

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

In the Matter of:

STUDENT,

Petitioner,

v.

CAPISTRANO UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE No. N2006100267

**NOTICE: This decision has been
UPHELD by the United States
District Court. Click [here](#) to view
the USDC's decision.**

DECISION

James R. Goff, Administrative Law Judge, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on January 10, 11, 12, 16, 17, 18, 19, 22, 23, 24, 25, 26, and 29, 2007, in San Juan Capistrano, California.

Michael E. Jewell, of the Law Offices of Michael E. Jewell represented Student at the hearing. Student's father attended the hearing.

Caroline A. Zuk, of the Law Offices of Caroline A. Zuk, represented Capistrano Unified School District (District). Also present at various times during the hearing on behalf of the District were Jennifer Fant, a Program Specialist in Autism, and Kimberly E. Gaither, a Legal Specialist.

On October 5, 2006, the Student filed a Request for Due Process Hearing. The due process hearing was calendared for March 24, 2006. On March 2, 2006, Student requested a continuance which was granted. Sworn testimony and documentary evidence were received at the hearing on January 10 through 29, 2007. At their request, the parties were permitted to file written arguments. Upon receipt of the written closing arguments, the record was closed on February 22, 2007, and the matter was submitted.

ISSUES

The issues raised by Student have been restated for purposes of addressing the merits of his claim:

1. Did the District deny Student a free and appropriate public education (FAPE) for the 2003-2004 school year, including the 2004 extended school year (ESY), through the following procedural and substantive violations of IDEA and related state law?
 - a. The failure to timely prepare and present an assessment plan to Student's parents.
 - b. The failure to conduct an appropriate and sufficiently comprehensive assessment of Student.
 - c. The failure to have a regular education teacher attend the initial individualized education program (IEP) team meeting.
 - d. The failure to identify appropriate accommodations and modifications for Student.
 - e. The failure to develop objective and measurable goals in all areas of need.
 - f. The failure to offer the appropriate type and amount of speech and language therapy (S/L) and occupational therapy (OT).
 - g. The failure to offer appropriate parent training in behavior across environments.
 - h. The failure to offer an appropriate behavioral program for Student.
 - i. The failure to offer appropriate behavioral service for Student.
 - j. The failure to offer an appropriate placement designed to meet Student's unique needs.
2. Did the District deny Student FAPE for the 2004-2005 school year, including the 2005 ESY, through the following procedural and substantive violations of IDEA and related state law?
 - a. The failure to conduct a timely follow up assessment for OT needs.
 - b. The failure to conduct an appropriate and sufficiently comprehensive assessment in the area of behavior by failing to conduct a proper functional

analysis assessment (FAA) to develop a behavioral intervention plan (BIP) for Student.

- c. The failure to have an individual qualified to conduct the FAA.
 - d. The failure to have an individual qualified to manage Student's BIP.
 - e. The failure to develop objective and measurable goals in all areas of need.
 - f. The failure to permit Student's speech therapist, occupational therapist, or any of Student's intensive behavioral intervention (IBI) aides to attend the November 2004 IEP team meeting; and failure to have the OT attend the April 2005 IEP team meeting.
 - g. The failure to make a single specific offer with respect to OT services for the 2005 ESY at the April 2005 IEP team meeting.
 - h. The failure to either file for due process or pay for an independent educational evaluation (IEE) for Student after parents' written request for an IEE.
 - i. The failure to have any staff members present who were qualified to address Student behavior at IEP team meetings.
 - j. The failure to respond to parents' notice of the provision of services to Student.
 - k. The failure to offer appropriate type and amount of speech and language therapy and OT for Student.
 - l. The failure to offer appropriate parent training in behavior across environments.
 - m. The failure to offer an appropriate behavioral program for Student.
 - n. The failure to offer appropriate behavioral services for Student.
 - o. The failure to offer an appropriate placement designed to meet Student's unique needs.
3. Did the District deny Student FAPE for the 2005-2006 school year, including the 2006 ESY, through the following procedural and substantive violations of IDEA and related state law?

- a. The failure to conduct an appropriate and sufficiently comprehensive assessment in the area of behavior by failing to conduct a proper FAA to develop a BIP for Student.
 - b. The failure to have an individual qualified to conduct the FAA.
 - c. The failure to have an individual qualified to manage Student's BIP.
 - d. The failure to develop objective and measurable goals in all areas of need.
 - e. The failure to obtain parents' consent to have a teacher who was not working with Student conduct an assessment of Student.
 - f. The failure to have Student's speech therapist attend the December 2005 IEP team meeting.
 - g. The failure to hold an annual IEP team meeting.
 - h. The failure to either file for due process or pay for an IEE for Student after parents' written request for an IEE.
 - i. The failure to have any staff members present at IEP team meetings who were qualified to address Student's behavior.
 - j. The failure to conduct a three-month review of Student's BIP at the end of summer and beginning of fall 2005.
 - k. The failure to offer the appropriate type and amount of speech and language therapy and OT for Student.
 - l. The failure to offer appropriate parent training in behavior across environments.
 - m. The failure to offer an appropriate behavioral program for Student.
 - n. The failure to offer appropriate behavioral services for Student.
 - o. The failure to offer an appropriate placement designed to meet Student's unique needs.
4. Did the District deny Student FAPE for the 2006-2007 school year, including the 2007 ESY, through the following procedural and substantive violations of IDEA and related state law?

- a. The failure to reimburse parents for the IEE of Dr. Perlman.
- b. The failure to timely respond to parents' request for reimbursement, and failure to reimburse parents, for private services provided to Student.
- c. The failure to develop objective and measurable goals in all areas of need.
- d. The failure to offer appropriate type and amount of speech and language therapy and OT for Student.
- e. The failure to offer appropriate parent training in behavior across environments.
- f. The failure to offer an appropriate behavioral program for Student.
- g. The failure to offer appropriate behavioral services for Student.
- h. The failure to offer an appropriate placement designed to meet Student's unique needs.

CONTENTIONS OF THE PARTIES

This case covers four school years which follow Student from preschool to second grade. For the 2003-2004 school year, when he entered preschool, Student contends that the District violated its child find obligation through the failure to refer him for a special education assessment. The District claims that it lacked sufficient information to suspect that Student was a child with a disability until Student's mother requested an assessment in April 2004.

For the 2004-2005 school year, the District held IEP meetings in July and November 2004, and in February, April and May 2005. Student contends that the initial assessment supporting the July 2004 IEP was incomplete, and that the District failed to have required persons present at the IEP meetings. Student further contends that the placement offered by the District for this school year was inappropriate because it did not contain sufficient S/L, OT and behavioral services. In September 2004, the District performed an FAA which led to the development of a BIP. Student contends that the FAA was defective in multiple respects and that the BIP failed to follow the statutory requirements for a behavior intervention plan. Student also contends that the District must pay for an IEE prepared by Dr. Mitchell Perlman. The District denies such claims.

For the 2005-2006 school year, the District held an IEP meeting in December 2005 and failed to hold Student's annual review IEP in May 2006. Student withdrew from school at the December 14, 2005 IEP meeting. He contends the District failed to have a S/L person at the meeting, and improperly conducted an assessment without his parents' consent. Student also

contends that a proposed District assessment plan was not properly prepared. He contends he was denied FAPE because there was inadequate S/L, OT, and IBI services offered. An inappropriate placement was proposed by the District to which his parents did not consent. He alleges substantive violations as a result of insufficient S/L and OT services provided, a failure to provide parent training, failure to provide a behavior program, failure to provide adequate behavior services and an inappropriate placement. The District contends that Student provided appropriate services and was provided FAPE.

According to the District the failure to conduct the May 2006 annual review IEP, was because the parents were not responsive to the District's attempts to communicate with them.

For the 2006-2007 school year, the District held IEP meetings on September 29, 2006, and December 15, 2006. Student contends that the District failed to offer FAPE at either meeting. He contends that the District failed to appropriately provide notice to the parents of the meeting dates. The placement proposed at both meetings was inappropriate. He alleges additional substantive violations as a result of insufficient S/L and OT services provided, a failure to provide parent training, failure to provide a behavior program, and a failure to provide adequate behavior services. The District contends that Student provided appropriate services. District responds that it provided FAPE at both meetings, and that parents were avoiding notice.

Finally, Student asserts that he is entitled to reimbursement and compensatory education as a result of the District's lapses in providing him an educational opportunity. District responds that parents' lack of cooperation renders Student's claims for reimbursement and compensatory education unfathomable.

FACTUAL FINDINGS

Jurisdictional Facts

1. Student is a seven year-old boy who currently attends a private regular education kindergarten class at Marina View School in Laguna Niguel, California. He lives with his mother in Laguna Niguel. His father resides in a different home in the same community.

2. As indicated in Factual Finding 85 and Legal Conclusion 7, no actions occurring prior to October 5, 2003, are within the jurisdictional purview of this hearing.

2003-2004 Child Find and Referral for Assessment

3. Legal Conclusion 3 sets forth the requirement that school districts have an affirmative duty to identify, locate and evaluate all children with disabilities residing in the state. This duty is known as "child find." The duty is triggered when the district has reason to suspect that a student has a disability and that special education services may be needed to

address the disability.

4. Student contends that District failed in its child find duty to Student's mother. He contends that the District had to know from his first day at Malcolm Elementary School (Malcolm) that he required an assessment.

5. On September 2, 2003, Student's mother enrolled Student in the preschool class of Malcolm Elementary School. On October 2, 2003, mother withdrew Student from Malcolm after only seven days of class attendance. Mother testified that Student did not act like the other pupils at Malcolm. He ran around the school. He had a short attention span. He placed objects in his mouth. At times, he lay on the floor and screamed. Mother stated that the teacher suggested that Student might be immature for preschool. Student spoke Farsi; he knew few words of English.

6. After a few months, mother enrolled Student in two private preschools: We Can and Kindercare. Student only lasted a day and one-half at We Can. The Kindercare experience was similar. Neither preschool tolerated Student's behaviors.

7. In April 2004, mother returned with Student to Malcolm because she had learned from a friend that she could request an assessment from the District. On April 19, 2004, mother and Student met with the Student Study Team (SST) which consisted of a resource specialist, a speech pathologist and a psychologist. The speech pathologist completed a Preschool Screening form in which she noted that Student's energy level was "HIGH," that he screamed in his communication and did not respond well to others, and that he was ecolalic, placed everything in his mouth, and talked in the third person. The Preschool Screening described Student as possibly autistic and possibly having an oppositional defiance disorder. The SST referred Student to the PreK assessment team. The SST also recommended to Student's mother that she contact the local Regional Center for potential services.

8. On April 26, 2004, mother enrolled Student at Kinoshita School which is a state-funded school operated by the Orange County Department of Education. On June 10, 2004, mother withdrew Student from Kinoshita where Student attended only seven days of class.

9. On April 27, 2004, Laura Hanaford, a speech and language pathologist for the District, received a telephone call from Student's mother, and arranged a meeting and a time for the observation of Student. Ms. Hanaford indicated that mother was concerned that Student had ADD or autism. On May 12, 2004, Student's mother gave her consent to the District's assessment plan, and the assessment of Student commenced. Mother indicated she wanted help so Student could be in school with other children.

10. The District did not violate its child find obligations towards Student. The District did not have reason to suspect that Student was a child with a disability who needed special education services from Student's seven day attendance at Malcolm Elementary

School. Thereafter, when Student's mother requested an assessment in April 2004, the District held an SST meeting, referred Student for an assessment, prepared an assessment plan, and started the assessment of Student the same day that mother consented to the assessment plan.

May and June 2004 Assessments

11. As discussed in Legal Conclusions 5 and 6, school districts must perform assessments according to strict statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor. One of the more important requirements is that the District must assess the pupil in all areas of suspected disability. Student contends that the District failed to assess him in all areas of suspected disability. He complains that the tests attempted were not completed; that a sensory intergration praxis test (SIPT) should have been administered; and that other, more appropriate, tests should have been given.

12. Jan Casteel, a school psychologist with the District, and Ms. Hanaford, the speech and language pathologist, conducted parts of Student's assessment. Before the testing began there was no information that visual processing skills might be a problem. A vision test could not be performed because of Student's behavior. The assessment report was completed on July 1, 2004. Neither professional was able to obtain standardized test results from Student. His behavior, his reliance primarily on Farsi, and his age made testing difficult. As a consequence, the testers used the results in combination with observations and other information as the bases for their conclusions.

13. Ms. Hanaford tested¹ Student in the home where Mother could translate for her. She concluded that Student's articulation/phonology skills could not be formally assessed, but his speech could be understood. She opined that the structure of all articulators was adequate for speech purposes. Student's receptive language and expressive language abilities were

¹ Ms. Hanaford used the Preschool Language Scale 4th ed. (PLS-4). The raw scores from this test were: Auditory Comprehension 20; Expressive Communication 25; for a total score of 45. She conducted an Informal Communication Sample that showed that voice and fluency were age appropriate. Semantics, morphology, and syntax appeared to be significantly below age expectations in both English and Farsi. She could not get 50 utterances from Student to conduct a formal word sample.

The Receptive-Expressive Emergent Language Scale-2d e. (REEL-2) was used even though it was normed for up to three years of age. In this test, information is obtained from the parents. It indicated that Student had a speaking vocabulary of 10-20 words. He could imitate two to three word sentences. He inconsistently carried out double commands, identified objects by pointing, comprehended simple questions and responded to simple action words, e.g., sit down.

She also relied in part on Ms. Casteel's testing of Student using the Psychoeducational Profile-Revised (PEP-R).

considered below age level in Farsi and English. Similarly, his pragmatic language usage was below age expectancies. Eye contact was inconsistent. He only occasionally initiated communication. He did not respond to greetings or engage in reciprocal exchanges. She found that it was difficult to know whether Student was able to process information or focus.

14. Ms. Casteel, in addition to observing Student at home, observed him at Kinoshita School. She interviewed his teacher who felt the school was inappropriate for Student. He was apparently not toilet trained. Student did not interact with anyone other than his Mother. As a result of the observations and testing,² Ms. Casteel concluded that Student's then-present level of intellectual functioning was below the average range. This opinion stemmed from the results of the Mullen Scale scores. She noted that he had relative strength in his perceptual skills. Student's self-help and social skills were delayed. He primarily engaged in solitary play. Mother reported that he eloped from home or when in the public. His gross motor skills appeared to be mildly delayed. Student's fine motor skills were delayed. He was able to imitate a circle. He could scribble and string beads. Ms. Casteel noted that Student was not interested in looking at books. Mother had indicated to her that Student did not like to be touched. The testing revealed that he could track vertical movement, which is an emerging seven to ten month-old skill. She did not suspect a visual processing problem because he could match things during testing. The information obtained indicated that Student's vision was believed to be within normal functional limits.³ Both Ms. Hanaford and Ms. Casteel opined in their testimony at hearing that it is difficult to separate traits of attention deficit hyperactivity disorder (ADHD) from autism. They show similar traits. Although there was an indication of ADHD, Ms. Casteel concluded that Student's primary problem was autism. She did not diagnose ADHD.

15. Brenda Rioux, an occupational therapist employed by the District, conducted an OT assessment of Student. Her report was completed on June 15, 2004. She could not complete the assessment because Student had hand surgery and was unavailable for part of the testing. She recommended a follow-up assessment in a couple of months when Student would be fully recovered. By the time of the hearing, Ms. Rioux was unavailable. Her

² Ms. Casteel used the Vineland Adaptive Behavior Scale (VABS), by having Mother provide the information. His age equivalency ranged from one year-five months to three years-seven months. The Mullen Scales of Early Learning resulted in an age range of two years-four months to two years-five months. These scores placed Student from below 1 percent to 1 percent. The Psychoeducational Profile-Revised indicated a developmental age of between 21-25 months. The Beery Visual-Motor Integration Test (VMI) resulted in an age equivalency of below two years-seven months. The result of the Pervasive Developmental Disorders Screening Test-II (PDDST-II) was insignificant. The Temperment and Atypical Behavior Scale (TABS) indicated a significant risk of atypical development. The Childhood Autism Rating Scale (CARS) indicated that Student was in the mild to moderate autistic range. The Attention Deficit Disorder Evaluation Scale (ADDES) showed elevated scores.

³ On July 3, 2004, parents completed a health questionnaire in which they indicated that Student had no difficulties with his vision.

supervisor, Claudia Ginsberg-Brown, described the OT procedures and conclusions reached by Ms. Rioux. Ms. Ginsberg-Brown related that attention span can affect the ability to obtain valid test results. Mother's concerns were with regard to fine motor skills and Student's developing a hand preference. Ms. Rioux conducted a parent interview, fine motor observations, clinical observations, the Peabody Developmental Motor Scales-2 (PDMS-2), the DeGangi-Berk Test of Sensory Integration (D-BTSI), the Sensory Profile Questionnaire, and a records review. In her report, Ms. Rioux indicated that Student had a pacifier in his mouth during the testing. He put 50 percent of the objects he touched in his mouth. His attention span was less than 30 seconds for fine and gross motor tasks. His hand was wrapped in bandages and he was taking antibiotics. Student was not able to consistently follow simple, one-step verbal directions due to his inattention and sensory-seeking behaviors. He would not sit at a table to perform tasks.

16. From the OT testing,⁴ Ms. Rioux concluded that Student had significant sensory difficulties, mainly in the proprioceptive and vestibular systems. Student was under-responsive to auditory and verbal stimuli. She noted that Student reacted to light touching. Ms. Rioux recommended that Student be observed 30 minutes per week for two months in an educational setting to determine his specific educational needs. She suggested a consult with Student's teacher once a month until his next IEP. She felt sensory strategies could be developed for use at home and school to address his attention and behaviors.

17. Student's expert witness Susan Perrine testified on the need to conduct the SIPT at the time of the 2004 assessment to determine Student's sensory needs. Her testimony was not compelling. Claudia Ginsberg-Brown, an expert on standards and practices in regard to OT, testified that the SIPT was not required. Ms. Ginsberg-Brown stated that the SIPT would not have been appropriate for Student. It is a long and complex test. It is not standardized for autistic children. It is not normed for individuals who speak Farsi. Ms. Perrine observed Student nearly two years after the May-June 2004 assessment. Although she was certified to conduct the test, the parents did not retain Ms. Perrine to conduct the SIPT, but relied instead

⁴ In the clinic setting Student would not allow an oral examination. Mother reported that Student suffered stridor and cyanosis when crying. The PDMS-2 was not helpful, because limited receptive language, auditory processing difficulty, cognitive limitations, medications and lack of interest impacted test scoring. The Sensory Profile is based on parental input and Mother did not complete sections H through L in the questionnaire. The information provided indicated Student had difficulty in the areas of touch, movement and activity level. The D-BTSI showed that, as to the visual system, Student was not able to visually track vertically or horizontally. As to the auditory system, Student only responded to his name or followed simple one-step verbal directions 50 percent of the time. In regard to the tactile system Student did not display any aversive behaviors when lightly touched. Testing of the proprioceptive system revealed that Student demonstrated poor trunk stability and fell over and off a swing. He would run, jump and chew on objects. Student exhibited poor body awareness and motor planning skills during gross body movements during tests related to his vestibular system.

on ABA therapy. Ms. Perrine acknowledged that attention, sitting still, and behaviors might have interfered with administering the SIPT. Similarly, a child with a cognitive level of two years old or below might not be able to perform this test.

18. Student's expert witness Barbara Pliha, the Director of Newport Language and Speech Centers, provided S/L and OT services to Student in mid-2005. She was critical of the District's initial assessment. She preferred different tests, would have completed the tests that were attempted, and complained that a formal word sample was not obtained. However, her opinion was not persuasive. She saw Student months after the assessment was completed. Her insistence that the standardized tests should have been completed and that a formal word sample was required, were not compelling. Student spoke Farsi and the tests were standardized for English speaking participants. Student's behaviors made it impossible to complete the testing. He had to be prompted more than once to obtain responses which in most cases invalidated the scoring. Student's language was limited. There was no credible evidence that Ms. Pliha's preferred tests could have been administered to Student. Ms. Tracy Kerins, a speech and language therapist with the District, who treated Student when he was later in school, indicated that standardized testing is difficult with preschoolers, and that in her experience information from the parents, non-standardized testing, teacher interviews and observation often provide more information than testing. She opined that a standardized test could not be normed based on Student's multiple languages. Ms. Hanaford testified that she noted responses even though it was not possible to score them. She used these limited responses in conjunction with her observations to reach conclusions regarding Student's needs. In other instances she did not score the testing when Student did not respond.

19. The District's initial assessment of Student was appropriate. While experts may prefer different tests, the District used tests that were reasonable and appropriate. Student did not establish that there was another test that would have been successful. Even Dr. Perlman, whose testing is noted below, was unable to obtain a completed standardized test for Student two years later.

July 7, 2004 IEP

20. Pursuant to Legal Conclusions 4, 13 and 20, an IEP team is required to include certain individuals on the team and the absence of any one of them can result in a procedural violation of special education law. However, not every procedural violation deprives a student of FAPE. To constitute a denial of FAPE, there must be a showing that the procedural violation resulted in a loss of educational benefit or significantly interfered with the opportunity of the parents to participate in the IEP process.

21. On July 7, 2004, the District held Student's initial IEP. A regular education teacher did not attend this meeting as required. The IEP team consisted of Ms. Hanaford (the SLT), Ms. Ferguson (Student's special education teacher), Ms. Rioux (the OT), Ms. Casteel (the school psychologist), Ms. Bueno (the District representative), and Mother. The IEP team found Student eligible for special education services under the condition of autism, which adversely affected his acquisition of preacademic skills. Ms. Casteel reviewed with Mother

her parental rights. At the meeting the District offered the following: placement in an SDC structured program for autistic students for four hours a day, five days a week; parent training and skills generalization, eight times for one hour in the home; OT, one time a week for 30 minutes of direct therapy, and one time a month of consultation; S/L, consultation one time a week for 30 minutes in the classroom; adapted P.E., specially designed; IBI, four hours a week on campus within socialization one-to-one until winter break, then it will be discontinued when he has acquired skills to participate in small group, four hours weekly at home one-to-one; IBI, four hours weekly from January to July on campus one-to-one on socialization and four hours on campus one-to-one after or before school. The District agreed to provide transportation to Student. It also agreed to ESY services from July 26, 2004 through August 6, 2004, on maintenance at Crown Valley Clinic with parent providing transportation eight hours a week. Student was to spend 85 percent of his time in the special education program. The IEP team adopted 24 goals and objectives for Student with appropriate benchmarks. Mother agreed to the IEP.

22. A procedural violation of IDEA occurred when the general education teacher failed to attend the IEP meeting. However, the procedural error did not rise to the level of a denial of FAPE. The parents did not object to the absence of the teacher. Student's general education exposure was limited to 15 percent of his school day. This consisted of recess, lunch periods, community outings, and assemblies. The purpose of the meeting was to establish an educational program for Student built around his attendance at an SDC class. Student has not carried his burden to demonstrate how this technical violation deprived him of an educational benefit or prevented his parents from participating in the IEP process. The violation was harmless.

23. Next, Student contends that his IEP failed to contain sufficient services to meet his unique needs. A school district has a duty to provide a special education student with services sufficient to meet his unique needs. The failure to provide appropriate services constitutes a substantive violation of IDEA. Here, the District provided adequate OT services for Student in the IEP. The IEP conformed to the recommendation of Ms. Rioux, the OT that assessed his needs. The opinion of Ms. Perrine, Student's expert OT, that Student needed additional OT services was not persuasive. She had no discussion with the District's OT. She was unfamiliar with the collaborative program provided by the District in Student's placement. Ms. Ferguson's SDC structured autism class was part of the District's BLASST OFF program, which is Building Language, Academics, and Social Skills Through Structured Teaching. In this program the teacher, the SLT and OT work together to maximize the student's educational experience.

24. Another concern raised by Student was an alleged inadequate provision of speech and language therapy. However, the S/L services provided by the District in the July 7, 2004 IEP were appropriate and sufficient to provide Student with a meaningful educational experience. Ms. Pliha, the director of Newport Language and Speech Center, was not familiar with the District's structured autism SDC. Thus, her critique of the number of goals for S/L and the amount of services did not detract from the adequacy of the District's proposed program. It is not required that elements of the preschool curriculum, which contain many

appropriate goals to prepare children for kindergarten, be specifically included in the IEP. The District was not required to include those goals in the IEP. Ms. Kerins, a SLT for the District, related that the SDC was a language based classroom in which Student would receive more than two hours a week of SLT. As a result of the teacher/aide to student ratio in the class, a great deal of one-to-one training is available to Student.

25. The amount of S/L and OT services provided for in the IEP was adequate to provide Student with a meaningful educational experience. This was Student's first exposure to special education services. The District could adjust such services as needed. There was no deprivation of FAPE arising from the provision of these services.

26. Student contends that he was denied FAPE, because the intensive behavioral intervention (IBI) services provided for in his IEP were inadequate.

27. Dr. Mitchell Perlman, a psychologist retained by Student's father, conducted a neuropsychoevaluational assessment of Student that was completed in August 2006. He testified that he had no quarrel with the District's recommended behavioral services contained in the July 7, 2004 IEP, based on his conclusion that Student's primary problem stemmed from ADHD and not autism.⁵ In his opinion the proffered services would have been adequate. However, if he was wrong and autism was really the source of Student's behaviors, then he thought the services would not have been adequate. He thought it more likely that Student was an out-of-control ADHD with low level intellect.

28. Nicole Onstadt is a private ABA therapy provider that father hired to provide private ABA therapy to Student. She is experienced, but she is not certified as a NPA in California. She began serving Student in the fall of 2005, took total control of Student's ABA therapy in October, and continues in that role. From December 2005, Ms. Onstadt has provided Student with 40 hours a week of intensive ABA therapy. She testified that she considered the District's IBI program, the Lovass Institute ABA program and the CARD ABA program as the same. She favored the CARD program because it permitted modifications to the program in response to Student's behaviors. She disagreed with Dr. Perlman's diagnosis that Student had ADHD, although she acknowledged that she was not qualified to diagnose

⁵ Dr. Perlman felt that Student could be brought under control through medication, though he did not have a detailed accounting of the medications that Student was taking. He was not able to complete any standardized testing of Student. In his opinion, Student was functioning in the mildly mentally retarded range. Dr. Perlman administered the Gilliam Autism Rating Scale (GARS), the Gilliam Asperger's Disorder Scale (GADS), the Asperger's Syndrome Diagnostic Scale (ASDS) for an indication whether Student was autistic. He also used the Attention-Deficit Disorders Evaluation Scale (ADDES-3) and the Behavior Assessment Scale for Children-2d ed. (BASC-2). On the GARS Student rated at 9 percent for likelihood of having autism. On the GADS, Student rated at 70 percent likelihood of Asperger's disorder. On the ASDS test, Student ranked at 42 percent or likely to have a disorder.

ADHD. Ms. Onstadt was not credible.⁶

29. As provided in Legal Conclusion 7, what is critical to IDEA is that the Student receives appropriate special education services, not the label attached to the eligibility for those services. Here, Student was not convincing in contending that he required 25 hours of ABA therapy in order to obtain an educational benefit from his school attendance.⁷ His own

⁶ Ms. Onstadt testified that she did not use overcorrection or aversive techniques in her application of ABA therapy to Student. A videotape prepared by father shows Ms. Onstadt providing ABA therapy to Student between December 2005 and December 31, 2006. On that videotape are instances of the application of aversive techniques. Student's witness, Dr. Gary LaVigna, viewed the videotape and commented that if that was the type of therapy that Student was receiving it should be stopped immediately. He indicated that it would cause Student's behaviors to escalate. Dr. Perlman observed an instance of overcorrection of Student that he did not feel was aversive, but refuted Ms. Onstadt's testimony. Testifying inconsistently, she acknowledged that she used an aversive basket hold on Student with the parents' permission. She also acknowledged that she locked Student in a room with parental permission. Ms. Onstadt related an instance in which Student urinated on her. She testified that he did it intentionally. In describing the incident, Ms. Onstadt testified that she directed Student to perform a task and he attempted to avoid the task by asking to go to the bathroom. Ms. Onstadt refused and held Student until he urinated on himself and her. Ms. Onstadt testified that Student voluntarily vomited on her and two other aides in response to tasks. Student's witness Ms. Perrine, the OT, testified that it was improbable that a child could intentionally vomit on someone. In her opinion, it was more likely that Student became so emotionally distraught that he became physically ill. Mother had reported that Student suffered stridor and cyanosis from crying. Ms. Perrine also testified to an incident in her clinic where Student climbed high up and became frightened. Ms. Perrine was concerned for his safety. Ms. Onstadt was present and directed Student to come down. Ms. Perrine used other techniques to encourage Student to feel secure and come down safely. Karen Brady-Nelson, a behavior specialist for the District, reviewed Ms. Onstadt's BIP and noted that she used time-out as a consequence for Student's behavior. Ms. Brady-Nelson testified that timeout is an aversive. One of the District's autism specialist and IBI supervisor, Stacey Hotter-Knight, observed Student at home and at his private preschool. At the home, Ms. Hotter-Knight observed Ms. Onstadt direct Student to eat a cucumber as a control mechanism. In Ms. Hotter-Knight's opinion, this was aversive. She also observed use of overcorrection on Student. She saw both Ms. Onstadt and Mr. Iller, her aide, compel Student to do a stand-up, sit-down behavior as another aversive technique. Ms. Onstadt prepared a report on Student's progress in her ABA program. The report reflected that Student's behaviors had practically disappeared by the end of 2006. Ms. Hotter-Knight indicated that Student demonstrated during her brief observation behaviors that exceeded those noted in Ms. Onstadt's report.

⁷ The article, "Early Intensive Behavioral Treatment: Replication of The UCLA Model In Community Setting." Howard Cohen, Ph.D., Mila Amerine-Dickens, M.S., and Tristram Smith Ph.D., Developmental and Behavioral Pediatrics Vol. 27, No. 2, April 2006, is an endorsement of the Lovass Institute's program of ABA therapy. The purpose of the article was

expert, Dr. Perlman, posed that Student's primary disability was ADHD and not autism. If Student was ADHD, then the IBI services provided in his IEP would have met his needs. There was no denial of FAPE from the allocation of IBI services in the IEP.

FAA

30. A Functional Assessment Analysis, or FAA, is an assessment that is made after the IEP team makes a determination that instructional/behavioral approaches specified in the IEP have been ineffective. (Cal. Code Regs., tit. 5, § 3052, subd. (b).) Trained functional analysis personnel gather information from observation, interviews and reviews of available data to address a student's behaviors. The report generated is presented to the IEP team to develop a behavioral intervention plan. This plan then is implemented to alter student's behaviors in a positive way.

31. An IEP maybe procedurally defective if it fails to contain, when appropriate, a FAA or BIP, or when the FAA or BIP is defective. However, an IEP should be designated inadequate only if procedural defects compromised the student's right to an appropriate education, or caused a deprivation of educational benefits. Here, the District prepared a FAA and BIP on November 17, 2004. The FAA identifies that targeted behavior to be decreased as hitting, which is identified as occurring between three to four times a day in the classroom and on the playground. The analysis indicates that the function of the hitting is to gain attention from adults and peers, although some sensory seeking is noted. Among factors felt to be influencing the behavior are Student's diagnosis of autism, ADHD, and parents' discontinuance of Student's Ritalin medication. Other factors considered are Student's below average range cognitive testing, the Farsi/English language dichotomy, delays in receptive and expressive language, attention, and sensory difficulties. Replacement behaviors were having Student ask for a break from activity and being able to ask for attention from adults or peers. Behavioral goals established are to improve self-regulatory skills, social/emotional/social interaction, and self-advocacy. The goal is for Student to reduce kicking and hitting behaviors to one or two episodes daily for three consecutive months.

32. The BIP provided that Student would be given a "take a break" card and a "hello" card to enable to Student ask for a break and to communicate with peers. Student was also to be taught, modeled and prompted to have appropriate physical contact. To modify antecedent events, Student was to be closely supervised. Student was provided a visual schedule, sensory input, frequent breaks reinforced when he returns to task, undesired tasks are followed by preferred tasks, reduce length of tasks and provide choices, precorrect for appropriate behavior, provide proprioceptive and vestibular stimulation, and sensory activities contained in a sensory diet. The plan provided that in response to preceding events that the staff will redirect Student with a question or task. Student will be prompted to use "hello"

not to determine the effectiveness of other methodologies. It was not intended to nor does it establish that the District's program could not attain similar goals. The SDC programs that were tested did result in progress for those students that were provided that therapy. There is no way to equate those programs with the District's programs.

card and, if he responds, to reinforce his action. If action persists, he will be physically prompted away and sensory diet will be used. If the targeted behavior occurs, Student is to be ignored and attention provided to the victim. If situation escalates, then physical action is used to maintain safety. The parents were to be provided a copy of the plan for use at home. Data on target and replacement behaviors was to be collected daily.

33. On November 17, 2004, the IEP team met and discussed the FAA and the goals. Student's mother agreed with the plan and consented to its implementation.

34. Dr. Gary LaVigna, the clinical director of the Institute for Applied Behavioral Analysis, was a witness for Student. Dr. LaVigna is a behavioral case manager (BCKM), in addition to his other qualifications. In reviewing the FAA and BIP, he was critical of the lack of definition and detail.⁸ He felt hitting should be defined. There was a reference to hitting and kicking without an explanation for the inconsistency. He felt that having staff redirect Student would provide the attention that Student was seeking from the behavior. He felt the implications of Student's diagnoses of autism and ADHD should have been explained. In part, he concluded that the FAA contained facts but there was no analysis. He indicated that there were no criteria for discontinuing or changing the plan.

35. The BIP suffered similar criticism. Dr. LaVigna stated that it was important in providing behavioral intervention that aversive actions be avoided. It was important in providing intervention that Student's conduct not be escalated by the intervention used. In his opinion the content of different programs could affect Student's behaviors. The use of 15 different ABA providers could cause escalation in Student's behaviors. In that circumstance, the school might provide a haven for Student to escape and his behaviors would be under control. In analyzing Student's behavior, it was important to determine the medications that he was taking and their effects. Parenting skills were also important in determining the source of Student's behaviors. If aversives are used in Student's ABA therapy but not in his school environment, it could cause his behaviors to escalate. He concluded that, if Student's behaviors improved under this plan, then it did not matter that the plan was not well-developed.⁹

36. Karen Brady-Nelson, a program specialist in behavior at the District, prepared the FAA and BIP. She gathered data for the analysis over four weeks with the assistance of Carole Darakjian and Erin Ferguson. Once the data was summarized into the analysis and subsequent reviews of the BIP, the data sheets were shredded. She added kicking to the FAA at the very end because of an incident in which Student kicked staff. She was not aware that Student was biting and engaging in other assaultive conduct or she would have added them to

⁸ Dr. LaVigna was critical of data from the District presented to him by Student. However, District witnesses testified persuasively that the data he was considering was not used for the FAA, but had been shredded once the analysis was completed.

⁹ Dr. LaVigna viewed part of a videotape prepared by father that depicted Ms. Onstadt's ABA therapy with Student. Dr. LaVigna indicated that reactive ABA therapy causes Student's behaviors to escalate.

the analysis. Hitting was a single hit. She did not incorporate a reinforcement schedule because she wanted the reinforcers used at all times. Ms. Brady-Nelson's experience with Student was that his behaviors did not escalate when his attention-seeking behaviors were not given attention. A new school district would have to enforce the BIP until they completed their own FAA. She acknowledged that the BIP lacked a date for terminating the plan and procedures to discontinue its use when it was no longer needed. After she concluded the FAA and BIP, the appropriate school psychologist would carry out the data gathering and prepare the appropriate three month reviews. After reviewing a videotape of Student's behavior between December 15, 2005 and December 31, 2006, she concluded that Student's focus of behaviors had changed from attention seeking to avoidance. That meant that a new FAA would be required.

37. Erin Ferguson was Student's SDC structured autism specific teacher from the start of the 2004-2005 school year until Student withdrew from school on December 15, 2005. In her class Student was a challenge but he was manageable. She kept data on Student's behaviors for her own and her aides' use in trying to cope with Student's actions. This data was not submitted to Karen Brady-Nelson for inclusion in the FAA or BIP. Ms. Ferguson and Ms. Kerins discussed sensory activities with the OT in dealing with Student. She did not see a written sensory diet at that time. However, Student's behavior in class improved, especially from January to August 2005. Ms. Ferguson did not have to use the BIP, because of Student's improved behavior. She was his teacher at Marblehead School in ESY 2005. During that time, Student was allowed to lead circletime. In fact, Ms. Ferguson was considering recommending that Student be put into a regular education class in the fall.

38. Necessary information was omitted from the BIP, and both the BIP and the FAA could have been written with more detail. But the teachers providing services to Student used the BIP effectively. Ms. Ferguson was so successful in using the BIP that she faded out its use in late 2004-2005 school year. The experience of a hands-on applicator must be credited over the technical expertise of the professor. Student is not persuasive that the defects in the FAA or the BIP adversely affected his parents' ability to participate in his IEPs, or that it denied him an educational opportunity.

November 17, 2004 IEP Addendum

39. As noted in Finding of Fact 20 and 22 and Legal Conclusions 4, 13 and 20, an IEP team is required to include certain individuals and their absence can result in a procedural violation of special education law. An IEP team meeting was held on November 17, 2004. The purpose of the meeting was to adopt the behavioral goals and the FAA. Student's parents, Ms. Ferguson, school principal Dana Scott Young, Carole Darakjian, behavioral support, attended the meeting. Mr. Young was the District's representative. Ms. Darakjian explained the FAA, the new goals, Student's behavior in the classroom, and the measures being used to help Student. She told the parents what procedures would be used to help Student modify his behaviors. Ms. Ferguson discussed with the parents the new goals that would be added to Student's IEP. The parents participated in the meeting and consented to the implementation and goals. Parents did not object to the FAA, goals or addendum to the

IEP. The parents did express their concern whether Student should be taking medication for his behaviors.

40. There was not a BCKM, an OT or an SLT at the meeting. The failure of these people to attend did not deprive Student of FAPE. The purpose of the meeting was to deal with the FAA and BIP. Ms. Darakjian, the behavioral assistant, was present at the IEP. She gathered much of the information for the documents. This was the beginning of the implementation of the BIP, and Ms. Darakjian was competent and knowledgeable on this process. Parent had no questions that Ms. Darakjian did not answer and posed no objection to implementation of the plans. Neither the OT, nor the SLT were needed. Later, if problems arose with the plan or its implementation, these people would have been critical in providing input on modifications or adjustment. For the implementation meeting, Student has shown no deprivation that would amount to a denial of FAPE.

February 16, 2005 Addendum

41. An addendum meeting to the July 7, 2004 IEP was held on February 16, 2005, to review BIP, goals and services. Student contends that the District should have used this meeting to expand services to him. The IEP team members in attendance were: Ms. Ferguson, Ms. Kerins, an OT, Principal Young and Mother. Ms. Kerins recommended changing S/L therapy to a one-to-one basis to work on Student's following one-step directions. His goal was reduced from complying with two step goals to one-step goals. Similarly, the OT recommended a change to one-to-one therapy from small group. Ms. Darakjian discussed the Hughes Behavior Intervention Plan Review. She was present as the behavior assistant instead of the BCKM. The report indicated that Student was making progress but still needed to be prompted. She observed Student in the classroom and noted the improvement in his behaviors. Mother did not object to the IEP addendum in fact she consented to it.¹⁰ As in Factual Finding 40, there was no procedural or substantive violation arising from this meeting.

April 18, 2005 and April 28, 2005 IEPs

42. On November 10, 2004, parents obtained a report from a neurologist, Dr. Pauline A. Filipek. As a result of a neurological examination, Dr. Filipek concluded that Student had autism based on his score on the Childhood Autism Rating Scale (CARS). She rated Student in the moderately severe autistic range. His score was 41. She noted in his sensory examination that he was intact to light touch and pain. She noted no other abnormality. Dr. Filipek referred parents to the Regional Center. She recommended a S/L assessment by Speech Pathology Associates and a complete OT/sensory integration assessment from Orange County Therapy Services. She indicated that these recommendations were for medical purposes and were not the responsibility of the local

¹⁰ Student contends that his mother thought his behaviors were worse in February 2005. She did not object to the report or apparently raise her concerns to the District. Mother's emotional relationship to the District limits the extent of parents' credibility.

education system.¹¹ This information was not shared with the District until much later.

43. Student's parent called for the IEP meeting that was held on April 18, 2005. The IEP team members present were: Ms. Ferguson, Ms. Schoolcraft (the school psychologist), Lisa Plantro (general education teacher), Principal Young, Nancy McGovern psychologist from the Regional Center of Orange County (RCOC), another person from RCOC, and Student's parents. Parents requested a change of schools, and more services. Principal Young indicated that the District was not prepared to discuss his goals and progress and that another meeting would be necessary. Mother discussed an incident when she attempted to observe in Student's class without a prior appointment. Principal had to threaten to call police before mother would leave. Parents indicated that they would provide District with a neurology report that requested additional services for Student. The IEP team discussed having an autism specialist at the next meeting.

44. The IEP team met again on April 28, 2005. This was an addendum meeting to review Student's progress on his goals and objectives. Team members were: Ms. Ferguson, Ms. Kerins, Ms. Wigglesworth (the general education teacher), Principal Young, Ms. McGovern from RCOC, another representative from RCOC, and Student's parents. The team discussed placement in general education and a SDC. The SDC was recommended. OT was extended for 30 minutes once a week of direct, collaboration, monitor and consult. Ms. Ferguson read the OT report of progress. The OT was on mandatory military duty. New OT goals were presented. An autism specialist was not available for the meeting. Ms. Ferguson reported that Student's behavior had improved since his new medication was introduced. Parents requested more S/L. The therapist explained that his present program is appropriate and successful, that parents should view the videotape of Student. Parents again requested the presence of an autism specialist at the next IEP.

45. These IEPs permitted parents to be involved in developing Student's special education services. It was agreed that the discussion of issues would be continued at the next IEP meeting. The parents consented to implementation of the new OT goals.

46. The absence of the OT from the meeting, and the failure of the District to add S/L services did not constitute a basis for denying Student a FAPE. As noted in Factual Finding 24, the basis for Student's complaint is the critique provided by Ms. Pliha. Her complaints are not persuasive because she had no experience with the collaborative model of the SDC. Ms. Kerins testimony was more credible that Student would receive nearly two hours of S/L in an SDC. Similarly, the absence of the OT because of military duty was explainable. As noted in Factual Findings 61 and 62 and Legal Conclusion 64, the absence of an IEP team member does not in and of itself require a deprivation of FAPE. Here, Ms. Ferguson was aware of the information from Ms. Johnson and she presented the family with the proposed new OT goals and services. Parents agreed to the goals. Thus, there was no demonstrable prejudice to parents.

¹¹ On December 22, 2004, Dr. Filipek wrote out prescriptions for three hours a week of S/L and three hours a week of OT. Dr. Filipek was not a witness

May 27, 2005 IEP

47. Student challenges the May 27, 2005 IEP, complaining that goals proposed were not measurable, that there was no data provided for review of his BIP, and that Ms. Mooney did not stay long enough. These assertions do not amount to a denial of FAPE. If they constitute procedural violations, Student fails to establish any adverse affect. On May 27, 2005, Student's IEP team met for his annual review. The members present were: Jacqueline Johnson (the OT), Christy Davis (the general education teacher), Ms. Ferguson (the special education teacher and case carrier), Sharla Pitzen (autism specialist), Ms. Kerins, Jennifer Mooney (special education teacher), Principal Young, Nancy McGovern (RCOC psychologist), and Student's parents. Parents were provided with the special education procedural safeguards. The team considered placements in general education and SDC. The team recommended SDC, Ms. Mooney's kindergarten structured autism class. Student's school day would increase to four hours a day. The previous services were recommended to continue. ESY was recommended between June 21, 2005 and July 22, 2005, with S/L four times for 30 minutes each and OT four times for 30 minutes each. Student's progress and accomplishment of goals was discussed by the OT, the SLT and the special education teacher. Sixteen new goals with specific measurable benchmarks were added to Student's IEP. The IEP team discussed several concerns raised by mother. She raised toe walking as a concern and the team agreed to develop a goal to add a verbal prompt to address her concern. Mother objected that Student was being interrupted too often by positive reinforcements. The team explained to mother how important these positive reinforcements were in Student's progress, but if they determined that he did not need them they would begin to fade those reinforcements. She complained about his use of the chewy tube. She suggested it only be offered as a reward for an activity. The team explained how important the chewy tube was to helping Student calm his behaviors. The team agreed to monitor his use to avoid it becoming too habitual. Mother was concerned about Student's use of a monster voice. The team told her that they understood her concern from a prior meeting and had instituted a procedure to prompt him to use a normal voice. Mother complained that Student was using both hands to paint instead of concentrating on use of an appropriate grasp and dominant hand. Ms. Pitzen explained to mother that they were working on other areas for him. Parents did not consent to the IEP.

48. Student fails to persuade that there was a denial of parents' opportunity to participate in Student's IEP development or that Student was deprived of an educational opportunity at the IEP meeting. The IEP team went out of the way to accommodate parental concerns. Student's complaint regarding data for review of the BIP is not well-taken. Karen Brady-Nelson, a behavioral expert for the District, indicated that the daily data was summarized in the report by the school psychologist or BCKM, and that there were no specific data sheets to see. The District's proposal that Student attend Ms. Mooney's SDC structured autism was an appropriate placement. It was the mirror image of Ms. Ferguson's class, just a year advanced.

IEE

49. As discussed in Legal Conclusion 10, parents have a right to an independent educational evaluation if they disagree with assessments conducted by the District. An IEE is to be funded by the District unless it files for due process to defend the appropriateness of its assessments. On June 7, 2005, Student's counsel sent a letter to Ms. Kimberly Gaither, a legal specialist with the District. Counsel indicated that he represented Student. The letter included an authorization for representation signed by Student's parents. Counsel indicated that Student's parents disagreed with the June 22, 2004 assessments conducted by the District and requested an IEE. Counsel actually said parents objected to the assessments reviewed at May 27, 2005 IEP, but there was no assessment on that date. It is assumed parents were objecting to the original assessment.

50. Ms. Gaither responded to Student's letter on June 28, 2005. She attached the District's criteria for funding an IEE. She also attached an assessment plan proposed by the District with a copy of parents' special education procedural safeguards. As an alternative to assessment, the District requested that the parents advise the District of their areas of concern regarding the earlier assessments. She requested a copy of the vitae of the assessor they chose. The criteria for an IEE specifically indicate that transportation costs will not be paid. It requires that the costs for an IEE be comparable to the costs of the District in obtaining an appropriate assessment. In bold lettering the criteria provides that the evaluators release their assessment information, including test protocols and reports, to the District before they are funded.

51. Dr. Perlman conducted his assessment without complying with the criteria promulgated by the District. On August 1, 2006, Student provided the District with a copy of Dr. Perlman's report. Attached was an invoice for \$10,527.50 that reflected that it had been paid. Student produced credit card statements and a check showing \$7,922.75 was paid to Dr. Perlman. Dr. Perlman's invoice contains entries for travel of \$2,215. Ms. Pitzen testified that Dr. Perlman's \$10,000 fee was unreasonable.

52. District did not agree to fund the Student's IEE. It also failed to file for due process to defend its initial assessments. The District relies on administrative letters to contend that they could delay deciding until after the assessment was completed. The applicable regulatory provision requires that there be no unnecessary delay and recent case law indicates that the District's position is no longer tenable. Parents are entitled to reimbursement once Dr. Perlman produces the required protocols.

Notice

53. As noted in Legal Conclusion 15, a District has a duty to give specified and detailed written notice when it proposes to take some action or in rejecting requests from parents for action to be performed. Student is not persuasive in contending that the District was obligated to respond to a claim for reimbursement.

2005-2006

54. Parents failed to provide Dr. Perlman or the District information concerning the nature, amounts and affects of the medications that Student was taking. In response to concern about this failure to disclose, Student correctly asserts that parents cannot be ordered to medicate their child even when that child's behavior is out of control. District would have the responsibility to address Student's behavior even if it stemmed from the parents' determination that they did not want their child medicated.

55. Student contends that the District's data concerning his behavior at the beginning of the 2005-2006 school year was inaccurate. Ms. Ferguson stated that Student's behavior was worse at the beginning of the 2005-2006 school year. She implemented the BIP again to address these increased behaviors. In her opinion, Student was bored with repeating her class for a second year. This resulted from parents' failure to consent to a placement for Student, so he remained in Ms. Ferguson's class.

56. Student complains that the District did not review his BIP during the summer of 2005. The plan specifies that it will be reviewed in three months. The last review was the IEP meeting on May 27, 2005. The Education Code excuses school districts from performing tasks when they are normally out of session. The District was not required to review the BIP during the summer of 2005.

December 14, 2005 IEP

57. Student raises several concerns with regard to the December 2005 IEP meeting. He contends that there was no data contained in the BIP that was to be reviewed; he reiterates his complaint that the BIP was defective. He contends that documents prepared by Ms. Ferguson demonstrate that his maladaptive behaviors were escalating not as reported in the BIP review. He contends that the SLT was not present. He contends that the District pulled a "bait and switch" routine that cost the parents money by not advising the experts who were participating in the observation that the focus of placement had changed from Palisades to Berguson Elementary School. He contends that Ms. Wood, the teacher at Berguson, conducted an evaluation of Student without his parents consent. He contends that the District did not comply with legal requirements in preparing its requested assessment plan. Finally, he claims that the District's offer of placement at Berguson was inappropriate. None of the contentions rises to the level of a deprivation of FAPE.

58. An addendum IEP meeting was held on December 14, 2005. Members of the IEP team attending were Ms. Pitzen, Alison Wood (the special education teacher at Berguson Elementary School), Vicki Galloway (a general education teacher), Jacqueline Johnson (the OT), Ms. Ferguson, Principal Young, Pamela Ender (school psychologist), Student's counsel, Ms. Onstadt, and the Student's parents. The purpose of the meeting was to conduct a BIP review, consider a new placement for Student at Berguson School beginning in January, and consider his transition. In regard to the BIP review, the District was requesting a new FAA to address Student's increased maladaptive behaviors. The District had been trying to schedule

this meeting since August. Ms. Enders, the BCKM, discussed the addition of new goals to the BIP. She presented parents with a new assessment plan. A discussion was held regarding Student's placement at Berguson in Ms. Wood's SDC autism structured kindergarten class. The District's selection of Berguson stemmed from mother's earlier request that Student go to Berguson. Parents reiterated their request for additional S/L and OT services. Student notified the District that he was being withdrawn from school. Parents' counsel attached notes of their concerns to the IEP document. Parents' did not consent to the new assessment plan, or the IEP. The notes reflected that parents intended to provide a private program and would seek reimbursement from the District.

59. A Hughes Behavior Intervention Plan Review prepared on December 2, 2005, was discussed at the addendum IEP meeting. It contained new goals and an indication that another FAA was needed. A copy of the document was mailed to parents by the District on December 16, 2005. Although the report expressed that Student was making progress and his behaviors had decreased, the report included adding a new goal and the need for a new FAA. Student's contention regarding data collection was addressed in Factual Finding 55. There was no procedural error.

60. Ms. Pitzen wrote to Student's parents on December 16, 2005. She responded to parents' concerns raised in the notes to the IEP. She specifically rejected any claim for reimbursement for whatever private program the parents had elected to provide. She rejected the claim that District had engaged in a "bait and switch" maneuver in regard to observations and Student's proposed placement. She explained that Ms. Wood's observation of Student was not an assessment. She attached the items Student's counsel had requested at the IEP meeting. She attached parents' rights and a copy of the BIP review. Ms. Pitzen reiterated the District's offer of placement for January. Student would attend Berguson in Ms. Wood's SDC, structured autism class for five hours a day, five days a week. He would be provided IBI services three hours daily on a one-to-one basis. S/L would be provided one time a week for 30 minutes individually and one time a week for 30 minutes in a small group. OT would be provided one time a week for 30 minutes individually. Finally, Ms. Pitzen noted that parental consent was necessary for modification of the BIP and to conduct a new FAA.

61. Student replied to Ms. Pitzen in a letter dated December 20, 2005. Besides repeating parents' complaints, the letter rejected the District's proposed assessment plan.

62. Student's contention that the observed increase in maladaptive behaviors had been an ongoing trend is not supported by the evidence. Student changed his medication in October 2005, which was a source for Student's increased behaviors. In November 2005, Student started a new medication.¹²

¹² Dr. Robert S. Dobrin prescribed medications for Student. Dr. Dobrin was not a witness nor was evidence of Student's medications provided except piecemeal and incompletely. Father had CARD provide an assessment of Student in mid-2005, but this information was not provided to the District.

63. Parents implemented a private ABA therapy program for Student in July 2005. There were 15 different providers independently hired by father. He was confident of his hiring ability because of his experience as an educational provider. Only Ms. Onstadt became a witness as to her qualifications and experience. Father fired one of the ABA providers for allegedly striking Student. These events provided additional sources of Student's increased maladaptive behaviors. Dr. LaVigna testified that a large number of ABA providers and a constant change in personnel could have an adverse affect on Student's behavior.

64. Ms. Kerins, the SLT, was absent at the IEP meeting, as a consequence of her unexpected illness. She had conferred prior to the meeting with Ms. Ferguson to present the information on Student's S/L. As noted in Factual Finding 40 and Legal Conclusion 39, the absence of a non-essential team member does not constitute a denial of FAPE.

65. As indicated in Legal Conclusion 4, not every observation triggers the need for parental consent or an assessment plan. Ms. Wood's observation of Student in the classroom was out of her expressed desire to be prepared for the IEP meeting in which placement of Student in her class was the primary subject for discussion.

66. Student is not convincing in his contention that Ms. Wood was conducting an assessment that had not been consented to.

67. Student is similarly not persuasive in contending that the District committed a procedural violation of IDEA when it did not prevent the requested observation of Ms. Mooney's class. He contends that the District deliberately did a "bait and switch" routine on his expert. This was an unfortunate incident, but there is no evidence that the District changed the placement merely to cause parents undue expense. There was no procedural violation.

68. Part of Student's contention that the Berguson class was an inappropriate one for Student was the opinions of Ms. Onstadt and mother. Based on footnotes 7 and 11, neither Ms. Onstadt nor mother is credible witnesses as to the appropriateness of Ms. Wood's class for Student.

69. Student has consistently reiterated the argument that Student was not receiving sufficient S/L and OT services. Based on Factual Findings 23, 24, and 25, the offers of S/L and OT are appropriate to meet Student's needs.

70. Dr. Perlman did not assess Student until at least six months later. His statements with regard to the December 14, 2005 IEP were based on questionable reliance on Ms. Onstadt's view of the situation. He did not observe the Student in this classroom. He was not aware of the extent to which Student was medicated or not medicated during this period. His views do not outweigh the opinion of experienced professional educators who found the proposed placement to be appropriate.

71. Parents' rejection of the District's proposed assessment that would have updated Student's FAA was unreasonable. Ms. Gingsberg-Brown, when she viewed a

videotape of Student's behaviors from December 2005 to December 2006, related that Student's focus of behavior had changed from attention seeking to task avoidance. The change necessitated a new FAA. Student's behaviors during the fall of 2005 had exacerbated, whether stemming from his boredom with repeating Ms. Ferguson's class, his medication change, the constant changing of his ABA providers, or his apparent assault by one of them. These circumstances made a new assessment critical.

72. Student is not persuasive in regard to the IEP team's review in preparation of the assessment plan. Student contends that parents could reject the District's proposed assessment plans as a result of defects in preparation and because parents as members of the team were not consulted. Parents were able to discuss the necessity of the new assessments at the December 14, 2005 IEP addendum meeting. There is no evidence to undermine the presumption that the IEP team adequately prepared for the meeting to develop the assessment plan.

73. Parents were not reasonable in removing Student from school. Cooperation between parents and district is imperative in special education. Parents presented no evidence that they had a better idea regarding providing for Student's unique needs. They did not have the benefit of Dr. Perlman's report when they acted.

May 2006 IEP

74. The failure to hold an annual review IEP is a procedural violation of IDEA. As noted in Legal Conclusion 4, the IEP team is required to meet at least annually to review Student's progress. Here, the District failed to hold Student's annual IEP in May of 2006. The annual IEP review was not conducted until September 29, 2006. After parents withdrew Student from school the District in February 2006, the District tried to reestablish contact with parents through Student's counsel. However, counsel never responded to the District's entreaty. Finally, on July 11, 2006, the District sent out an IEP meeting notice. Subsequently, the District sent out another notice on August 18, 2006. Student's counsel indicated to the District on August 28, 2006, that the parents preferred an IEP date after a proposed observation was completed. On September 18, 2006, Erin Ferguson sent parents a letter attaching an IEP annual review meeting notice. The District proposed a placement for Student at Lobo Elementary School (Lobo). The District sought parental input into another proposed assessment plan for Student. Ms. Ferguson attached a copy of parental rights. The letter was returned to the District stamped unclaimed by the Post Office. On September 27, 2006, Ms. Ferguson sent another letter to parents seeking their input into the District's proposed assessment to be discussed at the IEP meeting. This certified letter was returned unclaimed by the Post Office.

75. As discussed in Legal Conclusion 22, the District has an ongoing responsibility to provide special education services even when Student has withdrawn from school unless it is advised that the parents have waived special education services. Notwithstanding these clear mandates, neither Student nor parents were adversely affected by the failure to hold an annual IEP review. Student had withdrawn from school and was receiving private services.

Parents were unresponsive to the District's attempts to set up a later meeting in September. Student advised the District that it wanted to delay the meeting until after they received Dr. Perlman's report August 1, 2006, and a later school observation by Dr. Perlman. There was no deprivation of FAPE. This omission did not interfere with the parents' participation in Student's IEP process, and it did not deny Student an educational opportunity or deny him and educational benefit.

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76. In March 2006, parents took Student to an optometrist for a vision assessment. Dr. Julie Ryan determined that Student needed vision therapy. She indicated Student's behaviors were difficult. He would not cover one eye for testing purposes. She initially sent him home because she did not feel that he was ready to focus on therapy. Later, he was permitted to return for therapy. She recommended therapy twice a week for 45 minutes. She estimated that Student would need about two years of therapy. Her report was provided to the District on October 4, 2006.

77. On August 18, 2006, the District made its third attempt to obtain a current assessment of Student. It prepared an assessment plan for parents' consent. The District proposed that it be treated as his triennial which was not yet due. This is the assessment plan referenced in Ms. Ferguson's letter of September 18, 2006, which parents left unclaimed at the Post Office.

78. Student is not persuasive in contending that the IEP team did not properly perform its duty to review all relevant information before it agreed to the assessment plan. His contentions do not overcome the presumption of duties regularly performed. Also, enforcement of the assessment plan is not at issue here. The true issue is parents' cooperation in the IEP process. The District sought parents input regarding the assessment plan, but it was refused.

79. Student is somewhat disingenuous in contending parents were not properly notified of the September 29, 2006 annual review IEP meeting. On the one hand, Student criticized the District for not holding the meeting in May. He requested a delay of the meeting date to accommodate a school observation that the District agreed to. On the other hand, Student now contends that proper notice was not provided when his parents refused to pick up the certified notices. Mother acknowledged in a phone conversation with Ms. Ferguson having received timely notice.

September 29, 2006 IEP

80. Student again contends District noncompliance with the procedures for developing an assessment plan that parents rejected at the meeting. He contends that the District did not give parents adequate notice of the meeting; and, he alleges a denial of FAPE.

81. On September 29, 2006, the IEP team conducted Student's belated annual

review. Student's parents did not attend. The IEP team members attending were: Ms. Ferguson, Ms. Fant (a program specialist), Adrienne Clarke (Lobo Elementary School autism specialist/IBI supervisor), Stacey Hotter-Knight (autism specialist), Cathy Bognar (school psychologist), Lisa Bland (SLT), Deborah McCormick (general education teacher and Lobo Principal), Kimberly Richardson (Lobo SDC collaborative teacher kindergarten), and Lori West (collaborative regular education teacher). There was no OT on the team for this meeting. The team discussed Student's progress as indicated in Dr. Perlman's Report and Ms. Onstadt's reports. Stacey Hotter-Knight, an autism specialist who had observed Student, was more constrained in her appraisal of Student's behavior in class. She indicated that he was removed from circletime for 13 out of 15 minutes. She reported that one of Student's ABA providers indicated that parents used a bitter nail polish to keep Student from biting his nails. Parents used this substance on many objects in the house to discourage his mouthing. The provider told Ms. Hotter-Knight that Ms. Onstadt had encouraged parents to provide Student medication to calm him for her observation. The team proposed that Student's new placement would be at Lobo in Ms. Richardson's SDC collaborative class which would include a general education class and a general education teacher.¹³ The team included an Interim Behavior Support Plan Strategies to address Student's behavior problem. District was still seeking a new FAA and BIP. To assist Student with the transition from private school with ABA providers to Lobo with a new aide, the IEP team included a transition plan that would operate over five weeks to help Student go from private to public providers. The team proposed meeting again on November 1, 2006, to review Student's progress and transition.

82. In regard to the appropriateness of the proposed placement, Ms. Onstadt, Student's private ABA provider, recommended that Student be placed in a regular education classroom. Dr. Perlman, Student's neuropsychological assessor, recommended a regular education classroom, although he did suggest that an SDC class that was not autism specific might be considered. Student now suggests a different alternative. Student contends that he should be in a small general education classroom with an aide. However, Student's suggestion is not supported by his own experts. The District has attempted to carve a niche between the SDC and regular education and based on the District's educational expertise it offers Student an educational benefit. The suggested placement is appropriate and Student was not denied FAPE.

83. In light of Factual Findings 23 through 25 and 69, Ms. Perrine's and Ms. Pliha's suggestions for additional services are not persuasive. Ms. Onstadt is not a credible witness. Her reports that indicate Student's behaviors have nearly disappeared hardly support Student's contention that he needed additional ABA therapy.

¹³ Student was offered an aide one-to-one in the general education class five days a week for three and one-half hours a day; S/L individual therapy once a week for 30 minutes; S/L small group once a week for 30 minutes; IBI therapy at home ten hours a week; and OT individual therapy once a week for 30 minutes. Transportation and ESY services were included.

84. The District's five week plan to transition Student from ABA to a school room is more than appropriate for Student. As Dr. LaVigna testified, Ms. Onstadt's ABA therapy should be stopped immediately.

85. Student filed for due process on October 5, 2006.

86. On November 6, 2006, District mailed parents an IEP meeting notice for a proposed IEP team meeting to be held on November 13, 2006. The letters were returned as unclaimed by the Post Office. The District sent another notice of meeting on November 15, 2006. Again the District sent a notice of meeting on December 1, 2006. There was no response.

December 15, 2006 IEP

87. On December 15, 2006, the IEP met for Student's annual review and to consider placement, transition and assessment. IEP team members attending were: Ms. Bognar, Ms. Fant, Ms. Bland, Ms. Clarke, Ms. McCormick, Anita Dobson (program specialist), Ms. Ginsberg-Brown, Ms. Richardson, Caroline Carrie (collaborative regular education teacher), counsel for the District, counsel for Student, and the father. The District reiterated its desire to understand the identity, purpose and effect of Student's medications. The District wanted parents to agree to new assessments including a new FAA. The District reoffered the program it presented at the September 29, 2006 IEP. After discussion, the IEP team agreed to add consultation to the S/L and OT services. The team agreed to add a monthly meeting on Student's progress with parent. Parent did not consent to the IEP. Student's counsel noted that parents did not agree with the goals and objectives proposed and the benchmarks. Parents wanted the intervention facilitators included in the progress meeting.

88. Student's contentions are essentially the same as those raised in regard to the September 29, 2006 IEP. His contentions are not persuasive. The goals and objectives were measurable based on the benchmarks, and no procedural violation was involved. The December 15, 2006 IEP offered Student FAPE.

Reimbursement and Compensatory Education

89. In the absence of any evidence regarding amounts necessary for reimbursement or evidence regarding an appropriate award of compensatory education, the contentions will not be addressed.

90. Pursuant to Legal Conclusion 21, reimbursement and compensatory education are equitable remedies. Consideration for such determination depends on the conduct of the parties. Neither party is without fault.

91. Factors reflecting lack of cooperation by parents.

a. Father produced at least two videotapes admitted as exhibits in this case. One version did not contain a short segment taken from a District produced videotape of Student receiving S/L services from Ms. Kerins. This version was introduced by Student as showing Student's behavior between December 2005 and December 31, 2006. There are various scenes with Student as the subject. A majority of the scenes are of Student receiving ABA therapy from Ms. Onstadt. Student adamantly objected to the admission of the District's tape when offered merely as part of its opening statement. When Ms. Pliha testified for Student, she produced a different version of the videotape that Student had provided to her. The Pliha tape showed part of the District's video. The District's tape was prepared sometime between April 20, 2005 and July 27, 2005. Ms. Pliha relied on her tape as part of her expert opinion. Dr. Perlman was shown the District's tape of Student's performance and was surprised at his demeanor and wondered when the tape had been produced. Father's claimed expertise in the education field raises serious concerns over the manipulation of this evidence.

b. Father had Student assessed by CARD, but did not provide that report to the District or at the hearing.

c. Father had Student treated by Dr. Dobrin, who prescribed Risperdol, Ritalin, and Focallin for Student. Dr. Dobrin was not called as a witness nor was a report introduced. Parents have been unwilling to share the medication information with the District.

d. Parents refused to discuss Dr. Perlman's report with him.

e. Mother was asked to provide the District's phone number to Ms. Pliha but failed to do so.

f. Parents have refused three separate requests from the District to have Student assessed. Two of the assessment plans included desperately needed FAAs.

g. Early in the history between parents and the District, parents would attend IEP meetings based on a note in Student's backpack. These meetings were attended on one or two day notices. In the last several months, parents have delayed IEP meetings and not attended meetings based on their failure to pick up certified mail.

h. Parents were provided training under the July 7, 2004 IEP. Parents were informed at the April 18, 2005 IEP about activities they should be doing at home to help with Student's behaviors. Parents were provided training by Ms. Onstadt two hours a week. Yet, Dr. Perlman testified that the parenting skills were horrible when he first observed in the home in 2005, and had not improved in 2006. Dr. Perlman indicated that the parents were resistant to using medication. The parents consistently sought from the District help to control Student's toe walking, but the parents insisted that Student not wear shoes in the home. Use of shoes to control toe walking is an

accepted treatment. There was hearsay evidence that parents were using medication to control Student's participation in observation times.

i. When parents were asked by the District the basis for their objection to the initial assessments, the parents would not respond.

92. Ameliorative conduct by parents was their offer to advance Student in 2005.

93. Factors reflecting lack of cooperation by the District.

a. The District's refused to permit its employees to speak to Dr. Perlman when he was conducting Student's assessment.

b. The District's failed to alert Dr. Perlman and Ms. Onstadt that the focus of Student's placement had changed from Palisades to Berguson.

94. The District's ameliorative conduct.

a. The District made continuous efforts to attempt to reach an agreement with parents that would avoid litigation. Those efforts went to the extreme point that the District harmed its own position by its reluctance to force parents to provide necessary assessments.

LEGAL CONCLUSIONS

Applicable Law

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

2. The scope of the administrative hearing mandated by 20 U.S.C. section 1415(b)(2), is limited to the due process request filed to obtain the hearing. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.) The California Statute of Limitations¹⁴ on due process complaints generally is three years prior to the request for due process.

3. IDEA,¹⁵ the federal Individuals with Disabilities Education Act (20 U.S.C. §

¹⁴ The Statute of Limitations was amended effective October 6, 2006. It now conforms to the IDEIA and limits due process complaints to two years prior to the filing. (Ed. Code, § 56505, subd. (1).)

¹⁵ IDEA was effective until June 30, 2005, when it was amended by the Individual with Disabilities Information Act (IDEIA), which was effective beginning on July 1, 2005.

1400 et seq.) and the concomitant California special education programs (Ed. Code, § 56000 et seq.) were enacted to make public education available to children with disabilities and other exceptional needs. School districts are required to locate potentially eligible children, assess and evaluate them, determine which children are eligible for benefits, develop individual programs for eligible children, and propose school placements for them. This process is referred to as “child find.” Assessment of a child with a disability is not dependent on a parent’s request for an assessment. A pupil shall be referred for special education instruction and services only after the resources of the regular education have been considered, utilized and found inadequate. (Ed. Code, § 56303; see also *Vasherresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1156-1157.)

4. An IEP team consists of (1) parents, (2) one regular education teacher, (3) one special education teacher of the pupil, (4) a representative of the local education agency (LEA), (5) an individual who can interpret the instructional implications of the assessment results, (6) at the discretion of the parents or LEA, other individuals who have knowledge or special expertise regarding the pupil, including related services personnel, as appropriate, and (7) the individual with exceptional needs. (Ed. Code, § 56341, subd. (b)(1-7).) Participants on the IEP team are expected to be knowledgeable as to the student’s disability and educational history. (*Shapiro v. Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317 F.3d 1072, 1076, 1078.) The IEP team is required to meet at least annually to review student’s progress and the plan. (Ed. Code, § 56343, subd. (d).) The term of an IEP is one year. The annual IEP replaces the prior IEP. Service providers may be included at the discretion of the parent or LEA, but they are not mandatory members of the IEP team. (*Shaw v. District of Columbia* (D. D.C. 2002) 238 F.Supp.2d 127, 140-141; 34 C.F.R. § 300.344(a)(6) [now 34 C.F.R. § 300.321(a)(6)].)

5. To develop an IEP, a potentially eligible child is identified, then assessed by the school district to determine eligibility, and an individualized education program is prepared. (Ed. Code, §§ 56301, subd. (a), 56320, subd. (f).) A District is required to assess a Student in all areas related to a suspected disability. (Ed. Code, § 56320, subd. (f).) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a) & (b).) The school district must present a written plan to the student’s parents encompassing the areas it seeks to assess. (Ed. Code, § 56321, subd. (a).) The school district cannot perform an assessment without parental consent. (Ed. Code, § 56321, subd. (c).) If a parent refuses to provide consent for a school district assessment, the school district can request a due process hearing to compel compliance with an assessment. (Ed. Code, §§ 56321, subd. (c), 56501, subd. (a)(3), 56506, subd. (e).) Additionally, Student must permit the District to conduct necessary and appropriate assessments if he intends to seek the benefits of IDEA. In *S.F. v. Camdenton R-III School District* (8th Cir. 2006) 439 F.3d 773, the court refused to order compliance with the School District’s assessment plans “when parents refuse consent, privately educate the child, and expressly waive all benefits under IDEA.” (See also, 20 U.S.C. § 1414(a)(1)(D)(ii)(II); 34 C.F.R. § 300.505(a)(1)(ii) [now 34 C.F.R. § 300.300(a)(3)].)

6. Assessments must be conducted by individuals who are both “knowledgeable of the student’s disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student’s primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a) & (b).) Reassessments can be conducted as often as annually, but no less than every three years. (Ed. Code, § 56381, subd. (a)(2).) The District determines what assessments will be undertaken. (Cf. *Elida Local School District v. Erickson* (N.D. Ohio, W.D. 2003) 252 F.Supp.2d 476, 484.) An observation by a teacher of a student does not constitute an evaluation triggering an assessment plan and parental consent. (Ed. Code, § 56321, subd. (g).)

7. The IDEA concerns itself not with labels, but with whether a student is receiving FAPE. (*Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1055; *Lancaster School District*, 47 IDELR 118 (SEA CA 2007).)

8. Under IDEA, a school district must provide a free and appropriate public education to each disabled child. (20 U.S.C. § 1412(1).) FAPE consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction. (*Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 188-189 [73 L.Ed.2d 690, 102 S.Ct. 3034] (*Rowley*)). The instruction and services must comport with an individually-tailored IEP, which must be developed under strict statutorily-based procedures. (See 20 U.S.C. § 1401(11).) The IEP is a written document detailing the student’s current educational level, a statement of measurable annual goals, including both academic and functional goals. (Ed. Code, § 56345, subd. (a)(2); 34 C.F.R. § 300.347(a)(2) [now 34 C.F.R. § 300.320(a)].)

9. Cooperation between Student’s parent and the District is pivotal to carrying out the purposes of IDEA. (*Patricia P. v. Board of Education of Oak Park and River Forest High School District No. 200* (7th Cir. 2000) 203 F.3d 462, 469 [cooperate in assessment]; *Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 995 [same]; *S.M. v. Weast* (D. MD. 2003) 240 F.Supp. 426, 436 [cooperation in developing IEP]; *New York City Department of Education*, 46 IDELR 150 (SEA NY 2006) [failure to share reports with district].)

10. A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. (34 C.F.R. § 300.502 (b)(1); currently § 300.502 (b) (2).) When a parent requests an IEE, a school district, without unnecessary delay, must either comply or file a due process complaint to request a hearing to show that its own evaluation is appropriate. (*Pajaro Valley Unified School District v. J.S.* (N.D. Cal. 2006) 2006 U.S. Dist. Lexis 90840; *Norton v. Orinda Union School District*

(9th Cir. 1999) 1999 U.S. App. Lexis 3121; cf. *Herbin v. District of Columbia* (D. D.C. 2005) 362 F.Supp.2d 254, 262 [four month delay in responding to reevaluation request was reasonable].)

11. However, a parent is entitled to only one IEE at public expense each time the District conducts an evaluation with which the parent disagrees. (34 C.F.R. § 300.502 (b)(5).) Additionally, District cannot be forced to rely solely on an independent evaluation conducted at the parents' behest. (*Patricia P., supra*, 203 F.3d at p. 468.) The District can obtain its own assessment of Student.

12. To determine whether a District offered a student a FAPE, the focus is on the adequacy of the placement the District actually offered, rather than on the placement preferred by the parent. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) Under *Rowley, supra*, 458 U.S. 176, 179 [102 S.Ct. 3034, 73 L.Ed.2d 690], a challenge to an IEP requires resolution of two issues: (1) whether the school district complied with the procedural requirements of IDEA, and (2) whether the challenged IEP was reasonably calculated to enable the child to receive educational benefits. If the school district's program was designed to address student's unique educational needs, was reasonably calculated to provide some educational benefit, and comported with the IEP, then the District provided a FAPE, even if student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit

13. The law requires only that the IEP in place "be reasonably calculated to confer a meaningful educational benefit on the child." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has directed courts not to "judge an [IEP] in hindsight; [but] rather . . . look to the [IEP's] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer [the child] with a meaningful benefit." (See *Pitchford v. Salem-Keizer School District No. 24J* (2001 D. Or.) 155 F.Supp.2d 1213, 1234; see also, *T.R. v. Kingwood Township Board of Education* (3d Cir. 2000) 205 F.3d 572, 577.) The evidence must establish an objective indication that the child is likely to make progress. The evidence of progress, or lack thereof, must be viewed in light of the limitations imposed by the child's disability. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 130.)

14. In developing an IEP, the team shall in the case of a child whose behavior impedes his learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior. (34 C.F.R. § 300.346(a)(2)(i)[currently, 34 C.F.R. § 300.324(a)(2)(i)]; Ed. Code, § 56341.1, subd. (b)(1).) When the IEP team finds that instructional/behavioral approaches have been ineffective they may request a functional analysis assessment of student. (Cal. Code Regs., tit. 5, § 3052, subd. (b).) A FAA requires parental consent pursuant to California Education Code section 56321. Once the FAA is completed, then the IEP team meets to develop a behavioral intervention plan. The BIP is made a part of the IEP. An inadequate BIP can cause a denial of FAPE. (*Escambia County Board of Education v. Benton* (S.D. Ala. 2005) 406 F.Supp.2d 1248.) However, it is subject to harmless error analysis. (*School Board of Independent School District*

NO. 11 v. Renollett (8th Cir. 2006) 440 F.3d 1007, 1011.)

15. Before a school district may alter the educational placement of a student, the school district must first provide notice to the student's parents in writing. (20 U.S.C. § 1415(b)(3)(A); 34 C.F.R. § 300.503.) The notice must contain information pertaining to the program proposed and the reasons for the proposed change. (20 U.S.C. § 1415(c).) A district must provide a single specific offer of placement. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) A change of placement occurs if the adjustment in services is likely to affect in some significant way the student's learning experience. Minor discretionary decisions by a District with regard to a student's curriculum or assignment of teachers does not require prior written notice. (Cf. *Concerned Parents & Citizens For The Continuing Education of Malcolm X v. New York City Board of Education* (2d Cir. 1980) 629 F.2d 751, 753-754; *B.V. v. Department of Education, State of Hawaii* (D. Hawaii. 2006) 451 F.Supp.2d 1113 [whether aide needed specialized skills was a question of educational policy, not for court, to decide].) If the action proposed by the District requires parental consent, the District may give the parent notice at the same time it requests parental consent. (34 C.F.R. § 300.503 [comments].)

16. 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, subd. (a)(5)(A); Ed. Code, § 56031.) Mainstreaming is not required in every case. (*Heather S. v. State of Wisconsin, supra*, 125 F.3d at p. 1056.) However, to the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (Ed. Code, § 56031.)

17. ESY services are special education and related services provided to children with a disability beyond the normal school year. (34 C.F.R. § 300.309(b)(1)(i) [now 34 C.F.R. § 300.106(b)(1)(i)].) ESY services are necessary only if the IEP team finds, on an individual basis, that these services are necessary to provide a FAPE. (34 C.F.R. § 300.309(a)(2) [now 34 C.F.R. § 300.106(a)(2)].) ESY services must be in accord with a child's IEP. (34 C.F.R. § 300.309(b)(ii) [now 34 C.F.R. § 300.106(b)(1)(ii)]; Ed. Code, § 56345, subd. (b)(3); Cal. Code Regs., tit. 5, § 3043, subd. (f).) 34 C.F.R. section 300.309 [now 34 C.F.R. § 300.106] does not prescribe the time in which the school district must present an ESY proposal. School districts are entitled to have a reasonable time to implement ESY services. (*Faulders v. Henrico County School Board* (E.D. Va. 2002) 190 F.Supp.2d 849, 854; see, *Reinholdson v. School Board of Independent School District No. 11* (8th Cir. 2006) 2006 U.S. App. LEXIS 19021; cf. *Reusch v. Fountain* (D. Md. 1994) 872 F.Supp. 1421, 1426.)

18. The content of ESY services are governed by the necessity to prevent skills or benefits already accrued from the prior year from facing significant jeopardy due to regression or lack of retention. (*McQueen v. Colorado Springs School District No. 11* (D. Colo. 2006) 419 F.Supp.2d 1303, 1308-1310.) Additional skills training may be included in ESY when the IEP team determines that this is necessary to meet ESY skills-maintenance goals.

19. FAPE includes not only special education, but also related services. (*Union School District, supra*, 15 F.3d 1519, 1527; 20 U.S.C. § 1401(a)(17); Ed. Code, § 56341.1, subd. (c).)

20. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 892) To constitute a denial of FAPE, a procedural violation must result in deprivation of educational benefit or a serious infringement of the parents' opportunity to participate in the IEP process. (Ed. Code, § 56505, subd. (j).)

21. When a LEA fails to provide FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of the Town of Burlington v. Department of Education* (1996) 471 U.S. 359, 374 [85 L.Ed.2d 385, 105 S.Ct. 1996]; 20 U.S.C. § 1415 (i)(C)(iii).) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief which may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (*Parents of Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) The right to compensatory education accrues when the district knows, or should know, that student is receiving an inappropriate education. Compensatory education does not, however, necessarily involve an obligation to provide day-for-day or session-for-session replacement for opportunity or time missed. (*Id.* at p. 1497). The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of IDEA." (*Ibid.*) Both reimbursement and compensatory education issues are equitable issues requiring a balancing of the behaviors of the parties.

22. A school district has an ongoing responsibility to provide special education services to a student with disabilities. (Ed. Code, § 56383; 34 C.F.R. § 300.325(c); *Wise v. Ohio Department of Education* (6th Cir. 1996) 80 F.3d 177, 185.)

23. An LEA is prohibited from paying for any interventions that are likely to cause pain; deny adequate sleep, food, water, shelter, bedding, physical comfort, or access to bathroom facilities; involve locked seclusion; or deprive the individual of one or more of his or her senses. (Cal.Code Regs., tit. 5, § 3052, subd. (1)(1-8).)

Determination of Issues

Issue 1: Did the District deny Student a free and appropriate public education (FAPE) for the 2003-2004 school year, including the 2004 extended school year (ESY), through the following procedural and substantive violations of IDEA and related state law?

- a. The failure to timely prepare and present an assessment plan to Student's parents.

24. No. As discussed above in Factual Findings 1 through 10 and Legal Conclusions 1 through 3, the District was not on notice that Student had a disability that

required an assessment until the mother requested the assessment in April 2004. Student was in public and private school such a short period of time that the District did not have time to provide him with accommodations to see if they would alleviate his behavior issues.

- b. The failure to conduct an appropriate and sufficiently comprehensive assessment of Student.

25. No. As discussed above in Factual Findings 11 through 19 and Legal Conclusions 1 through 3, and 5 through 7, the District conducted the assessment that could be given under the circumstances. Student's language problems, his health and his behaviors prevented the District from learning more. Even the Student's expert could not obtain a standardized test result. The test for determining FAPE is reasonableness, and the District's actions under the circumstances were reasonable.

- c. The failure to have a regular education teacher attend the initial individualized education program (IEP) team meeting.

26. No. As discussed above in Factual Findings 20 through 22 and Legal Conclusions 1, 4 and 12, although a regular education teacher is a member of the IEP team, his/her absence does not always result in the denial of FAPE. In this case, denial of FAPE did not occur. Parents consented to the IEP as formulated. They actively participated in its development. Student's limited exposure to general education was not likely to have been in a regular education classroom. He was to spend 15 percent of his time in regular education. This would no doubt encompass recess, lunch time and coming and going.

- c. The failure to identify appropriate accommodations and modifications for Student.

27. No. Student presented no evidence contesting the accommodations and modifications provided by the District. Student did not argue this issue.

- d. The failure to develop objective and measurable goals in all areas of need.

28. No. As discussed above in Factual Findings 21 and Legal Conclusions 1, 8 and 12, there was no procedural violation when the District did not include state standards for preschool education in the IEP.

- f. The failure to offer the appropriate type and amount of speech and language therapy (S/L) and occupational therapy (OT).

29. No. As discussed above in Factual Findings 21, 23 through 25 and Legal Conclusions 1, 8, 12 and 13, the S/L and OT services offered by the District were reasonably calculated to confer a meaningful educational benefit on Student. Student has failed to carry his burden to the contrary.

- g. The failure to offer appropriate parent training in behavior across environments.

30. No. As discussed above in Factual Finding 21 and Legal Conclusion 1, Student has failed to carry his burden to demonstrate a substantive violation of FAPE. Parents did not object to the IEP. The District is not responsible for the parents' failure to take advantage of parent training or to compel the parents to make use of the training provided.

- h The failure to offer an appropriate behavioral program for Student.

31. No. As discussed above in Factual Findings 26 through 38 and Legal Conclusions 1 and 14, any procedural error arising from the drafting of the FAA and BIP were harmless error. Parents agreed with the FAA and BIP. It was effective with Student until the focus of his behaviors changed. Thereafter, the parents would not agree to allow the District to develop a new FAA and BIP.

- i. The failure to offer appropriate behavioral service for Student.

32. No. As discussed above in Factual Findings 21, 26 through 38 and Legal Conclusions 1 and 14, any procedural or substantive violation arising from the District's provision of behavioral services to Student did not prevent his parents from participating in the relevant IEPs nor did it deny Student an educational opportunity. Student was receiving an educational benefit from his program.

- j. The failure to offer an appropriate placement designed to meet Student's unique needs.

33. No. As discussed above in Factual Findings 21 through 38 and Legal Conclusions 1, 7, 8, 12, 13, 14, 16, 19 and 20, the Student fails to carry his burden of establishing that the District did not provide Student with FAPE. The Student was successful in the program provided. He was not denied an educational opportunity, his parents were not prevented from meaningfully participating in the IEP process, and the Student was receiving an educational benefit from his program.

Issue 2: Did the District deny Student FAPE for the 2004-2005 school year, including the 2005 ESY, through the following procedural and substantive violations of IDEA and related state law?

- a. The failure to conduct a timely follow up assessment for OT needs.

34. No. As discussed above in Legal Conclusion 1, Student has the burden in establishing that a procedural violation occurred. Ms. Jacqueline Johnson filed her report on February 7, 2005. There was no evidence that it was possible to have conducted the continued OT assessment any earlier. Student offered no argument on this issue.

- b. The failure to conduct an appropriate and sufficiently comprehensive assessment in the area of behavior by failing to conduct a proper functional analysis assessment (FAA) to develop a behavioral intervention plan (BIP) for Student.

35. No. The same determination in Legal Conclusion 31 pertains to this subissue.

- c. The failure to have an individual qualified to conduct the FAA.

36. No. As discussed above in Factual Findings 26 through 35 and Legal Conclusions 1 and 14, Ms. Karen Brady-Nelson was extremely well-qualified to prepare the FAA. No procedural violation occurred.

- d. The failure to have an individual qualified to manage Student's BIP.

37. No. As discussed above in Factual Findings 30 through 38 and Legal Conclusions 1 and 14, while the specific person in charge of Student's BIP was somewhat vague, the testimony was that Pam Ender was the BCKM beginning in 2005-2006. Additionally, the testimony established that, otherwise, the school psychologist served as the BCKM. Ms. Schoolcraft was not a witness, but no evidence established that she or the other school psychologists were not qualified. Even if this rose to the level of a procedural violation, it was harmless. Ms. Ferguson testified that the BIP worked until the end of ESY 2005.

- e. The failure to develop objective and measurable goals in all areas of need.

38. No. As discussed above in Factual Findings 21 and 39 through 47, and Legal Conclusions 1, 8, 19 and 20, Student is not persuasive in his contention that the goals were not objective and measurable. Except for the May 27, 2005 IEP, parents agreed to the goals as prepared by the District's staff. To the extent there is any vagueness in the goals it is resolved by the objective and measurable benchmarks that accompany the goals. Any deficiency in the goals is merely technical. The goals did not deny Student an appropriate education, hamper the parents' ability to participate in the formation of the IEP, or cause a deprivation of educational benefits.

- f. The failure to permit Student's speech therapist, occupational therapist, or any of Student's IBI aides to attend the November 2004 IEP team meeting; and failure to have the OT attend the April 2005 IEP team meeting.

39. No. As discussed above in Factual Findings 21 and 39 through 48, and Legal Conclusions 1, 4, 8, 12 and 20, Student was not denied FAPE. The November 17, 2004 IEP meeting was to adopt the goals for the BIP. Parents agreed and consented to the changes. Ms. Darakjian, the behavior support person, represented the BCKM at the meeting. She

explained the process to the parents and they were agreeable. The SLT, OT, and IBI aides are not IEP team members. If there was some confusion or dispute, their presence might have been helpful. There was no confusion or dispute. If it was a violation it was harmless. (Cf. *M.L. v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, 636, 641-642, Gould, J., concurring at page 653, fn. 2 (*Federal Way*); *S. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131-1132, 1133.) The absence of the OT from the April 28, 2005 IEP is even less a concern. Ms. Johnson was on mandatory military duty and could not appear. She consulted with Ms. Ferguson to provide the parents with information regarding new OT goals that were recommended. The parents consented to the new goals. Any error was harmless.

- g. The failure to make a single specific offer with respect to OT services for the 2005 ESY at the April 2005 IEP team meeting.

40. No. As discussed above in Factual Findings 42 through 48 and Legal Conclusions 1, 17, 18 and 20, Student does not argue this issue. The District confirmed its OT offer at the May 27, 2005 IEP team meeting. There was no procedural or substantive violation.

- h. The failure to either file for due process or pay for an independent educational evaluation (IEE) for Student after parents' written request for an IEE.

41. No. As discussed above in Factual Findings 49 through 52 and Legal Conclusions 1, 10, and 11, this is not a violation of FAPE. However, Student is entitled to appropriate funding for the IEE by Dr. Perlman. The District will be ordered to pay father \$5,707.75, when Dr. Perlman presents the District with his testing protocols.

- i. The failure to have any staff members present who were qualified to address Student behavior at IEP team meetings.

42. No. As discussed above in Factual Findings 21, 33, 37, 39 and 41 through 48 and Legal Conclusions 1, 4 and 20, there was no procedural violation. Ms. Ferguson, who was Student's teacher for 2004-2005 and 2005-2006, was also his case carrier. She was prepared at each IEP team meeting. Ms. Darakjian, the behavior assistant, also attended several IEPs.

- j. The failure to respond to parents' notice of the provision of services to Student.

43. No. As discussed above in Factual Finding 53 and Legal Conclusions 1 and 21, there was no procedural violation. Student notified the District at the December 15, 2005 IEP, when his parents withdrew him from school, that the parents would seek reimbursement from the District. The District responded in a letter dated December 16, 2005, that it rejected any claim for reimbursement because it had provided Student with FAPE. In the absence of a

failure to provide FAPE, Student has no right to reimbursement. 34 C.F.R. section 300.503, does not require the District to give any notice in these circumstances.

- k. The failure to offer appropriate type and amount of speech and language therapy and OT for Student.

44. No. As discussed above in Factual Findings 23, 24, 25 and 69 and Legal Conclusions 12 and 13, there was no substantive denial of FAPE. Although this was another year, the program offered by the District was appropriate and was reasonably calculated to offer an educational benefit. Student withdrew from school in December 2005. He did not make himself available for special education services from the District. The District had no communication from Student until August 1, 2006.

- l. The failure to offer appropriate parent training in behavior across environments.

45. No. As discussed above in Factual Finding 21 and Legal Conclusion 1, 14 and 30, there was no procedural or substantive violation.

- m. The failure to offer an appropriate behavioral program for Student.

46. No. As discussed above in Factual Findings 26 and 38 and Legal Conclusions 1, 14 and 31, there was no procedural or substantive violation. The BIP was particularly effective from January through July. Ms. Ferguson did not have to use it toward the end of the school year.

- n. The failure to offer appropriate behavioral services for Student.

47. No. As discussed above in Factual Findings 21, 26 and 38 and Legal Conclusions 1, 14 and 32, there was no procedural or substantive violation.

- o. The failure to offer an appropriate placement designed to meet Student's unique needs

48. No. As discussed above in Factual Findings 39 through 48 and Legal Conclusions 1, 7, 8, 12, 13, 14, 16, 19 and 20, the Student failed to carry his burden of establishing that the District did not provide Student with FAPE. The Student was successful in the program provided. He was not denied an educational opportunity and his parents were not prevented from meaningfully participating in the IEP process.

Issue 3: Did the District deny Student FAPE for the 2005-2006 school year, including the 2006 ESY, through the following procedural and substantive violations of IDEA and related state law?

- a. The failure to conduct an appropriate and sufficiently comprehensive assessment in the area of behavior by failing to conduct a proper FAA to develop a BIP for Student.

49. No. As discussed above in Factual Findings 21 and 26 through 38 and Legal Conclusions 1, 14, 31 and 32, the FAA and BIP were developed in 2004. The FAA and BIP worked effectively through July 2005 ESY. Beginning in June 2005, the District sought an assessment of Student, but Student's parents would not consent. (Factual Findings 58 and 61) The District sought a new FAA and BIP at the December 14, 2005, that was rejected by Student's parents. (Factual Finding 57) There was no procedural or substantive violation.

- b. The failure to have an individual qualified to conduct the FAA.

50. No. As discussed above in Factual Findings 26 through 35 and Legal Conclusions 1, 14, 36 and 49, there was no procedural or substantive violation.

- c. The failure to have an individual qualified to manage Student's BIP.

51. No. As discussed above in Factual Findings 30 through 38 and Legal Conclusions 1, 14 and 37, there was no procedural or substantive violation. Pam Ender was the BCKM for the 2005-2006 school year.

- d. The failure to develop objective and measurable goals in all areas of need.

52. No. As discussed above in Factual Finding 58, and Legal Conclusions 1, 7, 8, 12, 13, 14, 16, 19, 20 and 38, the Student failed to carry his burden of establishing that the District committed a procedural violation in developing appropriate goals.

- e. The failure to obtain parents' consent to have a teacher who was not working with Student, conduct an assessment of Student.

53. No. As discussed above in Factual Findings 65 and 66 and Legal Conclusions 1 and 20, the Student failed to carry his burden of establishing that the District committed a procedural violation when Ms. Wood observed in Ms. Ferguson's class. Ms. Wood's explanation was credible that she was trying to prepare for the IEP by observing Student in the classroom.

- f. The failure to Student's speech therapist to attend the December 2005 IEP team meeting.

54. No. As discussed above in Factual Finding 64 and Legal Conclusions 1 and 20, the Student failed to carry his burden of establishing that the District committed a procedural or substantive violation because Ms. Kerins was ill and unable to attend the meeting. Ms. Ferguson was briefed on the information and presented it to the parents. To the extent that it constitutes a technical violation, it was harmless and did not deny Student a

FAPE.

- g. The failure to hold an annual IEP team meeting.

55. No. As discussed above in Factual Findings 74 and 75 and Legal Conclusions 1 and 20, the Student failed to carry his burden of establishing that the District committed a procedural or substantive violation when the 2006 annual IEP review meeting was delayed to September 29, 2006, and eventually to December 15, 2006. The parents were partially responsible for the delay. (*N.R. v. San Ramon Valley Unified School District* (N.D. Cal. 2007) 2007 U.S. Dist. Lexis 9135 [parents removal of Student from school meant delay had little adverse affect].)

- h. The failure to either file for due process or pay for an IEE for Student after parents' written request for an IEE.

56. No. As discussed above in Factual Findings 49 through 52 and Legal Conclusions 1, 10, 11 and 41, the failure to pay is not a denial of FAPE. The issue was resolved in Legal Conclusion 41.

- i. The failure to have any staff members present who were qualified to address Student's behavior at IEP team meetings.

57. No. As discussed above in Factual Findings 21, 33, 37, 39 and 41 through 48 and Legal Conclusions 1, 4, 20 and 42, the Student failed to carry his burden of establishing that the District committed a procedural or substantive violation in regard to having someone to discuss Student's behavior.

- j. The failure to conduct a three month review of Student's BIP at the end of summer and beginning of fall 2005.

58. No. As discussed above in Factual Finding 81 and Legal Conclusions 1 and 20, the Student failed to carry his burden of establishing that the District committed a procedural violation when it reviewed the BIP on September 29, 2006. (See Ed. Code, § 56321, subs. (a) & (d).)

- k. The failure to offer the appropriate type and amount of speech and language therapy and OT for Student.

59. No. As discussed above in Factual Findings 21 and 23 through 25 and Legal Conclusions 1, 8, 12, 13, 29 and 44, the Student failed to carry his burden of establishing that the District committed a substantive or procedural violation.

- l. The failure to offer appropriate parent training in behavior across environments.

60. No. As discussed above in Factual Finding 21 and Legal Conclusions 1, 30 and 45, the Student failed to carry his burden of establishing that the District committed a substantive or procedural violation.

m. The failure to offer an appropriate behavioral program for Student.

61. No. As discussed above in Factual Findings 26 through 38 and Legal Conclusions 1, 14, 31 and 46, the Student failed to carry his burden of establishing that the District committed a procedural or substantive violation. From June 2005 to the date of hearing, parents have blocked any attempt made by the District to obtain a new FAA and BIP.

n. The failure to offer appropriate behavioral services for Student.

62. No. As discussed above in Factual Findings 21 and 26 through 38 and Legal Conclusions 1, 14 and 32, the Student failed to carry his burden of establishing that the District committed a substantive or procedural violation.

o. The failure to offer an appropriate placement designed to meet Student's unique needs.

63. No. As discussed above in Factual Findings 57 through 75, and Legal Conclusions 1, and 20, the Student failed to carry his burden of establishing that the District committed a procedural or substantive violation in providing Student with a FAPE. Although it was not a good idea to have Student repeat Ms. Ferguson's class, Student's parents locked the District into this position when they refused to agree to any offered IEP. Parents later acknowledged this result when they agreed to have Student advance to a kindergarten class.

Issue 4: Did the District deny Student FAPE for the 2006-2007 school year, including the 2007 ESY, through the following procedural and substantive violations of IDEA and related state law?

a. The failure to reimburse parents for the IEE of Dr. Perlman.

64. No. The failure to pay is not a denial of FAPE. The issue was resolved in Legal Conclusion 41.

b. The failure to timely respond to parents' request for reimbursement, and failure to reimburse parents, for private services provided to Student.

65. No. As discussed above in Factual Findings 89 through 94 and Legal Conclusions 1 and 20, the Student failed to carry his burden of establishing that the District committed a procedural violation. As a consequence of parents unreasonable failure to cooperate in the IEP process, they are not entitled to either compensatory education or reimbursement. Additionally, parents failed to show that Student had been denied FAPE, which is a prerequisite to reimbursement. Even if the other bars to reimbursement were not

present there is no evidence that the parents provided an appropriate placement for Student. Although they provided private ABA services, there is no evidence that they provided S/L or OT services to Student. Finally, as indicated in Legal Conclusion 23, the District is barred from paying for aversive-laced services like those contracted for by the parents.

- c. The failure to develop objective and measurable goals in all areas of need.

66. No. As discussed above in Factual Findings 81, 87 and 88, and Legal Conclusions 1, 7, 8, 12, 13, 14, 16, 19, 20 and 38, the Student failed to carry his burden of establishing that the District committed a procedural violation in developing appropriate goals. Student was provided with FAPE.

- d. The failure to offer appropriate type and amount of S/L therapy and OT for Student.

67. No. As discussed above in Factual Findings 21 and 23 through 25 and Legal Conclusions 1, 8, 12, 13 and 29, the Student failed to carry his burden of establishing that the District committed a procedural violation. (see additionally Factual Finding 83) The District provided measurable goals and objectives and to the extent they are not adequate such a procedural error would not rise to the level of a denial of FAPE.

- e. The failure to offer appropriate parent training in behavior across environments.

68. No. As discussed above in Factual Finding 21 and Legal Conclusions 1, 12, 13 and 30, the Student failed to carry his burden of establishing that the District committed a substantive or procedural violation.

- f. The failure to offer an appropriate behavioral program for Student.

69. No. As discussed above in Factual Findings 26 through 38 and Legal Conclusions 1, 12, 14, 31 and 46, the Student failed to carry his burden of establishing that the District committed a procedural or substantive violation.

- g. The failure to offer appropriate behavioral services for Student.

70. No. As discussed above in Factual Findings 21 and 26 through 38 and Legal Conclusions 1, 12, 13, 14 and 32, the Student failed to carry his burden of establishing that the District committed a procedural or substantive violation.

- h. The failure to offer an appropriate placement designed to meet Student's unique needs.

71. No. As discussed above in Factual Findings 81, 87 and 88 and Legal

Conclusions 1, 12, 13, 16 and 20, the Student failed to carry his burden of establishing that the District committed a procedural or substantive violation in providing Student with a FAPE. Student's own expert witnesses recommended a regular education class with an aide. Ms. Richardson's SDC collaborative class poses a big step in that direction. The strong preference in the law for the least restrictive environment supports this offer of FAPE.

72. As discussed above in Factual Findings 13 and 76, Student was found to need vision therapy. This was not communicated to the District until October 2006. Ms. Rioux, the school's OT, and Dr. Perlman both suggested that Student may be suffering from a visual processing disorder. The District has been unable to confirm or rebut this information, because of the parents' refusal to agree to an assessment. Student's teachers did not note a vision problem but they may have not been able to detect the problem as a result of Student's behaviors. Although the parents are barred from receiving reimbursement, it appears appropriate that Student's vision therapy be continued. Therefore, the order will be made to continue that therapy at the expense of the District. The District can compel the necessary assessment to confirm or rebut the necessity of these treatments. The District did not choose to file for due process and are not entitled to an order compelling the necessary assessments.

ORDER

1. District is ordered to reimburse Student for the neuropsychoevaluational report by Dr. Perlman in the amount of \$5,707.75, upon receipt by the District of Dr. Perlman's test protocols. If they are not produced no reimbursement will be required.

2. District is ordered to begin paying for Student's vision therapy through Dr. Julie Ryan when this order becomes final.

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. Student prevailed on the issue of the IEE at public expense for the neuropsychoevaluational report of Dr. Perlman, and the need for visual therapy prospectively. District prevailed on all other issues dealing with the provision of FAPE to Student.

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. (Ed. Code, § 56505, subd. (k).)

Dated: March 13, 2007

/s/

JAMES R. GOFF
Administrative Law Judge
Office of Administrative Hearings