

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

In the Matter of:

GARDEN GROVE UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2005090691

DECISION

Elizabeth Feyzbakhsh, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, heard this matter on March 6, 27, 28, 29, 30, and May 15, and 16, 2006, in Garden Grove, California.

Attorney Justin Shinnfield, Andelson, Loya, Ruud & Romo, appeared on behalf of Petitioner, Garden Grove Unified School District (District). Also in attendance for the majority of the hearing was Gary Lewis, Ed.D., Assistant Superintendent.

Attorney Paul Kamoroff, of Kamoroff & Associates, appeared on behalf of Respondent Student (Student). Present throughout the hearing was Student's mother.

The request for due process hearing at issue was received by the Office of Administrative Hearings on September 26, 2005. Oral and documentary evidence were received during the hearing. Upon request of the parties, written closing arguments were received by the Administrative Law Judge on June 19, 2006. Therefore, the record was closed and the matter submitted on June 19, 2006.

ISSUES

- Issue 1: Did the District properly assess Student in all areas of suspected disability in response to Student's mother's request in spring 2005?¹
- Issue 2: Did the District offer Student a free and appropriate public education (FAPE) in the least restrictive environment (LRE) in its June 15, 2005 Individual Education Plan (IEP)?

CONTENTIONS OF THE PARTIES

The District contends that Student's June 15, 2005 IEP complied with relevant special education laws and offered Student a FAPE.

Student contends that the District failed to assess Student in all areas of suspected disability. Specifically, Student challenges the District's psychoeducational assessment and contends that the District failed to:

- A. Conduct an appropriate visual processing assessment;
- B. Conduct appropriate fine and gross motor assessments; and
- C. Refer Student to mental health services for assessment due to separation anxiety.

Student contends that the District failed to offer a FAPE in its June 15, 2005 IEP by failing to:

- A. Provide appropriate academic goals and objectives;
- B. Provide vision therapy services and annual goals;
- C. Provide occupational therapy services and fine motor annual goals;

¹ This due process hearing was initiated by the District and, as such, only issues arising from that request are within the jurisdiction of this administrative law judge. During a clarification of issues, the ALJ ruled that no affirmative relief may be sought by the respondent in this matter.

- D. Provide an appropriate educational placement, including transportation;
- E. Provide emotional therapy services such as counseling;
- F. Provide accommodations for Student's other health impairments; and
- G. Provide any transition program for Student's transition from private school to public school.

FACTUAL FINDINGS

BACKGROUND

1. Student is a ten-year-old female who is eligible for special education services due to a specific learning disability. She resides within the geographical boundaries of the Garden Grove Unified School District. Student was not a special education student at the time the District became responsible for her education since, prior to relocating to the District, she was not receiving special education services.

2. At the time of the hearing, Student was enrolled in third grade in a private school called Prentice Day School (Prentice.) Student attended a private school called Wonderland Primary School for both kindergarten and first grade where she was retained after first grade. Student attended Rossmore Elementary school in the Los Alamitos Unified School District to repeat first grade and to attend second grade. In spring 2005, Student's parents unilaterally moved Student from public school within the Los Alamitos Unified School District to Prentice.

3. Student has had significant health problems since birth. Student was the product of a complicated pregnancy. There was an umbilical cord aneurism and intrauterine growth retardation. Student had coarctation of the aorta which was corrected by surgery in 2001. She also has asthma and coronary artery stenosis.

ASSESSMENT IN ALL AREAS OF SUSPECTED DISABILITY

4. The District is required to assess each special education student in all areas related to his or her disability and to prepare a written report on the results of each

assessment. Student contends that the District assessment was not appropriate and that further assessment in the areas of visual processing, fine and gross motor skills, and mental health are necessary.

5. In Spring 2005, when Student was in the second grade, Student's mother requested a complete psycho-educational assessment from the District. The purpose of the assessment was to establish eligibility for special education. The District provided an assessment plan and Student assented to the assessment plan. Dr. Georgia English is a school psychologist employed with the Garden Grove Unified School District. She conducted the psycho-educational assessment of Student.

6. As part of Student's assessment, Dr. English reviewed testing that had been previously been conducted at the request of Student's mother to determine why Student was having trouble with spelling and reading in school. Dr. English reviewed a February 2004 assessment for attentional problems conducted by Dr. Baringold of the Advanced Behavioral Healthcare Agency. Dr. English also reviewed a July 2004 psychoeducational assessment conducted by Francis M. Crinella, Ph.D., and Kathleen Montemagni, Ph.D., of the University of California, Irvine, Department of Pediatrics/Division of Child Development.

7. On May 17, May 24, and May 31, 2005, Dr. English met with Student at Prentice Day School to conduct her assessment on behalf of the District. She observed Student and conducted a number of tests.

8. Dr. English conducted observations of Student using the Behavioral Observation of Students in Schools program. This program is used to determine the amount of time a student is academically engaged, and the amount of time a student is off task in order to compare the student with peers. During the observation, Student had no off task time.

9. Dr. English administered the Dynamic Indicators of Basic Early Literacy Skills (DIBELS). This test measures specific aspects of decoding skills, or early indicators of reading ability. Student was given the DIBELS Oral Reading Fluency subtest which is

designed to identify children who may need additional instructional support and monitor progress toward instructional goals. Student scored in the “some-risk” level for third grade benchmarks.

10. Due to demonstrated weaknesses in reading fluency, Student was given the Phoneme Segmentation Fluency subtest. This test measures higher-level phonological awareness skills. Student scored in the “established” level, meaning that her higher level phonological awareness skills were developed appropriately. Dr. English concluded that while Student’s phonological awareness skills are fully developed, her reading fluency is negatively impacted by weak phonics skills at the third grade level.

11. Student was given the Woodcock-Johnson Test of Achievement-III (WJ-III) to assess her current functioning in specific academic areas. Student tested within the average range with a standard score of 91 in overall academics. In broad reading, Student received a standard score of 86, in the low average range.

12. Broad math tests measure achievement including problem solving, number facility, automacity with facts, and reasoning. Student performed in the average range with a 106 standard score.

13. Broad writing is made up of spelling, writing fluency, and writing samples. In overall writing skills, Student performed in the average range with a score of 92. Spelling was Student’s weakest area with a standard score of 84. Student’s writing fluency, or sentence structure was average. Her content of expression score was in the superior range, as indicated by a 121 standard score. Oral expression refers to the ability to express ideas. Student’s oral expression skills scores were within the superior range.

14. Student was given the Woodcock-Johnson III Test of Cognitive Abilities (WJ-III Cog). This test assesses the cognitive ability of children and is designed to provide measures of general intellectual ability (GIA). Student scored 103 overall, which is within the average range.

15. Verbal ability includes both verbal knowledge and comprehension. Student scored within the high average range with a score of 115. The area of thinking ability represents long term retrieval, visual spatial thinking, auditory processing, and fluid reasoning. Student's overall thinking ability was in the average range, but when compared with Student's verbal ability, the range of scores was not consistent and there was significant difference between the two composite scores. Dr. English determined that, because of this discrepancy, Student's GIA score was not the best overall predictor of Student's performance and that her more reliable measure was her verbal ability.

16. Student's cognitive efficiency was in the average range with a score of 96, her Phonemic Awareness was in the average range with a score of 110, and her working memory was in the average range with a score of 94.

17. Student was given the Wide Range Assessment of Memory and Learning-Second Edition which is a cognitive abilities and memory test designed to provide a general Memory Index in which scores can be compared with a normed sample of children of the same age. Student scored 85, which is within the low average range. Dr. English commented that there seems to be "... significant differences between her visual and verbal memory, with her verbal being higher. Her attention/concentration index was her lowest score."

18. Student was given the Comprehensive Test of Phonological Processing which assesses phonological awareness, phonological memory, and rapid naming. Overall, Student's phonological awareness and memory are within the low average range. Student's rapid naming, which is an indirect measure of working memory, was within the low range.

19. The Visual Motor Integration (VMI) test requires the examinee to copy geometric designs presented to her. On this test, Student had a standard score of 76, within the 5th percentile. The average score is 100.

20. Dr. English concluded that overall it appeared that Student's fine and gross motor skills were age appropriate. Dr. English further concluded that Student's adaptive, or

self-help skills were age appropriate, and that Student was very social and had many friends.

21. Dr. English administered the Conners' Teacher/Parent Rating Scale-Revised(S). This test measures cognitive problems and inattention. Student scored slightly in the above average range according to parent reports and within the average range according to teacher report. According to teacher report, Student was in the above average range for hyperactivity, because she had trouble sitting still, and appeared more restless and impulsive than other students her age. Student's parent rated Student in the below average range for hyperactivity. Both teacher and parent rated Student in the below average range for oppositional behaviors.

22. Dr. English prepared a report of her assessment results. Based on those results Dr. English concluded that Student met the eligibility criteria as an individual with exceptional needs in accordance with California Code of Regulations, title 5, section 3030(j): Learning Disability. The learning disability exists in the areas of reading comprehension, basic reading skills, and spelling, as measured by her verbal ability, which is her best predictor of overall cognitive ability, and skill-based achievement. Dr. English noted that there are discrepancies in the scores due to a visual processing deficit, and perhaps a problem with attention.

23. Dr. English noted that Student is at some risk for reading problems due to her phonics based weakness. Phonics is sight based rather than verbally based. When assessed to determine the processing weaknesses, Student demonstrated primary weaknesses in visual processing that are also affected by the combination of visual and attention-types of processing tasks.

24. Dr. English made the following recommendation: "Placement in resource program or alternative program as determined by the IEP team as her least restrictive environment." Dr. English conducted a comprehensive and appropriate assessment. In the

opinion of Dr. English no further assessments were necessary and the offer made by the District appropriately addressed Student's unique needs.

25. Student alleged that the District assessment was not adequate because the district failed to adequately assess in all areas of suspected disability. Specifically, Student claims that the district failed to assess Student in the areas of visual processing, fine and gross motor skills, and mental health.

26. Dr. Davidson testified as an expert on behalf of Student. Dr. Davidson is a licensed educational psychologist who was contacted by Student's mother to perform a comprehensive psychological assessment of Student after the District had performed its assessment. Dr. Davidson assessed Student in September 2005. This assessment occurred after the completion of the IEP in June 2005 and was therefore not considered in developing the IEP. Student was assessed for five hours in Dr. Davidson's home and observed for three hours in school.

27. Student easily separated from her mother for the assessment. Student appeared somewhat fragile and immature and indicated that she did not want to return to public school. Student indicated that she likes Prentice School because she is not singled out; everyone is in the same boat.

28. Dr. Davidson administered the WJIII, four months after the test had been administered by Dr. English. The WJIII has two forms that can be administered. Dr. Davidson contacted Dr. English to find out which form she administered and then gave Student the other form. There is nothing in the manual that says how long an evaluator should wait before re-administering the test. Dr. Davidson called the company that distributes the test and was informed that the general rule of thumb is to wait for three months before administering the same form again. Nonetheless, Dr. Davidson used the other form.

29. A severely discrepant score is 1.5 standard deviations from the norm. Student scored extremely low on the VMI which indicates real difficulty in visual motor integration and perception which goes hand in hand with reading and fluency.

30. Dr. Davidson had concerns regarding the assessment conducted by the District. She was concerned that no further inquiry was made regarding Student's inability to ride a bicycle because riding a bicycle is a major gross-motor milestone. Student contends that the District failed to assess for gross motor deficits.

31. Dr. Davidson was concerned about the findings on the Bender Visual Motor Gestalt test. Student had a difficult time with this test because of poor planning and impulsivity. Dr. Davidson would have inquired further and referred Student for both a visual processing assessment and an occupational therapy assessment. According to Dr. Davidson, her discrepant scores on all the testing indicate fluency difficulties. Although she does not generally just look at one test, based only on Student's performance on the Bender, occupational therapy and visual processing are suspected areas of disability.

32. The assessments established that Student has a visual processing disorder. Student scored in the bottom five percent on the VMI, and each of Student's assessments has concluded that Student has a visual processing deficit. Student contends that further assessment is necessary in the areas of visual processing, fine and gross motor skills, and mental health. The District contends that further assessment is unnecessary in the area of visual processing and an appropriate program can address Student's visual processing deficit. The District further contends that fine motor skills, gross motor skills, and mental health were not suspected areas of deficit and that no assessments in these areas were warranted.

VISUAL PROCESSING ASSESSMENT

33. In the area of visual processing, Student contends that further assessment is warranted. Conversely, the District contends that the psychoeducational assessment was sufficient to conclude that Student had a visual processing disorder and that an appropriate program can be developed without further assessment. In support of her position, Student called a vision expert, Dr. Ballinger, who is a board certified optometrist. She is in private practice where she conducts visual processing assessments, and reviews assessments. Dr.

Ballinger's current practice is a certified non-public agency which contracts with public school districts to perform evaluations. Dr. Ballinger reviewed Student's records but did not conduct her own assessment of Student. It is the first time Dr. Ballinger has testified in a case without ever having met the Student involved in the case.

34. Dr. Ballinger reviewed the testing administered by UCI. According to Dr. Ballinger, the UCI testing revealed that Student's visual system is having difficulty processing information. Based on the subtest results, Student has visual discrimination deficits, memory issues, speed and accuracy deficits, and problems with scanning and sequencing. It was difficult for Student to look at something, process it and reproduce it. No visual processing assessment was recommended. Nonetheless, Dr. Ballinger testified that these results indicated a need for further testing.

35. Dr. Ballinger reviewed the testing administered by Dr. English. Dr. Ballinger opined that based on the results of this assessment, a visual processing assessment was warranted. Dr. Ballinger noted that the VMI does not distinguish between visual and grapho- motor difficulties. Dr. Ballinger recommended a comprehensive visual examination including a visual integration assessment.

36. Dr. English agrees that Student has a visual processing deficit but contends that the appropriate response is to provide a program that assists Student in the academic areas that are deficient as a result of the deficit rather than to conduct further assessments.

37. Both experts were qualified and knowledgeable but the testimony of Dr. English was more persuasive. Dr. Ballinger never met Student and did not present convincing evidence that Student needed further assessment. An appropriate program could be developed to address Student's academic areas of need without conducting further visual processing assessments.

FINE MOTOR AND GROSS MOTOR SKILLS

38. Student contends that the Student has fine motor and gross motor areas of suspected disability and that the District failed to conduct an appropriate assessment in

those areas. In support of its position, Student called Laurie Cohen, a licensed and registered occupational therapist. She has been licensed since 1976. She was called as an expert witness in the area of occupational therapy. She never met Student. She reviewed the school records, the UCI psychological report, the Garden Grove psychological report, work samples from Student, an entrance evaluation from Prentice Day School, and Dr. Davidson's report.

39. In the opinion of Ms. Cohen, Student should have been referred for further testing because of her standard score of 76 on the VMI alone. According to Ms. Cohen, it is proper to refer based on a score of less than 90. The specific terminology reads "caution needs to be given for scores under 90."

40. In Laurie Cohen's view, Student needs more breaks at school and motor skills development. Student received a low score in fine motor control however her score was in the average range. Because there was a 21 point discrepancy between the verbal and performance IQ scores, Ms. Cohen is concerned that there may be a motor planning problem. Ms. Cohen opined that the low percentage ranking should have triggered further inquiry. Ms. Cohen would have recommended further assessment by a developmental optometrist and an occupational therapist. In her opinion, the testing she reviewed revealed an occupational therapy area of deficit and a visual processing area of deficit.

41. The evidence showed that a fine motor skill assessment was not necessary. Student's handwriting was messy at times but still within the average range. None of the assessments conducted prior to the IEP meeting recommended a fine motor skill assessment. Student's report cards did not indicate handwriting problems. Dr. Cohen's testimony was given little weight because she had never met or observed Student. Dr. Cohen's suggestion that further testing should occur based on a score of less than 90 was not entirely accurate. The specific terminology of what should occur for scores less than 90 does not require further testing.

GROSS MOTOR ASSESSMENT

42. Student contends that the District should have conducted a gross motor assessment of Student by an occupational therapist. The only evidence presented regarding a gross motor deficit was that Student was unable to ride a bicycle.

43. Student's report cards all reflect satisfactory to excellent marks in physical education. Nowhere in the records are any gross motor difficulties noted. Based on her observations and review of records Dr. English concluded that Student's gross motor skills were age appropriate and that no gross motor assessment was warranted.

44. The District established that gross motor skills were not an area of suspected disability. The fact that Student is unable to ride a bicycle, without more is insufficient to warrant a gross motor assessment.

REFERRAL TO COUNTY MENTAL HEALTH FOR EVALUATION

45. Student contends that the District should have referred Student to County Mental Health for assessment. Student has a history of separation anxiety.

46. The examiners at UCI saw no indication of anxiety or depression in their testing. UCI further indicated that the separation anxiety appeared to be partially alleviated with psychotherapy.

47. Student's report card from second grade, which was the 2003-2004 school year, indicated that Student was making good friends in class. The report card also indicated that Student no longer cried before school; rather, she smiled all day long. Student's report cards from Prentice School indicated that Student was adjusting well socially and that she excelled in her attitude and behavior in class.

48. The report by Dr. English states that Student's mother revealed that in second grade Student showed signs of separation anxiety disorder. However, Student's mother reported that Student has shown no signs of separation anxiety disorder since October 2004.

49. There is insufficient evidence to conclude that the District should have referred Student to mental health services for assessment based on her separation anxiety. The evidence established that while Student has a history of separation anxiety, the condition had largely resolved prior to her assessments at the District. Separation anxiety was not noted by any of the assessors or teachers in the last year and a half. The last time that separation anxiety was a problem for Student, she was in a different school district and she was much younger. Therefore, a referral to County Mental Health for assessment was not warranted.

THE DISTRICT'S OFFER OF FAPE FOR THE 2005-2006 SCHOOL YEAR

50. Children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet his or her unique needs and enable him or her to benefit fully from instruction.

51. The IEP team met on June 15, 2005, to discuss the District's offer of FAPE. In attendance were Student's parents; special education teacher, Elaine Eads; a general education teacher; the principal of Wakum Elementary, Thorsten Hegberg; program specialist, Sue McClellan; speech pathologist, Diane Ludlow; psychologist, Dr. English; and nurse, Celia Delacruz.

52. Student's mother initialed agreement in the following areas: having received and given an opportunity for a full explanation of the procedural safeguards, participation in the development in the IEP, and having received and reviewed the evaluation reports. Student's mother indicated disagreement with the IEP regarding the placement of school. Student's parents did not initial agreement with the goals and objectives in the IEP.

STUDENT'S UNIQUE NEEDS

53. The areas of need set forth in Student's IEP are spelling, reading comprehension and reading fluency. These areas of need are due primarily to a visual

processing disorder. The evidence supports the appropriateness of the areas of need set forth in the IEP.

54. At no time during that meeting did Student's mother complain about any assessments or about the need for further assessment in any area. The only disagreement voiced by the mother at the time of the IEP was in the offer of placement.

ACADEMIC GOALS AND OBJECTIVES

55. Academic goals and objectives must be designed to meet the unique needs of each student, to enable the student to benefit fully from the instruction.

56. The District proposed academic goals that are consistent with Student's identified areas of need. In the spelling area of need, the IEP contained the following goal: by June 2006, Student will use a variety of written English language conventions in order to demonstrate 80 percent mastery of correct spelling usage in three out of five writing samples.

57. In the area of Reading Comprehension, the IEP contained the following goal: by June 2006, Student will use a variety of comprehensive strategies to read and understand instructional level materials with 80 percent accuracy.

58. In the area of Reading Fluency, the IEP contained the following goal: by June 2006, Student will use her knowledge of word analysis and reading fluency and will demonstrate an understanding of decoding and word recognition 80 percent of the time.

59. There was no convincing testimony that the academic goals and objectives were inappropriate. Student argued that there should have been academic goals and objectives in the area of writing. However, the evidence showed that Student's writing skills were in the average range and that any deficiency in writing did not necessitate a separate writing goal.

ANNUAL VISION GOALS AND VISION THERAPY

60. Visual processing problems can impact academic performance because the student has to read more slowly or re-read materials. Dr. Ballinger testified that visual processing therapy can increase visual clarity and increase a child's awareness of how his or her vision is functioning.

61. In contrast, Dr. English testified that vision therapy assists in vision problems rather than visual processing deficits. Visual processing addresses the brain's ability to interpret visual input. In Dr. English's opinion, Student needs a program that addresses the visual processing deficits rather than vision problems.

62. There was insufficient evidence to show that Student needed vision therapy or annual vision goals. Student was not shown to have vision problems which would be appropriate for vision therapy services; rather she has visual processing difficulties which are treated by programs such as the "Learning! Program" or the "Slingerland" approach. Dr. English' testimony that Student's visual processing deficits should be addressed by a program that addresses the visual processing deficits was more credible than Dr. Ballinger's testimony that Student needed vision goals and vision therapy. Dr. Ballinger never met Student and her testimony regarding Student's needs was unpersuasive.

FINE MOTOR ANNUAL GOALS AND OCCUPATIONAL THERAPY;

63. Student contends that Student should have been provided occupational therapy and fine motor goals. This contention is based on Student's handwriting skills. In Ms. Cohen's opinion there should have been an OT present at the IEP and they should have conducted an OT assessment prior to the IEP team meeting.

64. Student's progress report from the 2001-2002 school year indicated that Student's writing was in the satisfactory range. Student's report card from the 2002-2003 school year showed checks and check minuses in writing. A check indicated that the Student met grade level standards. Student's report card from the 2003-2004 school year

indicated that Student was approaching grade level standards in her writing skills but did not meet grade level standards. Student's initial testing from the Prentice school indicated that Student's handwriting was sometimes poor.

65. Dr. English tested Student in broad writing skills which included writing samples. Student scored in the average range for overall writing skills. The evidence presented regarding Student's writing skills indicated that while Student's writing is sometimes messy, it remains within the average range.

66. The evidence established that Student's writing can be messy at times. However, her writing skills remained within the average range. The evidence did not establish that fine motor skills were an area of need such that annual goals or occupational therapy was necessary.

EMOTIONAL THERAPY SERVICES

67. Student contends that emotional therapy services such as counseling should have been included in Student's IEP. The only evidence presented regarding the need for such services was the testimony regarding separation anxiety.

68. Insufficient evidence was presented to establish that Student is in need of emotional therapy services, such as counseling.

PLACEMENT

69. To determine whether the District offered a FAPE, the analysis must focus on the adequacy of the district's proposed program. The program must provide a program designed to meet the unique educational needs of the pupil, reasonably calculated to provide educational benefit in the least restrictive environment.

70. The District offered placement in a general education classroom 80 percent of the school day and a resource program for 20 percent of the school day. The resource program consisted of the Language! Program for one hour per day. One hour per day is approximately 20 percent of the school day. In addition, the District offered the following

accommodations and modifications: flexible seating, preferential seating, small group, extended time on assessments, extended time for assignments, revised directions, frequent feedback, and reading of test items.

71. Elaine Eads is a resource teacher at Wakum Elementary School. She is a certified special education teacher credentialed in California. She testified on behalf of the District. Ms. Eads would have been Student's resource teacher had she attended Wakum Elementary school. She was a member of Student's IEP team and participated in an IEP meeting on June 15, 2005. She agreed that the IEP developed by the team at that meeting was appropriate for Student.

72. Wakum Elementary School uses the Language Program to assist students with reading difficulties. Ms. Eads is familiar with the program and has used the program to teach 90-100 students. It is a systematic, multi-sensory program which is approved by the State of California to address difficulties in spelling, reading fluency, reading comprehension, and writing. Ms. Eads opined that the Language! Program was appropriate for Student.

73. Thorsten Hegberg has been the principal at Wakum Elementary School for two years. He attended Student's June 15, 2005 IEP team meeting. He recalled that both parents were present at the IEP team meeting. There were no concerns raised at the IEP meeting regarding Student's health or the health report submitted by the school nurse. He recalled that Student's mother disagreed with the appropriateness of the "Language! Program" because she felt her daughter would be ostracized for being pulled out of the classroom. Mr. Hegberg felt that Student's mother did not understand the program and did not understand that the timing of the class was such that many children would be moving from one classroom to another at the same time as Student and the transition would likely not be noticed.

74. Susan McClellan is a program supervisor with the District. She works with seventeen different schools to assist in the coordination of the special education programs.

She attended Student's IEP team meeting on June 15, 2005. At the meeting there was a consensus that Student qualified for special education under the category of specific learning disability. At that meeting the parents did not sign the goals portion of the IEP and did not explain why they were refusing to sign. Ms. McClellan opined that the placement and services offered to Student were appropriate.

75. Student's mother contends that the placement offered in the IEP is not appropriate. In addition to her concern regarding her daughter being pulled out of the classroom, she is concerned that application of the program is not consistent throughout the day and she believes that each teacher working with Student should be trained in the program to ensure consistency. Student's mother was given an opportunity but did not visit the placement offered.

76. Dr. Davidson observed the RSP class at Wakum Elementary School. She indicated that the class is one hour per day. She indicated that it was loud in the classroom. There are two separate classes in the room concurrently. There is a divider between the two but the other class could be heard. She indicated that the teacher was very good but that the class entailed a lot of quick paced writing exercises that would be difficult for Student.

77. Carol Clark is an Educational Administrator with Prentice School. She testified that the school accepts only students with average to above average intelligence. She testified regarding the Slingerland program which is utilized at Prentice School. While this testimony was interesting it was not relevant to the proceedings herein. It may or may not be true that the Prentice Program is more beneficial to the Student, the issue to be decided here is whether the program offered by the District was reasonably calculated to lead to educational benefit.²

² It should be noted that the testimony established that Student received educational benefit at Prentice where she was receiving no vision therapy, no occupational therapy, no adaptive physical education, and no special health restrictions due to any medical conditions.

78. The placement offered by the District was designed to meet Student's unique needs. The District is obligated under both Federal and California law to provide for Student's unique needs in the least restrictive environment. The District proved that Student's educational needs could be met in the regular education classroom with RSP for one hour per day.

79. Placement in the Language! Program was reasonably calculated to lead to educational benefit. Student's areas of need have been determined to be spelling, reading fluency, and reading comprehension. The Language! Program is a systematic, multi-sensory program. It is approved by the State of California for the specific purpose of addressing difficulties in spelling, reading fluency, reading comprehension, and writing.

80. The evidence established that the RSP placement of Student at Wakum Elementary School was appropriate. The parent did not visit the location, and the testimony of Dr. Davidson that some of the writing exercises would be difficult and that it was loud when she observed was not sufficient to conclude that the placement was inappropriate for Student.

ACCOMMODATIONS FOR STUDENT'S OTHER HEALTH IMPAIRMENTS

81. Student contends that Student's IEP was deficient for failure to include accommodations for Student's other health impairments. The evidence showed that Student has had significant health issues since birth. She has asthma, coarctation of the aorta, and pulmonary artery stenosis.

82. There was insufficient evidence to conclude that the District failed to provide accommodations for Student's Other Health Impairments. Student is not currently receiving any adaptive physical education at Prentice School. Student's grades in physical education have been satisfactory to excellent throughout with no notations of difficulty. The evidence established that no special accommodation for Student's other health impairments was warranted.

TRANSITION PROGRAM FOR STUDENT'S TRANSITION FROM NON-PUBLIC SCHOOL TO PUBLIC SCHOOL.

83. A transition plan in the IEP is required when a pupil transfers from a non-public school into a regular class in a public school for any part of the school day. The transition plan must include a description of the activities provided to integrate the pupil into the regular education program, including the nature of each activity and the time spent on each activity each day or week.

84. Student contends that District failed to provide any transition program. Student was enrolled in a non-public school when she became eligible for special education services. The June 15, 2005 IEP did not contain a formal transition plan³. Instead, in the section entitled "LRE Transition Plan" District staff wrote: "as reading, spelling skills improve more time in gen. ed. will be added." No plan or assistance in transitioning Student from private school to the general education classroom was mentioned, nor was any evidence presented that provision for the transition was contemplated. The change in placement from the private school to the public school required a transition plan. The evidence established that there was no transition program to assist Student in her transition from Prentice private school to the public school setting.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. Each Special education student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program for

³ This type of transitional plan is not to be confused with an Individual Transition Plan (ITP), which concerns the transition of older students from school to postschool activities. (see Educ. Code § 56343.1.)

the student. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code § 56320, subd.(e), (f).) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code § 56320, subd. (a), (b).)

2. The personnel who assess the pupil must prepare a written report, or reports, as appropriate, of the results of each assessment. (Ed. Code § 56327.)

3. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA) and, effective July 1, 2005, the Individuals with Disabilities in Education Improvement Act (IDEIA), children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the State educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1401(8)(IDEA 1997); 20 U.S.C. § 1402(9)(IDEIA 2004).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(25)(IDEA 1997); 20 U.S.C. § 1402(29) (IDEIA 2004).)

4. Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(22) (IDEA 1997); 20 U.S.C. § 1402(26)(IDEIA 2004).) In California, related services may be referred to as designated instruction and services (DIS). (Ed. Code § 56363, subd. (a).)

5. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, [102 S.Ct. 3034], the United States Supreme Court addressed the level of

instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp.198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

6. The Supreme Court in *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of FAPE. Procedural violations may constitute a denial of FAPE only if the procedural inadequacies impeded the child's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); see *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

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

8. School Districts are also required to provide each special education student with a program in the LRE, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular education classes with the use of supplementary aids and services could not be

achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code § 56031; 34 C.F.R. § 300.550(b).) To the maximum extent possible, special education students should have opportunities to interact with general education peers.

9. The Ninth Circuit Court of Appeal has endorsed the “snapshot” rule, explaining that the actions of the school cannot “be judged exclusively in hindsight...an IEP must take into account what was and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d. 1031, 141.) However, the “snapshot” rule does not eliminate a school district’s obligation to revise a student’s educational program if it becomes apparent that the student is not receiving any educational benefit.

10. When a pupil transfers from a nonpublic school into a regular class in a public school for any part of the school day, provision for the transition into the regular class program shall be included in the IEP. According to California Education Code section 56345, subdivision (b)(4), the provision must include the following:

- (A) A description of the activities provided to integrate the pupil into the regular education program. The description shall indicate the nature of each activity, and the time spent on the activity each day or week.
- (B) A description of the activities provided to support the transition of pupils from the special education program into the regular education program.

11. Petitioner has the burden of proving at an administrative hearing the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S.____ [126 S.Ct. 528, 163 L. Ed. 2d 387].)

DETERMINATION OF ISSUES

ISSUE 1: DID THE DISTRICT PROPERLY ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY?

12. Based on Factual Findings 1-53, and Legal Conclusions 1-3, the District properly assessed Student in all areas of suspected disability when Dr. English conducted her comprehensive assessment in May, 2005. Further assessment in visual processing, occupational therapy, gross motor skills, and mental health were not warranted.

ISSUE 2: DID THE DISTRICT OFFER STUDENT A FREE AND APPROPRIATE PUBLIC EDUCATION (FAPE) IN THE LEAST RESTRICTIVE ENVIRONMENT (LRE) IN ITS JUNE 15, 2005 INDIVIDUAL EDUCATION PLAN (IEP)?

13. Focusing, as the law requires, on the adequacy of the District's proposed program, if the school district's program was designed to address Student's unique educational needs, was reasonably calculated to provide her some educational benefit, and comported with her IEP, then the District provided a FAPE, even if Student's parents preferred another program and even if her parents' preferred program would have resulted in greater educational benefit. Based on Factual Findings 50-64, and Legal Conclusions 4-6, and 8-11, the District offered an appropriate placement for Student.

14. Based on Factual Findings 65-68, and Legal Conclusions 4-6, and 8-11, the academic goals and objectives proposed by the District were appropriate. Student has a clear and measurable goal for each identified area of need.

15. Based on Factual Findings 68-71, and Legal Conclusions 4-6, and 8-11, the District did not fail to provide vision therapy and annual goals for Student.

16. Based on Factual Findings 72-75, and Legal Conclusions 4-6, and 8-11, the District did not fail to Provide Occupational Therapy and Fine Motor Annual Goals for Student.

17. Based on Factual Findings 76 and 77, and Legal Conclusions 4-6, and 8-11, the District did not fail to Provide Emotional Therapy Services for Student.

18. Based on Factual Findings 78 and 79, and Legal Conclusions 4-6, and 8-11, the District did not fail to Provide Accommodation for Student's Other Health Impairments.

19. Based on Factual Finding 80, and Legal Conclusions 4-11, the District Failed to Provide an Appropriate Transition Program for Student's Transition from Private School to Public School. The law requires that a provision for the transition into the regular class program be included in the IEP when a pupil transfers from a nonpublic school into a regular class in a public school for any part of the school day. The provision must describe the activities provided to integrate the pupil into the regular education program including the nature of each activity, the time spent on the activity each day or week, and a description of the activities provided to support the transition of pupils from the special education program into the regular education program.

20. In addition to being legally required, a transition plan is particularly important in this case because Student has a history of separation anxiety. Given that the anxiety has resolved in the recent past, that history alone does not rise to the level of necessitating a referral to mental health or the provision of therapy. However, it does warrant consideration in order to effectuate a smooth transition to the public school general education setting.

21. The District's failure to include a transition plan in the IEP was a procedural violation of the IDEA. While not all procedural flaws amount to a denial of FAPE, in this case the failure to include a transition plan denied the parents an opportunity to participate in the IEP process, would have caused a deprivation of educational benefits had the Student transferred to the public school, and constituted a denial of FAPE.

ORDER

The District is hereby ordered to hold an IEP team meeting and prepare an IEP in conformance with this decision.

PREVAILING PARTY

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

The District's failure to include a transitional plan resulted in a denial of FAPE and the Student prevailed on that issue. The District prevailed on all other issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of the receipt of this decision. (Ed. Code § 56505, subdivision (k).)

Date: August 30, 2006

A handwritten signature in black ink, appearing to read "Elina Abeth R. Feyzbakhs", written over a horizontal line.

ELINA ABETH R. FEYZBAKHS

Administrative Law Judge

Special Education Division

Office of Administrative Hearings