

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

In the Consolidated Matter of:

EAST WHITTIER CITY SCHOOL
DISTRICT,

Petitioner/Respondent,

vs.

STUDENT,

Respondent/Petitioner.

STUDENT,

Petitioner/Respondent,

vs.

EAST WHITTIER CITY SCHOOL
DISTRICT,

Respondent/Petitioner.

OAH NO. N 2005120635

OAH NO. N 2005120375

DECISION

Judith E. Ganz, Administrative Law Judge (ALJ) for the Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on March 7-9, and April 19, 2006.

Petitioner/Respondent (Student) was represented at the hearing by his attorney Andrea Marcus. Ms. Marcus was assisted by her paralegal Anne Zachry. Student's mother was present on two days of hearing. Attorney Darin Barber represented Respondent/Petitioner East Whittier City School District (District). Also present on behalf of the District was Linda Low, Assistant Superintendent of Student Services. Ruth Valadez, the Director of Special Education, substituted for Ms. Low on the first morning of hearing.

Student called the following witnesses: Mother; Dr. Robert Patterson, psychologist, and Ms. Carol Atkins, audiologist. In addition, Student called the following District personnel as witnesses: Lorraine Aflague, physical education teacher; Elizabeth Garrett, physical science teacher; Dale Miller, Linda Arroyo, language arts and social studies teachers; Patricia Watts, Patricia Recktenwald, Brandi Davis Lauber, resource specialist teachers; Roderick Paterson, school psychologist; Dr. Dorka Duron, principal; James Tighe, mathematics teacher; Marie Klobucar, reading teacher; Kenneth Martinez, Angela Bales, science teachers; and Carrie Schafer, summer tutor.¹

The District cross-examined Student's witnesses and also called Kimberly Swaim, audiologist.

INTRODUCTION AND STATEMENT OF THE CASE

Student is eligible for special education and is currently completing his ninth-grade year at one of the District's high schools. At issue in this proceeding, are the educational programs developed and implemented for Student's middle school years, namely part of the sixth grade (December 16, 2002- June 2003), and all of the seventh (2003-2004), and eighth grades (2004-2005).

On December 8, 2005, the District filed a Complaint requesting a due process hearing naming Student as respondent, seeking an order that its March 30, 2005 audiology assessment of Student was appropriate. On December 16, 2005, Student, through his attorney, filed a Complaint requesting a due process hearing alleging that the District failed to properly assess him and failed to identify appropriate goals, such that the individualized education programs provided to Student from December 16, 2002, through March 23, 2005, denied him a free appropriate public education. Student sought various remedies, including reimbursement for privately-funded tutoring, an assessment to determine appropriate compensatory education, compensatory education, and independent educational evaluations at District expense. On January 13, 2006, Administrative Law Judge Michael A. Scarlett, granted Student's January 3, 2006 unopposed motions to continue and to consolidate the two cases. A prehearing conference was conducted on February 17, 2006, by Administrative Law Judge Elsa H. Jones, and the issues for hearing were clarified.

The consolidated matter convened for hearing on March 7-9, 2006, in Whittier, California. The case was continued by mutual agreement of the parties for one additional day of testimony on April 19, 2006. Sworn testimony and documentary evidence was received. Closing oral argument was presented on April 19, 2006, by both parties, whereby the record was closed and the matter was submitted for decision.

¹ Brandi Lauber testified by telephone.

ISSUES²

1. Was the District's March 30, 2005, central auditory processing disorder (CAPD) assessment of Student appropriate?
2. Did the District deny Student a free appropriate public education (FAPE) by failing to: (a) assess Student for CAPD, and (b) perform a psychoeducational assessment from December 16, 2002, through its triennial review conducted in November 2004 and March 2005?
3. Did the District deny Student a FAPE by failing to: (a) include goals in Student's areas of need as described in the May 6, 2003, and May 4, 2004 individualized education programs (IEP), and (b) address Student's failure to meet a previous writing goal, as described in the May 6, 2003, May 4, 2004, and March 23, 2005 IEPs?
4. If the District denied Student a FAPE, is he entitled to any remedies?

CONTENTIONS OF THE PARTIES

The District maintains that its March 2005 CAPD assessment of Student comported with legal requirements. Student contends that the District's CAPD assessment was inappropriate and requests an individualized educational evaluation (IEE), at District expense.

Student alleges that the District should have conducted a CAPD and psychoeducational assessment of Student from December 26, 2002, through the District's November 2004 triennial review to determine Student's needs. Acknowledging that there is no way to know whether Student has educational needs that arise out of a potential CAPD, Student does not seek a finding that the failure to conduct a timely CAPD assessment denied Student a FAPE. As noted above, Student is seeking an IEE in the area of CAPD to help determine his needs.

Student maintains that Student's May 2003 and 2004 IEPs denied him a FAPE by failing to include reading and mathematics goals. Student further contends that the writing goals that were included in the May 2003, May 2004, and March 2005 IEPs were not modified from one year to the next in response to Student's needs and were vague. Student alleges that Student's grades were not an accurate measure of educational benefit because the grades were based on effort rather than achievement. Student seeks an assessment by a

² The parties agreed that the three-year statute of limitations applied. (Cal. Educ. Code § 56505, subd. (l).) Several of the issues set forth in the prehearing conference order were settled either before or during the course of the due process hearing. The following issues were withdrawn by the parties: whether Student is entitled to reimbursement for all privately-funded tutoring expenses incurred during the 2004-2005 school year; whether Student is entitled to an independent Assistive Technology assessment at District expense; and whether Student is entitled to reimbursement for the independent psychoeducational assessment performed by Dr. Robert Patterson. The issues set forth above are the remaining areas of disagreement.

Lindemood-Bell clinic to determine the appropriate amount of compensatory education in the area of reading, as well as an order for the amount of the compensatory education services the clinic recommends.

The District contends that the IEP team had sufficient information to develop appropriate educational programs for Student and that it advanced Student's triennial assessment in response to parental request. The District further maintains that the educational programs it offered and provided to Student were designed to meet his unique needs as they were reasonably known at the time, that Student progressed in the general education curriculum, and thus received educational benefit. The District asserts that Student is not entitled to any remedies.

The ALJ makes findings of fact, legal conclusions, and orders as follows:

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Student is a fifteen-year-old student who has been eligible for special education and related services since March 1997 as a student with a specific learning disability (SLD). According to teachers, assessors, and Mother, Student is a generally conscientious student, a likeable young man, and a good athlete.

2. Student attended a middle school within the boundaries of the District where he continued to receive special education and related services, for each of the three school years in dispute.

3. Student is currently attending a District high school where he continues to receive special education and related services.

Student's Educational History/Elementary School Years

4. When Student was first assessed for eligibility for special education in March 1997, the school psychologist determined that Student had a processing disorder in attention. Cognitive testing demonstrated a significant discrepancy between Student's low-average verbal and average performance scores. Student was prescribed medication for attention deficit hyperactivity disorder (ADHD). Academically, Student was achieving at readiness levels in all areas. The IEP team drafted goals in reading, writing, and mathematics. Student's hearing was normal. Student was placed in the resource specialist program (RSP).

5. In the spring of Student's first-grade year (1997-1998), Student remained at the readiness level in reading and written language. IEP goals were in the areas of reading decoding, written communication, and mathematics computation. The IEP team determined that the RSP did not provide sufficient individual and small-group instruction and placed Student in a special day class (SDC).

6. In an annual review dated March 18, 1999, performed when Student was in the second grade, elementary school teachers reported to the IEP team that Student made steady progress, was an emergent reader, but continued to require additional assistance. Goals were drafted in reading, written language, and mathematics.

7. At the triennial assessment conducted in May 1999, Student demonstrated significant gains. The IEP team found Student remained eligible for special education. Student continued to demonstrate a discrepancy between his verbal and performance scores on cognitive testing. Student exhibited behaviors associated with ADHD and he manifested auditory memory and auditory processing difficulties.

8. In May 2000, at the end of Student's third-grade year, teachers reported that although Student continued to make steady progress in the curriculum, reading and writing were still areas of need. A reading assessment placed him between the end of first-grade and beginning of the second-grade level and revealed reading fluency difficulty.

9. At the end of Student's fourth-grade year, in May 2001, teachers identified Student's educational needs in the areas of reading, written language, reading comprehension, and mathematics. An annual reading test and informal teacher-made assessments revealed that Student was reading at the end of the first-grade level.

10. In the summer of 2000, Student was enrolled by his parents at their expense in a private Lindemood-Bell reading clinic. According to Mother, Student's reading grade level improved at least one grade and he did very well.

11. At the beginning of the fifth-grade school year in September 2001, Student was placed in a learning center program, where he spent more time with typical peers.

12. In April 2002, Student was reassessed for his triennial review. Although Student's reading fluency rate had improved, his reading comprehension was measured at the third-grade level. In mathematics, Student exhibited strength in basic skills, but he had difficulty with fractions. In written language, Student needed help writing complete sentences with proper punctuation.

Middle School Years

May 15, 2002 Sixth-Grade IEP

13. The elementary school IEP team met on May 15, 2002 to review Student's assessment. Noting his long-term auditory memory difficulties, the team determined that Student remained eligible for special education. The IEP team observed that Student had benefited socially from greater exposure to typical peers. For the sixth grade (2002-2003), or his first middle school year, the IEP team recommended placement in the RSP program with assistance provided in the general education setting four days each week, for forty minutes

each day. The team drafted a goal in the area of written language. Accommodations in the area of reading included providing books-on-tape, altered assignments, and study aids. Patricia Recktenwald, an experienced teacher of twenty-five years, including nine years as a middle-school RSP teacher, was assigned to Student for the sixth-grade and part of his seventh-grade middle-school years and attended the May 2002 IEP transition meeting.

14. Student's May 2002 elementary-school IEP was implemented for the sixth-grade as he entered middle school. Student was fully included with his typical peers in the general education program and Ms. Recktenwald provided additional RSP support to Student in the area of writing and assistance with note-taking.

15. Based upon the Student's low scores on a standardized achievement test administered District-wide to all sixth-grade students, reading remained an area of need and Student was placed in a reading class of twelve to fifteen students that met two to three days each week. The reading teacher, Nicole Barbera, administered tests both at the start and end of the school year to measure Student's progress. Student worked on vocabulary, fluency, and comprehension and earned a "pass" grade indicating that, although Student had not achieved grade-level reading proficiency, progress had been made.

16. At the start of sixth-grade school year, Student was also informally assessed by his sixth-grade regular education language arts teacher in reading, spelling, and language arts. Although she was unable to recall Student specifically, Linda Arroyo, Student's sixth-grade language arts teacher, would have provided Student with reading support if he had scored below grade level and believed that she met Student's reading needs. Ms. Arroyo implemented the IEP's accommodations and modifications and Student earned a B grade, reflecting his understanding of the course material.

17. In the fall of the sixth grade, Student earned a grade point average (GPA) of 2.67. In the winter, Student's GPA was 2.50, and in the spring his GPA was 2.33. With the exception of one D in mathematics in the winter term, Student achieved C and B grades for all his academic subjects. Student's C grade in language arts was a measure of his average performance on State instructional standards, his participation in plays and projects, and a reflection that he worked to the best of his abilities.

18. Student was assessed pursuant to a consented-to assessment plan in April 2003 in the areas of academics. Teachers provided reports and noted that Student had improved study skills, taken on a leadership role in physical education, did well in fine arts in drawing and seeing detail, and worked hard in science, although he needed some help to focus. Implementation of the IEP modifications had proven successful in language arts. According to Ms. Recktenwald, Student maintained his grades, read and understood what he read, and satisfactorily functioned as a sixth-grader.

19. On standardized achievement tests administered at the end of the sixth grade in the Spring of 2003, Student performed "far below basic" in both English/language arts and mathematics.

May 6, 2003 Seventh-Grade IEP

20. The middle-school IEP team convened for the first time on May 6, 2003, to review the annual assessment and to plan Student's seventh-grade program (2003-2004). The team reviewed Student's work samples as well as teacher records and reports. Student's strengths were reported in visual work and verbal expression. It was determined that Student remained eligible for special education. Student was continued in the RSP program, four days each week for forty minutes of RSP assistance, to be provided in his general education classrooms. Accommodations included supplementary aids and services (such as buddy/peer tutoring, assistance with note-taking), behavioral support (such as positive reinforcement), and modification of instruction (such as shortened assignments, extra time for assignments, use of visual aids, and preferential seating).

21. Although progress was made, the previous writing goal had not been met. According to Ms. Recktenwald, the IEP team determined that writing remained an area of need for Student. A writing goal was drafted that, unlike the previous goal, required revision skills and an increased number of correctly written paragraphs.

22. According to Ms. Recktenwald, although the March 2002 elementary-school triennial evaluation had identified reading as an area of need, in May 2003, the IEP team did not include a reading goal because Student maintained his grades and was making progress in school. Ms. Recktenwald believed it was appropriate to draft goals based upon Student's recent progress rather than look back at the 2002 assessment.

23. Mother told the IEP team that Student appeared to have a hearing loss which made it difficult for him to hear certain sounds in noisy environments. Mother requested RSP support for her son in mathematics and signed consent to the May 2003 IEP.

24. According to Student's final sixth-grade progress report, issued on June 19, 2003, Student earned the following grades: C+ in fine arts, C- in language arts, C- in mathematics, A in physical education, C in science, and C in social studies with a grade point average (GPA) of 2.33.

25. During the 2002-2003 extended school year, Student attended a District summer program in language arts to improve reading, writing, and listening skills, and in mathematics. No grades or progress reports were provided.

26. Part way through the school year, Student was removed from his regular education mathematics class to a small class of six to eight students for additional RSP support in mathematics. The RSP program covered the same scope and sequence as the regular seventh-grade curriculum. Student was graded by his regular education teacher, in consultation with his RSP teacher. Based upon his ability to understand the regular education curriculum content, Student earned C- grades for all three grading periods.

27. Student performed successfully in his seventh-grade regular education science class earning B-, B, and C grades. Student's science grades were based upon test results, projects, and lab work. Student was conscientious about his homework and class assignments.

28. Student earned the following additional grades in the spring of the seventh grade: B in language arts; A- in social studies; A in physical education; and B in study skills. Student's GPA was 2.93 for the fall term and 3.00 for the spring term.

29. In April 2004, Student was assessed pursuant to a consented-to assessment plan in the area of academics. According to teacher reports, Student was doing fine in physical education, had benefited from the individual attention provided in twice-weekly mathematics tutoring, and was very willing and eager to learn in language arts.

30. On standardized achievement tests administered in the spring of 2004, Student scored "below basic" in both English/language arts and mathematics.

May 4, 2004 Eighth-Grade IEP

31. The IEP team reconvened on May 4, 2004, and considered the teachers' reports and observations. Student remained eligible for special education. For the eighth-grade school year (2004-2005), placement was continued in the RSP program three times each week, for forty minutes each day. Accommodations and modifications included buddy/peer tutoring, assistance with note taking, provision of teacher lecture notes, use of visual aids, extra time for oral and written responses, shortened assignments, oral or open book exams of reduced length, preview of test questions, frequent practice sessions, and seating near a high performing student.

Noting that Student had not yet met his writing goal, a new writing goal was drafted. The benchmarks provided in part that Student "will be given the opportunity to revise a multi-paragraph composition ... as measured by work samples, achieving a criteria of 85% in two out of three trials."

Mother signed consent to the IEP. Expressing concerns regarding Student's reading difficulties, Mother requested that Student's triennial review scheduled for May 2005 be advanced to September 2004.

32. In his general education eighth-grade physical science class, Student earned a D grade for the fall term. According to science teacher Elizabeth Garrett, Student's grade was based upon his poor showing on exams and the work he produced. Ms. Garrett implemented the modifications and accommodations set forth in the May 2004 IEP, and provided preferential seating, used flash cards to review course material before tests, and shortened homework assignments. Student was sometimes distracted but made an effort.

33. For both semesters of the eighth grade, Student was enrolled in teacher Dale Miller's regular education language arts/social studies class. Mr. Miller, a teacher for six years, has a single-subject teaching credential in social studies but was authorized to teach language arts when it was offered together with social studies as a "block." In the fall term, Student earned a B grade in language arts based upon his journal writing, staying on subject, grammar, spelling, short projects, and reading in class. Mr. Miller was unable to provide an estimate whether Student had achieved grade-level proficiency in reading, but observed that Student read aloud in class with no more difficulty than other general education students.

34. Student earned a grade of B in the fall term from eighth-grade mathematics teacher James Tighe. Mr. Tighe is a teacher of twenty-five years who possessed a single-subject teaching credential in life sciences with an authorization to teach mathematics. Mr. Tighe implemented the May 2004 IEP modifications and accommodations, by shortening homework assignments, using visual aids, practicing frequently, providing positive reinforcement, and permitting Student to use a calculator.

35. In the fall of the eighth-grade year, Student earned the following additional grades: A- in physical education and C- in social studies.

36. Bradi Lauber, a special education teacher for nearly two years and working under an emergency credential, was Student's RSP teacher for the eighth grade. Ms. Lauber worked with Student on reading during study skills class. According to Ms. Lauber, Student typically read by himself and was able to comprehend eighth-grade curriculum.

The District's November 2004 Triennial Assessment

37. Pursuant to parental request to advance Student's triennial evaluation, reassessment of Student was conducted by the RSP teacher and school psychologist in November 2004.

Academic and Cognitive Testing

38. Academic testing administered by Ms. Lauber revealed that Student was not at grade level in reading, writing, and mathematics. Student was reading at the 3.3-4.9 grade equivalency range, performing at the 3.9-6.7 grade equivalency range in mathematics, and at the 3.1-5.8 grade equivalency range in written language. Student achieved low scores in the areas of reading comprehension, fluency, written language, and mathematics skills. Ms. Lauber was uncertain whether Student could catch up to his same age peers in reading. School psychologist Roderick Paterson believed that Student's hearing loss and possible CAPD may have accounted for Student's low academic scores.

39. On cognitive tests administered by Mr. Paterson, Student scored in the below average range on the verbal component and above average range on performance scales. The performance scales measured visual-motor skills, eye-hand coordination, visual acuity, ability to complete puzzles, and identification of missing items. Student's performance

scores were higher than on previous assessments and, according to Mr. Paterson, demonstrated that Student's areas of strength had improved.

40. Based upon the significant and increasing discrepancy between Student's verbal and performance scores, the school psychologist suspected receptive language problems and recommended further assessment by a speech and language pathologist.

Speech and Language Assessment

41. Student was assessed by a speech and language pathologist over the course of several days in February 2005. Based upon test results demonstrating Student's difficulty processing information presented auditorally, the speech pathologist recommended a hearing evaluation to rule out a hearing loss and CAPD. The speech pathologist also recommended that the IEP team consider expressive language intervention to address Student's difficulty speaking with age-appropriate sentence structure.

December 9, 2004/March 23, 2005 IEP

42. The IEP team met on December 9, 2004, and again on March 23, 2005, to review the assessment results. Placement was continued in the RSP program, with increased support, namely five days each week for forty minutes each day in the resource room, and additional resource support provided in Student's general education classrooms four days each week for forty minutes each day.

43. The IEP team identified Student's educational needs in the areas of reading, written language, and mathematics. Goals were drafted in the areas of reading comprehension and mathematics (dividing with a two-digit divisor; adding and subtracting fractions). A listening and speaking goal (increase sentence complexity in spontaneous speech) was to be implemented by a speech and language specialist. Ms. Lauber believed that these goals were appropriate for Student.

44. Student earned a grade of B- in language arts at the end of the school year. According to Ms. Lauber, Student read well in class. With accommodations and modifications, such as assistance with note-taking, Student understood the general education curriculum.

45. Mr. Tighe, Student's eighth-grade mathematics teacher implemented the March 2005 IEP mathematics goal. Student understood the curriculum content and had a working knowledge of eighth-grade concepts as reflected in the B+ grade he earned in the spring term. Student was responsive to teacher instruction.

46. In the spring of 2005, on standardized tests, Student scored "far below basic" in English/language arts and "below basic" in both mathematics and history/social science.

The District's March 30, 2005 CAPD Assessment

47. The District contracted with a nonpublic agency (NPA) to conduct a CAPD assessment of Student.

48. A hearing test revealed that Student had a moderately severe high frequency sensorineural hearing loss in his right ear. Student's hearing in his left ear was normal.

49. An evaluation to determine whether Student had a CAPD was conducted on April 1, 2005, by audiologist Kimberly Swaim of the NPA. Ms. Swaim has been an audiologist for three years. She earned a bachelor's degree in communications disorders and a master's degree in audiology in 2002.

50. Ms. Swaim administered a battery of tests that was selected by the director of the NPA. Ms. Swaim administered the following tests and reported the following results:

(A) SCAN-A (screening test to detect CAPD):

Filtered-word subtest: A test-taker hears words in a muffled manner (degraded speech) and is asked to identify the word. Student's standard score of 6 and a percentile rank of 9 were "questionable" results.

Auditory figure-ground subtest: A test-taker hears a word accompanied by background noise and is asked to identify the word. Student did worse in his right ear, an expected outcome because of his hearing loss in that ear. Student's standard score of 5 and percentile rank of 5 were "questionable" results.

Competing words subtest: A test-taker hears a word in both ears at the same time and is asked to identify the two words. Student's standard score of 9 and percentile rank of 37 was rated "normal."

Competing sentences subtest: A test-taker hears a complete sentence in both ears and is asked to repeat each sentence in turn. Student's standard score of 12 and percentile rank of 75 was rated "normal."

(B) NU Auditory Test #6: The test-taker repeats words heard on a compact disc. Student performed within normal limits.

(C) BLK-SIN speech in noise test: A test-taker is given words to listen for as background noise becomes increasingly loud. Student performed within normal limits.

(D)VA-CD subtests:

Frequency tone pattern: Ms. Swaim did not administer this subtest because of Student's hearing loss.

Dichotic Digits: A test-taker hears two digits at the same time in each ear and is asked to identify the numbers. Student scored seventy-six percent or within normal limits.

Consonant-Vowel Binural Fusion: A test-taker hears a vowel and consonant in each ear and is asked to identify the sounds. Student performed within normal limits.

(E) CHAPS (Children's Auditory Performance Scale): Student's mother was provided with a questionnaire. Ms. Swaim's written report indicated that Mother rated Student "not at-risk." According to Ms. Swaim, Mother actually rated Student "at-risk," but this error on her report did not matter because "these were just parent impressions."

51. Although Ms. Swaim reported that results on two subtests of the SCAN-A screening device, namely the filtered-word subtest and the auditory figure-ground subtest, were "questionable," she concluded that Student did not have CAPD. Ms. Swaim administered the BKB-SIN as a follow-up to ascertain whether the scores obtained on the screening device were correct. According to Ms. Swaim, the normal results on the BKB-SIN confirmed that Student did not have CAPD.

52. Ms. Swaim believed that the test results were an accurate measure of Student's performance. However, Ms. Swaim was unable to explain how the standard scores or percentiles set forth in her written report were arrived at, or why or how she computed Student's raw scores to determine his scores fell within normal limits. Although the written report contained a table comparing Student's scores to the mean, Ms. Swaim did not know the standard error of measurement for any of the tests she administered. Student's standard scores and percentiles were based upon a formula she applied located in the NPA office but with which she was not conversant. Some of Student's scores were reported as percentages, while others were reported as percentiles. Ms. Swaim was unable to explain the difference.

53. Ms. Swaim did not choose the test instruments and could not articulate why or how they were selected. Ms. Swaim was unable to provide the full names of the tests where only acronyms were reported. Ms. Swaim did not know how many or which assessment instruments formed the basis for a standard CAPD evaluation. According to Ms. Swaim, the director of the NPA provided guidelines how to administer each test. Ms. Swaim assumed the tests were administered in accordance with the manufacturer's guidelines.

54. Carol Atkins is a California licensed audiologist since 1974. Ms. Atkins earned her master's degree in audiology in 1967. Ms. Atkins began to assess for CAPD in 1980 through research she conducted at Children's Hospital in San Diego, California. She has been a professor of audiology at several universities and a clinical audiologist for a variety of public and nonpublic agencies. Ms. Atkins has been in private practice for the last six and one-half years assessing individuals suspected of having CAPD.

55. Ms. Atkins had not met Student or his teachers. Ms. Atkins reviewed Ms. Swaim's report and test protocols, the speech and hearing evaluation, and Student's educational records.

56. In Ms. Atkins' opinion, the District's CAPD evaluation was scored incorrectly and the scoring sheets were not marked according to test instructions. The SCAN-A and the BKB-SIN tests were designed to measure different problems. According to Ms. Atkins, the BKB-SIN scores do not correlate with or help explain the questionable SCAN-A subtest results. Mother's actual "at-risk" scores on the CHAPS questionnaire, reported incorrectly on Ms. Swaim's written report, were consistent with difficulties identified on the speech and language assessment and problems noted with memory on Student's educational records. Based upon these errors, Ms. Atkins was unable to determine if Ms. Swaim's test results were correct.

57. In Ms. Atkins' opinion, Student requires an evaluation of CAPD by standard methods. A comprehensive CAPD evaluation measures a student's ability to hear words if a teacher turns her back and walks away, whether a student mishears a word, and the impact on decoding skills. According to Ms. Atkins, Children with CAPD and those with ADHD frequently present with similar problems and have educational consequences such as being off-task, distractible, and appearing overwhelmed by the quantity of information presented. CAPD is frequently correlated with spelling, word-attack, reading comprehension, and fluency deficits.

58. Based upon Ms. Atkins' extensive knowledge and experience compared to Ms. Swaim's more limited credentials, as well as Ms. Swaim's inability to explain or justify her findings, the ALJ accords Ms. Atkins' opinion testimony greater weight.

July 2005 Independent Educational Evaluation

59. Dr. Robert Patterson, a licensed clinical psychologist, educational psychologist, and marriage and family counselor, in private practice providing therapy, counseling, behavioral interventions and assessments since 1991, conducted an independent psychoeducational evaluation of Student in July 2005. Dr. Patterson administered cognitive and achievement tests and reported results similar to the District's November 2004 psychoeducational assessment.

60. Dr. Patterson possesses lifetime teaching credentials, has lectured on reading, and has worked as a director of special education as well as providing some training to RSP teachers. Regarding Student's reading skills, Dr. Patterson concluded that although Student uses phonemes to decode, Student is not a fluent reader. Dr. Patterson concluded that Student needs intensive reading remediation four to five days each week with one-to-one instruction by either the Lindemood-Bell summer clinic program, or appropriately-trained District staff. However, Dr. Patterson was uncertain whether Student could improve with remediation.

Summer 2005 Tutoring Program

61. On June 14, 2005, pursuant to a compliance complaint filed by Student alleging that the District had failed to implement an IEP provision providing for after-school tutoring, the California Department of Education (CDE) found in Student's favor. CDE ordered the District to provide Student with thirty hours of tutoring.

62. Carrie Schafer, an eighth-grade RSP teacher in the process of completing her special education credential, provided the CDE ordered tutoring to Student from the end of July 2005 through several weeks into the start of the 2005-2006 regular school year. Ms. Schafer met with Student approximately four days a week, for two hours each day and worked on his reading and mathematics IEP goals. Student read from a fifth-grade level reading book and did very well in both reading and mathematics. According to Ms. Schafer, Student was receptive to one-to-one tutoring.

Student's Current Program/September 2005 IEP

63. The high-school IEP team convened on September 16, 2005, to consider the results of Dr. Patterson's evaluation. Student was enrolled in a modified English class and a two-year algebra class. In addition to regular education classes, Student was provided with instructional aide support in science class, two resource specialist classes each day, and thirty minutes each week of speech and language therapy.

64. Patricia Watts, an experienced teacher of nearly thirty years, is Student's ninth-grade RSP teacher. According to Ms. Watts, Student is receiving educational benefit from the program developed by the IEP team in September 2005. Currently, Student is reading between the third and fourth-grade reading level and is placed in an intensive RSP program with seven other students for reading and algebra. All other classes are in the general education program. Student also receives speech and language services. Ms. Watts does not believe Student can achieve grade-level reading.

65. According to Ms. Watts, Student is not a successful reader and is not an independent learner. Ms. Watts declined to speculate why there were no reading goals in Student's middle-school IEPs. Ms. Watts believed that academic goals should not be developed based solely on isolated standardized achievement tests, but rather on assessments and achievement tests.

LEGAL CONCLUSIONS

Applicable Legal Principles

1. The District has the burden of proving that its CAPD assessment of Student comported with legal requirements. Student has the burden of proving the essential elements of the remaining claims. (*Schaffer v. Weast*, _U.S._, [126 S. Ct. 528 (2005)].)

2. Both State and federal special education law provide that a reassessment of a child with a disability shall be conducted at least every three years, or more frequently upon parent or teacher request, and/or if conditions warrant, as part of the school district's continuing obligation to make a free appropriate public education available to the student. (Cal. Educ. Code § 56381; 20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. §. 300.536(b).) Reassessments shall be conducted in conformity with the procedures specified in California Education Code sections 56320 and 56321, subd. (b). The purpose of reassessment is not only to determine whether the student remains eligible for special education and related services but to also determine the educational needs of the student. (20 U.S.C. § 1414(b)(3)(D); Cal. Educ. Code §§ 56320, subd. (e), 56321, subd. (a).) In addition, a student must be assessed in all suspected areas of disability and need. (20 U.S.C. § 1414(b)(2), (b)(3)(C); Cal. Educ. Code § 56320, subd. (f).) In determining the areas to reassess, the IEP team may review existing available data and determine what, if any, additional information or testing is needed. (34 C.F.R. § 300.533(a)(1), (2).)

3. Special education law requires that if a school district conducts further tests as part of a reassessment, it must follow the procedures governing initial assessments. (Cal. Educ. Code §§ 56320, 56381, subd. (a).) Testing and assessment materials and procedures must be selected and administered so as not to be racially, culturally, or sexually discriminatory; must be provided and administered in the pupil's native language; must be administered by trained personnel in conformance with test instructions; and must be validated for the specific purpose for which they are used. (Cal. Educ. Code § 56320, subs. (a),(b).) Assessment materials must assess specific areas of educational need and not merely provide a single general intelligence quotient. (Cal. Educ. Code § 56320, subd. (c).) Further, no single procedure shall be used as the sole criterion for determining an appropriate educational program for a child. (Cal. Educ. Code § 56320, subd. (e).)

4. The assessments shall be conducted by persons knowledgeable of the suspected disability. (Cal. Educ. Code § 56320, subd. (g).) Psychological assessments shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Cal. Educ. Code § 56324, subd. (a).) Health assessments shall be conducted by a credentialed school nurse or physician who is trained and prepared to assess cultural and ethnic factors for the pupil being assessed. (Cal. Educ. Code § 56324, subd. (b).) Additionally, assessments must be conducted by persons competent to perform the assessments, as determined by the school district, county office, or special education local plan area. (Cal. Educ. Code § 56322.)

5. Under California special education law, the IDEA, and effective July 1, 2005, the Individuals with Disabilities Education Improvement Act (IDEIA), children with disabilities have the right to a FAPE that provides special education and related services designed to meet their unique needs and provide them with educational benefit, and to prepare them for employment and independent living. (Cal. Educ. Code §§ 56000, *et seq*; 20 U.S.C. § 1401(25) (1997); 20 U.S.C. § 1402(29) (2004).) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet

the State educational standards, include an appropriate school education, and conform to the child's IEP. (20 U.S.C. § 1401(8) (1997); 20 U.S.C. § 1402(9) (2004).)

6. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 200 (1982), 102 S.Ct. 3034, 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 held that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.*, at 198-200.) *De minimus* benefit or only trivial advancement, however, is insufficient to satisfy the Rowley standard of "some benefit." (*Walczak v. Florida Union School District*, 142 F.3d 119, 130 (2d Cir. 1998.) A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Board of Education*, 103 F.3d 1114, 1121 (2d Cir. 1997).)

To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District*, 811 F.2d 1314 (9th Cir. 1987).) If the school district's program was designed to address a student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the district provided a FAPE, even if a student's parents prefer another program and even if his parents' preferred program would have resulted in greater educational benefit.

Special education law also requires that a student be educated in the least restrictive environment (LRE) and that removal of a student from the regular education environment occur only when the nature and severity of the student's disability is such that education in regular education classes cannot be achieved satisfactorily. (20 U.S.C. § 1412(1)(5)(A); 34 C.F.R. § 300.550(b); Cal. Educ. Code § 56301.)

7. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee*, 998 F.2d 1083, 1089 (1st Cir. 1993).) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106).)

8. Federal and State special education law require generally that the IEP developed for a child with special needs contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child's needs. (20 U.S.C. § (d)(1)(A)(ii); Cal. Educ. Code § 56345, subd. (a).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (34 C.F.R. § 300.347(a)(2)(i)(ii); 34 C.F.R. Part 300, Appendix A, Q.1; Cal. Educ. Code § 56345.)

9. IEP goals and objectives apply not only to meeting needs for enabling a child to be involved in and progress in the general curriculum, but also to “meeting each of the child’s other educational needs that result from a child’s disability.” (20 U.S.C. § 1414 (d)(1)(A)(ii).) These statutes generally provide that a child’s broad area of need should be addressed in an IEP. However, there is no specific requirement that the educational program include in an annual IEP goals that relate to areas of the curriculum in which the child’s disability does not affect the child’s ability to be involved in and progress in the general curriculum. If a child with a disability needs only modifications or accommodations in order to progress in an area of the general curriculum, the IEP does not need to include a goal for this area; however, the IEP would need to specify those modifications or accommodations. (34 C.F.R. Part 300, Appendix A, Q. 4.)

10. In order to provide an appropriate program for a hard-of-hearing child in the least restrictive environment, the IEP team is required to consider “the related services and program options that provide the pupil with an equal opportunity for communication access.” (Cal. Educ. Code § 56345, subd. (d); see also 34 C.F.R. § 300.346(a)(2)(iv).)

11. The District can be held responsible for information it had a basis for knowing at the time it developed the IEP. “In striving for ‘appropriateness,’ an IEP must take into account what was, and was not, objectively reasonable... at the time the IEP was drafted.” (*Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999), quoting *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1041 (3d Cir. 1993).) A school district is obligated to revise a student’s educational program if it becomes apparent over the course of the school year that the student’s educational needs have changed and/or the student is not receiving educational benefit.

12. A parent may obtain an independent educational evaluation (IEE) performed by a qualified specialist at public expense if the parent disagrees with an assessment obtained by the educational agency, and the educational agency is unable to show at a due process hearing that its assessment was appropriate. (34 C.F.R. § 300.502(b); Cal. Education Code § 56329, subd. (b).)

13. When a school district denies a child a FAPE, the child is entitled to relief that is “appropriate” in light of the purposes of the IDEA. (*School Committee of the Town of Burlington v. Dept. of Education*, 471 U.S. 359, 369 (1985); *Student W. v. Puyallup School District*, 31 F.3d 1489 (9th Cir. 1994); 14 U.S.C. §1415(i).) In addition, equitable considerations may be weighed in granting relief and courts have broad discretion to fashion a remedy which helps a student overcome lost educational opportunity. (*Burlington*.) There is no obligation to provide day-for-day or hour-for-hour compensation. “Appropriate relief is relief designed to ensure that the Student is appropriately educated within the meaning of the IDEA.” (*Puyallup*, 31 F.3d at 1497.)

14. An expert’s credibility may be evaluated by examining the reasons and factual data upon which the expert’s opinions are based. (*Griffith v. County of Los Angeles*, 267 Cal.App.2d 837, 847 (1968).)

Determination of Issues

Issue 1: The District failed to establish that its March 30, 2005 CAPD assessment was appropriate.

15. In light of legal principles 2 and 3 and Findings 49-51, 52, 53, 54 and 56, the ALJ concludes that the District's CAPD assessment failed to comport with legal requirements and was inappropriate. In particular, the District failed to establish that the tests were administered or scored in conformance with test instructions or that the test instruments were validated for the specific purpose for which they were used. In light of legal principles 4 and 14 and Findings 47, 48, 49, 51, 52, 53, 54, 56 and 58, the ALJ does not find Ms. Swaim's findings or opinion credible. A primary purpose of an assessment, namely to assist the IEP team to make an offer of FAPE, would not be furthered by Ms. Swaim's written report or explanation of her findings.

Issue 2: Student failed to establish that conditions warranted a psychoeducational reassessment of Student. However, Student established that conditions warranted a hearing screening and possible follow-up assessment from May 2003 until March 2005 when the District performed its hearing test and follow-up CAPD assessment.

Psychoeducational Assessment

16. As set forth above in legal principle 2, a school district is required to reassess a student every three years, or more often if conditions warrant. Student did not establish that conditions warranted a psychoeducational reassessment in the time period between the District's May 2002 and November 2004 triennial reviews.

As set forth above in Findings 18 and 29, in addition to performing comprehensive and regular triennial evaluations, at the start of Student's seventh and eighth-grade school years, District personnel conducted annual informal academic assessments. Those reports indicated that Student was successful in his educational program, that accommodations and modifications in the IEP were effective, and that he was achieving passing grades. In light of these teacher observations and reports and Finding 65, Student's relatively poor performance on end-of-year standardized achievement scores did not in and of themselves warrant reassessment. It was reasonable for the District to rely upon the expertise of Student's regular education and RSP teachers to determine Student's needs and to develop his educational program. Notably, as set forth above in Finding 37, the District advanced Student's triennial evaluation upon parental request.

Whether the District acted appropriately based upon the information it had to develop an appropriate educational program, will be addressed below in Issue 3.

CAPD Assessment

17. As set forth above in Finding 23, Mother told the IEP team in May 2003 that Student had difficulty hearing in a noisy environment and that she suspected Student had a hearing loss. Although the District properly assessed Student's vision each year, no hearing screens were performed. At a minimum, based upon legal principles 2 and 4, the District should have taken the initial step of conducting a hearing screening to verify if Student had a hearing loss in response to Mother's concern. The District failed to conduct a hearing screening and failed to determine whether additional follow-up assessments were necessary. The IEP team knew from previous assessments and Student's educational history, that one of the bases for Student's eligibility for special education arose out of his auditory processing deficits. (Findings 7 and 13.) Taking Mother's report to the IEP team and Student's already identified deficits together created circumstances that warranted assessment in this area. The District presented no contrary evidence.

18. Student does not seek a finding that the District denied Student a FAPE for its failure to earlier assess for CAPD. However, as discussed in legal determination 15 above, the District's CAPD assessment was inappropriate. Thus, it remains uncertain whether Student has additional educational needs, such as those articulated in legal principle 10, in this area. The IEE in the area of CAPD ordered below, will assist the IEP team to determine if Student has educational needs in this area.

Issue 3: In light of legal principles 5, 6, and 11, Student did not satisfy his burden to establish that the District denied Student a FAPE. The educational programs described in the May 6, 2003 and May 4, 2004 IEPs addressed Student's academic needs and provided him with educational benefit. The writing goals in the May 6, 2003, May 4, 2004, and March 23, 2005 IEPs were appropriate.

May 2002 Sixth-Grade IEP

19. In the sixth-grade school year (2002-2003), as set forth above in Finding 12, according to his April 2002 assessment, Student demonstrated, as he had throughout his educational history, deficits in the areas of reading and mathematics. However, as set forth above in footnote 2, the parties agreed that the appropriateness of the May 2002 IEP, that did not include goals in these areas, is barred by the statute of limitations.

Sixth-Grade/Reading Goal

20. Preliminarily, it is concluded that Student had unique academic needs in the area of reading during the sixth grade. As set forth in Finding 15, Student was struggling in his language arts class, had performed poorly on District-wide standardized reading test, and was placed in a small-group reading class. In light of Student's allegations and legal principles 5, 6, 7, 9, and 11 set forth above, the question is whether, in order to provide Student with a FAPE, the District had the obligation to revise Student's IEP from December 26, 2002, through the end of the sixth-grade school year to add a reading goal.

21. As set forth above in Finding 13, the May 2002 IEP included accommodations and modifications that targeted reading. Based upon Findings 16-18, these modifications and accommodations were effectively implemented by Student's language arts and reading class teachers resulting in educational benefit. As set forth above in Findings 15-18, Student made progress in reading, earned average and above average grades, and comprehended the sixth-grade curriculum. Further, based upon the uncontradicted testimony of Student's sixth-grade teachers, Student's grades were an accurate reflection of his ability to understand the course content consistent with State curriculum standards. Student failed to establish that the May 2002 IEP should have been revised over the course of the sixth-grade school year to add a reading goal.

Seventh-Grade/Reading Goal

22. Even though the modifications described above found in the May 2002 IEP were implemented and Student received some educational benefit from his program, as set forth above in legal determination 21, Student had not achieved grade-level proficiency in reading at the end of the 2002-2003 school year. In addition, Student performed poorly on the reading standardized achievement tests administered in May 2003. (Finding 19.) Thus, the evidence established that Student continued to have unique academic needs in the area of reading.

23. The May 6, 2003 IEP did not include a reading goal, but included accommodations and modifications such as assistance with note-taking and the use of visual aids. (Finding 20.) In light of legal principle 9, Findings 18 and 22, and legal determination 21 above, the IEP was designed to meet Student's unique reading needs.

24. Student was involved in and progressed in the general education curriculum and received educational benefit from the program described in the May 2003 IEP. Student presented insufficient evidence in support of his allegation that his grades were not an accurate measure of his mastery of the curriculum content. Thus, as set forth above in Findings 24, 27, 28, and 29, for the seventh-grade, Student's GPA improved to an above average, or B, grade.

Eighth-Grade/Reading Goal

25. Dale Miller, Student's eighth-grade language arts teacher, observed that Student read aloud in class with no more difficulty than his other general education students. (Finding 33.) As set forth above in Finding 30, Student continued to perform poorly on standardized achievement tests. However, based upon legal determination 24 above, the uncontradicted testimony of Mr. Miller and RSP teacher Patricia Watts (Finding 65), and legal principles 9 and 11, Student failed to establish that it was reasonably known to the IEP team that Student exhibited deficits in reading as he started his eighth-grade school year. Nevertheless, the May 4, 2004 IEP developed for Student's eighth-grade school year, continued to provide accommodations and modifications including use of flash cards to

review course material, preferential seating, and shortened assignments, designed to meet Student's academic needs as they were reasonably known by the IEP team.

26. Student received educational benefit from the program described in the May 2004 IEP, until it was modified, based upon the new triennial assessment results, in November 2004 and March 2005 to add a reading goal. Student presented insufficient evidence in support of his allegation that the grades he received in the fall of his eighth-grade year, were not an accurate measure his mastery of the curriculum content. As set forth above in Findings 32, 33, 34, 35, and 36, with the exception of a D grade in science, Student continued to receive average and above average grades in academic subjects, including Bs in both language arts and mathematics, and he progressed in the general curriculum.

Mathematics Goals

27. Although Student alleged that the failure to include a mathematics goals from December 16, 2002, until a mathematics goal was added in March 23, 2005, denied him a FAPE, Student did not satisfy his burden of proof.

28. In light of legal principle 11, Student failed to show that the sixth-grade May 2002 IEP should have been revised to add a mathematics goal in the sixth-grade. There was no testimony by any teacher or other witness establishing that Student's unique mathematics needs were not being met in the general curriculum. Ms. Watt effectively explained, without contradictory evidence presented by Student, that goals and objectives cannot be developed based solely on isolated standardized achievement test scores. Thus Student's poor showing on the sixth-grade standardized mathematics test, set forth above in Finding 19, does not warrant a different conclusion.

29. Although Student presented some evidence that he struggled in his seventh-grade regular education mathematics class (Finding 26), Student's mathematics needs were met with additional RSP support and he benefited from his educational program as evidenced by his passing grades and mastery of regular education curriculum content. (Findings 26 and 29.)

30. In the fall of the eighth grade, as set forth above in Finding 34, Student's mathematics teacher implemented the accommodations and modifications set forth in the May 2004 IEP, and Student earned a B grade.

31. Student did not satisfy his burden to prove that he lost educational opportunity in the area of mathematics. Notably, he did he not seek compensatory education or any other remedy to make up for the alleged denial of FAPE in this area of need.

The IEP Writing Goals

32. Student presented insufficient evidence in support of his allegation that the writing goals for the IEPs in dispute did not change from one school year to the next, or that

the May 4, 2004 benchmarks in the area of writing were vaguely written. To the contrary, as set forth above in Findings 21, 31, and in light of legal principle 8, the writing goals were appropriately revised to reflect Student's progress and needs.

33. Student failed to establish that the writing goal in the May 4, 2004 IEP which included the phrase "Student will be given the opportunity to revise..." in lieu of a more affirmative statement such as "Student will revise..." was vague. As set forth above in Finding 31, and in light of legal principle 8, the benchmarks, that included specific criteria, were sufficiently clear to apprise the IEP team how to measure Student's progress.

34. In sum, the District was not required to revise Student's sixth-grade IEP from December 16, 2002, through the end of the 2002-2003 school year to include a reading or mathematics goal. Student's academic needs were effectively met through the accommodations and modifications described in the seventh and eighth-grade IEPs, he received educational benefit from his programs, and he was provided with a FAPE. Dr. Patterson's contrary opinion that Student required a reading goal in all three school years, reached in July 2005 and presented with the benefit of hindsight, does not warrant a different conclusion.

Issue 4: Student is entitled to an IEE in the area of CAPD at District expense. All Student's further requests for relief are denied.

35. As set out in legal determination 17, the District had reason to suspect that Student required additional assessment to determine if he had a hearing loss in May 2003. Student acknowledged that an independent CAPD assessment will not necessarily result in a finding that Student has CAPD or that his educational program requires revision. Thus, no finding was requested and none was made that the failure to earlier conduct a CAPD assessment resulted in a denial of FAPE.

36. However, in light of legal determination 15, namely that the District's CAPD assessment was inappropriate, and based upon legal principle 12, Student is entitled to a independent assessment in the area of CAPD, at District expense.

36. The independent assessment report shall be made available to the IEP team at least twenty business days before the start of the 2006-2007 school year to assist the IEP team to determine the appropriate educational placement.

37. All Student's further requests for relief are denied.

ORDER

1. Upon selection of a qualified assessor by Student, the CAPD assessment shall be carried out at District expense. The assessment report shall be made available to the IEP team at least twenty days before the start of the regular 2006-2007 school year to assist the IEP team to determine an appropriate educational placement for Student.

2. The District shall reconvene the IEP team at least ten business days before the start of the 2006-2007 school year. The IEP team shall consider the results of the IEE ordered above in (1), to make an offer of FAPE.

3. All Student's further requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: Student prevailed to the extent that the District had reason to suspect that a hearing screen was required in May 2003, and that the CAPD assessment it performed in March 2005 was inappropriate. Student is entitled to an IEE in the area of CAPD, at District expense. The District prevailed to the extent it offered and provided Student with a FAPE from December 26, 2002, through and including the educational program described in the March 23, 2005 IEP.

NOTICE OF APPEAL RIGHTS

The parties are advised that they 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. (Cal. Educ. Code section 56505, subd. (k).)

DATED: May 22, 2006

JUDITH E. GANZ
Administrative Law Judge
Office of Administrative Hearings