

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

In the Matter of:

STUDENT,

Petitioner,

v.

BONITA UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2006020528

DECISION

Dennis C. Brue, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter on May 2-4, 2006, in San Dimas, California. This matter arises out of a due process hearing request filed on February 17, 2006.

Attorney Omar Naime represented Petitioner (Student). Student's mother was present throughout the hearing.

Attorney Marcelene C. Santos represented Respondent Bonita Unified School District (District). Michael Kelly, Director of Special Education for District, was present on the District's behalf.

Oral and documentary evidence were received. At the hearing's conclusion, the parties were given until May 18, 2006, to file closing briefs. The briefs were received timely and the record was closed on that date.

Student called the following witnesses: Student's mother; Gloria Wright, retired school psychologist; and Callie Sims, school nurse.

The District called the following witnesses: Terry Hugar, general education teacher; Catherine Calderone, Gifted and Talented Education program teacher; Dena Hoover, Student Services Coordinator; Cristal Workman, school psychologist; Nancy Garcia, special

education teacher; Rick Crosby, social studies teacher; Shahin Massoudi, science teacher; and Lois Klein, Principal and Senior Director of Curriculum and Assessment.

ISSUES

1. Did the District fulfill its “child find” obligations to Student from February 17, 2003, through the present¹?
2. Did the District deny Student a free, appropriate public education (FAPE) from February 17, 2003, to the present by failing to find Student eligible for special education as “other health impaired” (OHI)?
3. Did the District fail to give prior written notice to Student with respect to one or more of the following: (a) District’s refusal to assess Student until March 5, 2005; (b) District’s change of Student’s placement to add a Resource Specialist Program (RSP) transition class; (c) District’s denial of eligibility to Student under the category of OHI.
4. Did the District violate Education Code section 56504 by failing to timely provide Student with his educational records upon his request?
5. If Student prevails on any or all of Issues 1 through 4, is Student entitled to the following relief: (a) a determination that Student is eligible for special education and related services as a pupil with an OHI learning disorder; (b) individual counseling or other relief as a result of the District’s actions; and (c) reimbursement for the cost of educational services received from Sylvan Learning Centers during the 2004-2005 school year in the sum of \$5,428?

CONTENTIONS OF PARTIES

Student contends that, from February 2003 onward, Student was eligible for special education and related services as a child who is OHI. He alleges that because the District never found him eligible and provided special education services, Student was denied a FAPE during this entire period. The District contends that Student never met the eligibility requirements for special education services.

FACTUAL FINDINGS

1. Student is thirteen years old, and completing the eighth grade at Ramona Junior High. He resides with both parents within the District’s boundaries. He was diagnosed

¹While Federal “child find” obligations do not technically apply after an assessment request, the District’s response to the request will be discussed as part of the resolution of this issue.

with Attention Deficit Disorder/Hyperactive Disorder (ADHD) in second grade, but has not been found eligible for special education services.

2001-2002 School Year, 4th Grade

2. For the 2001-2002 school year, Student attended fourth grade at Fred Ekstrand Elementary School. He was taught by general education teacher Terry Hugar in a combination class made up of 4th and 5th grade students. Entry into this particular class was based upon a student's demonstrated academic ability. Ms. Hugar noted Student was bright and she recommended that he be tested for the District's Gifted and Talented Education Program (GATE). While Ms. Hugar had also noted Student's difficulties with staying on task and homework completion, she did not believe that Student's ADHD affected his educational progress. In her opinion, Student showed academic improvement during the school year and was able to learn. Ms. Hugar was a persuasive and credible witness as to Student's past academic performance.

3. To determine his GATE eligibility, Student took the Otis-Lennon School Ability Test (OLSAT) in the spring of 2002. He was tested on verbal reasoning and comprehension and nonverbal figural and quantitative reasoning. He tested "above average" in figural reasoning and "average" in all the other areas. Student was also given the Standardized Testing and Reporting (STAR)² test, receiving a Language Arts Score of 344, which is within the "Basic" range of 300-349. Student scored 399 in Mathematics, within the "Proficient" range of 350-400.

4. Student's OLSAT scores alone were insufficient to place him in the GATE program. However, combined with Ms. Hugar's recommendation, Student achieved GATE program placement for the following year.

5. Student completed the fourth grade with the following pertinent grades: As in Reading comprehension, Vocabulary, Listening, Geometry, Science, Art, Physical Education and Music. He received Bs in Spelling, Speaking, Algebra and Functions, Statistics and Mathematical Reasoning. He received Cs in Literary Response, Writing Strategies, and Writing Conventions.

²All California students take the Standardized Testing and Reporting (STAR) performance test annually. Beginning in 1997, California began putting into place a comprehensive standards-based educational system for all students. The STAR test validates student performance with respect to California state standards, and the results are used to track progress with respect to the federal No Child Left Behind Act. Students attain one of five levels of performance on the California Standards Tests for each subject tested: advanced, proficient, basic, below basic, and far below basic. The State Board of Education has established the "proficient" level as the desired achievement goal for all students.

2002-2003 School Year, 5th Grade

6. Student's 5th grade teacher and GATE instructor was Catherine Calderone. Student started slowly but then improved dramatically moving from an F to an A in work habits. Ms. Calderone found Student to be a "little immature" socially, exhibiting some difficulty in initiating and maintaining friendships with his classmates and peers. Conversely, Student's relationships with adults were "wonderful." She recalls Student being bright but with "organizational issues." Ms. Calderone was a persuasive and credible witness.

7. Student's STAR testing results for this school year were as follows: Language Arts Score of 334, within the "Basic" range of 300-349, and Mathematics score of 359, within the "Proficient" range of 350-400.

8. Student promoted from elementary school with the following pertinent grades: As in all State Reading Standards, Spelling, Science, History, and Art. He received Bs in Writing, Listening, Speaking, and all State Standard Mathematics.

9. Student failed to establish that the District had a duty to initiate a referral for assessment and special education and related services for the 2002-2003 school year. While Student had been diagnosed with ADHD and the District was aware of this diagnosis, both 20 U.S.C. section 1412(a) (3) and California Education Code section 56301 require the District have a reason to suspect a disability and a reason to suspect that special education services may be needed to address that disability. Here, Student was in a gifted educational program, had previously earned grades appropriate to his abilities, and promoted with As and Bs in substantive educational courses. In addition, his STAR test scores were "Basic" and "Proficient". Taken cumulatively, these factors evidence no need for special education.

2003-2004 School Year, 6th Grade

10. For the 2003-2004 school year, Student began attending Ramona Middle School. On October 27, 2003, there was a parent/teacher conference with Student's mother; Dena Hoover, the school's Student Services Coordinator; and four teachers in attendance. It was noted Student had inappropriate behaviors, such as refusing to work in groups and crying easily. In addition, his homework was not being completed and turned in, organization was difficult, and Student was feeling "overwhelmed" but failing to ask for help.

The following recommendations were made: homework and assignments were to be signed by parents and teachers; parents, teachers and Student were to assist in organizing his backpack; and Student was to seek out tutoring on an as-needed basis. No assessments were requested or conducted.

11. A Student Support Team (SST) meeting was held on January 27, 2004, with Student's parents, Ms. Hoover, math teacher Gina Sapienza, and five other teachers present. Accommodations implemented as a result of this meeting included giving Student extended

time to take exams and turn in homework, modified assignments, and seating near the front of the class. Parents were to expend additional effort to help Student stay focused and organized.

12. Student's STAR testing results for this school year were as follows: Language Arts Score of 347, within the "Basic" range of 300-349, and Mathematics score of 357, within the "Proficient" range of 350-400.

13. Student completed the sixth grade with the following pertinent grades: A- in Math, Bs in Art and Physical Education, C in English and D in Social Studies.

14. Student did not establish that the District failed to fulfill its "child find" obligations for the 2003-2004 school year. A special education services eligibility assessment would have required the District to have had a reason to suspect a disability and a reason to suspect that special education services may be needed to address that disability.

15. Student's academic performance was appropriate in core subjects and his STAR scores were consistent with his past levels of achievement. While Student did receive a D in Social Studies, he also earned an A- in Math. Thus, there was no showing that Student was in need of special education services to address his ADHD.

2004-2005 School Year, 7th Grade

16. On September 22, 2004, Parents sent a letter to the District, again advising it of Student's ADHD and anxiety disorder diagnoses. A SST meeting was held on October 14, 2004, with Student, both his parents, Ms. Hoover, and six of Student's teachers in attendance. A "Section 504"³ plan was developed to more formally address Student's ADHD as it affected his ability to learn.

17. Student's prior educational accommodations were continued, with additions to the plan including regular communication with Student's teachers, more parental help with organization, and follow through with homework. Student was to keep his back pack organized, ask for help when needed, and communicate with teachers and parents regarding assignments. Student and both parents signed the written 504 plan.

18. On their own initiative and at their own expense, Student's parents enrolled him in a Sylvan Learning Center from December of 2004 through the summer of 2005.

³As part of the Rehabilitation Act of 1973, Congress passed Section 504, a civil rights law to protect people with disabilities by eliminating barriers and allowing full participation in areas such as education and the workplace. "Handicapped person" is defined by Section 504 as a person with a mental or physical impairment that limits one or more major life activities, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working, to a substantial degree.

Student was taught non-academic subjects such as appropriate time management and given instruction on how to focus his efforts and concentration and to raise his self esteem.

19. Student's seventh grade, first quarter marks were below average. Student received the following grades: B- in Reading, C in Life Sciences; and Ds in English, Pre-Algebra, and Social Studies. Student had a 1.67 grade point average. Incomplete homework assignments were identified as areas of concern by Student's English, Algebra, and Social Studies teachers. Low test scores were also noted by Student's Algebra and Social Studies teachers.

20. On December 2, 2005, Student's mother made a written request to the District for Student's educational records. She testified that the District did not provide her with all of Student's records, but was unable to specifically identify what records were missing or incomplete.

21. Student's mother faxed a Request for Assessment to the District on January 11, 2005. The Request specifically referenced Student's ADHD and requested academic assessments. The District mailed the Notification of Referral the following day. The Assessment Plan was drafted on January 12, 2005, and signed by the mother on January 19, 2005, concurrent with her completion of the consent for testing form.

Assessment

22. On March 5, 2005, District psychologist Cristal Workman⁴ administered Student a Multi-Disciplinary Psychoeducational Assessment. Student scored within the average range on the Wechsler Intelligence Scale for Children – 4th Edition (WISC-IV), except in "processing speed" where he achieved "borderline" scoring.⁵ His Woodcock-Johnson Psycho-Educational scoring was also within age appropriate norms.

23. Student received poor ratings on the Burk's Behavior Rating Scale and the Conners' Parent Rating Scale.⁶ Student's Conners' scores were "Markedly Atypical" for Cognitive Problems/Inattention, Hyperactivity, and for ADHD. The Burk's Scale was "Excessive" for: self blame anxiety, withdrawal, and suffering. Student was rated "Poor" in

⁴Ms. Workman's credentials include a B.A. in Business Administration and M.A., in Marriage and Family Therapy. She has an M.A. in Educational Psychology, is a licensed educational psychologist; and has credentials in Counseling, School Psychology and Child Welfare.

⁵Student's WISC-IV scores are as follows: Verbal Comprehension 108; Perceptual Reasoning 115; Working Memory 97; Processing Speed 75; Full Scale 98. Student's Woodcock-Johnson scores are as follows: Letter-Word Identification 117; Passage Comprehension 103; Calculation 125; Applied Problems 98; Writing Samples 113; Spelling 120; Reading Fluency 79; Math Fluency 97; Writing Fluency 82.

⁶The Burk's Behavior Rating Scales has the parent rate a child in 19 different areas by asking over 100 questions. The Conner's Rating Scale, a test devised to diagnose ADHD, is completed by the parent and teacher taking 15-25 minutes to finish. Both observational scales were ordinarily completed by Student's mother.

the following areas: ego and physical strength, coordination, intellectuality and academics, impulse control, reality contact, and anger control.

24. Ms. Workman reviewed the test results and determined that Student did not meet the eligibility criteria for a specific learning disability because there was not a discrepancy between his overall ability and his academic achievement. The question of Student's special education eligibility was then referred to the full IEP team, as required by statute.

25. Student did not establish that the District failed its "child find" obligation for the 2004-2005 school year. The District had no duty to initiate an assessment prior to the November 2004, first quarter grades being published as the District had no reason to suspect that special education services may be needed to address Student's ADHD.

26. Student's mother's subsequent request for special education assessment superseded the District's "child find" duty by shifting the District's obligations to acting upon the request and assessing Student. The District responded in a timely manner to the assessment request.

IEP Meeting

27. An Individual Education Program (IEP) meeting was held on March 9, 2005, with Student's parents, Student Services Coordinator Dena Hoover,⁷ Ms. Workman, a general education teacher, and special education teacher Nancy Garcia attending.

28. Student's parents participated in the meeting, receiving copies of the Parental Rights and Procedural Safeguards, the psychoeducational assessment report, and the IEP itself. The IEP was signed by both of Student's parents. The issue of Student's eligibility for special education was discussed, with the team's determination that he did not qualify.

29. Ms. Hoover recalls discussion among the participants regarding Student's special education eligibility. Because Student was considered bright by his teachers and his previous STAR scores were "Basic" and "Proficient," Student was deemed not eligible for special education by the IEP team.

30. Ms. Workman administered Student's Multi-Disciplinary Psycho-Educational Assessment and evaluated the results, determining Student was not eligible for special education. Student's assessment performance was average to above average in most areas, excepting a "borderline" scoring in 'processing speed' and the Burk's and Connors' ratings, both of which are largely reliant upon Student's mother's input.

⁷Ms. Hoover's credentials include a B.A. in Human Services and Recreation, an M.A. in School Counseling, and a Pupil Personnel Services credential.

31. The special education eligibility issue was addressed on March 9, 2005, by the full IEP team, which included Student's mother. There was consensus that Student did not need or qualify for special education services.

32. Student's STAR testing results for the 2004-2005 school year were as follows: Language Arts Score of 353 and Mathematics score of 357, both of which are within the "Proficient" range of 350-400.

33. Student completed the seventh grade with the follows marks: C-in Phys. Ed.; Ds in English and Technology. He received a D in Pre-Algebra and Fs in Social Studies and Health Science.

2005-2006 School Year, 8th Grade

34. A Student Accommodation Plan, Section 504, review meeting was held on September 23, 2005, attended by Student's mother, Ms. Hoover, and seven of Student's teachers. This meeting was held to review/revise the educational accommodations pursuant to the existing 504 plan of October 14, 2004.

35. Student's accommodations were altered with the addition of a special Resource Specialist Program (RSP). This transition class was to assist Student with his organizational deficits by giving Student an hour a day to organize his homework and complete assignments from his other classes.

36. Student's accommodations were now as follows: seating near the front of the class, Friday status reports, modified assignments, extra time for tests, and the RSP class. The RSP class also lightened Student's academic load as this class replaced a substantive educational class on Student's schedule.

37. Student's Parents were to communicate with Student's teachers, help with organizational skills, maintain a special notebook for completed work, and review Student's Friday status reports and then follow up on any issues raised.

Additional Assessment

38. In March 2006, Ms. Workman further assessed Student by administering the Test of Auditory Processing Skills, Third Edition (TAPS-3) to Student. The TAPS-3 assesses a child's auditory, memory, interpretation, and processing skills necessary for the development, use and understanding of language commonly utilized in academic and everyday activities. Student's overall score of 104 fell within the average range, indicating no auditory processing deficits.

Student's Current 8th Grade Educational Status

39. Mother testified that presently, Student cannot seem to get organized. His backpack and assignments are disorganized to the point of uselessness. He comes home with barely half of the assignments given to him. He spends approximately four or more hours per night on homework, yet generally fails to complete his assignments. Student rarely turns in his completed homework as he simply forgets to do so.

40. Nancy Garcia is Student's RSP teacher. Under this program, Student was given the entire 5th period to organize his homework and assignments from the four previous classes. No subject matter is taught in this class, only study skills. Students were taught to calendar and organize homework and assignments and then given time to complete the work in class. Student had organizational problems in this class that required additional accommodations. Student kept misplacing his organizational materials and his completed assignments. Student was earning a C in this class. Out of the 16 children in this RSP class, Student is the only one not in Special Education.

41. Rick Crosby is Student's eighth grade Social Studies teacher. Student is currently receiving a D, down from a C in this class due to his failure to turn in homework. Student receives the 504 accommodations in Mr. Crosby's class, but does not take advantage of morning tutoring that is available.

42. Shahin Massoudi is Student's eighth grade Science teacher. Ms. Massoudi has 15 years experience teaching enrichment science courses and is the GATE program coordinator for Ramona Middle School. Student is receiving a C in her class, due to incomplete assignments. In this class, homework largely consists of "in class" work that Student does not complete. Ms. Massoudi describes Student as cheerful and polite. She showed obvious affection and concern for him, noting Student shows special interest and aptitude in computers.

43. Deborah Brownlee is Student's eighth grade Algebra teacher. Student is receiving failing grades due to incomplete homework assignments and low test scores. Tutoring is offered twice weekly, but Student does not attend.

44. No teacher or administrator indicated they believed Student was willful or defiant about completing homework or assignments.

45. Federal and State law⁸ requires the district have a reason to suspect a disability and a reason to suspect that special education services may be needed to address that disability. Student's possible need for these services was not demonstrated. Student's

⁸20 U.S.C. section 1412 (a)(3) and California Education Code section 56301.

academic performance⁹ is credible evidence that there was no need for special education services. Therefore, the District had no obligation to refer him for assessment, nor did it deny Student a FAPE.

2003-2004 school year.

46. Student failed to establish that he was eligible for special education services for the 2003-2004 school year. Early in the school year, both the District and Student's parents had met in a parent/student conference. Educational recommendations were developed and implemented with the parent's knowledge and participation. Later, the SST team was constituted, with additional accommodations for Student forthcoming. This is persuasive evidence of the District's actions and commitment to provide Student with an educational program appropriate to his needs and abilities.

47. As Student earned grades appropriate to his abilities,¹⁰ he was not eligible for special education at that time.

2004-2005 school year.

48. Student contends that the District should have made him eligible for special education in March 2005, based on his emotional/behavioral assessments, his inability to complete homework assignments, and his ADHD diagnoses.¹¹ Student failed to establish that he was eligible for special education services during the 2004-2005 school year.

49. The IEP team's determination was a credible exercise of knowledgeable, informed and experienced professional judgment.

2005-2006 school year.

50. Student failed to establish he was eligible for special education services for the 2005-2006 school year. Special education eligibility arising out of an OHI determination is subject to Education Code section 56339 requiring an adverse affect upon educational performance and California Code of Regulations, title 5, section 3030, requiring the impairment affect the child's "strength, vitality, and alertness." Herein, no evidence was put

⁹Student received the following grades: As in all State Reading Standards, Spelling, Science, History, and Art. He received Bs in Writing, Listening, Speaking, and all State Standard Mathematics.

¹⁰Student completed the sixth grade with the following pertinent grades: A- in Math, Bs in Art and Physical Education, C in English and D in Social Studies.

¹¹While there was an earlier anxiety disorder component to his medical condition, the testimony received indicated it had largely abated due to growing maturity on Student's part and medication. He still cries upon becoming overstressed, but there was no supporting evidence as to the relevance of this point to his special education determination.

forth regarding Student's strength or vitality, and Student's expert witnesses were not persuasive as to his ADHD affecting his "alertness."

Expert Witness Testimony

51. School Nurse Callie Sims, was called as an expert witness for Student. For the last five years, she has been employed at Joseph P. Widney High School, which is a special education campus with 300 students. As part of her nursing duties, Ms. Sims participates in IEP meetings for these students. Ms. Simms had reviewed Student's academic and medical records as well as interviewed Student and his mother.

52. Ms. Sims' testimony was that Student's ADHD was of a severe nature and responsible for his inability to complete tasks such as homework and his distractibility. She stated that Student's medications¹² may also be an issue as their beneficial effects are limited in time to few hours, leaving Student susceptible to a "rebound effect" where his ADHD symptoms would return in greater strength later in the day as the medication wore off.

53. Her professional opinion was that Student should have been placed in special education five years earlier when he was first diagnosed. She then testified that based upon her investigation and observation of him, Student currently qualifies for special education under the OHI criteria set forth in 20 U.S.C. 1401(3)(A)(i)(ii), and California Education Code section 56339 subdivision (a). This opinion contrasts with Student's academic performance at that time.

54. While Ms. Sims was of assistance regarding medical aspects of ADHD and their effect upon Student, her testimony was less persuasive concerning Student's eligibility for special education. In her opinion, Student should have been placed into special education years ago when he was first diagnosed. As Student thereafter went on to placement in a GATE program and earned As and Bs in substantive courses, her opinion is at odds with Federal and State statutory regulations regarding special education eligibility, District assessments, and Student's educational needs and actual performance.

55. Ms. Gloria Wright testified as an expert witness for Student. Ms. Wright is a retired school psychologist with 27 years experience in the Los Angeles Unified School District. For her testimony at this hearing, she reviewed Student's academic records. She testified that Student's ADHD affected his "alertness," which is a prerequisite for making a determination of eligibility for special education services under the OHI category.¹³ She stated that Student's grade level scores on the STAR test were a function of the test taking conditions, such as a quiet and distraction free room. She noted Student's earlier good grades

¹²Student was taking Aderal , Concerta, and Ritalin. He had earlier been placed on Prozac, but it had been discontinued as it made him excessively drowsy during the school day.

¹³California Code of Regulations title 5 section 3030

are explained by the fact that ADHD is more easily managed in a younger child than a young adult or teenager.

56. Ms. Wright believes that Student is eligible for special education under the OHI criteria and that he will need counseling to acclimate to junior high school as it is a much more complex environment with more difficult subjects, numerous teachers, and new social interactions. This decrease in structure and increase in distractions will, in her opinion, have a negative effect on Student.

57. Lois Klein is the Principal and Senior Director of Curriculum and Assessment at Ramona Middle School. She administers the STAR test. The test is designed to test proficiency in State of California approved curriculum and is also used to measure compliance with The No Child Left Behind Act. According to Ms. Klein, Student's "Proficient" scores in both Language Arts and Mathematics showed Student had no need for Special Education classes, despite his recent low grades.

58. Neither Ms. Wright nor Ms. Klein was particularly persuasive on the issue of Student's special education eligibility as neither of them had actually met Student or could testify specifically about his circumstances. While both witnesses had examined Student's school records, their lack of personal knowledge of Student and the nature and extent of his ADHD limited their testimony to broad generalities that were of limited probative value.

59. Ms. Wright had no personal knowledge of Student's "alertness." Ms. Sims testified Student should have been placed in special education prior to the 4th grade where he earned all As in his classes, evidencing no adverse educational progress and that his "alertness" was unimpaired. As these witnesses lacked credibility on this issue, Student did not meet his burden of proof.

60. As there was no cause to assess Student for special education at this time, there was no obligation to do so. Consequently, there was no duty on the part of the District to provide written notice to Student that he was ineligible for special education.

2003 through 2005 school years.

61. For the school years of 2003 through 2005, Student failed to establish the District had a duty to assess Student. As Student was performing well in school, earning grades appropriate to his abilities and otherwise evidencing no need for special education services, there was no cause or duty to assess Student for special education. Consequently, there was no duty to provide written notice to Student that he was ineligible for special education service.

2004-2005 school year.

62. Student did not establish the District had any duty to assess him for special education eligibility prior to his mother's request for assessment, which was essentially

concurrent with his poor first quarter grades being sent home. Once those grades were released, Student's mother made an assessment request, and the District thereafter assessed Student. Therefore, there was no "refusal" to assess Student and no concomitant duty to provide written notice.

Prior written notice of District's addition of a RSP transition class during the 2005-2006 school year.

63. Student did not establish that District failed to give him proper written notice of the addition of the RSP class. 20 USC 1415(c) notice requirements are reserved for students eligible for special education. As Student was not eligible for special education, he cannot sustain a procedural violation claim.

In addition, Student's mother attended and participated in the section 504 review meeting. She signed and dated the 504 meeting modifications sheet and a section 504 informational page that outlined her rights, and which also included school contacts if she had questions or disagreed with any determinations made by the District's staff.

District's response to Student's educational records request.

64. Student's mother testified that the District did not provide her with all of Student's educational records. She was unable to identify exactly what records were missing, stating the records jump sporadically between years. Student asserts this procedural error constitutes a denial of FAPE.

65. Student did not establish the District's alleged failure to provide all his educational records resulted in a denial of meaningful progress or denied Student's parents the ability to participate in the IEP process. The educational records the District supplied to Student appeared to be complete for the last three years and entered into evidence at the due process hearing by both parties. The records included report cards, teacher's comments, District assessments, SST and IEP documentation, all of which were signed by at least one of Student's parents and in substantial compliance with the requirements of Education Code section 56504.

66. Additionally, the District provided substantial documentary evidence of Student's parent's participation and presence at the parent/teacher conferences, SST and IEP meetings. Student's mother corroborated her participation through her testimony.

LEGAL CONCLUSIONS

Applicable Law

1. 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).)

2. In addition to the requirements for a continuous child-find system, a district has child-find responsibilities for specific children. A district’s child find obligation toward a specific child is triggered when there is reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Rae* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.*, at p. 1195.) A district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualified for services. (*Ibid.*)

3. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil’s educational needs shall be conducted. (Ed. Code § 56320.) 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); 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); Ed. Code § 56320, subd. (a), (b).)

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 may 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 50 calendar days¹⁴ 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).)

¹⁴This statute was amended on October 2005 to require 60 days.

5. 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. (Ed. 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).)

6. 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. (Ed. Code § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(22) (IDEA 1997); 20 U.S.C. § 1402(26)(IDEIA 2004).) In California, related services may be referred to as designated instruction and services (DIS). (Ed. Code § 56363, subd. (a).)

7. Not every procedural flaw constitutes a denial of a FAPE. Procedural flaws must result in the loss of educational opportunity to the student, or seriously infringe on the parent's participation in the IEP process, to constitute a denial of a FAPE. (*Board of Education of the Hendrick Hudson Central School District v. Rowley*, supra, 458 U.S. at 206-07; see also *Amanda J. v. Clark County School District*, 267 F.3d 877 (9th Cir. 2001).) However, 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 District No. 23*, 960 F.2d 1479, 1482 (9th Cir. 1992).)

8. A parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. *Furman v. East Hanover Bd. Of Education* (3rd Cir. 1993) 993 F.2d 1031, 1036.

9. Code of Federal Regulations, title 34, section 300.7 (a)(1), defines a child with disability as one who by reason of an "other health impairment" needs special education and related services.

10. The eligibility criteria for "other health impairment" is defined in Code of Federal Regulations, title 34, section 300.7 (c)(9)(i)(ii), as having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health

problems such as ... attention deficit disorder or attention deficit hyperactivity disorder...and adversely affects a child's educational performance.

11. Education Code section 56339 and Section 3030, title 5 of the California Code of Regulations track the language of their Federal counterparts closely, with the exception that ADD and ADHD are omitted from Section 3030. This is not a relevant distinction as the Federal statutes take precedence in defining minimal IDEA standards.

12. Education Code section 56339 provides that a pupil whose educational performance is adversely affected by a diagnosis of ADHD and who "demonstrates a need for special education and related services by meeting eligibility criteria specified in subdivision (f) or (i) of Section 3030 of Title 5 of the California Code of Regulations or Section 56377 and subdivision (j) of Section 3030 ...for the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 and following) categories of 'other health impairments,' 'serious emotional disturbance,' or 'specific learning disabilities,' is entitled to special education and related services."

13. The eligibility criteria for "other health impairments" under California Code of Regulations section 3030 are:

A pupil has limited strength, vitality or alertness, due to chronic or acute health problems, including but not limited to a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, severe asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases, and hematological disorders such as sickle cell anemia and hemophilia which adversely affects a pupil's educational performance. In accordance with Section 56026(e) of the Education Code, such physical disabilities shall not be temporary in nature as defined by Section 3001(v).

14. In general, a child with disabilities is defined as one with substantial impairments such as mental retardation, deafness, blindness, autism, traumatic brain injury, or some other health impairment such as ADHD that causes the child to need special education services. (20 USC 1401 (3)(A)(i)(ii).)

15. Procedural safeguards for students with disabilities mandate prior written notice to the child's parents when a change to that child's educational placement is contemplated, or a refusal to initiate or change the identification, evaluation, and educational placement of a child or the provisions of FAPE to a child. This notice must explain the changes and document relevant factors relating to the action proposed. (20 USC 1415(b)(3)(c).)

16. Petitioner, as the party seeking relief, has the burden of proof. (*Schaeffer v. Weast* (2005) 546 U.S. ____; 126 S.Ct. 528, [163 L. Ed. 2d 387]).

Determination of Issues

Issue 1: Did the District fulfill its child find obligations from February 17, 2003, through the present?

17. As determined in Legal Conclusions 9, 10, and 12, the District had no obligation to initiate a referral for special education for Student during the relevant time period (February 17, 2003, to the present). Pursuant to Factual Findings 7, 8, 12, and 13, during the 5th and 6th grades, Student's grades and STAR test scores were average to above average and therefore would not entitle or cause Student to be assessed as he did not demonstrate averse educational performance or demonstrate a need for special education.

18. While Student's performance declined precipitously during the seventh grade, as determined in Factual Finding 19, the District was first obligated to exhaust the resources of the regular education program before referring Student for an assessment. (Educ. Code § 56303.) The District therefore had no duty to refer Student for an assessment during this time period. Finally, as determined in Factual Finding 20 and 21, the District had no duty to refer Student for an assessment after January 2005 because Student's parents had already initiated a referral. Once Student's parents initiated a referral, the District's obligation was to assess Student in all areas of suspected disability. (Ed. Code §56320.)

Issue 2: Did the District deny Student a FAPE by its failure to make him eligible for special education under the "other health impaired" category during the period commencing from February 17, 2003 through the present?

19. As discussed in Legal Conclusions 9 and 10, to be eligible under the category of OHI, Student must establish that his educational performance is adversely affected by a diagnosis of ADHD and that he demonstrates a need for special education and related services by meeting eligibility criteria specified in subdivision (f) or (i) of Section 3030 of Title 5 of the California Code of Regulations or Section 56377 and subdivision (j) of Section 3030 ...for the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 and following).

20. Student was unsuccessful in proving that he meets the eligibility requirements of California Code of Regulations title 5 sections 3030 and 56377. Student's STAR test results constitute objective evidence of learning and academic progress. Student's low grades are a function of his failure to complete homework, not an inability to learn. Student argues that STAR test scores are not the only criteria to determine "learning." This argument cuts both ways as low grades are also not the only indicator of a need for special education.

21. In the final analysis, Student offered little direct evidence that would establish that the District had failed to meet its basic obligations. While it is true that Student's grades were very poor during the last two years, the record does not establish that occurred because the District failed to offer an adequate educational program. The record reveals that Student was pulling his grades down by failing to complete and then turn in his

homework. It has been held that failing grades alone do not necessarily establish a failure to provide an educational benefit; a broader examination of the evidence must be made. (See *Sherman v. Mamaroneck Union Free Sch. Dist.* (2d Cir. 2003) 340 F.3d 87, 93; *Mather v. Hartford Sch. Dist.* (D. Vt. 1996) 928 F. Supp. 437, 446: [“Grades, socialization skills, level of participation, consistency of effort and commitment to studies are all relevant in determining whether the whole individual has progressed in his or her education.”].) Student was hardly motivated as evidenced by his refusing several offers of tutoring. In these circumstances, his poor grades alone can not support a decision in his favor.

Issue 3: Did the District fail to give prior written notice to petitioner with respect to one or more of the following: (a) District’s refusal to assess petitioner until March 5, 2005; (b) District’s denial of eligibility to petitioner under at least the category of Other Health Impairment; (c) District’s change of petitioner’s placement to add a Resource Specialist Program (RSP) transition class.

22. As Student is not eligible for special education services, he cannot avail himself of the notice requirements of 20 U.S.C. 1415 (c) unless the District refuses to assess Student after a request has been made.

- (a) Factual Findings 7, 8, 9, 12 and 13 and Legal Conclusions 1, 2, 3, and 4, refute Student’s presumption of a denial to assess. As there was no such refusal, no written notice was required.
- (b) Factual Findings 65 and 66 show that at least one of Student’s parents was always present and a participant in every IEP meeting. The IEP and 504 plan and revisions are all signed by at least one of Student’s parents, fulfilling all State and Federal notice requirements, Legal Conclusion 15.
- (c) The transition class was added to Student’s section 504 plan on September 23, 2005. The 504 meeting was attended by Student and both parents, all of whom signed the revision adding the RSP class, Factual Finding 34. This fulfills all State and Federal notice requirements, Legal Conclusion 15.

Issue 4: Did the District violate Education Code section 56504 by failing to timely provide Student with his educational records upon his request?

23. Student did not prevail on this issue. Factual Finding 65 establishes the District did fail to provide some of the educational records requested. However, Factual Findings 65 and 66, and Legal Conclusions 7 and 8, establish that the lack of the records did not affect Student’s participation in his IEP, this due process hearing, or otherwise result in a loss of educational opportunity.

Issue 5: If Student prevails on any or all of Issues 1 through 4, is Student entitled to the following relief: (a) a determination that Student is eligible for special education and related services as a pupil with an OHI learning disorder; (b) individual counseling or other relief as a result of the District's actions; and (c) reimbursement for educational services received from Sylvan Learning Centers during the 2004-2005 school year?

24. Student did not prevail on any of Issues 1 through 4. Accordingly, Student is not entitled to any of the relief he seeks.

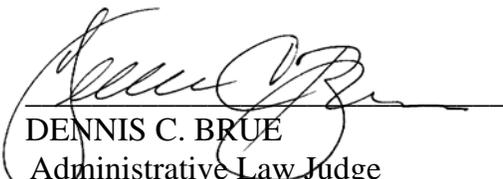
ORDER

All of Student's requests for relief are denied.

PREVAILING PARTY

25. 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: The District prevailed on all issues heard and decided.

IT IS SO ORDERED THIS 24th DAY OF August 2006.


DENNIS C. BRUE
Administrative Law Judge
Office of Administrative Hearings
Special Education Division

RIGHT TO APPEAL THIS DECISION

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, subdivision (k).)