

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

EUREKA CITY UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2010070151

DECISION

Administrative Law Judge Peter Paul Castillo (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter in Eureka, California, on September 13, 14, and 15, 2010.

Student was represented by Christian M. Knox, Attorney at Law. Student's mother and father (Parents) were present on all hearing days. Student was only present on September 14, 2010.

Eureka City Unified School District (District) was represented by Carl D. Corbin, Attorney at Law. Lee Ann Lanning, District Assistant Superintendent, attended all hearing days.

Student filed his due process request (complaint) on July 1, 2010. On July 21, 2010, the parties requested and received a continuance of the hearing dates. At the close of the hearing, the matter was continued to September 27, 2010, for submission of

closing briefs. The parties submitted their closing briefs on September 27, 2010, and the matter was submitted for decision on September 27, 2010.¹

ISSUES²

Issue 1: Did the District deny Student a free appropriate public education (FAPE) from January 14, 2010, through the end of the extended school year (ESY) 2010 by failing to:

- a. Develop an appropriate behavior support plan (BSP) and behavior goals?
- b. Provide appropriate reading services?
- c. Conduct an occupational therapy (OT) assessment?
- d. Conduct an assistive technology (AT) assessment?
- e. Provide appropriate AT services?
- f. Provide audio textbooks?
- g. Provide appropriate accommodations, including a note taker?
- h. Provide appropriate services during ESY 2010?

¹ To maintain a clear record, the closing briefs have been marked as exhibits. Student's brief has been marked as Exhibit S-19, and the District's brief has been marked as Exhibit D-30.

² These issues are those framed in the September 9, 2010 Order Following Prehearing Conference and as further clarified at hearing. The ALJ has reorganized the issues for this Decision.

PROPOSED REMEDY

As a proposed remedy, Student requests an order for the District to fund independent AT and OT assessments, and convene an individualized education program (IEP) meeting to discuss the assessment recommendations and goals in the area of task completion and self-advocacy, and develop a behavior support plan. Student also seeks compensatory education in the form of tutoring, and Parental reimbursement for costs of privately procured Lindamood-Bell services.

CONTENTIONS OF PARTIES

Student argues that the District failed to offer him behavioral goals and a BSP, even though the District admits that he requires these to make meaningful educational progress. Student also asserts that the District denied him a FAPE by failing to provide the agreed upon Reading Excellence: Word Attack and Rate Development Strategies (REWARDS) program as the District delivered the program in a group of five to six students, while Student needed the program to be delivered with no more than one other student. Student asserts that the District did not timely offer to conduct an OT or AT assessment. Student also contends that he requires classroom note taker and AT services, such as audio textbooks, to make meaningful educational progress, which the District did not provide. Finally, Student asserts that the District failed to make a legally sufficient offer of special education services for the 2010 ESY, or in the alternative that the District's offer was not adequate to address his reading deficits.

Regarding the behavioral goals and BSP, the District contends that it attempted to develop these, but were thwarted by Parents' refusal to cooperate during the individualized education program (IEP) process, and that the Parents failed to cooperate in the development of the OT and AT assessment plans. The District asserts that it properly implemented the REWARDS program as the program is designed and that

Student made meaningful educational progress during the times that he decided to attend the program. Finally, the District asserts it provided Student with a note taker as required by the December 2009 IEP and that it made an offer of services and placement for the 2010 ESY at the May 2010 IEP meeting that met Student's unique needs to prevent regression.

FACTUAL FINDINGS

JURISDICTION AND FACTUAL BACKGROUND

1. Student is a 13-year-old boy who resides with Parents within the District's geographical boundaries and was in the ninth grade for school year (SY) 2009-2010. Student is eligible for special education services under the category of specific learning disability. Student attended Eureka High School during SY 2009-2010.

2. On January 13, 2010, the parties entered into a settlement agreement (Agreement) in OAH Case No. 2009101559. In the Agreement, the District agreed to provide Student with the REWARDS program, three days a week in his Core Support Class (CSC).³ Upon completion of the REWARDS program, the District would convene an IEP meeting to discuss implementing either or both, REWARDS science and REWARDS social studies reading programs. Pursuant to the Agreement, either party could request a socio-emotional assessment, and the development of a BSP. As modified by the Agreement, Parents provided written consent to the December 10, 2009 IEP. Student waived all special education claims against the District through the date of the Agreement.

³ CSC is a special education, resource class in which students work on assignments from their other classes with assistance from the CSC instructor, take exam and quizzes for other classes and work on IEP goals.

3. At the start of the second semester, January 27, 2010, a new dispute arose between the parties regarding the implementation of the REWARDS program and the number of pupils in the class with Student. Because of the dispute, Student stopped attending the REWARDS program, and Parents and the District exchanged numerous emails. The parties held several IEP meetings during the second semester of SY 2009-2010 to discuss the District's implementation of the REWARDS program, and issues regarding Student's behavior, reading and writing deficits.

BEHAVIORAL GOALS AND BSP

4. If a student's behavior prevents the student from making educational progress, the IEP must address these deficits, which may include behavior goals. When a student exhibits serious behavior problems in the school setting that impedes his ability to make educational progress, a BSP may be created to eliminate the behavior. A BSP describes the targeted behaviors, describes the environment in which the behaviors occur and the events preceding the behaviors. A strategy is developed either to prevent the targeted behavior, or to control it if it cannot be prevented using positive reinforcement.

5. Student asserted that the District failed to adequately address his behavioral needs by not offering an adequate BSP and behavior goals. The District contends that it could not make an offer of a BSP and behavioral goals due to the Parents' refusal to cooperate during the IEP process.

6. The District knew that Student's behavioral deficits affected his ability to make meaningful educational progress as of the December 10, 2009 IEP meeting. The District noted in the IEP that Student was apt to shut down when tasks became too overwhelming, which impeded his educational progress. The District included a behavior goal for Student to chart his school experiences with his CSC teacher. Parents consented to this goal as part of the Agreement. The District attempted to implement this behavior

goal throughout the remainder of the school year, but Student was not willing to cooperate with his CSC teacher.

7. Student stopped attending REWARDS at the start of the second semester when he saw that five other students were in the program. Student felt embarrassed because of his reading disability and that additional persons would know of his disability. Student did not return to REWARDS until April 7, 2010. Additionally, Student missed nearly 20 percent of all his classes because of his decision not to attend due to his school performance anxiety that purportedly prevented his attendance.

8. The parties met on March 2, 2010 to discuss the District's implementation of the REWARDS program. At the IEP meeting, Student's math teacher, Joel Thornburgh, described an incident in which Student called him a name after being warned, and his general disobedience in class. At the IEP meeting, Parents stated that they were requesting a private behavioral evaluation, and District school psychologist, Barbara Olsson, stated that she would observe Student in classes and collect data regarding Student's behavior.

9. In the Agreement, either party could request that the District conduct a socio-emotional assessment. After the March 2, 2010 IEP meeting, the District wanted to develop a BSP and conduct a socio-emotional assessment due to Student's increased absenteeism, avoiding classroom instruction by ignoring or refusing to comply with teacher direction, occasionally leaving class without permission, and inappropriate comments to staff and students. Because of these behavioral issues, Student's ability to make educational progress was hindered, and the District requested an IEP meeting, which occurred on March 11, 2010.

10. Due to Student's increased absenteeism and classroom disobedience, Ms. Olsson, and Student's case manager, Carol Moné, worked to develop a draft BSP to discuss at the March 11, 2010 IEP meeting. The BSP presented at the IEP meeting was

incomplete because the District wanted to get information from Parents as to Student's behavioral deficits, strategies to improve his behavior, and proposed behavior goals. The District also presented Parents at the IEP meeting with an assessment plan to conduct the socio-emotional assessment, for which Parents provided consent that day.

11. Regarding the BSP and behavior goals, Parents refused to cooperate during the IEP meeting because they believed that the District was not adequately addressing Student's academic needs. Parents were upset with the additional students in the REWARDS program and the District purportedly not complying with the December 2009 IEP, especially by allegedly not providing a note taker. Parents contended that the District's failure to provide Student with an adequate education was the source of his behavioral problems. The District terminated the March 11, 2010 IEP meeting as it became increasingly contentious and no progress was being made in developing the BSP and behavior goals.

12. The District does not deny that Student required a BSP and additional goals to address his unique needs related to his behavioral problems and that it would have completed and implemented a BSP and behavior goals if Parents cooperated during the process. Parents did refuse to cooperate and stated at the IEP meeting, and in Mother's testimony, that they would not have consented to a BSP and behavior goals if the District presented them at the meeting. However, even with the Parents refusal to cooperate, the District possessed sufficient information as of March 11, 2010, to develop a BSP and behavior goals.

13. As of March 11, 2010, Ms. Moné had been in contact with Student's teachers during SY 2009-2010, including Mr. Thornburg, and obtained information from the teachers regarding Student's behavioral problems and how that prevented Student from accessing the educational curriculum. The District had significant information from Parents in emails regarding their belief as to the causes of Student's behavioral

problems. Also, the District had information from Student in conversations with District staff.

14. After the March 11, 2010 IEP, Ms. Olsson and Student's expert, Jan Paulus assessed Student's behavior and presented their reports at the May 19, 2010 IEP meeting. Even with this additional information, which included information from teachers, Student and Parents, the District failed to offer a BSP or behavior goals.

15. Therefore, the District possessed sufficient information to develop a BSP and behavior goals for Student, and needed to complete a BSP and behavior goals to meet his behavioral needs so he could make meaningful educational progress. The District had an obligation to develop a BSP and behavior goals and make a written offer. Parents' refusal to cooperate has relevancy as to the quality of information the District possessed in developing the BSP and behavior goals, but it is not an excuse for failing to develop a BSP and behavior goals and making a written formal offer.

STUDENT'S BEHAVIORAL NEEDS AND ACADEMIC PERFORMANCE

16. Student asserted that due to his behavioral needs that he required the REWARDS program to be implemented with no more than one student and that his behavioral deficits led to his attendance problems and in-class disobedience. The District contended that while Student had behavioral deficits, they were not so significant as to cause the purported level of anxiety for Student to miss school, and that Parents encouraged him to miss school. Ms. Paulus concluded, based on her assessment, that the District was not meeting Student's behavioral needs. Ms. Paulus opined that Student needed to attend the REWARDS class with no more than one Student, which the District disputed through Ms. Olsson's assessment and his classroom performance.

17. Ms. Olsson started her socio-emotional assessment right after Parents provided consent. Concurrently, Ms. Paulus assessed Student's behavioral needs. Both

Ms. Olsson and Ms. Paulus were equally qualified to conduct a socio-emotional assessment. Ms. Olsson has a master's degree in psychology, has been a credentialed school psychologist for nearly 30 years, and has conducted numerous assessments, including socio-emotional assessments. Ms. Paulus is a licensed educational psychologist, speech pathologist and marriage family therapist. Ms. Paulus has had an extensive history working with students who receive special education services over nearly 40 years, and conducted numerous psychoeducational and speech and language assessments. As part of their assessments, Ms. Olsson and Ms. Paulus reviewed prior District assessments, observed Student at school and administered formal assessments tools.

18. Regarding the school observations, Ms. Olsson was more thorough because she observed Student in his REWARDS, English, algebra and physical education classes, and not just his REWARDS class, like Ms. Paulus. Additionally, Ms. Olsson interviewed Student, Mother, his teachers, school counselor, school psychologist and school administrator, while Ms. Paulus only interviewed Student and Mother. Finally, while Ms. Olsson and Ms. Paulus both administered the Behavior Assessment System for Children, Second Edition (BASC-II), Ms. Olsson was more thorough in getting Student's teachers and one administrator to complete the BASC-II questionnaire, and not just Student and Mother.

19. Ms. Paulus' opinion regarding the severity of Student's behavioral needs due to depression, school performance anxiety and helplessness, and their impact on Student's educational performance was not supported by her assessment because she did not have adequate information regarding his school performance. Ms. Paulus failed to interview Student's teachers and observe Student in classes other than REWARDS. Nearly all of her information regarding Student's present behavioral deficits came from Mother and Student. Although Ms. Paulus obtained some information from Student's

education records regarding his behavioral deficits, the summary provided in her assessment did not contain the same level of concern as raised by Mother and Student about the severity of his behavioral deficits and educational impact.

20. In contrast, Ms. Olsson's assessment was very thorough in obtaining information regarding Student's behavioral deficits and impact on his educational performance. Ms. Olsson's teacher interviews showed that Student would get frustrated if the classwork was too hard and would not attempt to complete the work. Student did not like to complete written work in class. If Student was interested in the topic, he would be motivated to participate, but would become passive in class if not interested. Student responded best to quiet, one-on-one encouragement to complete work and participate in class. Student also had difficulty in advocating for himself in class and seeking assistance from his teachers.

21. The teachers' responses to the BASC-II questionnaires showed areas of concerns regarding handling social problems, attention, adaptive skills, adaptability, social skills, leadership, and study skills. Of concern in the District's BASC-II responses were Student bullying and threatening others and easily being annoyed by others. Student's and Mother's responses in the BASC-II provided a similar profile as their scores in the different domains examined in the BASC-II were in the average range, except anxiety, which was at the lower end in at-risk range.

22. Ms. Olsson tracked Student's on-task performance during her classroom observations. She observed that during his English and algebra classes that Student was on-task about 90 per cent of the time. His English teacher, Marci Zeppeghno, reported that Student is typically on-task 50 per cent, and his Algebra teacher reported on-task between 65 to 75 per cent. During her observation of the REWARDS class, Student was on task 100 per cent, with Student participating in the class instruction and answering the instructor's, Elizabeth Bell, questions. According to Ms. Bell, Student's performance

during Ms. Olsson's observation was representative of his performance in REWARDS when he decided to attend the class. Ms. Zeppegno and Mr. Thornburg were convincing in their testimony that Student made meaningful educational progress in their classes, despite his numerous absences, and that his "C" grades accurately reflected his progress.

23. Regarding Student's contention that it was emotionally harmful for him to attend the REWARDS class with five other students, Ms. Olsson's assessment established that it would not be harmful. Based on Ms. Olsson's assessment, and Student's statements, his embarrassment in others knowing about his reading deficits caused his desire not to attend, and not any particular behavioral need for a smaller group instruction. Ms. Paulus' assessment merely concluded that Student required a smaller group instruction based on the severity of his reading deficits, as discussed in paragraphs 37 through 40 below, without specifically analyzing his behavioral deficits and whether he could make meaningful educational progress in the REWARDS class with five other students, especially since Student was adequately participating during her observation.

24. Regarding Student's absences, Student did not establish that the District's failure to meet his needs by not developing behavior goals or a BSP led to Student's numerous absences. Ms. Olsson's comprehensive assessment established that Student's behavioral deficits were not so significant that Student could not attend school. Further, while Mother testified about information from Student's private counselor as to his emotional health, the counselor did not testify about Student's behavioral deficits. Finally, Ms. Paulus was not qualified to give an opinion regarding Student's mental health state because she failed to perform a comprehensive assessment, especially failing to obtain information from Student's teachers, and only speaking to Student on a couple of occasions.

25. While Student had sufficient socio-emotional deficits to warrant the District's assessment and the need for the development of a BSP and additional behavior goals, his behavioral deficits were not so significant as to warrant the need for the REWARDS program instruction with no more than one other student. Further, Student's lack of educational progress was due to his absences, and his socio-emotional deficits related to his education were not so significant as to be a cause of his absences. Therefore, Student failed to establish that the District denied him a FAPE because his behavioral deficits were not sufficient to cause his absences or that he required a smaller group for the REWARDS program instruction to make meaningful educational progress.

REWARDS PROGRAM

Program Implementation per Agreement

26. Student asserted that the District failed to properly implement the REWARDS program to meet his reading needs, and violated the parties' Agreement by having more than two students in the program, which denied him a FAPE. The District contended that it was not required to have only two students in the REWARDS program, and that it followed the REWARDS program instructions when implementing the program.

27. During the first semester of SY 2009-2010, due to Parents' concerns with Student's reading, the District investigated several reading programs, including REWARDS. The REWARDS program investigated was a secondary level program designed for students in the sixth to twelfth grades, who read at the 2.5 grade level or above, and have difficulty with multisyllabic words. REWARDS consists of 20 lessons, 50 minutes in length each. REWARDS may be taught in a small or large group or one-on-one, and a lesson can be taught over multiple days.

28. The District provided a copy of the REWARDS materials to Mother, who reviewed the materials and consented to the District's implementation in November 2009. Student's instructor was Elizabeth Bell, a resource specialist teacher, hired in part by the District to implement the REWARDS program. Ms. Bell obtained her California mild-to-moderate special education instruction credential in December 2009, and was qualified to implement the REWARDS program. Before working at the District, Ms. Bell had taught the elementary REWARDS program. Student began REWARDS by himself during his fifth period CSC, and after a couple of lessons, another student joined him. The instruction occurred in a separate classroom from the CSC, and the REWARDS lesson lasted approximately 30 to 50 minutes.

29. Student had completed Lesson Two by the end of the first semester. The District subsequently increased the number of students in the REWARDS class to six, including Student because these pupils could also benefit from the specialized instruction. Ms. Bell changed the time per session to 20 to 30 minutes based on her experience in implementing REWARDS during the first semester, as the program was not as effective in longer sessions.

30. Student immediately informed his Mother of the increase of students, and Mother contacted the District to complain. Mother stated that the District violated the Agreement as it agreed at the December 10, 2009 IEP meeting to continue implementing the REWARDS program as then presently conducted.

31. However, the Agreement is clear that the District made no promise that it would continue to implement REWARDS with just two students, as the District agreed only to implement REWARDS three times a week during the CSC period. The District did not offer REWARDS in the December 10, 2009 IEP, or agree to a specific number of students in the program. Therefore, the Agreement did not require the District to implement REWARDS with no more than two students.

REWARDS Program Meeting Student's Needs

32. Student asserted that the District's use of the REWARDS program denied him a FAPE because the program was not designed to meet his unique needs. The District contended that REWARDS was properly designed to meet his unique reading needs and that Parents agreed to its implementation in the Agreement.

33. Regarding Student's contention that REWARDS did not address his unique needs, Student waived in the Agreement his right to challenge whether REWARDS provided him with a FAPE. In the Agreement, the parties agreed that the District would implement REWARDS and at the end of the program convene an IEP meeting to discuss which follow-up program or both, REWARDS science or REWARDS social studies, the District would implement next. The Agreement did not obligate the District to consider other reading programs until the completion of the first REWARDS program. Therefore, Student waived in the Agreement his ability to challenge the REWARDS program and whether it was reasonably designed to permit him to make meaningful educational progress.

District's Implementation of REWARDS

34. Student further asserts that he required REWARDS implemented either one-to-one or with just one other student to make meaningful educational progress due to his unique reading needs. Additionally, Student contended that the District failed to properly implement the program as Ms. Bell did not properly instruct students nor follow the REWARDS program protocols. The District argued Student's absences and refusal to attend the REWARDS program caused any lack of progress and even with his absences, Student made meaningful education progress.

35. At the start of the second semester, Ms. Bell started at Lesson Two, Student's then present level. Ms. Bell instructed the class for 20 to 30 minutes based on her experience with the program regarding the ability of students to maintain interest.

Ms. Bell restarted the REWARDS program at Lesson One on February 10, 2010, because the other students in the class needed the instruction information from that level. Additionally, Student was not attending REWARDS during this time, so he was not required to repeat any instruction.

36. Regarding Student's reading skills, as of January 14, 2010, his reading ability was around the third grade level. Based on prior District psychoeducational assessments, Student had a full scale IQ of a little above 100, which is average, but had a visual processing disorder that significantly impacted his reading and working memory as there was a significant discrepancy between his verbal ability and performance intelligence, with his verbal skills much higher.

37. Ms. Paulus conducted an independent psychoeducational evaluation to assess concerns about Student's reading and writing deficits, and interventions to remediate those deficits. Ms. Paulus administered several assessment tools on March 29 and 30, 2010, to examine Student's processing and behavior deficits and possible causes for his reading deficit. Ms. Paulus administered portions of the Kaufman Test of Educational Achievement, Second Edition, which confirmed that Student's reading and writing skills were at a third grade ability. Student demonstrated difficulty in decoding words with automaticity and fluency, reading comprehension, and spelling.

38. Ms. Paulus also administered the NEPSY-II⁴ to examine Student's processing abilities, which confirmed his processing and working memory delays as he had difficulty in quickly responding to rapid questions in the assessment and recalling test directions. On the Delis-Kaplan Executive Functioning System, Student demonstrated difficulty in processing material he read, and writing what he was thinking. Finally, Ms. Paulus administered the Process Assessment of the Learner, Second

⁴ NEPSY is not an acronym.

Edition (PAL-II) to measure the motor aspects of Student's writing. On the PAL-II, Student had significant difficulty reading a writing sample and copying the sample as his scores were primarily in the fifth to ninth percentile on the subtests. Based on her assessment results and information from prior assessments, Ms. Paulus opined that Student was dyslexic and had dysgraphia. Dyslexia is a learning disorder in which persons typically have trouble decoding words and spelling. Dysgraphia is often marked by the inability to remember how to form letters rapidly and automatically.

39. Ms. Paulus' psychoeducational evaluation did not establish that the District needed to instruct Student either one-to-one or with just one another student because of the severity of his reading deficits due to purported dyslexia and dysgraphia. Ms. Paulus' opinion that Student was dyslexic and dysgraphic was not proven by her assessment. Ms. Paulus repeatedly referred to research by Virginia Berninger, Ph.D., to support her contention. However, the assessment only noted that Student's deficits were consistent of indications of dyslexia and dysgraphia, based on Dr. Berninger's research, but contained no definitive assessment results that established Student was dyslexic or dysgraphic.

40. Additionally, despite having conducted a thorough assessment in which the central question involved Student's reading and writing deficits and the adequacy of the District's instruction, Ms. Paulus did little, if any, research on REWARDS and its efficacy, if properly implemented, for individuals like Student. Ms. Paulus acknowledged that REWARDS is a research based curriculum and her opinion that REWARDS would not meet Student's unique needs was based more on her classroom observation and not whether REWARDS, if properly implemented, would permit Student to make meaningful educational progress, even if he had dyslexia or dysgraphia.

41. Regarding program implementation, REWARDS was designed with great flexibility regarding the number of students taught and the length of the instruction.

According to the research in support of REWARDS' efficacy, discrepancies in student progress was due primarily to fidelity of implementation, not the number of students in the class. (Michelle Wahl, Florida Center for Reading Research, September 2007; http://www.fcrr.org/FCRRReports/PDF/Rewards_Intermediate_Secondary92507.pdf.) Therefore, Ms. Bell's implementation is important as to its efficacy with Student.

42. For the assessment, Ms. Paulus observed the REWARDS program on April 29, 2010, for 35 minutes. While Ms. Paulus is qualified to give an opinion regarding the effectiveness of Ms. Bell's teaching, Ms. Paulus' failure to adequately research the REWARDS program regarding its implementation undercut her opinion that the District needed to implement REWARDS with fewer students to meet Student's unique needs due to the severity of his reading deficits.

43. During Ms. Paulus' observation of Ms. Bell's class, there were five pupils, including Student, as one pupil was absent. Ms. Paulus criticized Ms. Bell's instruction as not engaging the students as she went through that day's lesson. Ms. Paulus did not state that Ms. Bell was not following the REWARDS instructional method. Ms. Paulus observed student responses, which indicated that they acquired the concepts of prefixes, suffixes, and vowels and were accurate in dividing words into syllables. While, there may have been more 'down-time' than Ms. Paulus would prefer, there was no indication that Student did not understand the day's lesson, and did not obtain educational benefit from Ms. Bell's instruction. Additionally, Student's testimony did not establish that Ms. Bell did not follow REWARDS instructional methodology, only his lack of motivation to participate because of his anger with the increased number of other students in the REWARDS class.

44. Student also challenged Ms. Bell's decision to step down to Lesson One a couple of weeks into the second semester. Student did not establish that there would be any harm in having Student repeat Lessons One and Two if he had not been absent.

45. Finally, while Student missed 34 REWARDS classes in the second semester, he did make meaningful educational progress on his reading deficits. Regarding Student's reading fluency and comprehension, Ms. Bell possessed sufficient information based on the lessons' benchmarks. Student's fluency increased from 40 words a minute at the start of the REWARDS program to an average of 152 words a minute for the reading passages in Lessons 13 through 18, as did his spelling ability and comprehension. Additionally, Ms. Bell's observation of Student in the program established that Student progressed based on his participation, spelling tests and ability to sound out multisyllabic words.

46. Student's challenge to the District's contention as to his progress was that his reading level remained at third grade level from January 2010, through the second semester when later tested by Ms. Paulus and the Lindamood-Bell Learning Center. Regarding, Ms. Paulus' testing, she conducted it during the middle of the REWARDS program in March 2010, when Student was not attending REWARDS. Therefore, her testing information would not show any progress because of his failure to attend.

47. As to information from the Lindamood-Bell Learning Center, the person who conducted the June 17, 2010 assessment did not testify, as site director Terri Mehl reported the assessment data. Because the assessor did not testify, the results are only admissible if they corroborated direct evidence and information in the assessment results can be considered as reliable.⁵ The problem with the reliability of the Lindamood-Bell Learning Center assessment was the variety of tests used to determine Student's reading ability, as several of the test instruments were outdated, such as prior versions of the Detroit Test of Learning Aptitude and Gray Oral Reading Test, and the Lindamood Auditory was not normed. The reliable test measures included the current

⁵ Cal. Code Regs., tit. 5, § 3082, subd. (b).

Gray Oral Reading Test, Fourth Edition, Peabody Picture Vocabulary Test, Fourth Edition, Wide Range Achievement Test, and Woodcock Johnson Reading Mastery.

48. With the reliance on invalidated tests, Student failed to adequately explain how the Lindamood-Bell Learning Center test results proved that Student failed to make adequate progress with the REWARDS program. While Student's results on the validated tests indicate that Student's reading is at the third grade level, the results are not a comparison of Student's reading ability before he began the REWARDS program, nor take into account Student's absences. Much of Student's evidence regarding lack of reading progress focused on his lack of progress before January 13, 2010, which is outside the scope of this hearing due to the Agreement. Based on the severity of Student's disability as of the time of the Agreement, Ms. Paulus did not adequately opine what she would expect as meaningful educational progress for Student during the second semester.

49. Therefore, Student did not establish that, during the second semester of SY 2009-2010, his reading and processing deficits required the District to instruct him in the REWARDS program with no more than one other student. While Student had significant reading and processing deficits, Ms. Paulus' and the Lindamood-Bell assessment findings did not establish that he required individualized instruction to make meaningful educational progress. Further, Student did not establish that Ms. Bell failed to properly instruct Student with the REWARDS program. Accordingly, the District's implementation of the REWARDS program did not deny Student a FAPE.

OCCUPATIONAL THERAPY NEEDS

50. Assessments for educational need must be done in all areas related to any suspected disability the student may have. Student stated that the District failed to assess him in all areas of suspected disability by not conducting an OT assessment, even though the District was on notice regarding his writing difficulties. The District

contended that it had no duty to assess Student, and that if any duty existed the District became aware of its obligation to assess at the May 19, 2010 IEP meeting when Ms. Paulus reviewed her assessment findings. The District further contended that Parents have not consented to the assessment plan it provided in August 2010.

51. Student's difficulty in writing during times relevant to this action related to the speed of his writing and became easily fatigued while writing. Legibility of Student's writing was not an issue based on his performance in his English class.

52. Regarding writing speed and fatigue, the District possessed no information before it received Ms. Paulus' assessment that Student might require an OT assessment. Ms. Paulus noticed in her observation of Student that he had an incorrect pencil grip, which contributed to his slowness in writing and fatigue. However, Ms. Paulus failed to adequately explain that having an incorrect pencil grip warranted an OT assessment, especially considering the legibility of his writing.

53. As to writing speed and fatigue, the cause of this was related to issues regarding Student's processing delays and working memory deficit. Student stated that he had difficulty putting in writing what he was thinking and what he heard during classroom lectures, which correlated with his known processing and working memory delays. These delays caused Student to work harder when writing, which led to the slowness and fatigue when writing, and the District had previously assessed Student's processing deficits in its psychoeducational assessments.

54. Regarding Student's purported dysgraphia, Ms. Paulus did not adequately explain why Student having dysgraphia would require an OT assessment, the delays in Student's graphomotor speed and spelling noted in her report related to processing deficits in his inability to visualize letters and words and to automatically write letters and words. Ms. Paulus did not adequately explain why Student required an OT

assessment as his writing deficit was not related to any physical inability to write or sensory processing deficit.

55. Even if Student's purported dysgraphia required an OT assessment, the District was first put on notice at the May 19, 2010 IEP meeting. While the District did not send Parents a proposed assessment plan until August 20, 2010, which Parents refused to sign, the District could have timely assessed Student and held the IEP meeting by the time of the hearing because 60 school days had not elapsed.

56. Student did not establish that the District needed to conduct an OT assessment as his writing difficulties related to his processing and working memory deficits, which did not indicate that OT was an area of suspected disability. Additionally, when notified of the purported dysgraphia, the District agreed to conduct an OT assessment. Even though the District did not timely give Parents an assessment plan, it could have timely performed the assessment if Parents provided consent. Therefore, Student did not establish that the District denied him a FAPE as the District did not fail to conduct a timely OT assessment.

ASSISTIVE TECHNOLOGY

57. AT devices or services may be required as part of the child's special education services, related services, or supplementary aids and services. An AT device is any item used to increase, maintain or improve the functional capabilities of a child with a disability. To determine if a student requires such AT services, a school district must evaluate a student's need for AT services.

58. Student contended that the District needed to conduct an AT assessment because of Student's need for AT services. Further, Student asserted that the District failed to meet his needs by not providing any AT services, such as dictation software, due to his problems in writing. The District argued that it did not possess information that indicated that AT was an area of suspected disability in which it needed to asses

Student. In addition, when the District was presented with new information in Ms. Paulus' assessment, the District presented an assessment plan to Parents, who have refused to consent to an AT assessment.

59. The District was aware as of January 14, 2010, of Student's significant processing deficits that caused delays in his reading and writing. Regarding reading deficits and need for an AT assessment, Student did not establish a need for an assessment as to any possible need for AT services, other than audio textbooks, which the District already had available as an accommodation in the December 10, 2009 IEP. Student did not contend that his AT needs for reading extended beyond the need for audio textbooks.

60. Regarding writing, Student had delays, as discussed above in paragraphs 51 through 56, due to his processing deficits. Student contended that he had delays in using a computer to complete written assignments. Student asserted that he required an AT assessment to examine what AT devices, such as dictation software he could use, especially due to his purported dysgraphia. However, as noted above in paragraphs 54, Ms. Paulus did not establish that Student had dysgraphia. Finally, Ms. Paulus' assessment did not demonstrate that Student's writing deficits were so significant that he possibly required AT services, as confirmed by the observation of Ms. Zeppegno, who stated that he could write adequately, although slower, than his non-disabled classmates.

61. Ms. Zeppegno was convincing that Student's writing over the course of the second semester improved to where he met his goal of writing a three-paragraph essay based on his writing samples. Student's contention that Mother wrote his English assignment was not convincing based on Mother's numerous emails to the District complaining about the District's failure to properly educate Student. It is doubtful that Mother would not have also stated in these emails that she had to write Student's

English papers as further proof of the District's failure to properly educate Student, which she did not.

62. As noted above, at the May 19, 2009 IEP meeting, the District discussed conducting an AT assessment. However, the District did not present Parents with a written assessment plan until August 20, 2010. Student did not present any reason why Parents did not consent to the proposed plan, other than not trusting the District and wanting independent assessments. The District established that it could complete the AT assessment during the first month of SY 2010-2011.

63. While Student had significant processing deficits that impacted his reading and writing abilities, the fact that Student had these deficits did not automatically necessitate an AT assessment without further evidence that Student required additional AT services due to his suspected disabilities. Student failed to establish the need for an AT assessment as the District already made available, if needed, audio textbooks, and Student made meaningful progress regarding his writing. Finally, although the District failed to present Parents with an assessment plan until August 20, 2010, Student did not explain why Parents failed to consent to the assessment to permit the District to assess at the start of SY 2010-2011 to timely assess Student. Therefore, Student failed to establish that the District had a duty to conduct an AT assessment, and that District's failure to present an assessment plan until August 20, 2010 denied him an educational benefit.

AUDIO TEXTBOOKS

64. The December 10, 2009 IEP provided as an accommodation that the District would provide audio textbooks if needed. Student contended that due to his reading deficits that he required audio textbooks, which the District disputed.

65. While Student had significant reading deficits, Student did not establish that he required audio textbooks to make meaningful educational progress. In Ms.

Paulus' assessment, Student noted that he did not have textbooks for this academic year, but was concerned about the tenth grade when he would. During Ms. Olsson's English class observation, the class was discussing To Kill a Mockingbird, in which Student participated and was interested in the class. Regarding Student's math class, Mr. Thornburg established that Student made adequate progress, understood the class and did not need audio textbooks.

66. Student did not establish a need for audio textbooks for the second semester of SY 2009-2010 because he did not have textbooks. As noted in Ms. Paulus' recommendation that the District provide Student with audio textbooks, Student would need audio textbooks in the next school year when he would have textbooks. Additionally, Student did not establish that he required audio textbooks for any of his classes in which he had reading requirements. Therefore, Student did not establish that the District denied him a FAPE because he did not require audio textbooks during the second semester of SY 2009-2010.

STUDENT'S NOTE TAKING NEEDS

67. Student contended that the District failed to comply with the December 10, 2009 IEP by not providing him with a note taker when required. The District asserted that it complied with the IEP as Ms. Moné took notes during his algebra class, and that he did not require a note taker in his other classes.

68. The December 10, 2009 IEP required the District to provide a note taker if class note taking was fast paced or in large amount. Additionally, Student's teachers should provide him with a copy of the class notes. Ms. Moné discussed this accommodation with Student's second semester teachers. Student argued that the District failed to provide him with a note taker during his sculpting class when the teacher lectured.

69. Student pointed to one example in which the sculpture teacher, early in the second semester, had her students cut and paste information on the computer. However, this exercise did not require Student to take notes, only manipulate information the teacher provided to the class. The sculpture teacher having pupils cut and paste information on a computer did not require the District to provide Student with a note taker. Parents overreacted to this incident by demanding the District provide Student with a note taker in a series of emails and at the February 11, 2010 IEP meeting.

70. Student did not point out any other class in which the District needed to provide him with a note taker. The District implemented the note taker requirement in Student's algebra class, Student's other teachers provided him with class notes and the classes did not have fast paced or intensive note taking requirements. Therefore, Student failed to establish that the District did not comply with the note taking accommodation in the December 10, 2009 IEP.

2010 EXTENDED SCHOOL YEAR

71. A district must provide ESY services to a student in special education if an ESY program is required to provide the student a FAPE. A procedural violation of the Individuals with Disabilities in Education Act (IDEA) results in a denial of a FAPE if it impedes the student's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child, or causes a deprivation of educational benefits. When a District makes an offer of an ESY program, the school district must make an IEP offer sufficiently clear and coherent that informed parents might intelligently decide whether to accept it. Student asserted that the District failed to make sufficient clear offer of services for the summer of 2010, and that the District's offer failed to meet Student's needs. The District contended that it made a clear offer of an ESY program at the May 19, 2010 IEP meeting to implement the REWARDS program, and that it was sufficient to prevent regression.

72. The District does not dispute that Student required ESY services during the 2010 summer for reading remediation due to the severity of his deficits. At the May 19, 2010 IEP meeting, the District discussed providing Student with 20 days of service, two hours a day with the REWARDS program, either science or social studies, at the high school in a small group. Parents did not wish for the Student to attend the District's proposed program, and instead provided the District with notice of their intent that Student attend the Lindamood-Bell Learning Center during the summer, which they followed up on May 28, 2010, with formal written notice. Parents made clear during and after the IEP meeting that Student would not attend the District's ESY program and that they wanted the District to pay for him to receive Lindamood-Bell reading instruction. At the end of the IEP meeting, the District asked Parents to sign the IEP, and Parents refused to sign any document regarding the IEP, including whether they attended the meeting or not.

73. While the District did not write its 2010 ESY offer on a services page, like the IEP offer in December 2009, the District's offer is sufficiently clear. The District offered to provide one of the REWARDS programs, as specified in the Agreement. While the District did not specify the start date of the 2010 ESY, the date is known as part of the District's regular school calendar. The location of the REWARDS program was sufficiently clear, as was the duration of the program. Although the IEP did not specify the specific time in the day for the program, Student did not raise that as a concern as to Parents' evaluation of the proposed program, especially since they had already decided that Student would receive Lindamood-Bell services.

74. Regarding the adequacy of the proposed REWARDS program to meet Student's needs during the 2010 ESY, the program need only prevent regression. Student did not establish that use of the REWARDS program for science and social studies would not prevent regression of his reading skills. Regarding the Lindamood-Bell

services during the 2010 summer, its focus was on Student's advancement, and not to prevent regression. Ms. Paulus provided no opinion regarding the adequacy of the REWARDS science and social studies program to meet Student's reading deficits, and prevent regression.

75. At the May 19, 2010 IEP meeting, the District offered Student an ESY program, which was reasonably designed to address his reading deficits and to prevent regression. The District's offer was sufficiently clear regarding the nature of the reading program offered, length and duration of the program, number of students and location. Therefore, Student failed to establish that the District's offer for the 2010 ESY was not sufficiently clear and that it failed to meet his needs to prevent regression.

LINDAMOOD-BELL SERVICES

76. Student requested that the District reimburse Parents for the cost of his attendance for Lindamood-Bell services for 240 hours of one-to-one reading instruction, six hours a day, including transportation and hotel costs,⁶ due to the District's failure to provide him with educational services to permit him to make meaningful educational progress. The District's dispute with the Lindamood-Bell services is not the validity of the reading program, but that Student did not require Lindamood-Bell reading services to make meaningful education progress and the validity of the assessment information from Lindamood-Bell did not support the hours of tutoring it recommended.

77. Lindamood-Bell Learning Center conducted its pretest assessment on June 17, 2010, and based on this assessment recommended that Student receive 240 hours of Lindamood-Bell services. As noted above in paragraphs 47 through 49, the

⁶ Student and Father stayed at a hotel close to the learning center for the entire summer, with only a couple of trips home.

Lindamood-Bell Learning Center assessment was flawed due to its reliance on out-of-date and non-validated assessments to determine the level of service that Student required, and Ms. Mehl could not separate information from the valid tests administered to justify the 240 hours of service. Therefore, Student could not establish from the assessment that the Lindamood-Bell Learning Center conducted that he required 240 hours of Lindamood-Bell reading services.

LEGAL CONCLUSIONS

1. Student has the burden of proof in this matter as to his complaint.
(*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 [102 S.Ct. 3034, 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) 592 F.3d. 938, 950-953.) The Ninth Circuit has 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 (*Hellgate*); *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*, 458 U.S. 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 at p. 1149.)

ISSUE 1A: DID THE DISTRICT DENY STUDENT A FAPE FROM JANUARY 14, 2010, THROUGH THE END OF THE 2010 ESY BY FAILING TO DEVELOP AN APPROPRIATE BSP AND BEHAVIOR GOALS?

Procedural Violations

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 a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); and *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

Behavior Needs

6. When a child's behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324 (2006)⁷; Ed. Code, § 56341.1, subd. (b)(1).) As noted by the comments to the 2006 federal implementing regulations, "[D]ecisions [as to the interventions, supports, and strategies to be implemented] should be made on an individual basis by the child's IEP team." (64 Fed.Reg. 12620 (March 12, 1999).) California law defines behavioral interventions as the "systematic implementation of procedures that result in lasting positive changes in the individual's behavior," including the "design, implementation, and evaluation of individual or group instructional and environmental modifications . . . designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual's right to placement in the least restrictive environment as outlined in the individual's IEP." (Cal. Code Regs., tit. 5, § 3001, subd. (d).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033 (*Park*); *Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029.)

7. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement

⁷ All subsequent references to the Code of Federal Regulations are to the 2006 version.

of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

8. Pursuant to Factual Findings 5 through 15 and Legal Conclusions 6 through 7, the District needed to provide Student with a BSP and additional behavioral goals for Student to make meaningful educational progress. The District failed to make an offer of a BSP and new behavior goals after the March 11, 2010 IEP meeting, despite having adequate information from Student's teachers and Student to make an offer. The District had additional information after Ms. Olsson's and Ms. Paulus' assessments, and still failed to offer a BSP and additional behavior goals. The fact that Parents failed to cooperate in the development of a BSP and behavior goals did not excuse the District from developing a BSP and behavior goals. (*J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) __ F.3d __, __ [2010 WL 4117665, *29] (*J.W.*)). Therefore, the District denied Student a FAPE by failing to offer Student a BSP and additional behavior goals.

ISSUE 1B: DID THE DISTRICT DENY STUDENT A FAPE FROM JANUARY 14, 2010, THROUGH THE END OF THE 2010 ESY BY FAILING TO PROVIDE APPROPRIATE READING SERVICES?

IEP Implementation

9. A failure to implement a Student's IEP will constitute a violation of the Student's right to a FAPE if the failure was material. There is no statutory requirement that a District must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. (*Van Duyn, et al. v. Baker School District* 5J (9th Cir. 2007) 502 F.3d 811, 820-822.)

Settlement Agreements

10. Parents have the right to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) OAH has jurisdiction to hear due process claims arising under IDEA. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

11. In *Pedraza v. Alameda Unified Sch. Dist.*, 2007 U.S. Dist. LEXIS 26541 (N.D. Cal. 2007), the United States District Court for the Northern District of California held that OAH has jurisdiction to adjudicate claims alleging denial of FAPE as a result of a violation of a mediated settlement agreement, as opposed to “merely a breach” of the mediated settlement agreement that should be addressed by the California Department of Education’s compliance complaint procedure.

12. A special education settlement agreement is considered a contract. (See, e.g., *D.R. v. East Brunswick Board of Education* (3d Cir. 1997) 109 F.3d 896, 898.) Settlement agreements are interpreted using the same rules that apply to interpretation of contracts. (*Vaillette v. Fireman’s Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 686, citing *Adams v. Johns-Manville Corp.* (9th Cir. 1989) 876 F.2d 702, 704.) “Ordinarily, the words of the document are to be given their plain meaning and understood in their common sense; the parties’ expressed objective intent, not their unexpressed subjective intent, governs.” (*Id.* at p. 686.) If a contract is ambiguous, i.e., susceptible to more than one interpretation, then extrinsic evidence may be used to interpret it. (*Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 37-40.) Even if a contract appears to be unambiguous on its face, a party may offer relevant extrinsic evidence to demonstrate that the contract contains a latent ambiguity; however, to demonstrate an ambiguity, the contract must be “reasonably susceptible” to the

interpretation offered by the party introducing extrinsic evidence. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391, 393.)

13. Pursuant to Factual Findings 27 through 31 and 33 and Legal Conclusions 9 through 12, the Agreement required the District to implement the REWARDS program. The December 10, 2009 IEP and Agreement did not state that the District would only implement REWARDS with no more than two students. Further, pursuant to Factual Findings 17 through 25, while Student had behavioral deficits that necessitated a BSP and additional behavior goals, Ms. Olsson's assessment established that Student's deficits were not so significant to require REWARDS instruction with only one other student.

14. Pursuant to Factual Findings 34 through 40, Student did not establish that REWARDS would not allow him to make meaningful educational progress as Student's expert, Ms. Paulus, failed to sufficiently analyze the REWARDS program and whether it could address Student's reading deficits. Also, Student did not establish with Ms. Paulus' assessment that his reading deficits were so significant to require instruction with no more than one other student. Pursuant to Factual Findings 41 through 49, the District properly implemented the REWARDS program with six students in the class as the program allowed this type of instruction. Ms. Bell followed the REWARDS program curriculum with fidelity. Therefore, Student failed to establish that the District denied him a FAPE for failing to implement the REWARDS program with no more than two pupils or that District did not provide him appropriate reading services.

ISSUE 1C: DID THE DISTRICT DENY STUDENT A FAPE FROM JANUARY 14, 2010, THROUGH THE END OF THE 2010 ESY BY FAILING TO CONDUCT AN OT ASSESSMENT?

ISSUE 1D: DID THE DISTRICT DENY STUDENT A FAPE FROM JANUARY 14, 2010, THROUGH THE END OF THE 2010 ESY BY FAILING TO CONDUCT AN AT ASSESSMENT?

Assessment

15. A child must be assessed by a school district in all areas related to the suspected disability. (20 U.S.C. § 1414(A)(2), (3); 34 C.F.R. § 300.304 (c)(4); Ed. Code, § 56330, subd. (f).) A proposed assessment plan shall be developed within 15 calendar days of the referral for assessment, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five school days, from the date of receipt of the referral, unless otherwise agreed upon. (Ed. Code, § 56043, subd. (a).) In the case of school vacation, the 15-day time recommences on the date that the regular schooldays reconvene. (Ed. Code, § 56321, subd. (a).) An IEP meeting must be held within 60 days of receiving parental consent to the assessment plan, exclusive of school vacations in excess of five schooldays and other specified days. (Ed. Code, §§ 56043, subds. (b), (c), 56344, subd. (a).)

16. Pursuant to Factual Findings 51 through 56 and Legal Conclusions 5 and 15 the District was not required to conduct an OT assessment because Student's writing difficulties were related to his visual processing and working memory deficits, and not to any fine motor and sensory processing deficits. Ms. Paulus' assessment did not establish that Student had dysgraphia as she only stated that Student had indications of dysgraphia. When the District became aware of Student's possible dysgraphia in May 2010, the District discussed with Parents about performing an OT assessment in the first 30 days of SY 2010-2011. While the District failed to give Parents a written assessment plan within 15 days after the May 19, 2010 IEP meeting, the District still could have

timely performed the OT assessment and held the IEP meeting if Parents consented to the August 20, 2010 assessment plan. Therefore, Student did not establish that the District denied him a FAPE by failing to timely conduct an OT assessment as Student did not lose an educational benefit.

17. Pursuant to Factual Findings 58 through 68 and Legal Conclusions 5 and 16, the District was not required to conduct an AT assessment because Student did not have a suspected disability that required AT services, other than audio textbooks that the District already provided in the December 2009 IEP. Ms. Paulus' assessment did not establish that Student had dyslexia or dysgraphia as she only stated that Student had indications of these, or that Student's deficits were so significant that he required AT services, beyond audio textbooks. When the District became aware of Student's possible dyslexia and dysgraphia in May 2010, the District discussed with Parents about performing an AT assessment in the first 30 days of SY 2010-2011. While the District failed to timely to give Parents a written assessment plan until August 2010, the District still could have timely performed the AT assessment and held the IEP meeting if Parents consented to the assessment plan. Therefore, Student did not establish that the District denied Student a FAPE by failing to timely conduct an AT assessment as Student did not lose an educational benefit.

ISSUE 1E: DID THE DISTRICT DENY STUDENT A FAPE FROM JANUARY 14, 2010, THROUGH THE END OF THE 2010 SY BY FAILING TO PROVIDE APPROPRIATE AT SERVICES?

18. Pursuant to Factual Findings 65 and 66 and Legal Conclusion 17, the District was not required to provide Student with AT services beyond audio textbooks. Regarding audio textbooks, the District provided this as an accommodation in the December 2009 IEP. However, according to Student in Ms. Paulus' assessment, Student did not require audio textbooks in SY 2009-2010 because his classes would not have

textbooks until the next school year. Regarding the need for dictation software, Ms. Zeppegno established that Student could adequately write his class assignments without dictation software. Additionally, Student did not establish that he needed audio textbooks during SY 2009-2010, as he made meaningful educational progress in his classes based on information from his teachers from his in-class performance and homework.

ISSUE 1F: DID THE DISTRICT DENY STUDENT A FAPE FROM JANUARY 14, 2010, THROUGH THE END OF THE 2010 ESY BY FAILING TO PROVIDE AUDIO TEXTBOOKS?

19. Pursuant to Factual Findings 65 and 66 and Legal Conclusion 9, the District did not deny Student a FAPE because Student did not require audio textbooks as his classes did not use textbooks. Additionally, without audio textbooks, Student still made meaningful educational progress in his classes as shown in his grades and progress on goals. Therefore, Student did not establish that the District denied him a FAPE.

ISSUE 1G: DID THE DISTRICT DENY STUDENT A FAPE FROM JANUARY 14, 2010, THROUGH THE END OF THE 2010 ESY BY FAILING TO PROVIDE APPROPRIATE ACCOMMODATIONS, INCLUDING A NOTE TAKER?

20. Pursuant to Factual Findings 68 through 70 and Legal Conclusion 9, the District provided Student with appropriate accommodations to meet his unique needs, including a note taker. Regarding the note taker provided in the December 2009 IEP, the District provided Student with a note taker in his algebra class, and his teachers in the other classes provided him with class notes when required. Student did not prove a need for a note taker in sculpture class. As to any other needed accommodations, Student did not establish that the District failed to provide other accommodations he needed to meet his unique needs. Accordingly, Student did not prove that the District

failed to comply with December 2009 IEP regarding accommodations or denied Student any other needed accommodation.

ISSUE 1H: DID THE DISTRICT DENY STUDENT A FAPE FROM JANUARY 14, 2010, THROUGH THE END OF THE 2010 ESY BY FAILING TO PROVIDE APPROPRIATE SERVICES DURING 2010 ESY?

Written Offer

21. An IEP must contain the projected date for the beginning of services and the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(VII); Ed. Code, § 56345, subd. (a)(7).)

22. The Ninth Circuit has observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. A district has an obligation to make a formal written offer in the IEP that clearly identifies the proposed program. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526; *J.W., supra*, ___ F.3d. at p. ___ [2010 WL 4117665, **28-29.]

Extended School Year

23. California Code of Regulations, Title 5, section 3043, provides that extended school year services shall be provided for each individual with unique and exceptional needs who requires special education and related services in excess of the regular academic year. Pupils to whom ESY services must be offered under section 3043 "... shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression,

when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition.” (See also, 34.C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3); *Hellgate, supra*, 541 F.3d. at pp. 1210-1211.)

24. Pursuant to Factual Findings 72 through 75 and Legal Conclusions 21 through 23, the District made a legally sufficient written offer for the 2010 ESY. The District’s May 19, 2010 IEP offer contained sufficient information regarding the REWARDS program offered, the length of the program, frequency, location and when the program would begin. Student needed ESY services to prevent regression of his reading skills due to his significant deficits. The REWARDS program offer for the 2010 ESY was appropriately designed to prevent regression as Student did not establish that the REWARDS program offered for the 2010 ESY failed to meet Student’s needs. Therefore, Student failed to prove that the District did not offer appropriate services for the 2010 ESY, or the offer was not sufficiently clear.

Reimbursement and Compensatory Education

25. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were proper under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Comm. of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 369-371 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).)

26. Parents may receive reimbursement for a unilateral placement if it is appropriate. (34 C.F.R. § 300.148(c); *Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 15-16 [114 S.Ct. 361, 126 L.Ed.2d 284] (*Carter*).) The appropriateness of the private placement is governed by equitable considerations. (*Carter, supra*, 510 U.S. at pp. 15-16.) The placement need not provide the specific educational programming

necessitated by the IDEA. (*Alamo Heights Indep. Sch. Dist. v. State Board of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.)

27. A unilateral placement does not have to offer every service needed to maximize a student's potential. However, the unilateral placement does have to provide specialized instruction designed to meet the student's needs as well as any support services the student needs to benefit from that instruction. (*Gagliardo v. Arlington Cent. Sch. Dist.* (2d Cir. 2007) 489 F.3d 105, 112.) In *Gagliardo*, the private school offered the intensive reading and writing instruction that the student required, but it was unable to meet the student's need for treatment of his anxiety disorder. The Second Circuit held that the alternative chosen by parents was inadequate and that reimbursement was not appropriate. (*Id.* at pp. 113-114; see also, *Teague Indep. Sch. Dist. v. Todd L.* (5th Cir. 1993) 999 F.2d 127, 132-133.) A claim for reimbursement may fail if the student makes limited to marginal academic progress in the private placement. (*Corpus Christi Indep. Sch. Dist. v. Christopher N.* (S.D.Tex. 2006) 45 IDELR 221, 106 LRP 27898.)

28. Reimbursement may be reduced or denied in a variety of circumstances, including whether a parent acted reasonably with respect to the unilateral private placement. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d).)

29. Appropriate equitable relief, including compensatory education, can be awarded in a due process hearing. (*Burlington, supra*, 471 U.S. at p. 374; *Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park, supra*, 464 F.3d at p. 1033 (citing *Student W. v. Puyallup Sch. Dist.*, 31 F.3d at 1496).)

30. The District violated Student's procedural rights by failing to offer a BSP and additional behavioral goals, despite the District's acknowledgement that he needed these to make meaningful educational progress. The District's failure to offer Student

either a BSP or additional behavior goals denied him an educational benefit because his behavioral deficits impeded his learning with his passive resistance to instruction while in class, and skipping numerous classes.

31. Student attempted to challenge the appropriateness of the REWARDS program in seeking the 240 hours of Lindamood-Bell reading instruction. However, pursuant to the parties' Agreement, the REWARDS program was reasonably calculated to provide Student with meaningful educational progress. While Parents may have had subsequent doubts about the program, the Agreement obligated the District to implement the program, analyze its effectiveness and hold an IEP meeting to discuss Student's progress, which it did. Therefore, compensatory education is based on Student's loss of educational benefit caused by his inability to attend the REWARDS program caused by the District's failure to offer a BSP and additional behavior goals.

32. While Student received educational benefit from Lindamood-Bell instruction, Student did not establish the need for 240 hours of one-to-one instruction based on the faulty Lindamood-Bell assessment (Factual Findings 47, 48, 49, 76 and 77). Additionally, Student did not establish why he could not receive the instruction from a trained Lindamood-Bell instructor closer to Eureka, versus having to travel to Sacramento.

33. Additionally, a balancing of the equities weighs against granting Student's reimbursement request because Parents did not act reasonably as they refused to cooperate with the District in developing a BSP and behavioral goals. Further, Parents would not have consented to any BSP or behavior goals proposed by the District. Finally, Parents had already decided to enroll Student at Lindamood-Bell Learning Center before the May 19, 2010 IEP meeting, and refused to listen to the District's 2010 ESY offer, even though it embodied what the parties agreed to in the Agreement.

34. Therefore, Student is only entitled for reimbursement for 20 hours of reading instruction, at the \$96 per hour that the Lindamood-Bell Learning Center charged, because the District could not fully implement the REWARDS program in part due to its failure to offer a BSP and behavior goals on and after February 2, 2010. Although Student made progress in the REWARDS program, a balancing of the equities favors an award of 20 hours of Lindamood-Bell services because the District needed to make an offer of a BSP and behavior goals to ensure that Student did not lose an educational benefit. A greater award is not warranted based on Parents' refusal to cooperate in the development of a BSP and behavior goals and 2010 ESY, and Student's failure to establish the need for 240 hours of Lindamood-Bell services.

ORDER

1. Within 30 days of this Decision, the District shall convene an IEP meeting to discuss and make an offer of BSP and additional behavior goals.
2. Within 45 days of this Decision, the District shall reimburse Parents for \$1,920 for Lindamood-Bell reading services.

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. Student prevailed on Issue 1a. District prevailed on Issues 1b through 1h.

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: November 3, 2010

A handwritten signature in black ink, appearing to read 'PPC', is written over a horizontal line.

PETER PAUL CASTILLO

Administrative Law Judge

Office of Administrative Hearings