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

In the Matter of: STUDENT, Petitioner, v. SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, CONTRA COSTA COUNTY OFFICE OF EDUCATION, and CONTRA COSTA COUNTY SPECIAL EDUCATION LOCAL PLAN AREA, Respondents.	OAH NO. N 2005110307

DECISION

Judith A. Kopec, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter on April 3 through 7, 10 through 12, and 17 through 21, 2006, in Oakland, California.

Mandy G. Leigh and Emily Berg, Attorneys, represented Petitioner and Student (Student). Student's mother (Mother) was also present. Student's father was present at times throughout the hearing.

Dora J. Dome, Attorney, represented San Ramon Valley Unified School District (District), Contra Costa County Office of Education (County), and the Contra Costa County Special Education Local Area Plan (SELPA). Also present was Karen Heilbronner, Assistant Director, Special Education, for the District. Other representatives of Respondents were present at times throughout the hearing.

Testimony concluded, closing arguments were filed, and the matter was submitted on April 24, 2006.[1]

ISSUES[2]

1. Did Respondents deny Student a free appropriate public education (FAPE) during the 2002-2003 through 2004-2005 school years by failing to find him eligible for special education services as a result of autism by failing to:

    a. Provide the following services: discrete trial approaches; intense and individualized speech and language services; applied behavior analysis (ABA) methods; appropriate social skills curriculum; and behavior services?

    b. Consider the following independent assessments concerning the services required to provide a FAPE:

        (1) The September 19, 1996, report by Dr. Olson;
        (2) The October 23, 1999, report by Dr. Brad Berman; and
        (3) The July 18, 2001, report by Dr. Randi Hagerman?

2. Did Respondents deny Student a FAPE during the 2002-2003 through 2004-2005 school years by failing to have a regular education teacher participate in individualized education program (IEP) meetings, which denied Student's parents an opportunity to participate in the IEP process and which denied Student a FAPE in the least restrictive environment?

3. Did Respondents deny Student a FAPE during the 2002-2003 school year by failing to:

    a. Consider Student's need for small group instruction?
    b. Provide services to meet Student's unique speech and language, occupational therapy (OT), and academic needs and provide educational benefit?
    c. Implement a behavior plan and conduct a functional analysis assessment (FAA)?
    d. Conduct an assistive technology (AT) assessment and reimburse Student for the purchase of an augmentative communication device?

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[1] Student filed an amended complaint on December 6, 2005. On January 30, 2006, the hearing scheduled for February 1, 2006, was continued. The end of the statutory time period for rendering a decision was April 28, 2006.
[2] The issues have been re-framed for the purpose of this Decision. The time period at issue in the hearing begins on or after November 4, 2002.

4. Did Respondents deny Student a FAPE in the 2003-2004 school year by failing to:

   a. Provide services to meet Student's unique OT, speech and language, and academic needs and provide meaningful educational benefit?
   b. Conduct an assessment of AT computer software?
   c. Implement a behavior plan and conduct an FAA?

5. Did Respondents deny Student a FAPE in the 2004-2005 school year by failing to:

   a. Timely conduct Student's triennial assessment and convene an IEP team, resulting in a loss of educational opportunity?

   b. Provide Student's parents an opportunity to participate in the IEP process by the following:
      (1) Failing to accurately record or report Student's progress?
      (2) Failing to consider the input of Student's parents concerning an in-home ABA program, one-to-one instruction, a distraction-free environment, coordination between the District's speech therapist and Student's private speech therapist, and goals and objectives necessary to meet Student's unique needs and receive educational benefit?

   c. Offer behavioral services to meet Student's unique needs because Respondents failed to offer the following:

      (1) In-home ABA services?
      (2) One-on-one aide to provide behavioral and academic support?
      (3) Behavioral support plan?
      (4) FAA?

   d. Implement two expressive speech lists as required by the IEP?

   e. Reimburse Student for speech services?

6. Did Respondents deny Student a FAPE in the 2005-2006 school year by failing to:

   a. Provide 24 hours of required ABA services?
   b. Provide 75 minutes per week of required behavior management services?
   c. Timely disclose Student's behavioral issues to his parents, depriving them of an opportunity to participate in the IEP decision-making process?

d. Implement a behavior plan, behavior intervention plan, or conduct an FAA?

e. Offer placement and services at Liberty High School (Liberty) to meet Student's unique needs by:

(1) Providing only functional skills programming?
(2) Failing to provide ABA services?
(3) Failing to provide a one-to-one aide?
(4) Offering a large group setting?
(5) Failing to provide mainstreaming opportunities?
(6) Requiring a lengthy commute?
(7) Failing to provide a transition plan?

FACTUAL FINDINGS

1. Student is a 16-year-old boy who has received special education services from Respondents since 1993. He attended schools operated by the County from 1993 through June 2005, including Los Cerros Middle School (Los Cerros) from the 2001-2002 school year through the 2004-2005 school year. He attended the District's Monte Vista High School (Monte Vista) in August and September 2005. Student has received services at home since October 2005.

Issue 1: Respondents' Failure to Find Student Eligible as a Result of Autism during the 2002-2003 through 2004-2005 School Years

Failure to Provide Services

2. The record does not indicate the basis for Student's initial eligibility in 1993. On September 19, 1996, Dr. Donald Olson of Children's Hospital, Oakland, diagnosed Student with an autistic spectrum disorder, pervasive developmental disorder. The County was aware of this diagnosis as early as March 1999. As of October 1999, Student was attending a special day class at Wagner Ranch School (Wagner Ranch) that was designed for children with autism spectrum disorders. During the time pertinent to this hearing, Student was eligible for special education services on the basis of mental retardation. The IEP of April 13, 2005, is the first indication that Student was eligible for services based on autism.

3. There is insufficient evidence that Student was denied services, including discrete trial approaches, intense and individualized speech and language services, ABA methods, social skills curriculum, or behavior services because Respondents did not find him eligible on the basis of autism. While Respondents denied some services requested by Student's parents during the 2002-2003 through 2004-2005 school years, there is insufficient evidence that Respondents denied them because they did not find him eligible on the basis of autism.

Failure to Consider Independent Assessments

4. On March 17, 1999, Paula Tucker, School Psychologist for the County, relied on Dr. Olson's September 19, 1996, report and his diagnosis in her functional assessment report of Student. Dr. Olson's report was also referenced and relied upon in Student's December 3, 2002, integrated psycho-educational assessment done as part of his triennial review.

5. In a report dated October 23, 1999, Dr. Brad Berman, Student's developmental and behavioral pediatrician, reported that Student was responding well to the Wagner Ranch program for children with autism spectrum disorders. There was no evidence concerning the circumstances in which Student's parents obtained Dr. Berman's report, or when it was first provided to Respondents. While Student's cumulative file included some reports from Dr. Berman, it is unclear whether this specific report was included. Even assuming that this report was in Student's cumulative file, there is insufficient evidence that the IEP team considered, or was required to consider, this report during the time period at issue in this hearing.

6. On July 18, 2001, Dr. Randi Hagerman, Director, M.I.N.D. Institute, University of California – Davis Medical Center, diagnosed Student with pervasive developmental disorder and mental retardation. Dr. Berman referred Student's parents to the M.I.N.D. Institute to evaluate Student when his parents expressed interest in determining whether there was a genetic component to Student's disability. While this report was included in Student's cumulative file, it is not clear when it was first given to Respondents. There is insufficient evidence that the IEP team considered, or was required to consider, this report during the time period at issue in this hearing.

Issue 2: Respondents' Failure to Include a Regular Education Teacher in IEP Meetings During the 2002-2003 through 2004-2005 School Years

7. Prior to the time period at issue in this hearing, Student last participated in general education classes when he attended Wagner Ranch in the 2000-2001 school year. A general education teacher was not present at the seven IEP meetings during the 2002-2003 through 2004-2005 school years. Mother requested that a general education teacher be present at some time before the April 20, 2005, IEP meeting, but the request was denied because she was told it was not necessary. All but the April 13, 2005, IEP indicate that the team considered the option of general education for Student. However, the team did not discuss Student's participation in general education classes at some of these meetings.

8. According to Sally Mills, Student's teacher at Los Cerros,[3] Student was still learning the basic skills necessary to participate in a general education classroom and participation in

[3] Ms. Mills taught special education classes for the County for 11 years. She holds a preliminary level 1 education specialist instruction credential.

a general education classroom was not appropriate for him. Ms. Mills testified that to be mainstreamed, Student must be able to independently walk to class, participate without supervision, and be the sole responsibility of the classroom teacher. Respondents offered nothing to counter Ms. Mills' mistaken understanding of when participation in general education is appropriate for a student. Contrary to Ms. Mills' view, a child may participate in a general education classroom even if the child requires additional support to educationally benefit from it. While Mother always considered mainstreaming to be an option for Student, there was insufficient evidence that Student was harmed by not having a regular education teacher attend the meetings.

Issue 3: Respondents' Denial of FAPE During the 2002-2003 School Year

Failure to Consider Small Group Instruction

9. The December 4, 2001, and December 3, 2002, IEPs govern Student's program during the 2002-2003 school year. The December 2001 IEP required that all of Student's services be provided with individualized or small group instruction. The December 2002 IEP required that all of his services except OT be provided with individualized or small group instruction. Student's OT services were provided with consultation to staff and family. Student failed to meet his burden.[4] The IEP team considered Student's need for small group or individualized instruction for the 2002-2003 school year.

Failure to Provide Speech and Language Services

10. The December 2001 and December 2002 IEPs provided that Student receive speech therapy two times a week, 30 minutes each session, with individual and small group instruction in his special day class. Mona Epstein, Speech-Language Pathologist,[5] provided one-to-one services to Student twice a week and, in addition, provided services to him in both small group and large group settings in the classroom. Each IEP contained goals addressing Student's need for expressive communication and comprehension.

11. In December 2002, Student was diagnosed with apraxia, a motor speech disorder in which it is difficult for him to execute the oral movements necessary to put sounds together to create intelligible words and sentences. According to Robin Jaye-Elfont,[6] Speech-Language Pathologist, a minimum of three, 30-minute sessions a week was required

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[4] The burden of proof in a hearing challenging an IEP is placed upon the party seeking relief. (*Schaffer v. Weast* (2005) ___ U.S. ___ [126 S.Ct. 528, 537, 163 L.Ed.2d 387, 399, 2005 U.S. LEXIS 8554].)

[5] Ms. Epstein has an M.S. in Communicative Disorders and has been a licensed speech pathologist for 26 years. She holds a credential to provide speech and language services in public schools in California. She has provided speech and language services to severely handicapped students for the County for 11 years. Ms. Epstein provided speech and language services to Student during all but one year since he was about five years old.

[6] Ms. Jaye-Elfont has an M.S. in Communicative Disorders and has been a licensed speech pathologist for over 20 years. She has never provided speech services in a school setting.

to effectively treat Student's apraxia. None of Student's goals during the 2002-2003 school year addressed apraxia. Student made progress on the goals.

12. Ms. Epstein's opinion that Student could best gain educational benefit through non-verbal communication skills is persuasive. Unlike Ms. Jaye-Elfont, Ms. Epstein has considerable experience providing speech and language services to assist students to access their educational programs. Student's needs were met by the speech and language services provided during the 2002-2003 school year.

Failure to Provide OT Services

13. The December 2001 IEP required that Student receive one 30-minute session of OT a week provided individually in class. The IEP included an OT goal to develop body awareness and motor efficiency with benchmarks addressing pre-writing skills, putting on and removing front-opening garments, and cutting with scissors. The December 2002 IEP required that Student receive one, 30-minutes session of OT a week provided as consultation to classroom staff and family. None of the goals were expressly identified as an OT goal. OT-related activities, such as cutting out newspaper advertisements and using a computer keyboard, were included in the other goals. Student made progress on his goals.

14. Linda Marks, Occupational Therapist,[7] assisted with developing the December 2002 IEP. According to Ms. Marks, Student previously received direct OT services for a considerable period of time and no longer needed the direct, specialized services of an OT therapist. Ms. Marks' opinion is persuasive. Student's OT goals and services during the 2002-2003 school year met his needs.

Failure to Provide Academic Goals

15. At the time of the December 2002 IEP, Student's most recent tests of cognitive development indicated that he had an IQ of 35, a functional level between ages two and four, and an adaptive behavior level of age two. There was no clear distinction between academic and functional goals for Student. Student's December 2001 goals included developing Student's non-verbal communication, oral-motor movements, personal safety, group social skills, and understanding of time and money. In addition, the goals addressed Student's recognized need to generalize things he learned across different settings. Student's December 2002 goals addressed sequencing skills, social skills, computer skills, understanding time and money, counting, and non-verbal communication. Contrary to Student's allegation, he had more than one academic goal during the 2002-2003 school year. Student alleged that a goal requiring him to recognize and identify numbers involving the calendar, measurements, money and time was vague and not measurable. The goal is sufficiently clear and measurable. Student made progress on the goals.

[7] Ms. Marks, a licensed occupational therapist, has worked for 32 years as an occupational therapist, including seven years working for the County.

16. Student has a unique need for basic skills, both academic and functional, to enhance his independence in the activities of daily living. He also has a unique need for assistance in the retention and generalization of skills and knowledge.[8] The goals in the December 2002 IEP addressed functional skills in language and mathematics, comprehension, vocabulary, generalization, and appropriate social skills. Student's academic needs were met during the 2002-2003 school year.

Failure to Provide Behavior Plan and FAA

17. The December 2001 IEP team found that Student's behavior did not impede his learning or that of others. An IEP goal addressed Student's need to refrain from inappropriate touching of his body and female peers' bodies.

18. The December 2002 IEP team determined that Student's behavior impeded his learning or that of others, and that strategies or behavior interventions were required to address his behavior. The IEP incorporated a behavior support plan. Student exhibited aggressive behaviors of scratching, pinching and grabbing other people's necks four times a day, in brief episodes with moderate intensity. The behaviors occurred when Student was required to engage in unfamiliar tasks involving new concepts, undesirable activities, or in small or large group activities. The plan provided for the use of a token economy system, visual and verbal prompts and reminders, and consultation by the school psychologist with classroom staff. It required that data be collected concerning the frequency of the behavior and that data be reviewed at least bi-weekly. An FAA was not conducted.

19. Andrea Slavet, school psychologist,[9] supervised the classroom staff's implementation of the December 2002 behavior support plan. Student's behavior improved when the plan was implemented, but, according to Ms. Slavet, he continued intermittently to engage in scratching, pinching and reaching for staff's necks. By the time of Student's third quarter report card in April 2003, Ms. Mills began fading the program because there were fewer behavioral incidents. There is insufficient evidence that data concerning the frequency of the behavior identified in the behavior support plan were collected. The only evidence offered concerning the nature of the target behaviors was a general description. There is insufficient evidence that Student's behavior significantly interfered with the implementation of his goals and objectives.

Failure to Provide AT Assessment and Reimbursement for Augmentative Communication Device

20. Mother requested that Student be assessed to determine his need for AT in the area of augmentative communication devices at the December 3, 2002, IEP. No assessment

[8] The evidence shows that Student had a difficult time retaining information during the break between the end of the extended school year and the beginning of the next school year. However, Student's attorney argued during the hearing that Student made no allegations concerning services during any of the extended school years.

[9] Ms. Slavet has a M.S. in Applied Educational Psychology, with a specialization in School Psychology, and holds a clear pupil personnel services credential in school psychology.

plan was provided to Student's parents. Judy Dawson, Augmentative Communication Specialist,[10] assisted Mother with evaluating three different devices. After Ms. Dawson explained the pros and cons of the County purchasing the device, Mother decided to purchase it. Student's insurance paid $4,530.50 for the device and necessary software and accessories. Student's parents paid $3,408.49 for the equipment and $989 for an extended warranty from August 2004 through August 2006, for a total of $4,397.49. It is undisputed that the selected device meets Student's unique needs.

Issue 4: Respondent's Denial of FAPE During the 2003-2004 School Year

Failure to Provide OT Services

21. The December 3, 2002, and March 12, 2004, IEPs govern Student's program during the 2003-2004 school year. They continued the same level of OT consultation services from the prior IEP. The December 2002 IEP did not contain any expressly-identified OT goals. The March 12, 2004, IEP included two expressly-identified OT goals addressing Student's sensory motor needs and his need for independent living skills. Other goals included activities that also develop OT-related skills, such as cutting newspaper ads, sorting utensils, writing, and typing. Student made progress on these goals. Student's OT needs were met during the 2003-2004 school year.

Failure to Provide Speech and Language Services

22. The December 2002 and March 2004 IEPs continued the level of speech and language services from the prior IEP. Ms. Epstein primarily provided speech services to Student on an individual basis. The December 2002 IEP included expressive language goals to further Student's non-verbal communication. The March 2004 IEP included speech goals in the areas of expressive language and comprehension, pragmatic language, social language, verbal communication, and oral-motor movements. Additional goals involved the use of Student's augmentative communication device in a variety of settings. These goals addressed his unique needs for both developing functional communication skills, and for generalizing those skills to different settings. Student showed progress on his goals.

23. According to Ms. Epstein, Student's primary speech language goal continued to be the development of functional communication so that he can access the curriculum and meet his educational needs. Student's cognitive deficits precluded him from significantly benefiting from additional specialized speech services at this time. Ms. Epstein's opinion is persuasive. Student's needs for speech services were met during the 2003-2004 school year.

[10] Ms. Dawson has been an Augmentative Communication Specialist with the County for 18 years. She holds a life standard elementary teaching credential and a life standard restricted special education teaching credential.

Failure to Provide Academic Goals

24. Student's December 2002 goals addressed sequencing skills, social skills, computer skills, understanding time and money, counting, and non-verbal communication. Student's March 2004 goals included developing Student's computer skills, his understanding of the value of money, social skills, writing, independent living skills, and non-verbal communication with his augmentative communication device. They addressed Student's unique academic needs for generalization, functional skills in language and mathematics, appropriate social skills, and communication. Student made progress on these goals. Student's academic needs were met during the 2003-2004 school year.

Failure to Provide Assessment of Software

25. According to Mother, Ms. Mills and Ms. Dawson recommended at the March 2004 IEP that software be evaluated to assist the development of Student's reading, math and functional skills. Ms. Mills' para-educator was going to do this evaluation. Mother never requested a formal assessment of software. Ms. Mills informally evaluated and introduced software to Student as required by the IEP to support his goals and the curriculum. Respondents were not required to formally assess Student's needs for educational software.

Failure to Provide Behavior Plan and FAA

26. The March 2004 IEP team determined that Student's behavior impeded his learning or that of others and appropriate strategies, including positive behavior interventions, were required to address the behavior. He attempted to engage in the aggressive behavior at least once a day for several days in a row, and then had days or weeks without any attempts. He also regularly engaged in "escape" behavior to avoid undesirable activities by placing his head on the table or pulling his shirt over his head. The team incorporated a behavior plan into the IEP that addressed Student's aggressive behaviors of pinching and scratching classroom staff. In addition to the behavior plan, several of the March 2004 IEP goals addressed Student's behavior in different settings. An FAA was not conducted.

27. By the end of the 2003-2004 school year, Student did not exhibit aggressive behavior. He acted appropriately in the classroom and engaged in "escape" behavior less frequently. No evidence was presented concerning the nature of the target behaviors other than a generic description. There is insufficient evidence that Student's behavior significantly interfered with the implementation of his goals and objectives. An FAA was not required.

Issue 5: Respondents' Denial of FAPE During the 2004-2005 School Year[11]

Failure to Provide Timely IEP and Triennial Assessment

28. Student's annual IEP meeting was due by March 12, 2005. Student was also due for his triennial assessment. On February 4, 2005, Mother requested a date for the IEP so that she could arrange to have Student's private providers attend the meeting. Mother consented to the assessment plan for the triennial assessment on February 16, 2005; the County received the consent form on February 23, 2005. In a letter dated February 17, 2005, Mother provided written consent to extend the IEP meeting until early April. The team met on April 13, 2005, the first of a series of five IEP team meetings that continued through June 28, 2005. There is insufficient evidence that Student lost educational opportunity as a result of the scheduling of the triennial assessment and IEP meetings.

Failure to Provide Opportunity for Parents to Participate in IEP Process

29. Five IEPs govern the 2004-2005 school year. Both of Student's parents attended each IEP team meeting. In addition, Tamara Loughrey, a family friend and attorney, attended the April 13, 20, and May 3, 2005, meetings. Dr. Brad Berman, Student's developmental and behavioral pediatrician, attended on April 13 and 20. Robin Jaye-Elfont, Student's private speech pathologist, also attended on April 13.

30. Student's parents and the others who attended on Student's behalf, including Dr. Berman and Ms. Jaye-Elfont, actively participated in the meetings. Student's parents repeatedly questioned the validity of reports of Student's progress, and provided extensive input into all aspects of Student's program. The IEP team incorporated suggestions from Student's parents and providers into the IEP. Respondents neither denied Student's parents an opportunity to participate in the IEP process, nor failed to consider input from Student's parents and private providers.

Failure to Provide In-home ABA Services

31. Student's parents provided him with a six-week program of in-home discrete trial instruction because they were concerned that he was not making progress in the academic areas of reading, writing, and math. Tracie Vickers,[12] the Executive Director of Milestones, Student's private provider, reported that Student progressed from inconsistently recognizing ten sight words to consistently sight reading 40 words, and from counting one to counting one to three items.[13] Ms. Vickers recommended that Student receive a minimum of 15 hours of weekly, one-to-one discrete trial instruction.

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[11] Student also alleged that he was entitled to reimbursement for private speech services provided during the 2004-2005 school year. However, Student did not allege, and there was no evidence, that Respondents failed to provide a FAPE concerning speech and language services in the 2004-2005 school year.

[12] Ms. Vickers holds a B.A. degree in psychology and an M.S. in counseling.

[13] Respondents' relevance objection to the admission of a DVD of Student receiving in-home ABA services in 2005 (Exhibit No. 219), which was taken under submission, is overruled.

32. Student's April 2005 goals included developing his functional word recognition skills, basic decoding skills, personal safety skills, basic math skills, and his ability to count and tell time. These goals addressed Student's unique academic needs for generalization, functional skills in language and mathematics, appropriate social skills, and communication. Student progressed during the 2004-2005 school year. There is insufficient evidence that Student's unique needs required an in-home ABA program during the 2004-2005 school year.

Failure to Provide One-to-One Aide

33. According to Dr. Berman, Student required one-to-one support at all times. Dr. Berman's opinion is not persuasive. Student has shown slow but continued progress with the behavior supports that were provided while being taught by individualized instruction, small group instruction, and a limited amount of large group instruction. There is insufficient evidence that Student's unique needs required a one-to-one aide during the 2004-2005 school year.

Failure to Provide Behavior Plan

34. Student had a behavior plan in place since the December 3, 2002, IEP. A revised behavior plan was implemented in April 2004. Classroom staff implemented the behavior plan during the 2004-2005 school year and Student's classroom behavior improved significantly. At the April 13, 2005, meeting, the IEP team determined that Student's behavior did not impede his or her learning or that of others.[14] Student continued to benefit from positive support techniques built into his assignments and daily schedule. There is insufficient evidence that Student's unique needs required a behavior plan or an FAA during the remainder of the 2004-2005 school year after April 13, 2005.

Failure to Implement Expressive Speech Lists

35. The record is unclear as to which word lists Student alleges were not implemented as required by the IEP. Jolynn Austin, speech pathologist,[15] implemented a word list that she received from Mother. Ms. Mills implemented a word list as required by the IEP to assist Student with his transition to his high school placement. Respondents implemented word lists as required by the IEP.

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[14] The record does not indicate what determination the IEP team made about this at the other meetings in April and May 2005.

[15] Ms. Austin has an M.S. in Communicative Disorders and has been a speech pathologist for over 20 years. She has worked for the County since 1989. Ms. Austin has a clinical rehabilitative service credential and is authorized to teach students that have communicative disabilities.

Issue 6: Respondents' Denial of FAPE During the 2005-2006 School Year

36. Student's August 22, 2005, IEP provided Student the following services pertinent to the issues in this hearing: (1) special day class at Monte Vista with individual and small group instruction, functional academics and discrete trial training; (2) one-to-one aide during the school day; (3) speech and language services in four, 30-minute, individual sessions per week and one, 15-minute telephone consultation with Student's private provider; (4) OT services in one, 30-minute session per week provided as consultation with staff on site; (5) augmentative communication services in one, 30-minute session per week provided as consultation with staff on site; (6) behavior management services for 75 minutes per week on site; (7) ABA services 10 hours per week in the special day class on site; and (8) five hours per week ABA services in Student's home provided by a non-public agency. The IEP team determined that Student's behavior impedes his learning or that of others and that appropriate strategies, including positive behavioral interventions, are required to address his behavior. Student is in a general education environment over 30 percent of his school day, including participation in a general education culinary arts class.

37. Student was suspended from Monte Vista for five days from September 22 through 28, 2005, for grabbing, scratching, kicking, and attempting to choke staff. On September 29, the day that Student returned to school from his suspension, he again scratched his teacher while she was trying to control him in class. Student's aggressive behavior on September 21 and 29 was reported to the Contra Costa County Sheriff's Department.[16] There is nothing in Student's IEP that precluded him from being suspended or his conduct being reported to law enforcement.

38. The IEP team met on September 29, 2005, and provided Student an interim placement from September 30 through October 15, 2005, because Liberty High School (Liberty), where the District offered to place Student, was on break. The interim placement included the following: (1) three hours a day of discrete trial training at home provided by Student's private provider; (2) speech and language services for four, 30-minute, individual sessions a week provided at Monte Vista and one, 15-minute consultation; and (3) OT services provided as one, 30-minute consultation with Student's parents. The IEP team determined that Student's behavior impedes his learning or that of others and that appropriate strategies, including positive behavioral interventions, are required to address the behavior.

39. The IEP team met on October 5, 2005, and offered Student the following services: (1) a special day class at Liberty; (2) speech and language services for four, 30-minute, individual sessions; (3) OT services in one, 30-minute consultation with classroom staff; (3) augmentative communication in one, 30-minute consultation with classroom staff; and (4) five hours a week of discrete trial training at home. The IEP team determined that Student's behavior impedes his learning or that of others and that appropriate strategies,

[16] Respondents' relevance objections to the testimony of Contra Costa County Sheriff Deputy Daniel Sutherland and the admission of his reports concerning Student's behavior incidents on September 21 (Exhibit 160) and 29 (Exhibit 230), 2005, which were taken under submission, are overruled.

including positive behavioral interventions, are required to address his behavior. The offer placed Student in a non-integrated environment 100 percent of the time.

Failure to Provide 24 Hours of ABA Services.

40. Student did not receive a total of 14 hours of required ABA services during the weeks of August 29, September 5, and September 12, 2005.

Failure to Provide 75 Minutes of Behavior Services Per Week.

41. Angela Connor, Behavior Analyst,[17] provided consultation with the classroom teacher by telephone and email during the first two weeks of the school year. She provided the required behavioral management services at Monte Vista the weeks of September 12 and 19, 2005. Ms. Connor was unable to speak with Ms. Vickers during the first two weeks of the school year. During the third week, she spent one hour with Ms. Vickers at Student's home to observe his in-home program. Student was provided the required behavior management services.

Failure to Timely Disclose Student's Behavior

42. Bree Lemoine, Student's special day class teacher at Monte Vista, informed Mother that Student was exhibiting some inappropriate behaviors, such as touching himself and other students, and one occasion when he scratched Ms. Lemoine and tried to grab her neck. Mother responded that Student can be "too friendly," and that he probably grabbed at her neck because he is testing the new environment to see what he can get away with.

43. On September 15, there were three incidents[18] of Student grabbing himself and two incidents of choking others. On September 19, there were five incidents of Student grabbing himself, and six of scratching others. On September 20, there were eight incidents of Student grabbing himself, four of grabbing others, an extended series of incidents of scratching others, and an extended series of incidents of choking others. On September 21, there were eight incidents of Student grabbing himself, eight incidents of grabbing others, 22 incidents of scratching others, 11 incidents of choking others, and eight incidents of kicking others. Most of the incidents occurred while Student was in either his life skills or culinary arts classes. However, there were incidents of Student grabbing himself, grabbing others, and scratching others that occurred during his discrete trial training sessions. Mother was first informed of Student's aggressive behavior the afternoon of September 21, when she was told Student would be suspended. There is no requirement in Student's IEP that his parents be informed when he engages in unacceptable or aggressive behavior.

[17] Ms. Connor holds a M.Ed. in Applied Behavior Analysis. She has six years' experience as a behavior analyst or behavior consultant.
[18] An "incident" includes an occurrence of, or an attempt to perform, the target behavior.

Failure to Implement a Behavior Plan, a Behavior Intervention Plan, or Conduct an FAA

44. Student has a history of exhibiting aggressive behaviors. Even while Student was in a familiar classroom with Ms. Mills for four school years, he had a behavior plan during all or part of each school year from December 2002 to April 2005. Respondents knew that Student was likely to engage in inappropriate behaviors, including aggressive and assaultive behaviors, when he is required to engage in unfamiliar tasks and when he attempts to control a new environment. Student was going to participate in a general education class for the first time in four school years. All of the known antecedent conditions for Student's aggressive behavior were present as he moved to Monte Vista. Yet, there is little evidence concerning what consideration, if any, the IEP team gave to either developing a behavior plan or identifying appropriate strategies to address Student's behavior as he entered high school.

45. Ms. Connor testified that while Student did not have a behavior plan, staff at Monte Vista used strategies from his prior behavior plans to address his behavior. In Ms. Connor's view, those strategies were not successful and no other strategies could have been used in a behavior plan to prevent Student's deteriorating behavior. Ms. Connor's testimony in this area, which did not include any supporting details or analysis, is not persuasive. Student did not have the benefit of conscious consideration and evaluation of the efficacy of various positive behavior strategies to address his behavior that impedes his learning and that of others. As a result, Student engaged in assaultive behavior to staff which endangered other students in the culinary arts class.

46. After Student's serious behavior incidents which resulted in a five-day suspension, the IEP team did not conduct an FAA, develop a behavior plan or behavior intervention plan, or consider positive behavior strategies when it offered the placement at Liberty. Instead, Student's behavior at Monte Vista was viewed as unique to that setting. According to Ms. Connor and Tom Anderson, Program Supervisor,[19] Liberty staff will evaluate Student's behavioral needs once he is in their program. There is nothing in the IEP requiring that this be done.

Liberty High School Offer

47. Liberty is a self-contained program for multiple-handicapped students. Teaching is individualized for each student. There are three different programs at Liberty. The group for the highest functioning students has a total of about 30 students which are divided into three groups of ten students each. The students change classes for specific subject areas depending upon their needs, and the composition of students in each class changes, much like a general education high school. The other two groups, of about ten students each, are more traditional, self-contained special day classes. There is no evidence into which of the three programs at Liberty Student will be placed.

[19] Mr. Anderson has an M.S. in Professional Child Psychology and holds an administrative credential, a special education certificate and a multiple subject credential, and is a licensed educational psychologist.

Functional Skills Programming

48. The curriculum for the highest functioning group of students includes science, mathematics, and language arts concepts and skills. The goals offered in the October 5, 2005, IEP include developing Student's functional word recognition skills, basic decoding skills, personal safety skills, and basic math skills. The goals address Student's need to generalize skills across different settings. The goals developed at the April 2005 IEP address Student's unique needs for generalization, functional skills in language and mathematics, appropriate social skills, and communication. The Liberty program meets Student's academic needs.

Failure to Provide ABA Services

49. Ms. Connor recommended that ABA be the predominant methodology for Student's program and all goals should be in an ABA format. Student's August 22, 2005, IEP for his placement at Monte Vista required that he receive ABA services, including discrete trial training, both in school and at home. The IEP team determined that ABA services were required to meet Student's unique needs in the 2004-2005 extended school year, his placement at Monte Vista for the 2005-2006 school year, and his interim placement prior to beginning at Liberty. There is little evidence about the nature and extent of ABA services in the proposed program at Liberty. Nor did respondents offer evidence to explain the decision not to include ABA services at Liberty.[20] There is sufficient evidence that ABA services are required to meet Student's needs at Liberty.

Failure to Provide One-to-One Aide

50. Ms. Connor recommended that Student have a one-to-one aide to ease his transition to Monte Vista, but that it be faded as soon as possible to wean Student from his dependence on prompting from staff. The IEP team determined that Student required a full-time, one-to-one aide to meet his needs at Monte Vista. According to Mr. Anderson, Student does not require an aide at Liberty because the program meets all of his needs without an aide, he will be challenged at the appropriate level, and he will be able to perform at his optimum level. Mr. Anderson's testimony is not persuasive. He offered no details to support his averments.

51. Liberty offers Student a more controlled environment than Monte Vista, but it still presents a challenging transition for him. This is particularly true if he participates in the group of 30 students that change classes during the day. There is sufficient evidence that a one-to-one aide is required to meet Student's needs to assist him with the transition to Liberty.

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[20] Evidence code section 412 provides that "[i]f weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."

Large group Setting

52. It is undisputed that Student learns best in individual and small group settings. Although Student needs to develop his ability to adapt to larger settings, his unique educational needs require that he receive small group instruction. Respondents' offer at Liberty did not provide for Student to receive individualized or small group instruction in the special day class. There is sufficient evidence that Student requires individual and small group instruction in his special day class.

Failure to Provide Mainstreaming Opportunities.

53. One of the goals the District offered requires Student to participate in a school project and a campus club with general education peers. Liberty offers Student appropriate mainstreaming opportunities.

Lengthy Commute

54. Student's commute to Liberty will average about one hour each way. Student's needs can be met and a FAPE can be provided with this commute.

Failure to Provide Transition Plan

55. Student turned 16 years of age in May 2006. One of the goals offered by the District in the October 2005 IEP required Student to develop an understanding of jobs. The record does not contain any additional planning for Student's post-secondary transition. There is insufficient evidence that this results in a loss of educational opportunity for Student.

56. Student has not been attending public school since October 2005. Student has a need for additional support to assist him with the transition back to public school and to a new high school setting with new students, staff, and curriculum. There is sufficient evidence that Student's needs are not met without a plan addressing his return to school.

APPLICABLE LAW[21]

Eligibility

1. In order to be eligible for special education services, a student must have one or more specific disabilities which include mental retardation and autism. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.7(a)(1); Ed. Code, § 56026, subd. (a); Cal. Code Regs., tit., 5, § 3030.) In California, a child may be eligible for having "autistic-like behaviors" without

[21] Unless otherwise noted, citations to 20 United States Code are to statutes in effect prior to July 1, 2005, and citations to the Education Code are to statutes in effect prior to October 7, 2005.

having a diagnosis of autism. (Compare 34 C.F.R. § 300.7(c)(1)(i) with Cal. Code Regs., tit. 2, § 3030, subd. (g).) The services and placement for a child must be based on the child's unique needs and not on the child's disability. (34 C.F.R. § 300.300(a)(ii).)

FAPE

2. A child with a disability has the right to a FAPE. (20 U.S.C. §1412(a)((1)(A); Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(8); 20 U.S.C. § 1410(9), effective July 1, 2005; Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined in pertinent part as specially-designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(25); 20 U.S.C. § 1410(29), effective July 1, 2005; Ed. Code, § 56031.) Special education related services include in pertinent part developmental, corrective, and other supportive services, such as speech-language pathology services, psychological services,[22] occupational therapy, and social work services,[23] as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(22); 20 U.S.C. § 1410(26), effective July 1, 2005; 34 C.F.R. § 300.24(a); Ed. Code, § 56363; Cal. Code Regs., tit., 5, § 3001, subd. (z).)

3. A school district must provide "a basic floor of opportunity . . . [consisting] of access to specialized instruction and related services which are individually designed to provide educational benefit to the [child with a disability]." (*Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201.) The intent of the Individuals with Disabilities Education Act (IDEA) is to "open the door of public education" to children with disabilities; it does not "guarantee any particular level of education once inside." (*Id*. at p. 192.) A child receives a FAPE if the program (1) addresses the student's unique needs; (2) provides adequate support services so the student can take advantage of educational opportunities; and (3) is in accord with the IEP. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 444 F.3d 1149; *Capistrano Unified School Dist. v. Wartenberg* (9th Cir. 1995) 59 F.3d 884, 893.)

4. The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley, supra*, 458 U.S. at pp. 197, 200; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) As long as the school district's offer was reasonably calculated to provide educational benefits, it constitutes an offer of a FAPE. (*Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley*, *supra*, 458 U.S. at p. 200.) Nevertheless, the district must offer a program that is reasonably calculated to provide more than a trivial level of progress. (*Amanda J. v.*

[22] Psychological services include obtaining, integrating and interpreting information about child behavior and conditions related to learning. (34 C.F.R. § 300.24(b)(9).)
[23] Social work services include assisting in developing positive behavioral interventions strategies. (34 C.F.R. § 300.24(b)(13).)

Clark County School Dist. (9th Cir. 2001) 267 F.3d 877, 890, citing *Hall v. Vance County Bd. of Education* (4th Cir. 1985) 774 F.2d 629, 636.)

5. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)[24] "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) Although a child's progress toward the IEP's goals may be considered, whether an IEP offers a FAPE must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*; *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) The focus is on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.*, *supra*, 811 F.2d at p. 1314.) Even if the parents' preferred placement would be better for the child, this does not necessarily mean that the district's offer did not constitute a FAPE. (*Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley*, *supra*, 458 U.S. at p. 200; *Gregory K. v. Longview School Dist.*, *supra*, 811 F.2d at p. 1314.)

6. In addition to these substantive requirements, the Supreme Court recognized the importance of adhering to the procedural requirements of the IDEA. Thus, the analysis of whether a student has been provided a FAPE is two-fold: (1) the school district must comply with the procedural requirements of the IDEA, and (2) the IEP must be reasonably calculated to provide the child with educational benefits. (*Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley*, *supra*, 458 U.S. at pp. 206-207.)

7. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.*, *supra*, 267 F.3d at p. 892.) To constitute a denial of a FAPE, a procedural violation must result in either the loss of educational opportunity, or a serious infringement of the parents' opportunity to participate in the IEP process. (*Ibid.*; 20 U.S.C. § 1415(f)(3)(E)(ii), effective July 1, 2005; Ed. Code, § 56505, subd. (j).)

Least Restrictive Environment

8. A child with a disability must be educated, to the maximum extent appropriate, with children who are not disabled. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.550(b).) In addition, a child with a disability should be removed from the regular educational environment only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (*Ibid.*) Each child with a disability must participate with children who are not

[24] Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212). District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (*Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F. Supp. 2d 1213, 1236).

disabled in nonacademic and extracurricular services and activities, such as meals, recess and clubs, to the maximum extent appropriate to the needs of the child. (34 C.F.R. § 300.553.) The child's placement must be in the least restrictive environment (LRE), based on the child's IEP, and as close as possible to the child's home. (34 C.F.R. § 300.552(a)(2), (b)(2), (3).) A student's placement decision must be made in conformity with the requirements concerning the LRE for the child. (34 C.F.R. § 300.552(a)(2).) California law incorporates these requirements. (Ed. Code, §§ 56031, 56342.)

Participation of Regular Education Teacher in IEP Meetings.

9. The IEP team must include a regular education teacher if the student is or may be participating in the regular education environment. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.344(a)(2).) A regular education teacher who is a member of the IEP team shall participate in the review and revision of the IEP. (20 U.S.C. § 1414(d)(4)(B); 34 C.F.R. § 300.346(d); Ed. Code, § 56341, subd. (b)(2).) The requirement that the IEP team include a regular education teach if the student is or may be participating in a regular education classroom is a mandatory, not discretionary, requirement. (*M.L. v. Federal Way School Dist.* (9th Cir. 2004) 394 F.3d 634, 643.)

Parental Participation in IEP Process

10. A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. §§ 300.344(a)(1) [parents are members of IEP team], 300.345 [district must ensure opportunity for parents to participate in IEP meeting]; Ed. Code, §§56341, subd. (b)(1) [parents are members of IEP team], 56341.5 [district must ensure opportunity for parents to participate in IEP meeting], 56342.5 [parent must be member of any group making decision on educational placement].) The IEP team must consider the concerns of the parents for enhancing their child's education throughout the child's education. (20 U.S.C. §§ 1414(c)(1)(B) [during evaluations], (d)(3)(A)(i) [during development of IEP], (d)(4)(A)(ii)(III) [during revision of IEP]; 34 C.F.R. §§ 300.343(c)(2)(iii) [during IEP meetings], 300.346(a)(1)(i) [during development of IEP], (b) [during review and revision of IEP], 300.533 (a)(1)(i) [during evaluations]; Ed. Code, §§ 56341.1, subd. (a)(1) [during development of IEP], subd. (d)(3) [during revision of IEP], and subd. (e) [right to participate in IEP].)

11. The IDEA's requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J. v. Clark County School Dist.*, *supra*, 267 F.3d at p. 891.) The IEP process provides that the parents and school personnel are equal partners in decision-making; the IEP team must consider the parents' concerns and information they provide regarding their child. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12473 (Mar. 12, 1999).) While the IEP team should work toward reaching a consensus, the school district has the ultimate responsibility to determine that the IEP offers a FAPE. (*Ibid*.)

12. A parent has meaningfully participated in the development of an IEP when the parent is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1036.)

IEP Transition Plan

13. Beginning at age 14 and updated annually, an IEP must contain a statement of the child's need for transition services under the IEP that focus on the child's course of study. (20 U.S.C. § 1414(d)(1)(A)(vii)(I); 34 C.F.R. § 300.347(b)(1); Ed. Code, §§ 56043, subd. (e), 56345.1, subd. (a).) Beginning at age 16 or younger if determined by the IEP team, the IEP must include a statement of needed transitions services for the child, including a statement of interagency responsibilities or linkages. (20 U.S.C. § 1414(d)(1)(A)(vii)(II); 34 C.F.R. § 300.347(b)(2); Ed. Code, §§ 56043, subd. (f), 56345.1, subd. (b).) Effective July 1, 2005, the IEP in effect when a student reaches 16 years of age must include appropriate measurable postsecondary goals based upon age appropriate transition assessment related to training, education, employment and, where appropriate, independent living skills, and the transition services needed to assist the student in reaching those goals. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa), (bb); Ed. Code, §§ 56043, subd. (g)(1), 56345, subd. (a)(8), effective October 7, 2005.)

Requirements of an Assessment

14. A school district must re-assess a child with a disability at least once every three years, or if a parent or teacher requests one. (20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.536(b); Ed. Code, § 56381, subd. (a).) A school district is required to assess a child in all areas related to the suspected disability that is sufficiently comprehensive to identify all of the child's needs for special education and related services. (20 U.S.C. § 1414(b)(3)(C), (D); 34 C.F.R. § 300.532(g), (h); Ed. Code, § 56320, subd. (f).)

Timeliness of IEP and Assessments

15. Whenever an assessment for the development or revision of an IEP is to be conducted, the school district shall provide the parent with a written assessment plan meeting specific requirements within specific time periods. (Ed. Code, § 56321.) An IEP team shall meet at least annually. (Ed. Code, § 56043, subd. (h); 5 Cal. Code Regs., tit. 5, § 3069.) An IEP required as a result of an assessment shall be developed within 50 calendar days from the date the school district received the parent's written consent for the assessment, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (d)(1); 56344, subd. (a).)

Consideration of Independent Assessments

16. A parent is entitled to obtain an independent assessment of a child. (20 U.S.C. § 1415(b)(1); Ed. Code, § 56329, subd. (c).) An independent assessment must be considered by the district in any decision concerning a FAPE for the child. (34 C.F.R. § 300.502(c)(1); Ed. Code, § 56329, subd. (c).)

Requirements for Assistive Technology Devices

17. A school district is required to provide any AT device that is required to provide a FAPE to a child with a disability. (20 U.S.C. § 1412(a)(12)(B)(i); 34 C.F.R. §§ 300.308(a), 300.346(a)(v); Ed. Code§ 56341.1, subd. (b)(5).) An AT device is any item that is used to increase, maintain or improve the functional capabilities of a child with a disability. (20 U.S.C. § 1401(1).) There is no express requirement that a school district perform an AT evaluation. AT devices or services may be required as part of the child's special education services, related services, or supplementary aid and services. (34 C.F.R. § 300.308(a).) A school district is required to use the necessary assessment tools to gather relevant information about the child to assist in determining the educational needs of the child and the content of the child's IEP. (20 U.S.C. § 1414(b)(3)(D); 34 C.F.R. § 300.532(b)(2), (j).) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs. (34 C.F.R. § 300.532(h).) Therefore, in the proper circumstance, a school district may be required to perform an evaluation of a child's need for AT devices or services.

Behavior Intervention Plan and Functional Analysis Assessment

18. There are two situations in which federal and state law require that a child's behavior be addressed. First, when a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i), (b); Ed. Code, § 56341.1, subd. (b)(1).) Second, when a school district subjects a child to certain types of discipline, it must conduct a functional behavior assessment and implement a behavior intervention plan, or review and modify the behavior intervention plan if one is already in place. (20 U.S.C. § 1415(k)(1)(B); 20 U.S.C. § 1415(k)(1)(D), (F), effective July 1, 2005; 34 C.F.R. § 300.520(b); Ed. Code, § 48915.5 [a student receiving special education services may be suspended or expelled as provided by 20 U.S.C. 1415(k) and 34 C.F.R. §§ 300.519 – 300.529]; *Alex R. v. Forrestville Valley Community Unit School Dist. #221* (7th Cir. 2004) 375 F.3d 603, 614.)

19. Federal law does not impose any specific requirements for a functional behavior assessment or behavior intervention plan. (*Alex R. v. Forrestville Valley Community Unit School Dist. #221*, *supra*, 375 F.3d at p. 615.) Although the comments to the 1999 federal regulations offer guidance about what may be included, further requirements were not imposed in order to give the school discretion to determine what is appropriate depending upon the needs of the child. (64 Fed. Reg. 12588 (Mar. 12, 1999).)

The comments indicate that it may be appropriate for the IEP team to identify the circumstances or behaviors of others that may result in inappropriate behaviors by the child. (*Ibid*.) It may also be appropriate to include specific regular or alternative disciplinary measures that may result from infractions of school rules. (*Id*. at p. 12589.) A functional behavior assessment that meets the definition of an evaluation must meet the requirements of an evaluation. (*Id*. at p. 12620.)

20. While California law does not define a functional behavior assessment, a behavior intervention plan[25] is required when a student "exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the student's IEP." (Cal. Code Regs., tit., 5, § 3001, subd. (f).) Behaviors that are "self-injurious, assaultive, or cause serious property damage, and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the student's IEP are found to be ineffective," constitute a serious behavior problem that may require a behavior intervention plan. (*Id*., § 3001, subd. (aa).) An FAA must be conducted and considered in the development of a behavior intervention plan. (*Id*., §§ 3001, subd. (f)(1), 3052, subd. (c).) The requirements for a behavior intervention plan and an FAA are specific and extensive. (*Id*., tit. 5, §§ 3001, subd. (f), 3052.)

21. There are many behaviors that will impede a child's learning or that of others that do not meet the requirements for a serious behavior problem requiring a behavior intervention plan. These less serious behaviors require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i), (b); Ed. Code, § 56341.1, subd. (b)(1).) In California, a behavior intervention is "the systematic implementation of procedures that result in lasting positive changes in the individual's behavior." (Cal. Code Regs., tit., 5, § 3001, subd. (d).) It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. (*Ibid*.) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment. (*Ibid*.) If a student's behavior impedes learning, but does not constitute a serious behavior problem, the IEP team must consider behavior interventions as defined by California law. An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Park v. Anaheim Union High School Dist., supra*; *Neosho R-V School Dist., v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *Escambia County Bd. of Education* (S.D. Ala. 2005) 406 F.Supp.2d 1248.)

[25] The development of a behavior intervention plan under California law is commonly referred to as a "Hughes Bill assessment." (Ed. Code, § 56520; Cal. Code. Regs., tit. 5, § 3052.)

Compensatory Education

22. It has long been recognized that equitable considerations may be considered when fashioning relief for violations of the IDEA. (*Parents of Student W v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496, citing *School Com. of the Town of Burlington, Mass. v. Dept. of Education of Mass.* (1985) 471 U.S. 359, 374.) Compensatory education is an equitable remedy; it is not a contractual remedy. (*Parents of Student W v. Puyallup School Dist., No. 3, supra*, 31 F.3d at p. 1497.) The law does not require that day-for-day compensation be awarded for time missed. (*Ibid.*). Relief is appropriate that is designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Ibid*.)

LEGAL CONCLUSIONS

Did Respondents deny Student a FAPE during the 2002-2003 through 2004-2005 school years by failing to find him eligible for special education services as a result of autism, failing to provide specific services, and failing to consider independent assessments?

1. Based on Factual Findings paragraphs 2 and 3 and Applicable Law paragraphs 1 through 5, Respondents did not deny Student a FAPE as alleged.

2. Based on Factual Findings paragraphs 4 through 6 and Applicable Law paragraphs 1 through 5 and 16, Respondents did not deny Student a FAPE as alleged.

Did Respondents deny Student a FAPE during the 2002-2003 through 2004-2005 school years by failing to have a regular education teacher participate in IEP meetings?

3. Based on Factual Findings paragraph 7, a regular education teacher did not participate in Student's seven IEP meetings during this time period. Applicable Law paragraph 9 provides that a regular education teacher's participation is mandatory if Student may be participating in the regular education environment. Student had successfully participated in general education classes at Wagner Ranch during the 2000-2001 school year, shortly before the alleged time period. He was placed into general education classes at Monte Vista during the 2005-2006 school year, albeit unsuccessfully. Based on Factual Findings paragraphs 7 and 8, Respondents were required to have a regular education teacher attend the IEP meetings during this time period; however, there is insufficient evidence that Student was harmed. Respondents did not deny Student a FAPE as alleged.

Did Respondents deny Student a FAPE during the 2002-2003 school year?

4. Based on Factual Findings paragraphs 9 through 16, and Applicable Law paragraphs 2 through 5, Respondents did not deny Student a FAPE as alleged concerning Student's need for small group instruction, speech and language services, OT services, and his academic program.

5. Based on Factual Findings paragraphs 18 and 19, a behavior support plan was incorporated into the IEP to address Student's aggressive behavior. The behavior plan was implemented, except that data concerning the frequency of the target behaviors were not collected as required. The behavior plan successfully reduced the target behaviors. Based on Applicable Law paragraphs 6 and 7, there is insufficient evidence that the failure to collect data concerning the target behaviors either resulted in a loss of educational opportunity or denied Student's parents an opportunity to participate in the IEP process. Based on Factual Findings paragraph 19 and Applicable Law paragraph 20, Respondents were not required to perform an FAA. Based on Applicable Law paragraphs 18 through 21, Respondents did not deny Student a FAPE as alleged concerning his need for a behavior plan.

6. Based on Factual Findings paragraph 20 and Applicable Law paragraph 14, Respondents failed to assess Student for AT in the area of augmentative communication devices. Based on Applicable Law paragraphs 6 and 7, this did not result in a denial of a FAPE. Although Student's parents initially chose to purchase his augmentative communication device, they are now requesting reimbursement. Respondents shall reimburse Student $4,397.49 for the expenses paid for his augmentative communication device.

Did Respondents deny Student a FAPE in the 2003-2004 school year?

7. Based on Factual Findings paragraphs 21 through 25, and Applicable Law paragraphs 2 through 5, Respondents did not deny Student a FAPE as alleged concerning OT services, speech and language services, his academic program, or assessment concerning software.

8. Based on Factual Findings paragraphs 26 and 27, a behavior support plan was incorporated into Student's IEP to address his aggressive behavior. The behavior plan was implemented and successfully reduced the target behaviors. Based on Factual Findings paragraph 27 and Applicable Law paragraph 20, Respondents were not required to perform an FAA. Based on Applicable Law paragraphs 18 through 21, Respondents did not deny Student a FAPE as alleged concerning his need for a behavior plan.

Did Respondents deny Student a FAPE in the 2004-2005 school year?

9. Based on Factual Findings paragraphs 31 through 33, and Applicable Law paragraphs 2 through 5, Respondents did not deny Student a FAPE as alleged concerning in-home ABA services or a one-to-one aide.

10. Based on Factual Findings paragraph 28 and Applicable Law paragraph 15, Respondents did not deny Student a FAPE as alleged concerning the timing of Student's IEP meeting and triennial assessment.

11. Based on Factual Findings paragraphs 29 and 30 and Applicable Law paragraphs 10 through 12, Respondents did not deny Student a FAPE as alleged concerning the participation of Student's parents in the IEP process.

12. Based on Factual Findings paragraph 34 and Applicable Law paragraphs 18 through 21, Respondents did not deny Student a FAPE as alleged concerning a behavior plan or an FAA.

13. Based on Factual Findings paragraph 35 and Applicable Law paragraphs 2 through 5, Respondents did not deny Student a FAPE as alleged concerning the implementation of word lists required by his IEP.

Did Respondents deny Student a FAPE in the 2005-2006 school year?

14. Based on Factual Findings paragraph 40, Respondents failed to provide Student 14 hours of required ABA services. As provided in Applicable Law paragraph 3, a student must receive services in compliance with the IEP in order to receive a FAPE. Accordingly, respondents failed to provide a FAPE to Student in the area of ABA services.

15. Based on Factual Findings paragraph 41 and Applicable Law paragraphs 2 through 5, Respondents provided the behavior management services required by the IEP.

16. Based on Factual Findings paragraphs 42 and 43 and Applicable Law paragraphs 2 through 5, Respondents did not deny Student a FAPE concerning the disclosure of Student's aggressive behavior.

17. Based on Factual Findings paragraphs 37, and 42 through 45 and Applicable Law paragraphs 2 through 5, and 18 through 21, Respondents failed to consider and implement positive behavior strategies to address Student's behavior that impedes his learning and that of others. Student's participation in a culinary arts class presented a significant risk of serious harm to others if he were to engage in aggressive behaviors while in the class. Based on Applicable Law paragraph 20, Student's behavior constitutes a serious behavior problem that significantly interferes with implementation of his IEP. Respondents failed to comply with the legal requirements for considering and implementing positive behavior interventions when developing his program at Monte Vista. In addition, Respondents failed to comply with the legal requirements to develop a behavior intervention plan and conduct an FAA as a result of his behavior at Monte Vista.[26]

18. Based on Factual Findings paragraphs 47, 49, 50 through 52, and 56, and Applicable Law paragraphs 2 through 7, Respondents' offer of services at Liberty failed to meet Student's unique needs.

[26] This decision does not make any determination concerning whether the District appropriately suspended Student or reported his conduct to law enforcement.

19. Based on Legal Conclusions paragraphs 14, 17, and 18, Respondents denied Student a FAPE in the 2005-2006 school year.

Compensatory Education

20. Based on Legal Conclusions paragraphs 6 and 19, and Applicable Law paragraph 22, Student is entitled to the following as compensatory education:

a. Student shall receive a total of 14 hours of ABA discrete trial services provided in Student's home.
b. Student shall receive the services provided during his interim placement as described in Factual Findings paragraph 38 for one additional week.[27]
c. Respondents shall conduct an FAA and develop a behavior intervention plan that meets all legal requirements.
d. An IEP team, which includes one regular education teacher, shall be convened to develop an IEP that meets all legal requirements and shall include the following:
    (1) Student's IEP shall be implemented based on ABA methods, including discrete trial training.
    (2) Student shall be provided with a full-time, one-to-one aide to assist Student's transition to high school. Student's continued need for a full time, one-to-one aide shall be reviewed no less than once each school quarter.
    (3) Student's special education and related services shall be provided in individualized or small group instruction.
    (4) A transition plan shall be developed and implemented to assist Student's transition to high school.
e. Student shall be reimbursed $4,397.49 for the expenses paid for his augmentative communication device

ORDER

1. An IEP team shall be convened within ten days of the date of this order to develop an IEP that meets Student's unique needs, is consistent with this Decision, and meets all legal requirements.

2. Student shall be reimbursed $4,397.49 within ten business days of the date of this Decision.

[27] If Student has already received the services described in subparagraphs 20a or 20b from a private provider, Student may receive reimbursement for them upon submission of reasonable verification.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. Student prevailed on issues 6a, 6d, 6e(2), 6e(3), 6e(4), and 6e(7), and partially prevailed on issue 3d. Respondents prevailed on all remaining issues.[28]

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 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: June 1, 2006

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JUDITH A. KOPEC
Administrative Law Judge
Special Education Division
Office of Administrative Hearings

[28] The majority of the documentary evidence, testimony, and time in this matter were dedicated to issues on which Respondents prevailed.