

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

In the Matter of:

STUDENT,

Petitioner,

v.

BELLFLOWER UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2007040795

DECISION

Administrative Law Judge Richard T. Breen, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in Bellflower, California, on August 13 and 14, 2007, and September 5 and 6, 2007.

Melissa Canales and Ines Kuperschmit, Attorneys at Law, and Educational Advocate Carly Munson, J.D., represented Student. Student attended the hearing on August 13, 2007. Student's father (Father) attended the hearing on the first and last days. The hearing was interpreted into Spanish for Father.

Eric Bathen, Attorney at Law, represented Bellflower Unified School District (District). Assistant Superintendent Victoria Medina attended the hearing on all days on behalf of the District.

Student filed a Request for Due Process Hearing on April 25, 2007.¹ The parties stipulated to a continuance on May 23, 2007. At the hearing, the parties requested, and were granted, permission to file written closing arguments. Upon receipt of written closing arguments on September 17, 2007, the matter was submitted and the record was closed.

¹ The Due Process Complaint originally named the Los Angeles County Department of Mental Health (CMH) as a party. Prior to hearing, Student settled with CMH and withdrew all issues related to the provision of services from CMH.

ISSUES

1. Whether the District denied Student a free and appropriate public education (FAPE) from October 27, 2005 through January of 2006, by failing to submit a complete mental health referral packet to CMH within the time frame set forth in California Code of Regulations, title 2, section 60040, subdivision (a).
2. Whether the District denied Student a FAPE from January 31, 2006 through August of 2006, by failing to provide adequate levels of home instruction and related services.²

REQUESTED REMEDIES

Student seeks compensatory education in the amount of 260 hours of one-to-one academic tutoring.³

FACTUAL FINDINGS

Jurisdiction and Background

1. Student is a 16-year-old female who, while she resided in the District, was eligible for special education under the categories of emotional disturbance and specific learning disability. Student is mildly mentally retarded and/or developmentally delayed and has a history of hallucinations and violent behavior.
2. The parties stipulated that Student was a resident of the District for purposes of special education eligibility during the relevant time periods in the Complaint (October of 2005 through August of 2006), with the exception of the following periods during which Student was hospitalized for psychiatric care: November 14, 2005 through December 5,

² In light of Student's settlement with CMH in this matter, her claims regarding related services are limited to those other than those that would not have been provided by CMH. In addition, Student's closing brief argued for the first time that home instruction was not an appropriate placement because the District had failed to comply with California Code of Regulations, title 5, section 3051.4, subdivision (d), that requires consideration of a medical report prior to home or hospital placement. (Student's Closing Brief at p. 9.) However, no such allegation is contained in Student's complaint, which expressly alleged that Student was denied a FAPE because the *amount* of home instruction and related services were inadequate. (Complaint at p. 8.) Accordingly, because it was not alleged in Student's complaint, the issue of whether the home placement was appropriate will not be considered.

³ Other than the request for 260 hours of tutoring services, all of the "Proposed Compensatory Relief" referenced in Student's complaint related to mental health services provided by CMH. (Complaint at p. 13.) Student's closing brief made no other specific request for relief. (See Student's Closing Brief at p. 17.)

2005; December 25, 2005 through January 4, 2006; January 9, 2006 through January 27, 2006, February 10, 2006 through February 28, 2006.⁴

3. Prior to 2004, Student was in a residential placement. Student was returned to Father's custody in December of 2004. Between December of 2004 and September of 2006, the family lived in Paramount and Burbank. Student was enrolled in special education during this period.

Mental Health Referral Packet

4. Student and Father moved to the District in September of 2005. Student began attending Bellflower High School under the terms of her individualized education plan (IEP) from Burbank Unified School District (Burbank USD), pending the development of an IEP by the District.

5. On October 14, 2005, Bellflower High School psychologist Stacie Stern referred Student to Providence Community Services (Providence) for mental health day treatment.

6. The District held its first IEP meeting regarding Student on October 27, 2005. At the time, Student's "social/emotional" status was reported as: difficulty relating to peers, depressed and withdrawn, telling stories to get attention, fearful, unable to go to the restroom alone, multiple incidents of running away from class, one instance of running into other classrooms screaming, and a reported history of aggression toward peers and adults. The meeting notes reflect that at the time, Student was receiving counseling and psychiatric appointments at Hathaways Community Center. The resulting IEP placed Student in an SDC at Bellflower High School, with counseling at school as needed and teacher use of classroom behavior management techniques. Father signed the IEP and consented to referring Student to CMH for a mental health assessment.

7. Christine Bloom, Ed.D. (Dr. Bloom), was employed by the District as a Special Education Program Administrator. Dr. Bloom was responsible for preparing the referral packet to CMH. A referral containing the following documents was mailed on November 21, 2005: 1) a Burbank USD triennial assessment that had been conducted on April 26, 2005, which the District received on October 18, 2005; 2) a Burbank USD IEP dated April 26, 2005, which the District received on October 14, 2005; 3) Father's written consent to the CMH referral; and 4) a cover letter from Dr. Bloom requesting a mental health assessment based on Student's aggressive and irrational behavior at school and Father's difficulty controlling Student.

⁴ Education Code section 56167, subdivision (a), provides that during periods of psychiatric hospitalization, educational responsibility rests with the district where the psychiatric hospital is located.

8. Dr. Bloom explained that the delay between the October 27, 2005 IEP and her November 21, 2005 referral packet being sent was a result of the time it took for District personnel to get the Burbank USD documents to her.

9. Student was hospitalized at Gateways Hospital and Mental Health Center from November 16, 2005 until December 7, 2005 based on a diagnosis of bipolar disorder. Student was medicated at the time of her discharge with Depakote, Risperdal and Wellbutrin. Student was referred to Hathaways – Systems of Care for after care.

10. Providence would no longer provide day mental health treatment to Student after she was released from the hospital on December 7, 2005, because of Student’s violent behaviors.

11. On December 5, 2005, the District received a notice from CMH that Dr. Bloom’s referral packet was incomplete because it failed to contain a full psychoeducational assessment by the District. According to Dr. Bloom, although she had expected such a rejection based on the lack of a full psychoeducational assessment, and had “hoped” that CMH would accept the referral, she at least needed to attempt submitting the incomplete referral packet before verbally seeking consent for the referral from CMH. After receiving the first rejection letter, Dr. Bloom directed her staff to follow up on obtaining the psychoeducational assessment that she had “assumed” Burbank USD had conducted in order to complete the referral packet. CMH was telephoned and asked to accept the referral with the documents provided.

12. Dr. Bloom offered various explanations for why the District had not conducted its own full psychoeducational assessment of Student. Dr. Bloom alternatively testified: 1) that she had attempted to get a full psychoeducational assessment from Burbank USD that she “assumed” had been performed in conjunction with Burbank USD’s triennial IEP, when in fact no such Burbank USD assessment existed;⁵ 2) that the District had not performed an assessment because Father would not consent; and 3) that the District could not perform an assessment of Student in November and December of 2005 because Student was hospitalized during some of this time period. Dr. Bloom’s explanations do not demonstrate that the District was incapable of formulating its own psychoeducational assessment plan during this time period.

13. Student was hospitalized for psychiatric care between December 25, 2005 and January 4, 2006, and between January 9, 2006 and January 27, 2006.

14. On January 24, 2007, the District received another letter from CMH notifying the District that the referral packet was still incomplete because it failed to contain a full psychoeducational assessment. Dr. Bloom, in coordination with school psychologist Stern,

⁵ Dr. Bloom assumed that Burbank USD must have conducted a psychoeducational assessment based on her mistaken understanding that the law required such an assessment every three years. However, triennial assessments may be waived by parents. (See 34 C.F.R. § 300.303(b); Ed. Code, §56381, subd. (a)(2).)

called CMH to ask that the assessment be completed without the requested document in light of Student's need for services. CMH accepted the referral and sent an assessment plan to Father on January 31, 2006.

15. Between October 27, 2005 (the date of Student's first IEP in the District), and January 9, 2006 (the date Student was hospitalized at Del Amo Hospital until January 27, 2006), Student was entitled to a FAPE for a total of 23 school days, calculated as the number of school days minus holidays and minus the days Student was hospitalized.

Levels Of Home Instruction And Related Services

16. Following Student's three psychiatric hospitalizations in November, December and January, an IEP was held on January 31, 2006. The IEP team discussed the options of home instruction or a half day of school with crisis intervention if Student had a violent outburst. These options were intended as temporary placements pending the results of CMH's assessment. Father agreed to home instruction and signed the IEP. The IEP reflects that Student would be supervised at home by her aunt. The IEP does not include training for Student's aunt. The January 31, 2006 IEP did not specify a frequency and duration for instruction in the home, which, according to Dr. Bloom and District home teacher Gaudencio Javier (Javier), could not be determined until the home teacher could visit the child and determine the child's capabilities. The IEP did not provide for any counseling services or behavioral services at Student's home.

17. Student was hospitalized for psychiatric care from February 10, 2006 through February 28, 2006.

18. Javier attempted to provide services to Student beginning in March of 2006, but on his first three visits, no one was home. When he began service at the home, Javier initially visited Student two times a week for 45 minutes per session. Student was the most severely impacted Student that Javier had ever worked with. During Javier's visits with Student, her attention span was five minutes or less prior to Student having an outburst that consisted of Student screaming or saying "stop doing that to me," despite Javier doing nothing to Student but sitting with her at a table. Javier saw little progress on Student's IEP goals or in academics, but Student's attention span increased to approximately 15 minutes and her frequency of outbursts decreased after approximately six weeks of home instruction.

19. Javier credibly testified that the assistance of a one-to-one behavioral aide during his home teaching would not necessarily have improved Student's performance because he was already working one-to-one with Student.

20. On April 3, 2006, the District received CMH's mental health assessment of Student. Student presented to CMH with the following educational and psychiatric history: borderline to low average cognitive ability with weaknesses in receptive verbal abilities, visual and auditory memory and numerical abilities; behavior and emotional problems that included oppositional defiant behavior, psychotic symptoms including hallucinations,

symptoms of depression including mood swings, agitation and irritability; a history of eight psychiatric hospitalizations from 1999 through the date of the report, with four of those hospitalizations occurring between November of 2005 and February of 2006, for illogical thought processes, delusions, paranoia, visual and auditory hallucinations and being a danger to herself and others. CMH interviewed Student on February 28, 2006, at College Hospital. Student reluctantly participated in the interview after initially walking out. The interviewer reported Student to have a flat affect, suspicious and paranoid thoughts, irrational thought processes, poor concentration, impulsivity and internal preoccupation. The interviewer described Student as “actively psychotic” and noted that Student had “extreme difficulty relating even in the most basic manner to those around her.” CMH interviewed Father on February 28, 2006. Father reported to CMH that Student had the following symptoms: visual hallucinations, rebelliousness, auditory hallucinations, attempted escapes from home and school, sleeplessness, poor hygiene, attempting to hit family members, and falsely screaming that someone was hurting her. The District SDC teacher, who had taught Student during the fall of 2005, reported that Student’s ability to relate to peers was poor and eventually non-existent, that Student was suspicious and hostile to authority figures and that Student’s behavior was characterized by restlessness, unpredictability, distractibility, mood swings, disturbing peers, and low frustration tolerance. College Hospital reported that Student could be aggressive and oppositional, required constant redirection and supervision, and would not participate in group activities due to paranoid thoughts. In light of the above, CMH recommended that Student “participate in a 24 hour highly supervised and intensive therapeutic residential treatment program” for an initial period of six months in order to: 1) increase participation in educational programming; 2) stabilize psychotic symptoms; 3) stabilize depression symptoms; 4) improve “reality testing;” 5) increase social interaction with peers and adults; and 6) minimize Student’s behaviors that threaten herself or others.

21. An addendum IEP was held on April 28, 2006, at which time CMH and the IEP team recommended a residential placement and proposed goals consistent with the CMH assessment. Father disagreed with the IEP team recommendation of residential placement. The IEP notes state that in light of the disagreement, the District would seek an expedited due process hearing to resolve the disagreement. Father agreed to continue home instruction two times per week for 45 minutes per session until the placement dispute was resolved.

22. On May 17, 2006, the District filed a due process hearing request with OAH under case number N2006050649. The District’s due process hearing request sought a determination that the residential placement recommended by CMH and other members of the IEP team on April 28, 2006, was an offer of FAPE in the least restrictive environment.

23. On June 1, 2006, Student and the District entered into a written settlement agreement that covered “the pending hearing request” in OAH case number N2006050649.

24. Marcella Briceno (Briceno), had a master’s degree in marriage and family therapy, and provided counseling services to Student for one hour per week beginning from approximately August of 2006, through the date of hearing. Briceno had previously counseled Student in 2004 when Student was enrolled in another school district. Briceno

described Student as confused, paranoid, delusional, aggressive, agitated and impulsive. Briceno opined that in light of the above, Student needed a structured school program, a behavior modification program to address negative behaviors, and supervision. Briceno was critical of the adequacy of the home services provided to Student prior to August of 2006, and believed that a non-public school was the most appropriate placement for Student. However, Briceno's opinions were not persuasive because she had no direct knowledge of Student's educational program, her behavior, or her homelife between 2004 and August of 2006.

25. On August 13, 2006, an IEP team meeting was held to amend the October 27, 2005 IEP in order to conform to the June 1, 2006 settlement agreement. The August 13, 2006 IEP provided for placement at the Therapeutic Education Center (TEC), a one-to-one aide, and designated instruction and services consisting of 30 minutes per week of in-school group counseling and 30 minutes per week of in-school individual counseling. The goals from Student's October 27, 2005 IEP remained in place.

26. Julie Lucas (Lucas) was the NPS director for the TEC secondary school. As of August 14, 2006, Lucas thought that TEC was an appropriate placement for Student because TEC relied on a school-wide behavior intervention plan, provided therapy, could provide teaching at all levels from life skills to diploma-level, and could offer a low student to teacher ratio.

27. On August 31, 2006, Student began attending TEC under the terms of the August 13, 2006 IEP. While attending TEC, Student performed academically at approximately a third or fourth grade level.

28. Jason Hospedales, Student's teacher at TEC, described that upon entering TEC, Student was lethargic, and would not interact. Student started exhibiting "acting out" behaviors within approximately three months of entering TEC following the school's move to a new building.

29. Lucas described Student's behavior as "cyclical," meaning that at times Student was compliant and at other times required frequent use of a "time out" room to address Student's behaviors that include loud singing or talking, taking off her clothes, or disturbing peers. Some days Student would not participate in the academic day at all.

30. Student had a behavior support plan (BSP) at TEC to address the following behaviors: wandering the hallways and disturbing classes five to ten times a week, sleeping in class for up to three class periods, and having "poor boundaries," i.e., standing too close to peers and staff. The BSP at TEC does not support an inference that Student should have had a similar behavior plan during the period of home schooling as the TEC BSP relates to in-school behaviors.

31. During the time Student had been attending TEC, she was hospitalized for psychiatric care in December of 2006, March, May, and July of 2007, and as of the September 5 and 6, 2007 hearing dates. Student generally returned to TEC and resumed counseling with Briceno within days of her release.

32. Lucas testified that as of the date of the hearing, she agreed with a June 17, 2007 recommendation by an IEP team from Student's current school district (Paramount Unified School District) that Student needed a residential placement.

33. Student did not present any evidence supporting the request in her complaint for compensatory education in the amount of 260 hours of one-to-one academic tutoring and/or a mental health assessment by a non-public agency.

CONCLUSIONS OF LAW

Whether the District denied Student a FAPE from October 27, 2005 through January of 2006, by failing to submit a complete mental health referral packet to CMH within the time frame set forth in California Code of Regulations, title 2, section 60040, subdivision (a).

1. Student was not denied a FAPE between October 27, 2005 and January of 2006, by the District's delay in processing the referral to CMH.

2. Student contends that she was denied a FAPE from October 27, 2005, the date of her first IEP within the District, and January of 2006, by the District's failure to send a complete referral packet to CMH within five days of October 27, 2005, the date Father signed his consent to a CMH assessment. In particular, Student contends that any delay was unjustified and that Student lost educational opportunity because Student did not receive instruction in between psychiatric hospitalizations in December of 2005. The District contends that in light of Student's condition and need for services, it could not comply with the five day referral period and that any delay was reasonable and did not result in a deprivation of educational benefit. As discussed below, Student failed to meet her burden of proving that she was substantively denied a FAPE because of the District's procedural error.

3. As the petitioning party, Student has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

4. Under the IDEA and state law, children with disabilities have the right to FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) 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).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

5. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*)

6. The IDEA allows states the flexibility to provide related services required in IEP's through interagency agreements between the state educational agency and other public agencies. (See 20 U.S.C. § 1412(a)(12).) In California, in order to maximize the utilization of state and federal resources, mental health assessments for purposes of developing an offer of FAPE are the joint responsibility of the State Secretary of Public Instruction and the State Secretary of Health and Welfare. (Gov. Code, §§ 7570; 7572, subds. (a) & (c); 7576, subd. (a) [community mental health services provide the mental health services required in order to provide a FAPE].) Because California has chosen the above method to provide mental health services that would otherwise be part of an individual student's IEP, it follows that local education agencies must comply with state statutes and regulations that apply to referrals for provision of mental health services. Thus, a failure to follow state procedures may be the basis for alleging a denial of FAPE under the IDEA.

7. "Mental health assessment" means "a service designed to provide formal, documented evaluation or analysis of the nature of the pupil's emotional or behavioral disorder" that is conducted by qualified mental health professionals in conformity with

Education Code sections 56320 through 56329 [detailing the numerous procedural safeguards associated with assessments]. (Cal. Code of Regs., tit. 2, § 60020, subd. (g).) A local educational agency, an IEP team, or a parent, may initiate a referral to community mental health services for a special education student or a student who may be eligible for special education, who is suspected of needing mental health services. (Gov. Code, § 7576, subd. (b); Ed. Code, § 56320; Cal. Code of Regs., tit. 2, § 60040, subd. (a); see also Cal. Code of Regs., tit. 2, § 60030 [describing interagency agreements between local educational agencies and local mental health director for provision of mental health assessments].) The following conditions must be met in order to make a referral for a mental health assessment:

- (1) The pupil has been assessed by school personnel in accordance with [Education Code section 56320, et seq.]. Local educational agencies and community mental health services shall work collaboratively to ensure that assessments performed prior to referral are as useful as possible to the community mental health service in determining the need for mental health services and the level of services needed.
- (2) The local educational agency has obtained written parental consent for the referral of the pupil to the community mental health service, for the release and exchange of all relevant information between the local educational agency and the community mental health service, and for the observation of the pupil by mental health professionals in an educational setting.
- (3) The pupil has emotional or behavioral characteristics that are all of the following:
 - (A) Are observed by qualified educational staff in educational and other settings, as appropriate.
 - (B) Impede the pupil from benefiting from educational services.
 - (C) Are significant as indicated by their rate of occurrence and intensity.
 - (D) Are associated with a condition that cannot be described solely as a social maladjustment or a temporary adjustment problem, and cannot be resolved with short-term counseling.
- (4) As determined using educational assessments, the pupil's functioning, including cognitive functioning, is at a level sufficient to enable the pupil to benefit from mental health services.
- (5) The local educational agency . . . has provided appropriate counseling and guidance services, psychological services, parent counseling and training, or social work services to the pupil pursuant to Section 56363 of the Education

Code,^[6] or behavioral intervention as specified in Section 56520 [⁷] of the Education Code, as specified in the individualized education program and the individualized education program team has determined that the services do not meet the educational needs of the pupil, or, in cases where these services are clearly inadequate or inappropriate to meet the educational needs of the pupil, the individualized education program team has documented which of these services were considered and why they were determined to be inadequate or inappropriate.

(Gov. Code, § 7576, subd. (a); see also Cal. Code Regs., tit. 2, § 60040, subd. (a).)

8. A school district must initiate a referral for a mental health assessment within five working days of its receipt of parental consent to a referral. (Cal. Code Regs., tit. 2, § 60040, subd. (a).) The community mental health agency shall develop a mental health assessment plan and provide it to a parent within 15 days of receipt of the school district's referral. (Cal. Code Regs., tit. 2, § 60045, subd. (b).) If mental health services are recommended following a mental health assessment, then an IEP team meeting must be convened at which time the provision of services must be added to the IEP. (Gov. Code, § 7572, subd. (d).) The school district must schedule an IEP team meeting pursuant to Education Code section 56344 within 50 days from the mental health agency's receipt of the parent's written consent to the mental health assessment (Cal. Code Regs., tit. 2, § 60045, subd. (d).) The 50-day time period for convening an IEP meeting does not include school vacations in excess of five school days. (Ed. Code, § 56344(a).) If the referral for an assessment has been made 20 days or less prior to the end of the regular school year, the IEP developed as a result of that assessment shall be developed within 30 days after the commencement of the subsequent regular school year. (*Ibid.*)

9. The process of obtaining special education mental health services is not designed for an emergency situation. (Gov. Code, § 7576, subd. (f); Cal. Code Regs., tit. 2, § 60040, subd. (e).) If a student requires emergency services, a parent must seek other resources. (Gov. Code, § 7576, subd. (g); Cal. Code Regs., tit. 2, § 60040 (e).)

⁶ Education Code section 56363, subdivision (b), provides, in relevant part, that designated instruction and services may include: Counseling and guidance services; psychological services other than assessment and development of the individualized education program; parent counseling and training; and social worker services. (Ed. Code, § 563563, subs. (b)(9), (b)(10), (b)(11), & (b)(13).)

⁷ Education Code section 56520, subdivision (b)(1), provides, "That when behavioral interventions are used, they be used in consideration of the pupil's physical freedom and social interaction, be administered in a manner that respects human dignity and personal privacy, and that ensure a pupil's right to placement in the least restrictive educational environment." California regulations provide that a functional analysis assessment (FAA) and a behavior intervention plan (BIP) which is derived from the FAA, occur after the IEP team finds that instructional/behavioral approaches specified in the student's IEP have been ineffective, or after a parent has requested an assessment pursuant to Education Code section 56320 et seq. (Cal. Code Regs., tit. 5, § 3052, subd. (b).) The BIP is a written document that becomes part of an IEP and is developed when the 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), 3052, subd. (a)(3).)

10. Here, the District obtained Father's consent to the CMH assessment on October 27, 2005. Dr. Bloom did not send out a referral letter to CMH until November 21, 2005, and the fact that it took district personnel this long to transmit documents to her does not excuse the delay. As of November 21, 2005, Dr. Bloom was aware that the referral packet was incomplete because it did not contain sufficient psychoeducational assessments to meet the requirements of Government Code section 7576, subdivision (a). The District received notice that its referral packets had been rejected by CMH on both December 5, 2006 and January 24, 2006. It was only after January 24, 2007, that the District verbally convinced CMH to accept the referral for assessment, and CMH sent an assessment plan to Father on January 31, 2006. (See Factual Findings 4 through 15.) In light of the above, Student has met her burden of demonstrating that the District failed to procedurally comply with the five day time limit set forth in California Code of Regulations, title 2, section 60040, subdivision (a).

11. However, as discussed above, in order to obtain relief for the procedural violation of the District's failure to timely send a referral packet to CMH, Student must demonstrate that the procedural violation impeded Student's right to a FAPE, impeded Father's opportunity to participate in the IEP process, or caused a deprivation of educational benefits. The evidence established that once CMH accepted the referral and assessed Student, CMH recommended a residential placement that Father would not accept. (See Factual Findings 14, and 21 through 23.)

12. No evidence was presented that had the referral been made earlier, the resulting recommendation from CMH would have been different. To the contrary, Student required extended psychiatric hospitalization three times during between November of 2005 and January of 2006 (November 16, 2005 through December 7, 2005; December 25, 2006 through January 4, 2006; and January 9, 2006 through January 27, 2006). (See Factual Findings 2, 9, 13, and 18.) Even assuming that a complete referral packet had been sent to CMH on November 1, 2005, Student would have been assessed by CMH at a time when she required multiple psychiatric hospitalizations. (See Cal.Code Regs., tit. 2, § 60045, subds. (b) & (d) [assessment plan must be presented to parent within 15 days of receipt of referral and IEP held within 50 days after CMH receives written permission for assessment].) Further, a timely referral would not have changed the content of Student's IEP for the 23 days of FAPE that she would have been entitled to between October 27, 2005 and January 27, 2006. (See Factual Findings 6, 9, 13, and 15.) Thus, even without delay by the District, it can only be inferred that at most, the disagreement between the District and the IEP team as to whether residential placement was an offer of FAPE might have occurred a month or two prior to the April 27, 2006 IEP team meeting, and still would have resulted in a recommendation of residential placement that Father would not accept.

13. In light of the above, Student failed to demonstrate that the District's delay in processing the referral to CMH impeded her right to a FAPE or denied Father an opportunity to participate in the IEP process.

Whether the District denied Student a FAPE from January 31, 2006 through August of 2006, by failing to provide adequate levels of home instruction and related services.

14. Student was not denied a FAPE from January 31, 2006 through August of 2006.

15. Student contends that she was denied a FAPE from January 31, 2006, through August of 2006, by the District's failure to provide adequate levels of home instruction and related services. The District contends that the home instruction services provided a FAPE.

16. As the petitioning party, Student has the burden of proof on all issues. (*Schaffer v. Weast, supra*, 546 U.S. at pp. 56-62.) As discussed above, children who are eligible for special education are entitled to a FAPE that includes specially designed instruction to meet the child's unique needs, as well as related services (20 U.S.C. § 1400(d); 20 U.S.C. § 1401(a)(9), (26) & (29); Ed. Code, § 56000.) Related services may include counseling and guidance services, psychological services other than assessment and development of the IEP, parent counseling and training, and social worker services. (Ed. Code, § 56363, subs. (b)(9), (b)(10), (b)(11) & (b)(13).) A child with a disability receives a FAPE when he or she receives an education that is designed to meet the child's unique needs and is "sufficient to confer some educational benefit" in the least restrictive environment. (See *Rowley, supra*, 458 U.S. at pp. 200-204; *Gregory K. v. Longview School District, supra*, 811 F.2d at p. 1314.)

17. When developing an IEP, the IEP team must consider the child's strengths, the parent's concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).) The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of a school district cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable . . . at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

18. Student was eligible for special education and related services as a result of her borderline to low cognitive abilities and psychotic symptoms that included hallucinations, mood swings, oppositional behavior, inability to relate to peers and paranoid thought processes. At the time of the January 31, 2006 IEP team meeting, Providence, Student's day mental health treatment provider, would no longer serve her because of her assaultive behaviors. In addition, Student had missed almost three months of school due to her prolonged psychiatric hospitalizations from November 14, 2005 through December 5, 2005, December 25, 2005 through January 4, 2006, and January 9, 2006 through January 27, 2006. The frequency of Student's psychiatric hospitalizations demonstrates that she was not stable at the time of the January 31, 2006 IEP team meeting. (See Factual Findings 1, 2, 5, 6, 9, 10, 13, and 15.)

19. The January 31, 2006 IEP team considered home instruction or attempting to have Student attend a half day of school, and Father agreed with the team that home instruction was the more appropriate option. The IEP specified home teaching without setting forth a duration or frequency of instruction, however, as was plausibly explained by home teacher Javier, there was no way to know at the IEP just what, if anything, Student would be capable of doing following her psychiatric hospitalizations. Instead, a home teacher needed to begin home instruction in order to assess Student's capabilities. As testified to by Dr. Bloom, and as reflected in the IEP, the home instruction was intended to be temporary pending the results of the CMH assessment. (See Factual Finding 16.)

20. Between the time of the January 31, 2006 IEP and February 10, 2006, the date of Student's next psychiatric hospitalization, there were only six possible days of instruction given that there was no school on February 6, 2006. Student was psychiatrically hospitalized from February 10, 2006 through February 28, 2006. As of the date of her discharge, Student was "actively psychotic" and unable to relate in basic ways to those around her. The first three times that Javier attempted to begin home instruction in March of 2006, Student was not at home. When Javier did make contact with Student, he began by visiting her two times per week, for 45 minutes per session. When Javier attempted instruction, Student exhibited the psychotic symptoms, lack of attention and paranoia that were identified in the CMH assessment. (See Factual Findings 17 through 20.)

21. No evidence was presented at hearing that additional hours of home instruction, or any type of specific related services such as school counseling, parent training or positive behavior support would have assisted Student in benefiting from special education given her psychiatric condition at the time. Instead, Student presented general evidence that later in 2006, Student had some success at TEC. However, Student's later, sporadic success at TEC does not demonstrate that Student was not provided a FAPE during the spring of 2006, particularly when Student's behavior was "cyclical," the frequency of hospitalizations in early 2006 demonstrates that Student's condition was very unstable, the placement at TEC was the result of a settlement agreement and not an IEP decision regarding a FAPE, and TEC's own director no longer thought TEC was an appropriate placement at the time of hearing. (See Factual Findings 18 through 24, and 26 through 32.) In sum, Student did not meet her burden of demonstrating that the home instruction provided to her under the January 31, 2006 IEP was not reasonably calculated to provide some educational benefit to her in light of her unique needs at the time.

22. At the hearing, the parties disagreed as to the scope of the issues that Student could raise in light of the June 1, 2006 settlement agreement between Student and the District in OAH case number N2006050649. Student contends that the settlement agreement had no effect on the scope of her allegations in this matter, which extend to August of 2006. In contrast, the District contends that the settlement agreement barred all of Student's claims. As discussed below, under the terms of the settlement agreement, Student resolved all claims regarding denials of FAPE that arose on or after June 1, 2006.

23. OAH does not have jurisdiction to hear complaints that a school district failed to comply with the terms of a settlement agreement. (See *Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029-1030 [where school district was ordered during due process hearing to abide by terms of a settlement agreement reached during hearing, student was not entitled to a subsequent due process hearing seeking enforcement of the order]; see also *C.T. v. Vacaville Unified School District* (E.D. Cal., July 27, 2006, No. S-06-197) 2006 U.S. Dist. Lexis 55132, *21, fn. 8 [for purposes of determining jurisdiction, OAH treated a settlement agreement reached between the parties like the final order at issue in *Wyner*].) However, as in this case, where the petitioning party is not seeking to enforce the terms of the agreement, OAH may interpret the settlement agreement to determine the scope of the issues before it.

24. Settlement agreements are interpreted using the same rules that apply to interpretation of contracts. (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 686, citing *Adams v. Johns-Manville Corp.* (9th Cir. 1989) 876 F.2d 702, 704.) “Ordinarily, the words of the document are to be given their plain meaning and understood in their common sense; the parties' expressed objective intent, not their unexpressed subjective intent, governs.” (*Id.* at p. 686, citing Civ. Code, §§ 1636, 1638, *Beck v. American Health Group International, Inc.* (1989) 211 Cal.App.3d 1555, 1562.) If a contract is ambiguous, i.e., susceptible to more than one interpretation, then extrinsic evidence may be used to interpret it. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37-40.) Even if a contract appears to be unambiguous on its face, a party may offer relevant extrinsic evidence to demonstrate that the contract contains a latent ambiguity; however, to demonstrate an ambiguity, the contract must be “reasonably susceptible” to the interpretation offered by the party introducing extrinsic evidence. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391, 393.)

25. Here, in OAH case number N2006050649, the District filed a request for a due process hearing in which it asserted that a residential placement, like that offered at the April 28, 2006 IEP team meeting, was an offer of FAPE. The parties entered a written settlement of the District's claim on June 1, 2006. (See Factual Findings 23, 24, and 25.) No evidence was admitted at the hearing to show a latent ambiguity in the settlement agreement and the settlement agreement is unambiguous on its face. In particular, the settlement agreement resolves the District's claim in OAH case number N2006050649, i.e., that the District had offered Student a FAPE.⁸ Nothing in the settlement agreement releases the District of liability for Student's claims that may have existed prior to the June 1, 2006 settlement agreement. Conversely, Student agreed in the settlement agreement to the implementation of a placement and the provision of related services after June 1, 2006, without a change in home instruction until a non-public school that was acceptable to Father could be found. (See Factual Findings 21 through 23, and 25.) Thus, the settlement agreement in OAH case number N2006050649 settled the issue of provision of FAPE to Student after June 1, 2006.

⁸ Pursuant to Evidence Code section 1152, which provides that settlements are inadmissible to prove liability, no inference regarding what constituted a FAPE for Student has been drawn from the terms of the settlement agreement.

ORDER

All of Student's requests for relief are denied.

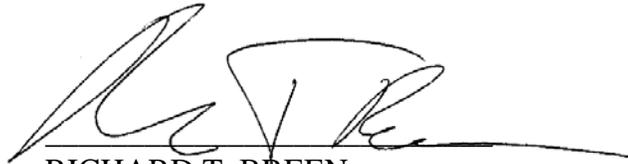
PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

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

DATED: October 18, 2007

A handwritten signature in black ink, appearing to read 'R. T. Breen', is written over a horizontal line. The signature is stylized and cursive.

RICHARD T. BREEN
Administrative Law Judge
Office of Administrative Hearings
Special Education Division