

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

In the Matter of:

STUDENT

Petitioner,

vs.

FONTANA UNIFIED SCHOOL DISTRICT,

Respondent.

OAH No.: N 2005070696

DECISION

The hearing in the above-captioned matter was held on October 11 through 13, 2005, at Fontana, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Student appeared through his grandparents (hereafter Grandfather, Grandmother, or Grandparents) and counsel, Francisco A. Suarez. Respondent Fontana Unified School District (District) appeared through Atkinson, Andelson, Loya, Rudd & Romo, by Karen A. Gilyard and Sundee M. Johnson.

Evidence was received, and the record held open so that the parties could submit written closing arguments. Student's Closing Argument is identified for the record as Exhibit X. Respondent's Response to Student's Closing Brief is identified as Exhibit 13. The Student's Reply Brief is identified as Exhibit Y. There being no further briefing, the matter was submitted for decision on November 15, 2005.

The Administrative Law Judge hereby makes his findings of fact, legal conclusions, and orders, as follows.

INTRODUCTION AND STATEMENT OF CASE

Student resides within the Respondent District. He has received special education services from the District based on a Specific Learning Disability since approximately January 2004, when he was in middle school.

Student's maternal grandparents play a key and integral part in his life, as his mother is a long-haul truck driver who must be away from her child for long periods of time. He lives with his grandparents, and they have represented him in most of the dealings with the District regarding his educational programming, and did so during the hearing in this matter.

This proceeding was commenced in June 2005. The initial claim for relief asserted that the District had failed to provide a Free and Appropriate Public Education (FAPE), in contravention of the governing laws and regulations. By the time of the hearing, the issues had been redefined to focus on whether or not an educational benefit had been provided, and whether or not appropriate assessments had been performed and whether proper services had been provided. Student would answer these queries in the negative, while the District asserts that it has properly assessed the student's needs, and provided him appropriate services, or at least offered such.

FACTUAL FINDINGS

A. THE PARTIES, AND JURISDICTION:

1. Student is now sixteen years old, his date of birth being December 12, 1989. (E.g., Ex. D., p. 1.) During most of the time relevant to this case he was enrolled in a middle school within the District¹. He was found eligible to receive special education from the District based on a specific learning disability (SLD). (See Ex. 2, p. 5; Ex. 3, p. 1.)

¹ At the time of the hearing he was a ninth grader at a high school within the District.

2. This proceeding was commenced in June 2005 through a request for due process hearing. By the time of the hearing, and after a pre-hearing conference, the issues in the case had been defined as follows:

- (A) Whether or not the District had provided an educational benefit;
- (B) Whether or not the District appropriately tested for occupational therapy and vision perception;
- (C) Whether or not the District offered appropriate speech therapy;
- (D) Whether or not the District provided appropriate tutoring.

Legally, the ultimate issue should be whether or not the District provided FAPE. Therefore, the issues above are recast, to determine if the District failed to provide a FAPE by failing to provide an educational benefit, assessments, speech therapy, or tutoring.

3. There is no dispute that jurisdiction was established to proceed in this matter.

B. STUDENT'S EDUCATIONAL BACKGROUND:

4. In October 2003, while Student was a seventh-grader at Fontana Middle School (FMS), he was referred for assessment for special education services. Student had been retained—held back—when he was in the fifth grade, and had received some speech and language services before that time. An assessment plan was generated, which Student's Grandfather approved on October 20, 2003. (Ex. 1.) The plan aimed at the assessment of academic achievement, cognitive development/learning ability, perceptual-motor development, social/emotional/behavioral development, and observations and interviews.

5. A psychoeducational report was prepared, dated January 14, 2004. The report was written by Michael Suchanek, a school psychologist employed by the District who performed the assessments. (See Ex. 3, p. 5.) He concluded that while Student's cognitive ability fell into the average range, his academic skills fell into the borderline to

average range. His auditory processing, and listening comprehension fell into the borderline range, while visual processing was described as ranging from superior to deficient. His oral expression was deemed to fall into the low average range as well. The deficits between cognitive ability and performance were deemed sufficient to support the finding of an SLD. (*Id.*)

6. An initial meeting of the Individualized Education Program (IEP) team took place on January 14, 2004². The team included a special education teacher, the school psychologist, Grandfather, and an educational advocate acting on Student's behalf. (See Ex. 3, p. 10.) The IEP document indicates that the parties agreed that the District would provide RSP services in math and language arts to Student, as the least restrictive environment. This meant that Student would remain in a regular classroom, but would receive teaching from a resource specialist in the areas of math and language arts during the school day. Certain accommodations were provided, and learning goals were set down.

7. During this first IEP meeting the family requested that Student be placed at Almeria Middle School, rather than at FMS, which raised issues of transportation to and from the proposed school site. (Ex. 3, p. 6.) A decision on the matter was deferred; it was agreed that a school administrator would contact the family within a week of the meeting with a decision on this placement issue. The boy's education advocate also requested an occupational therapy assessment to address perceived problems in his handwriting. The District did not agree to provide that assessment.

8. The request for placement at Almeria Middle School was denied within a few days of the January 2004 meeting. Further IEP meetings were held with staff from FMS in

² At the outset of the hearing Student asserted that an IEP meeting had been held before this date, without the consent of Student's guardian, but there was no evidence to support that claim.

March, April, and June 2004. During the March 2004 IEP meeting, Student's grandfather voiced his concerns that the math goals needed to be recast at Student's level; he requested setting them at the upper sixth grade level. The family also requested more testing. The team agreed to address the math goals after more testing was performed using the Brigance test. After-school tutoring was offered by the District, but was declined by the family. But, the team did agree that the role of a classroom aide would expand, to assist Student with reading. (Ex. S, p. 3.)

9. The IEP meeting in April 2004 did not reach any conclusions, and another team meeting was scheduled, for June 1, 2004. (See Ex. Q, p. 7.) This latter meeting did not go smoothly, as the parties could not get along with each other, and the June meeting terminated before any agreements could be reached. Participants from each side testified that the other side was to blame for the problems, by acting rudely and disrespectfully. Fault can not be apportioned here, though it is found that there is sufficient blame for both sides to share; this includes some District personnel as well as Student's advocate.

10. (A) An annual IEP review meeting was held on January 14, 2005. At that time Student was then in the eighth grade, but his performance was described as mid-fifth grade for math. Brigance testing indicated his writing skills were at the fourth grade level, and his reading was at the sixth grade level. Student was also exhibiting an inability to complete assignments as given and to turn them in when they were due. Grandfather reported that Student had difficulty understanding verbal communications at home. (Ex. P., p. 3.)

(B) The IEP plan document summarizes the colloquy that occurred during the meeting. It reports that Student's grandparents were concerned with his progress report from December 2004, though no details of specific concerns are set forth. The comments section also states that there had been an improvement in Student's work, though it is not clear if that pertains to simply turning the work in, the content of the work, or both. During the meeting Student's advocate raised the issue of a visual processing disorder on

Student's part, but the District pointed to prior testing as indicating that he did not have such a problem. Notwithstanding that position, the District agreed to conduct a visual processing assessment, the assessment to be performed by a school psychologist other than Mr. Suchanek, and the District also agreed to perform an occupational therapy assessment. (Ex. P, p. 10.) Because the latter assessment would take some time to complete, it was agreed that Student's written language goals would not be written until after the occupational therapy assessment was completed. The Grandparents took the IEP document home to review it, and they consented to it on January 18, 2005. (*Id.*, pp. 10 & 14.)

11. The IEP team met in May 2005, to discuss the testing results. (Ex. O, p. 10.) It was reported that the occupational therapist had recommended that Student use an Alpha Smart, a small electronic device similar to a laptop computer, in essence a specialized word processor. This was deemed a useful assistive device given his writing problems. The speech therapist reported that Student did not suffer from a visual processing disorder. (*Ibid.*) The plan document indicates that the IEP team agreed the District would provide 42 hours of compensatory tutoring to Student. (*Id.*, p. 11.) It was also agreed that he would receive speech and language services in the form of consultations rather than direct therapy, 30 minutes per month, and occupational therapy, for 30 minutes per session, 6 times per year. The occupational therapy was also to be provided as a consultation. (*Id.*, p.1.) While these agreements are set forth in the body of the document, including in the summary and comment section, the Student's grandparents did not actually sign the document and thereby indicating their assent. (See Ex. O, at p. 14.)

C. THE ASSESSMENTS OF STUDENT'S NEEDS:

12. (A) As set forth in Factual Finding 5, a psycho-educational assessment was performed in December 2003. Several diagnostic instruments were utilized in that assessment process, including a test of Student's cognitive abilities, his academic

achievements, and perceptual abilities. The Wechsler Abbreviated Scale of Intelligence indicated an IQ of 104, just above the middle of the average range.³ Standard scores on the Woodcock-Johnson Revised, an academic achievement test, ran from a low of 65 to a high of 105.

(B) The results from The Test of Visual Perceptual Skills, Upper Level (TVPS-UL) yielded a number of low scores on subtests. In the areas of Visual Sequential Memory, Visual Figure-Ground, Visual Closure, and Visual Discrimination, Student scored no higher than the fourth percentile, and two of these subtests were at the first percentile. On the Test of Auditory-Perceptual Skills, Upper Level (TAPS-UL), Student also revealed significant limitations in some areas. In the areas of Auditory Number Memory (forward and reversed) and Auditory Sentence Memory, his performance placed him between the fifth and seventh percentiles. His Auditory Perceptual Quotient was in the fourth percentile, and Auditory Word Discrimination was at the sixth percentile. Indeed, the best score on the TAPS subtests placed him in the 21st percentile. (See Ex. 2, p. 6.)

(C) Student's performance on the Oral and Written Language Scales (OWLS) failed to yield high scores, though they improved compared to prior performance. For example, in the Listening Comprehension subtest Student's standard score was a 70, placing him in the second percentile; his standard score in oral comprehension was better, an 81 that ranked him in the tenth percentile. (Ex. 2, p. 7.)

13. (A) A language, speech, and hearing assessment was conducted in December 2004, and a report generated from that assessment in February 2005. (See Ex. F.) According to that report, Student demonstrated difficulty understanding or using spoken language to the extent it adversely affected his education, a condition that could not be corrected without special education and related services. (*Id.*, p. 2.)

³ An average IQ is between 90 and 110.

(B) The testing results indicate significant scatter among subtests, with results placing him as low as the fifth percentile, and as high as the fiftieth. (Ex. F, p. 2.) However, significant growth had been seen in scores from the OWLS, compared to the testing in 2003. This amounted to a rise of 15 standard points in both the area of receptive language and in expressive language. Student was relatively strong in the area of semantics, and weak in the area of syntax. "He had difficulty using conjunctions to describe pictures in complex sentences, could not join 2 simple sentences or unscramble words into a complex sentence. He had difficulty identifying and correcting grammar errors or changing forms when given an association." (*Ibid.*)

(C) While finding Student eligible for speech and language services, the speech therapist recommended that services be provided on a consult basis, for several reasons. "First, Danial has made significant language growth in his current placement . . . demonstrating that RSP interventions have made a difference. Also, he will be attending high school next year, and it will not benefit Danial to be pulled from core classes." (Ex. F, p. 2.) The report went on to recommend goals that the English instructor and RSP teacher could collaborate on.

14. (A) A second psychoeducational assessment was performed in May 2005, by school psychologist Jodi Cunha. (See Ex. E.) Ms. Cunha made clear in her report that the purpose of the testing was to assess the area of visual processing; this is not as broad a study as was performed in December 2003. She utilized two testing instruments, the Wide Range Assessment of Visual Motor Abilities and the WOLD Sentence Copying Test.

(B) The results of the first test revealed that Student was in the average range in the visual-motor subtest. He was found in the high-average range on the visual-spatial subtest, and in the borderline range for the fine motor task subtest. On the WOLD instrument the results indicated that Student's motor skills, short-term memory, and attention were at a fourth grade level when compared with same-grade (here eighth-grade) peers. (Ex. E., p. 2.)

(C) Ms. Cunha concluded that Student did not have a disorder in one or more of the basic psychological processes involved in the use or understanding of language, whether written or spoken. Further, she concluded that he did not suffer from a visual processing disorder.

15. The District obtained an occupational therapy assessment from Lawrence A. Silcock, a registered occupational therapist. He concluded that Student had "shown declines in vestibular processing including posturing and balance with vision occluded. They do not appear to be hindering his school performance at this time. His written expression is greatly declined." In response to this latter finding, Mr. Silcock recommended use of an Alpha Smart to complete written assignments. Recognizing that it took time for the student to type, he also recommended two sessions of occupational therapy to assist in set up and training on the device, with monitoring to follow. (Ex. A.)

16. (A) Another occupational therapy assessment was performed, in September 2005, at A.B. Miller High School, by Kate Pinto, a registered occupational therapist. (See Ex. C.) She did not find any problems with motor skills, and using a standard test could not find any motor coordination problems with a postural component. She did find problem areas in his handwriting in that his copy speed of 50 words per minute was below grade expectations, which exceed 65 words per minute. Other problems included form errors and line recognition difficulties, and some difficulty with cursive writing.

(B) Ms. Pinto administered another TVPS test of visual processing. Overall, Student's visual perceptual quotient was at the 13th percentile (a standard score of 83). His main weakness was in the area of visual memory, which she defined as "a subject's ability to remember for immediate recall of all the characteristics of a given form, & being able to find this form from an array of similar forms." (Ex. C, p. 2.) Ms. Pinto found low to average ability in all areas of visual processing, excepting visual memory. However, because Student recollected taking the same test within 90 days of meeting with Ms. Pinto, she was forced to possibly discount her testing results.

(C) Ms. Pinto concluded that Student's handwriting problems appeared a function of poor form habits and to a lesser degree his visual memory deficit. She recommended daily drills to improve his handwriting, and stated he "might benefit from some short term perceptual retaining (sic) to further improve his visual memory." (Ex. C, p. 4.) She also recommended further typing courses.

(D) At the end of her report, Ms. Pinto addressed the issue of Student's motivation, pointing out that the right approach was necessary to motivate him. It is inferred that her concern was a result of her initial contact with Student, in that he was not able to tell her how he was doing in his classes, and when she asked Student what was difficult about school he replied "'the time [I have] to spend there.'" (Ex. C, p. 1.)

D. STUDENT'S ACADEMIC PERFORMANCE:

17. (A) In terms of his grades, Student's performance during middle school was rather poor. His overall grade point average (GPA), in the period from October 2002 through June 2005 (sixth through eighth grade) was 1.303, with a class rank of 386 out of 446 students. During one period, the first trimester of the seventh grade (the October 2003 reporting period), his grade point average was .333. That his GPA registered at all was only because he earned a "C" in physical education; he had failed all five of his academic classes. That period was the absolute nadir, though the last trimester of the sixth grade (June 2003 reporting period) was almost as low: Student's GPA for that period was .833, because he failed two language classes and social studies, and received D's in science and math. (See Ex. K.)

(B) There was some small improvement after the first part of the seventh grade, though Student had at least one failing grade every trimester until the term ending in June 2005. During that last part of the eighth grade, his G.P.A. rose to 2.5, as he had two B's, two C's, and only one D in the academic topics. (Ex. K.)

18. (A) A recurrent problem with Student's grades has been the fact that he was not turning in his homework. This was noted in IEP documents, commented on by

teachers in those documents, attested to by the teachers in this proceeding, and corroborated by other documents such as progress reports. For example, a progress report from January 14, 2005 (the day of an IEP meeting) for language arts showed grades of A, B+, and C for some criteria, but an F for the category of homework; the numerical grade being zero percent. (Ex. L, p. 1.) He also had a zero for his homework score in language (*id.*, p. 4), and in algebra he was given an F in the homework category, due to a score of 4.8%. (*Id.*, p. 3.) However, in social studies and science, he received passing grades in the homework category. (See pp. 2 and 5.) The May 2005 progress reports also showed problems with homework; three of five classes showed a failing grade in the homework category. (Ex. M.)

(B) Whether or not Student could do the homework became an issue in the case. According to his grandfather, Student could not do the homework, and Mr. Suchanek acknowledged that homework would be difficult for the student, though teachers attested to his ability to do some of the work in class. To the extent that his grandfather's observation was accurate, the fact that the family declined the assistance of a tutor did not contribute to increased performance by Student in this area.

19. Scores on standard academic achievement tests, or the state's standardized tests, were not submitted during this hearing, with the exception of the achievement test scores provided above, and some information regarding performance on the Brigance, set forth in some of the IEP documents. Thus, it is difficult to assess what progress, if any, Student has made in relation to other students. Likewise, it is difficult to ascertain whether or not Student has made progress despite his low grades; such information would be useful given that his poor grades have resulted, at least in significant part, from failing homework scores. It must be noted that Student's counsel acknowledged, at the outset of hearing, that he had received STAR testing data shortly before the hearing, but it was not offered in evidence by either party.

20. Student's teachers attested that he had made progress while they were working with him; this is reflected in some of the IEP summaries. While these observations are difficult to objectively assess, Ms. Pachot was able to articulate clearly the areas where the Student made progress while she was one of his instructors.

21. In some cases goals set for the student by the IEP team were not met, or can not be shown on this record to have been met. For example, the June 2004 IEP math goal number 1 called for Student to improve his broad math score by one grade level, to 6.8/7.0 by April 2005, but that had not happened. (Compare Ex. 5, p. 3 with Ex. 9, p. 3, the latter indicating fifth-grade level math performance as of May 2005.) On the other hand, he did meet reading goals set for him in June 2004: at that time the goal was set that he improve his reading to the sixth grade level by April 2005, and he in fact did so. (Compare Ex. 5, p. 4 with Ex. 9, p. 3.) However, as found above, there was evidence of academic progress.

E. CREDIBILITY OF THE WITNESSES:

22. The witnesses, in terms of demeanor, were generally credible, in that none gave obvious signs of prevarication. To be sure, there were instances when the recollection of District witnesses Annous and Caballero appeared selective, but their testimony was not critical to a resolution of the case. As to the expert witnesses, Ms. Dixon, who testified for Student, is a relatively inexperienced therapist who herself had never met Student or Grandparents, and had not consulted with his teachers. Therefore, the basis of her opinions was weakened, while the opinions of the District's speech and language provider, Ms. Tisher, were given greater weight, in part because of her 19 years of experience and actual contact with the student. Mr. Suchanek was credible in both his demeanor and in his qualifications and experience, as was Ms. Cunha. Student's Grandparents are plainly concerned about his educational handicaps, and concerned about his well-being.

F. FINDINGS OF ULTIMATE FACT:

23. While the programs offered by the District were not perfect, and while reasonable persons might debate the efficacy of certain aspects of the program, the services and supports offered provided the opportunity for an educational benefit. While Student's grades tended to be poor, there was some objective test data showing improvement by Student, such as is reflected in the two OWLS tests. Further, while some IEP goals were unmet, others were, and teachers credibly attested to progress in some areas.

24. The District appropriately tested for occupational therapy and for problems with vision perception, in that licensed or credentialed persons performed at least three such evaluations during the time Student was in middle school.

25. The District offered speech therapy, which was appropriate under all the facts and circumstances. This finding is supported by the entire record, and especially the testimony of Ms. Tisler.

26. The District offered appropriate tutoring in this case, and it has not been established that the failure to implement the tutoring was the fault of the District.

LEGAL CONCLUSIONS

A. LEGAL CONCLUSIONS COMMON TO ALL CLAIMS:

The General Principles of IDEA:

1. The Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et seq.) provides states with federal funds to help educate children with disabilities if the state provides every qualified child with a FAPE that meets the federal statutory requirements. Congress enacted the IDEA "to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs" (20 U.S.C. § 1400(c).)

2. "Free and appropriate public education" means special education and related services that are provided at public expense, that meet the state educational agency's standards, and conform with the student's individualized education program. (20 U.S.C. § 1401(8)(A)-(D).) "Special education" is specifically designed instruction, at no cost to the parents to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(25).)

3. The educational agency may be required to provide "related services", denominated as "designated instruction and services" (DIS) in California. Such include developmental, corrective, and supportive services that may be required in order to assist the student who has a disability to access, or benefit from, his education. (20 U.S.C. § 1401(22); Cal.Ed. Code § 56363.)

4. (A) In *Board of Education of the Hendricks Hudson Central School District v. Rowley*, (1982) 458 U.S. 176 (*Rowley*), the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the school district was required to comply with statutory procedures. Second, the IEP was examined to see if it was reasonably calculated to enable the student to receive some educational benefit.

(B) Regarding the nature of the educational benefit to be provided, the Supreme Court made clear that the schools are not required to provide the best possible education; instead, the requirement is to provide a student who suffers from disabilities with a "basic floor of opportunity." (458 U.S. at 207-208.) That being said, that basic opportunity must be more than a de minimus benefit. As stated by the Second Circuit Court of Appeals:

Plainly, however, the door of public education must be opened for a disabled child in a "meaningful" way. *Board of Educ. v. Rowley*, 458 U.S. at 192. This is not done if an IEP affords the opportunity for only "trivial advancement." *Mrs. B. v. Milford Bd. of Educ.* 103 F.3d at 1121 (quoting *Polk v. Central*

Susquehanna Intermediate Unit 16, 853 F.2d 171, 183 (3d Cir. 1988)). An appropriate public education under IDEA is one that is "likely to produce progress, not regression." *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (3d Cir. 1997) (internal citation omitted), cert. denied, 139 L. Ed. 2d 636, 118 S. Ct. 690 (1998). (*Walczak v. Florida Union Free School Dist.* (2d Cir. 1998) 142 F.3d 119, 130.)

(C) Under the statutes and the *Rowley* decision, the standard for determining whether the District's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and, (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment.

5. Procedural errors do not necessarily deprive a student of a FAPE. There must be a substantive harm to the student, such as a loss of an educational opportunity. (See Ed. Code § 56505, subd. (j): [Hearing officer may not base a decision solely on nonsubstantive procedural errors, unless that error caused pupil to lose educational opportunity or interfered with parent's opportunity to participate in the formulation process of the IEP]; *W.G. v. Bd. of Trustees* (9th Cir. 1992) 960 F2d 1479, 1484; *DiBuo v. Bd. of Educ.* (2002 4th Cir.) 309 F.3d 184.)

6. Pursuant to Title 20 United States Code section 1401, an "individualized education program" (IEP) is a written statement for each child with a disability that is developed, reviewed, and revised in accordance with the IDEA. It contains the following information:

(A) A statement of the child's present levels of academic achievement and functional performance,

- (B) A statement of measurable annual goals,
- (C) A description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals will be provided,
- (D) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child,
- (E) A statement of the program modifications or supports for school personnel that will be provided for the child,
- (F) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class,
- (G) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments, and
- (H) The projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications.

7. Student bore the burden of proving his claims against the District. (*Schaffer v. Weast* (2005) 126 S. Ct. 528.) While the *Schaffer* decision had not been announced at the time of this proceeding, such a rule should have applied in any event, based on familiar rules of evidence. (See Evid. Code, §§ 500, 664.)

ON CREDIBILITY GENERALLY:

8. (A) It is settled that the trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus

weaving a cloth of truth out of selected material." (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal. App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of "one credible witness may constitute substantial evidence", including a single expert witness. (*Kearl v. Board of Medical Quality Assurance, supra*, 189 Cal.App.3d at 1052.)

(B) The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. Disbelief does not create affirmative evidence to the contrary of that which is discarded. "The fact that a jury may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative." (*Hutchinson v. Contractors' State License Bd.* (1956) 143 Cal.App. 2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* (1923) 191 Cal. 295, 304.)

(C) An expert's credibility may be evaluated by looking to his or her qualifications (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 786.) It may also be evaluated by examining the reasons and factual data upon which the expert's opinions are based. (*Griffith v. County of Los Angeles* (1968) 267 Cal.App.2d 837, 847.)

(D) The demeanor of a witness is one factor to consider when assessing their credibility, a factor not readily established in subsequent judicial review. "On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted—but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability." (*Wilson v. State Personnel Board* (1976) 58 CA3d 865, at 877-878, quoting *Meinerv. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.)

B. LEGAL CONCLUSIONS PERTAINING TO SPECIFIC ISSUES IN THE CASE:

9. Jurisdiction to proceed in this matter was established, based on Education Code section 56501, subdivision (a), and Factual Findings 1 through 3.

10. It has not been established that the District failed to offer a program that was reasonably calculated to provide an educational benefit, based on Factual Findings 4 through 23. The programming was based on the evaluation of Student's condition and offered a meaningful opportunity for advancement, and it was likely to produce educational progress, within the meaning of applicable law. (See Legal Conclusion 4, above.) Therefore, it is concluded that the District provided a FAPE to Student.

11. Student has not proven that the District failed to appropriately test for occupational therapy needs and vision perception, based on Factual Findings 4, 5, 12(A) through 16, 22, and 24. The evidence reveals that Student's visual perception was examined on two separate occasions, and he was evaluated by a registered occupational therapist who recommended adaptive technology. Student has provided little evidence to establish that the testing was inadequate, except the limited testimony of a speech therapist who has relatively little experience and who had not assessed Student.

12. Student has not proven that the District failed to provide appropriate speech therapy, based on Factual Findings 4, 5, 12(A) through 16, 22, and 25. This Conclusion is also based on the lack of reliable evidence provided by Student on this point.

13. Student has not established that the District failed to provide, or failed to offer to provide, appropriate tutoring, based on Factual Findings 4 through 22, and 26. Student provided little, if any concrete evidence on this point; it can not be readily perceived just what Student's advocates believe would have been appropriate tutoring, even if the record did not disclose that tutoring had been offered and refused at one point.

14. The District is deemed to have prevailed on all issues, based on all the foregoing. (Ed. Code, §56507, subd. (d).)

DISCUSSION AND RATIONALE:⁴

In the final analysis, Student offered little direct evidence that would contradict the positions taken by the District since December 2003, or that would establish that the District had failed to meet its basic obligations. While it is true that Student's grades were very poor during much of his middle-school years, the record does not establish that occurred because the District failed to offer an adequate educational program. The record reveals that Student was pulling his grades down by failing to turn in his homework. It has been held that failing grades alone do not necessarily establish a failure to provide an educational benefit; a broader examination of the evidence must be made. (See *Sherman v. Mamaroneck Union Free Sch. Dist.* (2d Cir. 2003) 340 F.3d 87, 93; *Mather v. Hartford Sch. Dist.* (D. Vt. 1996) 928 F. Supp. 437, 446: ["Grades, socialization skills, level of participation, consistency of effort and commitment to studies are all relevant in determining whether the whole individual has progressed in his or her education."].) Student was hardly motivated, and an offer of tutoring was turned down as well. In these circumstances, his poor grades alone can not drive a decision in his favor.

There is no evidence that the initial assessment was inadequate or in some way flawed; to the contrary, it was reasonably thorough. The program offered by the District was based on that assessment and was designed to meet Student's unique needs. In the two years following that initial assessment the District performed other assessments, and offered other programming, also designed to meet his educational needs. That such was not always acceptable to the Student's family and their advocate does not establish that the District had failed to offer a FAPE or an educational benefit.

⁴ The section that follows is meant to provide a discussion of legal issues raised as well as key evidence, and a rationale for the findings, conclusions, and order. So far as stated, it is intended to augment credibility findings. However, the evidence and authorities referenced are not necessarily the only ones relied on in reaching the decision.

The findings and conclusions set forth above should not be read as some ringing endorsement of the District's practices. While the programming may meet the minimum standards set out in *Rowley* and *Walczak v. Florida Union Free School District, supra*, it was not overly ambitious. That a student with a GPA of 1.3 (much of that based on passing physical education grades) is ranked at approximately the 20th percentile in his class, or could be promoted after producing a raft of D's and F's in a given school year, brings little credit to the District, notwithstanding Student's status as a special education student. However, there was significant evidence that poor performance on the report card could be traced to a lack of effort on Student's part, and ultimately, Student has not sustained his burden of proof.⁵

As noted during the conclusion of the evidentiary phase of the hearing, the fact that some participants in the IEP process allowed personalities to disrupt that process is disappointing. Plainly, there can be genuine conflict in the opinions of the team members, and emotions can run high because the stakes are high. However, such conduct does not work to the best interests of the most important party to the process, Student. The parties are again encouraged to conduct future meetings in a positive and professional manner.

ORDER

The claims by Student against the Fontana Unified School District, not being sustained, are hereby dismissed, and the District shall be deemed the prevailing party on all claims made against it in this proceeding.

⁵ It should be noted that no weight was placed on the compliance investigation report offered by Student, Exhibit U. Its relevance was quite attenuated, and the report can not be given *res judicata* effect.

March 1, 2006

Joseph D. Montoya

Administrative Law Judge

Office of Administrative Hearings

RIGHT TO APPEAL THIS DECISION

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