

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

AARON C.,

Petitioner,

v.

LONG BEACH UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO.: N2005070128

CSEHO CASE NO.: SN05-01050

NOTICE: This decision has been **REVERSED** in part by the United States District Court. Click [here](#) to view the court's decision.

DECISION

This matter was heard on July 18,19, 20, 21, and 22, 2005, and on September 6, 7, and 8, 2005, in Long Beach, California, by Christopher J. Ruiz, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California.

Petitioner Aaron C.¹ (Petitioner or Student) was represented by Tania L. Whiteleather, Esq. Also present for a majority of the hearing dates was Vickki Rice, student advocate.

Respondent Long Beach Unified School District (Respondent or District) was represented by Patrick Balucan, Esq. Sara Jocham, Special Education Local Plan Area Director, was also present for a majority of the hearing dates.

Oral and documentary evidence were presented. On September 8, 2005, testimony was concluded and the matter was scheduled for briefing. Both parties' closing briefs were due concurrently on September 23, 2005. Petitioner's brief and timeline were timely received and were collectively marked for identification as Exhibit CCC. Respondent's brief was timely received and was marked for identification as Exhibit 12. The matter was submitted for decision after the ALJ had an opportunity to review the briefs on September 30, 2005.

The following witnesses testified at hearing: Vikki Rice, Petitioner's educational advocate; Christina Di Loretto, Theater Arts teacher at Wilson High School (WHS); Mary

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

Albright, counselor at WHS; Sherry C., Petitioner's mother (Mom); Merrie-Lyn Shickler, District administrator with the special education office; Dominic Bossanetta, chemistry teacher at WHS; Tim Rother, special education case carrier at WHS; Rodney Ford, educational advocate; Dr. David Lipsitz, a District clinical psychologist; Luis Maldonado, a District school psychologist; Kevin Luttrell, Petitioner's tutor; and Rick Cassaneve, history teacher at WHS.

ISSUES PRESENTED

From the date of the July 2004 settlement agreement², through the present, did the District deny Petitioner a free appropriate public education (FAPE) by:

1. Failing to provide the specific accommodations set forth in the Petitioner's Individualized Educational Program (IEP) regarding incomplete work and grades?
2. Failing to provide services³ from the date of Petitioner's hospitalization in November 2004, and again in January 2005, until Petitioner eventually returned to school?
3. Improperly changing the Petitioner's eligibility category from Other Health Impairment (OHI)/Learning Disabled (LD) to Emotional Disturbance (ED)?
4. Committing procedural violations by failing to: (1) provide prior written notice of the District's change in eligibility classification; (2) provide prior written notice of the District's refusal to abide by the parents' request to have someone at the applicable IEP meetings who was knowledgeable concerning Bipolar disorder and could help in identifying needs arising from the Bipolar disorder; and (3) have a person knowledgeable about Bipolar disorder at the applicable IEP meetings?⁴

FACTUAL FINDINGS

1. Petitioner is a 17-year-old student who was eligible for special education services and who, during the periods relevant to the due process hearing, was a resident and student in the District. Petitioner attended Long Beach Wilson High School where he was placed in a General Education classroom and was provided with special education accommodations.

² This settlement is more fully discussed in Factual Findings 26-28.

³ Petitioner does not claim that tutoring services are at issue. That is, it is undisputed that the District offered to provide tutoring services to Petitioner.

⁴ On the seventh day of hearing, September 7, 2005, Petitioner moved to add the following additional issue: "Violating the IEP process by holding monthly meetings: without the parents, without notice to the parents, and that discussed items only properly discussed at an IEP." That motion was denied for the reasons stated on the record.

2. Petitioner and his parents do not currently live within the jurisdictional boundaries of the District. They have resided in Bend, Oregon, since approximately June 2005.

3. In June 2002, the District found Petitioner eligible for special education under the category of Specific Learning Disability (SLD or LD.) (Exhibit C.)

4. On November 20, 2003, school psychologist Luis Maldonado (Mr. Maldonado) prepared an assessment of Petitioner and completed a report. Mr. Maldonado determined that Petitioner may meet the requirements for eligibility under the category of “emotional disturbance”. The final determination regarding eligibility would be made by an IEP team. (Exhibit 5.)

5. In December 2003, Dr. Joseph Haraszti, a psychiatrist, diagnosed Petitioner as having Bipolar disorder. Until this date, Petitioner had not been diagnosed as having this disorder. After Petitioner’s diagnosis of Bipolar disorder, several IEP teams convened to discuss Petitioner’s educational needs and to change his eligibility classification. The first such IEP meeting took place in February 2004.⁵

February 2004 IEP

6. On February 12, 2004, and February 19, 2004, (collectively, “February 2004 IEP”) the District convened a meeting of Petitioner’s IEP team. The purpose of this meeting was to conduct a triennial review of Petitioner’s placement, and to discuss eligibility, placement and services. At this IEP meeting, Petitioner’s parents and Ms. Vicki Rice, an advocate, were present. (Exhibit 8.)

7. At this IEP meeting, the District recommended changing Petitioner’s eligibility category from SLD to “emotionally disabled” (ED). No written notice was given to the parents prior to the meeting that the District would be proposing a change in eligibility for Petitioner.

8. The IEP team noted that Petitioner was being treated for Bipolar disorder. However, Dr. Haraszti had not prepared a written report. The Bipolar diagnosis was given to the IEP team by Petitioner’s parent and advocate. The record reflects that Dr. Haraszti produced a one-page letter on January 9, 2004, which diagnosed Petitioner with Bipolar disorder and recommended an IEP. (Exhibit U-1.) However, it was not established that this letter was provided to the District.

9. The IEP report indicates that Dr. Haraszti’s report would be available in six weeks and that Petitioner’s parents or advocate would contact Dr. Haraszti and advise the District what additional goals for the IEP the doctor recommended.

⁵ The majority of the issues to be decided in this case relate to the events that occurred after the July 2004 settlement. However, in order to decide those issues, the history concerning Petitioner’s education is necessary.

10. At the IEP, the District made the following program and services recommendations: General Education with Resource Specialist Program support, Strategies for Success class (SFS) two to three times per week, behavior consultation as needed and psychological counseling for 1 hour weekly or more as needed. Also, the IEP team developed a Behavior/Social-Emotional goal for Petitioner as follows: When in a frustrating situation, Petitioner's tendency is to go away from the situation to diffuse. The IEP team agreed that Petitioner should be allowed to leave the classroom when he was frustrated. The IEP did not specify the procedure for Petitioner's leaving the classroom. (Exhibit BB-8, 9.)

11. The IEP, under the heading Classroom Accommodations, states: "Turning in late work must be in agreement with the individual teacher and [District] curriculum standard." (Exhibit 8.)

12. As of February 2004, Petitioner was completing less than 70 percent of his school work. (Ex BB-7.) In order to rectify this issue, the IEP team decided to order "weekly progress reports to monitor work is turned in, and current letter grade is attained. These are available to him⁶ in the counseling center and resource room." (Exhibit BB-11.) The evidence presented at hearing established that these reports were meant to inform Petitioner's parents of Petitioner's progress. However, the IEP did not specify who had the responsibility for ensuring that the weekly progress reports were actually received by Petitioner's parents. Mr. Rother, Petitioner's case carrier, testified that he wanted Petitioner to obtain these reports and deliver them to his parents in order to develop personal responsibility.

13. This IEP was the last agreed-upon IEP and was the operative IEP through the fall semester of the 2004-2005 school year.

14. Petitioner's mother consented to the placement and services offered by the District, except as stated in the Parent and Advocate concerns page in the IEP. Those parental concerns are discussed below in Finding 16.

15. School psychologist Mr. Maldonado attended these meetings and had some knowledge of Bipolar disorder. He explained, either verbally or through his written report, why he believed that Petitioner would qualify as emotionally disturbed, and the reasons why the District was recommending a change in eligibility classification. The IEP minutes reflect that "psychologist shared ED qualifiers."

16. Petitioner's parent and advocate attached a page titled "Parent and Advocate Concerns" to the IEP, in which they stated their concerns with, among other things, the District's proposed eligibility category change to ED. They contended that the diagnosis of Bipolar disorder did not warrant a classification in the ED eligibility category. The parents

⁶ A complete reading of the IEP reveals that "him" referred to the Petitioner in this instance.

requested that Petitioner's eligibility be changed to OHI or multiple disabilities based on Petitioner's Bipolar diagnosis and his attention deficit-hyperactivity disorder (ADHD.) At this meeting, Ms. Rice suggested that the District have a specialist attend future IEP meetings who is knowledgeable about Bipolar.

17. At hearing, Mr. Maldonado conceded that additional information concerning Petitioner's Bipolar diagnosis would have been helpful in developing the IEP. However, Petitioner's parents agreed to the IEP as developed with the exception of the eligibility classification.

18. It was established that Petitioner could be deemed eligible for special education services as either ED or OHI based on Petitioner's diagnosis of Bipolar disorder which is a medical diagnosis, and not an educational diagnosis.

May 2004 IEP

19. On May 10, 2004, the District convened another meeting of Petitioner's IEP team (May 2004 IEP.)

20. At the meeting, the IEP noted that there had been no follow-through regarding the medical report requested at the February 2004 IEP team meeting. That is, Petitioner had still been unable to obtain, or submit to the District, a report from Dr. Haraszti.

June 2004 IEP

21. On June 16, 2004, the District convened another meeting of Petitioner's IEP team (June 2004 IEP.) The purpose of this IEP team meeting was another three-year review of Petitioner's educational program.⁷ Petitioner's parents were unable to attend this meeting, but an advocate, Rodney Ford, was present on their behalf. (Exhibit 4.)

22. The meeting minutes indicate that the District continued to request a medical report concerning Petitioner's diagnosis of Bipolar disorder. At this IEP, a report from Dr. Haraszi was still unavailable. Dr. Haraszti's report, dated July 20, 2004, was eventually obtained by Petitioner's advocate, Ms. Rice. Ms. Rice forwarded Dr. Haraszti's report to the District on approximately August 25, 2004. (Exhibits WW and YY.)

23. Debra J. Andrews and Mr. Maldonado, both school psychologists, were present at this IEP meeting. Ms. Andrews was asked to attend the meeting because of her knowledge of Bipolar disorder and in response to Petitioner's request that a expert on Bipolar disorder attend. Ms. Andrews had some limited knowledge of Bipolar disorder that was based on her training and also a family member who had a similar diagnosis.

⁷ The record is unclear as to why another three year review was conducted.

However, the meeting minutes do not reflect that Ms. Andrews discussed the specifics of Bipolar disorder and how it would affect Petitioner's educational experience. (Exhibit 4.)

24. During the IEP, the District continued to propose a change in Petitioner's eligibility status from SLD to ED. Petitioner's parents, through their advocate, continued to object to the change in eligibility category. Because the parents' did not consent to the District's proposed change in eligibility status, Petitioner's eligibility category did not change.

25. The IEP team recommended the following: Program/Services Recommended: general education with RSP support, psychological services, Assembly Bill 3632 mental health referral, SFS two to three times per week, and behavior consultation as needed. (Exhibit 4 and QQ.) The IEP team also recommended that the District continue to provide weekly reports, for all of Petitioner's classes, to monitor the work he turned in and his current grades. However, the parents did not attend this IEP and did not consent to its implementation. Therefore, the February 2004 IEP remained in effect.

July 2004 Settlement

26. On July 22, 2004, the District and Petitioner's parents entered into a Final Settlement Agreement in a previous due process hearing request filed with the Special Education Hearing Office. That case was assigned case number SN 03-01296. (Exhibit 7.)

27. In paragraph 3, subdivision (a), as one of the terms of that settlement agreement, the District agreed to provide to Petitioner up to 5 hours per week of individual tutoring services for the 2004-2005 school year.

28. In paragraph 11, Petitioner's parents also agreed that the agreement "resolves any and all issues, claims and demands...through the date of the execution of this agreement except for proposed change in eligibility and the issue of grade changes with are not under the jurisdiction of SEHO⁸, as well as expungement of discipline records."

Petitioner's education from July 2004 to December 2004

29. Petitioner continued to have difficulties completing his class work and homework. It was undisputed that Petitioner was absent from many classes during this time. Whether he missed these classes voluntarily, as a result of his illness, or was doing work somewhere else on campus, is unknown based on the evidence presented. The District contends that many of Petitioner's absences were unexcused. However, Petitioner's mother testified that she was not informed by the District that Petitioner was having an attendance problem during this time. Also, no IEP was scheduled to address Petitioner's attendance problems and the District did not formally notify Petitioner's

⁸ SEHO (Special Education Hearing Office) previously had the responsibility for conducting special education hearings prior to the Office of Administrative Hearings.

parents about Petitioner's lack of attendance until January 2005 when a letter was sent to the parents. (Exhibit RR- 5-7.)

30. Prior to the fall 2004 semester, Larry Moore had provided the parents with timely weekly reports on Petitioner's progress and also would provide any missing work. During the fall 2004 semester, Mr. Rother became Petitioner's case carrier. Mr. Rother testified that he had bi-weekly progress reports filled out and sent home. However, none of the progress reports was offered into evidence. If weekly progress reports had been sent home to the parents, it is likely that the District would have offered them at hearing. After July 2004, the weekly reports were not prepared by Petitioner's teachers on a consistent basis, nor were they consistently provided to the parents. Some teachers did send intermittent reports and/or made phone calls regarding Petitioner to his parents. Petitioner's mother understood that every Friday she or her husband would pick up a packet with weekly progress reports and any missing work.

31. a. During this time, Mr. Rother offered monthly IEP meetings to Petitioner's parents. Petitioner's parents declined these offers, as the due process leading to the present hearing was ongoing. He also discussed Petitioner's progress at weekly meetings with Petitioner's teachers.

b. Dr. Joseph Harastzi's prepared a letter dated July 20, 2004 (Exhibit WW) which was received by the District on approximately August 20, 2004 (Exhibit YY.) Dr. Harasztzi's letter indicates that "the Bipolar condition does not require additional time or accommodations when the illness is under control. Dr. Harasztzi's letter also states that Petitioner "does need extra time to complete examinations and also to turn in his work" due to Attention Deficit Disorder.

32. It was established that during this time the District would have allowed Petitioner with an opportunity to make-up incomplete work. Most of the teachers that testified indicated that they had liberal policies regarding make-up work as long as the work was completed during the semester. Petitioner's mother's understanding was that late work could be turned in up to two weeks late. However, without the weekly reports, Petitioner's parents were not advised that there was incomplete work to be done. The lack of weekly reports did not comply with the February 2004 IEP.

January 2005 IEP

33. No evidence was presented regarding Petitioner's November 2004 hospitalization. However, in January 2005, Petitioner was hospitalized for problems related to his medications. Petitioner missed all of his finals because he was in the hospital. An IEP meeting took place on January 27, 2005 (January 2005 IEP.) The purpose of this IEP meeting was to refer Petitioner to Educational Partnership High School (EPHS) for the spring semester of 2005.

34. At the time of this IEP meeting, Petitioner remained hospitalized. The IEP team noted a concern for salvaging credits for the prior fall semester. The District offered the following programs and services: designated instruction and services, independent study through EPHS twice per month, and tutoring per the Settlement Agreement for five hours per week. (Exhibit 2.)

35. The parties agreed that Petitioner's placement should be changed. Petitioner was failing many classes and his parents agreed to the EPHS placement. (Exhibit SS-17.) The IEP team agreed that Petitioner would be given "Incomplete" grades in his classes, the opportunity to make up missing work, and five hours of tutoring as indicated in the July 2004 settlement agreement. The agreement allowed Petitioner to make-up the work he missed while he was in the hospital and also to take his final exams. Petitioner's mother understood that the agreement allowed Petitioner to complete all incomplete work from the prior semester. The District contends that the agreement only encompassed the work Petitioner missed while hospitalized.

36. The January 2005 IEP does not state that the District would allow Petitioner to make up all of the work he had failed to complete during fall semester of 2004, nor does it specifically limit Petitioner's ability to only make-up work from the period of hospitalization. The IEP indicated that Petitioner's parent would "bring documentation of hospitalization and meet when Petitioner is released and ready to make-up incomplete grades." When the EPHS services were discussed and agreed to at the January 2005 IEP, the date that EPHS services would begin was not decided as Petitioner was still in the hospital. Petitioner was hospitalized until late in January 2005. Thereafter, the District was notified of Petitioner's discharge from the hospital. There was an approximately three week delay between Petitioner's discharge and when he began his orientation at EPHS. The IEP states that the referral is for the spring semester. The three week transition period was not unreasonable. It was established through Ms. Schickler's testimony that this type of referral usually takes a period of time and is not immediate or automatic.

37. Petitioner's parents did not make a request for home-hospital instruction at this IEP meeting.

January 2005 to March 2005

38. Ms. Albright worked with Petitioner's teachers to obtain the work he missed while hospitalized. (Petitioner's Exhibit BBB.) A few teachers provided make-up final exams and some limited make-up work was obtained from Petitioner's teachers.

39. a. After the January 2005 IEP meeting, Ms. Shickler contacted Kevin Luttrell, Petitioner's tutor, to arrange for tutoring services for Petitioner. Mr. Luttrell was ready and willing to provide tutoring services to Petitioner while he was in the hospital and thereafter to assist him with the school work he missed due to the hospitalization. He was available to provide tutoring to Petitioner for up to five hours per

week. Petitioner and his parents rarely utilized the available tutoring in the spring semester of 2005. When Mr. Luttrell attempted to arrange tutoring sessions, his phone calls went unreturned, Petitioner did not want to meet, or he was told it was a bad time because the parents were preparing to move to Oregon.

b. After the January 2005 IEP, Petitioner's report card listed as four letter grades and two incompletes. It was not established when Petitioner received his report card. Petitioner received "F" grades in English and Introduction to Theatre Arts and a "D-" in Strategies for Success. Petitioner received a "B" in Surfing and "Incomplete" in Chemistry and United States History. (See Exhibit VV.)

March 2005 IEP

40. On March 17, 2005, the District convened another meeting of Petitioner's IEP team (March 2005 IEP.) The IEP developed at this meeting was an addendum to the January 27, 2005 IEP. The purpose of this meeting was to establish a plan for Petitioner to complete as many credits as possible before he moved to Bend, Oregon, in June of 2005, and also to discuss a change of teacher for Petitioner. (Exhibit 3.)

41. The District offered that Petitioner would remain at EPHS with a change of site and teacher, twice per week through June 26, 2005. The District also agreed to assist in getting work from WHS for the classes for which Petitioner received incompletes in in the fall 2004 semester. Petitioner's advocate indicated that some make-up work for incompletes had been provided to Petitioner that week. Ms. C. testified that she consented to this IEP. (Exhibit 3.)

42. After this IEP, Ms. Schickler obtained two (Algebra and Chemistry) final exams. She also spoke with Petitioner's counselor, Ms. Albright, who informed her that some teachers did not have any make-up work available. Some make-up history work was provided for Petitioner's History class. Ms. DiLoretto, Petitioner's Theater Arts teacher, did not provide make-up work because Petitioner could not have raised his grade in her class to a passing grade even if he had been provided with the additional make-up work.

LEGAL CONCLUSIONS AND DISCUSSION

1. Pursuant to the Individuals with Disabilities Education Act (IDEA) and State special education law, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (California Education Code⁹ § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the State educational standards, and conform to the child's IEP.

⁹ All further references to "Code" are to the California Education Code.

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

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

4. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of the IDEA. The Court determined that a student’s IEP must be designed to meet the student’s unique needs and be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student’s abilities. (Id. at 198-200.) The Court stated that school districts are required to provide only a basic floor of opportunity that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (Id. at 201.)

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

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

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

8. The Petitioner has the burden of proving at an administrative hearing the essential elements of his claim. (*Schaffer v Weast* (November 14, 2005, No. 04-698) ___ U.S. ____.)

9. Petitioner alleges that the District failed to provide him with a FAPE both procedurally and substantively. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of the District's proposed program. If the District's program was designed to address Petitioner's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then District provided a FAPE, even if Petitioner's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. The District was also required to provide Petitioner with a program which educated him in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of his disabilities was such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Code § 56031.) Therefore, the program the District offered Petitioner must have met the following four requirements to have constituted a FAPE: (1) be designed to meet his educational needs; (2) be reasonably calculated to provide him some educational benefit; (3) be comported with his IEP; and (4) provided him an education in the least restrictive environment.

Issue No. 1: From July 22, 2004 Through The Date The Present Did Respondent District Deny Petitioner a FAPE By Failing To Provide The Specific Accommodations In His IEP Regarding Incomplete Work And Grades?

Petitioner's fall semester 2004 grades

10. In this proceeding, Petitioner contests his grades for the fall 2004 semester and requests that his letter grades be changed to "incompletes." Code sections 49066 and 49070 describe the procedure that parents must follow if they wish to contest their child's grades. That procedure does not involve special education due process hearings. Code section 56501, subdivision (a), provides the jurisdictional bases for due process hearings in the State of California which states that parents and public education agencies may initiate due process hearings under any of the following circumstances: (1) there is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education to the child; (2) there is a refusal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education to the child; (3) the parent refuses to consent to an assessment of the child; and (4) there is a disagreement regarding the availability of a program appropriate for the child. The request for a change in grades does not fall under any of these categories. Therefore, the ALJ has no jurisdiction to order Petitioner's grades changed. Additionally, Petitioner recognized this lack of jurisdiction when he entered in the July 2004 settlement which indicated that grade changes were not under the jurisdiction of SEHO. However, the IEP agreement concerning accommodations with respect to grades and incomplete work are before the ALJ and are discussed below.

Petitioner's Incomplete Work from July 2004 to December 2004

11. Petitioner's February 2004 IEP called for the District to send weekly reports to the parents regarding Petitioner's incomplete work. This was not done. Between July 2004 and December 2004, the District did not provide the agreed upon method of parental updates regarding incomplete work and grades. This failure to provide weekly reports frustrated Petitioner and his parents in achieving the goals stated in the IEP. Without Petitioner's parents knowing Petitioner's progress, or lack thereof, they had no way of knowing how much work Petitioner was failing to complete. It is noted that the parents could have been more proactive in tracking their son's progress. However, it was the District's burden to prove that it complied with the terms of the agreed upon IEP. The District failed to carry its burden as set forth in Factual Findings 1-18; 29-32.

Petitioner's Opportunity to Make Up Incomplete Work after January 2005

12. During the fall semester of 2004, Petitioner missed an extensive amount of classes. Petitioner alleges that the IEP's state, or were intended to mean, that the District would allow Petitioner to make-up work for any work he did not complete during the fall semester of 2004. It was undisputed that the District agreed to allow Petitioner to make up work that he missed while he was hospitalized in January of 2005 and also to take his final exams. At issue is whether or not the agreement allowed Petitioner to make up all work that he had failed to complete during the fall 2004 semester.

13. For the fall semester of 2004, the last agreed-upon and implemented educational placement for Petitioner was described in the February 2004 IEP. This was the IEP that was operative during the fall semester of 2004 because Petitioner's parents did not consent to any subsequent IEP's until January 27, 2005. The February 2004 IEP, under the heading Classroom Accommodations, states that, "Turning in late work must be in agreement with the individual teacher and LBUSD curriculum standard." It was established that the District liberally allows students to make up work, but only prior to when final grades are given. Therefore, if Petitioner had not been hospitalized, he only had until the end of the semester to complete all required class work.

14. However, In January 2005 Petitioner was hospitalized and missed all of his final exams. The District contends that the January 27, 2005 IEP does not indicate that the District would allow Aaron to make up all of the work he had missed for as a result of any of his absences during the fall semester of 2004. While this is correct, the IEP also does not restrict Petitioner's ability to make-up work to the period of hospitalization. The IEP only mentions that the school will be notified when Petitioner is able to take his final exams. Petitioner was to receive "Incompletes" as grades for the fall semester.

15. The District contends that the January 27, 2005 IEP requested that parents "bring documentation of hospitalization and meet when Aaron is released and ready to make-up incomplete grades" and that the District would only have required that documentation in order to determine what work Petitioner would be allowed to make up.

16. However, the March 2005 IEP states: “[Special Education] Administrator will facilitate getting parents work from WHS for the classes for which [Petitioner] received incompletes last semester.” That IEP further states that some make-up work for the incomplete classes had been provided that week and that the Special Education Administrator would speak with the WHS counselor to determine a due date. Read as a whole, the language of this IEP implies that sufficient work could be completed by Petitioner so as he could potentially pass his “incomplete” classes. Otherwise, allowing Petitioner to only complete a portion of the work he missed due to his January 2005 hospitalization and to take his final exams, and then fail him anyway, does not make sense. The term “incomplete” suggests that Petitioner could complete his classes. If he could not have passed his classes even by making up missed work and final exams due to his hospitalization, then the District should have simply stated such in the IEP. Ms. Albright testified that she worked with Petitioner’s teachers to attempt to obtain the work that he missed while he was hospitalized. Some did not provide a final exam, as Petitioner would have failed anyway without additional make-up work. 10 The District did not carry its burden that it presented Petitioner with an opportunity to make-up work as described in the January 2005 and March 2005 IEP’s as set forth in Factual Findings 33-42.

Petitioner’s “Incomplete” Grades

17. The parties agreed at the January 2005 IEP that Aaron would receive an “Incomplete” as a grade in each of his classes. However, when he received his report card, Petitioner’s grades were listed as four letter grades and two incompletes. It was not established when Petitioner received his report card. The documents presented at hearing showed “F” grades in English and Introduction to Theatre Arts and a “D-” in Strategies for Success. Petitioner received a “B” in Surfing and “Incomplete” in Chemistry and United States History. (See Exhibit VV.) The assignment of letter grades was contrary to the decision of the January 2005 IEP team as set forth in Factual Findings 33-42.

18. Petitioner prevailed on Issue No. 1. The District’s failure to: issue weekly reports, issue “Incomplete” for grades, and allow Petitioner to make-up work frustrated Petitioner’s education and he failed to make appropriate educational progress.

Issue No. 2: Did The District Deny Petitioner FAPE During His Hospitalizations In November Of 2004 And In January Of 2005 By Providing No Services Until Petitioner Returned To School?

Services during Petitioner’s January 2005 hospitalization

19. As noted above, the program the District offered must have met the following four requirements to have constituted an appropriate educational program for Aaron: be designed to meet his educational needs; be reasonably calculated to provide him some

educational benefit; comported with his IEP; and provided him an education in the least restrictive environment.

20. In this case, Petitioner's contention is that the District did not provide him with a program and services that were designed to meet his unique educational needs while he was hospitalized in November 2004 and January of 2005.

21. It was not established that the District denied Petitioner a FAPE during his November 2004 hospitalization. At hearing, the evidence presented on this issue related to the January 2005 hospitalization.

22. Petitioner was hospitalized for approximately one week in January of 2005. Thereafter, Ms. Shickler contacted Kevin Luttrell to arrange for tutoring services. Mr. Luttrell testified that he attempted to arrange tutoring services throughout the spring semester of 2005. However, Petitioner did not utilize any tutoring services.

23. Petitioner contends that the District should have provided home-hospital instruction to Petitioner while he was absent from school due to his hospitalization. However, Mr. Luttrell was willing to provide tutoring services to Petitioner while he was in the hospital and his tutoring services would consist of assisting Petitioner with the school work he missed due to the hospitalization. Mr. Luttrell was willing to work with Petitioner for up to five hours per week pursuant to the terms of the July 2004 settlement agreement. Petitioner and his parents did not utilize those services.

24. Ms. Rice testified that home-hospital and tutoring services were different because home-hospital would focus on the core-curriculum. However, the January 2005 IEP was consented to by Petitioner's parents and attended by their advocate Ms. Rice. The IEP does not reference any request for home-hospital services. Insufficient evidence was presented that Petitioner made a request for home-hospital services or that Petitioner could have even utilized these services. It would be unfair to hold the District responsible to provide a service that Petitioner's parents did not request. The District offered to provide tutoring services that were not being utilized as set forth in Factual Findings 33-39.

Services after Petitioner's January 2005 hospitalization

25. When Petitioner was hospitalized in January 2005, an IEP meeting was held. The IEP team agreed that once Petitioner was released from the hospital he would begin at EPHS, a District educational placement, and a referral was immediately prepared. Tutoring under the settlement agreement was to continue five hours each week. Petitioner did not begin attending EPHS until approximately three weeks after his discharge from the hospital. Petitioner contends this delay is an unreasonable implementation of the January 2005 IEP.

26. Federal law requires that an IEP and its services be implemented "as soon as possible" following an IEP meeting. (34 Code of Federal Regulations (C.F.R.) 300.342(b)(i)(2).) In general, an unreasonable delay in implementing an IEP is

impermissible. The special education and related services set out in a child's IEP should be provided by the agency soon after the IEP is finalized.

27. Petitioner further contends that after the January 2005 IEP, the placement and services for Aaron should have been implemented as soon as the referral was made in the absence of his consent to a three-week delay of EPHS services, Petitioner contends that he was denied substantive and procedural rights and denied a FAPE.

28. When Petitioner released from the hospital, he was required to attend an orientation at his new placement, which took several weeks to arrange. Following his release from the hospital in January 2005, until he began to attend EPHS, petitioner had three weeks without educational services. However, these three weeks could have been utilized by Petitioner to make up work from the prior semester or to obtain tutoring as offered by the District. For unknown reasons, Petitioner did not utilize the available tutor during this time. While the District did a deficient job of providing make up work, Petitioner's parents could have aided the process if they had contacted the District during this time to utilize the tutor and insist on being provided all make-up work.

29. When the EPHS services were discussed and agreed to at the January 2005 IEP, Petitioner was hospitalized and the date that EPHS services would begin was not decided as Petitioner was in the hospital. The IEP states that the referral is for the spring semester. The three-week transition period was not unreasonable. Ms. Schickler testified that this type of referral usually takes a period of time and is not immediate or automatic. The District prevailed on Issue No. 2. Factual Findings 33-42.

Issue No. 3: Did The District Inappropriately Change Petitioner's Eligibility Category From SLD to ED?

30. Petitioner argues that the District inappropriately changed his eligibility from LD to ED. However, the District required consent from Petitioner's parents before any changes could be made to his educational program or eligibility classification. (Code § 56346, subdivision (b.)) The District first proposed to change Petitioner's eligibility from LD to ED at the February 2004 IEP meeting. However, Petitioner's parents never consented to that change in eligibility. Therefore, that change never actually occurred. Petitioner's eligibility category remained LD.

31. Petitioner contends that the failure of the District to discuss the ED criteria at the February 2004 IEP and to permit the parent to participate in that discussion and in the eligibility determination denied their rights to participate in their child's IEP. However, Ms. C. and advocate Ms. Rice attended these meetings. They articulately noted their objection in the IEP under the heading "Parent and Advocate concerns." At this and every subsequent IEP that followed, Petitioner at all times contested the eligibility classification suggested by the IEP teams. A disagreement between the parents during an IEP meeting does not equate to a denial of participation in the IEP. The IEP minutes reflect "psychologist shared ED qualifiers." This evidence reveals that some discussion on the eligibility issue took place at

the February 2004 IEP. Further, both Mr. Maldonado and Dr. Lipsitz testified that eligibility for a student with Bipolar disorder could be in either Other Health Impaired or Emotional Disturbance. The District prevailed on this issue. Factual Findings 6-18.

Issue No. 4: Did The District Commit Procedural Violations By (1) Failing To Provide Prior Written Notice Of Change In Eligibility Classification; (2) Failing To Provide Prior Written Notice Of Refusal To Abide By The Parents' Request To Have Someone At The Applicable IEP Meetings Who Was Knowledgeable Concerning Bipolar Disorder And Could Help In Identifying Needs Arising From The Bipolar Disorder; (3) Failing Have A Person Knowledgeable About Bipolar Disorder At The IEP Meetings?

32. It must be determined whether the procedural steps required under the IDEA were complied with. If they were not, then a determination whether the procedural denials resulted in a substantive denial of FAPE must be made. Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural violations which result in a loss of educational opportunity or which seriously infringe the parents' opportunity to participate in the IEP formulation process result in the denial of a FAPE.

Failing To Provide Prior Written Notice Of Change In Eligibility Classification
Petitioner alleges that the District failed to provide him with prior written notice when it changed his eligibility classification from specific learning disability (SLD) to emotionally disturbed (ED).

33. A special education student's parents are entitled to notice of an IEP meeting. The notice shall indicate the purpose, time, and location of the meeting and who shall be in attendance. (Code § 56345.) Prior to the February 2004 IEP, there was no notice of the intent of the District to discuss or change Aaron's eligibility category to ED. At hearing, no evidence was offered by the District of any such notice.

34. An IEP team shall make the determination of eligibility and the parent is an important part of the IEP team. Parent participation in the IEP process must be meaningful.

35. With regard to the prior written notice requirement, the 34 C.F.R. § 300.503 states as follows:

Notice. (1) Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency (i) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or (ii) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. (2) If the notice described under paragraph (a)(1) of this section relates to an action proposed by the public agency that also requires parental consent under Sec. 300.505, the agency may give notice at the same time it requests parent consent. (emphasis added)

36. Under 20 U.S.C. §1415(b)(3), a local educational agency, when it proposes to change the identification of the child (i.e. eligibility) shall provide written notice. The District contends that in this case, the change in eligibility category would be an action that would require parental consent, and therefore prior written notice was not required. However, 20 U.S.C. §1415(b)(3) does not contain such a distinction. Therefore, written notice as procedurally required was not provided.

37. However, while District's conduct was a procedural violation, Petitioner has failed to show a serious infringement on the parents' ability to participate in the IEP as a result of the District's failure to follow the prior written notice provisions. At the February 2004 IEP, the District committed its proposal to change Petitioner's eligibility statement to the IEP document itself. Petitioner's parents brought an advocate to the February 2004 IEP, and were able to fully express their concerns about the proposed change in placement through the Parent and Advocate Concerns page attached to that IEP. The parents were provided sufficient information to allow them to consider the District's proposed change in eligibility, and to reject that proposal. Therefore, Petitioner's parents suffered no prejudice by failing to receive a notice document prior to the IEP meeting. The lack of notice did not result in a loss of educational opportunity or did not seriously infringe the parents' opportunity to participate in the IEP formulation process. Also, the parents could have brought their own expert to future IEP meetings to further contest the eligibility classification chosen by the District and chose not to do so. The District prevailed on this issue

Prior Written Notice Of Refusal Of Parent's Request To Have Someone Knowledgeable About Bipolar Disorder At IEP Meetings

38. Petitioner also argues that the District was required to provide prior written notice to the parents regarding a refusal to have someone knowledgeable about Bipolar Disorder at the IEP meetings. It was undisputed that the District provided no such notice.

39. However, this is not a subject that would activate the prior written notice protections of 34 C.F.R. §300.503 or 20 U.S.C. §1415(b)(3). Under both of those rules, prior written notice must be provided when the District "proposes to initiate or change the identification, evaluation, or educational placement of the child." There is nothing in the regulation that requires prior written notice for the District's decisions regarding personnel that it chooses to invite to IEP meetings.

40. In any event, the District did not refuse to have someone knowledgeable about Bipolar disorder at the IEP meetings. At the February 2004 IEP, the parents indicated that they would obtain a medical report from Dr. Haraszti. At the June 2004 IEP this report was still unavailable. It was not unreasonable for the District to rely on the parents' representation that a report, from Petitioner's expert on Bipolar, was forthcoming. Also, the District did have Ms. Andrews and Mr. Maldonado attend the June 2004 IEP. The District attempted to provide a knowledgeable person at the first possible IEP after becoming aware

of Petitioner's Bipolar diagnosis. Whether or not the District's attempt was sufficient will be discussed below, but there was no reason for the District to send notice of its "refusal to have someone knowledgeable about Bipolar" when it did not refuse to do so. Therefore, the District did not fail in any of its procedural obligations by not providing the notice Petitioner seeks.

Failing To Have A Person Knowledgeable About Bipolar Disorder At The IEP Meetings

41. Under the IDEA and *Rowley*, the program the District offered must have met the following four requirements to have constituted a FAPE for Petitioner: (1) be designed to meet his educational needs; (2) be reasonably calculated to provide him some educational benefit; (3) be comported with his IEP; and (4) provided him an education in the least restrictive environment.

42. Petitioner contends that the District's duty was to have someone knowledgeable about Aaron's assessments and his diagnoses at the IEP meetings.

43. Pursuant to State and federal law, members of the IEP team shall include, at the discretion of the parent or the District, other individuals who have knowledge or special expertise regarding the pupil, including related services personnel, as appropriate. (20 U.S.C. §1414(d)(1)(B)(vi); Code § 56341, subdivision (b)(6.)) Petitioner contends that medical personnel, or someone knowledgeable in Bipolar disorder, would be required under federal law to participate in the IEP. 34 C.F.R. §300.344(a); 34 C.F.R. §300.532.

44. The District used its discretion under 34 C.F.R. §300.344(a)(6.) by attempting to have persons who were knowledgeable regarding Petitioner's educational needs that arose from his Bipolar disorder as discussed in legal conclusions 39-41. However, the District was also required under state and federal law to provide Petitioner with a program that met his unique educational needs. (*Rowley* at 207-208.)

45. Petitioner correctly contends that Bipolar is a medical diagnosis and no medical personnel ever attended any of Petitioner's IEP's.

46. Mr. Maldonado who attended Petitioner's February 2004 IEP has some knowledge about Bipolar disorder. However, he cannot make such a diagnosis and he is not an expert on Bipolar disorder. He had a limited knowledge about how Bipolar would affect Petitioner's needs. Mr. Maldonado could not remember the four types of Bipolar disorder and could not identify some of the characteristics of Bipolar disorder.

47. Mr. Maldonado testified that the District had attempted to assess Aaron's Bipolar disorder through L.A. County Mental Health, but that the parent had refused that assessment. Petitioner's mother credibly testified that there was never any assessment plan given to the parent. In any event, a much simpler solution was available to the IEP team. The IEP team could have extended an invitation to Dr. Haraszi or its own employee, Dr. Lipsitz.

48. David Lipsitz, who had previously assessed Aaron, is knowledgeable about Bipolar disorder. He also stated that someone who has treated the disorder should participate in IEP's for a student with Bipolar disorder.

49. Dr. David Lipsitz, a District clinical psychologist, testified at length about Bipolar disorder; the two types: Bipolar One and Bipolar Two; the characteristics of the disorder in children; the behaviors that result from Bipolar disorder during the depressive and manic stages; strategies for helping kids with the diagnosis, including a behavioral component, a cognitive portion, and an inter-personal component which includes family, classmates, and a social role. Dr. Lipsitz stated that eligibility for a student with Bipolar disorder could be in either Other Health Impaired or Emotional Disturbance but specified that the IEP team must identify the student's unique educational needs and how to help him with psychiatric problems. In his opinion, the IEP team should include someone who is sufficiently knowledgeable.

50. Petitioner contends that without a person in attendance at the various IEP meetings who had a sufficient knowledge of Bipolar to provide the team with essential information about the characteristics of Bipolar disorder and effective strategies to address related behaviors, it was impossible for the team to develop an IEP with goals and a behavior plan, taking into account his diagnosis, which was calculated to provide educational benefit for Petitioner. Petitioner further contends that because the IEP teams lacked information necessary to identify Aaron's "unique educational needs," as part of his IEP, the IEP could not provide Aaron with FAPE.

51. As discussed previously, it was not unreasonable for the IEP team to rely on the fact that a report was forthcoming from Dr. Haraszti between the February 2004 IEP and the June 2004 IEP. However, after a report was again unavailable at the June 2004 IEP, the District should have either invited Dr. Haraszti or Dr. Lipsitz to a follow-up IEP. The parent had requested that an expert be present and having a person qualified to diagnosis Bipolar and describe how it would affect Petitioner's educational experience was necessary. The ALJ finds that a procedural violation did occur when the District did not have a person sufficiently knowledgeable about Petitioner's diagnosis of Bipolar at Petitioner's IEP's after June 2004.

52. The question then becomes whether the procedural denial resulted in a substantive denial of FAPE.

53. Petitioner contends that the manner in which the goals and services were decided by the IEP teams was deficient because of the above-described procedural violation. However, both Mr. Maldonado and Dr. Lipsitz testified that Bipolar disorder was a medical diagnosis. Both also testified that Bipolar disorder, in and of itself, would not have made him eligible for special education services. (See California Code Regulations, title 5, section 3030.)

54. At the February 2004 IEP meetings, the IEP team set out to identify Petitioner's unique educational needs, noting in the IEP document that Petitioner had been diagnosed with Bipolar disorder. At the June 2004 IEP meeting, the District asked Debra Andrews to attend the IEP meeting. Ms. Andrew's did not testify at hearing so her input at the June 2004 IEP could not be evaluated by the ALJ. The District contends the IEP teams correctly identified Petitioner's unique educational needs arising from his Bipolar disorder as confirmed by Dr. Joseph Harastzi's letter dated July 20, 2004, which was received by the District on approximately August 20, 2004. Dr. Harasztzi's letter indicates that Petitioner's Bipolar condition does not require additional time or accommodations when the illness is under control. Dr. Harasztzi's letter also states that Petitioner did need extra time to complete examinations and also to turn in his work due to Attention Deficit Disorder.

55. a. Dr. Harasztzi's recommendations were consistent with the February 2004 IEP team's determination to allow Petitioner more time to complete assignments. Therefore, this evidence revealed that the District's procedural violation did not result in a substantive denial of FAPE.

b. Insufficient evidence was presented that Petitioner's IEP goals and services actually did not provide a FAPE. First, Dr. Harasztzi's written opinion was consistent with the IEP team's recommendations. Second, the parents agreed to the goals and services as stated in the February 2004 IEP. Lastly, insufficient evidence was presented that even if a Bipolar expert had attended the IEP's, that Petitioner's program would have been designed differently. The District prevailed on this issue.

ORDER

56. WHEREFORE the following order is made:

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

The District is ordered to provide one semester of tutoring services to Petitioner as compensatory education. The tutoring services shall be at a rate of five hours per week so as to allow Petitioner to make-up his fall semester of 2004 work. However, it is Petitioner's responsibility to actually complete all necessary work and to take and pass his final exams for the classes he did not pass in the fall semester of 2004.

PREVAILING PARTY

57. Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: Petitioner prevailed on Issue No. 1 and the District prevailed on Issue Nos. 2, 3, and 4.

RIGHT TO APPEAL THIS DECISION

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

DATED: November ____, 2005.

CHRISTOPHER J. RUIZ
Administrative Law Judge
Office of Administrative Hearings