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

In the Matter of: STUDENT, Petitioner, v. ELK GROVE UNIFIED SCHOOL DISTRICT, Respondent.	OAH CASE NO. N 2006120302

DECISION

Administrative Law Judge Deidre L. Johnson (ALJ), Office of Administrative Hearings, Special Education Division, State of California, heard this matter on May 15, 16, and 17, 2007, in Sacramento, California.

Student's mother (Parent) represented Student. Student was not present during the hearing.

Van Vu, Attorney at Law, Best Best & Krieger, represented Elk Grove Unified School District (District). Shareen Rendon, program specialist for the District, was present as the District's representative.

Student filed his request for a due process hearing on December 8, 2006. The matter was continued on January 23, 2007. Oral and documentary evidence were received during the hearing. Following the evidentiary portion of the case, the parties presented oral closing arguments, the record was closed and the matter was submitted for decision.

ISSUES[1]

1. Did District fail or refuse to assess Student in the fall of 2006, and fail to present an assessment plan within the statutory time frame after parental request for assessment?

2. Did District commit a procedural violation that resulted in the denial of a FAPE, by:

A. unilaterally refusing to assess Student in October 2006?

B. failing to provide Parent advance notice of each assessment during District's 2007 assessments?

C. failing to provide assessment reports to Parent in advance of the IEP meeting of March 16, 2007?

3. Is Student eligible for special education and related services as a child with a specific learning disability (SLD)?

4. Is Student eligible for special education and related services as a child with a speech and language (SL) impairment?

5. Did District deny Student a FAPE for the 2006-2007 school year by failing to find Student eligible for special education and related services, and failing to provide him with appropriate placement and services to meet his unique needs?

PROPOSED RESOLUTIONS

Student seeks an order making Student eligible under the SLD or SL category, or both, for special education services and an educational program, placement and services designed to meet his unique needs.

FACTUAL FINDINGS

Background

[1] The issues for hearing have been reorganized by the ALJ for clarity of decision writing, but are the same issues that were determined for the hearing in the prehearing conference attended by both parties. Specific contentions of the parties with respect to each issue are set forth in the Factual Findings.

1. Student was born in June 2000, is almost seven years old, and resides in the District with Parent. Parent registered Student in the District on September 19, 2006. Student attends kindergarten at Samuel Kennedy Elementary School (Kennedy) for the 2006-2007 school year. This is Student's second year in kindergarten.[2] Student has not been previously determined eligible for special education services.

Assessment

2. Before any action is taken with respect to the initial placement of a student with exceptional needs in special education, an individual assessment of a student's educational needs shall be conducted. All referrals for initial special education and related services shall initiate the assessment process and shall be documented. The District must deliver an assessment plan to a parent within 15 days of the assessment request. An individualized education program (IEP) meeting to review the assessment must occur within 60 days of the receipt of parental consent for the assessment.

3. On October 2, 2006, Parent met with Student's kindergarten classroom teacher, Gayle Maier, and delivered a letter requesting that Student be assessed for special education services, accompanied by two assessment reports. One report was dated August 24, 2006, from Dr. Leanne Liddicoat of the Vision Therapy Clinic, Eye Center Optometrics, and the other report was dated August 25, 2006, from Elizabeth Dokimos of The Listening Clinic. Dr. Liddicoat's report stated that Student had ocular motor dysfunction and visual efficiency problems that caused Student some difficulty with his reading ability. Ms. Dokimos's report was a progress summary report following a period of auditory processing therapy, and stated that Student had auditory processing deficits of concern including focusing, auditory attention, immediate auditory memory and interpretation, and following directions. Both reports contained recommendations for individual therapy and classroom accommodations.

4. Ms. Maier delivered the reports to Tina Smith, a school psychologist with the District. Ms. Maier informed Ms. Smith that Student had been in her class for only one week, and that she had not observed any difficulties as suggested by Parent's reports. Ms. Smith directed Ms. Maier to use the accommodation recommendations in Parent's reports as appropriate and observe Student in the classroom.

5. Ms. Smith telephoned Parent the same day, to determine what Parent's concerns were. After the call, Parent understood that the District had agreed to conduct an "evaluation" or assessment of Student. Parent's testimony is credible, and is supported by, and consistent with her letter of October 3, 2006, to Ms. Smith in which she stated: "Please

[2] The contention of Parent and Student's private psychologist that this is the third year of kindergarten is not supported by the evidence. Student completed preschool in June 2005 (Phoenix School), and one year of kindergarten in June 2006 (California Montessori Project).

let me know if you need me to sign the parent consent form - or - if my letter requesting and consenting to assessment for special ed to Ms. [Maier]... will suffice."

6. Ms. Smith testified that she informed Parent the District would convene a Student Study Team (SST) meeting to discuss Student's needs, including whether assessment was necessary, and did not agree to conduct an assessment. According to Ms. Smith, the SST gathers information about the student and makes a determination regarding the assessment request which may result in modifications or accommodations to a student's program without a special education assessment. Parent understood that there would be a meeting with District personnel, asked if she could bring her professional experts to the meeting as well, and asked for five possible dates in order to coordinate schedules.

7. On October 4, 2006, Ms. Smith electronically mailed Parent a letter containing five proposed dates between October 16 and November 13, 2006, all at 2:30 p.m., when the SST was available to meet with Parent and her professionals. In the letter, Ms. Smith stated: "Since you submitted a written request for assessment, the law requires that we respond within 10 days with a Notice of Action regarding our decision to conduct an assessment for Special Education. As [Student] has recently passed the language screener, and his kindergarten teacher reports good academic skills, we do not have sufficient evidence to suspect a disability, nor data to support the need for special education services at this time. When we hold the SST meeting, more information might be presented that could cause the team to decide to develop an assessment plan. I will be mailing the Notice of Action form along with procedural safeguards to you today...." In a series of subsequent emails, Parent communicated her disagreement with District's refusal, and informed Ms. Smith she needed at least a week to coordinate dates with her experts, one of whom was out of town.

8. On October 4, 2006, District issued a written Notice of Action form to Parent, which listed the description of District's action regarding Student as "Refused Evaluation."[3] The notice informed Parent that District personnel conducted a language and articulation screener on October 3, 2006, a psychological observation, a teacher report, and consultation to evaluate Student. At the bottom of the page, District noted that an SST would meet, and again listed the five possible dates. Parent tried to coordinate dates and times that were convenient for her experts, to no avail. No SST meeting was held.[4] The District did not provide an assessment plan and did not assess Student at that time.

9. Parent made a request for an initial special education assessment in writing in the fall of 2006. The District was under an obligation to initiate the assessment process, deliver an assessment plan within 15 days of receipt of the request, and assess Student. While District's informal review of existing information, including review of Parent's reports and classroom observations, may be viewed as the initiation of an assessment process,

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[3] The Notice of Action recited the date of Parent's assessment request as September 25, 2006.

[4] All of District's proposed dates listed the start time as 2:30 p.m., and Student's private psychologist needed different times on the same or different dates.

conducting speech and language and psychological "screeners" without an assessment plan consented to by Parent did not meet the comprehensive initial assessment requirements of the law. District committed a procedural violation.

10. District delivered an assessment plan to Parent and Parent consented to it on January 16, 2007. The plan was untimely. The three and a half month delay is a harmless error because, pursuant to Determination of Issues 6, 7, and 8, it was not shown to have impeded Student's right to a FAPE, in that he is not eligible for special education and did not suffer a deprivation of educational benefit.

Procedural Parental Participation Issues

11. A school district must adhere to the procedural requirements of the law. Not every procedural violation is sufficient to support a finding that a student was denied a FAPE. To constitute a denial of a FAPE, procedural violations must be found to have impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits.

October 2006 Refusal to Assess

12. Parent contends that when District made a unilateral determination on October 4, 2006, to refuse to assess Student, District should have convened a meeting and invited Parent to participate and review their screenings or evaluations before they arrived at a decision. As set forth in Factual Findings 2 and 9, District was required to deliver an assessment plan and begin the assessments. There is no legal requirement that an IEP team has to meet before District commences that initial assessment process. District was not required to meet with Parent prior to offering an assessment plan.

Advance Notice of Assessments

13. When the parties met on January 16, 2007, District agreed to conduct assessments in all areas of suspected disability, including cognitive/ perceptual development, academic achievement, motor development, communication/ language, and health. Parent was concerned about not being provided adequate notice, and informed District's Director of Special Education, William Tollestrup, that she wanted to participate during the assessment process by receiving advance notice of each assessment, and being provided an opportunity to be present during them.[5] Mr. Tollestrup credibly testified that he did not agree to Parent's request, and explained to her that parental presence during assessment of a student could impact the assessment results. Nevertheless, Parent left the meeting with the impression that

[5] Parent's concern about lack of notice included a complaint that District failed to give Parent timely notice of a prior resolution session meeting in December 2006. However, OAH has no jurisdiction over that matter, and any such complaint should be directed to the California Department of Education.

she was assured of "participation" in the assessments. Mr. Tollestrup agreed that District would do their best to see that Parent received the assessment reports in advance of the IEP meeting.

14. District thereafter conducted assessments of Student. District personnel did not provide Parent with advance notice of assessment, with the exception of the health nurse. On February 26, 2007, Student came home from school with an envelope in his backpack from MacNeil Therapy Network, enclosing a sensory evaluation for Parent to fill out to complete an occupational therapy (OT) assessment that had occurred that day. Parent was upset that an unknown person has tested her son without notice to her, and wrote to Mr. Tollestrup. Parent contends that even though she consented to the assessment plan, the law requires parental notification in advance of each one. Parent provided no legal authority for this position. District was not legally required to give Parent separate advance notice of each assessment. Since there was no procedural violation, the question whether it impeded Parent's participation need not be reached.

Assessment Reports

15. Following the assessments, an IEP meeting began on March 16, 2007. Parent arrived at the IEP meeting with one of her experts, Dr. Gabrielle Guedet, and was handed the District's assessment reports for the first time. Parent was upset that District did not give her the reports in advance and contends that this was a procedural violation of the law. There is no legal requirement that a school district must deliver assessment reports to a parent in advance of the IEP meeting. The law requires the meeting to be held within 60 days of receipt of parental consent, and many professionals are involved in completing their assessments and reports. While Parent's failure to receive the reports in advance of the IEP meeting could have impacted her participation in the March 2007 IEP meeting, in that she would have needed time to sit and read them, District did not commit a procedural violation. Even if it could be said that lack of advance receipt of the reports significantly impeded Parent's opportunity to participate, it was harmless because District did not insist on proceeding with the meeting. District continued the IEP meeting to April 24, 2007, to provide Parent time to review the report to prepare for the meeting.

Eligibility for Special Education – Specific Learning Disability

16. A student is eligible for special education under the category of a "specific learning disability" (SLD) when: a) the student has a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, which may manifest itself in an impaired ability to speak, listen, think, write, spell or do mathematical calculations; and b) based on a comparison of "a systematic assessment of intellectual functioning" and "standardized achievement test," the student has a severe discrepancy between intellectual ability and achievement. Severe discrepancy is measured by converting the cognitive ability and achievement scores on standardized tests into common standard scores, and computing a discrepancy of at least 1.5 standard deviations

using a formula.[6] The severe discrepancy found by calculation must be corroborated by other assessment data. In addition, Student must show a need for special education that cannot be met in the regular classroom.

17. Student contends that he is eligible under the SLD category because he has been diagnosed with ocular motor dysfunction and other vision problems, which should qualify as a visual processing disorder. Student does not contend that District's assessments were inappropriate, or that District failed to assess Student in all areas related to his suspected disabilities, but rather that District ignored the reports from Student's private professionals regarding his disabilities. District contends it considered Student's private evaluations, and that the IEP team concluded Student was not eligible for special education using a variety of assessment tools and strategies.

District's Assessments

18. The IEP meeting reconvened on April 24, 2007, to consider Student's eligibility for special education. The IEP team considered District's psychological, academic achievement, speech and language, and occupational therapy assessments. District's assessments included a review of Student's records, interviews, the administration of standardized tests, and observations of Student during assessments and in the classroom. The IEP team considered the opinions of Student's psychologist, Dr. Gabriella Guedet, who was present at the IEP meeting, along with the July 2005 and August 2006 auditory processing reports of Elizabeth Dokimos, formerly with The Listening Center, the August 2006 optometric report of Dr. Leanne Liddicoat, and the October 2006 optometric report of Dr. Kristy Remick of the Mind Development Center.

19. On February 8, 2007, District school psychologist Tina Smith conducted a psychological assessment of Student and issued a report.[7] Because Student is African American, Ms. Smith administered alternative standardized tests used to evaluate a child's current intellectual ability, the Naglieri Nonverbal Ability Test (NNAT), the Children's Category Test (CCT), the Wide Range Assessment of Visual Motor Abilities (WRAVMA), and the Comprehensive Test of Phonological Processing (CTOPP).[8] The assessment tests were all standardized nationally with a broad database population, and were reliable.

20. The NNAT is a nonverbal measure of visual-spatial skills and nonverbal reasoning abilities, with scores of 85-115 denoting the average range compared to other

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[6] There is an alternative method that is not applicable here because the IEP team did not use it.

[7] Ms. Smith obtained a Master of Arts degree in School Psychology in 1992, has been a school psychologist for 15 years, and has been with the District since 1999. Ms. Smith considered Parent's reports in conducting the assessment.

[8] See *Larry P. v. Riles* (N.D. Cal. 1979) 495 F.Supp. 926, *affd in part, revd. in part* (9th Cir. 1986) 793 F.3d 969, regarding the permanent injunction against use of certain intelligence tests that had the effect of disproportionately identifying African American students as mentally retarded.

students of the same chronological age nationally. Student obtained a standard score of 94, in the 34th percentile, well within the average range. The CCT is designed to assess nonverbal learning and memory, concept formation and problem-solving abilities. Percentile scores between 14 and 84 denote the average range, and Student scored in the 38th percentile, well within the average range. The assessor did note some impulsivity in some of Student's responses. The WRAVMA measures three aspects of visual-motor functioning: visual-motor skills in a drawing subtest, visual-spatial skills in a matching subtest, and fine motor skills in a pegboard test, with standard scores of 85-115 denoting the average range. Student's composite score was a 93, in the 32nd percentile, within the average range. Student's highest score of 103 was on the drawing subtest. The assessor noted that Student did not find the tests to be difficult, and that he appeared to effectively use problem solving strategies. The CTOPP assesses phonological abilities, the use of phonological information in processing written language, especially the sound structure of oral language. Particularly in children with reading difficulties, deficits in phonological awareness, memory, and rapid naming are common. Student performed within the average range in all three areas, obtaining composite scores for phonological awareness, 98, phonological memory, 91, and rapid naming, 112. The assessor found that Student had average skills and abilities necessary for reading.

21. Bianca Hulfish, a resource specialist at Kennedy, conducted the Woodcock Johnson Tests of Achievement-III (WJ-III), with a reported testing date of February 15, 2007.[9] On the WJ-III, standard scores between 80-90 are within the low average range, from 90-110 in the average range, and from 110-120 in the high average range. Ms. Hulfish used age based profiles and reported Student's total achievement standard score as in the average range, with standard scores on broad reading of 86 (low average); broad math, 86 (low average); and broad written language, 102 (average).[10] Student received the following standard scores on the WJ-III subtests: letter-word identification, 95; passage comprehension, 88; calculation, 91; math fluency, 86; applied problems, 84; spelling, 105; writing fluency, 99; and writing samples, 99. Ms. Hulfish reported Student's academic skills and his ability in the average range when compared to others at his age level. In the areas of math calculation, letter word identification, and all three subtests for writing, Student performed at a first grade level.

22. Ms. Smith reviewed the WJ-III assessment, and included an analysis of the WJ-III scores from Ms. Hulfish's report in the psychological report, in order to conduct a comparison of Student's intellectual functioning and his academic achievement to determine if there was a discrepancy between them. Based on a comparison of Student's cognitive abilities with his academic achievement, Ms. Smith did not find a severe discrepancy between them to demonstrate a SLD.

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[9] Ms. Hulfish obtained a Bachelor of Arts with a minor in Special Education in 2004, was a teacher, and became a resource specialist with the District in 2006.

[10] Ms. Hulfish also reported standard scores using grade based profiles.

23. On February 26, 2007, Natalie MacNeill, an occupational therapist and owner of the MacNeill Pediatric Therapy Network, assessed Student as part of the eligibility assessments, under a contract with the District.[11] Ms. MacNeill interviewed Student's teacher, observed Student in his school environment, and conducted standardized tests: a handwriting evaluation, a sensory profile, and the Developmental Test of Visual Perception, 2nd Edition (DTVP-2). Student was then 6.8 years of age. The DTVP-2 is a battery of eight subtests that measure different visual perceptual and visual-motor abilities. Student's composite scores for general visual perception, 113, motor-reduced visual perception, 102, and visual motor integration, 105, were all within normal limits. The Print Tool Assessment (PTA) was used to assess eight basic handwriting skill areas. Student scored a 94 percent, higher than the average overall score of 80 percent for a six year old. In the sensory profile, the classroom teacher and Parent provided systematized input. Student's mother noted stronger areas of concern that the classroom teacher characterized as typical or only a probable difference in performance. Parent reported a definite visual/auditory sensitivity of concern, whereas the teacher was unable to score it because she had not observed the specific behavior in the classroom. Both noted differences in vestibular and auditory processing. Ms. MacNeill concluded that no OT was indicated as a need for Student. Student scored above age level in both assessments, and did not require any verbal cues to maintain or redirect his attention in the classroom. Ms. MacNeill did not recommend any modifications, interventions or adaptations, but did recommend limiting the amount of extraneous auditory stimuli during times of structured work, and also allowing movement breaks during the day.

24. Ms. Maier conducted an academics classroom assessment of Student on March 16, 2007. Student has exhibited some difficulty at times staying on task in the classroom, when he would talk to a neighbor or sing a song. Weekly behavioral reports were sent to all parents and it was not unusual for a child Student's age to be asked to "be a better listener" or to improve in the other categories of social behavior, such as following instructions. Ms. Maier has not observed Student to have visual difficulties, and notes that Student can track reading from left to right. Ms. Maier stated that children Student's age often reverse letters and that it did not trouble her. Ms. Maier's testimony is found to be persuasive. Ms. Maier has been a teacher since 1986. While she had been accommodating Student per Parent's request to copy things for Student from the board, Ms. Maier has found that Student has no problem copying from the board and discontinued that accommodation. In two formal assessment tests, the Dynamic Indicators of Basic Early Literacy Skills (DIBELS), and the Online Assessment Reporting System (Reading Lions), Student scored at or above the 70th percentile in the average range in all four subtests of the DIBELS, and nearly perfect in the Reading Lions.

25. Student's cognitive abilities, as found in Factual Finding 23 above, were all within the average range of 85-115 for his chronological age, including a 94 on the NNAT,

[11] Ms. MacNeill obtained a Bachelor of Science in OT with a certification in early childhood intervention in 1995.

composite standard score of 93 on the WRAVMA, and composite standard scores of 98, 91, and 112 on the CTOPP. As to his academic abilities, Student's scores, as found in Factual Finding 24, were also all within the average range for his chronological age. The standard scores were within the average range of 85-115, except for one subtest for applied math problems, where Student scored an 84. Given the mean of 100, and one standard deviation of 15, the requisite score to show a standard deviation of at least 1.5 deviations from the mean would need to be at or below 77.5. Student's score on one subtest of an 84 is therefore a minor discrepancy. It cannot be used in isolation and does not show any severe discrepancy between Student's cognitive abilities and his academic achievement to meet the criteria for SLD.[12] Even if there were a significant discrepancy based on the formula, there is no corroborating data required by law to support a finding of a severe discrepancy based on other tests, scales, instruments, observations, or work samples.[13]

Private Psychological Evaluation

26. Dr. Gabrielle Guedet has been providing home psychological therapy to Student for the past two years.[14] Dr. Guedet's work with Student has primarily focused on Student's emotional and relational needs. Dr. Guedet's licensure as a marriage family therapist does not permit her to conduct psychological assessments, and she has not assessed Student. Dr. Guedet described Student as very young for his age, impulsive, anxious, easily distracted, and immature.

27. Dr. Guedet reviewed Student's private evaluations, and District's February 2007 psychological and academic assessments, and disagreed with District's assessments. Dr. Guedet has not administered the tests she was critical of, the NNAT, the WRAVMA, or the WJ-III, and emphasized in her opinion that the test results did not explain why Student has been in kindergarten multiple times. Dr. Guedet's lack of expertise in the administration of psychoeducational assessments undermined the weight to accord her testimony. Dr. Guedet has observed Student's processing and tracking difficulties in following directions or playing a board game, and was sincere in her belief that Student has "a learning disability," and understood that the term learning disability is a term of art that covers a large spectrum, from those who function well, those who need marginal support, to those in severe need of support. However, Dr. Guedet was unfamiliar with the specific requirements of eligibility for special education. In addition, Dr. Guedet did not observe Student in his classroom environment.

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[12] Although District did not present evidence of a precise mathematical calculation of Student's ability and achievement scores, there is sufficient evidence from which to apply the requisite formula.

[13] Parent contends that Student's April 2007 home journal spelling, printing and drawing entries demonstrate a disability. As credibly explained by Ms. Maier, the home sample was not consistent with Student's classroom work, and was not unusual for children at the kindergarten level.

[14] Dr. Guedet holds a Ph.D. in psychology, and is licensed as a marriage family therapist. Her background includes acting as a mental health consultant with Head Start from 1999 to 2005, and in private psychotherapy for the past eight years, helping adults and children in trauma such as child abuse, domestic violence, and poverty.

Private Vision Evaluations

28. On August 24, 2006, Dr. Leanne Liddicoat of Vision Therapy Clinic privately evaluated Student's visual efficiency skills and visual processing at Parent's request.[15] Dr. Liddicoat examined two out of three areas of the vision system, visual form and function, and the visual efficiency of the binocular system (using two eyes as a team), but did not assess in the third area of the brain processing of visual perceptive skills. Student was found to be slightly nearsighted. During a visual efficiency evaluation, Student was found to have deficient saccadic eye movement, diagnosed as ocular motor dysfunction. The ability of Student's eyes to make accurate movements from one target to another were measured at a low score of one out of four. In a second test, the Ann Arbor letter tracking test, normed for Student's age, he took 65 seconds to scan only the first five of the 26 letters of the alphabet, when others his age would have completed the whole alphabet in 80 seconds. Dr. Liddicoat concluded that Student's eye movements "are very likely limiting his reading performance."

29. Dr. Liddicoat also found Student had accommodative inadequacy, which could interfere with seeing near objects clearly for an extended period of time, such as when reading. Dr. Liddicoat also found Student had poor alignment at distance and near, with inadequate amounts of convergence and divergency recovery abilities. Dr. Liddicoat opined that if the two eyes are not properly aligned, it could result in double vision, loss of place while reading, headaches, or eye strain. There was no evidence that Student suffered any of those side effects in the classroom, although Parent described that at home Student would rub his eyes occasionally. In addition to recommending a vision therapy program, Dr. Liddicoat recommended reducing the classroom effects of these problems by allowing Student to use his finger or a straightedge as a guide while reading, seating him in the front of the room, frequent rest periods, proper lighting, good posture, as well as optimum reading and writing distance, and minimizing board to desk copying. Dr. Liddicoat has no background in elementary education and did not consult with any District personnel. Dr. Liddicoat readily agreed that Student's vision difficulties are mild, and that up to 50 percent of the population aged six to 40 years old could be found to have some vision difficulties.

30. On October 18, 2006, Student was seen for a vision cognitive evaluation by Dr. Kristy Remick, a licensed optometrist with the Mind Development Center.[16] Parent reported to Dr. Remick that Student was struggling learning to read and getting frustrated at school and home. Dr. Remick reviewed Dr. Liddicoat's report. Dr. Remick conducted tests that Dr. Liddicoat did not, covering "receptive and expressive visual skills." Dr. Remick administered the Jordan Reversal Test (JRT), the Wold Sentence Copy (WSC), the Test of Auditory Analysis Skills (TAAS), and the Keystone Visual Skills Profile (KVSP). Dr. Remick found that Student reversed seven letters and seven numbers on the JRT. Dr.

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[15] Dr. Liddicoat obtained a Doctorate of Optometry in 1998 and has an optometric practice, Vision Therapy Clinic, specializing in the diagnosis and treatment of visual disorders in the pediatric and developmentally disabled populations.

[16] Dr. Remick is the author of Eyes on Track: A missing Link to Successful Learning (2000), and advocate of the need for increased vision screenings and services to California's school age children.

Remick found this deficit of Student's visual perception of "directionality concepts" to be significant. Dr. Remick's report did not provide much scoring detail for the results of the tests. She found Student performed "below grade level" in structured visual-perspective skills, but did not give an age based result. Dr. Remick provided a diagnosis of binocular vision dysfunction, perception motor dysfunction, and oculo-motor dysfunction. Dr. Remick did not recommend lenses. She recommended vision cognitive therapy and that Student be given extra time to complete board work, writing and other visually demanding tasks, be seated at the front of the class, and use a marker or tracking window to keep his place. Dr. Remick had no knowledge whether Student's visual difficulties caused any loss of educational benefit in the classroom, but rather is interested in optimizing Student's visual skills to enhance his academic and functional success.

31. The evidence that Student has vision and visual perception deficits does not establish that Student has a SLD disability to qualify him for special education. Student has not established that he has a severe discrepancy between his cognitive ability and academic achievement, a key component of the definition of a SLD. Parent wants Student to be performing better. However, the fact that Student repeated kindergarten once does not establish a severe discrepancy between cognition and performance.

Eligibility for Special Education -- Speech and Language Disorder

32. A child may be eligible for special education services on the basis of a speech or language disorder (SL) if the child has an expressive or receptive language disorder, scoring at least 1.5 standard deviations below the mean, or below the seventh percentile for his chronological age or developmental level, on two or more standardized tests, in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics. In addition, Student must show a need for special education that cannot be met in the regular classroom, Student contends that the District should find him eligible for special education in the category of SL impaired, because he has an auditory processing deficit.

District's Assessment

33. Between January 25 and February 9, 2007, Vicki Cesaretti, District's language, speech, and hearing specialist, conducted a SL assessment of Student.[17] Ms. Cesaretti reported that Student passed vision and hearing acuity screenings in October 2006 with normal results. Ms. Cesaretti had conducted District's informal evaluation of Student's speech and language on October 3, 2006. Ms. Cesaretti administered standardized tests, one being the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4), which is a comprehensive test of language functioning, administered for the five to eight year old age range. Student obtained a scaled composite score of 93, in the 32nd percentile in the average range. The assessor noted that during the concepts and following directions subtest, Student

[17] Ms. Cesaretti became a special education teacher in 1986, obtained a masters of Science, Speech Pathology and Audiology in 1990, and has been in speech pathology with the District since then.

"reauditorized the directions and would self correct if the examiner paused." The four subtest areas addressed abilities related to the school curriculum such as following teacher instructions, using word structure rules (morphology) to extend word meanings, accurate recall of the meaning, structure, and intent of spoken languages, and internalizing rules for sentence formation orally or in writing.

34. Ms. Cesaretti administered the Phonological Awareness Test (PAT), to assess foundational skills necessary for the development of a successful reader. Student obtained a standard score of 86, in the 17th percentile. The assessor reported that it was a lengthy and difficult test, and Student attended very well. He did not understand the directions on one subtest, and reversed the direction he read when the stimulus item was difficult; for example reading a /d/ for a /b/. The Token Test for Children (TTC) was also administered to evaluate Student's receptive language functions. The average range of scoring is 495-505, with a standard deviation of 5. In order to demonstrate at least a 1.5 standard deviation below the mean of 500, Student would have to score at or below 492.5. Student's score was 494, showing that his ability to follow directions of increasing length was within an acceptable level of standard deviation. Student again demonstrated that he reauditorized the directions to himself as a strategy for dealing with complex auditory information.[18]

35. Overall, Student's core language skills were in the average range, and his ability to follow directions of increasing complexity, with the use of strategies such as reauditorizing directions, checking his answers given nonverbal clues, and breaking the information into smaller chunks, was within 1.5 standard deviations from the mean. Therefore, Student did not qualify for SL services under the statutory definition by score or percentile.

Private Auditory Processing Evaluations

36. On May 6, 2005, Student was assessed by Elizabeth Dokimos, a speech and language pathologist with The Listening Clinic, and a report was issued dated July 7, 2005.[19] Ms. Dokimos administered a battery of tests, including the TTC, the Test of Auditory Perceptual Skills-R, the Wide Range Achievement Test, and others. Ms. Dokimos found that Student, who was then 4.11 years of age, had "moderate difficulty with auditory processing skills." Ms. Dokimos recommended a course of direct intervention, and also made suggestions for classroom and home management, including the use of visual cues, getting his attention, repeating what is said, reducing noise and distractions; and the use of compensatory strategies, such as repeating directions, asking for clarification, and using multi-sensory learning.

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[18] Student scored 2 standard deviations below the mean on one subtest, which cannot be used in isolation to find a SL impairment.

[19] Ms. Dokimos has been a Professor Emeritus of Speech and Language Pathology at California State University Sacramento since 2005, and was a professor there since 1972. She was a consultant to the Sacramento branch of The Listening Clinic for about one year, until it closed.

37. On August 1, 2006, Ms. Dokimos conducted a progress evaluation after Student's participation in direct auditory development intervention. Ms. Dokimos found that Student had "significantly improved his focusing and auditory attention." She recommended further direct therapy to address areas of concern in focusing, auditory attention, immediate auditory memory and interpretation, and following directions. Ms. Dokimos found a large discrepancy between Student's reading and spelling scores on the WRAT -3, but acknowledged that Student's scores were average overall. For both the 2005 and 2006 evaluations, Ms. Dokimos did not observe Student in a classroom setting, accepted Parent's descriptions of Student's academic difficulties, and did not have experience in correlating academic performance with the evaluation. Ms. Dokimos candidly testified that how a deficit will show up in a classroom is irrelevant to her diagnostic evaluation.

38. Student's improvement over the past two years in his auditory processing skills is consistent with Ms. Cesaretti's assessment and observations that Student did not demonstrate significant auditory processing deficits during District's 2007 assessment, and that his noted difficulties were within 1.5 standard deviations from the mean. Student scored much higher on the TTC she administered than on the one Ms. Dokimos had administered in 2005.

39. The evidence that Student has auditory processing deficits does not establish that Student has a SL disorder to qualify him for special education at this time. Student has not established that the impairment is below 1.5 standard deviations from the mean, a key component of the definition of a SL impairment.

Student's Educational Needs

40. In evaluating eligibility for special education under both the SLD and the SL categories, a required element is that the IEP team must make a determination that, because of the qualifying disability, the student's needs cannot be met in the general education classroom. Student contends that he needs special education in order to obtain educational benefit.

41. District's psychologist, Ms. Smith, observed Student and interviewed his classroom teacher, Ms. Maier. Beginning with receipt of Student's private evaluations from Dr. Liddicoat and Ms. Dokimos in October 2006, District considered their recommendations and provided or stood ready to provide accommodations or adjustments in the general education classroom. Student was seated in the front of the class near the board and away from distractions. Ms. Maier found that he was able to copy instructions or information from the board. Student was easily redirected when he did not stay on task, and used strategies such as reauditorizing instructions to himself.

42. Ms. Smith reported that Student is doing well academically at Kennedy, and that his latest report card showed that he is meeting state standards in all areas. Ms. Maier's primary concerns were some problems with distractibility and focusing within the classroom that were minor in nature and that did not impede Student's progress. Ms. Maier reported

that, academically, Student is now performing in the high average range in the class, and is advancing to first grade. Student is young, and has been in the District for less than a year. Thus, even if the evidence in this case established that Student was eligible for special education due to a SLD or SL impairment, Student has not established that his needs cannot be met in the general education classroom at this time.

43. There is no factual basis warranting an order that District should find Student eligible and provide him with special education services. Accordingly, District did not deny Student a FAPE for the 2006-2007 school year.

APPLICABLE LAW

Burden of Proof

1. Under Schaffer vs. Weast (2005) 546 U.S. 49 [126 S.Ct. 528], the party who filed the request for due process has the burden of persuasion at the due process hearing. Student filed for a due process hearing and bears the burden of persuasion.

General Principles

2. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(a)(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

Procedural Errors

3. Procedural errors in the IEP process do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits, or (Ed. Code, § 56505, subds. (f)(2) & (j); 20 U.S.C. § 1415(f)(3)(E).)

Requirements of an Evaluation or Assessment[20]

4. A school district must provide a full and individual initial assessment before special education services are initially provided to a child. (Ed. Code, § 56320, 20 U.S.C. § 1414(a)(1); 34 C.F.R. § 300.301(a).) A "referral for assessment" includes a parent's written request for assessment to identify an individual with exceptional needs. (Ed. Code, § 56029.) All referrals for special education and related services shall initiate an assessment process and shall be documented. (Cal. Code Regs., tit. 5, § 3021, subd. (a).) If the referral is verbal, the school district shall offer to assist the individual making the request to put the request in writing. (Ibid.) A proposed assessment plan shall be developed within 15 calendar days of the referral for assessment.[21] (Ed. Code, § 56043, subd. (a).) The parent has at least 15 days from the receipt of the proposed assessment plan to arrive at a decision. (Ed. Code, § 56321, subd. (c).) Consent for initial assessment may not be construed as consent for any initial placement or provision of services. (Ed. Code § 56321, subd. (e).) An IEP meeting must be held within 60 days of receiving parental consent to the assessment plan. (Ed. Code, § 56043, subds. (b), (c).)

5. A school district is required to assess a child in all areas of suspected disability, including in pertinent part, language function, general intelligence, academic performance, communicative status, and social and emotional status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is eligible for special education services and the content of the IEP. (20 U.S.C. § 1414(b) (2)(A); 34 C.F.R. § 300.304(b)(1).) The school district shall not use any single measure or assessment as the sole criterion for determining whether a child is eligible for special education services or the appropriate educational program. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).)

Parental Participation

6. A parent is a required and vital member of the IEP team. (Ed. Code, §56341, subd. (b)(1); 20 U.S.C. § 1414(d)(1)(B)(i).) The IEP team must consider the concerns of the parents for enhancing their child's education throughout the child's education. (Ed. Code, § 56341.1, subd. (a)(2). The IDEA's requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (Amanda J. v. Clark County School Dist., (_____) 267 F.3d at p. 891.)

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[20] An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

[21] There are exceptions noted in the statute, but they are not applicable to this matter.

7. A parent has meaningfully participated in the development of an IEP when the parent is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions. (N.L. v. Knox County Schools (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (Fuhrmann v. East Hanover Bd. of Education (3d Cir. 1993) 993 F.2d 1031, 1036.)

Eligibility for Special Education Services

8. A child is eligible for special education services if an IEP team determines that the child meets one of the eligibility categories and the impairment requires instruction or services, or both, that cannot be provided with modification of the regular school program. (Ed. Code, § 56026, subds. (a), (b).)

Eligibility based on Specific Learning Disability

9. A specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. The term "specific learning disability" includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. That term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage. (Ed. Code, § 56337, subd. (a); 20 U.S.C. 1401(30).)

10. For purposes of a SLD determination: (a) Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression; (b) Intellectual ability includes both acquired learning and learning potential and shall be determined by a systematic assessment of intellectual functioning; (c) The level of achievement includes the pupil's level of competence in materials and subject matter explicitly taught in school and shall be measured by standardized achievement tests; (d) The decision as to whether or not a severe discrepancy exists shall be made by the IEP team, including assessment personnel in accordance with Section 56341(d), which takes into account all relevant material which is available on the pupil. No single score or product of scores, test or procedure shall be used as the sole criterion for the decisions of the IEP team as to the pupil's eligibility for special education; and (e) The discrepancy shall not be primarily the result of limited school experience or poor school attendance. (Cal. Code Regs., tit. 5, § 3030, subd. (j).)

11. In determining the existence of a severe discrepancy, the IEP team shall use the following procedures:

(a) When standardized tests are considered to be valid for a specific pupil, a severe discrepancy is demonstrated by: first, converting into common standard scores, using a mean of 100 and standard deviation of 15, the achievement test score and the ability test score to be compared; second, computing the difference between these common standard scores; and third, comparing this computed difference to the standard criterion which is the product of 1.5 multiplied by the standard deviation of the distribution of computed differences of students taking these achievement and ability tests. A computed difference which equals or exceeds this standard criterion, adjusted by one standard error of measurement, the adjustment not to exceed 4 common standard score points, indicates a severe discrepancy when such discrepancy is corroborated by other assessment data which may include other tests, scales, instruments, observations and work samples, as appropriate.

(b) When standardized tests are considered to be invalid for a specific pupil, the discrepancy shall be measured by alternative means as specified on the assessment plan.

(c) If the standardized tests do not reveal a severe discrepancy as defined in subparagraphs (a) or (b) above, the IEP team may find that a severe discrepancy does exist, provided that the team documents in a written report that the severe discrepancy between ability and achievement exists as a result of a disorder in one or more of the basic psychological processes. The report shall include a statement of the area, the degree, and the basis and method used in determining the discrepancy. The report shall contain information considered by the team which shall include, but not be limited to: (1) data obtained from standardized assessment instruments; (2) information provided by the parent; (3) information provided by the pupil's present teacher; (4) evidence of the pupil's performance in the regular and/or special education classroom obtained from observations, work samples, and group test scores; (5) consideration of the pupil's age, particularly for young children; and (6) any additional relevant information. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(A).)

Eligibility based on Speech and Language Impairment

12. A child who demonstrates difficulty understanding or using spoken language under specified criteria and to such an extent that it adversely affects his or her educational performance, which cannot be corrected without special education services, has a language or speech disorder that is eligible for special education services. (Ed. Code, § 56333.) The criteria includes: (1) Articulation disorder: the child displays reduced intelligibility or an inability to use the speech mechanism which significantly interferes with communication and attracts adverse attention; (2) Abnormal voice: a child has an abnormal voice which is characterized by persistent, defective voice quality, pitch, or loudness; (3) Fluency Disorders: a child has a fluency disorder when the flow of verbal expression including rate and rhythm adversely affects communication between the pupil and listener; (4) Language Disorder: the

pupil has an expressive or receptive language disorder, in pertinent part, when he or she scores at least 1.5 standard deviations below the mean, or below the seventh percentile, for his or her chronological age or developmental level, on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics. (Cal. Code Regs., tit. 5, § 3030, subd. (c); Ed Code, § 56333.)

Need for Services Beyond the Regular School Program

13. As noted in Applicable Law 11 and 12 above, eligibility based on either SLD or SL impairment must include a determination that the adverse effects of the disability cannot be corrected without special education and related services; that is, that the degree of impairment "requires instruction, services, or both, which cannot be provided with modification of the regular school program." (Ed Code §§ 56026, subd. (b), 56333, 56337; Cal. Code Regs., tit. 5, § 3030.)

14. Where a student fails to establish that any existing discrepancy between ability and achievement could not be corrected through services offered within the regular instructional program, the Ninth Circuit Court of Appeal has recently held that the question whether the student's discrepancies satisfied the requisite mathematical formula for a severe discrepancy need not be reached. (Hood v. Encinitas Union School District (9th Cir. April 9, 2007, amd. May 11, 2007) 2007 U.S. App. LEXIS 11112.)

DETERMINATION OF ISSUES

1. Did District fail or refuse to assess Student in the fall of 2006, and fail to present an assessment plan within the statutory time frame after parental request for assessment?

1. As set forth in Factual Findings 2 through 10, and Applicable Law 4 and 5, the District failed to initiate the assessment process and deliver an assessment plan to Parent within 15 days of receipt of the request. District committed a procedural violation.

2. District's delivery of the assessment plan to Parent in January 2007 was untimely. The delay was harmless error because, pursuant to Determination of Issues 6, 7, and 8, Student is not eligible for special education and did not suffer a deprivation of educational benefit.

2(A). Did District commit a procedural violation that resulted in a denial of FAPE by unilaterally refusing to assess Student in October 2006?

3. As set forth in Factual Findings 2, 9, and 12, and Applicable Law 3, 6, and 7, District was not required by law to meet with Parent prior to offering an assessment plan, and did not commit a procedural violation that resulted in a denial of FAPE. Even if District

should have involved Parent, it was harmless because when District conducted assessments in early 2007, Parent was included in the eligibility determination process.

2(B). Did District commit a procedural violation that resulted in a denial of FAPE by failing to provide Parent advance notice of each assessment during District's 2007 assessment?

4. As set forth in Factual Findings 2, 10, and 13, and Applicable Law 3, 6, and 7, District did not unlawfully exclude Parent from the IEP process by not giving her advance notice of each assessment of Student during the 2007 assessments, because Parent consented to the assessment plan, and there is no legal requirement to provide her separate notice of each assessment.

2(C). Did District commit a procedural violation that resulted in a denial of FAPE by failing to provide assessment reports to Parent in advance of the IEP meeting of March 16, 2007?

5. As set forth in Factual Findings 2 and 15, and Applicable Law 3, 6, and 7, District was not legally required to deliver the assessment reports prior to the March 2007 IEP meeting, and did not commit a procedural violation. Even if it could be said that lack of advance receipt of the reports significantly impeded Parent's opportunity to participate, it was harmless because District did not insist on proceeding with the meeting, and continued it to provide Parent time to prepare.

3I. Is Student eligible for special education and related services as a child with a specific learning disability?

6. As set forth in Factual Findings 16 through 31, and 40 through 43, and Applicable Law 8 through 11, and 12 through 14, the evidence that Student has vision and visual perception deficits does not establish that Student has a SLD disability to qualify him for special education. Student has not established that he has a severe discrepancy between his cognitive ability and academic achievement based on standardized tests and corroborated by other data. The fact that Student repeated kindergarten does not establish a severe discrepancy between cognition and performance. In addition, Student has not established that his needs cannot be met in the general education classroom.

4. Is Student eligible for special education and related services as a child with a speech and language impairment?

7. As set forth in Factual Findings 32 through 43, and Applicable Law 12 through 14, the evidence that Student has auditory processing deficits does not establish that Student has a SL disorder to qualify him for special education. Student has not established that the impairment is below 1.5 standard deviations from the mean based on standardized tests. In addition, Student has not established that his needs cannot be met in the general education classroom.

5. Did District deny Student a FAPE for the 2006-2007 school year by failing to make Student eligible for special education in the areas of specific learning disability (SLD), or speech and language (SL) impaired, and by failing to provide Student with an IEP with appropriate levels of placement and services to meet his unique needs?

8. As set forth in Determination of Issues 6 and 7 above, Student did not establish that he is eligible for special education under either the SLD or the SL disorder categories. There is no factual basis to warrant an order that District should find Student eligible and provide him with special education services. Accordingly, District did not deny Student a FAPE.

ORDER

All of Parent's requests for relief are denied.

PREVAILING PARTY

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

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 (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: June 11, 2007

DEIDRE L. JOHNSON
Administrative Law Judge
Special Education Division
Office of Administrative Hearings