

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

NEWMAN-CROWS LANDING UNIFIED
SCHOOL DISTRICT.

OAH CASE NO. 2007080681

DECISION

Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH), State of California, heard this matter in Newman, California, on June 2 through 5, 2008.

Student's Mother represented Student, and was assisted by Student's Sister. Student was not present during the hearing.

Patrick J. Balucan, Attorney at Law, represented the Newman-Crows Landing Unified School District (District). Also present throughout the hearing was Jeri Hamera, District's Program Director of Curriculum and Instruction.

On August 24, 2007, Student filed his request for due process hearing. On October 15, 2007, OAH granted a request to continue the hearing. At the close of the hearing, the parties requested time for written argument. The District filed its closing brief on June 20, 2008. On June 23, 2008, OAH granted Student an extension to June 24, 2008, to submit a closing brief. Student did not submit a closing brief, and the matter was submitted on June 24, 2008.

ISSUES¹

1. Did the District deny Student a free appropriate public education (FAPE) in the 2005-2006 and 2006-2007 school years (SY) by failing to timely assess Student for special education eligibility, specifically failure to assess in the areas of occupational therapy (OT) and adapted physical education (APE)?

2. Did the District deny Student a FAPE in SY 2005-2006 and SY 2006-2007 by failing to qualify Student for special education services or provide Student with special education services, including failing to provide home-hospital instruction and aide support for Student's toileting difficulties?

REQUESTED REMEDIES

Student requests that the District provide him with a bank of hours to use for academic tutoring at the rate of four hours for every day of denial of FAPE. Student also seeks OT and APE services of at least one hour each for every week of denial of FAPE.

FACTUAL FINDINGS

BACKGROUND

1. Student, born March 20, 2000, lives with his Mother within the District boundaries. Student did not attend preschool before attending kindergarten. The District was the local education agency (LEA) responsible for Student during SY 2005-2006 and SY 2006-2007. Student was never determined to be eligible for special education services by the District. Student presently attends a charter school, the

¹ These issues are those framed in the May 23, 2008 Order Following Prehearing Conference. The ALJ has reorganized the issues, without changing their substance, for purposes of organizing this Decision.

California Virtual Academy (CAVA), where he enrolled right before SY 2007-2008.² It is unknown if CAVA assessed Student to determine his eligibility for special education services.

FAILURE TO ASSESS

2. Student contends that the District failed to assess him for eligibility for special education services even though the information Mother provided the District before the start of kindergarten indicated that Student might require special education services. Further, Student argues that the District knew or should have known that he was at risk for needing special education services due to his numerous absences, gross and fine motor deficits, learning disabilities and need for toileting assistance. Finally, Student asserts that if the District assessed Student, he would have been eligible for special education services. The District asserts that it did not have any reason to assess Student because he made adequate educational progress, and met his needs with regular education resources.

3. The term "child find" refers to a school district's affirmative, ongoing obligation to identify, locate, and assess all children residing within its jurisdiction who are suspected of having disabilities and who may need special education as a result of those disabilities. Specifically, if the District had reason to suspect that Student had a disability and that he may have needed special education and services to address his disability, the District would have had an obligation to assess him. The relevant inquiry is

² CAVA, which is a network of charter schools offering an independent study/home study program, and is also a LEA responsible for providing its pupils with special education services. (Ed. Code, § 47640 et seq.)

whether the LEA should assess the child, not whether the student will ultimately qualify for services.

ELIGIBILITY FOR SPECIAL EDUCATION SERVICES

4. Student asserts that he was eligible for special education services due to his cerebral palsy, toileting problems and susceptibility to illness. Additionally, Student contends that the District's APE assessment establishes that he was eligible for services because his abilities are substantially below his peers. Although Student did not assert the specific eligibility categories, the evidence presented reflected that Student asserted that he was eligible under category of other health impairment, orthopedic impairment or specific learning disability. For SY 2005-2006, the District argues that Student did not show that he required special education services because he made adequate educational progress with the regular education accommodations the District provided. For SY 2006-2007, the District asserts that Mother's conduct prevented the District from providing Student with home-hospital instruction as a regular education service until the District could assess Student.

SY 2005-2006

August 15, 2005 Meeting

5. Mother enrolled Student for kindergarten in March 2005. On the registration forms, Mother stated that Student was diagnosed with cerebral palsy, suffered a skull fracture and subdural hematoma at birth, and was still in diapers due to a medical condition. Mother also disclosed that Student had severe delays with his motor skills. Mother noted on the registration form that Student had attended not preschool due to his medical conditions. Additionally, Mother disclosed that Student's doctor recently diagnosed Student to have a medical condition that restricted his airway

passage. Mother listed on the form that Student would be receiving physical therapy (PT) and OT services from an outside agency.

6. While Mother listed numerous medical problems on the registration form, she did not indicate that Student had any learning difficulties. Mother stated on the registration form that what she wanted her son to learn most in kindergarten was social skills.

7. Based on the information provided by Mother, the District wanted to meet before school started to discuss Student's kindergarten attendance. On August 15, 2005, the day before school started, Mother met with Ms. Hamera, who was then the principal of Von Renner Elementary School, Darleen Craven, Student's kindergarten teacher, and Bernice Arnett, the District's school nurse. The District noticed the meeting on a "Notice of Section 504 Committee Meeting" form.³ Mother did not bring Student to this meeting.

8. The District did not observe Student before kindergarten started, even though the information that Mother provided raised red flags for the District that it needed to closely monitor Student to determine whether he may require special education services. The District did not explain why it did not ask to observe Student before he started kindergarten to evaluate his possible needs. Both Ms. Arnett and

³ A "504 plan" is a document created pursuant to the federal anti-discrimination law commonly known as Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; implementing regulations at 34 C.F.R. § 104.1 et. seq.) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity, such as learning.

Ms. Craven were concerned that Student might be in a wheelchair or have significant physical impairments based on the registration information that he had cerebral palsy.

9. At this meeting, Mother provided the District with medical documents from March 2005 and August 2003 which diagnosed Student with static encephalopathy, a disease of the brain that does not improve. Mother also told Ms. Hamera and Ms. Arnett that Student had cerebral palsy. Mother provided a document from the Shriners Hospital that listed as a goal for Student to be evaluated and treated for OT skills related to self-care, such as dressing, fine motor skills and motor planning, including hand-eye coordination, and gross motor skills. Mother also informed the District that the California Children's Services (CCS)⁴ was providing Student with PT and OT services due to his cerebral palsy, and provided a medical release allowing the District to contact CCS. Mother told the District that Student was not toilet trained, prone to accidents, and susceptible to respiratory infections.

10. At the August 15, 2005 meeting, the District agreed to conduct an OT and APE assessment to examine Student's gross and fine motor skills and psychomotor development. Ms. Hamera drafted the assessment plan on a Stanislaus Special Education Local Plan Area (SELPA) form. Ms. Hamera checked "Other assessment" as the reason for the assessment and wrote "October 6, 2005" in the "IEP (Independent Educational Evaluation) due date" box. Ms. Hamera left the other boxes, "Initial referral to determine eligibility," "Re-evaluation to determine needs," and "Three year re-evaluation" blank. Mother signed the assessment plan.

⁴ CCS provides diagnostic and treatment services, medical case management, and PT and OT services to children under age 21 with CCS-eligible medical conditions, which includes cerebral palsy. CCS also provides medical therapy services that are delivered at public schools. (<http://www.dhcs.ca.gov/services/ccs/Pages/ProgramOverview.aspx>.)

11. Additionally, Ms. Hamera provided Mother a form regarding the OT assessment. The form stated that the District would conduct an OT observation and screening because of concerns about Student developing skills needed to participate in his academic program. The occupational therapist was to observe Student during instructional activities, but would not conduct any formal testing. The District agreed to complete the observation within 15 days of Mother's consent, which Mother gave at the meeting, and to inform her of the results. The form stated that Mother understood that the District would not provide Student with any services because of the observation.

12. Ms. Hamera also provided Mother with a notice of parental rights and procedural safeguard form that explained her rights under the Individuals with Disabilities Education Act (IDEA). The parental rights form explained the District's obligations when it assessed a pupil to determine whether the pupil was eligible for special education services and to hold an IEP meeting to discuss Student's eligibility within 50 days⁵ after a parent's consent to the assessment.

13. Based on information Mother provided, Ms. Arnett drafted an Individual Health Plan (IHP) on August 16, 2005, to address conditions related to Student's cerebral palsy, which included toileting problems, delayed motor skills and being prone to infections. The IHP focused on strategies to address Student's toileting problems to avoid accidents, including dietary restrictions. Regarding Student's susceptibility to infections, the District agreed to report possible infections to Mother. Mother agreed to the IHP. The next day, the District modified the IHP to include assistance with cleaning after a bowel movement and training school personnel on proper cleaning to avoid infection. Although not in the IHP, the District agreed that an aide assigned to another

⁵ Effective October 7, 2005, the time period was extended to 60 days. (Ed. Code, § 56344, subd. (a).)

pupil in Ms. Craven's class would be available to assist Student with his toileting, if needed. The pupil and aide left Ms. Craven's class in October 2005, and the District did not assign another person to assist Student.

14. Ms. Hamera's intent in creating the assessment plan was not to assess Student for eligibility for special education services, but to assess Student to determine his needs for a Section 504 plan. While Ms. Hamera noted on Student's registration form that he was a Section 504 child and noticed a Section 504 meeting, Ms. Hamera confused the process whether the District was assessing Student for eligibility to receive services pursuant to Section 504 or the IDEA. Ms. Hamera used forms designed for special education assessment and gave Mother a form to notify her rights under the IDEA. However, Ms. Hamera never explained to Mother the difference between Section 504 and IDEA.

15. Based on the information Mother provided during kindergarten registration and at the August 15, 2005 meeting, the District knew or should have known that Student might require special education services. The District knew that Student did not attend preschool due to his medical conditions and did not attempt to contact Student's outside service providers regarding Student's unique needs. Therefore, the District had sufficient information that Student might require special education services based on the information that Mother provided before Student started kindergarten that he may require special education services.

Fine and Gross Motor Skills

16. During Student's kindergarten year, Ms. Craven, who has taught kindergarten for 29 years, did not observe Student having OT needs that prevented him from accessing the curriculum. Student could get around easily inside and outside of class, even though he had muscle weakness on one side of his body. Student did not play with his classmates in active sports and rarely used the play equipment. Student

had some difficulty with his fine motor skills as he needed assistance using his zipper or snaps on his clothes. At the start of kindergarten, Student had problems with his penmanship, but by the end of the school year, he had improved and was in the top of his class.

17. Doug Couture conducted the District's APE assessment on September 29, 2005, to evaluate Student's gross motor and motor planning abilities. Mr. Couture has been an APE specialist with the Stanislaus County Office of Education (SCOE) since 1990, and was assigned to Von Renner. Mr. Couture observed Student and administered the Test of Gross Motor Development, Second Edition (TGMD-2d), to measure his locomotive and object control skills. The locomotive skills tested Student's ability to hop, skip, jump and run, while object control tested his ability to hit, catch, throw and kick. Student easily followed Mr. Couture's directions. Student scored in the 16th percentile, with an age equivalency of 4.6 years old, on the test of locomotive skills and in the 9th percentile, with an age equivalency of 3.6 years old, for object control skills. Both scores are in the below average range. Mr. Couture recommended that Student receive APE services because of concerns about Student's safety while participating in regular physical education instruction. For Student's safety, Mr. Couture needed to collaborate with Student's teacher and develop a program to teach Student skills needed for large group instruction.

18. Wayne Stevenson conducted the OT observation of Student. Mr. Stevenson is employed by SCOE and was assigned to Von Renner during SY 2005-2006 and SY 2006-2007. Mr. Stevenson went to Von Renner to conduct his screening, but did not observe Student because he was absent. Mr. Stevenson completed the screening by speaking with Ms. Craven about Student's OT skills. Mr. Stevenson did not document his conversation with Ms. Craven and did not recall if she expressed any concerns about Student's OT abilities. Mr. Stevenson did not recall if he knew at the time of his

conversation with Ms. Craven that Student was receiving outside PT and OT services, or if he contacted CCS about Student. Mr. Stevenson did not prepare a report of his screening.

19. Neither Mr. Couture nor Mr. Stevenson reported their findings to the District, and the District did not inquire about their findings. In October 2005, Mother asked Ms. Craven about the status of the assessments and meeting to discuss the assessments. Ms. Craven spoke to Ms. Hamera, who promised to get back to Mother. However, Ms. Hamera never informed Ms. Craven or Mother about the status of the assessment and did not convene a meeting. Ms. Hamera did not contact SCOE to find out about the status of the assessments during SY 2005-2006, and offered no explanation why she did not, even after her promotion to the District's Program Director of Curriculum and Instruction, which oversees the District's Section 504 and special education programs.

Student's Health

20. From the outset, Student missed numerous days of class due to illness. During the first two trimesters, Student missed about one-half of the school days. Ms. Craven agreed with Mother that Student was extremely susceptible to illness. To make sure that Student would not get ill, Ms. Craven had Student sit at her desk if his classmates appeared to be sick. Despite Student's numerous absences, the District did little to inquire about the reasons for Student's absences other than accepting Mother's excused absence notes.

21. The District never offered Student home-hospital instruction during SY 2005-2006 because Mother never requested it. The District asserted that home-hospital instruction was to address the needs of a temporarily disabled student, and not a form of permanent instruction. However, the District's home-hospital policy states that it does not apply to a child deemed eligible to receive special education services, and that the

District should conduct a special education assessment for pupils with a permanent illness or disability.

22. The District had documentation from Mother that Student had a diagnosis of cerebral palsy, static encephalopathy, and problems with toileting and severe constipation. The District failed to contact Mother to inquire about Student's illness, and whether he had a permanent or temporary condition that caused these numerous absences. The District also had a release from Mother to contact CCS and obtain information about Student's disabilities. Even though Ms. Arnett had worked with CCS previously, she did not contact CCS about Student. The District offered no reasonable explanation why it failed to explore the cause for Student's excessive absences and the impact on Student's educational progress.

23. The District finally convened a Student Study Team (SST) meeting on May 3, 2006, to discuss Student's absences. Ms. Craven requested the SST meeting due to Student's numerous absences and her concerns about Student's ability to progress adequately due to his numerous absences. Ms Craven was also concerned about Student's ability to succeed in first grade due to his illnesses, and absences would make it difficult to keep up academically because the instruction gets harder with a longer school day. Ms. Craven was also concerned about Student's motor skills deficits during the SST process.

24. At the SST meeting, Mother and the District representatives, Ms. Craven, Ms. Grenz, Ms. Arnett, Von Renner principal Audry Garza, and school psychologist Jorge Belmonte, discussed Student's absences and his school progress. Mother again informed the District representatives that Student had cerebral palsy and toileting problems. Neither Mr. Couture nor Mr. Stevenson attended the SST meeting to discuss their evaluations, nor did the District staff in attendance have any information about the evaluations.

25. At the conclusion of the SST meeting, Mother executed a medical release for Ms. Arnett to get information from Student's doctors. Ms. Arnett requested the medical information on May 23, 2006. The only medical documentation that Ms. Arnett received from Student's doctors was a December 2004 report from Dr. Dana Lenser, which did not indicate that Student had cerebral palsy. The report indicated that Student had gross and fine motor delays, but did not quantify what they were. The report stated that Student had severe constipation and reactive airway disease, also known as 'RAD,' and that he suffered a skull fracture during birth. Ms. Arnett telephoned Dr. Lenser's office to find out what the initials 'RAD' meant, but did not inquire whether Student had cerebral palsy, the source of his repeated illnesses, or the extent of his toileting problems. However, despite all the District's concerns about Student's ability to make adequate progress because of his health problems, the District did not assess Student.

Academic Progress

26. Student had a problem working independently and sought out individualized assistance from Ms. Craven. Student required more prompting than his classmates to complete assignments in class and repeatedly sought help from Ms. Craven to repeat her directions. Ms. Craven associated some of Student's difficulties to the fact that he did not attend preschool and was unaware of the workings of a classroom. Further, Student's need for additional assistance in completing tasks was not unusual for a kindergartner, especially since the only pre-kindergarten instruction he received was one-to-one from his Mother.

27. Ms. Craven referred Student to Brett Grenz, a resource teacher at Von Renner, after the winter break because Student's expressive language was behind his peers. Ms. Craven felt that Student did not speak out in class due his shyness, and she wanted him to use language more. Mr. Grenz worked with Student two to three times a week, twenty minutes a session, at the school's learning center, along with other pupils

from his class. The learning center program was not a special education service. The purpose of the additional instruction was to help pupils avoid the need for special education services by providing early, additional assistance. Student was not significantly behind his peers when he started at the learning center program, and did not require more assistance than his classmates in this program. Student's expressive language and self-confidence improved in this program as he appropriately answered questions, engaged in the instruction and was cooperative.

28. By the end of the school year, Student had improved as he met nearly all the kindergarten benchmarks, except those related to letter and word recognition. However, Student's problems with letter and word recognition were not unusual for kindergarteners. Student progressed academically because his attendance increased during the third trimester as he only missed six days of school. Student continued to demonstrate hesitancy in new situations. Mother expressed concerns to Ms. Craven regarding Student's visual tracking, but he did not demonstrate any visual processing problems during kindergarten. Regarding toileting, Student had a couple of accidents that Ms. Craven handled, but those incidents did not interfere with his instruction. Ms. Craven's credibly established that Student made adequate educational progress during kindergarten was credible based upon her work with Student over the course of the school year, and there was no evidence to the contrary.

29. While Student made adequate educational progress, the District had numerous concerns about the impact of his excessive absences. Ms. Craven was concerned enough to refer Student to the learning center, and expressed her concerns at the SST meeting about Student's ability to make adequate progress in first grade with all his absences. The District did little to inquire why Student missed so many school days and whether his absences were related to the disabilities that Mother described to the District. While Student made adequate educational progress, the District was on

notice that he might require special education services due to his disabilities. Therefore, the District should have assessed Student during SY 2005-2006.

SY 2006-2007

30. Mother contacted Von Renner the day before SY 2006-2007 started to inform the District that Student would not start first grade due to illness. Even though Student did not attend class for several weeks, Mother did not send the District a doctor's note, and the District did not request a doctor's note. Mother stated that she mailed to Von Renner a doctor's note on September 15, 2006, which requested home-hospital instruction for one month. The doctor's note did not identify the doctor who requested home-hospital instruction, and did not give any reason why the doctor requested home-hospital instruction. The District asserted that it did not receive the note. Mother's testimony that she sent the doctor's note on September 15, 2006, is not credible as she did not recall to whom she sent the note or explain why she never contacted the District to ask why it was not providing Student with home-hospital instruction.

31. In late September and early October 2006, Ms. Arnett attempted to contact Mother by telephone, about Student's absences, but got no response. The District finally sent a school resource police officer to Student's home on October 5, 2006. In response, Mother personally brought to Von Renner a copy of the September 15, 2006 doctor's note and met with Ms. Garza and Ms. Arnett. The District subsequently agreed to immediately commence home-hospital instruction and Mother agreed to get another note from Student's doctor since the doctor's note only requested home-hospital instruction through October 15, 2006. Mother also instructed the District to contact her at her home telephone number and not the cell phone number that she had previously provided.

32. Around the same time, Student's great grandmother contacted Rick Hennes, the District's Assistant Personnel Superintendent, about Student's absences, the request for home-hospital instruction, and special education eligibility. Mr. Hennes reviewed Student's cumulative education file. Mr. Hennes observed that the SST meeting notes had items for the District to follow up and that it appeared that the District did not follow up. Mr. Hennes then set up an appointment to meet Mother at her home. They discussed Student's educational progress and need for home-hospital instruction at this meeting. Mother was providing Student with instruction during this time.

33. After the meeting, Mr. Hennes had concerns whether Student qualified for special education services. Mr. Hennes had Brett Grenz, District school psychologist, draft a proposed special education assessment plan because of Mother's request and Mr. Hennes's concern that Student may require special education services due to medical problems. On October 12, 2006, Mr. Grenz prepared a plan to assess Student in areas of academics, social-emotion, behavior, psychomotor development, communication development, cognitive abilities, health, OT and APE. On October 16, 2006, Mr. Hennes and Faith Sunde, a first grade teacher at Von Renner assigned to provide Student with home-hospital instruction, went to Student's home. Mr. Hennes wanted to discuss the assessment plan and Ms. Sunde sought to schedule her home-hospital instruction. Mother was not at home, so Mr. Hennes met with Mother a week later and discussed the assessment plan. However, Mother refused to sign the assessment plan because she wanted to know the results of the OT and APE assessments. Mother never told the District that the October 2006 assessment plan failed to propose to assess in all areas of suspected disability, or was in any way inadequate.

34. On October 23, 2006, Ms. Sunde started home-hospital instruction, scheduled for five hours a week. Ms. Sunde first performed benchmark academic assessments that she used with her first grade class to determine Student's abilities in the areas of math, reading, writing, and listening skills. Ms. Sunde determined that Student's abilities were commensurate with pupils in her first grade class and only his reading fluency was slightly below grade level. There was no evidence that Ms. Sunde's assessments did not accurately reflect Student's academic abilities. Following those academic assessments, Ms. Sunde provided Student with home-hospital instruction at the same level of difficulty that she taught her first grade class. Ms. Sunde also left homework for Student to complete that he would have received if he was attending her class. Ms. Sunde provided Student with 15 sessions of home-hospital instruction through November 22, 2006. Student understood the concepts Ms. Sunde presented and made adequate educational progress in all academic areas, which surprised Ms. Sunde, because Student had missed two months of first grade.

35. Home-hospital instruction stopped after the November 22, 2006 session because of a dispute between the District and Mother regarding the duration of home-hospital instruction, and what type of documentation Mother needed to provide. On October 18, 2006, Mother gave the District a note from Dr. Lenser that merely stated that Student was to remain on home-hospital until medically stable. Dr. Lenser did not provide any explanation why Student needed to remain on home-hospital instruction. The District did not want to continue home-hospital instruction because home-hospital instruction was only to be temporary. Mother attempted to return Student to Von Renner on November 30, 2006, after the District informed Mother that it needed another doctor's note to continue home-hospital instruction or else needed Student to return to school. The District did not allow Student to return to Von Renner because

Mother did not supply a doctor's note that Student did not have a contagious infection or illness.

36. The District met with Mother on December 18, 2006, to discuss with her the results of the OT and APE assessments, home-hospital instruction and the District's proposed assessment plan. Mr. Stevenson and Mr. Couture also attended and presented their findings about their SY 2005-2006 evaluations.

37. Unfortunately, Ms. Garza created confusion regarding whether this was an IEP meeting, because she used an IEP meeting notice form to notify the participants of the December 18, 2006 meeting, and kept meeting notes on a form titled "IEP Team Meeting Comments." Because the District labeled the December 18, 2006 meeting an IEP meeting and documents presented in August 2005 referred to the IDEA, Mother reasonably expected that the participants would discuss Student's eligibility for special education services.

38. At the meeting on December 18, 2006, Mr. Couture stated that Student qualified for APE services, but that he was not making any recommendation whether Student qualified for special education services. Although not discussed at the meeting, the District does provide APE services to Students who are not eligible for special education services. Mr. Stevenson presented the findings of his OT screening and stated that his screening did not indicate a need for further testing because Student did not exhibit significant OT deficits. There was not evidence presented at hearing that Student's gross and fine motor skills had changed from Mr. Couture's and Mr. Stevenson's evaluations during the prior school year.

39. The District also explained at this meeting that home-hospital instruction was for a temporary disability and that the District needed a new doctor's note every 30 days requesting home-hospital instruction. The District required that the note explain why Student needed home-hospital instruction and that he was not contagious. Finally,

the District gave Mother another assessment plan. Mother stated at the meeting that she was going to take the assessment plan home to review. Mother did not agree that she needed to submit a new note from Student's doctor every month, pointing to the doctor's statement that Student required home-hospital instruction until released. During the remainder of the SY 2006-2007, the District made two additional attempts to obtain Mother's consent to assess Student, but she never consented to the proposed assessment.

40. Mother did not sign any of the District's proposed assessment plans due to the dispute she had with the District regarding home-hospital instruction. Additionally, Mother believed that the OT and APE assessments and the medical documentation she already provided were sufficient to qualify Student for special education services. Mother did not provide to the District any doctor's note that explained why Student required home-hospital instruction through the end of the school year. Dr. Lenser's June 1, 2007 note stated that Student required home-hospital instruction due to encopresis.⁶

41. At the start of SY 2006-2007, the District failed to present Mother with a special education assessment plan despite Student's continued absences and the District's concern about the impact of these absences on his ability to make adequate educational progress. However, the District remedied its failure when Mr. Hennes presented Mother with a proposed assessment plan in October 2006. Mother did not sign the assessment plan because of her dispute with District regarding its failure to report the findings of the OT and APE assessments, and later due to the dispute

⁶ Encopresis is the inability to control one's bowel movements and can lead to toileting accidents. Encopresis is related to constipation and a child's inability to have regular bowel movements (<http://www.mayoclinic.com/health/encopresis/DS00885>.)

regarding home-hospital instruction. Mother's refusal to sign the assessment plans prevented the District from finding out if Student qualified for special education services, including home-hospital instruction.

42. Finally, the evidence did not establish that Student qualified for special education services. While Ms. Sunde taught Student for a limited time, he made adequate progress at grade level work and did not display any learning disability. Regarding Student's absences, there was no medical testimony that Student had a medical condition that prevented his school attendance. Additionally, Dr. Lenser's June 1, 2007 note contained no explanation why Student's encopresis prevented him from attending school. Finally, Mr. Couture's and Mr. Stevenson's findings established that Student's gross and fine motor deficits did not prevent Student from accessing the general education curriculum with regular education resources.

CONCLUSIONS OF LAW

BURDEN OF PROOF

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528], the party who filed the request for due process has the burden of persuasion at the due process hearing. Student filed for this due process hearing and bears the burden of persuasion by the preponderance of the evidence.

DID THE DISTRICT DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) IN THE 2005-2006 AND 2006-2007 SY BY FAILING TO ASSESS TIMELY STUDENT FOR SPECIAL EDUCATION ELIGIBILITY, INCLUDING FAILURE TO ASSESS IN THE AREAS OF OT AND APE?

2. Student asserts that the information that Mother provided to the District before the start of SY 2005-2006 necessitated that the District assess Student for eligibility to receive special education services. Student also contends that the District's

conduct at the August 15, 2005 meeting gave Mother the impression that it would conduct a special education assessment. Further, Student contends that his excessive absences due to illness put the District on notice that Student may require special education services. The District asserts that, based on the information it possessed, it did not have to assess Student because he made adequate educational progress. Additionally, the District asserts that the law requires it to exhaust regular education resources before referring Student for special education services.

3. Under both the federal IDEA and state law, students with disabilities have the right to a free appropriate public education. (20 U.S.C. § 1400; Ed. Code, § 56000.)⁷ The term “free appropriate public education” means special education and related services that are available to the student at no charge to the parent or guardian, that meet the state educational standards, and that conform to the student’s individualized education program. (20 U.S.C. § 1401(9).) A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.)

4. Pursuant to California special education law and the IDEA, school districts have an affirmative, ongoing duty to identify, locate, and evaluate all children with disabilities residing within their boundaries. (20 U.S.C. § 1412(a)(3); Ed. Code, § 56300 et seq.) The district’s duty is not dependent on any request by the parent for special education testing or referral for services. (Ed. Code, § 56300.) In addition, the district must develop and implement “a practical method” to locate those individuals. (Ed. Code, § 56301.) A district’s obligation to identify, locate, and assess applies to “children who are suspected of being a child with a disability . . . and in need of special education, even

⁷ All statutory citations to the Education Code are to California law, unless otherwise noted.

though they are advancing from grade to grade.” (34 C.F.R. § 300.125, subd. (a)(2)(1999); 34 C.F.R. § 300.111(c)(1)(2006)⁸.)

5. A district’s child find obligation toward a specific child is triggered where there is knowledge of, or reason to suspect a disability, and reason to suspect that a student may need special education services to address that disability. (*Dept. of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194 (hereafter “*Cari Rae S.*”).) The threshold for suspecting that a child has a disability is relatively low. (*Cari Rae S., id.*, at p. 1195.) A district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

6. A child’s parents, the state educational agency, other state agency, or the LEA, may request an initial evaluation of a child for purposes of determining his or her eligibility for special education services. (20 U.S.C. § 1414(a)(1)(B).) If a child is referred for assessment, the school district is obligated to develop a proposed assessment plan within 15 calendar days of the referral for assessment, unless the parent agrees in writing to an extension. (Ed. Code, § 56043, subd. (a).) A parent shall have at least 15 calendar days from the receipt of the proposed assessment plan to arrive at a decision whether to consent to the assessment plan. (Ed. Code, § 56043, subd. (b).) An IEP required as a result of an assessment of a student must be developed within a total time not to exceed 60 calendar days from the date the school district received the parent’s written consent to assessment, unless the parent agrees to extend these timeframes in writing. (Ed. Code, § 56043, subd. (f)(1).) All referrals for special education and related services shall initiate the assessment process and shall be documented. (Cal. Code Regs., tit. 5, § 3021, subd. (a).)

⁸ 2006 federal regulations became effective October 13, 2006.

7. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034] (*Rowley*), the Supreme Court recognized the importance of adherence to the procedural requirements of IDEA. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE. (Ed. Code, § 56505, subd. (f)(1).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) However, pursuant to 20 United States Code section 1415(f)(3)(E)(ii), a procedural violation of IDEA does not deny the student FAPE unless it 1) impedes the student's right to FAPE; 2) significantly impedes a parent's opportunity to participate in the educational decisionmaking process; or 3) causes a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (hereafter *Target Range*).

8. As determined in Factual Findings 10 through 14, Mother did not request that the District conduct an assessment for special education because the District's actions at the August 15, 2005 meeting gave her the impression that the District was going to assess Student for eligibility for special education services. At the August 15, 2005 meeting, the District did not explain the difference between Section 504 and the IDEA, and Mother's rights under each section. Additionally, Ms. Hamera drafted an assessment plan using a form designed for assessments conducted under the IDEA, and wrote on the form that District representatives and Mother would get together on November 5, 2005, to discuss the findings of the District's OT and APE assessments. However, that meeting never occurred. (Factual Finding 19.) The District's actions prevented Mother from requesting an assessment because the District gave Mother the impression that it was conducting an assessment to determine Student's eligibility for

special education services. Additionally, the District prevented Mother from participating in the education decisionmaking process by providing incorrect information.

9. The District asserted that pursuant to Education Code section 56303 that it need not assess Student for special education eligibility because Student was making adequate educational progress. Further, the District contends that it must exhaust regular education resources before assessing Student. However, the District's position is not persuasive. The law requires the District to seek and serve pupils who may require special education services and the fact that Student made adequate educational progress is not a valid reason not to assess Student. (*Cari Rae S., supra*, 158 F.Supp.2d at 1196-1197; 34 C.F.R. § 300.125, subd. (a)(2)(1999); 34 C.F.R. § 300.111(c)(1)(2006).) Further, the District's position could lead to unreasonable delays regarding when a LEA assesses a pupil and starts providing needed special education services as the LEA tries one regular education resource after another.

10. In this case, the District knew at the beginning of SY 2005-2006 that Student had multiple disabilities that could qualify him for special education services, plus receiving outside OT and PT services from CCS. (Factual Findings 5-9, 19, 21, 22 and 29.) Also, pursuant to Factual Findings 20 through 22, Student missed nearly half of the first 120 days of kindergarten with little inquiry by the District until it convened a SST meeting on May 3, 2006. Further, Ms. Hamera never followed up to find out the results of the OT and APE evaluations. Further, as determined in Factual Finding 23, Ms. Craven expressed concern about Student's progress due to his absences when she referred him to the learning center for additional assistance, and concern about his ability to make adequate educational progress during first grade at the SST meeting. Finally, the District's own home-hospital policy states that the District should conduct a special education assessment if the pupil has a permanent disability or illness. (Factual Finding 21.) The District did not offer to formally assess Student until October 16, 2006, when

Mr. Hennes presented the proposed assessment plan to Mother, which addressed Student's areas of suspected disability. (Factual Finding 33.) Therefore, the District failed to meet its child find duties because it did not refer Student for a special education assessment until October 16, 2006, even though it knew that Student might require special education services due to his excessive illnesses related to his disabilities.

DID THE DISTRICT DENY STUDENT A FAPE IN SY 2005-2006 AND SY 2006-2007 BY FAILING TO QUALIFY STUDENT FOR SPECIAL EDUCATION SERVICES OR PROVIDE STUDENT WITH SPECIAL EDUCATION SERVICES, INCLUDING FAILING TO PROVIDE HOME-HOSPITAL INSTRUCTION AND AIDE SUPPORT FOR STUDENT'S TOILETING DIFFICULTIES?

11. Student asserts that he is eligible for special education services under the categories of specific learning disability, other health impairment and orthopedic impairment because he has cerebral palsy and toileting problems, which interferes with his ability to participate in classroom instruction. Also, Student contends that his susceptibility to illness prevents him from accessing the curriculum due to his excessive absences and need to prevent illness when he is at school. Finally, Student argues that the District's APE assessment establishes his special education eligibility. The District asserts that Student does not qualify for special education services because he made adequate educational progress during kindergarten and that Student did not meet his burden of persuasion.

12. A student is eligible for special education if the student is a "child with a disability," and "who, by reason thereof, needs special education and related services." (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1) (2006); Ed. Code, § 56026, subds. (a) & (b).) A child is not considered a "child with a disability" under the IDEA if it is determined that the child only needs a "related service and not special education." (34 C.F.R. § 300.8(a)(2)(i) (2006).) Additionally, the child's impairment must require instruction and

services that cannot be provided with modification of the regular education program. (Ed. Code, § 56026, subd. (b).)

13. A child with a specific learning disability, who requires special education services as a result, is eligible for special education services. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a) (2006); Ed. Code, § 56026.) A specific learning disability is a disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language, which manifests itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. (20 U.S.C. § 1402(30)(A); 34 C.F.R. § 300.8(c)(10) (2006); Ed. Code, § 56337, subd. (a).) A specific learning disability includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (20 U.S.C. § 1402(30)(B); 34 C.F.R. § 300.8(c)(10)(2006); Ed. Code, § 56337, subd. (a).) A specific learning disability does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, mental retardation, emotional disturbance, or environmental, cultural or economic disadvantage. (20 U.S.C. § 1402(30)(C); 34 C.F.R. § 300.8(c)(10) (2006); Ed. Code, § 56337, subd. (a).)

14. A student is eligible for special education as a child with other health impairments if the child has limited strength, vitality or alertness, due to chronic or acute health problems, including but not limited to a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, severe asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases, and hematological disorders such as sickle cell anemia and hemophilia, which adversely affects a pupil's educational performance. (Cal. Code Regs., tit 5, § 3030(f).)

15. A student is eligible for special education services as a child with an orthopedic impairment if the child "has a severe orthopedic impairment which adversely affects the pupil's educational performance. Such orthopedic impairments include

impairments caused by congenital anomaly, impairments caused by disease, and impairments from other causes.” (Cal. Code Regs., tit 5, § 3030(e).)

16. Education Code section 48206.3, subdivision (a) provides that a school shall provide individual instruction to a pupil who has temporary disability that makes attendance in the regular day classes or alternative education program impossible or inadvisable. A “temporary disability” is:

a physical, mental, or emotional disability incurred while a pupil is enrolled in regular day classes or an alternative education program, and after which the pupil can reasonably be expected to return to regular day classes or the alternative education program without special intervention. A temporary disability shall not include a disability for which a pupil is identified as an individual with exceptional needs pursuant to Section 56026.

(Ed. Code, § 48206.3, subd. (b)(2).)

17. To date, no assessment has been conducted that established Student’s eligibility for special education services. Regarding eligibility under the category of other health impairment due to Student’s health and toileting problems, there was no direct evidence that these problems adversely affected his academic performance. The evidence established for SY 2005-2006 that the District was able to adequately address Student’s toileting problems with the IHP. (Factual Findings 13 and 30.) While Student had health problems during SY 2005-2006 and SY 2006-2007, the evidence did not establish that his health problems qualified him for special education services under the category of other health impairment. (Factual Findings 26-29.)

18. Regarding eligibility under the category of orthopedic impairment, the District's APE assessment did not establish that Student required special education services under the category of orthopedic impairment. As determined in Factual Findings 16 and 17, the assessment only showed that Student required accommodations to safely participate in his class's physical education instruction. While Student's scores on the TGMD-2d were below average, part of the reason that Student's scores were depressed was related to his lack of exposure to some of the activities tested. Therefore, Student's scores should improve with additional exposure to physical education activities. Student did have gross motor deficits as indicated in the APE assessment, but he was only a year behind. (Factual Finding 17.) Additionally, Student did not have difficulty getting around Ms. Craven's classroom or the playground. Regarding Student's fine motor skills, while he had difficulty with zippering and buttoning his clothes during kindergarten, his handwriting was excellent and no evidence presented that he could not perform fine motor tasks such as using scissors. (Factual Findings 16 and 18.) Therefore, the District's APE and OT assessments did not establish that Student qualified for special education services as a child with orthopedic impairment.

19. While Student displayed some problems in kindergarten in grasping new concepts, difficulty in independently performing academic tasks and following prompts, Student's problems were not unusual for a kindergarten student. (Factual Findings 26 and 27.) Student lacked some basic skills in learning with group instruction because he had not attended preschool and his educational experience was through one-to-one instruction from his Mother. Student did not establish that he had a processing disorder. Further, as Student became more comfortable in Ms. Craven's classroom, and with the additional assistance from Mr. Grenz, Student grasped better the kindergarten curriculum and was at grade level at the end of kindergarten despite missing 60 out of

180 days of school. (Factual Finding 28.) Finally, Student was at grade level when Ms. Sunde tested him. (Factual Finding 34.) Therefore, Student did not establish that he had a specific learning disability.

Remedies

20. IDEA empowers courts (and Administrative Law Judges) to grant requests for compensatory services as the court determines is appropriate. (*Burlington Sch. Comm. v. Massachusetts Dept. of Educ.* (1985) 471 U.S. 359.) Equitable considerations may be considered when fashioning relief for violations of the IDEA. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 16; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) An Administrative Law Judge may order an Independent Educational Evaluation (IEE) as an equitable remedy against a school district that failed to comply with its child find obligations for a student who is no longer the responsibility of the offending district. (*Los Angeles Unified Sch. Dist. v. D.L.* (C.D. Cal. 2008) 2008 U.S. Dist. Lexis 21692, pp. 16-20.) Finally, a parent's failure to make a student available for an assessment may limit the remedy for a District's failure to provide a FAPE. (See, *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315.)

21. In this case, as determined above in Legal Conclusions 8, 9 and 10, the District failed in SY 2005-2006 to timely offer to assess Student to determine if he qualified for special education services. However, the District remedied its error with its proposed assessment presented to Mother on October 16, 2006. Student provided no evidence that this or the other proposed assessment plans were not adequate. Mother's decision not to sign the proposed assessment was due to her dispute with the District regarding home-hospital instruction, not the adequacy of the District's proposed assessment plan. While Mother refused to allow the District to assess Student in SY 2006-2007, the District led Mother to believe in SY 2005-2006 that it was assessing

Student for special education eligibility. (Legal Conclusion 8). Although Student is not presently the responsibility of the District because Student attends CAVA, the District has an equitable obligation to provide Student with an IEE due to the seriousness of the District's violations in failing to assess Student during SY 2005-2006.

ORDER

1. Within 90 days of the date of this Decision, the District shall provide Student with an IEE at the District's expense in the areas of suspected disability identified in the District's April 2, 2007 assessment plan.
2. Mother shall make Student reasonably available for assessment to access the IEE.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), this 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 this statute:

Student prevailed on Issue 1 for SY 2005-2006 and through October 16, 2006. The District prevailed on Issue 1 for the time period beginning October 16, 2006, through the remainder of the 2006-2007 school year.

The District prevailed on Issue 2.

RIGHT TO APPEAL THIS DECISION

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

DATED: July 15, 2008

A handwritten signature in black ink, consisting of the letters P, A, P, C, written in a cursive style. The signature is positioned above a solid horizontal line.

PETER PAUL CASTILLO

Administrative Law Judge

Office of Administrative Hearings