

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: Parents, on behalf of Student, v. CARLSBAD UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2008090038
Parents on behalf of Student, v. CARLSBAD UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2008090855

DECISION

Administrative Law Judge Robert D. Iafe, of the Office of Administrative Hearings, Special Education Division (OAH), heard this matter on November 3, 4, 6, and 7, 2008, at the OAH office located at 1350 Front Street, San Diego, California.

Ellen Dowd, attorney with Special Education Legal Center, appeared on behalf of Student. Student's mother (Mother) was present during the entire hearing.

Jonathan P. Read and Susan Winkelman, attorneys with Fagen, Friedman & Fulfrost, LLP, appeared for Carlsbad Unified School District (District). Bruce Kramer, Director of Pupil Personnel Services for District, was present during the entire hearing.

PROCEDURAL BACKGROUND

On August 28, 2008, Student filed the request for mediation and due process hearing in OAH Case No. 2008090038. On September 3, 2008, OAH issued its scheduling order setting the due process hearing in Case No. 2008090038 to commence on October

22, 2008. On September 24, 2008, Student filed the request for mediation and due process hearing in OAH Case No. 2008090855. On September 29, 2008, OAH issued its scheduling order setting the due process hearing in Case No. 2008090855 to commence on November 25, 2008.

On October 9, 2008, Student filed a motion in Case No. 2008090038 to consolidate these two cases and to reschedule the due process hearing in the consolidated cases to November 3, 2008. On October 10, 2008, District filed its non-opposition to the motion to consolidate and consented to a due process hearing date to commence on November 3, 2008. On October 15, 2008, OAH issued an order consolidating the two cases and setting the hearing in the consolidated matters to start on November 3, 2008.

The administrative law judge (ALJ) opened the record on November 3, 2008. The ALJ received sworn testimony and documentary evidence during the four hearing days through November 7, 2008. At the conclusion of the hearing, the parties requested, and the ALJ ordered, the filing of written closing arguments to be filed by November 21, 2008. The parties were also given an opportunity to file any reply briefs by November 25, 2008, for the sole purpose of responding to any false representations made in an opponent's brief. The parties timely filed their closing arguments. Student filed a reply brief on November 25, 2008, and District filed a response to Student's reply brief on November 26, 2008, objecting to the content of the reply brief. The matter was deemed submitted for decision on November 26, 2008.

DISTRICT'S RESPONSE TO STUDENT'S REPLY BRIEF

District filed a response to Student's reply brief pointing out that Student raised various counterarguments¹ to District's closing brief that were not authorized by the briefing schedule. District is correct. The counterarguments raised by Student's reply brief are not considered.

ISSUES

Student raised the following issues for decision at the Due Process Hearing:

1. Did District fail to offer Student a free appropriate public education (FAPE) for the 2006-2007 school year, beginning August 28, 2006, because District failed to make an offer of placement before the school year began?
2. Did District deny Student a FAPE for the 2007-2008 school year?

Student alleged:

- A. District failed to assess Student in all areas of suspected disability prior to the May 21, 2007, IEP meeting.
- B. District failed to write appropriate measurable goals in the areas of reading, writing, and math at the May 21, 2007, IEP meeting.
- C. District failed to allow parent to meaningfully participate in the May 21, 2007, IEP meeting because IEP team members did not answer questions about Student's grade level equivalencies in reading, writing, and math.

3. Did District deny Student a FAPE for the 2008-2009 school year?

Student alleged:

¹ Student's reply brief made arguments concerning the evidence. Both Student and District commented on the evidence in their written closing arguments.

- A. District failed to assess Student in all areas of suspected disability or file a due process complaint when Parents refused to sign an assessment plan in June 2008.
 - B. District failed to convene an IEP meeting and make a placement offer before the beginning of the 2008-2009 school year.
4. Did District deny Student a FAPE by materially altering the May 21, 2007, IEP without parent's knowledge or consent?
5. Did District deny Student a FAPE by failing to allow Parent to meaningfully participate in the development of the May 21, 2007, IEP by altering it between May 21, 2007, and November 2007, which Parent did not discover until September 11, 2008?

PARTIES' CONTENTIONS

Student contends District failed to provide a FAPE for Student for the 2006-2007 school year because District convened no IEP meeting and made no offer of an IEP before the 2006-2007 school year began on August 28, 2006.

Student also contends that after Parents provided consent for assessment on March 29, 2007, District failed to assess in all areas of suspected disability in anticipation of the May 21, 2007, IEP team meeting. Student also contends that District failed to write appropriate goals for Student and failed to allow Parent to meaningfully participate in the May 21, 2007, IEP team meeting because District assessors did not provide Parent with grade level equivalencies when reporting on assessment of Student.

Finally, Student contends District failed to provide a FAPE for Student when District filed no due process proceeding to obtain an order for assessment after Parents provided no consent to evaluate Student for the 2008-2009 school year. Student also contends District failed to provide a FAPE because District made no placement offer before the beginning of the 2008-2009 school year.

District contends it attempted to conduct evaluations of Student that were required for a triennial review, but Parents never provided consent for the evaluations. As a consequence, District asserts it was not obligated to propose any modifications to Student's IEP for the 2006-2007 school year until Parents provided consent for assessment.

District also contends that after Parents provided consent for assessment on March 29, 2007, District assessed Student in all areas of suspected disability in anticipation of the May 21, 2007, IEP team meeting. District also contends that it formulated appropriate goals for Student at the May 21, 2007, IEP meeting, and that Mother meaningfully participated in the meeting.

Finally, District contends that it had no obligation to request a due process proceeding to compel assessment of Student prior to the 2008-2009 school year. District also contends in the absence of Parent consent for assessment, and the information such assessment was designed to provide, District was not obligated to make any offer of placement.

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Student is a 17-year-old home schooled student. He last attended a public school during the 2005-2006 school year when he was 14 years old in the 9th grade at District's Carlsbad High School. He first became eligible for special education and related services at the end of his 6th grade year in May of 2003 when he was 12 years old. Student has qualified under the category of other health impairment related to Student's attention deficit hyperactivity disorder (ADHD). At the time Student filed the request for a due process hearing in these consolidated cases, Student had not attended District's school since the end of his 9th grade year with District. During the time period at issue in

this proceeding, Student has resided with his Mother and Father (collectively Parents) within the geographical boundaries of District.

BACKGROUND AND STUDENT'S UNIQUE NEEDS

2. Student is described as an active young man who loves to fish, surf, play basketball, and ride his bicycle by the beach. He is presently home schooled and is in his senior year of high school. He is a leader. He is honest and a loyal friend. He gives his best at everything he attempts to do and is not afraid to stand up for what he believes in. Student is a hard worker who does not quit. He always tries to be the best that he can be. His Parents are very proud of him.

3. Before the start of the 2006-2007 school year, the most recent agreed upon IEP for Student was dated May 19, 2005. This IEP was designed for Student's 9th grade year at Carlsbad High School. The IEP noted Student had difficulty with visual motor, visual attention, and sustained attention. He showed average scores in memory and auditory learning. Student had strong verbal skills with a multi-sensory learning style. He needed small group instruction to be successful in math. To support Student's needs, the IEP contained several goals and provided supports for Student in the general education environment. This IEP provided for resource specialist program (RSP) support for three classes including RSP Math 1A Skills, RSP English I Skills, and RSP Study Skills, which amounted to two and a half hours per day. Student's primary teacher during the 9th grade was Susan Neptune (Neptune) who has been a credentialed special education teacher for District for 14 years.

4. The triennial review of Student's IEP was due on or before May 22, 2006. However, Parents and District representatives did not meet for the IEP review by this date.

ATTEMPTS TO CONDUCT ASSESSMENT FOR TRIENNIAL REVIEW OF STUDENT'S IEP

5. A reassessment of a special education student shall occur not more frequently than once a year and also shall occur at least once every three years unless there is agreement between parents and a district otherwise. In this case, there was no separate agreement regarding the timing of Student's reassessment and Student's triennial assessment was due no later than May 22, 2006.

6. Intending to get an early start on its reassessment of Student, District proposed a plan to evaluate Student eight months before the triennial assessment was due. On September 16, 2005, District sent an Evaluation Plan to Parents. This plan proposed to evaluate Student in several areas including: Academic Achievement, proposing the Woodcock-Johnson Achievement Battery-III (WJ-III, achievement); Psycho-Motor Development/Perceptual Functioning, using the Developmental Test of Visual Motor Integration (VMI); Language/Speech/Communication Development, using the Test of Auditory Perceptual Skill (TAPS); Cognitive Functioning, using the Woodcock-Johnson Cognitive Battery-III (WJ-III, cognitive); Social/Emotional Adaptive Behavior, using the Connor's Rating Scale; Prevocational/Vocational using the Vocational Interest Inventory; Assistive Technology; and Health. Parents did not provide consent for this Evaluation Plan.

7. On March 29, 2006, Neptune sent another Evaluation Plan to Parents. The Evaluation Plan was dated March 27, 2006, and this plan proposed essentially the same assessment instruments as the one dated September 16, 2005. For the area of Cognitive Functioning, this Evaluation Plan added the Wechsler Tests of Intelligence; for the area of Prevocational/Vocational, it included a records review, but no Vocational Interest Inventory; and for the area of Health, it added a Health and Developmental History, a Hearing Screening, and a Vision Screening. Parents did not consent to this Evaluation Plan. Neptune's letter also proposed to convene one meeting during the week of May 8-12, 2006, for Student's triennial and annual IEP review.

8. District's Evaluation Plan dated March 27, 2006 proposed several areas to be assessed including the areas of Academic Achievement administered by Special Education Staff, Psycho-Motor Development/Perceptual Functioning administered by School Psychologist; Language/Speech/Communication administered by School Psychologist/Speech Language Pathologist; both Cognitive Functioning and Social/Emotional Adaptive Behavior administered by School Psychologist; Prevocational/Vocational administered by Guidance Tech; an Additional and/or Alternative Assessment by North County Consortium for Special Education (NCCSE) staff; and Health which had a blank line beside the "Administered By" section. The assessment plan just named the assessors by their position with District, not by individual names.

9. Each of these separate assessment areas included a list of up to 16 specifically identified tests that could be selected for each area. The specific test to be administered could be identified by marking a box, plus there was an additional box item marked "Other" with a line beside it to identify any additional test to be given. Only a few of the specific test instruments were marked, except for the Additional and/or Alternative Assessment which checked the "Other" box and identified "AT Evaluation" and the Health Assessment which also checked the "Other" box and identified "records review."

10. On May 8, 2006, Mother made handwritten changes to the Evaluation Plan proposed by District and signed it. On this date Mother also sent a letter to teacher Neptune advising she needed some extra time to identify the particular assessments Mother wanted to add to the plan proposed by District. Although Mother addressed her request for additional assessments to teacher Neptune, Kramer is the one who responded to Mother's requests. Mother noted that before Kramer was hired, the Director of Pupil Personnel Services had never responded to Mother about discussions related to assessment of students at District.

11. Bruce Kramer has been the Director of Pupil Personnel Services for District

since August 2005. He holds a clear credential in Administrative Services in the state of California. Prior to his employment with District, Kramer brought 33 years of experience in special education law from the state of Ohio. He explained during the first few months on the job he spent a great deal of time with the local SELPA management structure, and with colleagues in director positions in other districts, and with attorneys, learning the differences between the education code in California and Ohio and where the similarities of practice were. As Director, he has many responsibilities. On the pupil personnel side he is responsible for student discipline, student transfers, health services, school psychological services, and counseling services. On the special education side, he is responsible for the development of programs and support of staff including students with disabilities. Kramer has never met Student.

12. By letter dated May 30, 2006, Kramer notified Parents that District had received the "amended evaluation plan" regarding Student from Parents. Kramer's letter explained:

The original evaluation plan which was presented was generated by our evaluation team with the intent of addressing all the areas of concern with [Student]. This plan includes assessments which are appropriate for use with students of [Student's] age and his educational background. The assessments you have added to the plan are unnecessary and in some cases, simply not appropriate.

Kramer's letter made clear that "[w]e reserve the right to complete an assessment to determine educational needs and continued eligibility in special education and retain the right to complete those assessments we believe to be appropriate." Kramer's letter included the original evaluation plan proposed by District and included additional

information Parents needed in order to do an Independent Educational Evaluation.

13. There was a conflict in the testimony about whether Mother ever responded to Kramer's May 30, 2006, letter. At hearing, Kramer testified District never received any response from Parents to his May 30, 2006, letter. Mother testified she did provide a response to Kramer's letter; and that response was by Mother's letter dated June 5, 2006, sent via facsimile to District with a facsimile cover sheet dated June 6, 2006. Although Kramer said he never received any response to his letter, a copy of Mother's letter was among the documents District submitted in its exhibit binder for hearing. As a result, Mother's testimony is more credible on this issue. Mother's letter referred Kramer to numerous special education laws from a Notice of Procedural Safeguards that she had which referred to parent participation in developing an evaluation plan. She also noted that Kramer had never met Student, that the school psychologist had never met Student, and that the school counselor had spent 15 minutes with Student. Mother also noted that the "team" that Kramer was referring to was not the best persons to be advocating what Student needed by way of assessments.

14. At hearing, Mother pointed out several previous assessment plans prepared by District for Student included the specific testing instruments to be used by District and specifically included the name and telephone contact number for the assessors. Several evaluation plans from District were received into evidence including an evaluation plan dated November 25, 2002; an evaluation plan dated April 2, 2003; an evaluation plan dated April 29, 2005; and an evaluation plan dated September 16, 2005.

15. On June 22, 2006, District filed a request for a due process hearing to conduct the assessments of Student first proposed by District's Evaluation Plan dated September 16, 2005.

16. Student's sophomore school year was to begin on August 29, 2006. On August 22, 2006, Neptune sent a letter to Mother to follow up on a telephone

conversation between the two from the day before. The letter included a recommended class schedule for Student's sophomore year during the 2006-2007 school year. The proposed schedule included special education classes in English Skills, Algebra 1A Support, and Directed Studies with general education classes in World History/Culture, Science Tech and Society, Algebra 1A, and Advanced Football. This proposed class schedule was based upon the continued implementation of Student's last agreed upon IEP from the year before. Neptune's letter explained, "Until an updated assessment is completed and an IEP meeting held, no changes can be made. Therefore the level of service will be the same as last year (three special education classes in math, English, and Directed Studies)."

17. At the hearing, Mother explained that she decided to home school Student at the beginning of the 2006-2007 school year because there was no IEP, and no offer of an IEP for Student, for the 2006-2007 school year. She used resources from Barnes & Noble, the library, and online programming to home school Student. Mother testified that she was home schooling Student "by default" and not by choice. However, at all times relevant to this due process proceeding Mother had the choice of enrolling Student with District or not enrolling Student with District. Parents' refusal to permit assessment by District is the reason District was unable to propose an IEP. In view of this, District proposed to allow the existing IEP continue until assessment was completed.

18. After October 2006, Mother gave counsel for District written confirmation that Parents were home schooling Student for the 2006-2007 school year. In addition to the private school affidavit, Mother admitted that she may have told District representatives in conversation that she was home schooling Student by default. Mother also identified "home school" as the school for Student when she filled out a Carlsbad Unified School District Health and Developmental History questionnaire for school psychologist Massey's Psycho-Educational assessment conducted six months later on May 8-9, 2007.

19. On December 12, 2006, District sent Parents a letter notifying them that on December 1, 2006, District withdrew its request for due process hearing which District had filed on June 22, 2006, which sought an order to conduct assessments of Student in the absence of Parents' consent. District withdrew its due process request based on the understanding that Parents had voluntarily placed Student in a private school for the 2006-2007 school year and would not be seeking special education and services from District. District also notified Parents that if they wished to re-enroll Student at any time in the future, District would conduct assessments of Student to obtain updated levels of functioning and provide a free appropriate public education to him.

20. In a letter to Kramer dated January 4, 2007, Mother confirmed a conversation between Mother's attorney and District's attorney requesting that District develop an assessment plan for Student. Mother requested District forward an assessment plan for her consent.

21. On January 16, 2007, Kramer sent an Evaluation Plan for Student to Mother. Neptune, as special education teacher for District, had prepared the Evaluation Plan dated January 12, 2007, for Student. She noted on the plan that Student was being referred for a 3-Year Re-Evaluation-Triennial at Parent request. She was familiar with Student as she had been Student's RSP teacher during his 9th grade year with District. As Student's case manager, Neptune also had input from Student's other teachers about his performance in their classes. For example, Neptune was aware that the English teacher from 9th grade suggested that there should be consideration of placing Student in general education, rather than RSP, noting Student "writes well (five paragraph essay with little guidance), reads and comprehends daily newspaper. His grade would have been an A, but he missed a couple of assignments due to illness."

22. The areas to be assessed on the Evaluation Plan dated January 12, 2007, were checked and included the following: Academic Achievement, Psycho-Motor

Development/Perceptual Functioning; Language/Speech/Communication; Cognitive Functioning; Social /Emotional Adaptive Behavior Administered by School Psychologist; Prevocational/Vocational. None of the particular tests within any of these areas were checked and the Administered By line showed "Carlsbad Unified Staff" for each area to assess. In addition, the boxes for Additional and/or Alternative Assessment and the Other box identified "observation, record review; interview" to be administered by Carlsbad Unified Staff. The Health area was also checked with the other box marked for "Medical release of information" showing it was to be administered by "Carlsbad Unified Staff; parents." Kramer sent this Evaluation Plan for Student to Parents.

23. Parents did not consent to District's Evaluation Plan dated January 12, 2007. Rather, on January 23, 2007, Mother sent a letter to Kramer referencing "Incomplete Assessment Plan" and noted Kramer did not designate which testing instruments and assessments will be given" to Student in any of the categories identified on the January 12, 2007, Evaluation Plan. Mother also requested which particular assessments were proposed for Student, rather than just the areas of assessment.

24. On January 25, 2007, Kramer wrote back to Mother acknowledging her request "for the specific assessments in each area identified on the plan." Kramer's letter continued:

The District has the right and the obligation to elect qualified individuals to conduct assessments. Those individuals must retain discretion to select instruments that they believe are appropriate to assess [Student's] needs in all areas of suspected disability...The District will consider any specific requests for test instruments but will ultimately select instruments that it believes are appropriate. Those requests

can be communicated to me in writing when you return the assessment plan.

25. On January 30, 2007, Parents filed a complaint with the California Department of Education (CDE) alleging District's Evaluation Plan dated January 12, 2007, failed to comply with the requirements for a proposed assessment plan. District responded to the complaint by March 5, 2007, and CDE conducted its investigation during the month of March. On March 26, 2007, CDE issued its written findings that District was in compliance with the requirements for its Evaluation Plan.

26. On March 29, 2007, Parents consented to District's Evaluation Plan dated January 12, 2007. Kramer explained at hearing that it was the normal practice of District's qualified assessors to notify and talk to parents regarding which assessments were appropriate, or what protocols would be used, and the number of sessions it would take to complete assessments of a student. In this case, on April 23, 2007, before any assessments were undertaken, District provided a letter to Parents describing the various assessments District proposed for Student and the estimated dates and times for such assessment. This letter included the Academic assessment to be conducted by Student's 9th grade teacher, Neptune, the Speech/Language assessment to be conducted by speech language pathologist, Shirley Wong, and the Cognitive/Processing/Social Emotional assessment by school psychologist, Georgellen Massey. The particular assessments were selected by the assessors identified in the letter.

THE PSYCHO-EDUCATIONAL EVALUATION REPORT FROM MAY 8-9, 2007

27. The first page of the written confidential Psycho-Educational Evaluation Report conducted on May 8-9, 2007, contained a section headed "Background Information and Educational History." The third sentence of this section states, "[Student] is currently

home schooled.” The first sentence of the Summary contained in the report noted Student was “a sixteen year old adolescent who is currently home schooled.”

28. On May 8 and 9, 2007, Georgellen Massey (Massey), school psychologist for District, conducted a psycho-educational evaluation of Student. Massey has some 20 years of experience in special education. She has been a special education teacher, a special education counselor, a guidance counselor, a dean of students, and a school psychologist. She holds a standard teaching credential, a special education learning handicap credential, a pupil personnel services credential, and a school psychology credential.

29. In conducting her assessment, Massey performed a review of records, observation of Student, and considered a Health and Developmental History filled out by Mother. Massey also selected certain test instruments to administer during her assessment which included the Developmental Test of Motor Integration – Fifth Edition (VMI-5), the Wide Range Assessment of Memory and Learning (WRAML-S), the Wechsler Test of Intelligence (WISC-IV), the Test of Visual-Perceptual Skills – Third Edition (TVPS), the Behavior Assessment Scales for Children (BASC), and the Rotter Incomplete Sentences test.

30. Massey reported on her findings in a confidential written Psycho-Educational Evaluation Report. Under the heading “Special Education Determination,” the Psycho-Educational report concluded that Student was diagnosed with Attention Deficit Hyperactivity Disorder and continued to meet the criteria for special education services under the handicapping condition of Other Health Impairment. Under the heading “Eligibility Statement,” the report also noted Student “meets the eligibility criteria for special education services under the handicapping condition of Specific Learning Disability.” Student displayed a significant discrepancy between his cognitive ability as measured by the WISC-IV, Verbal Comprehension (with a Standard Score (SS) of 106), and the WJ-III in the area of math computation (with a SS of 85). The report also noted that Student displayed visual processing deficits as evidenced by the results of the TVPS, WISC-

IV, and the VMI-5. These visual processing deficits were found consistent with the Psycho-Educational Assessment of Student dated March 19, 2003, which was conducted when Student was 12 years old in the 6th grade.

31. Recommendations in Massey's report for the IEP team to consider included the following: (1) Books on tape may be beneficial for Student; (2) A vision therapy assessment was recommended; (3) Student may need extended time for assignments and tests that require large amounts of writing and copying from the board; (4) Student would benefit from receiving visual information such as notes, copies of lengthy overheads, written outlines, due to visual processing speed delays; and (5) Student should be seated near the source of instruction.

32. On May 17, 2007, District provided a copy of this report to Parents. Mother testified that her experience home schooling Student was consistent with this evaluation.

THE SPEECH AND LANGUAGE ASSESSMENT REPORT DATED MAY 20, 2007

33. Shirley Wong has been a speech and language pathologist for 23 years. She has been employed with District for about 14 years. Before her employment with District, Wong was a speech and language pathologist for Chino Unified School District. She is licensed by the state of California for speech pathology and hearing. She has assessed hundreds of children during her career.

34. On or before April 23, 2007, Neptune asked Wong to assess Student for the IEP team. Based on a review of the records, conversations with those involved with Student, and the evaluation plan, Wong selected the Test of Auditory Processing Skills-3 for Student.

35. Wong reported on her assessment of Student in a document titled Summary of Assessment and Review of Records, Speech and Language dated May 20, 2007. She reported Student's auditory processing skills were in the average range as evidenced by her administration of the TAPS-3. Among the subtests given, Student had a scaled score

of 10, representing the 50th percentile, on the following: Word Discrimination, Phonological Segmentation, Phonological Blending, Word Memory, Sentence Memory, and Auditory Comprehension. Student had higher scaled scores on two tests. On the Number Memory Forward, he had a scaled score of 11, representing 61st percentile, and on the number Memory Reversed, he had a scaled score of 14, representing the 91st percentile. His lowest scaled score was on the Auditory Reasoning subtest, with a scaled score of 9, representing the 37th percentile. However, even the 37th percentile score on the Auditory Reasoning subtest was in the average range of scores. Thus, all of Student's subtests were in the average or higher range of development.

36. Wong's report noted that Student's voice, articulation, and fluency were all age appropriate at the time of her assessment. The report also noted that two years earlier, on May 5, 2005, the Comprehensive Assessment of Spoken Language (CASL) was administered when Student was in middle school. At that time, Student demonstrated receptive and expressive language skills on the CASL that were at or above the normal limits for his age.

THE MAY 21, 2007, IEP MEETING

37. On May 21, 2007, the IEP team for Student met to review triennial assessment results and to conduct an annual review of Student's IEP. Members of the IEP team who attended included special education teacher Neptune; Dawn Dully, a program specialist for District; Georgellen Massey, school psychologist; Alan Cusey, math teacher; David Rudolph, physical education teacher; Shirley Wong, speech/language therapist; Margaret Stanchi, principal of Carlsbad High School; Bruce Kramer, District's director of pupil personnel services; Mother; and a family friend. Student did not attend this meeting.

38. At the beginning of the meeting, the IEP team reviewed various assessments for Student. Massey reported on the results in her Psycho-Educational Evaluation Report from May 8-9, 2007. Neptune reported on her achievement assessments in the report.

Wong reported on the results of her Summary of Assessment and Review of Records, Speech and Language dated May 20, 2007.

39. When Massey reported on her psycho-educational evaluation of Student, she reviewed Student's diagnosis of ADHD and its effects on his education. She also reviewed her cognitive, processing, and social/emotional/adaptive behavior assessments of Student. Massey reviewed with the team that Student's adverse attention issues were demonstrated in a variety of settings and he had difficulty maintaining consistent work commensurate with his ability.

40. Neptune reported Student's scores on the WJ-III achievement tests. For Reading, Student scored in the average range with a Standard Score (SS) of 106 in Letter Word Identification and a SS of 95 in Passage Comprehension. For Writing, Student scored in the average range with a SS of 104 in Spelling and a SS of 112 in Writing Samples. For Mathematics, Student scored in the low average range with a SS of 85 in Calculation and a SS of 90 in Applied Problems.

41. The second page of the IEP dated May 21, 2007, contained information on Student's Present Levels of Academic Achievement and Functional Performance. At the time of the May 21, 2007, IEP meeting, and based on the Woodcock-Johnson Tests of Achievement given in May of 2007, Student's academic and functional skills were described for Reading, Written Expression and Mathematics. For Reading, the WJ results on the IEP noted, "Good word identification skills; passage comprehension average." For Written Expressions, the WJ results noted, "Good spelling; above average writing skills." And for Mathematics, the WJ-III results noted, "Calculation in low average range; applied problems average." In addition, Student's standardized STAR testing results showed he was Below Basic in English Language Arts and Far Below Basic in Mathematics.

42. When reporting on various assessment test results, Massey, Neptune, and Wong provided scaled scores, standard scores, and percentiles, but did not provide grade

equivalent scores² for Student. During the meeting, Mother requested that the IEP team members provide her with grade level equivalencies for Student in reading, writing, and math. Mother pointed out that the purpose for testing in the Academic Achievement area of the Evaluation Plan from January 12, 2007, was to measure Student's current reading, writing, and mathematics skills. She said she needed to know exactly where Student was functioning with respect to his grade level.

43. Mother noted there were some grade level equivalencies reported in the psycho-educational evaluation prepared by District for Student when he was first considered for special education in May of 2003. Mother asked that her request for grade equivalent scores to be provided be entered into the IEP team meeting notes. The team meeting notes reflect this request.

44. Several members of the IEP team explained District usually did not report grade level equivalencies because they do not provide an accurate description of present levels and can be vague and misleading. Massey, Neptune, and Wong explained that District preferred to provide standard scores, scaled scores, and percentiles to parents

² Grade equivalent scores are obtained by computing the average raw scores obtained on a test by children in different grades. Thus, if the average score of seventh graders on a math test is 30, the developer of that test would say that a child with a score of 30 has math knowledge at the seventh grade level. Grade equivalent scores are expressed in tenths of a grade, such that a grade equivalent score of 7.5 means the average performance of children in the middle of the seventh grade. Grade equivalent scores refer to the performance of an average student at the particular grade level on a given test. It does not mean that the performance of the student who achieved it is consistent with all expectations for that grade level at a particular school. (Sattler, Jerome M., *Assessment of Children: Cognitive Foundations*, (5th ed. 2008) page 104.)

because they were a more accurate representation of how a student performed when compared to the general population of students. They explained the standard scores are based on a Bell curve with the average score being 100. It is an easy to see graph which shows where the average level is for students who take the test. The visual Bell curve can be easily related to percentile scores where the 50th percentile is at the middle of the curve with a standard score of 100.

45. Massey pointed out that grade equivalencies can be inconsistent and noted that being two years below grade level in the fourth grade is different from being two years below grade level in the 10th grade. She also explained that they reported standard scores because assessment manuals highly recommend using standard scores which are much more specific and are normed on a large population of students.

46. Even though particular grade equivalent scores were not provided, there was a thorough discussion of Student's present levels of academic achievement and functional performance. For example, Student's previous teachers, including special education teacher Neptune, and math teacher Alan Cusey, participated in the discussions. Current assessors from District, including Massey, Neptune, and Wong, provided their input. Student's Mother, who had been home schooling Student during the 2006-2007 school year, also participated in the discussion of current levels. From this information, the IEP team formulated goals for Student.

47. The IEP team goals included goals to assist Student with organization and on-task behavior. For example, Goal #1 was in the area of Organization and was formulated to assist Student with completing tasks and turning work in on time. Goal #2 was in the area of On-task Behavior and was designed to assist Student with staying in his seat, raising his hand to speak and ask questions, and making appropriate comments.

48. In addition, Goals #3 and #4 addressed Student's mathematics deficits in the areas of math calculation and math application. The third proposed goal was in the area

of Math Calculation. This Math Calculation goal reported on Student's Baseline as "Woodcock-Johnson Standard Score was 85 SS (May '07)." Goal #3 was designed to assist Student with one-variable expressions that included positive and negative numbers. Goal #4 was formulated to assist Student with multi-step problems involving one variable.

49. The IEP team also formulated two goals in the area of Reading Comprehension. Although Student's scores in reading were in the average range, the team discussed the fact that Student's visual processing deficits could impact his reading comprehension. As a result, the two Reading Comprehension goals were added to the IEP to address Student's low processing speed, as identified by District's assessment of Student, rather than any inability to read.

50. District's teachers and assessors testified that all of the goals formulated for Student at the meeting were appropriate to meet his needs. There was no objection by Mother that any of the goals presented and discussed at the IEP meeting were inappropriate or would not meet Student's needs. Student presented no evidence at hearing, and no testimony from any educational expert, that any of the goals in the May 21, 2007, IEP were inappropriate for Student.

51. To implement these goals, District first proposed to place Student at Carlsbad High School with the following classes:

1. General education English – with collaboration
2. Directed Studies English (special education)
3. Algebra 1A (general education)
4. Algebra 1A Support (special education)
5. U.S. History (general education)
6. Elective (general education)

52. Mother believed this level of support did not appear to be sufficient. She noted that based on her working with Student during the previous year, she believed

Student needed more one-to-one instruction and support. After further discussion among the team members, and consideration of Student's needs relating to processing speed and organizational skills, the team made changes to the proposed classes to the following:

1. Special education English
2. Directed Studies (special education)
3. Algebra 1A (general education)
4. Algebra 1A Support (special education)
5. U.S. History – with special education collaboration
6. Elective (depends on choice)

53. At the conclusion of the IEP meeting, Mother advised the IEP team that she would review the District's offer with Father. By June 21, 2007, District had received no further communication from Mother. By letter dated June 21, 2007, District asked Parents to explain any disagreements they had with the proposed IEP and proposed assessments. On July 12, 2007, Mother sent a letter to District advising she intended to obtain independent assessments to confirm Student's grade level performance. By August 27, 2007, District had not received further information from Parents to give their consent to, or objections to the May 21, 2007, IEP. By letter dated August 27, 2007, District again asked for consent or any areas of disagreement as to the IEP. Parents did not enroll Student with District for the 2007-2008 school year.

THE FOUNDATIONS FOR READING AND LEARNING REPORT FROM JULY 27-AUGUST 3, 2007

54. On July 27, 2007, and August 3, 2007, Mother presented Student to the Foundations for Reading and Learning (Foundations) for an independent educational evaluation (IEE). The purpose of the evaluation was to determine Student's present levels of cognitive and language function and his potential for further development in these areas. District funded this independent evaluation.

55. The Foundations report included various percentile, mental age, and grade level equivalencies for Student. It described Student's grade level equivalent to be at 5.7 (representing the 5th grade, 7th month) in math. Some of the assessment results in the Foundations IEE did not use grade level equivalents. The Foundations report also found some deficits in Student's written vocabulary. Student scored in the 73rd percentile on the Peabody Picture Vocabulary Test, showing a mental age equivalent of 21-10 when he was 16 years, seven months old. However, Student's performance on the Vocabulary portion of the Test of Written Language - 3 (TOWL-3) was at the 9th percentile, a demonstration he was under using the vocabulary that he had. His performance on the Style and Logical Sentences subtests of the TOWL-3 were at the 1st and 2nd percentiles, showing deficits in grammar for written language. Although not all test results were provided in grade level equivalents, Mother was able to understand the assessments that did not use grade level equivalents if the results were explained to her.

56. Mother sent the Foundations IEE report to Kramer on September 19, 2007.

THE NOVEMBER 5, 2007, IEP MEETING

57. The IEP team met again on November 5, 2007, to consider the Foundations IEE report on Student and an addendum to the May 21, 2007, IEP meeting. Since the Foundations report described Student's current grade level equivalent to be at the 5th grade 7th month in math, Mother believed that goals should have been written at the 6th grade 7th month level for Student, essentially one year beyond his current level. The IEP goals actually prepared by District for math were set at the 7th grade level in the May 21, 2007, IEP. No changes were made to the math goals at the meeting.

58. Wong attended the November 2007 IEP team meeting. Wong recalled this meeting was to prepare an addendum to the May 21, 2007, meeting for written language goals as a result of the outside assessment received from Foundations. Wong had considered the findings in the Foundations report from the low percentile scores on the

subtests on the TOWL-3 and drafted two new goals in the area of written language. The two goals that Wong prepared bore the date of October 22, 2007, and they addressed delayed vocabulary and grammar skills that the Foundations report described.

59. In addition to the two proposed written language goals, Wong also proposed speech language therapy for Student at the rate of one time per week, for 30 minutes each week, in a group setting. Wong explained that at the time of the May 21, 2007, IEP meeting, based upon her review of records, testing, observations, and the observations of others who had previously worked with Student, there were no concerns that there were any problems in speech or language development. She also noted that as of the May 2007 meeting, the IEP team was aware of Student's results on the WJ-III for written expression was a Standard Score of 112 which was in the high average range. However, when Wong reviewed the Foundations report, the independent assessor concluded that although the Peabody Picture Vocabulary Test-Revised showed Student at the 73rd percentile for vocabulary, in written language form, Student was under-using the vocabulary he had and had some difficulty with grammar. As a speech language therapist, Wong believed the weekly 30-minute group sessions would be an appropriate level of speech services to implement the proposed goals. There was no testimony or other evidence to dispute this level of service.

THE MAY 12, 2008, IEP MEETING

60. After considering possible IEP meeting dates, District sent a notice of an IEP team meeting scheduled for May 12, 2008. In a memo dated April 25, 2008, accompanying the meeting notice, District requested that Mother provide, in advance of the meeting, work samples, tests, or grades, for consideration in generating new goals for Student. The notice of the IEP meeting identified the purpose of the meeting was to review results of assessments and an annual review of the IEP.

61. Mother attended the May 12, 2008, meeting, but would not agree that the

purpose of the meeting was for an annual review of the IEP. Moreover, Mother did not bring enough work samples, tests, or grades to assist the IEP team to determine Student's present levels of performance.

62. Wong also attended the May 12, 2008, IEP team meeting. The purpose of the meeting was to review assessments and conduct an annual review of Student's IEP. Although the meeting was scheduled as an annual review, Mother did not agree to proceed on that basis but only wanted to review assessment information. Wong specifically recalled the IEP team needed additional work samples from Student's home school curriculum to identify Student's present levels of performance and to identify Student's current needs before new goals could be discussed.

63. At the meeting, Mother provided the team with four small samples of Student's work. The IEP team discussed that this was not enough information to identify Student's current needs. Mother agreed to provide additional work samples after the meeting concluded. District provided the option to Mother for assessment information. In the absence of additional work samples for current academic levels, District would ask for an assessment plan for academics.

64. On June 3, 2008, Kramer sent a letter to Mother to follow up with the need for current assessment information regarding Student. Kramer's letter noted "no one has received any work samples from you regarding [Student]....Please find an assessment plan for the academic area only." Kramer's letter continued to leave the decision up to Mother as to whether Mother would provide additional work samples or consent to an assessment. His letter concluded, "As was discussed on May 12, you can provide work samples in lieu of new assessments."

65. Ten days later on June 13, 2008, Kramer sent another letter to Mother asking for work samples or consent for an academic assessment. Kramer's letter also inquired whether Mother was interested in enrolling Student with District to receive special

education services. Kramer also offered to implement the last IEP developed for Student until the assessments could be completed. There was no response to these letter requests.

INTEGRITY OF THE IEP DOCUMENTS MAINTAINED BY DISTRICT FOR STUDENT

66. At the beginning of the May 21, 2007 IEP meeting, Mother received a copy of a draft IEP document dated May 21, 2007, from District. This was nothing new, as Mother had received drafts of IEP documents at the beginning of other IEP team meetings with District. The IEP form contained blanks for page numbering in the form of "Page ___ of ___" at the top right of each page. During the meeting, handwritten changes to the draft document were made as the IEP team had its discussions and additional information was added to the document. At the conclusion of the meeting, Neptune added the handwritten page numbers in blue ink showing "Page 1 of 19" through "Page 19 of 19" at the top right of each page of the document. Mother received an IEP document with these handwritten page numbers. Page 12 of 19 contained the signatures of each of the IEP Meeting Participants for District with a handwritten date of 5/21/07 beside each signature, but did not include the signature of Mother. In addition, the section titled "Parent Consent" did not have any signature of Mother, the only parent to attend the meeting.

67. At the conclusion of the May 12, 2008, IEP team meeting, Mother requested a copy of the May 21, 2007, IEP from Neptune. Neptune admitted that she mistakenly printed a copy of the May 21, 2007, IEP that District had saved in its computer but the computer version did not have the handwritten changes or meeting notes from the May 21, 2007, meeting. This computer generated copy also did not have any signatures from the May 21, 2007, meeting. The printed document now included computer generated page numbers in the top right of each page of the document. This computer generated pagination now showed "Page 1 of 16" through "Page 16 of 16." This pagination occurred because the IEP was not saved by District as a completed and agreed to IEP from the May 2007 meeting.

68. Mother testified she discovered there were different versions of the draft May 21, 2007, IEP during a September 11, 2008, resolution session in this case. Although different copies of the draft May 21, 2007, IEP were presented at hearing, Mother was unable to identify which document she received at the November 5, 2007, IEP meeting, but she knew the documents she had received from District were different. Although different copies of the draft May 21, 2007, IEP were presented at hearing. Mother was unsure which she had received at various times. Neptune's testimony, supported by the evidence showing the handwritten additions in different colored ink is more credible, such that the unsigned 16 page version of the May 21, 2007, draft IEP was provided to Mother in error and was not used at the November 5, 2007, IEP team meeting.

69. Student raised a second issue with respect to the integrity of the IEP documents maintained by District. At the time of the resolution session in this case, Mother asked to review Student's complete special education files. District arranged for a time several days after the resolution session for Mother and her attorney to review all of District's files relating to Student. Because there were a number of different documents in the files, including originals and copies of IEP documents, Kramer added his own handwritten notes to the back page of two different copies Student's IEP to identify what the documents were and when they were generated. Kramer explained he wrote on the back page of the two documents to help identify the documents for Mother and her counsel because he was not able to attend the meeting to review the District files.

70. Joanne Caudill (Caudill), Coordinator of Special Education for District, explained that nothing should ever be written on an IEP document unless the entire team is participating. She noted the IEP is the product of the team, it should be created by the IEP team, and individual notes should never be added without the knowledge and participation of the entire team. Caudill has never written personal notes on the back of any IEP document. In her experience, she cannot recall ever seeing personal notes on the

back of any IEP document.

COMPENSATORY EDUCATION

71. Student's request for due process hearing asked for the specific remedy of compensatory education "by immediately placing him at a non-public school, or a non-public agency that can provide [Student] with a FAPE, and provide all appropriate supports and services, including vision therapy and assistive technology and special education transportation." Student contends that he was entitled to compensatory education because of District's failure to offer him a FAPE for the 2006-2007 and 2007-2008 school years. Student's prehearing conference statement requested, as an alternative resolution, "to have District fund Fusion Academy, an accredited school in North County San Diego...The preferred remedy, therefore would be funding to attend Fusion. The secondary remedy (which would be far costlier, because it would entail more semesters, transportation, and prep for the CAHSEE) would be placement at the Winston School or another NPS or NPA, depending on availability and suitability."

72. Compensatory education is an equitable remedy that may be employed to craft appropriate relief for an aggrieved party. Equitable relief would also require review of the conduct of both parties to determine whether relief is appropriate.

73. There is no support in the record for an award of compensatory education in this case. Compensatory education can only be awarded where it is found that there was a substantive denial of FAPE. Other than the supports and services identified in the IEPs offered by District, Student offered no other evidence for the remedies Student has requested; Student offered no evidence regarding the need for, or the provision of, any vision therapy or assistive technology, or transportation.

74. Moreover, even if Student had proved a substantive violation and an entitlement to compensatory education, Student provided no evidence of the availability or suitability of any non-public school or non-public agency for Student. No evidence as

to suitability, availability or cost was offered regarding the Fusion Academy. No evidence as to suitability, availability or cost was offered regarding the Winston School. No evidence was offered regarding what any non-public school or agency could provide in general or in particular for Student. No evidence was offered on the cost of any part of Student's education, not past, present, or future. The record is silent on these issues and the absence of any evidence concerning compensatory education for Student precludes any award for such in this case.

75. Student did not meet his burden to show District denied him a FAPE or that he was entitled to any award of compensatory education.

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, Student has the burden of persuasion in this case.

ISSUE 1. DID DISTRICT FAIL TO OFFER STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) FOR THE 2006-2007 SCHOOL YEAR, BEGINNING AUGUST 28, 2006, BECAUSE DISTRICT FAILED TO MAKE AN OFFER OF PLACEMENT BEFORE THE SCHOOL YEAR BEGAN?

2. Reassessment of a student eligible for special education must be conducted at least every three years, or more frequently if the local educational agency determines conditions warrant reassessment, or if a reassessment is requested by the student's teacher or parent. (20 U.S.C. § 1414(a)(2)(A); Ed. Code, § 56381, subds. (a)(1), (2).) No single procedure may be used as the sole criterion for determining whether the child has a disability or for determining an appropriate educational program for the child. (20 U.S.C. § 1414(b)(2), (3); Ed Code, § 56320.)

3. Before any action is taken with respect to the initial placement of an individual with exceptional needs in special education instruction, an individual assessment of the pupil's educational needs shall be conducted in all areas of the suspected disability. (20 U.S.C. § 1414(a)(1); Ed. Code, § 56320.) When developing a pupil's IEP, the IEP team must consider the results of this initial assessment, or the most recent assessment, of the pupil. (20 U.S.C. § 1414(c)(1)(A); Ed. Code, § 56341.1, subd. (a)(3).) On the issue of the reassessment of a student with an IEP, Education Code section 56381, subdivision (a)³ provides.

(a)(1) A reassessment of the pupil, based upon procedures specified in Section 56302.1 and in Article 2 (commencing with Section 56320), and in accordance with subsections (a), (b), and (c) of Section 1414 of Title 20 of the United States Code, shall be conducted if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment.

(2) A reassessment shall occur not more frequently than once a year, unless the parent and the local educational agency agree otherwise, and shall occur at least once every

³ Under federal law, the circumstances under which a "reevaluation of each child with a disability" must be conducted are the same. *See*, 20 U.S.C. section 1414(a)(2)(A) for the substantive, and 20 U.S.C. section 1414(a)(2)(B) for the "procedural requirements."

three years, unless the parent and the local educational agency agree, in writing, that a reassessment is unnecessary.

If the reassessment so indicates, a new individualized education program shall be developed. (Emphasis added).

4. A reassessment requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, §§ 56321, subd. (c), 56381, subd. (f); 34 C.F.R. § 300.300(c) (2006).) To obtain consent, a school district must develop and propose a reassessment plan. (20 U.S.C. § 1414(b)(1); Ed. Code, §§ 56321, subd. (a) and 56381, subd. (f).) If the parents do not consent to the plan, the district can conduct the reassessment only by showing at a due process hearing that it needs to reassess the student and is lawfully entitled to do so. (20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. § 300.300(c) (2006); Ed. Code, §§ 56321, subd. (c), 56381, subd. (f), 56501, subd. (a)(3).) The district must propose a written assessment plan and include notice of the procedural safeguards under the Individuals with Disabilities Education Improvement Act (IDEA) and state law. (20 U.S.C. § 1414(a)(1)(D)(ii); Ed. Code, §§ 56321, 56329, 56381.)

5. A parent who wishes that a child receive special education services must allow reassessment if conditions warrant; “if the parents want [their child] to receive special education under the Act, they are obliged to permit such testing.” (Gregory K. v Longview School Dist. (9th Cir. 1987) 811 F.2d 1307, 1315 (Gregory K.)) “A parent who desires for her child to receive special education must allow the school district to reevaluate the child using its own personnel; there is no exception to this rule.” (Andress v. Cleveland Independent School Dist. (5th Cir. 1995) 64 F.3d 176, 179 (Andress).) [T]here is no exception to the rule that a school district has a right to test a student itself in order to evaluate or reevaluate the student’s eligibility under the IDEA.” (Id. at 178.) Until a student’s parents waive all claims under IDEA, they must comply with the reasonable and

necessary assessment requests of the District. (*Dubois v. Connecticut State Board of Education* (2d Cir. 1983) 727 F.2d 44, 49.)

6. An administrative law judge may order a school district to provide compensatory education to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1486.)

7. Student's triennial evaluation was due on May 22, 2006. Accordingly, District had to request a reassessment of Student for the triennial evaluation. District properly noticed the triennial assessment to Parents and provided a proper written assessment plan for Student. On September 16, 2005, well in advance of the time for triennial evaluation, District sent its first Evaluation Plan for parental consent. Parents did not provide their consent for this evaluation.

8. On March 29, 2006, District sent another Evaluation Plan for parental consent. Student's Parents did not consent to this plan. Rather, Mother changed the Evaluation Plan and sent it back to District for consideration. The conditions imposed by the written response from Parents essentially interfered with District's ability to evaluate and assess the special education needs of Student. District has the right to evaluate Student to determine eligibility and for special education services using its own personnel. In doing so, District staff needed to use their professional judgment and training to determine the proper tests to be given, the nature of observations during the assessment process, and information they would need to gather to produce valid test results. The conditions and restrictions proposed by Parents would unfairly constrain the assessment process such that the District might not have received the proper picture of Student, the nature of his disability, and how best to meet his needs in the educational environment.

9. District made reasonable efforts to obtain parental consent to the assessment plan and made reasonable efforts to inform the Parents about the process. District is legally obligated to reassess Student for his triennial evaluation without

restriction or limiting conditions from Parents. If Parents eventually would disagree with the evaluation results, Parents would be entitled to an independent educational evaluation, but District's evaluation must occur first. The numerous changes proposed by Mother to District's Evaluation Plan was not consent to the plan, but rather imposed additional conditions upon the evaluation process crafted by District.

10. The purpose of the triennial assessment was to determine (A) whether Student continues to have a disability for special education eligibility; (B) Student's present levels of performance and educational needs; (C) whether Student continues to need special education and related services; and (D) whether any additions or modifications to Student's program to enable him to meet his goals and to participate, as appropriate, in the general curriculum. (Ed. Code, § 56381, subds. (b)(2)(A)-(D).)

11. In this case, District was prevented from gathering such information before the 2006-2007 school year began because Parents would not give their consent to evaluate Student. District could not develop any new IEP for the 2006-2007 school year until it received parental consent allowing District to discharge its obligation to evaluate Student. In short, if a parent wants special education services for a child, the parent must allow the district to conduct assessments of the child. (Gregory K., *supra*, 811 F.2d at 1315.)

12. District was obligated to have an IEP in effect for Student at the beginning of each school year. (34 C.F.R. § 300.323(a)(2006); Ed. Code, § 56344, subd. (c).) In the absence of consent to reevaluate Student, District was left with no way to determine whether (A) whether Student continues to have a disability for special education eligibility; (B) what Student's present levels of performance and educational needs were; (C) whether Student continues to need special education and related services; and (D) whether any additions or modifications to Student's program needed to be made to enable him to meet his goals and to participate in the general curriculum. Without the consent to obtain

this information, District could not comply with this obligation. District did not deny Student a FAPE by making no offer before the 2006-2007 school year began.

13. In addition to District's inability to obtain consent for Student's triennial reevaluation, there is another reason District cannot be responsible for failure to provide a FAPE to Student during the 2006-2007 school year. Beginning on October 13, 2006, the Code of Federal Regulations provides that if a parent of a student who is home schooled, or placed in a private school at the parents' expense, does not provide consent for a reevaluation, or if the parent fails to respond to a request to provide consent, a school district may not file a request for a due process hearing to compel such a reevaluation. (34 C.F.R. § 300.300(d)(4)(i)(2006).)

14. In this case, by December 1, 2006, Mother had provided a private school affidavit to District confirming student was being home schooled. As a result, District could not file a due process proceeding to compel implementation of its Evaluation Plan when Parents failed to give consent to the plan.

ISSUE 2.A. DID DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR BECAUSE DISTRICT FAILED TO ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY PRIOR TO THE MAY 21, 2007, IEP MEETING?

15. Student's Parent gave consent for the triennial reevaluation on March 29, 2007. The suspected areas of disability on District's Evaluation Plan dated January 12, 2007, included the following: Academic Achievement, Psycho-Motor Development/Perceptual Functioning; Language/Speech/Communication; Cognitive Functioning; Social /Emotional Adaptive Behavior; Prevocational/Vocational; and Health. Special education teacher Neptune, school psychologist Massey, and SLP Wong, prepared reports of their evaluations. The IEP team identified present levels of academic achievement and functional performance and prepared goals for Student. Student

challenges the areas of suspected disability based on the Foundations IEE which identified a deficit in written vocabulary and grammar.

16. The fact that two written language goals were added at the November 5, 2007, IEP meeting does not mean that the assessments for the May 21, 2007, IEP were not complete. The Foundations IEE actually agreed with the assessment of Student by the IEP team on May 21, 2007. The Foundations report noted Student performed in the average range in reading fluency. It also noted Student had deficits in math operations, also addressed at the May 21, 2007, meeting. The additional information disclosed by the Foundations report was Student's deficit in written vocabulary and grammar; and that information resulted in additional writing goals at the November 5, 2007, IEP meeting.

17. At the time of the May 21, 2007, IEP it was not improper for the assessment of Student to omit vocabulary testing. In selecting assessment instruments, Neptune had the benefit of a year as Student's teacher. Information from Student's other teachers also indicated that Student should even think about moving into general education, rather than RSP, for English. Neptune's choice of subtests for the May 2007 evaluation was based on her years of experience assessing students. As of May 21, 2007, the IEP team had sufficient information to identify Student's needs and the special education interventions he required.

18. District did not fail to assess in all areas of suspected disability because it did not administer a particular vocabulary test. To the contrary, Student's scores on the WJ-III achievement tests showed Student in the above average range for writing: Student earned a SS of 104 on the spelling subtest and earned a SS of 112 on the writing samples subtest. With such above average scores, there was no failure on District's part to assess in all areas of disability prior to the May 21, 2007, IEP meeting.

ISSUE 2.B. DID DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR BECAUSE DISTRICT FAILED TO WRITE APPROPRIATE MEASURABLE GOALS IN THE AREAS OF READING, WRITING, AND MATH AT THE MAY 21, 2007, IEP MEETING?

19. District was required to include a statement of measurable annual goals, designed to meet student's needs and to enable him to be involved in, and make progress in, the general education curriculum. (34 C.F.R. § 300.320(a)(2)(2006).)

20. Testimony at hearing, and the IEP team meeting notes from May 21, 2007, demonstrate that there was a thorough discussion of Student's present levels of academic achievement and functional performance. Student's previous teachers and current assessors from District provided input. Student's Mother participated in the discussion of current levels. From this information, the IEP team formulated goals for Student.

21. The IEP team included Goal #1 in the area of organization to assist Student with completing tasks and turning work in on time. Goal #2 in the area of on-task behavior was designed to assist Student with staying in his seat, raising his hand to speak and ask questions, and making appropriate comments. Goals #3 and #4 addressed Student's mathematics deficits in the areas of math calculation and math application. Goals #5 and #6 addressed the area of Reading Comprehension to meet Student's needs due to his low processing speed as identified by the assessment performed by District.

22. District's witnesses were well qualified to formulate the goals in this May 21, 2007, IEP. The amount of experience that Massey, Neptune, and Wong brought to the meeting included many years of special education expertise to formulate the goals for Student. Their testimony supported a finding that the goals were appropriate. Student provided no evidence that the goals were not appropriate to meet Student's needs. As a result, District did not deny Student a FAPE for the 2007-2008 school year because District failed to write appropriate measurable goals in the areas of reading, writing, and math at the May 21, 2007, IEP.

ISSUE 2.C. DID DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR BECAUSE DISTRICT FAILED TO ALLOW PARENT TO MEANINGFULLY PARTICIPATE IN THE MAY 21, 2007, IEP MEETING WHEN IEP TEAM MEMBERS DID NOT ANSWER QUESTIONS ABOUT STUDENT'S GRADE LEVEL EQUIVALENCIES IN READING, WRITING, AND MATH?

23. A parent has meaningfully participated in the development of an IEP when the parent is informed of the student's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions to the IEP. (N.L. v. Knox County Schools (6th Cir. 2003) 315 F.3d 688, 693.)

24. Student provided no authority for the contention that District was required to provide grade level equivalencies in reading, writing, and math for Student. District witnesses testified that standard scores, scaled scores, and percentiles provide a more accurate description of a student's present levels of performance than grade level equivalencies. For that reason, District personnel did not provide reports of Student's grade level equivalencies. Instead of grade level equivalencies, District assessors reported on Student's present levels using standard scores, scaled scores, and percentiles.

25. Although Mother noted there were some grade level equivalencies reported in District's psycho-educational evaluation of Student from May of 2003, District was not required to provide such information. Mother was also able to understand certain assessment results in the Foundations IEE that did not use grade level equivalents if the results were explained to her.

26. At the end of the May 21, 2007, IEP meeting, Mother took the IEP to review it with Father. Mother did not say she did not understand all of the assessment results. Rather, her request was for additional information so she could have an understanding of grade level equivalencies for Student. Having provided sufficient objective standard scores, scaled scores, and percentiles, to identify Student's current levels, District understood Mother's request for grade level equivalents but was satisfied it had provided

sufficient information from its assessment reports and explanations at the meeting. District therefore funded the Foundations IEE to allow Mother to obtain the grade level equivalents that she sought from an independent source.

27. Mother's concern about determining Student's grade level equivalents is understandable. If parents sense their student is behind in grade level abilities, it would naturally raise concerns. However, the facts in this case show that the information provided by District's assessment reports was sufficient to identify Student's needs and develop goals for his IEP. The scaled scores, standard scores, and percentiles presented for Student provided the proper information to accurately formulate a program for Student. When the Foundations IEE determined Student had a 5th grade, 7th month, grade equivalent in math, Mother urged that a math goal should be set at the 6th grade, 7th month level. However, using the scaled scores, standard scores, and percentile test results, the goal proposed by District was set at the 7th grade level. The resulting goal grade level was essentially the same, being arrived at from a different set of scores.

28. District did not deny Student a FAPE when IEP team members did not answer questions about Student's grade level equivalencies in reading, writing, and math. District provided an IEE to address Mother's concerns about knowing the grade level equivalencies for Student.

ISSUE 3.A. DID DISTRICT DENY STUDENT A FAPE FOR THE 2008-2009 SCHOOL YEAR BECAUSE DISTRICT FAILED TO ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY OR FILE A DUE PROCESS COMPLAINT WHEN PARENTS REFUSED TO SIGN AN ASSESSMENT PLAN IN JUNE, 2008?

29. Before a school district may perform a reassessment of a student with a disability, that district must obtain the written consent of the parent. (20 U.S.C. § 1414(a)(1)(D); Ed. Code, § 56381, subd. (f).) If a parent does not consent to the reassessment, the school district may, but is not obligated to, file a request for a due

process proceeding for the right to assess. (34 C.F.R. § 300.300(c)(1)(ii)(2006); Ed. Code, § 56381, subd. (f)(3).) A school district does not violate its obligation to assess if it declines to pursue the reassessment. (34 C.F.R. § 300.300(c)(1)(iii)(2006); Ed. Code, § 56381, subd. (f)(4).)

30. Student alleges District failed to offer a FAPE because District failed to file a due process proceeding after Parents refused to consent to District's Evaluation Plan dated June 4, 2008. However, if a parent wants a child to receive special education and related services, that parent is obligated to allow the school district to assess the child. (Gregory K., *supra*, 811 F.2d at 1315; Andress, *supra*, 64 F.3d at 178.)

31. District attempted to obtain assessment information concerning Student's current academic levels from Parents before, during, and after the May 12, 2008, IEP meeting. In view of the fact that Mother was home schooling Student, Kramer and District members of the IEP team requested Mother to provide current work samples, tests, or grades to assist the IEP team to determine Student's present levels of performance. At the May 12, 2008, meeting, Mother agreed to provide additional information to District.

32. After District made several requests for additional current academic information from Parents, and no additional information was provided, District requested that Parents consent to an academic assessment. District provided the Evaluation Plan for this academic assessment to Parents during the first week of June 2008, and additional dates thereafter. Parents again did not provide consent for District's assessment of Student. Under these circumstances, District was under no obligation to file a request for a due process proceeding.

ISSUE 3.B. DID DISTRICT DENY STUDENT A FAPE FOR THE 2008-2009 SCHOOL YEAR BECAUSE DISTRICT FAILED TO CONVENE AN IEP MEETING AND MAKE A PLACEMENT OFFER BEFORE THE BEGINNING OF THE 2008-2009 SCHOOL YEAR?

33. As discussed above, if Parents wanted special education services from

District, they must provide consent for District to assess Student. Parent did not do so. As a result of not permitting District to assess Student, Student is not entitled to the benefits under IDEA for special education and related services.

34. Student asserts that District should not be allowed to blame Student for its failure to provide FAPE to Student. However, until Parents provide their consent to allow District to conduct the assessments which District is obligated to conduct, District does not have the obligation to provide FAPE to Student.

ISSUE 4. DID DISTRICT DENY STUDENT A FAPE BY MATERIALLY ALTERING THE MAY 21, 2007, IEP WITHOUT PARENT'S KNOWLEDGE OR CONSENT?

35. The development, review, or revision of an IEP shall be conducted by an IEP team which must include one or both of a student's parents. (Ed. Code, § 56341, subds. (a) and (b).) A copy of each IEP must be maintained at each school site where a student is enrolled. (Ed. Code, § 56347.)

36. Student asserts that District made revisions to his IEP without the participation of Parents. Student points to the 19-page May 21, 2007, IEP with handwritten additions and dated signatures and compares that document to the 16-page computer generated IEP with no notes or signatures.

37. Student's assertion is not supported by the evidence. The 16-page computer generated IEP was not the document created by the IEP on May 21, 2007, and District never urged that it was Student's IEP. Rather, when Mother asked Neptune for a copy of the May 21, 2007, IEP at the conclusion of the May 12, 2008, meeting, Neptune erroneously printed out the May 21, 2007, draft that was on district's computer. Except for this error in providing a copy, there was no evidence that District ever sought to use the 16-page unsigned document as Student's IEP. Moreover, in the absence of this 16-page unsigned document, there was no evidence that District made any changes to any of the IEP documents for Student.

38. The evidence did show, however, that Kramer added handwritten personal notes on the back page of two IEP documents. While no notes should be written on any IEP documents without the participation of the IEP team, Kramer's notes do not intend to make any revisions to Student's IEP. Kramer's personal notes were intended to identify the documents and were placed on the back page of copies to help identify them for review by Parent and counsel. As a result, there was no material alteration of any IEP document.

ISSUE 5. DID DISTRICT DENY STUDENT A FAPE BY FAILING TO ALLOW PARENT TO MEANINGFULLY PARTICIPATE IN THE DEVELOPMENT OF THE MAY 21, 2007, IEP BY ALTERING IT BETWEEN MAY 21, 2007, AND NOVEMBER 2007, WHICH PARENT DID NOT DISCOVER UNTIL SEPTEMBER 11, 2008?

39. A parent has meaningfully participated in the development of an IEP when the parent is informed of the student's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions to the IEP. (N.L. v. Knox County Schools (6th Cir. 2003) 315 F.3d 688, 693.)

40. As discussed in the preceding section, District did not materially alter any IEP document for Student. As a result, District did not fail to allow Parent to meaningfully participate in the development of Student's May 21, 2007, IEP.

41. Moreover, Student asserts discovery of the unsigned computer generated version of the IEP on September 11, 2008. Any participation in the development of the May 21, 2007, was completed before September 11, 2008. Participation in the development of the May 21, 2007, IEP could not have been affected by discovery of the computer generated document on September 11, 2008. As a result, District did not fail to allow Parent to meaningfully participate in the development of Student's IEP.

ORDER

Student's requests for relief against District 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. District prevailed on all issues heard and decided in this case.

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: December 18, 2008

_____/s/_____

ROBERT D. IAFE

Administrative Law Judge

Office of Administrative Hearings