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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

XXXXXX and XXXXXXX
XXXXXX,

Plaintiffs,

No. C 07-2360 PJH

v.

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

SAN MATEO UNION HIGH SCHOOL
DISTRICT,

Defendant.

The parties' cross-motions for summary judgment came on for hearing on April 9, 2008 before this court. Plaintiffs, XXXXXXX and XXXXXXX (collectively "plaintiffs")¹, appeared through their counsel, Susan Foley. Defendant San Mateo Union High School District ("defendant" or "District") appeared through its counsel, Kimberly A. Smith. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS defendant's motion for summary judgment, and DENIES plaintiffs' motion for summary judgment, for the reasons stated at the hearing, and as follows.

BACKGROUND

This case arises under the Individuals with Disabilities Education Act ("IDEA"), which requires school districts to provide qualifying disabled children with a "free appropriate public education" ("FAPE"). See 20 U.S.C. § 1412(1).

A. Background Facts

¹ The court's use herein of "plaintiff" in the singular is purely a stylistic choice, as all arguments are addressed to both plaintiffs and all rulings apply equally to both.

1 Plaintiff XXXXXXXX, who is currently twenty years old, was first made eligible as
2 a student with a Specific Learning Disability and a Speech Language Impairment, on
3 November 26, 1990, during his 3rd grade year. See Administrative Record (“AR”) at 240.
4 He remained eligible for special education under these two categories for the duration of
5 his school career, including the time periods that are relevant for purposes of this lawsuit,
6 namely 2003-2006. During that relevant time period, plaintiff attended Hillsdale High
7 School as a freshman during the 2002-03 school year, and as a sophomore for part of the
8 2003-04 school year. AR at 242, 251.

9 During plaintiff’s 9th grade year at Hillsdale, in fall of 2002, defendant San Mateo
10 Union High School District conducted plaintiff’s triennial review. The triennial review refers
11 to the process of assessing and determining a student’s eligibility and placement needs
12 once every three years. AR 852. As part of the 2002 triennial review, defendant conducted
13 several assessments of plaintiff. These assessments included administration of the Wide
14 Range Achievement Test (WRAT”), a Bruckner diagnostic math test, and the Peabot
15 Individual Achievement Test (“PIAT”). AR at 587-88. On the WRAT, plaintiff demonstrated
16 weakness in math and spelling, and high level decoding skills. Id. at 589. On the
17 Bruckner, plaintiff scored very well in addition and subtraction, but was weak in
18 multiplication and division. AR at 591. Plaintiff performed above grade level on the PIAT.
19 Id.

20 Plaintiff was also observed in the classroom by an educational assistant, in order to
21 assess how plaintiff interacted with others in the classroom environment. The educational
22 assistant reported that plaintiff did not require assistance, was not easily distracted by
23 others, and did not distract others, although he at times appeared lethargic. AR at 594-95.

24 Finally, a District psychologist reviewed plaintiff’s student records and spoke with
25 plaintiff’s teachers. AR at 852-53. Based on this review, she determined that no further
26 psychological testing of plaintiff was needed. Id. She sent plaintiff’s mother, XXXXXXXX
27 XXXXXXXX, a confirming letter. Id. Ms. XXXXXXXX did not request further assessments. Id.

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1 at 855.

2 Following the completion of these triennial assessments, plaintiff's Individualized
3 Education Plan ("IEP") team convened on October 4, 2002 for the triennial review. AR
4 1145-63. Among others, plaintiff and his mother were present at the meeting, as well as
5 Ms. Pam Rianda, plaintiff's special education teacher, and Ms. Lisa Fox, plaintiff's speech
6 and language therapist. AR 1148. The IEP team noted plaintiff's areas of strength and
7 weakness, with plaintiff's written language and math skills included in the latter category.
8 AR 1145. The team also noted that plaintiff was experiencing problems with punctuality
9 and attendance, and was demonstrating some "defiant behaviors" and a "level of anger that
10 contribute[d] to [plaintiff's] not being successful in school." AR 1148, 1223-25. The IEP
11 team recommended that plaintiff continue to be placed in a Special Day Class ("SDC") for 3
12 to 4 periods a day, and in order to address plaintiff's observed speech and language
13 problems, it recommended that plaintiff be given 3 periods per month of direct speech and
14 language therapy. AR 1146-48. The team also recommended that plaintiff participate in
15 Hillsdale's anger management program. *Id.* Ms. XXXXXXXX received notice of the
16 Procedural Safeguards, indicated she understood her rights, and consented to the IEP. AR
17 306; 1148.

18 On November 12, 2002, plaintiff's IEP team convened again, in order to draft a
19 Behavior Support Plan ("BSP"). AR 1243-49. Prior to the meeting, the defendant had
20 requested consent to conduct an environmental assessment, which examines a student's
21 behavior, discipline and school functioning. AR 601-02; 1242. The purpose of the
22 environmental assessment was to determine if plaintiff needed more support or services,
23 and to determine if plaintiff needed a BSP. AR 602-03. It appears that the environmental
24 assessment never took place. Nonetheless, based on plaintiff's general behavior and
25 school performance, the IEP team developed a BSP on November 12. AR 603-05, 1249.
26 The BSP noted that plaintiff was exhibiting "inappropriate classroom behavior" that was
27 impeding plaintiff's learning, and that the behavior was being caused by "anger,"
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1 “frustration,” and a failure of success. AR 1249. To that end, the BSP outlined certain
2 interventions that were to be undertaken by defendant in an effort to modify plaintiff’s
3 behavior. The interventions consisted of specific teaching strategies, positive
4 reinforcement, one-to-one assistance when necessary, a tutorial study period, anger
5 management counseling, and weekly progress reports. AR 604-05; 1170; 1249. The BSP
6 did not, however, address any truancy issues that plaintiff was having, which had been
7 remarked upon earlier by the School Safety Advocate. AR 1240.

8 Plaintiff and his mother participated in the November 2002 IEP meeting, received the
9 Notice of Procedural Safeguards, indicated she understood her rights, and consented to
10 the IEP. AR 308; 1246. Defendant then implemented the BSP. AR 605. While plaintiff
11 continued to receive disciplinary referrals and suspensions after the creation of the BSP,
12 they were less frequent than the disciplinary referrals that plaintiff received prior to the
13 implementation of the BSP. AR 652; 977.

14 Several months later, on April 8, 2003, Ms. XXXXXXX wrote to Marvin Meyers, the
15 District’s Director of Special Education, and requested a change of placement for her son,
16 due to plaintiff’s continuing behavior problems and his inability to benefit in his current
17 placement. AR 248-49; 1252. In response, an IEP team meeting was thereafter held on
18 May 1, 2003. AR 1257-66. As the reports submitted in connection with the May 2003 IEP
19 stated, plaintiff was continuing to exhibit negative behaviors, including tardiness, defiance
20 of authority, and use of profanity, among other things. AR 1265. Plaintiff’s behavior was
21 described as “totally distracting to the class and instruction.” *Id.* Nonetheless, based on
22 the information discussed with plaintiff’s teachers at the IEP team meeting, plaintiff’s
23 mother “rescinded her request for change in placement,” and the May 2003 IEP resulted in
24 no changes to the October 4, 2002 and November 12, 2002 IEPs that were already in
25 place. AR 249; 1258; 1262.

26 Shortly thereafter, on May 13, 2003, plaintiff was arrested for stealing beer from a
27 San Mateo supermarket during school hours. AR 995; 1285. Defendant District was not
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1 notified of plaintiff's arrest, however, or of any subsequent juvenile court proceedings.

2 On November 13, 2003, plaintiff's IEP team once again convened, this time for
3 plaintiff's annual review. AR 1268-81. The IEP team noted that plaintiff's "greatest
4 weakness [was] his truancy." AR 1274. The team further noted that it was difficult to
5 gauge whether plaintiff's current placement was effective, due to excessive absences on
6 his part. AR 695; 974. In the area of speech and language, plaintiff's truancy prevented
7 the IEP team from formally assessing plaintiff. However, the speech and language
8 pathologist, Ms. Fox, was also plaintiff's treating therapist for the past two years, and
9 therefore was able to review records and reflect on her observations of plaintiff during
10 therapy sessions, in order to identify speech and language needs, and draft accurate
11 present levels of performance. AR 695; 974; 1279. Ms. Fox also recommended modifying
12 plaintiff's speech and language goals, and changing to consultation speech services,
13 because of plaintiff's frequent truancy. AR 690-91. Specifically, Ms. Fox was concerned
14 about the effect of pulling plaintiff out of his academic classes for speech, given his truancy
15 and poor grades. By switching to speech and language services on a consultation basis,
16 the idea was to afford plaintiff a chance to improve his attendance. Id.

17 In the area of academics, the November 2003 IEP team – which included plaintiff's
18 general education and special education teachers – developed accurate present levels of
19 performance based on current observations of plaintiff in the classroom. AR 616-22; 969;
20 971. The team noted that plaintiff's strengths included reading comprehension, vocabulary,
21 and creative writing. Weaknesses included attendance, expository writing, and
22 mathematics. AR 743-45. The IEP team recommended placement in SDC for three
23 periods per day. AR 968.

24 The IEP team also found that the November 2002 BSP was no longer appropriate,
25 as plaintiff's primary struggle was now with truancy. Accordingly, the IEP team developed
26 a new BSP at the November 2003 meeting. This revised BSP provided for daily planner
27 checks, one-one-one assistance during tutorial at least twice a week, weekly progress
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1 reports, positive progress reports sent home, and counseling from the District probation
2 officer to discuss the legal ramifications of plaintiff's truancy. AR 748; 750; 975. The
3 November 2003 BSP also required plaintiff's special education teacher to personally call
4 plaintiff on his cell phone when he did not appear in class, or to call Ms. XXXXXXX. AR
5 751. Plaintiff was not referred to the County Mental Health Department. Ms. XXXXXXX
6 participated in the November 2003 IEP team meeting, received the notice of procedural
7 safeguards, and consented to the IEP. AR 315-16.

8 In the first two months following implementation of the BSP, between November
9 2003 and January 2004, plaintiff's grades improved. AR 752. In December 2003 and
10 January through February 2004, however, plaintiff received suspensions for truancy from
11 school, and for disrupting activities and defying school policies. AR 1237-38; 1250.

12 On March 4, 2004, plaintiff's May 2003 arrest was adjudicated by the Alameda
13 County Juvenile Court. The court adjudged plaintiff a ward of the court and ordered plaintiff
14 to serve 60 days in juvenile hall. AR 1000. However, as an alternative to this sentence,
15 the court approved plaintiff's enrollment in a wilderness program called the Rocky Mountain
16 Academy, in Colorado – at his parent's expense. AR 998-99; 1287. Ultimately, Ms.
17 XXXXXXX enrolled plaintiff in the Ascent program in Idaho, a six week wilderness
18 intervention program. AR 281; 380; 2006. Plaintiff began the program at some point
19 between March 18 and March 21, 2004. AR 998; 1002. On March 22, 2004, Ms.
20 XXXXXXX informed plaintiff's special education teacher, Ms. Hahn, that plaintiff was
21 attending the Ascent program. AR 837. She made no request that the District fund the
22 program. AR 325-26.

23 Plaintiff attended Ascent from March 22, 2004 through May 5, 2004. AR 998; 1411.
24 While there, he made progress with certain maladaptive behaviors. AR 384-85. Upon his
25 completion of the program at Ascent, it was recommended by Ascent staff that plaintiff
26 attend a residential CEDU High School in San Bernardino. AR 998; 1301. On May 6,
27 2004, the Juvenile Court adopted this recommendation, and upon the court's order, plaintiff
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1 attended the CEDU High School until its closure in March 2005. AR 997; 1006; 1333.
2 While at CEDU, plaintiff earned a 2.60 GPA. AR 1335. After the CEDU school's closure,
3 plaintiff was sent home while an appropriate school placement could be located. Plaintiff's
4 probation officer noted in her report that no public or private schools met plaintiff's needs in
5 the surrounding area. AR 1296. Court records indicate that, after weighing the options,
6 plaintiff and his parents concluded that the Mt. Bachelor Academy in Oregon was the best
7 placement, and that the court allowed plaintiff to be placed there at the parents' expense.
8 AR 1006; 1296; 1304.

9 Plaintiff enrolled at Mt. Bachelor on May 11, 2005, where he finally graduated with a
10 High School Diploma in June 2006. AR 1401. While at Mt. Bachelor, plaintiff earned As,
11 Bs, and Cs, although he also continued to demonstrate behaviors such as truancy, low
12 grades, refusal to participate in class, and alcohol and tobacco abuse. AR 1110-11; 1113;
13 1115; 1360-67; 1370-71- 1383-89; 1398-99; 1400; 1404.

14 On July 20, 2006, Ms. XXXXXXXX filed a request for due process, seeking
15 reimbursement for plaintiff's private placements.

16 B. The ALJ Decision

17 The due process hearing occurred on December 18-20, 2006. See AR 228; 2106.
18 The Administrative Law Judge ("ALJ"), Suzanne Brown, considered the following issues at
19 the hearing:

20 1. Did the District deny plaintiff a FAPE from July 19, 2003 through the 2005-06
21 school year by failing to: (a) assess plaintiff's behavioral needs; (b) meet plaintiff's unique
22 needs for behavioral and mental health services;

23 2. Did the District deny plaintiff a FAPE from November 12, 2003, through the
24 2005-06 school year by failing to: (a) have a school psychologist attend the November 13,
25 2003 IEP team meeting; (b) assess plaintiff in the areas of behavior, speech and language,
26 and academics; (c) provide adequate present levels of performance in the November 13,
27 2003 IEP in the areas of behavior, speech and language, and academics, which denied
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1 plaintiff educational opportunity and his parent an opportunity to participate in the decision-
2 making process; (d) include adequate goals in the November 13, 2003 IEP in the areas of
3 behavior, speech and language, academics, and mental health, which denied plaintiff
4 educational opportunity and his parent an opportunity to participate in the decision-making
5 process; and (e) meet plaintiff's unique speech and language needs in the areas of
6 dysfluency, and expressive receptive and pragmatic language skills; and

7 3. If the District denied plaintiff a FAPE, is Ms. XXXXXXXX entitled to
8 reimbursement for private school placements from March 2004 to June 2006, and related
9 transportation costs.

10 ALJ Brown issued a decision on February 8, 2007. With respect to the first issue,
11 the ALJ concluded that plaintiff failed to demonstrate that the District denied him a FAPE
12 from July 19, 2003 through the 2005-06 school year. AR 158. Specifically, the ALJ found
13 that the District had not failed to assess plaintiff's behavioral needs, and furthermore did not
14 fail to assess plaintiff's unique behavioral and mental health needs. *Id.* Similarly, on the
15 second issue, the ALJ also found that plaintiff had failed to establish that the District denied
16 him a FAPE from November 12, 2003 through the 2005-06 school year, and made specific
17 findings with respect to each of the sub-issues presented. AR 158-59. Finally, the ALJ
18 found that, with respect to the last issue, plaintiff's mother is not entitled to reimbursement
19 for the private school placements or related transportation costs. AR 159.

20 Plaintiff now seeks reversal of the ALJ's decision, reimbursement for educational
21 expenses, and attorneys' fees and costs. Defendant, by contrast, seeks an order affirming
22 the findings of the ALJ in their entirety.

23 **DISCUSSION**

24 A. Legal Standards

25 1. Summary Judgment

26 Summary judgment shall be granted if "the pleadings, depositions, answers to
27 interrogatories, and admissions on file, together with the affidavits, if any, show that there is
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1 no genuine issue as to any material fact and that the moving party is entitled to judgment
2 as a matter of law.” FRCP 56(c). Material facts are those which may affect the outcome of
3 the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to
4 a material fact is genuine if there is sufficient evidence for a reasonable jury to return a
5 verdict for the nonmoving party. Id. The court must view the facts in the light most
6 favorable to the non-moving party and give it the benefit of all reasonable inferences to be
7 drawn from those facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
8 587 (1986).

9 2. IDEA Claims

10 The IDEA requires school districts to provide disabled children with a “free
11 appropriate public education” (“FAPE”). 20 U.S.C. § 1412(1). The education to which
12 access is provided must be “reasonably calculated to enable the child to receive
13 educational benefits.” Bd. of Educ. of Hendrick Hudson Central Sch. Dist. Westchester
14 County v. Rowley, 458 U.S. 176, 207 (1982). To that end, the IDEA requires school
15 districts to create an “individualized education program” (IEP) for each disabled child. Id. It
16 further authorizes parents challenging their child’s IEP to request an “impartial due process
17 hearing.” See id. at § 1415(f). The party that has requested the hearing bears the burden
18 of proof at the hearing. See Schaffer v. Weast, 126 S.Ct. 528, 537 (2005).

19 A party aggrieved by the findings and decision made in a state administrative due
20 process hearing has the right to bring an original civil action in a state court of competent
21 jurisdiction or in federal district court in order to secure review of the disputed findings and
22 decisions. See 20 U.S.C. § 1415(i)(2). The party challenging the decision bears the
23 burden of persuasion on its claim. See Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396,
24 1399 (9th Cir. 2004). In reviewing the administrative decision, the district court “shall
25 receive the records of the administrative proceedings; shall hear additional evidence at the
26 request of a party; and basing its decision on the preponderance of the evidence, shall
27 grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(B).

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1 Judicial review of state administrative proceedings under the IDEA is less deferential
2 than the review of other agency actions. See Ojai Unified School District v. Jackson, 4
3 F.3d 1467, 1471 (9th Cir. 1993). However, “because Congress intended states to have the
4 primary responsibility for formulating each individual child’s education, [courts] must defer
5 to their ‘specialized knowledge and experience’ by giving ‘due weight’ to the decisions of
6 the states’ administrative bodies.” Amanda J. Ex rel. Annette J. v. Clark County Sch. Dist.,
7 267 F.3d 877, 888 (9th Cir. 2001). This review requires the district court to carefully
8 consider the administrative agency’s findings. See Susan N. v. Wilson Sch. Dist., 70 F.3d
9 751, 758 (3d. Cir. 1995). “The amount of deference accorded the hearing officer’s findings
10 increases where they are thorough and careful.” Capistrano Unified Sch. Dist. v.
11 Wartenberg, 59 F.3d 884, 891 (9th Cir. 1995). After such consideration, “the court is free to
12 accept or reject the findings in part or in whole.” Susan N., 70 F.3d at 758. When the court
13 has before it all the evidence regarding the disputed issues, it may make a final judgment in
14 what “is not a true summary judgment procedure [but] a bench trial based on a stipulated
15 record.” Ojai, 4 F.3d at 1472.

16 B. The Parties’ Cross-Motions for Summary Judgment

17 The parties’ cross-motions raise the following issues for resolution: (1) whether the
18 ALJ properly concluded that the District did not deny plaintiff a FAPE from July 19, 2003
19 through the 2005-06 school year; (2) whether the ALJ properly concluded that the District
20 did not deny plaintiff a FAPE from November 13, 2003, through the 2005-06 school year;
21 and (3) whether the ALJ properly conclude that Ms. XXXXXXXX was not entitled to reim-
22 bursement for private school placements from March 2004 to June 2006.

23 Preliminarily, however, the court notes that in addition to these issues, plaintiffs raise
24 others that defendant has correctly noted are time-barred. For example, plaintiffs argue in
25 their papers that the November 2002 IEP that was drafted constituted denial of a FAPE,²

26 _____
27 ² This claim is distinguishable from plaintiff’s claim that, because the November
28 12, 2002 IEP was not based on an Environmental Assessment, the BSP that was developed
and which was in operation from July 2003 to November 2003, reflected a denial of a FAPE.

1 and that a FAPE was further denied when defendant District failed to include necessary
2 members at the November 12, 2002 and May 1, 2003 IEP meetings. See Pl. Mot. Summ.
3 Judgm. at 22:24-23:10; 25:24-26:19. Neither party disputes, however, that plaintiff's
4 claims, which were administratively filed on July 20, 2006, are subject to a three year
5 statute of limitations. See Cal. Educ. Code § 56505(l), eff. October 7, 2005 to October 8,
6 2006 (amended by Cal. Educ. Code § 56505(l), eff. October 9, 2006). Accordingly, plaintiff
7 cannot assert any claims arising out of conduct occurring prior to July 20, 2003, and his
8 claims relating to defendant's denial of FAPE in connection with the November 12, 2002
9 IEP and IEP meeting, and the May 1, 2003 IEP meeting, are barred.³ Moreover, because
10 the ALJ did not have occasion to pass upon these claims, they are furthermore barred
11 because plaintiff failed to exhaust all administrative remedies in connection with the claims.

12 The court now turns to the substantive issues before it.

13 1. Whether the District denied plaintiff a FAPE from July 19, 2003 through the
14 2005-06 school year

15 Plaintiff contends that the District denied him a FAPE for the above-referenced
16 period when it (a) failed to properly assess his behavioral needs; and (b) failed to meet his
17 behavioral needs. With respect to the former, plaintiff argues that the District failed to
18 conduct an environmental assessment in connection with the November 12, 2002 IEP
19 meeting, leading to an ineffective BSP that failed to meet plaintiff's needs, and furthermore,
20 that the District failed to offer a Behavior Intervention Plan.⁴ See Pl. Mot. Summ. Judgment
21 at 21-23. With respect to the latter, plaintiff argues that the District failed to meet his unique
22 behavioral needs when it failed to refer plaintiff for County Mental Health Services, despite
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25 ³ The ALJ noted July 19, 2006 as the operative date of filing for statute of
26 limitations purposes.

27 ⁴ A Behavior Intervention Plan is usually developed following a Functional Analysis
28 Assessment ("FAA") or Functional Behavioral Assessment ("FBA"). See Cal. Code. Regs. Tit.
5, § 3001 (aa, f).

1 the fact that plaintiff's behavior, grades, and attendance record mandated as much. See id.
2 at 25; see also Pl. Opp. to Summ. Judgm. at 8-10. For the reasons that follow, however,
3 the court finds that plaintiff's arguments are without merit.

4 a. District's failure to assess plaintiff's behavioral needs

5 The issue before the court is whether the District failed to conduct an environmental
6 assessment and a FAA or FBA leading to a Behavior Intervention Plan, and if so, whether
7 such failure constituted a denial of a FAPE. In the underlying administrative decision, the
8 ALJ found that it was unclear whether the District conducted an environmental assessment
9 in November 2002, as witness testimony on the matter was not conclusive. However, the
10 ALJ found that the team members present at the November 2002 IEP did identify plaintiff's
11 behavior problems and adopted a BSP to deal with those problems, which BSP actually
12 resulted in a decrease in frequency of those behavior problems. AR 149. As for whether
13 defendant District was obligated to provide a FAA or FBA, the ALJ found that plaintiff's
14 behavior, as noted in the IEP meeting notes, did not constitute a "serious behavior
15 problem" requiring an FAA, which would have resulted in a Behavior Intervention Plan.
16 While acknowledging that plaintiff's truancy problem did become a behavior problem in fall
17 of 2003, the ALJ concluded that this was dealt with by defendant District in the November
18 2003 IEP and BSP. Id.

19 Plaintiff has not pointed to any evidentiary dispute that demonstrates error on the
20 ALJ's part. First, even assuming that the District failed to undertake an environmental
21 assessment before the November 2002 BSP was developed and implemented, this failure
22 did not constitute a denial of a FAPE. Procedural violations – such as the failure to conduct
23 the environmental assessment – only constitute a denial of a FAPE if the violation caused a
24 loss of educational opportunity to the student or significantly infringed on the parents' right
25 to participate in the IEP process. See, e.g., R.B., ex rel. F.B.v. Napa Valley Unified School
26 Dist., 496 F.3d 932, 938 (9th Cir. 2007). Here, the BSP that resulted from the November
27 IEP was intended to address plaintiff's problems with attendance, punctuality, motivation,
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1 anger, and defiant behaviors. AR 604-05; 1170; 1249. And, as the ALJ found, the BSP
2 actually succeeded in decreasing plaintiff's disruptive behaviors by the beginning of the
3 2003-04 school year. AR 652; 977. Moreover, plaintiff and his mother were present at the
4 November 2002 IEP team meeting at which the BSP was developed. Plaintiff's mother did
5 not object, and even consented to the November 2002 IEP and BSP. AR 306.

6 Accordingly, even if the District failed to conduct an environmental assessment in
7 connection with the November 2002 IEP, this did not rise to the level of a denial of a FAPE.

8 Plaintiff asserts that his behavior – specifically, plaintiff's truant behaviors –
9 nonetheless deteriorated following the November 2002 IEP, such that plaintiff's truancy
10 became the target behavior by the time the November 13, 2003 IEP was prepared and
11 conducted. Yet the District continued in its failure to conduct proper assessments, resulting
12 in an ineffective November 2003 BSP that failed to properly address plaintiff's truancy, and
13 therefore also denied plaintiff a FAPE. While plaintiff contends that his truant behaviors
14 were ignored, the testimony of certain November 2003 IEP team members was that the
15 November 2003 BSP was developed with the express purpose of targeting plaintiff's truant
16 behaviors, and that this focus had shifted from the prior BSP entered in November 2002.
17 AR 748. The November 2003 IEP also expressly noted that plaintiff's "greatest weakness"
18 was truancy, and set forth increased attendance as a goal and objective. AR 966, 969,
19 971. To that end, the revised BSP that was developed at the November 2003 IEP team
20 meeting set forth several proposed adjustments in plaintiff's educational services in order to
21 address the truancy issues. Specifically, the revised BSP required daily planner checks,
22 one on one assistance, referral to a truancy probation officer, and phone calls to plaintiff
23 from plaintiff's teacher and mother when he was not in attendance at school. AR 748-51;
24 975. According to testimony given at the hearing, implementation of this revised BSP did,
25 in fact, help improve plaintiff's attendance after it was implemented. AR 752. Thus, not
26 only was the BSP adopted in November 2003 tailored to meet plaintiff's unique behavioral
27 needs in the area of truancy – the primary target behavior identified at the time – but the
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1 BSP also resulted in some improvement. Accordingly, there is no evidence that a failure to
2 properly assess plaintiff's needs in connection with the November 2003 IEP and
3 subsequent BSP resulted in a loss of educational opportunity for plaintiff, or the denial of a
4 FAPE.

5 Finally, with respect to plaintiff's contention that the District's wrongfully failed to
6 conduct an FAA or FBA and to implement a Behavior Intervention Plan, the ALJ properly
7 concluded that no FAA or FBA – and therefore no Behavior Intervention Plan – was
8 necessary. California law requires that a FAA be undertaken whenever a student develops
9 a "serious behavior problem," which is defined as a student's actions exhibiting self-
10 injurious, or assaultive tendencies, or a student's actions in causing serious property
11 damage or other pervasive and maladaptive tendencies. See Cal Code Regs., tit. 5 §
12 3001. Plaintiff, however, has not pointed to any affirmative evidence in the record that
13 demonstrates, prior to November 2002, either plaintiff's self-injurious or assaultive
14 tendencies, or plaintiff's actions causing serious property damage, or defendant District's
15 knowledge of such. Accordingly, there is no evidence that supports the existence of a
16 "serious behavior problem" that would have warranted a FAA, FBA, or Behavior
17 Intervention Plan.

18 b. District's failure to meet plaintiff's behavioral needs

19 Plaintiff also asserts that the District denied him a FAPE by refusing to refer him for
20 County Mental Health Services. The ALJ found that no referral to Mental Health Services
21 was necessary. AR 149-51. This was based on the finding that the only significant,
22 frequent behavior preventing plaintiff from benefitting from his education – and possibly
23 triggering a mental health referral – was truancy. AR 149. Yet the ALJ found that the
24 District attempted to address the truancy behavior through the November 2003 revised
25 BSP, which in part referred plaintiff to a truancy officer. AR 150. This, combined with the
26 testimony of plaintiff's teachers stating that they did not think plaintiff exhibited a need for
27 mental health services, led the ALJ to conclude that the District's failure to refer plaintiff did
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1 not constitute a denial of FAPE.⁵ AR 151.

2 In general, the ALJ correctly noted that a local educational agency (“LEA”) such as
3 defendant District may refer a student for community mental health services when the
4 student has emotional or behavioral characteristics that: (1) are observed by qualified
5 educational staff in educational and other settings, as appropriate; (2) impede the pupil
6 from benefitting from educational services; (3) are significant, as indicated by their rate of
7 occurrence and intensity; (4) are associated with a condition that cannot be described
8 solely as a social maladjustment as demonstrated by deliberate noncompliance with
9 accepted social rules, a demonstrated ability to control unacceptable behavior and the
10 absence of a treatable mental disorder; and (5) are associated with a condition that cannot
11 be described solely as a temporary adjustment problem that can be resolved with less than
12 three months of school counseling. See AR 157; see also Cal. Gov’t Code § 7576 (b)(3).
13 The LEA must also first have provided appropriate services, however, such as counseling
14 or behavioral intervention, and the IEP team must have determined that the services do not
15 meet the student’s individual needs. See id. at § 7576 (b)(5).

16 Here, plaintiff does not actually identify the emotional or behavioral characteristic
17 that he contends warranted a referral to mental health service. Plaintiff states only that the
18 District should have made such a referral “based on [plaintiff’s] behavior and the District’s
19 own failed BSPs of November 2002 and November 2003,” and that plaintiff “failed his
20 classes, became a habitual truant and had numerous referrals for discipline.” See Pl. Opp.
21 to Summ. Judgm. at 9. Even assuming, however, that truancy, failed classes, and
22 discipline referrals constituted qualifying emotional and/or behavioral characteristics as
23 outlined above, it has not been demonstrated that the District attempted to provide services
24 that were unable to meet plaintiff’s individual needs. Indeed, as discussed above, the

25
26 ⁵ Furthermore, the ALJ provided sound reasons for discrediting plaintiff’s
27 witnesses, who testified that plaintiff needed mental health services while at Hillsdale: those
28 witnesses were not familiar with plaintiff’s placement or services at Hillsdale, and two of them
worked with plaintiff more than two years after plaintiff left Hillsdale. AR 151. Accordingly,
their testimony was speculative.

1 evidence demonstrates the opposite – i.e., that the November 2002 and November 2003
2 BSPs actually *did* succeed in improving the maladaptive behaviors that were noted in
3 plaintiff's respective IEPs. Furthermore, a Behavior Intervention Plan was not mandated,
4 based on the record presently before the court.

5 In sum, the ALJ's finding that no referral to County Mental Health Services was
6 required, is supported by the record. See also AR 150-51; 375-394; 530-32; 553-54; 750-
7 52; 760-63; 965-975; 989.

8 The court therefore affirms the ALJ's findings and conclusions with respect to the
9 first issue before the court – i.e., whether the District denied plaintiff a FAPE from July 19,
10 2003 through the 2005-06 school year, by failing to properly assess and/or meet plaintiff's
11 behavioral needs. Defendant's motion for summary judgment as to this issue is
12 accordingly GRANTED, and plaintiffs' cross-motion for summary judgment on the same
13 issue is DENIED.

14 2. Whether the District denied plaintiff a FAPE from November 13, 2003 through
15 the 2005-06 school year⁶

16 Plaintiff contends that the District denied him a FAPE for the above-referenced
17 period for several reasons. Each issue considered by the ALJ, is addressed in turn.

18 a. failure to have a school psychologist attend the November 13, 2003
19 IEP team meeting

20 The November 2003 IEP meeting consisted of: general education teacher Ms.
21 Rianda, special education teacher Ms. Hahn, speech and language pathologist Ms. Fox,
22 plaintiff, and plaintiff's mother. AR 151, 963-975. Plaintiff, however, contends that the
23 District violated procedure and denied plaintiff a FAPE, because it did not have a school
24 psychologist attend the meeting.

25 ⁶ Defendants point out in their motion for summary judgment that the ALJ's opinion
26 sometimes states that the November 13, 2003 IEP meeting occurred on November 12, 2003.
27 This appears to be a confusion with the November 12, 2002 IEP meeting. Accordingly, all
28 references herein are to the November 13, 2003 IEP meeting, notwithstanding the ALJ's
statement to the contrary.

1 The federal IDEA and the California Education Code require that IEP team meetings
2 include: parents, at least one regular education teacher, at least one special education
3 teacher, a representative of the public agency who is qualified to provide or supervise the
4 provision of instruction designed to meet the needs of children with disabilities, an individual
5 who can interpret the implications of evaluation results, and the child if appropriate. The
6 last individual may already be a member of the team. See 34 C.F.R. § 300.344(a)(1999);
7 Cal. Educ. Code § 5634.

8 The ALJ noted that California law provides that where a student is suspected of
9 having a learning disability, at least one member of the team shall be qualified to conduct
10 individual diagnostic examinations of children, such as a school psychologist, speech-
11 language pathologist, or remedial reading teacher. The Code of Federal Regulations
12 further clarifies that a school psychologist's attendance is required only when determining
13 eligibility under the learning disability category. Accordingly, since plaintiff here had already
14 had his eligibility under the law determined, the ALJ concluded that no school psychologist
15 was required to attend the November 2002 IEP meeting. Furthermore, the ALJ noted that
16 in addition to the attendance of speech and language pathologist Ms. Fox at the November
17 2002 IEP meeting, Ms. Rianda and Ms. Hahn both gave testimony at the hearing that their
18 education and training included training in drafting BSPs. Accordingly, the ALJ concluded
19 that while helpful, a school psychologist was not required by either state or federal law.

20 Not only are the ALJ's observations with respect to the law thorough and accurate,
21 but plaintiff has not introduced any law or evidence here that contradicts these conclusions.
22 Accordingly, the court concludes that the ALJ was correct in deciding that the District did
23 not deny plaintiff a FAPE by not having a school psychologist attend the November 2003
24 IEP meeting.

25 b. failure to assess plaintiff in the areas of behavior, speech and
26 language, and academics

27 The ALJ concluded that the District did not deny plaintiff a FAPE by failing to assess
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1 plaintiff in the areas of behavior, speech and language, and academics. With respect to
2 behavior, and as mentioned above, the ALJ concluded that the District assessed plaintiff's
3 behavioral needs when it modified plaintiff's BSP in November 2003. With respect to
4 speech and language, as well as academics, the ALJ concluded that the District was
5 required by law to assess plaintiff in all areas related to his disability at least once every
6 three years, unless the parent and the school agree in writing that a reassessment is
7 unnecessary. AR 152. And since the District conducted its triennial assessment of plaintiff
8 in fall 2002 with three diagnostic tests – the WRAT, Bruckner math test, and the PIAT –
9 there was no need to reassess plaintiff between fall of 2002 and March of 2004, when
10 plaintiff left Hillsdale. AR 152, 587. Furthermore, the ALJ noted that plaintiff had
11 introduced no evidence warranting reassessment in November 2003, nor did the record
12 reflect that plaintiff's mother had requested reassessment. AR 152.

13 As is repeatedly the case in the motion papers, plaintiff has failed to present any
14 evidence that presents a dispute of fact on the relevant issues. Plaintiff mentions almost no
15 evidence⁷ relating to the District's purported failure to assess plaintiff academically, and as
16 for the District's speech and language assessment, plaintiff also fails to point to any
17 evidence that would indicate a failure to assess plaintiff as required by law. Moreover,
18 plaintiff's mother never requested reassessment as to the District's speech and language
19 assessments. AR 316.

20 In sum, there is no dispute present that calls into question the ALJ's conclusion that
21 the district properly assessed plaintiff's behavioral, academic, and speech and language
22 needs from July 19, 2003 through the 2005-06 school year.

23 c. failure to provide adequate present levels of performance in the

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25 ⁷ Plaintiff does contend that the District failed to offer plaintiff direct speech
26 language therapy when it switched to consultation services as part of the November 2003 IEP.
27 However, this is more properly construed as an argument that defendant failed to provide
28 proper services, rather than an argument relating to defendant's failure to assess plaintiff, and
is addressed below, in connection with defendant's purported failure to meet plaintiff's unique
speech and language needs.

1 November 13, 2003 IEP in the areas of behavior, speech and
2 language, and academics

3 Plaintiff also asserts that the District failed to provide adequate present levels of
4 performance in the November 2003 IEP in the areas of behavior, speech and language,
5 and academics. As defendants acknowledge, the IDEA requires that a student's annual
6 IEP contain a statement of the student's present levels of academic achievement and
7 performance, including the manner in which the student's disability affects his or her
8 involvement and progress in the general education curriculum. See 20 U.S.C. §
9 1414(d)(1)(A)(i); Cal. Educ. Code § 56345(a)(1)(A).

10 The ALJ noted that the November 2003 IEP contained limited information about
11 plaintiff's present levels of performance. While it listed some information, such as plaintiff's
12 strengths and preferences, his scores on some testing, and his areas of need, the IEP did
13 not contain specific information regarding academic assessments, or regarding the goals
14 and objectives for plaintiff. AR 152. This was because of plaintiff's excessive truancy. The
15 IEP states: "current testing has not been performed due to excessive absences...". Id.; see
16 also AR 969. Nor did the November 2003 IEP contain any "baseline" data from which
17 plaintiff's student performance may be assessed. AR 152. The ALJ found, however, that
18 because plaintiff's teachers and speech therapist established that they were familiar with
19 plaintiff's needs from working with him in the past and seeing him occasionally in fall 2003,
20 they were able to make knowledgeable recommendations about plaintiff's IEP program. Id.

21 Now, plaintiff contends that the ALJ's conclusion was error, because the District's
22 failure to assess his present academic levels made it (a) impossible to determine if the
23 goals proposed adequately addressed plaintiff's academic needs, and (b) made it
24 impossible for Ms. XXXXXXXX to determine if the District's offered program met plaintiff's
25 needs.

26 These arguments fail to persuade. As to the former, while true that the November
27 2003 IEP expressly stated that current testing could not be performed due to "excessive
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1 absences,” the IEP does contain descriptions of plaintiff’s performance to the extent
2 possible, including notations regarding plaintiff’s attendance problems, failure to turn in
3 paperwork, GPA score, and the credits required to graduate. AR 1274. The IEP also
4 states that until plaintiff “attends school regularly, the current placement will continue to be
5 the least restrictive and most appropriate environment for [plaintiff.]” Id. Moreover, the IEP
6 that was left in place was designed, as the ALJ found, by teachers with knowledge of
7 plaintiff’s needs and past performance, and the BSP that was newly revised at the
8 November 2003 IEP meeting was specifically done with the purpose of aiding the truancy
9 problems so that plaintiff could get back on track academically. Therefore, even though the
10 District was admittedly unable to assess plaintiff’s present levels of performance
11 thoroughly, the District was still able to make knowledgeable recommendations regarding
12 plaintiff’s proposed IEP, and to recommend a BSP that would target plaintiff’s truancy and
13 allow him to benefit from his education.

14 As for plaintiff’s argument that the lack of present levels of performance made it
15 impossible for Ms. XXXXXXX to participate and determine whether the District’s
16 educational offerings met plaintiff’s needs, plaintiff does not dispute that Ms. XXXXXXX was
17 present at the November 2003 IEP team meeting, or that Ms. XXXXXXX subsequently
18 consented to the November 2003 IEP without raising any objections, either at the meeting
19 or afterwards. AR 315-16. Nor does plaintiff submit any legal authority that suggests that a
20 parent’s lack of meaningful participation in the IEP process occurs under factual
21 circumstances similar to the case at bar.

22 In sum, to the extent that the District failed to include present levels of performance
23 in connection with the November 13, 2003 IEP, it did not constitute a denial of a FAPE.

24 d. failure to include adequate goals in the November 13, 2003 IEP in the
25 areas of behavior, speech and language, academics, and mental
26 health

27 This issue is related to the preceding issue. Plaintiff contends that, since the District
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1 failed to ascertain plaintiff's present levels of performance in connection with the November
2 2003 IEP, then the District also failed to provide adequate goals, as required by IDEA. See
3 20 U.S.C. § 1414(d)(1)(A)(i)(II); Cal. Educ. Code § 56345(a)(2). For the following reasons,
4 plaintiff is incorrect.

5 First, as discussed above, the District's failure to include present levels of
6 performance did not constitute a denial of FAPE. Accordingly, plaintiff's argument that the
7 same led to a failure to provide adequate goals, fails. Second, the evidence demonstrates
8 that the November 2003 IEP *did* include goals that were adequately tailored to plaintiff's
9 needs. Specifically, the IEP included a statement of goals related to academic
10 performance (through improved attendance), literacy skills (through the writing of
11 expository essays), in math skills (through completion of math homework), and mental
12 health skills (BSP stated goal of "cooperative and positive attendance"). AR 966-67; 976.
13 Plaintiff, moreover, does not dispute that these goals were included.

14 Accordingly, the ALJ's conclusion that the District's purported failure to include
15 adequate goals in the November 13, 2003 IEP in the areas of behavior, speech and
16 language, academics, and mental health did *not* constitute a denial of a FAPE, is well-
17 founded. The court hereby affirms the ALJ's decision in this regard.

18 e. failure to meet plaintiff's unique speech and language needs in the
19 areas of dysfluency, and expressive receptive and pragmatic language
20 skills

21 Finally, plaintiff contends that the District denied him a FAPE when it failed to meet
22 his unique speech and language needs, and expressive receptive and pragmatic language
23 skills. Specifically, plaintiff asserts that the District failed to do so when it adjusted plaintiff's
24 direct speech therapy to a consultation based service as part of the November 2003 IEP.

25 Plaintiff was receiving direct speech language therapy until the November 2003 IEP.
26 At the November 2003 IEP, plaintiff's teachers determined that the best therapy would be
27 via consultation services. This was in part because of plaintiff's truancy. As plaintiff's
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1 speech and language therapist testified, although she was reluctant to switch plaintiff to
2 consultation services, she felt that “there was a power struggle that was going to get set up
3 around speech.” AR 690-91. She wanted speech “to be the place [plaintiff] comes to ... to
4 work on goals.” AR 691. Furthermore, plaintiff was missing so many classes that he was
5 failing, and it would be “counterproductive” from “an educational point of view,” to have
6 plaintiff show up on the rare occasion, only to have to pull him out of general education
7 classes for speech therapy. To that end, the recommendation was made to switch plaintiff
8 to consultation services, to “hopefully give the behavior plan a chance to work, get him
9 back into school more regularly so that [the speech-language therapist] could re-engage
10 with him in a productive way.” AR 690. Otherwise, plaintiff’s therapist continued, “it was a
11 totally unproductive, unworkable therapeutic plan.” *Id.*

12 The ALJ found that plaintiff’s speech and language therapist, who testified to the
13 above, was a “credible and persuasive witness,” and that her testimony established the fact
14 that direct speech therapy “no longer facilitated [plaintiff’s] overall educational needs.” AR
15 153. Furthermore, because plaintiff had already benefitted from years of speech therapy,
16 the pause in direct therapy sessions would only minimally impact plaintiff’s ability to
17 improve his speech fluency. Finally, the ALJ found that plaintiff had presented no contrary
18 evidence on the issue.

19 Here, plaintiff argues only that the District’s decision to switch to consultation
20 services was akin to “giving up” on its student – precisely what Congress sought to prevent
21 when it enacted the IDEA. However, plaintiff offers no authority or contrary evidence in
22 support of this argument. Indeed, the only evidence in the record – Ms. Fox’s testimony –
23 established that the District was not giving up on plaintiff, and that it was attempting
24 everything possible to ensure plaintiff’s continued improvement. In sum, plaintiff has not
25 presented evidence that warrants reversal of the ALJ’s holding on this issue.

26 In conclusion, and with respect to the second issue presented before the ALJ – i.e.,
27 whether the District denied plaintiff a FAPE from November 13, 2003 through the 2005-06
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1 school year – the ALJ’s decision is affirmed, and summary judgment is GRANTED in
2 defendant’s favor, and DENIED as to plaintiffs.

3 3. Whether Ms. XXXXXXXX was entitled to reimbursement for private school
4 placements from March 2004 to June 2006

5 Having concluded that the ALJ’s decision is to be affirmed, the court also concludes
6 that Ms. XXXXXXXX was not entitled to reimbursement for private school placements from
7 March 2004 to June 2006. For without proof that plaintiff was denied a FAPE, no
8 reimbursement for such denial is appropriate. See Burlington v. Dep’t of Educ., 471 U.S.
9 359, 374 (1985)(“If the courts ultimately determine that the IEP proposed by the school
10 officials was appropriate, the parents would be barred from obtaining reimbursement for
11 any interim period in which their child’s placement violated § 1415(e)(3)”).

12 Moreover, as the ALJ noted, for the entire length of plaintiff’s attendance at private
13 schools, Ms. XXXXXXXX failed to notify the District of any intent to seek reimbursement. AR
14 154. The IDEA provides that reimbursement may be denied or reduced if the parents do
15 not give the school district notice of their intent to remove a child from public school before
16 they do so. See, e.g., 20 U.S.C. § 1412(a)(10)(C)(iii)(I). Generally, parents must provide
17 such notice at the most recent IEP meeting that the parents attended prior to the removal of
18 the child from the public school, or by written notice ten business days prior to the removal
19 of the child from public school. Id.

20 Here, plaintiff was arrested in May 2003. AR 995. Several months later, the
21 November 2003 IEP meeting took place. Around that time (in November or December
22 2003), plaintiff’s private therapist first recommended that plaintiff attend the Rocky
23 Mountain Academy as an alternative to Hillsdale. AR 345-46. Yet there is no evidence that
24 plaintiff or his mother informed the District of either plaintiff’s arrest or the private therapist’s
25 recommended education placement, at the November 2003 IEP team meeting, or
26 thereafter. Subsequent to 2003, plaintiff appeared in court in January 2004, at which
27 appearance the court stated that plaintiff could go to Rocky Mountain Academy, which is
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1 part of the CEDU program. AR 323. Two months later, in March 2004, plaintiff was
2 adjudged a ward of the court. AR 996. Still, throughout all this time, there is no evidence
3 that plaintiff or his mother informed the District of the potential private placement. In fact,
4 Ms. XXXXXXXX did not contact the District to inform them of plaintiff's private placement until
5 March 22, 2004, *after* plaintiff had been adjudged a ward of the court and *after* plaintiff had
6 already left for private placement at Ascent [plaintiff went to Ascent instead of Rocky
7 Mountain Academy]. AR 837, 998, 1002. Even then, Ms. XXXXXXXX never requested
8 reimbursement from the District. The first time the District learned of the request for
9 reimbursement was when she filed the due process complaint in the underlying
10 administrative action.

11 On balance, these facts demonstrate a complete failure to provide adequate notice
12 to the District of plaintiff's private placement. Accordingly, even if a denial of a FAPE had
13 been demonstrated, no reimbursement would be appropriate. For all the foregoing
14 reasons, therefore, the court also affirms the ALJ's decision that reimbursement is not
15 warranted. Defendant's motion for summary judgment on this ground is GRANTED. The
16 court DENIES plaintiffs' cross-motion with respect to the reimbursement issue.

17 C. Conclusion

18 The ALJ's decision is thorough, organized, and detailed, warranting a higher level of
19 deference. To that end, the decision is affirmed in all respects. Defendant's motion for
20 summary judgment is GRANTED, and plaintiffs' cross-motion for summary judgment is
21 DENIED.

22 **IT IS SO ORDERED.**

23 Dated: July 3, 2008



PHYLLIS J. HAMILTON
United States District Judge

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