

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

In the Matter of:

STUDENT,

Petitioner,

v.

BELLFLOWER UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH NO. N 2005080006

DECISION

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, heard this matter on January 19 and 20, 2006, and on April 7, 2006, at the offices of the Bellflower Unified School District, 16703 South Clark Avenue, Bellflower, California.

Petitioner (Student) was represented by her attorney, Joyce H. Vega, Esq., and special education advocate, Steven A. Figueroa. Student was present during the first two days of hearing. Student's parents (Mother and Father) were also present at various times during the hearing on Student's behalf.

Respondent Bellflower Unified School District (District) was represented by Eric Bathen, Esq. Victoria Medina, the District's Assistant Superintendent of Special Education, was also present on the District's behalf.

At the conclusion of the hearing, the matter was continued for the parties to file closing briefs. On May 8, 2006, Student filed her closing brief, which has been designated in the record as Petitioner/Student's Exhibit R. On May 9, 2006, the District filed its closing brief, which has been designated in the record as Respondent's Exhibit 8.

The ALJ has considered the oral and documentary evidence, and written argument, and makes the following findings:

PROCEDURAL HISTORY

Student filed her due process complaint on July 27, 2005, and it was received by OAH on July 28, 2005. On September 22, 2005, the matter was continued pursuant to stipulation of the parties. During this period of continuance, the due process hearing was set to commence on January 19, 2006. The hearing lasted two days, until January 20, 2006, at which time the matter was continued to February 9, 2006, for the parties to submit closing briefs. By order dated February 7, 2006, the ALJ, on her own motion, re-opened the evidentiary record and admitted additional evidence. After consultation with the parties, an additional day of hearing was set for April 7, 2006. On April 7, 2006, the ALJ conducted the continued hearing and received additional oral and documentary evidence. The ALJ continued the matter until May 12, 2006, when closing briefs were ordered to be filed.

ISSUES

The general issue presented is whether the Student is entitled to compensatory education and additional private tutoring services related to her reading skills, at the expense of the District. The determination of this issue requires resolution of the following issues:

1. Did the District deny Student a free, appropriate, public education (FAPE) for the school years 2002 through 2005 by failing to timely assess her and find her eligible for special education services between July 28, 2002 and approximately March 2003?¹
2. Did the District deny Student a FAPE during the school years 2002 through 2004 by failing to meet statutory timelines for holding the initial IEP meeting?
3. Did the District deny Student a FAPE for the school years 2002-2003 and 2003-2004 by failing to provide Student's parents with notices of their procedural rights under the Individuals with Disabilities Education Act (IDEA), such that they were not able to fully participate in the IEP process?
4. Did the District deny Student a FAPE for the school years 2002-2003, 2003-, 2004, and 2004-2005, by failing to provide educational services which were designed to meet Student's unique needs and to provide educational benefit to Student, due to a failure to properly assess Student?
6. Are the Student's parents entitled to reimbursement for the costs previously incurred and to be incurred by reason of Student's attendance at Sylvan Learning Center (Sylvan) including tuition, costs of financing tuition, and related expenses, such as transportation to and from Sylvan?

¹ Student sought relief for the years 1999-2002. On the first day of hearing, the ALJ determined that all claims prior to July 28, 2002 were barred by the three-year statute of limitations contained in Education Code section 56505, subdivision (1).

FACTUAL FINDINGS

General Background and Jurisdictional Issues

1. Student is 12 years old. She was born on December 18, 1993. She is currently in the fifth grade at Frank E. Woodruff Elementary School (Woodruff) located in the District.

2. Student attended the Intensive Learning Center (ILC) in the District for Head Start, from kindergarten through second grade. While in second grade, she was found eligible for special education services under the category of Specific Learning Disability. Prior to that time, she was receiving remedial reading assistance at the ILC.

3. Student repeated kindergarten during the 2000-2001 school year. She attended first grade during the 2001-2002 school year and second grade during the 2002-2003 school year. Student transferred to Woodruff for third grade (the 2003-2004 school year). She completed fourth grade at Woodruff (the 2004-2005 school year). At the time of the due process hearing, she was in the fifth grade at Woodruff.

Student's IEP for the School Years 2002-2004

4. There was no evidence that the District took any relevant action with respect to Student during the period between July 28, 2002 and September 2002. In approximately September 2002, a Student Study Team (SST) was formed at the ILC to consider Student's academic progress. On September 25, 2002, a Notification of Psychoeducational Evaluation Referral was signed by the SST Chair, referring Student to the school psychologist to determine whether Student should be assessed. On September 30, 2002, Mother signed a consent to an assessment plan, which consisted of a single document containing both the assessment plan and a signature block for consent to the assessment. According to this assessment plan, Student was to be assessed for academic achievement and cognitive development. No evidence was presented as to whether or when the District received the consent. No evidence was presented as to whether any assessments were performed pursuant to this assessment plan/consent to assess. The assessment plan/consent to assess was only one document. However, a special education program administrator for the District testified that, as a matter of custom and practice, it is delivered in a packet that contains at least two documents. There was no evidence as to the nature of any other documents that the District customarily provided with the assessment plan/consent to assess, and there was no evidence that Mother was presented with any document other than the lone assessment plan/consent to assess document.

5. On March 17, 2003, Mother signed two additional consents to assess, each of them consisting of one page. One of the consents was written solely by Mother; the other consent was on a District form, entitled "Parent Consent for Assessment." The "Parent Consent for Assessment" was one page of a two-page document. The other page describes the areas to be assessed and who is to assess, but Mother denied that she received the other

page, or any other document, when she received the “Parent Consent for Assessment.” The “Parent Consent for Assessment” states:

I have been informed that my child cannot be assessed for or placed in special education and related services without my consent. I understand that I have a right to receive this notice of consent in writing in my native language. If my language is not written, this information will be translated orally or manually. I further understand that my consent is voluntary and can be revoked at any time.

Below the signature block, the “Parent Consent for Assessment” states: “Please keep goldenrod copy and parent rights form for your records.”

6. Mother testified that both consents were executed at a meeting, but there was no evidence as to who was present at the meeting, other than Mother and the school principal, or the specific purpose of the meeting, or why Mother executed multiple consents to assess.

7. By a notice dated March 28, 2003, which Mother received, the District invited Mother to attend an IEP meeting on April 3, 2003. The notice contained information about the purpose of the meeting, and gave a brief description of the parents’ rights, including the right to bring someone to the meeting, such as a friend or teacher; how to request an interpreter; and Student’s right to participate at the meeting.

8. At the IEP meeting, which was held on April 3, 2003, Student was found to be eligible for special education services in the category of Specific Learning Disability. Specifically, the IEP stated:

There is a severe discrepancy between her average cognitive ability and her achievement in reading and written language which is well below average. This is due to a processing disorder in auditory sequential memory.

9. Both Mother and Father were present at the IEP meeting, as was Student’s teacher, the special education teacher (Barry Carlson), the school psychologist, and the principal of the ILC. The IEP team documented Student’s then present levels of functioning in the areas of academic achievement, social-emotional status, psycho-motor development, pre-vocational/vocational skills, self-help skills-adaptive behavior, communicative status, intellectual development, and physical health. The assessments mentioned in the IEP were the Woodcock-Johnson Revised (WJ-R), the Developmental Test of Visual-Motor Integration (VMI) and the Kaufman Brief Intelligence Test. (K-BIT.)

10. Academically, the team found that Student was achieving well below average for her grade and age in reading and written language. Her WJ-R grade level and standard scores in these areas were:

	Grade Level	Standard Score (Grade)
Letter Word Identification	1.4	72
Passage Comprehension	1.5	80
Dictation	1.2	67
Writing Samples	1.6	88

The IEP team noted that Student's sight vocabulary was very limited and her phonics skills were very weak. Her math achievement was in the average range. Under intellectual development, the IEP team noted that Student had average nonverbal reasoning ability. Her verbal ability was in the low-average range. Overall she had average cognitive ability. She obtained an IQ composite score of 93 on the K-BIT.

11. The IEP team established goals and objectives in the following areas: improve reading skills, improve writing skills, and teach pre-vocational skills to promote independence, because Student did not complete work by herself and was overly dependent on others to direct and assist her. The goals and objectives were specific as to the levels of achievement, using grade-level standards or other specified measures, to be attained over a specified period of time. Factors pertaining to placement in the least restrictive environment, given Student's learning disabilities and academic delays, were considered. The IEP team recommended that Student would benefit from individualized and small group instruction in the Resource Specialist Program (RSP) setting. The IEP team recommended that Student spend 83 percent of Student's school time in the general education class, and 17 percent of her school time in the RSP setting. The IEP team determined that Student should finish the second grade at the ILC, and that the educational program recommended in the IEP would commence in September, 2003 and encompass the 2003-2004 school year.

12. The IEP team recommended instructional modifications and accommodations for the general education teacher at ILC. The IEP team recommended that the teacher give additional class time to complete assignments, give reinforcement for completion of written assignments, and repeat directions to clarify understanding for academic tasks. The IEP also included accommodations to be used when standardized district-wide tests were administered to Student, including that the tests would be administered in a small group setting, and that instructions would be read aloud.

13. The IEP states that Mother and Father agreed to the IEP, and Mother signed the pages of the IEP containing goals and objectives, next to text which stated:

I understand and agree with the emphasis on the goals and objectives stated in this plan.

I understand that this program is reviewed annually, and that I may request at any time a re-evaluation or change of educational program for my child. I give my consent to the on-going assessment which is an aspect of this program.

Mother also signed next to text on the IEP that stated: "I have read and understand my rights as explained to me by the district representative."

Mother also signed the page of the IEP which described the accommodations to be made for standardized testing of Student. Her signature appeared below the following text:

I understand the options for participation of my child in the district-wide testing program and the implications if my child is not to be included in the general education assessment. I agree with the option selected and the reason for the selection.

Student's IEP for the School Year 2004-2005

14. Father, but not Mother, was present at this IEP meeting, which occurred on March 11, 2004. At the time of the IEP meeting, Student was in the third grade at Woodruff, which she had been attending since September 2003. The parents were notified of the meeting by a written notice dated March 3, 2004. The notice contained the same information regarding the purpose of the meeting and parental rights as did the notice that was sent to Mother in 2003 regarding the IEP of April 3, 2003.

15. In addition to Father, a District administrator, Student's general education teacher, and Mr. Carlson, Student's special education teacher, attended the IEP meeting. The IEP team again considered Student's then present levels of functioning in academic achievement, social-emotional status, psycho-motor development, pre-vocational/vocational skills, self-help skills-adaptive behavior, communicative status, intellectual development, and medical health/physical condition.

16. The IEP team reviewed Student's Woodcock-Johnson III (WJ-III) scores from testing performed on or about February 4, 2004. Her grade level scores and standard scores in Reading and Written Language Skills were:

	Grade Level	Standard Score (Grade)
Broad Reading	1.7	70
Letter-Word Identification	1.9	72
Reading Fluency	1.2	72
Passage Comprehension	1.9	80
Broad Written Language	1.8	78
Spelling	1.5	75
Writing Fluency	2.1	83
Writing Samples	2.2	87

17. The IEP team reviewed the goals and objectives from the previous IEP. The team found that Student had not met the reading goal, although she demonstrated “good functional growth” in tutorial sessions. She had demonstrated only 2 to 5 months growth in reading on standard tests. The other goals from the previous IEP were partially met. She demonstrated 4 to 6 months growth in written language skills on standard testing. With respect to her pre-vocational skills, the IEP stated that Student had significant difficulty working independently for more than 5 to 10 minutes.

18. The IEP team added math as a goal, and recommended objectives. The IEP team noted that Student did not “officially qualify” for support in math, but that she required daily assistance.

19. The IEP team set new goals and objectives for reading, written language skills, and pre-vocational skills, specifying the desired level of achievement over time, and recommended specific accommodations/modifications for testing and learning. The additional accommodations regarding testing included allowing the test to be taken in the resource room, allowing more time to complete the test, reading the test to Student, and using more objective items. Additional educational accommodations included giving directions through several channels, providing auditory and visual input, using different methods and materials to teach the same concept, using manipulatives, and using computational aids. The team recommended that Student’s general education instruction be reduced to 75 percent of her school time, and that she receive 25 percent RSP support in reading, written language, and math.

20. Father signed the goals and objectives pages of the March 2004 IEP, signifying, according to the text beside his signatures, that he understood and agreed with the emphasis on the goals and objectives, that he understood that the program is reviewed annually, that he may request a re-evaluation or change of the program, and that he consents to the on-going assessment of the child. He also signed the initial page of the IEP, although, inexplicably, his signature was not in the signature block stating that he has read and understood his rights, but rather in a signature block further down on the page, designating him as a committee member who will provide information to an absent parent. He also signed the pages listing the classroom and testing accommodations the IEP team had agreed upon for the Student.

Student's Enrollment at Sylvan and Subsequent IEPs

21. In January and February 2005, Mother and Father obtained financing for Student to attend Sylvan Learning Centers (Sylvan). Sylvan is a non-public school which is not certified to provide special education services in California. Student's parents have taken a loan in the principal amount of \$9,720.00 to pay for Sylvan's tuition. Student commenced attending Sylvan on or about February 11, 2005. Student's program at Sylvan consists of reading and math tutoring. The reading tutoring takes place with a small group of three or four students, and Student receives individual attention as necessary. Student's program at Sylvan is remedial; there was no evidence that Sylvan provides special education.

22. By letter dated February 10, 2005, Student, through her attorney and student advocate, expressed concerns about Student's education, and made several requests. Among other things, Student requested an IEP meeting "as soon as possible." They questioned whether Student had been assessed in all areas, and requested a new psychoeducational assessment, a neurological assessment from an independent neurologist, an occupational therapy assessment, an assistive technologies assessment, and a functional analysis assessment.

23. The annual IEP meeting for the school year 2005-2006 occurred on March 16, 2005, while Student was in the fourth grade at Woodruff. Father and Mother were both present. Also present at the IEP meeting were a District administrator, Student's general education teacher, Mr. Carlson, Student's special education teacher, Student's attorney, and Student's special education advocate.

24. The IEP team again considered Student's then present levels of functioning in academic achievement, social-emotional status, psycho-motor development, pre-vocational/vocational skills, self-help skills-adaptive behavior; communicative status, intellectual development, and medical health/physical condition. Under academic achievement, the team noted that Student had shown seven months growth in Broad Reading, six months growth in Broad Math, and 13 months growth in Broad Written Language, according to the W-J III which was administered on February 18, 2005. Specifically, the W-J III grade level and standard scores in Reading and Written Language skills were:

	Grade Level	Standard Score (Grade)
Broad Reading	2.4	75
Word Identification	2.4	75
Reading Fluency	2.2	79
Passage Comprehension	2.7	86
Broad Written Language	3.1	86
Spelling	2.4	81
Written Fluency	3.9	94
Written Samples	3.2	92

25. With respect to goals and objectives, the team noted that Student had met the goals set forth in the previous IEP for Broad Reading, Writing/Spelling, Math, and Pre-Vocation Skills/Work Completion. The team set new goals and objectives in these areas.

26. The IEP team recommended accommodations and modifications, some of which were the same as the previous year's IEP, but some of which were new. The new accommodations and modifications included breaking assignments into small series of assignments, using adapted test/simplified worksheets, providing frequent opportunity for review, adjusting/shortening assignments, pre-teaching vocabulary, and using homework cards/assignment book.

27. The IEP team determined that Student's RSP time should be increased to 30 percent. Student's parents agreed to the IEP, without waiving their rights to seek compensatory education and to raise issues of denial of FAPE for the years 2000-2004. Mother signed the IEP in multiple locations, indicating her understanding of and assent to the goals and objectives.²

28. The IEP team noted Student's attorney's concerns that the District had failed to assess in all areas, and the attorney's request for additional assessments. Copies of the latest assessments were provided. Student's teachers reported that Student had made significant progress in all areas. The parents executed a consent to assess. The school principal offered a tutoring program, but the Student's parents chose to continue with Sylvan, which Student had been attending for two months. The IEP team also agreed to provide extended school year (ESY) services for Student, and that she would use an Alpha Smart device, which is a mini-computer that assists with writing. At this meeting, a follow-up IEP was scheduled for April 26, 2005, to discuss the results of the assessments.

29. The follow-up (addendum) IEP team meeting occurred on May 31, 2005. The District notified Student's parents of the meeting by a notice that was substantially similar to the notices which they had sent for previous IEP meetings. The meeting was attended by many individuals, including Terry J. Tibbetts, Ph.D., who had conducted the independent psychoeducational assessment on May 20 and 23, 2005; a representative of Sylvan; the school psychologist; the principal; the general education teacher; Resource Specialist Barry Carlson; an adaptive physical education teacher; an occupational therapist; a speech-language pathologist; and an assisted technology specialist. Mother, Father, the Student's attorney, and the Student's special education advocate were also present at the meeting. The meeting involved reports from the various educational specialists regarding their assessments.

² The pages of the IEP are marked with the crossed-out word "Draft" at the top. This indicates that the document, although originally a draft, was the final version.

30. The adaptive physical education teacher reported that Student was in the “high average zone” on the physical education assessment, and recommended that Student remain in the general physical education program. The occupational therapist reported that Student demonstrated many areas of strength and did not recommend occupational therapy. Student’s general education teacher reported that Student’s classroom performance had improved. In this regard, she had made progress in spelling and writing, and could organize a short, three paragraph story. She demonstrated increased perseverance. She had difficulty with 2-step problem solving, and was below-grade level in language arts and math. She appeared to have difficulty with her long-term memory. The speech-language pathologist reported that there were vocabulary deficits but that Student did not qualify for services at the time.

31. Dr. Tibbets, according to the notes on the addendum IEP, found significant deficits in oral reading and multiple areas of writing. He found that Student had deficits in long-term memory, and he recommended that Student be provided more multiple choice tests than essay tests. He recommended that the IEP goals address state standards. He recommended additional RSP time, and that a visualization type of program might be useful. He found that Student may suffer from ADHD and from depression, and recommended that the team consider a change of Student’s special education eligibility category to Other Health Impaired.

32. The assisted technology specialist reviewed his assessment results and recommended computer software, graphic organizers, books on tape, and a device such as Alpha Smart.

33. The IEP team recommended an AB 3632 referral to mental health, to be initiated by the school psychologist. The team also recommended that Student see a guidance intern the following year.

34. The team agreed to reconvene in August 2005, after the parents met with their physician for ADHD issues, to establish goals and a behavior support plan. The District reminded the parents that ESY was available.

35. New accommodations and modifications were written, in light of the psychoeducational assessment performed by Dr. Tibbets. Additional accommodations and modifications for testing included: providing a list of correctly spelled responses from which the student may choose, reducing the number of tests, and substituting assignment for tests. Additional classroom accommodations included providing a lecture/outline guide, providing a copy of notes; providing auditory input, underlining/highlighting major points in assignments; using simplified texts and worksheets; and adjusting/shortening assignments. Accommodation for behavior management including using frequent eye contact and seating Student near the teacher.

36. The August IEP meeting that was contemplated in the May 31, 2005 addendum IEP was set, but was never held. Mother could not attend. Neither of Student's parents took her to a physician, as contemplated by the May 31, 2005, addendum IEP. They did not consent to the AB 3632 referral until the next annual IEP meeting, which was held on April 6, 2006. They did not consent to a referral for a guidance counselor, also as contemplated by the May 31, 2005, addendum IEP.

37. The most recent IEP meeting was held on April 6, 2006. It was attended by Father, Student's special education advocate, Student's general education teacher, Mr. Carlson, the school psychologist, and a district representative. The team reviewed Student's present levels of functioning and goals, and established new goals and objectives. The team also agreed upon classroom and testing modifications, and accommodations for standardized testing. Father consented to the AB 3632 referral that was recommended at the May 31, 2005, addendum IEP meeting.

38. The IEP team increased Student's RSP time to 40 percent. Academically, Mr. Carlson reported that the Student is making slow but steady growth in all areas. Her grade level and standard scores in Reading and Written Language Skills on the WJ-III administered on February 15, 2006 were as follows:

	Grade Level	Standard Score (Grade)
Broad Reading	2.8	76
Word Identification	3.1	81
Reading Fluency	2.0	72
Passage Comprehension	3.4	89

Various attention and memory deficits were noted. The IEP team found that Student only partially met her reading skills goal, having a decreased test score in Reading Fluency on the WJ-III administered on February 15, 2006. She made partial progress on the goal of Functional Reading, and met the goal on Reading Comprehension. She did not meet the goal for written language/spelling. She partially met the goal for Math Skills, and she met the goal for Vocational Skills. New goals were set in these areas, specific as to time frame and level of achievement. Additionally, an entirely new goal category was established for Reading Efficiency.

39. The IEP was approved by Father, who signed it in multiple locations, indicating his understanding of and agreement to the various components of the IEP. Father specifically noted on the IEP form that his consent to the IEP was not a resolution of Student's outstanding contentions regarding past denials of FAPE and its continued impact on Student, and Student's request for compensatory education.³

³ The District's Special Education Program Administrator testified that Student's special education advocate requested that she write on the April 6, 2006 IEP that both parents indicate that they are learning disabled, and that

CONCLUSIONS OF LAW

Applicable Law

1. Under the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400; Ed. Code § 56000 et seq.) The term “free appropriate public education” means special education and related services that are available to the student at no cost to the parent, that meet state educational standards, and that conform to the student’s IEP. (20 U.S.C. §1401(9).) “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(29).) The term “related services” includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).) California provides that designated instruction and services (DIS), California’s term for related services, shall be provided “when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program.” (Ed. Code § 56363, subd. (a).)

2. The IDEA places an affirmative duty on the state to identify, locate, and evaluate all children with disabilities residing in the state. (20 USC § 1412(a)(3).) California specifically obligates the District to actively and systematically seek out “all individuals with exceptional needs.” (Ed.Code § 56300, et seq.) Under the regulations relating to the pre-July 1, 2005 version of the IDEA, this “child find” obligation applies to, among others, “children who are suspected of being a child with a disability. . .and in need of special education, even though they are advancing from grade to grade.” (34 C.F.R. § 300.125(a)(2)(ii) (2000).) In performing its obligations under child find with respect to a particular child, the District shall refer a pupil for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized.” (Ed. Code § 56303.)

3. Once a child is identified under the IDEA as having a disability, the local educational 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. This process results in the IEP. (Ed. Code §§ 56300-56302; 20 U.S.C. § 1412.)

4. The United States Supreme Court has 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 the instruction and services to be provided by the District as stated in a student’s IEP must be reasonably calculated to provide the student with

Father has severe, Type I, Juvenile Diabetes. She acceded to that request. During Father’s testimony, which occurred on January 20, 2006, prior to this IEP meeting, Father testified that he had difficulty reading and that he had never told the District of this difficulty. He did not testify that he suffered from diabetes. Student presented no evidence that Mother had any difficulty reading, or that either parent had been diagnosed as learning disabled, or that Father suffered from diabetes.

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. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 198-200.) The school districts are required to provide 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; *Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519.) Important, but not necessarily determinative factors in determining educational benefit are the student's grades and whether the student is advancing from grade to grade. (*Rowley*, 458 U.S. 176 at 203, and fn. 25.) Another factor is progress on standardized tests. (*See, W.G., et al. v. Board of Trustees of Target Range School District, etc.* (9th Cir., 1992) 960 F.2d. 1479.) Another factor is whether the student makes progress toward the goals set forth in the IEP. (*County of San Diego v. Cal. Special Ed. Hearing Office, et al.* (9th Cir., 1996) 93 F.3d 1458.)

5. The United States Supreme Court recently ruled that the Student in a special education due process administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v. Weast* (2005) 126 S.Ct. 528.)

6 The issue of whether a school district has offered a FAPE has both procedural and substantive components. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student 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*, 960 F.2d 1479 at 1483.) Citing *Rowley*, the court also recognized the importance of adherence to the procedural requirements of the IDEA, but indicated that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at 1484.) Procedural violations may constitute a denial of a 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. (*Ibid.*) The IDEA contains a similar formulation as to when a procedural violation constitutes a denial of a FAPE. (20 U.S.C. § 1415(f)(3)(E).) The breach by the state education agency of its child find duties has been determined to be a procedural violation of the IDEA. (*Dept. of Ed., State of Hawaii, v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190.)

7. The right to a FAPE arises only after a student is assessed and determined to be eligible for special education. (Ed. Code § 56320). 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); an assessment may begin immediately upon receipt of the

consent. (Ed Code § 56321, subd. (c).) Thereafter, a school district must develop an IEP no later than 50 calendar days from the date of the receipt of the parent's written consent to assessment (excluding days of school vacation in excess of five school days) unless the parent agrees in writing to an extension. (Ed. Code § 56043, subd. (d).) (Education Code section 56043, subdivision (d), and Education Code section 56344, have recently been amended such that the 50 calendar day period to develop an IEP has been enlarged to 60 calendar days, but these amendments were not in effect at the time of the pertinent events in this matter.)

8. Thus, the analysis as to whether a school district has offered a FAPE is twofold. The first inquiry is whether the school district has complied with the procedures set forth in the IDEA during the process of developing the IEP. The second inquiry is whether the IEP developed through the IDEA's procedures is reasonably calculated to enable the child to receive educational benefits. (*Bd. of Education v. Rowley, supra*, 458 U.S. at 206-207.) Under the IDEA and *Rowley, supra*, a school district offers the student a FAPE by meeting the following substantive requirements: (1) the IEP has been designed to meet the student's unique needs; (2) the instruction and services that the IEP offers have been reasonably calculated to provide the student with some educational benefit; (3) the school district has comported with the IEP; and (4) the program set forth in the IEP is provided in the least restrictive environment (LRE).⁴ Whether a FAPE was provided under the substantive portion of the analysis is to be determined from the perspective of the IEP team at the time of the IEP, and not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141 at 1149.) Furthermore, to determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the proposed program. (*Gregory K. v. Longview School District* (9th Cir., 1987) 811 F.2d 1307 at 1314.)

9. School authorities may be ordered to provide compensatory education or additional services to a child who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir., 1994) 31 F.3d 1489 at 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Id.* at p. 1497.) To obtain relief in the form of compensatory education, Student must present specific evidence as to how the compensatory education should be calculated. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516 at 524.)

Did the District Deny a FAPE During the School Years 2002-2005?

District's Assessment of Student and Compliance with Procedural Timelines

1. A denial of FAPE may occur if, due to a failure of the District to comply with the statutory procedures by which an IEP is developed, the Student's parents' opportunity to participate in the IEP process is seriously infringed or the Student has lost an educational

⁴ The requirements that the school district provide services that comport with the IEP and provide a program in the LRE are not at issue in this case.

opportunity. (*W.G. v. Bd. or Trustees of Target Range, supra*, 960 F.2d 1479 at 1483.) There was no evidence that any failure of the District to comply with appropriate procedures seriously infringed on Mother's or Father's opportunity to participate in the IEP process or caused Student to lose an educational opportunity.

2. There was no evidence that the District had not timely assessed Student and found her eligible for special education during the period from July 2002 to the time that Student was assessed in or about March 2003.⁵ The District knew that Student had been held back for one year in kindergarten, and knew that Student was performing below average for her grade and age in reading and written language. Prior to being found eligible for special education during second grade, the District was providing remedial reading assistance to Student, and had formed an SST. The District's delay for a brief period of time before deciding to assess a young child for a learning disability simply because she has difficulty learning to read and write is not unreasonable. This is especially so in view of the requirement that the District not refer a pupil to special education until general education resources have been considered and applied. (Ed.Code § 56303.) Additionally, there was no evidence that Student was deprived of an educational benefit, or that her parents' ability to participate in the process was seriously infringed because Student was not assessed and found eligible for special education services between July 2002 and March 2003.

3. There was no evidence that the District violated any of the timelines of Education Code section 56043 for conducting assessments and holding the initial IEP, as contended by Student. Mother signed a consent for assessment in September 30, 2002, but the document that Mother signed was not complete, and there was no evidence as to when or whether the request was received by the District. Therefore, there is no means of determining when the timelines for completing the assessments and for convening the IEP meeting, pursuant to Education Code section 56043, commenced to run. Significantly, Mother signed two consents for assessment on March 17, 2003, and the IEP team meeting was held within a month thereafter, on April 3, 2003. This was within the 50-day timeline of Education Code section 56043.

4. Even if the circumstances surrounding the September 30, 2002 consent to assess constituted a violation of the timeline, Student did not demonstrate that the parents' ability to participate in the IEP process was seriously infringed, or that Student lost an educational opportunity. One or both of Student's parents participated in all of the IEP meetings, including the IEP meeting of April 3, 2003. Student presented no evidence of the impact on her education of the brief delay in providing her special education services.

⁵ Student has framed this issue in terms of the District's child find obligations. No evidence was presented that the District's child find procedures, in general, violated the IDEA and state statutes. Therefore, this issue is addressed on the narrower grounds of whether the District violated its obligations to timely assess and identify Student as eligible for special education services.

District's Notices to Parents Regarding the IEP Process

5. The District did not violate its obligations to give notice and information concerning the IEP process and procedures to Student's parents, such that they were prevented from fully participating in the IEP process.

6. The evidence supporting this contention was minimal and unpersuasive. On March 17, 2003, Mother signed a "Parent's Consent to Assess" which stated that it included a "parent rights form." Although Mother testified that she received no other document with the form, she did not explain why she did not simply ask for the "parent rights form." Furthermore, Mother's testimony with respect to the documents she received, the dates she received them, and who gave them to her is not credible. Mother's recollection of relevant events was vague and spotty. Throughout her testimony, she did not remember dates, names, who was at meetings, the purpose of meetings, when certain conversations and meetings occurred, when she received documents, from whom she received documents, who Student's teachers were, and other details. Mother could not recall, without prompting, which IEP meetings she attended. Even attempts to refresh her memory by showing her other documents were only partially successful. Her testimony was confusing at times, as when she testified that she repeatedly asked Student's teachers and the principal at the ILC why Student was behind in her reading, and then she testified that she was surprised, after Student was transferred from the ILC, that Student was indeed far behind in her reading.

7. Father's recollection of events was also vague. He attempted to testify that he attended an IEP meeting that he admitted he had no recollection of attending. Also, implicit in the Student's contention that her parents did not know their rights in the process is the idea that they were left out of meetings, and were denied the opportunity to participate meaningfully in the IEP process. Yet, Mother testified that one reason she did not recall who was present at meetings, when they occurred, and what was said, was because "there were so many meetings."

8. Additionally, both parents appeared at the initial IEP meeting of April 3, 2003, and Father appeared at the meeting of March 11, 2004. Prior to attending the meetings, they were sent a written notice which explained certain of their rights. Either Mother or Father, depending upon who was attending the meeting, signed the IEPs in various places. By their signatures, they affirmed that they understood their rights, and that they consented to the IEPs. Both Mother and Father testified that, despite their signatures on the IEPs, they were unaware of their rights, and did not understand what was occurring at the meetings. They testified that they only signed the IEPs because they would sign anything the District requested, if they thought that it would help their daughter. This testimony is unpersuasive. It is not credible that parents would blindly attend multiple meetings, and blindly sign multiple documents, over a period of several years, without understanding what they were signing or understanding what was happening at the meetings. Significantly, there was no evidence that the District had any knowledge that Mother and Father were signing the IEPs without understanding them and the events that transpired at the meetings.

9. The evidence that Student's parents were denied the opportunity to meaningfully participate in the IEP process was unpersuasive. The testimony of Mother and Father was vague regarding the contents of any complaints or comments they made at the IEP meetings or elsewhere, when they were made, or to whom they were made. Mother testified to raising only one specific concern. At the initial IEP meeting on April 3, 2003, she expressed her concern that Student was to be transferred from the ILC. She testified to no reason for this concern, and, indeed, Father testified that he "blamed" the ILC for Student's academic difficulties. Under these circumstances, the fact that Student transferred from Woodruff is not persuasive evidence that Mother and Father were prevented from participating in the IEP process. The District does not deny a FAPE if a parent does not agree with every aspect of the IEP, or if a parent is not given veto power over any individual aspect of the IEP. (*See, e.g., Ms. S., et al. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115 at 1131-1132.)

10. Significantly, school personnel did not mislead Student's parents as to her academic progress. According to Mother's testimony, she was advised, in response to her inquiries, that Student was seriously behind in reading and writing. On several occasions, she was told that Student required, and was receiving, extra help in school. Further, school personnel recommended that the parents provide help with reading at home, and she testified that she did so. Father testified that he had numerous conversations with Barry Carlson, Student's RSP teacher, regarding Student's problems and progress.

11. In any event, the IEPs themselves demonstrate that, each year, the IEP team considered Student's progress, and adjusted the goals, objectives, services, and modifications in an attempt to achieve further progress. This demonstrates that, either in response to the complaints of Student's parents, or in response to some other stimulus, the District was addressing Student's unique needs and her progress.

Mother and Father were participating in the IEP process. Student did not demonstrate any specific manner in which the parents' rights to participate in the IEP process were seriously infringed, such that Student was denied a FAPE.

Under these circumstances, the District did not deny a FAPE on procedural grounds.

The Programs and Services Offered by the District, and District Assessments

12. The programs and services offered by the District in the IEPs constituted a FAPE. They were designed to meet the Student's unique needs, and the instruction and services that the IEPs offered were reasonably calculated to provide the student with some educational benefit (as was stated above, the other two elements of FAPE, that the services provided comport with the IEP, and that the services be provided in the LRE, are not at issue in this case.). Additionally, the programs and services offered by the District were based upon appropriate assessments.

13. With respect to the issue of Student's unique needs, the IEP team modified the goals, proposed additional accommodations, and increased the Student's RSP time to promote her progress in reading and writing every year. Furthermore, even though Student did not technically qualify for assistance in math, the team agreed that Student required additional assistance in math, and provided for such assistance in all IEPs except for the initial IEP. Additionally, in the IEP for the 2005-2006 school year, the District offered tutoring, which Student's parents declined. The District recommended a referral for AB 3632 services a year ago, to which Student's parents only recently consented. They did not consent to the services of the guidance counselor that was offered by the District in the addendum IEP for the 2005-2006 school year. No evidence was presented at the hearing that the parents had consulted with their physician regarding Student's possible ADHD, as was also discussed in the addendum IEP.

14. Student presented no evidence that any portion of the IEPs were inappropriate or irrelevant to Student's needs, or that the District was not addressing any of Student's unique needs, or that the District had not conducted proper assessments. Rather, the evidence demonstrated that the IEP team evaluated Student's progress during the relevant years and considered how her particular deficits could be addressed. In this regard, Dr. Tibbetts, who performed the independent psychoeducational assessment of Student in May 2005, agreed with the District that Student has a specific learning disability. His report proposes further areas of inquiry, such as the possibility that Student also has ADHD and mental health issues. The District and the parents have agreed to address these issues, and the District has waited for the parents to agree to the mental health assessment and to pursue an assessment for ADHD. Dr. Tibbetts suggested certain modifications to Student's IEP, which were incorporated into the addendum IEP. There was no evidence, however, that Dr. Tibbetts had any significant criticisms of the programs and services that the District was providing, or had provided, Student. Student contended that the District had failed to properly assess her, but the recent assessments performed by the District and by Dr. Tibbetts, as described in the addendum IEP, did not support that contention. Student provided no evidence that any particular assessment should have been performed and was not.⁶ Mother testified that she could not remember when the District performed its assessments because "there were so many tests." Especially in view of the failure of Student's parents to promptly agree to an AB 3632 referral and to have her assessed for ADHD, the Student's contention that she has been harmed because the District's assessments were inappropriate or incomplete is unpersuasive.

⁶ Student contends that the District's reliance on the grade level scores is inappropriate. This contention is apparently based upon comments made in Dr. Tibbetts' report in which he generally criticizes scores expressed as grade levels. The report contains no explanation as to the basis for his criticisms, the scores' degree of inaccuracy, the extent to which the District relied upon such scores, or why the scores would be inaccurate as a measurement of this particular Student's progress. Dr. Tibbetts was not called to testify at hearing. Therefore, this contention is based solely upon what is, at best, administrative hearsay. This portion of the report is uncorroborated and, moreover, too vague and uncertain to have any evidentiary value. Therefore, the contention that the District should not have relied upon grade level scores is without evidentiary support.

15. The IEPs were also reasonably calculated to, and did, provide Student with some educational benefit. Educational benefit is measured by several factors, including grade promotions, improvement on standardized tests, and progress on the goals and objectives set forth in the IEP. (*Rowley, supra*, 458 U.S. 176 at 203, and fn. 25; *W.G., et al. v. Board of Trustees of Target Range, supra*, 960 F.2d. 1479; *County of San Diego v. Cal. Special Ed. Hearing Office, et al., supra*, 93 F.3d 1458.) Under these factors, Student received an educational benefit. Most of the goals set forth in the IEPs were either met or partially met. Student was promoted from grade to grade. All of the IEPs subsequent to the initial IEP generally demonstrated increases in the standardized test scores. For example, the IEP held on March 16, 2005, reported marked increases in Student's Broad Reading skills, Broad Math skills, and Broad Written Language skills, based upon the WJ-III. The IEP held on April 6, 2006, also reported progress in these areas.⁷ Student also made progress on her Pre-Vocation Skills/Work Completion skills on her IEP of March 11, 2004, as the March 16, 2005 IEP team reported that she had met the goal set forth in the March 11, 2004 IEP for that area. All of this evidence demonstrates that Student made some academic progress and received an educational benefit.

16. Student relied upon her second grade and third grade Student Achievement Reports (report cards) to demonstrate that she had not progressed in reading and writing from second grade to third grade. The report cards are not persuasive for several reasons. First, Student presented no evidence as to how the marks on the report cards should be interpreted for a special education pupil such as Student. Secondly, Student presented no evidence that the marks on the report cards necessarily meant that Student was making no academic progress and not receiving an educational benefit from her special education services. In view of the various indicia discussed above that demonstrated Student's academic progress, the report cards, by themselves, are not sufficient to demonstrate that Student has made no academic progress and received no educational benefit.

Reimbursement for Sylvan

17. Since the District offered a FAPE, Student is not entitled to reimbursement for Sylvan. (*Student W. v. Puyallup School District, supra*, 31 F.3d 1489 at 1496.)

ORDER

The request of Student for relief and/or reimbursement of the services, costs, and expenses incurred as a result of Student's attendance at Sylvan is denied.

⁷ Student's standardized test score in Reading Fluency dropped. The District's Special Education Program Administrator testified that this could be due to the fact that Student was reading more difficult material than previously, therefore, it is not necessarily cause for concern now.

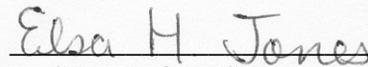
PREVAILING PARTY

Education Code section 56507, subd. (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to this mandate, it is determined that District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: June 26, 2006

Handwritten signature of Elsa H. Jones in cursive script, written over a horizontal line.

ELSA H. JONES

Administrative Law Judge

Office of Administrative Hearings