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

In the matter of : STUDENT, Petitioner, vs. COMPTON UNIFIED SCHOOL DISTRICT and the LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondents.	OAH Case No. N2005060620

DECISION

Marilyn A. Woollard, Administrative Law Judge (ALJ) for the Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on October 12, 13, and 14, 2005, in Compton, California.

Petitioner Student was represented at the hearing by his attorney, Lillian Meredith. Student was present at the hearing on October 12, 2005, and part of October 13, 2005. His parents, Father and Mother, were also present during the hearing. Attorney Daniel Gonzalez represented respondents Compton Unified School District (CUSD) and Los Angeles Unified School District (LAUSD), and was assisted by his associate, Patrick Wang. Program cocoordinator, Joseph Mahabir, was also present at the hearing on behalf of CUSD.

On October 12, 2005, at the beginning of the hearing, the parties informed the ALJ that petitioner and respondent LAUSD had reached a settlement. Accordingly, LAUSD was dismissed pursuant to the terms of the parties' settlement agreement.

Petitioner testified and called the following additional witnesses: his mother; his father; LAUSD school psychologist, Billie Thomas; and Black Community Education Task Force ombudsman, Dr. Ernie Smith. CUSD called the following witnesses: Compton High School guidance counselor, Nia League; and CUSD school psychologist, Richard Reed.

Oral and documentary evidence was received. The parties agreed that the record would remain open pending receipt of their written closing arguments. On November 14, 2005, the ALJ received these arguments, which were made part of the record. The record was then closed and the matter was submitted for decision.

ISSUES[1]

1. Upon Student's enrollment at Compton High School in August 2002, did CUSD fail to provide him with an interim placement in accordance with his June 15, 2001, individualized education program (IEP) and/or fail to convene an IEP team meeting within thirty days?

2. From August 2002 through the 2004 - 2005 school years, did CUSD appropriately assess Student's educational, social-emotional, psychological, assistive technology, and vocational services needs?

3. Did CUSD fail to provide Student with a free appropriate public education (FAPE) for the 2002 - 2003 through 2004 - 2005 school years, including the extended school years, by failing to convene annual and triennial IEP team meetings, by failing to provide thirty minutes a week of speech services, and/or by failing to provide individual

[1] The issues were reorganized for clarity of analysis.

resource specialist program (RSP) services one hour a day, five days a week, all as required by his June 15, 2001 IEP?

4. If CUSD did not appropriately assess Student or assess him in all areas of suspected disability, are his parents entitled to reimbursement for the independent psycho-educational assessment conducted by Ms. Thomas in late 2004, and/or to publicly funded IEEs in assistive technology and vocational needs?

5. If CUSD denied Student a FAPE, is he entitled to reimbursement for educational expenses his parents incurred during the 2004 - 2005 school year to send him to Verbum Dei, a private high school, and/or to compensatory education?

CONTENTIONS OF THE PARTIES

Petitioner contends the CUSD denied him a FAPE because it failed to implement the terms of his June 15, 2001, IEP that had been developed by LAUSD when he enrolled at CUSD's Compton High School in August 2002. Petitioner argues that this IEP was still viable in August 2002, despite the February 26, 2002, IEP amendment by which LAUSD exited him from special education. Petitioner asserts that once he enrolled at Compton High School, CUSD should have (1) immediately provided him with an interim IEP placement, (2) convened an IEP team meeting within thirty days, (3) provided him the services outlined in the June 2001 IEP, and (4) conducted annual and triennial IEP team meetings as scheduled in the June 2001 IEP. Petitioner further asserts that CUSD failed to appropriately assess him for the scheduled triennial review and that his parents are therefore entitled to reimbursement for the independent psycho-educational assessment conducted at his parents' request in late 2004 by LAUSD school psychologist Billie Thomas. Finally, petitioner asserts that his family is entitled to reimbursement for the costs of his private education during the 2004 – 2005 school year due to CUSD's denial of a FAPE, and that he is entitled to compensatory education services.

CUSD asserts that petitioner is attempting to enforce an IEP that is no longer valid. Specifically, CUSD contends that the June 15, 2001 IEP was superseded by the February 26, 2002, IEP amendment that exited him from special education with his mother's consent. In CUSD's view, it had no duty to provide petitioner with a FAPE because he was enrolled at Compton High School by his parent as a regular education student, and the family thereafter made no requests for interim placement, for an IEP, or for any special education or related services. CUSD further asserts that petitioner's longstanding interest is in obtaining an assessment in Ebonics rather than any special education services. CUSD argues that this is demonstrated by the fact that it has offered petitioner three assessment plans since October 2004, but that petitioner has to date refused to make himself available for an assessment. As a consequence, CUSD asserts that it should not be ordered to reimburse petitioner for the costs of an independent assessment, for the costs of his private school placement during the 2004- 2005 school year, and that it should not be ordered to provide any compensatory education services.

FINDINGS OF FACT

PROCEDURAL HISTORY

I. Procedural Background

1. On June 25, 2004, Father filed a request for a due process hearing on behalf of his two sons, Student and Brother, against CUSD with the California Special Education Hearing Office (SEHO). Father asserted that his sons' primary language was an African language system known as Ebonics that was derived from their Nigritian or Niger-Congo heritage, and that this was a non-English language. As a proposed resolution to this problem, Father requested that his sons be assessed in Ebonics, and that CUSD create an assessment tool in Ebonics if one did not exist. In addition, Father requested that all of his sons' grades which allegedly had been given "based on

inappropriate placements," be expunged from their records. In support of the request for a due process hearing, Father incorporated a twenty-five page declaration from himself regarding his son Brother and a declaration from Brother's mother, each of which was written in fluent English. Student, who was over eighteen years old, also filed a letter giving his parents "express authorization to handle my mediation and due process hearing."[2] SEHO assigned each of the cases a separate case number and the cases were assigned for hearing separately.

2. Thereafter, the case was continued at the parents' request. On August 20, 2004 the parties agreed to take the case off calendar to pursue mediation.

3. On August 27, 2004, the Los Angeles Unified School District (LAUSD) was added as a party at petitioner's request.

4. On May 6, 2005, petitioner requested that the case be set for hearing on the next available dates.

II. Relevance of Testimony Regarding Ebonics

5. On June 2, 2005, the due process hearing was convened and the hearing participants clarified petitioner's issues against each of the respondents. During the discussion of the issues, petitioner contended that he has unique bilingual educational needs arising out of his primary or native language of Ebonics that must be addressed as part of his special education unique needs. Petitioner further argued that all of his special education assessments, and any special education and related services offered or provided to him by respondents should have been provided by persons who were (1)

[2] CUSD's motion to dismiss the case due to its assertion that Student was an adult and his parents were not authorized to represent him was denied by order dated May 31, 2005.

trained in, knowledgeable about, and able to speak Ebonics, (2) trained in teaching English as a second language, and (3) culturally sensitive to petitioner's native language.

To ensure that the issues raised by petitioner were appropriate for adjudication in a special education due process hearing, the parties were ordered to provide written briefs and supporting declarations, if necessary, regarding whether Ebonics is a non-English "native language" in which a school district must assess a student to determine special education eligibility and/or to provide special education and related services. The Hearing Officer also ordered Student to provide a declaration, under penalty of perjury, regarding whether he is fluent in the English language. The hearing was continued to July 14, 2005. (June 9, 2005 Summary Order Regarding Issues and Case Status.) Thereafter, the parties submitted their briefs, but petitioner declined to submit the ordered declaration regarding his English- speaking ability.

6. On June 30, 2005, SEHO issued an order regarding the native language issue. In pertinent part, the Hearing Officer concluded that "petitioner's desire to have Ebonics recognized as a non-English 'native language' in which he must be assessed and provided special education and related services is a policy issue that exceeds the scope of the Hearing Office's jurisdiction. Accordingly, expert testimony on whether Ebonics is a non-English 'native language' is not relevant to the issues for hearing." The Hearing Officer's order found that petitioner would be allowed to submit evidence regarding whether any of the assessments conducted by respondent LAUSD were racially or culturally biased pursuant to California Education Code sections 56320, subdivision (a) and 56324, subdivision (a).

7. On July 1, 2005, the case was transferred to the Office of Administrative Hearings (OAH). On July 14, 2005, OAH conducted a telephonic status conference and continued the matter to August 1, 2005. When the hearing convened on August 1, the

parties requested that the matter be taken off calendar to pursue informal resolution. On October 5,2005 the case was placed back on calendar at petitioner's request.

8. On October 12, 2005, the due process hearing commenced. The ALJ clarified that written and oral evidence of meetings and communications between the parent and CUSD regarding Ebonics may be relevant to the limited extent that these meetings and communications may also have involved a request for special education assessment and services. The ALJ noted that a central dispute between the parties was whether, as the District asserted, the parent only sought bilingual education assessment and services for Student or whether, as the petitioner asserted, his parent sought special education services in addition to assessment and instruction in Ebonics.

III MOTION TO RECUSE ALJ

9. On September 27, 2005, the ALJ issued a decision in the matter of Student's sibling, Brother, in OAH Case Nos. N2005070129 and N2005070151. Pursuant to that decision, Brother partially prevailed in his claims against CUSD. Although the petitioner was aware at the time this decision was issued that the ALJ was also assigned to hear his case, petitioner did not file a pre-hearing motion to disqualify the ALJ.[3]

On October 12, 2005, Father advised the ALJ that he believed her to be biased against him in light of the findings made by the ALJ in the case of his son Brother.

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[3] The undersigned ALJ was also the Hearing Officer handling this matter for SEHO. Pursuant to the Administrative Procedure Act, "any party may request the disqualification of any administrative law judge or agency member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that the administrative law judge or agency member is disqualified. ..." (Cal. Gov. Code § 11512, subdiv. (c).)

Thereafter, petitioner's attorney moved to recuse the ALJ for bias in light of the prior decision.

In denying the motion, the ALJ ruled that the factual findings to be made in the present case would be based upon the unique facts, issues, and evidence regarding Student to be introduced in this matter.

IV. MOTION TO ADD ISSUE

10. On October 13, 2005, petitioner asked to add the following issue: If Student was exited from special education by LAUSD, did CUSD fail to identify him as a special education student pursuant to its "child find" obligation? The District objected to the addition of a new issue at this date.

Because the case had been pending for over fifteen months, the issues were discussed in detail with petitioner's counsel at the June 2, 2005 hearing, and the request was made on the second day of the hearing, the request to add a new issue was denied.

FACTUAL HISTORY

11. Student is a twenty-year-old African-American student who is described by his parents as a peacemaker with great strengths in sports and in music, and great struggles academically, particularly in math and English. Student attended schools within CUSD throughout his elementary years. In approximately 1997, Student's mother moved to Los Angeles, where he attended schools within the Los Angeles Unified School District (LAUSD). In August 2002, Student returned to CUSD and attended its Compton High School for the 2002 - 2003 and 2003 - 2004 school years. Throughout high school, Student has received predominantly failing grades, and he has repeated both the ninth and the eleventh grades. In the fall of 2004, his parents advised CUSD that it had denied Student a free appropriate public education (FAPE) and that they were placing him in a private school. The parents placed Student at Verbum Dei High

School, a private Catholic all-male school where he attended twelfth grade during the 2004 - 2005 school year.

To date, Student has not graduated from high school due to a severe deficiency of credits required for a high school diploma. In September 2005, Student enrolled at Los Angeles Southwest Community College (LA Southwest), where he is currently working toward an associate of arts degree.

STUDENT'S INDIVIDUALIZED EDUCATION PROGRAMS (IEPS) FROM LA USD

A. Initial June 15, 2001 IEP

12. In the fall of 1999, Student enrolled in ninth grade as a regular education student at LAUSD's King/Drew Medical Magnet High School for the 1999 - 2000 school year. Student failed ninth grade and repeated this grade during the 2000 - 2001 school year. In May 2001, Student was assessed by LAUSD to determine his eligibility for special education and related services.

13. On June 15, 2001, LAUSD convened an initial individualized education program (IEP) team meeting to review its assessments and to consider Student's eligibility for special education. The IEP team concluded that Student was eligible for special education as a student with a specific learning disability (SLD), who exhibited a severe discrepancy between his ability and his academic functioning in written and oral expression. Student's SLD eligibility was based upon the following findings. First, Student functioned within the average range of cognitive ability and demonstrated relative strength in auditory processing skills; however, he was more than two years below age and grade expectancy in several academic areas. Second, Student had a severe expressive language processing deficit and a deficit in visual perception processing that affected his academic skills. The IEP team determined that Student's SLD

was not primarily attributable to various factors, including his unfamiliarity with the English language.

14. The IEP team recommended that Student spend five percent of his time each week in special education and that he receive the following special education and related services during 2001-2002 the regular school year at King/Drew:

- speech and language services thirty minutes a week;
- resource specialist program (RSP) services in math and language arts for a total of one hour a week (thirty minutes each); and,
- additional time to complete assignments and tests when requested.

The IEP team offered Student goals in math (improve basic math skills), language arts (develop well-constructed sentences and paragraphs), vocational education (complete classroom and homework assignments in a timely manner four times a week), and speech and language (improve retrieval skills for expressive language, and improve general speech clarity for more intelligible speech). The IEP team identified Student's annual IEP and triennial review dates as June 15, 2002, and June 15, 2004.

On June 15, 2001, Student's mother signed her consent to this IEP.

B. February 26, 2002 Amendment to IEP Exiting Student from Special Education

15. In the fall of 2001, Student began the 2001 - 2002 school year repeating ninth grade at King/Drew. At the conclusion of that semester, Student received failing grades in all subjects except health (D) and life skills (C).

16. On February 26, 2002, the IEP team met to amend the June 15, 2001, IEP and to discuss Student's "future educational placement now that he has transferred from King/Drew Magnet." The IEP team noted that Student did not complete his assignments, did not take advantage of offers of assistance either in or outside of class, and continued to fail in language arts and math. His communication skills were

improving, however, particularly in word recognition and pronunciation. The IEP team continued to recommend that Student receive RSP services, and that the amount of time Student would spend in special education be increased from 5 to 33 percent of his school day.

The team offered Mother two possible placements: Student could go to the Harbor Occupational Center, as recommended by his resource teacher, and continue to receive special education services. Alternatively, Student could go to the Maxine Waters Continuing Education School. Student's mother was advised that Maxine Waters School did not accept special education students and that the school "could not enroll an RSP student in the program unless he has exited special ed. and is able to receive regular ed. instruction." Student's mother determined that Student should attend Maxine Waters School, because it was closer to home and other of her children had attended school there in the past. The IEP provided as follows:

> It was decided by the consensus of the IEP team that Student will transfer to Maxine Waters. Per parent request, Student will exit special education services and will receive instruction in regular education classes at Maxine Waters. It was also noted that Student will continue to be eligible for special ed. services in case he decides to transfer to another school which provide[s] such services.

The face of this IEP reiterated Student's annual and triennial review dates.

On February 26, 2002, Mother provided her written consent to this IEP, with a a limited dissent in which she expressed her concern that Student had not been assessed in Ebonics.

Following this IEP, Student attended Maxine Waters with the goal of improving his grades. No documents were introduced that discuss his performance at that school; however, Mother testified that this plan did not work.

STUDENT'S TRANSFER BACK TO CUSD IN AUGUST 2002

A. Evidence Regarding Notifying CUSD Of Prior IEP Upon Enrollment

17. LAUSD school psychologist Billie Thomas testified that she was the special education coordinator of her district for four years. Based upon her experience as an administrator, she testified that when a school district receives an IEP on a transfer, the receiving district has an obligation to immediately implement the IEP, investigate the needs delineated in the IEP, and develop a new IEP within 30 days. Ms. Thomas reviewed Student's February 26, 2002, IEP and testified that, if she had received this IEP, she would have spoken to the parent about implementing it and provided the services.

18. In August of 2002, Mother moved her family back to Compton where Student enrolled in the eleventh grade for the 2002 - 2003 school year.[4] Because

[4] There is confusion in the testimony and in Student's educational records regarding his grade level in certain school years. According to his two IEPs from LAUSD and to his cumulative records, Student attended ninth grade during the 1999 - 2000 and 2000 - 2001 school years, and he again began ninth grade in the fall of 2001. According to his intradistrict transfer request of August 2002, as well as his Verbum Dei transcripts, Student entered Compton High School in the fall of 2002 in the eleventh grade, and he remained in the eleventh grade for both the 2002 - 2003 and the 2003 - 2004 school years. The Verbum Dei transcript indicates his enrollment in the tenth grade during portions of 2001. Father testified that Student enrolled in the tenth grade at Compton High School.

Student's school of residence was Centennial High School and Compton High School was closer to the parent's job, Mother sought an intradistrict transfer for Student to attend Compton High School.

On August 26, 2002, Mother completed and signed a CUSD form entitled "Intradistrict Attendance Permit." Among the information requested by this form was a designation of the services the student was currently receiving. Boxes were provided to check off one of five categories: special education services, section 504, ELL [English language learner], GATE, or regular education services. The "regular education services" box was checked on the form.

Mother testified that she completed this form but that she did not recall checking the "regular education services" box.

19. Mother further testified that when she enrolled Student at CUSD, she believed the IEP from LAUSD was still in effect. She did not provide CUSD with a copy of Student's IEPs. Mother testified that she informed Compton High School's principal that Student had an IEP in place. In response, the principal informed her that CUSD had a "small schools'" program he thought would be perfect for Student because it had art and technology.

20. Mother has several children other than Student who were/are in special education. She understands that IEP meetings are to be held annually for special education students. After Student was at Compton High for a year, Mother never requested an IEP team meeting for him. Rather, she asked that Student be placed in a "proper educational setting to get the best education." Mother testified that she had ongoing discussions with Student's principal, counselor, and teachers in both the fall of 2003 and the fall of 2004. In her recollection, she was always seeking help due to Student's grades. Mother also testified that, in her experience with IEPs at CUSD, it was common to go for more than one year without an IEP team meeting.

21. Mother's testimony that she did not remember indicating that Student was a regular education student, as well as her testimony that she advised the principal that Student had an IEP, is not credible in light of the record as a whole. The only document provided to CUSD by the parent upon enrollment did not provide any objective notice that Student required special education services. Rather, on its face, it indicated that Student was a regular education student. CUSD was not provided with the IEP documents by the parent on enrollment. There was nothing manifestly apparent in Student's manner or demeanor that would place CUSD on notice of his potential status as a special education student. Mother's recollection of a crucial conversation over three years later in a manner that would benefit her son's case is suspect, particularly in the absence of any written communications to that effect. Further, Mother's action of previously removing Student from special education due to the more convenient location of the Maxine Waters continuation school indicates that special education services were not a priority for her at that time.[5] Her subsequent failure to ask CUSD for an IEP meeting or for special education services reinforces the conclusion that she took no action to inform CUSD about Student's IEP on his initial enrollment. Finally, neither parent provided any written request or complaint to CUSD about its alleged failure to implement Student's IEP from the time of his enrollment in August 2002 until approximately June 2004.

[5] Mother was questioned about LAUSD's offer of ongoing special education service at Harbor Occupational Center as an alternative to exiting special education to attend Maxine Waters Continuation School. Mother testified that she did not recall being specifically told that special education support was provided, even though this is clearly written in the February 26, 2002, IEP she signed.

22. Since approximately 1997, Father has been involved in efforts to ensure that his children's native language for educational purposes be designated as Nigritian Ebonics rather than English. In this context, he has expressed his concern that African-American students have been inappropriately placed in speech therapy or special education classes due to the failure of school districts to use culturally appropriate assessment instruments, and that they are being discriminated against on the basis of their race, color, and national origin in receiving equal educational opportunity. Father has requested that any assessments be conducted with a testing instrument in Ebonics, a remedy he again sought in his request for Student's due process hearing. In this endeavor, Father has written detailed letters in fluent English to superintendents and special education personnel in both LAUSD and CUSD, as well as to the Office of Civil Rights for the United States Department of Education.

Against this background, the absence of written communications from Student's parents to CUSD requesting implementation of Student's IEP upon enrollment at Compton High School in August 2002, or for any special education services at any time thereafter until approximately June of 2004, is strong and persuasive evidence that no such requests were made.

B. Evidence Regarding Subsequent Special Education Services And/Or Requests For Special Education Assessment And Services

23. Throughout the two years of Student's enrollment at Compton High School, his parents never requested in writing that CUSD convene an IEP team meeting to establish his eligibility or his continuing eligibility for special education, or provide him with speech and language and/or resource specialist services as called for in his June 15, 2001, IEP from LAUSD.

During this period, Student was never assessed or reassessed for special education services by CUSD. CUSD never convened an IEP team meeting to discuss

Student's eligibility for special education or to offer him any special education and related services. Student never received any speech/ language or resource specialist services of the type and amount identified in his June 15, 2001, IEP.

24. Following his enrollment at Compton High School, Student attended its Arts & Technology (A & T) program, also called "the small school," for both the 2002 - 2003 and 2003 - 2004 school year, in the eleventh grade. The A & T "small school" program provided the same core curriculum as the high school, but with smaller classes (1:25 vs. 1:30-40) and more individual attention. Subjects were team-taught and project topics were coordinated between classes. Electives were offered in graphic design and animation. According to Compton school counselor Nia League, this program was generally for students who were in the average range, but who could benefit from individualized attention to improve their skills.

Student's academic performance during the 2002 - 2003 and the 2003 - 2004 school years was extremely poor. He failed the vast majority of his classes. During these years, Student played football, basketball, and ran track for the high school. Student's failing grades did not affect his ability to play sports, however, because Compton did not require student-athletes to maintain a minimum grade point average. Student was also reported to have significant absences from classes. Student's parents testified that CUSD kept moving Student's classes around and inaccurately recording him as absent. Compton school counselor Nia League testified persuasively that any class changes were updated on the computer every two weeks and that any erroneous absences resulting from class changes would have been corrected within two weeks.

25. During the 2003 - 2004 school year, Ms. League was the school counselor for both Student and for his brother at Compton High School. Both Student and Brother were in the "small school" and both were receiving primarily failing grades. Student was repeating eleventh grade and was below the 160 credits required for entry into the

twelfth grade. As a consequence, Ms. League recommended to Mother that Student attend a continuation school; however, Mother wanted him to remain at Compton. Ms. League never saw an IEP for Student nor reviewed his cumulative file.

26. There was conflicting testimony regarding whether Ms. League discussed Student with Father during the 2003 - 2004 school year, and whether Father had requested special education for Student while meeting with Ms. League in May of 2004.

Ms. League testified that she never had any conversations with Father about Student and that she never received any requests for special education regarding Student from either parent. Ms. League did recall a meeting she had with Father regarding his son Brother During this meeting, Father requested special education for Brother Based upon this request, Ms. League referred Father to the special education department. She testified that the focus of this conversation with Father was on Brother, not on Student.

Father disputed Ms. League's recollection. He testified that he had discussed both Student and Brother with Ms. League, because both were failing at the small school, and because he wanted both of his sons moved out of the small school program. Father was told that his sons would have to be assessed to get out of the small school.
He then arranged a meeting with all of Student's teachers to discuss his education.

27. The ALJ finds that Father's testimony is entitled to greater weight than that of Ms. League on this point. During the 2003 - 2004 school year, Ms. League carried a caseload of approximately 350 to 400 students. With this heavy caseload and the passage of approximately fifteen months of time, a lapse of recollection can occur, particularly in the absence of supporting documentation to the contrary. By contrast, Father's testimony that he discussed both of his sons with Ms. League is supported by the records provided by petitioner, including the requests for due process hearing and letters to CUSD personnel in 2004. Each of these documents was penned by Father on

behalf of both Student and Brother due to the similarity of the issues being raised by the parent. In addition, as detailed below, subsequent meetings between Father, his advocate Dr. Smith, and Compton's assistant principal Dr. Williams concerned both Student and Brother

Accordingly, the ALJ finds that Father made a verbal request for special education for Student in approximately May 2004.

28. Following this request, Father enlisted the assistance of Dr. Ernie Smith, an ombudsman and advocate from the Black Community Education Task Force, who had previously worked with the parent in his efforts to obtain an assessment in Ebonics. Dr. Smith's testimony at the hearing was limited to his role as an advocate for Father in his interactions with District personnel regarding Student's education.[6]

29. Dr. Smith and Father testified that a meeting they originally planned with all of Student's [and Brother's] teachers for May 28, 2004, was cancelled by Dr. Williams, who met with them privately. Dr. Williams then invited Mr. Umar Baba, CUSD's program coordinator for special education, to join the meeting. Neither Mr. Williams nor Mr. Baba testified at the hearing.

According to Dr. Smith, the purpose of this meeting was to request an assessment for Student in his primary language of Ebonics. If an assessment in Ebonics

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[6] Dr. Smith is a professor of linguistics who has a doctoral decree in comparative culture with a specialty in comparative linguistics. He has lectured and written extensively on topics relating to the language of African Americans, Ebonics, bilingualism, and teaching English to African-Americans as a second language and assisted Father in past complaints agains't LAUSD and CUSD to have Father's children assessed in Ebonics. Dr. Smith has no formal training in special education, or in the laws or regulations pertaining to special education.

revealed that Student had a need for special education services, the parent was willing to accept that. The primary concern was with the validity of the assessment instrument.[7] Dr. Smith did not ask that the June 2001 IEP be implemented at this meeting.

According to Father, at this meeting he asked for "an appropriate assessment," in Ebonics. He did not call it a bilingual or special education assessment; rather, he was asking for help and he did not refuse special education. Mr. Baba referred him to director of special education, Dr. Diggs, and assisted him in making an appointment with Dr. Diggs once they realized she was not available. Dr. Diggs never contacted him. Mr. Baba then referred Father to Dr. Buenavista, CUSD's director of pupil services - new student orientation.

30. On June 14, 2004, Father wrote a letter to Dr. Buenavista as a follow-up to the meeting in which he requested help in having his sons Student and Brother assessed in Ebonics. Father specifically requested that Dr. Buenavista take action to expunge all of his sons' grades and to provide them "passing grades because of their attendance, and inappropriate assessments led to inappropriate placement that led to inappropriate grades."

31. On June 18, 2004, Father wrote to Compton High School principal Dr. Salmon-Asfaw regarding Student and Brother to request assistance in expunging his sons' failing grades and replacing those grades with passing grades. The basis for

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[7] Dr. Smith testified that he shared his concern with Father about the disproportionate placement of African- American students in special education classes and the issue of bias in testing discussed in Larry P. vs. Riles (N.D. Cal. 1979) 495 F. Supp. 926, affd in part, revd. in part (9th Cir. 1986) 793 F. 2d 969 [permanent injunction issued that prohibited the use of certain intelligence tests that had the effect of disproportionately identifying African- American students as mentally retarded].

this request was the parent's assertion that his sons had been inappropriately assessed in English rather than in their primary language and that these inappropriate assessments "led to inappropriate placement that led to inappropriate grades." Further, Father asserted that his sons had been discriminated against "because they speak a language other than English; from getting from the Compton Unified School District a free appropriate public education."

32. On June 25, 2004, Father filed the request for due process hearing.

33. Father's verbal request for special education to Ms. League in May 2004, his actions at the meeting of May 28, 2004, and his subsequent correspondence to CUSD personnel were sufficient to put CUSD on notice, effective in mid-June 2004, that he had requested a special education assessment for Student. Although Father's letters described above reference assessments in Ebonics rather than specifically mentioning special education, they must be interpreted in light of the prior verbal request and the discussion at the meeting with Dr. Williams and Mr. Baba. The District produced no witnesses to contradict any of the testimony made regarding the substance of these meetings.

34. Due to the intervention of summer recess, CUSD was obligated to present the family with an assessment plan for their consent and to assess Students and convene an IEP team meeting within 50 calendar days of receipt of the parent's consent to the assessment plan, not counting the summer vacation. (Cal. Ed. Code § 56043.) As a consequence, an assessment and an IEP was required by approximately the middle or end of October 2004.[8]

[8] Because CUSD's school calendar identifying the specific dates for summer vacation and the start of the 2004 - 2005 school year at Compton High School was not placed in evidence, these dates are approximate.

UNILATERAL PLACEMENT AT VERBUM DEI FOR 2004-2005 SCHOOL YEAR

35. Student's parents began the process of applying for his admission to Verbum Dei in June 2004 by seeking recommendations from Ms. League, from Dr. Williams, and from his Compton English teacher.

36. On August 4, 2004, Father wrote to CUSD's attorney Mr. Gonzalez "to formalize my disagreement with the Compton School District ("District") offer of free and appropriate education ("FAPE") for the past three years" for Student. Specifically, Father asserted that CUSD had failed to appropriately address Student's speech and language disabilities and his needs arising from his specific learning disability. Father advised CUSD of his intent to provide private educational services to Student and to seek reimbursement from CUSD. This letter was sent to Mr. Gonzalez on August 18, 2004.

37. Student enrolled in the twelfth grade at Verbum Dei in August 2004. As part of Verbum Dei's program, Student participated in a work study clinic by working at the human resources department of a law firm.

INDEPENDENT ASSESSMENT BY BILLIE THOMAS

38. From late October through early December of 2004, LAUSD school psychologist Billie Thomas conducted a psycho-educational assessment of Student at his parents' request to determine his eligibility for special education. Ms. Thomas tested Student over four sessions, observed him at Verbum Dei on three occasions, and

administered standardized tests.[9] When Ms. Thomas began the assessment, Student told her he was eighteen years old. During the assessment, however, Ms. Thomas learned that Student was actually nineteen years old. In her opinion, as well as that of CUSD school psychologist Richard Reed, the validity of her test results were not significantly affected by the subsequent discover of Student's true chronological age.

From her assessment, Ms. Thomas concluded that Student was eligible for special education as a student with a specific learning disability who exhibited a significant discrepancy between his average cognitive ability and his academic achievement in reading, math and written language due to psychological processing deficits in visual perceptual skills, multi-sensory skills, cognitive processing, and verbal reasoning. Ms. Thomas recommended that Student continue in the current small school setting at Verbum Dei and identified numerous specific teaching strategies. Ms. Thomas also recommended that Student receive remediation and intervention based upon the mediated learning experiences model that uses non-content-specific materials to develop cognitive thinking skills in a manner that modifies the student's cognitive ability. CUSD school psychologist Richard Reed testified that Ms. Thomas' assessment was, in his opinion, a good report.

Ms. Thomas provided the parents with a copy of her assessment report in December 2004, and an invoice for her assessment in the amount of $2,100.00.

[9] The tests administered were the Matrix Analogies Test, the Beery Visual Motor Integration Test, the Test of Visual Perceptual Skills, the Comprehensive Test of Phonological Processing, and the Wide Range Achievement Test, and portions of the Woodcock Johnson III Tests of Achievement.

STUDENT'S PROGRESS AT VERBUM DEI

39. Student testified that he has trouble understanding his class assignments and needs one-to-one assistance to help him understand the assignments in all subjects. Once he has this help, he can understand the lesson. Student found Verbum Dei to be more challenging than Compton High School, but he also found that Verbum's Dei teaching staff would spend more time with him after class to make sure he understood. For example, Verbum Dei's principal Dr. Abelein inspired him in business math during a weekly small- group session. Student testified that he struggled at Verbum Dei, but passed due to the extra help he received. During this year, Student also received one-to-one mediated learning sessions from LAUSD school psychologist Robert Jones, who was asked to work with him by Ms. Thomas.

40. As a student at Verbum Dei, Student was not allowed to play sports unless he had a 2.5 grade point average. As a consequence, he did not participate in organized school sports during the 2004 - 2005 school year. Student testified that this was a hardship for him because playing football is his *raison d'etre* or reason for living.

41. During the 2004-005 school year, Student completed 30 of the 35 high school credits he attempted. Student failed only three of his classes, and passed both English (D and C grades) and business math (B grades). At the end of this school year, Student's overall grade point average was 1.54. He did not graduate.

Both parents observed an improvement in Student's motivation and class participation while he attended Verbum Dei. Father attributed this to Verbum Dei's structure and to its desire to see Student succeed. Ms. Thomas also expressed her opinion that Student received educational benefit at Verbum Dei, due to the small structured environment, his work experience, and the rapport and attention he received from the teachers.

42. For the 2004 - 2005 school year, the parents incurred a total of $ 3,994.00 in costs for Student's education at Verbum Dei, for tuition ($2,000.00), uniforms and books ($ 575.00), transportation ($ 519.00) and meals ($ 900.00).

CUSD'S ATTEMPTS TO ASSESS STUDENT

43. In October 2004, CUSD provided Father with an assessment plan for both his sons. On October 21, 2004, Father wrote to CUSD's interim director of special education Joseph Mahabir indicating that the assessment plan did not indicate his sons' primary/native language on the forms. He requested that the assessment plan be updated by including their primary language before it signed the assessment plan. Father testified he never received a response to this letter.

44. On December 3, 2004, CUSD school psychologist Richard Reed prepared an assessment plan pursuant to which CUSD would assess Student for special education and related services. Included with the assessment plan was a five-page parent question that requested information or concerns relevant to the proposed assessment. Mr. Reed had the assessment plan mailed by certified mail to Student's parents. Father testified that he never received this assessment plan.

45. On February 22, 2005, CUSD's attorney, Mr. Gonzalez, wrote to petitioner's attorney, Ms. Meredith, inquiring about the status of the assessment plan. Mr. Gonzalez requested a prompt response regarding whether consent to be provided to the assessment plan.

46. In June 2005, CUSD filed its action, OAH Case No. N2005071091, against Student, and sought a determination that it had a right to assess him for special education pursuant to its June 10, 2005, assessment plan. On August 31, 2005, the parties reached a settlement authorizing Student's assessment and CUSD's case was dismissed in light of the settlement. Since this settlement, however, Student has not been made available for an assessment by CUSD. When he testified on October 14,

2005, Mr. Reed expressed concern about his ability to make an appointment for Student's assessment because the parent had told him to contact Ms. Meredith. Student testified that he really did not know whether he had any objection to being assessed by CUSD. He would have to ask his father about this.

As of the conclusion of the hearing, Student had not been made available for assessment by CUSD.

COMPENSATORY EDUCATION

47. Student testified that he would like to earn both a high school diploma and a college degree. Due to his age, Student would not feel comfortable attending a comprehensive high school. He is currently receiving tutoring at Southwest Community College's tutoring program for students with learning disabilities. Student receives approximately eleven hours a week of tutoring at Southwest and spends approximately six hours a week with his primary tutor Ms. Johnson.

Currently, Student plays football for LA Southwest. Student's football practice schedule varies but generally involves four to seven hours a day, plus his physical education class. Student is not willing to stop playing sports to get additional help to graduate, because he needs to have sports as a motivation to work on academics. Student testified that if compensatory education was ordered in a greater amount, he would just keep his current tutor. He would be willing to work with a tutor who would work around his athletic schedule.

Ms. Thomas recommended that Student participate mediated learning sessions for one hour a week over the next two years.

LEGAL CONCLUSIONS

APPLICABLE LAW[10]

1. Under both State law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a free appropriate public education (FAPE). 20 U.S.C. § 1400 (2004); Education Code § 56000. The term "free appropriate public education" means special education and related services that are available to the student at no cost to the parents, that meet the State educational standards, and that conform to the student's individualized education program (IEP). 20 U.S.C. § 1401, subdivision (9). "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. 20 U.S.C. § 1401, subdivision (29). The term "related services" includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. 20 U.S.C. § 1401, subdivision (26). Education Code § 56363, subdivision (a) similarly provides that designated instruction and services (DIS), California's term for related services, shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program."

2. Before a student can be determined to be eligible for special education and related services and entitled to a FAPE, he or she must be assessed by the responsible educational agency. A referral for assessment means any written request for assessment made by a parent, teacher, or other service provider. (Cal. Ed. Code § 56029.)

[10] The IDEA was reauthorized in 2004 and the California Education Code was recently amended as an urgency statute to conform to the new IDEA (AB 1662). Statutory citations in this decision are to the statutes as they existed at the time in question.

All referrals for special education and related services shall initiate the assessment process and must be documented. (Cal. Code Regs., tit. 5, § 3021, subd. (a).) "When a verbal referral is made, staff of the school district, special education local plan area, or county office shall offer assistance to the individual in making a request in writing and sfiall assist the individual if ...request[ed]..." *Id.* "All school staff referrals shall be written..." (Cal. Code Regs., tit. 5, § 3021, subd. (b).) In addition, upon initial referral for assessment, parents shall be given a copy of their rights and procedural safeguards. (Cal. Ed. Code § 56301.)

Once a student is referred for an assessment and the parent provides written consent to the assessment plan, the District must assess the student "in all areas related to the suspected disability " (Cal. Ed. Code § 56320, subd. (f).) An IEP must be developed within 50 calendar days from the date of the parent's written consent to the assessment plan. (Cal. Ed. Code § 56043, subd. (d).)

3. The assessments conducted must be discussed at the IEP team meeting. If the IEP team determines that a student is eligible for special education as a child with a disability, the team must outline the placement and services to be provided to that student in an IEP. (Cal. Ed. Code § 56329, subd. (a).)

In *Board ofEduc. of the Hendrick Hudson Central Sch. Dist.* v. *Rowley,* 458 U.S. 176, 200, 102 S.C. 3034 (1982), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. *Id.* At 198 - 200. The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and

related services which are individually designed to provide educational benefit to the student. *Id.* at 201. The Supreme Court in *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA *Id.* at 205.

4. The burden of proof in an administrative hearing challenging an individualized education program (IEP) under the Individuals with Disabilities in Education Act, 20 U.S.C. 1400 et. seq., is on party seeking relief. *Schaffer* v. *Weast* (Nov. 14, 2005) 126 S. Ct. 528, U.S. Lexis 8554.

Issues I & 4: Conclusion Regarding Interim Placement And CUSD's Duty To Implement The June 15, 2001 IEP Upon Student's Enrollment

5. As indicated in Factual Findings 13, 14, and 16, Student was determined to be eligible for special education and related services as a student with a specific learning disability by the LAUSD on June 15, 2001, and was exited from special education by the LAUSD in the February 26, 2002, IEP amendment, with a caveat that he would remain eligible if he returned to a school that offered special education services.

Any claims regarding a denial of FAPE for inappropriately exiting Student from special education in February 2002 are not appropriately leveled against CUSD. Rather, any such claims involve LAUSD, with whom petitioner entered into a settlement agreement on October 12, 2005.[11]

6. At the heart of the dispute between petitioner and CUSD is the effect of the language in the February 26, 2002, exit IEP that petitioner would remain eligible if he transferred to a school that provided special education services. Petitioner's position is

[11] LAUSD's February 26, 2002 IEP agreement to exit Student from special education at the parent's request arguably violated the IDEA's requirement that a local educational agency evaluate a child before determining that he or she is no longer a child with a disability." (20 U.S.C. § 1414, subd. (c)(5).)

that his eligibility automatically resurrected and created a duty on CUSD at the moment he enrolled at Compton High School to implement the terms of the June 15, 2001 IEP. CUSD's position is that the February 26, 2002, IEP amendment extinguished the June 15, 2001 IEP, and that no duty arose because it was never advised of petitioner's prior eligibility or of his desire for special education services.

7. At the time Student enrolled in Compton High School in August of 2002, there was no active IEP. Rather, pursuant to the February 26, 2002 addendum to the June 15, 2001 IEP, the parent and the IEP team members at LAUSD had agreed to exit Student from special education, and Student had in fact exited the special education program to attend Maxine Waters School. Nonetheless, as indicated in Factual Finding 17, if a receiving district had been provided with the February 26, 2002 IEP, a duty to investigate the need for special education services would have arisen. As discussed below, however, no such duty arose under the facts of this case.

8. In 2002, California Education Code section 56325, subdivision (a), provided that "whenever a pupil transfers into a school district from a school district not operating programs under the same local plan in which he or she was last enrolled in a special education program, the administrator of a local program under this part shall ensure that the pupil is immediately provided an interim placement for a period not to exceed 30 days. The interim placement must be in conformity with an individualized education program, unless the parent or guardian agrees otherwise. The individualized education program implemented during the interim placement may be either the pupil's existing individualized education program, implemented to the extent possible within existing resources, which may be implemented without complying with subdivision (a) of Section 56321, or a new individualized education program, developed pursuant to Section 56321." (see also, Cal. Ed. Code § 56043, subd. (k).) Prior to the end of this 30-

day interim period, the IEP team must review the interim placement and make a final recommendation on the appropriate placement. (Cal. Ed. Code § 56325, subd. (b).)

9. The IDEA is silent on how the receiving district is to become aware that a student transferring into its schools has an IEP. Section 56325 does not impose strict liability on a receiving district, however. Thus, to trigger a duty to immediately provide an interim IEP placement, petitioner must prove that CUSD knew or should have known that he had been a special education student with an IEP prior to his enrollment.

10. As indicated in Factual Findings 18 through 22, petitioner did not meet his burden of proof that he provided CUSD with a sufficient factual basis to invoke a duty to offer him an interim IEP on his enrollment in August 2002. Consequently, CUSD did not violate federal or State law by failing to provide an interim IEP placement or by failing to offer him an IEP within 30 days of his enrollment at Compton High School as asserted in Issue I.

11. Further, as indicated in these same Findings and in Conclusions 5 and 7, the June 15, 2001, IEP was no longer in effect and consequently imposed no duty on CUSD to implement its services, or to abide by its timelines for IEP team meetings, including triennial assessments and reviews. Consequently, CUSD did not deny Student a FAPE in the manner asserted in Issue IV.

Issue II: Conclusion Regarding Assessment In All Areas Of Suspected Disability

12. Petitioner contends that CUSD failed to assess him because it did not comply with the triennial assessment required for the triennial IEP review due in June 2004 as dictated by the June 15, 2001 IEP. Further, petitioner contends that his parents requested a special education assessment for him in May 2004.

13. As indicated in Factual Findings 18 through 23, and Conclusions *5, 1,* 10 and

14. CUSD had no duty to reassess petitioner for a triennial review as indicated on the June

15. 2001 IEP. Further, pursuant to these Findings as well as Factual Findings 26 through 34, there were no requests to assess Student for special education from August 2002 through May 2004, including in the areas of assistive technology and vocational needs. CUSD thus had no duty to offer to assess Student for special education until mid-June 2004.

16. As indicated in Factual Findings 33 and 34, the parent requested a special education assessment of Student in mid-June 2004. As a consequence, CUSD had an obligation to offer an assessment plan, to conduct an assessment, and to convene an IEP team meeting for Student by approximately mid- to late- October 2004. CUSD first offered an assessment plan for Student in October 2004. This delay in providing the assessment plan would undoubtedly have resulted in a failure to meet the 50-day requirement of California Education Code section 56043, subdivision (d). Nonetheless, as discussed in Conclusion 17, this delay was insignificant when compared to petitioner's lengthy refusal to consent to the assessment plan or to make himself available for an assessment after CUSD sought its own due process hearing to resolve the matter.

Issue III: Conclusion Regarding Reimbursement For Independent Educational Evaluation (IEE) By Billie Thomas And Request For IEE In Assistive Technology And Vocational Needs

17. A parent has the right to obtain an independent educational assessment of the pupil from a qualified specialist, at public expense, if the parent disagrees with the assessment obtained by the District, unless the District shows at a due process hearing that its assessment is appropriate. (Cal. Ed. Code § 56329, subd. (b).) "If a parent obtains an independent educational assessment at private expense, the results of the assessment shall be considered by the public education agency with respect to the

provision of free, appropriate public education to the child and may be presented as evidence at a due process hearing...regarding the child." (Cal. Ed. Code § 56329, subd. (c).)

18. As indicated in Factual Finding 38, Ms. Thomas conducted her assessment from October through early December 2004. Petitioner premised his request for reimbursement for Ms. Thomas's assessment on the notion that CUSD had a long-standing obligation to assess him for special education pursuant to his June 15, 2001, IEP but failed to do so. As a consequence, petitioner argued that the requirement that the parent first disagree with a district's assessment before obtaining and seeking reimbursement for an IEE was not applicable in his case, (citing, *San Diego Unified School District,* U.S. District Court So. District Civ. No. 04-CV-1230 WQH (WMc).) As indicated in Factual Findings 18 through 23, and Conclusions 5, 7, and 10 through

1. CUSD had no duty to reassess Student for a triennial review as identified in the June 15, 2001 IEP, and it was under no obligation to assess Student until Father's request for special education assessment in mid-June 2004.

2. As indicated in Factual Findings 34 and 43, CUSD first provided an assessment plan to the parents in October 2004, but should have conducted an assessment and convened an IEP meeting to discuss the assessment by mid- to late-October 2004. While this constituted a delay by CUSD, it is not so egregious to support an award of reimbursement, particularly in light of the surrounding circumstances. As indicated in Factual Findings 43 through 46, petitioner's nearly eleven-month refusal to consent to an assessment, his refusal to make himself available for assessment since the settlement of the District's right to assess case, and his failure to provide CUSD with Ms.

Thomas's assessment for approximately six months, establishes that petitioner has no genuine interest in being assessed for special education by CUSD.[12]

Issue V: Conclusion Regarding Reimbursement And Compensatory Education

1. Parents may be entitled to appropriate relief, including reimbursement for the costs of placement or services that they have independently procured for their child, when the school district has failed to provide a FAPE and the private placement or services are determined to be proper under IDEA and are reasonably calculated to provide educational benefit to the child. *School Committee of the Town of Burlington* v. *Department of Education* (1985) 471 U.S. 359, 369, 105 S. Ct. 1996. Court decisions subsequent to *Burlington* have also extended relief in the form of compensatory education to students who have been denied a FAPE. *Student W.* v. *Puyallup School District* (9th Cir.1994) 31 F.3d 1489, 1497.

2. As indicated in Factual Finding 36, petitioner notified CUSD of his placement at Verbum Dei and his intent to seek reimbursement due to CUSD's denial of FAPE on August 18, 2004. Pursuant to Conclusions 10 and 11, however, CUSD did not fail to offer petitioner a FAPE as asserted in Issue IV. Consequently, there is no basis for

[12] Although not raised by the parties, the ALJ notes that Student was nineteen at the time of his assessment by Ms. Thomas. As indicated in California Education Code section 56026, one requirement for special education eligibility is that the student comes within one of the following [relevant] age categories: "... (3) Between the ages of five and 18 years, inclusive. (4) Between the ages of 19 and 21 years, inclusive; enrolled in or eligible for a program under this part or other special education program prior to his or her 19th birthday; and has not yet completed his or her prescribed course of study or who has not met proficiency standards or has not graduated from high school with a regular high school diploma.

an award of reimbursement or of compensatory education services as requested by petitioner in Issue V.

ORDER

Petitioner's requests for relief are hereby denied.

PREVAILING PARTY

Pursuant to California Education Code § 56507(d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute:

The District prevailed on Issues I, III, IV, and V

The District substantially prevailed on Issue II.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. California Education Code § 56505, subdivision (k).

DATED: December 12, 2005

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MARILYN A. WOOLLARD
Administrative Law Judge
Special Education Division
Office of Administrative Hearings