

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

In the Matter of:

STUDENT,

Petitioner,

v.

MONTEREY PENINSULA UNIFIED
SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2006080191

DECISION

Administrative Law Judge (ALJ) John A. Thawley, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter on December 18-21, 2006, in Monterey, California.

Melvin Mason, Advocate, represented Petitioner (Student). Student's Guardian (Guardian) and two of Student's aunts also attended portions of the hearing.

Jeff Gabrielson, Director of Special Education, represented Respondent Monterey Peninsula Unified School District (District).

Student's due process hearing request was filed on August 4, 2006. On August 30, 2006, OAH granted a continuance. Oral and documentary evidence were received. During the hearing, the parties agreed to file closing briefs by January 16, 2007, and the record was held open for the submission of the briefs. On January 16, 2007, the District timely filed its brief. On January 18, 2007, Student's brief was filed late because it had

been sent to OAH's previous address. The brief was nevertheless considered. The record closed and the matter was submitted on January 18, 2007.

ISSUES¹

1. For the 2003-2004 school year, did District fail to assess Student in all areas of suspected disability, specifically, for vision problems?

2. For the 2003-2004 school year, should District have found Student eligible for special education and related services under the eligibility category of specific learning disability?

3. For the 2004-2005 school year, did District fail to assess Student in all areas of suspected disability, specifically, for vision problems?

4. For the 2004-2005 school year, should District have found Student eligible for special education and related services under the eligibility category of specific learning disability?

5. For the 2005-2006 school year, did District fail to provide a FAPE by failing to ensure that Student's general education teacher implemented Student's individualized education plan (IEP)?²

¹The issues and contentions have been refined and clarified based on the evidence adduced at the hearing

²Student also made allegations about teacher turnover, which included an assertion that he had three teachers during the 2005-2006 school year, at least two of whom were not made aware of the IEP. However, Student was not found to be eligible for special education and related services until October 31, 2005; Alicia Davis, his general education teacher, attended the IEP team meeting; Ms. Davis was his general education teacher for the remainder of the school year. Accordingly, Student's allegations regarding teacher turnover are irrelevant, since there was no IEP while those teachers were teaching

6. For the 2005-2006 school year, did District violate the procedural right of Student's Guardian to meaningfully participate in the IEP team meeting on March 6, 2006, because the principal and perhaps the general education teacher were not present for the entire IEP meeting?

7. Is Student entitled to reimbursement for the costs of the Lindamood-Bell program, the costs associated with the optometrist's assessment, including the tinted glasses prescribed by the optometrist, and the costs for his current placement at the Chartwell School (Chartwell), a private school.

PARTIES' CONTENTIONS

Student alleges that District failed to fully assess him, in that Lindamood Bell referred him to a developmental optometrist who discovered that he had a visual problem, specifically, Scotopic Sensitivity Syndrome, prescribed tinted glasses for him, and made recommendations as to the appropriate lighting and seating in his classroom. Student also alleges that the District failed to find him eligible for special education and related services due to a specific learning disability.

Student contends that, in the fall of 2005, after he was reassessed and found eligible for special education and related services due to a specific learning disability, related to visual and auditory processing, as well as attention issues, Alicia Davis, his general education teacher, refused to follow the IEP. For example, Ms. Davis would not allow Student to leave the classroom to go to the Resource Specialist Program (RSP) classroom, which was part of his IEP placement, and as a result, he made no academic progress.

Student alleges that the IEP team meeting on March 6, 2006, was interrupted three or four times when at least one member of the IEP team left and returned to the meeting.

Student

District argues that: (1) Student was not eligible for special education and related services, and made academic progress during the 2003-2004 and 2004-2005 school years; (2) Student's visual assessments did not reveal any vision problems; (3) Scotopic Sensitivity Syndrome is not a medically-recognized visual problem; (4) Student's IEP was appropriately implemented; and (5) District personnel, and Guardian, meaningfully participated in the IEP meeting on March 6, 2006.

FACTUAL FINDINGS

1. Student was born July 28, 1995, and lives within the District's boundaries. A family member serves as his guardian. On October 31, 2005, he was found eligible for special education and related services due to a specific learning disability based on weaknesses in his auditory and visual sequential memory skills, as well as attention issues. He currently attends Chartwell.

RELEVANT BACKGROUND FACTS FROM THE 2002-2003 SCHOOL YEAR

1. During the 2002-2003 school year, Student was supported by a Student Support Team (SST). Student also participated in the Reading Resource Program, a general education reading intervention program that supplements the general education reading instruction.

2. In December 2002, Student had 20/20 vision in both eyes. Student passed the visual color test about a month later.

3. In February 2003, based on concerns about Student's academic performance and "attention/distractability," a SST and Student's teacher referred him for a special education assessment.

2. In April 2003, Ms. Ponko conducted a psycho-educational assessment of Student.³ She interviewed Student and those who had worked with him, including

³Guardian did not give the District any private or independent assessments to

teachers and family members. Student's academic skills were within the normal range. Student's scores on various assessment instruments were in the low-average range, and Ms. Ponko believed that the scores had been negatively impacted by Student's inattentiveness and impulsivity. The only discrepancy of consequence was on Student's scores on the Behavior Assessment System for Children, in that Student's teacher-reported scores indicated that he was at risk in the areas of hyperactivity, aggression, attention, adaptability, and study skills, but his home-reported scores were not in the at-risk range in any area. Ms. Ponko concluded that Student was not eligible for special education and related services.

5. Linda Brandewie is the RSP teacher and Reading Resource Program supervisor at Bay View Elementary School, the school that Student attended. Ms. Brandewie assessed Student, and observed him in his classroom and in the Reading Resource Program. Student's needs were not out of the ordinary at the time because, as established by Ms. Brandewie, there is a "huge" range of normal among young pupils. For example, the normal reading range in a second-grade classroom would go from pupils who were almost at a non-reading level to others who were reading above grade level; and the pupils would have varying learning rates.

6. On April 24, 2003, the IEP team met to consider the assessments. Guardian attended the meeting. The team concluded that Student was not eligible for special education and related services. The team recommended that Student continue in the Reading Resource Program as part of his general education environment. Guardian's concerns about Student's academic progress, and that he continue to attend the Reading Resource program, are noted in the IEP. There are check marks in the IEP form boxes that indicate that Guardian was given copies of the assessments and of her rights and

review, so Ms. Ponko did not have any other assessments to review or consider as part of her assessment process

procedural safeguards, as well as in the box (and circle) to indicate she agreed to the IEP team's conclusion of ineligibility. However, Guardian's signature is not on the IEP form. Ms. Ponko and Ms. Brandewie believed that Guardian checked the boxes; Ms. Ponko thought that Guardian wanted to take the IEP home to consult with family members before signing it.

3. Student's report card for the 2002-2003 school year indicates that he progressed from Developing in all seven core subjects in the first trimester to mostly Capable for the third trimester.⁴ Student's teacher noted that he had made progress during the year, that he was able to "work independently and complete assignments," and that he had improved in reading, done well in math, and had an "exceptional love" of the life sciences. Student was promoted to second grade.

THE 2003-2004 SCHOOL YEAR

District's Failure to Assess Student

8. A school district has an obligation to identify children who require special education and related services as a result of a disability. A school district also has an obligation to initiate a special education assessment referral of a student upon receiving a written request for such an assessment, or if the school district had a reason to suspect that the student had a disability and a reason to suspect that special education and related services may be needed to address that disability.

9. During the 2003-2004 school year, Guardian never submitted a written request to the District for Student to be assessed for special education and related services.

10. Guardian brought to the attention of Student's teacher the possibility that

⁴At the time, the District's report card used a five-level rubric (lowest to highest): Emergent, Progressing, Developing, Capable, and Strong

Student might have a learning disability. Guardian attended parent-teacher conferences to discuss her concerns and what could be done to assist Student. At the end of the school year, Guardian talked to Student's teacher and received materials to use with Student during the summer. Guardian believed that Student was below grade level, but she conceded that no documents supported her belief.

11. In September 2003, Student had 20/25 vision in both eyes.

12. During the 2003-2004 school year, Student continued to participate in the Reading Resource Program. On Student's report card, his teacher noted that he had a "challenging" year, was on an hourly behavior contract, and could have limited attention for core subjects. For the first trimester, Student's core subject grades were Emergent in oral language listening, Progressing in oral language speaking, reading, written language, and math, and Developing in science and history-social science. For the third trimester, Student received Developing grades in all seven of the core subjects. Therefore, Student was able to access the curriculum and make academic progress during this school year. Student was promoted to the third grade.

4. At some point, there was discussion about whether Student had Attention Deficit Disorder (ADD) or Attention Hyperactivity Deficit Disorder (ADHD). However, Student's family explicitly resisted any attempt to diagnose Student as having either of these disorders. Student's family did not want Student to be diagnosed with a label before he was properly assessed.⁵ One of Student's aunts testified that she and her husband checked the Diagnostic and Statistical Manual and concluded that Student did not exhibit any symptoms of ADD. Student's doctor evaluated him and found that he did not have ADD or ADHD. Student saw a pediatric neurosurgeon who also found that he did not have ADHD. Student did not give any of these assessments to the District.

⁵As noted in the Prehearing Conference Order, Student has not challenged the District's assessments

14 At the administrative hearing, Guardian testified that she told the school principal that Student's therapist had diagnosed Student with separation anxiety disorder related to his mother, which had symptoms similar to ADD or ADHD. Guardian did not give District a copy of any medical record reflecting the diagnosis. Student presented no medical evidence during the administrative hearing to substantiate the asserted diagnosis. Even if the asserted diagnosis was relevant to Student's behavior issues at school, the District did not have notice of the diagnosis.

15. Student failed to establish that the District had a duty to initiate a referral for special education and related services during the 2003-2004 school year. Neither Guardian nor Student's family requested a referral of Student for a special education assessment. Student failed to establish that District should have suspected a disability which might require special education and related services. Student had been comprehensively assessed just a few months prior to the start of the school year, and had been found ineligible for special education and related services. There were concerns about Student's behavior and attentiveness, but his family actively resisted any attempt to determine if Student was someone with ADD or ADHD, which could have led to eligibility for special education and related services under the category of Other Health Impaired. Additionally, Student's grades indicated that he accessed the curriculum and made progress during the year. Student's vision was checked during the school year, and there were no indications that Student was experiencing visual problems of the type which would warrant a more detailed assessment.

District's Failure to Find Student Eligible

17. As District had no reason to suspect any disability which might have required the provision of special education and related services to Student during the 2003-2004 school year, District did not fail to find Student eligible for special education and related services when they should have done so.

THE 2004-2005 SCHOOL YEAR

District's Failure to Assess Student

18. For the 2004-2005 school year, Student did not submit to the District a written request for assessment for special education and related services. Therefore, the focus must again be on whether the District had a reason to suspect that Student had a disability, and a reason to suspect that special education and related services may be needed to address that disability.

19. Guardian unilaterally removed Student from the Reading Resource Program sometime in the fall of 2004 because she did not believe that he was making sufficient progress.⁶

2. During the 2004-2005 school year, no significant issues, of the type that would trigger a suspicion that Student had a disability and a reason to suspect that special education and related services may be needed to address that disability, were brought to the attention of Ms. Ponko. Student's report card indicates that he was meeting grade level standards in science, history, and social science in all three trimesters. Student was making progress toward grade level standards in reading, math, comprehension, listening, and speaking. His reading score was 61 percent, which

⁶Guardian also removed Student from the Reading Resource Program because she alleged that the two teacher's aides who worked in the program treated Student abusively. However, in light of the findings below regarding the District's lack of a reason to suspect that Student had a disability for which special education and related services may have been required during the 2004-2005 school year, Student's allegations regarding abusive treatment and/or racial discrimination are irrelevant to his claims in this matter, made pursuant to the Individuals with Disabilities Education Act and the California Education Code

increased to 91 percent when he received one-to-one help. His math score was 60 percent, which increased to about 83 percent with help. Student was making limited progress toward grade level standards in writing. Student was promoted to the fourth grade.

3. Student's behavior was an issue. For example, on November 17, 2004, Student was suspended for throwing a rock that damaged a teacher's car. Student admitted that he threw the rock and explained that he thought the car belonged to a student with whom he was having a conflict. On December 1, 2004, Student's teacher, Ms. Bredthauer, filled out a Reason for Referral Rating form that referenced Student's difficulties in Work Habits and Social Behavior. On April 21, 2005, Ms. Bredthauer's teacher report detailed some of Student's behavioral challenges, including disrespecting the authority of teachers and playground supervisors and ignoring the playground rules. Ms. Bredthauer noted that, when she did not stay by Student's side in the classroom, he did everything but the assigned class work, including bothering other pupils. Many times Student did not complete his homework. If a bad report was sent home, Student conveniently lost his folder, or the log page with the report was removed. As a result, Ms. Bredthauer made additional modifications to the classroom for Student, including repeating directions, teaching study skills, reteaching expected behavior, group or individual counseling, and using manipulative materials. Student's report card also reflects behavioral difficulties such as making good use of his time, working independently, accepting responsibility for his own behavior, and showing self-control. Ms. Bredthauer gave Guardian materials to help keep Student focused.

20. The District convened SST meetings to address Student's problems and to provide more assistance. On April 5, 2005, the SST noted that Guardian and Student's aunts had requested another psycho-educational assessment. The SST agreed to hold an

assessment meeting in the fall of 2005.⁷ On May 13, 2005, the SST indicated that the assessment would be done at the start of the next school in August 2005.

5. At the administrative hearing, the only medical evidence of Student's asserted unique visual needs, specifically, Scotopic Sensitivity Syndrome, consisted of a report by Bradford Murray, O.D., dated March 8, 2005. Student's aunt testified that she gave to Student's school principal a copy of Dr. Murray's entire report. However, the testimony of Student's aunt was not credible. Her answers were often unresponsive. She seemed to provide only the information that she wanted to talk about or believed was helpful to Student's case. Also, she was repeatedly non-time-specific, so that she seemed to lump various school years together in order to make a point.

6. Guardian gave a copy of the two-page "Teacher Recommendations" portion of Dr. Murray's report to Ms. Bredthauer, who modified the classroom layout.

7. Ms. Brandewie received only a copy of the "Teacher Recommendations" portion of Dr. Murray's report. She did not receive Dr. Murray's entire report, nor did she see a copy of the report in Student's cumulative file. Ms. Brandewie saw no difference in Student's performance when he was wearing, or not wearing, his tinted glasses.

8. District witnesses provided convincing testimony that Scotopic Sensitivity Syndrome is not a visual problem that is recognized by official medical associations or journals.

9. Student failed to establish that the District had a duty to initiate a referral for special education and related services during the portion of the 2004-2005 school year

⁷Student did not present evidence as to the exact date of this (apparently verbal) request for an assessment. Neither of the parties presented evidence on the impact of the requirement to complete an assessment within 60 days of receiving parental consent for an assessment. (20 U.S.C. § 1414(a)(1)(C)(i).) Student has not raised a claim that the District denied his right to a timely assessment in the spring of 2005

that came before the SST noted Student's family's request for another psycho-educational assessment. Neither Guardian nor Student's family submitted a written request for a referral of Student for a special education assessment. Student failed to establish that, prior to the verbal request for an assessment, District should have suspected a disability which might require special education and related services. There continued to be concerns about Student's behavior and attentiveness, but, as noted above, previously his family had actively resisted any attempt to determine if Student was someone with ADD or ADHD, which could have led to eligibility for special education and related services under the category of Other Health Impaired. The District provided, or at least offered, a reading intervention program, and made additional classroom modifications, including preferential seating, prompts to re-direct Student, and reduced or modified homework, to address the behavior and attention concerns. Student's grades indicated that he accessed the curriculum and made academic progress during the year. When Student's family requested an assessment, apparently verbally in the spring of 2005, the parties – through the SST process – agreed that the assessment would be done at the start of the 2005-2006 school year. Additionally, even if Scotopic Sensitivity Syndrome was an officially-recognized visual problem, the District did not receive Dr. Murray's report. Student's tinted glasses did not make a difference on his performance in Ms. Brandewie's classroom.

District's Failure to Find Student Eligible

28. As District had no reason to suspect any disability which might have required the provision of special education and related services to Student during that portion of the 2004-2005 school year prior to Student's family's request for an assessment, District did not fail to find Student eligible for special education and related services when they should have done so.

DISTRICT'S IMPLEMENTATION OF STUDENT'S IEP DURING THE 2005-2006 SCHOOL YEAR

29. If a pupil is found eligible for special education and related services, the school district must convene an IEP team meeting to develop an IEP. The special education and related services provided to the pupil must, among other things, comport with the IEP developed during the IEP team meeting.

30. In October 2005, Ms. Ponko and Ms. Brandewie assessed Student, except that Guardian declined to have Student assessed in the social-emotional areas. Neither Ms. Ponko nor Ms. Brandewie were given any independent or private assessments or diagnoses to consider as part of their assessments. Student had 20/20 vision in both eyes. Ms. Ponko recommended that Student be found eligible for special education and related services due to a specific learning disability, specifically, weaknesses in auditory and visual sequential memory skills and attention.⁸ Student has not challenged the assessments of Ms. Ponko or Ms. Brandewie.

2. On October 31, 2005, the IEP team met and agreed with Ms. Ponko's recommendation. No independent or private assessments were presented to the IEP team. The IEP team developed an IEP that called for Student to spend 60 minutes per day, four times a week, in the RSP classroom, where he would work on goals in reading and spelling. Student was to spend the remainder of his school time in the general education setting. Guardian consented to the IEP with exceptions, but four days later she indicated that she opposed the IEP and wanted the District to pay for Student to be placed at

⁸Student alleged that District personnel mentioned that he had symptoms of dyslexia but did nothing about it. However, "dyslexia" is a broader medical term that is not a primary eligibility category for special education and related services, nor does it reveal how a pupil best learns. As a result, the District uses "learning disability" to more precisely describe a particular pupil's processing deficits

Chartwell. However, Student has not challenged the adequacy of the IEP.

3. At the request of Student's family, the District held IEP Addenda meetings on December 9, 2005, and February 1, 2006. The District increased Student's RSP time to 90 minutes per week, and then to 100 minutes per week, due to an escalation in Student's misbehavior. At each of the IEP Addenda meetings, the IEP team discussed additional accommodations in Student's general education classroom, to be developed via consultation with Ms. Brandewie. At the second IEP Addendum meeting, the IEP team allotted 10 minutes per week for Ms. Brandewie to consult with Student and Ms. Davis to develop strategies to assist Student. One of the accommodations was that Student be allowed to go to the RSP classroom for a quiet place to work or take tests. The District increased the accommodations made for Student as the school year progressed.

4. The changes made during the IEP Addendum meeting on February 2, 2006, allowed Ms. Brandewie to become Student's Language Arts teacher. Ms. Brandewie adapted Student's core curriculum to help ensure he was more successful, and she monitored Student's progress by holding two parent-teacher conferences, communicating verbally, and by sending home to Guardian materials and a contract on a daily basis. Ms. Brandewie ensured that the IEP was being implemented, in part by meeting with Ms. Davis to draft a behavioral contract and to address issues. Student's behavior improved. The strategies developed by Ms. Brandewie and Ms. Davis included a colored piece of paper that Student could place on his desk to alert Ms. Davis that he needed help or assistance. Ms. Brandewie also created materials for Ms. Davis's classroom. Laura Thorpe, the Bay View principal, saw the IEP being implemented in both the general education and RSP settings.

5. Collaboration was an important part of Student's IEP. When Student's behavior deteriorated after spring break, Ms. Brandewie called a meeting which resulted in additional accommodations, more service, and greater collaboration. At this point, Ms. Brandewie was going to Ms. Davis's classroom twice a day. During her first visit she would

ensure that Student's homework was out, that he noted his assignments, and that his binder was organized. At the end of the day, Ms. Brandewie would "de-brief" the day, and make sure Student was using his marker, books, binder, and other tools. Ms. Brandewie also consulted with Ms. Ponko on a weekly basis.

6. Ms. Thorpe sometimes briefly took control of the classroom so that Ms. Davis and Ms. Brandewie could meet regarding Student. Also, Ms. Thorpe did yard and lunch duty, where she witnessed Student's misbehavior, which often increased during those less-structured times of the day. Sometimes she intervened; she would walk the track with Student to allow him to re-focus and talk. Ms. Brandewie and Ms. Thorpe had weekly counseling sessions with Student, so that, when he was not angry, he could hear and understand things, such as what had happened and the reason for the choices he had made.

7. Student's report card indicates that he made limited progress toward grade level standards in all of the core subjects – reading, writing, math, science, and history-social science, except that, in science during the third trimester, he made progress toward grade level standards. Student met his annual reading and spelling goals. Student's scores on the Test of Academic Performance indicated that, during the 2005-2006 school year, he made 1.1 years of progress in spelling, 1.6 years of progress in reading, and 2.2 years of progress in reading comprehension. When Ms. Brandewie shared Student's scores with him, as she always does with her pupils, he was "very excited." Student knew he was learning because he was better able to access the general education curriculum. Ms. Brandewie always shared the information on Student's progress at the IEP team meetings.

8. Student's claim that the District failed to ensure that Ms. Davis implemented the IEP is based on several problems that arose during the 2005-2006 school year. First, Ms. Brandewie used to accompany Student to and from Ms. Davis's classroom. This was a safety measure, due to Student's distractibility. However, once when Student wanted to

go to the RSP classroom, Ms. Davis did not allow him to leave her classroom because no one was there to escort him. To solve the problem, Ms. Brandewie told Ms. Davis to call her, so that Student could be picked up. They also implemented a strategy to make sure such a situation never happened again: Student was given a sheet of colored paper that he could use to indicate he wanted to go to the RSP classroom. This led to the second problem, which was that the sheet of colored paper that Student used to indicate that he needed to go to the RSP classroom was the same sheet of colored paper that Student used to indicate to Ms. Davis that he needed help. However, the paper was color-coded. The two sides of the sheet of paper were two different colors, to distinguish Student's need. Ms. Brandewie noted that Student sometimes quietly came into the RSP classroom with a book, and sat in a bean bag chair. Sometime during the last six weeks of the school year, Student told Ms. Brandewie that he no longer needed the sheet of colored paper; she guessed that he had simply phased it out himself. The third problem was that, at some point during the school year, Ms. Davis began to treat the general education afternoon art class as a reward for good behavior, rather than as part of the core curriculum. Ms. Brandewie had rearranged Student's RSP time so that he could attend art. Ms. Brandewie met with Ms. Davis to ensure that Student had access to everything that the other pupils accessed. The two or three "professional disagreements" that Ms. Brandewie and Ms. Davis had were resolved in private; they never had a disagreement in front of pupils about the implementation of the IEP. Their relationship was cooperative; they made decisions based on what was in Student's best interest.

9. Accordingly, the District promptly and appropriately resolved every one of the difficulties that occurred in implementing the IEP. As a result, during the 2005-2006 school year, the District appropriately implemented Student's IEP.

THE PARTICIPATION OF STUDENT'S GUARDIAN IN THE IEP TEAM MEETING ON MARCH 6, 2006

10. A district must provide the parent of a disabled child the opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to the child. The members of the IEP team who are required by law to attend the IEP team meeting must do so, unless properly excused.

31. On March 6, 2006, Ms. Ponko, Ms. Davis, Ms. Brandewie, Guardian, and Jeff Gabrielson, the District Director of Special Education, attended a third IEP Addendum meeting. Student's family expressed concerns about, among other things, a suspension of Student, for which they had not yet received the paperwork, as well as the need for additional accommodations. The suspension documentation had been mailed the previous day, but Ms. Thorpe left the room and made a copy of it for Student's family. Ms. Thorpe addressed the suspension and then explained that she had to leave the meeting because there were no front office staff present to supervise the pupils who were there. Ms. Brandewie and Ms. Davis reported on Student's progress and difficulties. The meeting lasted for about 35 minutes. Mr. Gabrielson was present for the entire meeting.

12. Guardian admitted that she attended and participated in all of the IEP team meetings. However, she felt that the meeting on March 6, 2006, was "not professional at all" because at times Ms. Thorpe and Ms. Davis had to leave the meeting to answer the phone. Nevertheless, Guardian conceded that Ms. Thorpe discussed Student's suspension and explained the reason that she had to leave the meeting. Student provided no additional evidence regarding the length of time that Ms. Davis was absent from the meeting to answer the telephone.

13. The District did not violate Guardian's right to meaningfully participate in the IEP team meetings. Rather, as Guardian conceded, she attended and participated in all of the IEP team meetings. The District responded to Guardian's concerns, expressed in the IEP team meetings, by increasing the amount of time that Student received RSP

support and by providing time for Ms. Brandewie to consult with Ms. Davis. In addition, the individuals present at the meeting on March 6, 2006, composed the complete IEP team. Mr. Gabrielson, a District administrator, was present for the entire meeting. Student failed to establish that Ms. Davis was absent from the meeting for a period of time sufficient to constitute a significant infringement of Guardian's right to participate in the IEP process.

APPLICABLE LAW PRINCIPLES

1. Student has the burden of proving the essential elements of his special education claims. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)
2. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA), and the Individuals with Disabilities in Education Improvement Act of 2004 (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. (20 U.S.C. § 1400 et al.; ⁹Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (§ 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Special education" is defined in pertinent part as specially designed instruction and related services, at no cost to parents, to meet the unique needs of a child with a disability. (§ 1401(29); Ed. Code, § 56031.) "Related services," known in California law as Designated Instruction and Services (DIS), means transportation and other developmental, corrective and supportive services that may be required to assist the child to benefit from special education. (§ 1401(22); Ed. Code, § 56363, subd. (a).)

⁹All statutory references are to the Individuals with Disabilities Education Act (IDEA), Title 20 of the United State Code, unless specifically noted otherwise

3. There are two parts to the legal analysis in suits brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. of Ed. of the Hendrick Hudson Sch. Dist v. Rowley* (1982) 458U.S. 176, 200 [*Rowley*].) Second, the court must assess whether the IEP developed through those procedures was designed to meet the child's unique needs, reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Id.* at pp. 206-207.)

4. In *Rowley*, the United States Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. But procedural violations constitute a denial of FAPE only if the violations caused a loss of educational opportunity to the student or significantly infringed on the parents' right to participate in the IEP process. (*Rowley, supra*, 458 U.S. at pp. 206-207; *M.L. v. Federal Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, 646; *MM v. Sch. Dist. of Greenville County* (4th Cir. 2002) 303 F.3 523, 534; *Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 892; § 1415(f)(3)(E)(ii); Ed. Code § 56505, subd. (j).)

5. The IDEIA and State law impose an affirmative duty on school districts to ensure that disabled children who are in need of special education and related services are "identified, located, and evaluated." (§ 1412(a)(3); Ed. Code, § 56300.) A district's duty is not dependent on any request by a parent for special education testing or referral for services. Rather, the obligation is triggered when there is reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Rae* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) The appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualified for services. (*Ibid.*)

6. Under State law, a child may be referred for special education only after the resources of the regular education program have been considered and, where

appropriate, utilized. (Ed. Code, § 56303.) Once a child has been referred for assessment, the school district must assess the child in all areas of suspected disability. (34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).)

7. To be eligible for special education and related services due to a visual impairment, the visual impairment must be such that it “adversely affects a pupil’s educational performance” even with correction. (Cal. Code Regs., tit. 5, § 3030, subd. (d).)

8. Another procedural requirement, found in both State and federal law, requires that the parents of a child with a disability be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to the child. (Ed. Code, §§ 56304, 56342.5; 34 C.F.R. § 300.501(b).) Thus, parents are required members of the IEP team, which also includes at least one of the child’s general education teachers (if the child is or may be participating in the general education environment), at least one special education teacher or provider who provides special education to the child, a representative of the local education agency, an individual who can interpret the instructional implications of the assessments, other individuals who have knowledge or special expertise regarding the child (depending on the discretion of the parents or local education agency), and, whenever appropriate, the disabled child. (§ 1414(d)(1)(B)(i)-(vii); 34 C.F.R. § 300.321(a)(1)-(7); Ed. Code, § 56341, subd. (b).) Education Code section 56341.1 also requires the IEP team to consider, among other matters, the strengths of the pupil and the results of the initial assessment or most recent assessment of the pupil. The IEP team must consider the concerns of the parents throughout the IEP process. (§ 1414(c)(1)(B), (d)(3)(A)(i), (d)(4)(A)(ii)(III); 34 C.F.R. §§ 300.305(a)(i), 300.324(a)(1)(ii), (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(1), (d)(3), (e).)

1. A parent has meaningfully participated in the development of an IEP when he is informed of his child’s problems, attends the IEP meeting, expresses his disagreement regarding the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover*

Bd. of Educ. (3rd Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

LEGAL CONCLUSIONS

ISSUE 1: FOR THE 2003-2004 SCHOOL YEAR, DID DISTRICT FAIL TO ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY, SPECIFICALLY, FOR VISION PROBLEMS?

10. Based on Factual Findings 3, 12, 16 and 17, and Applicable Law Principles 1 through 7, Student failed to prove that he had any medically-recognized unique visual needs during the 2003-2004 school year. As determined in Factual Findings 3 and 12, Student's vision assessments in December 2002 and September 2003 revealed no vision problems, and Student passed the color test in January 2003. There were no indications that Student was experiencing visual problems of the type which would warrant a more detailed assessment.

ISSUE 2: FOR THE 2003-2004 SCHOOL YEAR, SHOULD DISTRICT HAVE FOUND STUDENT ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES UNDER THE CATEGORY OF SPECIFIC LEARNING DISABILITY?

11. As discussed above in Factual Finding 9, and Applicable Law Principles 5 and 6, the District was required to identify children who require special education and related services as a result of a disability, and to initiate a special education assessment referral of Student upon receiving a written request for such an assessment. Based upon Factual Findings 2 through 8, Student was assessed and found to be ineligible in April 2003. Based upon Factual Finding 10, Guardian did not request an assessment of Student during the 2003- 2004 school year.

12. As discussed above in Factual Finding 9, and Applicable Law Principles 5 and 6, the District was also required to initiate a special education assessment referral of Student if the District had a reason to suspect that Student had a disability and a reason

to suspect that special education and related services may be needed to address that disability. Based upon Factual Findings 1 through 17, the District had no obligation to initiate a referral for assessment for special education and related services during the 2003-2004 school year, because the District had no reason to suspect any disability that might require special education and related services. Specifically, based upon Factual Findings 2 through 7, Student was assessed and found to be ineligible in April 2003. During the subsequent school year, the District had no reason to suspect that Student's eligibility had changed. In addition, the District appropriately first exhausted the resources of the regular education program before re-referring Student for an assessment. (Ed. Code, § 56303.)

ISSUE 3: FOR THE 2004-2005 SCHOOL YEAR, DID DISTRICT FAIL TO ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY, SPECIFICALLY, FOR VISION PROBLEMS?

13. Based on Factual Findings 20 and 23 through 28, and Applicable Law Principles 1 through 7, Student failed to prove that he had any medically-recognized unique visual needs during the 2004-2005 school year. Rather, the District established that Scotopic Sensitivity Syndrome is not a medically-recognized visual unique need. The District also established that it did not receive notice of Student's diagnosis of Scotopic Sensitivity Syndrome. Based upon Factual Finding 25, Student's performance in Ms. Brandewie's class was the same without his tinted glasses as it was when he wore his tinted glasses.

ISSUE 3: FOR THE 2004-2005 SCHOOL YEAR, SHOULD DISTRICT HAVE FOUND STUDENT ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES UNDER THE CATEGORY OF SPECIFIC LEARNING DISABILITY?

1. As discussed above in Factual Finding 9, and Applicable Law Principles 5 and 6, the District was required to identify children who require special education and related services as a result of a disability, and to initiate a special education assessment referral of

Student upon receiving a written request for such an assessment. Based upon Factual Finding 22, Guardian did not request an assessment of Student until the spring of 2005, and Guardian agreed, as part of the SST, to schedule the assessment at the start of the 2005-2006 school year.

2. As discussed above in Factual Finding 9, and Applicable Law Principles 5 and 6, the District was required to initiate a special education assessment referral of Student if the District had a reason to suspect that Student had a disability and a reason to suspect that special education and related services may be needed to address that disability. Based upon Factual Findings 19 through 22, 27, and 28, the District had no obligation to initiate a referral for assessment for special education and related services prior to the time that Guardian requested such an assessment in the spring of 2005 because the District had no reason to suspect any disability that might require special education and related services before the request for an assessment. Specifically, based upon Factual Findings 19 and 20, the District provided, or at least offered, a general intervention reading program, and Student was able to access the curriculum and make academic progress during the school year. The District continued to increase the accommodations made for Student to appropriately respond to Student's behavioral issues, and to appropriately first exhaust the resources of the regular education program before re-referring Student for an assessment. (Ed. Code, § 56303.)

ISSUE 5: FOR THE 2005-2006 SCHOOL YEAR, DID DISTRICT FAIL TO PROVIDE A FAPE BY FAILING TO ENSURE THAT STUDENT'S GENERAL EDUCATION TEACHER IMPLEMENTED STUDENT'S INDIVIDUALIZED EDUCATION PLAN (IEP)?

16. As discussed above in Factual Finding 29 and Applicable Law Principles 1 through 3, the District had an obligation to ensure that the special education and related services provided to Student comported with his IEP. Based on Factual Findings 30 through 38, and Applicable Law Principles 1 through 3, the District appropriately implemented Student's IEP during the 2005-2006 school year. Specifically, based upon

Factual Findings 30 through 37, as the school year progressed the District increased both the level of services provided to Student, as well as the modifications made for Student, and the District promptly and appropriately responded and resolved each difficulty in implementing the IEP.

ISSUE 6: FOR THE 2005-2006 SCHOOL YEAR, DID DISTRICT VIOLATE THE PROCEDURAL RIGHT OF STUDENT'S GUARDIAN TO MEANINGFULLY PARTICIPATE IN THE IEP TEAM MEETING ON MARCH 6, 2006?

17. As discussed in Factual Finding 39 and Applicable Law Principles 8 and 9, the District was required to provide Guardian the opportunity to participate in IEP team meetings, composed of all the necessary members, regarding the identification, assessment, educational placement and provision of a FAPE to Student. Based on Factual Findings 39 through 42, and Applicable Law Principles 1, 8 and 9, the District did not violate Guardian's right to participate in the IEP team meeting on March 6, 2006. Student's Guardian meaningfully participated in all the IEP team meetings. The complete IEP team was present for the IEP team meeting on March 6, 2006; any procedural violation for Ms. Davis's departure from the meeting to answer the telephone was de minimis, in that Student failed to establish that the absence significantly infringed on Guardian's right to meaningfully participate in the IEP process.

ORDER

All of Student's requests for relief are denied.

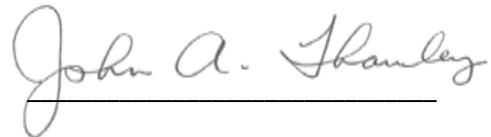
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on all issues in this matter.

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

Dated: February 5, 2007

A handwritten signature in cursive script that reads "John A. Thawley". The signature is written in black ink and is positioned above a horizontal line.

JOHN A. THAWLEY

Administrative Law Judge

Special Education Division

Office of Administrative Hearings