

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

In the Matter of:

STUDENT,

Petitioner,

v.

COMPTON UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2007070980

DECISION

Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in Los Angeles, California on December 3-5, 2007.

Pamela K. Daves, Attorney at Law, represented Student. Jean Murrell Adams, Attorney at Law, assisted Ms. Daves during the first day of hearing. Ian T. Wade, Attorney at Law, represented the Compton Unified School District (District). Brady J. Mitchell, Attorney at Law, assisted Mr. Wade during the hearing.

Student's Grandmother was present during portions of the hearing on December 3 and 4, 2007. Student was present during portions of the hearing on December 4, 2007. Also present throughout the hearing was Gloria Smith, District's Program Specialist. Alfred Martins, District's Program Specialist, was present the morning of December 4, 2007.

On July 30, 2007, Student filed his request for due process hearing. On September 13, 2007, OAH granted a request to continue the hearing. At the close of the hearing, the parties requested time for written argument. The parties filed their closing briefs on December 21, 2007, and the matter was submitted that day. The parties stipulated that the decision would be due by January 25, 2008.

PROCEDURAL MATTERS

Student's Motion for Reconsideration

Student alleged in the complaint that the District denied him a Free Appropriate Public Education (FAPE) by not providing all school records in response to Student's records request. At the Prehearing Conference on November 26, 2007, ALJ Richard T. Breen dismissed this issue because Student did not assert how the District's failure to produce records denied Grandmother the ability to participate in Student's educational decisionmaking process.

Student made a Motion for Reconsideration regarding ALJ Breen's dismissal order at the commencement of the due processing hearing. However, Student failed to demonstrate how the District's failure to produce records denied Grandmother the right to participate in the Individualized Education Program (IEP) process or resulted in a denial of FAPE. Student's remedy for the District's failure to produce documents for hearing was to request that the ALJ impose evidentiary sanctions against the District to ensure a fair due process hearing. (*Sykes v. District of Columbia* (D.D.C. 2007) 518 F.Supp.2d 261 [court held it was appropriate for the hearing officer to defer to the student's position at hearing when the record was deficient due to the district's failure to produce a record].) After reconsidering Student's request, the issue regarding the District's failure to produce Student's education records is still dismissed.

District's Motion to Dismiss

Concurrently with the closing brief, the District made a separate motion to dismiss Student's complaint because Student and the Los Angeles County Office of Education (LACOE) entered into a settlement agreement to dismiss LACOE as a respondent. The District asserted that this agreement resolved all issues in Student's complaint, including the claims against the District. Student submitted an opposition brief on January 3, 2008.

Student named LACOE in the complaint because LACOE performed Student's speech and language assessment. LACOE also provides speech and language assessments and direct speech and language services pursuant to a contract for services. The District's contention that LACOE is solely responsible for providing Student with speech and language services because the District contracts out this function has no merit for the reason that, since Student resides within the District boundaries, the District is the local education agency (LEA) responsible for providing Student with special education services. The fact that the District contracts with LACOE to provide speech and language services is no different than if the District contracted with a nonpublic agency to provide these services; the District still remains the LEA ultimately responsible for Student's special education services. (34 C.F.R. § 300.201; Ed. Code, §§ 48200, 56026.3.) Additionally, Student's settlement agreement with LACOE only resolves Student's contentions against LACOE, and is not a global settlement of all contentions against both the District and LACOE. Therefore, the District's

motion to dismiss is denied as the Settlement Agreement did not resolve all matters in this case, nor is the agreement binding between Student and the District.

ISSUES¹

1. Did the District fail to meet its “child find” obligation by not assessing Student for special education eligibility between September 2005 and June 2006?

2. Did the District deny Student a FAPE in June 2006 by failing to assess Student in all areas of suspected disability by not conducting a neuropsychological exam or speech and language assessment in the initial assessment for eligibility?

3. Did the District deny Student a FAPE by failing to timely perform the speech and language assessment, as specified in the June 29, 2006 IEP?

4. Did the District deny Student a FAPE because the June 29, 2006, February 26, 2007 and July 9, 2007 IEPs did not provide Student with speech and language services and goals?

5. Did the District deny Student a FAPE because the June 29, 2006 and July 9, 2007 IEPs failed to meet Student’s unique needs regarding his self-advocacy, auditory processing, written expression, social skills, social-emotional condition, and academic deficits?

6. Did the District deny Student a FAPE by failing to provide the Resource Specialist Program (RSP) services and classroom accommodations specified in the June 29, 2006 IEP?

7. Did the District fail to provide Grandmother with prior written notice that it refused to conduct an initial assessment, failed to conduct the speech and language assessment specified in the June 29, 2006 IEP, and, at the February 26, 2007 IEP meeting, refused to provide speech and language services?

REQUESTED REMEDIES

Student requests that the District fund neuropsychological and speech and language Independent Educational Evaluations (IEE), and that the District convene an IEP to discuss the findings of these IEEs. Student also requests one-to-one academic tutoring and group speech and language services be provided by a certified non-public agency.

¹ These issues are those framed in the November 26, 2007 Order Following Prehearing Conference. The ALJ has reorganized the issues, without changing their substance, for purposes of organizing this Decision

CONTENTIONS OF THE PARTIES

Student asserts that the District failed to timely locate and serve him as a child who may need special education services. Student contends that the District failed to assess him for special education eligibility in September 2005, after Grandmother gave the District a letter from Student's psychologist, Verna Fabella-Hicks, Ph.D., which stated that he had an expressive language disorder and may require special education services. Additionally, Student contends that the District knew that Student might require special education services because he suffered from a traumatic brain injury (TBI), which led to the District creating a Section 504 plan in June 2005 to assist Student due to his academic failings. The District contends that it did not become aware until April 2006, that Student may require special education services when it received Grandmother's assessment request and the letter drafted by Dr. Fabella-Hicks regarding Student's expressive language disorder.

Student also contends that the District did not adequately assess him during the initial assessment in June 2006, because the District should have conducted a neuropsychological assessment due to Student's TBI and shunt implanted in his skull. Student alleges that the District needed to conduct a speech and language assessment due to Dr. Fabella-Hicks's finding that Student had an expressive language disorder. The District asserts that Student did not exhibit suspected disabilities that would have required either a neuropsychological or speech and language assessment based on its observations of Student, information from Dr. Fabella-Hicks' letter and Grandmother's assessment request.

Student asserts that the District agreed to conduct a speech and language assessment at the June 29, 2006 IEP meeting, but failed to timely conduct the assessment and hold an IEP meeting to discuss the assessment. Student also contends that the District needed to provide him with speech and language services and academic tutoring to meet his unique needs. The District asserts that it made a timely referral to LACOE to conduct the speech and language assessment and it was LACOE's responsibility to meet the required timelines. The District further contends that Student does not require specific speech and language goals and direct services based on the speech and language assessment.

Student asserts that the June 29, 2006, February 26, 2007 and July 9, 2007 IEPs failed to provide him with a FAPE because the IEPs did not contain goals to address his unique needs in self-advocacy skills, auditory processing deficits, written expression, social skills and social-emotional deficits. The District contends that its IEPs provided Student with FAPE because the IEPs were reasonably calculated to address Student's unique needs and provide Student with some educational benefit.

Student alleges that the District did not provide him with the RSP instruction and classroom accommodations set forth in the June 29, 2006 IEP. The District stated that it provided Student with the RSP instruction and classroom accommodations.

Finally, Student contends that the District violated Grandmother's procedural rights by failing to provide her with prior written notice in September 2005, that District was not

going assess Student after its receipt of Grandmother's assessment request. Additionally, Student asserts that the District did not provide prior written notice regarding its failure to conduct the speech and language assessment promised in the June 29, 2006 IEP meeting, or regarding its failure to provide speech and language services at the February 26, 2007 IEP meeting. The District argues that Grandmother did not deliver her assessment request until April 2006, and that LACOE was responsible for notifying Grandmother regarding the speech and language assessment. Finally, the District contends that it provided adequate notice at the February 26, 2007 IEP meeting about why it did not offer speech and language services or goals.

FACTUAL FINDINGS

Background

1. Student, born July 15, 1992, lives with his Grandmother, who is his legal guardian, within the District boundaries. The parties agree that Student is eligible for special education services under the category of Specific Learning Disability (SLD). Student presently attends high school and is in the ninth grade.

2. Student suffered a serious head injury at the age of two, and another head trauma when he was four. Student suffered brain hemorrhaging with the second head injury, and a shunt was placed in his head to drain excess cerebral fluid. Student still has a shunt. Student moved in with his Grandmother when he was five years old. Student has attended District schools since then.

Child Find

3. The term "child find" refers to a school district's affirmative, ongoing obligation to identify, locate, and assess all children residing within its jurisdiction who are suspected of having disabilities and who may need special education as a result of those disabilities. Specifically, if the District had reason to suspect that Student had a disability and that he may have needed special education and services to address his disability, the District would have had an obligation to assess him. The relevant inquiry is whether the child should be assessed, not whether the student will ultimately qualify for services.

4. In May, June and July 2005, Dr. Fabella-Hicks conducted a psychodiagnostic evaluation of Student. Dr. Fabella-Hicks conducted the evaluation pursuant to a referral by the Los Angeles County Department of Children and Family Services due to Student's regressive behavior, impulsivity, poor adaptive skills and poor academic functioning. Dr. Fabella-Hicks prepared a report that summarized her test results and recommendations. Dr. Fabella-Hicks also prepared a letter on September 27, 2005, for Grandmother to give to the District. Dr. Fabella-Hicks's letter stated that she had assessed Student and, based on her assessment, requested that the District conduct a full psychoeducational assessment. Dr. Fabella-Hicks stated that her assessment indicated that Student had an expressive

language disorder and should be provided with necessary supports. Dr. Fabella-Hicks's letter noted that Student had significant variations in cognitive abilities, which has allowed him to progress to date without special education supports. However, as school becomes more difficult, Student now requires these supports.

5. Grandmother stated that she delivered Dr. Fabella-Hicks's letter to the District right after she received it. Grandmother stated that a few months after she first delivered Dr. Fabella-Hicks's letter that she prepared the request for an IEP and delivered that request, Dr. Fabella-Hicks's letter, and an undated, handwritten cover letter to Student's school. However, Grandmother did not recall when she gave these documents to the District, nor did she recall to whom she gave the letter at Student's middle school. On March 24, 2006, Lance Golden, assistant principal at Student's school, wrote a letter stating that the school psychologist would be testing Student. Alphonso Davis, District school psychologist, testified credibly that he first received Grandmother's assessment request in April 2006, and then proceeded to prepare an assessment plan and assess Student. Mr. Davis established that his review of Student's records before he began his assessment did not show that Grandmother delivered Dr. Fabella-Hicks's letter in the fall of 2005.

6. However, the fact that Grandmother did not deliver her assessment request until March 2006, does not end the analysis regarding whether the District fulfilled its child find duties if the District had independent knowledge to suspect that Student had a disability and may have required special education services. During fifth grade, Student's teacher noted that Student was having increasing difficulty with his class work in the areas of reading fluency, vocabulary, comprehension, and mathematics. On Student's end of the year report card, Student's teacher noted that Student was below average in math, reading and writing, and that the teacher had concerns about whether Student should be promoted into the sixth grade.²

7. The District knew about Student's TBI and academic difficulties, when he began the sixth grade, which placed Student at risk for needing special education services. The District held a Section 504³ plan meeting on June 4, 2004, to discuss problems that Student was having in learning. The District determined that Student's had a qualifying disability, TBI, which significantly impaired his learning. The District developed classroom accommodations for the teachers to implement. Student struggled academically in the sixth grade as he failed his English class and received average grades to below average grades in science and health, social studies, and math classes.

² Elementary school in the District is kindergarten through grade five, middle school is grades six through eight, and high school grades nine through 12.

³ A "504 plan" is a document created pursuant to the federal anti-discrimination law commonly known as Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; implementing regulations at 34 C.F.R. § 104.1 et seq.) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity, such as learning.

8. Student's grades in the first quarter of school year (SY) 2006-2007 indicated that he was continuing to struggle. Student received a C+ in Life Science, a D in both English and Math, an F in Reading and a C- in World History in his seventh grade general education courses. Student continued to struggle academically the remainder of the school year as his grade showed minimal progress. The District was aware that Student had a disability, TBI, which impacted his ability to access his education without accommodations. Mr. Davis's testimony made it clear that, because Student did not have behavior problems in his classes, Student was not brought to the attention of special education staff for an assessment. Therefore, the District let Student continue to struggle academically due to his disability until it received Grandmother's assessment request in March 2006. The District failed to comply with its child find duties as it should have known by no later than the end of the first quarter of SY 2005-2006 that Student might need special education services due to his TBI, and, despite that knowledge, failed to assess him.

District's Psychoeducational Assessment

9. Mr. Davis conducted Student's psychoeducational assessment on May 25, and June 13, 2006. Mr. Davis has worked as a school psychologist with the District since 1999, and before that was a school counselor for two years with the District. Mr. Davis's job duties include conducting psychoeducational assessments and counseling students. As part of his assessment of Student, Mr. Davis spoke with Grandmother and his grade math teacher, Elochuk Ude, and observed Student in and out of class. Mr. Davis administered the Beery-Bucktenica Developmental Test of Visual-Motor Integration (VMI), Test of Auditory Perceptual Skills-Revised (TAPS-R), Test of Visual Perceptual Skills-Revised (TVPS-R), Naglieri Nonverbal Ability Test, Form A, Woodcock Johnson Achievement Test, Third Edition (WJ-III), and had Mr. Ude complete the Burks' Behavior Rating Scales (BBRS).

10. Before conducting the formal tests, Mr. Davis observed Student in a general education class for ten to fifteen minutes, lunch area for five minutes and physical education for five to ten minutes. Student did not know that Mr. Davis was observing him. Mr. Davis stated during the classroom observation that Student was quiet and attentive to the class instruction. During the lunch observation, Mr. Davis observed Student interacting appropriately with his peers, and that Student did not display any signs of social awkwardness. Mr. Davis also spoke to Grandmother, who provided background information about Student's family structure, Student's activities at home, and developmental history. Grandmother did not inform Mr. Davis that Student was displaying any psychological problems, difficulty with interacting with peers or problems with activities of daily living, such as grooming and self-care. Mr. Davis did not speak to Dr. Fabella-Hicks, or obtain her complete report during the assessment process. Mr. Davis stated that he requested that Grandmother provide the report, which she did not do.

11. Mr. Davis spoke to Mr. Ude, who reported that Student was not a behavior problem in class, but that Student did have problems with his attention and withdrawal. Mr. Ude completed the BBRS, which is designed to measure a student's behavioral problems in the classroom based on a series of 110 questions. According to the questionnaire, Student

scored in the “significant” range in the areas of excessive withdrawal, poor ego strength, poor intellectuality, poor academics and poor attention.

12. Student’s scores on the VMI and TVPS-R tests showed that Student possessed average to slightly above average abilities with his visual motors, perception and reasoning skills. However, Student demonstrated extremely deficient abilities regarding his visual sequential-memory skills, which involves his ability to problem solve, sequence visual information, and recall visual information. Student’s problems with his visual sequential memory could negatively impact his written expression, spelling and math skills.

13. Mr. Davis also administered the TAPS-R to examine Student’s auditory processing skills and his processing of auditory information. The test results indicated that Student’s had extreme difficulty processing and remembering auditory and would have difficulty remembering and processing properly verbal classroom instructions. Mr. Davis’s assessment found Student’s cognitive functioning to be within the average range. Finally, Mr. Davis used the WJ-III to get a broad measure of Student’s academic abilities in various categories, such as reading fluency, math and writing. Mr. Davis found Student’s academic skills and ability to perform academic applications to be in the low average range. Student demonstrated extremely poorly regarding reading fluency and passage comprehension. Student had problems decoding more complex words, reading a sentence, and then being able to state what word would be most appropriate to complete the sentence. Student had trouble spelling words with more than three syllables and problems with sentence structure, grammar, capitalization and punctuation. Student’s strongest area was math, as Student was in the low average range, as Student had difficulty with advanced math skills, such as mixed fractions, multiplying decimals, and word problems that required multiple step operations.

14. Based on his assessment findings, Mr. Davis recommended that the IEP team find Student eligible for special education services under the criteria of SLD. Mr. Davis based his recommendation on the fact that Student’s academic achievement in reading, writing and math are not commensurate with his cognitive ability, which is in the average range. Mr. Davis concluded that Student’s discrepancy was caused by his psychological processing disorder in auditory perceptual processing and problems with his attention.

District’s Failure to Assess Student in All Areas of Suspected Disability

15. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of educational needs must be conducted. Assessments must be conducted in all areas related to the suspected disability by persons who are knowledgeable and competent to perform the assessment, as determined by the school district.

Neuropsychological Assessment

16. Student contended that because he has TBI and a shunt that the District needed to conduct a neuropsychological assessment. Tara Niendam, Ph.D., testified about her April

2007 neuropsychological assessment and assessment findings and recommendations. Dr. Niendam is presently a post-doctoral neuropsychology fellow at the University of California, Los Angeles, and has a bachelor's and master's degree in psychology, and a Ph.D. in clinical psychology. While Dr. Niendam was qualified based on her experience and education to conduct the tests she administered in her assessment, Student did not qualify her to give expert testimony as a neuropsychologist. Dr. Niendam's testimony and assessment did not establish that the District needed to conduct a neuropsychological assessment to assess Student in all areas of suspected disabilities.

17. Dr. Niendam's assessment found the same academic weaknesses that Mr. Davis found, and the lower test scores in Dr. Niendam's assessment were not significant. Dr. Niendam's assessment did not establish that Student had social skills or social-emotional needs that Mr. Davis did not document in his assessment. Dr. Niendam did not conduct her observations until April 2007, and the evidence did not indicate that the severity of problems indicated in her report were present in June 2006. Therefore, Student did not show what information regarding his suspected disability and educational needs that the District would have obtained with a neuropsychological assessment that the District did not obtain with its psychoeducational assessment.

18. Additionally, neither Dr. Fabella-Hicks's September 27, 2005 letter nor her August 2005 assessment report indicated that the District needed to conduct a neuropsychological assessment. Dr. Fabella-Hicks only recommended that the District conduct a psychoeducational assessment, which the District did. Therefore, the preponderance of the evidence did not establish that the District needed to conduct a neuropsychological assessment to assess Student in all areas related to his suspected disability.⁴

Speech and Language Assessment

19. Dr. Fabella-Hicks's September 27, 2005 letter stated that Student had an expressive language disorder. After reviewing Dr. Fabella-Hicks's letter, Mr. Davis prepared the April 25, 2006 Assessment Plan, and did not include speech and language assessment in the assessment plan. Mr. Davis stated that he wanted to speak to Grandmother regarding Student's speech and language deficits, and to personally observe and speak to Student, before determining the level of speech and language assessment the District needed to conduct. However, Mr. Davis did not explain why he could not obtain that information before he sent out the assessment plan. He admitted that the District needed to conduct a speech and language assessment based on Dr. Fabella-Hicks's finding that Student had an expressive language disorder. Because Dr. Fabella-Hicks found that Student had an expressive language disorder, the District was put on notice, as of its receipt of that information in April 2006, that this was an area of suspected disability. Hence, the District

⁴ In his closing brief, Student challenges the adequacy of Mr. Davis's assessment and alleges that the psychoeducational assessment did not assess Student in all areas of suspected disability. However, Student did not raise this as an issue in the complaint, and thus this Decision does not consider that issue.

was obligated to initiate the speech and language assessment at that time, instead of waiting two months to propose the assessment.

Timeliness of the District's Speech and Language Assessment

20. If there is a referral for an assessment, the parent or guardian of the pupil shall be given a written proposed assessment plan within 15 days of the assessment request, not counting days between the student's school sessions and vacations in excess of five schooldays. If the referral for an assessment is made between school sessions, the assessment plan shall be developed within 10 days after the commencement of the school session. An IEP meeting to review the assessment results must occur within 60 days of the district's receipt of parental consent for the assessment, not counting days between the student's school sessions and vacations in excess of five schooldays. Student contends that the District did not timely conduct the speech and language assessment.

21. A school district must comply both procedurally and substantively with the IDEIA. While not every procedural flaw constitutes a denial of FAPE, one that impedes a student's right to receive a FAPE, significantly impedes a parent's opportunity to participate in the IEP process, or causes a deprivation of educational benefit to a student, constitutes a denial of FAPE.

22. At the conclusion of the June 29, 2006 IEP meeting, the District agreed to conduct a speech and language assessment. The District contracts with LACOE for speech and language assessments and services. After the IEP meeting, Mr. Davis placed a referral request for the LACOE speech and language specialist assigned to the school, Gail Adkins, to conduct the assessment. Because the District was on summer break, Ms. Adkins did not pick up the request until the beginning of September when school resumed. However, Ms. Adkins first conducted an observation of Student and did not prepare an assessment plan at the start of SY 2006-2007. Ms. Adkins subsequently contacted Kathryn George, her supervisor, because Student's case presented some unique difficulties. Ms. George went to Student's school to observe him, and then prepared an assessment plan on November 8, 2006. Grandmother signed and returned the assessment form the same day. Ms. George assessed Student on November 15 and 16, 2006, and prepared her report on November 20, 2006. However, Ms. Adkins did not schedule an IEP meeting to discuss Ms. George's assessment until February 9, 2007. Ms. Adkins gave Grandmother a copy of the report at the IEP meeting, which Ms. George did not attend. Grandmother requested additional time to review Ms. George's report, which led to another IEP meeting on February 26, 2007; Ms. George attended that meeting and presented her report.

23. Because the District agreed at the June 29, 2006 IEP to conduct the speech and language assessment, the parent should have been given the proposed assessment plan within 10 days of the start of SY 2006-2007, and the District failed to ensure that LACOE did so. Additionally, the District failed to ensure that it held an IEP meeting within 60 days of Grandmother's approval of the assessment plan, which was January 24, 2007, with the two-week winter break not counted in the 60 days. Therefore, the District failed to timely

conduct a speech and language assessment, which impeded Grandmother's ability to participate in IEP process because she did not have any information regarding Student's speech and language deficits until the end of February 2007, when she should have had that information in mid-November 2006.

Speech and Language Services and Goals for SY 2006-2007 and 2007-2008

24. An LEA must provide a student with an educational program that is reasonably calculated to provide the student with some educational benefit in the least restrictive environment. An LEA is not required to provide a special education student with the best education available or to provide instruction or services that maximize a student's abilities. An LEA need only provide a basic floor of opportunity that consists of access to specialized instructional and related services, which are individually designed to provide an educational benefit to the student. The District did not offer speech and language goals or services in the June 29, 2006 IEP, February 26, 2007 or July 9, 2007 IEPs. Student asserts that he needed direct speech and language services, and speech and language goals to address his unique needs and to allow him to receive some educational benefit.

District's Speech and Language Assessment

25. Ms. George has worked as a speech and language pathologist with LACOE for the past six years. Ms. George's duties include conducting speech and language assessments for students who have more complex issues than a speech and language specialist would typically encounter. Before working at LACOE, Ms. George was employed by the Diagnostic Center of Southern California (DCSC) for 11 years.⁵ At the DCSC, Ms. George conducted speech and language assessments for nine years, before her promotion to assistant director. While Student did not challenge the District's speech and language in the complaint, Student contended that the District improperly denied Student speech and language services based on inaccurate information in Ms. George's assessment.

26. Ms. George administered the TAPS-III, Goldman Fristoe Test of Articulation-II (GFTA-II), Comprehensive Receptive and Expressive Vocabulary Test-II (CREVT-II) and Oral and Written Language Scales (OWLS). Ms. George also used portions of tests developed by DCSC as alternative cognitive measures for African-American and English Language Learner students.

27. Before conducting the formal assessment, Ms. George observed Student in class and did not note any behavioral or verbal problems. Ms. George spoke to Student's first period teacher, who noted that Student did not have problems following directions or attending in class. Ms. George had a copy of Dr. Fabella-Hicks's complete report, and knew of Student's TBI and test scores. Dr. Fabella-Hicks's report found Student in the borderline

⁵ The DCSC is operated by the California Department of Education and provides assessment and educational planning services to assist school districts in determining the needs of special education students, and technical assistance and consultative services.

range for academic functioning and processing speed, and with poor working memory. Ms. George also reviewed Mr. Davis's assessment.

28. Ms. George used the cognitive and communication portions of the DCSC ordinal scales of development to see if Student's abilities were consistent with Dr. Fabella-Hicks's findings regarding Student's cognitive abilities. Ms. George has administered the DCSC ordinal scales several hundred times. The DCSC ordinal scales are not standardized, but are criterion based on whether the child has met certain developmental milestones. Ms. George's findings on the DCSC ordinal scales mirrored Dr. Fabella-Hicks's findings as Student was a beginning logical reasoner and reflected Student's TBI.

29. Ms. George noted that Student cooperated during the assessment. Ms. George observed that Student had problems processing her questions, and his responses were often delayed, causing her to prompt Student for a response after 15 seconds. Ms. George noted that Student did not independently ask her for assistance or for her to repeat the question if he was unsure what she asked. Student told Ms. George that he did not always understand class assignments, but that he would not ask the teacher for assistance. Based on her observations, Ms. George recommended that Student be encouraged to self-advocate and that this skill be practiced and reinforced.

30. Ms. George observed that Student had significant problems with his attention and auditory memory. Student took an unusually long time to respond to instructions, from a few seconds to a minute. Ms. George administered the TAPS-III to test Student's auditory skills needed for language use and development in everyday situations and at school. While Student's strengths were his ability to discern sound differences and similarities between words, ability to manipulate sounds within words and ability to understand spoken information, his scores were below average in these areas.

31. Ms. George stated that Student's subtest scores for word and number memory, sentence memory and auditory reasoning were significantly below average. Student's scores evidenced that Student had severe auditory processing deficits and problems processing abstract information. Ms. George's assessment showed that Student is a concrete learner, drawing from personal experiences and should not be expected to perform higher functioning tasks that require drawing inferences or determining consequences and conclusions. Student's performance on the TAPS-III subtests were commensurate with his cognitive ability and learning styles indicated in Dr. Fabella-Hicks's evaluation and Ms. George's findings on the DCSC cognitive measures.

32. Ms. George administered the CREVT-II and OWLS to test Student's vocabulary comprehension. Student's performance revealed that he better understood concrete words, and had difficulty with abstract concepts, and that he would not understand higher order language unless the instruction was repeated and presented to Student through demonstrations, modeling and with concrete explanations. Ms. George also stated that Student's classroom or resource teacher could best implement this recommendation.

33. Ms. George used the OWLS to test Student's ability to form and understand sentences, which showed that his abilities were within normal limits for his age. However, Student had significantly low scores of the receptive and expressive language subtests, which were attributable to his problems with attention, auditory memory and cognitive limitations. Student's test scores and Ms. George's observations demonstrated that Student understood with better comprehension concrete sentences and had trouble understanding inferences and figurative thinking, which was consistent with other test results.

34. Student had adequate pragmatic language skills as Student could adequately respond to questions, comment and report information. Ms. George observed that Student could carry a conversation on a topic with which he was familiar, and provide additional information with adult prompting. Student provided appropriate responses when asked questions regarding common social situations and roles. Student did not have problems with his articulation as Student could accurately produce sounds.

35. Ms. George admitted at hearing that Student's scores in her report were not correct to the extent that she did not correctly transfer the information from her testing protocols for the TAPS-III and OWLS, and thus Student's scores on those tests were lower than those reflected in her report. In her report, Ms. George stated that Student's receptive vocabulary was in the borderline range. However, Student's corrected receptive vocabulary subtest score actually placed him in the third percentile. Student's corrected expressive vocabulary subtest score placed him in the sixth percentile, and in the second percentile for the general vocabulary composite of expressive and receptive vocabulary subtests, all in the deficient range. Ms. George credibly explained that, even with the corrected, lower scores, Student's abilities were commensurate with his cognitive abilities and her report recommendations for instruction were not affected by her mistake.

Speech and Language Services and Goals

36. The District did not offer speech and language services and goals in the June 29, 2006 IEP because it had not assessed Student. Based on Ms. George's assessment, the District did not offer speech and language services and goals. At this IEP meeting, Ms. George presented her assessment and recommendations that Student not receive direct speech and language services because he would not benefit from direct services. Ms. George stated that Student would not benefit from direct services since his speech and language abilities were commensurate with his cognitive abilities and TBI, and his deficits related to his auditory processing disorder could not be remedied with direct services and therapy. Ms. George recommended accommodations and modifications to improve Student's understanding of more complex sentences through modeling, paraphrasing and demonstrations. Ms. George suggested that Student be seated in the front of the class, that teachers repeat verbal instructions and ask Student to repeat back instructions to make sure that he understood the directions. Teachers needed to encourage Student's self-advocacy skills, and avoid abstract concepts and information unless these ideas and concepts have been pre-taught and rehearsed to familiarize Student. The District again did not offer speech and language services at the July 9, 2007 IEP meeting.

Student's Private Assessment

37. Ms. Denley assessed Student on October 27, 2007, at her clinic. Ms. Denley did not observe Student at school, nor speak to any of his teachers as part of her assessment. Ms. Denley did not review in depth Student's prior assessment and did not know that Student had a TBI until after she completed her assessment. Ms. Denley also did not review Dr. Niendam's neuropsychological evaluation to obtain information regarding Student's cognitive ability.

38. Ms. Denley administered the Clinical Evaluation of Language Fundamental-IV (CELF-IV), GFTA-II and the Comprehensive Assessment of Spoken Language (CASL). Similar to Ms. George, Ms. Denley observed lengthy delays in Student's responses to questions. On the GFTA-II, Ms. Denley noted that Student's speech was intelligible, and voice and speech fluency within normal limits. Ms. Denley administered the CASL to examine Student's receptive and expressive language abilities. Ms. Denley used the CELF-IV to measure Student's word and sentence structure, word meanings and ability to recall and retrieve verbal information. However, the CASL and CELF-IV scores were not valid due to Student's TBI and cognitive impairment. Ms. George testified convincingly that the CASL and CELF-IV tests involve higher levels of executive functioning with the use of abstract language and reasoning that are above Student's abilities.

39. Because Ms. Denley did not know that Student had TBI or Student's cognitive ability before conducting her assessment, Ms. Denley could not validate her scores and establish that the testing instruments were appropriate for Student. Therefore, Ms. Denley's opinion that Student's speech and language deficits were so significant to require speech and language services two times a week, sixty minutes each session is not supported by valid test scores. The same deficiency exists regarding her recommendation that Student required specific speech and language goals to improve Student's expressive and receptive language skills. Additionally, Ms. Denley's failure to observe Student at school or to obtain information regarding his abilities at school and progress on his IEP goals undermines Ms. Denley's recommendations. Therefore, the evidence did not establish that Student required direct speech and language services or specific goals in either the June 29, 2006, February 26, 2007 or July 9, 2007 IEP.

Adequacy of the June 29, 2006 IEP

40. Student asserts that the June 29, 2006 IEP failed to address his self-advocacy, auditory processing, written expression, social skills, social-emotional, and academic needs by not providing him with goals and services to meet his unique needs. Student argued at hearing that the District's offer of placement did not provide him with a FAPE. However, Student did not allege in the Complaint that the District's offer of placement was not adequate to meet his unique needs and not addressed in this Decision.

41. The District offered at the June 29, 2006 IEP to place Student in a RSP class, four days a week, 50 minutes a day, with the rest of Student's school day in regular

education classes. The IEP document indicated that Student would receive mental health counseling as a related service through the Augusta Hawkins Center, operated by Los Angeles County. Mr. Davis testified that Grandmother informed the District that Los Angeles County Mental Health provided Student with mental health counseling. Mr. Davis explained that the District might have offered some form of counseling if Student was not already receiving counseling. The District proposed numerous accommodations and modifications for classroom instruction and testing, such as preferential seating, modifying instructional methods, pre-teaching subject material, providing additional test time and providing instructions through different methods. Grandmother agreed to the IEP.

Self-Advocacy and Academic Goals and Services for SY 2006-2007

42. The June 29, 2006 IEP did not contain self-advocacy goals, which Student contends were needed for him to receive a FAPE. According to Grandmother, Student did not know how to seek help if he did not understand what was told to him, which Ms. George confirmed in her assessment and recommendations. Ms. George indicated in her assessment that Student's auditory processing and auditory memory deficits caused Student not to be able to understand verbal instructions, and that Student needed to learn how to speak up for himself when he did not understand instructions. If the District had obtained Dr. Fabella-Hicks's report before the IEP meeting, the District would have seen that she noted that Student believed that he was less intelligent than his classmates due to his TBI, which related to his lack of self-confidence and a need for self-advocacy skills. Finally, Mr. Davis's assessment reported that Student was withdrawn in class, easily distracted and satisfied with inferior work, which was further indication that Student would not seek assistance when needed. Therefore, Student needed self-advocacy goals to obtain educational benefit because, due to his lack of confidence and his deficits in auditory processing and memory, he did not have skills to seek out help in class if he did not understand the instructions.

43. The June 29, 2006 IEP did not provide Student with academic tutoring, which Student asserted that he required due to his significant academic deficits. Mr. Davis's assessment found Student's academic abilities to be in the low average range. Mr. Davis recommended in his assessment report that Student receive tutorial services to address his academic needs. Mr. Davis made this recommendation when discussing Mr. Ude's responses on the BBRs, which indicated that Student had problems with his attention, excessive withdrawal and poor ego strength. Mr. Davis's recommendation for tutorial services would address Student's inability to seek help when needed. However, the June 29, 2006 IEP only provided Student with one RSP class a day to address his academic deficits. The District provided scant evidence of the services Student would receive in his RSP class and how these RSP services would address Student's academic deficits. Due to Student's poor self-advocacy skills, he needed additional academic support, because he could not independently seek assistance if he did not understand the class instruction, especially in his general education classes. Therefore, the District's June 29, 2006 IEP was not reasonably calculated to provide with a FAPE because the IEP did not adequately address Student's academic needs because he needed self-advocacy goals and academic tutoring to meet his unique needs.

Auditory Processing and Written Expression for SY 2006-2007

44. Student asserts that he required IEP goals related to his auditory processing deficits for the SY 2006-2007. While Student has auditory processing deficits as established in Mr. Davis's, Dr. Fabella-Hicks's and Ms. George's assessments, Student did not provide evidence about what type of goals Student needed to meet his auditory processing deficits to obtain educational benefit. Therefore, the evidence did not establish that Student needed specific goals to address his auditory processing deficits. Regarding Student's contention that the IEP did not contain goals written expression goals, which included punctuation, grammar and spelling, Student overlooks the IEP writing goal. This goal included Student working on sentence structure, which would include grammar, vocabulary, and spelling. Therefore, the District provided a goal to meet Student's needs regarding punctuation, grammar and spelling.

Social Skills and Social-Emotional Goals and Services for SY 2006-2007

45. Student also contends that he required goals and services in the June 29, 2006 IEP to meet his social skills and social-emotional deficits. Regarding Student's social skills and social emotion needs, Grandmother testified that, at the time of the IEP, Student did not play with his peers and preferred to associate with younger children. However, this testimony was not ultimately persuasive because Grandmother did not have any direct knowledge regarding Student's social skills at school. In contrast, Mr. Davis testified credibly that, during his observation of Student, he observed Student interacting appropriately with peers, such as while playing basketball. Dr. Fabella-Hicks's report did not indicate that Student had significant social skills deficits, depression or emotional problems, except for anger towards Student's Father. Finally, Dr. Niendam's assessment did not establish that Student had social skills or social-emotional needs for which the District needed to draft goals in the June 29, 2006 IEP; Dr. Niendam did not conduct her observations until April 2007, and the evidence did not indicate that the severity of problems indicated in her report were present in June 2006.

46. Student asserted that he had significant social-emotional needs because he suffered from depression, had anger control problems and had auditory hallucinations. In his assessment and observation of Student, Mr. Davis did not find that Student exhibited problems with depression, anger, or auditory hallucinations. While the District did not have a copy of Dr. Fabella-Hicks's evaluation at the time of the June 29, 2006 IEP meeting, her report supports the District's position that Student did not have significant social-emotion needs that the District failed to address. Dr. Fabella-Hicks examined Student's social-emotional needs. Her report stated that Student did not exhibit any emotional disturbances or visual or auditory hallucinations. Dr. Fabella-Hicks administered the Child Depression Inventory and Reynolds Adolescent Depression Scales-Second Edition, which indicated that Student was not experiencing a significant level of depression. Dr. Fabella-Hicks found that Student exhibited average levels of anger on the Adolescent Anger Rating Scales. Therefore, at the time of the June 29, 2006 IEP meeting, Student did not have social skills or social-emotional deficits that the District needed to address in the IEP.

Adequacy of the July 9, 2007 IEP

47. At the February 26, 2007 IEP meeting, IEP team members agreed that, effective March 1, 2007, Student should move to an SDC for all academic instruction. Thereafter, Student attended the SDC taught by Jean Claude Jones, who provided Student with intensive academic instruction. Student made adequate educational progress, receiving A and B grades in his math, English, general science and social studies instruction in Mr. Jones's class. After the conclusion of SY 2006-2007, the District held an IEP meeting on July 9, 2007, to plan for Student's high school attendance. The July 9, 2007 IEP maintained Student in an SDC for all academic instruction. The District offered to provide Student with auditory aids, such as audio tapes, and to continue the prior accommodations and modifications.

48. Mr. Jones drafted the nine goals in the July 9, 2007 IEP. The proposed goals focused on improving Student's writing and ability to discuss in writing information that he read. To improve Student's reading comprehension, the District proposed that Student work on discerning differences between facts and opinion, which would work on Student's deficits regarding making inferences and abstract thought. Mr. Jones wrote a goal to work on Student's vocabulary and to write a grammatically correct three paragraph story. Regarding math, the District proposed a goal to solve word problems, which involved more abstract reasoning, math calculations with one to three digit numbers using two or more mathematical operations, and basic algebraic equations. Grandmother consented to the District's IEP. Similar to the June 29, 2006 IEP, Student asserts that the July 9, 2007 IEP failed to address his self-advocacy, auditory processing deficits, social skills, social-emotional condition, and academic deficits.

Self-Advocacy and Academic Goals and Services for SY 2007-2008

49. Student asserts that the July 9, 2007 IEP failed to address his need to improve his self-advocacy skills and his academic deficits. While the July 2007 IEP does not contain self-advocacy goals and academic tutoring, the direct instruction Student received in the SDC gave him the confidence to succeed that he did not have in general education and RSP classes. Mr. Jones established in his testimony that Student did not have problems advocating for himself and being assertive in the SDC, which is in marked contrast to Mr. Davis's and Ms. George's general education classroom observations. Mr. Jones testified that Student's self-confidence increased in his classroom, as Student became a more active participant in class activities and willing to ask questions when he did not understand class instruction. Student attempted to show that he needed self-advocacy goals based on findings in Dr. Niendam's report. However, Dr. Niendam's findings about Student's withdrawal and need for self-advocacy goals were not based on observing Student in class. Instead, Dr. Niendam based her recommendations on family responses to Student's behavior at home. Additionally, the Connor's Rating Scale responses that Dr. Niendam received from Mr. Jones regarding Student were based on Student's first month of SDC, and not reflective of Student's improvement with additional SDC instruction.

50. With the SDC instruction, Student was receiving intensive academic instruction and did not require an academic tutor. Mr. Jones established that Student made adequate educational progress with the intensive instruction in his SDC, and that Student was able to access the curriculum with the additional supports and accommodations provided in the SDC. Therefore, Student did not require self-advocacy goals and academic tutoring to access his education because the intensive academic instruction in the SDC boosted his self-confidence, provided him with the skills to seek help and to be an active participant in his class, and met his academic needs.

Auditory Processing Goals and Written Expression Goals for SY 2007-2008

51. Student asserts that the July 9, 2007 IEP needed to contain goals related to his auditory processing deficits. As with the June 29, 2006 IEP, Student failed to present adequate evidence about how the goals in the July 9, 2007 IEP failed to address his auditory processing deficits. Regarding Student's contention that the IEP did not contain written expression goals, which included punctuation, grammar and spelling, the July 9, 2007 IEP contained writing goals that involved Student working on sentence mechanics, which included grammar and punctuation, improving his vocabulary, and spelling tests. Therefore, the District provided an adequate goal to meet Student's needs regarding punctuation, grammar and spelling.

Social-Emotional and Social Skills Goals Services for SY 2007-2008

52. Student contends that the July 9, 2007 IEP failed to address his social emotion needs because he suffered from depression, auditory hallucinations and anger. Dr. Niendam's report contains statements from Grandmother and Student's older sister that Student suffered from depression, anger management problems, and auditory hallucinations that commanded him to hurt others. Student mentioned to Dr. Niendam that he experiences auditory hallucinations starting in June 2006, but that their frequency had decreased with his medications. However, for the July 9, 2007 IEP, the District did not have Dr. Niendam's assessment because she did not complete her report until September 27, 2007.

53. While Student may have experienced problems with depression, auditory hallucinations and anger at home, he did not display those problems at school. Mr. Jones testified credibly that did not observe any these problems while Student was in his classroom. Student did not appear depressed in the SDC; rather, he was outgoing and interacted properly with his classmates and teacher. Mr. Jones explained in his testimony that he did not observe Student having any particular behavior that might indicate Student was having an auditory hallucination or anger management problems. Additionally, Grandmother did not inform the team members at the July 9, 2007 IEP meeting about the social-emotion problems that she described to Dr. Niendam just a couple months previously. Therefore, the District did not have any information at the time of the July 9, 2007 IEP meeting, either from Grandmother, a private assessment, or District personnel, that Student was depressed, had auditory hallucinations, or anger problems.

54. Regarding Student's social skills needs, Grandmother and Dr. Niendam's assessment viewed Student as a loner who did not know how to interact with his peers and preferred to play with younger children. However, neither Grandmother nor Dr. Niendam observed Student at school. Mr. Jones noted that he observed Student engaging in appropriate social contact with his classmates in his SDC. Additionally, Student played basketball with his peers during lunch and interacted properly with them, including engaging in appropriate "trash talking." Therefore, the evidence did not establish that the District failed to provide Student with a FAPE in the July 9, 2007 IEP as Student did not have unique needs in the areas of social-emotional or social skills that required specific goals or services.

Provision of RSP Services and Classroom Accommodations During the SY 2006-2007

55. Student's June 29, 2006 IEP offered him RSP services, four days a week, 50 minutes a day, in a resource room. Grandmother stated that Student did not receive RSP services from the start of SY 2006-2007 until March 1, 2007, when Student moved to an SDC. However, Grandmother did not have direct knowledge of whether the District provided RSP services, and based her opinion on her belief that Student was not making adequate progress. Thus, Grandmother's testimony was not persuasive. In contrast, Mr. Jones was knowledgeable that Student received the RSP services because, as part of his duties special education chair, spoke regularly with Student's RSP classroom teacher, about the services he provided Student. Testimony from Mr. Jones established that Student received the RSP services in conformity with the June 2006 IEP. The RSP teacher also stated at the February 26, 2007 IEP meeting that Student received RSP services. Therefore, Student did not establish that the District did not provide him with RSP services.

56. However, District special education staff did not know if the general education teachers were providing the accommodations in the June 29, 2006 IEP. Therefore, it was not unexpected to find that Student struggled academically. Other than Student's one A grade in his Cadet Corp class, Student received C to D grades in his general education classes during his first two semesters, which mirrored his academic performance in SY 2005-2006 before the District qualified him for special education services. The District failed to provide any monitoring to check on Student's progress, and to check whether general education teachers were implementing the IEP's accommodations and modifications. Additionally, the District's failure to implement the classroom accommodations had a greater negative impact because of the District's failure to provide Student with self-advocacy goals in the June 29, 2006 IEP; in light of this combination of factors, Student did not seek assistance in his general education classes to receive the academic assistance he needed. Therefore, the District failed to provide Student with accommodations in his general education classes, which caused Student not to benefit from his general education classes.

Prior Written Notice

57. A school district must provide a student's parents prior written notice when it proposes to alter the student's educational placement or services. A change in placement can occur if the adjustment in services is likely to affect in some significant way the student's

learning experience. This notice must include the following: a description of each assessment, record or report used as a basis for the action; a statement that the parents have protection under the procedural safeguards set forth in the IDEIA; sources for the parents to obtain assistance in understanding IDEIA; a description of other options considered and rejected by the IEP team; and a description of the factors relevant to the district's proposal. Prior written notice can be the IEP document itself. A district's failure to provide prior written notice may be a procedural violation.

58. Student contends that the District failed to provide Grandmother with prior written notice that it was not going to conduct the initial assessment of Student in the fall of 2005. However, as determined above in Factual Finding 5, Student did not establish that Grandmother gave a copy of Dr. Fabella-Hicks's September 27, 2005 letter to the District in the fall of 2005, which the District needed to respond.

59. Student asserted that at the February 26, 2007 IEP meeting the District did not provide Grandmother with prior written notice on its decision not to provide Student with speech and language services and goals. As determined by Factual Finding 36, the District provided to Grandmother sufficient information why it was not going to provide Student with speech and language services or goals based on the findings in Ms. George's assessment.

60. As determined in Factual Findings 20 through 23, the District did not timely conduct Student's speech and language assessment, and hold the IEP meeting. The District failed to inform Grandmother that Student's speech and language assessment and IEP meeting to discuss the assessment was not timely. The District's failure to inform Grandmother of the delay impeded her ability to participate in IEP process because she did not have any information regarding Student's speech and language deficits until the end of February 2007, when she should have had that information in mid-November 2006.

CONCLUSIONS OF LAW

Burden of Proof

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 537, 163 L.Ed.2d 387, 399], the party who filed the request for due process has the burden of persuasion at the due process hearing. Student filed for this due process hearing and bears the burden of persuasion by the preponderance of the evidence.

Did the District fail to meet its "child find" obligation by not assessing Student for special education eligibility between September 2005 and June 2006?

2. Pursuant to California special education law and the IDEIA, school districts have an affirmative, ongoing duty to identify, locate, and evaluate all children with disabilities residing within their boundaries. (20 U.S.C. § 1412(a)(3); Ed. Code, § 56300 et

seq.⁶) The district's duty is not dependent on any request by the parent for special education testing or referral for services. A district's child find obligation toward a specific child is triggered where there is knowledge of, or reason to suspect a disability, and reason to suspect that a student may need special education services to address that disability. (*Dept. of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Dept. of Educ., State of Hawaii v. Cari Rae S., id.* at p. 1195.) A district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

3. At the commencement of the hearing, the District raised the argument that OAH does not have jurisdiction to hear Student's contention that the District failed to meet its "child find duties." The District contends that the Individuals with Disabilities Education Improvement Act (IDEIA), 20 United States Code section 1400, et seq., and California Education Code section 56501, subdivision (a), do not authorize a due process complaint based on a district's purported failure to timely identify a student eligible for special education services. The District's position was rejected by the United States District Court in *Compton Unified School District v. Starvena Addison* (C.D.Cal. 2007) 2007 U.S. Dist. LEXIS 29828, which held that the "child find" requirements of the IDEIA are a legally cognizable claim in a due process proceeding. (See also, *Hacienda-La Puente Unif. Sch. Dist. v. Honig* (9th Cir. 1992) 976 F.2d 487, 491 [court stated, "If we found issues concerning the detection of disabilities to be outside the scope of IDEA 'due process hearings,' school districts could easily circumvent the statute's strictures by refusing to identify students as disabled."].)

4. Student contends that the District failed to comply with its child find obligations when Grandmother gave the District a copy of Dr. Fabella-Hicks's letter regarding Student's expressive language disorder in the fall of 2005. However, pursuant to Factual Findings 4 through 5, Grandmother did not provide the District with Dr. Fabella-Hicks's letter until March 2006. However, pursuant to Factual Findings 6 through 8, the District was on notice by the end of the first quarter in SY 2005-2006 that Student had a disability and reason to suspect that he might need special education services. The District knew that Student had TBI and struggled academically, as evidenced by the District's creation of a 504 Plan for Student for SY 2005-2006. Student struggled academically in SY 2005-2006 as the school curriculum became harder. Student encountered even greater academic difficulties at the start of SY 2006-2007. Therefore, as of November 2005, the District knew that Student had a disability that impacted his learning, and may have required special education services; despite that knowledge, the District did not monitor Student or refer him for assessment. Based upon these findings, the District fail to meet its "child find" obligations to search and serve Student from November 2005 to April 2006.

⁶ All statutory citations to the Education Code are to California law, unless otherwise noted.

Did the District deny Student a FAPE in June 2006 by failing to conduct a neuropsychological exam and a speech and language assessment at the initial assessment for eligibility?

5. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs must be conducted. (Ed. Code, § 56320.) In California, a district assessing a student's eligibility for special education must use tests and other tools tailored to assess "specific areas of educational need" and must ensure that a child is assessed "in all areas related to" a suspected disability, such as vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (Ed. Code, § 56320, subs. (c), (f).)

6. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034] (*Rowley*), the Supreme Court recognized the importance of adherence to the procedural requirements of the Individuals with Disabilities in Education Act (IDEA). However, pursuant to 20 United States Code section 1415(f)(3)(E)(ii), a procedural violation of IDEIA does not deny the student FAPE unless it 1) impedes the student's right to FAPE; 2) significantly impedes a parent's opportunity to participate in the educational decision-making process; or 3) causes a deprivation of educational benefits. (See, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

7. Student contends that, because he has TBI and a shunt in his head, the District needed to conduct a neuropsychological assessment as part of the initial eligibility assessment in June 2006. Pursuant to Factual Findings 10 through 18, the evidence did not establish that the District needed to conduct a neuropsychological assessment. Student did not establish that a neuropsychological assessment would have provided the District with further information regarding Student's suspected disability of TBI that Mr. Davis obtained in his psychoeducational assessment. Further, Dr. Fabella-Hicks's assessment and letter only recommended that the District conduct a psychoeducational assessment, which the District did. Therefore, the evidence did not establish that the District needed to conduct a neuropsychological assessment to assess Student in all areas of suspected disability.

8. Student contends that the District needed to conduct a speech and language assessment as part of its initial assessment because Dr. Fabella-Hicks stated that Student had an expressive language disorder. Pursuant to Factual Findings 10 and 19, the District knew that Student had a suspected disability regarding his speech and language. Mr. Davis stated that the District knew it needed to conduct a speech and language assessment based on Dr. Fabella-Hicks's letter. Mr. Davis explained that the District did not request a speech and language assessment until after the June 29, 2006 IEP meeting, because Mr. Davis wanted to determine the level of assessment. However, this review does not excuse the District's obligation to conduct the speech and language assessment as part of the initial assessment, in light of the District's knowledge that Student needed to be assessed in that area. Pursuant to Factual Findings 11, 29, 32, 42, and 43, Student suffered a loss of educational benefit by the

delay in the completion of the speech and language assessment. Although Student did not require direct speech and language services or speech and language goals, Ms. George's assessment showed that Student had significant problems in his general education classes because he would not seek assistance if he did not understand the class instructions. With this information, Grandmother could have argued that Student required self-advocacy goals to address his auditory processing deficits and Student's belief that he was less intelligent than his classmates due to his TBI.

Did the District deny Student a FAPE by failing to timely perform the speech and language assessment, as specified in the June 29, 2006 IEP?

9. The district must give the parents the proposed assessment plan within 15 days of the referral for assessment, not counting days between the student's school sessions and vacations in excess of five schooldays. (Ed. Code, § 56321, subd. (a).) If the referral is made between regular school sessions, the district shall give the proposed assessment plan to the parents within 10 days after the commencement of the new school term. (Ed. Code, § 56321, subd. (a).) The assessment plan must be accompanied by a notice of the parent's rights and a written explanation of the procedural safeguards under IDEIA and California law. (Ed. Code, § 56321, subd. (a).) The parent has at least 15 days from the receipt of the proposed assessment plan to arrive at a decision. (Ed. Code, § 56321, subd. (c).) Consent for initial assessment may not be construed as consent for any initial placement or provision of services. (Ed. Code, § 56321, subd. (e).)

10. Pursuant to Factual Findings 20 through 23, the District failed to timely conduct Student's speech and language assessment after the June 29, 2006 IEP meeting. The District was legally required to ensure that Student received a timely speech and language assessment, even though the District contracted out these assessment and services to LACOE. (34 C.F.R. § 300.201; Ed. Code, §§ 48200, 56026.3.) The District promised Grandmother on June 29, 2006, that Student would receive a speech and language assessment. The District did not ensure that Grandmother received the assessment plan within 10 days of the start of SY 2006-2007. Additionally, the District did not ensure that the assessment was completed and reviewed by the IEP team within 60 days after Grandmother signed the assessment plan. Student suffered a loss of educational benefit by the delay in the completion of the speech and language assessment, because the assessment provided additional information that Student would continue to struggle academically unless he received assistance learning how to ask for help in his general education classes.

Did the District deny Student a FAPE because the June 29, 2006, February 26, 2007 and July 9, 2007 IEPs did not provide Student with speech and language services and goals?

11. Pursuant to California special education law and the IDEIA, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational

standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1402(9).) "Special education" is specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1402(29).)

12. Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1402(26).) In California, related services may be referred to as designated instruction and services. (Ed. Code, § 56363, subd. (a).)

13. School districts receiving federal funds under IDEIA are required by title 20 of the United States Code, section 1414(d)(1)(A)(i), to create an IEP for each child with a disability that includes: (1) a statement regarding the child's then-present levels of academic achievement and functional performance; (2) measurable annual goals, including academic and functional goals designed to meet the child's educational needs and enable the child to make progress; (3) a description of how the child's progress will be measured; (4) a statement of the special education and related or supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child; (5) a statement of the program modifications or supports that will be provided; (6) an explanation of the extent to which the child will not participate with nondisabled children in the regular class; and (7) other required information, including the anticipated frequency, location, and duration of the services. (See also, Ed. Code, § 56345, subd. (a).)

14. In *Rowley*, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. (*Rowley, supra*, 458 U.S. 176, 200.) The Court held that a student's IEP must be reasonably calculated to provide the student some educational benefit, but that the IDEA does not require school districts to provide the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.) De minimus benefit or trivial advancement, however is insufficient to satisfy the *Rowley* standard of "some" benefit. (*Walczak v. Florida Union Free Sch. Dist.* (2d Cir. 1998) 142 F.3d at p. 130.) Rather, a child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Bd. of Educ.* (2d Cir. 1997) 103 F.3d 1114, 1121.)

15. To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of the district's proposed program, not the parents' proposed alternative. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) An IEP is evaluated in light of information available at the time it was developed; it is not

judged in hindsight. (*Adams, etc. v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)⁷ It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) If the district's program was designed to address the student's unique educational needs, was reasonably calculated to provide student some educational benefit, and comported with student's IEP, then the district provided a FAPE, even if the parents preferred another program and even if the preferred program would have resulted in greater educational benefit. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d at p. 1314.) School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.)

16. An IEP must include a statement of the child's present levels of educational performance; a statement of measurable annual goals; the manner in which the student's progress toward meeting the goals will be measured; when periodic reports on the progress toward meeting the goals will be made; the special education and related services, supplementary aids and services, and modifications or supports to be provided; and the date the services begin and their anticipated frequency, location, and duration. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320(a); Ed. Code, § 56345, subd. (a).) An IEP that fails to contain the child's present levels of educational performance or objective evaluation criteria may be cured if the required information was known to the administrators and parents who participated fully in the development of the IEP. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23, supra*, 960 F.2d at pp.1484-1485; *Cleveland Heights-University Heights City School Dist. v. Boss* (6th Cir. 1998) 144 F.3d 391, 399.) A district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.)

17. Pursuant to Factual Findings 25 through 35 and 37 through 39, Student did not require speech and language goals or direct services to meet his unique needs and provide him with an adequate educational benefit. Although Ms. George wrote the incorrect scores in her report, she nevertheless credibly established that, even with the lower scores that should have been in her report, Student's speech and language deficits were commensurate with his cognitive deficits and would not improve with direct services. Additionally, the evidence did not establish that Student required speech and language goals to receive some educational benefit. The recommendations of Ms. Denley, Student's expert, that Student required speech and language services and goals is not supported by valid assessment information, because she failed to consider Student's TBI and cognitive abilities when she assessed Student. Additionally, the District's modifications and accommodations and goals

⁷ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP. (*Christopher S. v. Stanislaus County Off. of Educ.* (9th Cir. 2004) 384 F.3d 1205, 1212.) Further, District Courts within the Ninth Circuit have adopted the *Adams* analysis in evaluating IEPs. (See, e.g., *Pitchford v. Salem-Keizer School Dist. No. 24J* (D.Ore. 2001) 155 F.Supp.2d 1213, 1236.)

for math, reading and writing addressed Student's speech and language deficits caused by his auditory processing deficits by changing the means of instruction to compensate for his auditory processing deficits. The modifications, accommodations and goals were reasonably calculated to provide Student with some educational benefit. Therefore, the evidence did not establish that Student required speech and language services or goals to receive a FAPE.

Did the District deny Student a FAPE because the June 29, 2006 and July 9, 2007 IEPs failed to meet Student's unique needs regarding his self-advocacy, auditory processing, written expression, social skills, social-emotional condition, and academic deficits?

18. Pursuant to Factual Findings 11, 29, 32, 42 and 43, the District failed to provide Student with a FAPE by not providing him with self-advocacy goals and academic tutoring in the June 29, 2006 IEP. Student required self-advocacy goals to obtain an educational benefit in his general education classes. Mr. Davis recommended that Student receive academic tutoring due to his problems with attending, excessive withdrawal, and poor ego strength. Mr. Davis's assessment noted that Student was withdrawn in class, did not seek assistance when he did not understand classroom instruction, and did not understand the classroom instruction due to his auditory processing deficits. While the District created accommodations and modifications to address Student's deficits in his general education classes, the District failed to address Student's unique need that he would not seek help in general education classes. As noted in Legal Conclusion 7, the District should have had a speech and language assessment conducted by the time of the June 29, 2006 IEP. If the District had Ms. George's assessment, and a copy of Dr. Fabella-Hicks's report, the District would have known more about the extent of Student's withdrawal in his general education classes caused by auditory processing deficits and belief that he was less intelligent than his classmates due to his TBI. Therefore, Student required self-advocacy and academic tutoring goals in his June 29, 2006 IEP to receive a FAPE.

19. Pursuant to Factual Findings 47, 49, and 50, the District's July 9, 2007 IEP was reasonably calculated to provide Student with some educational benefit by meeting Student's unique self-advocacy and academic needs. The February 26, 2007 IEP changed Student's placement to a SDC, where Student received intensive academic instruction. Student's self-confidence improved with the intensive instruction he received in the SDC. In the SDC setting, Student sought assistance when he did not understand class instruction, which he could not do in his general education classes. The July 9, 2007 IEP continued Student's placement in a SDC for SY 2007-2008. Because a SDC placement met Student's self-advocacy and academic needs, the District's July 9, 2007 IEP was reasonably calculated to provide Student with some educational benefit by meeting Student's unique needs.

20. Pursuant to Factual Findings 44 and 51, the evidence did not establish that the District needed to create specific goals in either the June 29, 2006 or July 9, 2007 IEP to address Student's auditory processing deficits, given that the District's modifications and accommodations and goals for math, reading and writing addressed Student's deficits, and were reasonable calculated to provide Student with some educational benefit. Additionally,

the District writing goals were reasonable calculated to provide Student with some educational benefit regarding spelling, grammar and punctuation.

21. Pursuant to Factual Findings 10, 45, 46, 52 and 53, Student did not need specific goals regarding his social skills or social-emotional needs in either the June 29, 2006 or July 9, 2007 IEP. Mr. Davis did not observe that Student experienced signs of depression, anger control problems or auditory hallucinations during his assessment. Additionally, Dr. Fabella-Hicks's assessment examined Student in these areas of purported deficits, and did not find that Student had significant problems in these areas. Additionally, Mr. Davis found that Student did not have any problems interacting his peers at school, nor did Dr. Fabella-Hicks note peer interaction as a problem in her report. Mr. Jones observed that Student properly interacted with his classmates, and did not exhibit behavior problems or signs of depression or auditory hallucinations. Therefore, Student did not manifest needs in social skills or social-emotional functioning that the District needed to address in his educational program for Student to receive a FAPE.

Did the District deny Student a FAPE for the SY 2006-2007 by failing to provide the RSP services, classroom accommodations and a speech and language assessment, as specified in the June 29, 2006 IEP?

22. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. (*Van Duyn v. Baker Sch. Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 813.) A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Ibid.*)

23. Pursuant to Factual Finding 55, the evidence did not establish that the District failed to provide Student with the RSP services delineated in the June 29, 2006 IEP. Testimony from Mr. Jones established that Student received the RSP services called for in the June 2006 IEP before Student moved to his SDC classroom. However, pursuant to Factual Finding 56, the evidence established that the District did not provide Student with the accommodations called for in the June 29, 2006 IEP. No evidence indicated that the District ensured that Student receive the accommodations in his general education classes, or checked to monitor his progress. Student continued to struggle in his general education classes for the first half of SY 2006-2007, and did not show any progress from the prior school year. Student only made adequate educational progress once he moved into Mr. Jones's SDC classroom, as Mr. Jones ensured that Student received the accommodations he required to obtain an adequate educational benefit.

Did the District fail to provide Grandmother with prior written notice that it refused to conduct an initial assessment, failed to conduct the speech and language assessment specified in the June 29, 2006 IEP, and, at the February 26, 2007 IEP meeting, refused to offer speech and language services?

24. IDEIA and federal regulations require a school district to provide written notice to parents before they initiate or refuse a change in a student's identification, evaluation, or educational placement. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.) Specifically, the written notice must contain:

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

25. Pursuant to Factual Finding 58, the District did not fail to provide Grandmother with prior written notice in the fall of 2005 regarding the assessment of Student because Grandmother did not give the District of Dr. Fabella-Hicks's letter until March 2006. Pursuant to Factual Finding 59, the District gave Grandmother adequate information at the February 26, 2007 IEP as to why it would not provide Student with speech and language services based on Ms. George's assessment.

26. However, pursuant to Factual Finding 60, the District needed to provide Grandmother with prior written notice regarding the delay in the completion of Student speech and language assessment. Student suffered a deprivation of an educational benefit due to the District's failure to provide written notice, because the lack of information impeded Grandmother's ability to participate in the education decision-making process. The speech and language assessment and IEP meeting were not timely, and Grandmother did not have the information from Ms. George's report to assist her in requesting that Student move to a SDC setting until February 26, 2007.

Remedies

27. IDEIA empowers courts (and Administrative Law Judges) to grant requests for compensatory services as the court determines is appropriate. (*Burlington Sch. Comm. v. Massachusetts Dept. of Educ.* (1985) 471 U.S. 359.) Equitable considerations may be

considered when fashioning relief for violations of the IDEIA. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 16; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.)

28. Pursuant to Legal Conclusion 4, the District failed to perform its child find obligations from November 2005 to April 2006, to the extent that it should have determined by the end of the first semester of SY 2005-2006 that Student's TBI was negatively impacting his education and Student might require special education services. If the District had assessed Student, he would have started to receive special education services mid-way through SY 2005-2006. Additionally, pursuant to Legal Conclusion 18, the District's failure to provide Student with self-advocacy goals and failure to ensure that Student received the required accommodations in his general education classes caused Student not to receive an adequate educational benefit until he began to attend Mr. Jones's SDC classroom on March 1, 2007. Therefore, Student did not receive a FAPE for little over one year, 36 school weeks, which caused Student to fall behind academically. Student requires additional academic instruction for two hours per week for Student to obtain the academic benefit and to get him to the academic level that he would achieved if the District had provided him with a FAPE.

29. Pursuant to Legal Conclusions 8 and 10, the District needed to conduct a speech and language assessment as part of its initial assessment. The District failed to timely conduct a speech and language assessment after agreeing to assess Student at the June 29, 2006 IEP meeting. The District's failure to timely conduct a speech and language assessment deprived the IEP team from having needed information regarding Student's need for self-advocacy goals in general education classes and need for academic tutoring, as discussed in Legal Conclusions 18 and 28. However, Student did not establish that he required speech and language services or goals to receive a FAPE, and Student did not lose any academic benefit. Therefore, even if the District timely assessed Student, he would not have received speech and language services and goals in the June 29, 2006 IEP because he did not require these services and goals to receive a FAPE.

ORDER

1. The District shall provide Student with the following compensatory services: 36 weeks of academic tutoring, for two hours per week, designed to meet Student's IEP goals, either through a certified non-public agency or a tutor on the District's No Child Left Behind list.
2. All of Student's remaining requests for relief are denied.

PREVAILING PARTY

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

Student prevailed on Issue 1, the speech and language assessment in Issue 2, entirely as to Issue 3, and partially as to Issues 5, 6 and 7.

The District prevailed on the neuropsychological assessment in Issue 2, entirely as to Issue 4, and partially as to Issues 5, 6 and 7.

RIGHT TO APPEAL THIS DECISION

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

DATED: February 6, 2008

A handwritten signature in black ink, appearing to read 'P. P. Castillo', is written over a horizontal line.

PETER PAUL CASTILLO
Administrative Law Judge
Special Education Division
Office of Administrative Hearings