

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

POWAY UNIFIED SCHOOL DISTRICT,
DEPARTMENT OF DEVELOPMENTAL
SERVICES.

OAH CASE NO. 2008080112

DECISION

Administrative Law Judge Susan Ruff, Office of Administrative Hearings, State of California (OAH) heard this matter on November 15 – 17, 2010, in Laguna Hills, California.

Vladimir Parizher, Esq., appeared on behalf of Student and his parents (Student). Student’s father was present for most of the hearing. Student was not present.

Justin Shinnfield, Esq., appeared on behalf of Poway Unified School District (District). Emily Shieh, Assistant Director, Special Education Department, also appeared on behalf of the District.

Bruce Beland, Senior Staff Counsel, appeared on behalf of the Department of Developmental Services (DDS).

Student filed his request for a due process hearing on July 28, 2008. On September 16, 2008, OAH granted the first continuance of this matter. After additional continuances, the hearing was held on November 15 – 17, 2010. At the close of the hearing, the parties requested time to file written closing argument. The matter was submitted upon receipt of written closing argument on December 6, 2010.¹

¹ To maintain a clear record, Student’s written closing argument has been marked as Exhibit FF, the District’s written closing argument has been marked as Exhibit 23, and the DDS’s written closing argument has been marked as Exhibit 24.

ISSUES

*Issues Regarding the District:*²

a) Did the District deny Student a free appropriate public education (FAPE) between October 2, 2006, and January 2007 by failing to address the following areas of need in Student's individualized education program (IEP): mental health services; behavioral deficits; sensory integration; auditory processing; other health impairments; and autism?

b) Did the District deny Student a FAPE between October 2, 2006, and January 2007 by failing to provide appropriate services to address Student's autism?

Issue Regarding DDS

c) Did the DDS deny Student a FAPE between September 2007 and May 2008 by failing to hold IEP team meetings, perform required assessments, and implement Student's existing IEP?

CONTENTIONS OF THE PARTIES

This case involves a man who suffers from, among other things, Asperger's Syndrome and the related emotional difficulties and social skills problems that stem from that disability. Student has attended numerous educational placements in different school districts over the years. This case involves only two of those placements -- the four months between October 2006 and January 2007 in which Student attended a nonpublic school (NPS) funded by the District and the nine months between September 2007 and May 2008 when Student attended the Goodell School at the Fairview Developmental Center under the jurisdiction of the DDS.³

Student contends that the District failed to offer or provide services to meet Student's needs. Student claims that Student failed to gain educational benefit as evidenced by his failure to earn full credit toward his high school diploma during the time Student was in the District between October 2006 and January 2007. The District contends that the District properly implemented the IEP in place for Student when Student transitioned into the District, and that the subsequent IEP's offered to Student during the remaining time were

² Student's due process hearing request originally contained additional issues regarding the District. During the telephonic prehearing conference (PHC), Student withdrew the remaining issues against the District. At hearing, the parties stipulated to change the date in the issues from July 2006 to October 2, 2006.

³ This case originally involved other school districts and government entities, but those other parties were dismissed prior to the hearing, either due to settlement or motion.

reasonably calculated to provide Student with educational benefit and addressed all of Student's educational needs.

Student contends that the DDS failed to implement Student's existing IEP, hold IEP team meetings, and perform required assessments. The DDS contends that IEP team meetings were held, that required assessments were performed, and that the IEP was implemented to the greatest extent possible, given Student's behavioral problems at the time.

This Decision finds that the District properly implemented Student's existing IEP when Student entered the District, and thereafter continued to offer Student an IEP which was reasonably calculated to meet Student's educational needs until Student left the District in January 2007. The Decision also finds that the DDS properly held IEP team meetings and implemented Student's existing IEP to the greatest extent possible, given Student's behavioral state at the time. Student failed to meet his burden to show that the DDS failed to perform required assessments. Instead the DDS properly performed a functional behavioral assessment to address Student's behavioral needs. Even if there had been a procedural violation due to the failure to assess, that violation did not give rise to a substantive denial of FAPE.

This Decision concludes that there was no denial of FAPE by either the District or the DDS, and Student's claims as to both entities are dismissed.

FACTUAL FINDINGS

1. Student is a 21-year-old man with Asperger's Syndrome who has been found eligible for special education services under the category of autism. At the times at issue in this case, Student was approximately 16 through 18 years old. The present hearing involves two periods of time -- the time between October 2, 2006, and January 2007, when Student was attending school within the jurisdiction of the District, and the time between September 2007 and May 2008 when Student was residing at the Fairview Developmental Center and attending the Goodell School under the jurisdiction of the DDS.

The Time Leading to October 2006

2. Prior to the two time periods at issue in this case, Student had attended school in the District on and off for several years. During the 2005-2006 school year, Student's 10th grade year, Student attended school at a nonpublic school (NPS) known as Sierra Academy (Sierra), funded by the District. During that school year, the District was concerned about Student's failure to attend school. He had attended only 20 school days that school year. Student also exhibited serious behavioral problems when he did attend, and the District was concerned that Student's mental health might be interfering with his education. The District attempted to refer Student for a mental health assessment by the County of San Diego Health and Human Services Agency (County), but Student's parents would not consent to that referral.

3. The District filed a due process hearing request with OAH, seeking an order which would permit the District to refer Student to the County for the mental health assessment. On June 1, 2006, in OAH case number N 2005120371, OAH found in favor of the District. The OAH order concluded, in part: “if parents wish to have special education and related services made available for Student, Student and his parents are ordered to comply with the referral for assessment by [the County] and to make Student available for the ordered assessment.”

4. Student’s parents did not make Student available for the assessment despite the order.⁴ Instead, during the summer of 2006, the District received word that Student had moved into the jurisdiction of the Escondido Union High School District (Escondido). Escondido was located in a different special education local plan area (SELPA) than the District. Escondido held an IEP team meeting for Student and requested that representatives from the District and Sierra attend the IEP team meeting.

5. On August 25, 2006, Michelle Fouts, Student’s special education case manager for the District, and a representative of Sierra attended the Escondido IEP meeting. The Escondido IEP team offered Student a placement at an NPS referred to during the hearing as New Haven. Student’s father wanted Student to be fully included in the general education classroom, but the rest of the IEP team determined that his needs could not be met in such an environment. Instead, the team found that the NPS placement was the least restrictive environment appropriate to meet his educational needs. The Escondido IEP also offered Student speech and language services and counseling services. Student’s father did not agree to the IEP at the time of the meeting, but thereafter gave his consent and Student began attending New Haven.

Student’s Time at the District Between October 2, 2006, and January 12, 2007

6. In September 2006, Emily Shieh, the Assistant Director, Special Education Department, for the District, heard that Student might be coming back to Poway. On September 29, 2006, the District learned that Escondido had determined that Student’s family did not live in Escondido and that September 29 was the last date that Escondido would accept responsibility for Student’s placement. The principal of Poway High School received a fax from Student’s father stating that the family lived in Poway and wanted Student to continue attending New Haven.

7. The District immediately took steps to hold an interim IEP meeting for Student. The District staff was concerned because Escondido was no longer going to pay for

⁴ During the hearing, Student’s father testified at length to the reasons that he was concerned about the County mental health assessment. Because the appropriateness of the referral for the County assessment was previously litigated and decided in OAH case number N 2005120371, the reasons stated by Student’s father are not detailed in the Factual Findings in the instant case.

Student's NPS placement, so for Student's sake they wanted to hold an interim meeting as soon as possible. The District noticed the interim meeting for October 2, 2006, less than a week after receiving the September 29 letter from Escondido.

8. Student's parents had never made Student available for the mental health assessment ordered by OAH. Therefore, under the terms of that OAH order, the District could have refused to provide Student with special education and related services until Student's parents complied with the order. However, the District staff was concerned about Student's welfare and decided to offer a special education placement and services for Student, including funding Student's NPS placement.

9. At the interim meeting held on October 2, 2006, the District offered Student the same placement, services, and goals as those contained in Student's existing IEP that had been formulated by Escondido in August 2006. Student's parents agreed to the interim offer. Student continued to attend school at New Haven pursuant to the interim IEP. The team also discussed the referral to the County for the mental health assessment, but Student's parents still refused to permit that assessment.

10. Student was due for his three-year (triennial) assessment, so the District developed a plan to conduct a full psychoeducational assessment of Student to determine his educational needs. Student's parents consented to the psychoeducational assessment on October 11, 2006. Student's parents wrote a request for additional assessments when they signed the assessment plan, including an "auditory language assessment." The District refused to conduct those additional assessments, and notified Student's parents by letter dated November 1, 2006. The District's letter explained that the District believed the proposed assessment plan was "both comprehensive and complete."

11. The District began the assessment process and took steps to develop a new IEP for Student. The IEP team met again on November 1, 2006. The IEP team proposed to modify several of the goals from the interim IEP because of progress Student had made on those goals at New Haven. Because of that progress, the team determined that New Haven was an appropriate placement for Student and recommended that it be continued. The team once again discussed the referral to the County for the mental health assessment, but Student's parents still did not consent to that assessment. The IEP offered 30 minutes per week of speech-language services to be provided at New Haven.

12. The supplemental aids and accommodations to be provided to Student in the proposed IEP included: "paired instruction, visual supports, breaks as needed, extended time, graphic organizers, modified assignments with regard to output, opportunities for clarification and re-explanation, note-taking assistance, preferential seating." The IEP team found that Student's behavior impeded his learning and recommended a behavior support plan. The goals and objectives in the IEP included the areas of arriving at school on time, learning techniques for coping with anxiety, learning alternatives to unsafe and socially inappropriate behavior, completion of classroom assignments, reading comprehension goals

related to critical thinking and problem solving, and speech-language goals related to pragmatic language, social skills and speech fluency.

13. The IEP team met again on December 11, 2006. The purpose of the meeting was to review and discuss the triennial assessment. However the District had not been able to complete the assessment, in part, because Student's parents had not returned the rating scales they were supposed to fill out to assist the District's assessors in determining Student's needs. In addition, Student was very resistant to the assessment process and refused to cooperate with the testing attempted by the District's assessors. Fouts had been unable to perform any standardized testing of Student because of Student's lack of cooperation.⁵ Student had not been available to meet with the occupational therapist for an assessment related to Student's sensory needs prior to the meeting.

14. The District decided to hold the December IEP team meeting even though the assessments were not complete, to try to push along the assessment process. (Student's parents later completed the rating scales, and the assessment was updated and discussed at an IEP team meeting held in February 2007.) At the December IEP meeting, Student's parents still refused to consent to the referral for the mental health assessment by the County. However, on approximately December 22, 2006, Student's parents finally agreed to make Student available for that assessment. The County performed the assessment in January and February 2007.

15. On January 12, 2007, Student was removed from his parents' home by Child Protective Services and placed in a hospital and later a group home outside the jurisdiction of the District. Student never returned to the District or to the New Haven NPS during any subsequent time relevant to this case. Because Student was no longer within the jurisdiction of the District after January 12, 2007, the District was no longer obligated to provide Student with any special education or related services.

16. The County completed the mental health assessment in February 2007, after Student had been removed from his family home. The assessment report concluded that Student suffered from a developmental disorder "that can not be ameliorated through therapy." However, the report noted that Student suffered from an anxiety disorder in addition to his developmental disorder and recommended outpatient mental health services, consisting of individual therapy one time per week for 30 minutes. The report recommended that Student's response to the outpatient therapy be monitored to see if he was able to benefit from the service.

17. Despite the fact that Student was no longer within the District's jurisdiction after January 12, 2007, the District continued the assessment process and held another IEP

⁵ Student's refusal to cooperate with assessments, perform classroom work, and participate in services such as speech-language therapy was an ongoing problem throughout the times at issue in this case. Student's expert Jared Maloff explained that Student's refusal to cooperate was a result of Student's disability, not a volitional choice on his part.

team meeting for Student on February 16, 2007. Ms. Shieh explained during the hearing that the District was uncertain what would ultimately happen to Student. If the court made Student's removal from his family home permanent, Student would no longer be within the jurisdiction of the District. However, if the court determined that Student should be returned to his family home, he would once again be within the District and would need IEP services from the District. The District staff was concerned that if the District delayed the IEP process while waiting for the ultimate decision of the court, Student might lose valuable educational time and services. Even if Student's removal from his family home became permanent, the District's assessment and IEP offer would be of benefit to Student's new school district, and therefore would ultimately benefit Student. Therefore, for Student's sake, the District proceeded with the IEP process, although the District had no legal obligation to do so after January 12, 2007.

18. The February 16 IEP proposed a placement at New Haven and offered 30 minutes per week of speech-language therapy. The team considered the County recommendation for counseling services. Student's parents reported that Student was receiving outpatient counseling services through a private provider and they did not wish to change providers. The IEP report noted that Student's parents declined the County mental health services, although they were aware that those services would be provided at no cost to them. The team agreed with the parents' decision to continue with their private provider, noting that Student did not require mental health services as part of his special education program. The parties stipulated that from October 2, 2006, through February 27, 2007, the District recommended and offered Student 30 minutes per week of counseling provided by a New Haven counselor. The parties also stipulated that from January 1, 2007, through February 27, 2007, "the District recommended and offered Student counseling daily at 8:30 a.m. and during his school day as needed."

19. During her testimony, Fouts described the educational progress that Student made at New Haven prior to January 12, 2007. Unlike the previous school year in which Student had attended only 20 days of school, Student regularly attended school at New Haven, was interacting more with his peers, made progress on his IEP goals, and began to complete some of his classroom assignments. Also unlike the previous school year, Student began to obtain class credit toward his high school graduation. He obtained 2.5 credits during the time that he attended New Haven. In Fouts' opinion, the educational program at New Haven met Student's educational needs.

20. Garth Phillips, Student's special education teacher at New Haven, also believes Student's program at New Haven was appropriate to meet Student's needs. During his testimony, he described Student's progress while at the school. Student's classroom at New Haven contained about eight to 12 pupils, and Phillips was able to have regular conversations with Student's parents when they dropped off Student or picked him up from school. Phillips worked with Student on social skills and pragmatics, such as making eye contact and proper peer interactions. At first, Student made only limited eye contact with other people, but that improved during his time at New Haven. Student learned to say his peers' names and to shake hands in a comfortable manner instead of squeezing too hard (as

he had previously done). When Student first came to New Haven, Student would read only books that Student brought with him from home and refused to do class assignments, but gradually he began to work on some of the class assignments. The school staff learned that Student loved to read about the United States Presidents, so they structured his English lessons around that topic. When Student refused to write, they accommodated him by allowing him to respond verbally. They eventually got him to the point where he was completing approximately 15 percent of his school assignments. This was a significant increase from the previous school year, in which he had completed no assignments.

21. Student also had a behavior support plan in place to assist him while he was at New Haven. Student had serious problems with anxiety, and depending on the level of his anxiety, the school staff would sometimes take him outside to walk around or allow him to work one-to-one with the teacher, until they could get him back on track. New Haven also provided counseling services for Student.

22. New Haven attempted to provide the speech-language services called for in Student's IEP, but Student did not always accept those services. Therefore, New Haven had the speech-language pathologist come into the classroom to assist with Student's speech-language needs, without Student realizing that he was being observed. In Phillips's opinion, the speech-language services called for in the IEP were appropriate. He did not believe that additional speech-language services would have benefited Student, because Student would have refused to participate in those additional services. As he described it, New Haven was taking "small steps" with Student to give him the services.

23. The parties stipulated that if Tim Evanson, the Director of New Haven at the time at issue in the case, had been called to the witness stand, he would have testified that the District funded the placement and services called for in Student's IEP during the time that Student attended New Haven. He would also have testified that the placement and services offered to Student while at New Haven provided Student with a FAPE.

24. Student brought in no expert witness to challenge the opinions of Fouts, Phillips and Evanson that the District's IEP met Student's needs and that Student made educational progress at New Haven. Student's sole expert witness who testified at the hearing, Jared Maloff, Psy. D., agreed with the conclusions in the District's 2006-2007 assessment. In a report he prepared in March 2008, Maloff stated that Student's "right to appropriate services entitles him to receive the services recommended by Poway Unified School District...." During his testimony at hearing, Maloff agreed that the District's services were sufficient to meet Student's needs.

25. In a later report prepared in August 2008, Maloff recommended additional services for Student, such as group and individual counseling, tutoring, additional speech and language, applied behavior analysis, and occupational therapy. During his testimony, he explained that Student's needs changed in the months between his first report in March 2008

and his second report in August 2008. His recommendations changed over time based on changes in Student's level of functioning.⁶

26. The only statement in Maloff's August 2008 report (his second report) that directly criticized the District was found on page 11 of his report. In discussing Student's placement at Fairview, Maloff wrote that it was "reasonable to hypothesize that if [Student] had been receiving proper support services to truly deal with his self injurious and sensory seeking behavior by the public school district, his commitment to Fairview as a result of this behavior *may* not have occurred." This hypothesis contradicts Maloff's March 2008 opinion that the District's services were appropriate. His testimony at hearing did not elaborate on that sentence or explain the basis for his August 2008 hypothesis. That statement is not sufficient to show any denial of FAPE by the District.⁷

27. Student also relies upon a report prepared by Nathan Hunter, Ph.D., in October and November 2008. Hunter did not testify during the hearing and his report mentioned the District's program and services only in passing. He did not criticize the District's program or services for Student. To the extent that his report called for Student to receive services not addressed by the District, that does not prove the District's program was inappropriate. As Dr. Maloff testified, Student's needs had changed greatly during the months after his departure from the District.

⁶ Dr. Maloff concluded his testimony on the second day of hearing, November 16, 2010. On the evening of November 16, Student's father sent Maloff an email regarding his testimony. Maloff also had discussions with Student's counsel. The next morning, November 17, 2010, Student's counsel asked to recall Dr. Maloff to the witness stand. Dr. Maloff testified that his March 2008 report was incorrect when it referred to the District's IEP. He said he had never reviewed the District's IEP. Instead, his report should have referred to the assessment done by the District, not the IEP.

It is uncertain which is correct – Maloff's report or his revised testimony. The District's February 2007 assessment report described the terms of Student's IEP, so Dr. Maloff may have relied upon that description when he referred to the District's IEP in his March 2008 report. However, even if his revised testimony was correct, that does not change this Decision. Student still failed to bring in any evidence to challenge the opinions of the District's experts. If Maloff had no idea what was in the District's IEP, he certainly could not criticize that IEP at the hearing. His March 2008 report, prepared over a year after Student left the District, spoke of the District's program for Student in favorable terms, even if Maloff was confusing the District's assessment with the IEP. During the hearing, Maloff never testified that there was any denial of FAPE by the District.

⁷ Maloff may have been referring to a different school district that educated Student after he left the District. Maloff's second report made general references to Student's "years of not receiving proper services within the public schools" and similar comments. The evidence showed that Student attended many different schools over the years, so these comments are insufficient to show any deficiency by the District.

28. The same considerations apply to the third report relied upon by Student, the February 22, 2009 assessment conducted by Gary LaVigna, Ph.D. Dr. LaVigna did not testify at the hearing and his report did not criticize the District's IEP for Student. His report was issued two years after Student left the District and long after both of Maloff's reports. Nothing in that report is sufficient to show a denial of FAPE by the District.

29. Student also relied on a 2004 assessment report written by Mary Baker-Ericzen, Ph.D. She was one of the few assessors able to test Student, because Student cooperated with the standardized testing on that occasion. Based on her testing, she determined that Student suffered from Asperger's Syndrome. She made general recommendations for areas that should be addressed in his education, but did not specify any level of services to be provided. For example, one of her recommendations was: "[c]ontinue with services that are directly aimed to improve his verbal expression, conversational skills and pragmatics." Another recommendation stated "[c]ontinue with services that are directly aimed to reduce his anxiety and minimize emotional distress. Use cognitive-behavioral approaches." Nothing in her report (which was written long before the times at issue in this case) criticized the District's IEP or the District's program provided during the fall of 2006 and early 2007. Indeed, it appears that the District's IEP's addressed most of the areas of concern she raised, including social skills, pragmatic speech, and reduction of challenging behaviors.

30. Student's father testified that he requested many services for Student from the District IEP team, including group and individual therapy, services to address Student's sensory needs and intense behavioral services. Based on the testimony of the District's experts and Dr. Maloff, the additional services were not required at the time Student attended school in the District. Further, the District was still in the process of assessing Student's needs in the fall of 2006. It would have been premature to load additional services onto Student until the assessment was completed, particularly in light of Student's refusal to participate in some of the services he was already receiving.

31. In Student's written closing argument, Student contended that the District did not properly assess Student in the areas of mental health, behavioral deficits, sensory integration, auditory processing, other health impairments and autism. Student did not allege a failure to assess in these areas in his due process hearing request claims against the District, so the appropriateness of the District's assessments is not at issue in this case. (See 20 U.S.C. § 1415(f)(3)(B).)⁸

32. However, even if Student had properly raised this issue, Student did not bring in sufficient evidence to show a failure to perform required assessments in these areas. Instead, the evidence shows that the District properly sought a mental health assessment

⁸ Student's due process hearing request originally contained an allegation that the District "failed to include properly qualified personnel in the assessment/IEP process." However, Student withdrew that issue during the prehearing conference.

through the County (to which Student's parents refused to consent until the end of December), assessed Student's sensory needs and auditory processing as part of the occupational therapy assessment, and assessed Student's health needs, behavioral needs and needs related to autism as part of the psychoeducational assessment and speech-language assessment. There was no failure to assess. Student's written closing argument contends that the recommendations of the assessment plan were never implemented and that the District "ordered no related services pursuant to the assessment plan." However, as discussed in Factual Findings 17 – 18 above, Student was already out of the District by the time the assessment was completed. Student provided absolutely no evidence that the District was at fault for delaying the assessment process. Instead, the evidence showed that the District at all times sought to expedite the assessment process. The District could not have implemented recommendations from the assessment plan after Student was no longer in the District. There was no denial of FAPE.

33. Student's main contention is that Student failed to obtain full high school credit during the months that he attended New Haven. For that reason, Student argues that he failed to gain educational benefit during that time. However, the evidence does not support Student's contention. Instead, the evidence shows that Student made meaningful educational progress. While at New Haven, unlike previous years, he began to attend class regularly, to participate more with his peers, to make progress on his IEP goals, and to gain at least a little high school credit. While the severity of his disability may have prevented him from fully participating in the classroom environment, the evidence shows that he did make progress and gain educational benefit during that time. As will be discussed in the Legal Conclusions below, special education law does not require a school district to guarantee a certain result (such as a high school diploma). Instead a school district is required to develop an IEP that is reasonably calculated to provide educational benefit based on the information possessed by the District at the time the IEP was formed. The evidence shows that the District developed an IEP that was reasonably calculated to provide benefit and did, in fact, provide educational benefit to Student. There was no denial of FAPE.⁹

Student's Time at the Goodell School under the Jurisdiction of the DDS

34. Approximately eight months passed between the time Student was removed from his family's home and the District's jurisdiction in January 2007 and the time he was placed at Fairview Developmental Center (Fairview) under the jurisdiction of the DDS. Very little evidence was introduced at hearing regarding Student's residence or educational placement during those months. Apparently Student spent part of the time in hospitals and part in group homes. It was also not established what educational services Student received

⁹ Student's final two witnesses were behavioral therapists who currently work with Student. They were able to describe Student's severe disabilities at the present time. (For example, the therapists spend time using behavioral techniques to try to coax Student out of his bedroom.) Both have only worked with Student for a few months and were not familiar with the IEP programs of either the District or DDS. Their testimony did not show a denial of FAPE by either the DDS or the District.

during that time, but it appears that no other IEP's were agreed to and implemented between the time Student left the District and the time that Student entered Fairview.

35. In approximately September 2007, a court ordered that Student be placed in Fairview. Fairview provides a residential facility for disabled individuals who are in crisis. It is not intended to be a long-term placement, but instead is intended to address the immediate crisis so that the individual can move back into a community placement. The disabled individuals who reside in Fairview are placed there because of a court order. Usually the court orders them there because the individuals have exhibited high aggressive behaviors or because they were let go from school or group homes. The individuals placed at Fairview attend school at the Goodell School on the Fairview campus. The Goodell School provides special education services.

36. Joshua Richardson, a special education teacher at the Goodell School, was the teacher who taught Student's class while he was at Fairview. When Student arrived at Fairview in September 2007, Richardson reviewed his IEP from the District, conducted informal assessments to determine Student's levels of academic functioning, and determined his ability levels in light of his current condition. During the time Student started at Fairview, he exhibited many intense behaviors that needed to be addressed. Student had a lot of aggression and injured Fairview staff. The staff tried to teach Student self-control without aggressive behaviors.

37. Richardson relied upon the District's IEP and his informal assessment of Student's abilities in formulating a proposed educational program for Student at the Goodell School. Fairview held an IEP meeting for Student on October 17, 2007, within the first month after Student's arrival at the facility. Student's parents attended the IEP meeting, but did not sign agreement to the IEP. Student's father called Richardson on many occasions to discuss Student during the time that Student was at Fairview.

38. At the time of the October 17, 2007 IEP team meeting, Student's parents did not hold the educational rights for Student. During his testimony, Richardson did not know who actually signed the October 17 IEP on behalf of Student but he knew that there was an IEP and that it was implemented by Fairview. He explained that there was a lot of court action at the time regarding the rights of Student's parents. The notes of the subsequent IEP meeting held in April 2008 state that the October 17 IEP could not be finalized "as there was no one identified as having educational rights at the time."

39. At some point in or after March 2008, Student's parents regained educational rights for Student, and Fairview began the IEP process again in order to ensure that Student's parents had a full opportunity to participate in the process. On March 19, 2008, Fairview sent notice to Student's parents of an IEP team meeting to be held on April 10, 2008. That IEP team meeting was held as scheduled, and a draft IEP was prepared. Student's parents attended the meeting but did not sign their agreement to that IEP during the meeting. Fairview sent them a follow-up letter with a copy of the draft IEP on May 12, 2008, asking for their signature. Shortly after that, Student was removed from Fairview. Student ceased

to attend the Goodell School, and the DDS had no responsibility for Student's education after that time.

40. Raymond Vagas, a senior psychologist at Fairview, explained during the hearing that Fairview conducted a functional behavior assessment for Student in March and April 2008. The behaviors exhibited by Student when he first arrived at Fairview included hitting, slapping, grabbing, threatening, racial slurs, and inappropriate sexual comments. After conducting a functional behavior assessment, the staff at Fairview learned that Student was very anxious and had unusual preoccupations. The staff identified the things that seemed to generate anxiety for Student. They tried to organize Student's program to avoid those things and to help him engage socially with others. In Vagas's opinion, Student made behavioral progress during the time he was at Fairview.

41. Student's father testified that he attended IEP meetings at Fairview in September or October 2007. He was concerned during the meetings because he felt the academic goals established for Student were at too low a level. He said that he tried to give his opinion and request services for Student, but was told that he did not hold the parental right to do so. He was also concerned about the medication given to Student while living at Fairview. He felt that Fairview was a place for children with intellectual disabilities, but Student did not have an intellectual disability.

42. The evidence does not support a finding that the DDS denied Student a FAPE between September 2007 and May 2008 by failing to hold IEP team meetings. To the contrary, one or more IEP meetings were held within a short time after Student's arrival at Fairview and the process was started a second time once Student's parents regained educational rights.

43. Likewise, Student presented no evidence that the DDS failed to implement Student's existing IEP during the time he attended the Goodell School. Richardson testified that an IEP was in place and that he implemented it as Student's special education teacher to the extent that he could, given Student's serious behavioral issues while at Fairview.

44. Maloff's March 2008 report stated that Student was not receiving his IEP services while at Fairview and was "not treated by staff members with expertise in Autistic Spectrum Disorders." It is not clear where Maloff received the information to make those assertions. He did not testify about those assertions at hearing, and his report indicates that he was unable to view Student's program while Student was at Fairview. It appears that Maloff either based his assertions on what Student's parents told him or made assumptions based on his understanding that the Fairview facility housed individuals with intellectual disabilities.¹⁰ Maloff's unsupported assertions are not sufficient to refute Richardson's testimony.

¹⁰ There are questions about the accuracy of the information upon which Maloff relied in formulating his March 2008 report. For example, he erroneously thought that Student had been placed at New Haven as a result of the County's mental health assessment.

45. Student also provided insufficient evidence to show that the DDS denied Student a FAPE by failing to perform required assessments. The District had just conducted Student's triennial assessment the year before so there was no legal requirement for a complete psychoeducational assessment by Fairview. As discussed in paragraph 32 above, the District's triennial assessment included the areas of speech-language and sensory processing/occupational therapy. The County had performed a mental health assessment in January 2007. Student's critical problems when he arrived at Fairview involved behavior, and Fairview properly conducted a functional behavioral assessment. Neither Maloff nor any other expert witness testified that Fairview should have conducted additional assessments.

46. The only evidence presented in the case suggesting that further assessments might have been necessary came from a Fairview psychological progress report dated December 26, 2007. In that report the writer opined, among other things, that Student "would benefit from having a psychological assessment (testing) done to help determine his current cognitive and adaptive functioning. Such an assessment would help to determine [Student's] strengths and weaknesses in a manner that would better enable professionals to provide specific interventions focused on utilizing his strengths and strengthening his weaknesses." That lone sentence is not sufficient to show that the failure to conduct such an assessment denied Student a FAPE while he was at Fairview. Further, as discussed in Legal Conclusions 22 – 26 below, even if the DDS committed a procedural violation by failing to conduct additional assessments at that time, the procedural violation did not give rise to a substantive denial of FAPE.

47. Dr. Maloff's March 2008 and August 2008 reports criticized Student's placement at Fairview. However, his criticisms dealt mostly with his belief that Fairview was not an appropriate placement for Student because it was a school for youths with intellectual disabilities, not autistic individuals. He criticized the curriculum provided by Fairview, but did not contend that Fairview failed to hold IEP team meetings or failed to conduct necessary assessments. Student's issues for hearing did not allege problems with the placement or curriculum at Fairview/Goodell. It would have been hard for Student to make a case against the DDS based on the Fairview placement in any event, because the Fairview placement was ordered by a court, not an IEP team.

48. The evidence showed that Fairview received Student pursuant to court order, implemented his existing IEP, held one or more IEP team meetings, and conducted a functional behavioral assessment to try to assist with his problem behaviors. Once Student's parents regained educational rights, Fairview began the IEP process again to ensure that

Apparently no one informed him that Student's parents had refused to consent to that assessment until almost the end of Student's stay at New Haven. As discussed in footnote six above, Maloff testified that his reference to the District's IEP in his March 2008 report had been erroneous. These inaccuracies call into question the accuracy of the information upon which he based the remainder of his report.

Student's parents had a full opportunity to participate in the process. There was no denial of FAPE.

LEGAL CONCLUSIONS

1. The Student, as the party filing this due process case, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

2. Under the Individuals with Disabilities Education Act (IDEA) and corresponding state law, pupils with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the pupil at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).) Special education services should meet the "unique needs" of a pupil. (Ed Code, § 56031, subd. (a).)

3. The congressional mandate to provide a FAPE to a child includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (*Rowley*), the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the child's IEP to determine if it was reasonably calculated to enable the pupil to receive educational benefit. (*Id.* at pp. 206 - 207.)

4. Not every procedural violation of IDEA results in a substantive denial of FAPE. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484.) According to Education Code section 56505, subdivision (f)(2), a procedural violation may constitute a substantive denial of FAPE only if it:

- (A) Impeded the child's right to a free appropriate public education;
- (B) Significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or
- (C) Caused a deprivation of educational benefits.

5. In *Rowley*, the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. (*Rowley, supra*, 458 U.S. at p. 201.) *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child

receives access to an education that is “sufficient to confer some educational benefit” upon the child. (*Ibid.*)

6. In Student’s written closing argument, Student contends that the *Rowley* standard “was subsequently distinguished on substantive grounds in cases involving children with severe disabilities and not attending a regular public school...” Student is not correct. The *Rowley* standard is still the law in the Ninth Circuit. (See *J.L. v. Mercer Island School District* (9th Cir. 2010) 592 F.3d 938, 941.) Student is correct that subsequent cases have indicated that the *Rowley* standard requires a showing of more than *de minimis* or trivial benefit (see *Polk v. Central Susquehanna Intermediate Unit 16* (3d Cir.1988) 853 F2d. 171, 180 (*Polk*)), but, as discussed in Factual Findings 19 – 24 and 33 above, the evidence in the instant case showed that Student gained far more than *de minimis* educational benefit during his four months at New Haven that were funded by the District.

7. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has endorsed the “snapshot rule,” explaining that an IEP “is a snapshot, not a retrospective.” The IEP is evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

8. When a pupil with an IEP transfers into a school district from a district in a different SELPA, the new district must provide the pupil with educational services comparable to those in the pupil’s existing IEP, in consultation with the child’s parents or guardians, for a period not to exceed 30 days, by which time the district shall either adopt a previously approved IEP or develop, adopt and implement a new IEP for the pupil. (Ed. Code, § 56043, subd. (m).)¹¹

¹¹ In their written closing arguments, the District and the DDS raised legal issues regarding Student’s case. The District raised the issue of whether Student was entitled, as a matter of law, to any special education services from the District in light of the refusal of Student’s parents comply with OAH’s order requiring them to make Student available for the County mental health assessment. The DDS raised the issue of whether a civil tort action for damages that Student’s parents filed against Fairview would collaterally stop this special-education due process proceeding. Because the District and the DDS prevailed on all issues of this case as a factual matter, it is not necessary for this Decision to address those two legal issues. There is also no need to rule on DDS’s request for OAH to take official notice of the civil tort action.

Did the District Deny Student a FAPE Between October 2, 2006, and January 2007 by Failing to Address the Following Areas of Need in Student's IEP: Mental Health Services; Behavioral Deficits; Sensory Integration; Auditory Processing; Other Health Impairments; and Autism?

9. Student contends that the District failed to offer an IEP program to address all of Student's educational needs. However, Student's contention is not supported by the evidence. As discussed in Factual Findings 1 – 9 above, Student came to the District with an existing IEP from Escondido, outside of the District's SELPA. The District swiftly and properly held an interim IEP team meeting and adopted the Escondido IEP, along with the NPS placement. As discussed in Factual Findings 10 – 18 above, the District then properly took steps to assess Student and to formulate a new IEP.

10. Student is incorrect that the District's IEP's failed to address Student's mental health needs. As discussed in Factual Findings 1 – 33 above, the District attempted to address Student's mental health needs through a referral to the County for mental health assessment, but Student's parents refused to cooperate with that assessment. The District did everything it could to try to facilitate that assessment, including going to a due process hearing and obtaining an order from OAH for that assessment. The District also offered counseling services at New Haven. There was no denial of FAPE.

11. As discussed above in Factual Findings 6 – 33, Student failed to meet his burden to show that the District's interim IEP and subsequent IEP proposals failed to address his behavioral deficits, sensory integration, auditory processing, autism or other health impairments. Every expert who testified at the hearing, including Student's own expert, stated that the District's IEP was sufficient to meet Student's needs. Even if Maloff's revised testimony was correct that he had never seen the District's IEP, that still was not sufficient to prove the denial of FAPE by the District. At most, his revised testimony simply proves that Student had no evidence to refute the opinions of the District's experts that the IEP met Student's needs. Student's counsel spent much of Student's written closing argument making assertions that the District's programs did not meet Student's needs and that Student needed additional related services. However, the statements of Student's counsel alone are not sufficient to make those assertions true -- instead, it was incumbent upon Student to provide expert testimony or other persuasive evidence to support these claims. Student did not do so. This due process hearing request was brought by Student and Student has the burden of proof in the case. Student has not met that burden.¹²

12. The District's witnesses were persuasive in their testimony that the District's IEP's met Student's educational needs. There was no denial of FAPE.

¹² As stated above in Factual Findings 31 – 32 above, Student spent part of his written closing argument contending that the District failed to assess in all areas of suspected disability. That was not one of the issues that Student raised for the hearing against the District. Such issues cannot be raised for the first time during hearing or in written closing argument. (20 U.S.C. § 1415(f)(3)(B).)

13. Student relies on the *Polk* case to argue that the District should have provided Student with additional related services, but that reliance is not well taken. In *Polk*, the pupil brought in expert testimony at the due process hearing to explain why the child needed direct physical therapy as opposed to consultative physical therapy. (*Polk, supra*, 853 F.2d at p. 185.) As discussed in Factual Findings 19 – 33 above, in the instant case, Student failed to bring in expert testimony or other persuasive evidence of the need for additional services during the four months Student was at New Haven under the District’s jurisdiction. Student’s own expert explained that Student’s needs changed during the months after he left the District, so the expert reports from two or three years later are not relevant to the issue of what related services Student required between October 2006 and January 2007. Student has the burden of proof in this matter and failed to meet that burden.

14. Student’s main complaint against the District is that Student only gained 2.5 credits toward his high school diploma during the time he was at New Haven under the District’s jurisdiction. However, that is not an appropriate basis for finding a denial of FAPE. The IEP process does not guarantee a particular outcome (such as a high school diploma) for a pupil. (See *Rowley, supra*, 458 U.S. at p. 192.) The evidence in the instant case showed that Student gained educational benefit while in the District’s program at New Haven, but the critical factor in determining FAPE is not whether, in hindsight, the child gained benefit, but whether the IEP was reasonably calculated to provide educational benefit. In this case, the District’s decision to retain the New Haven placement and services from the interim IEP was reasonably calculated to provide benefit – the District knew that Student had made progress on his IEP goals at his New Haven placement and that his school attendance and work completion improved while he was there. Even though the District had not yet completed its assessments in November and December 2006, it was reasonable for the District to assume that Student’s progress at New Haven would continue.

15. There is a strong implication in Student’s closing argument that Student expected the District to “cure” his disability. For example, at one point Student’s counsel stated, “Because the District’s behavioral assessments all failed to find a solution, it is evident that its selected approach to assess Autism through behavior analysis failed as well.” The law does not require an educational agency to “find a solution” for or “cure” a child’s disability. Instead, the law requires the educational agency to develop an IEP that confers educational benefit upon that child and meets the unique educational needs arising from the child’s disability. The expert testimony was clear in the instant case that the District’s IEP met those factors. There was no denial of FAPE.

Did the District Deny Student a FAPE between October 2, 2006, and January 2007 by Failing to Provide Appropriate Services to Address Student’s Autism?

16. Student contends that the District failed to provide adequate related services to address Student’s autism. Related services, also known as designated instruction and services in California, can include transportation and services such as speech-language pathology, psychological services, physical and occupational therapy, and other services “as

may be required to assist an individual with exceptional needs to benefit from special education....” (Ed. Code, § 56363, subd. (a).)

17. As discussed in Factual Findings 1 – 33, the District provided services to address Student’s autism, including specialized education, training on social skills and pragmatic language skills, an NPS placement with a very small class size and adult support, and related services such as speech-language pathology. Student produced no expert testimony to show that those services were inadequate or inappropriate to address Student’s autism at the time that Student attended the New Haven school within the District. Even Student’s own expert reported in March 2008 that Student was entitled to IEP services such as the ones offered by the District. While Student’s expert may have recommended additional services in August 2008, he explained during his testimony that those additional services were required because Student’s needs had changed between March 2008 and August 2008. Because of the change in Student’s needs, the later reports by Hunter and LaVigna are of little value in determining what services Student required in 2006. Student has the burden of proof in this due process proceeding, and has failed to meet his burden to show that the District provided inadequate services to address his autism. There was no denial of FAPE.¹³

Did the DDS Deny Student a FAPE between September 2007 and May 2008 by Failing to Hold IEP Team Meetings, Perform Required Assessments, and Implement Student’s Existing IEP?

18. The law requires a school district or other local educational agency to hold IEP team meetings after an initial formal assessment, when a pupil demonstrates a lack of anticipated progress, when a parent or teacher requests a meeting, and at least annually to review the pupil’s progress. (Ed. Code, § 56343.) As discussed in Legal Conclusion 8 above, an educational agency is also supposed to hold an IEP team meeting within 30 days when a pupil transfers from a different district in another SELPA. (Ed. Code, § 56043, subd. (m).)

19. As discussed in Factual Findings 34 – 48, the evidence showed that IEP team meetings were held while Student was at Fairview, both before and after Student’s parents regained their educational rights. Even Student’s father admitted that he attended those meetings. Student’s written closing argument attempts to raise additional procedural issues,

¹³ Student’s written closing argument also raises the legal point that, under Education Code section 56031, subdivision (d), the District was required to group special education individuals “for instructional purposes according to their instructional needs.” Student claims the District “presented no evidence” at the hearing that this was attempted or implemented. It is not clear what Student means by this argument. The District properly assessed Student and provided him with special education services designed to meet his educational needs. His grouping with other pupils at New Haven was reasonably calculated to help him gain educational benefit. Student has the burden of proof in this case and provided no evidence that such a grouping was not done in accordance with the law.

such as whether all required individuals attended the IEP team meetings. However, those issues were not raised in Student's due process request and are not properly raised at this time. (20 U.S.C. § 1415(f)(3)(B).) The sole issue raised in Student's due process hearing request with respect to the IEP team meetings was whether those meetings were held. The evidence proved they were held, so there was no violation of special education law and no denial of FAPE.

20. As discussed in Factual Findings 34 – 48, the evidence also showed that Fairview implemented Student's IEP while Student resided there. The unsupported assertion by Student's expert in his March 2008 report was not sufficient to show that the IEP was not implemented. Student had an opportunity to question the expert during the hearing about that statement, but did not do so, and it is unclear what the basis for that assertion was. The testimony of Joshua Richardson was persuasive that Student's IEP was implemented at Fairview. There was no denial of FAPE.

21. Student's written closing argument makes many statements, without citation to the record, regarding Student's time at Fairview. For example, Student contends that he was "subjected to multiple restrains (sic) as a form of dealing with his aggressive behavior." Student also contends that the Fairview staff was unable to address his behavior problems "and instead resorted to disengaging him from the educational process altogether, confining [Student] to his room." Even assuming that Student provided evidence that these events occurred, they do not automatically mean that Student's educational program at Fairview was inadequate -- Student provided no expert testimony to show that Student was capable of attending class on those occasions. The evidence showed that Student was ordered by the court to Fairview because of his serious problem behaviors. Without any persuasive expert testimony to contradict the testimony of the Fairview employees that Student's behavioral needs were being met while he was at Fairview, Student has failed to meet his burden to show a denial of FAPE.

22. The law requires a child to be assessed before the child is initially found eligible for special education services. (Ed. Code, § 56320.) After an initial assessment and finding of eligibility, a special education pupil is supposed to be reassessed periodically. Reassessment shall not occur more frequently than once a year, unless the parent and district agree otherwise, and shall occur at least once every three years, unless the parent or district agree otherwise. (Ed. Code, § 56381, subd. (a)(2).) A reassessment shall be conducted "if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment." (Ed. Code, § 56381, subd. (a)(1).)

23. As discussed in Factual Findings 11 – 18, the District conducted Student's triennial assessment in late 2006 and early 2007, so that assessment was not due during the time that Student resided at Fairview and attended the Goodell school. Even Student's written closing argument concedes that Student "had already undergone assessments...." As discussed in Factual Findings 34 – 48, for most of the time that Student resided at Fairview,

Student's parents did not even hold educational rights for Student, so they could not have requested reassessment. Fairview properly conducted a behavioral assessment of Student and informally reviewed his educational needs after he arrived. As was clear from the testimony of the Fairview employees, Student was placed at Fairview temporarily by court order to address his problem behaviors. Fairview's priority was to abate that behavioral crisis and return Student to the community.

24. The report of Student's expert, although he criticized the Fairview placement as being inappropriate, did not speak to any assessments that might have been necessary at the time. Instead, the expert opined that the placement and services offered by the District the year before were appropriate to meet Student's needs. As discussed in Factual Findings 45 – 46 above, one psychologist at Fairview felt that additional psychological assessment might assist Student by helping to determine his strengths and weaknesses. That one opinion in one report is not sufficient to show that Fairview had determined Student warranted reassessment.

25. However, even if that statement was sufficient to show that assessment should have been done or even if a request for assessment had been made by Student's parents or another holder of Student's educational rights, the procedural violation of the DDS by failing to conduct such an assessment did not give rise to a substantive denial of FAPE. As stated above in Legal Conclusion 4, a procedural violation only gives rise to a substantive denial of FAPE if it impedes a child's right to a free appropriate public education, causes a deprivation of educational benefits, or significantly impedes the parents' opportunity to participate in the decision making process.

26. As discussed above in Factual Findings 34 – 48, Student's parents did not hold educational rights for most of the time Student was at Fairview. When they regained those rights, Fairview immediately included them in the IEP process. The failure to conduct reassessments would not have substantially impeded their opportunity to participate in the process. Likewise, the denial would not have deprived Student of educational benefit or caused a denial of FAPE. Student had a full assessment by the District less than a year before he started at Fairview. Even Student's expert agreed that the District's assessment was sufficient to address Student's educational needs. A behavioral assessment was what Student desperately needed at that time, and that is what Fairview conducted. The evidence showed that Student made behavioral progress while he was at Fairview. Even if there was a procedural violation due to the failure to assess, that procedural violation did not give rise to a substantive denial of FAPE.

Because There Was No Denial of FAPE, There Is No Need to Address the Issue of Compensatory Remedies.

27. The DDS spent part of its written closing brief arguing that Student had not alleged any appropriate remedies. However, the issue of remedies only arises if there has been a finding that FAPE was denied. Since there was no denial of FAPE this case, there is no need to discuss remedies.

ORDER

Student's claims for relief against the District and the DDS are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here the District and the DDS prevailed on all issues heard and decided in this matter.

RIGHT TO APPEAL THIS DECISION

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

DATED: December 27, 2010

_____/s/
SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings