

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

FRESNO UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2012020842

DECISION

Administrative Law Judge Peter Paul Castillo (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter in Fresno, California, on May 15, 16 and 17, 2012.

Martha A. Torgow, Attorney at Law, represented Student. Student's Parents were present on all hearing days. Student did not attend the hearing.

Sang-Jin Nam and Melody Hawkins, Attorneys at Law, represented Fresno Unified School District (District). Debbi Clark-Fleming, Manager II, District Special Education Department, attended all portions of the hearing.

Student filed a request for a due process hearing (complaint) on February 22, 2012, that listed several problems, some of which involved an expedited appeal of a school disciplinary manifestation determination, and others which alleged a denial of a free appropriate public education (FAPE) on a nonexpedited basis. On February 27, 2011, OAH set the expedited and non-expedited matters for separate hearings. The expedited matter proceeded to hearing with no continuances on March 21, 22 and 23, 2012, and the Expedited Decision issued on April 16, 2012. The hearing for the non-expedited complaint was continued on April 3, 2012, and the hearing held as scheduled. At the parties' request, the ALJ allowed the parties to submit written closing argument by May 25, 2012. The parties submitted their closing briefs on May 25, 2012, and the expedited matter was submitted for decision.¹

¹ To maintain a clear record, the closing briefs have been marked as exhibits. Student's brief has been marked as Exhibit S-61, and the District's brief has been marked as Exhibit D-35-NE.

ISSUES²

Issue 1: Did the District deny Student a FAPE by failing to provide him with special education services from May 9, 2011 through October 5, 2011?

Issue 2: Did the District deny Student a FAPE by failing to conduct a functional behavior assessment (FBA) and not developing a behavior support plan (BSP) at the May 13, 2011 manifestation determination (MD) meeting to prevent a reoccurrence of the behavioral incident?

REQUESTED REMEDIES

Student requests that OAH order the District to conduct an FBA and develop a BSP, and provide him compensatory education in all subjects for missed instruction, to be provided in an appropriate educational setting or through one-on-one tutoring.

CONTENTIONS OF THE PARTIES

Student contends that after the District suspended him on May 9, 2011, the District failed to provide him with any special education services through October 5, 2011, when he began attending the District's Phoenix Secondary School (PSS). The District subsequently modified the suspension to an expulsion, and offered PSS as a placement in its September 15, 2011 expulsion order. Student also contends that the District was required to provide education services during the 2011 extended school year (ESY).

The District asserts that it offered adequate educational services pending the expulsion process by providing weekly homework packets through the end of the 2010-2011 school year (SY), and that Student was not eligible for ESY services. Also, the District argues that it offered adequate educational services at the start of SY 2011-2012, although there was a delay in the expulsion process and Parents unreasonably refused to accept an alternative placement. Because of the delay, the District provided 20 hours of individualized tutoring to Student as compensatory education.

Regarding behavioral assessments and services, Student argues that he had a history of inappropriate social interactions of which the District was aware. Therefore, the District should have offered an FBA and a BSP at the May 13, 2011 MD review meeting and individualized education plan (IEP) team meeting, to prevent a reoccurrence of the alleged disciplinary conduct.

² These issues are those framed in the May 7, 2012 Order Following Prehearing Conference and as further clarified at hearing. The ALJ has reorganized the issues for this Decision.

The District contends that Student did not have a history of behavior problems and the May 9, 2012 disciplinary conduct was an isolated incident for which an FBA and a BSP would not be appropriate.

FACTUAL FINDINGS

Jurisdiction and Background

1. Student resides with his adoptive Parents in Clovis. Student attends school in the District pursuant to an inter-district transfer. Student was first made eligible for special education in 2002. Student is eligible for special education and related services under the category of other health impaired (OHI), primarily based on a medical diagnosis of ADHD. Student's last agreed upon and implemented educational program is his January 19, 2011 IEP. It provides for four general education classes, two special education resource specialist program (RSP) classes, one in language arts and the other in math, and contains math reasoning and writing goals. The IEP does not provide for extended school year services or any other special education services. Student was 14-years-old and in the eighth grade at Ahwahnee Middle School (AMS) in the District at the time of the disciplinary incident on May 9, 2011.

2. On Monday, May 9, 2011, Student engaged in conduct that violated the law and school rules at AMS. Student assisted in the cafeteria during lunch, including when students from AMS' functional life skills class came for lunch, 15 minutes before the rest of the school. Students eat lunch in the AMS multi-purpose room. Student allegedly took an intellectually disabled male student from the functional life skills class to the bathroom located off the multi-purpose room, and entered and locked the bathroom stall. Student was accused of unwanted attempted sexual intercourse in the stall. A District teacher found the two students in the locked bathroom stall, partially disrobed. Student and the victim wrote statements for the school, and Student was arrested and incarcerated for three days. No formal charges were filed against Student.

3. The District initially suspended Student from school for five school days. On May 10, 2011, AMS Principal Tim Liles recommended Student's expulsion. On May 10, 2011, the District mailed written notice to Parents of a pre-expulsion MD review meeting to discuss the District's decision to change Student's placement due to the disciplinary incident, and an IEP team meeting. At the MD review meeting on May 13, 2011, the District

members of the review team determined that the behavioral incident on May 9, 2011, was not a manifestation of Student's disability.³

4. On August 17, 2011, the District held an expulsion hearing. On September 15, 2011, the District's governing board notified Parents that it adopted the administrative panel's finding and decision to expel Student through December 22, 2011. The Board stayed the expulsion so Student could attend PSS, which is a community day school. On November 17, 2011, the Fresno County Board of Education (FCBOE) granted Student's appeal of the District's expulsion, and ordered the District to expunge the expulsion records. On February 14, 2012, the District filed a writ of mandate in the Superior Court of Fresno County to overturn the decision of the FCBOE. The civil court's hearing on the District's writ was scheduled for May 2012,⁴ and Student continues to attend PSS.

Special Education Services

May 13, 2011 MD Review Meeting

5. A child with a disability who is removed from his or her current placement must continue to receive educational services, although in another setting, to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP. Student contends that the District failed to provide Student with any special education services from May 9, 2011 through October 5, 2012. The District asserts that it provided Student with weekly homework packets through the end of SY 2010-2011. Also, the District contends that Parents unreasonably delayed Student receiving special education services at the start of SY 2011-2012 because they delayed the expulsion process, and did not accept the District's placement offer pending the expulsion process. As a result, the District provided 20 hours of individualized tutoring to meet Student's educational needs.

6. At the May 13, 2011 MD review meeting, the District found that Student's disciplinary conduct was not a manifestation of his disability. The District's May 13, 2012 pre-expulsion summary form contains a place for the District to write the special education services Student will receive during the expulsion process. Eric Nyberg, District Regional Instructional Manager (RIM), chaired the MD review meeting, and was responsible for

³ The April 16, 2012 Expedited Decision, found that the District committed procedural violations that voided its MD decision and ordered the District to either hold a new MD review meeting within 10 school days, or expunge the expulsion decision from Student's educational records. The District held a subsequent MD review meeting on April 27, 2012, and again determined that Student's disciplinary conduct was not a manifestation of his disability. Parents disagreed with this determination. The District's April 27, 2012 MD review decision is not a subject of this hearing.

⁴ Neither party has informed OAH of the status of the writ proceeding.

documenting the meeting. According to Mr. Nyberg, the District's policy for special education pupils such as Student, who only receive RSP services, is to provide weekly homework packets for the student to complete. Richard Crowder, Student's RSP math teacher and case manager, would be responsible for collecting the homework assignments.

7. The testimony of Mr. Nyberg and Mr. Crowder indicated that the District only discussed the homework packets in passing during the May 13, 2011 manifestation determination meeting, even though the District also convened on May 13, 2011, an IEP team meeting to discuss Student's progress on his January 11, 2011 IEP. Further, at neither meeting did the District discuss with Parents how Student would receive the specialized instruction the District previously provided him in his RSP language arts and math classes while the expulsion process was pending. It was District policy for RSP-only special education students to only provide them with homework packets. Neither the pre-expulsion summary nor the IEP team meeting notes document the educational services the District would provide Student during the expulsion process or how Student would receive the special education services to progress on his IEP goals.

8. After the May 13, 2011 meeting, Mr. Nyberg noticed an error on the pre-expulsion summary that stated Student received special education services in a special day class when in fact he only received RSP services. Although Mr. Nyberg corrected pre-expulsion summary to state Student received RSP services, Mr. Nyberg did not insert the special education services Student would receive pending the expulsion process.

9. Mr. Crowder did collect Student's homework from his teachers and had it ready for Parents to pick up on May 16, 2011, which they did. Mr. Crowder did not modify the homework to provide specialized instruction. Parents subsequently returned the completed homework. Mr. Crowder prepared a subsequent homework packet, which Parent picked up, but did not return. Mr. Crowder did not follow up with Parents as to why they did not return the homework packet because he thought, without checking, that Student had probably transferred to another school pending the expulsion. It was not uncommon for students to transfer to another school or school district while pending expulsion. Other than the homework packets, the District offered no other education services to Student for the remainder of SY 2011-2012.

10. The District provided no explanation as to why it failed to document the special educational services that it would provide Student while he awaited the expulsion decision at either the May 13, 2011 MD review meeting, or the IEP team meeting held the same day. The District failed to consider how it would provide special education services because of its policy that any special education student, whose only special education service is RSP instruction, would only receive homework packets that are not modified to provide specialized instruction. This is the same support a general education student receives pending expulsion. Therefore, the District's uniform educational policy for RSP-only students pending expulsion, significantly impeded Parents' ability to participate in the decision making process. This was exacerbated by the District only briefly discussing the

services Student would receive, but not documenting these services, because the District did not afford Parents the ability to discuss how Student would progress toward his IEP goals.

2011 Summer

11. A district must provide ESY services to a student in special education if an ESY program is required to provide the student a FAPE. Student contended that he should have received ESY services because Mother requested that Student attend summer school at the January 19, 2011 IEP team meeting. The District argued that it did not need to provide Student with special education services during the summer of 2011, because the January 19, 2011 IEP did not provide for ESY services.

12. At the January 19, 2011 IEP team meeting, Mother requested that Student attend summer school because he was eligible to do so due to a low grade in science. However, the District summer program Mother referenced was a general education program. While Student might have been eligible for that summer program, it would not have provided him with special education services. Instead, for Student to receive special education services during the summer, Student's IEP would need to state that. However, Student's January 19, 2011 IEP, did not provide for ESY services, nor did any other IEP Student had while in the District. Because Student did not allege in the complaint that District denied him a FAPE because it did not offer him special education services for the 2011 ESY, and the January 19, 2011 IEP was his last agreed upon and implemented educational program, the District was not required to provide Student with special education services during the 2011 summer.⁵

SY 2011-2012 through October 5, 2011

13. The District's expulsion hearing did not occur until August 17, 2011, and the District's Board adopted administrative panel's recommendation to expel Student at its September 14, 2011 board meeting. The reason for the delay in the expulsion process is of little consequence in this decision because both parties sought to delay the expulsion hearing because they needed time to prepare. Also there was a change in District hearing officer. Both parties had good cause in seeking delays of the hearing before the District's administrative panel, and Parents had good cause in seeking a brief delay for the District's Board meeting, from August 24, 2011, to September 14, 2011, to consider the administrative panel's recommendation.

14. Before the start of SY 2011-2012,⁶ the District contacted Parents and asked them to look at its Millbrook program, which is a stand-alone program that includes special

⁵ Nothing in this decision determines whether Student requires ESY services nor prevents Student from filing a new complaint to challenge the adequacy of the January 19, 2011 IEP because it failed to provide Student with ESY services. (20 U.S.C. § 1415(o).)

⁶ The first school day of SY 2011-2012 was August 22, 2011.

education services, designed for students with emotional and behavioral problems, especially foster children and children in group homes. Edward González, District Associate Superintendent, Prevention and Intervention Services,⁷ knew that Student had not been in school since May 9, 2011, based on his communication with Parents, and wanted to ensure that Student received educational services during the pendency of the expulsion process. Mr. González contacted Nancy Miser, Manager III, Special Education Program and Services, to inquire about the possibility of Student attending Millbrook. Ms. Miser agreed that Millbrook might be appropriate and had Mr. Nyberg contact Parents to arrange a visit.

15. Father visited Millbrook right before the start of SY 2011-2012, and he and his wife determined that Millbrook was not appropriate to meet their son's needs. While the District contended that Millbrook was appropriate and Parents refusal delayed Student's receipt of educational services, the District never made a formal, written offer of Millbrook.

16. After Parents rejected Millbrook, Mr. González and Ms. Miser were still concerned about Student not receiving educational services. They decided to offer Student 20 hours of individualized tutoring to be provided at Student's home or other mutually agreeable location. They arrived at that number of hours because Student would miss approximately four weeks of school by the time of the September 14, 2011 school board meeting. Students typically receiving this service, such as being home due to illness or injury, receive one hour of service for day of school missed, which would be 20 hours. Parents agreed to the District's offer, and Ms. Miser selected Wesley Haar to provide the service. Mr. Haar is a credentialed special education teacher whose regular assignment is to provide this type of service as a District Individual Support Group Instructor.

17. Mr. Haar provided the 20 hours of service, the last day being September 14, 2011, at Student's home. Mr. Haar reviewed Student's IEP before working with him, and knew his IEP goals. In regards to math, Student completed ninth grade work with Mr. Haar. For language arts, Mr. Haar started his instruction with ninth grade work and determined that Student could not perform at this level. Mr. Haar went to his assigned high school and obtained modified high school curriculum, which was at the sixth grade level, which was appropriate for Student. Mr. Haar established that Student received a meaningful educational benefit with the 20 hours of instruction.

18. The District issued its decision to expel Student on September 15, 2011, but stayed the expulsion so that Student could attend PSS effective immediately. After receiving the Board's decision, Parents contemplated whether to enroll Student in independent study and instruct him at home. Parents eventually decided to enroll Student at PSS, and his first

⁷ Mr. González oversees the District's student discipline process for both general and special education students and was in contact with Parents regarding the scheduling of the administrative panel expulsion hearing. Mr. González does not oversee the District's special education programs.

day was October 6, 2011. Student did not contend that PSS was not adequate for him to access the general curriculum, or to progress on his IEP goals.

19. Although the District did not make a formal, written offer to Student of educational placement and services at Millbrook and home instruction, the District did provide him with adequate educational services from the start of SY 2011-2012 through September 15, 2011, with Mr. Haar's one-to-one instruction. Although Parents rightfully took time to decide whether to enroll Student at PSS, the District is not responsible for any educational loss caused by Parents' delay in making their decision.

Behavior Assessment and Services

20. If the disciplinary conduct is not a manifestation of the child's disability, the child must receive, as appropriate, an FBA,⁸ and behavioral intervention services and modifications designed to address the behavior violation so that it does not recur. In California, less serious behaviors may be addressed by the development of a BSP. Sometimes a BSP will be developed following an FBA. Student asserts that the District needed to conduct an FBA and then develop a BSP because Student had previously demonstrated behavior problems that might be responsible for his inappropriate conduct on May 9, 2011. The District asserts that it did not need to conduct an FBA and develop a BSP because Student's disciplinary conduct was an isolated incident and not subject to analysis through an FBA.

21. Student attended the Clovis Unified School District (CUSD) from April 2007, when he moved into Parents' home, through the end of SY 2007-2008. At CUSD, Student had a BSP, dated January 24, 2008, and one of the behaviors identified was Student invading the personal space of others during transitions and recess when his teacher was not present to provide structure. Parents decided to home-school Student at the start of SY 2008-2009 and home-schooled him through December 2009. The District did not develop a BSP when Student entered into AMS.⁹

22. From January 2010 through the May 9, 2011 disciplinary incident, Student did have some problems properly interacting with his peers, which Parents discussed with AMS personnel. Nothing in the emails between Parents and AMS personnel establish that Student

⁸ In California, an FBA is a behavior assessment for less severe behaviors. It is distinct from the functional analysis assessment (FAA), which is a statutorily-defined assessment performed under prescribed conditions and governed by a panoply of requirements pursuant to title 5, California Code of Regulations, section 3052, subdivision (b). Although Education Code section 56331 references an FBA, there are no other California statutes or regulations related to FBAs and BSPs.

⁹ Nothing in this decision addresses whether the District should have developed a BSP before the May 9, 2011 disciplinary incident.

had serious behavioral issues that would indicate that he might engage in a serious disciplinary incident that involved improper sexual conduct.

23. School psychologist Russell Koop conducted the psychoeducational assessment of Student in February and March 2010. Mr. Koop's psychoeducational assessment included a social-emotional assessment, which found that Student had a tendency to engage in "behaviors that others might see as 'odd' or immature." Student was also in the at-risk range on the Schools Problems Composite on the Behavior Assessment System for Children, Second Edition (BASC-II), due to impulsivity related to his ADHD and tendency to avoid social interaction with peers. Mr. Koop's assessment did not mention that Student had a BSP while at CUSD, and whether at the time of the assessment he had behaviors that impeded his ability to access the curriculum while at CUSD.

24. At the May 13, 2011 MD review meeting and IEP team meeting, the District did not discuss any behavior assessments or services that Student might require because the District believed that Student's conduct was an isolated incident. Mr. Koop and other District team members did not discuss whether Student currently needed further behavior assessment, or a BSP. Nor were concerns raised by Mr. Koop's assessment comments about Student's social immaturity. The District team members should have discussed whether Student required a further behavior assessment, possibly including an FBA, and additional behavioral supports and services such as a BSP, due to the information in Mr. Koop's assessment, and in also the prior CUSD assessment about Student's social immaturity and problems with peer social interaction.

25. However, Student did not present adequate evidence to rebut Mr. Koop's, Ms. Miser's and Deeds Gills' opinions that an FBA was not appropriate for Student because an FBA involves observing the Student over time to observe the targeted behavior to find its antecedents and consequences.¹⁰ Mr. Koop, Ms. Miser and Mr. Gills are familiar with the purposes of an FBA and how an FBA is conducted. All three were convincing that an FBA would not uncover the reasons why Student engaged in the act, which resulted in discipline, because it was doubtful that Student would repeat the conduct at school after being arrested. However, the District could have conducted other behavior assessments to analyze why Student might have engaged in the inappropriate conduct, which could determine if the May 9, 2011 incident was abnormal or possibly related to Student's emotional immaturity, social deficits and low-average cognitive ability, as noted in Mr. Koop's and prior assessments.

26. The District contends that Mr. Gill's subsequent psychoeducational assessment addresses these behavioral issues. Mr. Gills conducted an in-depth assessment, which included a review of prior assessments and speaking with David A. Fox, M.D., who Student has seen from May 2008 through the present for the treatment of several psychiatric

¹⁰ Mr. Gills is the District School Psychologist who assessed Student in December 2011 and January 2012,

conditions, along with Student's ADHD. Mr. Gills also interviewed Student, Parents and two teachers at PSS, plus observed Student at PSS, as part of his assessment. To assess Student's behavior and social-emotional deficits, Mr. Gills administered the BASC-II and Connors Rating Scales, Third Edition and analyzed in depth the ratings forms completed by Student's teachers and Parents. Student did not establish that Mr. Gill's subsequent assessment was not adequate to analyze Student's behavior to prevent a reoccurrence of the disciplinary incident. Additionally, Student did not establish that the behavioral supports and services the District provides to Student at PSS are not adequate to prevent a reoccurrence of the behavioral violation.

27. Student did not establish that the District needed to conduct an FBA to analyze the conduct involved in the disciplinary incident to prevent its reoccurrence because an FBA would not be appropriate to analyze the possible causes of Student's disciplinary conduct to prevent its reoccurrence. The District needed to discuss with Parents at the May 13, 2011 MD review meeting, or soon thereafter, whether Student required any further behavior assessments, supports or services to prevent a reoccurrence of the disciplinary incident. However, Student failed to introduce sufficient evidence as to his need for a BSP or other behavioral interventions or modifications to prevent a reoccurrence based on information in Mr. Gills' assessment. Accordingly, Student did not establish that the District needed to conduct an FBA or develop a BSP to prevent a reoccurrence of the disciplinary conduct.

Relief

28. ALJs have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. Appropriate equitable relief, including compensatory education, can be awarded in a due process hearing. The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. An award to compensate for past violations must rely on an individualized analysis, just as an IEP focuses on the individual student's needs. The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place."

29. Regarding the District's failure to provide Student with educational services after the May 9, 2011 disciplinary incident, the District need not provide Student with services for the first 10 school days, which would be through May 20, 2011. Therefore, for SY 2010-2011, the District needed to provide Student with educational services from May 23, 2011 through June 9, 2011, 13, school days, which would be 13 hours of one-to-one tutoring based on the formula the District employed for SY 2011-2012. For the 2011 summer, Student was not entitled to ESY services because the January 19, 2011 IEP did not provide for this special education service.

30. As to SY 2011-2012, the District provided Student with adequate educational services from August 22, 2011 through September 15, 2011, 17 school days, to meet his unique needs through the 20 hours of one-to-one tutoring Mr. Haar provided. The District's

expulsion decision that Student could attend PSS, which Student did not challenge as an inadequate placement to provide him with special education services, and any delay in Student enrolling at PSS was not the responsibility of the District. Therefore, Student did not establish that he required any additional special educational services for SY 2011-2012 other than the 20 hours provided by Mr. Haar.

LEGAL CONCLUSIONS

Burden of Proof

1. Student, as the party requesting relief, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) In this case, the Decision is limited to the non-expedited issues only.

Provision of a FAPE

2. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950-953.) The Ninth Circuit has referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213 (*Hellgate*); *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149. (*Adams*).)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*J.G. v.*

Douglas County School Dist. (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, 195 F.3d at p. 1149.)

Procedural Violations

5. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

6. The Ninth Circuit has observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. A district has an obligation to make a formal written offer in the IEP that clearly identifies the proposed program. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526; *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d. 431, 459-460.)

Educational Services for Disciplined Special Education Students

7. When a school district changes the placement of a special education student for specific conduct in violation of a student code of conduct, the student is entitled to certain procedural protections. The district is required to conduct a review to determine if the conduct that is subject to discipline is a manifestation of the student's disability. This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).) A change of placement is defined as (a) a removal for more than 10 consecutive school days, or (b) a series of removals that cumulate to more than 10 consecutive school days and constitute a pattern based on listed factors. (34 C.F.R. § 300.536(a) (2006).¹¹) Expulsion or suspension for more than 10 days is a change of placement. (*Honig v. Doe* (1988) 484 U.S. 305 [108 S.Ct. 592].) The IDEA provides that a child with a disability who is removed from the child's current placement must continue to receive educational services to enable the child to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. (20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d)(1)(i); *Student v. Bellflower Unified School District* (June 14, 2010) Cal.Ofc.Admin.Hrngs. Case No. 2007020519, p. 9.)

¹¹ All subsequent references to the Code of Federal Regulations are to the 2006 version.

8. A failure to implement a student's IEP will constitute a violation of the student's right to a FAPE if the failure was material. There is no statutory requirement that a District must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 502 F.3d 811, 820-822.)

ESY

9. California Code of Regulations, Title 5, section 3043, provides that ESY services shall be provided for each individual with unique and exceptional needs who requires special education and related services in excess of the regular academic year. Pupils to whom ESY services must be offered under section 3043 “. . . shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition.” (See also, 34. C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3); *Hellgate, supra*, 541 F.3d. at pp. 1210-1211.)

Issue 1: Did the District deny Student a FAPE by failing to provide him with special education services from May 9, 2011 through October 5, 2011?

10. Pursuant to Factual Findings 5 through 10 and Legal Conclusions 2 through 8, the District denied Student a FAPE by failing to provide him with special education services after the District determined at the May 13, 2011 MD review meeting that Student's disciplinary conduct was not a manifestation of his disability. While the District briefly discussed the education services it would provide Student pending the expulsion, the District violated Parents' procedural rights by failing to document on the May 13, 2011 pre-expulsion and IEP documents the educational services that the District would provide Student while the expulsion process was proceeding. Additionally, the District had a uniform policy of only providing homework packets to pupils like Student who only require as special education services RSP services with no analysis whether that would meet Student's unique needs. These actions significantly impeded Parents' ability to participate in the educational decision making process for Student. Student established that the District failed to meet his unique needs at the end of SY 2010-2011 because only giving him homework packets failed to ensure that Student made progress on his IEP goals, for which he required special education instruction.

11. For the 2011 ESY, Student was not entitled to special education services because the January 19, 2011 IEP, Student's last agreed upon and educational program, did not provide for ESY services. Finally, the District provided adequate special education services during SY 2011-2012 with the one-to-one tutoring by Mr. Haar, and because Parents delayed Student's attendance at PSS. Accordingly, the District denied Student a FAPE by failing to provide him with special education services after it decided to expel him pending

the final decision by the District Board through the end of SY 2010-2011, but not during 2011 ESY or SY 2011-2012. (Pursuant to Factual Findings 11 through 19.)

Behavioral Needs

12. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, “strategies, including positive behavioral interventions, strategies, and supports to address that behavior.” (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324; Ed. Code, § 56341.1, subd. (b)(1).) As noted by the comments to the 2006 federal implementing regulations, “[D]ecisions [as to the interventions, supports, and strategies to be implemented] should be made on an individual basis by the child’s IEP team.” (64 Fed.Reg. 12620 (2006).) California law defines behavioral interventions as the “systematic implementation of procedures that result in lasting positive changes in the individual’s behavior,” including the “design, implementation, and evaluation of individual or group instructional and environmental modifications . . . designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual’s right to placement in the least restrictive environment as outlined in the individual’s IEP.” (Cal. Code Regs., tit. 5, § 3001, subd. (d).) An IEP that does not appropriately address behavior that impedes a child’s learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029.)

13. Further, for a disciplined special education student where there has been a change in placement and the MD review team determined that the student’s conduct was not a manifestation of his or her disability, the child must receive, as appropriate, a functional behavior assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. (20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(d)(1)(ii).)

Issue 2: Did the District deny Student a FAPE by failing to conduct an FBA and not developing a BSP at the May 13, 2011 MD meeting to prevent a reoccurrence of the behavioral incident?

14. Pursuant to Factual Findings 20 through 27 and Legal Conclusions 2 through 6 and 12 and 13, Student did not establish that he required an FBA. Failure to discuss whether to conduct an FBA is a procedural error. Mr. Koop, Ms. Miser and Mr. Gills established that Student’s disciplinary conduct was not appropriate for an FBA because an FBA involves a systematic observation of Student. An assessor could not observe Student to examine the antecedents of a sexual incident with another student because this was an isolated incident and Student did not have a history of behavior problems at AMS. While the District should have discussed at the May 13, 2011 MD review, and IEP team meeting, whether Student required a BSP to prevent a reoccurrence of the May 9, 2011 incident, Student did not establish that he needed a BSP, and was denied a FAPE because an FBA was not conducted, and a BSP was not developed. While Student had social skills and behavioral deficits, as documented in both Mr. Koop’s and Mr. Gills’ psychoeducational assessments, Student did

not establish that these deficits were the cause of the May 9, 2011 incident, or that he needed a BSP to prevent a reoccurrence. Accordingly, Student failed to establish that the District needed to conduct an FBA or develop a BSP to prevent a reoccurrence of the disciplinary conduct.

Relief

15. ALJs have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [85 L.Ed.2d 385] (*Burlington*); *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).)

16. Appropriate equitable relief, including compensatory education, can be awarded in a due process hearing. (*Burlington, supra*, 471 U.S. at p. 374; *Puyallup, supra*, 31 F.3d at p. 1496.) The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park, ex rel. Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033 (*Park*) (citing *Puyallup, supra*, 31 F.3d at p. 1496).) An award to compensate for past violations must rely on an individualized analysis, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*) The award may consist of additional training for special education staff. (See *Park, supra*, 464 F.3d at p. 1034.)

17. Pursuant to Factual Findings 28 through 30 and Legal Conclusions 10, 11, 15 and 16, the District denied Student a FAPE as to the provision of special education services after the May 13, 2011 MD review meeting, when it failed to provide Student with special education services for the remainder of SY 2010-2011. The District was not required to provide educational services for the first 10 days when Student was suspended, so the time in which the District denied Student a FAPE is from May 23, 2011 through the end of SY 2010-2011, June 15, 2011, 13 school days. For the 2011 ESY, the District was not required to provide special education services because Student's last agreed upon and implemented educational program, the January 19, 2011 IEP, did not provide for ESY services. For SY 2011-2012, the District provided adequate special education services from the start of the school year through the September 14, 2011 District Board meeting, with the 20 hours of one-to-one tutoring by Mr. Haar. From September 15, 2011, when the District notified Parents of the suspended expulsion and that Student could attend PSS through October 6, 2011, Student's first day at PSS, Student did not establish that the District failed to provide adequate education services because Parents decided not to immediately enroll Student at PSS. Additionally, Student did not contend that PSS was not adequate to meet his educational needs. As the District put forth with Mr. Haar's instruction, one hour of instruction equals a day of instruction. Therefore, the District needs to provide Student with 13 hours of one-on-one instruction by a credential special education teacher as compensatory

education for the 13 days of instruction that the District failed to provide at the end of SY 2010-2011.

18. Additionally, the testimony of Mr. Nyberg established that the District has provided its RIM with misinformation that it may uniformly provide RSP special education students, like Student, with only homework packets and that would be sufficient to provide specialized instruction so that the student may meet his or her IEP goals. The testimony of District witnesses who attended the May 13, 2011 meeting, indicated a lack of understanding of the need to make individual decisions about how to meet a special education student's needs as set forth in the student's IEP during the expulsion process, as required by special education law. Accordingly, additional training to District RIMs is needed to ensure that individualized decisions are made during MD review meetings as to services students shall receive while awaiting the expulsion decision.

ORDER

1. Within 90 calendar days of this Decision, the District shall provide Student with 13 hours of one-to-one tutoring by a credentialed special education high school teacher, such as an Individual Support Group Instructor. Parents shall cooperate with the District in the scheduling of the tutoring.

2. Within 90 calendar days of this decision, the District shall provide its special education RIMs with four hours of training on properly noticing and conducting MD review meetings and completing pre-expulsion summary and IEP documents for these meetings, focusing on the provision of special education services while a student is suspended pending expulsion.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on Issue 1 and the District prevailed on Issue 2.

RIGHT TO APPEAL THIS DECISION

This is a final administrative Decision, and all parties are bound by this Decision. The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: June 22, 2012

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings