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

In the Matter of: STUDENT, Petitioner. vs. COMPTON UNIFIED SCHOOL DISTRICT, Respondent.	OAH No. N2005090626

DECISION

Anahid Hoonanian, Administrative Law Judge (ALJ) for the Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on November 30, December 1, and 2, 2005, in Compton, California.

Petitioner (Student) was represented at the hearing by her attorney, Pamela Daves of Adams Esq. Jean Murrell Adams and Jeff Lasley of Adams Esq. were also present at times. Student's mother (Parent or Mother) was also present at different times during the hearing. Respondent, Compton Unified School District (District), was represented at the hearing by its attorneys Daniel Gonzalez and Ian Wade of Littler Mendelson. The District's program coordinator, Joseph Mahabir, was present at the beginning of the hearing.

Before taking evidence, the ALJ ruled on the District's motion to dismiss, which was filed on November 21, 2005. The District argued that it agreed to each and every educational request that Student had made and the only issue that remained to be resolved was that of Student's attorneys' fees. The District contended that OAH should dismiss the matter, contending there was no live dispute for adjudication.

The ALJ determined that the issues for due process hearing were not resolved. The parties did not execute a binding settlement agreement or otherwise stipulate to dismiss the matter. Based on that finding, the ALJ determined OAH has jurisdiction to hear and

determine the issues Student identified in her due process hearing request. Thus, the ALJ denied the motion to dismiss.

Petitioner called her mother and Dr. Delania Martinez to testify on her behalf. The District called Sean Andrew, the Student's teacher, during the 2002-2003 and 2003-2004 school years, and Emo Pula, the Student's teacher, during the 2004-2005 school years.

Oral and documentary evidence was received. The parties agreed that the record would remain open until December 16, 2005 pending receipt of their written closing arguments. On December 16, 2005, the ALJ received these arguments, which were made part of the record as Petitioner's exhibit NF 12 and Respondent's exhibit 15, respectively. The record was then closed and the matter was submitted for decision.

ISSUES[1]

I. Did the District deny Student a Free Appropriate Public Education (FAPE) during the 2001-2002, 2002-2003, 2003-2004 and 2004-2005 school years by failing to appropriately assess her in all areas related to her suspected disability?

II. Did the District deny Student a FAPE during the 2004-2005 school year by:

A. failing to design an educational program to meet her unique and individual needs?
B. suspending Student for more than 10 days without conducting a manifestation determination review?
C. failing to conduct an appropriate and timely triennial review and Individualized Education Program (IEP) meeting?
D. failing to provide proper written notice of its refusal to assess Student?
E. violating Student's parent's procedural safeguards by failing to provide copies of Student's school records within 5 days after a written request was made?

III. Is Student's parent entitled to reimbursement for the psychoeducational assessment conducted by Dr. Delania Martinez in September 2005?

IV. Is Student entitled to an independent Functional Analysis Assessment (FAA) in order to design an appropriate Behavior Intervention Plan (BIP)?

V. Is Student entitled to compensatory education?

[1] Student's issues for hearing have been reorganized for clarity of analysis.

FACTUAL FINDINGS

1. Student is a twelve-year-old girl who lived with her mother and now-deceased father within the jurisdictional boundaries of the Compton Unified School District from October 2001 to August 31, 2005. Student was exposed to illegal drugs prenatally, and she was born while her birth mother was incarcerated. Student's biological father took custody of Student and her siblings, but they were removed from his custody because he physically and sexually abused Student. Student has a history of emotional and behavioral difficulties for which she has received psychiatric treatment at various times. Her mother adopted Student when she was three years old. On or about September 1, 2005, Mother moved the family to Long Beach so that Student could attend school within the Long Beach Unified School District.

2. In 1999, Student was first referred to special education. On April 27, 2000, when Student lived in San Bernardino County, Student had her initial IEP meeting. At that time, the San Bernardino Unified School District determined Student was eligible for special education and services as a student who met the specific learning disability criteria. The April 27, 2000, IEP provided: "Student's biggest problem at school is her self-control. She has a hard time sitting still and paying attention; if not in a one-to-one or small group setting. She is easily distracted and tends to bother other children." In addition, under the heading of "Social Emotional", her IEP stated that Student "has trouble in the classroom following directions and staying focused. Frequently, she is out of her seat and off-task creating difficulty in her learning. Student is always seeking attention…. She has a short attention span."

2001-2002 School Year

3. Sometime in or about October 2001, Student and her family moved to Compton. During the 2001-2002 school year, Student attended Lincoln Elementary School as a third grade student. She was identified as a student with a specific learning disability and was placed in a special day class (SDC). Her December 18, 2001, IEP identified transportation as the only related service she was to receive. The IEP also included a behavior or discipline plan, which provided in part that, if Student engaged in mild disruptive and defiant behavior, she would get three warnings and the fourth time, she would be "sent home for a time out from school." The behavior plan also included the provision that if Student engaged in serious disruptive behavior she would be sent home for the remainder of the day as a "time out from school". Under the heading of "social-emotional status", the IEP stated that Student had a short attention span and was easily distracted. She was often angry and defiant, and while school staff explained school rules and regulations to Student over and over again, Student did not respond appropriately.

4. During the 2001-2002 school years, while attending Lincoln, Student acted out sexually by asking other children to look, feel and touch her. While she was attending Lincoln, Student was once found behind some bushes on campus with one or two boys engaging in inappropriate sexual conduct. The boys involved in the incident were suspended, and the District told Mother to keep Student home for a few days for her own safety.

During her attendance at Lincoln Elementary, when Student would misbehave, her teacher would call Mother and ask her to pick Student up and take her home. Due to her behaviors, which included inappropriate sexual conduct, going places she was not supposed to go on campus, being disrespectful and difficult to control, Mother was called often and became concerned with Student's safety. At one point, Student's parents were taking turns going to her class watching her to make sure she did not misbehave. As the number of instances where Student was sent home for her behaviors increased, her teacher told Mother that she should come directly to the classroom to pick Student up and take her home, and that it was not necessary for Mother to go to the school office.

5. Sometime about April 2002, Monique Lang-Townsend, a social worker at the Department of Children and Family Services (DCFS), wrote a letter to the Superintendent of Support Services at the District. Ms. Townsend's letter corroborates the testimony of Mother that the District was sending Student home as a way of addressing her behaviors. The District did not give any written notices to Mother regarding its discipline of Student by sending her home early. Mother did not believe that sending Student home early as a way of addressing Student's behaviors was appropriate. Mother requested an IEP meeting. Ms. Townsend's letter also included a request for an IEP meeting to determine whether Student met the eligibility criteria as a student with emotional disturbance, and whether Student should be placed in a non-public school.

6. On June 12, 2002, District psychologist, Audrea Jewell, conducted a psychoeducational assessment of Student in order to ascertain "if another placement is determined to be necessary." Ms. Jewell determined that Student met the criteria for a student with Serious Emotional Disturbance (SED) "under the heading of Oppositional Defiance Disorder." She found Student exhibited the following characteristics and behaviors: inability to build or maintain satisfactory interpersonal relationship with peers and teacher, inappropriate types of behavior or feelings under normal circumstances, exhibited in several situations, throwing herself on her chair and threatening to fight or hurt any classmate who observes her, is easily angered, agitates and provokes peers so that they respond with verbal or physical assault. Ms. Jewell concluded that Student exhibited these characteristics "over a long period of time and to a marked degree, which adversely affects the pupil's educational performance." Ms. Jewell recommended that the District consider providing family and/or individual counseling and make a referral to the IEP team for determining an appropriate placement.

7. Following Ms. Jewell's assessment, on June 13, 2002, the IEP team met to change Student's placement to Systems of Care. Student's next triennial IEP was to be held on or before June 12, 2005. The IEP provided that Student would receive transportation and spend 80 percent of her time in special education.

8. Petitioner contends that Respondent should have conducted an FAA for the purpose of developing a BIP for the 2001-2002 school year. The District did not conduct an FAA.

2002-2003 and 2003-2004 School Years

9. Student attended the Systems of Care day treatment program during the 2002-2003 and 2003-2004 school years. Systems of Care is a day treatment center, operated through a partnership between District and the county mental health's Guidance Center. All the students attending Systems of Care are students who need special education and services, including behavior management. All students attending Systems of Care, including Student, participated in group therapy twice a week and were pulled out of class twice a week for one hour individual therapy sessions. During her two years of attendance at Systems of Care, Student was in a classroom of about 10-12 students. The classroom had one teacher, Sean Andrew, one teacher's aide and three behavior specialists. The staff monitored and corrected the students' behaviors. Mr. Andrew testified that Student did not require a BIP, because the entire program at Systems of Care was a behavior management program.

10. When Student first attended Systems of Care, she had difficulty with peer relationships, was disrespectful of staff, and did not follow directions. While attending Systems of Care, Student's behaviors improved and she made academic progress. During her attendance at Systems of Care, Mother did not receive any calls from the day treatment program asking her to take Student home due to behaviors.

11. Petitioner contends that the District should have conducted an FAA for the purpose of developing a BIP for the 2002-2003 and 2003-2004 school years. During Student's attendance at Systems of Care day treatment program, the District did not conduct an FAA or otherwise formally assess her areas of need in the emotional and behavioral domains.

12. On or about June 22, 2004, the IEP team met to discuss Student's transition out of Systems of Care. The District offered Student placement at a Special Day Class – Learning Handicapped (SDC – LH) at Bunche Elementary School (Bunche). The District offered her one thirty-minute counseling session per week. The IEP indicated that the next annual IEP meeting would be held on or before June 12, 2005. The IEP did not

include a behavior intervention or support plan. The IEP did not include any information about whether Student was formally or informally tested before the IEP meeting. According to the IEP, Student's academic achievement was as follows:

Reading Recognition: 4.3 grade level
Reading Comprehension: 4.5 grade level
Math Calculation: 3.5 grade level
Mathematical Reasoning: 3.0
Written Language: Student's written language skills are delayed.

13. The District continued the June 22, 2004, IEP meeting so that it could request a copy of the previous psychoeducational evaluation completed by San Bernardino Unified School District. Student continued attending Systems of Care through June 22, 2004. The IEP team met again on July 21, 2004, when it was confirmed that, while the District requested records from San Bernardino School District, they were not sent or received by the District. Accordingly, the IEP team decided that Student needed an assessment and noted on the IEP: "She will need a new psychoed eval in Sept. 2004." (emphasis in original). Based on the information provided at the June and July 2004 IEP, Mother spoke with the principal, who said Student was on the list for the next group of students who were due to have IEP meetings. Mother also asked other District personnel, including the District's special education program coordinator, about when the IEP would take place. However, the District did not complete a psychoeducational evaluation in September, 2004 or at any other subsequent time. The District did not hold an IEP meeting during the 2004-2005 school year, while Student attended Bunche. The District did not provide Mother with prior written notice regarding her request for the IEP meeting or the psychoeducational assessment.

2004-2005 School Year

14. Sometime in September 2004, Student was placed in the SDC - LH classroom at Bunche Elementary pursuant to her June 2004 IEP. Student constantly talked in the classroom, was out of her seat without permission, was disruptive and would interfere with other students' conversations. Her teacher, Ms. Emo Pula, described Student as a challenge and a "headache." In order to address her behaviors of constant talking and attention seeking, Ms. Pula changed Student's seating. Ms. Pula sat next to Student so she could give Student constant attention.

15. The SDC teacher, Ms. Pula, had certain classroom rules, including the following system: once a student misbehaved, Ms. Pula would put a check mark next to the student's name and send the student to the office. When the student received a second check mark, Ms. Pula would request a parent-teacher conference. When the student would receive a third check mark, the student would "strike out" and Ms. Pula would send the student home.

16. In an incident report dated September 24, 2004, Ms. Pula wrote the following about Student: "She is constantly out of her seat without permission. She continues to talk out loud in class without permission. I want a parent conference." As a result of this incident, Student "struck out" of the classroom and Ms. Pula sent her home. Next month, the District disciplined Student again by sending her home. On or about October 22, 2004, Ms. Pula wrote in an incident report that Student "… does not know when to shut her mouth. She talks too much while I'm trying to teach." As a result of the incident, Student "struck out" of the classroom and Ms. Pula sent her home. Thus, on at least two instances early in the 2004-2005 school year, the District disciplined Student for her behaviors by sending her home early. On or about January 19, 2005, Student was engaged in a fight in the classroom. In an incident report dated May 31, 2005, Ms. Pula wrote: "Student vandalized a desk."

Mother did not receive a copy of any of the incident reports written in September and October 2004 and January 2005. Instead, Mother received telephone calls from the school informing her about the incidents. Mother had not seen the incident reports until the due process hearing. Mother testified that, Ms. Pula's practice was to call Mother and tell her about any behavior incidents involving Student. There was no evidence to contradict Mother's testimony that she had not been given a copy of the incident reports or that the practice was for Ms. Pula to call her about incidents and ask her to come take Student home.

17. Towards the end of the 2004-2005 school year, while Student was still attending Bunche, there were two separate incidents involving Student being found in an electrical bin located on school grounds. In the first incident, Student was the only person found in the electrical bin. In a second incident, which occurred sometime during the second semester, Student was found in the electrical bin engaging in inappropriate sexual behavior with two other students. The police were called on campus to investigate the second incident. A school counselor informed Mother that she should keep Student at home for a couple of days. After the second incident involving the electrical bin, Mother told Mrs. Pula that she wanted to change Student's school due to her concerns about Student's safety while on campus. Ms. Pula testified that she was only aware of one incident involving Student being caught at the electrical bin. Mother testified that there were at least two separate incidents involving the electrical bin. At the time of the second incident, Ms. Pula was on medical leave and only found out about the incident after she returned to work. The ALJ determines that there were at least two separate incidents involving Student hiding in the electrical bin.

18. Sometime around March or April 2005, Ms. Pula returned from a one-month medical leave, and Student told her about the second electrical bin incident. Ms. Pula went to the vice principal at Bunche and they decided that Ms. Pula would prepare a "behavior intervention plan" to address Student's behaviors. At the hearing, Ms. Pula brought with her a copy of the purported BIPs. She testified one BIP was to address Student's sexually acting out behavior and one was for Student's disruptive behavior in the classroom. Ms. Pula testified that after the incident involving the police, she prepared the BIPs with the help of the vice principal. She claimed she had prepared three BIPs, but could only find two of them and did not testify as to the third BIP. The ALJ did not admit these documents into evidence

as the District had not disclosed them at least five days prior to the due process hearing. Ms. Pula printed the BIPs from her computer. Ms. Pula claimed that she found the BIPs on November 29, 2005, two days before she testified at the due process hearing. The IEP team did not participate in creating these purported BIPs. Ms. Pula testified that it was her goal to have the BIPs be part of the IEP because usually she has BIPs discussed at IEP meetings. She testified there should have been a copy of the BIPs in Student's portfolio in school, but that she does not know where the portfolio is now.

19. During the 2004-2005 school year, the District did not conduct any assessments or hold an IEP. The District relied on the information provided about Student in her last IEP prepared at Systems of Care, which took place on June 21, 2004 and July 21, 2004. Ms. Pula testified that Student met her reading goal, partially met her writing goal, but did not meet her math goal.

20. Ms. Pula testified that Student met her behavior goal. The behavior goal as stated in the June 2004 IEP was: "By June 2005: In the special ed class, Student will be able to establish positive peer relationships and show a greater respect for authority as measured by observation achieving 4 out of 5 trials for a period of 6 weeks." The benchmarks or objectives for this goal were: "Benchmark A – By September 2004: In the special ed class, Student will be able to stay focus [sic] on task as measured by observation achieving 4 out of 5 trials for a period of 6 weeks. Benchmark B – Will be able to establish better relationships with her peers. Benchmark C – By April 2005: In the special ed class, Student will be able to respect authority figures better as measured by observation achieving 3 out of 5 trials for a period of 5 weeks." In explaining how Student met her behavior goal, Ms. Pula testified that Student was more aware of what she was doing wrong and would apologize, whereas, in the beginning Student would not take responsibility for any mistakes. The evidence demonstrates that Student's behaviors were not improving, and in fact, her maladaptive behaviors were escalating. The only evidence presented regarding Student meeting her behavior goal was Ms. Pula's testimony. Her testimony was not credible.

21. Student's teacher, Ms. Pula, was not a credible witness. At one point during the 2004-2005 school year, Ms. Pula lost interest in teaching. She never really wanted to be a teacher but wanted to become a counselor. She found teaching special education involved taking special education courses, which was holding her back from obtaining her Master's degree.

Ms. Pula produced copies of two of the three purported BIPs at the hearing itself, thus, the documents were not exchanged five days before the hearing, as required by California Education Code section 56505. Ms. Pula's testimony that she showed the BIPs to Mother prior to implementing them was not credible. Her testimony that Mother signed the BIPs, because she would not use the plans unless the parent had signed them, was similarly not believable. Ms. Pula could not remember the contents of the BIPs and after reviewing the documents, she testified that the BIPs were positive behavior plans to state Student's behaviors, the frequency of the behaviors and strategies to prevent the behaviors. Ms. Pula had not prepared a BIP addressing inappropriate sexual conduct before she prepared one for

Student. She did not remember if she reviewed any documents or assessments before she prepared the BIPs. She testified that during the beginning of the school year, Student did not have any behavior problems. Yet, soon after school began, she prepared an incident report dated September 24, 2004 about Student "striking out" of her class. It was not established by Ms. Pula's testimony that BIPs were prepared, signed by Mother, and reviewed by the IEP team.

22. Petitioner contends that the District should have conducted an FAA for the purpose of developing a BIP for the 2004-2005 school year. The District did not conduct an FAA.

Independent Assessment

23. On or about September 6, 2005, Dr. Delania Martinez conducted an independent psychoeducational assessment of Student. Dr. Martinez is a licensed educational psychologist, who has been a school psychologist since 1997 and has conducted many psychoeducational assessments and reviewed several hundred such assessments. As part of her assessment of Student, Dr. Martinez interviewed Mother, reviewed available educational and medical records, and observed Student interacting with her sister and tested Student. Dr. Martinez met and spoke with Student for two and a half to four hours. Her interview of Mother lasted about one hour.

24. Dr. Martinez administered the Woodcock-Johnson III Tests of Achievement and determined that Student is performing at the very low to low range and more than two deviations below the mean. Student's reading ability is very poor, she does not know money, and her math skills are her weakest academic area. Student's scores on the test were as follows:

Cluster/Test	Standard Score	Grade Equivalent
Oral Language	72	1.7
Broad Reading	71	2.6
Broad math	61	2
Math Calc Skills	62	2.5
Academic Skills	78	3.2
Academic Fluency	70	2.7

25. Dr. Martinez opined that sending Student home early as a way to address her maladaptive behaviors is not an appropriate intervention as it serves to take away her right to an education. Due to Student's lack of boundaries, aggression toward younger children, and inappropriate sexual conduct, Dr. Martinez recommended a behavior analysis assessment, an AB 3632 referral to obtain intensive mental health therapy from the Department of Mental Health, family therapy, a one-to-one aide, and placement in a more restrictive setting. Dr. Martinez opined that Student's placement in the SDC-LH class at Bunche was not appropriate in that Student did not receive an adequate support structure and behavior plan to

transition back into the public school environment. In Dr. Martinez's opinion, a special day class for students with emotional disturbance "would have been a better placement for her as opposed to the SDC-Learning Handicapped class."

26. Sometime in September 2005, and prior to filing her due process hearing request, Mother requested a copy of Student's school records from Bunche Elementary, but the school did not provide the records. Thereafter, Dr. Delania Martinez, who had obtained Mother's authorization, asked the District to provide her with a copy of any assessment reports. The District did not provide Dr. Martinez with the records she requested. On September 8, 2005 and again on September 16, 2005, Student's counsel submitted written requests to the District requesting a copy of Student's records. At the resolution meeting held on October 13, 2005, Student through her advocate, Danielle Jenkins, again requested a copy of Student's educational records. In its closing argument, the District concedes that it did not timely provide Student with educational records.

27. The testimony of Ms. Pula and the information in the June 2004 IEP regarding Student's progress and academic functioning levels were simply not corroborated by any standardized testing or assessment reports. Rather, the testing administered and reported by Dr. Martinez is credible. Mother's testimony regarding Student's inability to tell time, read, count, take a simple message or count money corroborates the findings of Dr. Martinez. Moreover, Ms. Pula is not credible because she asserted that she administered the Birgance, but those reports or test scores were never produced.

28. In Mother's view, the District did not provide a safe campus where students were adequately supervised, which resulted in a number of incidents where Student was able to wander on school grounds and engage in inappropriate sexual conduct. On or about September 1, 2005, Mother moved her family to Long Beach because of her concerns with Student's safety and education.

LEGAL CONCLUSIONS

1. Under both State law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a Free Appropriate Public Education (FAPE). (20 U.S.C. §1400; Ed. Code, § 56000.) The term "Free Appropriate Public Education" means special education and related services that are available to the student at no cost to the parents, that meet the State educational standards, and that conform to the student's Individualized Education Program (IEP). (20 U.S.C. § 1401(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).)

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 other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (20

U.S.C. § 1401(26).) California Education Code section 56363, subdivision (a), similarly provides that designated instruction and services (DIS), California's term for related services, shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." These services include psychological services. (Ed. Code § 56363, subd. (b).)

In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id*. at 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.)

Federal special education law requires states to establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which he is entitled and that parents are involved in the formulation of the student's educational program. (*W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483).) The Supreme Court in *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at p. 1484.) Procedural violations may constitute a denial of FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parent's opportunity to participate in the IEP process.

2. Therefore, the inquiry under the IDEA is twofold. The first question is whether the school district has complied with the procedures set forth in the IDEA. The second is whether the IEP developed through the IDEA's procedures is reasonably calculated to enable the student to receive an educational benefit. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of the District's proposed program. If the District's program was designed to address Petitioner's unique educational needs, was reasonably calculated to provide her some educational benefit, and comported with her IEP, then District provided a FAPE, even if Petitioner's parent preferred another program and even if her parent's preferred program would have resulted in greater educational benefit. The District was also required to provide Petitioner with a program which educated her in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of her disabilities was such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.)

The 2001-2002 School Year

3. Petitioner alleges that the District denied Student a FAPE during the 2001-2002 school year because it failed to assess Student in all areas related to her suspected disability. Specifically, Petitioner contends that the District should have conducted an FAA and developed a BIP during the 2001-2002 school year.

California Education Code section 56505, subdivision (l), provides that any request for due process hearing shall be filed within three years from the date of the party initiating the request knew or had reason to know of the facts underlying the basis for the request. However, the three-year statute of limitations "shall not apply to a parent if the parent was prevented from requesting the hearing due to – (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or (ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent." (20 U.S.C. § 1415(f)(3)(D).)

4. Petitioner filed her hearing request on September 20, 2005. Petitioner knew of the facts underlying her claims as early as 2001. There was no evidence that the statute of limitations should have been tolled based upon any specific misrepresentations by the District that it had resolved any of the Student's special education issues, or that it withheld any information it was required to provide to the parent. (20 U.S.C. § 1415(f)(3)(D).) Therefore, any claims against the District relating to the District's obligation to provide Student a FAPE prior to September 20, 2002, are barred by California's three-year statute of limitations. Specifically, this includes Student's claim that the District failed to assess Student in all areas of suspected disability during the 2001-2002 school year.

5. Consequently, the District did not deny Student a FAPE for failure to conduct an FAA and develop a BIP during the 2001-2002 school year.

The 2002-2003 and 2003-2004 School Years

6. Petitioner contends that the District denied her a FAPE during the 2002-2003 and 2003-2004 school years by failing to appropriately assess her in all areas related to her suspected disability. Specifically, Petitioner asserts that the District should have conducted an FAA and developed a BIP during the 2002-2003 and 2003-2004 school years. The District contends it was not required at any time during the last three years to develop an FAA or a BIP, because Student's behaviors did not constitute a serious behavior problem.

7. Prior to the initial provision of special education and related services to a student with a disability, a local educational agency (LEA) must conduct a full and individual initial evaluation of the student. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) Reevaluations of the student must be conducted if conditions warrant a reevaluation or if the

parent or teacher requests a reevaluation, but at least once every three years. (20 U.S.C. § 1414(a)(2)(A); Ed. Code, § 56381, subd. (a).) In developing a student's IEP, the IEP team must take into consideration the student's most recent evaluation. (20 U.S.C. § 1414(d)(3)(A)(iii); Ed. Code, § 56341.1, subd. (a)(3).)

8. Both initial evaluations and reevaluations must adhere to requirements enumerated in the IDEA and State special education law. Reevaluations must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (20 U.S.C. § 1414(b)(3)(iv); Ed. Code, §§ 56320, subd. (g), 56322.) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) In addition, the tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible; and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subd. (a), (b).) Additionally, the student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program for the student. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (e), (f).)

9. A local educational agency must assess a special education student in all areas related to his suspected disability, including the student's social and emotional status. (Ed. Code, § 56320, subd. (f).) An evaluation must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the eligibility category of the student. The school district must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the student. The school district must use assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the student. (34 C.F.R. § 300.532(h), (i), & (j) (1999).)

In addition, the school district must use a variety of assessment tools and strategies to gather both relevant functional and developmental information about the child, including information provided by the parent**.** (34 C.F.R. § 300.532(a), (b), (g), (h), (i), and (j).)

10. Every special education student who demonstrates a serious behavior problem must receive a functional analysis assessment. (*See* Cal. Code Regs., tit. 5, § 3052.) This assessment will then be used to develop a behavior intervention plan for the student. The behavior intervention plan will become part of the student's IEP. (Cal. Code Regs., tit. 5, § 3001, subd. (f).) A serious behavior problem is a behavior which is self-injurious or assaultive, or causes serious property damage, or is severe, pervasive, maladaptive, and for which instructional or behavioral approaches stated in the student's IEP have been found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (aa).)

11. Upon its first evaluation of Student in preparation for her December 2001 IEP, the District knew or should have known Student's medical and family history, which includes being born to a mother addicted to cocaine and later being physically and sexually abused by her biological father. When the District held Student's December 2001 IEP, it was or should have been aware of Student's earlier IEPs. As early as Student's April 27, 2000, IEP, which reports Student's biggest problem at school to be her self-control, the District was aware of her behaviors.

At the time of Student's December 2001 IEP, the District knew that Student engaged in such serious behaviors that a behavior plan had to be developed. The behavior plan, was a system of warnings, which would result in Student being sent home early after the third warning. The District knew that Student was often angry and defiant and that she would not follow school rules, even though the school had repeatedly explained those rules to Student. DCFS social worker, Ms. Townsend's letter in April 2002, confirms that the District was aware of Student's behavior problems and that it's solution was to send Student home. The program and placement the District offered Student during the 2001-2002 school year, including the "behavior plan" calling for Student to be sent home early when she misbehaved, were unsuccessful. The District's program and attempts at addressing Student's behaviors were so ineffective, that the District finally determined Student to be a student with emotional disturbance and placed her in a day treatment program at Systems of Care for the following two school years. Therefore, at the June 2004 IEP meeting, when the District determined that Student's needs could only be met at a day treatment program, the District should have conducted an FAA and developed a BIP in order to address her behaviors.

12. Student attended Systems of Care during the 2002-2003 and 2003-2004 school years, which is a restrictive day treatment program offering counseling and behavior management to all its students, including Student. The testimony of Student's teacher, Mr. Andrew, further establishes that Student had pervasive maladaptive behaviors such as difficulty in establishing and maintaining peer relationships, following instructions, respecting school staff, and she thrived on negative attention. Student's behaviors were severe and serious enough to require placement at a restrictive day treatment program, yet the District did not conduct a comprehensive assessment to address her emotional and behavioral needs. Her IEPs during the 2002-2003 and 2003-2004 school years do not include any behavior assessments or behavior support plans.

It is clear that Student's behaviors were severe and serious enough to require her placement at a day treatment program. Therefore, the District should have conducted an FAA and developed a BIP to address Student's longstanding behaviors.

The 2004-2005 School Year

Functional Analysis Assessment and FAPE

13. At the end of her two years at Systems of Care, Student showed some improvement in her behaviors. Thus, in June 2004, the District held an IEP to determine her placement once she transitioned out of Systems of Care. The IEP team determined that Student would exit Systems of Care and return to a less restrictive setting at Bunche Elementary School.

14. To determine whether the District's proposed IEP was designed to address Student's unique needs and calculated to provide her with educational benefit, it is first necessary to determine what Student's unique needs were for the 2004-2005 school year. There was no dispute that Student's areas of need included reading, writing, math and behavior. There was no dispute regarding the appropriateness of the goals and objectives in the June 21, 2004, IEP. Petitioner contends that Student's behavioral issues should have prompted the District to perform a comprehensive assessment of Student so that the IEP team could determine the type of behavioral supports and placement Student needed. The District contends that Student did not exhibit serious behaviors and that the District was not required at any time during the last three years to conduct an FAA or develop a BIP.

15. While Student attended the SDC-LH classroom at Bunche Elementary, she talked constantly and bothered other children in the classroom. The extent of Student's behaviors was such that her teacher had to seat Student next to her in order to monitor Student and control her behaviors. Despite whatever measures the teacher undertook, Student's behaviors worsened at the end of the 2004-2005 school year to the point that the teacher attempted to develop three behavior plans for Student. Those behavior plans were not based on any assessment plan or behavioral assessment, nor did the plans appear to be the result of observations, systematic or otherwise. There was no evidence regarding the qualifications of Ms. Pula either to assess and evaluate Student's behaviors or to develop a behavior plan. On at least two occasions in September and October 2004, the District documented Student "striking out" of the classroom. In January 2005, Student was involved in another incident, this time for fighting in the classroom. Finally, in May 2005, Student was referred to the administrator at Bunche Elementary for vandalizing a desk. Student was also found in an electrical bin on school grounds engaging in inappropriate sexual behavior, which prompted the District to call the police. Despite the ineffectiveness of the District's attempts to address Student's behaviors during the entire the 2004-2005 school year, neither an IEP meeting was scheduled nor an assessment plan proposed.

16. In light of all the incidents that occurred while Student attended Bunche Elementary, including her dangerous behavior of going to the electrical bin, the District knew that Student had serious behaviors, but it did not conduct a functional analysis assessment to properly address those behaviors. The only psychoeducational assessment that the District conducted in 2002 is sparse and deficient. On the face of the document, it appears that Ms. Jewell used a single test to evaluate Student. The report does not include a

developmental history, it does not indicate whether Mother was interviewed, and it does not address any of the other domains including her academic abilities. The District did not conduct any other psychoeducational assessments and it did not conduct a functional analysis assessment.

17. The record does not show the number of times Student was sent home early for her behaviors. However, Student had been sent home on a number of occasions due to her maladaptive behaviors. Student's behaviors were impeding her learning – she could not learn if she was being sent home early. The IEP team should have addressed Student's behaviors which resulted in her being sent home early. (34 C.F.R. Part 300 (1999), Appendix A, at p. 12588 ("suggestions that behavior may be exhibited that impedes learning due to a frustration over a lack of services and that the IEP team needs to examine in and out-of-school behavior to develop interventions to sustain learning are extremely important"). If a student does not attend school for the full school day, that student obviously cannot benefit from the instruction that otherwise would have been provided to the student. Where a student is repeatedly sent home early and the IEP does not address the issue of the underlying behaviors, whether by addressing the behaviors or by providing alternate services during the times student was sent home early, it cannot be argued that the IEP was reasonably calculated to provide the student with educational benefit.

18. Ms. Pula testified that she consulted with the vice principal and prepared three behavior plans. These behavior plans were not produced until the second day of hearing. The fact that her teacher had to prepare three behavior plans further demonstrates that the Student's IEP and the methods used by her teacher were not effective in addressing Student's behaviors. Therefore, the District should have conducted an FAA and developed a BIP during the 2004-2005 school year. The District's failure to conduct an FAA and to develop a BIP resulted in a program that completely failed to meet Student's most critical needs. Because Student was sent home early repeatedly, she could not benefit from her education. The ALJ concludes that the District's offer was not designed to meet Student's unique needs and was not calculated to provide her with educational benefit.

19. The District's contention that Student's behaviors were not serious and did not impede her education was not persuasive. District personnel recognized that Student's behaviors were impeding her education. First, Student's need for behavioral and emotional supports and intervention resulted in her placement at the Systems of Care day treatment program during the 2002-2003 and 2003-2004 school years. When the District held an IEP on June 12, 2004, to transition Student from Systems of Care to a SDC, the District knew of her needs in this area. Second, her behaviors after leaving Systems of Care included fighting with other students, acting out sexually, and incessant talking. Her behaviors are well documented beginning in first grade. Student's behaviors only escalated as the 2004-2005 school year progressed. The methods that her teacher used simply did not address her needs. Instead of holding an IEP meeting or conducting a behavior assessment to determine her needs and how to address them, her teacher used a system by which Student was warned and then she would "strike out" and be sent home.

20. The ALJ finds Mother's testimony that Student was sent home early repeatedly to be more persuasive than Ms. Pula's testimony denying that Student was suspended or sent home regularly. Therefore, the ALJ determines that due to her behaviors, Student was repeatedly sent home early. Given the teacher's classroom rule of students "striking out" and being sent home, the ALJ determines that Student was sent home on a number of occasions. However, as the District did not provide Mother with written notices of the incidents involving the removals from the instructional setting, there was insufficient evidence to determine whether the removals totaled to more than ten school days during the 2004-2005 school year. Consequently, the ALJ finds that the District did not deny Student a FAPE by failing to conduct a manifestation determination review.

21. In light of the many years that Student has exhibited behavioral difficulties and the pervasive nature of those behaviors, the ALJ finds that the District's failure to conduct an FAA and develop a BIP during the 2004-2005 school year is sufficient in itself to find that the proposed offer does not constitute a FAPE. The development of a BIP based on a proper assessment was necessary in order for the proposed IEP to meet Student's unique needs and provide her with some educational benefit.

Triennial Review and IEP Meeting

22. After the initial evaluation and IEP, reevaluations of the student must be conducted if conditions warrant a reevaluation or if the parent or teacher requests a reevaluation, but at least once every three years. (20 U.S.C. § 1414(a)(2)(A); Ed. Code, § 56381, subd. (a).) In developing a student's IEP, the IEP team must take into consideration the student's most recent evaluation. (20 U.S.C. § 1414(d)(3)(A)(iii); Ed. Code, § 56341., subd. (a)(3).) The school district must implement the IEP as soon as possible. (Cal. Code Regs., tit. 5, § 3040, subd. (a).)

23. Petitioner contends that the District did not conduct a timely triennial review. It is undisputed that Student's triennial assessment and IEP were due on or before June 12, 2005. It is also undisputed that a triennial assessment and IEP did not take place during the 2004-2005 school year. In this case, the District not only failed to conduct a triennial assessment and hold a triennial IEP on or before the June 12, 2005 deadline, it also failed to implement the Student's IEP. The June 21, 2004 IEP, which was re-convened and completed on July 21, 2004, stated that the IEP team recommended that Student be given a psychoeducational assessment and an IEP meeting to take place when Student began attending Bunche Elementary. The evidence at hearing established that the District did not reassess Student. Thus, the District failed to implement Student's IEP.

24. The District argues that the last day of school for the 2004-2005 school year at Bunche was on June 17, 2005, and therefore, the District's failure to conduct a triennial assessment and hold a triennial IEP was a procedural error, which resulted in a short delay in the creation of the triennial IEP. The District's argument is not persuasive, because as early as the June 21, 2004 and July 21, 2004, IEP meetings, the District knew that Student required a comprehensive assessment. When the District held Student's IEP on June 21, 2004, the

District did not have any current assessments to consider. The IEP team should have had available to it an evaluation that was sufficiently comprehensive to identify all of Student's special education and related service needs, whether or not commonly linked to the disability category in which she had been classified. (34 C.F.R. § 300.532(h) (1999).) Had the IEP team possessed an appropriate evaluation in developing Student's IEP, it would have been able to correctly identify her unique needs and thereby develop a program able to meet those needs. There was no evidence that the District considered any formal assessments in developing Student's IEP. Without a comprehensive assessment, the IEP team could not have accurately determined Student's needs and designed a program to meet those needs. The IEP does not indicate whether Student met her goals or what progress she was making in meeting her goals and objectives. Therefore, the program the District offered Student was not designed to meet her educational needs and was not reasonably calculated to provide her some educational benefit.

Prior written notice

25. A local educational agency must provide parents with prior written notice, when it refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child. (20 U.S.C. §1415(b)(3).) Under the California Education Code, if an assessment for the development or revision of the individualized education program is to be conducted, the parent or guardian of the pupil shall be given, in writing, a proposed assessment plan within 15 days of the referral for assessment, unless the parent or guardian agrees, in writing, to an extension. (Ed. Code, § 56321, subd. (a).) Thereafter, an IEP required as a result of an assessment of a pupil shall be developed within a total time not to exceed 50 days from the date of receipt of the parent's written consent for assessment, unless the parent agrees, in writing, to an extension.[2] (Ed. Code, § 56344.)

26. In June and July 2004, the District discussed the need for a pyschoeducational assessment of the Student. Subsequently, Mother asked District staff about conducting a psychoeducational assessment and holding an IEP for Student. The District failed to assess Student and failed to hold an IEP meeting as provided in the IEP. Therefore, the District should have provided Mother with prior written notice regarding its decision not to assess Student and not to hold an IEP meeting at Bunche Elementary. The District violated the procedural requirements of the IDEA by failing to provide written notice of its refusal to conduct a pyschoeducational assessment and its failing to hold an IEP meeting as stated in the IEP and as requested by Mother.

[2] Effective October 7, 2005, California Education Code section 56344 has been amended to require that an IEP required as a result of an assessment of a pupil shall be developed within 60 days form the date of receipt of the parents' written consent for assessment. As Mother requested an assessment prior to July 1, 2005, the 50-day timeline, not the 60-day timeline, applies in this case.

27. Since the District did not give Student prior written notice of its refusal to conduct a pyschoeducational assessment and hold an IEP meeting, Student continued to remain at the SDC-LH classroom at Bunche Elementary where, due to her behaviors, she was sent home early repeatedly and was unable to benefit from her education. As a result of the District's procedural violation, there was a loss of educational opportunity to the Student. Thus, the District denied Student a FAPE.

AB 3632 Referral

28. Student asserts that the District should have made an "AB 3632" referral. Assembly Bill (AB) 3632/882, which is codified at Government Code sections 7570-7588 (Chapter 26.5), describes interagency responsibilities for providing services, including mental health services, to children with disabilities. Pursuant to Government Code section 7576, mental health referrals may be initiated for assessment of a pupil's social and emotional status by a local education agency, IEP team, or parent for any child who has been determined eligible for special education and "who is suspected of needing mental health services." This referral is appropriate where the child satisfies the following key criteria:

> (3) the pupil has emotional or behavioral characteristics that:
>
> > (A) Are observed by qualified educational staff in educational and other settings, as appropriate;
> > (B) Impede the pupil from benefiting from educational services;
> > (C) Are significant as indicated by their rate of occurrence and intensity;
> > (D) Are associated with a condition that cannot be described solely as a social maladjustment or a temporary adjustment problem, and cannot be resolved by short-term counseling.
> > (Gov. Code, § 7576, subd. (b)(3).)

Additional criteria for a mental health referral, as set forth in Government Code section 7576, subdivision (b), are as follows: (1) the pupil must have been assessed by the school in accordance with Education Code section 56320; (2) written parental consent for the referral has been obtained by the local education agency; (3) the pupil has emotional or behavioral characteristics that impede the pupil from benefiting from educational services, are significant as indicated by their rate of occurrence and intensity and are associated with a condition that cannot be described solely as a social maladjustment or a temporary adjustment problem, and cannot be resolved with short-term counseling; (4) the pupil's functioning, including cognitive functioning, is at a level sufficient to enable the pupil to benefit from mental health services; and (5) the local education agency has provided counseling, psychological, or guidance services to the pupil pursuant to section 56363 and the IEP team has determined that the services do not meet the pupil's educational needs, or, in cases where these services are clearly inappropriate, the IEP team has documented which of these services were considered and why they were determined to be inappropriate.

29. Given Student's eligibility for special education as a student with emotional disturbance, her family and developmental history, and the pervasive nature of her maladaptive behaviors which resulted in her placement at the Systems of Care, the District should have considered an AB 3632 referral so that, once Student transitioned to Bunche Elementary, she could obtain mental health services from the Department of Mental Health. The counseling the District provided did not address her needs. In addition, the District did not consider any supplemental aides and services in order to address her behavioral needs, such as the efficacy of a one-to-one aide, family therapy, or a psychiatric evaluation to review her mental health needs. The evidence showed that the intensive supports and services Student received while attending Systems of Care addressed her emotional and behavioral needs. Those intensive services were not continued or provided to Student at Bunche, and her behaviors while attending Bunche worsened. The services and supports she received while attending Bunche Elementary did not address her needs. While Petitioner asserted that the District denied Student a FAPE by its failure to consider making an AB 3632 referral, she did not request that the ALJ order the District to make such a referral. Therefore, the ALJ only finds that the District failed to offer Student a FAPE because it did not consider making an AB 3632 referral.

30. Petitioner contended that Student required a more restrictive placement than the SDC Learning Handicapped class at Bunche. Dr. Martinez opined that an SDC class for students with emotional disabilities would have been a better placement for Student as opposed to the SDC Learning Handicapped class which Student attended while she was at Bunche Elementary. Respondent contends that the District is only obligated to provide Student with a setting where she can attain an educational benefit. The evidence established that Student's program for the 2004-2005 school year was not designed to meet her educational needs in that her emotional and behavioral needs were not addressed; therefore, there is no need to determine whether or not the SDC-LH class at Bunche Elementary was the least restrictive environment.

School Records

31. One of the procedural safeguards afforded to parents under the IDEA is the right to examine all records relating to the student. (20 U.S.C. § 1415(b)(1).) The school district must provide the parent with a copy of the student's records, within five days of the oral or written request by the parent. (Ed. Code, § 56504.) In allegations of procedural violations, a hearing officer may find that a child did not receive a FAPE only if the procedural violations impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(D)(ii).)

32. Here, it is not disputed that Student requested a copy of her educational records on several occasions. On November 3, 2005, the District provided Student a copy of some of her educational records. At the hearing, it became apparent that some of Student's records were either missing or were simply not provided to her after her many requests. The District did not explain its failure to provide Student with a copy of all of her records and it

did not explain why it took the District until November 3, 2005 to provide Student with parts of her educational records. Student contends that numerous documents, including Birgance assessments, assessment plans, report cards for the 2003-2004 school year, disciplinary notices, behavior plans and tally sheets maintained by Ms. Pula are still missing. In its closing argument, the District conceded that it did not timely provide Student with educational records. The District contends that the delay in providing records was a nonsubstantive procedural error which did not amount to a denial of FAPE. The District does not address why other documents were not produced.

33. While the District did commit a procedural violation by the delay and failure to provide Student with a copy of her educational records, that procedural violation did not impede the Student's right to a FAPE, significantly impede the Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the Student, or cause a deprivation of educational benefits.

Reimbursement for Independent Evaluation by Delania Martinez

34. Reevaluations of the student must be conducted if conditions warrant a reevaluation or if the parent or teacher requests a reevaluation, but at least once every three years. (20 U.S.C. § 1414(a)(2)(A); Ed. Code, § 56381, subd. (a).) If a parent disagrees with an assessment conducted by the public educational agency, the parent has the right to an independent assessment at public expense, unless it is established at a due process hearing that the public education agency's assessment was appropriate. (Ed. Code, § 56329, subd. (b), (c).)

35. The District failed to provide Mother with an assessment plan and conduct the psychoeducational assessment in response to the IEP team's determination that such an assessment be conducted. While California Education Code section 56329, subdivision (b), requires parents to disagree with a district's assessment in order to seek reimbursement for an independent assessment, in this case, there was no assessment for Mother to disagree with as the district simply did not assess Student as it was required to do.

36. The District contends that it should not be required to reimburse Mother for the independent evaluation by Dr. Martinez, because Dr. Martinez conducted the assessment in September 2005, when Student was no longer attending a school within the Compton Unified School District. The IEP team knew that Student required a psychoeducational assessment; yet, the District did not conduct the assessment. Additionally, Mother requested a psychoeducational assessment; yet, the District neither conducted the assessment nor provided Mother with prior written notice of its refusal to assess Student. The only triennial assessment conducted by the District in April 2002, was inappropriate, as set forth in Legal Conclusion 16 above.

Dr. Martinez's assessment and report has high probative value. There was no dispute that the assessment performed by Dr. Martinez was educational in nature; it addressed Student's cognitive ability, achievement, social-emotional functioning, and other issues

affecting her ability to learn. Dr. Martinez, with her eight years of experience assessing students with disabilities as a school psychologist and educational psychologist in private practice, was qualified to perform the assessment. In light of the District's failure to meet its obligation to assess Student, reimbursement is warranted for the psychoeducational assessment Dr. Martinez conducted in September 2005. An invoice for Dr. Martinez's assessment was not submitted into evidence; therefore, Mother will have to submit a copy of the invoice and cancelled check to the District to establish the amount to be reimbursed for the assessment and report.

Independent FAA

37. The record is replete with evidence of behavioral issues that were significantly impacting Student's education. An LEA is required to assess a student with exceptional needs in all areas related to the suspected disability and ensure that the evaluation is sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified. (34 C.F.R. § 300.532(g), (h) (1999); Ed. Code, 56320, subd. (f). It is recognized that a student's behavior may constitute a need that must be addressed in a student's IEP if the behavior impedes the student's learning. (20 U.S.C. § 1414(d)(3)(B)(i); Ed. Code, § 56341.1, subd. (b)(1).)

38. The District failed to conduct an FAA or any other assessment which was sufficiently comprehensive to address all of the Student's needs. Consequently, the ALJ grants Petitioner's request for an independent FAA. The District argues that since Student now lives in Long Beach and attends a non-party district's school, OAH does not have jurisdiction to order an independent FAA. The mere fact that Student no longer attends a Compton Unified School District program does not relieve the District from its obligation to Student during the 2002-2003, 2003-2004, and 2004-2005 school years to assess her in all areas related to her suspected disability. The ALJ has found that the District failed to assess Student's serious behavioral needs and accordingly Student's parent is entitled to obtain an independent FAA by an assessor qualified to perform an FAA at the District's expense. Such an assessment shall conform to the requirements of California Code of Regulations, title 5, section 3052.[3]

[3] The District argues that Student has not proffered any evidence that Student's new school would allow an assessor contracted by Compton Unified School District onto their school campus in order to complete the FAA or that the new district's IEP team would agree to meet to discuss the assessors findings and develop a BIP. Appropriate relief in this case, includes the provision of an independent FAA at the District's expense. It will be up to Petitioner to arrange for the logistics of the independent FAA, including selecting a qualified assessor, obtaining permission from the current school district to observe and assess Student, and making arrangements for an IEP at the new school district to consider the results of the independent FAA.

Compensatory Education

39. When an LEA fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Comm. of the Town of Burlington v. Dept. of Educ.* (1996) 471 U.S. 359, 374; 20 U.S.C. § 1415 (i)(C)(iii).) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief which may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (See, e.g., *Parents of Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) Compensatory education does not, however, necessarily involve an obligation to provide day-for-day or session-for-session replacement for opportunity or time missed. *Id.* at p. 1497. The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of IDEA." *Ibid.*

40. Petitioner requested an award of compensatory education totaling 300 hours of tutoring. The District argues that there is no evidence proffered regarding the amount or type of educational services warranted as compensatory education. However, among the District's evidence submitted at the hearing is a letter dated November 1, 2005, in which the District agrees to Mother's request of 300 hours of tutoring. (Respondent's Exhibit 12.) By including this letter in its evidence packet and its subsequent admission into evidence, the District waived any potential claims of privilege that this letter contains confidential settlement information or discussions.

41. Given the determination that the District denied Student a FAPE during the 2002-2003, 2003-2004, and 2004-2005 school years, the ALJ determines that Student requires a compensatory remedy totaling 300 hours of individual tutorial services to be provided by a non-public agency including necessary transportation to and from the NPA.

PREVAILING PARTY

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

Issue I: The District prevailed with respect to the 2001-2002 school year. The Student prevailed with respect to the 2002-2003, 2003-2004 and 2004-2005 school years.

Issue II (A): The Student prevailed;
(B): The District prevailed;
(C): The Student prevailed;
(D): The Student prevailed;
(E): The Student prevailed in part, on the procedural claim that the District failed to provide her educational records in a timely manner, but this violation did not result in a denial of FAPE.

Issue III: The Student prevailed.

Issue IV: The Student prevailed.

Issue V: The Student prevailed.

ORDER

1. Within thirty calendar days from receipt of the invoice and cancelled check(s), the District shall reimburse Mother the amount of $2,500.00 for expenses related to Dr. Martinez's psychoeducational assessment conducted in September 2005.

2. Within 30 calendar days from the date of this Decision, Student's parent may obtain an independent FAA and report by a qualified assessor through a certified non-public agency. The FAA shall meet the legal requirements set out in California Code of Regulations, title 5, section 3052. The District shall pay for the independent FAA and the FAA report. Following the completion of the independent FAA, the District shall pay for the attendance of the independent FAA assessor at an IEP at Student's current school of attendance in Long Beach.[4]

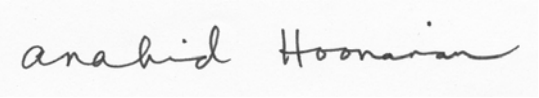
3. Within 30 calendar days from the date of this Decision, the District shall meet and confer with Mother, and Long Beach Unified School District, if that district is willing to participate, to develop a plan for providing Student with 300 hours of one-to-one academic tutoring sessions focusing on Student's current academic weaknesses. Within 60 calendar days from the date of this Decision, the District must begin providing the one-to-one tutoring services. These 300 compensatory education hours shall be used by December 31, 2007, unless the parties agree in writing otherwise. The District shall arrange for and pay all necessary fees and transportation costs in relation to the compensatory education hours.

[4] California special education law requires that the IEP required as a result of an assessment of a pupil shall be developed within a total time not to exceed 60 days from the date of receipt of the parent's written consent for assessment, unless the parent agrees, in writing, to an extension. (Ed. Code § 56344.) Furthermore, the functional analysis assessment that is used to develop a behavior intervention plan for the student will become part of the pupil's IEP. (Cal. Code Regs., tit. 5, § 3001, subd. (f).) Therefore, once the independent FAA and report is completed, it will be necessary for the independent evaluator to present the FAA report to the IEP team.

RIGHT TO APPEAL THIS DECISION

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

DATED: January 31, 2006



Anahid Hoonanian
Administrative Law Judge
Office of Administrative Hearings
Special Education Division