems, and some behaviors that appeared to be hyperactive, and that would meet criteria for OHI or specific learning disability as attention deficits or attention concerns for Student. From the social skills deficits, Cohen explained Student could meet the criteria for ED for having difficulty relating to peers and adults. To further support the ED category, Cohen recalled Student told her that Student does not have any friends. In addition, Johnson told Cohen that Student desires friends, but she does not know how to obtain or maintain friendships. From an interview, Johnson also reported to Cohen that Student sometimes does not tell the truth to teachers and that she can become unkind to teachers easily. Finally, Cohen referred to an e-mail to her from Student's treating therapist Amanda Stewart that Student did not believe she can have friends and still remain bonded with her family. From all this input, Cohen concluded Student met the criteria for the disability category of ED under the category of "an inability to build or maintain satisfactory personal relationships with peers and teachers." Additionally,

Cohen concluded that Student also met the criteria for a specific learning disability (SLD) due to attention related problems. Cohen reported on her findings and recommendations at the April 10, 2008, IEP team meeting.

14. In the same e-mail from Stewart to Cohen that discussed Student's belief about staying bonded with her family, Stewart also noted that Student requires a high level of encouragement, praise, and reassurance to address her emotional and behavior challenges. She also noted that Student's interpersonal skills were underdeveloped as a result of the severity of her separation anxiety.

Informal Behavior Observation Reports

15. From the beginning of the school year, Johnson kept a log of the behavior of each of her students on a daily behavior point sheet. The information she gathered was designed to let parents know how their child was doing throughout each day. The behavior point sheets are broken into 10 separate periods during each day from the morning opening, through several academic periods, lunch, and recess to the end of the day. It is also to help Johnson see any patterns of behavior that may occur during each day. For each full day a student can earn a total of 100 points and for half days on Wednesdays a student can earn a total of 60 points. She sometimes supplemented the daily behavior point sheets with behavior logs which are personal notes she has taken to further explain events that occurred during the day.

16. Behavior log entries from the beginning of the year show Student had problems with her behavior. For example on Monday September 10, 2007, Student earned only 34 points out of a possible 100. The behavior logs also described Student as uncooperative noting she would shut down during class when being redirected or asked to do work. There were also entries related to Student not being able to get along with other students in the class. Johnson believed Student had difficulty making and keeping

friendships with other students. Johnson described Student's behaviors at school to include pushing, hitting, throwing objects, and using rude and disrespectful language.

17. At the hearing, District provided 98 of the daily behavior point sheets that Johnson maintained for Student during the past school year. The dates on the behavior point sheets ranged from September 4, 2007, to April 24, 2008. For the first recorded week of school during September 4-7, 2007, Student earned an average behavior point total of 57 out of 100. For the period shortly before the winter break from December 10-13, 2007, Student earned an average point total of 53 out of 100. And for the period from March 3-7, 2008, Student earned an average point total of 68 out of 100. In contrast, for the two most recent weekly periods in April for which data was presented, Student earned an average point total of 90 out of 100 total behavior points for each of these weeks.²

THE APRIL 10, 2008, IEP TEAM MEETING AND DISTRICT'S PROPOSED PROGRAM

18. District convened an IEP team meeting on April 10, 2008. Father attended this meeting on behalf of Student. Sam Chavez, who lives with the family and has known Student for the past ten years, also attended the meeting with Father. Other members of the IEP team included teacher Johnson; school psychologist Cohen; Jeri Lindberg, program diagnostic resource teacher; Marina Garcia, vice principal and District representative; and teachers Emily Weller and Marcy Shapiro.

19. The IEP team reviewed the assessment report for Student and determined areas of need from that report. The team identified academic needs in the area of

² For the period from April 11-17, 2008, Student earned an average point total of 92 out of 100. For the period from April 18-24, 2008, Student earned an average point total of 88 out of 100.

reading for sight words, fluency, comprehension, and decoding. For written language, the team identified sentence structure as an area of need for Student. And in the area of math, the team identified needs in the areas of multiplication facts and word problems. The team also identified social/emotional/behavioral needs to respond appropriately to adults and peers and to follow directions in a reasonable time frame and with appropriate responses.

20. To address these needs, District members of the team proposed a number of annual goals for Student. The first two goals were social/emotional goals to address "Following Directions." Goal One was a social/emotional goal for Student to accept constructive academic or behavioral suggestions with appropriate verbal responses after a verbal redirection (e.g., Thank you, I will try, or no response at all including facial or physical actions that may appear negative) for 80 percent of the time as measured by teacher records and observations. Goal Two was another social/emotional goal that provided when given a direction, Student will follow that direction within one minute with no protest or complaining for four out of five requests for five consecutive days as measured by teacher records and observation.

21. Goal Three was designed to address Student's needs in the area of written language to address "Writing Applications." This goal provided Student will write a narrative and/or expository paragraph that provides details of setting, character, problem or goal, events, and solution with correct punctuation, spelling, and formatting given teacher conferencing on two occasions as measured by a passing score on a writing rubric.

22. Goal Four for Student was a math goal to address "Number Sense" because she did not know all her multiplication facts. The goal provided that Student will memorize the multiplication table for numbers from one to 10 and use the inverse relationship of multiplication and division to solve problems with 80 percent accuracy.

23. Several goals were proposed in the area of reading. Goal Five was a reading goal for "Vocabulary/Concept Development" by working on getting Student more sight word recognition. This goal provided that when given a list of priority sight words, Student will read the list aloud with automaticity and 80 percent accuracy. Goal Six was designed to help Student with her "Decoding/Word Recognition." This goal provided that when given a list of multi-syllable nonsense words and basic sight words, Student will decode the target words with 80 percent accuracy in five consecutive trials as measured by teacher records. Goal Seven was also in the area of reading to address "Comprehension." This goal provided that Student will identify main ideas, supporting details, and the problem or author's message, after listening to or reading a literary or expository text with 80 percent accuracy as measured by interim assessment.

24. Goal Eight was in the area of math to help with Student's "Mathematical Reasoning" for word and story problems. This goal provided Student will make decisions about how to approach problems with 80 percent accuracy as measured by interim assessment.

25. In addition to the eight proposed goals, the IEP included a behavior support plan (BSP) to meet Student's needs with her difficulty in following directions and taking redirection in a constructive way. Johnson explained that by putting Student on a BSP Student would know the expectations at school, she would know the consequences of not following such expectations, and the plan would be useful at both school and at home.

26. At the start of the meeting, District presented a proposed IEP which was marked "draft" at the top right of each page. This draft IEP³ identified Student's primary disability as OHI on the first page. It also identified Student's primary disability as OHI and secondary disability as ED in the triennial review section of a page titled "present levels of academic achievement and functional performance."

27. During the meeting Father pointed out that Student was never diagnosed with ADHD. Rather, he explained Student is currently seeing a psychiatrist, is being treated for separation anxiety, and is taking medication for that disorder. Father pointed out that moving Student from the school she currently attends would set her back. He noted that Student knows her school now; she knows the teachers, the administrative offices and gets around well there. Father asserts that moving Student will create a big anxiety issue for her. Father asserts that District is attempting to identify Student as ED to remove her from her current school site.

28. Father explained that no doctor had ever given a medical diagnosis of ADHD for Student. Rather, the only diagnosis for Student was separation anxiety disorder. Father described Student's separation anxiety as being based on the fact that he is a single parent with full custody of his children, including Student. Student is afraid of being away from her father because she lost her mother in the sense that she has not seen her mother since last year. Some of her behaviors are caused by the separation anxiety. For example, Father noted Student will forget her eye glasses at home so her father will have to come to school during the day to drop them off for Student.

³ Only two pages of the draft IEP were provided at the time of the hearing: the first page, bearing page number 1a, and the page titled "present levels of academic achievement and functional performance," bearing page number 3.

29. During the meeting, Father told the team about his understanding of the current diagnosis of separation anxiety for Student. He also told the team no medical doctor had ever diagnosed Student as emotionally disturbed. Father did not bring any medical records or other documents to the IEP team meeting. He said he told the other IEP team members during the meeting that Student was being treated for separation anxiety and it appeared they did not know of the treatment sessions for Student or the medication changes. Father believes District wanted to change Student's classification to ED so that she would be placed in a different school.

30. Jeri Lindberg is a diagnostic resource teacher for District who attended the April 10, 2008, IEP team meeting. She has several teaching credentials including for general education, special education for moderate to severe disabilities, resource specialist, and an administrative credential. She has been employed with District for almost 15 years. Her current position with District is a program diagnostic resource teacher. In this position, Lindberg works with about thirty of District's schools to provide help with cases, to solve problems, and to support their special education programs. She is familiar with the special education resources available at both the Carson and Cubberly elementary schools. She is familiar with the programs at these schools because Carson is on her current case load and she has had Cubberly on her case load in the past. She is also familiar with District's non-severe special education program as well as with District's emotional disturbance program.

31. Lindberg knew that the federal handicapping condition identified for Student on each IEP since the first grade had been OHI because of ADHD. There was a discussion as to how ADHD had ever gotten on Student's IEP since Father noted Student was never diagnosed with ADHD. Lindberg noted that since Student was never diagnosed with ADHD the team began a discussion of ED.

32. Lindberg believed the assessment data presented at the meeting would support a change in placement to an ED-SDC. She explained her understanding that the crux of Student's disability was in the realm of emotional disturbance. The separation anxiety would support eligibility for an ED student. Lindberg believed an ED-SDC would meet Student's educational needs and she believed Student's IEP could be implemented at Cubberly.

33. Lindberg described the staffing at the ED-SDC to include a special education teacher supported by an instructional behavior technician (IBT). The IBT is trained to work with students with emotional disabilities. The last time Lindberg was present at Cubberly was six months before the hearing. At that time, there was a high ratio of adults to students, with about a total of 10 students between two ED-SDC classes.

34. However Lindberg also pointed out that an important mental health component was missing from the April 10, 2008, IEP. To meet Student's needs, the IEP should have provided for access to counseling and access to the psychological services that were available at the school site. Lindberg explained that an IEP for this type of placement in an ED-SDC setting should also include some 16 hours of social work and an additional amount of hours for psychological counseling. The ED department at each elementary site has these additional services available for students so they can work on their emotional issues. The fact that the mental health resource center and additional resources are present at Cubberly does not mean that all students at that school would be able to access those services. Such services would either need to be added to the IEP for Student or be added as an IEP addendum.

35. She believed the reason it was not included on the April 10, 2008, offer was because the team agreed to reconvene on July 8, 2008, to see what transpired over

the months after April 10, 2008. The purpose was for data collection and to reconvene to discuss the data that was going to be collected from April 10, 2008, to July 8, 2008.

36. Lindberg was clear in her testimony that there was no discussion at the IEP team meeting about the additional resources that would be available at the Cubberly site such as the mental health resource center and counseling. She explained that there was no discussion of these services because Father was very upset over the discussion of the ED placement and that pretty much ended the discussion.

37. Lindberg explained that the behavior support plan for Student was initiated months before the April 10, 2008, meeting, and at the meeting it was agreed to be continued to be implemented for data collection.

38. Lindberg also recalled the team's discussion of gathering more information about Student. The meeting was set to reconvene on July 8, 2008, to review the behavior support plan for Student because of changes in the plan. The team wanted to see how implementation of the plan, and any changes to the plan, would work for Student. She recalled the discussion of the changes in Student's therapy. Because of this, the team had talked about reconvening the Team meeting at another time. The agreement to reconvene in paragraph 7 of the team action notes was to give time to collection and review of data as prescribed by paragraph 4 of the team action notes.

39. Lindberg recalled the team discussed some of Student's needs during the meeting. She remembered that the offer of an ED placement was discussed during the meeting. She was present during the meeting for about two hours during the time the discussion of the ED-SDC took place. Lindberg recalled Father made it very clear that he was not interested in the ED-SDC placement. However, she left before the meeting concluded. At the hearing Lindberg reviewed the page of the IEP titled Team Action. She noted she was not present when the notes were written in box 7 which stated:

District offer is ED-SDC for 25 hours a week outside of general education at Cubberly Elementary, with transportation and ESY to be provided. Because parent did not consent to ED-SDC, NS-SDC services will continue pending the reconvening of meeting on 7/8/08. District agreed to collect data and review student progress on 7/8/08.

40. Although the offer of placement in the ED-SDC at Cubberly was discussed, Lindberg made clear that the Team Action page accurately reflected the course of action the IEP team agreed to take. She noted the IEP team agreed to reconvene to discuss the issue of placement again after a few months. During her testimony, Lindberg described the discussion at the team meeting as both lively and heated. She testified to a very lively discussion at the April 10 team meeting.

41. The purpose for reconvening the team meeting on July 8, 2008, was to allow time for observations of Student to see how she behaved in school after the change in her medication and after she began treatment with her psychiatrist. This is because Father had told the IEP team of his concern that Student's behavior was changing as a result of her new medication and as a result of her treatment sessions.

42. In considering the issue of placement, Lindberg was interested in the question of whether Student had made progress this year in her current setting. Lindberg noted that although there had not been a huge trend in improvement, there had been some improvement. As to the behaviors that Student still exhibited, she was not throwing chairs. Student was disruptive at times, and she was leaving classes, but both of the general education teachers enjoyed her in the classroom. The behaviors were at a level, in the mind of Lindberg, where Student was not "blowing up" and was not "blowing out of the classroom." Lindberg thought that to reconvene the meeting in

three months was not a long period of time to gather data while Student continued in the NS-SDC placement.

43. Moreover, for Student to transition in the middle of a school year, and not at a natural progression time such as the end of a school year, would only serve to add more anxiety for Student. At the end of the school year students naturally transition to new schools. From the point of view of considering transition and anxiety issues, the team discussed the problems with making a change of placement for this particular student in the middle of the year.

44. Lindberg's opinion of an appropriate offer at the April 10, 2008, meeting would be to have Student finish the 2007-2008 school year in the setting she was currently placed, and then transition into an ED classroom placement after the school year completed and the IEP team met again in July to review Student's progress.

45. Father recalled the IEP meeting was to be continued to July 8, 2008, for review of data only if Father agreed to the ED disability category. He did not sign his agreement to the change in category. Chavez agreed the team was to meet again in July to review Student's progress and to conduct another IEP team meeting. The team wanted to see how Student was going to be performing after another three months in her current placement.

TESTIMONY BY STUDENT'S TEACHER AMY JOHNSON

46. Johnson was present during the entire April 10, 2008, IEP meeting. She recalled District team members offered placement in the emotional disturbed special day class at Cubberly Elementary school. Although the first page of the IEP identified Student's primary disability as other health impaired, Johnson noted there was a computer glitch that did not permit a change to that entry. She explained that technicians, who work with the District's special education computer program known as

Encore, were working on being able to correct that entry. However, that computer glitch was noted on the team action page of the IEP to give the correct information.

47. Father left the IEP meeting with a draft copy of the IEP with the understanding that he would contact Dr. Lee for additional information about Student's diagnosis.

48. Johnson explained why she believed the placement in the ED-SDC at Cubberly would meet Student's needs. Johnson explained for Student to benefit from a NS-SDC, it has to be an appropriate setting. For Student to reach the academic portion of the material, Johnson commented that Student must get beyond her behaviors and emotions which often get in the way of Student being able to access the curriculum and learn from it. When Student goes through her day and something happens that becomes disruptive to her learning environment, then she cannot benefit from the curriculum. She has needs that are affecting her learning. And the most important part is to give her an appropriate setting that can address those needs and help her be successful.

49. According to Johnson, the IEP team agreed to meet again on July 8, 2008, because Father pointed out that Student was receiving psychiatric treatment and different medications. The team would meet again to have a discussion and review her progress. The follow up meeting in July was to review her progress and track the data gathered over the next three months to see how Student was doing at that time.

50. Cohen recalled the disagreement at the meeting when Father noted Student was never diagnosed with ADHD. She recalled agreeing to change her assessment report if Father provided information from Dr. Lee confirming this. In fact, after receiving the April 16, 2008, letter from Dr. Lee, Cohen changed her part of the assessment report. In particular, she changed the background information to quote from Dr. Lee's report that her primary psychiatric diagnosis was separation anxiety

disorder, to include Student's current medications, and that continued assessment and treatment was essential to determine whether she meets the criteria for ADHD. The IEP was also changed after receiving Dr. Lee's letter: the disability category no longer said OHI-ADHD but was changed to a primary disability of ED and a secondary disability of SLD.

51. Cohen believed an ED-SDC would be appropriate for Student because such a class focuses on teaching replacement behaviors so students can work through their behavioral and emotional problems and then be able to access the curriculum.

CLAIM OF IMPROPER INFLUENCE BY A VOTE

52. Marina Garcia Adams has been employed by District since 1989. Over the years she has been a classroom teacher, a school counselor and vice principal for the past ten years. For the last five years she has been the vice principal at Carson Elementary. She is familiar with Student both from informal contracts throughout the school day to formal interactions when Student is on a pass, a referral or a time out. When Student comes to her office on disciplinary matters, Student often cools down quickly and acts in a manner to be able to go back to class. Most of the referrals have been for defiant behavior or when Student has threatened a staff member or other classmate, or used profane language. Garcia's schedule provides for her to be present at campus three days per week. She noted Student's disruptive behaviors are unpredictable but can be once or twice a week.

53. On the issue of whether Garcia called for a majority of votes on Student's placement, Lindberg recalled Garcia went around the table and asked everyone for their opinion. By the time the second person was polled, Lindberg told Garcia that this was not a vote but this was a discussion. At that point, Garcia stopped her request for votes from the team. There was no vote of the entire IEP team. Lindberg did not believe that any partial vote had influenced any team member concerning the offer from District.

54. Father recalled at the start of the IEP meeting, vice principal Marina Garcia Adams wanted a majority of votes from the team to decide who votes for Student to go to a different school. However, Lindberg told Garcia that the team meeting was not to be an issue of majority of votes, but rather a discussion of the education program for Student. The voting stopped after Lindberg redirected the team away from the polling by Garcia.

55. On the issue of asking for a vote, Cohen recalled vice principal Garcia asking around the table whether each person believed the current placement was appropriate for Student. She too, recalled that no vote was actually completed concerning Student's placement.

56. Sam Chavez recalled the vice principal abruptly spoke at the IEP and wanted to see a show of hands to remove Student from the school. Before any voting was completed, Lindberg spoke out and said this was not a matter of votes but had to do with the education of Student and the voting was stopped.

57. On the issue of asking for a vote, Garcia denies asking to take a vote. Instead, she says she was asking for all team members to give their input. Garcia also denies telling Father that if he agreed never to appeal a future suspension, that District would agree to not change Student's placement. Garcia denied that she ever said all, "those in favor of removing Student from Carson, raise your hand."

CLAIM OF IGNORING PARENTAL INPUT

58. Lindberg testified that during the IEP meeting, Father was able to speak and ask questions. She noted he brought Sam Chavez to the meeting, a person who has known Student for the past 10 years. During the meeting, Father told the other team members about what he did not like about their offer and what he wanted instead. She recalled Father participated in the team meeting, he asked questions, and there was a lively discussion of the issues. Father's input was not ignored at the meeting. To the

contrary, the team's agreement to review Student's behavior from April to the end of the school year was based on Father's concerns and request.

59. Johnson, Cohen, and Garcia all recalled Father participated in the IEP meeting. He asked questions and was very involved in the meeting. No one prevented him from speaking or sharing his concerns.

CLAIM OF REQUIRING FATHER TO SIGN IEP

60. Father testified that Johnson told him he had to sign the IEP within 24 hours. Johnson denied ever telling Father that he had to sign the IEP within 24 hours. She recalled that Father refused to sign his consent to any portion of the IEP proposed by District. She recalled a discussion at the end of the meeting concerning Father's request to get additional information from Dr. Lee. Johnson recalled telling Father to get whatever information he needed to get from Dr. Lee and they would talk again in a couple of days. Johnson heard no other team member tell Father he had to sign the IEP within 24 hours or 48 hours. The only follow up time that was mentioned was to talk again in a couple of days, to give Father some time to contact Dr. Lee.

EVENTS AFTER THE APRIL 10, 2008, IEP TEAM MEETING

61. The diagnosis of separation anxiety was confirmed in a letter dated April 16, 2008, from Paul C. Lee, M.D., as Program Psychiatrist for Mental Health Systems, Inc., to Melissa Cohen, School Psychologist for Carson Elementary. Father agreed the letter was sent from Dr. Lee directly to Cohen several days after the IEP team meeting concluded.

62. Father noted that Student is behaving much better since the time of the April 10, 2008, IEP team meeting. He acknowledges she is not 100 percent better but her behavior has improved. He is concerned that if Student is moved to a different ED placement, all her progress will be reversed due to anxiety.

63. Father told the team he could get reports to confirm Student's diagnosis. He arranged for Dr. Lee to send a letter dated April 16, 2008, to school psychologist Cohen. In this letter Dr. Lee explained he was the treating psychiatrist for Student since he first saw her on November 13, 2007. His letter explained the primary psychiatric diagnosis for Student was separation anxiety disorder. He noted a common symptom of this disorder is insomnia, which Student experienced. Dr. Lee described the medications he had prescribed for Student noting he made adjustments during the five months she had been treating with him. He also advised he had discontinued one drug and began another medication regimen on April 16, 2008. Dr. Lee explained that one of the uses for the new prescription he was starting was to target anxious and hyperactive behaviors resulting from the severity of Student's anxiety. He explained the anxious and hyperactive behaviors exhibited by Student may be attributed to her diagnosis of separation anxiety disorder. He cautioned that his continued assessment and treatment of Student was essential to determine whether Student actually met the psychiatric diagnostic criteria for attention deficit hyperactivity disorder.

64. Father confirmed with teacher Johnson that the school psychologist had received Dr. Lee's letter. Some of the information from Dr. Lee's letter was incorporated into the IEP prepared by District and Johnson sent this final "closed" version of the April 10, 2008, IEP to Father under cover of her April 28, 2008, letter. The April 28, 2008, letter advised Father that the revisions made to the draft copy of the IEP District gave to Father at the end of the April 10 meeting included changes to several pages of the IEP. The IEP signature page was updated to reflect those in attendance and a reference to being unable to obtain parent signature. The assessment report was updated to reflect there was no medical diagnosis of ADHD. The health section of the present levels was revised to reflect the psychiatrist diagnosis of separation anxiety disorder and medication for anxiety and insomnia. The disability identification section of the present

levels was changed to delete the original disability of OHI based on ADHD and to now show the primary disability as emotional disturbance and the secondary disability as specific learning disability. The team action page was updated with the notes from the meeting and to clarify that the primary disability code identified on page one of the IEP, which showed other health impairment, was incorrect due to a computer glitch but it was correct on page three of the present levels, which showed emotional disturbance as the primary disability. Most of these changes were the result of requests by Father.

65. Johnson sent Father a final, or locked,⁴ version of the IEP on April 28, 2008, with her cover letter explaining the changes from the draft. The items that were discussed at the meeting included the revisions to the assessment report, and the present levels as to the primary disability, and the team action page. The change in primary disability was made because Father was clear that Student was never diagnosed with ADHD and Father said he would get written confirmation of that fact from Dr. Lee. The District members of the IEP team agreed that if Dr. Lee provided his written report that Student was not diagnosed with ADHD, the disability category that had been based on ADHD would be changed. And that is what occurred after Dr. Lee sent his April 16, 2008, letter to the school psychologist.

66. Andrea Stewart was the program therapist working with Student under the direction of Dr. Lee. Stewart testified at hearing briefly about the problems that would likely be caused by a placement change for Student. She said that due to Student's separation anxiety, a change in placement would likely trigger a whole set of other symptoms that would require more interventions than what was presently being implemented through her office. At the hearing, Father presented a letter from Stewart

⁴ Johnson explained that a locked version of the IEP means the computer program will not allow any further edits to be made to the document.

to Father dated June 9, 2008, that described the issues children with separation anxiety disorder deal with including intense fear and anxiety about being separated from home, family, familiar surroundings, and major attachment figures, which would include the people with whom children have regular contact while in school. Stewart's letter concluded that the potential risks of placing Student in a school outside her neighborhood, which is further from familiar surroundings, her family, and other major attachment figures appeared to outweigh the potential benefits of such a change. Stewart's letter also explained that due to Student's separation anxiety disorder, Student would benefit from interventions while remaining in familiar surroundings and she proposed to work with school staff to explore intervention options. However, Stewart was not present at the April 10, 2008, IEP team meeting. Although there was some evidence of e-mail contact between Stewart and teacher Johnson in the months leading up to the meeting, Stewart did not provide any input to the District team members about the IEP at the time of the meeting.

67. Johnson also described how Student performed in her class after the April 10, 2008, meeting. She noted that Student has had some better days where she gets the maximum of 100 points on full days and 60 points on half days. However, Student also has days when she does not maintain the maximum points earned and she is not consistent with her behavior. Johnson described a change from months ago when she had to talk to Student 10 times a day to redirect or stop instruction to intervene with Student's behaviors, to about 5 times a day. However, Johnson's expectation in the classroom is that no behaviors will occur and Student does not meet that basic expectation. Although Johnson has seen some progress on Student's goals, she thinks Student could make more progress in the ED-SDC.

68. Johnson recalled that in the beginning of the school year, Father came to Johnson's class for his daughter almost every day. At that time, her behavior resulted in

daily behavior point totals of about 50 out of 100 possible points. Johnson also agreed that Student was doing much better now that she is treating with her psychiatrist and with a medication regimen that is working. In particular, after Student started her most recent medication change in April, her behavior was markedly improved, earning point totals in the 80s and 90s range. Johnson agreed Student was progressing on her goals and the treatment was making a difference in her education.

TESTIMONY BY PRINCIPAL ANNE WORRALL

69. Anne Worrall has been the principal at Carson for five years. Before becoming principal, she was a principal intern for one year and a teacher for 11 years. She is familiar with Student because of her interaction with Student for both discipline issues and rewards. Student is rewarded when she shows Worrall her behavior charts with good results. However, Student came to her office for discipline for refusal to follow directions more times than for good behavior.

70. Worrall explained that Student has had access to the same disciplinary system that all students have at Carson which is the progressive classroom disciplinary system set by the teacher. Under this system, a student has multiple chances to correct classroom behavior. If the student is not able to correct the behavior, then the following step can be to see an administrator such as the vice principal or the principal. Worrall noted that for a short period of time Student was scheduled for six counseling sessions in previous months, but had only attended two of them due to a series of outside medical appointments. There was no evidence that any of the missed counseling sessions were rescheduled.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. The petitioning party has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, Father has the burden of persuasion in this case.

A. PROCEDURAL VIOLATIONS:

1. Claim of Lack of Meaningful Participation in the IEP Process

2. Under the Individuals with Disabilities Education Improvement Act (IDEA) and state law, children with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400(d); Ed. Code, § 56000, et seq.) 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 individualized education program (IEP). (20 U.S.C. § 1401(9).)

3. "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(29); Ed. Code, § 56031.) "Related services" means transportation and such developmental, corrective, and supportive services as may be required to assist the child to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].)

4. In reviewing a student's IEP, both procedural and substantive issues must be addressed. The first consideration is whether the school district has complied with the procedures set forth in the IDEA. (*Bd. Of Ed. Of the Hendrick Hudson School District v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034, 73 L. Ed.2d 690] (hereafter *Rowley*.) The second consideration is 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. (*Id.* pp. 206-207.) A procedural violation will constitute a denial of FAPE only if the violation caused a loss of educational opportunity to the student or significantly infringed on the parents' right to participate in the IEP process. (*Rowley, supra*, 458 U.S. at pp. 206-207; *M.L. v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, 646; *MM v. School District of Greenville County* (4th Cir. 2002) 303 F.3d 523, 534; *Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 892.)

5. Among procedural rights, parents of a child with a disability must be given an opportunity to participate in meetings for the identification, evaluation, and educational placement of their child, and the provision of a FAPE to their child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) Meaningful participation by a parent means the parent is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County School District* (6th Cir. 2003) 315 F.3d 688, 693.)

6. In this case, Father asserts he was denied meaningful participation and alleges District members of the IEP team ignored his input. However, Father attended the April 10, 2008, IEP meeting and fully participated. District representatives explained the assessment report prepared by District in great detail. Father told the IEP team his concerns about Student. For example, he described the fact that Student was never diagnosed with ADHD. In response, the IEP team removed the ADHD diagnosis from the IEP.

7. More importantly, during the IEP meeting Father also made clear he did not agree with the proposed placement of Student in the ED-SDC at Cubberly. He wanted his daughter to remain at Carson, the local neighborhood school, and continue to work with Student's private therapists. In response, the IEP team agreed to continue the meeting to allow Father to provide additional information from Dr. Lee, and to again

review the IEP after gathering additional data about Student in her present placement and presenting it at another meeting some three months in the future.

8. Based on the foregoing, the facts in this case do not support a claim that District denied Father meaningful participation by ignoring his input.

2. Claim Regarding No Change of Placement if No Appeal of Suspensions

9. Father asserts that District members of the IEP team agreed they would not change Student's placement if Father agreed to never appeal a suspension of Student again. This claim fails for lack of evidence. Although Father testified to the other alleged procedural violations in this case, there was no evidence provided to support this claim.

10. Based on the foregoing, the facts in this case do not support a claim that District members of the IEP team agreed they would not change Student's placement if Father agreed to never appeal a suspension of Student again.

3. Claim of Improper Influence by Calling for a Vote

11. Father asserts that vice principal Garcia called for a vote of IEP team members to decide whether to remove Student from her current placement at Carson. Father believes this improperly influenced the remaining District IEP team members.

12. Most of the IEP team members recalled Garcia asking for a polling of the members on the issue of Student's placement. However, every witness who testified about this issue, including Father, made clear that no vote was taken. Rather, diagnostic resource teacher Lindberg immediately stepped in to say that the IEP meeting was not about voting, but rather to discuss the education of Student. There was no evidence that this vote that never took place had any influence on any team members. To the contrary, it appeared that each of the members who participated in the meeting was actively engaged in the formulation of an IEP for Student.

13. Based on the foregoing, the facts in this case do not support a claim that the vice principal improperly influenced District IEP team members.

4. Claim that District Required an IEP Signature within Two Days

14. Father testified that teacher Johnson told him he had to sign District's proposed IEP within 24 hours after the IEP team meeting. In contrast, Father asserted both in his request for this due process hearing and again at the prehearing conference that he was required to sign the IEP within two days. This contradiction in position detracts from the credibility of his assertion.

15. The testimony of Johnson that Father would get back to her in a few days is more credible. Testimony from several members of the IEP team recalled that at the end of the April 10, 2008, meeting the team agreed to reconvene in July. The IEP document itself also confirmed the team would reconvene in July to review data on Student's behavior and to discuss the placement dispute again.

16. Based on the foregoing, the facts in this case do not support a claim that District required Father to sign the IEP within two days. The facts also do not support a claim that District required Father to sign the IEP within 24 hours.

B. DID DISTRICT DENY STUDENT A FAPE BY OFFERING TO CHANGE STUDENT'S PLACEMENT FROM CARSON ELEMENTARY SCHOOL AT THE APRIL 10, 2008, IEP TEAM MEETING?

17. To determine whether a District's April 10, 2008, IEP offer constitutes a FAPE, the analysis must focus on the adequacy of District's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) If a school district's program was designed to address the pupil's unique educational needs, was reasonably calculated to provide her some educational benefit, and comported with her IEP, then

that district offered a FAPE, even if the student's parents preferred another program.
(*Ibid.*)

18. The April 10, 2008, IEP proposed by District was designed to meet Student's educational needs in the areas of math, reading, and written language. Of the eight goals developed for Student, Goals Three through Eight addressed such needs. The first two goals were also designed to meet Student's needs in the area of following directions. They were classified under the area of social/emotional because they required Student to comply with directions without protest and to provide appropriate verbal responses when redirected.

19. However, there were no goals to address the most important topic of discussion at the IEP meeting which was Student's maladaptive behaviors. The parties spent much time discussing the potential cause of Student's behaviors. District first had proposed Student's difficult behaviors were a result of ADHD. Father disputed that diagnosis and urged the team to consider the recent diagnosis of separation anxiety disorder as the cause of Student's behaviors. District team members then urged the disability category of ED as the source of Student's difficulties. But the IEP failed to address Student's behavioral needs.

20. District's offer to place Student in an ED class with no mental health component also failed to provide a FAPE for this Student. District's diagnostic resource teacher Lindberg was clear that if any student were to be placed in the ED setting, there should be at least 16 hours of social work services and an additional amount of psychological services provided to the student. In the absence of these services, placement in the ED-SDC would not be appropriate.

21. In its IEP, District proposed a change in the physical site for Student, but there was no offer to provide individualized behavioral, social work, or psychological services that would assist Student in the new location. The suggestion, at the time of

hearing, that District could add 16 hours of counseling by addendum does not cure the deficient IEP dated April 10, 2008. The three month period of data collection was precisely designed to determine what services Student might need in the future. With a new medication regimen, the IEP team properly agreed to gather new data to see how Student progressed. It was an open question how Student would behave after the most recent medication change. In the absence of the information concerning Student's present performance at school, the very information the IEP team is to consider when it would reconvene in July, it is not appropriate to change Student's placement.

22. Moreover, it is clear the entire IEP team did not have sufficient current information about Student's behaviors to make any decision to place her in the ED setting. Under state law and IDEA,⁵ the IEP team is designed to include those persons with the most knowledge about Student. This IEP team included Student's Father, her special education and two general education teachers, the school psychologist who assessed Student, a program diagnostic resource teacher, and the vice principal of Student's school. This IEP team agreed to reconvene the IEP meeting after three months of gathering further data about how Student was progressing in her current placement.

23. Father testified to an improvement in Student's behavior as a result of recent therapy and medication changes. The daily behavior point sheets for Student showed a dramatic change in Student's behavior from the beginning and middle of the school year, a time when she was earning an average of 50 to 60 points out of 100, to the present time, when Student was earning an average of 90 points. In view of the

⁵ See, Education Code section 56341; title 20 United States Code section 1414(d)(1)(B); and title 34 Code of Federal Regulations part 300.321(a), for the persons required to be on an IEP team.

team's agreement to reconsider Student's IEP after gathering additional information, the IEP dated April 10, failed to provide FAPE for Student

24. Based on the foregoing, District denied Student a FAPE by offering to change Student's placement from Carson at the April 10, 2008, IEP team meeting.

C. IS STUDENT ELIGIBLE UNDER THE CATEGORY OF EMOTIONALLY DISTURBED?

25. A child is eligible for special education if the child has one of the disabling conditions specified by law. District proposed to find Student eligible under the disabling condition of ED which is a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (34 C.F.R. § 300.8(c)(4); 5 C.C.R. § 3030(i).)

26. Father urges that Student be determined eligible under the disabling condition known as other health impairment because of her separation anxiety disorder. OHI means a student has limited strength, vitality or alertness, due to chronic or acute health problems, including but not limited to a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, severe asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases, and hematological disorders such as sickle cell anemia and hemophilia which adversely affects the student's educational performance. (34 C.F.R. § 300.8(c)(9); 5 C.C.R. § 3030(f).)

27. In support of its position for ED, District provided the testimony of school psychologist Cohen. On cross examination, Father asked her whether separation anxiety could be the basis for an OHI disability. While Cohen agreed that separation anxiety disorder could possibly support a finding of either an ED or an OHI disability, she identified ample evidence to support her conclusion that Student's behaviors were better identified under the category of ED.

28. In making her conclusion as a school psychologist, Cohen had input from standardized testing, record review, her own observations, and interviews with teacher Johnson, therapist Stewart, and Student herself. District provided substantial evidence to support its position that Student qualified for special education under the disabling condition of ED. In contrast, Father admitted he brought no documents to the April 10, 2008, IEP team meeting. He relied on his own statements to the team to find Student eligible under the OHI disability. The only written record of the diagnosis of Student's separation anxiety disorder from Dr. Lee was the letter he wrote to Cohen dated April 16, 2008. There is no question that this document was not presented, or even available, to the IEP team at the time of the April 10, 2008, meeting.

29. At the time of the hearing Father introduced no testimony from any health professional to contradict the conclusion of psychologist Cohen. The prehearing conference order for this case provided for the presentation of medical expert testimony as requested by Father. Item Seven of the order addressed the witnesses each party anticipated calling during the hearing. Based on Father's identification of witnesses and proposed plan for producing them at hearing, the order provided: "On the first day of hearing, Student will call Andrea Steward, Student's private therapist, and Sam Chavez, parent's roommate. Student will also call Dr. Le [sic]." In spite of Father's plan to present testimony from Student's psychiatrist Dr. Lee, Father did not present this witness at the hearing to testify about the disabling condition of Student. His letters provide some insight into his diagnosis, but provide an insufficient basis for the ALJ to make a finding of eligibility.

30. In support of the separation anxiety diagnosis, Student provided the testimony of Father, Chavez, and a letter that was written after the April 10, 2008, IEP team meeting. Based on the information available to the team on April 10, 2008, the evidence supports a determination of ED as the eligibility category for Student. This

does not mean that the diagnosis by Dr. Lee should not be considered by the team. To the contrary, Dr. Lee's diagnosis would have been entitled to substantial weight had his diagnosis been presented to the team on April 10, 2008, or at the hearing in this matter. Neither therapist Stewart nor Dr. Lee were present at the meeting and Dr. Lee's letter was not available to the team on April 10, 2008.

31. As a result, Cohen's testimony that Student is eligible for special education under the category of ED is entitled to more weight than Father's testimony for eligibility under OHI. Based on the foregoing, Student is presently eligible for special education under the category of ED.⁶

ORDER

A. District did not deny Student a FAPE because of the following procedural issues:

1. District did not deny parent meaningful participation by ignoring parental input at the April 10, 2008, IEP team meeting.
2. District did not state it would agree not to change student's placement if parent signed an agreement to "never appeal a suspension again"; at the April 10, 2008, IEP team meeting.
3. District did not deny parent meaningful participation because the vice principal improperly influenced various district members of the IEP team at the April 10, 2008, IEP team meeting.

⁶ The parties are reminded that an eligibility category does not determine special education services or placement. Rather, the IEP team must identify Student's unique needs when the team meeting reconvenes.

4. District did not require parents to sign the individualized education program (IEP) within two days after the April 10, 2008, IEP team meeting.

B. District denied Student a FAPE by offering to change Student's placement from Carson Elementary School at the April 10, 2008, IEP team meeting.

C. Student is eligible for special education under the category of emotionally disturbed.

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. Student prevailed on issue B. District prevailed on issues A1-4, and C.

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 (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: July 21, 2008

ROBERT D. IAFE

Administrative Law Judge

Office of Administrative Hearings