

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

GUARDIAN on behalf of STUDENT,

v.

GARDEN GROVE UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. N2007080547

NOTICE: This decision has been
PARTIALLY REVERSED by the
United States District Court. Click
[here](#) to view the USDC's decision.
The USDC's decision was
AFFIRMED by the United States
Court of Appeals. Click [here](#) to
view the USCA's opinion.

DECISION

Richard M. Clark, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter from May 5 to 8, 2008, in Laguna Hills, California.

Attorney Jack Anthony represented Student. Student's guardian (Guardian) was present during the hearing. Attorney Justin Shinnfield represented Garden Grove Unified School District (District). Gary Lewis, Assistant Superintendent for the District, and Scott Adams, program specialist for the District, were present during the hearing.

Student filed his request for due process hearing on August 20, 2007. On August 30, 2007, the matter was consolidated with OAH Case Number 2007060711 and the hearing dates were continued.¹ Oral and documentary evidence were received during the hearing. The record remained open for the submission of written closing arguments and reply briefs by May 23, 2008, when the record was closed and the matter was submitted for decision.

¹ On May 6, 2008, during the consolidated hearing, the ALJ dismissed OAH Case Number 2007060711 for lack of jurisdiction. OAH Case Number 2007060711 was a District-filed case involving the appropriateness of compensatory education offered to Student in response to a California Department of Education (CDE) compliance complaint order in CDE Case No. S-0613-06/07.

ISSUES²

1. Did the District commit substantive violations of the IDEA by:

(A) Failing to provide the following services in accordance with the February 8, 2006 Individualized Education Program (IEP): intensive behavior intervention (IBI) services from February 8, 2006 to June 21, 2007; social skills services from September 2006 to June 20, 2007; Resource Specialist Program (RSP) from April 1, 2007 to June 20, 2007; and appropriate one-to-one aide services from February 8, 2006 to March 31, 2007;

(B) Failing to provide speech and language (SL) and audiology services in accordance with the June 15, 2006 IEP?

(C) (1) Did the District deny Student a FAPE at the June 15, 2006 IEP by failing to create appropriate goals and objectives to meet Student's unique needs in SL, audiology, central auditory processing disorder, and anxiety? (2) Did the District deny Student a FAPE by failing to create appropriate goals to address Student's unique need in the area of anxiety at the October 13, 2006 IEP?

(D) Failing to make an offer of placement and services for the period between February 22, 2007 and June 20, 2007;

(E) Failing to develop, adopt and implement any and/or appropriate goals and objectives from February 22, 2007 to the present;

(F) Failing to offer SL goals and objectives, occupational therapy (OT), or IBI services for the 2007 Extended School Year (ESY);

(G) Failing to make an offer of placement and services on June 20, 2007, for the 2007-2008 school year that was appropriate to meet Student's unique educational needs by: (1) offering a special day class (SDC) instead of general education (GE); (2) failing to offer any mainstream time in GE; (3) failing to offer a proper transition from GE to SDC; (4) failing to offer aide support when Student had previously had an aide; and (5) failing to offer goals and objectives for the proposed SDC, and offering inappropriate goals and objectives based upon a GE classroom teacher when Student was offered an SDC?

2. Did the District deny Student a FAPE by committing procedural violations of the IDEA by:

² For clarity of decision writing, the issues have been reorganized, but are the same issues that were clarified at the prehearing conference. The issues for hearing were further discussed and agreed upon at the hearing, and the parties agreed that the issues listed above were the only issues for hearing. To the extent that either party raised issues in their closing brief not listed in this decision, those issues are not considered.

(A) At the October 13, 2006 IEP, failing to respond to Student's parents' request for SL and reading comprehension services by a nonpublic agency (NPA);

(B) Failing to consider Independent Education Evaluations (IEE) and proposed goals prepared by the Reading Learning Center (RLC) and Dr. Reicks, and submitted to the District on February 5, April 9, and June 13, 2007;

(C) Failing to provide Student's parents with accurate and complete copies of Student's records, including copies of IEP documents, from February 5 to April 9, 2007;

(D) Failing to timely hold an IEP meeting in spring 2007 and eventually giving Student an offer of placement and services on June 20, 2007, without an IEP team meeting?

PROPOSED RESOLUTIONS

Student requests reimbursement for services rendered by the RLC in an amount to be proved at hearing and for the costs of transportation to and from RLC. Student also seeks compensatory education and payment for prospective services at RLC.

FACTUAL FINDINGS

Background

1. Student, who was born June 6, 1994, is now 14 years old and resides in the District with Guardian, who is his maternal aunt and legal guardian with educational rights. Student is eligible for special education and related services in the categories of autistic-like behaviors and other health impaired due to attention deficit disorder (ADD). Student does not currently attend a District school. Instead, Student attends the RLC, a certified NPA, where he has attended since June 2007. Student last attended Cook Elementary School (Cook) within the District when he was in the fifth grade.

2006-2007 School Year

Offer of FAPE

2. A district is required to provide a student with an educational program that is designed to meet the student's unique needs and is reasonably calculated to provide the student with some educational benefit in the least restrictive environment (LRE).³ A school district need only provide a basic floor of opportunity that consists of access to specialized

³ Student was in the GE environment during the 2006-2007 school year, and hence LRE for that school year is not at issue in this decision.

instructional and related services that are individually designed to provide an educational benefit to the student. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP.

Unique Need, Goals and Objectives

3. A district is required to identify a student's unique educational needs and to provide special education and related services designed to meet those needs. An IEP must include a statement of measurable annual goals that are designed to meet the student's needs resulting from the student's disability, and a statement of how the child's progress toward the annual goals will be measured.

4. Student's annual IEP was held on February 8, 2006, and reconvened on February 26, 2006. The IEP team determined that Student had unique needs in reading comprehension, math, math applications, written communication strategies, pre-vocational, psychomotor (gross motor skills), socialization, fine motor skills, and social skills communication. The IEP team developed goals in all areas of need, including four fine motor goals and two gross psychomotor goals. Student did not challenge the appropriateness of the goals and needs as determined by the IEP team and his unique needs and goals are not in dispute.⁴

Placement and Services

5. A district is required to provide a placement that is designed to address the student's unique educational needs and is reasonably calculated to provide the student with educational benefit. In addition, an IEP is evaluated in light of the information available at the time it was developed; it is not judged in hindsight. The focus is on the placement offered by the school district, not the alternative preferred by the parents.

6. At the February 8 and 26, 2006 IEP meetings, the District offered the following placement and services to Student: placement in a GE classroom at Cook; SL therapy for 45 minute pull-out individual and 45 minute in class per week; adaptive physical education (APE) weekly collaboration for 30 minutes and direct support for 30 minutes every other week; RSP for 345 minutes per week for reading comprehension and math; OT for 45 minutes two times per week, once at school and one time at the OT clinic; extra classroom aide for five hours per day on school days; IBI services for 30 minutes prior to school for pre-teaching and socialization opportunities, 20 minutes at morning recess and 40 minutes at lunch and lunch recess to address socialization; and social skills for 30 minutes per week for consultation and collaboration within the class and recess in the natural setting. Guardian did not consent the IEP.

⁴ Student contends that the District did not address his unique needs at an IEP meeting held on June 15, 2006. That issue is discussed later in this decision.

7. On February 24, 2006, Guardian filed a dissent letter to be attached to the IEP. In the letter, Guardian consented to the GE placement with RSP support, APE and OT services. Guardian consented to the aide support, but believed Student needed behavioral supervision and one consistent aide throughout the day. She consented to the SL services, but believed Student needed more time, and she agreed to the social skills offer, but believed Student needed more time. Guardian also believed Student needed services to address his auditory processing needs and needed recreational therapy.

8. As discussed further below, Student contends that the District did not provide the IEP services in accord with the February 8, 2006 IEP in the area of IBI services, social skills, RSP and one-to-one aide support. Student also asserts that the discussions at the IEP meeting listed the time when services would occur, but they were not included in the IEP. The District contends that the services were provided in accordance with the IEP and that the IEP does not dictate specific times for services.

IBI Services

9. Student's February 6, 2006 IEP required that he receive IBI services for 30 minutes prior to school for pre-teaching and socialization opportunities, 20 minutes at morning recess and 40 minutes at lunch and lunch recess to address socialization. Student contends that the District failed to provide IBI services from February 8, 2006 to June 20, 2007. Sara Morgan has been an IBI supervisor at the District for four years and supervised Student's IBI program for three years. She provided consultation and supervision to the IBI aides who worked with Student during the 2006-2007 school year. Ms. Morgan established in her testimony that the IBI services required by Student's IEP were provided consistently, though she acknowledged that some hours were missed. In addition, Ms. Morgan provided a declaration in response to a CDE compliance complaint that stated Student did not receive all of the IBI services required by his IEP because of instructional assistant absences.⁵ In the same declaration, Ms. Morgan stated she developed three proposals to provide compensatory IEP services for the missed IBI, but Guardian did not consent to any of the proposals. Ms. Morgan established that she did not know exactly how many hours were missed, but through questioning it was determined that the hours were minimal. At the October 13, 2006 IEP meeting, the IEP team agreed to discuss compensatory IBI services at a follow-up meeting to be held outside of the IEP process. The character and quality of Ms. Morgan's testimony, as well as her demeanor while testifying, showed her to be a very credible witness. Her testimony was believable and is entitled to significant weight.

10. Adrienne Conger was Student's instructional aide at Cook from the later half of his third grade year (2004) through December 2006 of his fifth grade year. As Student's aide, Ms. Conger worked three and one-half hours per day, five days per week. From September 2006 to December 2006, she worked five hours per day until she left for another job in December 2006. During fifth grade, she started approximately 30 minutes after Student's school day when he was in language arts, and ended her day at 1:30 p.m. Ms.

⁵ The declaration was given in response to CDE Case No. S-0613-06/07. (See fn. 1, *supra*.)

Conger stated that from February 2006 to December 2006, Student did not have an IBI aide in the classroom, but Student received pre-teaching in the morning. Ms. Conger also stated that she met Ms. Morgan, the IBI supervisor, on no more than three occasions.

11. To the extent that there is a conflict between the testimony of Ms. Conger and Ms. Morgan, Ms. Morgan's testimony is entitled to greater weight. The character, quality and demeanor of Ms. Morgan's testimony were more persuasive than that of Ms. Conger, who appeared to have a bias toward the District. Further, while the declaration and testimony of Ms. Morgan acknowledged that some IBI services were missed, the evidence did not establish over what time period services were missed, how many hours were missed or how often. The evidence established that the IBI services were consistently provided as required by Student's IEP. Any discrepancy in services was minor and did not rise to the level of a material failure to implement the IEP.

Social Skills Services

12. Student's February 6, 2006 IEP required that he receive social skills services for 30 minutes per week for consultation and collaboration within the class and recess in the natural setting. Student contends that the District failed to provide social skills from September 2006 to June 20, 2007. Mai Van was the school psychologist who performed Student's last triennial assessment and provided social skills training to Student since 2004. She provided direct services to Student during the 2006-2007 school year, and also collaborated and supervised an aide. Ms. Van established that Student received the social skills training, collaboration and consultation required by his IEP, and there was no credible evidence to the contrary. Ms. Conger established that Ms. Van did provide social skills training to Student in the afternoon and also during social studies and science.

13. Student appears to argue that Ms. Van provided the required services, but not during the times or subjects that Guardian believed they should be. The IEP did not specify a specific time that the social skills services should be provided. Ms. Van was a credible witness and her testimony is entitled to substantial weight, particularly as it was corroborated by the testimony of Ms. Conger. The evidence established that Student received social skills services in conformity with his IEP during the time period alleged.

RSP

14. The February 6, 2006 IEP stated that Student would receive RSP services for 345 minutes per week for reading comprehension and math. Student contends that the District failed to provide RSP services from April 1, 2007, to June 20, 2007. Diane Peterson has been an RSP teacher for seven years at Cook and was Student's resource teacher during the third, fourth and fifth grades. Student's RSP service times changed during the fifth grade because of school "teaming," which places students with similar ability levels in a small group setting and is part of RSP services. Teaming required the time slots for delivery of services to change even though the IEP was the same. Ms. Peterson established that she did not provide Student with his full RSP services because Guardian took Student from school

early nearly every day. Ms. Peterson prepared a calendar of the days that she actually provided services to Student and included any missed services. Her chart demonstrated that any missed services required under the IEP were essentially made up over the school year. Ms. Peterson provided Student with pull-out RSP services in the fifth grade during language arts and math. Ms. Peterson established that the IEP did not call for one-to-one services for reading comprehension, but only required 30 minutes per day of reading comprehension, which she provided to Student. Ms. Peterson was present on Tuesdays and Thursdays at Cook, except during the beginning of the year when she had training on a total of five days and she had a substitute. Guardian and District had a difference of opinion about when his services should occur, but the IEP did not specify a time or during a subject that services should be provided.

15. John Chelini was Student's fifth grade teacher at Cook from September 2006 until June 2007. Mr. Chelini established that RSP support was provided in his classroom and not in the RSP room, and he believed that Student received his RSP support either from the RSP teacher or aide, though he was not sure if the RSP services were exactly as provided by the IEP. Mr. Chelini was a credible witness and his testimony was entitled to substantial weight.

16. Ms. Conger testified that during fifth grade, while she worked with Student, he did not receive any pull-out services. Ms. Conger stated she never knew one day to the next if his RSP teacher was going to show up. Ms. Conger stated that Ms. Peterson did not provide RSP in the morning during fifth grade because the RSP teacher was teaching a general education class during that time. Ms. Conger asserted that Student did not receive 30 minutes in the RSP room at all, and did not consistently receive small group math for 40 minutes and never in the RSP classroom. Ms. Conger stated that Student did not receive RSP services prior to lunch during the fifth grade and she did not see an RSP aide. Ms. Conger stated that during fifth grade, Student was sometimes pulled out during math and sometimes during music and science, but he did not work on reading comprehension to the best of her knowledge. She also testified that on Tuesdays and Thursdays, Ms. Peterson was not on campus at all and the schedule provided by Ms. Peterson is not accurate. Ms. Conger also established that Guardian did pull Student out of school daily, but she was not sure at what time.

17. Scott Adams, the District's special education program supervisor, established that Guardian signed Student out of school early 55 times prior to removing Student from the District. The majority of time Student left at 12:15 p.m., 12 times at 10:00 a.m., and once or twice at 2:00 p.m., which made it difficult to provide services to Student.

18. Guardian believed that from April 1 to June 20, 2007, Student did not receive the RSP services required by his IEP. Student should have been receiving pull-out RSP reading comprehension in the RSP room for 30 minutes, and 40 minutes per day in the RSP room. Guardian prepared a service log based upon discussions with Student, Ms. Peterson, Ms. Conger, Mr. Chelini, and Alicia Carulla, who was the school principal. Ms. Peterson promised one-to-one service for 30 minutes in the RSP room for reading comprehension and

small group for math in RSP room during discussions at the IEP meeting, but it was not documented in the IEP. Guardian kept a daily log, mostly based upon statements from Student, about whether he received certain services. Guardian claimed she could see Student going to different services on campus at Cook because her house is adjacent to Cook. However, Guardian indicated that she worked full-time and would work from home approximately one day per week. During the same time frames in the log, Guardian also kept a daily log regarding aide and instructors, but did not mention the missed services to anyone.

19. To the extent that there is a conflict in the testimony of Ms. Peterson and Ms. Conger, Ms. Peterson's testimony is entitled to more weight. Ms. Peterson was candid about the missed RSP services and provided a detailed accounting of her RSP time, services provided and missed, and included an accounting of missed services that were later provided to Student. Her testimony was corroborated by Mr. Chelini, who established that Student generally received his RSP services. For the same reasons stated earlier, Ms. Conger was a less credible witness; she remembered District errors well, but did not have the same candor in her testimony when discussing Guardian. Further, as stated in Factual Finding 10, Ms. Conger left District employment in December 2006. Therefore, her testimony about District services from April to June 2007 is not persuasive. In addition, Guardian's testimony on this point was less compelling than that of Ms. Peterson. Guardian appeared to believe that services discussed at the IEP meeting but not actually written into the IEP document were required to be provided. The evidence established that Student did miss some RSP services though it was never established how many hours, but the weight of the testimony established that the services were delivered on a regular basis during April to June 2007, that Student was regularly receiving educational benefit from his program, and was making progress on and actually met his academic goals related to RSP. The evidence did not establish that the District materially failed to implement Student's RSP services.

One-to-One Aide Services

20. Student's February 6, 2006 IEP requires that he receive extra classroom aide for five hours per day on school days. Student contends that the District failed to provide one-to-one aide services from February 8, 2006 to March 31, 2007, the date that Student's new full-time aide started at the District.

21. As noted above, Mr. Chelini was Student's fifth grade teacher at Cook from September 2006 until June 2007. He was familiar with Student's IEP and implemented it on a daily basis. Mr. Chelini established there were days when Student's aide was late, but there was always an aide present to work with Student. Mr. Chelini was not sure whether Student had aide support in social studies and science, but he was certain that Student had aide support for language arts. Student's aide support was inconsistent, with different aides at different times; some were more experienced than others. As stated earlier, Mr. Chelini was a credible witness and his testimony is entitled to significant weight.

22. Guardian believed that after Ms. Conger left the District, there were not consistent aide services provided by the District. Guardian took time from her job to help at Cook but eventually the District told her that she could not do so. Student's full time replacement aide started in March 2007. According to Guardian, she believed that the February 22, 2006 IEP required one full-time aide because it was discussed at the IEP meeting. However, the IEP does not state that one specific one-to-one aide was to be provided by the District. Guardian kept a log of missed aide services, which she totaled to be 127 hours, 45 minutes, of missed one-to-one aide time because Student did not have an aide with him for the full day. The full school day ran from 8:05 a.m. to 2:25 p.m., which is a six hour and 20 minute day. The IEP required Student to have an aide for five hours per day, not for the entire school day. The Guardian's testimony regarding aide services was not persuasive, particularly since her testimony was contradicted by Mr. Chelini and her logs represent missed services that were not required by the IEP. Mr. Chelini was in school and saw Student on a daily basis and was familiar with the requirements of his IEP. His testimony was more credible regarding aide services.

23. The persuasive weight of the evidence established that Student received the one-to-one aide services required by his IEP and any failure to provide aide services was a minor discrepancy and not a material failure to implement those services.

June 15, 2006 IEP – SL and Audiology Services

24. Student contends that the District failed to provide SL and audiology services as agreed upon in the June 15, 2006 IEP. Guardian kept a log of Student's SL services and it was her belief that the SL services were not being provided during the EL and GE physical education time slots. The June 15, 2006 IEP modified Student's program beginning September 2006 to include SL services for 45 minutes twice weekly, one-to-one pull-out service, and audiology services for 30 minutes one time in September and one time per quarter afterwards. The IEP notes reflect that the IEP reached a consensus that SL services would occur during Student's "EL" block and during GE physical education.

25. Merianne Merito was a District speech and language pathologist (SLP) who provided services to Student from second grade until he left in June 2007. Between September 2006 and June 2007, Ms. Merito provided Student with SL services for 90 minutes as required by his IEP. She worked with Student alone during language development or worked with him in the speech room. In October 2006, Ms. Merito notified Mr. Adams, the District's program supervisor for special education, that she had difficulties scheduling Student's SL services because of Student's schedule. Ms. Merito provided the services required by the IEP, but attempted to work with Guardian to change the delivery times and length of service. For example, Ms. Merito offered to deliver the services in three 30 minute increments instead of two 45 minute blocks, but Guardian did not agree. Ms. Merito indicated that they would wait until the IEP meeting to resolve the difficulties. At the October 13, 2006 IEP meeting, the District offered 360 minutes of compensatory services based upon missed SL services. The total minutes of missed SL services was not trivial and rose to the level of a material non-conformance with the IEP that denied Student a FAPE.

26. Janice Hunthausen is a District audiologist who provided audiology consultation for Student. Ms. Hunthausen met in the classroom with teacher to provide input about services and accommodations and to “see how Student was doing.” She made contact with the classroom teacher in September 2006, but did not actually consult in the classroom until October 3, 2006, and otherwise provided consultation once every three months as required by Student’s IEP. Student did not have any specific audiology needs or goals. Student’s IEP required the audiologist to consult one time in September 2006, which Ms. Hunthausen admitted she did not do. However, she consulted with the classroom teacher on October 3, 2006. Any error that occurred as a result of the brief day delay was a minor discrepancy in the service and did not amount to a material failure to implement those services.

June 15, 2006 IEP – Request for Additional Goals

27. Student contends that at the June 15, 2006 IEP, the District failed to create appropriate goals and objectives to meet Student’s unique needs in SL, audiology, central auditory processing disorder, and anxiety. The June 15, 2006 IEP contained draft goals prepared by Ms. Merito in communication for auditory processing, vocal loudness, and vocal pitch and intonation. Ms. Hunthausen collaborated and gave input on the SL goals drafted by Ms. Merito. Both witnesses established that the draft goals addressed Student’s area of need for auditory processing, SL and audiology. The goals were drafted after the IEP team determined Student had a unique need in the area of auditory processing. Guardian initialed the goals indicating her agreement in concept to the goal, but wanted them modified with present levels and to be observable and measurable; she did not consent to the proposed goals.

28. The IEP notes reflect that the goals in communication for auditory processing, vocal loudness, and vocal pitch and intonation were draft goals and would be edited and agreed to by Guardian adding a second set of initials in the next week. Baselines would be established via pre-testing and then forwarded to Guardian once completed. Guardian established that draft the goals were never forwarded to her for approval and were never implemented for Student. Guardian’s testimony was credible on this point and there was no contrary evidence from the District disputing this contention. Therefore, the evidence established that the District did not implement auditory processing goals for Student even though the IEP team determined he had a unique need in that area. There is no indication that the draft goals in communication for auditory processing, vocal loudness, and vocal pitch and intonation were ever modified or that they were ever approved and implemented for Student. There was no persuasive testimony or evidence presented at the hearing that Student had a unique need in the area of anxiety at the time of the June 15, 2006 IEP meeting. The District denied Student a FAPE by failing to implement a goal to address Student’s auditory processing need.

October 13, 2006 IEP

Request for SL and Reading Comprehension Services from an NPA

29. A local educational agency (LEA) must provide a parent or guardian with prior written notice of its refusal to change the educational program of a child with a disability. The notice must include, among other things, an explanation for the refusal; other options considered and rejected and the reasons; and each test, record, or report used as a basis for the refusal. Student contends that the District did not respond to Guardian's request for SL and reading comprehension services from the RLC made at the October 13, 2006 IEP meeting, which was held at the request of Guardian. At that meeting, Guardian told the District that Student was not receiving SL and reading comprehension services as required by his IEP. Guardian requested those services from an NPA. On November 3, 2006, Guardian sent a letter to the District stating that Student was not getting SL and reading comprehension services so she would be obtaining private services and seeking reimbursement from the District.

30. The evidence showed that Guardian's request was discussed at the October 13 2006 IEP, but that the District never responded to her request. However, pursuant to the IEP notes, the request was thoroughly discussed and considered at the IEP meeting even though the District did not otherwise respond to Guardian's request. There was no testimony that failure to respond to the request impeded Student's right to a FAPE, caused a loss of any educational benefit to Student, and the evidence established that Guardian fully and meaningfully participated in the IEP process. Therefore, the District's failure to respond in writing to Guardian's request did not cause any denial of FAPE.

Request for Goal in Area of Anxiety

31. Student contends that the District failed to create goals to address Student's unique need based upon anxiety as discussed at the October 13, 2006 IEP meeting. The October 13, 2006 IEP notes reflect that anxiety was discussed as a unique need and that Guardian asked for one full time aide all day rather than a separate IBI and classroom aide.

32. Guardian established that anxiety was a unique need for Student and directly discussed the need at IEP meeting in October 2006. Prior to the October 13, 2006 IEP meeting, Guardian had asked the District for one full-time aide, but there had not been any finding or discussion about Student having a unique need related to anxiety. The October 13, 2006 IEP meeting notes reflect that, "[t]he question was asked if this was considered a new unique need," but the notes do not list any further discussion or comments and no goal was developed. Guardian's position was supported by a letter sent to the District by Ed Reicks, a licensed clinical psychologist who was Student's private therapist beginning in September 2006. Dr. Reicks' has a doctorate in clinical psychology and has worked as a psychologist for 24 years, but has never been a school psychologist. On October 11, 2006, Dr. Reicks sent a letter notifying the District that Student had abandonment issues in his background and that he had observed Student to have regressive behaviors due to Student reacting to the change

of his school aide's schedule, which caused Student anxiety. Dr. Reicks opined in the letter that changing the aides' work schedule and introducing other new aides is beyond Student's "coping level and understanding level, ergo his regressing and stress."

33. Mr. Chelini established that Student had anxiety in the classroom that was affecting his ability to focus and make progress in the classroom. Mr. Chelini testified credibly that there were too many people involved in Student's program, which could frustrate Student and others. Mr. Chelini explained that the level of services for Student was appropriate with the exception of the aide issue because he believed one aide would best serve Student's needs. Mr. Chelini established that with one aide, Student could get a lot more work done, that such reduction would reduce Student's anxiety and he would have a smoother working environment.

34. The testimony and evidence of Mr. Chelini and Guardian, as well as the IEP notes from October 13, 2006, establish that Student had a unique need in the area of anxiety as of October 13, 2006, but the District did not develop or implement a goal to address the need, and anxiety was affecting Student's ability to access his education. Therefore, the District denied Student a FAPE by failing to develop and implement a goal to address his unique need in the area of anxiety.

Annual IEP – February, April, June 2007

35. Student contends that the District failed to timely hold an IEP meeting in spring 2007 and did not discuss the offer of placement for ESY 2007 and the 2007-2008 school year at an IEP meeting, which denied Guardian the opportunity to participate in developing an appropriate IEP for Student. Student also contends that the District did not make an offer of placement and services for the period between February 22, 2007, and June 20, 2007, and that the District did not develop, adopt and implement any and/or appropriate goals and objectives from February 22, 2007, to the present. The District contends that Guardian participated fully in the IEP process, but when the June 15, 2007 IEP could not go forward, it was obligated to present an offer of placement and services to Student.

Timely IEP Meeting Spring 2007

36. The IEP team shall review the pupil's IEP periodically, but not less frequently than annually. Further, a District shall have an IEP in effect for each student at the beginning of each school year. Student contends that the District did not timely hold an IEP meeting in the spring 2007. The allegation is unclear, since the evidence established that the District convened Student's annual IEP on February 5, 2007, but it was not completed. The IEP team agreed to reconvene in March 2007, that was later rescheduled to April 9, 2007, but it was again not able to complete the IEP. The IEP team agreed to meet again in May 2007 to complete the IEP, which was rescheduled to June 15, 2007. However, the June 15, 2007 IEP meeting did not go forward because Ms. Peterson, Student's RSP teacher, was ill that day, and the audiologist was not available. Guardian would not waive the presence of either participant, but would have allowed the meeting to move forward while reserving the right to

assert that the meeting was not properly constituted. The IEP process was on-going and there was no evidence that the meetings were not scheduled in a timely and appropriate manner. Further, the District was obligated to provide Student an offer of FAPE for the ESY and school year and have an IEP in place before the start of the school year. In addition, ESY was not scheduled to begin until July 1, 2007. Further, there was no evidence that Student lost any educational benefit from the delay in the length of the annual IEP process or that his right to a FAPE was impeded in any way; the evidence established that Student was receiving his IEP services and was attending school and making progress. Further, Guardian was participating fully and meaningfully in the development of Student's IEP. Therefore, there was no FAPE denial from failure to timely hold an IEP meeting in the spring 2007.

37. On June 18, 2007, Guardian delivered a letter to the District dated June 15, 2007, which stated that because Student did not have an offer of placement for ESY and the 2007-2008 school year, she was going to privately place Student and seek reimbursement.

Placement and Services from February 22, 2007 to June 20, 2007

38. Student contends that the District did not make an offer of placement and services for the time period from February 22, 2007, to June 20, 2007, which is the time period that Student's annual IEP was being completed. The evidence established that the IEP team was working in good faith to complete Student's IEP. Guardian was regularly attending and actively participating in the IEP process. Student regularly attended Cook and was receiving the services and attending the placement under his IEP dated February 6, 2006, and was making educational progress. There was no evidence of any loss of educational benefit to Student during the alleged time period or that it impeded his right to a FAPE. Therefore, there was no FAPE denial from February 22, 2007, to June 20, 2007.

Goals and Objectives February 22, 2007 to Present

39. Student contends that the District did not implement appropriate goals and objectives from February 22, 2007 until the present. At the February 5, 2007 IEP meeting, the IEP team discussed that Student had met his goals. The IEP team did not discuss new goals on February 5 because the IEP team ran out of time that day, but the District agreed to provide Guardian with the proposed goals so they could be discussed at the next IEP meeting.

40. The annual IEP reconvened on April 9, 2007. Draft goals had been provided to Guardian and her representative on March 15, 2007, but no response or input was received. The February 5 IEP notes reflect that the team agreed to discuss the concepts of the goals, but changes to the goals would be made after collaboration and consultation with Guardian and included a schedule for providing the goals to Guardian for her input and a return date from Guardian with her feedback. The RLC also provided draft academic goals for Student at the April 9 IEP. Guardian established that at the April 9, 2007 IEP, the RSP, OT, and APE goals were discussed, as was IBI, which would be revised for next meeting. Audiology and SL goals were not reviewed. Guardian had concerns about the District's

proposed goals that were provided to her on March 15, 2007, but decided to wait until the April IEP meeting to discuss her concerns. Guardian established that the goals were never agreed upon and had not been settled to date.

41. Student had met his goals at the February 5, 2007 IEP meeting. The evidence demonstrated that the goals were being considered and worked upon, but they were never settled and agreed upon at any IEP meeting and they have not been agreed upon to date. The District was required to implement goals to meet Student's area of identified needs. However, there was no evidence that established any loss of academic benefit to Student. He was regularly attending school and was making educational progress. Therefore, there was no FAPE denial.

District Offered Placement -- ESY 2007

42. A school district must provide service beyond the regular academic year when the interruption of the pupil's academic program may cause regression, coupled with the pupil's limited recoupment abilities, would render it unlikely or impossible for the pupil to attain the level of self-sufficiency or independence that would normally be expected. Student contends that the offer for the 2007 ESY was not appropriate to meet his unique needs because it did not include SL goals and objectives, occupational therapy (OT), or IBI services.

43. On June 20, 2007, the District sent a Notice of Proposed Action and Refused Actions to Guardian denying the request contained in her June 15, 2007 letter and making an offer of placement for ESY 2007. For ESY 2007, the District offered Student placement in the GE at Excelsior Elementary School, extra classroom support aide and SL for 30 minutes, one time per week individual service. The letter indicated that the District considered input from all IEP team members who worked with Student and the discussions at the February 5, 2007, and April 9, 2007 IEP meetings, including a review of present levels of performance, draft goals, and objectives, accommodations, and modifications presented at those meetings, and the RLC reports with proposed goals and objectives, two reports from Dr. Reicks, an assessment report from Orange County Behavioral Health, and an OT report from Russo, Fleck and Associates. In addition, the District reviewed all prior assessments and consulted with District staff who had worked with Student.

44. As discussed in Factual Findings 39 to 41, SL goals and objectives had not been settled for the coming school year, but goals were an ongoing part of the IEP discussions. The ESY offer included SL services, however, there was no evidence establishing that the District was required to propose SL goals for ESY. Therefore, there was no FAPE denial based upon a failure to propose a SL goal for ESY.

45. Ms. Morgan, who was the IBI supervisor, testified credibly that the ESY 2007 offer was appropriate for Student even though IBI services were not included. Ms. Morgan established that the nature of the services provided to Student would prevent undue regression over the summer, particularly because Student was going to have a one-to-one

aide. Ms. Morgan's testimony was persuasive on this topic because she was familiar with Student and understood the reason ESY services are provided. Therefore, IBI services were not necessary to provide Student a FAPE during ESY.

46. Anne Fleck is the OT who had provided services to Student for the last four years. She established that OT services usually extend to ESY if a student is in summer school, but she did not provide OT to Student during ESY 2006. Ms. Fleck established that based upon Student's progress, she was recommending a reduction in OT services for the 2007-2008 school year to one time per week. Mr. Adams, the District's special education supervisor who was in charge of Student's IEP, spoke to Ms. Fleck prior to making the written offer for ESY, but he could not explain why OT was not included in the ESY offer. Based upon the testimony of Ms. Fleck and Mr. Adams, OT was a required part of the ESY offer in order to ensure that Student did not regress and benefited from his program. The District's failure to include OT in the ESY offer denied Student a FAPE because the offer was not reasonably calculated to provide him educational benefit.

District Offered Placement – 2007-2008 School Year

47. The District's June 20, 2007 letter to Guardian also included an offer of placement from September 2007 to the annual review in February 5, 2008. The District offered Student specialized academic instruction for 1550 minutes per week in a mild – moderate SDC at Hill Elementary School, with the following services: extra classroom aide support 300 minutes per day for the first four weeks, with a fade plan reduction of 75 minutes per day each week for four weeks; SL for 45 minutes one time per week individual instruction; OT for 45 minutes one time per week individual therapy in the OT clinic and 45 minutes one time per week school based individual therapy by an NPA; IBI for 90 minutes per week after school in the IBI clinic and 20 minutes recess support, to ensure generalization of social skills and functional communication skills learned in the IBI clinic; APE for two 30-minute collaboration sessions per month, and two 30-minute consultations sessions per month, in collaboration and consultation with the GE physical education teacher; and counseling and guidance services 30 minutes per week collaboration in the SDC by a school psychologist; and audiology services for 30 minutes of consultation four times per year in the SDC. The 2007-2008 school year began on August 14, 2007.

48. Student contends that the offer for the 2007-2008 school year was not appropriate because it offered an SDC when Student had been in GE; it did not offer any mainstream time in GE; it did not include an offer for a proper transition from GE to an SDC; and did not include an offer of aide of support when Student had previously had an aide. Finally, Student contends the 2007-2008 school year offer was not appropriate because it did not offer goals and objectives for the proposed SDC and based the goals and objectives upon a GE classroom teacher when Student was offered an SDC. In a letter dated August 14, 2007, Guardian's attorney rejected the District's offered placement and indicated that Guardian would self-fund placement for Student and seek reimbursement.

49. Ms. Peterson testified credibly that an SDC would be more appropriate because Student needs total support in the classroom including prompting. Student was receiving 345 minutes of RSP support; Ms. Peterson explained persuasively that this amount of time generally indicates an SDC is more appropriate, because of the level of support Student continued to require. Ms. Peterson was credible on this issue and her opinion was entitled to significant weight, particularly since she had worked as Student's RSP teacher since the third grade. Ms. Peterson established that even though Student met his goals from the second grade forward, he was so prompt-dependent on others to complete his tasks that he was not developing independent skills.

50. Ms. Morgan, Student's IBI supervisor, established that the level of IBI services offered to Student would meet his needs. Ms. Morgan persuasively established that Student would actually be receiving more IBI than he was receiving in the current school year, but it would be delivered in a different setting. Ms. Morgan credibly established that Student was too dependent on his aides and sought out adults for play rather than his peers. In addition, it was Ms. Morgan's opinion that the placement offer included transition services for the one-to-one aide, which would eventually fade out the aide. The offer of IBI services for the 2007-2008 school year were designed to address Student's need in that area and were designed to provide him with educational benefit.

51. Ms. Merito, who had provided Student with SL services since the second grade, established that the offer of SL services for the 2007-2008 school year was appropriate for Student. Ms. Merito was a credible witness. She had provided Student with SL services for four years and was well aware of Student's strengths and needs. Ms. Merito also established that a mild-moderate SDC was appropriate because Student was having difficulties in all academic areas; the class would be smaller, with more individualized attention, lower student-staff ratio and he could work on customized GE curriculum. Student was also prompt dependent on the aides and would wait to answer and would appear anxious about it. Ms. Merito persuasively established that the one-to-one setting at RLC was not appropriate for Student because he had difficulty with pragmatics and needed to develop friends and was interested in other children activities; an environment that did not provide services to help Student with pragmatics would not be appropriate.

52. Ms. Fleck, who was Student's OT, established that the District's offer for OT services during the 2007-2008 school year would meet Student's need in the area of OT. Ms. Fleck worked with Student on a regular basis, was familiar with his strengths and progress. Ms. Fleck credibly established that based upon her assessments of Student, he was making progress, but continued to have sensory processing needs. Ms. Fleck established that the level of OT service offered by the District would address Student's OT needs.

53. Guardian established that the written offer for the 2007-2008 school year was never discussed at the February 5 or April 9, 2007 IEP meetings. Student had been in the GE since he had been in the District and the first she learned about a proposed change of placement was in the written offer in June 2007. Guardian also established that the District had a pre-IEP meeting in January 2007 where Student's placement was discussed by the

District staff who reached a consensus that Student would be offered an SDC. Guardian was not invited to the meeting. Mr. Chelini and Mr. Adams corroborated Guardian's testimony in that regard.

54. Guardian offered the testimony of Dr. Reicks, who has been Student's private therapist since September 2006. It was Dr. Reicks' opinion that the placement offer for Student was not appropriate. In a letter dated March 27, 2007, Dr. Reicks included recommendations for Student's educational program, including a list that he believed should be considered "unique needs" for Student to progress emotionally and to facilitate his placement. Dr. Reicks believed that the RLC would best serve Student because it offered one-to-one instruction with SLPs and instructors trained to work with Student's who have autism. Dr. Reicks believed Student had a unique need for a consistent one-to-one aide, social skills group for at least one hour per week, and intensive services at the RLC for SL, reading, auditory processing, reading comprehension, math concepts, and the "Intercept Program" to improve Student's concentration. Dr. Reicks opinion was not entitled to significant weight. He did not observe any District program and did not talk to any District staff or teachers prior to forming his opinion. He also did not observe the RLC or talk to its staff, but based his opinion about the appropriateness of RLC based upon its website. In addition, Dr. Reicks recommended social skills training for Student and still maintained the RLC was appropriate even though the RLC does not offer socials skills training. Dr. Reicks was confused about what a mild-moderate SDC involved and believed that the District had misdiagnosed Student as mentally retarded because District recommended a mild-moderate SDC.

55. Ms. Pliha, who is the Director of RLC and a licensed SLP, testified that the District's offer for services during ESY 2007 and the 2007-2008 school year were not appropriate to meet Student's educational needs. The 2007 ESY offer did not include intensive enough services and it was unclear what his GE placement would look like and how it would meet Student's needs. The offer for the 2007-2008 school year was also not appropriate because it did not describe student to teacher ratio and there was no description of the program or setting. Ms. Pliha's opinion was entitled to less weight than that of the District witnesses. She did not appear to have an understanding of what was necessary for a FAPE offer from the District and the difference between ESY and a school year offer, and the character of her testimony was less compelling than that of the District witnesses. In addition, Ms. Pliha seemed confused about her role in conducting the RLC assessments of Student.

56. Mr. Adams contacted all the personnel involved in working with Student to discuss Student's present levels and appropriate needs before making a written offer to Guardian. He also reviewed and considered the draft goals and objectives presented at the February 5 and April 9 IEP meetings. Mr. Adams established that an SDC was a more appropriate placement for Student because he was not independently accessing his curriculum and needed to develop independence from his aides, and Student's anxiety was increasing. Mr. Adams was a credible witness and his testimony is entitled to considerable weight. Mr. Adams established that Student needed a comprehensive program that addressed

all areas of Student's needs, including social skills training, that the RLC could not provide. He also established persuasively that he met with all District providers and considered their input into Student's program before making the offer of placement. Mr. Adams provided a comprehensive offer to Student that addressed all area of need.

57. As discussed in Factual Findings 39 to 41, the goals and objectives had not yet been agreed upon for the new IEP. The District did not indicate in its offer what goals and objectives would be implemented in the SDC, but the discussion about the goals was ongoing and Guardian was fully participating in that discussion. Guardian had been provided the proposed goals in all areas and had agreed upon a timeline for input upon which she did not follow through. There was ample time to discuss goals and objectives prior to the start of the school year. It is reasonable to infer that the goals would be those that had been proposed by the District and discussed at the April 9 IEP meeting, particularly since those goals were referenced in the offer letter. Further, goals are required to address areas of need and were not written based upon Student's placement. Student's argument that the 2007-2008 placement offer did not include goals written for the SDC rather than GE is not persuasive.

LRE

58. Student contends that the placement offer for the 2007-2008 school year did not include any time in the GE environment. The IEP must include a statement of the extent to which a child will not participate in a regular classroom with nondisabled children. The IEP must also indicate why the student's disability prevents his or her needs from being met in a less restrictive environment even with the use of supplementary aids and services. Further, in order to measure whether a placement is in the LRE, four factors must be considered: (1) the academic benefits available to the disabled student in a general education classroom, supplemented with appropriate aids and services, as compared with the academic benefits of a special education classroom; (2) the non-academic benefits of interaction with children who are not disabled; (3) the effect of the disabled student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the disabled student in a general education classroom.

59. As stated in Factual Finding 49 to 52 and 56, the District properly offered Student placement in an SDC classroom. Regarding the first prong, the academic benefit to Student in an SDC outweighed the GE, which had been tried for many years. The District established that Student was not independently accessing his education without the necessity of an aide and the intensity of the RSP support in the GE demonstrated that a more structured academic program was necessary to address his academic needs. Regarding the second prong, the District established that Student needed more structured interaction with his peers because he was not independently developing peer relationships and the District addressed that need in the placement offer. However, the offer of placement did not include any time for Student in the GE and it did not properly explain why Student would be in an SDC and not the GE. District had a pre-IEP meeting in January 2007 and had decided that it would offer Student an SDC. The District never made that offer to Guardian at an IEP meeting and

did not offer an SDC at an IEP meeting. The offer made in June 2007 did not include any explanation about time in the GE classroom or otherwise explain why the change was necessary. Regarding prong three, there was no evidence that Student's presence in the GE had a negative impact on the other children in the classroom, but, as discussed in Factual Finding 33, Mr. Chelini established that the number of people involved in Student's program in the GE frustrated Student and those working with him. The cost of the mainstreaming was not challenged or discussed at the hearing.

60. The District made a comprehensive offer of placement to Student for the 2007-2008 school year. The offer included services in all area of need and mirrored many of the services Student had in his current IEP. The District substantiated its offer of fading out a one-to-one aide because of Student's prompt dependence on the aide and Student's need to develop independence. The offer was designed to address each area of Student's need and include a transition to fade out the full-time aide. However, there was no showing that a transition plan is required when going from the GE to an SDC or that Student had a need for such a plan. In addition, there was time to hold further IEP meetings and discuss the offer of placement prior to the start of the new academic year and settle goals and objectives prior to the new school year. However, because the District did not properly document why Student should be moved to a more restrictive setting and did not include any time in the GE in the offer, the offer from the District did not constitute a FAPE.

Procedural Errors

61. Procedural errors during the IEP process may constitute a denial of FAPE when the procedural inadequacies impede the child's right to a FAPE, cause a deprivation of educational benefits, or significantly impede the parent's opportunity to participate in the decision making process regarding the provision of FAPE. Student contends that the District committed a series of procedural violations that denied him a FAPE.

Student Records -- February 5, 2007 to April 9, 2007

62. Student contends that the District failed to provide Guardian with accurate and complete copies of Student's records, including copies of IEP documents, from February 5 to April 9, 2007. The District contends that it provided all documents to Guardian.

63. Guardian testified that she received documents from CDE in response to a records request that were not provided to her as school records by the District. One document she received was typed IEP notes dated February 5, 2007, with the word "DRAFT" written across the top, when in fact the notes were from the October 13, 2006 IEP meeting. Guardian had not seen the document prior to her records request and believed that based upon that document, that the District had not provided all of Student's educational records. Mr. Adams credibly explained the error in the documents as a computer error when transferring the typed IEP document from one meeting to the next. Mr. Adams established that the document with the word "DRAFT" was actually the notes from the October 13, 2006 IEP meeting that had been provided to Guardian.

64. There was no other persuasive evidence about any documents Guardian requested that were not provided to her. Further, there was no evidence establishing any loss of educational benefit to Student, showing that his right to a FAPE was impeded in any manner, or demonstrating any denial of Guardian's right to participate in the educational process. Accordingly, there was no evidence establishing a FAPE denial based upon an alleged failure of the District to provide educational records for Student.

Review of Independent Evaluations during Annual IEP

65. When a parent obtains an independent assessment at private expense and shares that information with the District, the District is required to consider the results of the evaluation with respect to the provision of FAPE to the child if the assessment meets the District's criteria for assessments. Student contends that the District failed to consider IEEs and proposed goals prepared by the RLC and Dr. Reicks, which were submitted to the District on February 5, April 9, and June 15, 2007. The District contends that it properly considered the reports and goals from both sources and they helped inform the goals that were proposed for Student.

66. On February 5, 2007, Student's annual IEP was held. IEP notes reflect that RLC representatives summarized their assessment results, but the report of those assessments would be considered by the IEP team once the team had time to review the report in detail. The notes reflect that the IEP team reviewed Student's current levels of performance and his old academic goals, which he had met. The IBI, APE, and OT providers reviewed Student's progress. The team asked questions of RLC representatives, who explained that their recommendations were more extensive than previously discussed. The team agreed that it would discuss new draft goals and objectives at the reconvening IEP meeting on April 9, 2007.

67. While the District did not discuss the goals proposed by the RLC at any IEP meeting, Mr. Adams established that he considered the proposed RLC goals prior to making the offer of placement for the ESY 2007 and the 2007-2008 school year. Therefore, the District did not deny Student a FAPE by failing to consider the RLC proposed goals at an IEP meeting.

68. Prior to the April 9, 2007 IEP meeting, Guardian provided the District with a letter dated March 27, 2007, from Dr. Reicks that reported the results of 14 hours of therapeutic assessment. Dr. Reicks' letter reported that he used a comprehensive test battery using the WISC-III-R, the Amen Parent ADD Assessment Test, and the Qb+ Objective Continuous Performance Test, but the letter did not include any of the subtest scores on any of the instruments administered. The document was presented as a letter and did not have the indicia normally associated with a professional assessment and evaluation. Dr. Reicks testified that had the District consider his report, it would have never made the offer for services that it did. However, Ms. Van, the District psychologist, established that Dr. Reicks' assessment of Student was not appropriate because he used the WISC-III, which is outdated with old norms, and not the WISC-IV, which is the current standard and that the

report did not have any of the protocols included that would be considered best practice for assessments. To the extent that there is a conflict between Ms. Van and Dr. Reicks, Ms. Van was the more credible witness. Her testimony and knowledge of school settings, standardized testing and protocols was much more compelling and believable than Dr. Reicks' testimony. For the same reasons stated in Factual Finding 54, Dr. Reicks' testimony is entitled to little weight. The District established that Dr. Reicks' report was not appropriate and read more as a letter than an assessment report. Even though the report was not appropriate, Mr. Adams considered Dr. Reicks' report prior to making the offer of placement in June 2007. There was no FAPE denial based upon failing to consider Dr. Reicks' March 27, 2007 report.

Reimbursement and Prospective Placement

69. When a school district does not provide a FAPE to a special education student, parents may obtain reimbursement for education and services they procure for the pupil if those services address the student's needs and are reasonably calculated to provide educational benefit to the pupil. Compensatory education is an equitable remedy. Relief must be calculated to provide the educational benefit that would likely have accrued from the special education services that the school district should have provided. Reimbursement may be reduced or denied if the pupil's parents did not provide notice prior to removing the pupil from the public school, and did not state their concerns and express their intent to enroll the pupil in a non-public or private school. Parents need not provide the exact placement or services required under IDEA, but must only provide a placement or services that address the student's needs and provide the student with educational benefit. The conduct of both parties must be evaluated when determining what, if any, relief is appropriate. Several factors must be considered when determining the amount of reimbursement to be ordered: the efforts parents expended in securing alternative placements; the availability of other more suitable placements; and the cooperative or uncooperative position of the school district.

70. Student is entitled to a remedy for the District's failure to provide him a FAPE by failing to provide SL services in accord with the June 15, 2006 IEP, failing to develop and implement a goal to address his unique need in the area of auditory processing after June 15, 2006, by failing to develop a goal and address Student's need in the area of anxiety after October 13, 2006, failing to make Student an appropriate offer for ESY 2007 by failing to include OT services, and by failing to include the amount of time Student would spend in the GE in the offer and include an explanation why an SDC was more appropriate in the offer of placement in June 2007.

71. The RLC provides both individual and small group instruction in the areas of reading, writing and math instruction, as well as SL services. RLC has been providing one-to-one services to Student since November 2006. Student has peer interaction briefly during instructor change and there is another Student in the same room at times receiving one-to-one instruction from a different instructor. The evidence showed that Student transitioned between five instructors during his day at RLC. The RLC does not provide social skills training and does not have a behaviorist or school psychologist on staff. Pursuant to its

certification from the state of California, the RLC can only provide language based services, which means RLC can provide math word problems and vocabulary, but not arithmetic calculation. The RLC is an NPA and is not a certified nonpublic school (NPS).

72. The RLC established that Student had made significant growth in his reading comprehension while at RLC. Dr. Reicks also established that Student showed significant improvement in his IQ that Dr. Reicks attributed to the program at RLC. Ms. Fleck also determined that Student had made significant improvement with his OT needs in the last year and had observed that Student seemed less anxious and more confident, sentiments that were echoed by Guardian. Student established that he made educational progress during the time he has been at the RLC. However, since RLC is an NPA and not a NPS, it is not an appropriate placement full-time for Student. The RLC does not offer any social skill program and does not have the proper certification to teach Student arithmetic. Student requires a comprehensive program that addresses all area of need and the RLC cannot provide a program that does so. Student is not entitled to prospective placement at the RLC.

73. Guardian seeks reimbursement for RLC expenses in the amount of \$41,693.75 out of pocket to send Student to RLC from November 29, 2006, to end of the 2007-2008 school year, plus an additional \$1291.50 for the May 2008 services for a total of \$42985.25. Guardian also incurred mileage from home to RLC totaling 7036 miles, which represented 143 school days from September 2007 to April 2008, four trips per day at 49.2 miles per day. Guardian paid \$3370 out of pocket for the cost of the RLC during ESY 2007. For the period of August 14, 2007, through December 2007, Guardian made four trips to RLC per day at 49.2 miles per day, for 68 school days, for total mileage of 3345.60.⁶ Guardian also spent \$3820 out of pocket to RLC for the period of November 2006 to June 19, 2007. For the period of August 14, 2007, the day the 2007-2008 school year began, through December 2007, Guardian paid \$15389.58 to RLC.

74. Weighing the equities in this matter and considering the conduct of both parties and the nature of the violations by the District, Guardian is entitled to reimbursement. However, the program offered at RLC is not a comprehensive program and is not designed to meet all of Student's educational needs. The evidence at hearing established that Student has needs for peer interaction and social skills development that were not and cannot be addressed by the RLC. The District should have worked more diligently to implement the necessary goals to address Student's needs, particularly since auditory processing and anxiety were significant areas of deficit for Student and were directly impacting Student's access to his education, and should have made an offer for the ESY 2007 that addressed Student's needs. Student is entitled to reimbursement for the period of November 2006 through ESY 2007, including mileage. Student is not entitled to reimbursement for the entirety of Student's course of study at RLC because it is not an appropriate placement for Student and did not meet all of educational needs. However, given the failure of the District

⁶ The parties entered into a settlement agreement on or about January 2007 which stated that Guardian would bear the cost of all transportation to the RLC through ESY 2007. Accordingly, no mileage reimbursement will be awarded from November 2006 through ESY 2007.

to include any GE time in the offer of placement for the 2007-2008 school year and otherwise include an explanation about why an SDC was appropriate when Student had previously been in the GE full time, Student is entitled to additional reimbursement for one semester of the 2007-2008 school year while at the RLC, including mileage. The total amount of reimbursement that the District must pay to Guardian is \$22,579.58 for RLC services and mileage total of \$1689.53. The total amount due to Guardian is \$24,269.11.

APPLICABLE LAW AND LEGAL CONCLUSIONS

Burden of Proof

1. Under *Schaffer vs. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who filed the request for due process has the burden of persuasion at the due process hearing. Accordingly, Student bears the burden of persuasion.

General Principles

2. 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(a)(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).)

3. There are two parts to the legal analysis of whether a school district complied with the IDEA. The first examines whether the district has complied with the procedures set forth in the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-07.) The second examines whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) The IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Id.* at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

4. Procedural errors in the IEP process do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the procedural inadequacies impeded the child's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents' opportunity to participate in the

decision making process regarding the provision of FAPE. (20 U.S.C. § 1415(f)(3)(E); *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) Procedural errors during the IEP process are subject to a harmless error analysis. (*M.L., et al., v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, 650, fn. 9 (lead opn. of Alarcon, J.).)

5. An IEP is evaluated in light of the 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.)⁷ It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district, not the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) The evidence must establish an objective indication that the child is likely to make progress. The evidence of progress, or lack thereof, must be viewed in light of the limitations imposed by the child's disability. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 130.) Further, the District is required to make a formal offer of FAPE to the student in writing, even though the parents have indicated they will not accept the offer. (*Union School District v. B. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525-1526.)

6. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. (*Van Duyn v. Baker Sch. Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 813.) A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Ibid.*)

The IEP

7. An IEP must contain a statement of the child's present levels of educational performance; a statement of measurable annual goals; a statement of the "extent. . . to which" a child will not participate in a regular classroom with nondisabled children; a statement of the special education and related services to be provided; and a statement of how the child's progress toward the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.347(a); Ed. Code, § 56345, subds. (a)(1), (2), (3).) The documentation shall indicate why the student's disability prevents his or her needs from being met in a less restrictive environment even with the use of supplementary aids and services. (Cal. Code Regs., tit. 5, § 3042, subd. (b).) This does not expressly require the team to document its rationale in the IEP document. However, this regulation is found in Article 4 of the regulations, which is titled, "Instructional Planning and Individualized Education Program." Subdivision (a) of section 3042 of the regulations defines an educational placement as specified in the IEP.

⁷ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeal applied the analysis in *Adams* to other issues concerning an IEP. (*Christopher S. v. Stanislaus County Off. of Educ.* (9th Cir. 2004) 384 F.3d 1205, 1212.) Further, 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.)

Accordingly, it is reasonable to interpret subdivision (b) of section 3042 as requiring the IEP team to document its rationale in the IEP document.

8. The IEP team shall review the pupil's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the pupil are being achieved, and revise the IEP as appropriate. (Ed. Code, §§ 56341.1, subd. (d), 56043, subd. (d), 56343, subd. (d).) Each local educational agency shall have an IEP in effect for each individual with exceptional needs within its jurisdiction at the beginning of each school year. (Ed. Code, § 56344, subd. (c); 34 C.F.R. § 300.323(a), (b).)

9. Prior written notice shall be given by the public agency to the parents or guardians of an individual with exceptional needs, or to the parents or guardians of a child upon initial referral for assessment, and a reasonable time before the public agency proposes to initiate or change, or refuses to initiate or change, the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education to the child. (Ed. Code, § 56500.4, subd. (a).)

Extended School Year Services

10. A school district may be required to provide, in addition to special education and related services during the regular academic school year, ESY services to pupils who have disabilities that are likely to continue indefinitely or for a prolonged period, if interruption of the pupil's educational programming may cause regression, coupled with the pupil's limited recoupment capacity, rendering it impossible or unlikely that the pupil will achieve the level of self-sufficiency and independence that would otherwise be expected in light of his or her disability. (Ed. Code, § 56345, subd. (b)(3); Cal. Code Regs., tit. 5, § 3043; see also 34 C.F.R. § 300.106.)

Private Evaluations

11. If the parent obtains an IEE at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation: (1) must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and (2) may be presented by any party as evidence at a hearing on a due process complaint regarding that child. (34 C.F.R. § 300.502(c); Ed. Code, §§ 56341.1, subd. (f), 56381, subd. (b)(1).)

Least Restrictive Environment

12. Federal and state law requires school districts to provide a program in the LRE to each special education student. (See 34 C.F.R. §§ 300.114, et. seq (2006).) A special education student must be educated with nondisabled peers “[t]o the maximum extent appropriate,” and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services “cannot be achieved satisfactorily.” (20 U.S.C. §

1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i) & (ii).) In order to measure whether a placement is in the LRE, four factors must be considered: (1) the academic benefits available to the disabled student in a general education classroom, supplemented with appropriate aids and services, as compared with the academic benefits of a special education classroom; (2) the non-academic benefits of interaction with children who are not disabled; (3) the effect of the disabled student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the disabled student in a general education classroom. (*Sacramento Unified School District v. Holland* (9th Cir. 1994) 14 F.3d 1398, 1403.)

Did the District commit substantive violations of the IDEA by failing to provide the following services in accordance with the February 8, 2006 IEP: IBI services from February 8, 2006 to June 21, 2007; social skills services from September 2006 to June 20, 2007; RSP from April 1, 2007 to June 20, 2007; and appropriate one-to-one aide services from February 8, 2006 to March 31, 2007?

13. As stated in Factual Findings 9 to 11, the District provided IBI services in accordance with the February 8, 2006 IEP. To the extent that any services were missed, the District proposed a compensatory education plan for those services. In any event, the missed services did not rise to the level of a material failure to implement the IEP.

14. As stated in Factual Findings 12 to 13, the District provided social skills services in accordance with the February 8, 2006 IEP. There was no requirement that the services be provided at any particular time of the day and Student conceded that he received the services, but not at the times Guardian believed he should have received them.

15. As stated in Factual Findings 14 to 19, the District provided RSP services in accordance with the February 8, 2006 IEP. To the extent that any services were missed, the evidence established that they were later provided to Student and there was no material nonconformity with the IEP.

16. As stated in Factual Findings 20 to 23, the District provided one-to-one aide services in accordance with the February 8, 2006 IEP.

Did the District commit substantive violations of the IDEA by failing to provide SL and audiology services in accordance with the June 15, 2006 IEP?

17. As stated in Factual Findings 24 and 25, the District did not provide SL services in accordance with the June 15, 2006 IEP. The District missed SL services and offered 360 minutes of compensatory services at the October 13, 2006 IEP. The missed SL services were a material departure from the SL service required by Student's IEP.

18. As stated in Factual Findings 24 and 26, the District provided audiology service in accordance with the June 15, 2006, with the exception of the September 2006 consultation. The evidence showed that Ms. Hunthausen did not conduct the consultation in September 2006, even though she contacted the classroom teacher and set up a time to meet.

The service was conducted on October 3, 2006, and there was no evidence that the error was a material nonconformity with the IEP.

Did the District deny Student a FAPE at the June 15, 2006 IEP by failing to create appropriate goals and objectives to meet Student's unique needs in SL, audiology, central auditory processing disorder, and anxiety?

19. As stated in Factual Findings 27 and 28, the District denied Student a FAPE by failing to create appropriate goals and objectives to meet Student's unique needs in SL, audiology, and central processing disorder at the June 15, 2006 IEP meeting.

20. As stated in Factual Finding 28, the District did not deny Student a FAPE by failing to create an appropriate goal to address anxiety at the June 15, 2006. There was no evidence that Student had a unique need in the area of anxiety at that meeting.

Did the District deny Student a FAPE by failing to create appropriate goals to address Student's unique need in the area of anxiety at the October 13, 2006 IEP?

21. As stated in Factual Findings 31 to 34, the District denied Student a FAPE by failing to create an appropriate goal to address Student's unique need in the area of anxiety at the October 13, 2006 IEP meeting.

Did the District deny Student a FAPE by failing to make an offer of placement and services for the period between February 22, 2007 and June 20, 2007?

22. As stated in Factual Findings 35 to 37, the District did not deny Student a FAPE by failing to make an offer of placement from February 22, 2007 to June 20, 2007.

Did the District deny Student a FAPE by failing to develop, adopt and implement any and/or appropriate goals and objectives from February 22, 2007 to the present?

23. As stated in Factual Findings 39 to 41, the District did not deny Student a FAPE by failing to develop appropriate goals for Student from February 22, 2007 to the present. The evidence established that the goals were proposed and were being drafted, but the District never followed through with the revision of the goals as stated in the IEP documents. However, there was no loss of educational benefit to Student while the goals were being finalized. He was regularly attending school and making educational progress.

Did the District deny Student a FAPE by failing to offer SL goals and objectives, OT, or IBI services for the 2007 ESY?

24. As stated in Factual Findings 42 to 46, the District denied Student a FAPE when it made a written offer on June 20, 2007, for ESY 2007. The offer was not appropriate because it did not address all area of Student need, specifically in OT, which was necessary to prevent regression.

Did the District deny Student a FAPE by failing to make an offer of placement and services on June 20, 2007, for the 2007-2008 school year that was appropriate to meet Student's unique educational needs by: (1) offering an SDC instead of GE; (2) failing to offer any mainstream time in GE; (3) failing to offer a proper transition from GE to SDC; (4) failing to offer aide support when Student had previously had an aide; and (5) failing to offer goals and objectives for the proposed SDC, and offering inappropriate goals and objectives based upon a GE classroom teacher when Student was offered an SDC?

25. As stated in Factual Findings 47 to 57, the District did not deny Student a FAPE in its written offer on June 20, 2007, by offering Student an SDC instead of the GE, not including an offer of a one-to-one aide, and not including a transition from the GE to an SDC. The District also did not deny Student a FAPE by not developing goals based upon the SDC placement. The offer should have included proposed goals and objectives to be implemented, even though there was no requirement that goals be specific to one classroom. Goals are designed to address need regardless of where they are to be implemented. The offer did not indicate what goals would be implemented, but it is reasonable to expect that the IEP team would have met again to finalize goals for the school year. The offer addressed Student's unique needs and was designed to provide him educational benefit.

26. As stated in Factual Findings 58 to 60, the District denied Student a FAPE in the June 20, 2007 written offer of placement by failing to include any time in the GE in the offer and include an explanation about why Student needed to be in an SDC when he had previously been in the GE full time. The District was proposing to move Student to a more restrictive setting and therefore the offer to Guardian should have been more detailed.

Did the District deny Student a FAPE at the October 13, 2006 IEP, by failing to respond to Student's parents' request for SL and reading comprehension services by an NPA?

27. As stated in Factual Findings 29 and 30, the District did not deny Student a FAPE by failing to respond to Guardian's request for NPA services. The evidence did not establish any loss of educational benefit or impede Student's right to a FAPE. The evidence also showed that Guardian was actively and meaningfully participating in the IEP process.

Did the District deny Student a FAPE by failing to consider IEEs and proposed goals prepared by the RLC and Dr. Reicks and submitted to the District on February 5, April 9, and June 13, 2007?

28. As stated in Factual Findings 65 to 68, the IEP team discussed reports from RLC at the February 9 meeting and RLC staff members provided a review of their assessments and the team asked questions. The goals proposed by the RLC presented at the April 9, 2007 IEP meeting were not discussed at an IEP meeting. However, Mr. Adams considered the goals prior to making an offer of placement to Student in June 20, 2007. Further, the goals were considered by Student's service providers as well. There was no FAPE denial based upon the District's alleged failure to consider the proposed goals from the RLC. Further, Dr. Reicks report dated March 27, 2007, was not considered at any IEP

meeting, but the District established that the report in the form of a letter from Dr. Reicks was not appropriate and therefore did not need to be considered by the District. However, the evidence established that Mr. Adams considered Dr. Reicks report prior to making the June 20, 2007 written offer of placement and there no FAPE denial related to consideration of Dr. Reicks' report.

Did the District deny Student a FAPE by failing to provide Student's parents with accurate and complete copies of Student's records, including copies of IEP documents, from February 5 to April 9, 2007?

29. As stated in Factual Findings in 61 to 64, the District did not deny Student a FAPE by failing to provide accurate and complete Student records. The evidence was insufficient to establish any denial of FAPE related to school records. The evidence showed that Guardian was provided records to Student and that draft IEP notes were submitted to CDE with the incorrect date, but Student otherwise had those records. There was no FAPE denial.

Did the District deny Student a FAPE by failing to timely hold an IEP meeting in spring 2007 and eventually giving Student an offer of placement and services on June 20, 2007, without an IEP team meeting?

30. As stated in Factual Findings 36 to 37, the District did not deny Student a FAPE by failing to timely hold an IEP in the spring 2007 and by making a written offer to Student without first holding an IEP meeting. The District was obligated to make Student a specific, written offer for services and it did so.

Reimbursement and/or Compensatory Education

31. When a LEA fails to provide FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of Burlington v. Department of Education* (1996) 471 U.S. 359, 369-371; 20 U.S.C. § 1415(i)(2)(C)(3).) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (*Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The right to compensatory education accrues when the district knows, or should know, that student is receiving an inappropriate education. Compensatory education does not, however, necessarily involve an obligation to provide day-for-day or session-for-session replacement for opportunity or time missed. (*Id.* at p. 1497.) The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of IDEA." (*Ibid.*) Both reimbursement and compensatory education issues are equitable issues requiring a balancing of the behaviors of the parties. The award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

32. Parents need not provide the exact placement or services required under IDEA, but must only provide a placement or services that address the student's needs and provide the student with educational benefit. (*Florence County Sch. Dist., Four v. Carter* (1993) 510 U.S. 7, 13 [114 S.Ct. 361]; *Alamo Heights Indep. Sch. Dist. v. State Board of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.) The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park v. Anaheim Union Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, citing *Student W.*, supra, 31 F.3d at 1496.)

33. A district is not required to pay for the cost of education, including special education and related services, for a pupil attending non-public or private school if the district made a FAPE available to the pupil and the pupil's parents chose to place the pupil in the non-public or private school. (20 U.S.C. § 1412(a)(10)(C)(i); 34 C.F.R. § 300.148(a); Ed. Code, § 56174.) A district may be required to reimburse a pupil's parents for the costs of a non-public or private school if the child previously received special education and related services from the district, and the district failed to make a FAPE available to the pupil. (20 U.S.C. § 1412(a)(10)(c)(ii); 34 C.F.R. § 300.148(c); Ed. Code, § 56175.)

34. As stated in Factual Findings 25, 28, 34, 46 and 59, the District failed to provide Student a FAPE by failing to provide SL services in accord with the June 15, 2006 IEP, by failing to develop and implement a goal to address his unique need in the area of auditory processing after June 15, 2006, by failing to develop a goal and address Student's need in the area of anxiety after October 13, 2006, failing to make Student an appropriate offer for ESY 2007 by failing to include OT services, and by failing to include the amount of time Student would spend in the GE in the offer and include an explanation why an SDC was more appropriate in the offer of placement in June 2007.

35. As stated in Factual Findings 69 to 74, Guardian privately placed Student at the RLC from November 2006 and ESY 2007 and maintained his placement at RLC for the 2007-2008 school year. The RLC was an appropriate placement for Student because Student had been receiving supplemental services beginning in November 2006 and the services were appropriate through ESY 2007. The program was appropriate to address Student's needs in the summer program and was designed to provide him educational benefit during that time frame. However, as stated in Factual Finding 71, 72 and 74, RLC is not an appropriate full-time placement for Student. It does not offer the appropriate services to address all areas of Student need and it is an NPA, with limited certification and not an NPS. The equities dictate that Guardian receive some reimbursement for placement of Student at RLC during the first semester of the 2007-2008 school year, but because the program was not appropriate, Guardian is not entitled to full reimbursement. Because the RLC is not a school and is otherwise not certified to provide a comprehensive program for Student, it would not be an adequate alternative to the public school setting for prospective placement.

36. As stated in Factual Finding 73, Guardian is entitled to reimbursement in the amount of \$7190 for services from November 2006 to ESY 2007. Guardian is entitled to

additional reimbursement for the period of August 14, 2007, through December 2007, in the amount of \$15389.58. The total reimbursement to Guardian for services at RLC is \$22579.58. Further, Guardian provided transportation to Student for a total of 49.2 miles per day, for 68 school days from August 14, 2007, through December 2007. The rate for reimbursement shall be .505 cents per mile. The total amount of mileage reimbursement is \$1689.53. The District is ordered to reimburse Guardian in the amount of \$24269.11 within 45 days from the date of this decision.

ORDER

1. The District shall reimburse Guardian in the amount of \$24269.11 within 45 days from the date of this decision.
2. All other requests for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed on Issues 1(A), 1(D), 1(E), and Issue 2 in its entirety. Student prevailed on Issues 1(B), 1(C), 1(F), and 1(G).

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: June 24, 2008



RICHARD M. CLARK
Administrative Law Judge
Office of Administrative Hearings