

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

In the Matter of:

STUDENT,

Petitioner,

OAH NO. N 2005070421

v.

TUSTIN UNIFIED SCHOOL DISTRICT  
AND ORANGE UNIFIED SCHOOL  
DISTRICT,

Respondents.

**DECISION**

Administrative Law Judge Susan A. Ruff of the Office of Administrative Hearings, Special Education Division, State of California, heard this matter on February 9, 14, 15, 16, 21, 22, and April 19, 20, 21, 24 and 25, 2006, in Tustin, California.

Petitioner (Student) was represented at the hearing by Paul H. Kamoroff, Esq. Douglas E. Jacobs, Esq., also appeared on behalf of Student for part of the hearing. Student's mother and step-father were present at various times during the hearing. Student was not present.

Respondents Orange Unified School District (OUSD) and Tustin Unified School District (TUSD) were represented by Nancy Finch-Heurman, Esq. Also present for most of the hearing on behalf of OUSD was Dr. William Gee, Special Education Director for OUSD. Also present for most of the hearing on behalf of TUSD was Lori Stillings, SELPA Director for TUSD.

The matter was deemed submitted as of May 19, 2006, after filing of written closing argument by the parties.<sup>1</sup>

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<sup>1</sup> The parties' written closing arguments were marked as Petitioner's Exhibit 97 and Respondents' Exhibit D and included within the parties' respective exhibit books.

## ISSUES

Student listed 42 issues to be decided in this matter in the Prehearing Conference Statement filed on January 25, 2006. On February 6, 2006, Student filed a document requesting permission to withdraw issues number 37, 38, 39, 40, 41 and 42. Student's request to withdraw these issues was granted, over the Districts' objections, on February 9, 2006. The remaining 36 issues are summarized as follows:<sup>2</sup>

1. During the 2002-2003 school year, did OUSD fail to provide Student with a free appropriate public education (FAPE) by:

- a. Failing to conduct a functional analysis assessment (FAA);
- b. Failing to have an occupational therapist, adaptive physical education teacher, and speech pathologist present at the August 30, 2002 IEP team meeting;
- c. Failing to have a regular education teacher and occupational therapist present at the October 3, 2002 IEP team meeting;
- d. Failing to perform a mental health assessment;
- e. Failing to offer an appropriate level of behavior designated instruction and services; an appropriate level of counseling services, and an appropriate placement?

2. Did OUSD fail to provide Student with a FAPE during the 2003-2004 school year by:

- a. Failing to conduct an FAA until December 2003;
- b. Failing to have a behavior intervention case manager (BICM) present at the December 11, 2003, and January 29, 2004, IEP team meetings;
- c. Failing to hold an IEP to develop and implement a behavior intervention plan (BIP) from December 11, 2003, until February 19, 2004;
- d. Failing to perform a mental health assessment;
- e. Failing to offer an appropriate level of counseling services, and an appropriate placement;
- f. Failing to gather documentation of targeted behaviors for FAA analysis, to document program implementation of FAA, and to hold FAA program effectiveness reviews?

3. Did TUSD fail to provide Student with a FAPE during the 2003-2004 school year by:

- a. Failing to have a BICM present at the June 10, 2004 IEP team meeting;
- b. Failing to perform a mental health assessment, offer an appropriate level of counseling services, and an appropriate placement;

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<sup>2</sup> This summary of issues is based on the titles for each issue set forth in Student's list of issues in the Prehearing Conference Statement. Student's full list of issues was approximately twelve pages long.

- c. Failing to gather documentation of targeted behaviors for FAA analysis, to document program implementation of FAA, and to hold FAA program effectiveness reviews?
4. Did TUSD fail to provide Student with a FAPE during the 2004-2005 school year by:
  - a. Failing to have a BICM present at the November 8, 2004, December 3, 2004, and May 9, 2005 IEP team meetings;
  - b. Failing to perform a mental health assessment;
  - c. Failing to offer an appropriate level of counseling services and an appropriate placement;
  - d. Failing to gather documentation of targeted behaviors for FAA analysis; to document program implementation of FAA; and to hold FAA program effectiveness reviews?

### FACTUAL FINDINGS

1. The parties stipulated to the following: “With respect to adaptive physical education, speech and language, and occupational therapy, the assessments completed and the services offered by OUSD and TUSD for the years in question provided FAPE as to the provision of those services and assessments and only to the extent of those services and assessments.”

2. Student is a ten-year-old boy born on March 15, 1996. He attended OUSD during part of his preschool and then moved to the Los Angeles Unified School District (LAUSD). In approximately August 2002, he moved back within the boundaries of OUSD.

3. Prior to Student’s return to OUSD, LAUSD found Student eligible for special education and related services on the basis of autism, emotional disturbance, and speech and language. When Student attended LAUSD, he exhibited the following behaviors: echolalia, twisting his wrists and hands in a self-stimulatory manner, banging on the table, pounding his chest with his hands, avoiding eye contact at times, laughing to himself, singing to himself, staring into space, pretending to be a dog in class, drooling, failing to respond to his name when called, grimacing, mimicking adults’ expressions, phrases and voice tones, twisting his body, spitting on people, laying on the rug, telling people to shut up, running out of the room, inability to sit on the rug for directed lessons, screaming in a loud voice, spitting food on other children, pinching other children, eating crayons in the class, taunting other children, pulling his pants down in class, profanity, eating “Mr. Potato Head” and crawling on the ground.

4. Student’s November 2001 IEP at LAUSD reported that:

He also exhibits oppositional behaviors at school. He has bit a teacher and spit on a teacher. He often argues with adults, refuses to do what is requested,

does things deliberately to annoy others, uses foul language, throws things at other children, mimicks adults, and makes threatening gestures to other children and teachers. Father reported that he “has a shorter fuse” during very warm weather.

He may benefit from a well structured environment with a positive behavior modification program, firm consistent limits, and calm responses to behaviors...He has spread food on his face and body many times. He pulled his pants down in class once.

#### *2002-2003 School Year (OUSD)– First Grade*

5. On August 30, 2002, OUSD conducted a 30-day interim placement meeting and offered an interim placement. The district relied upon the three categories of eligibility from LAUSD’s IEP and found that Student’s primary handicapping condition was “Multidisability (Autism, ED, S/L).” Student’s mother attended the meeting and signed the interim document, consenting to continue the IEP that was in effect from LAUSD. Student was placed in a first grade special day class (SDC) at Cambridge Elementary School. There was no occupational therapist, speech/language pathologist, or adaptive physical education teacher in attendance at the meeting. Student was receiving occupational therapy, speech/language therapy, and adaptive physical education services at LAUSD and continued receiving them from OUSD in the interim placement.

6. The parties dispute whether this August 30, 2002 interim placement meeting was intended to be a full IEP meeting. William Gee, the special education director for OUSD who is familiar with OUSD’s policies and procedures, testified that the meeting was a 30-day interim placement meeting, not a full IEP meeting. The document itself confirms his testimony. It states that the “type of meeting” is “interim” and discusses the interim placement of Student. The report adopts the findings of LAUSD. The evidence supports a finding that this was not a full IEP meeting, but was instead a 30-day interim placement meeting.

7. The interim placement report noted that not all parties agreed with the placement of Student in an SDC. Student’s mother and grandmother wanted “SDC or special school” while Student’s biological father wanted “RSP/mainstream.” The parents also disagreed about the school Student would attend, with the mother preferring a school near her and the father requesting a different school. The “pertinent information” section of the document reported that: “Student is designated by LAUSD as emotionally disabled/autistic – irregular bowel problem (soils himself) – uses foul language – has bitten a teacher – needs small group environment/one-on-one – dad wants an aide for him.”

8. On October 3, 2002, the combined meeting to confirm the interim placement and annual IEP meeting was held for Student. The report of that meeting continued to find the same three bases for eligibility as LAUSD had found. OUSD does not typically change the eligibility category without conducting assessments of a student. During the meeting, the

IEP team learned that Student was not receiving services from the Regional Center and suggested that the parents pursue those services. The IEP team recommended that Student spend 40 percent of his school time in regular education, including time in social studies, field trips and art/music/electives. No regular education teacher was in attendance at that IEP meeting. A speech/language specialist was present, but no occupational therapist was present. The Student was still receiving occupational therapy services at the time.

9. The IEP team noted problems with Student's behaviors. Under the "Summary of Present Levels of Pupil's Educational Performance" the category entitled Social/Emotional Functioning notes that Student "displays difficulty interacting with other students and adults. He has been observed touching other students after being reminded to keep his hands to himself, talking back to an adult, and disobeying playground rules such as freezing after the bell and running the opposite way of where the students line up."

10. The Speech/Language Assessment Report included in the IEP noted: "verbal outbursts which were irrelevant to the subject being discussed, noises, self-talk which was rambling and out of context and staring into space for prolonged periods of time for no apparent reason. [Student] does not maintain coherence in conversation when answering questions or problem solving."

11. Student's biological father attended that IEP meeting on behalf of Student. Student's mother was not in attendance. At the hearing, Student's mother testified that she did not attend the IEP meeting because Student's biological father was present. Without a court order, the district could not exclude one parent or the other from the IEP meetings while the parents shared joint custody of Student. At that time there was no court order.

12. As a result of Student's behavioral issues, Jennie Bain, a behavior specialist for OUSD, observed Student in class and issued a report dated October 4, 2002, in which she made recommendations regarding behavioral interventions for the classroom. Student's teacher Sarah Van Peteghen implemented those suggestions in the classroom.

13. On Friday, November 1, 2002, the IEP team met to discuss the results of the occupational therapy assessment done by Russo, Fleck & Associates. The IEP team adopted the recommended goals and determined that Student would receive a 45-minute occupational therapy session twice a week.

14. On February 13, 2003, the IEP team met again and issued an Addendum to the October 3, 2002 IEP report. One of the purposes of the meeting was to discuss a referral to Orange County Mental Health (OCMH) for Student. Under the heading of "Recommendations and Person(s) Responsible" the addendum stated: "Offers of OCMH. Parent accepts referral." [Underlining and double-underlining in original.]

On a follow-up page, the Addendum noted: "Parent concerns regarding discussion of student needs for medication. Decisions regarding medication are under the direction of a physician. This service is also available thru the direction of OCMH. An offer of referral to

OCMH was made. Consista [remainder of word was cut off on exhibit] and contact with pediatrician was discussed.”

15. The district personnel believed that a referral for mental health services was warranted because Student had exhibited behaviors such as aggression and sadness. Because of the problems occurring in Student’s home life with custody battles and similar matters, they felt the whole family could benefit from those services. OCMH would assess the child, and if counseling services were warranted, OCMH would provide them. OCMH had the ability to get the whole family involved in the counseling process, which the school could not do.

16. In February 2003, Tracey Zaldivar sent a referral letter for Student to the Orange County Director of Mental Health Services. The letter noted that OUSD had not yet received Student’s “cumulative record” and noted the following behaviors: “[Student] occasionally displays very oppositional behavior and has been observed to make derogatory remarks and threats to other students; [Student] appears to have difficulties in the area of self esteem and has expressed a lack of confidence: at times, [Student] is very reluctant to engage in the classroom lesson; on the playground [Student] has difficulties relating to others that go beyond the realm of autistic like behaviors. [Student’s] mother has noted that [Student] occasionally becomes quite upset and has difficulty with his feelings of anger.” The letter concluded that “due to the severity and nature of the concerns, it appears that [Student] could benefit from Mental Health support.”

17. The referral letter was written to enable OCMH to evaluate Student to see if counseling was warranted. OUSD found it difficult at that time to get OCMH to accept a referral, particularly for an autistic child, because OCMH would not provide services for autistic behaviors. Instead, it was necessary for the school district to “magnify” their concerns regarding Student in the referral letter and describe other observed behaviors or emotional concerns besides autism. If OCMH denied the referral, the district personnel would rewrite the letter and try the referral again.

18. The evidence did not establish whether Student’s mother contacted OCMH during the 2002-2003 school year after the referral was made. Student’s mother remembered that she contacted OCMH in late 2003 (during the following school year) but she could not remember whether she contacted OCMH in February 2003, after Zaldivar sent the February 2003 letter of referral to OCMH.

OUSD received a letter dated March 24, 2003, on the letterhead of the County of Orange Health Care Agency (aka OCMH), stating that OCMH was unable to complete a request for an assessment because the “[p]arents have withdrawn their request for an assessment.” However, no representative from OCMH testified at the hearing and the contents of this letter were received into evidence only as administrative hearsay. There are also other hearsay statements in various documents made by district personnel which state that the parents withdrew the request for an assessment.

19. However, the evidence establishes that the OUSD personnel believed the parents had withdrawn their request for an assessment. Zaldivar testified that she read the OCMH letter at the time the district received it and believed that the parents had withdrawn the request for an assessment. Her testimony is supported by the hearsay statements of the district employees in the various assessments that also state the parents withdrew the request. There is no evidence that Student's mother made a request for a mental health assessment during the 2002-2003 school year after this date.

20. Student's behavior improved toward the end of the 2002-2003 school year. On June 26, 2003, Van Peteghen prepared an Educational Progress Report. Because Student's IEP ran from October 2002 to October 2003, only certain short term objectives/benchmarks within each of the goals were scheduled to be met at that time. Of the five academic/pre-academic goals and objectives set forth in Student's October 3, 2002 IEP, Student met the June benchmarks for three of the goals and was making progress on the fourth. He also met the June benchmark for his "social and emotional" category goal: "In a classroom setting, [Student] will respond appropriately (no talking back, accurate responses) to questions or directions given by an adult or other student with a visual prompt as measured by observation Record using a criteria of 80%." His report card for the final trimester of the school year also reflected his progress, showing "satisfactory" grades in most categories, including those involving citizenship and social habits.

#### *2003-2004 School Year(OUSD) – Second Grade*

21. On September 30, 2003, Student's annual IEP meeting was held by OUSD. The Primary Handicapping Conditions listed on the IEP remained the same: "Multidisability, Autism, ED, S/L." The IEP noted that Student was receiving medication: "Methylphordate 1 tabl. 20 mg." Student had met two of his academic/pre-academic goals and was making progress toward the others. Student also met or made progress on many of his goals relating to occupational therapy, speech/language and adaptive physical education. However, he had regressed in his "social and emotional" category goal. The IEP report noted that: "Since the beginning of this school year, [Student] has talked back or responded inappropriately in response to questions or directions given by an adult..." The IEP team recommended that Student remain in his SDC placement, with 26 percent of his time mainstreamed in a regular education class.

22. Under the category of social/emotional functioning, the September 30, 2003 IEP stated Student: "has been observed getting upset very quickly and letting his temper go. This appears to make it difficult for other students to initiate interaction with him. He has been given guidance on proper interaction with peers including the book 'Tobin'. At this point, it does not seem to make a difference even when a verbal prompt is given. When [Student] is asked what he would like at school he says 'a friend'." The section of the report entitled "Communication Skills" noted that Student pesters peers by coming very close to them and singing in their space. When adults ask him to stop an inappropriate action, he repeats their words or "talks back," including lines such as, "Oh yeah, I'll show you."

23. On September 30, 2003, a consent form was signed to permit OUSD to conduct a full assessment of Student in eleven different areas. The reason for the assessment was listed as “Triennial Review and Behavior Concerns.” The assessment areas included a “Functional Analysis of Behavior” as well as an assessment of social/emotional behavior.

24. Student’s mother contacted Regional Center of Orange County (Regional Center), and the Regional Center conducted an intake interview regarding Student in November 2003. Student’s mother testified that she first contacted OCMH, but OCMH referred her to the Regional Center. The Regional Center assessor reported Student “might benefit from an AB-882 Mental Health Referral and Behavior Intervention via the Hughes Bills due to atypical and challenging behavior.”

25. In October and November, 2003, OUSD conducted various assessments and tests of Student in accordance with the September 30, 2003 assessment plan. The tests administered included the BASC (Behavior Assessment System for Children) and several other tests. The psychoeducational report written by Tracey Zaldivar noted “The mother’s responses to the BASC were very significant and indicate that professional psychotherapy continues to be strongly indicated and warranted.”

26. The psychoeducational report stated that while Student “displays behaviors that appear to meet the criteria of ‘seriously emotional disturbed’, such as difficulty forming friendships and/or atypical behavior, the undersigned surmises that the primary disability is autism. While many of [Student’s] behaviors present as severe and/or in the clinically significant range (such as anxiety, conduct difficulties, adaptive difficulties), research indicates that autistic behaviors often manifest themselves in a variety of areas.”

27. Zaldivar considered whether Student might be seriously emotionally disturbed at the time she conducted the assessments. That is why behavioral assessments were conducted. However, when she reviewed the results of the assessments and tests, she concluded that Student’s behaviors were characteristic of his autism, not serious emotional disturbance.

28. In December 2003, OUSD completed an FAA of Student. The report noted that the FAA “was initiated to coincide with [Student’s] triennial evaluation due to a documented history of severe behaviors that impede with [Student’s] learning and/or the learning of others.” The behaviors included “verbal and physical outbursts (such as the banging of [Student’s] fist on the table and/or verbal tirades of foul language); physical aggression toward peers (such as stepping on someone else’s hands and/or pushing); spitting, and self-injurious behaviors (such as banging fist to chest).” The report also noted that prior behavioral interventions, including a behavior support plan and referral to a behavior specialist were not successful “in addressing the behaviors of concern.” The FAA identified four targeted behaviors: 1) angry outbursts (including verbal and physical aggressive behaviors); 2) Banging fist to chest accompanied by loud singing; 3) toileting accidents; and 4) spitting. The report noted that physically aggressive outbursts directed towards others occurred about two times per week and verbal outbursts were a daily event. His chest

banging occurred once a day, and the toileting accidents once every other week. His spitting was reported as sporadic (he might have several episodes within an hour, then none for the rest of the week).

29. On December 11, 2003, Student's IEP team met for his annual review and triennial review. Student's biological father attended the meeting. Student's mother was not present. The IEP team discussed Student's eligibility for special education based on the assessments that OUSD conducted and changed Student's "primary handicapping condition" from "multidisability" to "autism."

30. Tracey Zaldivar, the school psychologist who had conducted the FAA, attended the meeting in the capacity of the behavior intervention case manager (BICM) and presented the FAA and proposed BIP to the IEP team. Student's father did not agree to the BIP at that meeting. He signed his agreement to the remainder of the IEP, but stated that he wished to have Student's mother review the BIP before it was signed. The IEP report did not list Zaldivar as the BICM, because it was not OUSD's practice to list the name of the BICM.

31. After Student returned from winter break, his behavior took a sharp and sudden decline. On January 20, 2004, he was suspended from school based on an incident in which he ran out of the classroom in defiance of teacher orders, hit another student with a beanbag chair, grabbed another student's pencil box, and tore up the other student's bookmark. He was suspended for one day.

32. On January 22, 2004, the day after Student returned from his suspension, he was suspended again for an incident in which he punched his teacher in the stomach and threw his books at his teacher, hitting her in the stomach.

33. On January 29, 2004, Student's IEP team met to discuss the reasons for Student's suspensions. Student's mother attended the meeting. Tracey Zaldivar attended the meeting as the school psychologist and Student's BICM. Student's mother signed the IEP, consenting to the programs and services. The IEP team talked about the need for consistency in Student's daily schedule and the need for Student's biological father to be consistent in providing medication to Student. Student's behavioral problems were worse on days when he did not receive his medication.

34. The IEP noted that Student's "aggression was more severe than had been seen previously." Student's mother told the team that Regional Center had been contacted and "appointments set for information gathering." Student's mother signed a paper giving OUSD personnel permission to contact Student's pediatrician regarding his medications. The IEP team agreed that the school nurse would contact Student's father about giving Student his medications on the days he was with his father. The IEP noted that Student's mother "requested clarification of major or aggressive behaviors." The evidence is unclear to what extent the IEP team discussed the FAA and BIP at this meeting, but the evidence is undisputed that the BIP was not signed at this time.

35. In February 2004, Peter Himber, M.D., conducted a pediatric neurology evaluation of Student on behalf of the Regional Center. Himber's report found that Student had "severe behavioral problems" and suggested prescribing Risperdal. According to the report, Himber spoke with Student's pediatrician on February 6, 2004, about starting Student on Risperdal while awaiting a specialist consultation.

36. Student started taking Risperdal, but it made him highly aggressive and the medication was eventually stopped. Because the Regional Center had recommended the Risperdal for Student, Student's mother lost confidence in the Regional Center to effectively deal with Student's difficulties.

37. On February 9, 2004, Student was once again suspended from school. On this occasion he got angry and yelled at a staff member, screamed, threw a chair, ran at the staff member and hit him, tore down a class poster, ran at the teacher and bit the staff member on both arms.

38. On February 19, 2004, Student's IEP team met to make a referral to OCMH and to have the BIP signed. Student's father attended that meeting. Tracey Zaldivar, Student's BICM, also attended the meeting. The IEP noted that Student's medication had changed from Ritalin to Risperdal. The IEP noted under recommendations: "referral to Mental Health AB3632 2/19/04" and listed the type of meeting as "Other...referral to Mental Health, Hughes Bill; change to extended school year." The IEP stated Student was in regular education 10 percent of the time.

39. The BIP was discussed and signed by the individuals present, including Student's biological father. The BIP was consistent with the one Zaldivar had proposed at the December 11, 2003 IEP, except that it now included an emergency strategy of a "two person escort involving minimal use of force to safely escort a student who presents a danger to self or others." Zaldivar once again suggested a referral to OCMH. Student's father agreed to that referral. The IEP notes indicate that Student's mother "is aware of the referral and understands/agrees that there will be follow through." The IEP team also agreed to a reduction in the number of minutes Student would spend in a general education classroom and agreed Student would not attend any extended school year classes during the intersession. Student was on a year-round school program at the time and went on intersession during the month of March.

40. Shortly after the February 19, 2004 IEP meeting, Tracey Zaldivar wrote another letter to OCMH referring Student for mental health services. The letter recites Student's "aggressive behaviors have escalated to include attacks on staff members as well as other students and a Hughes Bill has recently been implemented." The letter also states Student had been referred for a mental health evaluation the previous year, but Student's mother withdrew her referral.

41. In addition to the written referrals to OCMH for a mental health assessment and counseling services, Zaldivar also spoke with both parents about a referral for counseling services on multiple occasions. When she spoke with Student's biological father, she suggested alternatives to OCMH, including organizations such as Turning Point and Child Guidance. Zaldivar testified that Student's biological father told her he had discussed counseling with the mother and they decided not to pursue it. Although Zaldivar's hearsay statement regarding what the Student's father told her cannot in and of itself support a finding, it did support Zaldivar's testimony that she provided alternatives to OCMH to the parents. Student's mother testified at hearing that she did not follow up with OCMH after this referral was made. Zaldivar testified that psychotherapy has not proven very successful for students with autism, but the referral was written in the hopes that counseling would help Student's family and Student.

42. Student's second trimester grades at OUSD reflect his behavioral problems. His "citizenship and social habits" grades were all "unsatisfactory" or "needs improvement." However, his educational progress report dated February 27, 2004, showed he had met his benchmarks in three of his academic goals and was making progress on four others. Sarah Van Peteghen, Student's SDC teacher for first and second grade at OUSD testified that when Student started her class in first grade, he could not read, but by the time he left in second grade, he could read. When she tested Student in first grade Student was able to give 13 out of 26 sounds of the alphabet for capital letters and 12 out of 26 for the lower case. By second grade, he could give all 26 sounds in both upper and lower case. When she gave him the San Diego Quick Assessment in first grade he was not able to read any words. By second grade, he was reading quite a few words. When she tested Student in second grade, he was able to read passages from a primer and answer comprehension questions, which he was unable to do in first grade. In first grade, Student was still tracing letters. By second grade, he had advanced to writing words and was working on capitalization and spacing between words. In first grade, he could count to eleven, but by second grade he could count to 49 and was beginning to be taught the concepts of "greater than and less than."

#### *2003 – 2004 School Year (TUSD) – Second Grade*

43. In April, 2004, Student enrolled in TUSD.<sup>3</sup> On April 13, 2004, Student's mother, through her attorney, requested that TUSD provide special education services to Student based on the current IEP from OUSD until TUSD could hold an IEP meeting. TUSD placed Student in an SDC at Guin Foss Elementary School.

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<sup>3</sup> In February and March 2004, OUSD and Student's mother had a dispute about whether Student resided within OUSD's jurisdiction. Student's due process hearing request made no claim that OUSD denied Student a FAPE because OUSD determined Student resided within TUSD's jurisdiction. Therefore, the issue is relevant only insofar as it relates to the credibility of Student's mother. The evidence submitted by OUSD, which consisted almost exclusively of hearsay statements by an OUSD investigator (who did not testify at the hearing), does not support a finding that Student's mother lied to OUSD personnel in February 2004 about the location of her residence, and does not support a finding that her testimony at the hearing was untruthful.

44. On April 30, 2004, TUSD sent written notice to Student's mother of a 30-day review IEP team meeting. The meeting was set for May 10, 2004, within the 30-day limit. Due to the unavailability of Student's mother or her attorney, the meeting was rescheduled several times and finally held on June 10, 2004.

45. Student's mother attended the June 10, 2004 IEP meeting along with her attorney. Lori Stillings was among the TUSD personnel who attended the meeting on behalf of TUSD. Stillings is certified as a BICM with the Orange County Department of Education. She is currently the SELPA Director for TUSD. At the time of the June 10, 2004 IEP, she was the Coordinator of Special Education for TUSD.

46. The parties dispute whether Stillings attended the June 10, 2004 IEP in the capacity of a BICM. The report of the June 10, 2004 IEP meeting does not specifically list Stillings or anyone else as a BICM. Student's mother testified that Stillings never introduced herself as the BICM during the IEP meeting. Stillings signed the IEP report in the capacity of a special education teacher.

Stillings testified that she attended the meeting in the capacity of a BICM as well as a special education teacher and informed Student's mother during the meeting that she was the BICM. Normally, the school psychologist would have attended the meeting as the BICM, but because Student's mother had requested that the meeting begin after 3:00 p.m., the school psychologist was unable to attend.<sup>4</sup> Therefore, Stillings became the BICM for Student and stayed the BICM for the remainder of the 2003-2004 school year and during the 2004-2005 school year.

The evidence supports a finding that Stillings attended the meeting in the capacity of a BICM. Her testimony that she told Student's mother that she was the BICM is supported by the notes to the IEP meeting discussing the OUSD BIP which state: "District BICM will be in attendance at review meetings." Stillings was not named as the BICM in those notes, because it is TUSD's policy to use titles instead of names to maintain flexibility regarding personnel attendance at future meetings.

47. During the IEP meeting, TUSD recommended that Student continue to be eligible for special education services under the eligibility category of "autism" as found by OUSD. The TUSD personnel also recommended continuation of the goals and objectives from the last annual OUSD IEP and added goals and objectives related to occupational therapy and adaptive physical education. They recommended Student continue in the special day class at Guin Foss for the remainder of the school year and for fall 2004. The IEP team recommended continuation of the OUSD BIP, with a three month review. Student was to be mainstreamed for 15 percent of his educational day.

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<sup>4</sup> California law permits the duties of a BICM to be performed by "any existing staff member trained in behavior analysis..." (Cal. Code Regs., tit. 5, § 3001, subd. (e).)

48. On the day of the IEP meeting, Student's mother signed an assessment plan, permitting TUSD to conduct an assessment of Student in the areas of language and speech development, social/emotional/behavioral development, health development (vision and hearing screening) and observation/interviews by the school psychologist or autism specialist regarding Student's "academic and behavioral functioning in the school and/or natural setting."

49. The notes to the IEP meeting stated that the TUSD autism specialist would observe Student and develop program recommendations as part of the assessment plan. The notes also state: "Parents are requesting evaluation for possible emotional disturbance to be conducted by TUSD or deferred to OCMH. This area was added to the assessment plan. District recommended referral to OCMH. Parent agreed."

50. Student's mother did not consent to any of the services recommended by TUSD on the day of the IEP meeting. Instead, her attorney sent a letter to Stillings on July 8, 2004, after the end of the school year, stating that Student's mother consented to eight components of the IEP. Although Student's mother had agreed verbally to the OCMH referral during the IEP meeting, the referral to OCMH was not included within the eight components mentioned in the attorney's letter.

51. From April 20, 2004, through the end of the school year, Student's SDC teacher at TUSD kept a daily log of Student's behavior which was sent home to Student's mother. Between April 20 and June 9, 2004, Student had one incident in which he screamed, kicked a table and threw a chair, three incidents in which he hit children during recess, one incident in which he bit a student while on the school bus, one morning in which he threw his pencil across the room several times, two incidents in which he arrived at school upset, but later calmed down (on one of these occasions he spit several times) and two incidents in which he called his teachers names.

52. Most of these incidents occurred on days on which Student's biological father had custody of him or the day immediately following that custody. At the time, Student's mother and biological father shared custody of Student. They disagreed about whether Student should be medicated to help control his behaviors, and Student's biological father did not consistently give Student his medications on the days when the biological father had custody of Student. Student's behavior was worse on days when he did not receive his medication.

53. The behavior logs for the summer session documented one incident in which Student kept putting his hands down his pants and imagined that something was cutting his penis. That was the only negative incident reported until the new school year started on August 30, 2004.

*2004-2005 School Year (TUSD) – Third Grade*

54. On September 8, 2004, TUSD sent Student's mother a notice of an Amendment IEP meeting to be held on September 29, 2004. Student's mother wrote back that she was unable to attend the meeting. After several attempts to reschedule the meeting, it was finally held on November 8, 2004.

55. On September 28, 2004, Tracy Murphy, a school psychologist for TUSD, issued a report with the results of her assessment of Student. The results were discussed with Student's mother by telephone on October 20, 2004, and provided to her in writing on October 23, 2004. The purpose of the assessment was to determine if Student was eligible for special education services as emotionally disturbed. The assessment was based on observation of Student, information provided by Student's mother, special day class teacher, and by Student himself. Murphy concluded that Student did not "seem to exhibit behaviors in the emotionally disturbed category."

56. As part of the assessment, Student's mother, biological father and teacher filled out the BASC. The BASC is a form of rating scale in which an individual is asked to complete a series of questions about the child. Student's mother and biological father gave answers that rated Student in the average range, not emotionally disturbed. Although both scored Student high in the conduct problems area, their scores were still in the average range. The teacher scored Student as higher than normal in the aggression category, but average in all the others. None of the results indicated that Student was emotionally disturbed. Student's mother also filled out another rating scale, the Devereux Parent Form, in which her answers indicated that Student was average in all areas, but borderline-average in the autism category. Student's expert witness Dr. Eaton testified that Student's mother may have minimized Student's conduct when she filled out these rating scales because of an ongoing court battle with an ex-husband (who was not Student's biological father). Eaton testified that this could be a way of explaining why the description of Student's conduct by Student's mother in these rating scales was so different from what Eaton found when he conducted his assessment several months later.

57. The evidence does not support a finding that Student's mother falsified her answers to these rating scales in order to gain an advantage in court. Student's mother never testified that she deliberately "minimized" any answers. She was the one who requested an assessment to see if Student was emotionally disturbed, so it is not reasonable to conclude she would jeopardize that assessment through incorrect answers. Her answers were consistent with those of Student's biological father and the teacher. Student's mother and biological father were not on good terms and there would be no reason for collusion by them on their answers. Instead, the evidence shows that Student's mother answered the rating scales questions honestly, to the best of her ability, and with the best interests of Student in mind.

58. During the months of September, October and November 2004, Student's behavior was much worse than it had been in the past. There were weekly episodes of anger and aggression, including misconduct on days besides the days in which his biological father had custody. Student continually teased one of the female students in his class, often irritating her to the point where she grew angry.

59. On November 2, 2004, Rosa Patterson, an autism specialist with TUSD, signed a report setting forth the findings of her observations of Student and recommendations to assist the SDC teacher Kimberly Luther. That report was provided to Student's mother on the same day.

60. On November 8, 2004, the annual review IEP meeting was held. Student's mother, step-father and their attorney all attended the meeting. Student's mother had to leave the meeting early, so the parents did not agree to the IEP that day. Instead, the meeting was continued to December 3, 2004, for finalization of goals and objectives and determination of placement and services.

The IEP team found that Student was eligible for special education services under the category of autism. The team reported that Student had met seven of his goals from the September 30, 2003 IEP conducted by OUSD, including naming and giving the value of coins and combining letters to form words. He had partially met several others, including starting sentences with capital letters and using periods at the end of sentences, and orally counting/reading/writing numbers to 100. He had not met or not begun five of his goals. The IEP team drafted new goals for him, some of which continued the goals he had not met or partially met, while others expanded on the goals he had met in his previous IEP. The IEP team recommended that Student be mainstreamed for 30 percent of his school day. The team also discussed whether an updated FAA should be conducted.

61. Lori Stillings attended the meeting in the capacity of the school administrator and as the BICM for Student. Student's mother testified that Stillings never introduced herself as the BICM during the meeting, and Stillings was not listed on the IEP report as the BICM. However, Stillings testified that she attended the meeting as the BICM and told Student's mother that she was there as the BICM. The IEP team discussed an updated FAA, and Stillings ultimately conducted that FAA. She was also listed as the BICM on the FAA report. Student's mother and step-father were represented during the meeting by experienced counsel. The evidence supports a finding that Student's parents knew that Stillings attended the meeting as the BICM for Student.

62. On November 24, 2004, Student's mother had Student evaluated by Amor Del Mundo, M.D. Dr. Del Mundo sent a report to the district which contained recommendations to "facilitate a more optimal learning environment for" Student. Dr. Del Mundo found that Student had "ADHD and Developmental Disorder." He stated that Student "may benefit from having a counselor at his school site work towards maintaining some rapport with [Student] to provide a base of familiarity if he becomes unusually anxious." The report

concluded with the statement “Taking into account the severity of his diagnosis, placement and services outside his regular school setting should be considered.”

63. On December 3, 2004, the continued IEP meeting was held. Once again, Lori Stillings attended the meeting as Student’s BICM. Student’s mother testified that Stillings did not introduce herself as the BICM, but the more persuasive evidence supports a finding that Stillings attended as the BICM and everyone present knew she was the BICM.

The December 3 IEP incorporated most of the goals from the November 8 IEP, but reduced the time that Student would be mainstreamed to 20 percent of his educational day, during lunch, recess and special events. Student’s mother signed the IEP, agreeing to the services, but objected to TUSD’s failure to offer or provide direct behavior therapy services, such as Applied Behavior Analysis (ABA) services. The parent comments to the IEP report also noted the parents’ concerns about Student’s behavior.

64. On November 17, 2004, Student’s mother signed an assessment plan permitting a new FAA to be conducted. Lori Stillings thereafter completed an FAA and prepared a report dated February 11, 2005, which was received by Student’s mother that same day. An IEP meeting was held on February 11, 2005, to discuss the FAA. That meeting resulted in an amendment to the annual IEP and a new BIP which was approved by Student’s mother on February 11, 2005. The FAA and BIP targeted three types of behaviors: 1) temper tantrums (screaming, hitting and verbal aggression); 2) aggression (biting and hitting other students); and 3) teasing of peers.

65. In addition to implementing the BIP, the IEP team agreed to begin two hours a week of ABA intervention for Student as of February 22, 2005, with two hours per month of program supervision. The team also agreed that Student would attend a homework club after school and set a tentative date for the three month review of the BIP for May 9, 2005.

66. On February 21, 2005, while with his biological father, Student got into a fight with another boy and stabbed the boy with a fork. According to court documents, the other boy was the son of the biological father’s girlfriend. Although the cut bled, the other child did not need professional medical care. Student also presented evidence that Student had been physically abused by his biological father on one or more occasions.<sup>5</sup>

67. After that IEP meeting, Student’s mother and step-father hired Martin J. Eaton, Ph.D, to conduct an evaluation of Student’s educational progress in TUSD. Dr. Eaton is a licensed clinical psychologist and an adjunct associate professor at the University of Southern California. He was recently appointed to the Orange County Mental Health Board. He has provided therapy for and conducted testing and assessments of children, adolescents and adults. He had provided advice to school districts and written numerous publications in the field of education.

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<sup>5</sup> These events are mentioned here only because they were significant to Dr. Eaton’s opinion that Student requires residential placement.

68. On April 13, 2005, Dr. Eaton prepared a report of his evaluation of Student. The purpose of Dr. Eaton's report was to answer three questions: 1) "Is there an ability and achievement discrepancy that would bring into question the effectiveness of the current intervention strategies that are being implemented" in Student's IEP; 2) If a discrepancy exists, does Student's "lack of educational progress combined with his unique emotional-psychological disorder involving a high degree of aggressive and impulsive behaviors" cause a "health and safety concern" for Student and prevent him from receiving a FAPE; and 3) Would an alternative educational placement, specifically a residential setting, be in the best interest for [Student] to make satisfactory educational and socio-emotional progress?"

Dr. Eaton conducted various tests of Student and reviewed Student's past records. Based on the tests and assessments, he believed that there was a discrepancy between Student's ability and his achievement that indicated Student's present educational placement was not providing him with appropriate educational benefit. He found that "[t]here is a consistent pattern of inappropriate aggressive behavior that causes potentially severe health and safety concerns for [Student] and for his peers which requires immediate intervention." He also found that Student's "potential and actual acting out behavior" prevents him from obtaining a FAPE.

He concluded that a residential treatment setting would be the appropriate placement for Student because of three factors: "1) the limited resources available at the school; 2) the need for greater consistency between his two homes and his school life, and 3) the need for a reduction of stress regarding his biological father's inappropriate use of force when parenting [Student]." Dr. Eaton concluded that: "Having a residential treatment setting for [Student] would provide [Student] a safe haven from having to deal with this conflict with his father, minimize the potential contentiousness that can occur between his two families regarding custody and parenting issues, and provide [Student] the most consistent and predictable environment for him to grow."

Although Dr. Eaton's report is dated April 13, 2005, the evidence at hearing established that it was not provided to TUSD until June, near the end of the school year.

69. On May 9, 2005, the parties held another IEP meeting for the three month review of the BIP. Once again, Lori Stillings attended the meeting as Student's BICM. For the first time, Student's biological father, mother and step-father all attended the meeting together. Student's parents got into a verbal altercation during the meeting, as a result of which the meeting was halted before it was completed. Student's attorney agreed that the meeting would be cancelled.

70. Both sets of parents were given the district's proposed goals and objectives to take with them for review. Some of these new goals and objectives were drafted because Student had already met his previous goals from his last annual IEP. For example, in the November/December 2004 IEP, one of the goals stated that Student would be able read/write/count numbers to 100 with 80 percent accuracy. By the May 9, 2005 IEP, he had

met that goal, so a new goal was drafted that he would be able to read/write/count numbers up to 200 with 80 percent accuracy.

The new goals reflected that he had partially met other goals. For example, in the November/December 2004 IEP, Student had a goal to be able to recall addition sums up to twenty. The baseline at that time showed that he was still counting on his fingers. By May 9, 2005, he could recall addition sums up to ten and was working toward twenty.

71. Prior to the point where the meeting was halted due to the parents' verbal altercation, TUSD staff recommended continuing with the BIP, with another three-month review to be held later. The classroom teacher reviewed the techniques being used and their effectiveness, and the TUSD autism specialist discussed the progress regarding her interventions. The classroom teacher gave the team members written reports she had prepared on the behavior intervention strategies and the BIP.

72. The evidence supports a finding that the BIP was effective in reducing Student's targeted behaviors. Immediately after the BIP was implemented, the behaviors continued, but they began to slow as the weeks progressed. The logs showed that, aside from occasional silliness, Student had only three incidents relating to anger or aggression in March, two in April, none in May and one on June 1, 2005, (when there was a substitute teacher in the room). There was also one incident in May when Student was worried about a giant worm at his desk, but he did not become aggressive about it. Instead he told the teacher that his medicine makes him "paranoid." From March until June, there were only two reported incidents of teasing peers (and both of those were on the same days as his temper tantrums). The logs also showed that Student was responding to the techniques used in the BIP. For example, on one occasion when he exhibited aggressive behavior, later that same day he was able to comment on another Student's bad behavior and relate that to his own experience earlier in the day.

There was also one toileting accident on April 19, but this occurred a day after Student sprained his right ankle. The evidence does not support a finding that this incident was a continuation of the toileting accidents he experienced in his younger years. Instead this incident appears to be an isolated event caused by his injured state.

73. Student's report card for the end of the 2004-2005 school year reported: "[Student] has made good progress both behaviorally and academically. [Student's] behavior plan is showing great progress in teaching him to identify his feelings instead of acting out with impulsive and angry behavior. In math [Student] is currently working on mastering tell time and adding and subtracting double digit numbers without regrouping. In reading [Student] is learning to read for meaning by answering comprehension questions and summarizing text."

74. Student's expert Dr. Eaton disputed that Student made academic progress during the time he was at TUSD and OUSD. Dr. Eaton compared the scores on the subtests he had obtained when he administered the WIAT-II achievement test to Student on March

16, 2005, with the scores on the subtests that Van Peteghen had obtained when she administered the Woodcock-Johnson III test to Student in October 2003. Dr. Eaton testified that, although Student had made some progress, he was falling behind where he should be for his age group and therefore was not making sufficient educational progress.

75. Dr. Eaton's comparison of the results of the WIAT-II and Woodcock-Johnson III tests is of questionable value, because the tests are not the same and do not necessarily measure the same things. However, even if the comparison of the two is a good way of measuring progress, the evidence does not support a finding that no educational progress was made. Comparing those two tests shows that Student had made progress in many areas, including spelling (1.7 grade equivalent on first test; 2.5 grade equivalent on Eaton's test); word reading (2.0 grade equivalent on first test; 4.2 grade equivalent on Eaton's test); reading comprehension (1.4 grade equivalent on first test; 1.7 grade equivalent on Eaton's test). With respect to mathematics, the first test found Student to be at Kindergarten, seventh month (K.7) in calculation and less than K.2 in math fluency. Dr. Eaton's test found numerical operations at K.8 and math reasoning at first grade, fifth month (1.5). There were a few areas in which Dr. Eaton found a lower score than Van Peteghen had found, but it is not clear if those apparent regressions were because different things were measured on the two tests. Dr. Eaton admitted during his testimony that he was not familiar with the tasks Student had to perform on the subtests for the Woodcock-Johnson III, so there is no way of knowing if it is valid to compare the scores for the two tests.

The evidence at hearing supports a finding that Student was meeting or making progress on the goals and objectives in his IEP during all his time at OUSD and TUSD. He made significant educational progress at both schools during all three years.

76. At some point during the summer of 2005, Student's biological father committed suicide.<sup>6</sup>

77. There was evidence of some incidents of misbehavior during the 2005-2006 school year.<sup>7</sup> Student introduced evidence of several incidents of aggressive behavior in September 2005, one in October, one in November and one in January 2006. However, Student objected to TUSD's attempt to introduce more complete records for the 2005-2006 school year into evidence, both on the basis that the information was irrelevant because Student had dismissed the charges relating to the 2005-2006 school year, and because TUSD's evidence had not been produced in accordance with the Prehearing Conference Order issued by the Office of Administrative Hearings. Student's latter objection was sustained and the evidence was not admitted. Because the evidence regarding the 2005-2006 school year is incomplete, it is not possible to make a finding as to whether Student's

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<sup>6</sup> The cause of the biological father's death is only reported here because the event was significant to Dr. Eaton's opinion that Student needs residential placement.

<sup>7</sup> The evidence regarding the events in the 2005-2006 school year is considered only to the extent that compensatory education is at issue, and no finding is made as to the appropriateness of placement or services in the 2005-2006 school year.

behavior improved during the 2005-2006 school year. However, the evidence does not support a finding that Student's behavior grew worse during that year. The few incidents introduced by Student into evidence indicate that the incidents of aggression were higher in September (shortly after the new school year started), but decreased in the following months to one incident per month (or even every other month). If those were the only incidents of misbehavior during the 2005-2006 school year, it would support a finding that Student's behavior had improved.

78. Student's expert Dr. Eaton testified that in his opinion Student should be placed in a residential facility. Because Student's father had committed suicide, Dr. Eaton expressed concern that Student might be exhibiting the precursor behavior to bipolar disorder. He said that bipolar disorder is the most likely of any mental illness to be passed down from a parent to a child. Dr. Eaton testified that Student has conduct disorder which might, if proper intervention does not occur, develop into a personality disorder in later years. If Student does develop such a personality disorder, it could lead him to criminal activity and eventual incarceration.

Dr. Eaton testified that Student exhibited characteristics consistent with serious emotional disturbance (SED) in addition to autism. Dr. Eaton's written report of April 13, 2005, had focused almost exclusively on Student's autism and made no finding of SED. Dr. Eaton explained that his testimony was not inconsistent with his report because SED is an eligibility category for special education under the law, not a clinical diagnosis. His clinical diagnosis in his report of conduct disorder was consistent with his testimony at the hearing that Student suffered from SED.

Dr. Eaton testified that Student needs twenty-four hour monitoring and intervention. He saw a delusional quality in Student and was concerned about Student's ability to interpret reality correctly. He felt that a residential placement was the only appropriate placement for Student. He believes Student needs that type of consistency to self-regulate. When asked whether he had concerns about placing Student in such a restrictive environment, he testified that a residential placement would be better for Student than incarceration. He believed there were health and safety concerns if Student remained in a public school setting. He felt that residential placement was appropriate despite the fact that Student had just lost his biological father, because Student had the greatest chance for success in such a placement.

He also testified that, based on Student's history, Student should have been placed in a residential setting during all the years he attended OUSD and TUSD. Dr. Eaton believes that Student, because of his autism and behavioral problems, is not learning to his full potential. Instructors in a residential placement would be able to teach Student at any time of the day and could take advantage of times in the evenings and weekends when Student might be ready to learn.

In his opinion, the two hours of ABA therapy per week given to Student during TUSD's 2004-2005 school year were inadequate. Instead, Student should have 25 to 35 hours per week of intensive one-to-one ABA therapy in addition to his regular schooling.

He also testified that in his opinion, OUSD should have conducted an FAA immediately after Student transferred from LAUSD to OUSD, and that both districts should have provided counseling to Student.

79. The districts' experts disagreed with his opinions. Tracey Zaldivar, the school psychologist for OUSD, testified that residential placement would not have been appropriate for Student while he was attending OUSD. It is not beneficial to institutionalize children with autism. It goes against the hope of eventually having them function in normal society. It would not have benefited Student to place him in the "sterile, unnatural setting" of a residential facility.

Zaldivar also disputed Eaton's opinion that Student needed 25 to 30 hours of ABA therapy in addition to his regular school day. She testified that ABA therapy is most effective with children under five years old and it is usually used in lieu of a regular school program, not in addition to such a program.

80. Lori Stillings, Student's BICM at TUSD, testified that a residential placement is not necessary for Student to benefit from his education. She pointed out that during the current school year Student has been moved to a less restrictive placement. (Although he is still in an SDC, it is no longer an autism specific SDC.) She believes that the two hours per week of ABA that Student received during his 2004-2005 school year at TUSD was appropriate.

81. Stillings testified that the ABA services provided by TUSD were designed to implement behavior strategies in the classroom. This was a different focus of ABA from the intensive hours of ABA given to preschool children. With preschool children, the purpose of 25 to 30 hours of intensive, one-to-one ABA is to provide the foundational skills necessary for those children to be successful in a school environment.

## LEGAL CONCLUSIONS

### *Applicable Law*

1. Pursuant to the Individuals with Disabilities in Education Act (IDEA) and, effective July 1, 2005, the Individuals with Disabilities in Education Improvement Act (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. § 1401(8)(IDEA 1997); 20 U.S.C. § 1402(9)(IDEIA 2004).) "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(25)(IDEA 1997); 20 U.S.C. § 1402(29) (IDEIA 2004).)

2. 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 from specially designed 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. § 1401(22) (IDEA 1997); 20 U.S.C. § 1402(26)(IDEIA 2004).) In California, related services may be referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

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

4. To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of the district’s proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district’s program was designed to address a student’s unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the district provided a FAPE, even if the student’s parents preferred another program and even if the parents’ preferred program would have resulted in greater educational benefit. 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.) Actions of school districts “cannot ... be judged exclusively in hindsight,” but instead on “what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, quoting from *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

5. Procedural violations by a school district only give rise a denial of FAPE if the procedural violations: 1) impeded the child’s right to a free appropriate public education; 2) significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents’ child; or 3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii).)

6. Title 20, United States Code, section 1414, subdivision (d)(3)(B)(i) states that an IEP team shall “in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior....” California law expands on this concept, with very particular requirements regarding FAAs and BIPs:

A functional analysis assessment shall occur after the individualized education program team finds that instructional/behavioral approaches specified in the student’s IEP have been ineffective. Nothing in this section shall preclude a parent or legal guardian from requesting a functional analysis assessment pursuant to the provisions of Education Code sections 56320 et seq.

(Cal. Code Regs., tit. 5, § 3052, subd. (b).)

7. California Education Code section 56325, subdivision (a)(1), requires a school district, within 30 days after the transfer of the Student from another district, to either “adopt the previously approved individualized education program or...develop, adopt, and implement a new individualized education program that is consistent with federal and state law.”

8. California Education Code section 56341 provides that an IEP team must consist of one or both of the student’s parents, not less than one regular education teacher of the student, if the student is or may be participating in the regular education program, not less than one special education teacher of the student, a representative of the local education agency, an individual who can interpret the instructional implications of the assessment results, the student, whenever appropriate, and “at the discretion of the parent, guardian, or the local education agency, other individuals who have knowledge or special expertise regarding the pupil, including related services personnel, as appropriate.” (Ed. Code, § 56341, subd. (b).

9. The burden of proof in this proceeding is on the party seeking relief, in this case the Student. (*Schaffer v. Weast* (2005) \_\_\_\_ U.S. \_\_\_\_ [126 S. Ct. 528].)

### *Determination of Issues*

#### *Did OUSD and TUSD Provide an Appropriate Placement for Student?*

10. The critical issue of this case is whether Student’s placement in an SDC class with partial mainstreaming was appropriate while Student attended OUSD and TUSD. The districts’ experts testified that an SDC (with some mainstreaming) was the appropriate placement for Student at all times during this case. Student’s expert Dr. Eaton disagreed and testified that a residential placement was the only appropriate placement for the Student for all three school years in question.

11. Despite Dr. Eaton's impressive credentials, there are several factors that make his testimony less persuasive than that of the district personnel.

First, Dr. Eaton based his opinion on all the behaviors Student had exhibited over the years, including some which had ceased or almost ceased by the time of his assessment. For example, in his report he stated that Student "lacks consistent bladder control." However, unlike in earlier years, Student had only one toileting accident during the 2004-2005 school year, and that appeared to be connected to his sprained ankle the day before.<sup>8</sup> Dr. Eaton testified about Student spreading food on his body and how that was inconsistent with autism. However, that behavior had vanished by the time of Eaton's assessment.

12. In addition, during his testimony he dismissed indications that Student might be learning. For example, when cross-examined about whether the subtest scores he found on the WIAT-II indicated that Student was learning to read, he stated that he could not tell if the scores were because of what Student was learning at school or whether they were based on learning at home.

13. It is also troubling that Dr. Eaton's opinions changed between his written report and his testimony. His written report clearly focused on Student's autism, but during the hearing his testimony focused instead on Student's conduct disorder and his concerns that Student might at some future date develop a personality disorder. Dr. Eaton attempted to overcome this discrepancy by saying that his report found a conduct disorder, but whether or not he made reference to it in the report, conduct disorder and the "precursor" behavior to personality disorder were not the focus of his report.

Likewise, the reasons that Dr. Eaton gave in his report for the need for residential placement were entirely different than those he gave at hearing. While his report concentrated on the inconsistent environment and acrimony between Student's two biological parents' households, that concern was no longer an issue at the time of the hearing. After the tragic death of Student's biological father, the inconsistency had ceased. Student was in the custody of only his mother and step-father. No longer would there be concerns about physical abuse, inconsistent medication and similar matters.

At hearing, when faced with the new circumstances, Dr. Eaton's testimony focused instead on SED and the possibility that Student might develop a personality disorder at some unspecified point in the future.

14. Actions of school districts "cannot ... be judged exclusively in hindsight," but instead on "what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, quoting from *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) If not even Dr. Eaton felt it was significant to concentrate on this

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<sup>8</sup> There was another incident a few months earlier in which he told the teacher that he had a toileting accident, but it did not appear to the teacher that an accident had actually occurred.

“precursor to personality disorder” in his report in April 2005, it is not reasonable that the districts should have known about these problems during the three school years in question.

Instead, the two districts acted on the information they had, including extensive assessments of Student, behavior rating scales filled out by Student’s own mother and biological father, and opinions of psychologists and behavior specialists, which identified the Student’s unique needs. None of these assessments or tests demonstrated that Student suffered from SED and none indicated that there was a need for residential placement.

15. Dr. Eaton’s testimony also raised a question about whether he fully understands the concept of “least restrictive environment.” He testified that residential placement is less restrictive than incarceration. However, incarceration is not an educational placement at all, but instead is a punishment for those who violate the law. Dr. Eaton also testified that he was unfamiliar with the term “typically developing peers.” While Dr. Eaton would not be expected to know legal terminology, his lack of knowledge of these basic special education concepts raises concerns that his opinion about the appropriate placement for Student was made solely from a clinical perspective of what would be best for Student, rather than an opinion based on the placement necessary to provide Student with a free appropriate public education in the least restrictive environment as required by the law. A district is not required to maximize a student’s potential in order to provide a free appropriate public education. (*Board of Education v. Rowley, supra*, 458 U.S. 176, 198-201.)

16. Least Restrictive Environment is not just a matter for school preference, it is a statutory mandate. (20 U.S.C. § 1412(a)(5); Ed. Code, § 56523, subd. (b)(2)(D).) While parents can ignore that mandate by unilaterally choosing to place their children in private schools at their own expense, school districts do not have that authority. OUSD acted appropriately to meet Student’s unique needs by first adopting the IEP from LAUSD and then calling in a behavior specialist to assist the teacher with classroom interventions. Those interventions were successful and Student ended the 2002-2003 school year on a high note behaviorally. He had met or partially met many of the benchmarks in his IEP and was making both academic and behavioral progress.

17. Student failed to meet his burden of showing that he was denied a FAPE based on inappropriate placement during the 2002-2003 school year.

18. There is no question that Student’s behavioral problems grew worse during the 2003-2004 school year. OUSD acted properly in response to that. When it became apparent that the current behavioral strategies were not working, OUSD conducted a full assessment of Student, including an FAA. OUSD also referred Student’s mother to OCMH who referred her to Regional Center. The assessment plan was signed on September 30, 2003, and the proposed BIP was presented at the December 11, triennial review IEP meeting. Student’s mother did not attend that IEP meeting. Instead Student’s biological father attended, but did not agree to the BIP because he wanted Student’s mother to have a chance for input.

There is no dispute that something happened to cause Student's behavior to take a serious turn for the worse after he returned from winter vacation. This may have been due to the medication he was taking. The evidence showed that Student's physicians were trying different medications around that time, and that at least one of them made Student far more aggressive. Whatever the reason, OUSD called for an IEP at the end of January, after he was twice suspended for violent acts. Another IEP meeting was held on February 19, 2004, at which the BIP was signed. Shortly after that Student left the district.

The evidence does not support a finding that OUSD's placement during 2003-2004 was inappropriate. When Student's behavior declined, OUSD properly acted to meet his unique needs with an FAA and a BIP. Without attempting interventions of that type, a more restrictive placement would not have been appropriate.

19. Student also failed to meet his burden of proving that TUSD failed to provide him with a FAPE during the 2003-2004 school year by failing to provide appropriate placement. TUSD could not have changed Student's placement during the 2003-2004 school year (absent an emergency) because Student's mother and her attorney were not available for an IEP meeting until June and signed the assessment plan on that date. Student's mother did not agree to portions of the IEP until July, after the regular school year ended. Without a full assessment by TUSD, a change of placement would have been inappropriate.

20. The following year, Student's behaviors escalated at the beginning of the year. After conducting assessments and gathering data through the classroom behavior logs and input from behavior specialists, the school psychologist Dr. Stillings determined that it would be appropriate to conduct another FAA to see if a new BIP was warranted. After the authorization for that FAA was signed and it was conducted, the IEP team agreed to a revised BIP to address the new behaviors that Student exhibited.

21. The evidence at the hearing showed that the BIP was successful. The targeted behaviors were greatly reduced in the months that followed. Student's teasing behavior had virtually ceased and his aggression was curbed. Under those circumstances, TUSD's actions in keeping him in his current placement were appropriate.

22. Student failed to meet his burden of proving that OUSD or TUSD denied Student a FAPE by failing to provide an appropriate placement to meet his unique needs during any of the school years in issue.

#### *OUSD 2002-2003 School Year (First Grade)*

##### *Failing to Conduct an FAA*

23. Student failed to meet his burden of proving that OUSD denied him a FAPE by failing to conduct an FAA during the 2002-2003 school year.

24. When Student began exhibiting problem behaviors at OUSD, rather than immediately moving to a full FAA and BIP, OUSD tried the more moderate behavior support plan approach set forth in federal law. (20 U.S.C. § 1414(d)(3)(B)(i).) OUSD had an autism specialist observe Student and make recommendations to the teacher. Those recommendations were successful and Student ended the year with progress in both academic areas and behavioral areas. There was no need for OUSD to conduct an FAA during that school year to meet Student's unique needs.

*Failing to have an Occupational Therapist, Speech Pathologist and Adaptive Physical Education Teacher Present at the August 30, 2002 IEP Team Meeting*

25. Student failed to meet his burden of showing that OUSD failed to provide him with a FAPE because OUSD failed to have an occupational therapist, speech pathologist, and adaptive physical education teacher present at the August 30, 2002 meeting.<sup>9</sup>

26. As set forth in Factual Findings 5-7, the August 30, 2002 meeting was an interim meeting for the purposes of providing services to Student in accordance with the IEP from LAUSD. Nothing in the law requires a district to hold a full IEP meeting for the 30-day interim placement. Neither party has cited to authority requiring a full IEP meeting under these circumstances. (See 20 U.S.C. § 1414(d)(2)(c)(i)(I); Ed. Code, §§ 56043, subd. (m)(1); 56325, subd. (a)(1).)

The occupational therapist, speech pathologist and adaptive physical education teacher are not required members of the IEP team. Instead, they come under the category of optional team members: "at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services as appropriate...." (20 U.S.C. § 1414(d)(1)(B)(vi).)

27. Given that this was simply an IEP to provide services comparable to a previous placement, there was no procedural violation based on the absence of these optional team members. However, even if there was a procedural violation, that procedural violation did not cause a denial of FAPE.

28. Any procedural violation caused by the absence of the three district staff members did not impede Student's education or cause a deprivation of educational benefits. The parties stipulated that occupational therapy, adaptive physical education and speech language services were appropriate. Likewise, the evidence does not establish that their absence impeded Student's parents' opportunity to participate in the decision making process. The only "decision" made was how to provide services comparable to the previous IEP which was already in place for Student.

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<sup>9</sup> In his closing brief, Student contends that no regular education teacher was at the August 30, 2002 meeting. However, that issue was not raised in Student's Proposed Issues and Resolutions submitted at the time of the Prehearing Conference. Therefore, no finding is made on that issue.

*Failing to Have a General Education Teacher Present at the October 3, 2002 IEP Team Meeting*

29. There is no dispute that OUSD did not have a regular education teacher present at the October 3, 2002 IEP and that Student was mainstreamed for part of his educational time in a regular education class. The law requires an IEP team to include a regular education teacher. (20 U.S.C. § 1414(d)(1)(B)(ii).) This constitutes a procedural violation. Therefore, the only issue is whether that procedural violation denied Student a FAPE for the 2002-2003 school year.

30. If this were a case in which Student was complaining that the district failed to include more mainstreaming of Student or that the district had not provided a free appropriate education in the least restrictive environment, the need for a regular education teacher at the October 3, 2002 IEP would be clear. However, this case is just the opposite. Here the parents insist that Student should have been placed in a much more restrictive setting – a residential program with no involvement in the school’s regular education class.<sup>10</sup>

31. Under these circumstances, the absence of the regular education teacher from the IEP meeting did not impede Student’s right to a free appropriate public education or cause him any educational deficits. Likewise, it did not impede the opportunity of Student’s mother to participate in the IEP process. Student’s mother did not even attend the October 3, 2002 IEP because she knew Student’s biological father would be present at the meeting. Even if a regular education teacher had been present at the meeting, it would not have had any effect on the mother’s right to participate in the decision making process. Student submitted no evidence whatsoever that his biological father was denied a right to participate.

32. The evidence does not support a finding that OUSD’s procedural violation in failing to have a regular education teacher at the October 3, 2002 IEP denied Student a FAPE for the 2002-2003 school year. Student failed to meet his burden on this issue.

*Failing to Have an Occupational Therapist Present at the October 3, 2006 IEP Team Meeting*

33. Student failed to meet his burden of showing that OUSD failed to provide him a FAPE during the 2002-2003 school year because OUSD failed to have an occupational therapist present at the October 3, 2002 IEP meeting.

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<sup>10</sup> Student’s expert Dr. Eaton testified at hearing that the residential school does attempt to mainstream some children in some circumstances, but he had no first hand knowledge of whether that would be done with Student. No school representative from Student’s preferred residential placement testified at the hearing. The evidence does not support a finding that Student would receive any education in a general education classroom if he was placed in the residential program preferred by Student.

An occupational therapist is not one of the personnel required to be at an IEP meeting by law. The evidence shows that an occupational therapy assessment was done and an addendum IEP meeting held on Friday, November 1, 2002, to address the occupational therapy assessment and discuss the occupational therapy services that OUSD would provide to Student. Under those circumstances, it was not a procedural violation to have the October 3, 2002 IEP without an occupational therapist present.

However, even if there had been a procedural violation, Student has not met his burden of showing that the procedural violation denied him a FAPE. Student was already receiving occupational therapy services under the Interim IEP. He was not denied any educational benefit from the delay. There is also no evidence to show that Student's mother or biological father were denied an opportunity to participate in the decision making process. Student's mother did not even attend the October 3, 2002 IEP meeting. Student submitted no evidence whatsoever that his biological father was denied an opportunity to participate.

#### *Failing to Perform a Mental Health Assessment*

34. Student failed to meet his burden of showing that OUSD failed to provide him with a FAPE during the 2002-2003 school year because the district failed to perform a mental health assessment of him.

The evidence shows that the district personnel followed their customary practice of making a referral to OCMH for a mental health evaluation when they believed that counseling might be appropriate. Although the evidence does not establish whether Student's mother withdrew her request for that referral, the evidence does establish that the OUSD personnel believed in good faith that she had done so.

During the 2002-2003 school year, Student's behavioral problems had not manifested to the extent that they did the following year. The district personnel testified that they recommended counseling because of Student's home situation (the ongoing difficulties between Student's divorced parents), not because they felt that counseling was essential for him to benefit from his education. Instead, they concentrated on his behaviors at school through a behavioral support plan and assessments. The district's actions in this regard were reasonable given Student's behaviors at the time.

#### *Failing to Offer an Appropriate Level of Behavior Designated Instruction and Services*

35. Student failed to meet his burden of showing that OUSD failed to provide him with a FAPE during the 2002-2003 school year because the district failed to provide "an appropriate level of behavior designated instruction and services...."

36. The evidence shows that no behavior designated instruction and services were necessary for Student in the 2002-2003 school year to meet his unique educational needs. Although Dr. Eaton testified that 25 to 35 hours per week of ABA services were necessary, his testimony in this regard is not persuasive. As the districts' experts testified, intensive,

one-to-one ABA hours are usually given to preschool children to prepare them for school. Student in the instant case was already in school and was beyond the age in which numerous hours of ABA would provide real benefit. Student made educational progress during the 2002-2003 school year (as well as behavioral progress) without any hours of ABA. He ended his first grade year with a report card consisting of satisfactory grades in both the academic areas and behavioral areas. There was no need for any “behavior designated instruction and services” during that school year in order for Student to benefit from his special education.

*Failing to Offer an Appropriate Level of Counseling Services*

37. Student failed to meet his burden of proving that OUSD denied him a FAPE during the 2002-2003 school year by failing to provide counseling services. As with the ABA services, the evidence does not support a finding that Student needed counseling in order to benefit from his special education. Student made both academic and behavioral progress during that school year.

*OUSD 2003-2004 School Year (Second Grade)*

*Failing to Conduct an FAA until December 2003*

38. Student failed to meet his burden of proving that OUSD denied him a FAPE by failing to conduct an FAA until December 2003. The evidence shows that OUSD did conduct an FAA prior to this time. The assessment plan which permitted OUSD staff to conduct the FAA was signed on September 30, 2003. The FAA was conducted during the time after that and presented to the IEP team at the December 11, 2003 meeting. The evidence shows that extensive testing was done and assessments conducted of Student during that time period. It was appropriate for OUSD staff to wait until the December IEP meeting to discuss the results of the FAA and proposed BIP. The evidence shows that Student continued to make educational progress in academic areas up until the end of the time he was at OUSD. Any failure of the OUSD staff to complete the FAA sooner did not result in any lost educational opportunity for Student.

*Failing to Have a BICM Present at the December 11, 2003 IEP Meeting*

39. Student failed to meet his burden of proving that OUSD denied Student a FAPE because OUSD failed to have a BICM at the December 11, 2003 IEP meeting.

As set forth in Factual Findings 28-30, the evidence shows that Tracey Zaldivar attended the meeting as the BICM. It is irrelevant whether she was listed on the IEP as the BICM – she prepared the FAA and discussed that FAA during the meeting. It was clear to everyone who attended that she was the BICM.

*Failing to Hold an IEP to Develop and Implement a BIP from December 11, 2003, until February 19, 2004*

40. Student failed to meet his burden of proving that OUSD denied him a FAPE because OUSD failed to hold an IEP meeting with a BICM present to develop a BIP between December 11, 2003, and February 19, 2004.

As set forth in Factual Findings 28-39, OUSD conducted an FAA and presented a BIP at the December 11, 2003 IEP, but Student's father refused to sign it at that time until he could discuss it with Student's mother. Student's mother was not present at the meeting. Approximately a week or so after the meeting, Student went on winter break. When Student returned from winter break and his behavior grew worse, OUSD held an IEP in January and one on February 19, at which time Student's biological father signed the BIP. Student presented no evidence that he lost any educational opportunity because of the short gap caused by the biological father's refusal to sign the BIP in December.

*Failing to Have a BICM Present at the January 20, 2004 IEP Team Meeting*

41. Student failed to meet his burden of proving that OUSD denied Student a FAPE because OUSD failed to have a BICM present at the January 29, 2004 IEP meeting.

Tracey Zaldivar, the school psychologist, attended that meeting. She was Student's BICM and the one who conducted the FAA. It does not matter whether she was listed in the IEP as the BICM or told the parents she was the BICM; the evidence shows that she was in fact the BICM and attended the meeting in that capacity.

*Failing to Perform a Mental Health Assessment and Offer Appropriate Counseling Services*

42. Student failed to meet his burden of proving that OUSD failed to provide Student with a FAPE because the district failed to perform a mental health assessment of Student and failed to provide counseling.

A district is required to assess a child in all areas of suspected disability. (Ed. Code, § 56320, subd. (f).) In the instant case, OUSD conducted extensive assessments of Student, including a social/emotional assessment to see if Student should be classified under the eligibility category of SED. At no time did the results indicate that Student suffered from SED or any disability for which a mental health assessment was required.

43. Student cites to Education Code section 56331, which sets forth procedures a school district must go through prior to a referral to County Mental Health. That code section is not applicable. It was added in late 2004, after Student left OUSD. However, even without that code section, it was still the responsibility of the district to provide all assessments and services necessary for Student's education. If the district relied upon another agency to perform that task and that agency failed to perform, the district was left

with the ultimate responsibility. If a mental health assessment was necessary, the district could not avoid providing it just because OCMH failed to do so.

44. There is no dispute that OUSD sent referrals for Student to OCMH. The evidence is not clear to what extent Student's parents cooperated with those referrals. There is hearsay evidence that Student's parents did not want counseling for Student, but there is no direct evidence to support a finding. The only direct evidence is the testimony of Student's mother that when she contacted OCMH, the staff at OCMH referred her to the Regional Center. There is no dispute that Student's mother contacted the Regional Center in November 2003, and the Regional Center conducted a Pediatric Neurology Evaluation on February 3, 2004. The notes to the February 19, 2004 IEP meeting state that OUSD "gave another referral" to OCMH and that Student's mother (who was not at the IEP meeting) "is aware of the referral and understands/agrees that there will be follow through." Student's mother admitted at hearing that she did not follow through with OCMH after that date. By March 2004, Student was out of the district and within the jurisdiction of TUSD.

Given the facts of this case, there was no reason for OUSD to have conducted a mental health assessment in the 2003-2004 school year. The school had just conducted extensive assessments (including a social/emotional assessment) and determined that Student's disability was autism. Although Student exhibited some of the traits of SED, those traits could also be explained by his autism.

45. Student points out in his closing argument that OUSD's referral letters to OCMH stated Student's behaviors went beyond autism. However, the uncontradicted testimony at hearing established that OUSD routinely made such statements in referrals to OCMH, because OCMH would not provide services to students based on autism. While the practice is certainly not commendable, it does not prove that OUSD believed Student needed a mental health assessment in order to properly determine his disability.

46. Likewise, there is no showing that Student needed counseling in order to benefit from his special education program. Student was under a pediatrician's care for medication issues and he had the benefit of Regional Center services. It is true that in the triennial assessment, Tracey Zaldivar noted that Student's mother's responses to the BASC "were very significant and indicate that professional psychotherapy continues to be strongly indicated and warranted." However, that does not mean Student needed those services in order to benefit from his special education. In her testimony, Zaldivar explained that counseling is generally not that effective for children with autism, and her recommendation for counseling services was based on her thought that family counseling might assist Student's home situation. The evidence showed that Student did benefit from his education at OUSD. He made progress during his second grade year on many of his IEP goals and objectives. He also continued to make progress later at TUSD.

*Failing to Gather Documentation of Targeted Behaviors for FAA Analysis, to Document Program Implementation of FAA, and to hold FAA Program Effectiveness Reviews*

47. Student has not met his burden of showing that OUSD failed to gather documentation of targeted behaviors for FAA analysis, failed to document program implementation of the FAA or failed to hold FAA program effectiveness reviews during the 2003-2004 school year.

The evidence shows that Student went into intersession shortly after the BIP was signed. During that time, the dispute arose between OUSD and Student's mother about Student's residence. When school recommenced, Student had started at TUSD.

To say Student was denied FAPE because of any failure by OUSD to gather data, document implementation of the FAA and hold FAA program effectiveness reviews during those two or three weeks, is putting form over substance. No FAA program review or documentation of implementation would have been warranted during that short time. Even if the evidence did show that OUSD failed to gather documentation of behaviors during that short time, it could not possibly have impeded Student's learning or prevented Student's parents from meaningfully participating in the decision making process.

*TUSD 2003-2004 School Year (Second Grade)*

*Failing to Have a BICM Present at the June 10, 2004 IEP Team Meeting*

48. The evidence does not support a finding that TUSD conducted an inappropriate IEP on June 10, 2004, because TUSD failed to have a BICM present at the IEP meeting.

As stated above in Factual Finding 46, Lori Stillings attended the IEP meeting as the BICM. Student's closing brief argues that Stillings could not "wear dual hats" and attend the meeting in two different capacities. Student cites to no legal authority for that proposition. California regulations state that a BICM can be "any existing staff member trained in behavior analysis...." (Cal. Code Regs., tit. 5, § 3001, subd. (e).)

*Failing to Perform Mental Health Assessment and Provide Appropriate Level of Counseling Services*

49. The evidence does not support a finding that TUSD denied Student a FAPE by failing to perform a mental health assessment of Student during the 2003-2004 school year.

To the contrary, the evidence shows that TUSD had Student's mother sign an assessment plan which included a social, emotional and behavioral assessment on the date of the June 10 IEP meeting. At that meeting, TUSD also recommended a referral to OCMH. Although Student's mother verbally agreed to that during the IEP meeting, she did not give

written consent to the IEP at that time. Her attorney's letter, which was sent to TUSD almost a month after the IEP meeting and after the end of the regular school year, consented to only eight specific things from the IEP. The referral to OCMH was not among those eight things. Any failure by TUSD to refer Student to OCMH during the 2003-2004 school year was the fault of Student, not TUSD.

50. Likewise, TUSD did not deny Student a FAPE because it waited until the new school year to conduct the observations and assessments called for in the assessment plan signed on June 10, 2004. That plan was signed only days before the end of the school year. It was not TUSD's fault that the IEP meeting was held so late in the school year. TUSD made several attempts to schedule the meeting and accommodated the wishes of Student's family that the IEP meeting be held after 3:00 p.m. June 10, 2004, was the first date that Student's mother, her attorney and the district personnel could attend. The time limit for conducting an IEP after assessments does not count the time between regular school sessions. (Ed. Code, § 56344, subd. (a).) Student has not met his burden of showing that there was any denial of FAPE caused by a failure to conduct a mental health assessment during the 2003-2004 school year.

51. For the same reason, Student has not met his burden of showing that TUSD failed to provide Student a FAPE because TUSD "failed to provide an appropriate level of counseling services during the 2003/2004 school year, after March of 2004...."

When Student first transferred from OUSD to TUSD, the law required TUSD to continue the services that Student had been receiving. (Ed. Code, § 56325, subd. (a)(1).) TUSD attempted to hold the 30-day review prior to June 10, 2004, but Student's mother and her attorney had scheduling conflicts. Student's mother did not consent to any services under the June 10 proposed IEP until July 8, 2004. TUSD could not have begun counseling services during the 2003-2004 school year under those circumstances, even if an assessment had been completed or a referral to OCMH had been made.

*Failing to Gather Documentation of Targeted Behaviors for FAA Analysis; to Document Program Implementation of FAA, and to Hold FAA Program Effectiveness Reviews*

52. Student has not met his burden of showing that TUSD failed to gather documentation of targeted behaviors for FAA analysis, failed to document program implementation of the FAA or failed to hold FAA program effectiveness reviews during the 2003-2004 school year.

Student misunderstands the language of California Code of Regulations, Title 16, section 3052, subdivision (f). That section does not require a district to "gather continual documentation of targeted behaviors," but instead states that the district's measures of the targeted behaviors are to be "taken at scheduled intervals determined by the IEP team." The scheduled interval discussed at the June 10 IEP meeting was a three-month review.

53. Even if data collection was required to be “continual” as Student claims, TUSD had continual classroom logs documenting behaviors that occurred throughout the school day (including recess and on the bus). Those logs also documented implementation of the BIP, by describing the reactions of the school staff to Student’s conduct.

Student failed to meet his burden to show any procedural violations by TUSD during the 2003-2004 school year. However, even if Student could meet his burden to show procedural violations by TUSD during the 2003-2004 school year, the evidence does not support a finding that those procedural violations led to a denial of FAPE. Student’s mother fully participated in the IEP process with her attorney. She was well aware of Student’s behaviors while at TUSD – she received a daily log of those behaviors. Any failure by TUSD to comply with documentation of behaviors, documentation of implementation of OUSD’s BIP or failure to hold an effectiveness review during the approximately two months of the 2003-2004 school year that Student attended TUSD did not in any way impede Student’s FAPE or deny him educational benefit. Student received educational benefit during his time at TUSD. Whether or not TUSD complied with every technical provision regarding documentation of the BIP, it is clear that the BIP was being followed and was discussed at the IEP meeting.

*TUSD 2004-2005 School Year (Third Grade)*

*Failing to Have a BICM Present at the November 8, 2004, December 3, 2004, and May 9, 2005 IEP Team Meetings*

54. Student failed to meet his burden of showing that TUSD failed to have a BICM attend the November 8, 2004, December 3, 2004, and the May 9, 2005 IEP meetings. As discussed in Factual Findings 61, 63 and 69 above, the evidence establishes that Lori Stillings attended each of those meetings in the capacity of Student’s BICM. She signed the FAA and BIP as the BICM.

*Failing to Perform a Mental Health Assessment*

55. Student failed to meet his burden of showing that TUSD failed to provide Student with a FAPE because TUSD failed to perform a mental health assessment during the 2004-2005 school year.

Given the information that the district possessed at that time, the district was reasonable in concluding that there was no need for such an assessment. None of the assessments performed by TUSD staff during that school year concluded that Student had eligibility under the category of SED. Lori Stillings’ psycho-educational evaluation determined that Student’s behavioral problems were the result of his autism, not SED. Her conclusions were based, in part, on rating scales filled out by Student’s SDC teacher, mother and biological father, as well as Stillings’ own observations. This assessment was supported by the ongoing observations of the district’s autism specialist Rosa Patterson.

56. The opinions of Student's experts do not change this result. Dr. Del Mundo's letter to TUSD in November 2004 talks about "ADHD and Developmental Disorder" and suggests that Student "may benefit from having a counselor at his school site work towards maintaining some rapport with [Student] to provide a base of familiarity if he becomes unusually anxious." However, Dr. Del Mundo's suggestions make no mention of a need for a mental health assessment, nor does the doctor characterize Student as having SED or needing counseling to benefit from his special education.

57. Even Dr. Eaton's written report (which was not provided to the district until almost the end of the school year) focused on Student's autism and the need for a structured environment to overcome the turmoil in Student's home situation. Dr. Eaton testified at hearing that he found Student had a conduct disorder that might be a precursor to a personality disorder, but that was not the focus of his report. Given the information TUSD had at that time, TUSD properly assessed Student in all areas of suspected disability.

*Failing to offer an appropriate level of counseling services*

58. Student failed to meet his burden of proving that TUSD failed to provide Student a FAPE by failing to offer an appropriate level of counseling services.

Based on all the assessments done during the 2004-2005 school year, TUSD had no reason to conclude at that time that Student came within the eligibility category of SED or needed counseling to benefit from his special education. Instead, the various assessments indicated that his behavior problems were based on his autism as well as his biological father's conduct in failing to be consistent with Student's medications. The evidence showed that Student did benefit from his special education during his third grade year at TUSD, and his behavior improved once the BIP was in place.

*Failing to Gather Documentation of Targeted Behaviors for FAA Analysis; to Document Program Implementation of FAA; and to Hold FAA Program Effectiveness Reviews*

59. Student failed to meet his burden of showing that TUSD failed to gather documentation of targeted behaviors for FAA analysis, document program implementation of FAA and hold FAA program effectiveness reviews. In fact, the evidence at hearing shows just the opposite.

TUSD set program effectiveness reviews at three-month intervals and held the first three-month review as scheduled. Student's teacher kept a continual log of Student's behaviors, wrote a report about the implementation of the BIP for the review meeting, and reported in person at the review meeting. Student's BICM also made a report at that meeting and written documentation of the meeting was properly recorded in the IEP report. Student's biological parents and step-father attended that meeting and participated up until the time that the parents' verbal altercation caused the meeting to be cut short. Student's mother had her counsel in attendance at the meeting.

60. Student maintains that TUSD never gathered data or analyzed the effectiveness of the OUSD BIP that was in place at the time Student started at TUSD. To the contrary, TUSD continued to monitor Student's behavior during the early part of the 2004-2005 school year. As a result of that monitoring, the IEP team determined that Student's behaviors had changed and that a new FAA and BIP should be prepared.

61. Student also maintains that TUSD never conducted any "formalized behavioral study which meets the stringent requirements" of the regulations. However, the FAA conducted by Lori Stillings was based on more than just behavior logs and did meet the requirements of the regulations. Both before and after that FAA, TUSD personnel properly monitored and collected data regarding Student's targeted behaviors.

62. There were no procedural violations by TUSD with respect to these three issues. However, even if there were such procedural violations, the violations did not deprive Student's parents of a full opportunity to participate in the decision making process or affect Student's education in any way. At all times, TUSD acted properly, first by implementing the OUSD BIP and, when it became apparent that Student had different behaviors to be addressed, conducting a new FAA and preparing a new BIP to address those behaviors.

## ORDER

Student's request for relief against the District is denied.

## PREVAILING PARTY

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

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 ninety days of receipt of this Decision in accordance with California Education Code section 56505, subdivision (k).

Dated: June 22, 2005

A handwritten signature in black ink, appearing to read "Susan Ruff", written over a horizontal line.

SUSAN A. RUFF  
Administrative Law Judge  
Special Education Division  
Office of Administrative Hearings