

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2016061182

DECISION

Parent on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on June 20, 2016, naming Los Angeles Unified School District. On July 29, 2016, OAH granted the parties' request to continue this matter.

Administrative Law Judge Kara Hatfield heard this matter in Van Nuys, California, on August 30 and 31, 2016, and September 1 and 7, 2016.

Barbara Dixon, Attorney at Law, represented Student. Mother and Father attended the hearing on all days. Student attended the hearing on August 31, 2016.

Karin Anderson, Attorney at Law, represented District. Barbara Rainen, a representative for District, attended all days of the hearing.

At the request of the parties, OAH continued the matter for written closing arguments. The record closed on September 26, 2016, upon receipt of closing briefs from the parties.

ISSUES

1. Did District deny Student a free appropriate public education by failing to qualify Student as eligible for special education under the category of other health impairment at his May 17, 2016¹ individualized education program team meeting?

2. Did District deny Student a FAPE by predetermining that he was not eligible for special education under the eligibility category of other health impairment at his May 17, 2016 IEP team meeting?

SUMMARY OF DECISION

Student had an attention disorder that impacted his ability to access his education. Accordingly, Student sought special education eligibility under other health impairment. Student contends District denied him a FAPE by failing to offer him special education eligibility and by predetermining that he was not eligible.

District contends Student did not require special education to access his education.

This Decision finds that Student required special education and that District predetermined that he did not qualify for special education. This Decision therefore orders District to provide Student special education eligibility and compensatory services.

¹ Although the Order Following Prehearing Conference indicated the IEP team meeting occurred on May 16, 2016, the parties agreed and the evidence established that the IEP team meeting occurred on May 17, 2016.

FACTUAL FINDINGS

BACKGROUND

1. Student was 16 years old and resided with his parents within District's boundaries during the applicable time frame. He attended schools within District since kindergarten, with the exception of seventh grade. For a period of four months in 2005, during preschool, Student had been eligible for special education under the category of a language or speech disorder due to an articulation deficit. He briefly received services from District and was exited from special education.

2. Student had a history of difficulties in school going back to elementary school. From second through eighth grade, Student's teachers reported that although he was sweet and well-liked, he needed encouragement to do his work; had difficulty with homework; was inconsistent in completing homework; and had wide variability in his grades, ranging from A's to failing. During the spring of eighth grade, in April 2014, District assessed² Student for eligibility for special education at the request of Student's teachers and parents due to concerns he possibly had a learning disability.³ At that time,

² The terms "assessment" and "evaluation," and "assessed" and "evaluated," are synonyms. Federal statutes and regulations generally use the term "evaluation" for special education. California statutes and regulations generally use the term "assessment." This Decision will use the term "assessment" since that is the common usage in California, except when referring to a federal statute or an independent educational evaluation.

³ Student had a Section 504 plan to accommodate fluctuating hearing loss due to recurrent cerumen impaction and asthma. A Section 504 plan is an accommodation plan created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see

Student had classroom interventions of preferential seating, frequent prompting to start work, parent contact, teachers checking for understanding, and modified assignments. Teachers reported variable classroom behavior, including Student spending too much time talking to his classmates and rushing through written class work. His English teacher identified Student's weaknesses as his lack of focus and lack of motivation. His math teacher stated that although Student was one of the top algebra students, he needed several reminders to write and complete class notes. His science teacher reported that Student was easily distracted in class, and provided the shortest responses so he could quickly complete tasks, but his responses did not clearly demonstrate comprehension. Student required reminding, additional time, and encouragement to complete homework. In history, Student was easily distracted in class and rarely completed classwork or homework. He did not follow directions. At times he had difficulty keeping still, and at other times he had difficulty staying awake in class. He required constant supervision to ensure he stayed in his seat and focused on his work. The history teacher was concerned that Student appeared either to have too much energy or to be extremely lethargic and unable to stay awake. In art, Student was easily led off task and required frequent prompting to do his work. He socialized instead of working on his assignments.

3. District conducted a psychoeducational assessment in April 2014. The school psychologist who conducted the assessment concluded that Student exhibited poor attention to written tasks, but he otherwise exhibited good attention and did not display a severe discrepancy between his cognitive ability and academic achievement

34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a school district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity, including learning.

due to a disorder in any basic psychological process and, therefore, a specific learning disability was not indicated. District convened an IEP team meeting to review the assessment, and the IEP team found that Student was not eligible for special education and related services.

2014-2015 SCHOOL YEAR

4. In the fall of Student's ninth grade year, he attended Nathaniel Narbonne Senior High School, his District school of residence. He failed French. He received D's in Geometry and Science. He received a C in Geography, a B in Honors English, and an A in Freshman and Sophomore Football. District did not allow plus or minus marks on final semester grades.

5. In the spring semester, Student provided District a letter from his doctor, a psychiatrist, dated May 5, 2015, stating that she had diagnosed Student with Attention Deficit/Hyperactivity Disorder, combined type, moderate severity, and with Oppositional Defiant Disorder, moderate, and was treating him.

6. Student's final grades for the spring semester were F's in French and Life Skills. He earned C's in Honors English, Geometry, and Science. He received an A in Advanced Conditioning, the spring football training program.

7. Student's academic classes during the regular school year were composed of approximately 40 students and one teacher.

8. Student believed that although the District policy changed at a later date, during the 2014-2015 school year, D grades were not sufficient to earn course credit and he needed to repeat Geometry and Science in the summer to earn credits towards graduation. During summer 2015, he took Geometry in a class of approximately 15 students, and Science in a class of approximately 25 students. He earned B's in both courses. Student's transcript dated August 22, 2016, reflects that he had in fact received credit during the fall 2014 semester for those two courses, and received no credit for

having repeated the courses during the summer.

9. During the regular school year, Student had four full day absences and 31 partial day absences, which Student attributed to health issues.

2015-2016 SCHOOL YEAR AND MAY 2016 PSYCHOEDUCATIONAL ASSESSMENT

10. In the fall semester of Student's tenth grade year, he failed History, Biology, Spanish, and English. Along with those F's, Student received unsatisfactory marks for work habits, and unsatisfactory marks for cooperation.⁴ He received a D in Algebra, and was marked unsatisfactory in work habits and satisfactory in cooperation. He received an A in Football, and was marked excellent in both work habits and cooperation. Student had more than the average amount of absences, missing first period far more often than others. By March 31, 2016, he had missed a total of 61 class periods.

11. In December 2015, District filed a request for a due process hearing to defend its April 2014 assessment and avoid Student's request for independent educational evaluations. District and Student settled that case on February 2, 2016.

12. In the February 2016 agreement, District agreed to comprehensively assess Student by a District assessor who was not familiar with Student, and to specifically consider whether Student was eligible for special education under the category of other health impairment. District agreed to provide Parents an assessment plan by February 22, 2016. Parents were then required to sign and return the assessment plan, and District was required to conduct the assessment and hold an IEP team meeting to review the assessment, within the normally prescribed, statutory timelines.

13. In March 2016, District began conducting the psychoeducational

⁴ He did receive a "satisfactory" mark in cooperation in English.

assessment. District called upon school psychologist Catherine Lew to assess Student. Ms. Lew had been a school psychologist for District since earning her master's degree in educational psychology in 1993. She was not based at Narbonne High, and was called in to conduct the assessment of Student as a person from outside the school with fresh eyes, having no background about Student. Ms. Lew began her assessment on April 7, 2016, and documented the dates on which she performed various parts of the assessment. Her review of records was conducted on April 27, 2016, when only midterm scores were available. Two days later, on April 29, 2016, third quarter marks were sent home to Parents. Ms. Lew's psychoeducational assessment report documented Student's midterm grades as failing in History, Biology, and Spanish, with unsatisfactory marks for work habits and cooperation in those classes.⁵ His midterm marks were C's in Auto Shop and Algebra, and an A in English. Student's third quarter marks reflected that he was still earning F's, with unsatisfactory work habits and cooperation, in History and Spanish; but his Biology grade was noted as a P, for passing, which could have included a D grade. His work habits and cooperation marks were satisfactory in Biology. His Auto Shop grade had come up to a B, but his English grade had dropped from A to C. Comments from the teachers included that he was in danger of failing and not meeting promotion standards, seldom worked in class, wasted time, and did not complete assignments and tasks.

14. In sharp contrast to his failing grades and overall lack-luster marks in his academic courses, Student performed very well on the Woodcock-Johnson III Tests of Achievement, version B,⁶ administered by credentialed special education teacher Erica

⁵ He did receive a "satisfactory" mark in cooperation in Spanish.

⁶ Because Student had been administered version A of the same test during the

Pan on March 30 and 31, 2016, as part of the comprehensive psychoeducational assessment. Ms. Pan used materials and procedures that were selected so as not to be racially, culturally, or sexually discriminatory and were considered valid and reliable for the evaluation. No modifications of the standard procedures were necessary, and the test results were a valid reflection of Student's skills and abilities. Student's subtest scores in reading spread from the average to the very superior ranges. In broad reading, he performed at the level of a 23-year-old. His subtest scores in oral language included average and superior range scores. In oral language, he performed at the level of a 21-year-old. In written language, Student's subtest scores were in the high average and superior ranges. His math subtest scores were in the average and high average ranges. His broad math skills were at the level of a 22-year-old. When compared to others of his age level, Student's skills ranged from average to superior.

15. School psychologist Ms. Lew also administered standardized tests to Student, including the Cognitive Assessment System, to estimate Student's cognitive ability; the Test of Visual Perceptual Skills – Third Edition, to measure Student's ability to process and make sense of information taken in through the eyes; and the Test of Auditory Processing Skills – Third Edition, to measure Student's ability to remember and give meaning to the information he heard. The materials and procedures Ms. Lew used were selected and administered so as not to be racially, culturally, or sexually discriminatory and were considered valid and reliable for the evaluation. Ms. Lew followed the publisher's instructions for administering the Cognitive Assessment System.

16. The Cognitive Assessment System evaluated four processes that were believed to be interrelated and interactive with an individual's base for knowledge. Student's scores in three processes were in the average range, and one was in the high

assessment District performed in 2014, Ms. Pan selected version B.

average range. Ms. Lew concluded that Student was functioning within the average-to-high average range of cognitive ability. Ms. Lew was surprised at Student's many low grades, given his average-to-high average cognitive abilities and academic abilities, as indicated by the Woodcock-Johnson III Tests of Achievement, as well as Student's prior scores on the California Standards Tests, on which he had achieved advanced ratings in English language arts and math in 2012, and in science in 2014.

17. Student's scores on the Test of Visual Perceptual Skills were in the average range on the overall composite score, with two subcategories in the average range and one in the high average range.

18. Student's scores on the Test of Auditory Processing also were in the average range on the overall score, with two subcategories in the average range and one in the high average range.

19. Ms. Lew also administered some standardized rating scales to assess Student's social-emotional status and probability of Attention Deficit/Hyperactivity Disorder. Student, Mother, and Student's tenth grade History, Biology, and Algebra teachers completed rating scales of the Behavior Assessment System for Children – Second Edition. Mother and Student's same teachers completed rating scales of the Attention-Deficit/Hyperactivity Disorder Test.

20. Mother's responses on the Behavior Assessment System for Children rated him as clinically significant in almost every category. The validity of her responses was rated by the f index, which identifies whether a responder reports in an overly negative way. The f index for Mother's responses indicated that her responses were over-reporting negative behavior and should be viewed with extreme caution. Mother's responses on the Attention-Deficit/Hyperactivity Disorder Test indicated a high probability of ADHD.

21. The teachers' responses on the Behavior Assessment System for Children

rated Student as average in 14 areas, but at-risk only regarding study skills, except the English teacher, who also rated Student as at-risk regarding attention problems. The English and History teachers rated Student on the Attention-Deficit/Hyperactivity Disorder Test as having a below average probability of ADHD, and the Algebra teacher rated Student as having a very low probability of ADHD. However, these three teachers', and Student's other tenth grade teachers', comments to Ms. Lew regarding Student's behavior and performance in class painted a much different picture than the rating scales suggested.

22. Similar to Student's teachers from second through eighth grade, his second-semester tenth grade teachers reported that Student had significant challenges paying attention; staying on task in class; completing or submitting class work, assignments, and homework; and with organization. Information collected for the psychoeducational assessment documented the following reports.

23. In his first period World History class, Student rarely arrived on time. He did not exhibit concern for his grade and did not make-up missed assignments despite being given the opportunity to do so for full credit. The teacher's concerns were reported as minimal effort given in class, varied attention, and distractibility.

24. In his second period English class, Student had good task completion and fair independent work habits, but some difficulty staying on task. The teacher noted that Student's priority of what was important at the moment suggested an attention deficit. Ms. Pan provided push-in services to other students in Student's English class. She had not noticed Student before she conducted the academic testing for his psychoeducational assessment, but after the testing she became aware that he was in a classroom in which she serviced three other students. Ms. Pan casually observed Student approximately five times during her once-a-week visits to Student's English class, and she noted he was not actively participating in class, although he was not disruptive,

distracting others, or out of his seat or moving around. He was just quiet. She described him as “there but not really there.”

25. Student’s fourth period Spanish teacher reported that Student often complained of being unable to sleep at night and too tired in class, and he had to be reminded to stay awake. Student listened to instructions but easily became off task. He had to be reminded to put away his cell phone on a daily basis. He needed redirection to keep him on task during independent work.

26. In fifth period Algebra, Student was mostly described very positively. Areas in which he needed improvement were organizational skills and homework completion.

27. In sixth period Biology, Student could be talkative and easily distracted by peers, would get off task, but could be redirected back to task. He struggled with organizational skills, like maintaining a chronological notebook.

28. In sum, despite teachers providing standardized rating scale scores that overall indicated no concerns or only mild concerns regarding Student’s classroom behavior, performance, and attention, all of Student’s academic course teachers provided written comments documenting that Student had challenges with attention, distractibility, focus, task completion, motivation, and organization.

29. Student’s teachers had attempted many interventions with him to support his classroom behavior, attention, focus, task completion, submission of classwork, assignments and homework, and organization. His History teacher, who was also his football coach, talked to him, told him what needed to be done, told him to complete as many missing assignments as he could and that he would receive full credit. The general education intervention the History teacher used with Student was that he could have as much time as he needed. Still, Student failed the first semester and was failing during the second semester, with unsatisfactory work habits and cooperation marks. Student’s English teacher placed Student in preferential seating, second row from the blackboard

on the left side. Student was on his mobile phone five times per class. The teacher would tell him to put it away, but 10 minutes later Student was on his mobile phone again. The teacher periodically checked in with Student, and would prompt him to stay on task by asking Student to finish his work.

30. Student's Spanish teacher observed Student using his mobile phone while she taught, and when she finished she would tell him to put the phone away, take out a sheet of paper, and do his work. Student would start work, but not finish; he would daydream, and just stop writing. He would sometimes put his head down, and sometimes fall asleep. The teacher used interventions like changing around the students' seats, seating Student up front or beside her, close to the board, sending Student to the office, then sending him home, suggesting that he attend tutoring during the lunch period in her classroom, and walking around in the class and asking if anyone needed help. Because Student had failed in the first semester and was failing in the second semester, the Spanish teacher did not think the interventions were successful. Student's biology teacher gave Student extended time to turn in his notebook with his class notes and classroom assignments, reminded him multiple times to bring in his notebook for credit, but Student still did not submit his notebook. The biology teacher believed Student was very intelligent and capable. Her explanation for Student's failing marks in her class was that Student "made a conscious choice not to turn in his notebook even with me prodding him every single day for two weeks. I knew he could do it. But there was something else that I couldn't pinpoint, why he wouldn't do it."

31. Ms. Lew received and reviewed documentation from Kaiser Permanente reflecting that in addition to asthma, for which Student had previously had a Section 504 plan, Student's psychiatrist had diagnosed Student with mild Oppositional Defiant Disorder and with ADHD, combined type, moderate severity, and prescribed the stimulant medication Concerta to be taken daily in the morning. The medication

sometimes caused Student nausea and he spent extra time in the bathroom in the morning, sometimes vomiting. Student's psychiatrist had also diagnosed him with Generalized Anxiety Disorder and with insomnia, and prescribed diphenhydramine, as needed, as a sleep aide.

32. Ms. Lew evaluated Student to determine eligibility under other health impairment. As detailed in the Legal Conclusions, below, other health impairment is limited strength, vitality, or alertness that is due to chronic or acute health problems and adversely affects a child's educational performance. With respect to limited alertness, Ms. Lew was looking at attention, not insomnia or fatigue. Although she thought insomnia and fatigue could have played a role in Student's focus, his attention challenges were reported during all class periods, not only in the morning. This perspective discounted Student's fourth period Spanish teacher's reports that Student needed to be reminded to stay awake and that Student often complained about being unable to sleep at night and too tired in class.

33. After reviewing Student's records, interviewing Student, administering standardized testing to Student and observing him during that testing, interviewing Mother, reviewing questionnaires and rating scales completed by Student, Mother, and most of Student's second-semester tenth grade teachers, Ms. Lew concluded that Student appeared to have the ability to do the work, but his inconsistent work habits, motivation, and distractibility prevented him from achieving consistently at a higher level. In her May 11, 2016 report, Ms. Lew made an eligibility recommendation regarding the category of other health impairment. Referring to "Section 3030(f), Title 5, CCR,"⁷

⁷ The cited section of the California Code of Regulations had been amended almost two years earlier, renumbering the eligibility category and revising the description to specifically include attention deficit disorder or attention deficit

and to “Article 2.6 5633 (a),”⁸ she concluded that Student appeared to meet the eligibility criteria for other health impairment due to “ADHD-like characteristics.” She noted that the results of her evaluation were not primarily due to other factors, including poor attendance. Ms. Lew’s testimony at the hearing confirmed her opinion was that Student’s lower grades were due to his poor attention, more than his poor attendance.

34. Ms. Lew followed District protocol regarding eligibility determinations for the category of other health impairment and presented her assessment and conclusions to her school psychologist colleagues and her specialist, Jolene Bowman. Ms. Lew explained at hearing that Student’s situation might have been a borderline case of eligibility under the other health impairment category because of the inconsistent impact his attention challenges appeared to have on his academic scores, with him passing some academic classes, and failing others. But the peer and specialist review process validated and confirmed Ms. Lew’s conclusion that Student was eligible for special education and related services under the category of other health impairment.

hyperactivity disorder as possible causes of a student’s limited strength, vitality, or alertness. (Cal. Code Regs., titl 5, § 3030(b)(9), effective July 1, 2014.)

⁸ This appears to be a reference to Education Code section 56339, subdivision (a), which states that a student whose educational performance is adversely affected by a suspected or diagnosed attention deficit disorder or attention deficit hyperactivity disorder and demonstrates a need for special education and related services by meeting eligibility criteria specified in the California Code of Regulations is entitled to special education and related services.

SPECIAL EDUCATION SERVICES AT NARBONNE HIGH

35. Narbonne High had a limited range of special education services. As described by the assistant principal in charge of special education, Earlondra Jackson,⁹ and Ms. Pan, Narbonne High only offered three services. First, for students performing below the third-to-fifth grade level in one or more subjects, they could be placed in a self-contained classroom with a credentialed special education teacher and an aide. The class size was limited to 14 students. This was referred to as a special day class, and designated as serving students with specific learning disabilities. Students who did not require the special day class attended the general education classrooms and received push-in services from a credentialed special education teacher, referred to as a resource specialist teacher, for support in English and/or math. Narbonne High also had school-based counseling services, defined only as “DIS counseling,” for students with social-emotional needs. This was the entirety of the continuum of placement options available at Narbonne High, according to the school’s assistant principal and a special education teacher at Narbonne High.

36. Ms. Jackson, who attended IEP team meetings as the administrator, was not aware of any other programs or services available at other high school campuses within District. Narbonne High had a least restrictive environment specialist, Nina White,¹⁰ who might have been aware of other resources, but Ms. Jackson did not know what Ms. White did or did not know. At hearing Ms. Jackson was asked, if Narbonne

⁹ Ms. Jackson held master’s degrees in education and administration, and a pupil personnel services credential for school psychology and school counseling, in addition to a teaching credential and an administrative credential.

¹⁰ Ms. White was not a witness at the due process hearing.

High did not have the right program for a student who was eligible for special education, how did Narbonne develop a program or services for a student and get District services to provide certain supports for the student. Ms. Jackson stated she was unaware of any other special education services, or how to acquire such services.

MAY 16, 2016 PRE-MEETING AND THE MAY 17, 2016 IEP TEAM MEETING

37. On May 16, 2016, school psychologist Ms. Lew, least restrictive environment specialist Ms. White, special education teacher Talehccia Jones, and other unnamed District personnel¹¹ met to review Ms. Lew's psychoeducational assessment report. Ms. Lew gave a summary of her report and recommendations. District personnel had questions about Student's numerous absences from first period and summoned him from class to join their meeting. Ms. Jones testified that it is unusual to have a meeting in advance of an IEP team meeting, that it is done when there is some confusion, a concern that the IEP team meeting will be difficult, or that it will be difficult to communicate at the IEP team meeting. In those situations, District personnel would meet to review the assessments and prepare so their statements at the IEP team meeting would be brief and clear. In Student's case, there were questions no one at the pre-meeting could answer about why Student was frequently absent in first period and failing that class, so Student was brought to the meeting. Ms. Jones testified that the group discussed that topic with him, but nothing else. Her testimony that nothing else was discussed with Student conflicted with Ms. Lew's testimony that the group discussed with Student what special education was and what it looked like, as well as Student's account of the meeting. Ms. Jones' testimony was less persuasive regarding the pre-meeting as others' testimony.

¹¹ Ms. Jackson was not at the May 16, 2016 pre-meeting.

38. Ms. Lew claimed not to remember much about the May 16, 2016 pre-meeting, which occurred only three and a half months before the hearing. She recalled some explanation to Student of what special education was, and did not recall if there was some discussion of what a Section 504 plan was. She recalled Student being asked about his absences and some explanation that he was tired in the morning. She recalled District personnel suggesting that to combat his fatigue, Student should go to bed early or have a snack. Ms. Lew's testimony regarding the May 16, 2016 pre-meeting was vague and non-specific, and did not contradict any of Student's testimony regarding the substance of the May 16, 2016 pre-meeting. However, her professed minimal recollection of an event that occurred relatively close in time to the date of her testimony undercut the reliability and weight of her testimony.

39. During the pre-meeting on May 16, 2016, District staff questioned Student about his many tardies and absences. He described his schedule and the difficulties he experienced as a consequence of his insomnia. He went to bed between 9:30 and 10:30 p.m. He would fall asleep, but then woke up in the middle of the night around 1:00 or 2:00 a.m., and was not able to fall back asleep. He would finally fall asleep again around 5:00 a.m. Father would come in to wake Student up, repeatedly, starting around 6:00 a.m., and tried to keep him awake. Student would get out of bed between 6:30 and 7:00 a.m. He would take a shower, and sometimes fall asleep in the shower. Between 7:00 and 7:15 a.m., he would get dressed, go downstairs, and eat breakfast. Most mornings he felt sick to his stomach, and spent a lot of time in the bathroom, sometimes being sick. Sometimes Student felt too ill to go to school, and he stayed home. Although school started at 8:00 a.m., many days he left the house around 8:00 to 8:20 a.m. The walk to school took 15 to 20 minutes. He often arrived during first period, and sometimes was marked tardy and sometimes was marked absent depending on how much time was left in the period. During fourth period Spanish, he was exhausted again

and would fall asleep in class. After school, at whatever time he arrived home, he laid down and rested, for between one and two hours. Sometimes he took a nap for one hour. Student sometimes attempted homework, but got bored, distracted or frustrated. He would work on easy or short assignments, or things that he regarded as more interactive than paper or writing on basic topics. He ate, did activities on his mobile phone, watched television, or just rested. He went to bed again between 9:30 and 10:30 p.m.

40. District personnel asked Student for his thoughts on the IEP; he stated he had ADHD, and that he was eligible and needed special education. District personnel told Student he would fit better on a Section 504 plan. They explained to Student that if a student needed an IEP, it was because the student needed to learn the steps, and that an IEP was for students who were not on the same level as other people. They explained that a Section 504 plan was for students who knew the steps and needed help, who could be on the same level as other students but needed a little push to be able to walk with them. District personnel asked Student what he wanted, special education or a Section 504 plan. He said he didn't know what he wanted because he didn't know what an IEP was for. District personnel told Student he was smart, his test scores were high, and they didn't think he needed an IEP.

41. District convened an IEP team meeting for Student on May 17, 2016, the day after the pre-meeting. The IEP team meeting was held to review the psychoeducational assessment of Student, and to discuss his eligibility for special education and related services. The meeting was attended by Student; Parents; Ms. Jackson; an administrative designee; general education teacher Arlene Pascua; Ms. Pan and Ms. Jones; Ms. Lew, a school nurse; and Ms. White.

42. Student's Algebra teacher attended the meeting and presented first. She gave her feedback about Student, and then asked to leave because she had a class to

teach. She left after only a few minutes. She was not present for any discussion of eligibility.

43. The special education teacher who administered the academic testing, Ms. Pan, presented second, reviewing the results of her testing. She was not aware of the eligibility category that was being considered for the IEP team meeting. She knew Student had been eligible due to a speech impairment in preschool and had resolved it. After she presented her report, she asked to leave because she had a class to teach. She left early, and was not present for any discussion of eligibility.

44. Ms. Lew provided Parents her psychoeducational assessment report at the IEP team meeting. She presented her assessment results and conclusions. Similar to her poor recollection of the pre-meeting, Ms. Lew did not recall much about the IEP team meeting that occurred slightly over three months before her testimony. She recalled that she presented her report and read that she thought Student was eligible under the category of other health impairment. Special education teacher Ms. Jones did not recall that anyone at the IEP team meeting used the term other health impairment, or the acronym OHI. Ms. Jones recalled there was a recommendation that he "met criteria." Ms. Jones did not know the criteria for other health impairment. Assistant principal Ms. Jackson recalled that the outside school psychologist recommended Student for special education and said he qualified for it, but she didn't remember under which eligibility category. Similar to Ms. Lew's poor recollection, Ms. Jackson also claimed not to recall many things about the May 17, 2016 IEP team meeting.

45. District personnel explained to Student and Parents the different parts of special education, as follows: There was the alternative curriculum, and Student did not require that. There was a special day class, and Student did not require that either. There was the resource program to support general education, but there was only support for English and math, and Student had good test scores in both those subjects. So Student

should just have a lot of accommodations. District staff proposed an accommodation to shorten assignments, so that Student was only required to demonstrate mastery.

46. As explained by Ms. Jackson, the purpose of the IEP team meeting was “to see if [Student] qualified; he wasn’t being able to access the curriculum, if his failing grades were contributing to him not being able to access, and his ADHD keeping him from accessing the curriculum.” With respect to determining whether, as school psychologist Ms. Lew recommended, Student qualified for special education, Ms. Jackson explained, “We never said that he didn’t qualify, we just came up with the decision that it wasn’t . . . suitable for him at that time. So we didn’t say that he didn’t, that he doesn’t qualify for the services. . . . According to, under OHI, and the, the law, basically, he would qualify. But the services, as a team, I, I didn’t feel that Narbonne High School would be able to service him in our RSP setting, in our Resource setting.” Ms. Jackson’s testimony confirmed that although the IEP team concluded Student was legally entitled to special education, District did not declare him eligible because the alternative curriculum, special day class, resource support program, and DIS counseling available at Narbonne High were not what Student needed.

47. The IEP document prepared during and after the meeting contained a page captioned Section F: Eligibility. In the box for “areas discussed related to disability or suspected disability,” nothing was written. The box for “does not meet eligibility criteria for Special Education Services” was selected, but the only potential eligibility indicated in the page was speech or language impairment. District personnel testified this was a consequence of the way District’s special education management computer system, Welligent, inalterably functioned, and was a vestige of Student’s brief special education eligibility 11 years earlier.

48. The IEP document also contained an individual transition plan, with a box marked for “additional courses/activities discussed that may support post secondary

[sic] goals (e.g. SLC participation, electives or instruction related to postsecondary goals, community experiences, participation in other school clubs or programs, etc.) NOTE: these are suggestions and contingent to availability.” Ms. White wrote in, “The IEP team considered all assessments and found that [Student] would be better served on a 504 plan rather than an IEP. At this time [Student] does not qualify for special education services. [Student] will participate in credit recovery opportunities and list along with his parents a list of current accommodations needed in the classroom.”¹²

49. At the end of the meeting, Parents were told to develop a list of accommodations they thought would help Student and to send that to District for consideration during a future Section 504 meeting to develop a plan of accommodations for Student. Student knew he had a problem doing classwork and homework, but didn’t know what to do to improve, didn’t know what would help him, and he wanted someone to help him improve. Parents knew of the accommodations Student had under his prior Section 504 plan designed to support his participation in school due to his variable hearing loss and asthma, but they were unaware of what other accommodations were possible. They did not know what other things could be done.

50. District mailed Parents a copy of the IEP on June 7, 2016, along with a letter chastising parents because although “a list of 504 accommodations was to be created by you and returned on May 20th,” Parents had not done that, and they also had not informed District whether they agreed or disagreed with “District’s offer of FAPE for accommodations to be administered through the 504 plan in general education.”

¹² The IEP document did not contain any page designated as notes or comments, and there was no detailed, descriptive summary of what occurred at the IEP team meeting.

51. Student finished the spring semester with failing grades in Spanish and History. At the conclusion of his tenth grade year, Student had only 85 of the required 210 credits to graduate. He did not have credit for two semesters of history, one semester of English, and one semester of science, four semesters of foreign language, and a course called Life Skills. District relied on Student's other passing grades from the spring semester to support District's position at hearing that although Student may have a disability, he does not require special education and therefore was not eligible for special education and related services.

52. Student did not present the testimony of any witness or move into evidence any document setting forth what Student required to address his unique needs. Further, although the Order Following Prehearing Conference dated August 22, 2016 required a party seeking compensatory education to provide evidence regarding the type, amount, duration, and need for any requested compensatory education, Student presented no such evidence, either written or testimonial.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA¹³

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.¹⁴; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that

¹³ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹⁴ All references to the Code of Federal Regulations are to the 2006 version.

all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, which meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, §§ 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the

potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student, as the complaining party, bears the burden of proof.

ISSUE 1: FAILURE TO FIND STUDENT ELIGIBLE FOR SPECIAL EDUCATION UNDER

OTHER HEALTH IMPAIRMENT CATEGORY

5. Student contends District denied him a FAPE by failing to find him eligible for special education as a student with an other health impairment at the May 17, 2016 IEP team meeting. District argues that Student was not eligible for special education under the other health impairment classification because any deficits he presented could be addressed in a general education classroom with accommodations.

6. A student is eligible for special education and related services if he is a "child with a disability" such as having intellectual disabilities, orthopedic impairments, or other health impairments, and, as a result thereof, needs special education and related services which cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b).)

7. A student may be eligible for special education in the category of other health impairment if he "has limited strength, vitality, or alertness, including 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 . . . and [a]dversely affects a child's educational performance" (Cal. Code Regs., tit. 5, § 3030, subd. (b)(9).) Both the federal and California regulations specify that attention deficit disorder or attention deficit hyperactivity disorder may be a chronic or acute health problem leading to a student's limited alertness in the educational environment. (34 C.F.R. § 300.8(c)(9); Cal. Code Regs, tit. 5, § 3030, subd. (b)(9)(A).)

8. A student having a suspected or diagnosed attention deficit disorder or attention deficit hyperactivity disorder may be eligible for special education in the category of other health impairment. (Ed. Code, §56339, subd. (a).) To be eligible, the student's educational performance must be adversely affected by the disorder, and must demonstrate a need for special education and related services by meeting the eligibility

criteria for other health impairment, set forth in the preceding paragraph. (Ed. Code, §56339, subd. (a).) If a student with attention deficit hyperactivity disorder is not determined to be eligible for special education and related services, his instructional program must be provided in the regular education program. (Ed. Code, §56339, subd. (b).)

9. A student shall be referred for special education and related services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed Code, § 56303.) A student shall not be determined to be an individual with exceptional needs¹⁵ if the prevailing factor for the determination is one of the following: (A) lack of appropriate instruction in reading; (B) lack of appropriate instruction in mathematics; (C) limited English proficiency; or (D) if the student does not otherwise meet the eligibility criteria under federal and California law. (Ed Code, § 56329, subd. (a)(2).)

10. Not every child who is impaired by a disability is eligible for special education. (*Hood v. Encinitas Union School District* (9th Cir. 2007) 486 F.3d 1099, 1106 (*Hood*) [decided under former Education Code section 56337].) A student may have a qualifying disability, yet not be found eligible for special education, because the student's needs are able to be met with appropriate accommodations in and/or modification of the general education classroom. (*Id.* at pp. 1107-1108, 1110.) In *Hood*, the court instructed, "Just as courts look to the ability of a disabled child to benefit from

¹⁵ California law defines an "individual with exceptional needs" as a student who is identified by an IEP team as a "child with a disability" pursuant to Title 20 United States Code section 1401(3)(A), who requires special education due to his or her disability, and instruction and services cannot be provided with modification of the regular school program. (Ed. Code, § 56026, subds. (a), (b)).

the services provided to determine if that child is receiving an adequate special education, it is appropriate for courts to determine if a child classified as non-disabled is receiving adequate accommodations in the general classroom – and thus is not entitled to special education services – using the benefit standard.” (*Id.* at p. 1107.) Some disabled students can be adequately educated in a regular education classroom. Federal law requires special education only for a “child with a disability,” who is defined in part as a child with an impairment “who, by reason thereof, needs special education and related services.” (20 U.S.C. § 1401(a)(3)(A)(ii); 34 C.F.R. § 300.8(a)(i).)

11. “Educational benefit” is not limited to academic needs, but also includes the social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office, et al.* (9th Cir. 1996) 93 F.3d 1458, 1467.)

12. Although a student may be obtaining satisfactory grades, and have the knowledge and skills typical of a student of his age and in his grade at school, he may still qualify for special education services as student with an other health impairment. (*M.P. v. Santa Monica Malibu Unified School Dist.* (C.D. Cal. 2008) 633 F.Supp. 2d 1089; *W.H. ex rel. B.H. v. Clovis Unified School Dist.* (E.D. Cal., June 8, 2009, No. CV F 08-0374 LJO DLB) 2009 WL 1605356, *judgment withdrawn in part* (E.D. Cal., Dec. 22, 2009, No. CV F 08-0374 LJO DLB) 2009 WL 5197215.)

13. When a student is eligible for special education and related services, an IEP is developed. An IEP must include: a statement of the student’s present levels of academic achievement and functional performance, including the manner in which the student’s disability affects his involvement and progress in the general education curriculum; a statement of measurable annual goals, including academic and functional goals, that are designed to meet each of the educational needs of the student that result from his disability; a description of how progress towards the goals developed will

be measured and reported; a statement of the special education and related services and supplementary aids and services to be provided to the student to enable the student to advance appropriately toward attaining the annual goals; and the frequency, location, and duration of the special education and related services and supplementary aids and services. (Ed. Code, §56345, subd. (a).) The statutory framework for the IEP provides a nearly step-by-step analytical approach to developing an individualized program of instruction and services for a student who requires special education.

14. A school district's determinations regarding special education, including eligibility, are based on what was objectively reasonable for the district to conclude, given the information the district had at the time of making the determination. A district cannot "be judged exclusively in hindsight," but instead "an IEP must take into account what was, and what was not, objectively reasonable . . . at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) However, after-acquired information may be used to assess the reasonableness of a school district's determinations. (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2009) 652 F.3d 999, 1004.)

15. An administrative law judge has the authority to determine whether a student is eligible for special education and related services under the IDEA. (*Hacienda La Puente Unified School Dist. v. Honig* (9th Cir. 1992) 976 F.2d 487, 492-493.) If a district has failed to properly identify a student as eligible for special education, and therefore failed to develop an appropriate IEP for the student, the district has denied the Student a FAPE. (*Department of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1196.)

16. With respect to Student, the District school psychologist who assessed him concluded that Student was having academic difficulties; had a history of general

education interventions that had not been effective in addressing his difficulties; had a medical diagnosis of Attention Deficit Hyperactivity Disorder for which he had been prescribed a stimulant medication; and had reports from teachers that Student's performance in class was marked by periods of inattention, distractibility, sleeping in class, and failure to complete or submit classwork, assignments, and homework. She believed these circumstances indicated eligibility for special education and related services. District's peer review process and review by her supervisor validated and confirmed her conclusion that Student was eligible for special education under the category of other health impairment.

17. The assistant principal responsible for special education acknowledged that Student qualified for special education and related services under the category of other health impairment. However, District regarded the analysis of whether or not Student required special education, and therefore was eligible for special education services, as a function of whether Student required any of the special education and related services available at the high school Student was attending. The information District possessed indicated that the numerous and varied general education interventions already attempted for many years were not effective, and District should have concluded that Student therefore required special education. Next, District should have determined what Student's unique needs were, what goals Student should have to address his unique needs, what services would address the goals, and what placement would be appropriate to deliver those services. Instead, District mistakenly began by ruling out the suitability for Student of each of the limited array of special education services Narbonne High offered and therefore concluded that Student did not require special education and would be "better served" by a plan of accommodations, to be invented by Student himself and Parents, under Section 504.

18. Student persuasively established that he was eligible for special education

under the category of other health impairment and qualified for special education and related services because he had Attention Deficit Hyperactivity Disorder, which manifested in the classroom as limited alertness in the educational environment. Student further established that the general education interventions that had been provided were not effective in sustaining his attention and facilitating his progress in the general education curriculum. Despite Student's average cognitive ability and average-to-superior performance on standardized academic achievement tests, he was failing core academic classes and was not on track to graduate high school. The school psychologist, her peers, and her supervisor concluded Student's attention deficits were the primary cause of his poor achievement, and that Student's frequent absences were not the primary cause. In total, the evidence demonstrated that Student qualified for special education and related services, and District's conclusion to the contrary denied Student a FAPE.

ISSUE 2: PREDETERMINATION THAT STUDENT WAS NOT ELIGIBLE FOR SPECIAL EDUCATION

19. Student contends that District predetermined that it would not find Student eligible or qualified for special education and related services. District contends it did not predetermine whether Student was eligible or qualified for special education. District argues that the District IEP team members went into the May 17, 2016 IEP team meeting with an open mind.

20. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483.) (*Target Range*) [superseded by statute on other grounds, as stated in *R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 939.] Citing

Rowley, supra, the court in *Target Range* also recognized the importance of adherence to the procedural requirements of the IDEA, but determined that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Target Range, supra*, at 1484.) This principle was subsequently codified in the IDEA and Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE 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 regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefits. (20 U.S.C. §1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).) The Ninth Circuit Court of Appeals has confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn.3; *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.) The Ninth Circuit has also found that IDEA procedural error may be held harmless. (*M.L. v. Fed. Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 652.)

21. Predetermination of a student's placement, or any other aspect of an IEP, is a procedural violation that deprives a student of a FAPE in those instances in which placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F. 2d 840, 857-859.) To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusion, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 [parent who had an opportunity to discuss a proposed IEP and whose concerns were considered by the IEP team has participated in the IEP process in a meaningful way].) "A school district violates IDEA procedures if it independently

develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. ex rel G. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131.) However, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F. Supp. 2d 127, 139 [IDEA did not provide for an "education . . . designed according to the parent's desires."].)

22. Where a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892-895 [school's failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents' right to participate in the IEP process, resulting in compensatory education award].)

23. In this case, the conclusion that District predetermined the outcome of the IEP team meeting is not based exclusively on a finding that District decided the day before the IEP team meeting that Student would not qualify for special education services. The conversation District personnel had with Student at the pre-meeting did show, absent Parent input, what the IEP team would recommend, and seemed aimed at persuading Student himself to reject any special education services. But what cemented District's predetermination of the outcome of the IEP team meeting was that District concluded that because none of the special education services available at Narbonne High were appropriate to meet Student's unique needs in the areas of alertness, attention, focus, task completion, and organization, Student did not qualify for special education and related services at all. By putting the placement location (Narbonne High) before the services horse, the IEP team meeting amounted only to District informing Parents and Student that Student was not eligible for special education.

District told Student and Parents the continuum of placement options available at Narbonne High, dismissed any of them as appropriate to serve Student's unique needs, did not know of and therefore never considered options outside of Narbonne High, and redirected the conversation from Student's eligibility for special education to putting the obligation on Parents and Student to propose educational accommodations that would "better serve" Student than the limited special education options at Narbonne High. Parents did not participate in the IEP process; they were merely given the opportunity to ratify what District had already determined.

24. Through the assistant principal in charge of special education at Narbonne High, District conceded that Student legally satisfied the criteria for eligibility for special education in that he had an other health impairment and by reason thereof required instruction and services that could not be provided with modification of the regular school program (special education). However, District avoided the conclusion that Student qualified for special education by reasoning that if Student didn't need the special education services available at Narbonne High, he didn't need special education. Neither the least restrictive environment specialist who attended the May 17, 2016 IEP team meeting nor the assistant principal for special education pursued, or even knew what to pursue from among, the panoply of special education services available to a pupil with an other health impairment residing within the second largest school district in the nation.

25. Student persuasively demonstrated that based on the incorrect eligibility analysis of District and Narbonne High-specific personnel, it was a foregone conclusion that Student would not be found eligible for special education at the May 17, 2016 IEP team meeting. As a consequence of District's predetermination that Student did not qualify for special education, Parents were deprived of meaningful participation in the IEP team meeting. In addition, Student was deprived of educational benefit in that an

IEP was not developed for Student and he did not receive the special education services to which he was entitled, from the date of the IEP team meeting forward. Student therefore was denied a FAPE.

REMEDIES

26. Student prevailed on Issues 1 and 2. Student proved that District wrongly failed to find Student eligible for special education and related services under the eligibility category of other health impairment and that District predetermined this outcome at the May 17, 2016 IEP team meeting, significantly impeding Parents' opportunity to participate in the decision making process and depriving Student of educational benefit. As remedies, Student requested: to be found eligible for special education under the eligibility category of other health impairment; at least one period per day to complete classroom tasks, organize his materials and assignments, and systematically address timelines for completion of course projects; 60 minutes a week of counseling as a related service to help Student improve his task application skills, learn strategies to reduce his inattention, and help him work on increasing his class attendance; a systematic credit recovery program; an IEP team meeting to document appropriate accommodations for and modifications of the general education program and to develop a behavior support plan to address his class attendance; compensatory education of 120 hours of individual academic services provided by a nonpublic agency to address to address Student's organization and assignment/homework completion; and 34 hours of counseling from a nonpublic agency to assist Student in developing strategies to control his off-task behavior.

27. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); see *School Committee of the Town of Burlington, Massachusetts v. Dep't. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad

equitable authority extends to an administrative law judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

28. An administrative law judge can award compensatory education as a form of equitable relief. (*Park v. Anaheim Union High School Dist.*, *supra*, 464 F.3d 1025, 1033.) Compensatory education is a prospective award of educational services designed to catch the student up to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265; *Orange Unified School Dist. v. C.K.* (C.D.Cal. June 4, 2012, No. SACV 11-1253 JVS(MLGx)) 2012 WL 2478389, *12.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid v. Dist. of Columbia*, *supra*, 401 F.3d 516, 524.) Compensatory education awards depend upon the needs of the disabled child, and can take different forms. (*R.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1126.) Typically, an award of compensatory education involves extra schooling, in which case "generalized awards" are not appropriate. (*Parents of Student W. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497.) "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Ibid.*)

29. Student failed to introduce any evidence supporting his request for specific special education services or for compensatory services. No evidence indicated the type, frequency, or duration of services that would be appropriate to enable Student to make progress addressing his unique needs in the areas of alertness, attention, focus, task completion, and organization, or to compensate Student for services he was denied since May 17, 2016. In part, this was a consequence of the vague recommendations

included in District's psychoeducational assessment report and the failure of District to consider and document what Student actually needed, instead of only crossing off options that he didn't need, until none of the three core curriculum special education services available at Narbonne High were left. While Student has proposed prospective and compensatory services, no person qualified to recommend such services testified any of them were appropriate for Student.

30. However, Student's failure to present expert testimony does not mean he should not receive any remedy for the denial of FAPE caused by District's failure to find him eligible for special education and District's predetermination that Student was not eligible for special education. It is equitable to award Student remedies arising from District's denial of FAPE. As a remedy for District's failure to find Student eligible for special education, Student is entitled to an order declaring him eligible for special education and requiring District to hold an IEP team meeting within 10 calendar days of the date of this Decision to develop an IEP to provide Student with special education eligibility under other health impairment. Additionally, District is ordered to develop a credit recovery plan for Student to allow him the opportunity to graduate in June 2018.

31. As a further remedy for District's failure to find Student eligible for special education, Student is entitled to some compensatory education for the 68 instructional days¹⁶ between the date District denied him a FAPE, May 17, 2016, and the date of this Decision, during which he should have been receiving some special education services. Student is awarded 68 hours of compensatory individual specialized academic

¹⁶ There were 17 instructional days in the 2015-2016 school year after the May 17, 2016 IEP team meeting at which Student was denied a FAPE. There were 51 instructional days in the 2016-2017 school year before this Decision was issued on October 31, 2016.

instruction from a credentialed special education teacher, to be provided by a nonpublic agency certified by the California Department of Education, on a year round basis, without regard to whether school is or is not in session. Student shall have until June 15, 2018, to access this compensatory education.

32. It is also equitable to order that District provide Student an independent educational evaluation. The evidence indicated that District lacked information regarding how to address Student's unique needs. District personnel were uninformed of what was necessary to address Student's limited alertness in the educational environment and its impact on his progress in the general education curriculum. Consequently, Student is also awarded an independent educational evaluation by a licensed psychologist of Student's choosing, to make specific recommendations in a program of special education to address Student's unique needs related to limited strength, vitality, or alertness as a consequence of attention deficit disorder or attention deficit hyperactivity disorder, general anxiety disorder, and insomnia. District shall compensate Student's selected assessor up to \$6,000 for the assessment, including a written report and two hours of participation at an IEP team meeting to review the assessor's results. Parents will be responsible to pay their chosen assessor any cost beyond \$6,000.

33. The evidence in this case warrants the further remedy of an order for special education training of District personnel. Narbonne High and local area District personnel demonstrated a lack of knowledge of the law and procedures regarding eligibility determinations and development of IEP's. They reverse engineered lack of eligibility by ruling out the limited services available at Narbonne High, and in doing so deprived Parents of meaningful participation in the decision making process and denied Student educational benefit. They admitted to not knowing about special education services beyond those few programs provided at Narbonne High. Furthermore, they

failed to consider the impact of other acute or chronic health conditions and the potential consequences of the medications Student was taking for those conditions on his alertness in the educational environment. Therefore, as a remedy, District shall provide at least 12 hours of special education training from an independent institution specializing in special education training to school districts,¹⁷ to all of the administrative and teaching personnel at Narbonne High and in the local area District office (identified on District stationery as ESC South), as well as any District employee who was in any respect involved in the pre-meeting on May 16, 2016, the IEP team meeting on May 17, 2016, or in addressing or resolving the merits of this case. Training shall include instruction in the areas of eligibility categories and criteria, the role of the IEP team in determining eligibility for special education and related services, the step-by-step process for developing an IEP, every program, related service, supplementary aide and support, and accommodation available in District, and how to access special education and related services at other locations when the school a student would attend based on his residence does not have the special education program or related service that the student requires to receive a FAPE. The training shall be completed by June 9, 2017.

ORDER

1. Within 10 calendar days of this Decision, District shall hold an IEP team meeting that includes Parents, to confer special education eligibility for Student under other health impairment due to an attention deficit hyperactivity disorder.

2. Within 30 days of this Decision, District shall develop an IEP and offer Student a program of special education and related services, and shall develop a credit

¹⁷ This does not include the law firm that represented District in this due process hearing.

recovery plan for Student.

3. Within 30 days of this Decision, District shall contract with a certified nonpublic agency to provide Student 68 hours of compensatory, individual specialized academic instruction from a credentialed special education teacher, on a year round basis. If the provider cancels a session, the time will be credited back to Student. If Student cancels a session with a least 48 hours' notice, the hours shall be credited back to Student. If Student cancels a session with less than 48 hours' notice, Student will forfeit the hour or hours for the session. Student shall have until June 15, 2018, to access this compensatory education. Any hours not used by that date shall be forfeited.

4. Within 10 business days of this Decision, Parents will provide District with the name of a licensed psychologist to conduct an independent psychoeducational evaluation. Within 10 business days of its receipt of Parents' selection, District shall contract with the assessor to perform a psychoeducational assessment. If Parents fail to timely select an independent assessor, District may choose an independent, licensed psychologist who has experience assessing students with attentional challenges, general anxiety, and insomnia, to conduct a psychoeducational assessment of Student. District, if it chooses the assessor, shall ensure that the assessment is completed and an IEP team meeting to review the results is convened within 60 calendar days of the date it executes the contract with the assessor. District shall compensate Student's selected assessor up to \$6,000 for the assessment, including a written report and two hours of participation at an IEP team meeting to review the assessor's results. Parents will be responsible to pay their chosen assessor any cost beyond \$6,000.

5. District shall provide 12 hours of special education training to all of the administrative and the special education teaching personnel at Narbonne High and in the local area District office (identified on District stationery as ESC South), as well as District employees who were involved in the pre-meeting on May 16, 2016, the IEP team

meeting on May 17, 2016, or in addressing or resolving the merits of this case. Training shall include instruction in the areas of eligibility categories and criteria, the role of the IEP team in determining eligibility for special education and related services, the step-by-step process for developing an IEP, every program, related service, supplementary aide and support, and accommodation available in District, and how to access special education and related services at other locations when the school a student would attend based on his residence does not have the special education program or related service that the student requires to receive a FAPE. The training shall be completed by June 9, 2017. The training shall be provided by an independent agency or institution not affiliated with District and which specializes in education training to school districts, and may not be provided by the law firm that represented District in the due process hearing.

6. All other relief sought by Student is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on both issues in this case.

DATE: October 31, 2016

/s/

KARA HATFIELD

Administrative Law Judge

Office of Administrative Hearings