

THE
OFFICE OF ADMINISTRATIVE HEARINGS SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

SANTA ANA UNIFIED SCHOOL DISTRICT,

Petitioner and Respondent,

vs. STUDENT,

Respondent and Petitioner.

OAH No. N2005090037; 2005100257

DECISION

James R. Goff, Administrative Law Judge, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on November 15, 16 and 18, 2005, in Santa Ana, California.

Christine D. Lovely, Esq., of the law firm of Atkinson, Andelson, Loya, Ruud & Romo, represented petitioner and respondent Santa Ana Unified School District (District). Also present at the hearing on behalf of the District were Diane Blevins (November 15), and Barbara Cummings, Coordinator Special Education (November 16, 18).

Paul Kamaroff, Esq. and Jill Rowland, Esq. of Kamaroff & Associates, represented respondent and petitioner, Student H. (Student) at the hearing. Also present at the hearing on behalf of Student H. was his mother Maria S.

On or about August 31, 2005, SAUSD filed its request for a due process hearing. The issue raised was "whether the transition plan for Student to advance to first grade at his school of residence, with supports, as detailed in his May 23, 2005 transition IEP is appropriate"? The case was numbered as OAH N2005090037.

Originally the case was set for hearing on September 27, 2005. On September 21, 2005, the Office of Administrative Hearings received a continuance motion from counsel for

the Student. The motion was based on unavailability of Student's parents. The motion was denied. At the hearing on September 27, 2005, counsel for student moved again for a continuance based on the fact that Maria S.'s mother was ill in Mexico. No witness was sworn and the hearing did not proceed. The hearing was continued until November 15 and 16, 2005.

On or about September 30, 2005, counsel for Student H. filed a request for a due process hearing. The issue posed by Student was whether "Santa Ana Unified School District's Transition Individualized Education Program ("IEP") dated May 23, 2005, appropriate and does it provide Petitioner with a FAPE [Free Appropriate Public Education], designed to meet his unique needs for the 2005/2006 school year and extended school year?" The case was numbered as OAH N2005100257.

On November 3, 2005, the Office of Administrative Hearings granted student's motion to consolidate the two requests for due process hearing for the same date. The District called the following witnesses: Maria S. (Student's mother); Pamela Lopez (Speech and Language teacher); Meggen Fleener (General Education Teacher); Deirdre Parkinen (First Grade Teacher). The District called Gail Booth (Director of Special Education), as a witness. The student called the following witnesses: Maria S., Jill Rowland, one of his attorneys, and Dr. Chris Davidson, an educational psychologist. An exhibit was received from Student that consisted of three hours of a videotaped interview with Student by Ms. Rowland. The videotape was reviewed in its entirety. Counsel for the parties were allowed to submit a seven page written final argument by the close of business on November 23, 2005. The matter was submitted for decision on the close of business on November 23, 2005.

STATEMENT OF ISSUES

Essentially, the parties' requests for due process review raise the same basic question: whether the May 23, 2005 IEP addendum to the September 14, 2004 IEP denied Student H. FAPE. The controversy stems from the recommendation that Student H. progress to first grade. Student H.'s counsel raised a sub issue whether he was denied FAPE by the decision

not to grant ESY for the 2005-2206 school year. Student H. raised sub issues relating to California Education Standards, and lack of assessments.

FACTUAL FINDINGS

BACKGROUND

1. Student H. lives with his mother Maria S. and his father Louis H. in the City of Santa Ana. His residence places him within the Santa Ana Unified School District (SAUSD). At the time of this hearing Student H. was six years old. He still lives within the SAUSD. He is entitled to the benefits of special education because he was earlier diagnosed with a specific learning disability (SLD). There is no evidence that the condition has abated.

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., guarantees children with disabilities a free appropriate public education (FAPE). What constitutes a free appropriate public education is determined on a case-by-case basis, pursuant to procedures established by the IDEA. The enactment requires that each child receive an individualized education program (IEP), which is intended to be the result of collaborations between parents, educators, and representatives of the school district. The IEP is the main cog in the IDEA's education system. It is intended that the IEP set out the child's present educational performance, establish annual and short-term objectives for improvements in that performance, and describe the specially designed instruction and services that will enable the child to meet those objectives. If parents believe their child's IEP is inappropriate, they may request an impartial due process hearing. (20 U.S.C. § 1415 (f).) Similarly, the school district may request a due process hearing when it feels that parents are unreasonably withholding consent to an IEP.

2. On September 14, 2004, Student H.'s IEP team met. The team was made up of his mother, two attorneys, a district representative, a special education programs specialist, the school nurse, a special education teacher, Student H.'s general education teacher, his speech and language aide, a school psychologist and an occupational therapist. The team

met to develop Student H.'s annual IEP. As a consequence of an earlier settlement agreement between Student H.'s parents and the District, Student H. was receiving from SAUSD transportation to and from school, speech and language therapy, occupational therapy and he had an aide assigned to help with his toileting. Student H. was in a general education class with the designated services. (Cal. Edu. Code, § 56363, subd. (a).) At the conclusion of the meeting Maria S. agreed with the placement and service recommendations made by the participants.

3. On May 23, 2005, the IEP team met to consider an addendum to the September 14, 2004 IEP. Attending this meeting were the principal, the general education teacher for kindergarten, a general education first grade teacher, two school psychologists, an occupational therapy coordinator, the school nurse, two attorneys, Maria S., a special education teacher, a speech-language pathologist, and a special education program specialist. The team was concerned with Student H.'s transition into first grade and his present levels of performance. As to general education, the IEP addendum indicated that Student H. knew 26 of 26 letter sounds, 6 of 10 high frequency words that he was beginning to decode. He knew the numbers 0-10, identified upper and lower case letters, printed his first name, and wrote a sentence with prompting. The IEP addendum noted that Student H. had quite a few friends in class. It indicated that he no longer pouted or had a temper tantrum. He participated in class; he sang, shared, raised his hand and enjoyed being part of the group. In regard to speech-language therapy, the IEP addendum indicated that Student H. made a great deal of progress. He met his goal with regard to the k and g sounds. The addendum noted that he would enjoy participating in a group to promote spontaneous speech and interaction with others. It also suggested that the 45 minute speech and language sessions might need to be broken up into shorter sessions. Commenting upon the area of occupational therapy, the IEP addendum stated that Student H. appropriately held his pencil, drew a picture with detail, drew shapes, used a scissors correctly, used a spoon and straw appropriately, and put his shoes on and took them off correctly. The addendum

stated that Student H. was accomplishing goals that were set for him earlier. It indicated that he was age appropriate in his skills. Student H. was scheduled for assessment of his eligibility for occupational therapy in the fall of 2005, as part of his triennial IEP. He had met all of his occupational therapy goals. As to his instructional assistant, the IEP addendum indicated that his teacher thought that Student H. was relying on the aide and missing directions from the teacher. The teacher thought that he no longer needed the aide. His teacher indicated that he could handle his pull-ups effectively. According to the teacher, Student H. indicated that his mother told him to go to the bathroom in his diaper. The teacher recommended that Maria S. adopt the school schedule for bathroom breaks to reinforce his progress at school. The first grade teacher indicated that Student might experiment with a buddy accompanying him to the bathroom instead of an aide or that he use the nurse's bathroom.

4. The IEP addendum of May 23, 2005, indicated that Maria S. registered her attendance at the meeting, that she acknowledged receiving a copy of her rights that she had participated in the meeting but that she did not sign agreement with the goals and objectives of the IEP addendum, or with the recommendations for placement and services. The attorney for Student H.'s parents stated during the meeting that mother wanted him to repeat kindergarten due to his academics and his toileting. Student H.'s teacher recommended that he progress to first grade where there would be a longer day and fewer students. The teacher indicated that Student H. met the California Standards for kindergarten requirement to move on to first grade.

5. The recommendations of the IEP team in the addendum were:

- A. To assist with toileting, an aide will help him to schedule times. Two hours a day the first week of school. One hour a day the second week of school. The aide will check in daily the third week of school.
- B. Speech-language therapy will remain the same until the triennial/annual review.

C. Occupational therapy will remain the same until the triennial/annual review.

D. ESY-the team does not recommend Extended School Year for Student. However, there is a general education summer school program at Santiago School that Maria S. will check out with the school principal.

E. Maria S. will share the doctor's report regarding Student's feet/legs with his school's nurse as soon as it is ready.

6. Sometime following the May 23, 2005 IEP addendum meeting, Maria S. retained Dr. Chris Davidson to conduct an assessment of Student H. Maria S. enrolled Student H. in a reading class provided at Santiago Elementary School. In July, Dr. Davidson observed Student H. in the class setting.

7. Student H. began the school year at Santiago Elementary School in first grade. After less than a week, the "stay-put"¹ effect of the request for a due process hearing resulted in Student H. returning to his kindergarten class with a new teacher Ms. Anderson.

8. Meggen Fleener was one of Student H.'s kindergarten teachers for the 2004-2005 school year. She has been teaching kindergarten for four years. She had one year experience teaching in first grade. She is working on her master's degree. Student H.'s kindergarten class usually has about 31 students. The kindergarten class runs from 7:50 a.m. to 11 a.m. Ms. Fleener participated in the September 14, 2004, IEP for Student H., and the addendum of May 23, 2005. She recommended that Student H. progress to first grade. In her opinion there would be no educational benefit in retaining Student H. in kindergarten for another year. He would benefit from a full day class and the smaller class size in first grade. His first grade teacher would have more time to devote to his educational goals. She evaluated Student H.'s kindergarten performance and prepared the trimester report card for

¹ 20 U.S.C. § 1415 (j), once a due process hearing complaint is filed, the student must stay-put, or remain in the current educational placement.

his 2004-2005 school year. The report card rates a student at either a 1, 2, 3, or 4 level. The number 1 reflected that the student was working below grade level. Number 2 indicated that the student was approaching grade level. A 3 rating meant that the student was performing at grade level or above. A 4 on the report card meant that the student was performing above standards.

9. Student H. missed 18 days of the 2004-2005 school year. The missed school time adversely affected his ability to attain his educational goals. Ms. Fleener indicated that although Student H. was shy when school began, by the end of the school year he was average. He had three friends in his class: Mike, Nilaye and Jahaziel. By the end of the year, Student H. was performing in the middle of his class. He had made tremendous progress. Ms. Fleener said that he knew his letters and sounds. From Ms. Fleener's testing, Student H. by the end of the school year was performing at first grade level in some categories and he met most kindergarten level standards in the other areas. Student H.'s report card reflected that he received mostly 1s in the first trimester, but that by the third trimester his grades were mostly 3s. At the end of the year, Ms. Fleener wanted Student H. to participate more in singing and dancing. She provided incentives for him to participate and he followed through. Ms. Fleener conducted oral and written testing on Student H. throughout the year. In areas where Student H. had not met grade standards, Ms. Fleener felt that he would be able to master them in first grade. Student H. was one of the few students in kindergarten still wearing diapers, and as a result he was provided with an aide to assist him with his toileting. Ms. Fleener worked up a chart to put Student H. on a schedule for bathroom visits that seemed to lessen the disruption and the problems posed by the aide's presence in the classroom. Ms. Fleener was aware that the parents were concerned about Student H.'s toileting.

10. At the IEP transition meeting on May 23, 2005, Ms. Fleener recommended that Student H. advance to first grade. She based her recommendation on Student H.'s progress and achievements during the year. She felt that Student H.'s progress in toileting

would make it unnecessary for him to have an aide in first grade and that he could have a buddy accompany him to the bathroom when needed. Maria S. objected to the recommendation to discontinue the aide. Maria S. was concerned regarding Student H.'s writing and planned on enrolling him in a writing class at Santiago school during the summer.

11. Gail Booth, a special education program specialist who had been with SAUSD for thirty years was a member of Student H.'s IEP team. She attended the September 14, 2004 IEP meeting and the May 23, 2005 IEP addendum meeting concerning Student H.'s transition to first grade. The purpose of the 2004 IEP meeting was to integrate a prior settlement agreement into the IEP. Maria S. had signed the 2004 IEP. At the May 23, 2005 IEP addendum meeting, Student H.'s performance levels and his progression to first grade were discussed. It was agreed by the IEP team that Student H. should progress to first grade and that as to other services that he would be assessed as to those during his triennial IEP in the fall. Maria S. and her attorney disagreed with the IEP and did not sign it. Ms. Booth recalled that Maria S. was concerned over the proposed reduction in the aide during the first few weeks of first grade. There was also the assertion by Maria S. that Student H. could only count to five, while Ms. Fleener indicated he could count to 10. Ms. Booth acknowledged that Student H.'s triennial IEP was overdue at the time of this hearing, but said that the SAUSD had not received a necessary approval from Maria S. to begin that assessment. Ms. Booth said that the IEP team was ready to conduct the necessary assessments for triennial IEP. She felt that since Student H. had only attended a few days of first grade and then had gone back to kindergarten and that assessment would be required to see whether at this late date it would be appropriate to now move Student H. into first grade.

12. Pamela Lopez, a speech and language pathologist for Roosevelt Elementary School had been in that position for the last six years. She provided pull out speech and language services for Student H., during the year he was in kindergarten with Ms. Fleener.

She participated as an IEP team member for Student H.'s IEP meetings. She informally assessed Student H. at the beginning of the school year to make sure that goals set were still appropriate. She also conducted an informal assessment at the end of the year to determine if he was meeting his goals. She felt that Student H. had made a great deal of progress during the year. He met the goal of dealing with the letters "t" and "g" sounds. All the services were to continue pursuant to the 2004 IEP until the fall when a full assessment would be made at the triennial IEP. Ms. Lopez indicated that 45 minute sessions were too long for Student H., his attention span early in the year lasted only about 15 minutes. She recommended that the 45 minute sessions be broken down into shorter sessions to accommodate Student H.'s attention span.

13. Another member of Student H.'s IEP team was Deirdre Parkinen, she was a first grade teacher at Santiago Elementary School. She had worked for 17 years as a teacher with 16 at Santiago. She attended the May 23, 2005 IEP addendum meeting because she was potentially going to be Student H.'s first grade teacher. According to Ms. Parkinen, in first grade she works on journal writing, counting, spelling and word recognition, using a pencil, reading blended vowels and consonants, vocabulary relevant to book reading, science and social work. A first grader needs to know 50-60 words, blending, and be able to enjoy a story. A student should understand sound and letter correlation. In math he should be able to count to 50, although 100 is better. However, if they know how to count to ten then she would teach them to count higher. A first grader should be able to recognize out of order patterns and shapes. She expects them to be able to listen and follow two to three directions. A first grader should be able to write the alphabet. She has found that it is not typical that new first graders can add 9 plus 5. It is also less and less common that they know where they live or their phone numbers. Being able to speak in one or two complete sentences is common. Coherent sentences while speaking is not common. Learning the hands on a clock is something she teaches in first grade. A first grader may be able to read

numbers but not understand the concept of time. They may recognize a penny but not a quarter. She would like them to recognize high frequency words.

14. Maria S. attended the 2004 and the May 23, 2005 IEP meetings. At the 2005 IEP meeting, she had asked Ms. Parkinen whether Santiago Elementary School used the "Handwriting Without Tears" writing program. Ms. Parkinen indicated that they used a different handwriting program at Santiago School. Maria S. had her attorney convey to the IEP meeting her position that Student H. should be retained in kindergarten. Maria S. indicated that she had two other children with special education needs, and, in comparing them to Student H., she felt that he needed to be retained. She was concerned with his handwriting, numbers, socialization and his speech. His letters do not look like they should. She said that the letter "n" looks like a hill when Student H., writes his name. She noted that he confused letters and numbers. He cannot write within the lines on a piece of paper. Student H. could not add 6 plus 5. Regarding his socialization, he had not been invited to any birthday parties. Student H. had mentioned Michael a few times, but then indicated that Michael was not his friend. Maria S. indicated that Student H. could not write his name. He would not finish his homework. She was concerned with his toileting because she on occasion saw that his aide was not in the classroom. Maria S. indicated that when Student H. got home, he was required to take off his diapers and he was not permitted to use them at home. He was encouraged to wear multiple pairs of boxer shorts to school instead of his diaper, but he would not do it. She was concerned that Student H. did not want to go to school and that he would run back into the house. She also indicated that he had begun stuttering in February, 2005, and that it was getting worse. Even in his second year of kindergarten, he was stuttering much more severely and refusing to go to school. She had not discussed his speech or stuttering with Ms. Lopez. In fact Maria S. said that she had not met Student H.'s speech therapist. Maria S. recalled a discussion with Ms. Fleener in September of 2004, that Student H. was performing below standards and Ms. Fleener wanted Student H. to have a tutor to help him reach the standards. According to Maria S.,

Ms. Fleener indicated that she would write a letter to the district to see about getting a tutor, however, Ms. Fleener never indicated that she received a reply. No tutor was provided to help Student H. with his performance. Maria S. indicated that she had a second conversation with Ms. Fleener in January, 2005, about obtaining a tutor for Student H., but nothing happened. Maria S. did not call the district directly about the tutor because she did not know who to contact there.

15. In regard to Student H.'s due process complaint, Maria S. said that she received a letter from Jeanne Miller indicating that she had not signed the district's request for permission to conduct an assessment of Student H. for his triennial IEP due in October. Maria S. did not recall receiving an earlier request for permission to conduct the assessment. Maria S. signed the permission form and forwarded it to her attorney instead of sending it to the District.

Maria S. requested an evaluation of Student H. by Dr. Chris Davidson, a psychologist, because she did not agree with the recommendations made at the May 23, 2005 IEP meeting to transition Student H. to the first grade. Maria S. wanted Student H. to be retained for another year of kindergarten to permit him time to gain more knowledge. Dr. Davidson's report does not reflect when it was requested. The report is dated September 25, 2005. Dr. Davidson apparently observed Student H. at his school on July 28, 2005, as part of the preparation for the report. Dr. Davidson had conducted an evaluation of Student H. in October, 2003. Maria S. was concerned that Student H. was slow in writing letters of the alphabet. She had observed him in class just staring out. He does not know the letters of the alphabet except from singing the alphabet song. He does not understand who the author or illustrator is of a book that has been read to him. Maria S. felt that when he had completed one year of kindergarten that he should know everything. She was comparing Student H.'s performance against his sisters who also have disabilities. She works with Student every week night from 8:30 p.m. when she gets home from work to 8:45 p.m. when Student has to go to bed. She does not work with him on the weekends because there is no school work.

Maria S.'s opinion was that Student H. will not succeed in first grade. Maria S. referenced two recent examples of Student H.'s work. There was a reading log from Ms. Anderson's kindergarten class from the week of October 24-27 that involved drawing a picture after hearing a story. Maria S. found only one picture to be recognizable. She also pointed to a paper containing letters of the alphabet that Student H. prepared in his attorney's office prior to the hearing. Another item Maria S. relied on was the October 7, 2005 "First Mid-Trimester Report to Parents Santiago Elementary School" from Ms. Anderson. It reflects that at that time Student H. recognized 26 of 26 capitol letters and 20 of 26 lower case letters. He also can count to 13. He had mastered the colors: red, orange, yellow, blue, green, purple, black and brown. He had mastered the circle, square, and triangle. He needed to work on the rectangle. He had mastered upper case letters "a-g" and lower case letters "a-g", except for the letter "b". In the area of work habits and practical skills he was progressing nicely in the area of coloring within the lines and holding his pencil correctly. Student H. had otherwise mastered the other skills that he had been working on. One of the attorneys for Student H. had videotaped two lengthy sessions at which the attorney tested Student H. on compliance with statewide guidelines for kindergarten achievement. In one of the tests, Student H. was asked to write some words. The only recognizable word was "mom". It appeared that he wrote "dad" as "dat". Maria S. acknowledged that Student H. had already missed 23 days of the 2005-2006 school year. She did not think that his missing school that many days had adversely affected his school performance because she picked up his homework and brought it home so he could keep up.

16. Dr. Chris Davidson, a highly qualified educational psychologist, performed a psycho-educational testing on Student H. at Maria S.'s request. She had completed an assessment in 2003 and updated the assessment in 2005. The reevaluation took four hours. She also viewed twice the videotape of the testing performed by Jill Rowland. Each session lasted approximately one and a half hours. The first session on October 3, 2005 went from 11:30 a.m. until completed. Breaks were taken to permit Student H. to play according to Ms.

Rowland. These breaks were not recorded. On October 7, 2005 the session began around 2:30 p.m. and continued until concluded. Ms. Rowland had no prior experience in testing or child development. Ms. Rowland formulated the questions for the testing from the standards for kindergarten found on the California Department of Education website, consultation with two teachers and her declared common sense. She reviewed standardized questions, Dr. Davidson's two reports and all evaluations of Student H. In regard to the testing, Ms. Rowland was not aware of when Student H. ate or napped. He had attended school prior to the second session. He was being medicated for an eye infection around the eye. There were some 200 questions. Dr. Davidson generally approved of Ms. Rowland's testing of Student H. However, she did note that a tester needs to establish rapport with a subject before testing and needs to be aware of when the subject needs to take a break and refocus. Some of the tasks that Student was required to perform were too long. Whether the subject needs to eat or is too tired had to be taken into consideration and may have affected test results. In several instances Dr. Davidson indicated that she would have refocused Student H. before continuing with the testing. Dr. Davidson was not concerned with Student H.'s recognition of upper and lower case letters in Ms. Rowland's testing because if a child learns the letters in lower case format he will not be able to recognize them in the upper case format.

Dr. Davidson testified in detail concerning the tests performed, Student H.'s performance and the inferences to be drawn from that performance. She conducted a classroom observation of Student H. on July 28, 2005 at his classroom at Santiago Elementary School. This was during the Extended School Year (ESY). Student H.'s teacher was Paula Goldberg. There were 30 students in the class. Dr. Davidson interviewed Ms. Goldberg. However, Ms. Goldberg indicated that she had received no information on Student H. from the district and had not been able to get much out of him to determine where he was in regard to his learning. Ms. Goldberg expressed frustration at only having 19 days to get the students ready for first grade. She told Dr. Davidson that the class included

the lowest students in the area and they were not good role models for Student H. Dr. Davidson also testified in regard to Student H.'s performance in Ms. Rowland's video taped testing. She indicated that she observed Student H. stuttering and that he used a fist grip in holding his pencil. Maria S. told her that she attributed Student H.'s stuttering to his going to first grade. Dr. Davidson opined that Student H. could only meet 47 of the 83 educational standards for kindergarten. She was very critical of Ms. Fleener's earlier grading of Student H. in her kindergarten class, suggesting that Ms. Fleener had not accurately graded Student H., and that since she was a relatively new teacher she might have felt obliged to grade Student H. higher to make her own efforts appear better.

According to Dr. Davidson, the bottom-line from the reevaluation testing was that Student H. was only an average to below average performer. Dr. Davidson indicated that:

- A. In the 2003 evaluation, Student H. scored a performance IQ of 123, which is in the superior range. His full scale IQ was 104, which is in the average range. Dr. Davidson felt that the higher score was the more indicative of his abilities.
- B. Dr. Davidson used the Woodcock-Johnson Tests of Achievement-Third Ed. (WJIII). In the Letter Word Identification subtest, Student H. scored 100, which is kindergarten sixth month level and rated an age appropriate level of fifth year eleventh month. Overall he rated average. On the Word Attack subtest, Student H. scored 109 that was a first grade level, an age of six years three months and upper level of average.

In the Academic Skills test that includes the Letter Word, Calculation and Spelling subtests Student H.'s overall score was 102, which is kindergarten sixth month, an age level of six and considered in the average range.

In the Academic Applications area that includes the Passage Comprehension, Applied Problems and Writing Samples subtests. Student H. scored 91, which was kindergarten third month level, age five years and seven months and considered the lower level of average.

Academic Knowledge testing revealed that Student H. scored 77, which is less than kindergarten, an age level of four years one month and is considered low. In Picture Vocabulary Student H. scored 101, which is kindergarten seventh month level. It is an age level of six and is considered average.

In Punctuation and Capitalization Student H. scored 100, which is kindergarten fourth month, age level of five years eleven months, and again average.

Dr. Davidson indicated that Student H.'s strengths were in Spelling, Word Attack and Picture Vocabulary. His weaknesses were in Applied Problems, Writing Samples, and Academic Knowledge.

- C. Dr. Davidson performed the Boehm Test of Basic Concepts-3 Preschool (Boehm-3 Preschool) test on Student H. He scored a 73, which was range 3 the lower third.
- D. The Bracken School Readiness Assessment (BSRA) was administered to Student H. He scored a 77, which rated delayed average.
- E. The Pre-Reading Inventory of Phonological Awareness (PIPA) test was administered to Student H.
 - 1. As to the subtest for Rhyme Awareness, Student H. scored in the emerging/below basic category.
 - 2. In the Syllable Segmentation subtest he was rated basic.
 - 3. In the Alliteration Awareness subtest he was rated emerging/below basic.
 - 4. The Sound Segmentation subtest rated Student H. as emerging/below basic.
 - 5. The Letter-Sound Knowledge subtest rated Student H. as basic.

- 17. As a result of the reevaluation and the video testing of Student H., Dr.

Davidson was of the opinion that Student H. should continue in kindergarten. She indicated that he should have been retained in pre-school. She indicated that his immaturity, poor performance on skills and the fact that he was still wearing diapers led her to the conclusion that he should continue in kindergarten. The immaturity she felt stemmed from his late

October birthday. She stated that she seldom recommends retention. She opined that kindergarten and first grade were the best opportunities for a child to continue at that grade level. Dr. Davidson indicated that Student H. would be a challenge for a first grade teacher. In comparing her test results with the goals of the 2005 IEP, she felt that Student H. could not meet those goals. Dr. Davidson opined that the 2005 IEP was not appropriate and therefore failed to provide a free appropriate public education (FAPE). She felt that the IEP should have included a full day of education in kindergarten; a one-on-one aide, a language based learning program that provided more oral work, an ABA evaluation, the Laureate Learning System, a PT evaluation, and the Handwriting Without Tears writing program. There were some eleven elements to her recommendation. One of her recommendations was that Student H.'s parents undertake special training to deal with Student H.'s problems. The absence of any element of her recommendation would result in Student H. falling further behind. She indicated that it would be difficult for Student H. to succeed in first grade even with all the services.

18. SAUSD called school psychologist Jeanne Miller to testify that she had sent out a two of requests to Maria S. to permit the district to conduct evaluations of Student H. for his triennial IEP. One set was sent by certified mail and showed that it had been received on September 19, 2005. Ms. Miller sent out another set of requests on September 30, 2005 because no permission was received. The district never received a signed permission to proceed with the evaluations. Ms. Miller attended the May 23, 2005 IEP meeting. Ms. Miller indicated that the only issue raised by Maria S. at the meeting was her concern about toileting. Maria S. did indicate that she did not feel Student H. was ready for first grade. Ms. Miller agreed with Meggen Fleener's recommendation that Student H. progress to first grade. Ms. Miller relied on Ms. Fleener's testing of Student H.

Additionally, Ms. Miller was critical of Ms. Rowland's testing of Student H. There was no demonstrated attempt to build rapport between Student H. and Ms. Rowland. Student H. played with the video equipment indicating that he had not been desensitized to the

equipment before the testing took place. Ms. Miller was critical of the chair and desk used for Student H. in the testing. They were made for adults and not children. She was critical of the paper used for the testing in that it was not typically used by kindergartners. The questioning was too long. No sampling was provided to familiarize Student H. regarding the information sought by the questions. Student H. was inappropriately playing with toys during the testing. The first session was at 11-11:30 a.m., which is a kindergarten child's lunch time. The second session was late in the afternoon when a kindergarten child would be tired. Hunger, thirst, and being tired can adversely affect the test results. Student H. needed to be calm during testing to permit his best efforts. His crying or distress could adversely affect the results. Student H. was joyful at the beginning of the testing and when he was allowed to leave. He did not want to participate in the testing. When Student H. lost interest, it was imperative that the testing stop to help the student refocus for his best performance. Student H. went to great lengths to indicate that he did not want to participate. He said he did not want to be tested. He put his shirt over his head many times to demonstrate that he was withdrawing from the testing format, but the questions continued. Student H. at times was lying on the table or under the table not paying attention, but the testing continued. Student H. repeatedly indicated he did not know in response to questions, but it could not be determined whether this reflected his knowledge or an attempt to withdraw. Ms. Rowland told him that he could not leave. At one point she told him to get back to work. When he put his head down on the desk, it could not be determined whether he understood the material he was being questioned on. When he refused to write the alphabet, Ms. Miller indicated that she would have stopped the testing and rescheduled if she was not able to refocus Student H. on the task. Ms. Miller would not have tested more than 45 minutes in a session. She did not think that the transitions between testing segments were sufficient to allow Student H. to focus on the new area of testing.

19. Meggen Fleener presented examples of Student H.'s work in her kindergarten class that she felt demonstrated her recommendation that he progress into the first grade. She indicated that she wrote a letter to the district after the first trimester to request some tutoring help for Student H. during the intersession; she never received a reply from the district. However, by the second and third trimesters, Student H. was performing at a higher level than half the class and did not need a tutor. Ms. Fleener testified that she told Maria S. on the last day of school that if she had any questions about Student H.'s report card that she would be in her classroom all day to answer questions. Maria S. did not come in to discuss the report card.

Ms. Fleener indicated that the paper used by Ms. Rowland for Student H.'s video testing was inappropriate; it was paper typically used in the fourth or fifth grades. She indicated, as to the Dolce words that he was tested on, that he learned the letters in lower case so he could not be expected to succeed on upper case letters. In her class, Ms. Fleener said that only forty percent were able to tie their shoes. Telling time on a clock is usually a first grade standard. Only one of her students knew the letter blends. Very few of her students were able to name and state the value of coins. About seventy-five per cent could tell their right from their left. About fifty percent could name the months of the year. Only one student knew the purpose of Thanksgiving, maybe one or two knew the significance of President's Day or Veteran's Day. About five knew about Martin Luther King Day. Ms. Fleener presented exhibits 5-13 of Student H.'s class work. On Exhibit 5 Student H. recognized 14 numbers out of 21 numbers. On exhibit 6 he recognized 26 of 26 upper and lower cased letters. Exhibits 6-8 were part of an end of year assessment that she applied to her class. Ms. Fleener indicated that exhibit 7 was testing rhyming words, phonemes in words and CVC words. Student H. got 2 of 5 right in the rhyming words test. He scored zero of seven phonemes. On CVC words he got 4 of 10 right. On exhibit 8, Student H. got 19 of 21 right in matching consonants and sounds. He got 5 out of 5 in matching short vowels and sounds. And, he scored 6 out of 10 in high frequency words. Exhibit 9

contained a self-portrait that Student H. drew at the start of school. Exhibits 11-13 show Student's progression in drawing. At the start of kindergarten, Student H. could not write his name. However, exhibit 10 shows that he could write his first name but he did not know how to write his last name. She indicated that he was able to write a sentence. Ms. Fleener indicated that if Student H. was not able to perform to this level now that he may have regressed over the summer.

20. Jill Rowland testified in regard to exhibit "A" that she received the signed permission to do the evaluation of Student H. from Maria S. Ms. Rowland faxed the permission to Justin Shinnefield whom she believed to be an attorney for the district. The fax sheet says to the attention of Leslie. Ms. Rowland identified Leslie as Mr. Shinnefield's secretary.

CREDIBILITY OF WITNESSES

21. Dr. Chris Davidson is a highly qualified expert in the special education field and her opinions are generally entitled to greater weight than those of a lay person. It is easy to accept her opinion that Student H.'s IQ is in the superior range. There is no dispute regarding her test results, but a number of things undercut her recommendations in this case. The first problem is that she accepted the testing performed by Ms. Rowland as providing an accurate picture of Student H. Actually, the view of Student H. on the video tape is one of a very charming young man being subjected to rapid fire questioning, of a child being held captive against his will, and of a media event that was intended to show that he would fail. This is a significant factor in discounting Dr. Davidson's opinions. Additionally, Dr. Davidson indicated that Student H., stuttered during the testing, but it was not observable. She indicated that Student H. used a fistful grasp of his pencil. It was not clear in the video, but Ms. Fleener, Ms. Anderson and Ms. Jain, all agreed that he used an appropriate grasp of his pencil when they observed him. Dr. Davidson stated in her report that Student H. did not speak in complete sentences. In the video Student H. can be seen and heard speaking in complete sentences. Dr. Davidson responded that she meant that

80% of the time he did not speak in complete sentences. Ms. Parkinen testified that in her first grade class few students speak in complete sentences. Dr. Davidson sets out in her report a list of the reasons for Student H. to continue in kindergarten and then reasons why he should progress. Unfortunately, the reasons asserted for him to progress do not appear intellectually honest. They are "straw men" that do not provide justification for Student H. to progress to first grade. There was no mention made of the frustration the young man would experience with his intellectual capability being forced to repeat kindergarten. There was no consideration of the loss of the acquaintances that he made in Ms. Fleener's class as a reason for Student H. to progress. This is especially significant to a child where socialization is a recognized problem.

Maria S. is a caring and concerned mother, who has to work hard to maintain her family. In the video she can be observed comforting Student H., when he needed support. She can be observed giving him sign language prompts. She testified that she learned early to communicate with Student H. by using sign language. She is concerned about Student H.'s stuttering which she attributes to the threat of first grade. It may be that the stuttering stems from pressures placed on him at home to deal with his toileting problem and not school. Maria S. indicated that Student H. stuttered in kindergarten when Ms. Fleener was his teacher and later when Ms. Anderson was his kindergarten teacher. By the time that he was with Ms. Anderson, first grade was not pending. Maria S. failed to discuss Student H.'s problems with the teachers involved in his education. If she disagreed with Ms. Fleener's final kindergarten report card, she should have discussed it with Ms. Fleener for an explanation. When Student H. began stuttering, she failed to discuss that with Student's speech and language pathologist Pam Lopez, or even alert her to the problem. She indicated that she worked with Student H., each evening from 8:30 to 8:45 p.m.; however, this time period may not be Student's most productive time period in the day. As Dr. Davidson suggested, the parents might benefit from training on how to successfully implement the programs to deal with Student H.'s unique needs. Maria S. indicated that

Student H. could only count to five. However, Ms. Fleener indicated that he could count to 10. Ms. Anderson and Ms. Rowland showed that he can count to 13. Maria S. is not seeing the success at home that Student H. is demonstrating in the classroom.

The ultimate question of whether Student H. will progress to first grade may not be resolved as a consequence of this due process proceeding. Ms. Booth testified that SAUSD would do an assessment before deciding whether to promote Student H. to first grade because any decision would be coming late in the school year. Student H. was due for his triennial IEP assessments and Maria S. testified that she approved the district doing the assessment. Thus, the district may determine after the assessments to continue Student H. in kindergarten notwithstanding a determination of the due process proceeding.

CONCLUSIONS OF LAW

1. Both SAUSD and parents submitted for decision by due process hearing the question "whether the transition plan for Student to advance to first grade at his school of residence, with supports, as detailed in his May 23, 2005 transition IEP [was] appropriate?"

A. Under *Board of Education of Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 179 [102 S.Ct. 3034, 73 L.Ed.2d 690], a challenge to an IEP requires resolution of two issues: (1) whether the school district complied with the procedural requirements of IDEA, and (2) whether the challenged IEP was reasonably calculated to enable the child to receive educational benefits.

Counsel for the parents asserts for the first time in his seven page written closing argument that the May 23, 2005 addendum to the IEP was unlawful because it did not contain a review of prior assessments under 20 U.S.C. § 1414, (c)(1). It is interesting that counsel objected to and argued that the 2004 IEP was irrelevant to this hearing, yet now contends that the assessments for the 2004 IEP should have been mentioned in the 2005 IEP. His new argument is not compelling in that the May 23, 2005 IEP was an addendum to the 2004 IEP. An addendum is an amendment or revision of an existing IEP. (Cf. *Mewborn v.*

Government of District of Columbia (2005 DCD) 360 F.Supp.2d 138, 144.) In this case, the September 14, 2004 IEP that was approved by Student H.'s parents was designed to reflect an earlier settlement agreement between the parties. Parents cannot attack their own settlement agreement in this due process hearing without a showing of a change in circumstances. (Cf. *D.R. by M.R. v. East Brunswick Board of Education* (1993 D.N.J.) 838 F. Supp. 184, 193-194; *E.D. v. Enterprise City Board of Education* (2003 MD Ala.) 273 F. Supp.2d 1252, 1269.) There is no showing of a change in circumstances to permit relitigation of the issues resolved in the earlier agreement. The May 23, 2005 IEP meeting was held pursuant to California Education Code section 56343, subdivision (d), but the parties were required to implement the settlement agreement other than to review interim progress of Student H., and his potential progress to first grade. To the extent that Dr. Davidson's testimony was critical of a lack of mention of her 2003 independent education evaluation (IEE) in the 2005 IEP addendum, her criticism is not relevant.

Student H.'s parents' claim of procedural error is not well taken. In any event, there is no evidence that the absence of review of all prior assessments in any way adversely affected parents' participation in the 2005 IEP addendum. As the court indicated in *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484:

"Procedural flaws do not automatically require a finding of a due process denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process clearly result in the denial of FAPE."

Here, parents participated as did their counsel in the 2005 IEP, and as discussed below there was no loss of educational opportunity. The same analysis and conclusion applies to counsel's contention that the 2005 IEP addendum was unlawful because no assessments were made by Ms. Parkinen (First grade teacher from Santiago Elementary School), Ms. Miller (Roosevelt Elementary School Psychologist), Ms. Lopez (Speech and Language Pathologist), and Ms. Minnich [Booth] (Special Education Program Specialist).

Counsel argues there is a procedural flaw in that SAUSD has failed to conduct assessments for a triennial IEP meeting for Student H. Initially, this is beyond the scope of either request for a due process hearing, and for that reason alone is rejected. Additionally, counsel incorrectly asserts that parental consent to these assessments was communicated to SAUSD's counsel. Ms. Rowland testified that she faxed the consent to Leslie, Mr. Shinnefield's secretary. At one point Mr. Shinnefield represented the district in this matter, but his representation was unrelated to the need for assessments for the triennial IEP meeting. Finally, the alleged parental permission is ambiguous and therefore cannot be used to bind the district. Exhibit A was not a completed form. Maria S. failed to signify that she gave her consent. Counsel apparently forwarded this document to Mr. Shinnefield without correcting this fatal flaw.

There are no procedural errors that in any way caused a loss of educational opportunity to Student H., or that deprived the parents of Student H. to have a meaningful opportunity to participate in the IEP process. This legal conclusion is based on findings of fact numbers 11, 12, 14, 15, 18, 20, 21, and 23.

The challenged IEP was reasonably calculated to enable the child to receive educational benefits. The objective evidence indicates that Student H. was likely to progress under the questioned IEP plan. (Cf. *Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130.) Student H.'s report card from Ms. Fleener's kindergarten class showed that Student progressed from first trimester grades of below standards to having reached standards by the end of the year. At the beginning of the school year Student H. could not write his first name or draw a recognizable picture; by the end of the year he could print his first name and draw very recognizable objects. (Exhibits 3, 5-13.) Ms. Rowland's video tape showed Student H. speaking in sentences and counting to 13. The video has little other significance. The law looks unfavorably upon evidence that is prepared for trial. Here, the tapes were prepared in October, 2005, some months after SAUSD

requested a due process hearing and a week or so after student requested a due process hearing.

The law requires only that the IEP in place “be reasonably calculated to confer a meaningful educational benefit on the child.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has directed courts not to “judge an [IEP] in hindsight; [but] rather . . . look to the [IEP’s] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer [the child] with a meaningful benefit.” *Id.* (See *Pitchford v. Salem-Keizer School District No. 24J* (2001 D.O.) 155 F. Supp.2d 1213, 1234; see also, *T.R. v. Kingwood Township Board of Education* (3rd Cir. 2000) 205 F.3d 572, 577.) The May 23, 2005 IEP addendum maintained the same services that had carried Student H. through Ms. Fleener’s kindergarten class where he had attained decent accomplishments. The IEP team’s recommendation that Student H. progress to first grade was reasonably based on the evidence that Student H. had reached his IEP goals during his kindergarten year and was prepared to progress to first grade. Parents contend that based on Dr. Davidson’s testimony and the testing by Ms. Rowland that Student H. cannot meet a majority of the educational standards that are recommended for his age group. However, Student H. is not required to meet all these standards to progress to first grade. Additionally, the testing conducted by Ms. Rowland has little evidentiary value. Parents have failed to show that SAUSD failed to implement the provisions of Student H.’s IEP. A preponderance of the evidence reflects that the district exercised its professional judgment and good faith in producing and implementing Student H.’s IEP.

The challenged IEP was reasonably calculated to enable the child to receive educational benefits. Dr. Davidson was highly critical of the IEP, because her testing indicated that by September of 2005, Student H. was not performing as he had in Ms. Fleener’s kindergarten class. However, the IEP cannot be tested in hindsight. Ms. Fleener acknowledged that Student H. might have regressed during the summer. According to Dr.

Davidson during her observation of Student H., the summer school teacher, Ms. Goldberg, told her that the group she had was not good role models for Student H. He may have picked up some bad learning habits from this class. Further, Dr. Davidson's testing indicated that Student H. was average. The determination of her testing does not mean that first grade is inappropriate. A preponderance of the evidence reflects that the district exercised its professional judgment and good faith in producing and implementing Student H.'s IEP. Though the court respects Student H.'s parents' disagreement with the district's judgment, the district complied with *Rowley* and the IDEA's requirements, which is what the law requires.

The court cannot say that Student H. was denied a FAPE. (*Houston Independent School District v. Bobby R.* (5th Cir. 2000) 200 F.3d 341, 349.) Student H.'s parents have diligently sought the best possible treatment for Student, and this court is sympathetic to their concerns. The IDEA does not secure the best education that money can buy; it calls upon government, more modestly, to provide an appropriate education for each child. That is what SAUSD has done in this case. This legal conclusion is based upon Findings of Fact numbers 3, 5, 10, 11, 12, 13, 14, 15, 18, 20 and 21.

Presumably, Maria S.'s testimony at the due process hearing that she consents to those assessments will cause SAUSD to begin the assessments and implement the triennial IEP meeting.

2. Both parties were required to brief the applicability of California Education Code section 48011 to the due process issues discussed above. Each side submitted an argument citing language supporting its position, none of which was particularly helpful. Counsel for Student H. contended that it was beyond the scope of these proceedings and on that basis it will not be discussed.

3. Parents raised the issue of an extended school year (ESY) for Student H.'s 2005-2006 school year. Dr. Davidson's testing indicated some possible regression after the end of the 2004-2005 school year. However, the issue is what the record demonstrated

that the IEP team knew when it indicated that ESY was unnecessary. A preponderance of the evidence indicated that the IEP team felt that Student H. was progressing appropriately and would not need ESY. The IEP team was aware that Maria S. was enrolling Student H. in a reading program during the summer. ESY can be more appropriately reconsidered at the triennial IEP.

4. It is critical to the success of the special education program that parents and the district cooperate in order to implement successfully these educational efforts. The child involved will be in the system for many years and only through cooperation will the efforts maximize the potential for success. It is imperative that parents voice their concerns to the district's representatives as often as necessary to make sure that all participants are working on the same page of this game plan.

ORDER

Accordingly, SAUSD's May 23, 2005 IEP addendum was appropriate and did not deny Student H. FAPE. The SAUSD is ordered to proceed immediately with assessments and evaluations relative to Student H.'s triennial IEP. Student H.'s request for relief against Santa Ana Unified School District is dismissed.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (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 all issues heard and decided.*

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 section 56505, subdivision (k).

Dated: December 27, 2005

JAMES R. GOFF

Administrative Law Judge

Special Education Division

Office of Administrative

Hearings