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CENTRAL DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARIA [redacted] as Guardian Ad Litem for I.H.,

Plaintiff,

v.

SANTA ANA UNIFIED SCHOOL DISTRICT,

Defendant.

CV 06-3783 PA (PLAx)

MEMORANDUM OF DECISION

DOCKETED ON CM
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BY m6 009

Plaintiff I.H., by and through her guardian ad litem, Maria [redacted], appeals the special education due process hearing decision by the California Special Education Hearing Office. She contends that the Santa Ana Unified School District denied her a free appropriate public education ("FAPE") by finding that she did not qualify as a disabled student with exceptional needs and by failing to provide her adequate special education and related services.

I. FACTUAL & PROCEDURAL BACKGROUND

A. I.H.'s Educational History

I.H. is a twelve-year old female child who resides with her parents in Santa Ana Unified School District. In 1998, based on its pre-kindergarten assessment, the District found I.H. to be eligible for special education services based on a Specific Learning

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Disability ("SLD") and disorders in semantics, syntax, morphology, attention, phonology, pragmatics, and auditory processing. I.H. attended preschool at Santa Ana College Development Center ("SACDC"), where she received special education including Resource Special Program ("RSP") services and speech and language services. Based on her developmental progress, I.H.'s parents decided to continue her pre-kindergarten education at SACDC for an additional year.

On May 19, 2000, just before I.H. entered kindergarten, a school psychologist conducted the required triennial assessment of I.H. and prepared a Multidisciplinary Assessment Report. At the time of the assessment, I.H. was 5 years and 9 months old. The evaluation team concluded that she met "the criteria for specific learning disability due to a disorder in one or more of the basic psychological processes: auditory processing and attention." (Pl. Ex. 17.) The team also concluded that I.H. met "the criteria for Special Education as a student with exceptional needs due to a language or speech disorder which interferes with educational progress." Id. Special education services, including speech and language therapy, were recommended. Id. The team also recommended that I.H. be encouraged to be more physically active to maintain her weight and that a Behavior Management Plan be created to facilitate development of appropriate social skills. The Report also notes that, though I.H.'s vision was 20/30 bilaterally, she seemed to have some difficulty tracking. The Report postulated however that this difficulty could be secondary to her other attention and focusing limitations.

In summer of 2000, I.H. began attending Santiago School. During her kindergarten year, she received 3 hours per day of special education services and was integrated into the general education class for 20-30 minutes per day. Her parents approved this educational arrangement during the Individual Education Program ("IEP") team meeting conducted on June 12, 2000.

On June 1, 2001, following an IEP team meeting, I.H.'s parents signed an IEP for the first grade. The IEP, which states that I.H. had a SLD in semantics, syntax, morphology, phonology and pragmatics, placed her in a special education class for three hours per day

and a general education class for 20 minutes per day. The IEP also provided I.H. with 50 minutes of Designated Instruction and Services ("DIS") per week in speech and language. The June 2001 IEP lists a special education teacher as attending the team meeting, but not a general education teacher. However, it appears that Shellye McLellan, a general education teacher, signed the IEP as the administrator.

On May 30, 2002, an IEP was signed by I.H.'s parents for the second grade. The IEP placed I.H. in a general education class for three hours per week and a special education class for 21.5 hours per week. The IEP also provided I.H. with speech and language therapy for 30 minutes per month, with consultation two times per week. The IEP also reflects the parents' request that I.H. be punished for excessive talking through the use of "time-outs." The ALJ found that both I.H.'s general education and her special education teachers attended this IEP team meeting. However, the IEP does not appear to have been signed by a general education teacher.

On November 11, 2002, a follow-up IEP meeting was conducted because I.H. met and exceeded her annual math goals. The IEP was revised to reflect new math goals and to begin developing a plan for eventually main-streaming I.H. into general education for math. During this meeting, I.H.'s parents requested that their daughter be tested for Attention Deficit Hyperactivity Disorder ("AD/HD"). Both a general education and special education teacher were present at the November meeting.

On December 18, 2002, school psychologist Amy Miller ("Miller") conducted the AD/HD screening requested by I.H.'s parents. She concluded that I.H. was "a cooperative and attentive learner," and that she did not "meet the diagnostic criteria of a child with an attention disorder." (Pl. Ex. 37.) To the contrary, Miller found that I.H. was at grade level in reading and spelling, and exceeded grade level in math. Miller did note, however, that I.H. displayed more oppositional behavior at home than at school, where her teachers generally characterized her as a "sweet and cooperative girl" who "demonstrates socially acceptable behavior."

On January 30, 2003, the IEP was again amended to increase the time I.H. spent in general education. Based on her class performance, the IEP team determined that I.H. "was very strong in Math and Language Arts." (Pl. Ex. 10.) Thereafter,"[t]he IEP team decided it would be beneficial for [I.H.] to be mainstreamed for part of the day to study Math and Language Arts." Id. As a result, I.H. was in special education 67% of the day with the balance of the day in general education. The IEP specifically provided for regular consultation between her general education and special education teachers to ensure her successful transition. The speech and language therapy provision remained unchanged from the May 2002 IEP. However, her parents objected to the amount of speech and language therapy being given to I.H. and indicated that they would seek an independent assessment of I.H.'s speech and language development. Diane Pope attended the IEP meeting as the special education teacher and Shellye McLellan attended as the general education teacher.

On February 18, 2003, an IEP team meeting was convened to add additional goals. During the meeting, it was noted that I.H. was a good communicator and had made significant progress in her language goals. Her writing and math goals were advanced and the IEP was amended to mainstream I.H. into general education for the language arts block every day, with the help of an instructional assistant. During this IEP meeting, I.H.'s parents agreed with all of the revisions but continued to object to the amount of speech therapy given to I.H. The parents felt that she needed more speech therapy and requested an independent educational evaluation ("IEE") for speech and language testing. The District amended the IEP to provide I.H. with 30 minutes of speech therapy in the general education classroom per week and thirty minutes per week in the special education classroom.

On April 1, 2003, another IEP meeting was conducted. Based on I.H.'s successful progress in the general education reading class, time with her teaching aide was reduced from 45 minutes to 30 minutes per day. The team also agreed that I.H. should participate in the Accelerated Reading Program, an independent reading program in the library. Ms. Carol Frankel, Director of the Sylvan Learning Center, attended the IEP meeting to discuss the Center's evaluation of I.H.. She explained the protocols used by the Sylvan Learning Center

to evaluate the student and stated that their evaluation indicated that I.H. was average or near average in all areas of academic progress. I.H.'s parents again requested that an independent evaluation be conducted, but that this time the independent evaluator not visit I.H.'s school or review school records.

As requested by the parents, on April 17, 2003, Fabi Moy ("Moy"), a pediatric speech and language pathologist was retained by the District to assess I.H.'s speech and language development. Moy's initial examination of I.H. was conducted at her office. I.H.'s parents were both present. Moy spent time discussing I.H.'s personal and educational background with the parents. She then conducted a Test of Problem Solving Revised ("TOPS"), a language sample analysis, and structured and unstructured language tests. Moy noted that, due the extensive testing already conducted on I.H., there was a limited number of assessments that could be done without being prejudicially repetitive. However, all of the tests she conducted revealed I.H. to be an average, functioning child with language skills commensurate with her age and background. Moy further concluded that the raw test scores derived from her evaluation of I.H. likely underestimated I.H.'s developmental level because they included topics that I.H. was not familiar with and therefore had greater difficulty discussing, and because of I.H.'s exposure to both Spanish and English languages at home.

Following her in-office assessment, the parents agreed to permit Moy to observe I.H. at school. Moy spent several hours observing I.H. in her general education classroom, special education classroom, and at recess. Moy observed her doing a reading assignment in her general education class and also discussed I.H.'s social progress with Mrs. McClellan, I.H.'s second grade teacher. Moy also observed I.H. doing work in her special education class and playing with other students at recess. In both classroom settings Moy found I.H. to be attentive and participatory. Though she acknowledged that I.H. had some trouble following her teachers' directions, she felt that this problem was normal amongst young students and shared by all of I.H.'s peers. At recess, Moy found I.H. to be socially accepted by her peers and her behavior to be socially appropriate.

Ultimately, Moy concluded that I.H. "presents with receptive / expressive language and pragmatic skills that are within normal limits." In her final report, she opined that I.H.'s grammatical errors were likely the product of being exposed to multiple languages at home and that her overall skill set was normal for a second grader, though chronologically, I.H. was closer in age to the third grade. Moy suggested greater interaction with peers of her own age in a non-academic setting, and encouraged I.H.'s parents to reduce the amount of time I.H. spent watching television.

Shortly after Moy's assessment was conducted, on May 21, 2003, Miller conducted I.H.'s second triennial assessment and prepared a Multidisciplinary Assessment Report. At the time of the assessment, I.H. was 8 years and 8 months old. She was nearing the end of her second grade year at Santiago. During this assessment, a number of physical, educational, and psychological tests were administered. Additionally, reports from I.H.'s current and previous educational providers were collected and assessed. A medical screening was conducted by Colleen McNamara, R.N., which indicated that I.H. was in good health and that both her vision and hearing were within normal limits. The report did note that her weight fell above the 95th percentile and that healthy exercise and dietary choices would help I.H. manage her weight.

In terms of behavioral development, all of I.H.'s teachers reported that she was a normal student who behaved appropriately in classroom and social settings. The report noted that her teachers generally found her to be an attentive, conscientious student. On a few occasions, she demonstrated oppositional and bossy behavior in her special education classes. This behavior was not observed in any of her general education classes. The Report noted that assessment of I.H.'s classroom behavior differed markedly from the home behavior reported by her parents, which was more disruptive.

Her second grade teacher found her academic performance in math, reading, and written language to all be at grade level. The standardized tests administered to her included: the Woodcock Johnson-III ("WCJ-III"), the Kaufman Test of Educational Achievement ("KTEA"), the California Achievement Test ("CAT"), and the Wechsler

Intelligence Scale for Children - 3rd Edition ("WISC-III"). All of the academic tests suggested average or near-average levels of competence in math, writing, and reading.

The cognitive assessment and psychological tests, including the WISC-III, similarly suggested that she had normal cognitive ability for a second grader. She received a verbal IQ score of 88, a performance IQ score of 106, and a scaled IQ score of 95 on the WISC-III. The scaled average on this test is 100. I.H. scored particularly well on the object assembly portion of the test, but showed weakness in the "coding" portion, which measures visual motor dexterity. She was also relatively weak in the areas of vocabulary and comprehension. However, Miller felt that her performance I.Q., which is not culturally anchored, better assessed her true cognitive abilities because they are unrelated to her verbal, educational, and environmental experiences.[1/]

The other memory and learning tests conducted showed that her visual memory skills were normal but that she had a "weakness" in auditory perception processing. Specifically, the Wide Range Assessment of Memory and Learning ("WRAML") put her in the 10th percentile in verbal memory and the Test of Auditory-Perceptual Skills-Revised ("TAPS-R") placed her in the 7th percentile for auditory sentence memory, word memory, and interpretation of directions. The TAPS-R put her in the 4th percentile for auditory number

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1/ Several of the witnesses, including Miller, Moy, and I.H.'s speech therapist, Doris Denbi-Ingrassano testified that the potential disjunct between I.H.'s actual cognitive ability and her test scores was likely caused by the variance in her cultural and environmental experience. For example, during Moy's speech assessment, I.H. was unable to identify and discuss a picture of a "hiking." As Moy explained, this could suggest an articulation problem, but is more likely the result of I.H.'s unfamiliarity with the activity of hiking. Ms. Denbi-Ingrassano provided another illustrative example. She explained that, in conducting assessments of students in the Alaskan region, it was appropriate to ask them to describe different pictures of snowy conditions. These students, familiar with the various types of snow, could easily distinguish between the pictures of cold, snowy weather. By comparison, students in Santa Ana are generally unable to articulate these distinctions. While this could cause residents of Southern California to score below average on the language tests, the result is much better explained by their lack of experience with snowy weather. As all three witnesses testified, I.H.'s language development is affected by several environmental factors including the level of English spoken in her home and the fact that she spends her school days with younger developmentally challenged children. For these reasons, all three experts believed that the standardized tests often underestimated I.H.'s true cognitive abilities.

memory-forward. But she scored well, in the 21st and 27th percentile, on the auditory number memory-reversed and the auditory processing portions of the TAPS-R. Based on these test results, Miller concluded that her auditory weakness did not reach the level of a disability requiring special education services under the SLD category.

Based on her overall assessment of I.H., including her personal observations, the results of the standardized tests, and the reports of her teachers, Miller concluded that she no longer met the requirements for special education. Miller also opined that transitioning I.H. into general education, the least restrictive environment, could facilitate her speech and language development because it would increase the level of everyday interaction she had with other typically-developing peers and would provide appropriate social modeling.

On May 29, 2003, an IEP meeting was held to evaluate I.H.'s academic progress and begin formulating an IEP for the extended school year ("ESY") as well as for the third grade year. Miller and Moy both attended the meeting, as did Doris Denbi ("Denbi"), I.H.'s speech and language therapist; Diane Pope, one of her special education teachers; and Shellye McLellan, her general education teacher. Both I.H.'s parents were present. During this meeting the teachers reported that she was functioning well in class and meeting or exceeding all of the previously-set IEP academic goals. They did note that she continued to write slowly and that, unless frequently reminded, her handwriting tended to be messy. Moy and Denbi both testified that her speech and language progress was sufficient to disqualify her from special education services. Miller also presented the results of her triennial assessment and concurred that "it [did] not appear that [I.H.] qualifies as a student who meets the eligibility criteria for SLD in special education according to the California Education Code." (Pl. Ex. 13.)

The District concluded that she no longer met the criteria for special education services and that such services should be "gradually fade[d]" out of her curriculum. The District offered general education placement with special assistance for 4 hours and 15 minutes per day, with RSP services for 45 minutes per day in the afternoon. I.H.'s parents disagreed. They believed that she needed more speech and language therapy and that it was

inappropriate to transition her completely into general education. The parents refused to sign the IEP.

Based on her parents' concerns and refusal to consent to the IEP, I.H.'s special education services were maintained throughout 2003-2004. She spent the mornings in a third grade general education classroom and participated in the general education language arts block. Her other academic subjects were taught in a special education class. I.H. was integrated into the general education class for field trips, assemblies, and other special projects. Speech and language therapy was continued in weekly group sessions and in classroom observation.

Cheryl Glorioso ("Glorioso"), I.H.'s third grade general education teacher, testified that she performed well in her class. She interacted well with the other students and was able to adequately complete her assignments. Though I.H. initially had some difficulties with the transition, in just a few months, she had fully adapted and even requested permission to spend more time in the general education classroom. Throughout the year, her class work was at or around the same level as the other students in the class. Glorioso also testified that I.H. would benefit from more time in the general education class.

On June 15, 2004, a team meeting was held to update I.H.'s IEP for her fourth grade year. Glorioso attended as did I.H.'s special education teacher. The IEP minutes state that I.H. "blossomed in the general education classroom." The IEP did not recommend participation in ESY or continued speech and language therapy services. All of her teachers agreed that I.H. was average or above average in her speech and language skills and that she had an "incredible" vocabulary. The District offered general education placement for four hours per day with RSP for one hour per day. Again, however, I.H.'s parents refused to consent.

Enrique Pedraza ("Pedraza"), I.H.'s fourth and fifth grade special education teacher, testified that during the time she was in his class, she consistently performed at or above the

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average class level.[2] She was able to keep up with the work despite the discontinuity in her instruction caused by her daily transition between special and general education class. Pedraza found her to be well integrated socially and highly participatory in the classroom. He did note that she had a tendency to be bossy towards the other students and, at times, would ignore instructions to stop working on class projects, particularly when she was reading. Pedraza acknowledged this could have been caused by her advanced academic development over her special education peers. No similar problems were noted in her general education class. Overall, her class performance in both classes demonstrated that she was an average student of normal abilities.

On March 14, 2005, a due process hearing request was filed. A mediation was conducted on April 14, 2005. At the mediation, I.H.'s parents provided the District with several independent assessment reports compiled from third party examiners over the years. Prior to the mediation, the parents had never shared these reports with the District.

On May 10, 2005, an IEP meeting was held to discuss I.H.'s upcoming fifth grade year. I.H.'s parents did not attend the meeting, though they acknowledged that they received notice of it. The independent assessments provided by I.H.'s parents were discussed at the meeting.[3] The IEP team, including Glorioso and Pedraza, concluded that I.H. did not meet

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[2] During oral argument, plaintiff's counsel stated that Mr. Pedraza found I.H. to be one year delayed in reading as compared to the rest of his class, which was taught at a below grade level degree of difficulty. In fact, Mr. Pedraza testified that I.H. was the most advanced student in his class in terms of reading comprehension. Indeed, he felt the special education class was below I.H.'s skill level and, as a result, she was often bored in class. Though I.H. received average and below average grades in reading from Mr. Pedraza, he testified that the grades were derived from the combined assessment of I.H.'s reading skills in her special education and general education classes. Additionally, he noted that her grades and test results were all based on standardized grade-level norms. The fact that she faced daily class transitions and, for at least part of the day, was taught below grade level may have affected her performance and grades.

[3] I.H.'s parents provided the District with six (6) private, independent assessments of I.H. that were conducted at their expense in 2003 and 2004: a Psychoeducational Report dated October 17, 2003, prepared by Dr. Christine Davidson; a Newport Language and Speech Center evaluation dated August 4, 2003; a Speech and Language Evaluation by (continued...)

the eligibility requirements for special education and that she would benefit from greater integration into general education. They recommended 21 hours a week of general education and four hours of special education, facilitated by RSP services.

Between January 17 and 25, 2006, the parents challenged the District provision of a fair and appropriate public education in a due process hearing before an administrative law judge (the "ALJ"). The ALJ concluded that the District had not denied I.H. a FAPE. The parents appeal the ALJ's determination.

II. ANALYSIS

A. IDEA

Under the IDEA, states receiving federal funds are obligated to provide disabled students with a free appropriate public education ("FAPE"), including, as necessary, "special education" and related services. See 20 U.S.C. §§ 1401(9) & 1401(a)(18) (defining "special education" as "specially designed instruction . . . to meet the unique needs of a child with a disability"). A state satisfies the IDEA's requirement that it provide a FAPE to a child with a disability by:

> providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be

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3/ (...continued)
Abby Rozenberg dated June 7, 2004; a report prepared by Abramson Audiology dated July 30, 2003; a report from the Newport Beach Developmental Optometry Group prepared by Dr. Beth Ballinger, dated January 21, 2004; and an occupational therapy assessment conducted by Nancy Lin at Children's Therapy Studio on May 20, 2004. In evaluating the assessments, I.H.'s IEP team made several general observations that undermined their credibility. First, they noted that the reports were all over a year old and did not reflect I.H.'s current academic progress. Similarly, they noted that current classroom observations were not reflected in the reports, and that I.H.'s current academic performance directly refuted a number of the conclusions drawn by the independent assessments. Finally, they noted that some of I.H.'s deficiencies could likely be traced to her significant number of absences from school. She was absent for 32 days in second grade, 22 days in third grade, and 12 days in fourth grade.

> formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

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See Bd. of Educ. v. Rowley, 458 U.S. 176, 203-204, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690 (1982); see also Walczak v. Fl. Union Free Sch. Dist., 142 F.3d 119, 122 (2d Cir. 1998) ("The 'free appropriate public education' mandated by federal law must include 'special education and related services' tailored to meet the unique needs of a particular child . . . and be 'reasonably calculated to enable the child to receive educational benefits.'") (citing Rowley, 458 U.S. at 181, 102 S. Ct. at 3037-38) (internal citations omitted). The IDEA does not require a school district to provide every educational service requested by the student's parents or that the "instruction provided . . . be the 'absolutely best or potential maximizing.'" See Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 890 (9th Cir. 2001) (quoting Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1314 (9th Cir. 1987)). Rather states are only "obliged to provide a 'basic floor of opportunity' through a program 'individually designed to provide educational benefit to the handicapped child.'" Gregory K., 811 F.2d at 1314 (quoting Rowley, 458 U.S. at 201, 102 S. Ct. 3034).

To qualify as a "child with a disability" eligible for special accommodations, within the meaning of 20 U.S.C. § 1401(3)(A), a student must fall within the purview of one or more of the handicaps defined by state regulations and must, "by reason thereof, need special education and related services." See 20 U.S.C. § 1401(3)(A); Gregory K., 811 F.2d at 1311. Federal and state law identify a number of qualifying disabilities including: mental retardation, hearing impairments (including deafness), speech and language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, "other health impairments," and "specific learning disabilities." See 20 U.S.C. § 1401(3)(A); Cal. Educ. Code § 560265; see also CCR § 3030 ("The decision as to whether or not the assessment results demonstrate that the degree of the pupil's impairment requires special education shall be made by the

individualized education program team."). California requires the presence of three elements to establish the existence of a specific learning disability: (1) a severe discrepancy between the student's intellectual ability and achievement in one or more of the enumerated academic areas including oral expression, listening comprehension, written expression, reading skills and comprehension, and mathematical calculation and reasoning; (2) the discrepancy is caused by a disorder in one or more of the basic psychological processes and is not the result of environmental, cultural, or economic disadvantage; and (3) the discrepancy cannot be corrected through other regular or categorical services offered within the regular instructional program." Cal. Educ. Code § 56337.

Once it has been determined that a student is a "child with a disability," the state is required to "conduct a full and individual initial evaluation . . . before the initial provisions of special education and related services to a child." 20 U.S.C. § 1414(1)(A). Section 1414(d)(1)(B) requires that "at least one regular education teacher be included on the IEP team" assigned to "evaluate a disabled students special education needs." See M.L. v. Fed. Way School Dist., 394 F.3d 634, 643 (9th Cir. 2005). A written IEP assessing the individualized educational needs of the disabled child and prescribing the services required to meet those needs must be established annually. See Walczak, 142 F.3d at 122 (citing 20 U.S.C. § 1414(a)(5)).

"[A] state must comply both procedurally and substantively with the IDEA." ML, 394 F.3d at 644 (citing Rowley, 458 U.S. at 206-07, 102 S. Ct. at 3051). To determine whether an IDEA violation has occurred, a court's inquiry is twofold. "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Rowley, 458 U.S. at 206-207, 102 S. Ct. at 3051.

B. Standard of Review

A district court reviews the decision of the hearing officer under a modified de novo standard. Ojai Unified School District v. Jackson, 4 F.3d 1467, 1471-73 (9th Cir. 1993); see

also Amanda J, 267 F.3d at 887-888 ("Congress intended 'judicial review in IDEA cases to differ[ ] substantially from judicial review of other agency actions . . . . Complete *de novo* review, however, is inappropriate."); Ojai, 4 F.3d at 1472 (characterizing review as analogous to "de novo review" of a "stipulated record").[4/] "The district court's independent judgment is not controlled by the hearing officer's recommendations, but neither may it be made without due deference." Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 891-92 (9th Cir. 1995) (citing Rowley, 458 U.S. at 206, 102 S. Ct. at 3051); Glendale Unified Sch. Dist. v. Almasi, 122 F. Supp. 2d 1093, 1100 (C.D. Cal. 2000) ("Although the Ninth Circuit has described the judicial review of the administrative decision as de novo, the standard is modified by the special weight given to the hearing officer's decision.") (citing Ojai, 4 F.3d at 1471). Ojai did not rule out the appropriateness of summary judgment in certain instances. 4 F.3d at 1472 n.6. A district court trying a case anew fails to give the hearing officer's decision due weight. See Capistrano, 59 F.3d at 892; Amanda J., 267 F.3d at 887 ("complete *de novo* review is inappropriate").

The Court's decision must be supported by the preponderance of the evidence. 20 U.S.C. § 1415(i)(2)(C)(iii). The preponderance of the evidence standard "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." Rowley, 458 U.S. at 206, 102 S. Ct. at 3051. Rather, the Court must give "due weight" to the administrative proceedings. Id.; Capistrano , 59 F.3d at 891-92. More specifically, the Court "should give substantial weight to the hearing officer's decision if the court finds that the decision was careful, impartial and sensitive to the complexities presented." Ojai, 4 F.3d at 1476. The Court must consider the findings of the hearing officer carefully and endeavor to respond to the hearing officer's resolution of each material issue. However, the Court is free to accept or reject the findings

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[4/] Judicial review of IDEA decisions is not completely bound by the administrative record. The court must "hear additional evidence at the request of a party." 20 U.S.C. § 1415(i)(2)(C)(ii). Here, neither party exercised its right to present new evidence at trial. Thus, the Court's decision is confined to the administrative record and the Court defers to the hearing officer's decision as to issues of credibility. Almasi, 122 F. Supp. 2d at 1100.

of the hearing officer as a whole once such consideration is granted. San Diego v. California Special Education Hearing Office, 93 F.3d 1458, 1466 (9th Cir. 1996)

C. Review of Plaintiff's Claims

As a preliminary matter, the Court addresses the weight it gives the Administrative Law Judge's decision at the due process hearing. Having reviewed the administrative record and decision, the Court finds that the decision, which is over twenty pages in length and deals with the substantial factual history of this action in meticulous detail, was well-reasoned, "carefully, impartial, and sensitive to the complexities presented." Ojai, 4 F.3d at 1476. Therefore, the Court will give substantial weight to the hearing officer's findings and conclusions. County of San Diego, 93 F.3d at 1466; Walczak, 142 F.3d at 129 ("Deference is particularly appropriate when, as here, the state hearing officers' review has been thorough and careful.").

1. Procedural Violations

The plaintiff claims the District violated the procedural requirements of the IDEA by conducting the May 30, 2002 IEP meeting without the assistance of a general education teacher.[5/] The ALJ specifically found that both a general education and special education teacher were present at the May 30, 2002 IEP meeting.[6/] While the ALJ's findings of fact, such as this, are entitled to deference, the Court notes that the May 30, 2002 IEP report is not signed by I.H.'s general education instructor. Failure to include a general education teacher is a violation of the IDEA's procedural requirements. See 20 U.S.C. §§ 1414(d)(1)(B)(ii) & 1414(d)(4)(B); Cal Educ. Code § 56341(b)(2) (requiring that at least one regular education teacher be included on the IEP team if the "pupil is, or may be,

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[5/] The challenging party bears the burden of proving, by a preponderance of the evidence, that the state educational agency did not comply with the IDEA. See 20 U.S.C. § 1415(i)(2)(C)(iii) (requiring that a reviewing court's decision be based on the preponderance of the evidence). Poolaw. Bishop, 67 F.3d 830, 833 (9th Cir. 1994). Though the plaintiff raised a number of alleged procedural violations during the administrative hearing, it appears that she has abandoned those claims on appeal.

[6/] On the other hand, the ALJ found that no general education teacher was present at the previous, June 1, 2001 IEP team meeting.

participating in the regular education environment"); ML, 394 F.3d at 643 ("[T]he requirement that [at] least one regular education teacher be included on an IEP team, if the student may be participating in a regular classroom is mandatory - not discretionary."). Nonetheless, the Court finds that even if no general educator was present on May 30, 2002, I.H. was not denied a FAPE.

While the Court acknowledges that "[p]rocedural compliance is essential to ensuring" the efficacy of the IDEA, "[n]ot every procedural violation . . . is sufficient to support a finding that the child . . . was denied a FAPE." Amanda J., 267 F.3d at 892; W.G. v. Bd. of Trustees of Target Range Sch. District, 960 F.2d 1479, 1484 (9th Cir. 1992) ("Procedural flaws do not automatically require a finding of a denial of a FAPE."). The case law is unsettled with regards to the standard of review applied to procedural violations, ML, 394 F.3d at 644, however it is well-established that "procedural inadequacies that result in the loss of educational opportunity;" those that "seriously infringe the parents' opportunity to participate in the IEP formulation process;" and those that cause "deprivation of educational benefits," "clearly result in the denial of a FAPE." Amanda J., 267 F.3d at 892.

In this case, whether the Court applies the harmless error test or the more rigorous "structural error" standard, its conclusion is the same. Cf. ML, 394 F.3d at 650 n.9 (embracing the "structural error standard" but acknowledging that the majority of the panel "adopted a harmless error test instead") (Alarcon, J.). The Court agrees with the ALJ's determination that I.H. was not denied a FAPE even if no regular education teacher was present at one of her IEP meetings. Cf. ML, 394 F.3d at 647 (finding that exclusion of a student's regular teacher from the IEP team could result in denial of a FAPE because the general education teacher provides "important expertise regarding the general curriculum and the general educational environment" and there is "no way of determining whether the IEP team would have developed a different program after considering the views of a regular education teacher"). The IEP team met numerous times before and throughout I.H.'s second grade year. Her IEP was revised throughout the year as she met and exceeded the short term goals established in May. At each subsequent team meeting, all necessary participants,

including the general education teacher, were present and actively involved. Additionally, I.H.'s parents attended the meetings and played an integral role in developing I.H.'s IEP. Clearly, the District met and exceeded the basic requirements of the IDEA which only require one annual IEP update. Poolaw, 67 F.3d at 836 (noting that the IDEA requires the state educational agency to update a student's IEP annually). Failure to include a general education teacher at one meeting, particularly in light of I.H.'s minimal involvement in her general education class at the time, does not significantly undermine the validity of the District's efforts to address I.H.'s educational needs. The plaintiff has not identified any specific prejudice to I.H. or her parents caused by this singular deficiency. Therefore, the Court concludes that the omission of her general education teacher, if it occurred, is insufficient to support a claim of denial of FAPE under the IDEA.

2. *Substantive Violations*

Plaintiff's substantive claims fall into two general categories. First, she claims that her disabilities were improperly assessed by the District, and second, that she was denied proper educational accommodation for her disabilities. I.H.'s parents believe that she suffers from disabling vision impairment; auditory processing impairment; and attention deficit disorder, all of which were not properly assessed by the District. They also claim that, though she was diagnosed with speech and language impairment, and speech therapy services were provided, the District improperly assessed the scope of I.H.'s language impairment.

School districts have an affirmative duty to identify and assess students with suspected disabilities. See 20 U.S.C. § 1414(b)(3)(C); Cal. Educ. Code § 56320(e)-(f); Pasatiempo v. Aizawa, 103 F.3d 796 (9th Cir. 1996) ("The DOE has an affirmative duty to locate and identify potentially disabled children for evaluation."). Once a district has been put on notice of a potential impairment, either through its own testing or by third party testing conducted at the parent's behest, the district has a duty to respond appropriately. Id. at 802 (holding that the IDEA requires school districts to "respond adequately to parental concerns about their children") (citing S. Rep. No. 168, 94th Cong., 1st Sess. 1, 3 (1975)).

However, not all parental complaints must be met with a full battery of tests. See Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1086, 1088-89 (9th Cir. 2002) (holding that the school district did not violate the IDEA by refusing to administer a traditional IQ test to student); Pasatiempo, 103 F.3d at 803 ("Every parental request for an evaluation need not result in administration of a Chapter 36 evaluation, or any evaluation at all."). Educators must be afforded substantial discretion in determining whether and what type of diagnostic testing is appropriate. Id. ("We have no quarrel with the proposition that school officials may . . . design and administer different types of tests in order to measure different student abilities or impairments."). All that is required is that the school conduct appropriate assessment and notify the parents of the steps taken to evaluate the student. Id. at 805.

Once a school district determines that a student suffers from an impairment that qualifies them for special education, an IEP team comprised of educators, specialists, and the student's parents create an IEP tailored to address the student's special needs. See 20 U.S.C. § 1401(a)(20); Walczak, 142 F.3d at 122 (stating the required elements of an IEP). The education provided by the school district must conform to the IEP, but there is no requirement that the student be provided with the best possible education, or even with an education that maximizes the student's learning potential. Rowley, 458 U.S. at 189, 102 S. Ct. at 3042. The basic standard for evaluating the sufficiency of a student's education, and ensuring that the student is receiving a FAPE, is whether the student shows progress, rather than regression, in her education.[7] Walczak, 142 F.3d at 130 ("An appropriate public education under the IDEA is one that is 'likely to produce progress, not regression.'") (quoting Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 248 (5th Cir. 1997)).

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[7] The IDEA also shows a marked preference for mainstreaming children into general education to the extent possible. See Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1403 (9th Cir. 1994) ("20 U.S.C. § 1412(5)(B) . . . . sets forth Congress's preference for educating children with disabilities in regular classrooms with their peers."). A student's IEP must educate her "in the least restrictive environment" that is consistent with the student's needs. 20 U.S.C. § 1412(a)(5)(A); Cal Educ. Code. § 56031.

At the onset, the Court notes that I.H.'s significant academic and social achievement while at Santiago forms an important backdrop for the Court's consideration of whether I.H.'s IEP was reasonably calculated to enable her to receive educational benefit. See Frank G. v. Bd. of Educ., 459 F.3d 356, 364-65 (2d Cir. 2006) (holding that academic progress is an important factor, indicative that the child is receiving an educational benefit) (collecting cases); Walczak, 142 F.3d at 130 ("[T]he attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress."). I.H.'s teachers all testified that she both behaved and performed well in her classes at Santiago. None of the experts suggested that regression was a concern in any aspect of her development.[8/] To the contrary, the experts seemed to agree that I.H.'s auditory, attention, and language impairments improved as she got older.

It is undisputed that I.H. was diagnosed with a speech and language impairment and provided responsive services by the District during her kindergarten through second grade school years. Mid-way through the second grade, in January 2003, her parents requested that I.H.'s speech and language therapy services be increased. The parents made this request despite the encouraging academic progress I.H. appeared to be making in her classes. In response to the request, the District promptly secured an independent assessment by a licensed speech pathologist, Fabi Moy. As discussed above, Ms. Moy ultimately concluded that I.H.'s speech and language skills fell within normal limits and that she was not eligible for special education services. I.H.'s speech and language therapists, Ms. Dembi and Linda Stephens, concurred with Ms. Moy's determination that she did not require speech and therapy services in order to receive an appropriate education. The results of the triennial assessment conducted by Ms. Miller were consistent with this conclusion.

[8/] Though her parents claims that I.H. suffered from developmental regression, there is no evidence in the record to suggest that I.H. has suffered from significant regression in any area of development. Though it is true that there were slight drops in her Woodcock Johnson-R reading composite and language word tests between 2000 and 2003, there was improvement in other areas, including written language and math composite, such that her overall academic achievement scores improved over time. Additionally, the KTEA examination suggested that I.H.'s reading composite scores were average and at grade level.

While the plaintiff offers testimony and reports from Abby Rozenberg and the Newport Language and Speech Center that I.H. was speech and language impaired, it is undisputed that the District did not receive any of the third party reports until the mediation on April 14, 2005. See Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999) (stating that an IEP must be evaluated based on the information known at the time it was drafted). By then, the reports were outdated and did not reflect I.H.'s current level of functioning. Nonetheless, the District convened an IEP team meeting to evaluate the reports. The IEP team concluded that, based on I.H.'s current progress in meeting and exceeding her academic goals, additional special education services were not required. Though I.H. may have benefitted from additional speech and language services, as recommended by the parents' experts, there is nothing in the reports or testimony that persuasively proves that she was denied a FAPE without them. Cf. Walczak, 142 F.3d at 132 ("What the statute guarantees is an 'appropriate' education, not 'one that provides everything that might be thought desirable by loving parents.'") (quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 (2d Cir. 1993), abrogated on other grounds by Florence County Sch. Dist. v. Carter, 510 U.S. 7, 114 S. Ct. 361, 125 L. Ed. 2d 284 (1993)). Similarly, the argument that the battery of tests, both formal and informal, conducted by the District to assess I.H.'s speech and language development were improper is insufficient to demonstrate that she was denied a FAPE.[9/] Cf. Pasatiempo, 103 F.3d at 805 ("Educators must be left free to educate. Even when individualized testing is contemplated, educators enjoy the discretion to evaluate, or to refuse to evaluate, children."). Thus, the Court finds no error in the ALJ's conclusion that "the District conducted appropriate speech and language assessments, and provided

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9/ Neither the testing procedures nor the resulting recommendations need to be perfect to constitute a FAPE. Small procedural errors, such as Ms. Moy's failure to record or transcribe I.H.'s language sample, do not significantly undermine the credibility of her test results. Additionally, though I.H.'s parents disagrees with way her test scores were evaluated, because they compared her to bilingual students, they offered no expert evidence that such scoring was inappropriate. Rather, both parties' experts agreed that I.H.'s speech and language development would be affected by her early Spanish exposure and the fact that English is not the first language of her parents.

services designed to meet the unique needs of the Student in the area of SL deficits." (OAH Decision ¶ 16.)

The Court also finds that the ALJ did not in err in finding that I.H. no longer suffers from a "specific learning disorder" that would qualify her for special education services. Contrary to her contention, there does not appear to be a significant discrepancy between I.H.'s intellectual ability and achievement in basic reading skills, reading comprehension, written expression, mathematics calculation or reasoning, oral expression, or listening comprehension that necessitates special services. (OAH Decision ¶ 31). I.H.'s standardized test scores from second grade showed that she "was reading at a mid-second grade level, and was at an ending second grade level for written language skills." Her math skills in both calculation and applied problems appeared to be slightly above average. Overall, Miller concluded that the "[r]esults of standardized achievement tests indicate that [I.H.] is functioning within the range of expected ability in all academic areas." These results were corroborated by the testimony of her teachers, which demonstrated that she was able to work up to class level in all academic areas.

Though the plaintiff's expert Dr. Christine Davidson testified that I.H. demonstrated a greater than 18-point discrepancy between her cognitive ability and her standardized testing scores, and that this discrepancy suggested the existence of a qualifying SLD, the ALJ found this evidence unpersuasive. As with all of the third party assessments procured by I.H.'s parents, Dr. Davidson's report was not available to the District at the time her third grade IEP was formulated. Additionally, the state regulations do not support Dr. Davidson's calculus, that anything greater than an 18-point discrepancy automatically qualifies a student for special education services. To the contrary, the regulations were specifically amended to provide greater discretion to the IEP team to disregard or otherwise pro-rate standardized scores in evaluating whether a significant discrepancy exists. See 5 CCR § 3030(j)(4) ("The decision as to whether or not a severe discrepancy exists shall be made by the individualized education program team . . . which takes into account all relevant material which is available on the pupil. No single score or product of scores, test or procedure, shall be used as the

sole criterion for the decisions of the individualized education program team as to the pupil's eligibility for special education."). Indeed, Dr. Davidson agreed that proration of IQ test scores is often appropriate and necessary to accurately assess a student's score.[10/] The Court can find no fault with the ALJ's well-reasoned determination that overall, the evaluation by I.H.'s IEP team, which consisted of teachers and specialists who worked with I.H. on a daily basis, was more persuasive than that of her parents' expert.

Similarly, the Court finds that the conclusive testimony of I.H.'s teachers and learning specialists outweighs the perceived academic "weaknesses" identified by the third party experts. Cf. W.G., 960 F.2d at 1487 (noting that "[s]tandardized tests are not the sole indicator of a student's progress" and placing greater weight on the testimony of the student's educators). The Court acknowledges that I.H., like many students, suffered from some academic difficulties at Santiago. Her triennial assessment revealed an auditory processing weakness that makes it more difficult for her to understand oral instruction. At least one of her teachers noted in her IEP that I.H. writes slowly. Her fourth grade teacher, Sarah Silva, also testified that I.H. entered fourth grade at a second grade reading level. And her report cards for the Fourth and Fifth grade were sometimes below average. However, her grades were nearly all passing, and by the time she exited Ms. Silva's class she was reading at a high third grade, nearly fourth grade, level. Ultimately, despite all of the identified weaknesses, every one of I.H.'s teachers testified that she was an average student who functioned appropriately in general education classes.

The IDEA does not provide special education to all students who earn less than top marks at school or who fall slightly below optimal grade level. Cf. Cal Educ Code § 56337 (requiring both a significant discrepancy in cognitive and functional abilities *and* a showing that this discrepancy requires special education services that cannot be provided in a regular classroom to qualify a child as "specific learning disabled"); Walczak, 142 F.3d at 130 ("The purpose of the Act was 'more to open the door of public education to handicapped

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10/ Dr. Davidson even concurred with the District's experts' findings that I.H.'s test scores must be evaluated in the context of her home and learning environment.

children on appropriate terms than to guarantee any particular level of education once inside.'") (quoting Rowley, 458 U.S. at 192, 102 S. Ct. at 3034); Lunceford v. D.C. Bd. of Educ., 745 F.2d 1557, 1483 (D.C. Cir. 1984) (stating that federal law "does not secure the best education money can buy; it calls upon government, more modestly, to provide an appropriate education for each child."); Pasatiempo, 103 F.3d at 803 (noting that the IDEA only covers children with disabilities, not all students with achievement delays, and school districts "may draw distinctions between students on the basis of the perceived severity of their problems). Based on I.H.'s academic progress, which is particularly significant when viewed in light of the educational barriers she dealt with on a day to day basis such as constant class room changes and the decelerated curriculum offered in her special education classes, the Court finds that I.H. does not manifest a specific learning disability that would qualify her for special education.[11/]

The Court finds no evidence in the record to support the supposition that I.H. suffers from AD/HD. The assessment conducted by Ms. Miller at the parents' behest describes I.H. as a "cooperative and attentive learner" and concludes that she does not meet the diagnostic criteria for a child with AD/HD. See 5 C.C.R. § 3030(f) (providing that "other health impairments" must "adversely affect[] a pupil's educational performance" to be considered a "disability"). Similarly, with the exception of assessments provided by I.H.'s parents, none of the psychological tests revealed any significant AD/HD or other attention deficit problems. Even the plaintiff's own expert, Dr. Davidson, has not conclusively diagnosed I.H. with AD/HD. Furthermore, while some attention processing weakness was identified in

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[11/] The Court further notes that educating I.H. in regular classes is consistent with the goal of the IDEA that students with special needs be educated in the least restrictive environment. See 20 U.S.C. § 1412(a)(5)(A); Walczak, 142 F.3d at 122 ("Because the law expresses a strong preference for children with disabilities to be educated 'to the maximum extent appropriate,' together with their non-disabled peers, 20 U.S.C. § 1412(5), special education and related services must be provided in the least restrictive setting consistent with a child's needs."). Under the law, a student may only be removed from regular education when the nature or severity of her disabilities is such that education in regular classes, even with the use of supplementary aides and services, does not achieve satisfactory educational results. See id.

early assessments, there is no indication that the problems qualify I.H. as disabled based on an "other health impairment," as defined in 5 C.C.R. § 3030. To the contrary, all of her teachers and evaluators generally characterize her as attentive and cooperative in the academic setting; and the behavioral deficits at home identified by her parents do not fall within the purview of the IDEA. Therefore, the Court concurs with the ALJ's determination that "[t]here is no compelling evidence that Student had unique needs in the area of AD/HD after the assessment. Thus, the District was under no obligations to provide classroom accommodations and modifications for AD/HD."

The Court also finds that the District was under no obligation to provide additional testing or support for I.H.'s alleged visual and audio processing deficits. It is undisputed that prior to entering kindergarten, the District identified psychological auditory processing and speech and language impairments that qualified I.H. for special education services. (District Trial Brief. 10-11.). To address her impairments, I.H. was placed in a special education day class for most of the day in kindergarten through second grade.[12/] However, after I.H. met and exceeded most of the goals set forth in her second grade IEP before the year was even half over, the District decided to reassess the appropriateness of special education. During her triennial assessment, school psychologist Miller conducted a number of cognitive assessment tests and reviewed I.H.'s academic records. Based on her review, Miller concluded that, while I.H. did suffer from some auditory processing weakness, it did not constitute a disability sufficient to require special education services. The IEP team, including I.H.'s special education and general education teachers, agreed with Miller's conclusion based on I.H.'s quality of performance in their classes. Thus, though Dr. Abramson, an expert hired by I.H.'s parents, did diagnose her with several auditory

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[12/] At the end of second grade, the IEP team determined that I.H. would benefit from greater mainstreaming. However, because the parents disagreed, I.H. continued to be educated in special day class until her parents transferred her to Prentice School. See Doe v. Maher, 793 F.2d 1470, 1482 (9th Cir. 1986) (holding that a student must be permitted to remain in her then-current educational placement pending resolution of any review proceedings unless the parent agrees otherwise).

processing deficits which may have prevented her from performing optimally in her classes, the Court does not find that her testing persuasively demonstrates that I.H. is eligible for special education. Gregory K., 811 F.2d at 1314 (noting that "even if [the parent's proposed services] were better for [the student] than the District's proposed placement, that would not necessarily mean that the placement was inappropriate."). Additionally, the Court does not find that the District was required to provide testing by a licensed audiologist to adequately assess I.H.'s auditory processing deficiency.

Similarly, the Court finds that the District was not deficient in its evaluation of I.H.'s visual impairment. It is undisputed that she has fully functional visual acuity. Though some tracking difficulty was noted on her pre-kindergarten assessment, it was attributed to her other attention and focusing limitations. (Pl. Ex. 17.) In the years that followed, none of I.H.'s teachers noticed any vision problems. And her parents never notified the District that they believed I.H. suffered from vision impairment. In June 2004, Dr. Beth Ballinger evaluated I.H.'s vision and found that she had difficulty tracking, difficulty with saccharic eye movement, problems with visual attention and integration, and was impaired in her visual motor control and perceptual abilities. But these reports were not provided to the District until the next year. And even that report found I.H.'s visual acuity to be functional though slightly far-sighted. It was not until Dr. Ballinger reevaluated I.H. in September of 2005 that she found any signs of progressive myopia. The report from that visit was not provided to the District until the due process hearing. Thus, the Court agrees with the ALJ's conclusion that the District was under no obligation to provide vision testing or services in excess of those afforded to I.H.

Finally, with respect to I.H.'s need for occupational therapy ("OT") resources, which was not raised in the plaintiff's trial brief, the Court concurs with the ALJ's determination that "the District had no notice that OT was an area of suspected disability for Student at the time of the triennial assessment" and "Student failed to offer persuasive evidence that OT services were required by Student." (OAH Decision ¶ 18.). The District offered testimony by Diana Wertheimer-Gale, a licensed occupational therapist, that significantly undermined

the conclusions presented in the plaintiff's OT assessment. The ALJ found the District's expert to be significantly more credible than Ms. Lin, who assessed I.H. on behalf of her parents, and agreed with her that Ms. Lin's report used "improper protocols." Based thereon, the ALJ concluded that there was no evidence to support I.H.'s need for OT services. In the absence of any countervailing evidence or argument by the plaintiff, the Court finds the ALJ's determination to be correct.

SCANNED

CONCLUSION

For the foregoing reasons, the Court finds that I.H. is not a "child with a disability" as defined by 20 U.S.C. § 1401(3)(A) and the District did not deny I.H. a FAPE while she was being educated at Santiago. Accordingly, the Court will enter judgment in favor of the District.

IT IS SO ORDERED.

DATED: March 31, 2007

Percy Anderson
UNITED STATES DISTRICT JUDGE