

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on Behalf of STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2008050453

DECISION

Administrative Law Judge (ALJ) Glynda B. Gomez, Office of Administrative Hearings (OAH), heard the above-captioned matter in Los Angeles, California on September 8-12, 2008 and September 15, 2008.

Petitioners were represented by Valerie Gilpeer, Attorney at Law. Student's legal guardians (Parent or Parents) attended the hearing.

Respondent Los Angeles Unified School District (District) was represented by Stephanie Bowick, Assistant General Counsel. Julie Hall, Lisa Kendrick and Doreen Ruben attended various days of the hearing on behalf of District.

The Due Process Complaint/Due Process Hearing Request was filed on May 9, 2008. A Due Process hearing was scheduled for June 30, 2008. On June 11, 2008, pursuant to a joint request made by the parties on June 10, 2008, and for good cause, the due process hearing was continued. The ALJ opened the record on the matter on September 8, 2008. Testimony and documentary evidence were received on September 8-12, 2008 and September 15, 2008. The record remained open until September 25, 2008 for the submission of closing briefs. The record was closed on September 25, 2008 upon receipt of briefs from each party.

ISSUES

1. Did the District deny Student a free and appropriate public education (FAPE) by not developing a proposed assessment plan within 15 days of Student's written request for an assessment on March 30, 2007?
2. Did the District deny Student a FAPE by not conducting a timely assessment of Student?
3. Did the District fail to assess Student in all areas of suspected disability?
4. Did the District deny Student a FAPE by failing to find Student eligible for special education and related services as a student with specific learning disability at the June 21, 2007 Individualized Education Plan (IEP) team meeting?
5. Did the District deny Student a FAPE by failing to develop an IEP at the June 21, 2007 IEP team meeting?
6. Did the District deny Student a FAPE by failing to find Student eligible for special education and related services as a student with specific learning disability at the February 8, 2008 IEP team meeting?
7. Did the District deny Student a FAPE by failing to develop an IEP at the February 8, 2008 IEP team meeting?

FACTUAL FINDINGS

Jurisdiction

1. At all relevant times, Student resided within the boundaries of the District.

Background

2. Student is a 13-year-old boy born April 27, 1995. He is in the ninth grade at Summit View School, a certified non-public school. Student was exposed to methamphetamine and marijuana in utero. Since the age of six weeks, he has been raised by Parents. Parents hold all educational and custodial rights of Student. Until Student was five years old, his biological mother lived in the home with Student and Parents. Due to her continued drug use and eventual incarceration, she was asked to leave the home by Parents. Student maintains contact with her.

3. Student attended preschool at the Walther School. The Walther School is a private preschool that offers primarily a socialization program. There were no indications of academic difficulty at the Walther School.

4. Parents had Student assessed by Psychologist Kenneth Williams, in December of 2002. Dr. Williams advised Parents that Student might have right hemisphere brain damage and/or a neurological disorder due to prenatal exposure to drugs. Williams recommended psychological and educational therapy and some educational modifications and teaching strategies for Student. According to Parents, Williams recommended that Student be re-assessed periodically.

Hollywood School House

5. Student attended the Hollywood School House from kindergarten through sixth grade. Student progressed at Hollywood School House with a series of supports and accommodations. Student received mostly "A" and "B" grades at Hollywood School House through the fourth grade. In fourth grade, the curriculum became more advanced and Student's difficulties increased. Student's fifth and sixth grade years were very difficult. Parent quit his job to assist Student and to coordinate privately obtained support services for Student. Although the evidence was not clear about when accommodations and modifications were first made for Student, by fifth grade Student was receiving what the school headmaster considered to be "incredible" accommodations including extended testing times, preferential seat assignment, additional time with teachers and teacher checking for understanding.

6. Student's academic performance deteriorated in fifth grade. The deterioration coincided with the change in class structure and the increase in complexity of the curriculum. Up until fourth grade, Hollywood School House students were in a homeroom setting with one teacher. Starting in fifth grade, the class structure required students to change classes and navigate a six period day with different teachers for each class. Additionally, the curriculum became more advanced in fifth grade. Parents reported great difficulty in getting Student to complete homework and observed Student's frustration with school work. Student had little time for anything other than educational supports and trying to catch-up in class. Parents were always proactive in seeking assistance for Student. They obtained educational therapy, psychotherapy and tutoring for Student in math and Spanish and after school tutoring from Hollywood School House staff in core academic areas. By sixth grade, Student was failing some classes and doing poorly in his core academic courses. He was eventually placed on academic probation and was not invited to continue to seventh grade at the Hollywood School House.

7. Stephen Bloodworth, the headmaster at Hollywood School House, met with Parents periodically to discuss Student's progress. At one point, Bloodworth suggested that Student might be more successful in an educational environment that contained supports, tutorials and accommodations imbedded in the program rather than having the extensive supports and tutorials that parents had obtained for Student after school and on the weekends. Bloodworth had extensive interactions with Student and his family over the course of his four years as headmaster at Hollywood School House. He opined that although Hollywood School House might be more academically demanding than a public high school, Student would have problems and need support at any general education school. Bloodworth

reported that Student had problems comprehending written material and recalling facts. Bloodworth referred Parents to Andre Van Rooyen, a clinical neuropsychologist (Van Rooyen). Bloodworth based his recommendations and referral on concerns over homework, comprehension, cumulative testing and reports from teachers that Student's response did not connect with the questions that were asked.

Van Rooyen's Assessment

8. On January 16, 2007 and January 23, 2007, Van Rooyen conducted a psychoeducational evaluation of Student. Parents paid for this evaluation. Van Rooyen administered the Achenbach Child Behavior Checklist (Parent/Teachers), Beery Buktenica Visual Motor Integration Test (VMI), California Verbal Learning Test for Children (CVLT-C), Children's Depression Inventory-Short Version (CDI-S), Conners'-Wells Adolescent Self-Report Scale (CASS), Conners' Parent Rating Scale Revised: Long Version (CPSR:L), Conners' Teacher Rating Scale Revised: Long Version (CPSR:L), Delis Kaplan Executive Functioning Systems (D-KEFS), Multidimensional Anxiety Scale for Children (MASC), NEPSY (selected subtests), Peabody Picture Vocabulary Test-3rd Edition (PPVT-III), Test of Variables of Attention (TOVA), Test of Visual Perceptual Skills-3rd Edition (TVPS-3), Woodcock Johnson Test of Achievement-Third Edition (WJ-III), and Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV). He also conducted parent interviews and a clinical interview with Student.

9. Student obtained a Full Scale Intelligence Quotient (FSIQ) score of 83, which is within the low average range. Student scored in the low average range for working memory and processing speed. His scores on the memory skills measures were inconsistent, ranging from borderline to average range. According to Van Rooyen, the scores indicated that Student could adequately encode verbal information into memory, but had difficulty retrieving information from memory. Student's visual memory abilities were generally stronger than his verbal memory skills. Results indicated that Student had below average processing speed and executive functioning. Executive functioning is mental flexibility, response inhibition and planning and organizational skills.

10. Student's scores on the WJ-III were varied from far below grade level to above grade level. Student displayed weaknesses in his academic fluency. Fluency is the speed at which one can complete basic academic tasks. Van Rooyen felt that Student would have difficulty completing grade level math and reading material under time limits. He also opined that Student would have difficulty with the inferential aspects of reading. Accordingly, as assignments become more complex and require Student to organize and complete more complex assignments, Student would have greater difficulty. Van Rooyen opined that Student's learning problems stem from deficits in processing speed, verbal reasoning and executive functioning. These deficits affect his reading comprehension, fluency and inferential thinking.

11. Van Rooyen recommended that Student receive educational therapy, preferential seating, repetitive teaching, shorter learning periods and shorter assignments

broken into more manageable material. He also recommended a computer assisted writing program, testing accommodations, and progress monitoring. Van Rooyen suggested that Student might benefit from the assistance of a resource specialist and/or an environment for students with learning difficulties. Van Rooyen opined that Student had learning disabilities that required remediation and accommodation. In diagnosing Student with learning disabilities, Van Rooyen relied on the Diagnostic and Statistical Manual of Mental Disorders Fourth Edition (DSM-IV). Van Rooyen was familiar with the requirements of the California Education Code and the severe discrepancy model of determining the existence of a specific learning disability as set forth in the California Education Code. However, Van Rooyen is a clinical psychologist, not a school psychologist. While school psychologists use the Education Code for determination of eligibility, clinical psychologists use the DSM-IV for diagnosis of mental disorders and other conditions.

Request for Assessment

12. After consultation with Bloodworth and Van Rooyen, Parents contacted District about the possibility of enrolling Student in public school or obtaining funding for a placement at a private school for students with learning disabilities. On March 30, 2007, Parent hand-delivered a memorandum to John Burroughs Middle School (Burroughs) addressed to acting special education coordinator Susan Cumbrow (Cumbrow), and to Assistant Principal Loren Drake (Drake), advising them that Student had been privately diagnosed with learning disabilities and needed special education. By their memo, Parents specifically requested that Student be fully tested for special education needs by the District.

13. On or about April 14, 2007, Cumbrow called Parents and asked that they bring in any documentation that they had including grades or reports. Cumbrow called on April 14, 2007 because she knew that the 15 days that the District is given under the Education Code to prepare an assessment plan was about to expire and she had been told by the school psychologist Grace Park-Noh (Park) that additional information about Student was needed for the assessment. Park is a licensed clinical psychologist and a licensed school psychologist. Student was not enrolled in the District and therefore, Park had no access to school records and prior reports. Parents provided Student's recent report cards and the assessment from Van Rooyen.

14. On April 24, 2007, Parent, Cumbrow and Park met to discuss Park's preliminary impressions and additional information about Student. At that time, Park expressed to Parent that, based upon a review of the standardized testing scores obtained by Van Rooyen, she did not think Student would qualify for special education as a child with a specific learning disability. She explained to Parent that she did not see a severe discrepancy between his ability and achievement as defined in the Education Code. Park explained that she looked for a deviation of 18 points or more in the standard scores, also known as 1 1/2 standard deviations, to establish a severe discrepancy. Park advised that without the severe discrepancy, there would not be a finding of eligibility for special education. She told Parent that she would proceed with a District assessment if he wanted her to do so.

15. On May 4, 2007, District provided Parents with an assessment plan. The plan called for assessment by a nurse, a school psychologist and a special education teacher in the areas of health and development, general ability, academic performance, language function, motor abilities, and social-emotional status. Parents signed the assessment plan on May 11, 2007 and returned it to the District on May 14, 2007.

District Assessment

16. The Burroughs nurse conducted a brief examination of Student. Parent complained that the nurse was rude and abrupt with Student. Upon seeing Student in her office, she told Parent that she could see by looking at Student that he was fine and asked why he was there. Park's assessment report indicated that the school nurse made a referral for vision care and took a developmental history. Although Park's report references a detailed health report, the report is not in evidence and Parents were never provided a copy of a health report.

17. On May 14, 2007, special education teacher Samuel Drebbin (Drebbin) administered the WJ-III to assess Student in the areas of basic reading skills, reading comprehension, math reasoning, academic applications, letter-word identification, calculation, passage comprehension, applied problems, writing samples, word attack, reading vocabulary, quantitative concepts and spelling. Student scored in the average range in all areas.

18. Park conducted an assessment of Student over several days. On June 14, 2007, Park administered the Cognitive Assessment System (CAS), Visual-Motor Integration Test (VMI), Test of Visual-Perceptual Skills-3 (TVPS-3), Test of Auditory-Perceptual Skills-3 (TAPS-3), and Achenbach Child Behavior Checklist (Achenbach).

19. Park also administered a sentence completion measure, reviewed school records, reviewed Drebbin's test results and made both testing and classroom observations. Her classroom observations were conducted at the Hollywood School House over several hours on June 13, 2007, during the last week of the school year. Park observed Student in his language arts class and at a class party. In the language arts class, students were watching the movie "Lord of the Rings." Park did not observe any academic instruction on this atypical day. Her observations were primarily that Student seemed to socialize well with others. Park spoke to all of the teachers in Student's core academic classes and left feedback forms for other teachers with the school office. The teachers commented on Student's inability to keep up in class, poor comprehension in science and poor independent skill in math. He was described as generally positive and "chatty." Teachers reported that he usually got along well with other students, but had conflicts with particular students. Park did not receive any additional written feedback before preparing her report. Park also reviewed Van Rooyen's report and Student's report cards for fourth to sixth grade.

20. The CAS is a test of cognitive processes that evaluates planning, simultaneous processing, attention and successive processing. Student showed relative strengths in the

simultaneous and successive subtests, especially in nonverbal reasoning ability and in the ability to recall verbal information in a specific sequential order, all in the average range. He scored in the low average range in attention. Park considered this to be a suggestion of mild weakness in his ability to focus on specific features and the ability to resist distracting stimuli. Park found a significant deficit in the planning subtests, suggesting a weakness in the areas of planning that included creating a plan of action and applying it effectively. This subtest measures components of executive function.

21. The TVPS-3 is comprised of seven subtests each measuring an aspect of visual perception. Visual perception is the capacity to interpret or give meaning to what is seen. Overall, Student performed in the average range. Park noted that Student performed in the low average range on tests of complex processes and visual perceptual skills. The TAPS-3 is a test of auditory processing skills. Student's overall performance on the TAPS-3 was average. Student showed relative weaknesses in auditory memory with scores ranging from low average to average in this area. Student received a score in the average range on the VMI, a test of visual-motor integration skills.

22. District policy prohibits the use of Intelligence Quotient (IQ) tests such as the WISC to determine the cognitive abilities of its students. Instead, District uses alternative measures of cognitive function such as the CAS and VMI. Although the CAS does provide a score, District does not utilize the score for evaluation purposes. Instead, District references ranges of scores. In evaluating Student, Park determined that Student had average cognitive ability and average skills with no discrepancy between the range of his cognitive ability and the range of his academic achievement. Based upon this data, Park opined that Student did not have a severe discrepancy between his academic achievement and cognitive ability. She noted that Student showed a relative weakness in planning. According to Park, this meant that Student may have difficulty creating a plan of action, applying the plan and modifying the plan as needed. Planning is a component of executive functioning. Park opined that Student's social skills were one of his strengths. In her assessment report, Park noted that Student would need to review and correct his work before turning it in, classroom instruction should be supported by multi-modal presentation, and reinforcement should be given for self-correction in completing assignments. She also indicated that Student would benefit from a classroom setting in which expectations are clear and consistent with reinforcement in place for more independent work habits.

23. According to Park, the assessment data did not reveal the necessary statistical deviation to result in a severe discrepancy between achievement and ability, so Student did not qualify for special education as a child with specific learning disability. According to Park, to find a severe discrepancy warranting eligibility for special education as a child with a specific learning disability, the assessment data must show a severe discrepancy of 18 to 22 points or 1 1/2 standard deviations between achievement and ability. Because District utilizes alternative measures of cognitive abilities and uses ranges not actual standard scores of cognitive ability, Park could only give an estimate of Student's academic ability. Here, the estimate of cognitive ability was within the average range. Student scored in the low average

to average range in academic achievement overall. Therefore, according to, Park there was no discrepancy between Student's cognitive ability and academic achievement.

24. Parents had to find a placement for Student for the 2008-2008 school year. They had been told by Park on April 24, 2007, that she did not believe Student would qualify for special education based upon her review of the Van Rooyen test scores. By June 7, 2007, District testing was still not complete and Parents were running out of time to make a decision about Student's placement for the 2008-2009 school year. After viewing the Burroughs campus, On June 7, 2007, Parents gave written notice to District representative Cumbrow that they would enroll Student in an alternate educational school and seek reimbursement from the District due to the delay in testing. Parents also noted that the initial request for evaluation was made on March 30, 2007.

June 21, 2007 IEP meeting

25. An IEP meeting was held on June 21, 2007 at Burroughs, Student's school of residence. Present at the meeting were Parent, administrator Virginia Quant (Quant), special education teacher Drebbin, general education teacher Joaquin Atwood-Ward (Atwood-Ward) and school psychologist Park. At the meeting, Park summarized her report. Drebbin summarized the academic testing that he conducted. Park concluded that the testing did not reveal a severe discrepancy between Student's ability and achievement levels. Park noted that some aspects of Student's auditory memory and visual processing were in the low average range. She noted that Student had poor planning and weaknesses in his ability to create a plan of action and apply it effectively. The team discussed Park's conclusion that no severe discrepancy existed between Student's cognitive ability and achievement level according to the test scores and that, therefore Student did not qualify for special education as a student with a specific learning disability. Park summarized portions of the Van Rooyen report in her assessment report, but did not provide a full copy of the Van Rooyen report to the IEP team. The IEP team discussed the general education environment at Burroughs and advised Parent that the only offer they could make to Student was a regular education classroom in the general education setting without modifications or accommodations.

Enrollment in Private School

26. Rather than place Student in a large general education class without supports, Parents enrolled Student in Summit View School (Summit View), a state certified non-public school (NPS) for the 2007-2008 school year pursuant to the notice given to District by Parents on June 7, 2007. He attended ESY 2008, and at the time of the hearing, was enrolled at Summit View for the 2008-2009 school year.

Independent Assessment

27. Pursuant to an agreement amongst the parties an independent assessment was conducted by Sean Surfas, Ph.D. (Surfas). Surfas conducted his independent assessment of Student on four sessions on November 6 and 13, 2007, December 13, 2007 and January 14,

2008.¹ Surfás is a licensed school psychologist in private practice. He administered the Behavior Assessment System for Children, Second Edition (BASC-2), Structure Developmental History, The Berry-Buktenica Development Test of Visual-Motor Integration (VMI), Wechsler Intelligence Scale for Children-IV (WISC-IV)², The Comprehensive Test of Nonverbal Intelligence (CTONI), The Detroit Tests of Learning Aptitude, Fourth Edition (DTLA-4), Learning Disabilities Diagnostic Inventory (LLDI), Kaufman Test of Educational Achievement (KTEA-II) and Vineland Adaptive Behavior Scales, Second Edition (Vineland).

28. Surfás also interviewed Parents, spoke to teachers and reviewed the assessment reports of Van Rooyen and Park as well as a December 2002 report by Kenneth Williams, Psy.D. Surfás reviewed Student's grades for the 2007-2008 school year at Summit View and prior grades from Hollywood School House. Student's grades at Summit View during the 2007-2008 school year were "B"s in all academic subjects. Teachers commented that Student needed improvement in western culture and basic math. The math teacher indicated that Student needed prompts to stay on task. The western culture teacher commented that Student needed to remember to bring materials.

29. Surfás observed Student in a math class and study skills class at Summit View. He found Student to be on task most of the time, but socializing often during class time. Surfás opined that Student appeared to be in constant flux between what he knows is right to do and keeping up a social face to friends. In essence, when academics became difficult or frustrating to Student, he engaged in distracting behavior or socialized to avoid academics. He answered questions appropriately when asked, but did not volunteer or engage with the teacher beyond what was demanded of him.

30. Surfás' administered the WISC-IV, a test of intellectual functioning that provides a Full Scale Intelligence Quotient. Student received a score of 89 placing him within the low average range. The WISC-IV measures four areas: Verbal Comprehension Index (VCI), Perceptual Reasoning Index (PRI), Working Memory Index (WMI), and Processing Speed Index (PSI). Student's scores in PSI were in the low average range. All other composite standard scores were within the average range. Processing Speed is the ability to perform simple, clerical type tasks quickly and efficiently using sustained attention and concentration.

31. The CTONI is a battery of six subtests that measure different but interrelated nonverbal intellectual abilities. Student scored within the average range on Surfás'

¹ Portions of the WISC were administered by his assistant Ledys Lopez, a credentialed school psychologist. Lopez also assisted with the scoring of some instruments. When Parents, through their attorney, objected to Lopez's administrations of tests, Surfás administered the remainder of the assessment tools personally.

² Although there was testimony about potential "practice effect" impacting the validity of Student's scores on the WISC-IV due to its recent administration by Van Rooyen, there was no evidence that Student's scores were impacted by the closeness of the administration. Further, the evidence did not establish that there was anything improper in Surfás' administration of the WISC-IV within one year of Van Rooyen's administration.

administration of the CTONI. The nonverbal intelligence quotient was 92, within the average range. Student's score of 96 on the pictorial nonverbal intelligence quotient was within the average range and his score of 89 on the geometric nonverbal intelligence quotient was in the low average range.

32. The DTLA-4 was administered by Ledys Lopez and interpreted by Surfás. The test measures general mental abilities and consists of 10 subtests. Student scored in the below average range on the subtests of sentence imitation (a measure of grammar and memory), reversed letters (a measure of auditory processing) and on the subtests for order recall and basic information. He scored in the poor range on the design sequences subtest, a measure of visual discrimination and memory. Student scored in the superior range in design reproduction, a measure of drawing from memory. According to Surfás, Student's cognitive scores fell in the average range. Adaptive skills were opined to be in the low average range and academics overall were in the average range with math and spelling as relatively weak areas. Surfás observed visual short-term and auditory short-term memory to be areas of relative to moderate weaknesses for Student. Student had strong social skills.

33. According to Surfás, Student did not qualify for special education services because Student's test scores did not reveal a severe discrepancy between cognitive ability and academic achievement. Surfás made extensive recommendations for Student including accommodations, modifications and strategies for reading, math and writing to be implemented both at home and at school. Surfás opined that all of the recommendations were specifically tailored to Student, many required individual instruction, and that Student needed remediation to be successful in an academic environment. Although Surfás found that Student was not eligible for special education services under the category of specific learning disability based upon the severe discrepancy model used by the District and wrote that in his revised report, he testified that he believed that Student had learning challenges that required direct instruction and remediation.

February 8, 2008 IEP meeting

34. On February 8, 2008, an IEP meeting was held to discuss the Surfás assessment. In attendance were: Parents, administrator Loren Drake (Drake), Drebbin, Park and general education teacher Vicky McClaren (McClaren.) The IEP meeting lasted approximately three hours. Surfás joined the meeting for two hours by conference call. McClaren stayed less than fifty minutes and left without the written authorization of Parents. She was not present for any discussions about Student's proposed placement in general education.

35. For two hours, Surfás went through his draft report line by line with the IEP team. He made revisions to the report along the way, including changing template portions of the report that reflected the wrong child's name and a conclusion that the other child was eligible for special education. Surfás explained that it was an error in his use of template and forms. He revised his report to reflect Student's name and a determination of no severe discrepancy. He also dictated a passage about Student's writing ability that was erroneously

omitted from his report. Surfás advised the team that although not reflected in his report, he had given Student a writing test. Surfás advised that the writing test reflected that Student had difficulty conceptualizing higher levels of written expression. Park typed the passage into the IEP. As an example, Surfás offered that Student was asked to write a letter indicating what type of house he wanted. According to Surfás, Student made a long list, but was not able to express the concepts at a higher level.

36. Surfás provided a copy of his draft report to Parents and to Park before the IEP. Park did not review the entire report or the recommendations contained therein. Park reviewed Surfás' testing and conclusions from the testing. She entered a summary of his conclusions from testing into the District's computerized IEP preparation system known as Welligent. The draft report was not provided to the entire IEP team. Park did not ask any questions during Surfás' presentation because she did not believe it was her place to do so since she had not prepared the report.

37. Administrator Drake testified that he accepted Surfás' assessment as valid because he was the independent assessor. Drake presumed that someone had reviewed his qualifications and determined that he was the appropriate person to conduct the assessment. Drake seemed to value the fact that the parties had mutually agreed to Surfás as an independent assessor. Drake did not question Surfás' conclusions because he did not feel that he had the appropriate credentials to do so. Drake was aware that the Education Code allows an IEP team to determine eligibility for special education under the category of Specific Learning Disability by methods other than severe discrepancy on standardized tests, but did not know what the alternative methods were. He felt that some of Surfás' recommendations were generic and could be implemented in a general education classroom.

38. In response to concerns and questions raised by Parents, Drake told Parents that he would try to place Student in a class that already had some students under supervision of an RSP teacher so that the RSP teacher could "keep an eye on" Student and see how he progressed. This was offered as something informal and not as a special education placement. Parents were advised that the Burroughs classes typically have 30 or more students. Student was offered a general education placement at Burroughs without modifications or accommodation based upon Surfás' determination that there was no severe discrepancy between academic achievement and cognitive ability on the standardized tests. The IEP team did not make its own separate analysis or determination of whether a severe discrepancy existed.

39. District's expert witness Jose Gonzales (Gonzales), a clinical neuropsychologist and credentialed school psychologist with excellent credentials and extensive experience with learning disabilities, opined that Student's test scores did not show a severe discrepancy between academic achievement and cognitive ability. Gonzales defined a severe discrepancy as a standard score discrepancy of 18 to 22 points when comparing an academic achievement assessment to a cognitive assessment. Gonzales was candid, credible and thorough throughout his testimony. His expertise and experience together with his clear and concise answers to questioning by both parties set him apart from the other three

witnesses that gave testimony in the area of psychological testing. Gonzales opined that the test results obtained by Van Rooyen, Park and Surfes were all very similar and none showed a severe discrepancy between academic achievement and cognitive ability from testing. All showed Student to be of low average cognitive ability with low average academic abilities. All three reports gave indications of executive function and processing difficulties. Gonzalez also acknowledged that the IEP team had the authority to determine that Student had a severe discrepancy between cognitive ability and academic achievement by looking at factors other than a discrepancy in scores on standardized tests.

Summit View School

40. Barbara Rodney (Rodney), the Assistant Director of Summit View, described the school as serving children with learning challenges. Rodney has been the assistant director for seven years. She has California physical education and multi-subject credentials. Prior to working at Summit View, she spent 15 years coordinating services and programs for learning disabled high school students at Campbell Hall, a private general education school in North Hollywood, California and four years working at the Buckley School, a private general education school in Sherman Oaks, California. She has received some training in special education through Summit View and has attended various conferences and trainings throughout her career. Rodney spent four years as a general education middle school teacher in Humboldt County from 1979-1983 and worked as a substitute teacher for the Santa Monica school district from 1983 to 1984.

41. According to Rodney, most students at Summit View have a diagnosis of learning disabled or attention deficit disorder. Most of the students are placed there by public schools and have IEPs. Some students are privately placed and have a plan similar to an IEP drafted by Summit View staff. Summit View is a California certified non-public school. The teachers all have special education credentials to teach mild to moderately disabled students. The school has a 12:1 teacher to student ratio with a teacher's aide for assistance in each class. The goals of the various students' IEPs are imbedded in the classroom curriculum. Staff is trained in multi-modal presentation methods. The curriculum and presentation are modified and re-modified as needed for the needs of the students. Summit View teaches curriculum based on California state standards utilizing research based programs such as Wilson Reading, Touch Math, "Language" and University of Kansas Learning Strategies. California State Testing (CST) is administered, with accommodations to the students. Summit View offers extended school year (ESY), homework club, tutoring and extra-curricular activities to its students.

42. Rodney has regular staff meetings with the teachers every two weeks, and meets with parents regularly. Rodney observes students informally throughout the day in both classroom and playground settings. She believed that Student was a "good fit" with Summit View. Based upon her review of psychological testing conducted prior to his enrollment at Summit View, input from Parents and teacher observations, she understood that Student had weaknesses in the areas of attention, planning, organization, executive function and visual processing. Initially, Student had some problems staying on task and

some behaviors that impeded his learning. She noticed good progress by Student on behavior issues and academics during the 2007-2008 school year.

43. Heather Cruz, a credentialed special education teacher, was Student's English teacher for the 2007-2008 school year. She had seven years of experience at Summit View and six years of experience at another NPS. At the time of the hearing, she was a special education teacher in the Hart School District, a public school district. According to Cruz, Student seemed like "a deer in the headlights" when she first met him. She would often calm his anxieties by prefacing her questions to him with the comment "You're not in trouble." Cruz commented that Student would initially try to "become invisible" or "check out" when called upon in class. From Cruz's perspective, in a class of 10 students, there was nowhere for him to hide. In time, he became more comfortable in the classroom and the behavior subsided.

44. Cruz opined that Student was an average learner who needed visual cues and repetition. She also observed some issues that were characteristic of executive functioning deficits including organization and homework problems. She saw deficits in reading comprehension and his ability to draw inferences from what he had read. At Summit View, the teachers read books aloud in class and the students wrote book reports from the readings. Pictures, diagrams and frequent discussions were part of the process. The teacher reading to students was an example of an intervention. The goal was to help students visualize, verbalize and create a "movie in their heads" to help with reading comprehension and skills. Student received a "B" grade in Cruz's class at the end of the school year.

45. Cruz reviewed Surfas' recommendations and opined that most of the recommendations could be implemented in a general education classroom. Cruz opined that Student would need support and modifications in a general education classroom and would require RSP support and tutoring for reading and writing.³ In her class, Student's reading materials were at a fourth to fifth grade level. Student had trouble making inferences or drawing conclusions from the materials and he needed direction and prompts with writing. According to Cruz, Student's executive function deficits were trainable, but would require specific strategies and direct teaching. Strategies she recommended were use of step cards to set forth the steps that are required for a particular exercise or task, developing specific procedures for a task and explicitly teaching the steps of those procedures. Cruz opined that Student had made progress in her class and that she believed it was an appropriate educational setting for Student.

46. While Student attended Summit View for ESY 2008, there was no evidence presented concerning Student's need for ESY services in the summer of 2008 or what educational benefit, if any, Student received during ESY 2008.

47. Parents paid \$27,000 for Student's base tuition at Summit View for the 2007-2008. Parents also paid \$3000 for Student's tuition at Summit View for ESY 2008.

³ Cruz did not have sufficient knowledge of Student's math abilities to opine on his math needs or abilities.

48. Parents paid \$27,000 for Student's base tuition at Summit View for the 2008-2009 school year.

LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 534-537, 163 L.Ed.2d 387].)

Assessments

Issue 1: Did the District deny Student a FAPE by not developing a proposed assessment plan within 15 days of Student's written request for an assessment on March 30, 2007?

Issue 2: Did the District deny Student a FAPE by not conducting a timely assessment of Student?

Issue 3: Did District fail to assess Student in all areas of suspected disability?

2. Student contends that District failed to provide a proposed assessment plan within 15 days of Parents' request on March 30, 2007, and failed to hold an IEP meeting within 60 days of the initial request for assessment. Student further contends that District failed to assess Student in all areas of suspected disability. District contends that a telephone inquiry was made to Parents requesting additional information within 15 days, thereby meeting District's obligation to provide a proposed assessment plan within 15 days of the request. Further, that once an assessment plan was signed on May 11, 2007, District met the statutory time requirements by conducting an assessment and holding an IEP by June 21, 2007. District contends that it conducted a comprehensive assessment of Student in all areas of suspected disability.

3. Under the Individuals with Disabilities Education Act (IDEA) and companion state law, students with disabilities have the right to free appropriate public education (FAPE). (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE 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 IEP. (20 U.S.C. § 1401(a)(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Related Services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401 (26).)

4. In order to provide a student with a FAPE, the district must determine his unique needs and design a program to meet those needs. Districts are not required to maximize a child's potential. They are merely required to provide a "basic floor of opportunity." (*Rowley v. Bd. of Education of Hendrick Hudson* (1982) 485 U.S. 176, 208, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 680.) De minimus benefit, or only trivial advancement,

however, is insufficient to satisfy the *Rowley* standard of "some" benefit. (*Walczak v. Florida Union Free School District* (2d Cir.) 142 F.3d 119, 130.) 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* (2d Cir. 1997) 103 F.3d 114, 1121.) The IDEA and state law require that, in order to provide FAPE, a school district must develop an IEP that is reasonably calculated to provide the child with an educational benefit. (*Rowley, Supra*, at p. 203.)

5. In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations that occurred impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); *M. L., et. al., v. Federal Way* (9th Cir. 2004) 394. F.3d 634, 653.)

6. A student's parent or the responsible public educational agency may request an initial evaluation to determine whether a child is eligible for special education and related services on the basis of a qualifying disability. (20 U.S.C. §1414 (a)(1)(A), (a)(1)(B).) The initial evaluation must consist of procedures to determine whether a child is a child with a qualifying disability and to determine the educational needs of the child. (20 U.S.C. § 1414 (a)(1)(c).) In conducting the evaluation, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent that may assist in determining whether the child is a child with a disability and the contents of an individualized education program. (20 U.S.C. § 1414(b)(2)(A); see also Ed. Code, § 56320.) The district may not use any single assessment as the sole criteria for determining eligibility and must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. (20 U.S.C. § 1414(b)(2)(B), (b)(2)(C); see also Ed. Code, § 56320.)

7. An assessment plan is to be prepared within 15 days of the initial referral or request for assessment. (20 U.S.C. § 1414(a)(C)(I); Ed. Code, §56321, subd. (a).) In order to assess or reassess a student, a school district must provide proper notice to the student and his/her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under IDEA and state law. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must appear in a language easily understood by the public and the native language of the student, explain the assessments that the district proposes to conduct, and provide notice that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subds. (b)(1)-(4).) Districts must give the parents and/or the student 15 days to review, sign and return the proposed assessments plan. (Ed. Code, § 56321, subd. (a).) Once parents sign and return the assessment plan, districts have 60 days to complete the assessment. (20 U.S.C. § 1414(c)(I).)

8. For purposes of evaluating a child for special education eligibility, the district must ensure that the child is assessed in all areas of suspected disability. (20 U.S.C. §

1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (*See Vashereesse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) A school district is required to use the necessary assessment tools to gather relevant functional and developmental information about the child to assist in determining the content of the child's IEP. (34 C.F.R. § 300.304 (c)(6) (2006).)

9. An IEP required as a result of an assessment of a pupil shall be developed within a total time not to exceed 60 days, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five school days, from the date of receipt of the parent's written consent for assessment. (Ed. Code, § 56344, subd. (a).)

10. With respect to Issue 1, District failed to provide Student with an assessment plan within 15 days of Parents' March 30, 2007 request. On April 14, 2007, which was the fifteenth day, District requested that Parents provide additional information and meet with the school psychologist. This request was not sufficient to meet District's obligation to provide an assessment plan within 15 days of the initial request for assessment. The proposed assessment plan was not provided to Parents until May 4, 2007. That was a 20-day delay. Parents returned the signed assessment plan on May 14, 2007. From that date, District had 60 days to complete their assessments and hold an IEP meeting (July 14, 2007). District received its assessment on June 20, 2007, and held the IEP team meeting June 21, 2007, both within the permissible time parameters. While the failure to provide an assessment plan by April 14th was a procedural violation of the IDEA and the Education Code provisions governing FAPE, it does not rise to the level of a denial of FAPE because the delay of 20 days in providing the assessment plan did not delay the assessment and IEP team meeting beyond the 60-day period when the ten day interval between providing the plan to Parents and return by Parents is considered. District should have provided the assessment plan to Student by April 14, 2007. Ten days elapsed from the time the assessment plan was provided to Parents to when the assessment plan was returned to District. District then would have had 60 days to perform the assessment and hold an IEP by June 23, 2007, which it did. Accordingly, the delay did not cause a denial of educational benefit to Student nor did it deprive Parents of any rights or opportunities to participate in the IEP process. (Factual Findings 12-16 and Legal Conclusions 5-7.)

11. With respect to Issue 2, District failed to provide Student with an assessment plan within 15 days of Parents' March 30, 2007 request. However, once the assessment plan was provided to Parents and returned on May 14, 2007, District acted quickly and completed the assessment by June 20, 2007, and held an IEP on June 21, 2007, within 60 days of the signed assessment plan. There were no procedural violations in the timeliness of the assessment nor was there a denial of FAPE because Student's IEP and assessment were conducted within the 60 day required timeframe. (Factual Findings 12-18 and 25 and Legal Conclusions 5-7 and 9.)

12. With respect to Issue 3, District conducted a comprehensive assessment that evaluated academics, achievement, social/emotional, development and health issues as set forth in the signed assessment plan. District's assessment concentrated on the area of specific learning disability because that was an area specifically identified as the main concern by Parents and Van Rooyen. Qualified individuals, including Park, a licensed school psychologist and licensed clinical psychologist assessed Student using both standardized and developmental measures, observation and parental input. Student did not introduce any evidence of a specific area in which District failed to assess Student. District assessed Student in all areas of suspected disability. (Findings of Fact 12-25 and Legal Conclusions 4-9.)

First Determination of Ineligibility

Issue 4: Did District deny Student a FAPE by failing to find Student eligible for special education and related services as a student with specific learning disability at the June 21, 2007 IEP team meeting?

Issue 5: Did District deny Student a FAPE by failing to develop an IEP at the June 21, 2007 IEP team meeting?

13. Student contends that the IEP team should have found him eligible for special education at the June 21, 2007 IEP meeting as a student with a specific learning disability based upon the Van Rooyen report, standardized testing, his grades, observations and input from parents and teachers. Student contends that District only considered whether or not his standardized test scores demonstrated a statistical severe discrepancy between academic achievement and cognitive ability. District contends that Student did not demonstrate a severe discrepancy between cognitive ability and academic achievement on the standardized tests and therefore was not eligible for special education.

14. A student is eligible for special education and related services if the student is a "child with a disability" such as specific learning disabilities, and as a result thereof needs special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, §56026, subds. (a) & (b).) A child is not considered a "child with a disability" for purposes of the IDEA if it is determined that the child only needs a "related service" and not special education. (34 C.F.R. § 300.8(a)(2)(i).)

15. A student is eligible for special education under the category of "specific learning disability" if: 1) the student 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 2) based on a comparison of "a systematic assessment of intellectual functioning" and "standardized achievement tests" has a severe discrepancy between intellectual ability and achievement. (34 C.F.R. § 300.8(c)(10)(i); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (j).) If standardized tests do not

reveal a severe discrepancy between intellectual ability and achievement, the IEP team may still find that a severe discrepancy exists as a result of a disorder in a basic psychological process based on: 1) data obtained from standardized assessment instruments; 2) information provided by the parent; 3) information provided by the pupil's present teacher; 4) evidence of the pupil's performance in the regular and/or special education classroom obtained from observations, work samples, and group test scores; 5) consideration of the pupil's age, particularly for young children; and 6) any additional relevant information. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(C).) "Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression." (Cal. Code Regs., tit. 5, § 3030, subd. (j)(1).)

16. The decision as to whether or not a severe discrepancy exists is to be made by the IEP team, including assessment personnel. The IEP team is to take into account all relevant material that 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. (Cal. Code Regs. tit. 5, § 3030, subd. (j)(4).)

17. In determining the existence of a severe discrepancy, the individualized educational 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 point, 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 (A) or (B) above, the IEP team may find 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

classroom obtained from observations, work samples, and group test scores; 5) consideration of the pupil's age, particularly for young children; and 6) any additional relevant information. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(A)(B) & (C).)

18. An IEP team may determine that a child has a specific learning disability, if the child does not achieve adequately for the child's age or to meet state-approved grade-level standards in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation and mathematics problem solving. (34 C.F.R. § 300.309(a).)

19. The IEP team shall review the assessment results, determine eligibility, determine the content of the IEP, consider local transportation policies and criteria and make program placement recommendations. (Ed. Code, § 56342, subd. (a).)

20. Each local educational agency shall have an IEP in effect for each individual with exceptional needs within its jurisdiction at the beginning of each school year. (Ed. Code, § 56344, subd.(c).)

21. If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation: (1) must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and (2) may be presented by any party as evidence at a hearing on a due process complaint regarding the child. (34 C.F.R. § 300.502(c); Ed. Code, §§ 56341.1, subd. (b)(1), 56381, subd. (b).)

22. The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule explaining that the actions of the District cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable...at the time... ." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

23. With respect to Issue 4, the team utilized Park's limited analysis. Park determined that there was no severe discrepancy between Student's academic achievement and cognitive ability on standardized tests using the severe discrepancy model utilized by District. The model used by District included the administration of standardized achievement tests and alternative measures of cognitive ability, non-IQ tests as permitted by section 3030 (j)(4)(A) & (B) of title 5 of the California Code of Regulations. Here, Park used the CAS as a cognitive assessment and utilized the VMI, TVP-3 and TAPS-3 to evaluate visual perception, auditory processing and visual-motor integration. While the CAS does yield a standard score, District policy is to utilize only the range (i.e., above average, average, low average, below average) and not the standard score. Accordingly, District's cognitive assessment, as limited, was not even capable of the standard score comparison pursuant to section 3030 (j)(4)(A). Accordingly, it was incumbent upon the IEP team to exercise the discretion afforded it under section 3030(j)(4)(C) to consider other factors.

24. Had the IEP team looked at more than the test scores, they would have understood that the assessments by Park and Van Rooyen both showed Student's deficits in planning, a component of executive functioning and slow processing speed, both disorders of basic psychological processes. Van Rooyen and Park both opined that Student was of low average to average cognitive ability. Student's parents and teachers provided information about the numerous supports, accommodations and interventions that Student had tried without success. Parents and teachers advised that Student had difficulty with schoolwork and homework despite extensive tutoring, educational therapy and the assistance of Parents and teachers. Parents advised Park and the IEP team of Van Rooyen's assessment finding that Student had a learning disability based upon the DSM-IV. The IEP team did not have Van Rooyen's report. The report was provided to Park. However, Park only summarized portions of Van Rooyen's report and did not provide it to the team. Student's teachers at Hollywood School House informed Park of Student's inability to keep up in class, poor comprehension in science and poor independent skills in math. Although Van Rooyen and Park both agreed that a private school such as Hollywood School House was likely to have higher expectations and standards for its students than a District public school might, the fact remains that Student was on academic probation, was failing and was not invited to continue at Hollywood School House after sixth grade. Student's grades reflected his actual academic achievement and showed dramatic decline and failure when the class structure and curriculum became more advanced. Park conducted an observation of Student during the last week of school, after all academic instruction had concluded. Her observations were mainly of Student's social abilities and were irrelevant to her determination that Student was not eligible for special education. Nonetheless, after observation, even Park concluded in her assessment report that Student would need multi-modal presentation of course material and reinforcement and consistency in the classroom.

25. The IEP team did not fully consider the ample information available. By failing to do so, the IEP team failed to recognize Student's eligibility for special education as a child with a specific learning disability based upon deficits in executive functioning and processing speed which affect his reading comprehension, reading fluency, math and writing and require special education. The team did not go to the next step to determine whether a severe discrepancy existed based upon other factors as set forth in section 3030(j)(4)(C). In summary, the District's eligibility determination was based solely on a single, limited, analysis of standardized test scores. Therefore, the District denied Student a FAPE by failing to find him eligible for special education at the June 21, 2007 team meeting. (Findings of Fact 2-25 and Legal Conclusions 14-24.)

26. With respect to Issue 5, the IEP team had information available to it that suggested student had a specific learning disability based upon deficits in executive functioning and processing speed which manifest themselves in weak reading comprehension, reading fluency, math and writing difficulties. The IEP team relied upon Park's report and her analysis that no severe discrepancy existed based upon Student's scores on standardized testing and did not go further and evaluate other information available to it. In doing so, the IEP team failed to find Student eligible for special education as a child with a specific learning disability. Since Student should have been determined eligible for special

education as a child with a specific learning disability and the team should have developed an IEP for Student. Student was denied a FAPE when the IEP team failed to develop an IEP for Student at the June 21, 2007 IEP meeting. (Findings of Fact 2-25 and Legal Conclusions 3-4 and 14-25.)

Second Determination of Ineligibility

Issue 6: Did District deny Student a FAPE by failing to find Student eligible for special education and related services as a student with specific learning disability at the February 8, 2008 IEP team meeting?

Issue 7: Did District deny Student a FAPE by failing to develop an IEP at the February 8, 2008 IEP team meeting?

27. Student contends that the IEP team should have found him eligible for special education at the February 8, 2008 IEP meeting as a student with a specific learning disability based upon the Surfas Report, Van Rooyen report, standardized testing, his grades, observations and input from Parents and teachers. Student contends that District only considered whether or not his standardized test scores demonstrated a severe discrepancy between academic achievement and cognitive ability when it should have considered additional relevant factors. District contends that Student did not demonstrate a severe discrepancy between cognitive ability and academic achievement on the standardized tests and therefore was not eligible for special education.

28. With respect to Issue 6, the IEP team should have looked beyond the fact that the standardized tests results did not show a severe discrepancy between Student's cognitive ability and academic achievement. Here too, the IEP team should have considered additional relevant information about Student's academic achievement and cognitive ability. The team was not provided with a copy of Surfas' report at the IEP meeting. Only Parents and Park had seen a copy of the Surfas' draft assessment report. Park did not read the entire report and did not read or consider the 12 pages of extensive suggestions for remediation made by Surfas. She read Surfas' conclusion that Student did not have a severe discrepancy between his cognitive ability and academic achievement based upon standardized testing and typed that into the IEP document.

29. Here, Surfas opined that Student had deficits in executive functioning and processing speed that adversely affected his reading, math and writing abilities. Surfas further opined that the impact of the deficits would become more apparent as the material became more complex. Parents and teachers all reported Student's progress at Summit View, a specialized educational environment with a slower, modified curriculum and accommodations geared to students with learning challenges using multi-modal teaching methods and strategies. The progress was reflected in Student's "B" grades in all subjects. Student's teachers commented that he still needed prompts to stay on task and needed to remember to bring materials to class. Surfas opined that Student needed direct instruction, remediation and accommodations in order to succeed academically. Surfas detailed his

recommendation in 12 pages of specific suggestions for Student. As set forth in Legal Conclusions 24 and 25 above, Student should have been determined eligible for special education at the first IEP team meeting in June of 2007. The Surfes assessment and the February 8, 2008 IEP team meeting merely added additional factors for consideration. However, the IEP team did not consider all information available because the IEP team was not provided the information. The IEP team members, including Drake, the administrative designee, were not aware that they could consider more than the statistical severe discrepancy model as presented by the school psychologist. The IEP team should have exercised its discretion to consider additional information under section 3030(j)(4)(C). Had it done so, the team would have concluded that Student was eligible for special education under the category of specific learning disability. (Findings of Fact 2-48 and Legal Conclusions 14-19 and 21-28.) Therefore, District denied Student a FAPE by failing to find him eligible for special education as a student with specific learning disability on February 8, 2008.

30. With respect to Issue 7, the IEP team must develop an IEP that provides FAPE to any child found eligible for special education. Here, Student should have been found eligible for special education and the IEP team failed to develop any IEP for Student based upon their faulty analysis of eligibility. Accordingly, Student was denied a FAPE when an IEP was not developed for Student at the February 8, 2008 IEP meeting. (Findings of Fact 2-48 and Legal Conclusions 3-4 and 14-29.)

Remedies

31. Student asserts that he is entitled to reimbursement for Summit View tuition for the 2007-2008 school year, ESY 2008 and the 2008-2009 school year. He further asserts that he should be reimbursed for the expense incurred for the January 2007 Van Rooyen assessment and report. District asserts that Student is not entitled for reimbursement of tuition and that if District denied Student a FAPE for the 2008-2009 school year by finding him not eligible for special education, the ALJ should have the IEP team determine placement for the 2008-2009 school year. District further contends that Van Rooyen's assessment occurred before District had an opportunity to assess Student and accordingly, there is no basis for reimbursement of the expense.

32. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that: 1) the district had not made a FAPE available to the student prior to the placement; and 2) that the private placement is appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); *see also School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).) Reimbursement may be denied if at least ten days prior to the private school enrollment the parents fail to give written notice to the district about their concerns, their intention to reject the district's placement and their intention to enroll the student in a private school at public expense. (20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); 34 C.F.R. §

300.148(d)(1).) The fact that Student has never attended public school is not a bar to reimbursement of tuition payments. (*Board of Educ. of City School Dist. of City of New York v. Tom F. ex. re. Gilbert F.*, (2007) 128 S.Ct. 1, 169 L.Ed, 2d 1; *Forest Grove School Dist. V. TA* (9th Cir. 2008) 523 F.3d 1078.)

33. Extended school year services means special education and related services that are provided to a child with a disability beyond the normal school year of the public agency in accordance with the child's IEP and at no cost to the parents of the child and meet the standards of the state educational agency. (34 C.F.R. § 300.106 (b)(1) & (2) (2006).) Extended school year services must be provided only if a child's IEP team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child. (34 C.F.R. § 300.106 (a)(2) (2006); Ed. Code, § 56345, subd. (b)(3).) In implementing ESY, the district may not limit ESY to particular categories of disability or unilaterally limit the type, amount, or duration of the services. (34 C.F.R. § 300.106 (a)(3) (2006).)

34. A parent is entitled to obtain an Independent Educational Evaluation (IEE) of a child. (20. U.S. C. § 1415(b) (1).) An IEE is an evaluation conducted by a qualified examiner not employed by the school district responsible for the child's education. (34 C.F.R. § 300.502(b) (1); Ed. Code § 56329, subd. (b).) When a parent disagrees with an assessment by the educational agency, the parent has the right to an IEE from qualified specialists at public expense unless the educational agency is able to demonstrate at a due process hearing that its assessment was appropriate. (Ed. Code, §§ 56329, subds. (b) & (c), 56506, subd. (c); 34 C.F.R. § 300.502.)

35. District may have been able to provide Student with a FAPE at a public school had it endeavored to do so. However, when District determined that Student did not meet eligibility requirements, it offered Student only a general education placement without support, modifications or accommodations. Parents were then faced with either accepting the general education placement that they had good reason to believe would not be appropriate for Student or locating a suitable placement outside of the public school system. Parents chose to maintain Student's enrollment in Summit View, a nonpublic school for students with learning challenges where he had attended ESY 2008. The placement is appropriate and Student is receiving an academic benefit. The IEP team must prepare an IEP for Student and may evaluate placement options for Student. (Findings of Fact 2-48 and Legal Conclusion 32.)

36. Although Student requested that District reimburse parents for ESY 2008 tuition as a form of compensatory education, the evidence presented did not support or establish a need for ESY 2008. The evidence was merely that Student attended. Accordingly, reimbursement for ESY 2008 tuition is not awarded. (Finding of Fact 46 and Legal Conclusion 34.)

37. Student seeks reimbursement for the IEE performed by Van Rooyen in January of 2007. Parents did not request an assessment by District until March 30, 2007, two months after the Van Rooyen assessment had been completed. The District was not afforded

