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

STUDENT, Petitioner, v. GLENDORA UNIFIED SCHOOL DISTRICT, Respondent.	OAH CASE NO.: N 2005070341

DECISION

This matter was heard on September 20-22, 2005, in Glendora, California, by Chris J. Ruiz, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California.

Petitioner Student[1] (Petitioner or Student) was represented by Tara L. Canady, Esq. Also present was Mother, Petitioner's mother (Mom).

Respondent Glendora Unified School District (Respondent or District) was represented by John E. Hayashida, Esq. Also present was Ted McNevin, Director for Instructional and Student Support Services (Mr. McNevin).

Oral and documentary evidence was presented. On September 22, 2005, testimony was concluded and the matter was scheduled for briefing. Both parties' closing briefs were due concurrently on October 7, 2005. Petitioner's brief was timely received and was marked for identification as Exhibit SS-21. Respondent's brief was timely received and was marked for identification as Exhibit 22. The matter was submitted for decision after the ALJ had an opportunity to review the briefs on September 30, 2005.

[1] Petitioner's full name is not used so as to protect her privacy and that of her family.

ISSUES PRESENTED

1. Did the District deny Petitioner a free appropriate public education (FAPE) by failing to meet Petitioner's unique needs?

2. Did the District violate Parent's procedural rights by failing to adhere to assessment timelines?

FACTUAL FINDINGS

1. Petitioner is a preschool student who lives within the District's boundaries. Petitioner was in teacher Lisa Fiorenza's preschool special day class during the 2004-2005 school year. Presently, Petitioner is in the same teacher's class for the 2005-2006 school year.

2. On June 9, 2004, the District convened an initial Individual Education Program (IEP) team meeting to determine Petitioner's eligibility to receive special education services. The IEP team determined that Petitioner qualified for special education services under the categories of language and speech disorder and autistic-like behaviors. Speech and language goals were developed and services from a speech and language pathologist were offered. Mom consented to the implementation of the June 9, 2004 IEP. (Exhibit 5.)

3. On June 10, 2004, Mom signed an assessment plan, granting the District permission to conduct assessments in multiple areas, including occupational therapy (OT). (Exhibit SS-19.)

4. On July 28, 2004, Jules Dombrower, the District's school psychologist, assessed Petitioner and prepared a psycho-educational report. Petitioner's general cognitive ability appeared to be in the significantly below-average range of intellectual functioning. Petitioner evidenced significant delays in receptive and expressive language, as well as in her level of social and emotional maturity. (Exhibit 7.)

5. On September 29, 2004, Mom made a written request that the District assess Petitioner's need for OT services. (Exhibit 10.)

6. On October 14, 2004, the IEP team met to review Petitioner's program. Mom indicated Petitioner's strengths included her ability to do difficult puzzles, visual skills, and fine motor skills. Mom indicated Petitioner's weaknesses included socialization, focusing on specific activities and directions, and language. Speech and language services were continued and academic goals were added. The IEP team recommended a referral for an OT evaluation. Mom consented to implementation of this IEP. (Exhibit 11.)

7. On December 12, 2004, a referral for an OT evaluation was made to Gallagher Pediatric Therapy. (District Exhibit 12.)

8. On March 18, 2005, almost six months after Mom's request, Ms. Janie Brown (Ms. Brown), an OT therapist, of Gallagher Pediatric evaluated Petitioner. Ms. Brown's OT evaluation and report indicated that Petitioner's behaviors are indicative of sensory processing difficulties. She shows defensiveness to touch and auditory sensory input. Petitioner seeks intense proprioceptive sensory input to help her stay focused on task. Her fine motor skills are functional. Her self-care skills are slightly delayed. Organization of behavior is an area of difficulty and is impacted by her difficulties with sensory defensiveness. (Exhibit 13.)

9. The District did not conduct an OT evaluation within 50 days of receiving a signed assessment plan from Mom. The District also did not conduct an OT evaluation within 50 days of receiving Mom's September 29, 2004 written request. The District's normal course of business is to either provide a parent with an assessment plan, or to provide a written explanation of their refusal to provide an assessment plan, within 15 days of a request for an assessment. The District did not offer any explanation for the approximately six-month delay, from the date of Mom's written request for assessment, in obtaining an OT evaluation.

10. On March 22, 2005, Mom wrote a letter to Mr. McNevin regarding Petitioner's failure to meet her benchmark objectives. Mom also informed Mr. McNevin that Petitioner's behavioral therapist and speech and language pathologist felt Petitioner could benefit from Discrete Trial Training (DTT). Mom requested a meeting to discuss other appropriate services that could help Petitioner improve in school. (Exhibit SS-7.)

11. On April 1, 2005, Mom wrote a letter to Mr. McNevin requesting that a behavioral assessment be conducted on Petitioner. (Exhibit SS-5.) Mom was not provided with an assessment plan within 15 days as required. The District has not conducted a behavioral assessment of Petitioner.

12. On April 21, 2005, an IEP team met (April 2005 IEP) to consider the following: Ms. Brown's OT assessment, Petitioner's behavior, and Mom's request for a behavioral assessment and DTT. The IEP team decision, in pertinent part, was to offer two hours of OT consultation therapy and three hours per week of in-home tutoring. Petitioner's unique needs at the time of the IEP and the assessments considered by the IEP team are discussed below.

Petitioner's Unique Needs as of the April 2005 IEP

13. Petitioner's past and current behaviors in her preschool class include making noises and touching other children's hair. Petitioner has difficulty remaining focused and staying on task. Petitioner needs much redirection, including verbal and physical prompts. Petitioner's focus is stronger when she participates in activities she likes or wants to do.

14. Petitioner's attention, or focus, during "circle time" improves through the use of OT techniques, such as joint compression and bear hugs, which can help calm Petitioner and moderate her behavior. Petitioner, at times, can be aggressive. At times, Petitioner's

behavior in the classroom interferes with her participation in class activities. Petitioner's behaviors sometimes interfere with other students' participation in class activities.

15. Petitioner tested below average in fine motor skills including grasping and visual motor integration. (Exhibit SS-3, page 2) Petitioner has an immature grasp of writing tools, such as markers. However, she is able to put puzzles together, lace shoelaces on a card, string small beads, and manipulate small objects. Petitioner does not use the toilet.

Behavioral Assessment Issue at the April 2005 IEP

16. The District invited Darren Lemon, the Special Education Local Plan Area's (SELPA) behavior specialist, to the April 2005 IEP meeting. The District did not believe an assessment of Petitioner's behavior was warranted. Instead, the District wanted to try OT techniques and strategies to moderate Petitioner's behaviors before requesting a behavioral assessment. The District's intent was to have Mr. Lemon consult and collaborate with the people involved in Petitioner's education, including Mom and Petitioner's in-home tutoring aide. The District offered the tutoring aide for three hours per week to assist Petitioner in meeting her annual goals. The District wanted Mr. Lemon to train and supervise Petitioner's in-home tutoring aide so that the aide could also address Petitioner's behavioral needs. The District also recommended a request for services to the SELPA's Autism Spectrum and Related Disorders (ASRD) program. The ASRD staff could recommend additional behavior assessments, if needed. The ASRD can provide applied behavior analysis and discrete trial training and other techniques, as necessary.

17. While the District's intent was to evaluate and provide Petitioner services related to her behavioral needs, the April 2005 IEP did not include a clear statement of related services, modifications, and supports. While the District's desired approach in having Mr. Lemon monitor Petitioner's behavioral situation may have been appropriate, the IEP itself made no indication that that the in-home tutor was going to have a background in behavior therapy or be supervised by Mr. Lemon. (Exhibit 17.)
As such, Petitioner was not unreasonable in assuming that the District had not offered any services related to Petitioner's behavioral needs.

18. A functional behavioral assessment must be conducted before the provision of direct behavioral therapy. An assessment would determine whether or not behavioral therapy is necessary to help Petitioner increase interactions with others, build necessary social skills, and obtain an education. It would be unreasonable to allow the District to not provide a behavioral assessment after it did not accurately describe its intended offer of services in the IEP. Further, the District wanted Mr. Lemon, a behavioral specialist, to assist Petitioner and also recommended referring Petitioner to the ASRD program. Both of these proposals by the District indicate an acknowledgement that Petitioner's behavior is an issue. A behavioral assessment will be the most expedient way to resolve the issue and is also necessary to assist future IEP teams in designing a program that will be reasonably calculated to meet Petitioner's unique needs. The District's failure to accurately include its offer of behavioral services in the April 2005 IEP denied Petitioner a FAPE.

Occupational therapy at the April 2005 IEP

19. The parties agree that Petitioner requires OT services. The dispute between the parties is over the type and quantity of OT services.

20. Petitioner did not receive any OT services during the 2004-2005 school year. The Districts own expert recommended OT services. Thus, it was established that provision of OT would have addressed Petitioner's OT deficits. Petitioner did not receive any OT services because Mom did not consent to the April 2005 IEP. As a result, the IEP was not implemented and the District did not provide OT services.

21. Ms. Brown, the District's OT expert, recommended 50 minutes of occupational therapy consultation per month. (SS-8) The April 2005 IEP team, including Mom, disagreed with Ms. Brown's recommendation and, as a result, increased the recommended OT services to two times per month at 50 minutes per session from April 21, 2005, to November 30, 2005. These OT services were not to exceed 12 sessions. The IEP team also recommended three hours per week of in-home tutoring to work on annual goals; individualized instruction provided by the classroom teacher and/or instructional aide during table time on Tuesday and Thursday; and an additional 15 minutes each day of individualized instruction, provided by the classroom staff, following the second snack period.

22. OT consultation does not include the provision of direct occupational therapy to Petitioner by an occupational therapist. OT consultation therapy includes the classroom teacher and parent consulting with an occupational therapist regarding strategies to employ at school and at home in order to help Petitioner improve her OT deficits. Direct therapy involves an OT specialist working directly with a student.

23. Dr. Robert Rome testified that Petitioner needs 25 minutes of direct OT per week and 50 minutes of consultation OT per month. Dr. Rome's testimony is not persuasive because he is not an OT expert. Dr Rome is a psychologist as is District psychologist Jules Dombrower who prepared a report on July 28, 2004. (Exhibit 7.)

24. Dr. Rome's report is dated May 19, 2005. At the time of the April 2005 IEP, his report was not available to the IEP team. Petitioner tested below average on her fine motor skills, but Petitioner also was able to participate in her classroom from a physical standpoint. Petitioner did not hold her pen correctly, but Ms. Brown opined that her grip was immature, rather than a grip requiring OT. At the time of the April 2005 IEP meeting, the IEP team's offered OT services were reasonably calculated to address Petitioner's unique needs. The OT consultative services offered were designed to assist Petitioner's teacher and Mom in reducing Petitioner's OT deficits.

The overall April 2005 IEP

25. Petitioner contends the April 2005 IEP report was insufficient. Petitioner is correct that the IEP report did not specifically discuss behavior or the provision of behavior-related services to Petitioner in conjunction with the in-home tutorial services as more fully set forth in Findings 16-18. Petitioner is also correct in contending that the IEP does not contain a complete statement of measurable goals. (Exhibit SS-4) Goal "H" on page 3 of 4 of the IEP is incomplete.

26. However, under 20 United States Code section 1415(f)(3)(B), the issues at a due process hearing are limited to those raised by Petitioner in her request for hearing. (Exhibit SS-1.) No issue was raised in Petitioner's due process request as to the deficiencies of the IEP itself. The District did not deny Petitioner a FAPE based solely on an evaluation of the April 2005 IEP report.[2]

LEGAL CONCLUSIONS AND DISCUSSION

1. Pursuant to the Individuals with Disabilities Education Act (IDEA) and State special education law, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (California Education Code[3] § 56000.) 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, and conform to the child's IEP.

2. "Special education" is defined as specially designed instruction, provided at no cost to parents, that meets the unique needs of the child. (Code § 56031.) "Related services" means transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. State law refers to related services as "designated instruction and services" (DIS) and provides that DIS services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Code § 56363, subdivision (a.).)

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

4. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of the

[2] The District's failure to accurately include its offer of behavioral services in the April 2005 IEP did deny Petitioner a FAPE as discussed in Findings 16-18.
[3] All further references to "Code" are to the California Education Code.

IDEA. The Court determined that a student's IEP must be designed to meet the student's unique needs and 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.) The Court stated that school districts are required to provide only a basic floor of opportunity that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (Id. at 201.)

5. Federal special education law requires states to establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which he is entitled and that parents are involved in the formulation of the student's educational program. (*W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, (9th Cir. 1992) 960 F.2d 1479, 1483).)

6. The Supreme Court in Rowley also recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. (Id. at 1484.) Procedural violations may constitute a denial of FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parent's opportunity to participate in the IEP process.

7. Therefore, the inquiry in IDEA cases is twofold. The first question is whether the school district has complied with the procedures set forth in the IDEA. The second is whether the IEP developed through the IDEA's procedures is reasonably calculated to enable the student to receive an educational benefit.

8. The U.S. Supreme court recently ruled that Petitioner has the burden of proving at an administrative hearing that the District's offered program is insufficient. (*Schaffer v Weast* (November 14, 2005, No. 04-698) ___ U.S. ____.)

9. Petitioner alleges that the District failed to provide her with a FAPE both procedurally and substantively. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of the District's proposed program. If the District's program was designed to address Petitioner's unique educational needs, was reasonably calculated to provide her some educational benefit, and comported with her IEP, then it must be found that the District provided a FAPE, even if Petitioner's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. The District was also required to provide Petitioner with a program which educated her in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of her disabilities was such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. §1412(a)(5)(A); Code § 56031.) Therefore, the program the District offered Petitioner must have met the following four requirements to have constituted a FAPE: (1) be designed to meet her educational needs; (2) be reasonably

calculated to provide her some educational benefit; (3) be comported with her IEP; and (4) provide her an education in the least restrictive environment.

Issue Number One: Did the District deny Petitioner a FAPE by failing to meet her unique needs?

April 2005 IEP report

10. Petitioner contends the April 2005 IEP failed to comport with the IEP requirements under the IDEA. For the reasons set forth in Factual Findings 25-26 the Administrative Law Judge declines to find the IEP report itself denied Petitioner a FAPE.

Occupational Therapy

11. The District did not deny Petitioner a FAPE in terms of its offered OT services as described in the April 2005 IEP for the reasons stated in Factual Findings 19-24. The IEP team attempted to meet Petitioner's unique needs by increasing the amount of OT services from the initial amount recommended by occupational therapist Ms. Brown. The IEP team offered services reasonably calculated to provide Petitioner with some educational benefit.

Behavioral Therapy

12. Under the IDEA, when a child's behavior impedes her learning or that of others, the IEP team shall consider strategies, including positive behavior interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.346(a)(2)(i).)

13. Mr. Lemon testified that a functional behavioral assessment would have to be conducted before direct behavioral therapy could be provided. The District intended to address Petitioner's behavioral issues by having the in-home tutor also address Petitioner's behavioral issues. However, this intent was not expressed in the April 2005 IEP as set forth in Factual Findings 16-18. As such, the District did not appropriately address Petitioner's unique behavioral needs. As such, the District denied Petitioner a FAPE.

Issue Number Two: Did the District violate Parent's procedural rights by failing to adhere to assessment timelines?

14. According to the IDEA, a local educational agency shall ensure that a reevaluation of a child is conducted if conditions warrant a reevaluation or if the child's parent or teacher requests a reevaluation. (20 U.S.C. §1414(a)(2)(A).)

15. A local educational agency shall provide written prior notice to the parent of a child whenever such agency refuses to initiate or change; the identification, evaluation, or educational placement of the child. (20 U.S.C §1415(b)(3)(B).)

16. Under the California Education Code, if an assessment for the development or revision of the individualized education program is to be conducted, the parent or guardian of the pupil shall be given, in writing, a proposed assessment plan within 15 days of the referral for assessment, unless the parent or guardian agrees, in writing, to an extension. (Code § 56321, subd. (a).) Thereafter, an IEP required as a result of an assessment of a pupil shall be developed within a total time not to exceed 50 days from the date of receipt of the parent's written consent for assessment, unless the parent agrees, in writing, to an extension. (Code § 56344.)

Occupational Therapy

17. On June 10, 2004,Mom signed an assessment plan granting the District permission to conduct an OT assessment of Petitioner. A referral for an OT assessment was made to Gallagher Pediatric Therapy on December 12, 2004 and Student was evaluated on March 18, 2005. The IEP meeting to discuss the OT assessment results was held on April 21, 2005. The District did not provide written notice of their refusal to conduct the evaluation and hold an IEP within 50 days of receiving the signed assessment plan.

18. The District procedurally violated IDEA by failing to provide written notice of their refusal to initiate an occupational therapy evaluation; and violated the California Education Code by failing to develop an IEP within 50 days of receiving a signed assessment plan from Ms. Hernandez granting permission to conduct an occupational therapy assessment.

19. As a result of the District's procedural violations of assessment timelines, the dispute over the type and quantity of OT services took much longer to develop and there was a loss of educational opportunity to the student. Had the District acted timely, the instant decision could have been issue sooner and Petitioner could have begun receiving OT services sooner, albeit the services the District offered. Earlier provision of OT services would have improved Petitioner's deficits in that area and would have helped her access the school curriculum and progress toward meeting her academic goals.

20. No evidence was presented regarding the compensatory services Petitioner needs in order to "catch up" from this delay in receipt of OT services. Petitioner has the burden of providing evidence as to an appropriate remedy. (P*arents of Student W v. Puyallup School District*, (9th Cir. 1994) 31 F.3d 1489.) However, evidence was presented that Petitioner needed OT services and the District delayed the OT assessment. The delay was at least approximately four months (i.e. six months less the 50 days allowed to perform the assessment. Additional OT consultation services would be redundant. As such, direct OT services, for a limited time, will be an equitable remedy for the District's delay.

Behavioral Assessment

21. On April 1, 2005, Mom requested, in writing, that Petitioner receive a behavioral assessment. The District did convene an IEP on April 21, 2005, with the intention of

discussing Student's behavior. However, the District did not present Ms. Hernandez with an assessment plan to conduct a behavioral assessment or provide written notice of their refusal to do so within 15 days of her request. It is the District's normal course of business to provide either an assessment plan or written notice of their refusal to do so within 15 days of a request for assessment.

22. Therefore, the District procedurally violated the IDEA. However, the issue then turns to whether this procedural violation is a denial of FAPE. Under *Rowley*, a procedural violation is only a denial of a FAPE if it results in the loss of educational opportunity to the student or seriously infringes on the parent's opportunity to participate in the IEP process. In this case, as to the procedural failure alone, there was no such denial. Mom participated in the April 2005 IEP, brought a request for due process hearing, and raised the issue of a behavioral assessment. This situation would have been the same had the District provided a written refusal to perform a behavioral assessment.

Reimbursement for Dr. Robert J. Rome's report

23. Petitioner is not entitled to reimbursement, or funding, for Dr. Rome's psychological-educational evaluation. Code section 56329, subdivision (b), provides:

> A parent or guardian has the right to obtain, at public expense, an independent educational assessment of the pupil from **qualified specialists**, as defined by regulations of the board, if the **parent or guardian disagrees** with an assessment obtained by the public education agency . . . (Emphasis added.)

25. Petitioner did not take issue with the District's psycho-educational study report that was prepared by District psychologist Jules Dombrower on July 28, 2004. Mom disagreed with the recommended OT services and the lack of behavioral services, not the District psychologist's opinion. Code section 56329, subdivision (b), requires that a qualified specialist conduct the independent assessment. Dr. Rome is a psychologist. He is not a licensed OT therapist and is not an expert in the area of OT. Also, it was not established that Dr. Rome is a qualified specialist in the area of conducting behavioral assessments. Those were the two issues to be decided at hearing. Therefore, the Petitioner's request for reimbursement is denied because Dr. Rome is not a qualified specialist in the areas of OT or behavioral assessment, the two issues in the case.

24. The Administrative Law Judge considered all of the evidence before issuing this decision. Any evidence not specifically discussed was deemed insufficient to establish the fact or legal principle for which it was offered.

ORDER

WHEREFORE the following order is made:

As the District failed to provide Petitioner a FAPE, she entitled to the following remedy:

1. The District shall conduct a functional behavioral assessment of Petitioner within 30 days of the date of this decision.

2. The District shall provide all services described in the April 2005 IEP.

3. The District shall provide 25 minutes of direct occupational therapy, twice per month, for four months from the date of this decision.

PREVAILING PARTY

25. Pursuant to 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:

26. Petitioner prevailed on Issue Number One with respect to the issue of behavioral therapy. The District prevailed on Issue Number One with respect to the issue of occupational therapy.

27. Petitioner prevailed on Issue Number Two with respect to occupational therapy. The District ultimately prevailed on Issue Number Two with respect to behavioral therapy as there was a procedural violation, but that violation did not result in the loss of educational opportunity to the student and did not seriously infringe on the parent's opportunity to participate in the IEP process.

RIGHT TO APPEAL THIS DECISION

30. The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. California Education Code section 56505, subdivision (k).

DATED: November 23, 2005.

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CHRISTOPHER J. RUIZ
Administrative Law Judge
Office of Administrative Hearings