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

STUDENT, Petitioner, v. PLACENTIA-YORBA LINDA UNIFIED SCHOOL DISTRICT and ORANGE UNIFIED SCHOOL DISTRICT, Respondents.	OAH No.: N2005071105 NOTICE: This decision has been UPHELD by the United States District Court. Click here to view the court's decision. The USDC's decision was AFFIRMED by the United States Court of Appeals. Click here to view the court's decision.

DECISION

Administrative Law Judge (ALJ), Suzanne B. Brown, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on November 1, 2, 3, 4, and 17, 2005, in Placentia, California.

Petitioner Student was represented by attorney Scott Ayers of the law firm Kamoroff & Associates. Legal assistant Douglas Jacobs was also present on Petitioner's behalf. Petitioner's parents, Mother and Father, each attended the hearing on Petitioner's behalf during portions of the hearing.[1] Student did not attend the hearing, except to testify briefly on the final hearing day.[2]

Respondent Placentia-Yorba Linda Unified School District (Placentia-Yorba Linda) was represented by attorney Daniel Harbottle of the law firm Ruttan & Tucker. Joan Akers, Placentia Yorba-Linda's Director of Special Education, attended the hearing on behalf of Placentia-Yorba Linda. Respondent Orange Unified School District (Orange) was

[1] At times neither Father nor Mother attended the hearing due to their respective work commitments, but indicated that the hearing could go forward in their absence, with Student's attorney present to represent Student.
[2] Student was eighteen years old at the time of the hearing. Student established, and there is no dispute that, Student signed his consent to permit his mother and the law firm of Kamoroff & Associates to represent his interests in this matter.

represented by attorney Cynthia Yount of the law firm Parker & Covert. William Gee, Director of Orange's Special Education Local Plan Area (SELPA), attended the hearing on Orange's behalf.

Petitioner called the following witnesses to testify: Judy Segal, speech-language pathologist; Dr. Christine Majors, licensed psychologist; Mother, Student's mother; Father, Student's father, and Student, the Petitioner.

Placentia-Yorba Linda called the following witnesses to testify: Dolores Kuper, Resource Specialist Program (RSP) teacher; Barbara Hartl, school psychologist; Matthew Stine, special education math teacher; Carol Collins, RSP teacher; and Laura Carvelli, school counselor.

Orange called the following witnesses to testify: Meredith Bittel, Designated Instruction and Services (DIS) Program Coordinator; Matthew Dale, teacher; Kimberly Smith, school psychologist; and Dr. Batia Swed, school psychologist and Coordinator for Special Education Services.

On May 18, 2005, the Petitioner filed a request for due process hearing with the California Special Education Hearing Office (SEHO). On May 23, 2005, the parties agreed to continue the matter. On July 1, 2005, the matter transferred from SEHO to OAH, and the case was assigned OAH case number N2005071105. Sworn testimony and documentary evidence were received at the hearing on November 1, 2, 3, 4, and 17, 2005. On December 5, 2005, the parties submitted written closing arguments by mail. Upon receipt of the written closing arguments, the record was closed on December 12, 2005, and the matter was submitted.

ISSUES[3]

1. Did Placentia-Yorba Linda deny Petitioner a Free Appropriate Public Education (FAPE) from May 18, 2002, through the end of the 2001-2002 school year, and for the 2002-2003 and 2003-2004 school years, by failing to:

    A. provide an appropriate placement;
    B. provide speech-language services, with appropriate goals and objectives in speech-language;
    C. have an audiologist conduct an auditory processing assessment for a central auditory processing disorder;
    D. conduct a mental health assessment;
    E. provide counseling services;

[3] For purposes of clarity and organization, the ALJ has reorganized Petitioner's issues as identified in Petitioner's Fourth Revised Issue Statement. While Petitioner's Issue Statements continually alleged violations that included the extended school year (ESY) sessions for every school year at issue, Petitioner never received, requested, or qualified for ESY services, and there is no contention that he should have received or qualified for ESY services. Thus, the present issues do not include the ESY for any of the school years at issue.

F. provide appropriate modifications for the classroom?

2. Did Placentia-Yorba Linda deny Petitioner a FAPE from May 18, 2002, through the end of the 2001-2002 school year by failing to provide appropriate goals and objectives in phonemic awareness?

3. Did Placentia-Yorba Linda deny Petitioner a FAPE for the 2002-2003 school year by failing to provide appropriate goals and objectives in reading?

4. Did Placentia-Yorba Linda deny Petitioner a FAPE for the 2003-2004 school year by failing to:

   A. conduct an appropriate triennial psychoeducational reassessment in December 2003;
   B. conduct a triennial reassessment in speech-language;
   C. reassess following the December 2003 psychoeducational reassessment?

5. Did Orange deny Petitioner a FAPE for the 2004-2005 school year by failing to:

   A. hold an interim Individualized Education Program (IEP) meeting within the 30-day timeline upon Petitioner's enrollment;
   B. allow parental participation in the November 30, 2004 IEP meeting;
   C. provide an appropriate placement;
   D. reassess following the December 2003 psychoeducational reassessment;
   E. have an audiologist conduct an auditory processing assessment for a central auditory processing disorder;
   F. conduct a mental health assessment;
   G. provide counseling services;
   H. provide appropriate modifications for the classroom?

6. Did Orange deny Petitioner a FAPE for the 2005-2006 school year by failing to:

   A. provide an appropriate placement;
   B. reassess following the December 2003 psychoeducational reassessment;
   C. have an audiologist conduct an auditory processing assessment for a central auditory processing disorder;
   D. conduct a mental health assessment;
   E. provide counseling services;
   F. provide appropriate modifications for the classroom?

FACTUAL FINDINGS

Jurisdictional Matters

1. Petitioner is an 18-year-old student who, during all time periods at issue in this matter, has continually been eligible for special education services under the category of Specific Learning Disability (SLD). During the 2001-2002, 2002-2003, and 2003-2004 school years, Petitioner was a resident within the boundaries of Placentia-Yorba Linda. During the 2004-2005 and 2005-2006 school years, Petitioner was a resident within the boundaries of Orange. He is currently attending school in the ACCESS program, which is operated by Orange County Department of Education (OCDE).[4]

Procedural Background

2. During a pre-hearing telephone conference on October 31, 2005, the ALJ addressed Respondents' motions to dismiss issues based upon the statute of limitations.[5] The ALJ ruled that Petitioner's Fourth Revised Issue Statement did not substantially amend issues which had been dismissed in previous OAH orders and, therefore, Petitioner's Fourth Revised Issue Statement was essentially a motion for reconsideration of OAH's prior dismissals. Thus, based upon OAH's earlier orders in this matter, the ALJ granted Respondents' motions to dismiss those issues. Immediately thereafter, Petitioner moved for reconsideration of the dismissal of the issues concerning Orange's failure to offer speech-language services. Petitioner did not identify sufficient grounds for reconsideration, and could not explain why he had not moved for reconsideration of the dismissal of the speech-language issues when those issues had been dismissed previously. For these reasons, the ALJ denied Petitioner's motion for reconsideration regarding dismissal of the speech-language issues.

Factual Background

Attendance at Placentia-Yorba Linda

3. For the 2001-2002 school year, Student attended eighth grade at Placentia-Yorba Linda's Tuffree Middle School (Tuffree). In January 2002, Student's IEP team convened for his annual IEP meeting. The team agreed to placement in Resource Specialist Program (RSP) classes for study skills and language arts, and placement in a Special Day Class (SDC) for math, for a total of 42 percent of his school day in special education.

4. For the 2002-2003 school year, Student attended ninth grade at Placentia-Yorba Linda's El Dorado High School (El Dorado). For the first semester, he attended RSP classes for math, language arts, and physical science, with the remainder of his time in

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[4] OCDE is not part of Orange Unified School District and is not a party to this matter.

[5] As discussed in prior orders issued by OAH in this case, OAH had previously dismissed several of Petitioner's issues, including issues concerning assessments, due to the statute of limitations.

general education. In December 2002, the IEP team agreed that Student would attend a general education physical science class for the second semester, due to a personal conflict with the RSP physical science teacher.

5. In January 2003, Student's IEP team convened for his annual IEP meeting for the 2002-2003 school year. The team agreed to continue Student's placement in RSP for two periods per day. For the 2003-2004 school year, Student attended tenth grade at El Dorado and continued to attend RSP classes in math and language arts.

6. In November 2003, school psychologist Barbara Hartl and special education math teacher Matt Stine conducted Student's triennial reassessment which entailed administration of the Wechsler Individual Achievement Test (WIAT) and review of previous cognitive testing and other records. In December 2003, the IEP team convened to review the results of the triennial assessment and conduct the annual IEP meeting. Mother and the other team members agreed to continue Student's placement in three RSP classes per day.

7. In January and February 2004, Student had disciplinary incidents at school, and problems with the coach and other players and the school football team on which he played. Mother was concerned about the kids with whom Student and his younger brother were spending time, and was also concerned that Student was being unfairly singled out by school personnel due to his race.

Removal from Placentia-Yorba Linda

8. In early March 2004, Mother voluntarily withdrew Student from El Dorado. She did not request that El Dorado offer Student a different placement or different services. On March 9, 2004, RSP teacher Matt Stine and school psychologist Barbara Hartl met with Student for an IEP meeting to confirm his withdrawal from school. The IEP meeting notes indicate that "[Mother] is withdrawing Student from El Dorado to home school him. He continues to maintain eligibility for special education." The IEP notes state that Mother waived attendance at the meeting, although the document contains her signature and check marks next to boxes indicating both her disagreement with the IEP and consent to Student no longer receiving special education services.

9. After withdrawing Student from El Dorado, Mother enrolled Student and his younger brother in the ACCESS program, an independent study program operated by OCDE. Student participated in the ACCESS program for the remaining months of the 2003-2004 school year.

Attendance at Orange's Canyon High School

10. In August 2004, Student and his family moved to a new residence within the district boundaries of Orange. On September 13, 2004, Student enrolled at Orange's Canyon High School (Canyon). On that date, Matt Dale, who was an RSP teacher at Canyon and was assigned as Student's case carrier, met with Student and Mother to arrange for Student's 30-

day interim special education placement at Canyon. Because the Orange staff did not have Student's previous IEP document from Placentia-Yorba Linda, the interim placement was developed based upon information provided by Mother and Student. The September 13, 2004 IEP provided that Student would attend RSP classes in English and science, and noted that an additional RSP class could be added "if parents/student feel more support is needed after trial period." The participants agreed to meet again in one month to review whether the program was appropriate for Student.

11. On October 15, 2004, the IEP team convened for the planned follow-up meeting and agreed to continue Student's placement in RSP for two periods per day. The team also agreed to classroom modifications including extra time on tests and use of organizational aids such as a graphic organizer and an assignment notebook.

12. In early November 2004, local police investigated possible gang activity at Canyon. As part of that investigation, the police interviewed and questioned Student about whether he was involved in gang activity or had any gang affiliations. Student and Mother were both very upset by this incident, and felt that the school and police were unfairly targeting him.

13. Over the course of Student's attendance at Canyon, school psychologist Kimberly Smith met with Student on a few occasions when he was upset, such as after the police interviewed him in early November, 2004. Ms. Smith suggested to Mother that Student receive additional counseling or a referral to Orange County Behavioral Health (OCBH) for mental health services, but Mother declined.

14. On November 29, 2004, RSP teacher Matt Dale met with Student to discuss Student's Individual Transition Plan (ITP) and IEP goals, in anticipation of Student's annual IEP review meeting scheduled for November 30, 2004. Mr. Dale arranged to meet with Student on November 29, so that Student would be able to attend a tutorial for his history class that was scheduled for the same time as the IEP meeting on November 30.

15. On the morning of November 30, 2004, Mother arrived at the IEP meeting at approximately 7:50 a.m. The meeting was scheduled for 8:00 a.m., and Mr. Dale was the only IEP team member in attendance when Mother arrived. Mr. Dale informed Mother that the other team members would be arriving in a few minutes, but said that the two of them could talk informally while they waited for the others to arrive.[6] During that discussion, Mother expressed her frustration and displeasure with Mr. Dale and with Canyon, including her beliefs that the school staff were trying to pressure Student to join the military and that the school staff had falsely identified Student a gang member because of his race. As their discussion continued, and before the meeting could formally begin, Mother became upset and left. During that discussion, two other members of the IEP team had arrived for the

[6] Mother's account of this meeting directly contradicts Mr. Dale's account on numerous key points. However, for reasons discussed further in Factual Findings 23 and 24, Mr. Dale's version of events was more credible than Mother's.

meeting. That evening, the school principal telephoned Mother and asked to reschedule the IEP meeting, but Mother did not agree. The following day, December 1, RSP teacher, Carole Stone, telephoned Mother to try to reschedule the meeting, but Mother told Ms. Stone not to contact her directly to contact Student's attorneys instead.

Removal from Canyon High School

16. On January 18, 2005, Student was suspended from school for four days for an incident wherein he allegedly "snapped" a female student's underwear and threatened to beat up her boyfriend. Orange attempted to schedule an IEP meeting to conduct a manifestation determination regarding this incident. Although Student's suspension lasted only until January 21, 2005, thereafter he did not return to Canyon and remained out of school.

17. On January 25 and 31, and February 15, 2005, Dr. Christine Majors conducted an independent neuropsychological evaluation of Student. She also referred Student to speech-language pathologist, Judy Segal, for a speech-language assessment, which Ms. Segal conducted in late February 2005.

18. Student's IEP team convened on February 7, 2005, with attorneys for both Petitioner and Orange in attendance. The topics discussed included a request by Mother and Petitioner's attorney, Scott Ayers, that Student transfer to another high school. Pursuant to that request, Orange agreed to locate an appropriate placement for Student at another Orange high school.[7] Orange again offered a referral to OCBH for a mental health assessment and services, but Mother did not agree to the referral. Orange proposed developing a behavioral plan for Student upon his return to school. The team agreed not to conduct the manifestation determination.

19. On February 18, 2005, the IEP team met to finalize Student's transfer to Orange's Villa Park High School (Villa Park). The team agreed that Student would continue to receive two periods of RSP per day at Villa Park. Mother informed the Orange staff that Student was being evaluated by an independent assessor, and that she agreed to continue RSP placement pending the IEP team's receipt and review of those assessment results.[8]

Removal from Villa Park

20. Student attended Villa Park for approximately four days. In early March, 2005, Student became upset upon learning that the District Attorney would be pressing charges against him for the January 2005, incident at Canyon. On March 3, 2005, Student was hospitalized due to psychiatric and behavioral problems, including reportedly threatening to kill himself and his mother. After Student's release from the hospital,

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[7] Mother also requested, and Orange agreed, that Student's younger brother would transfer to the new high school along with Student.

[8] There is no indication that Orange subsequently received the results of the independent educational evaluations, other than as part of the exchange of evidentiary exhibits required prior to the due process hearing.

approximately one week later, Mother sent him to live with relatives in northern California, where he received home schooling. Mother did not notify Orange of Student's withdrawal from school and did not make any request that Orange change the placement or services it offered to him.

21. In May 2005, Student had to return to southern California for a court appearance regarding the January 2005 incident. Student remained in Orange County; thereafter, Mother sought to enroll him in the ACCESS Program which is operated by OCDE.

22. On May 18, 2005, Petitioner filed a request for due process hearing in this matter. On June 16, 2005, Student's IEP team convened to discuss Student's placement. Mother indicated that she wanted Student to attend OCDE's ACCESS Program. She did not seek any placement or services from Orange.

Witness Credibility

23. While Mother seemed sincere in her testimony, her accounts of events were often unreliable, particularly when the school districts' employees offered entirely different, credible explanations regarding the same events. For example, Mother testified that, at an IEP meeting during Student's attendance at Orange, Mr. Dale told her that Student should quit school and join the Marines and that he had already contacted a Marine recruiter on Student's behalf. In contrast, Mr. Dale credibly testified that he never said any such thing, that he would never tell a student to quit school, and that he did not give Student's name to any Marine recruiters.[9] Mr. Dale recounted that he always advises students not to drop out of school because doing so would limit their opportunities later in life and also because school is "one of the last free things you'll ever get." Mr. Dale was a credible witness and his testimony on this topic was entirely believable, whereas Mother's account was so improbable that it was difficult to believe on its face.

24. For another example, Mother testified that the reason why Student was able to achieve near-passing scores on the California High School Exit Exam (CAHSEE) was that an RSP teacher read the test questions to him. In contrast, Orange school psychologist Kimberly Smith testified that this did not occur because students were not allowed to have the CAHSEE test questions read to them. In her position as a school psychologist for Orange, Ms. Smith is better informed than Mother about legal requirements for administration of the CAHSEE and how Orange implements those requirements. Moreover, Mother's assertion again sounded improbable. Hence, the ALJ found more credible Ms. Smith's testimony that Student achieved his score on the CAHSEE by reading the test questions himself, not by having the test questions read to him by an RSP teacher. Thus, as

[9] Student's individual transition plan (ITP) from El Dorado, developed before he ever met Mr. Dale, reflected Student's intention to contact a Marine recruiter prior to high school graduation. Matt Stine, Student's case carrier at El Dorado who helped Student develop that ITP, confirmed that the goal of joining the military came from Student himself.

exemplified by these two instances, Mother's testimony was often unreliable and, therefore, the ALJ found Mother's testimony on several topics to be less persuasive than testimony from many of the school districts' employees.

Student's Academic Needs

25. The basis for Student's SLD eligibility was a disorder in phonological awareness which resulted in a severe discrepancy between ability and achievement in reading and written language. His cognitive ability was in the borderline to below average range, with cognitive test results showing a full-scale IQ score of 78, 79, or 80. He had academic deficits in reading, writing, and math, and therefore needed remedial instruction related to those areas.[10] Like all special education students, he also needed to be involved in and advance in the grade-level general education curriculum. (See 34 C.F.R. § 300.347(a).)

Placentia-Yorba Linda Placement

26. For the period from May 2002, to June 2002, Student's attended two RSP classes and an SDC math class, with the remainder of his day in general education. When Student entered high school in Fall 2002, he attended three RSP classes, and otherwise attended general education classes. Because of the parent's December 2002, request to transfer Student to another science class, Student's program changed to two special education classes beginning in January 2003, and remained at that level through his withdrawal from El Dorado in March 2004. Throughout Student's attendance at Placentia-Yorba Linda, his IEPs contained goals and objectives in reading, writing, and math to address his needs in those areas.

27. Testimony from Student's special education teachers established that the smaller environment and slower pace of RSP was commensurate with Student's academic needs. Matt Stine, who was Student's case carrier and RSP math teacher at El Dorado, established that Student made progress on his IEP math goals, and that Student would sometimes assist other students in the class. Similarly, Carol Collins, who was Student's Language Arts teacher for both of his years at El Dorado, established that she worked with Student to address his reading comprehension and writing goals, and Student made progress on these goals, at a level average for the RSP students in his class.[11] Additionally, in her testimony, Ms. Collins established that Student was able to read the assigned materials. For example, Ms. Collins assigned Student a part when the class read the play "*Our Town*" and he was able to read his lines aloud without advance review of the material.

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[10] There was no evidence or contention of any significant change in Student's academic needs over the school years at issue.

[11] Ms. Collins is an experienced special education teacher who has a master's degree in communication handicaps. She has a multiple subject teaching credential, an RSP teaching credential, and credential for teaching communicatively handicapped students in an SDC.

Orange Placement

28. For the 2004-2005 school year, Student's October 15, 2004 IEP provided for his attendance at Canyon in RSP for two classes and general education for the remainder of his school day. His two RSP classes were in science and English. Mother indicated to the IEP team that Student did not need special assistance in math but, in any event, Student was not taking a math class that year because he had already taken the two years of math classes required for graduation. Matt Dale, Student's case carrier at Canyon, established that this IEP incorporated Student's prior goals from the Placentia-Yorba Linda IEP dated December 2, 2003, in anticipation that new goals would be developed at Student's next annual IEP meeting. As a general education service, Orange also assigned Student to an at-risk counselor.

29. Pursuant to Mother's request in February 2005, the IEP team agreed to change Student's placement. Pursuant to the IEPs of February 7, and February 18, 2005, Orange continued to offer Student the same type of academic program at a different Orange high school, Villa Park. Mrs. Mendoza withdrew Student from that placement in or about early March 2005. Although Orange has indicated that it continues to offer Student placement in RSP classes and general education classes at Villa Park neither, Mother nor Student, have expressed any interest in Student returning to attend school within Orange.

30. Matt Dale, who taught Student's RSP science class during Fall 2004, established that Student's academic level was appropriate for that class and indeed that he was among the academically stronger students in that class. However, because Student attended Canyon for such a short time, there is little evidence regarding whether he made any progress there. He completed only one academic quarter, with an academic grade point average (GPA) of 2.4 that included an "F" in history due to failure to turn in assignments. Student did not attend Canyon long enough to receive semester grades or be formally assessed. Mr. Dale established that Student's work quality and success in the classroom at Canyon varied significantly according to Student's moods and behaviors.

Appropriateness of Placements

31. The testimony and assessment report of Dr. Christine Majors did not demonstrate that Petitioner's placement at either school district was inappropriate. Dr. Majors was not familiar with Student's program at either school district and did not identify what aspects of the programs may have been inappropriate. Dr. Majors' position "whatever the school district did, it did not work" failed to establish that either program was inappropriate, particularly in light of the lengthy amounts of time Student was withdrawn from school, and evidence indicating that Student made some progress when he attended school. For example, in addition to his passing grades at school, comparison of Student's WIAT scores from 2000 and 2005 show that his grade-level equivalent scores increased in nearly every area, and the maintenance of his standard scores reflected that Student was keeping up with the WIAT's increased expectations for his chronological age. For generally

the same reasons, the testimony and report of Ms. Segal failed to establish that the placements at the school districts were inappropriate.

Classroom Modifications

32. Student's IEPs at Placentia-Yorba Linda provided for various modifications such as extra time on tests and use of tools such as a calculator and a graphic organizer. The testimony of Ms. Collins, Ms. Kuper, and Mr. Stine established that these modifications were implemented and available to Student. Similarly, Student's IEP at Orange also provided for modifications including extra time on tests, the opportunity to take tests in another setting, and use of organizational tools such as a graphic organizer. Mr. Dale established that these modifications were implemented and available to Student, although Mother told Orange staff that Student did not need to take his tests outside of the classroom and Student did not utilize that modification.

33. In light of the findings in the above paragraph, Petitioner's vague contentions regarding classroom modifications failed to establish that the modifications utilized by the Respondents were in any way inappropriate. Given that Dr. Majors and Ms. Segal were unfamiliar with the modifications used by the school districts, the testimony and reports of those witnesses did not even particularly support Petitioner's contentions on this point.

Speech-Language

34. A January 2001 speech-language assessment by Placentia-Yorba Linda established that Student had expressive and receptive language skills in the low average range commensurate with his cognitive abilities, although he demonstrated particular weaknesses in phonological awareness. Based upon these assessment results, the assessor concluded that Student's needs in phonological awareness could be addressed within his classes and without the need for one-to-one services, which would have constituted a more restrictive environment.

35. A February 2005 speech-language assessment by Judy Segal diagnosed Student with a mixed receptive/expressive language disorder and with abnormal auditory perception, pursuant to the Index of Communicative Disorders (ICD). Like Placentia-Yorba Linda's assessment, Ms. Segal concluded that Student had deficits in phonological awareness. Ms. Segal also found that Student's difficulties did not involve his speech, only his use of language, and recommended language therapy to address his language needs. However, one key distinction between the two assessments' conclusions is that the Placentia-Yorba Linda assessment determined that Student's deficits in language skills were commensurate with his cognitive skills, whereas Ms. Segal did not consider Student's cognitive levels and assumed that he had average cognitive abilities. As Orange's DIS program coordinator Meredith Bittel established, if a student's language skills are commensurate with his or her cognitive ability, then the student does not have a speech or language disorder. Moreover, while Ms. Segal recommended that Student receive language therapy, she did not know any specific information about what type of program Student had

been receiving at school, and thus did not consider whether his language needs were addressed within his school program. Considering all of the above, Petitioner failed to establish that Student had needs in speech or language that required DIS or IEP goals in those areas.

36. Ms. Bittel was a credible witness who was knowledgeable concerning speech and language topics in special education. She holds a bachelor of science degree in speech pathology/audiology and a master's of science in educational computing from Pepperdine University. She also holds an administrative services credential and a life restricted credential in speech/hearing, authorizing her to provide speech and hearing therapy and to teach students who have speech and language impairments. (See Cal. Code Regs,. tit. 5 § 80047.5, subd. (d).) Prior to becoming Orange's program coordinator for DIS, she spent fifteen years as an itinerant speech-language pathologist for Orange. Given Ms. Bittel's educational background and her extensive experience as a credentialed speech-language pathologist, Petitioner's contention that Ms. Bittel was unqualified to testify regarding speech and language was unpersuasive.

Assessment for Central Auditory Processing Disorder

37. The testimony of Dr. Majors and Ms. Segal recommending that Student be assessed by an audiologist for a central auditory processing disorder failed to establish that this was an area of suspected disability for Student. Preliminarily, the circumstances under which Ms. Segal subsequently added this recommendation in her testimony, despite the absence of the recommendation in her detailed assessment report, raised questions about the credibility of her recommendation. In any event, as Ms. Bittel explained, the factors cited by Dr. Majors and Ms. Segal, such as Student's history of ear infections, did not particularly suggest a central auditory processing disorder. Moreover, Ms. Bittel persuasively established that there is no consensus among professionals in the field regarding what constitutes a central auditory processing disorder, how to test for one or, if such a disorder can be diagnosed, how to treat one. Nothing in the IDEA, ICD or Diagnostic and Statistical Manual (DSM) defines or recognizes a central auditory processing disorder. Considering all of these factors, Petitioner failed to establish that this is an area of suspected disability for him.

Mental Health and Counseling

38. Student demonstrated some emotional and behavioral problems which appeared to be related to his anger regarding police and disciplinary incidents at Placentia-Yorba Linda in January 2004, and again at Orange in January 2005. On several occasions over the years, staff from both school districts had asked Mother about counseling for Student and/or suggested a referral to OCBH for a mental health assessment.[12] These occasions included a Placentia-Yorba Linda IEP meeting on September 21, 2001, discussions Orange school psychologist Kimberly Smith had with Mother in fall 2004, and an Orange

[12] Some evidentiary exhibits and testimony refer to the agency as OCBH, while others identify it as Orange County Mental Health (OCMH). The two names are used interchangeably to refer to the same agency.

IEP meeting on February 7, 2005. On all of these occasions, Mother declined the suggested referrals for mental health assessments.

Goals and Objectives in Phonemic Awareness for May-June 2002 at Placentia-Yorba Linda

39. Student's January 2002 IEP included a reading goal and a writing goal. Testimony from Student's eighth grade RSP Language Arts teacher, Dolores Kuper, established that these goals were appropriate to address his reading and writing needs. Ms. Kuper further established that she addressed Student's needs in phonemic awareness as part of his reading instruction, incorporating instructional techniques from programs including Language! and the Lindamood Bell LiPS program. In light of this evidence, Petitioner's contention that the IEP needed to include a specific phonemic awareness goal does not succeed.

Goals and Objectives in Reading for 2002-2003 School Year at Placentia-Yorba Linda

40. As determined in the preceding paragraph, the January 2002 IEP goals were appropriate to address Student's reading needs. For the latter half of the 2002-2003 school year, Student's January 17, 2003 IEP contained a goal to improve reading comprehension. Ms. Collins' testimony established that this goal was appropriate to address Student's needs in reading.

November/December 2003 Triennial Reassessment

41. As determined in Factual Finding 6, school psychologist Barbara Hartl and special education math teacher Matt Stine conducted Student's triennial reassessment in November 2005. His areas of suspected disability were academic achievement and cognitive achievement. Because there was no indication of change in Student's cognitive level, the assessment plan provided only for a review of records regarding cognitive ability, and did not provide for readministering cognitive testing during this reassessment. As noted above in Factual Finding 24, Student's cognitive test results from 2001 to 2005 are highly consistent, with full-scale IQ scores of 78, 79, or 80 on each administration, and Petitioner raises no argument to the contrary. Because the assessors could rely on the results of the prior cognitive testing, there was no need to readminister cognitive testing for the 2003 reassessment.

42. In a similar vein, there was no need to retest Student in speech or language. Pursuant to Factual Findings 34 and 35, Student did not need speech-language services, and there was no evidence to indicate that Student's needs related to speech or language had changed since the 2001 assessment. Thus, Petitioner failed to establish that speech-language was an area of suspected disability that should have been reassessed during the 2003 triennial reassessment.

43. To assess Student in the area of academics, RSP teacher Matt Stine administered the WIAT. Student's standard scores on that test increased in most areas as compared to his WIAT scores from 2000. Mr. Stine recalled that when administered the test, he allowed Student approximately thirty seconds to respond to each question. However, Dr. Majors testified that the WIAT manual only allows the student ten seconds to respond to each question. While the ALJ did not find persuasive Dr. Majors' recommendations about Student's placement, nevertheless Dr. Majors' testimony established that she is knowledgeable about the WIAT and other tests that she administers. In contrast, Mr. Stine has less experience and less familiarity with the WIAT. Thus, the ALJ finds that the WIAT only allows a student ten seconds to answer each question, and therefore Mr. Stine's administration of the WIAT to Student did not conform to the WIAT's instructions. Although not clearly established at hearing, it is possible that the nonconformity may have affected the reliability of the WIAT's results.

Appropriateness of Independent Educational Evaluation (IEE) by Dr. Majors

44. As discussed and reflected in Factual Findings 31 and 42, the ALJ did not find Dr. Majors' opinions persuasive. Nevertheless, Dr. Majors report and testimony established that she was generally knowledgeable about how to test for learning disabilities. It appears that she correctly administered standardized testing to Student, and there was no evidence or argument to the contrary. Dr. Majors testified that she recalled charging Mother approximately $4,000 or $4,500 for the evaluation. Despite a specific inquiry from the ALJ, Petitioner did not submit an invoice or other evidence establishing how much Mother paid for Dr. Majors' evaluation.

Subsequent Reassessment After December 2003

45. Petitioner does not allege any facts indicating that the school districts should have been on notice that conditions warranted reassessment of Student.[13] Student remained at Placentia-Yorba Linda for only a short time after the triennial, and nothing occurred during that time which would have notified staff that Student required reassessment. Similarly, nothing occurred prior to or during Student's brief attendance at Orange that would have indicated Student should be reassessed. Neither Mother nor Student ever requested reassessment. Indeed, the June 2005 IEP notes indicate that Student's attorney requested that no reassessment take place at that time. In light of all of this information, there is no evidence to support Petitioner's claim that conditions warranted reassessment following the November/December 2003 triennial.

[13] The factual finding in paragraph 41 concerning the technical nonconformity with test instructions during the November/December 2003 triennial does not establish or support a finding that conditions warranted reassessment of Student. Neither school district would have had reason to know of the technical error in the November/December 2003 triennial reassessment.

LEGAL CONCLUSIONS

Applicable Law

1. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA) and, effective July 1, 2005, the Individuals with Disabilities in Education Improvement Act (IDEIA), 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. (Cal. Educ. Code § 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, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1401(8)(IDEA 1997); 20 U.S.C. § 1402(9)(IDEIA 2004).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(25)(IDEA 1997); 20 U.S.C. § 1402(29) (IDEIA 2004).)

2. Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Cal. Ed. Code § 56031.) The term "related services" includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).) California Education Code section 56363, subdivision (a), similarly provides that DIS, California's term for related services, shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program."

3. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, 102 S.C. 3034, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*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 instructional and related services which are individually designed to provide educational benefit to the student. (*Id*. at 201.)

4. 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. Procedural violations may constitute a denial of FAPE only if the procedural inadequacies impeded the child's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); see *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

5. The Ninth Circuit Court of Appeal has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight…an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) However, the "snapshot" rule does not eliminate a school district's obligation to revise a student's educational program if it becomes apparent over the course of the school year that the student is not receiving any educational benefit.

6. Petitioner alleges that both Placentia-Yorba Linda and Orange failed to provide him with a FAPE substantively, and also alleges that Orange committed procedural violations which procedurally denied him a FAPE during the 2004-2005 school year. To determine whether the Respondents offered Petitioner a FAPE, the analysis must focus on the adequacy of each district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district's program was designed to address Petitioner's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that 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. Although not directly at issue in this case, school districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is 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); Cal. Ed. Code § 56031.)

7. Special education students must be reassessed every three years or more frequently, if conditions warrant, or if the pupil's parent or teacher requests a new assessment and that a new IEP be developed. (Cal. Ed. Code § 56381.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program for the student. (20 U.S.C. § 1414 (a)(2), (3); Cal. Ed. Code § 56320, subd.(e), (f).) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Cal. Ed. Code § 56320, subd. (a), (b).) When a parent disagrees with an assessment obtained by the public educational agency, the parent has the right to an independent educational evaluation (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. (Cal. Ed. Code § 56329, subd. (b).)

8. Petitioner has the burden of proving at an administrative hearing the essential elements of his claim. (*Schaffer v Weast* (2005) 546 U.S. ____ [126 S.Ct. 528, 163 L.Ed 2d 387].) However, regardless of the applicable burden of proof, or any presumptions regarding the appropriateness of an IEP, as discussed below, the Respondents established that they complied with the IDEA and offered a FAPE to Student.

Determination of Issues Regarding Placentia-Yorba Linda

Issue 1(A): Placement

9. As determined in Factual Findings 26, 27 and 31, the program addressed Student's needs and allowed him to make some educational progress. Hence, the placement Placentia-Yorba Linda offered Student constituted a FAPE. Moreover, on this issue and several others, Petitioner's evidence and arguments focused solely on the level of progress that Student actually made, instead of addressing whether the program was designed to address his unique needs and *reasonably calculated to lead to educational benefit*. (*Rowley* at 200.) This distinction is particularly important in the present case because Student's actual progress at school was often difficult to evaluate because of the lengthy periods in which his parent withdrew him from attending school. Additionally, it is significant that neither Petitioner's evidence nor arguments established what type of program the school districts arguably should have offered as an alternative to what was offered. It is incongruous for Petitioner to assert that in hindsight he cannot prove what type of program would have been appropriate for him, yet request that nevertheless the ALJ determine in hindsight that the offered programs were not appropriate for him.

Issue 1(B): Speech-language services and speech-language goals and objectives

10. As determined in Factual Findings 34 and 35, Petitioner did not establish that Student needed DIS or goals in speech-language. Hence, the absence of such goals or services did not deny him a FAPE.

Issue 1(C): Assessment for Central Auditory Processing Disorder

11. As determined in Factual Finding 37, Petitioner did not establish that a central auditory processing disorder was a suspected disability for him. The failure to assess Student in this area did not deny him a FAPE.

Issue 1(D): Mental Health Assessment

12. As determined in Factual Finding 38, while Student had some emotional and behavioral problems as of at least January 2004, Student's mother continually declined offers by both school districts to refer him for a mental health assessment. Because the Respondents offered this assessment, there was no denial of FAPE. In any event, Petitioner failed to establish why he should prevail on this denial of FAPE claim despite his refusal of mental health assessment or services.

Issue 1(E): Counseling Services

13. For the same reasons identified in Factual Finding 38 and Legal Conclusion 12, the absence of counseling services did not constitute a denial of FAPE.

Issue 1(F): Classroom Modifications

14. Pursuant to Factual Findings 32 and 33, the classroom modifications offered were appropriate and did not deny Student a FAPE.

Issue 2: Goals and Objectives in Phonemic Awareness for May-June 2002

15. Pursuant to Factual Finding 39, the IEP goals and objectives were appropriate and did not constitute a denial of FAPE.

Issue 3: Goals and Objectives in Reading for 2002-2003 School Year

16. Pursuant to Factual Finding 40, the IEP goals and objectives were appropriate and did not constitute a denial of FAPE.

Issue 4(A): November/December 2003 Triennial Reassessment

17. As determined in Factual Finding 43, the WIAT Student took during the November/December 2003 triennial reassessment was not administered in conformance with the test instructions provided by the producer of the test. While in some cases, a nonconformity could be essentially a harmless error, in the present case the nonconformity may have affected the reliability of the WIAT's results. Given that this was the only measure given to test Student's academic achievement at that time, the error in administering the WIAT had a significant effect on the validity of the triennial reassessment. Accordingly, Placentia-Yorba Linda has not demonstrated that the triennial reassessment was appropriate pursuant to the requirements of California Education Code section 56329, subdivision (a).

18. As determined in Factual Finding 44, Dr. Majors conducted an appropriate IEE. Thus, pursuant to the findings in the preceding paragraph, because Placentia-Yorba Linda's triennial reassessment was not appropriate, Student's mother is entitled to reimbursement from Placentia-Yorba Linda for the IEE conducted by Dr. Majors according to proof of amount paid. Pursuant to Factual Finding 44, the reimbursement amount shall not exceed $4,500.

Issue 4(B): Reassessment in Speech-Language

19. As determined in Factual Finding 42, Student did not need reassessment in speech-language. Therefore, Placentia-Yorba Linda did not deny Student a FAPE on this ground.

Issue 4(C): Failure to Reassess Following 2003 Triennial Reassessment

20. As determined in Factual Finding 45, conditions did not warrant Placentia-Yorba Linda reassessing Student in the months following the November/December 2003 triennial reassessment. Thus, this did not constitute a denial of FAPE.

Determination of Issues Regarding Orange

Issue 5(A): Failing to Hold an Interim IEP Meeting Within 30 Days of Enrollment

21. As determined in Factual Findings 10 and 11, Orange held an IEP meeting on October 15, 2004, following Student's initial enrollment on September 13, 2004. The October 15 meeting complied with Orange's obligation to hold an IEP meeting following Student's initial enrollment, and no procedural violation or procedural denial of FAPE occurred.

Issue 5(B): Failing to Allow Parental Participation in the November 30, 2004 IEP Meeting

22. As determined in Factual Finding 15, Orange had invited Mother and Orange teachers involved in Student's education to attend the IEP meeting on November 30, 2004, and Mother' failure to participate was due to her decision to leave the meeting before it began. Pursuant to these findings, no procedural violation occurred and no procedural denial of FAPE occurred.

Issue 5(C): Placement

23. As determined in Factual Findings 28, 29, 30, and 31, the placement addressed Student's needs and allowed him to make some educational progress. Hence, the placement that Orange offered Student constituted a FAPE. As discussed further under Issue 1(a), Petitioner's position on this point was entirely unpersuasive.

Issue 5(D): Failure to Reassess Following 2003 Triennial Reassessment

24. As determined in Factual Finding 45, conditions did not warrant Orange reassessing Student. Thus, the failure to reassess Student did not deny him a FAPE.

Issue 5(E): Assessment for Central Auditory Processing Disorder

25. As determined in Factual Finding 37, Petitioner did not establish that a central auditory processing disorder was a suspected disability for Student. Hence, the failure to assess Student in this area did not deny him a FAPE.

Issue 5(F): Mental Health Assessment

26. As determined in Factual Finding 38, while Student had some emotional and behavioral problems as of at least January 2004, Student's mother continually declined offers by both school districts to refer him for a mental health assessment. Because the Respondents offered this assessment, there was no denial of FAPE. In any event, Petitioner failed to establish why he should be able to prevail on this denial of FAPE claim despite his mother's rejection of the mental health assessment.

Issue 5(G): Counseling Services

27. For the same reasons identified in Factual Finding 38 and Legal Conclusions 12 and 13, the absence of counseling services did not constitute a denial of FAPE.

Issue 5(H): Classroom Modifications

28. Pursuant to Factual Findings 32 and 33, the classroom modifications offered were appropriate and did not deny Student a FAPE.

Issue 6: FAPE for the 2005-2006 School Year

29. As determined in Factual Findings 20, 22, and 29, Mother voluntarily withdrew Student from Orange and did not seek any different placement or services from Orange. Given that Student was voluntarily withdrawn from Orange for the 2005-2006 school year and did not seek placement within Orange during that year, Orange had no obligation to offer him a FAPE. (See 34 C.F.R. § 300.454.) Thus, Petitioner's claim concerning the 2005-2006 school year does not succeed.

ORDER

WHEREFORE, THE FOLLOWING ORDERS ARE MADE:

31. Petitioner shall submit to Placentia-Yorba Linda proof of the cost of Dr. Majors' evaluation. Upon receipt of such proof, Placentia-Yorba Linda shall reimburse Mother for the cost of Dr. Majors' evaluation in an amount not to exceed $4,500.

32. All of Petitioner's other requested relief is denied.

Prevailing Party

33. Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute:

Petitioner prevailed only on Issue 4(a) against Placentia-Yorba Linda, and obtained the limited remedy of reimbursement for an IEE. Respondents prevailed on all other issues.

Right To Appeal Decision

34. 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. (Cal. Ed. Code § 56505, subd. (k).)

Dated: January 19, 2006

SUZANNE B. BROWN
Administrative Law Judge
Office of Administrative Hearings
Special Education Division