

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

In the Matter of:

STUDENT,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2006010961

DECISION

Eileen M. Cohn, Administrative Law Judge, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on May 22 – 24, 2006, at the offices of the Los Angeles Unified School District (District) in Los Angeles, California.

Petitioner Student (Student) was represented by David J. Kim, Attorney at Law, of ADAMS ESQ. Parent was present with Student, his twin brother and his two-year-old sister, the first day of the hearing.

Respondent Los Angeles Unified School District (District) was represented by Deborah J. Unger, Attorney at Law, of Miller Brown & Dannis. Susan Glickman, Due Process Coordinating Specialist for the District, was present on District's behalf during certain portions of the hearing. Other District personnel were occasionally present at the hearing on behalf of the District.

Student's due process hearing request was filed on January 25, 2006. On March 23, 2006, OAH granted District's motion to continue the due process hearing.

At the hearing, oral and documentary evidence were received.¹ At the conclusion of the hearing on May 24, 2006, the parties waived the statutory deadline for issuance of a decision to allow time for the parties to submit written argument. The parties stipulated that they would submit closing briefs to OAH no later than close-of-business, June 16, 2006. The parties further stipulated that the Administrative Law Judge would have until July 7, 2006, to issue her decision. Closing briefs were timely filed by Student and District. The record was then closed and the matter was submitted for decision on June 19, 2006. On June 30, 2006, the Administrative Law Judge re-opened the record to take official notice of two public documents: A certified and executed copy of the Modified Consent Decree entered in *Chanda Smith, et al v. Los Angeles School District, Case No. CV93-7044-RSWL*, and a copy of District's objectives in compliance with the Modified Consent Decree set forth on its web-site.² The parties agreed to extend the deadline for issuance of the decision to July 14, 2006.

ISSUES

1. Whether District failed to fulfill its "child find" obligations.
2. Whether District failed to assess Student in all areas of suspected disability.
3. Whether District denied Student a free and appropriate public education (FAPE) from October 12, 2005, until January 23, 2005, by failing to design and provide an educational program to meet his unique and individual needs.
4. Whether the District violated the procedural rights of Student's Parent by failing to provide sufficient prior written notice of its refusal to evaluate Student, or by failing to provide copies of Student's educational records.
5. Whether, as a consequence of District's actions in 1-4 above, Student is entitled to :
 - A. an independent educational evaluation at public expense; and/or
 - B. compensatory education.

¹ By agreement of the parties and to further judicial economy, this hearing was heard simultaneously with the hearing in the matter of *Student v. Los Angeles Unified School District*, OAH CASE NO. N2006010962. The students in these cases are twins who were enrolled together in the same District elementary school. The cases were filed at the same time and involve the same parties, counsel, and witnesses. With few exceptions, each witness testified to general matters applicable to both Students, and then submitted to direct and cross-examination, re-cross, rebuttal, as to each Student, beginning with OAH CASE NO. N2006010961 and concluding with OAH CASE N2006010962. District's opening argument applied to both Students. Documents were marked and admitted for each Student.

² The Administrative Law Judge took official notice of a certified copy of the Modified Consent Decree of March 16, 2003 in *Chanda Smith, et al v. Los Angeles School District, Case No. CV93-7044-RSWL*, and District's objectives regarding the Modified Consent Decree which it obtained from the District's web-site. The Order, Modified Consent Decree and the District's objectives were marked and added to the record of OAH CASE NO. N2006010961 and OAH CASE NO. N2006010962.

FACTUAL FINDINGS

Jurisdiction

1. Student is a five-year-old African American twin boy, born July 18, 2000. In 2002, when Student was two years old, Parent's Aunt, a social worker in Northern California, was awarded custody of Student as a foster parent. On October 1, 2005, when he was five years old, Student was reunited with Parent in Los Angeles. On October 12, 2005, Parent enrolled him in kindergarten at Manhattan Elementary School (Manhattan), a District school. Student attended Manhattan from October 12, 2005, through October 26, 2005. Until January 23, 2006, Student lived with Parent within the jurisdictional boundaries of the District. On January 24, 2006, Parent moved with Student to a new residence in Long Beach, California, and was no longer within the District's boundaries.

Assessment

2. On October 12, 2005, about five weeks after the beginning of the 2005-2006 school year, Parent completed the necessary paperwork and enrolled Student in kindergarten. As required, Parent provided Manhattan with Student's immunization record and health history. Parent filled out the form for Student's health history. Parent indicated on the form that Student did not have any medical problems during his lifetime. Parent represented that Student's birth was uncomplicated and Student did not suffer from any illnesses during the first two weeks of life. In addition, under the category of developmental history, Parent affirmed that Student likes school, enjoys learning, likes other children, follows directions and sleeps well. On the same form, Parent also denied that Student had temper tantrums, seemed overactive, or wet his bed.

3. On Wednesday, October 12, 2005, Student was placed in a general education, full-day kindergarten class with one teacher and twenty students. Student was present at Manhattan a total of 11 days. Student began school on Wednesday and attended kindergarten three days his first week, five days his second week, and three days his last week. Student last attended Manhattan on Wednesday, October 26, 2005.

4. It was quickly apparent to Parent and school personnel that Student was having problems in kindergarten. Shortly after Student enrolled, Parent had a conversation with the principal, Ms. Shirley Gideon (Principal Gideon) about Student's difficulties in school. Parent told Principal Gideon that her social worker recommended that Student be assessed. Principal Gideon told Parent that Student needed time to adjust to school.³

³ Parent insisted that she disclosed to Principal Gideon private information about Student during this conversation. Parent spoke passionately and forthrightly about her discussions with Principal Gideon. She also freely volunteered that her later contacts with the Principal were strained and emotionally charged. She did not hesitate in responding to questions and appeared to be doing her best to give the most accurate recollection of events, which was difficult since she had to testify about Student during a time when his twin was experiencing similar problems. However, at times her recollection was not consistent with the documents she submitted to Manhattan about Student's developmental history.

5. Student's behavior did concern his kindergarten teacher. On three occasions Student's behavior was significantly aberrant to his teacher and she referred him to Manhattan's administrators. Each time Student was referred, Parent came to Manhattan to take Student home.

6. The first teacher referral, Monday, October 17, 2005, read: "Ms. Gideon, [Student] scratched an adult, drew blood. Please call parent. Adult went to nurse."

7. Parent attended parenting classes and received other therapeutic support services for her, Student and Student's siblings at Shields for Families (Shields). Shields provides counseling, therapeutic and crisis intervention services for individuals, children, and families. Shields operates a therapeutic nursery day treatment program for children. Shields is under contract with the Los Angeles County Department of Mental Health (LACDMH) to provide services. Shields also has been retained by the District to train classroom teachers on effective management of children with emotional and behavioral difficulties. At the time of the first teacher referral, Shields' counselors requested a meeting with Principal Gideon and Assistant Principal Hale. At the meeting, Shields' counselors explained Shields' programs for Parent, Student and his siblings.⁴ The counselors explained that they were working on issues concerning the whole family, including Parent's successful reunification with her children. The counselors further explained that Parent was attending parenting classes four days a week. They also described Student's current therapeutic program at Shields. Finally, the counselors provided details of additional programs Shields had available for Student that would assist Manhattan in its management of Student's behavior. In addition to discussing Shields' programs, the counselors and Parent inquired whether Parent could sit in class with Student. However, Parent had a two-year-old daughter. Principal Gideon refused to allow Parent to sit in the class with her daughter because District policy barred the presence of children on campus that were not school-aged.

8. On October 18, 2005, Parent submitted a written referral for a special education assessment. She became concerned about Student's behavior as a result of the information she received from the school. Parent's counselors at Shields provided her with a form letter to complete. Parent dated and addressed the form letter to Principal Gideon and supplied Student's name, her name, address, home phone number and cell phone number. In the form letter Parent stated:

I am the Parent of [Student], who currently is enrolled at your school. My child has not been doing well in school and I am concerned about his educational progress.

I am writing to make a referral for assessment for special education services for my child. I am requesting that he/she be

⁴ Two Shields' counselors attended meetings with Manhattan's administrators as advocates for Student and his siblings. One counselor focused on Student and his five year old twin brother, and the other counselor focused on Parent's seven year-old twins, who also attended Manhattan.

given a comprehensive assessment by the school district and that an IEP meeting be scheduled for him. I believe that my child needs mental health services as part of his/her educational program. Therefore, as part of this assessment, I am requesting that you refer my child under the provisions of AB3632 to the County of Department of Mental Health.

9. On Thursday, October 20, 2005, Student was referred to the Principal a second time due to his behavior. Student's teacher noted:

[Student] [r]efuses to obey playground adults when asked to return to classroom, is playing outside, yelling in windows, calling his mother from behind the bungalow, etc. knocking and running from the door, etc., etc.

10. A third teacher referral note, written Monday, October 24, 2005, read: "Ms. Gideon- [Student] (Twin – New Student) pulled down [pupil's] pants in the boy's restroom, "TWICE." [Pupil] pulled them up and [Student] pulled them down again." (name of Student and pupil omitted).

11. On October 24, 2005, Principal Gideon and Assistant Principal Hale had a second meeting with Shields' counselors. By this point, Parent was having great difficulty communicating with Principal Gideon. Everyone was extremely frustrated with the situation. Parent felt she was having a "melt down." While Shields' counselors were in the classroom speaking with the principal and assistant principal, Parent was being called to the office to pick up Student and his twin, who were referred to the office by their teachers. Shields met with the administrators because they were concerned about Parent's readjustment and progress as a parent. Shields' counselors discussed the advantages of placing Student with his twin at Shields' therapeutic facilities so that the whole family could be together. The administrators offered Shields' counselors the opportunity to sit in class with Student.

12. On October 24, 2005, Parent had a heated confrontation with Principal Gideon. Principal Gideon told her not to bring Student (or his twin brother) back to school. She said: "Get them out of here. I'm not babysitting them any longer. I'm sick of this. I don't care what you do with them." Parent repeated that she needed help with an evaluation and reminded principal that she requested an assessment. The principal told her that an assessment takes time and it does not happen overnight.

13. Student last attended Manhattan on October 26, 2005. On that day, Parent enrolled Student in Shields' therapeutic nursery. Parent placed Student at Shields because she believed that the principal did not want him at Manhattan. She was also having difficulty attending parenting classes at Shields because she was being called to Manhattan to pick up Student or his twin. Shields initially viewed Student's enrollment as a temporary solution

until Student's problems at Manhattan were resolved. Shields offered a therapeutic setting without kindergarten-level academics. Student first attended Shields on October 31, 2005.

14. By law, District's response to Parent's special education assessment request was due no later than November 2, 2005. When Parent arrived at the main office that day, Principal Gideon was unavailable and had not yet signed the response. Assistant Principal Hale showed Parent the unsigned response and offered it to her with the procedural guidelines. Parent refused to take the documents and insisted on meeting with principal. On November 3, 2005, Parent met with Principal Gideon. Parent asked the principal to sign and date the response. The principal refused. Principal Gideon said "these kids are out of control" and insisted that she would not sign the document until she spoke with "the Board." Parent told her she would wait for her to telephone "the Board." Principal Gideon did not call "the Board," but still refused Parent's repeated request to sign and date Manhattan's response. Parent left the office with the unsigned response. Principal Gideon did not give Parent the procedural safeguards. Parent called District's complaint unit not long after that day. By the time the District contacted her, she had retained an attorney and did not attempt to speak with the District directly again.⁵

15. District's response to Parent's assessment request was prepared on a District-issued form. District's stated rationale for its refusal to assess Student was "Student has limited school experience [and] [n]o evidence of interventions used previously. On the form the District states in relevant part:

This notice includes a description and explanation of the decision and description of other options that have been considered. It also includes a description of information used as a basis for the decision and any other factors that are relevant (interventions, modifications, supporting data, etc.).

In a section entitled "Documentation Used to Make the Decision" the District form included blank boxes next to the applicable documentation. Assistant Principal Hale checked off the following categories: review of student records, health medical records, observations, teacher reports, attendance records. She did not check off the box next to Student Success Team. As it was Parent's initial referral for assessment, the boxes next to the categories of state and district assessments, psychoeducational reports were also left blank.

16. The response of Manhattan's administrators to Parent's special education referral was contrary to District's policies and practices. District's psychological field coordinator, Ms. Patricia Ann Morales, (Ms. Morales), testified about District's special education assessment practices. District does not assess for special education where it has convened a Student Study Team (SST). Like the IEP team, the SST comprises

⁵ Principal Gideon insisted that she provided Parent with the procedural safeguards. Her refusal to sign Manhattan's response to Parent's special education referral casts doubt on her version of her last interaction with Parent.

knowledgeable school personnel, including the school psychologist. The SST, after consultation with the parent, could choose to delay the requested assessment. Instead of assessing the Student immediately, the SST would apply general education behavior intervention techniques and “watch and monitor” Student to determine whether the techniques worked.

17. Manhattan never convened a SST for Student. Manhattan never discussed with Parent delaying the assessment or convening a SST. Instead, Assistant Principal Hale made a unilateral determination for the District that an assessment was not appropriate until behavior intervention techniques were applied. Assistant Principal Hale instructed the general education teacher to apply recognized and appropriate methods of behavior modification to control Student’s behavior. She spoke twice with the classroom teacher about Student’s behavior before finalizing Manhattan’s response to Parent’s referral for a special education assessment. She was satisfied that behavior intervention techniques were working because when she consulted with Student’s teacher, she was told that the teacher was successfully using behavior interventions and was not having problems with Student.⁶ However, Assistant Principal Hale did not know the date of her last conversation with Student’s teacher. The last teacher’s referral was dated October 24, 2005, two days before Student enrolled in Shields and left the school.

18. Contrary to District’s policy of using a team approach through a SST to “watch and monitor” Student’s behavior, Assistant Principal Hale alone determined that Student’s behavior did not warrant an assessment. She did not rely upon Manhattan’s school psychologist. Without the advice of the school psychologist, she concluded that his teacher’s referrals, individually or collectively, were not indicative of a sustained behavioral problem. The school psychologist did not observe Student, interview Student’s teachers or review his teacher’s referrals. Assistant Principal Hale did not show the school psychologist the teacher’s referrals. Assistant Principal Hales’ conversation with the school psychologist was very brief. Assistant Principal Hale told the school psychologist that a parent had made a special education request. She told the school psychologist she was looking at Student’s health history and preparation for school (“school readiness”) as well as “appropriate” interventions.⁷

19. District’s refusal to assess Student was also inconsistent with District’s policies aimed at preventing the over-identification of African Americans as emotionally disturbed. District’s special education guidelines caution against testing procedures which result in the identification of disproportionate number of African American pupils as emotionally disturbed. District entered into a Modified Consent Decree, (the Decree), effective May 16, 2003 to settle a class action lawsuit, entitled *Chanda Smith, et al v. Los Angeles School District, Case No. CV93-7044-RSWL*. The Decree required the collection of data during the 2003-04 school year to

⁶ Student’s classroom teacher did not testify.

⁷ Manhattan’s school psychologist did not testify. Ms. Morales, District’s psychological field coordinator, testified in her place.

determine whether African-American pupils were disproportionately identified as emotionally disturbed. (*Ibid.* at p. 13-14.) The Decree also instructed the Independent Monitor to review the data and determine whether a performance outcome should be established.⁸ The Decree did not discharge District's obligation to assess pupils *suspected* of having a disability.

20. Manhattan recorded Student's attendance until December 1, 2005. From December 16, 2005 through January 8, 2006, Manhattan was in recess. Student attended Shields' therapeutic nursery for approximately four months, from October 31, 2005 until February, 24, 2006, one month after Student left the District. Manhattan did not follow-up on Student's progress at Shields after he left Manhattan. Assistant Principal Hale did not know Student was attending Shields' therapeutic nursery until after Student's due process complaint was filed.⁹

21. Ms. Ragon Duffy, (Ms. Duffy), Shields' Therapeutic Nursery Coordinator, personally observed Student throughout Student's time at Shields.¹⁰ Student qualified for Shields' therapeutic nursery because his behavior was severe enough to warrant intervention services through LACDMH. Duffy had anticipated a full year of day treatment for Student. Shields obtained approval from LACDMH for Student's treatment every three months. At the time Student left Shields he had been approved for his second three month cycle of treatment. Student left Shields before he met his treatment goals.

22. On November 10, 2005, Shields referred Student to a psychiatrist for a psychiatric medication evaluation and treatment. Student was diagnosed with Post-Traumatic Stress Disorder. On November 16, 2005, he was placed on medication to control hyperactivity, impulsive outbursts, anxiety and Post Traumatic Stress Disorder flashbacks. He was also given medication to control bedwetting.

⁸ After the data was collected, the District developed a "performance outcome", which became the final of eighteen outcomes required by the Decree. The performance outcome requires that "no later than, June 30, 2006, ninety percent of African American students identified as emotionally disturbed during an initial or triennial evaluation, will demonstrate evidence of a comprehensive evaluation ... and consideration for placement in the least restrictive environment."

⁹Parent's Due Process Complaint (Complaint) was prepared by her attorney. It indicated that Student was diagnosed with depression and attention deficit disorder (ADD). District was served with the Complaint in late January, 2006. After receiving the Complaint, District proposed assessing Student. District claims that it proposed the assessment plan after it learned of the ADD diagnosis in the Complaint. Parent did not present any evidence that Student in fact has ADD. District proffers evidence that it offered to assess Student once it found out about the ADD to show that its denial of Parents special education referral was reasonable. District's post-litigation offers are not probative of its pre-litigation decision-making. Moreover, District's settlement offers and communications, including communications with Parent or Parent's counsel at the resolution session, are confidential and inadmissible to prove the invalidity of Parent's claim. (Evid. Code §1154.)

¹⁰ Ms. Duffy was qualified to testify about Student's behavior. She is a licensed clinical social worker. She was responsible for planning, structuring, overseeing and implementing all interventions within the nursery day treatment program, including behavior modification, and social skills training. She was also responsible for all intakes, assessments, diagnoses and treatment planning. Ms. Duffy designed and taught a general education teacher training program for District elementary schools. The training program focused on effective classroom management of pupils with emotional and behavioral difficulties.

23. It was clear after Student's first week at Shields, that his behavior was not the result of an adjustment disorder arising from his Parent's custody, his new school, or his subsequent transition to Shields. Shields was also aware that Student had been in therapy previous to his arrival at Shields. Consequently his behaviors were not the result of recent changes to his environment, but indicative of a chronic problem. Student did not have a problem adjusting to new situations. Student was not shy, and he easily bonded with female authority figures. Student's behavior was not typical for a five year old boy. The frequency and severity of Student's behaviors and his demonstrated lack of remorse, clearly were not typical. Shields' therapeutic nursery had a low staff-pupil ratio. Three staff persons attended twelve children. Shields could "barely handle him" with three teachers for twelve children. It was apparent that Student would be an extraordinary burden to a general education teacher responsible for Student and nineteen other pupils.

24. Throughout his time at the therapeutic nursery, Student was disruptive, aggressive, impulsive, attention-seeking and needy. Anytime he was frustrated Student would react without warning with extreme physical aggression, and would often have to be physically restrained so that he would not harm other pupils. He would try to inflict serious injuries on other pupils at the slightest provocation. In one instance, he went directly for a pupil's stitches. If his needs were not attended to immediately, he would sulk, withdraw or run from the group. He exploded in a tirade of name calling for no discernable reason. It was not uncommon for Student to have several temper tantrums within an hour. Student needed constant one-on-one attention. Ms. Duffy used a variety of behavior interventions to control Student's behavior. The behavior interventions did not have a consistent or lasting impact on Student. Student left Shields after four months with substantially the same behavior problems he had when he arrived at Shields.

25. On March 14, 2006, the school psychologist for Long Beach Unified School District (Long Beach) prepared a psychoeducational assessment of Student. The school psychologist determined that Student qualified for special education services under the category of emotional disturbance.

26. Long Beach held an Individual Education Plan (IEP) meeting on March 20, 2006. Parent attended. She agreed with the District's identification of Student as emotionally disturbed. Long Beach proposed placing Student in a special day class.

Student Records

27. Parent, through her attorney, requested Student's records on November 30, 2005. Assistant Principal Hale was responsible for responding to the document request. She received Parent's request on November 30, 2005. Manhattan responds to requests within five calendar days. Assistant Principal Hale contacted Parent's attorney to confirm that they were responding to the request. Manhattan had a limited number of documents, provided to them by Parent, which included the medical and developmental history, Student's attendance record, and the teacher referral notes. With the exception of the teacher referral notes,

District timely responded to Parent's document request. The teacher referral notes were sent later, on February 15, 2006, after they were located in Principal Gideon's office.

LEGAL CONCLUSIONS

Applicable Law

1. Under the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. §1412 (a) (1) (A); Ed. Code §56000 et seq.) The term "free appropriate public education" means special education and related services that are provided at public expense and under public supervision and direction, that meet state educational standards, and conform to the student's individualized education program (IEP). (20 U.S.C. §1401(8); Cal. Code Regs., tit. 5, §3001, subd. (o).) Special education is defined in pertinent part as specially-designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, whose educational needs cannot be met with modification of the regular instruction program. (20 U.S.C. §1401(25); Ed. Code, §56031.) This right to FAPE arises only after a student is assessed and determined to be eligible for special education.

2. The IDEA and state law imposes upon each school district the duty to actively and systematically identify, locate, and assess all children with disabilities or exceptional needs who require special education and related services, including children with disabilities who may be homeless or migrant, wards of the state, or not enrolled in a public school program. (20 U.S.C. §1412(a)(3); 34 C.F.R. §300.125; Ed. Code §§56300, 56301.) This statutory obligation of a school district to identify, locate, and assess children with disabilities is often referred to as the "child find" or "seek and serve" obligation and applies also to children who are suspected of having a disability and in need of special education even though they may be advancing from grade level to grade level. (34 C.F.R. §300.125(a)(2).) A state must ensure that these child find duties are implemented by public agencies throughout its jurisdiction as part of its general obligation to ensure that FAPE is available to all children with disabilities who reside within the state. (34 C.F.R. §300.300(a)(2).)

3. A referral for a special education assessment means any written request for assessment to identify an individual with exceptional needs made by a parent, teacher, or service provider of the individual. (Ed. Code §56029, subd. (a)-(b).) All referrals for special education and related services shall initiate the assessment process and shall be documented; when a verbal referral is made, staff of the school district or special education local plan area shall offer assistance to the person in making a request in writing. (Cal. Code Regs., tit. 5, §3021, subd. (a).) All school staff referrals shall be written and include a brief reason for the referral and documentation of the resources of the regular education program that have been considered, modified, and when appropriate, the results of intervention. This documentation shall not delay the time-lines for completing the assessment plan or assessment. (Cal. Code Regs., tit. 5, §3021, subd. (b).) Upon initial referral for assessment, parents shall be given a

copy of their rights and procedural safeguards. (Ed. Code §56301, subd. (c).) A pupil shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code §56303.)

4. A school district shall develop a proposed assessment plan within 15 calendar days of referral for assessment, unless the parent agrees in writing to an extension (Ed. Code §56043, subd. (a)), and shall attach a copy of the notice of parent's rights to the assessment plan (Ed. Code §56321, subd. (a)). A parent shall have at least 15 calendar days from the receipt of the proposed assessment plan to arrive at a decision whether to consent to the assessment plan. (Ed. Code §56403, subd. (b).) A school district cannot conduct an assessment until it obtains the written consent of the parent prior to the assessment (unless the school district prevails in a due process hearing relating to the assessment); assessment may¹¹ begin immediately upon receipt of the consent. (Ed. Code §56321, subd. (c).) Thereafter, a school district must develop an individualized education program required as a result of an assessment no later than 60 calendar days from the date of receipt of the parent's written consent to assessment, unless the parent agrees in writing to an extension. (Ed. Code §56043, subd. (d).) The 60 day period does not include days between regular school sessions, terms, or school vacation in excess of five schooldays. (Ed. Code §56043, subd. (f)(1)).

5. A school district must insure that a full and individual initial evaluations are conducted for each pupil being considered for special education and related services (1) to determine if the child is a "child with a disability" and (2) to determine the educational needs of the child. (34 C.F.R. §300.320.) Before any action is taken with respect to the initial placement of an individual with exceptional needs in special education instruction, an individual assessment must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area ." (Ed. Code §§56320, subd. (g), 56322; see 20 U.S.C. §1414(b)(3)(B)(ii).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code §56324.) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. §12414(a)(2), (3); Ed. Code §56320, subd. (a), (b).)

6. Reassessment of a pupil shall occur not more frequently than once a year, unless parent and the local educational agency agree otherwise in writing, and shall occur at least once every three years, unless the parent and the local educational agency agree, in writing, that a reassessment is unnecessary. If parent disagrees with the assessment obtained

¹¹ California law refers to the "assessment" of a pupil (Ed. Code §56320) while federal law refers to the "evaluation" of a child (20 U.S.C. §1414(a).) These terms mean the same thing. (See express reference to "Section 1414 of Title 20 of the United States Code" in Education Code section 56320.)

by the local educational agency, parent has the right to obtain an independent educational assessment of the pupil from a qualified specialist, at public expense; however, if the local educational agency shows at a due process hearing that its assessment was appropriate, a parent is not entitled to receive reimbursement. (Cal. Ed. Code § 56329, subd. (b).)

7. In order to be eligible for special education services, a student must have one or more specific disabilities. (20 U.S.C. §1401(3)(A); 34 C.F.R. §300.7(a)(1); Ed. Code, §56026, subd. (a); Cal. Code Regs., tit., 5, §3030.) For purposes of special education eligibility, the term “child with a disability” means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, require instruction, services, or both, which cannot be provided with modification of the regular school program. (20 U.S.C. §1402(3)(A)(ii); 34 C.F.R. §300.7(a).) Similarly, California law defines an “individual with exceptional needs” as a student who is identified by an IEP team as “a child with a disability” pursuant to 20 U.S.C. section 1402(3)(A)(ii), and who requires special education because of his or her disability. (Cal. Ed. Code §56026, subd. (a), (b).) California Code of Regulations, title 5, section 3030 includes a list of conditions, referred to in the regulation as impairments, that may qualify a pupil as an individual with exceptional needs and thereby entitle the pupil to special education if required by “the degree of the pupil’s impairment.”

8. Where African-American children are suspected of being emotionally disturbed, the IDEA acknowledges that “[g]reater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.” (20 U.S.C. §1400(c)(12)(A).) The IDEA expressed concern that “African-American children are identified as having mental retardation and emotional disturbance at rates greater than their White counterparts.” (*Id.* at §1400(c)(12)(C).)

9. To guarantee parents the ability to make informed decisions about their child’s education, the IDEA grants parents of a child with a disability the right to examine all relevant records relating to their child’s “identification, evaluation and educational placement.” (20 U.S.C. §1415(b)(1).) Parents may also request copies of records if failure to provide such copies would effectively prevent parents from exercising their right to inspect and review the records. (See C.F.R. §300.562(B)(2).) In addition to the right and opportunity to examine school records, all parents have the right to receive copies of all school records within five days after such request is made by the parent. (Ed. Code §56504.) Parents are also entitled to receive prior written notice, when a local educational agency refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child. (20 U.S.C. §1415(b)(3); 34 C.F.R. 300.503.)

10. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE unless a procedural violation impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. §1415(f)(3)(E)). (See Cal. Ed. Code § 56505, subd. (j)) (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley, supra*, 458 U.S. at 206-07; see also *Amanda J. v. Clark County School Dist.*, 267 F.3d 877 (9th Cir. 2001).) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP formulation process are insufficient to support a finding that a pupil has been denied a free appropriate public education. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23*, 960 F.2d 1479, 1482 (9th Cir. 1992).)

11. The Ninth Circuit 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*, 195 F.3d at 1149 (citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041).)

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

13. As the petitioner, Student has the burden of proving its contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. ___, 126 S.Ct. 528, 163 L. Ed. 2d 387.)

Determination of Issues

ISSUE NO. 1: District did not fail to fulfill its child find obligations.

1. As set forth in findings 1-3, District did not fail to fulfill its federal and state statutory child find obligations to Student from Student's initial enrollment at Manhattan, October, 12, 2005, through the date of Parent's request for assessment (October 18, 2005.) District did not have adequate information from Student's school, medical and developmental history records to suspect Student had a qualifying disability. Parent did not provide any evidence to show that District failed in its obligation to "seek and serve." As set forth in findings 4 and 8, Parent was well aware of her right to request a special education assessment on Student's behalf and Student's right to receive special education services. Parent submitted her written special education referral to District on October 18, 2005, four

school days after Student enrolled in Manhattan. Parent used a form provided by Shields. Once Parent submitted the special education assessment referral Student was “found.” Parent’s referral initiated the assessment process. District was duty-bound to assess Student once Parent referred Student for a special education assessment. However, District did not fail its “seek and serve” child find obligations because District had adequate procedures in place to identify and locate Student, and Student was “found.”

ISSUE NO. 2: District failed to assess Student in all areas of suspected disability.

2. As set forth in factual findings 4-15, 18, 20-24, District failed to assess Student in all areas of suspected disability. District received Parent’s unambiguous written notice requesting an initial special education assessment. Parent also had a direct conversation with Principal Gideon where she requested that Student be assessed. The District was duty-bound to conduct an initial assessment based upon Parent’s referral. District was not entitled to ignore Parent’s request for an initial assessment and reject an assessment based upon its own superficial investigation. The District’s obligation to assess was mandated by law and further supported by the facts. Student was still enrolled in kindergarten when he entered Shields full time on October 31, 2005, and remained in the District until January 23, 2006. If District had conducted its assessment as it should have, it would have fully investigated Student. District would have discovered that Student was previously in therapy. It would have obtained a complete profile of Student while he was at Shields. District would have found that Student’s uncontrollable behaviors persisted despite medication to treat Post-Traumatic Stress Syndrome and hyperactivity.

3. As set forth in factual findings 15-19, District’s contention that its policies and practices mandated that it reject Parent’s referral is without merit. District’s contention that it can reject a Parent’s *initial* referral conflicts with the California Education Code and is not supported by its own response form. California Education Code specifically provides that a parent’s referral *shall* initiate the assessment process. District’s form allows administrators to indicate that they reviewed previous assessments of Students. Clearly, a District is justified in rejecting repeated requests for assessments, after an initial assessment has been done. School districts are not obligated to continually assess and reassess pupils. The IDEA and the California Education Code provide procedures for parents to object to recent assessments, including, providing that parents can obtain their own independent assessment at public expense. In addition, the IDEA requires an annual review of a pupil’s progress and a triennial assessment. However, neither the IDEA nor the California Education Code allows a school district to summarily reject a parent’s *initial* referral request. The governing statutory authority does not prohibit school districts from entering into an agreement with Parent to pursue an SST instead of conducting an assessment. Further, the IDEA provides that the time for completing an assessment can be extended by agreement. Manhattan did not enter into any agreements with Parent. Instead, its administrators unilaterally denied the assessment.

ISSUE NO. 3: District did not fail to provide Student a FAPE by failing to design and implement an educational program to meet his unique and individual needs.

4. As set forth in factual findings 14, 20, 25 and 26, Student was not denied a FAPE. Student was diagnosed as emotionally disturbed by Long Beach and Parent agreed with Long Beach's assessment. However, if District had agreed to assess Student and Parent immediately signed Manhattan's assessment plan, District would have had until January 25, 2006, to convene an IEP meeting. Student's last day in the District was January 23, 2006. Accordingly, District was under no obligation to convene an IEP and provide an educational program designed to serve Student's unique needs.

ISSUE NO. 4: District did not violate Parent's procedural rights by failing to provide sufficient prior written notice of its refusal to evaluate Student, or by failing to provide copies of Student's educational records.

5. As set forth in factual findings 14 and 27, District's technical violations of statutory procedures did not deny Student's right to a FAPE, did not significantly impede Parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefits. District's response was due no later than November 2, 2006. District failed to provide Parent a signed response that day, or the next day, November 3, 2006. On November 3, 2006, Principal Gideon did not provide Parent the required procedural safeguards. However, Parent was informed of District's response on both days and had the opportunity to participate in decision-making by timely challenging District's decision. Parent called the District's complaint department shortly after receiving District's decision. Parent also retained counsel by the end of November, 2005. Similarly, Student failed to provide any evidence that District's untimely production of all Student's records impeded the rights of Parent to participate in the "identification, evaluation and educational placement" of Student. Manhattan produced the majority of records within five days of counsel's request. The copies of the teacher's referrals were not sent until February, 2006, after Student left the District. As set forth in factual findings 25-26, there is no evidence that the omission of the teacher referral notes from the earlier production deprived Student of educational benefits. The teacher's referrals were provided to Parent prior to Long Beach's psycho-educational assessment and IEP meeting.

ISSUE NO. 5(A): Student is not entitled to an independent evaluation at public expense.

6. Compensatory relief must be fashioned to further the goals of the IDEA. As set forth in factual findings 25-26, Student was assessed by Long Beach. Parent agreed with Long Beach's assessment. Student has not articulated any rationale for obtaining an additional independent evaluation which furthers the goals of the IDEA.

ISSUE NO. 5(B). Student is not entitled to compensatory education.

7. As set forth in factual finding 14, District was obligated to provide Student an assessment plan no later than November 2. As set forth in factual findings 1 and 20,

assuming Parent consented immediately to District's assessment plan, District was required to complete the planned assessments and convene an IEP meeting no later than January 25, 2006, one day after Student moved to Long Beach. Accordingly, Student was not denied a FAPE. Moreover, even assuming Student remained in the District and District was required to provide Student a FAPE, Student would not be awarded compensatory education because Student did not provide probative evidence of his academic deficiencies. As set forth in findings 20-21, 24, Student attended Shields, a therapeutic nursery, where he received behavior modification training, until a month after he left the District. Student did not receive kindergarten-level academics. However, Student did not define kindergarten-level academics and did not provide probative evidence of Student's academic deficiencies. Without probative evidence of Student's current academic deficiencies it is not possible to fashion appropriate compensatory education.

8. Student also requests compensatory education for the period of time Student attended Shields. As set forth in factual findings 13 and 20, Student left Manhattan on October 26, 2006 and attended Shields from October 31, 2005 until February 24, 2006. Parent believes she was forced to leave Manhattan. Parent's claim for compensation for any alleged wrongdoing by Manhattan's administrators which resulted in her removing Student from Manhattan is unrelated to her due process claim under the IDEA. Accordingly, her claim is not within the jurisdiction of OAH. Furthermore, as set forth in factual finding 1, District was not obligated to provide services to Student after Student left the District, January 24, 2006. Finally, without probative evidence of Student's current academic deficiencies, it is not possible to fashion appropriate compensatory education. Therefore, Student would not be awarded compensatory education even if District had an obligation to provide Student a FAPE during the time Student attended Shields and lived in the District.

ORDER

Parent's requests for an independent educational assessment and compensatory education are denied.

PREVAILING PARTY

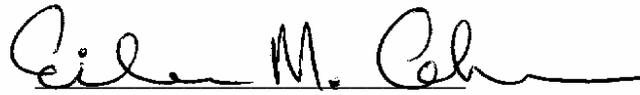
Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute:

1. The Petitioner prevailed on Issue 2.
2. District prevailed on Issues 1, 3, 4, 5(A) and 5(B).

RIGHT TO APPEAL THIS DECISION

The parties to this case may appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Cal. Ed. Code § 56505(k).)

Dated: August 3, 2006

A handwritten signature in black ink, appearing to read "Eileen M. Cohn", written over a horizontal line.

EILEEN M. COHN

Administrative Law Judge

Office of Administrative Hearings