

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

KONOCTI UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2009070974

DECISION

Administrative Law Judge Peter Paul Castillo, Office of Administrative Hearings (OAH), State of California, heard this matter in Lower Lake, California, on December 14 through 16, 2009, and January 12, 2010.

Nancy W. Ryan, Attorney at Law, represented Student. Student's mother and stepfather (Parents) were present during the hearing. Student was not present.

John Drummond, Attorney at Law, represented the Konocti Unified School District (District). Patty Langston, the District's Director of Educational Support Services, was present during the hearing on behalf of the District.

Student filed his due process request (complaint) on July 27, 2009. On September 16, 2009, the hearing was continued. The October 15, 2009 Prehearing Conference Order bifurcated Student's case so OAH could first decide the issue related to the statute of limitations, which was heard on October 27, 2009. On November 12, 2009, OAH issued a decision that denied Student's request to toll the two-year statute of limitations, and limited the issues for hearing. The hearing re-commenced on December 14, 2009. At the close of the hearing, the matter was continued to January 29, 2010, for the submission of closing briefs. On January 27, 2010, OAH granted Student's request to

extend the time for the parties to file their closing briefs until February 8, 2010. The parties submitted their closing briefs on February 8, 2010, and the matter was submitted for decision.<sup>1</sup>

## ISSUES

1. Did the District deny Student a free appropriate public education (FAPE) in School Year (SY) 2007-2008 by failing to:

- a) Meet its "child find" obligation by not assessing Student for eligibility to receive special education services?
- b) Qualify Student for special education services under the eligibility category of other health impairment (OHI), and to provide him with special education services?

## PROPOSED REMEDY

Student requests an order that the District failed to perform its child find duties by not timely assessing Student for eligibility to receive special education services, and by failing to qualify Student for special education services under the category of OHI. Student requests compensatory education for the District's failure to comply with its child find duties and failure to find Student eligible for special education services.

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<sup>1</sup> To maintain a clear record, the closing briefs have been marked as exhibits. Student's brief has been marked as Exhibit S-16, and District's brief has been marked as Exhibit D-20.

## CONTENTIONS OF PARTIES

Student asserts that the District knew at the start of SY 2007-2008 that it needed to assess him for eligibility to receive special education services because of Student's attention deficits, emotional outbursts and defiance of authority related to his attention deficit hyperactivity disorder (ADHD),<sup>2</sup> which impeded his ability to make appropriate educational progress. Student also asserts that he qualifies for special education services under the category of OHI because his qualifying disability, ADHD, caused Student to have limited alertness that prevented him from completing his class work and complying with classroom instructions. Additionally, his classroom outbursts led to numerous disciplinary referrals, and he required special education services to make adequate educational progress.

The District asserts that it did not have to assess Student for special education eligibility because Student made adequate educational progress with modifications and accommodations in a general education program. Specifically, during SY 2007-2008, the District implemented a plan under Section 504 of the Rehabilitation Act of 1973 (504 Plan),<sup>3</sup> which included services from the District's social skills program, and addressed

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<sup>2</sup> The medical documentation presented at hearing used both the terms ADHD and attention deficit disorder (ADD) as Student's diagnosis.

<sup>3</sup> 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.

Student's attention deficits and emotional outbursts, which permitted Student to make adequate educational progress.

## PRELIMINARY ISSUE

After the close of the hearing, the District filed a motion to dismiss the case on the grounds that Student's claims against the District were moot because Student left the District at the conclusion of SY 2007-2008. The District relies on *C.N. v. Willmar Public Schools, Ind. Sch. Dist. No. 347* (8th Cir. 2010) \_\_ F.3d. \_\_, 2010 WL 27047, in which the Court of Appeals upheld the dismissal of a student's Individuals with Disabilities Education Act (IDEA) claim against the school district as being moot because student did not file a due process hearing request until after the student enrolled in a new school district. The court relied on prior precedent in the Eighth Circuit, *Thompson v. Bd. of Special Sch. Dist. No. 1* (8th Cir. 1998) 144 F.3d 574 (*Thompson*) in dismissing student's IDEA claims.

However, in *Alexis R. v. High Tech Middle Media Arts Sch.* (S.D.Cal. 2009) 2009 WL 2382429, at \*7 (*Alexis R.*), the only California special education decision that cites *Thompson*, its reasoning was rejected. *Alexis R.* held that although the student had left the district, student's IDEA claims were not moot because student was seeking compensatory education for the school's purported failure to provide student with a FAPE. *Alexis R.* held that student's claims were not moot because the requested compensatory education could be provided even though the school was no longer responsible for providing student with special education services.

In this matter, Student requests compensatory education services for the District's purported failure to timely assess him for eligibility for special education services and for not providing Student with special education services. Although Student enrolled in a new school district for SY 2008-2009 that found him eligible to receive special education services and provided these services to Student, Student asserts that the District should

have provided these services during SY 2007-2008 and that the District owes him compensatory education. Therefore, relying on *Alexis R.*, Student's request for compensatory education is not moot and the District's motion to dismiss is denied.

## FACTUAL FINDINGS

### JURISDICTION AND BACKGROUND

1. Student is a 10-year-old boy who resides with Parents within the geographical boundaries of the District, and is in the fifth grade for SY 2009-2010. During SYs 2004-2005, 2005-2006, 2006-2007 and 2007-2008, Student attended Lower Lake Elementary School (Lower Lake) within the District. For SY 2008-2009, Student attended school in the Benicia Unified School District (BUSD). BUSD found Student eligible for special education services. At present, Student attends school in another district pursuant to an interdistrict transfer.

### CHILD FIND

2. 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 had an obligation to assess him. The relevant inquiry is whether the local education agency should assess the child, not whether the student will ultimately qualify for services.

3. Student contends that Student's behavioral problems related to his ADHD put the District on notice that Student might require special education services. The District asserts that it did not have any reason to assess Student because he made

adequate educational progress despite his behavioral difficulties, and it met his needs with regular educational resources.

#### Prior School Years and First Trimester of SY 2007-2008

4. In June 2004, Mother enrolled Student in kindergarten, and completed a registration application. During the registration process, Mother informed the District that Student had been diagnosed with ADHD and had asthma. Mother spoke to Lower Lake Principal Greg Mucks before the start of SY 2004-2005 about Student's ADHD and behavioral problems in preschool. The District acknowledged that it knew of Student's ADHD diagnosis during all times relevant to this matter.

5. During SYs 2004-2005, 2005-2006 and 2006-2007, the District disciplined Student several times for emotional outbursts against his teachers and for hitting his classmates. Mr. Mucks was aware of these incidents, and had numerous contacts with Mother to discuss these incidents. During SY 2005-2006, Mr. Mucks switched Student to a different first grade classroom because of his conflicts with his teacher. However, during SY 2006-2007, Student had only three disciplinary referrals, and got along well with his second grade teacher. His report card reflected excellent academic progress as Student met or exceeded grade-level standards in all language arts and mathematics areas. Therefore, based on Student's academic progress and lack of disciplinary referrals, the District was not on notice at the start of SY 2007-2008 that Student might require special education services to access the school curriculum.

6. For third grade, SY 2007-2008, Student's teacher was Dawn Felperin. Mr. Mucks informed Ms. Felperin of Student's ADHD and behavior problems and told her that Student was a very bright child. From the start of SY 2007-2008, Student received disciplinary referrals for conduct during recess, such as improper use of equipment and hitting or harassing classmates, and for being defiant and arguing with school staff who attempted to intervene and discuss the incident with Student. There

were a couple of incidents of in-class defiance in which Student refused to follow Ms. Felperin's instructions and talked back to her. From the start of the school year through the December break, Student received seven discipline notices and three school detentions.

7. Despite Student's disciplinary referrals, he made adequate progress in his academic subjects during the first trimester of SY 2007-2008, which ended in November 2007. Student had progressed in language arts, reading, writing and mathematics, with reported levels of basic, proficient or advanced in all areas. Student's citizenship and study habits in class were satisfactory, and he regularly completed his homework. Student had already exceeded the reading fluency for the third grade by the end of the first trimester.

8. During the first trimester, Ms. Felperin could easily redirect Student back to a task with simple requests. Student would occasionally walk around the class, stand by his desk or sit on the floor, instead of sitting in his desk. Ms. Felperin would allow Student to do this provided he was quiet and not disturbing the class.

9. At the start of second trimester, Student stopped bringing his math homework to class daily. Student told Ms. Felperin that he did not want to do his math homework. Ms. Felperin informed Mother of Student's failure to turn in his math homework, and still Student did not bring his homework to school. Student also did not regularly submit his language arts homework.

#### January 17, 2008 Student Study Team Meeting

10. After the first semester, Student's in-class defiance began to increase as he refused to complete work and follow classroom instructions. Ms. Felperin noticed that Student's anger increased as the school year progressed, and that she could not redirect him as easily. Student disrupted the class regularly, and argued with Ms. Felperin. Ms. Felperin discussed Student's in-class behaviors and disciplinary referrals with

Mr. Mucks and Gavin Huffmaster, Lower Lake's vice-principal. Because of Student's escalating behavior problems, Ms. Felperin asked Mr. Huffmaster to have the District hold a student study team (SST) meeting to discuss Student's increasing behavioral problems.

11. The District convened the SST meeting on January 17, 2008. Parents attended along with Mr. Mucks, Mr. Huffmaster, Ms. Felperin and two District education specialists. During the SST meeting, the participants discussed different strategies to improve Student's school behavior, including developing a 504 Plan because of Student's ADHD. In the middle of the meeting, a District representative left the meeting and got Richard Savarese, Ph.D., a District educational consultant, and school psychologist, Lucas Madrzyk, to attend the meeting. Before this SST meeting, neither Dr. Savarese nor Mr. Madrzyk had met Student or been informed about his behavioral problems.

12. Dr. Savarese was invited to attend the SST meeting because he had developed the District's social skills academy, and was the program consultant for it. The District developed the social skills academy to work primarily with general education students who had behavioral problems that were interfering with their education and had a SST referral. The District implemented the social skills academy during SY 2006-2007 at its elementary schools. The social skills academy did have a few special education students during SY 2006-2007 and SY 2007-2008. The social skills academy worked to improve the student's social skills, increase on-task behaviors during class, and give students different strategies to manage their own behaviors, such as when they became frustrated or angry. Each campus had a behavioral aide, trained by Dr. Savarese, who worked with 10 to 12 children under the supervision of Dr. Savarese and the school psychologist assigned to the campus. Barbara Hooton was the behavioral aide for Lower Lake. The behavioral aide had a classroom where the students could drop in if necessary



and where she could work on their social skills and behavioral strategies. The behavioral aide also made unannounced visits to the students' classrooms to observe their behavior. Students earned points for being on-task during class that they could redeem for prizes. The District believed this program might be beneficial for Student to help decrease his behavioral problems.

13. Dr. Savarese described the program to Parents during the January 17, 2008 SST meeting, and it was incorporated into Student's 504 Plan. Besides the social skills academy, the 504 Plan included having Student attend a weekly enrichment activity, such as a science project in another class, and improving communication between Ms. Felperin and Mother with a weekly phone call. The District agreed, as part of the 504 Plan, to change Student's seating in the classroom to the back of the class, which would allow him to stand and wander. The District also developed a "time out" plan for Student to go to the office or Ms. Hooton's room to deescalate, rather than disciplining him. Student was also referred to a school counselor for weekly counseling sessions. Parents consented to the 504 Plan. Parents did not request at this SST meeting, or any time during this school year, that the District assess Student for eligibility to receive special education services.

#### Social Skills Academy Assessments

14. As part of the social skills academy, the District conducted formal and informal assessments of participating students to gather information regarding their academic abilities and behavioral deficits. Mother consented to the District's request to conduct formal and informal assessments, which the District began in late January 2008.

15. Ms. Felperin subsequently completed a survey regarding Student's academic, social, and behavioral skills and deficits. The survey indicated that Student had trouble staying on task, was easily frustrated, had trouble using anger management skills, was impulsive and frequently disrupted the classroom. Dr. Savarese administered

portions of the Wide Range Achievement Test, Third Edition (WRAT-3d) to gather information regarding Student's academic abilities, and found Student to have grade-level abilities. Dr. Savarese also reviewed Student's educational records as part of the preparation for Student's entry into the social skills academy.

16. Dr. Savarese has extensive experience working with regular and special education students, and has been an educational psychologist for nearly 40 years. Dr. Savarese has participated in numerous individualized education program (IEP) meetings on behalf of school districts and students as part of his private practice. Dr. Savarese has also taught college-level courses on behavior management.

17. Dr. Savarese also gave Mother the Behavior Assessment System for Children, Second Edition (BASC-2d) questionnaire to obtain further information regarding Student's behavior deficits and strengths, and he observed Student at school. Mother's responses to the questionnaire were consistent for a child with ADHD and showed that Student had attention deficits, impulsivity, overreacted when faced with a problem, and required a lot of attention from adults. Mother also expressed concerns about Student's low self-esteem, which Dr. Savarese noted is also present with ADHD children. At the time of these informal assessments, Student was taking Ritalin to improve his attentiveness because of his ADHD.

18. Based on the information Dr. Savarese and Ms. Hooton obtained during the informal assessments and review of Student's educational records, Dr. Savarese did not believe that Student required special education services when he entered into the social skills academy. Dr. Savarese based his opinion on the fact that, despite Student's behavioral difficulties, Student made adequate educational progress as shown by his test scores and grades.

19. Student did not establish that by the end of January 2008, the District needed to assess him for eligibility to receive special education services. Although

Student had behavioral problems that led to the SST meeting and social skills academy referral, Student was still making adequate educational progress. Student's behavioral deficits related to his ADHD were not so significant as to indicate that he might require special education services. The District appropriately decided to implement general education supports and services through the 504 Plan and social skills academy to see if the District could ameliorate Student's behavioral deficits.

#### Implementation of the 504 Plan and Social Skills Academy

20. In February 2008, as part of the social skills academy program, Student attended a social skills support group led by Ms. Hooton once a week. Additionally, Student had a chart on his desk where the teacher, Ms. Hooton or any District personnel could note Student's positive behavior. Ms. Hooton developed an individual support plan to reduce Student's in-class disruptions and to increase his ability to remain on-task in class by having Student follow classroom instructions and be respectful to adults and peers. Ms. Hooton did not discuss the individual support plan with Mother, nor have it incorporated into Student's 504 Plan. Ms. Hooton did implement the individual support plan.

21. Ms. Hooton implemented a ticket reward system in which Student would receive tickets that he could redeem for prizes based on his on-task behaviors in class. Ms. Hooton awarded tickets based on her in-class observations and information on the chart on Student's desk where his positive behaviors were recorded. Twice a day, Ms. Hooton visited the classrooms of all students in the Lower Lake social skills academy for approximately five to 25 minutes, to observe, provide assistance if needed to the teacher, and implement the ticket reward system. Outside of her classroom observations, Ms. Hooton saw Student several times a day as he visited her room during recess and for outings, such as a weekly music lesson taught by high school students.

22. Student was motivated to earn tickets for on-task behaviors and earned several rewards, such as a basketball and a guitar. Student was required to plan because he had to save his tickets to earn these rewards. Ms. Hooton noticed that Student would improve his in-class behaviors if Student observed her coming into Ms. Felperin's classroom. Student interacted appropriately with his peers during the social skills group and during the outings with Ms. Hooton and the other social skills academy participants. Mr. Madrzyk observed the social skills academy participants, including Student, every other week for approximately 20 minutes. Like Ms. Hooton, Mr. Madrzyk noted that Student improved his behavior when he noticed Mr. Madrzyk's presence.

23. As part of the 504 Plan, Student saw a school counselor approximately every week to work on strategies to improve his behaviors and control his emotions. Additionally, Dr. Savarese met with Student in Ms. Hooton's room, observed Student, and made suggestions to Ms. Hooton to help improve Student's behaviors at school.

24. Despite the 504 Plan and participation in the social skills academy, Student continued to have numerous disciplinary referrals for harassing and hitting other students, and for defying Ms. Felperin in class and other District personnel who attempted to resolve playground incidents. Student would swear at Ms. Felperin, and became increasingly agitated when reminded that he had to follow the school rules that applied to all students. Student received nine disciplinary referrals, which led to two school suspensions and two school detentions after the January 17, 2008 SST meeting through the end of the school year.

25. In addition to the disciplinary referrals, Ms. Felperin asked Ms. Hooton to come to her classroom several times to assist her in calming Student because of his in-class agitation. Mr. Madrzyk was also called to Ms. Felperin's class on a couple of occasions due to Student's behavior. Student calmed down when he saw Ms. Hooton and Mr. Madrzyk entering the classroom. Additionally, as permitted by the 504 Plan,

Student left Ms. Felperin's classroom with permission and went to Mr. Huffmaster's office to deescalate and then returned on his own to Ms. Felperin's classroom.

26. Student was still not completing and turning in his homework after the implementation of the 504 Plan and his entrance into the social skills academy. However, even with his failure to complete his homework and in-class disruptions, Student still made adequate educational progress at the conclusion of the second trimester, which ended in March 2008. Student exceeded the grade-level reading standards and his written work approached or met grade-level standards. In contrast, Student did not make as much progress in mathematics. However, Student was still approaching state standards in algebraic functions, number sense, geometry and problem-solving, and on District's mathematics assessments.

27. Student's frustration and defiance was focused on Ms. Felperin. Additionally, Mother became increasingly frustrated with Ms. Felperin. Dr. Savarese observed Mother "badmouthing" Ms. Felperin in front of Student. The tension between Mother and Ms. Felperin became so great that the District modified the 504 Plan on April 3, 2008, to replace Ms. Felperin's weekly phone calls to Mother with written daily communication between Ms. Felperin and Mother. Eventually, on May 5, 2008, the District switched Student's classroom at the request of Parents.

28. Student next attended the third grade classroom of Linda Mock. Student continued to have behavioral problems in Ms. Mock's classroom. In one incident, Student refused to come back to class after lunch for math and screamed at Ms. Mock. In another incident, Student disrupted the classroom by calling classmates offensive names and yelling across the class. Finally, at the close of the school year, Student would not settle down and stay seated. He kicked the classroom's door and yelled at people who walked by the class. During the last two incidents, Student asked to see Ms.

Hooton. There is no indication that Student's homework completion improved in Ms. Mock's classroom.

29. The end-of-the-year report card indicated that Student regressed in language arts in writing. Student's reading scores were still at or above grade-level standards. In writing, Student's writing strategies and writing applications fell from approaching grade-level standards to below basic. Student's grammar, punctuation, capitalization and sentence structure fell to approaching grade-level standards. Student did not show improvement in mathematics, as he still had not met grade-level standards. However, Student's report card did not indicate that Student was at risk of retention in third grade, and he would have progressed to the fourth grade if he remained in the District.

30. Student participated in the Standardized Testing and Reporting (STAR) testing in the Spring of 2008. However, the District did not receive the STAR test results until after the conclusion of SY 2007-2008. While the test scores showed a decline in his mathematics and reading scores compared to his second grade scores, this information was not available to the District in evaluating whether to assess Student during SY 2007-2008.

31. Mother met with Ms. Hooton, Mr. Mucks, Mr. Huffmaster, Mr. Madrzyk and Dr. Savarese on numerous occasions during the second half of SY 2007-2008 to discuss Student's progress. However, Mother never requested that the District assess Student for special education eligibility.

32. Even with the District's intensive regular education supports through the 504 Plan and social skills academy, Student's classroom defiance and conflicts with his classmates continued. However, Student demonstrated the ability to control his behavior when he saw Ms. Hooton or Mr. Madrzyk. Student had the ability to control his behavior to earn ticket reward points when observed by Ms. Hooton. Student could

control his behaviors in the presence of a preferred person, or because he wanted to earn a reward, which indicates that Student had control over his behaviors. Additionally, Student could perform classroom academics when motivated.

33. Based on their observations of Student, and from working with him during the last half of SY 2007-2008, both Dr. Savarese and Mr. Madrzyk did not believe that the District needed to assess Student for eligibility for special education services. While Student continued to have disciplinary problems, both Dr. Savarese and Mr. Madrzyk observed that Student could control his behaviors and targeted his defiance to persons who sought to enforce school rules and discipline. Therefore, both Dr. Savarese and Mr. Madrzyk established that the District need not assess Student for special education eligibility.

34. The District appropriately decided to implement general education supports and services in January 2008 to improve Student's behaviors. Although Student continued to have behavior and academic problems, they were not so significant as to require the District to assess Student for eligibility for special education services, because he could control his behaviors for a preferred adult and to earn rewards. Additionally, Student's academic difficulties, as reflected in report cards and test scores, were not so significant as to require the District to assess Student for special education eligibility.

#### After the 2007-2008 School Year

35. During the summer of 2008, Mother decided to disenroll Student from the District and move to her father's home in the BUSD because of her dissatisfaction with the District. Student's stepfather did not move. Mother enrolled Student in school in that district, and soon after SY 2008-2009 commenced, she requested that the BUSD assess Student for eligibility to receive special education services. The BUSD assessed Student and found him eligible to receive special education services under the category

of OHI on October 16, 2008. The BUSD found Student eligible due to his behavioral difficulties, such as his defiance of teachers and inability to remain on task, that were related to his ADHD, and significantly impaired his ability to access the general education curriculum without special education services.

36. Although the BUSD found Student eligible for special education services just a few months after he left the District, the BUSD's decision is not determinative in this hearing. In the four months after Student left the District, Student was uprooted from his support structure and the school he had attended for four years and placed in a new school. Student did not establish that the BUSD's finding Student eligible to receive special education services required the District to assess Student for special education eligibility in SY 2007-2008.

## LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of proof in this matter. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

### ELEMENTS OF A FAPE

2. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are



required to provide only a “basic floor of opportunity” that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) \_\_\_ F.3d \_\_\_, 2010 WL 103678, at \*\*7-12.) The Ninth Circuit has also referred to the educational benefit standard as “meaningful educational benefit.” (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149. (*Adams*).)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, 195 F.3d 1141, 1149.)

5. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in the denial of a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

## CHILD FIND DUTIES

4. Under the IDEA and California law, a school district has an affirmative, continuing obligation to identify, locate, and evaluate all children with disabilities residing within its boundaries. (20 U.S.C. § 1412(a)(3); Ed. Code, § 56300 et seq.) The duty is not dependent on any action or inaction by parents. The district must “actively and systematically seek out all individuals with exceptional needs . . . who reside in the district.” In addition, the district must develop and implement a practical method to locate those individuals. (Ed. Code, § 56301.) This “child find” obligation applies to, among others, “children who are suspected of being a child with a disability ... and in need of special education, even though they are advancing from grade to grade.” (34 C.F.R. § 300.111(a) (2006).) Accordingly, “[a] pupil shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized.” (Ed. Code, § 56303; see also, *Hood v. Encinitas Union Sch. Dist.* (9th Cir. 2007) 482 F.3d 1175, 1184 [finding student with specific learning disorder properly placed in regular education under previous version of California statute].)

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. v. Cari Rae S.* (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.) A district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

ISSUE 1(A): DID THE DISTRICT DENY STUDENT A FAPE IN SY 2007-2008 BY FAILING TO MEET ITS "CHILD FIND" OBLIGATION BY NOT ASSESSING STUDENT FOR ELIGIBILITY TO RECEIVE SPECIAL EDUCATION SERVICES?

6. Pursuant to Factual Findings 5-8, 15-19, 22, 25, 26, 27, 29, 32, 33 and 34 and Legal Conclusions 2 and 3, the District did not violate its child find duties. The District properly determined in January 2008 that it would implement general education supports through the 504 Plan and social skills academy to address Student's behavioral problems. Although Student had numerous disciplinary referrals during the school year, he made adequate educational progress. Additionally, Student demonstrated the ability to control his behaviors to earn reward points, and when a preferred adult entered the classroom. This established that not all of Students' behavioral deficits were related to his ADHD. Therefore, Student did not establish that the District needed to assess him for special education services during SY 2007-2008.

ELIGIBILITY FOR SPECIAL EDUCATION SERVICES

7. Under both California law and the IDEA, a child is eligible for special education if the child needs special education and related services by reason of mental retardation, hearing impairments, speech or language impairments, visual impairment, emotional disturbance, orthopedic impairments, autism (or autistic-like behaviors), traumatic brain injury, other health impairments, or specific learning disabilities. (20 U.S.C. §1401 (3)(A)(i) and (ii); Cal. Code Regs., tit. 5, § 3030.)

8. A pupil whose educational performance is adversely affected by a suspected or diagnosed ADD or ADHD and who demonstrates a need for special education and related services by meeting eligibility criteria in the categories of OHI, serious emotional disturbance, or specific learning disabilities, is entitled to special education and related services. (Ed. Code, § 56339, subd. (a).) A pupil is eligible under the category of OHI if the pupil has limited strength, vitality or alertness, due to chronic

or acute health problems, which are not temporary in nature and adversely affect a pupil's educational performance. (Cal. Code Regs., tit. 5, § 3030, subd. (f).) The IDEA criteria for eligibility in the category of OHI specify that limited alertness includes a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment that is due to chronic or acute health problems, such as ADHD. (34 C.F.R. § 300.8(c)(9).) For purposes of the IDEA, a "child with a disability" is one who, because of the disability, needs instruction, services, or both which cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3) (A); Ed. Code § 56026, subd. (a), (b).)

ISSUE 1(B): DID THE DISTRICT DENY STUDENT A FAPE IN SY 2007-2008 BY FAILING TO QUALIFY STUDENT FOR SPECIAL EDUCATION SERVICES UNDER THE ELIGIBILITY CATEGORY OF OHI, AND TO PROVIDE HIM WITH SPECIAL EDUCATION SERVICES?

9. Pursuant to Factual Findings 5-8, 15-19, 22, 25, 26, 27, 29, 32, 33 and 34 and Legal Conclusions 6, 7 and 8, because the District was not legally obligated to assess Student for special education eligibility, the District was not obligated to find him eligible for special education services under the category of OHI.

## ORDER

All of Student's requests for relief are denied.

## PREVAILING PARTY

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

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by 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 23, 2010

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/s/

PETER PAUL CASTILLO

Administrative Law Judge

Office of Administrative Hearings