

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

In the Matter of :

STUDENT,

Petitioner,

vs.

SANTA ANA UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N2005090464

NOTICE: This decision has been UPHELD by the United States District Court. Click [here](#) to view the court's decision.

DECISION

Richard M. Clark, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter between January 17 and January 25, 2006, in Santa Ana, California.

Petitioner (Student) was represented by attorney Jill Rowland. Student's mother was also present at the hearing on Student's behalf.

Respondent Santa Ana Unified School District (District) was represented by attorney Patrick Balucan. Barbara Cummings, Special Education Coordinator, was also present on the District's behalf.

Student called the following witnesses: Student's mother; Dr. Chris Davidson, educational psychologist; Maria Abramson, licensed audiologist; Dr. Beth Ballinger, optometrist; and Abby Rozenberg, speech and language pathologist.

Respondent called the following witnesses: Fabi Moy, speech and language pathologist; Diane Wertheimer-Gale, occupational therapist; Linda Stephens, speech and language pathologist; Amy Miller, school psychologist; Cheryl Glorioso, third grade regular education teacher; Sarah Silva, fourth grade regular education teacher; Enrique Pedraza, special education teacher; Colleen McNamara, school nurse; Linda Bell, principal at Santiago Elementary school; Barbara Cummings, Special Education Coordinator; Dr. Kristina Lance, fifth grade regular education teacher; and Doris Dembi-Ingrassano, speech and language pathologist.

Oral and documentary evidence were received during the hearing and that portion of the hearing was closed on January 25, 2006. Closing arguments were submitted by both parties on February 10, 2006, and the record was closed. Both parties waived time for a decision.

ISSUES

Student's Issues and Resolutions Statement submitted on January 3, 2006, set forth 234 issues for resolution at the due process hearing. The issues were further clarified at a prehearing conference held on January 6, 2006.¹ However, the issues for decision still require reference to the actual pleading, which is unnecessarily lengthy and complex. The issues for decision have been restated by the ALJ as follows:

I. From March 9, 2002, through the 2005-2006 school year, did the District fail to provide Student a Free Appropriate Public Education (FAPE) by: (a) failing to conduct a visual processing assessment, failing to provide vision therapy services and failing to provide vision therapy annual goals; (b) failing to conduct an appropriate speech and language assessment, failing to provide appropriate amounts of speech DIS, and failing to provide appropriate speech and language goals; (c) failing to conduct an auditory processing assessment, failing to provide appropriate auditory processing therapy, and failing to provide appropriate auditory processing goals and objectives; (d) failing to conduct an occupational therapy assessment, failing to provide DIS occupational services, and failing to provide appropriate occupational therapy goals and objectives?²

II. From March 9, 2002, through the 2005-2006 school year, did the District fail to provide Student a FAPE by: (a) failing to conduct an appropriate Attention Deficit Hyperactivity Disorder (ADHD) assessment; (b) failing to provide appropriate classroom accommodations and modifications for Student's ADHD, visual, and auditory processing needs; (c) failing to provide an appropriate placement and modify that placement to ensure that Student progressed in terms of her academic skills; (d) failing to provide appropriate annual academic goals and objectives; (e) failing to conduct a social/emotional assessment, (f) failing to provide Student with Designated Instruction and Services (DIS) social skills training; (g) failing to provide any social goals and objectives; (h) failing to ensure that a vision specialist, licensed audiologist, occupational therapist, and a licensed speech pathologist attended Student's Individualized Education Program (IEP) and addendum meetings, including a licensed speech pathologist at the January 8 and April 1, 2003 IEP meetings?³

¹ The issues for decision were set forth in a prehearing conference order dated January 6, 2006.

² Student's Issues and Resolutions Statement submitted on January 3, 2006, issues 1-12, 45-56, 110-121, 161-172, 209-220.

³ Student's Issues and Resolutions Statement submitted on January 3, 2006, issues 13-20, 57-68, 70, 122-131, 173-182, 221-230.

III. During the 2002-2003 through the 2005-2006 school years and extended school years (ESYs), did the District fail to find Student eligible for special education and related services based on her visual impairment, speech and language impairment, and based on her ADHD under the category Other Health Impaired (OHI)?⁴

IV. From March 9, 2002, through the 2001-2002 school year and ESY, did the District fail to provide Student a FAPE by failing to ensure that a general education teacher attended her annual IEP meeting?⁵

V. From March 9, 2002, through the 2005-2006 school years and ESYs, did the District fail to provide Student a FAPE by failing to ensure that Student's cumulative educational file was kept and maintained in accordance with California law and regulations?⁶

VI. During the 2002-2003 through the 2005-2006 school years and ESYs, did the District fail to provide Student a FAPE by failing to find Student eligible for special education based on her specific learning disability in basic reading skills, basic reading comprehension, mathematics calculation, mathematics reasoning, written expression, oral expression, or listening comprehension due to a disorder or deficits in the basic psychological process in visual processing, auditory processing, and attention?⁷

VII. During the 2002-2003 school year and ESY, did the District fail to provide Student a FAPE by failing to ensure that a special education teacher was present at the January 8, 2003 IEP meeting?⁸

VIII. During the 2002-2003 school year and ESY, did the District fail to provide Student a FAPE by failing to hold an IEP to review the results of the ADHD and Kaufman assessments until six months after they were completed?⁹

IX. During the 2002-2003 and 2003-2004 school years and ESY, did the District fail to provide Student a FAPE by failing to obtain Student's parent's consent prior to conducting an assessment?¹⁰

X. During the 2002-2003 and 2003-2004 school years and ESY, did the District fail to provide Student a FAPE by failing to comply with Student's record requests for a copy of Speech and Language Assessment performed by District speech specialist Doris Dembi, dated February 18, 2002 [*sic*] and February 18, 2003, and a copy of speech therapy logs?¹¹

⁴ Student's Issues and Resolutions Statement submitted on January 3, 2006, issues 23-25, 88-90, 139-141, 187-189.

⁵ Student's Issues and Resolutions Statement submitted on January 3, 2006, issue 21.

⁶ Student's Issues and Resolutions Statement submitted on January 3, 2006, issues 22, 87, 138, 186.

⁷ Student's Issues and Resolutions Statement submitted on January 3, 2006, issues 26-44, 91-109, 142-160, 190-208.

⁸ Student's Issues and Resolutions Statement submitted on January 3, 2006, issue 69.

⁹ Student's Issues and Resolutions Statement submitted on January 3, 2006, issues 71-72.

¹⁰ Student's Issues and Resolutions Statement submitted on January 3, 2006, issues 73-78, 132.

¹¹ Student's Issues and Resolutions Statement submitted on January 3, 2006, issues 79, 86, 136.

XI. During the 2003-2004 through the 2005-2006 school years and ESYs, did the District fail to provide Student a FAPE by: (a) failing to comport with the requirements of the January 28, 2003 IEP; (b) failing to comport with the “stay put” right to a one-to-one independent facilitator in February 18, 2003; (c) failing to comport with the Accelerated Reading Program, Speech and Language (SL) services, and “stay put” rights for the ESY in the April 1, 2003 IEP; (d) failing to comport with the last agreed upon IEP on January 3, 2006?¹²

XII. During the 2002-2003 school year and ESY, did the District fail to provide Student a FAPE by: (a) failing to review an independent speech assessment at an IEP meeting; (b) failing to hold an IEP meeting within 30-days of parent request for a meeting; (c) implementing annual goals and objectives found in May 29, 2003 IEP without parental consent; (d) holding an IEP meeting without parent’s in attendance?¹³

XIII. During the 2004-2005 and 2005-2006 school years and ESYs, did the District fail to provide Student a FAPE by: (a) failing to ensure that Student’s parents were invited to the annual IEP; (b) holding the IEP meeting at a mutually agreed upon time and place; (c) failing to provide transportation services; (d) failing to provide parents a copy of the annual IEP within a reasonable period of time?¹⁴

FINDINGS OF FACT

Background

1. Student is currently 11-years-old and attended Santiago Elementary School (Santiago) until December 2005 when she enrolled in Prentice School, a non-public school.

2. In a triennial assessment conducted by District school psychologist Amy Miller on May 19, 2000, Student was determined to be special education eligible as specific learning disabled (SLD) with auditory processing and attention disorders. Student was also determined to be eligible due to a speech or language (SL) impairment that interferes with her educational progress, specifically in the area of semantics, morphology, syntax and pragmatics. Visual acuity was noted as 20/30 with difficulty tracking. Student was in pre-kindergarten at Santa Ana College Child Development Center at the time of the assessment and was aged 5 years 8 months. On the Kaufman Assessment Battery for Children (KABC), Student had a standard score in sequential processing of 83, simultaneous processing of 106, mental processing composite of 95, and nonverbal of 93. On the Comprehensive Test of Nonverbal Intelligence (CTONI), Student had composite scores of nonverbal intelligence quotient 106, pictorial intelligence quotient 104, and geometric intelligence quotient of 106. Student was placed in a special education day class at Santiago with mainstreaming in regular education for part of the day.

¹² Student’s Issues and Resolutions Statement submitted on January 3, 2006, issues 80, 84-85, 133-135, 184, 234.

¹³ Student’s Issues and Resolutions Statement submitted on January 3, 2006, issues 81-83, 137

¹⁴ Student’s Issues and Resolutions Statement submitted on January 3, 2006, issues 183, 231-233.

3. On June 1, 2001, an IEP was signed by the parents for the 2001-2002 school year when Student would be in the first grade. The IEP placed Student in a special education day class three hours per day, with DIS for 50 minutes per week in speech and language. The IEP called for Student to have general education 20 minutes per day for art, music, field trips, recess and lunch. The June 1, 2001 IEP listed a special education teacher as attending, but not a regular education teacher.

4. On May 30, 2002, an IEP was signed by the parents for the 2002-2003 school year when Student would be in the second grade. The IEP placed Student in general education three hours per week for recess, lunch, art, physical education, music, assemblies, social studies and science. Student was placed in special education 21.5 hours per week for reading, math, spelling, and written language. Student received SL therapy 30 minutes per day, with consultation two times per week. The IEP reflects that both a general education and a special education teacher attended the IEP.

5. On November 26, 2002, the parent's approved an addendum to the May 30, 2002 IEP which permitted an assessment for "AD/HD," and established new math goals since Student had achieved the earlier math goals.

6. On January 8, 2003, the May 2002 IEP was again amended to provide Student math and language arts in general education beginning on January 13, 2003. Student would be in special education for 67 percent of the day, with the special education teacher consulting regularly with the general education teacher to ensure Student's success. The parents objected to the SL recommendations which were the same as in the May 2002 IEP, but otherwise agreed to the addendum. The parents indicated that they would seek an independent assessment for Student in the area of SL. Diane Pope attended as the special education teacher and Shellye McLellan attended as the general education teacher.

7. On February 18, 2003, an IEP meeting resulted in another addendum to the May 2002 IEP which added a goal for Student to write a paragraph with a topic sentence, develop the body of the story and conclude with an ending paragraph. Student's math program would also be accelerated. The parents continued to object to the amount of time given to SL, and they requested an independent educational evaluation (IEE) for SL testing. The District recommended speech one time per week for 30 minutes in the general education classroom, with a group lesson for 30 minutes per week in the special education classroom on a different day. With the exception of the amount of time for speech therapy, the parents otherwise agreed to the addendum.

8. On April 1, 2003, an additional addendum to the May 2002 IEP was signed by Student's mother, placing Student in the general education classroom for all reading components with the assistance of a special education aide for 30 minutes, with a gradual decrease in the amount of aide time. The IEP team reviewed an assessment conducted by Sylvan Learning Center whose Director of Education was present at the IEP meeting to discuss the assessment. The mother told the District that Student complains about things that occur at school but does not tell her teacher. A complaint journal was established to help

Student communicate any issues she might be having at school. Student also would be part of the independent reading program in the library, and would participate in ESY. The parents requested an IEE for SL, but wanted assurance from the District that the evaluator would not visit the school, view records or observe Student.

9. On May 29, 2003, an IEP meeting was held where it was determined that Student no longer met the criteria for special education services as a student with a SLD or in the related area of SL. The District offered general education placement with accommodations for 4 hours 15 minutes per day, with the Resource Specialist Program (RSP) for 45 minutes per day in the afternoon. The parents attended the meeting but did not agree with Student being exited from special education and did not sign the IEP. The parents had concerns about Student being in the general education classroom full-time and believed that Student continued to need SL services. The IEP noted that Student needs RSP support for assignments and with all written language as she writes slowly. The IEP team recommended that special education and related services “gradually fade” over the first two trimesters of the 2003-2004 school year.

10. An IEP was held on June 15, 2004. The parents signed as attendance only. The District offered general education placement four hours per day, with RSP one hour per day. The notes of the IEP indicate that Student had blossomed in the general education classroom. She was not recommended for ESY. According to the SL therapist, Student met all her SL goals and no longer qualified for SL therapy.

11. The parents filed a due process hearing request on March 14, 2005. Mediation was held on April 14, 2005. During mediation, Student’s parents provided the District with several independent assessment reports. On April 28, 2005, the District provided notice of an IEP meeting scheduled for May 10, 2005. The parent’s attorney sent a letter to the District dated May 2, 2005, indicating that the parents were unavailable to attend the IEP and that since a due process hearing request had been filed, they would not attend the IEP meeting. The District replied on May 6, 2005, indicating that the District understood the parents were refusing to attend the IEP because of the pending due process hearing, but the District was still required to hold IEP meetings and evaluate the independent assessment reports provided by the parents at mediation. The IEP meeting was held on May 10, 2005 and the parents did not attend.

Triennial Assessment

12. On May 21, 2003, school psychologist Amy Miller conducted a triennial assessment of Student and prepared a Multidisciplinary Assessment Report. At the time of the assessment, Student was age 8 years, 8 months and in the second grade. The assessment included a medical screening performed by Colleen McNamara, R.N., which showed 20/20 vision bilaterally, and that Student passed the hyperopia and tracking tests. Student was otherwise in good health. Diane Pope, Student’s current special education teacher, estimated Student’s academic performance at the second grade level for math, reading, and written language. Ms. Miller determined that the results of the assessment were a valid estimate of Student’s cognitive abilities.

13. During the triennial assessment, Ms. Miller administered the Wechsler Intelligence Scale for Children-3rd edition (WISC-III). The results showed Student to have a verbal IQ score of 88, a performance IQ score of 106, and a full scale IQ score of 95. Ms. Miller noted a significant 18-point discrepancy between the verbal and nonverbal intellectual functioning. She recommended that the full scale score be interpreted with caution and that the performance IQ score (nonverbal ability) be used as the best indicator of Student's cognitive ability because the other scores included language processing that were potential issues for Student. The performance IQ indicated average potential. The WISC-III indicated a low score on the coding subtest which measures visual motor dexterity, associative nonverbal learning, and nonverbal short-term memory. Ms. Miller also noted weakness in vocabulary and comprehension. The vocabulary subtest measured Student's verbal and educational experiences and environment. The comprehension test measured her common sense, social knowledge, practical judgment in social situations, and level of social maturation.

14. Ms. Miller also tested Student in the area of psychological processing and gave Student the Wide Range Assessment of Memory and Learning (WRAML), Test of Auditory-Perceptual Skills-Revised (TAPS-R), and the Beery Buktenica Development Test of Visual-Motor Integration (VMI). The WRAML and the TAPS-R indicated a significant weakness in retention and recall of information from oral presentation. The VMI indicated that Student's visual-motor skills were within the average range for children her age.

15. Ms. Miller administered the Conners' Teacher and Parent Rating Scale Revised (short version) during the triennial assessment. The Conners' test is part of an evaluation in the area of ADHD. Ms. Miller also evaluated Student using a series of questions that address the ADHD criteria. Ms. Miller's testing showed that there was a difference in perception between the school and home environments. Ms. Miller determined that Student did not meet the eligibility criteria for ADHD since significant inattentive behavior must be shown over a variety of settings and affect Student academically and socially. Ms. Miller indicated Student was performing academically in the range for second graders, was outgoing, and demonstrated socially acceptable behaviors.

16. During the triennial assessment, Student was also tested using the Woodcock Johnson-III (WCJ-III), the Kaufman Test of Educational Achievement (KTEA), and the California Achievement Test (CAT). The WCJ-III revealed that Student had reading composite and comprehension scores of 91, a written language composite score of 105, and a math composite score of 108. On the KTEA, Student had a standard score in reading composite of 97, written language composite of 101, and a math composite of score of 90. The CAT revealed that Student had a total reading score of 2.6 grade equivalent, and a total math grade equivalent of 2.8. Student's grade at the time of the CAT was 2.6. The tests showed that Student was reading at a mid-second grade level, and was at an ending second grade level for written language skills. Overall, the test results revealed that Student was functioning at the range of expected ability for second graders in all academic areas. Ms. Miller noted an auditory processing weakness. In spite of the auditory processing weakness, Ms. Miller indicated that based upon the testing and discussions with teachers, Student no longer met the requirements for eligibility in special education under the SLD category.

17. Ms. Miller testified credibly regarding the evaluations of Student. Her training and experience working as a school psychologist more than qualified her to evaluate, assess and interpret the testing performed on Student. At the due process hearing, Ms. Miller no longer worked for the District and no longer worked as a school psychologist. She had difficulty remembering the exact protocols for some of the tests that were administered, but she was aware of the option to “prorate” scoring on the WISC-III though she could not explain the process and did not prorate the WISC-III scores in this case. Her testimony regarding prorating scores was credible, and her assessments and conclusions took into account the areas that might be included in the prorated scoring. Ms. Miller also said that the 18 point discrepancy was significant and indicated a language delay or auditory processing issue. Student did have auditory processing difficulties, but was otherwise at grade level. Ms. Miller felt that placing Student in general education, the least restrictive environment, would assist her with any SL difficulties because of the everyday interaction and support from her typically developing peers who would provide appropriate social modeling.

18. Ms. Miller further testified that standardized testing is not the only way to assess and make recommendations for students. She explained that standardized tests are a snapshot of how a student did on a particular day, and that other means could be used to obtain information on deficits including observations, talking to teachers, and reviewing academic performance. Some instructional strategies that address deficits can be implemented in the regular education classroom.

Independent Assessments

19. At the May 10, 2005 IEP meeting, the IEP team evaluated private assessments of Student that were given to the District by Student’s parents on April 14, 2005. The assessments were conducted at the parents’ expense. The assessments considered by the IEP team were a Psychoeducational Report dated October 17, 2003 prepared by Dr. Chris Davidson, Newport Language and Speech Center evaluation dated August 4, 2003, Speech and Language Evaluation by Abby Rozenberg dated June 7, 2004, a report prepared by Abramson Pathology dated July 30, 2003, a report from Newport Beach Developmental Optometry Group prepared by Dr. Beth Ballinger dated January 21, 2004, and occupational therapy assessment conducted by Nancy Lin at Children’s Therapy Studio on May 20, 2004.

20. The IEP team critiqued and evaluated the assessments, and noted that the reports were old, did not have current information, and did not have current classroom observations. Current observations from Student’s teachers directly contradicted information found in the reports. The IEP team was not persuaded that Student had special educational needs at the current time, and continued to recommend that Student be exited from special education since she no longer met the SLD or SL criteria. The IEP team also noted that Student was absent for 32 days in second grade, 22 days in third grade, and 12 days in the fourth grade.

21. Dr. Christine Davidson has extensive experience as an educational psychologist and school administrator, and testified as an expert on behalf of the student. Dr. Davidson conducted a detailed assessment of Student in October 2003 that included a review of Student's records, an in class observation of Student by Dr. Davidson in September and October 2003, and a series of standardized tests.¹⁵ Dr. Davidson also evaluated and critiqued the District's reports and assessments. Dr. Davidson indicated that significant discrepancies in testing scores require the evaluator to look further to determine why the discrepancies exist. Dr. Davidson acknowledged that interpretation of standardized testing allows the individual psychologist's clinical judgment to determine which testing score is the better indicator of performance. She trained her staff that a child would be eligible for special education as SLD if an 18 point discrepancy existed and there was corroborating evidence. Dr. Davidson stated that the WISC-III protocols indicated that a psychologist could "tease out" or prorate scores in order to address discrepancies in test scores. Dr. Davidson testified that if the scores were prorated, the performance IQ score would be much higher and the discrepancy would qualify Student for special education as SLD. Dr. Davidson would find Student eligible as SLD with a learning disability in reading, based upon the District's testing numbers, Student's achievement, and what the teachers told Dr. Davidson during the classroom observations.

22. As part of her detailed evaluation of Student, Dr. Davidson administered the Woodcock Johnson-III test and the General Intellectual Ability Extended (GIA). Dr. Davidson indicated that Student needs vision therapy because her visual processing speeds were low. Dr. Davidson was unfamiliar with the Sacramento County Office of Education (SCOE) statewide standardized testing for reading that is administered by the District. Dr. Davidson indicated that the District's assessments were accurate at the time the testing was done, and did not testify about any concerns with the manner in which the District conducted its testing of Student.

23. While Dr. Davidson was a credible witness, her testimony regarding the prorated IQ scores was not persuasive. Her interpretation of an 18-point discrepancy qualifying Student for special education does not comport with the California Code of Regulations.¹⁶ To the extent that Dr. Davidson's interpretation of the District's test scores conflicted, the ALJ finds the District's testimony to be more persuasive and accepts the District's test scores as the most compelling indicators of Student's IQ scores at that time.

ADHD Evaluation

24. Ms. Miller assessed Student for ADHD in December 2002 but determined that the characteristics of ADHD were not met since they did not appear in both the school and home environments. The behavior that the mother indicated that she observed at home did not appear in the school. Ms. Miller administered the Conners' Teacher Rating Scale-Revised

¹⁵ Dr. Davidson also conducted an updated assessment in August 2005, but that assessment report was not provided to the District until the due process hearing where it was marked and admitted as an exhibit. The District indicated that it had not yet held an IEP meeting to discuss the August 2005 report since they received it during the hearing.

¹⁶ See discussion under Conclusions of Law number 10, *infra*.

(short version) in December 2002. The results revealed that Student displayed inattentive behaviors at home but not at school, and that Student was doing well in the classroom. Ms. Miller concluded that Student did not meet the criteria for ADHD.

25. Ms. Miller also conducted an ADHD evaluation as part of the triennial assessment in May 2003 and found that Student did not meet the eligibility criteria for ADHD. (See factual finding 15, *supra*.)

Speech and Language

26. Linda Stephens is a speech and language pathologist working for the District. She had worked with Student for the past 2.5 years, and was working with her prior to Student leaving the District. Ms. Stephens testified that she observed Student weekly in her general education classroom and found her speech to be appropriate. Student fit in well, kept up with her work, participated in class, and had no obvious needs for speech and language services. Student was socially appropriate, but routinely went back and forth between classes which made it difficult to maintain friendships. Ms. Stephens did not do a formal assessment of Student, but worked directly with her, observed her, and discussed her progress with her teachers. Student had no articulation problems, did not have issues with grammar, syntax or morphology, and Mrs. Stephens stated that Student's speech was age appropriate. Student's attendance was not the best, but in spite of that, she did well.

27. Doris Dembi-Ingrassano provided SL services to Student prior to Ms. Stephens. Ms. Dembi-Ingrassano indicated that she provided SL services as required under the IEP, and that Student was doing extremely well. Ms. Dembi-Ingrassano thought Student's language skills were strong enough to warrant being exited from SL services. For the May 30, 2002 IEP, Ms. Dembi-Ingrassano drafted the goals. The goals were typical SL goals, but they were appropriate for Student. Ms. Dembi-Ingrassano acknowledged that there were no expressive or receptive language goals, and that Student was frequently off topic. However, Ms. Dembi-Ingrassano stated that not every type of service needs a goal but that the areas were worked upon daily as part of her role as an educator, particularly in the area of pragmatics. In 2003, Ms. Dembi-Ingrassano gave Student a Structured Photographic Expressive Language Test-2 (SPELT II) test in order review current levels of performance for the annual IEP, but it was not a formal assessment. The formal SL assessment was provided by Fabi Moy, an independent SL therapist not employed by the District. Both Dembi-Ingrassano and Ms. Moy indicated that any testing must consider that Spanish was spoken in Student's home, even though Student was not bilingual. Ms. Dembi-Ingrassano stated that teacher input was important in SL, so she spoke to Student's teachers who stated that Student was performing above many of her peers. Ms. Dembi-Ingrassano testified that she provided SL logs to Student's parents after they requested proof that Student was receiving SL services.

28. Fabi Moy conducted an independent SL assessment of Student for the District on April 17, 2003. This was Ms. Moy's first assessment for the District. Ms. Moy administered the Test of Problem Solving Revised (TOPS) and performed a Language Sample Analysis,

and found the results to be within normal limits. Ms. Moy also conducted a classroom observation of Student and found Student to be appropriate in the classroom. Ms. Moy also reviewed Student's records at the District. Ms. Moy determined that Student did not meet the requirements for SL impaired, which was consistent with the findings of Ms. Dembi-Ingrassano and Ms. Stephens.

29. Abby Rozenberg testified as a SL expert for Student. On June 7, 2004, Ms. Rozenberg conducted a SL evaluation of Student that included administering the Test of Reading Comprehension (TORC-3), the Clinical Evaluation of Language Fundamentals 4th Edition (CELF-4), the Comprehensive Assessment of Spoken Language (CASL), and the Test of Auditory-Perceptual Skills-Revised (TAPS-R). Ms. Rozenberg indicated that Student's SL goals were not appropriate to bridge the deficits facing Student. Student might make progress with the SL services provided by the District, but the deficits Ms. Rozenberg found would not improve to the point where there could be a decrease in services. Ms. Rozenberg observed Student in her office and reviewed the District's reports, and determined that Student was still SL impaired. Ms. Rozenberg testified that it would be inappropriate to take Student out of special education since all of her deficits had not been remediated.

Visual Therapy

30. Dr. Beth Ballinger testified as an expert in the area of optometry, visual information processing and visual perceptual training. She stated that Student had visual processing disorders and needed proper assessments and vision therapy as far back as 2000. When she first assessed Student in 2004, Student was seeing double, rubbing her eyes, closing her eyes, had eye tracking fatigue, skipped words and sentences, had difficulty copying sentences and had right/left confusion. Dr. Ballinger used her expertise to extrapolate that Student must have been having difficulties in prior school years since the types of issues that Dr. Ballinger observed with Student's vision did not just occur, but Student's system had been in trouble for a while. Dr. Ballinger opined that Student was in need of visual therapy to remediate the problems that Dr. Ballinger identified during her assessment.

31. The triennial assessment conducted by the District in May 2000 revealed 20/30 vision acuity, but difficulty with tracking. The assessment indicates that Student's fine motor skills were age appropriate, that her visual motor integration was commensurate with cognitive ability and that her visual processing skills were an area of strength.

32. Based upon the testimony and evidence adduced at the due process hearing, the ALJ finds that there is no persuasive evidence that Student had a visual processing disorder in the 2001-2002 school year, beginning on March 9, 2002. Further, the District did not have any reason to suspect any type of visual disorder.

Occupational Therapy

33. Nancy Lin, an occupational therapist, conducted an assessment of Student on May 20, 2004, and wrote a report on that assessment on July 21, 2004. Ms. Lin did not testify at the hearing. Her report was admitted into evidence based upon testimony of Dr. Davidson, though Dr. Davidson indicated that she was not an occupational therapist.

34. The District retained Diane Wertheimer-Gale, a licensed occupational therapist, to testify about the nature and quality of Ms. Lin's OT assessment. Ms. Wertheimer-Gale was a well qualified and credible witness. Ms. Wertheimer-Gale described multiple flaws in the report, including the use of improper protocols by Ms. Lin. Based upon the testimony of Ms. Wertheimer-Gale and the report she prepared regarding Ms. Lin's assessment, there was no credible evidence that Student had a need for occupational therapy services. This conclusion was corroborated by Student's teachers who testified credibly that they did not observe any indications that Student had difficulties that might require OT services.

Procedural Issues

35. The District provided persuasive evidence, including copies of the signed documents, that Student's parents signed consent forms allowing the District to assess Student on October 2, 2002, April 1, 2003, and April 8, 2003.

36. Student's mother testified that the District did not initially provide transportation when ESY began for Student during 2004 ESY. Her testimony indicated that there was an apparent miscommunication about when and where Student should be picked up and dropped off. The ALJ was not persuaded that the District did not provide transportation as required by Student's IEP's.

37. Student's mother testified that she might have reviewed the District's cumulative file on a prior occasion, but could not recall when or what might have been missing from the file. Student's mother's testimony regarding review of the cumulative file was not persuasive to show that the District was not otherwise maintaining Student's cumulative file according to the California law.

38. Student's mother testified that she "might have" reviewed both the ADHD assessment and the Kaufman tests, but she was "not sure." There was no evidence presented as to the exact dates that the assessment and test were completed and what dates the mother might have seen the test results. There was no persuasive evidence that the District failed to review the documents in a timely manner.

39. Student's mother testified that she never received a copy of a SL assessment from Doris Dembi. There was no persuasive testimony that such an assessment exists. Ms. Dembi testified that she did not write a formal assessment of Student in February 2003, but instead conducted tests to obtain benchmarks to set SL goals and objectives.

40. Student offered no persuasive evidence regarding the dates that she or her attorney received any IEP documents from the IEP meetings that the parents did not attend. The notes at the IEP reflect that copies of the IEPs would be sent to the parents.

41. Student's mother testified that she was uncertain if Student was receiving all of the services required under the IEP. While the mother was a credible witness, her lack of recall about specific dates and services did not persuade the ALJ that the District was not complying with the requirements of Student's IEPs.

CONCLUSIONS OF LAW

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

2. Once a child is identified under the IDEA as handicapped, the local education agency must: identify the unique educational needs of that child by appropriate assessment, create annual goals and short-term benchmarks to meet those needs, and determine specific services to be provided. (Ed. Code §56300-56302; 20 U.S.C. §1412.)

3. The United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (*Id.* at 201.)

4. The U.S. Supreme court recently ruled that the Student in a special education administrative hearing has the burden to prove their contentions at the hearing. (*Schaffer v Weast* (2005) 546 U.S. ___, 126 S.Ct. 528.)

5. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which he is entitled and that parents are involved in the formulation of the student's educational program. (*W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483.) Citing *Rowley*, the Court also recognized the importance of adherence to the procedural requirements of the IDEA, but indicated that procedural flaws do not automatically require a finding of a FAPE denial. (*Id.* at 1484.) Procedural violations may constitute a FAPE denial if they result in the loss of educational opportunity to the student or seriously infringe on the parent's opportunity to participate in the IEP process. (*Id.*)

6. Procedural errors during the IEP process are subject to a harmless error analysis. (*M.L., et al., v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, 650, fn. 9 (lead opn. of Alarcon, J.)) In *M.L.*, the court decided that failure to include a regular education teacher at the IEP team meeting was a procedural violation of the IDEA, and using the harmless error analysis, determined that the defective IEP team was negatively impacted in its ability to develop a program that was reasonably calculated to enable M.L. to receive educational benefits. (*Ibid.*) In separate opinions, concurring in part and dissenting in part, Judges Gould and Clifton agreed that the procedural error was subject to a harmless error test, and considered whether the error resulted in a loss of educational opportunity to M.L., but disagreed in their conclusions. (*Id.* at 652, 658.)

7. The IEP team must include at least 1 regular education teacher of the child, if the child is or may be participating in the regular education environment, and at least 1 special education teacher of the child. (20 U.S.C. §§1414(d)(1)(B); Ed. Code §56341, subs. (b)(2) and (3).)

8. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)¹⁷ It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987), 811 F.2d 1307, 1314.)

9. California Education Code section 56337 states that the following three requirements must be met in order to satisfy eligibility criteria for a specific learning disability: (a) A severe discrepancy exists between the intellectual ability and achievement in one or more of the following academic areas: (1) Oral expression; (2) Listening comprehension; (3) Written expression; (4) Basic reading skills; (5) Reading comprehension; (6) Mathematics calculation; (7) Mathematics reasoning; (b) The discrepancy is due to a

¹⁷ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212), and District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (*Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F. Supp. 2d 1213, 1236).

disorder in one or more of the basic psychological processes and is not the result of environmental, cultural, or economic disadvantages; (c) The discrepancy cannot be corrected through other regular or categorical services offered within the regular instructional program.

10. California Code of Regulations, Title 5, section 3030, subdivision (j), provides that:

A pupil has 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 an impaired ability to listen, think, speak, read, write, spell, or do mathematical calculations, and has a severe discrepancy between intellectual ability and achievement in one or more of the academic areas specified in Section 56337(a) of the Education Code. For the purpose of Section 3030(j):

(1) Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression;

(2) Intellectual ability includes both acquired learning and learning potential and shall be determined by a systematic assessment of intellectual functioning; (3) 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;

(4) The decision as to whether or not a severe discrepancy exists shall be made by the individualized education program 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 individualized education program team as to the pupil's eligibility for special education. In determining the existence of a severe discrepancy, the individualized education program 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 individualized education program 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.

(5) The discrepancy shall not be primarily the result of limited school experience or poor school attendance.

11. California Code of Regulations, Title 5, section 3030, subdivision (c), states in relevant part that a student shall qualify for special education as a student with an expressive or receptive language disorder if the Student meets one of the following criteria: (1) The pupil scores at least 1.5 standard deviations below the mean, or below the 7th 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; or (2) The pupil scores at least 1.5 standard deviations below the mean or the score is below the 7th percentile for his or her chronological age or developmental level on one or more standardized tests in one of the areas listed in subsection (1) and displays

inappropriate or inadequate usage of expressive or receptive language as measured by a representative spontaneous or elicited language sample of a minimum of fifty utterances.

12. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE unless a procedural violation impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. §1415(f)(3)(E).)

13. The IDEA inquiry is twofold. The first inquiry is whether the school district has complied with the procedures set forth in the IDEA. The second inquiry is whether the developed IEP provides the student with a FAPE by meeting the following substantive requirements: (1) have been designed to meet Student's unique needs; (2) have been reasonably calculated to provide Student with some educational benefit; and (3) comport with his IEP.¹⁸

14. As discussed below, Student has failed to meet her burden of proof.

Issue I

15. Regarding Issue I(a), as stated in factual findings 30 to 32, the District was not on notice and under no duty to assess Student for a suspected visual disorder. Since the District had no obligation to assess, there was no obligation to provide services or annual goals.

16. Regarding Issue I(b), as stated in factual findings 12, 18 and 26 to 29, the District conducted appropriate speech and language assessments, and provided services designed to meet the unique needs of Student in the area of SL deficits. Further, there was no persuasive evidence offered by Student that SL goals and objectives were inappropriate for Student.

17. Regarding Issue I(c), as stated in factual findings 2 and 12 to 18, the District properly assessed Student during the May 2000 triennial assessment and addressed services to Student's unique needs including in the area of auditory processing. No persuasive evidence was offered that the District had an obligation to provide any further assessments or services in the area of auditory processing.

18. Regarding Issue I(d), as stated in factual findings 33 and 34, the District had no notice that OT was an area of suspected disability for Student at the time of the triennial assessment. Furthermore, Student failed to offer persuasive evidence that OT services were required by Student.

¹⁸ The District was also required to provide Student with a program which educated him in the least restrictive environment (LRE), with removal from the regular education environment occurring only when the nature or severity of her disabilities was such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. §1412(a)(5)(A); Code § 56031.) LRE is not an issue in this case.

Issue II

19. Regarding Issue II(a) and (b), as stated in factual findings 15 and 24 to 25, the District properly assessed Student for ADHD at the parents request in December 2002, and found her ineligible for services under the ADHD category. There was no compelling evidence that Student had unique needs in the area of ADHD after the assessment. Thus, the District was under no obligations to provide classroom accommodations and modifications for ADHD.

20. Regarding Issue II(a) and (b), as stated in factual findings 2 and 12 to 18, there was no compelling evidence that the District failed to identify or assess Student in the area of auditory or visual processing needs. Thus, the District was under no obligations to provide classroom accommodations or modifications for those needs.

21. Regarding Issue II(c) and (d), as stated in factual findings 2 to 10, the District offered Student appropriate goals and objectives that addressed her academic needs. The District was diligent about modifying goals and objectives to ensure that Student made academic progress.

22. Regarding Issue II(e), (f) and (g), as stated in factual findings 12 to 18 and 26 to 28, Student was well adjusted and doing well in her academic setting. There was no persuasive evidence offered at the hearing that Student had unique needs in the area of social and emotional needs, including social skills training that were not otherwise being met by Student's IEP. Thus, the District was under no obligation to provide goals and objectives in the area of social and emotional needs.

23. Regarding Issue II(h), as stated in factual findings 2, 19 to 22, and 29 to 33, Student did not provide private assessments to the District until April 2005. Student offered no compelling evidence that the District had any notice or was otherwise under any obligation to ensure a vision specialist, licensed audiologist, occupational therapist, or a licensed speech pathologist attended any IEP meetings. Furthermore, there was no evidence adduced at the hearing that the parents requested any specialists be present at any IEP meetings.

Issue III

24. As stated in factual findings 15 and 24 to 25, the District properly assessed Student in the area of ADHD and found her not eligible for services.

25. As stated in factual findings 2, 12 to 18, 26 to 28, the District assessed Student and based on those assessments, was under no obligation and was not on notice that Student had any unique needs in the area of visual impairment and SL impairment other than those needs that were being addressed through the IEP process.

26. As stated in factual findings 19 to 30, Student did not provide independent assessments to the District until April 2005. The District properly evaluated the independent assessments and was not persuaded that they provided any relevant information based upon the date of the reports and Student's success in the classroom.

Issue IV

27. As stated in factual finding 3 and 4, Student attended a special day class at Santiago during the 2002-2003 school year. The IEP meeting to discuss the placement for that school year occurred on May 30, 2002. There is no indication that a general education teacher attended that May 30, 2002 IEP meeting even though Student was mainstreamed in general education for a minimal amount of time. A general education teacher attended all other meetings during the 2002-2003 school year.

28. The District committed a procedural violation of the IDEA and California Education Code by failing to have a general education teacher present at the May 30, 2005 IEP meeting.

29. Procedural violations are subject to a harmless error analysis. (See legal conclusions 5 and 6.) In light of the minimal nature of Student's general education at that time, the parent's desire that Student be placed in special education, and that a general education teacher attended all other IEP meetings for Student, the ALJ finds that the procedural error was harmless. Specifically, the ALJ finds that there was no lost educational opportunity for Student based upon the procedural violation, and the parent's right to participate in the IEP process was not negatively impacted by the District's violation.

Issue V

30. As stated in factual finding 37, there was no persuasive evidence that the District failed to maintain a proper cumulative file. The ALJ is not persuaded that the District failed to maintain a cumulative file according to California law.

Issue VI

31. As stated in factual findings 12 to 18 the District properly assessed Student at a triennial assessment and found her no longer eligible for special education services in the area of SLD since a significant discrepancy no longer exists in her standardized scores.

32. As stated in factual findings 21 to 23, the ALJ is not persuaded that the District did not properly interpret the triennial assessment data conducted in May 2003.

33. The ALJ finds that Student is not eligible for special education in the area of specific learning disability.

Issue VII

34. As stated in factual finding 6, a special education teacher attended the January 8, 2003 IEP meeting. Student has failed to meet her burden of proof on this issue.

Issue VIII

35. As stated in factual findings 5 to 9, 24 to 25, and 38, the District and Student's parents had frequent IEP meetings between November 2002 and May 2003, many at the parents' request. However, there was no indication on what dates Student's mother received or reviewed the reports.

36. The ALJ is not persuaded that the District committed procedural violations of the IDEA by not reviewing the ADHD assessment and the Kaufman test results in a timely manner.

Issue IX

37. As stated in factual finding 35, the District obtained proper consent to assess Student from her mother. Student has failed to meet her burden of proof on this issue.

Issue X

38. As stated in factual findings 27 and 39, there is no persuasive evidence that Ms. Dembi-Ingrassano ever wrote the report requested. Student has failed to meet her burden of proof on this issue.

39. As stated in factual finding 27 and 39, the ALJ is not persuaded that Student's mother did not receive information related to speech therapy logs in February 2003.

Issue XI

40. Regarding Issues XI(a)-(d), as stated in factual findings 36, 40, and 41, Student offered no persuasive evidence that the District was not "comporting" with the requirements of Student's IEP's. Student has not met her burden of proof on these issues.

Issue XII

41. Regarding Issue XII(b), as stated in factual findings 5 to 9, the District routinely held IEP meetings attended by Student's parents between November 2002 and May 2003. No persuasive evidence was offered that parent's requested an IEP meeting that was not held within a 30-day window.

42. Regarding Issue XII(d), as stated in factual findings 5 to 9, Student's parents attended all IEP meetings during the 2002-2003 school year. Student has not persuaded the ALJ that she was not invited to attend any IEP meetings during the 2002-2003 school year.

43. Regarding Issues XII(a) and (c), Student offered no persuasive evidence on these issues.

Issue XIII

44. Regarding Issues XIII(a), (b) and (d), as stated in factual findings 10, 11, and 40, there is no compelling evidence that the District failed to include Student's parents in the IEP process. Credible, persuasive evidence was presented at the hearing that the parents did not attend IEP meetings in 2004 and 2005 on advice of counsel.

45. Regarding Issues XIII(c), as stated in factual finding 36, no persuasive evidence was offered that the District failed to provide transportation services.

ORDER

1. Student's request for relief is denied. The District's finding that Student was no longer eligible for special education services after May 2003 is supported by the evidence. Student has failed to carry the burden of proof by a preponderance of the evidence that the District denied her a FAPE in any of the years alleged.

PREVAILING PARTY

2. 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 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. (Ed. Code §56505, subd. (k).)

DATED: March 21, 2006



RICHARD M. CLARK
Administrative Law Judge
Special Education Division
Office of Administrative Hearings