

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

EDUCATIONAL RIGHTS HOLDERS ON
BEHALF OF STUDENT,

OAH CASE NO. 2010110659

v.

JEFFERSON UNION HIGH SCHOOL
DISTRICT AND SAN MATEO COUNTY
BEHAVIORAL HEALTH AND RECOVERY,

JEFFERSON UNION HIGH SCHOOL
DISTRICT,

OAH CASE NO. 2010110380

v.

EDUCATIONAL RIGHTS HOLDERS ON
BEHALF OF STUDENT.

DECISION

Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH), State of California, heard this matter in Daly City, California, on February 7 through 10, and March 28, and 29, 2011.

Jefferson Union High School District (District), was represented by Eugene Whitlock, San Mateo County Deputy Counsel. Sherry Segalas, District's Director of Pupil Personnel Services, was present during the hearing. Roxanne Dean was present during the hearing on behalf of San Mateo County Behavioral Health and Recovery (County), as its Chapter 26.5 compliance coordinator.¹

¹ Chapter 26.5 of the Government Code (§ 7570, et seq., also known as Assembly Bill (AB) 3632) governs the delivery of educationally based mental health services to public school pupils who qualify under stated criteria, including eligibility for special education.

Student and his two Educational Rights Holders (Holder No. 1, Ms. M., and Holder No. 2, Ms. P, Student's aunt, collectively referred to as Student) were generally present throughout the hearing and were represented by attorneys Christian Knox, of Ruderman & Knox, and Karie Lew, of Legal Advocates for Children and Youth (LACY). In addition, Student's Foster Parent was occasionally present.

District filed its request for a special education due process hearing (complaint) with OAH on November 8, 2010. Student filed his complaint with OAH on November 18, 2010. On November 30, 2010, OAH granted Student's motion to consolidate the cases, and designated statutory timelines to be governed by Student's case. On December 10, 2010, OAH granted Student's motion for a continuance to the above hearing dates. At the hearing, oral and documentary evidence were received. On February 10, 2011, a continuance was granted until the hearing resumed on March 28, 2011. On March 29, 2011, a continuance was granted to permit the parties to file written closing statements. The record remained open until May 2, 2011, for the submission of written closing arguments. Student and District timely submitted closing briefs, the record was closed on May 2, 2011, and the matter was submitted for decision.²

ISSUES³

Student's Issues:

Issue 1: In connection with District's triennial assessment dated November 20, 2008, did District fail to adequately assess Student's ability to produce written work?⁴

Issue 2: Beginning on November 8, 2008, did District deny Student a free appropriate public education (FAPE) for the 2008-2009 school year by failing to offer or provide him with:

- (a) annual goals in the areas of math, written expression and self-advocacy;
- (b) one-to-one instruction services to address Student's executive functioning deficits;⁵

² District's brief has been marked as Exhibit D-39, and Student's brief has been marked as Exhibit S-70.

³ The issues have been reorganized, renumbered, and reworded in the interests of clarity and consistency with the applicable law. In addition, during the hearing, Student withdrew certain issues as indicated.

⁴ Student's Issues 1(a) and 1(c) were withdrawn (previously numbered Issue 2).

⁵ Student contends that the instructor should be a "masters level educational psychologist."

- (c) a one-to-one instructional aide;
- (d) an appropriate transition plan, and transition goals and services;
- (e) school-based counseling services;
- (f) the accommodations, modifications and annual goals provided for in Student's individualized education program (IEP);⁶ and
- (g) accommodations and modifications, in addition to those in Student's IEP, for modified grading?

Issue 3: Did District procedurally deny Student a FAPE during the 2008-2009 school year by failing to have a general education teacher at his December 2008 IEP team meeting?

Issue 4: Did District deny Student a FAPE during the 2009-2010 school year, and 2010 summer school, by failing to offer or provide him with:⁷

- (a) appropriate, measurable annual goals in the areas of math, written expression, self-advocacy, on-task behavior, work completion, and organization (check sheets);
- (b) one-to-one instruction services to address Student's executive functioning deficits;
- (c) an adequately trained one-to-one instructional aide;
- (d) an appropriate transition plan, and transition goals and services;
- (e) school-based counseling services;
- (f) the accommodations, modifications and annual goals provided for in Student's IEPs;
- (g) accommodations and modifications in addition to those in Student's IEPs, for modified grading;
- (i) the recommendations of the Diagnostic Center of Northern California (DCNC) to address Student's executive functioning deficits;
- (j) assistive technology services, supports and equipment to address Student's ability to produce written work; and
- (k) summer school services as agreed to in Student's May 2010 IEP?

Issue 5: Did District procedurally deny Student a FAPE during the 2009-2010 school year by failing to:

⁶ Issues 2(f), 4(f), 4(k), and 6(g) involve application of the laws regarding failure to implement material components of an IEP.

⁷ Student's issue mislabeled the summer school program as extended school year (ESY) services. However, the ESY laws are not applicable here, where District offered Student home schooling over the summer without regard to ESY.

- (a) convene an IEP team meeting on or after September 23, 2009, to consider the results of the DCNC assessment;
- (b) convene an IEP team meeting within 30 days of Student's November 20, 2009 written request;
- (c) convene an annual IEP team meeting in December 2009;
- (d) make a clear offer of FAPE in the District's IEP offers made during that school year;
- (e) review Student's progress on his annual goals; and,
- (f) consider parental concerns at IEP team meetings held during that school year?

Issue 6: Did District deny Student a FAPE during the 2010-2011 school year by failing to offer or provide him with:⁸

- (a) appropriate, measurable annual goals in the areas of math, written expression, self-advocacy, on-task behavior, work completion, and organization (check sheets);
- (b) placement in the least restrictive environment;
- (c) one-to-one instruction services to address Student's executive functioning deficits;
- (d) an adequately trained one-to-one instructional aide;
- (e) an appropriate transition plan, and transition goals and services;
- (f) school-based counseling services;
- (g) the accommodations, modifications and annual goals provided for in Student's IEPs;
- (h) accommodations and modifications in addition to those in Student's IEPs, for modified grading;
- (i) the DCNC recommendations to address Student's executive functioning deficits; and
- (j) assistive technology services, supports and equipment to address Student's ability to produce written work?

Issue 7: Did District procedurally deny Student a FAPE during the 2010-2011 school year by:⁹

- (a) predetermining Student's placement;
- (b) failing to make a clear offer of FAPE in the IEP offers made during that school year;

⁸ Student's original issue for this school year also included a claimed denial of FAPE for failure to provide a highly qualified instructor, which he abandoned in his closing brief.

⁹ Student's Issue 7(b) regarding educational records was resolved and withdrawn prior to hearing.

- (c) failing to review Student's progress on his annual goals;
- (d) failing to consider parental concerns at IEP team meetings held during that school year; and
- (e) failing to timely convene an IEP team meeting in September 2010 at a mutually agreeable time?

Issue 8: Did County fail to conduct a timely and adequate mental health assessment in September 2010?

Issue 9: Did County deny Student a FAPE during the 2010-2011 school year by predetermining Student's placement?¹⁰

District's Issue:

Issue 10: Did District's IEP offer dated September 15, 2010, as modified on November 3, 2010, for a therapeutic day school placement, including specialized academic instruction, psychological services, and occupational therapy, offer Student a FAPE?

CONTENTIONS AND REQUESTED REMEDIES

District requests an order determining that its September and November 2010 IEP offers for a special education therapeutic day school (TDS) placement, including specialized academic instruction, psychological services, and "occupational therapy," offered Student a FAPE.¹¹ District and County contend that Student's primary disability is emotional disturbance, which interferes with his educational progress, and that, despite District's provision of many services, accommodations, and modifications since 2008, Student has not progressed in the general education curriculum because his significant emotional deficits need to be addressed in a therapeutic program outside of the regular educational environment. Therefore, District requests an order affirming the TDS placement, and absolving District of responsibility for Student's education should he refuse the placement. County contends that it conducted an appropriate mental health assessment in September 2010, and that it did not predetermine its recommendation for a TDS placement.

Student contends that District's offer for a TDS placement was not appropriate and did not offer him a FAPE. Overall, Student asserts that District has denied him a FAPE since November 2008, when it failed to accurately assess his executive functioning deficits and ability to produce written work, and thereafter made IEP offers that denied him a FAPE because they did not appropriately address his executive functioning deficits, and did not provide him with adequate annual goals and related services, including one-to-one

¹⁰ Student withdrew Issues 9(b) and 9(c) against the County.

¹¹ The TDS program occupational therapy service refers to vocational and employment services provided by a County occupational therapist.

instructional services, a one-to-one aide, and transition plans, goals and services; and did not provide him with appropriate accommodations and modifications to meet his unique needs related to his disability in order to progress in high school. In addition, Student contends that the District committed specified procedural violations that denied him a FAPE during all three school years. Finally, Student contends that County denied Student a FAPE in September 2010 when it failed to conduct a timely and adequate mental health assessment, and predetermined his placement.

Based on these contentions, Student requests remedies including 360 hours of compensatory education in the areas of executive functioning and assistive technology, 300 hours of compensatory education in a credit recovery program, and continued placement at his comprehensive high school campus. In addition, Student requests orders for District to fund Dr. John Brentar's attendance at an IEP team meeting to develop appropriate annual goals, accommodations and modifications to meet Student's needs; to fund Dr. Brentar's training of Student's one-to-one aide; and to contract with a nonpublic agency (NPA) to identify Student's transition needs and services and develop a transition plan.

FACTUAL FINDINGS

Jurisdiction, Background, and FAPE

1. Student is 18 years old, has resided within the boundaries of the District since he was about 10 years old, and is in 11th grade at Oceana High School (Oceana), a comprehensive campus. Student lived with his mother out-of-state until the age of 10, during which time he reportedly suffered significant trauma, physical abuse, possible sexual abuse, and exposure to violence, alcohol and drug abuse in the home environment.

2. From the age of 10, Student resided with his grandmother (Grandmother) in Pacifica, California, until March 2010 when she passed away. Student was made a ward of the juvenile dependency court, who appointed Educational Rights Holders No. 1 and No. 2 in April 2010. After Student turned 18 in December 2010, he assigned his educational rights to his Educational Rights Holders.

3. Student has received mental health services since the age of 10, including therapy for depression and anger management, and medical diagnoses for attention deficit hyperactivity disorder (ADHD), dyslexia, dysgraphia, attachment disorder, depression, and post traumatic stress disorder (PTSD). Student has at least average cognitive ability, with good vocabulary, oral expression, and social skills, and therefore appears to have more life-coping and functional skills than he actually possesses.

4. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Improvement Act (IDEA), defined as special education and related services that are available to the pupil at no cost to the parent, meet the state educational standards, and conform to the pupil's IEP.

Lack of Evidence for the Period from November 18, 2008, to December 15, 2008

5. Student contends that, beginning on November 18, 2008, District denied him a FAPE for the 2008-2009, 2009-2010, and 2010-2011 school years, as evaluated below. The beginning date reflects the outside limits of the applicable two-year statute of limitations based on the date Student filed his complaint, on November 18, 2010.

6. However, there is no evidence as to Student's special education placement and services from November 18, 2008, to the IEP team meeting on December 15, 2008. Accordingly, this decision finds that Student did not meet his burden with respect to his claims during that time period. District's IEP offer of September 4, 2008, was not agreed to by Grandmother. The record suggests that the last IEP prior to that date would have been an IEP team meeting in October 2007; however, that IEP was never placed in evidence, nor was there testimony about its substance. Therefore, Student's claim that his IEP was deficient or not implemented for the time period from November 18, 2008, to December 15, 2008, was not sustained.

7. For the 2008-2009 school year, in tenth grade, Student's continued eligibility for special education was under the category of a specific learning disability (SLD), and the September 2008 IEP noted that "[d]yslexia and dysgraphia impede progress in the general education curriculum."¹² In ninth grade the previous year, Student had failed to pass core Science and Humanities classes required for graduation, did very little work and missed a lot of assignments. Over the course of two IEP team meetings on September 4, and October 6, 2008, District proposed to retain Student in ninth grade. Grandmother disagreed, and noted that Student needed to be in 10th grade in order to prevent harm to his self-esteem, learned best by hearing the class material, and needed multiple accommodations, including one-to-one assistance, a reduction in paper and pencil tasks, a laptop computer, and modified assignments.

Assessments and Student's Unique Needs Related to His Disabilities

Appropriateness of November 2008 Triennial Assessment

8. Before any action is taken with respect to the initial placement of a child with special needs, an assessment of the pupil's educational needs shall be conducted in all areas related to suspected disability. Thereafter, special education pupils shall be reassessed at least once every three years (referred to as a triennial assessment), and may be reassessed not more frequently than once a year, unless the parent and the school district agree otherwise, or unless the district determines that reassessment is warranted.

¹² Dyslexia is a learning disability that affect's a person's ability to read, write, and spell, commonly characterized by number and letter reversals. Dysgraphia is a related disability, defined as a significant difficulty with the process of writing, from the physical acts of handwriting to the transfer of thoughts from the mind to the written or typed word. Neither deficit, in itself, renders a pupil eligible for special education.

9. Another IEP team meeting was held on October 10, 2008, at which District's school psychologist Lane Coopersmith and other District members of the team recommended assessing Student in order to both complete his triennial evaluation, and to consider a placement in the County's TDS program, rather than in the general education setting. Grandmother opined that a TDS placement would be too restrictive, but nevertheless consented to the assessment. Ms. P, Educational Rights Holder No. 1, credibly testified that, at that meeting, Ms. Coopersmith informed the team that after the assessment, Student would "lose" his eligibility designation based on dyslexia and dysgraphia. Thereafter, Ms. Coopersmith, conducted a psycho-educational assessment of Student for his triennial evaluation on November 20, 2008, and issued a written report.

10. Student contends that the District failed to adequately assess his "ability to produce written work" in connection with his November 2008 triennial assessment, and no other aspect of his triennial assessment is at issue. Other components of the assessment are nevertheless relevant to identify Student's unique needs relating to his disabilities. District contends that the assessment of Student's writing ability was appropriate and complied with the law.

11. At the time of the assessment, Student was 15 years old, and was in the 10th grade at Oceana. Ms. Coopersmith is a licensed educational psychologist and marriage family child therapist, and has been a school psychologist for 16 years. She obtained a master's degree in counseling in 1980, and a pupil personnel services credential in 1996. She was therefore qualified to conduct Student's psycho-educational assessment. Ms. Coopersmith reviewed Student's records, including his developmental history, conducted a teacher survey, and observed Student in the classroom and at lunch. In addition, she administered standardized tests and relied on assessment tests conducted by others.

12. Ms. Coopersmith found, in Student's records, that in fourth grade he demonstrated a visual motor integration deficit that interfered with his completion of written assignments. In fifth through eighth grades, Student received special education in a resource specialist program (RSP) with annual goals for written expression and work completion. In December 2005, a psychological evaluation reported that Student had a significant attention deficit, and in December 2006, a report indicated that penmanship and written mechanics were areas of weakness, along with a significant discrepancy between Student's ability and achievement in the areas of math calculation and fluency. While she found mention of dyslexia and dysgraphia in his records, she found no source documents identifying when those diagnoses had been made, or by whom.

13. Ms. Coopersmith did not formally assess Student's intellectual functioning. Instead, she reviewed prior assessments, including an assessment in April 2008 conducted by the Youth and Family Enrichment Services (YFES), an NPA, in San Mateo County, where Student obtained a full scale intelligence quotient (IQ) score within the average range, with a relatively lower working memory score. The YFES medically diagnosed Student as suffering from PTSD, and found that Student did not demonstrate any cognitive functioning deficits (including executive functioning deficits to the extent it was even assessed), but

suffered from psychological pain, was distressed by everyday events, and had low coping resources. The YFES report stated: “While considering his history and diagnosed dyslexia it is not surprising that academics would be a challenge for [Student]. [Student’s] hard time focusing may be due to his tendency to daydream and to be hypervigilant of his surroundings.” YFES made no mention of Student’s ADHD impairment, which also significantly impacts attention and focus.

14. Ms. Coopersmith administered the Bender-Gestalt Visual Motor Integration Test (BGVMI) to assess Student’s visual motor integration skills and found that he had a significant difficulty with visual motor integration skills, necessary for translating visual to written work, and obtained a standardized score in the deficient range.

15. Ms. Coopersmith administered the Wechsler Individual Achievement Test II (WIAT-II), designed to measure Student’s academic progress. The writing composite included spelling and written expression. Ms. Coopersmith determined that Student had problems with “penmanship,” which demonstrated dyslexic features such as “reversing y’s, g’s and j’s.” He also used lower and upper case letters indiscriminately. The evidence established that Ms. Coopersmith had already concluded Student did not have dyslexia or dysgraphia prior to the assessment. In the assessment, she concluded that Student’s problems did not amount to dyslexia, and did not appear to interfere with either Student’s comprehension or his ability to write fluently. Her conclusion was unclear and contradicted by her recommendation that Student required a computer to produce written work. Ms. Coopersmith’s predetermination of the assessment results negatively impacted her credibility.

16. As part of the triennial assessment, Neil Salazar, Student’s RSP teacher, administered the Woodcock-Johnson Test of Achievement III (WJ-III). Mr. Salazar holds a clear multiple subject teaching credential, obtained in June 2008; and he also obtained a level one special education specialist credential for mild/moderate disabilities at the same time. Thus, at the time of this assessment, he was a new teacher with little assessment experience, though he had been an instructional aide for a number of years. Aside from Student’s low fifth to sixth grade level math scores, Mr. Salazar reported that Student obtained a score equivalent to a grade level over 18 (i.e., beyond college level) in both passage comprehension and writing samples. Overall, Student’s broad academic skills were at a grade equivalent of 10.8, and the academic application score (including comprehension, applied problems and writing samples) placed Student at a grade level of 13.1. However, as found below, the writing sample portion of the assessment was flawed and did not address writing production beyond the level of one sentence responses. Ms. Coopersmith did not question Student’s scores on the WJ-III or check Mr. Salazar’s protocols for the test.

17. On the Behavior Rating Inventory of Executive Functioning (BRIEF), a rating questionnaire given to Grandmother and teachers, Ms. Coopersmith found that Student had problematic scores in a number of areas that are related to the production of written school work, including reduced initiation skills, working memory, ability to plan and organize, organization of materials, and self-monitoring. She determined that Student demonstrated

significant difficulties with executive functioning and his overall global executive composite was “extreme.” On the Behavior Assessment System for Children-2, a self-assessment, many of Student’s scores were in the at-risk or clinically significant ranges.¹³ Many of his symptoms were indicative of PTSD, if not depression or an anxiety disorder, including dissatisfaction with his teachers and his own performance, and a lowered self-esteem.

18. Overall, Ms. Coopersmith concluded that Student had processing difficulties that impeded his ability to achieve at his estimated learning potential “in the areas of psychomotor integration and attention.” In addition, she identified emotional issues that should be addressed, and recommended that his eligibility for special education should be changed from SLD to other health impairment (OHI).¹⁴ Ms. Coopersmith did not request or conduct an assistive technology assessment. Dysgraphia was not mentioned or discussed in her assessment report. Ms. Coopersmith made specific recommendations in her report for accommodations and modifications to support Student’s deficits.

Student’s Expert, Dr. Brentar

19. Student’s expert, Dr. Brentar, was persuasive that District’s 2008 triennial assessment did not adequately assess Student’s ability to produce written work, primarily because the WJ-III was not properly administered to assess Student’s writing ability. Dr. Brentar has been a licensed clinical psychologist for 20 years, and has been the executive director of the Morrissey/Compton Educational Center in Palo Alto since 2006. He is also a clinical instructor in the Division of Child Psychiatry at Stanford University’s Department of Psychiatry and Behavioral Sciences. He was previously with the Children’s Health Council for over 10 years, primarily as chief psychologist. He has over 20 years of experience in assessing children and adolescents, including many IEP’s and independent educational evaluations (IEE’s). Dr. Brentar specializes in executive functioning deficits, and conducts trainings on executive functioning, which he defined as a collection of neuropsychological processing skills with which a person is able to perform goal-directed behaviors. Dr. Brentar qualified as an expert in many areas, including child, adolescent, and adult psychology; cognitive, psychological, and educationally related assessments; and the assessment and treatment of pupils with executive functioning deficits and dysgraphia.

20. Dr. Brentar reviewed Student’s educational records, including prior assessments, met Student and observed him twice in the school setting at Oceana, and assessed him over a period of almost four hours over two sessions in February 2011. Dr.

¹³ Ms. Coopersmith did not report the scores and it was impossible to tell which were in the clinically significant range that called for services and supports.

¹⁴ To be eligible for special education services under the category of other health impairment, an IEP team must determine that the pupil has limited strength, vitality or alertness, due to chronic or acute health problems which adversely affect the pupil’s educational performance. Student does not challenge the change in his category of eligibility and it is not an issue in this proceeding.

Brentar did not administer formal, standardized tests and did not submit a written report. Dr. Brentar reviewed Student's assessments conducted by YFES in April 2008, and by the Diagnostic Center of Northern California (DCNC) in September 2009.

21. Dr. Brentar was persuasive in establishing that Student had dysgraphia, or the neurodevelopmental disorder of written expression, based on a variety of factors, including a physical analysis of his handwriting, his visual motor integration weakness and the poor quality and production of his work. Dr. Brentar's testimony was reasoned, coherent and credible and he did not demonstrate any bias in favor of Student in his analysis. Due to Dr. Brentar's expertise in this area, and Ms. Coopersmith's demonstrated goal to eliminate a neurodevelopmental deficit in favor of a psychological deficit, Dr. Brentar's opinion was entitled to more weight.

22. Dr. Brentar also credibly established that Mr. Salazar's academic assessment in the domain of writing was flawed and did not follow the WJ-III protocols. When the protocols were produced by the District during the hearing, Dr. Brentar demonstrated that Mr. Salazar did not give legitimate scores and achieved artificially inflated scores for Student's writing samples on the test. Mr. Salazar used the incorrect criteria to score Student's responses and gave Student higher scores than those called for in the protocols. On the spelling test, due to Student's dyslexia or dysgraphia, he made many spelling errors that Mr. Salazar disregarded, and the use of the wrong letters on some words should not have been scored. Because Mr. Salazar did not score Student's writing fluency test, Ms. Coopersmith's reliance on the WJ-III scores ensured that the District failed to fully assess Student's writing fluency. Dr. Brentar determined that Student's writing scores, had the WJ-III been administered correctly, were more likely in the grade equivalency range of four-point seven, to seventh grade.

23. Dr. Brentar was not persuasive that District should have conducted some type of assistive technology assessment in order to determine what technologies could help improve his production of assigned work. Student did not meet his burden of proof on this issue for several reasons. First, Student was represented by counsel, and his complaint and prehearing conference statement never identified failure to conduct an assistive technology assessment as an issue in this case. Second, assuming that the issue was impliedly identified due to its relation to work production, Dr. Brentar did not explain the basis of his opinion that such an assessment would have yielded information material to understanding Student's needs. Third, Grandmother had specifically asked the District to look at technologies such as a laptop to address Student's lack of work production, and Ms. Coopersmith concluded that Student needed a computer for written assignments. Student did not present any evidence as to what type of assistive technology assessment should have been done.

24. Based on the foregoing, District failed to conduct an appropriate assessment of Student's writing abilities and the failure constituted a procedural violation. The writing portions of the WJ-III were flawed, Student's writing fluency was not assessed, and his executive functioning and dysgraphia deficits were minimized. The District, and all members of Student's December 2008 IEP team, received inaccurate information about

Student's functional and academic writing abilities. At the December 2008 IEP team meeting, the IEP team believed that Student possessed developmentally appropriate abilities to perform written work when that was not the case, and offered instruction and related services without accurate information. Grandmother's rights to participate in the IEP process were therefore necessarily negatively impacted, and Student lost educational benefit, and was therefore denied a FAPE.¹⁵

DCNC 2009 Assessment

25. The California Department of Education (CDE) operates three regional assessment centers to assist school districts with assessments. In May 2009, Grandmother expressed disagreement with District's triennial psycho-educational assessment and requested an IEE. District referred Student to the DCNC center, located in Fremont, to address what accounted for his continued lack of progress; what was an appropriate psycho-educational diagnosis; and how District could prepare Student for postsecondary options. In September 2009, the DCNC found that Student had both a neurodevelopmental disorder, involving ADHD and severe deficits in executive functioning, and an emotional disturbance disorder, including a significant attachment disorder, PTSD, and depression.

26. In the 2009 DCNC assessment report, the center's assessors, Priscilla Harvell, M.S., and Marji Stivers, Ph.D., recommended significantly increased support for Student, to include mental health services and reconsideration of his eligibility for Chapter 26.5 services from the County, the provision of "explicit and intensive [executive functioning] instruction in self-management, problem-solving, decision-making, and organizational skills to maximize future independence," and the development of a transition plan with "interventions in educational, employment/vocational domains." At the bottom line, the DCNC warned: "Without significantly increased support [Student] is unlikely to graduate from school and is at risk of behaving (unintentionally) in ways that place himself and others at risk of serious harm."

27. The DCNC determined, based the combination of Student's ADHD and executive functioning deficits alone, without regard to emotional disturbance, that he had "extremely severe deficits for someone in his age" in the following areas:

- Initiation – critical abilities needed to determine where to start, assemble and prepare work-space and materials, focus attention, and mobilize energy toward the task;
- Organization of time, materials, and thought processes;
- Planning – breaking down a task or activity into doable parts;
- Sequencing – figuring out the best order for steps, mapping the path to completion;

¹⁵ Due to the number of violations found, this Decision will address remedies in a separate section.

- Self-monitoring of performance - tracking progress toward task completion; monitoring whether efforts remain goal-directed (rather than on a tangent); and
- Shifting – revising plans as strategies fall or in response to changes in environmental demands.

28. Based on both Student’s neurodevelopmental disorder and emotional disturbance, the DCNC determined that:

He has not yet developed capacities beyond the five-to-six year-old level to organize himself (his time, materials, as well as thought processes) sufficiently to produce work. Because of the strength of his learning abilities, he retains information and concepts without the repeated exposure and practice that comes with homework, studying, and completing assignments. While his major deficits do not prevent him from learning grade-level material, they do prevent the level of productivity necessary for him to earn passing grades in his courses and accumulate units for graduation.¹⁶

29. District did not have the benefit of the DCNC assessment in November 2008, and cannot be charged with knowledge of it until District received the report in late September 2009. It is not legally appropriate to evaluate District’s 2008 triennial IEP assessment in hindsight. However, the DCNC assessment is relevant to understand the complexity of Student disabilities and his unique needs related to those disabilities. In addition, independent of the DCNC evaluation, Ms. Coopersmith’s psycho-educational assessment obtained information similar to that obtained by DCNC, in that she found that Student had significant executive functioning deficits and ADHD, as well as emotional problems. But Ms. Coopersmith downplayed the severity of his executive functioning deficits as her assessment emphasized Student’s apparent depression and “lack of motivation” as an emotional and attitudinal problem, rather than his neurodevelopmental deficits.

Presence of Teachers at the IEP Team Meeting of December 2008

30. Student contends that no general education teacher was present at his December 2008 IEP team meeting as required by law. A pupil’s IEP team shall include specified participants, including not less than one regular education teacher of the pupil, if the pupil is, or may be, participating in the regular education environment. District contends that Student did not meet his burden on this issue, and even if he did, it was a procedural violation that did not result in a denial of FAPE. To determine whether District denied

¹⁶ Overall, Dr. Brentar agreed with the DCNC evaluation; however, he estimated that Student’s depressed skill sets in executive functioning, from 2008 to the present, were, and are at about the third or fourth grade level, rather than a first grade level as estimated by the DCNC.

Student a FAPE in connection with any of his IEP's at issue in this case, the IEP must meet both the procedural and substantive requirements of the law. For a procedural inadequacy to constitute a denial of FAPE, it must have (a) impeded the child's right to a FAPE, (b) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or (c) caused a deprivation of educational benefits.

31. The evidence established that the IEP team meeting began on December 15, 2008, with the following persons present: Student, Grandmother, a family advocate, Oceana Vice Principal Jonas Barbour, District transition specialist Megan Curran Sanchez, school psychologist Ms. Coopersmith, and the special education RSP teacher, Mr. Salazar.

32. As of the fall of 2008, Student was placed in the general education environment for about 82 percent of the time, including classes in algebra, biology, world history, humanities, physical education, and a survivor of the fittest class, and attended special education programs for about 18 percent of the time, in Mr. Salazar's "tutorial" RSP class for one period every other day. Accordingly, a general education teacher was required to be at the meeting because Student was participating in the regular education environment to a significant extent.

33. While Mr. Salazar held a general education credential, as well as a special education credential, he was Student's special education RSP teacher and case manager, and the evidence did not establish that he was employed at Oceana as a general education teacher. Mr. Barbour held a clear administrative services credential and a clear single subject teaching credential in mathematics, and taught at Oceana for 10 years. However, Mr. Barbour was present at the IEP team meeting as the administrative representative and was a Vice Principal for Oceana at the time of this meeting, and not as a teacher, and had not taught Student in any general education class.

34. The evidence established that no general education teacher from any of Student's six general education classes attended at the December 2008 IEP team meeting. Based upon the substantial amount of placement in general education, Student's difficulties in the prior school year, and District's concern about a repeated failure in 10th grade, it was paramount for District to have a regular education teacher at the IEP team meeting. A regular education teacher could have provided valuable advice on how to support Student and implement his IEP in regular education. Accordingly, District committed a procedural violation. Because the December 2008 IEP team did not have vital information, Grandmother's rights to participate in the IEP process were necessarily negatively impacted, and Student lost educational benefit. The violation therefore denied Student a FAPE. At the next IEP team meeting in January 2010, District corrected the violation.

Substantive FAPE for the 2008-2009, 2009-2010, and 2010-2011 School Years

35. For a school district's IEP to offer a substantive FAPE, the proposed program must be specially designed to address the pupil's unique needs and be reasonably calculated to provide some educational benefit, including measurable annual goals. IEP offers are to be

evaluated in light of the information available at the time the offers were made, and are not to be judged in hindsight.

Annual Goals to Meet Student's Unique Needs

36. Student first contends that District's IEPs denied him a FAPE for all three school years by failing to offer annual goals to meet all of his unique needs, and failing to offer appropriate, measurable annual goals in stated areas. District argues that Student did not meet his burden of proof and that the goals were appropriate for all school years.

37. By December 2008, following the triennial assessment, District was aware that Student had unique needs or deficits in the areas of math fluency and calculation; visual motor integration (translating visual to written); ADHD and executive functioning, affecting his ability to initiate, plan, organize, and sustain future-oriented problem solving in working memory, including production of written work; attention; and significant emotional needs related to attachment disorder, PTSD and depression, including self advocacy.

2008-2009 School Year: Lack of Annual Goals for Math and Written Expression

38. The December 2008 IEP offered three annual goals that Student did not place at issue. Goal 1 was a work completion goal, which provided that by December 15, 2009, Student would complete and turn in 90 percent of class work assignments and 80 percent of homework assignments. Goal 2 was a self-advocacy goal which provided that, by December 15, 2009, Student would attend "office hours" three times a week as arranged by Student and his teachers.¹⁷ Goal 3 was a class behavior goal which provided that Student would remain "on task" 80 percent of the time during class time with only one to two prompts from classroom teachers and staff.

39. Student contends that District omitted additional goals necessary to meet his needs in the areas of math, organization, and writing. However, Student's complaint did not make a claim about an organization goal for this school year. Student's issues must be limited to those in his complaint.¹⁸ Therefore, for the 2008-2009 school year, the absence or adequacy of any goal related to organization is not at issue.

40. In September 2008, District had offered Student additional annual goals as follows: a writing goal for Student, when given written assignments, to use prewriting strategies with the assistance of his teachers (including outlines and graphic organizers) to produce "chunk" paragraphs and essays that contained standard sentence and paragraph

¹⁷ Office hours were those unscheduled times before or after school when the high school teachers were available to talk individually with pupils. Student's claim that District did not offer a self-advocacy goal was mistaken.

¹⁸ 20 U.S.C. § 1415(f)(3)(B); Education Code § 56502, subd. (i).

elements (such as a topic sentence); and a math goal for Student to solve linear equations and inequalities..

41. At hearing, Mr. Salazar was questioned as to the omission of the above writing and math goals (along with a sixth organization goal) from the District's December 2008 IEP offer. He was surprised to see that the IEP did not contain the goals for writing and math, and was persuasive that their omission was inadvertent. In particular, Student had had a written expression goal since fifth grade, was still struggling in that area, and had a demonstrated deficit in math skills. In the same December 2008 IEP, District offered to have Mr. Salazar work with Student on prewriting strategies as an accommodation but did not offer a written expression goal. The evidence established that District should have offered Student goals in writing and math as he clearly had deficits in both areas that District was obligated to address. Student was without annual goals to address his writing and math needs for over a year until the next annual IEP was held in January 2010. Since his poor ability to write was a primary impediment to his progress, and he needed to pass Algebra I, the absence of both of these material goals substantively denied Student a FAPE.

2009-2010 Annual Goals: Lack of Appropriate Goals for Math, Written Expression, Self-Advocacy, On-Task Behavior, Work Completion, and Organization

42. Student contends that District's annual goals for the 2009-2010 school year did not comply with the law, and that District failed to offer or provide IEP goals for math, written expression, self-advocacy, on task behavior, work completion and organization. The December 2008 IEP remained in effect until the next IEP team meetings in January and February 2010, when Grandmother consented to new offers. Therefore, the defects in Student's goals continued and he still lacked any annual goals to address his needs related to writing and math.

43. For the 2009-2010 school year, Student contends that he should have had an organization goal. As found above, District inadvertently omitted an annual organization goal from Student's December 2008 IEP. The eliminated goal provided that Student would update his planner daily four out of five days of the week as monitored by his teachers. The December 2008 IEP provided, as an accommodation, that Mr. Salazar would work with Student in the RSP Tutorial class to use an Internet-based calendar. However, there was no annual goal to be monitored for measurable progress. Accordingly, District should have, at some point between December 2008, and January 2010, realized that Student did not have annual goals for written expression, math and organization, and failed to call an IEP team meeting, or propose an IEP addendum to correct the mistake. District's failure to have critical annual goals to be monitored in these areas of need substantively denied him a FAPE.

44. Student established that, by the start of the 2009-2010 school year, District knew or should have known that the self-advocacy goal for office hours was not working. Student had given up on it, and District staff did not oversee or monitor the goal. As set forth in Factual Findings 82 through 84, District had materially failed to implement the goal and, by early 2009, had left implementation of the goal up to Student, who had little or no

self-advocacy or initiative skills. Therefore, the self-advocacy goal itself failed and needed adjustment to provide criteria for its implementation. District's failure to offer to revise the goal in an area critical to meet Student's emotional regulation, self-esteem, and self-advocacy needs until January 2010, denied him a FAPE.

45. The January 2010 IEP offered new annual goals. Goal 1 was a revised work production goal, for Student to demonstrate mastery of the curriculum through "work completion of modified assignments using accommodations and services." Goal 2 was a revised self-advocacy goal for him to "check in" with a qualified, trusted counselor on a daily basis. Goal 3 was an organization goal for Student to begin and then increase his ability to fill in the responsibilities on a teacher-made and completed check sheet, and to prioritize them.

46. Following the January 2010 IEP team meeting, District held a follow-up IEP meeting to complete the goals on February 12, 2010, at which time District offered two more annual goals for math and written language.¹⁹ Goal 4 provided that Student would pass an Algebra I class as required for graduation, by taking tests in a quiet environment and having use of notes. Goal 5 was a written language goal, with a baseline that Student could write two grammatically correct sentences, by the end of one year, and provided that he would write an eight-paragraph essay following the conventional rules of the written English language. Grandmother consented to both the January and February, 2010 IEP's, including the goals.

47. The first and third goals addressed Student's executive functioning deficits but were vague and not measurable. Student's baseline for work completion was noted as anywhere from five to 20 percent; however, there was no standard provided as to what constituted a completed assignment, or when Student had to have it completed in order to be counted. Mr. Salazar, who wrote all the goals, admitted at hearing that the work completion goal was not measurable. The organization goal did not meet Student's needs because it was not measurable as there was no defined "increase" from a baseline of zero ability to fill in a check list to any measurable amount of progress.

48. The daily check-in goal for self-advocacy was a well-intentioned improvement from the previous office hours goal. While there was no definition of "trust," the goal was otherwise measurable. As to the math goal, Student had problems in math calculation and fluency, and tended to compute math problems in his head instead of working through the problems step-by-step on paper. The math goal was vague and inappropriate, because it did not address an area of unique need related to Student's disabilities, but only his academic need to pass a course. Student already had accommodations for taking tests in a quiet environment, and this goal did not provide support to pass a math class, such as calculating

¹⁹ In addition, a separate annual transition goal to support Student's transition plan was proposed and accepted, which is addressed in the transition plan section.

in written steps, in which progress could be measured over time. Finally, the fifth written language goal was measurable over an annual period and met his written expression needs.

49. Grandmother passed away in March 2010. District held an IEP team meeting on May 5, 2010, to review Student's educational progress, goals and placement, and prepare for the next school year, and no new or different goals were proposed. The IEP team reconvened on May 25, 2010. Both May IEP's were addendums to the January 2010 IEP. Student had made some progress but, overall, continued to produce very little written work for his classes.

50. At the May 25 IEP team meeting, Educational Rights Holders submitted four more proposed goals addressing Student's executive functioning needs which were thoughtful, if not overly detailed. The evidence established that they were adopted by the IEP team as proposed. Goal 6 was a new organization goal for Student, with the assistance of his one-to-one aide, to keep a separate three-ring binder for each class with specified contents, including a table of contents, daily agenda, and numbered and dated pages, to be reviewed daily, and measured by compliance with the content requirements on a weekly basis. Goal 7 was a new work completion goal, to break work into manageable chunks with four components by which Student, by the annual date, would: (a) complete at least 75 percent of class work by using written sentence starters and graphic organizers; (b) at the end of each day, review the notes he and his aide took and discuss what he remembered and what he did not understand; (c) reflect and discuss what went well, what he was concerned about, and what his next steps would be; and (d) make a plan, with the aide's assistance, to meet with his teachers when he needed help clarifying or completing an assignment. Goal 8 was a self-management goal to improve Student's on-task behaviors with five components, including for Student to respond to prompts from his teachers within 20 seconds, or for him to ask the aide for clarification, to complete lists of tasks to remember the steps to take, and other items all to be measured by a daily log kept by the aide, and for Student to monitor his own on-task behavior by looking at a clock every five to 10 minutes and marking a chart. Goal 9 was a new self-advocacy goal for Student to actively participate in the goal setting and monitoring process by daily use of a list or graphic organizer with his aide.

51. The new goals were well-intended and went a long way to delineate the kind of daily structured attention, tools, and strategies Student needed in order to overcome the barriers to work production he experienced on a daily basis due to his disabilities. The apparent annual outcome for each of these goals was 100 percent compliance, and hence, they were mostly measurable. For example, the annual goal for a complete three-ring binder for each class could be measured by calculating the contents of Student's binders as a percentage of the content requirements. Educational Rights Holders drafted Goals 6 through 9 to require intensive hands-on involvement of Student's aide and teachers in every class. The IEP team agreed with them and therefore agreed to implement them. The goals, as drafted, met Student's executive functioning needs and offered a FAPE.

52. Based on the foregoing, for the 2009-2010 school year through January 2010, District failed to offer or provide Student with any annual goals in the areas of written

expression, math, and organization, and Student was substantively denied a FAPE. Thereafter, District's annual goals for self-advocacy and written language were appropriate. However, the other goals for work production, organization, and math did not meet his needs, were vague and not measurable, and therefore denied Student a FAPE. Beginning on May 25, 2010, through the end of the school year, only the annual math goal did not meet Student's needs as previously found, and did not comply with the law, and denied Student a FAPE.

2010-2011 Annual Goals: Lack of Appropriate Goals for Math, Written Expression, Self-Advocacy, On-Task Behavior, Work Completion, and Organization

53. Student contends that District's annual goals for the 2010-2011 school year did not comply with the law, and that District failed to offer or provide appropriate IEP goals for math, written expression, self-advocacy, on-task behavior, work completion, and organization. District convened an IEP team meeting on September 15, 2010, where County's mental health assessment was reviewed and Student was found to qualify for County mental health services. District members of the IEP team therefore offered to change Student's placement from Oceana, to County's TDS program, and proposed two new annual goals as an addendum to the January 2010 IEP. The proposed goals were mental health goals and are not at issue in Student's case. Thereafter, District convened IEP team meetings on November 3, and November 23, 2010, where no new or different annual goals were offered.

54. Since Student did not accept District's fall 2010 IEP offers, his annual goals remained controlled by the January, February, and May 2010 IEP's. Based on the foregoing, for the 2010-2011 school year to the time of the hearing, the January, February, and May 2010 IEP's remained in effect, and Student's math goal continued not to meet his needs as previously found, did not comply with the law, and denied him a FAPE.

One-to-one Instruction Services for Executive Functioning

55. "Related services" are additional services that may be required to assist a pupil to benefit from special education and receive a FAPE, and include transportation and other developmental, corrective, and supportive services, including therapies or tutoring. Student contends that District should have offered him a qualified "masters level educational psychologist" to provide individual executive functioning teaching or training, and that District's failure to do so denied him a FAPE for all school years at issue. District contends that Student did not, and does not need such individual instruction from an educational psychologist and was not denied a FAPE.

56. District's December 2008 IEP did not offer Student individual instruction services as a related service to teach him strategies or skills to address his executive functioning deficits. Instead, District offered accommodations and modifications. District offered many of Ms. Coopersmith's recommendations to address Student's executive functioning deficits, including using a computer, having a note taker and copies of notes, and

being given extended time on tests and assignments. In addition, the IEP team agreed with her recommendations that the RSP teacher should, in “every tutorial class,” help Student check his materials, organize his notebook and assignments, use the computer, use an Internet calendar, and use prewriting strategies to follow a format to write a paragraph, and use email to send work to himself and his teachers. In effect, the IEP provided that the RSP teacher, Mr. Salazar, would provide instructional oversight to assist Student to implement strategies and tools to complete his work. Based on the knowledge District had at that time, this component of the IEP addressed Student’s executive functioning deficits. Mr. Salazar was a credentialed, albeit new, special education teacher. Therefore, District’s offer for Mr. Salazar’s services, at the time it was made, was reasonably calculated to provide educational benefit. District’s failure in the December 2008 IEP to offer one-to-one instruction by an educational psychologist to address Student’s executive functioning deficits accordingly did not deny him a FAPE.

57. At the January 2010 IEP team meeting, the team discussed the September 2009 DCNC evaluation report and recommendations. DCNC recommended that the District should take a leadership role in providing Student with “explicit and intensive instruction in self-management, problem-solving, decision-making, and organization skills to maximize future independence.” At some point, Grandmother came to the conclusion that DCNC recommended an educational psychologist to provide instructional tutoring to Student. However, Dr. Stivers and Ms. Harvell were persuasive that they did not make such a recommendation and that DCNC generally does not get involved with the qualifications of service providers. Dr. Stivers was candid that she was not sure what qualifications would be appropriate for someone to assist Student, as long as the instruction was intensive and delivered by someone who could work well with him. Thus, Student’s own witnesses from DCNC did not support his contention on this issue. Accordingly, District’s decision not to offer to hire an educational psychologist to instruct Student at any time during 2010 did not deny him a FAPE.

Trained One-to-One Instructional Aide

58. The December 2008 IEP did not offer Student a one-to-one instructional aide. Student contends that District was required to offer him an aide as a related service to assist him to benefit from special education and receive a FAPE. District contends that, prior to January 2010, Student did not have a need for an aide and did not request one. As found above, the January 2010 IEP offered a full time, one-to-one instructional aide and Grandmother consented to the offer. Student has had an instructional aide since that time. He contends that, thereafter, the aide was not adequately trained.

59. The evidence established that Grandmother requested one-to-one assistance for Student to accomplish his goals and complete work assignments as early as September 2008. In the December 2008 IEP, District offered to have Mr. Salazar oversee and help Student with strategies and tools in the RSP class. Student did not sustain his burden to establish that he also needed an instructional aide in addition to the services of the RSP

teacher every other day. Consequently, District's failure to offer a one-to-one aide in the December 2008 IEP did not deny Student a FAPE.

60. However, subsequent to the December 2008 IEP, District did not fully implement many components of the IEP, including Mr. Salazar's services and accommodations, and Student's continued lack of progress became apparent. Between December 2008, and January 2010, the evidence established that Student's annual IEP goals, accommodations and modifications pursuant to the December 2008 IEP were poorly implemented, with poor results. There is no evidence that Student's RSP teacher regularly, or even occasionally, helped Student check his materials, organize his notebook and assignments, use the computer, use an Internet calendar, use prewriting strategies to follow a format to write a paragraph, and use email to send work to himself and his teachers, as required by his IEP. Mr. Salazar testified that he primarily helped Student by prompting him to start or focus on work, and to use his check list. Student had emotional difficulties that also adversely affected his progress, and he was absent a lot during the fall of 2009 due to depression and medication adjustment difficulties. However, District's contention that Student's lack of progress was solely due to his emotional disabilities was not supported, in view of District's material failures to have appropriate supports and implement the supports provided in his IEP. In view of District's failure to implement the RSP accommodations during 2009, and the DCNC's September 2009 recommendations for intensive supports, District should have called an IEP team meeting or offered a one-to-one aide by November 2009. The failure to do so denied Student a FAPE for about three months, until District offered Student a "note taker" in the January 29, 2010 IEP.

61. At the February 12, 2010 IEP, District changed the scope of the aide's purpose to "assist in supporting [Student's] academic needs." In late February 2010, Rozeena Jhinnu was hired by the District as Student's full time, one-to-one aide, and has worked with him daily since then. Student contends that she was inadequately trained and supervised. District contends that Ms. Jhinnu was qualified to be Student's aide.

62. Ms. Jhinnu is a college graduate and obtained a bachelor's degree in political science in the spring of 2008. From the fall of 2008 to June 2009, she was a special education instructional aide at another high school. When Ms. Jhinnu was hired by the District, she was provided general information about Student's disabilities and needs, and the scope of her assistance, prompting and supports. She has taken the initiative to read some books and Internet articles about educational disability, including executive functioning deficits. There is no evidence that Ms. Jhinnu had any training about positive behavior intervention, executive functioning deficits, emotional disorders, or special education disabilities. Ms. Jhinnu understood that her primary duties were to prompt Student, take class notes for him, and assist him "in organizational skills, staying on task, study skills, and paying attention to work." Overall, the evidence established that the IEP team's goal, using the aide's supports, was to increase Student's self-regulation and his abilities to focus, plan, organize, and produce written assignments, and not just to have someone take notes for him.

63. Mr. Salazar established that he was responsible to supervise Ms. Jhinu. However, the evidence demonstrated that Mr. Salazar did not actively supervise Ms. Jhinu. He kept in touch with her by email, and interacted with Student and her in his RSP Tutorial class every other day. For example, at hearing, Mr. Salazar had no idea whether or how Ms. Jhinu organized Student's binders. He assumed that she organized the class notes by subject matter, and did not know that, for over a year, she had organized Student's binder notes by date instead, rendering it difficult for Student to find anything. Ms. Jhinu testified that she generally only worked on helping Student organize his binder every two weeks in the RSP class, instead of daily or weekly. However, Ms. M. credibly established that Ms. Jhinu did not actively assist Student to keep his papers organized and that Ms. M. regularly found Student's binder in disarray. Dr. Brentar, in February 2011, saw Student's binder and concluded it was a "mess," with old papers on top that dated back to November 2010. Ms. Jhinu was provided with daily check lists for each of Student's classes, with spaces for work expectations, behavior expectations, and tasks to complete before leaving the classroom, including using a planner or calendar, getting class notes, turning in homework, and organizing his backpack and binders. However, Student's IEP goal was for him to learn to self-monitor and fill out his check lists himself. Instead, Ms. Jhinu and the teachers filled out the check lists for Student, who was only expected to check things off. In addition, she was unaware of his IEP goals or who was responsible for them. Student's glaring lack of progress in turning in written assignments calls into question the level of training, skills and supervision of his on-to-one aide, who had no idea how to strategize for Student to succeed in turning in class assignments.

64. Dr. Brentar observed Ms. Jhinu interact with Student in two classes. In the humanities class, taught by Lorna Sotomayor, Dr. Brentar saw Ms. Jhinu provide Student a pencil, as he often did not come to school with supplies other than art supplies. During a written quiz, she did not prompt Student to stay on-task. In the RSP Tutorial class, Mr. Salazar did not interact with Student at all, and Dr. Brentar observed Ms. Jhinu act "like a babysitter," as she did not engage in any direct guidance with Student to complete his homework. Instead, Student worked independently unless he asked her a question.

65. Overall, the evidence established that District did not train and supervise Ms. Jhinu to be anything more than a note taker, prompter, and reminder aide for Student. If that was the extent of her intended role, her minimal training and experience would have sufficed to establish some educational benefit. However, given the severity of Student's deficits, and District's intended goal for self-regulation, the quality of the aide's services was insufficient to meet his needs. While well intentioned, District did not train her to provide active interventions for Student to learn to self-regulate, or monitor and supervise her services. Aside from using extensive prompts, she received no training about how to be an effective instructional or behavioral aide to provide guidance for Student. Student's disabilities manifested in lack of initiative and lack of planning and organizational skills, and the aide's own lack of skills and training did not serve to promote Student's independent acquisition of skills. Student's submission of written assignments did not significantly improve with her supports. Based on the foregoing, Student sustained his burden to establish that the aide was not trained and supervised to meet his unique needs related to his

disabilities, as was implicit in the IEP provision for an aide. Thus, District failed to fully implement the IEP provision, and in light of Student's lack of demonstrated progress in self-regulation, this must be deemed to be a material failure, which denied him a FAPE.

Transition Plan and Transition Goals and Services

66. District's December 2008, January and February 2010 IEP's offered Student individual transition plans (ITP) within the body of the IEP's. Student contends that the ITP's, and the transition goals and services provided for in the plans, did not comply with the law because the plans did not have specific transition services or include measurable annual transition-related goals. District contends that the ITP's were appropriate.

67. Beginning not later than the IEP in effect when a pupil becomes 16 years of age (or younger if appropriate), his or her IEP must have postsecondary goals related to training, education, employment, and where appropriate, independent living skills, and must have transition services needed to assist the pupil in reaching the postsecondary goals. Thereafter, the ITP's shall be updated annually. Transition services for high school pupils are an essential component of a FAPE, and include instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and acquisition of daily living skills.

68. It was appropriate for the December 2008 IEP team to offer Student a transition plan because it had to be in place by his 16th birthday, just a few days later. At that time, Student was in 10th grade, and had only earned 22.5 credits out of 225 credits needed for graduation. Under the category of education and training, the ITP provided a long term, postsecondary goal for Student to enroll in a community college and earn a degree or certificate in an area of interest. This goal involved objectively measurable events, and was appropriate given Student's expressed interests. However, under the column for "transition services," District listed the California High School Exit Exam (CAHSEE) for math and English, and a list of accommodations for Student to help him complete his work assignments and pass his classes. The CAHSEE is a statewide exam that Student was required by law to take and pass in order to graduate from high school. Thus, it was not a service, but a state-mandated academic assessment. District did not offer a service that would have supported his passage of the exam, such as tutoring or exam-taking skills. The transition plan is evaluated in conjunction with the IEP as a whole. District had proposed annual goals for Student's work production and on-task behavior; however most of those goals were not appropriately drafted. The transition plan was poorly written, and, even when read with the IEP, Student's ITP educational goal did not comply with the law because it was not supported by any transition service or annual goal.

69. Under the employment category, the December 2008 ITP provided, as a long term, postsecondary goal that, upon completion of high school, Student would obtain part-time employment in an area of interest with the assistance of the California Department of Rehabilitation or Work Transition Services. This goal was measurable and appropriate. District was not obligated to identify a specific job at this juncture while Student was still

narrowing his interests in 10th grade. As related transition services, the ITP provided that Student would: (1) take a regional occupational program (ROP) class to earn credit and narrow his career interests; (2) be referred to the Department of Rehabilitation in the spring of his junior year in high school; and (3) perform “career research related to skills and abilities, develop resume detailing previous work experience.” The primary deficiency for the employment goal was that no related transition or IEP goals were referenced or provided, and none were found throughout the IEP.

70. Accordingly, District committed a procedural violation because the postsecondary education goal had no transition service or annual goal, and the employment goal was not accompanied by any annual goal. The procedural violation impeded Student’s educational progress and therefore denied him a FAPE.

71. For the category of independent living skills, the ITP said “none” and was blank. Student had been living in a fairly stable home setting with his grandmother since the age of 10. He did not sustain his burden of establishing that District was required to offer a postsecondary independent living skills goal at this point in time. Accordingly, District’s failure to offer a postsecondary goal in this area, or related services and goals, did not deny Student a FAPE.

72. For the January, February, and May 2010 IEP’s, District again offered an ITP on February 12, and May 25, 2010. Under the education and training, and employment categories, the postsecondary goals were the same as in the December 2008 ITP. Under the transition services section, District offered “specific research in interest areas to identify career goals for post HS [high school] pursuit” to support the education goal; and “compile documentation needed for employment” to support the employment goal. For the May 25, 2010 ITP, District proposed a transition goal providing that Student would research his interests and career goals, learn which colleges offer those programs, and make a plan for his future including compilation of required documents.

73. Ms. Jacobs-Levine, District’s transition specialist, testified that it was premature for Student to work on a college goal, given how far away he was from graduating. She admitted that she had not met with Student regarding his transition plan during the 2010-2011 school year, even though he was 18. In addition, based on her recommendation, District again did not offer Student any postsecondary goal for independent living skills. However, by May 2010, Student’s living situation had dramatically changed, Grandmother had passed away, he had been made a ward of the court, and his living situation was in limbo. As a dependent ward and foster child, Student’s future was no longer secure and he faced many issues, such as where to find housing after the age of 19. Ms. Jacobs-Levine’s testimony that she thought independent living skills only addressed basic matters, such as whether a pupil could brush his teeth or take public transportation, was misinformed. The evidence established that Student was at risk of academic failure, and was entitled to independent living skills services and goals while in high school to help him prepare for postsecondary life. The absence of any goal or service in this area was a procedural violation that denied Student a FAPE.

74. District's argument that it was not required have detailed plans for Student's postsecondary life because he was still "at least three years away from graduating" was short-sighted and does not excuse the violation, because the transition law is mandatory and its purpose is to help high school pupils prepare and plan for adulthood. District's failure to have annual goals and services associated with the ITP's constituted a procedural violation for each school year that impeded Student's educational progress and denied him a FAPE.

School-Based Counseling Services

75. Student contends that District's IEP's denied Student a FAPE because they did not offer any school-based counseling services as a related service. District contends that school-based counseling services were available and that Student used the services.

76. Student's mental health records showed that, in June 2008, Grandmother had privately referred Student for mental health services from the County.²⁰ Student's County mental health therapist, James Rutherford, established that Grandmother made the referral due to conflict in the home. Student was depressed, engaged in angry episodes with Grandmother, and had spent six weeks at a shelter for runaways earlier in 2008. Ms. Coopersmith reported these matters in her 2008 assessment and District was aware of them. The evidence established that Student had significant needs related to his emotional deficits that adversely affected his education. Student's lack of work production was not only due to his deficient executive functioning skills and ADHD, but also due to his mental health needs, which also involved distractibility, daydreaming, and depressive symptoms. In addition, Chapter 26.5 required District to offer appropriate school-based mental health services, such as psychological counseling or behavior interventions as related services in Student's IEP's, prior to referring him for County mental health services. District therefore should have offered school-based services to address his mental health issues as they impacted the school setting.

77. For the 2008-2009 school year, the evidence established that Student voluntarily saw a school counselor on different occasions when he needed help dealing with things. District had counselors available for all pupils on a crisis, or occasional basis. In addition, Student received private individual and family therapy through the County outside of the school setting. Mr. Barbour established that Grandmother did not consent to school-based counseling. Based on Grandmother's refusal to approve school-based counseling, District's lack of such services for the 2008-2009 school year did not deny Student a FAPE.

78. However, after the September 2009 DCNC assessment, DCNC recommended that Student needed increased mental health services from the District. At the January 2010 IEP team meeting, the IEP team agreed on a daily check in with a trusted counselor as an annual goal. Student was persuasive that the daily check in helped him start the day with a

²⁰ Student's mental health records from the County were admitted into evidence subject to a protective order, under which District is prohibited from passing the documents on to any staff, service providers or the IEP team.

positive outlook. He liked an intern counselor, and met with her 15 to 20 times in the spring of 2010. However, a few minutes in the morning to check in with a counselor did not amount to mental health counseling as a related IEP service. After the intern was reassigned, District did not replace her with someone Student could trust. District did not offer school-based psychological counseling as a related service in the January, February or May IEP's.

79. For the 2010-2011 school year, District claims that Student was informed that school counselor Ms. Ambrose was available to meet with him daily. However, Student did not establish a rapport with her, and has not met with her. Student claims he was never informed she was available. District has not offered any other counselor to date. Based on its own criteria to provide a trusted counselor, District was required to offer another counselor, or modify the goal. Based on the foregoing, for most of 2010, and to the time of the hearing, District did not offer or provide Student with school-based counseling or other psychological services as a related service to address his mental health needs related to his education, and therefore denied him a FAPE.

Failure to Implement IEP Accommodations, Modifications, and Goals

80. Student contends that District failed to implement specified accommodations, modifications, and annual goals offered and agreed to in the December 2008 IEP, and the January, February and May 2010 IEP's, which denied him a FAPE. District argues that Student's RSP case manager and teachers implemented his IEP goals, accommodations, and modifications during all times at issue in this case.

81. A failure to implement a provision of the IEP may amount to a FAPE violation only where the failure has been determined to be material. A material deviation from an IEP occurs when the program or services provided to the pupil fall significantly short of those required by his or her IEP, without a showing of educational harm.

82. For the 2008-2009 school year, Student contends that District failed to implement the following: the office hours goal and the accommodations and modifications for reduction of work, extended time to complete work, option to give oral responses, and note taker. For self-advocacy, Student's annual goal in the December 2008 IEP was to attend office hours at least three times a week. The evidence established that arrangements were made for him to go in before school started. Student testified that, over a period of about two or three weeks, he caught a bus at 5:00 a.m. a number of times in order to attend office hours with a teacher before school; however, only one teacher met with him on one occasion. Based on his reports, Grandmother thereafter allowed Student to stop going in to school early.

83. The evidence established that Mr. Salazar began to implement the office hours goal by informing Student's teachers about the December 2008 IEP, and took Student to meet them to establish when he could meet with them for office hours. In addition to Mr. Salazar, five of Student's other teachers testified at hearing. However, only one of them, Karen Scher, taught him during the 2008-2009 school year. In Ms. Scher's Humanities class,

she posted her office hours in the classroom, which included the hour before school began in the morning, but Student never visited her during the school year.

84. Student met his burden to establish that District did not implement the office hours goal. Student needed a goal for self-advocacy because he was not able to advocate for himself. Therefore, when he arrived at school and did not find a preferred teacher, he did not advocate for himself, but gave up. As Student's case manager, Mr. Salazar was responsible to oversee the goal to help Student gradually implement it over time, and to monitor it for progress, and there is no evidence that he did. Mr. Salazar did not oversee, monitor or implement the goal, or provide any support for Student to communicate with teachers, plan ahead, make appointments or otherwise work toward the gradual implementation of the goal on a measurable basis. District staff should have reported Student's lack of progress to the IEP team, and proposed to modify the goal or change the way it was being implemented. District simply left it up to Student to either show up or not, without providing him with the skills or supports to support his progress. District's material failure to implement this goal denied him a FAPE from January 2009 through January 2010, when it was changed to a daily check in with a counselor.

85. Ms. Scher was persuasive that she implemented some of Student's IEP accommodations and modifications in her classroom, including giving Student extra time on assignments and allowing him to do less writing in order to receive credit. For example, Student was allowed to use a "chunk" writing style and submit one to two paragraphs as a modification of the assigned work. Mr. Salazar allowed Student extra time in his RSP Tutorial class. For the 2008-2009 school year, Student did not sustain his burden to establish that District failed to implement the December 2008 IEP as to modification of assignments, extended time, or optional oral responses.

86. The December 2008 IEP provided that Student would have a note taker, and copies of class notes, but the evidence established that the accommodation was never implemented from December 2008 through February 2010. Student had not learned the skills necessary to listen and take notes at the same time, and rarely took notes in any of his classes. At the IEP team meeting on January 29, 2010, over a year later, District agreed to advertise for an aide to assist him with note taking. By the end of February 2010, Ms. Jhinu, the aide, became Student's note taker. Therefore, District committed another procedural violation which denied Student educational benefit and denied him a FAPE from December 2008 through February 2010.

87. Beginning in January 2010, and for the 2010 summer school, Student contends that District failed to implement the following: the annual goals for executive functioning, and a daily check-in with counselor; and the accommodations and modifications for elimination of homework, reduction of work, extended time to complete work, option to give oral responses, note taker, the provision of math formulas, daily check list, and weekly reports. District denies the allegations.

88. As found above, the evidence showed that District partially implemented the goal for a daily check in with a counselor from January 2010 through the spring, using an intern counselor. For the 2010-2011 school year, District has not proposed another counselor that Student has rapport with. The goal has therefore languished without implementation during this school year. As with the prior office hours goal, Student lacks the ability to solve the problem and District staff are not actively monitoring the goal. Accordingly, District denied Student a FAPE.

89. For the 2009-2010, and 2010-2011 school years, Mr. Salazar did not provide Student's teachers with a complete list of his accommodations and modifications, but only provided them with a summary in a red binder, containing a list of about six or seven accommodations and modifications. Lorna Sotomayor, Student's Humanities teacher for the current 2010-2011 school year, credibly identified the list and did not recall being given any supplemental attachment listing more of them. For example, in the January 29, 2010 IEP, District offered a separate accommodation for oral responses as follows: "Tests: oral multiple choice as brief as possible to demonstrate competence and mastery of subject curriculum, which will count as full credit." However, that accommodation never made it into Mr. Salazar's red binder. On February 12, 2010, District offered an accommodation for taking a test to pass the Algebra I class: "pass class in RSP room and formulas and vocabulary needs will be available for reference," which also did not appear on the list. Student established that the math formulas were supposed to be given to him on the top of his assignment sheets, not just on tests, and that he was not given the formulas most of the time. In addition, the May 25, 2010 IEP team agreed that the teachers would email Educational Rights Holder No. 1 weekly, as to Student's progress on the new executive functioning goals. Neither the detailed executive functioning goals nor the email contact agreement were placed in the binder for Student's teachers for the 2010-2011 school year, and Mr. Salazar did not recognize them. Ms. M. spoke with some of Student's teachers for the current school year who informed her they were unaware of his disabilities or IEP accommodations.

90. Ms. Sotomayor established that she used the daily check list system with Student, along with a daily agenda, broke down assignments for him, gave him extended time on tests and gave him tests ahead of time to prepare in the RSP class. She gave him the option of asking for oral responses, which he generally declined. Homework was only five to 10 percent of the class grade, and Student was not required to do homework. Ms. Sotomayor was credible that when Student was able to pre-plan a test, he was among the first to finish and did not need extended time. However, Student was generally unable to complete all of the class work she assigned, even in the RSP class. In addition, Ms. Sotomayor did not implement the accommodation for Student to have extended time on her assignments unless he followed her rules: Student needed to ask her ahead of time and show her his progress on the assignment up to that point, and she maintained discretion to deny the request. At the May 5, 2010 IEP team meeting, District agreed to another accommodation that "Student will be allowed to hand in work as completed." That accommodation also never made it into the teacher binder, and for the 2010-2011 school year, Ms. Sotomayor appeared to be ignorant of it, and did not follow it. At the May 5, 2010, IEP team meeting,

Student was failing multiple classes primarily due to lack of written work. Educational Rights Holders informed the IEP team that some teachers, who had not attended the earlier IEP team meetings, were still assigning homework and were still assigning a high volume of class work that Student could not keep up with.

91. Based on the foregoing, District failed to implement many of Student's accommodations and modifications beginning in January 2009, shortly after the December 2008 IEP, and the failure must be deemed to be material. The accommodations, modifications, and IEP goals that actually were provided to Student fell significantly short of those required by his IEP. Moreover, the failure to implement so many of them was not recognized or acknowledged by District, which led to the conclusion that its staff had "tried everything," and that Oceana was therefore no longer an appropriate placement for Student. District's failure to implement material IEP components therefore denied Student a FAPE.

Additional Accommodations and Modifications

92. Student's complaint claimed that, in addition to the accommodations and modifications that District offered in its IEP's, District should have offered additional accommodations and modifications. However, Student's closing brief only argued that District failed to offer Student modified grading. Dr. Brentar testified generally that, in addition to direct executive functioning training, Student should have been provided with modified grading. Student's contention that he did not receive modified grading is not supported by the evidence. For example, if an assignment was modified so Student had to write three paragraphs, instead of eight pages, his grade was modified based on the shorter assignment, provided he turned it in. Based on the foregoing, District did not deny Student a FAPE by failing to modify his grades.

Failing to Offer DCNC Recommendations

93. For the 2009-2010, and 2010-2011 school years, Student contends that District's IEP's after the DCNC issued its September 2009 assessment report, should have contained provisions to implement the DCNC's recommendations to address his executive functioning deficits. District asserts that it was not obligated to adopt the recommendations. Student failed to explain how this issue differs from his claim that District should have hired someone to provide direct executive functioning instruction. Student's closing brief combines both of these topics into one argument. Accordingly, this issue is subsumed in Student's Issues 3(a), 5(a), and 7(b), on executive functioning instruction.

Assistive Technology Services, Supports, and Equipment

94. Student contends that, beginning with the 2009-2010 school year, District failed to offer or provide him with assistive technology services, supports, and equipment to address Student's ability to produce written work. As found above, Student does not have as an issue in this case whether District should have conducted an assistive technology assessment. Without establishing whether an assistive technology assessment was requested

or warranted, Student failed to establish that District was obligated to offer assistive technology. Accordingly, District did not deny Student a FAPE with regard to assistive technology.

Summer Services Pursuant to the May 2010 IEP

95. At the May 25, 2010 IEP team meeting, District agreed to provide 10 hours per week of instructional services to Student for 10 weeks during the summer of 2010, for a total of 100 hours, once a teacher was found and hired to provide credit recovery tutoring. The IEP did not identify the nature of the instruction, which was simply labeled “home teaching.” Student contends that District agreed the teacher would “work on executive functioning skills, including the goals added to the IEP that day, and help [Student] make up credits in classes he had not passed.” District contends that it implemented substantially all of the hours and that Student caused scheduling delays.²¹

96. District hired Ms. Jacobs-Levine to provide the summer instruction to Student, and she established that she provided 78.5 hours of services to him from June through November 2010, all but two hours of which were completed before the start of the 2010-2011 school year. Thereafter, Ms. Jacobs-Levine attempted to schedule meetings with Student after school let out at 3:00 p.m. with little success. In September 2010, Ms. Lew requested an accounting of the hours of service and Ms. Jacobs-Levine submitted an itemized log, along with answers to Educational Rights Holders’ questions about what services she provided. The teacher described that her assigned goal was for Student to complete a total of 25 credits: five in Health, 10 in Algebra, and 10 in World History, and Student received B grades and completed 15 credits (five in each subject). As to executive functioning instruction, Ms. Jacobs-Levine stated that she focused on the academic subject areas. Nevertheless, she established that Student responded well to her one-to-one tutoring and reported his progress as “excellent.” She was able to help Student organize, broke work into manageable chunks, made adjustments, and found she only had to redirect his focus occasionally. They did the history and health work orally with success. Ms. Jacobs-Levine reported that Student achieved a self-management goal with 95 percent accuracy in the one-to-one setting, but that he needed to learn to generalize it into a standard classroom setting.

97. Ms. Jacobs-Levine acknowledged that Student obtained a job in July 2010, independently of District’s transition plan, and that they worked around his schedule, including meeting on weekends. Student also missed several sessions as he overslept. The evidence did not show that Student deliberately avoided the sessions. He attended most of them, had to work, was motivated, and performed successfully with the one-to-one instruction. Based on the foregoing, District still owed Student 21.5 hours of instruction as promised in his IEP. The amount of hours that remain undelivered cannot be considered to

²¹ Student cited no authority for his assertion that the home schooling constituted ESY services, for which specific legal requirements apply. In addition, District’s May 25, 2010 IEP expressly stated that ESY was not offered.

be minimal or not material, and the failure to complete those hours during the 2010-2011 school year through the time of the hearing therefore denied Student a FAPE.

Procedural Claims for the 2009-2010, and 2010-2011 School Years

Failing to Convene an IEP team meeting Between September 2009 and January 2010

98. Student contends that District failed to convene an IEP team meeting in a timely fashion following completion of the DCNC evaluation in September 2009; and that District failed to convene an IEP team meeting within 30 days of Grandmother's November 2009 request for an IEP team meeting. In addition, Student asserts that District failed to timely convene Student's annual IEP team meeting in December 2009. District contends that Grandmother delayed the IEP team meeting until January 2010, because that was when the DCNC assessors were able to attend. In addition, District contends Student produced no evidence of Grandmother's request for a meeting.

99. Once a pupil is receiving special education and services, a school district must conduct an IEP team meeting at least annually (unless a parent agrees otherwise) to review the pupil's progress and make any necessary revisions to the IEP. A district must also convene an IEP team meeting within 30 days of receipt of a parent's request for a meeting to develop, review, or revise an IEP.

100. In 2009, District referred Student for assessment and funded the DCNC evaluation. On September 23, 2009, the DCNC held a conference to discuss its findings with Student and District. However, this meeting was not an IEP team meeting called to review Student's educational placement and services.

101. Student's annual IEP was due in December 2009. On November 20, 2009, Grandmother emailed Ms. Pemberton at the District, requested an IEP team meeting, and proposed the dates of November 24, December 1, or December 2, 2009. By December 8, 2009, not having heard a response from the District, Student's aunt, Ms. P., forwarded the email to attorney Karie Lew at LACY. On January 4, 2010, Ms. Lew wrote to Ms. Coopersmith about the lack of a response or a scheduled IEP team meeting. Ms. Lew noted that she would instruct Grandmother to email Ms. Coopersmith or Mr. Salazar in the future, rather than Ms. Pemberton, who was the school principal. However, because Ms. Pemberton was an administrative representative of the District, District is charged with receipt of the November 2009 email from Grandmother. Accordingly, even if District had no set legal timeline within which to hold an IEP team meeting to review the DCNC assessment, it was required to hold the meeting within 30 days of the November 20, 2009, request for an IEP team meeting, and did not do so. In addition, District did not otherwise schedule or attempt to schedule the annual IEP team meeting in December 2009. The law requires school districts to document their attempts to schedule IEP team meetings with parents and District produced no documentation of such attempts. There was no evidence that Grandmother delayed the IEP meeting.

102. Based on the foregoing, District committed a procedural violation when it did not hold the IEP team meeting by December 20, 2010. District did not produce any evidence that it was closed for winter vacation by then. District held the IEP team meeting on January 29, 2010, a little over one month later. The delay of over one month impeded Student's right to a FAPE and deprived him of educational benefit during that time, because District only had three annual goals in place for Student, had no IEP goals for math or written expression, and many of the accommodations put in place for him in December 2008 had not been implemented for many months.

Failing to Make Clear Offers of FAPE

103. Student claims that District's IEP's for January, February, May, September, and November 2010 did not contain clear offers of programs, placement, and services as specified below. The requirement of a formal, written offer alerts the parent to the need to consider seriously whether the offered placement was appropriate under the IDEA, so that the parent can make informed decisions about accepting, rejecting, or negotiating to modify the offer. District contends that its offers were clear, and that Student was represented by Educational Rights Holders and legal counsel, who actively participated in the IEP's.

104. Student first contends that District did not offer placement until May 2010. Overall, the evidence established that District's IEP's were hard to track. The February 12, May 5, and May 25, 2010 IEP's are each labeled as an "addendum," generally taken to mean that a finalized IEP was being modified by the added or modified pages. However, school psychologist Ms. Fickers, District's IEP note taker and chair, testified that she used the word "addendum" to indicate that an IEP had not been finalized yet, and was still continuing.

105. However, the confusion is due to a missing page, rather than the lack of a clear offer. District's May 25, 2010 IEP has a services page. In District's Exhibit D-4, containing the May 25, 2010 IEP, page 3 is a formatted services page with a typed date of January 29, 2010, and the special education, related, and supplemental services and supports all have a beginning date of January 29, 2010; with a handwritten date of "5/25/10 addendum," added. In any event, regardless of District's confused trail of IEP team meetings and offers, the evidence established that Student was not confused about the offer of placement at any time, and the IEP teams understood that Student remained placed in the RSP program at Oceana with additional accommodations, modifications and supports.

106. Second, Student asserts that the nature, frequency, and duration of the services of his one-to-one aide did not appear in any of the 2010 IEP's. As found above, District offered the aide services on January 29, 2010, subject to hiring her, which was accomplished by the end of February 2010. The evidence established that District provided the aide to assist Student in all of his classes, including the RSP Tutorial class, and thus, there was no confusion about the frequency and duration of her services. District's failure to delineate her role or duties goes more to the aide's lack of training and supervision, and District was not required to spell out her duties in the IEP.

107. Student contends that the September 15, 2010 IEP was confusing because it offered two different placements in two different places. Student and his representatives did not attend that meeting and needed to rely on the clarity of the written offer in order to understand District's position. On its face, District's September 2010 IEP did not contain a clear written placement offer. On the services pages, it offered Student specialized academic instruction in a regular classroom at a public day school 80 percent of the time, along with Chapter 26.5 psychological services through the Department of Mental Health twice a week for 30 minutes per session, for a total of 60 minutes (at the service provider location) and ESY for the summer of 2011. However, the IEP notes stated that Student was found to qualify for Chapter 26.5 services, and that District members of the IEP team "recommended" (offered) the TDS placement. To the extent the offer may have been unclear, the violation was corrected a week later via District's Prior Written Notice letter dated September 22, 2010, which detailed that District was proposing an educational placement at the TDS located at the Serramonte Del Rey campus. Student was also in receipt of County's assessment report and was aware of the recommendation. Consequently, the violation, if any, did not deny Student a FAPE and was harmless error.

108. Student asserts that the November 3, 2010 IEP is not clear because the services were offered only "following intake" into the TDS program. Student did not sustain his burden on this issue as County explained the process involved in a Chapter 26.5 referral for assessment, which could lead to County's admittance or intake into its program.

109. Finally, Student contends that District's IEP's did not set forth the offered accommodations in one place, but they were written throughout the IEP's in a variety of places, which made it confusing and difficult to find and understand them. Student's contention is well taken, considering the difficulty in tracking which IEP accommodations were proposed or approved throughout 2010 in five IEP's. This confusion and lack of clarity in the IEP documents as to the accommodations constituted a procedural violation because it was prejudicial to Student, his teachers, and the IEP teams. For example, Mr. Salazar did not track all accommodations and modifications in order to put them in his red teacher's binder to update the teachers, so that many of them were not implemented or implemented poorly. District's September 2010 IEP offered four accommodations, and then stated: "see notes for further accommodations," with a handwritten reference back to the January 2010 IEP, thus inadvertently missing (or dismissing) significant accommodations added in the February and May 2010 IEP's. District therefore committed a procedural violation by failing to clearly delineate the accommodations in each offer, which impeded Student's right to a FAPE, and denied him a FAPE.

Failing to Review Student's Progress on Annual Goals

110. Student contends that, in connection with all of District's 2010 IEP's, District committed a procedural violation by failing to "review" his progress on his annual goals. The law requires the IEP team to meet at least annually to review the pupil's progress on his or her annual IEP goals. The IEP must contain a statement, at least annually, of the pupil's then-present levels of academic and functional performance (PLOP's) in all areas of need

related to the disability. A pupil's PLOP's are generally derived from evaluating his or her last baseline PLOP for each annual goal, and then evaluating the pupil's progress or lack of progress to date as reported by the teachers and service providers.

111. District's school psychologist Ms. Fickers took notes for all of the 2010 IEP team meetings. She testified that it was her practice at IEP team meetings to record a note as to progress directly on the pupil's IEP goal page as that goal's progress was reported orally. Thus, in 2010, District staff did not submit written progress reports on Student's IEP goals in advance of, or at the meeting.

112. Student had three annual goals to review at the January 2010 IEP team meeting. The evidence established that, while the IEP team may have orally discussed those goals, Ms. Fickers did not make notations of Student's progress on the IEP goal pages, and his progress on the goals was not recorded. Overall, the January 2010 IEP merely stated, cryptically, that Student's December 2008 goals were reviewed by the IEP team. For the most part, District failed to establish any reasonable record of Student's progress on his IEP goals, except for his progress on the daily check in self-advocacy goal, which indicated he was checking in twice a week. By the time of the May 25, 2010 IEP, District's IEP goal pages remained blank, with no progress reports filled in whatsoever. It is evident that the May 25, 2010 IEP team discussed Student's goals, because Educational Rights Holders offered detailed annual goals to address his executive function difficulties in view of his lack of progress on District's goals.

113. Based on the foregoing, District failed to document Student's measurable progress or lack of progress on his annual IEP goals during the year. This failure goes to District's substantive violation for failing to implement goals in a measurable manner, as found above. However, Student did not sustain his burden to establish that, in addition, District procedurally violated the law, which only required it to review Student's annual goals and PLOP's annually. For 2010, District held numerous IEP team meetings which discussed, but did not document, a review of Student's progress on his goals. Therefore, Student was not denied a FAPE on this basis.

Predetermining Placement and Failing to Consider Parental Concerns

114. Student contends that District refused to consider his concerns and those of his Educational Rights Holders at the May 5, and November 3, 2010 IEP team meetings, and predetermined his placement in a TDS program. District contends that District convened five IEP team meetings in 2010 in order to consider Student's concerns and to work with his representatives, and did not violate the law.

115. Predetermination occurs when a local educational agency (LEA) responsible for the provision of a FAPE has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. A school district acting as the LEA may not arrive at an IEP team meeting with a "take it or leave it" offer.

116. By the time of the May 5, 2010 IEP team meeting, Student's new and revised annual IEP goals had been in place for about two and a half to three months, during which time his Grandmother had died. District had put a one-to-one aide in place by the end of February 2010. Student had borne up well emotionally under the personal difficulties in his life. District invited Student's County mental health therapist, Mr. Rutherford, to the IEP team meeting, and proposed to refer Student to the County for a Chapter 26.5 eligibility assessment. Student, his representatives and legal counsel were present, along with District staff and legal counsel. The IEP team discussed the fact that, although Student's attendance had improved, he was still failing most classes due to lack of work production. The team discussed possible options including Student taking the General Education Development test (GED), or transferring into the TDS program. The IEP noted that District "offered" the TDS placement, but that Student would remain at Oceana pending the completion of the County mental health assessment. This did not constitute a predetermined offer of placement because Student's TDS placement was contingent on his qualification for Chapter 26.5 services. Rather, it is more reasonably interpreted as District's preference for a TDS placement, depending on what County found in the assessment. Educational Rights Holders were both professionals with experience in mental health, agreed knowingly and voluntarily to the assessment, and believed that Student would not be found eligible. The fact that they disagreed with the TDS placement was noted and considered by the District team members.

117. At the November 3, 2010 IEP team meeting, Student, his representatives, and legal counsel were present, and the team reviewed the mental health assessment results and the September 2010 IEP offer for the TDS placement. Student disagreed with the TDS offer and a placement option to remain at Oceana was discussed. Educational Rights Holders requested a one-to-one aide trained in executive functioning, and consultation with DCNC. Again, however, the fact that District disagreed with Student's requests did not mean that his requests were not carefully considered. While the District staff came to the meeting prepared and had previously offered the TDS placement, the evidence established that the District members of the team listened to and considered Student's concerns. The fact that District did not find new or different information to persuade a change in the prior TDS offer does not prove that it did not consider Student's requests. Therefore, District complied with the law and did not predetermine the IEP offer.

Failing to Timely Convene an IEP team meeting at a Mutually Agreeable Time in September 2010

118. Student contends that District failed to timely convene an IEP team meeting in September 2010, in order to review County's Chapter 26.5 mental health assessment, and that District failed to schedule the meeting at a mutually agreeable time. District contends that the IEP team meeting was scheduled on a timely basis, that Student's representatives caused delays and did not appear for the September 15, 2010 IEP team meeting, and that County presented the assessment results to Student at a separate meeting in any event.

119. The parents of a child with a disability are critical members of the IEP team. California law requires that the parents be given notice of the meeting early enough to ensure

an opportunity to attend. The law also requires the IEP team meeting to be scheduled at a mutually agreed-upon time and place. An IEP team meeting must be convened with 60 days of the date the community mental health agency receives the parent's written consent for the child's assessment, excluding specified days.

120. District was required to hold an IEP team meeting to review the mental health assessment report by October 18, 2010, as calculated in conjunction with County. Student did not dispute that calculation. On August 13, 2010, District proposed dates in late August for an IEP team meeting to review County's assessment. However, County did not issue the mental health assessment report until September 1, 2010, and the offer was premature. The evidence established that, by September 1, District and Student were engaged in an argument because Student requested copies of records pertaining to him generated by the County in connection with the assessment, as well as an accounting of Ms. Jacob-Levine's summer tutoring. Tentative IEP team meeting dates were proposed for September 3, 8, and 13, 2010. Student's representative, Ms. P., was not available on September 3; Student's attorney, Ms. Lew was not available on either September 8 or 13, and again requested the records prior to the meeting.

121. Beginning on August 24, 2010, Mr. Whitlock, counsel for the District, insisted that the IEP team meeting had to be held immediately, and that Student and his representatives did not need to have documents to prepare for the meeting. Mr. Whitlock directed District to serve an IEP team meeting notice without further delay. On September 1, 2010, District issued an IEP team meeting notice unilaterally setting the meeting for September 15, 2010. Ms. Lew informed District that she was not available on that date, and that Student's representatives declined to attend the IEP team meeting without their legal counsel. District's accusation that Student caused unnecessary delay, excusing it from negotiating a mutually agreeable IEP team meeting date, was unsupported. Student's request for records was reasonable. District had until mid-October to hold the IEP team meeting to review the mental health assessment. District's further justification for not continuing attempts to schedule a mutually agreeable date was that Student was in immediate need of mental health services. However, the Educational Rights Holders had consented to the assessment in May 2010, and many months had passed. Therefore, the professed urgency was artificial, and District's unilateral IEP notice did not comply with the law.

122. District held the IEP team meeting without Student and his representatives on September 15, 2010, and thereafter mailed a copy of the IEP offer to them, along with a letter of Prior Written Notice. District therefore committed a procedural violation when it scheduled and held the mental health assessment IEP team meeting at a time that was not mutually agreeable and was unavailable to Student and his representatives, without making reasonable attempts to jointly schedule a meeting. The procedural violation impeded Student's right to a FAPE and impeded Educational Rights Holders' rights to participate in the IEP process, as critical decisions were made at the September 15, 2010 IEP team meeting without Student's involvement or input. The violation was corrected when District convened an IEP team meeting on November 3, 2010.

County Mental Health Services

*Appropriateness of September 2010 Mental Health Assessment*²²

123. Student contends that County failed to conduct an adequate mental health assessment in 2010, because it did not consider what prior interventions District had provided, did not conduct a classroom observation, and improperly relied on old data. County claims that the assessment was adequate and complied with the law.

124. A school district, IEP team or parent may refer a pupil to the county mental health agency for assessment if the pupil meets all statutory criteria, including that the pupil is eligible for special education, and has emotional or behavioral characteristics that impede him or her from benefiting from educational services, and which are significant as indicated by rate of occurrence and intensity. In addition, the district must have provided appropriate counseling and guidance services, psychological services, parent counseling and training, social work services, or behavioral intervention as related services in the pupil's IEP, which the IEP team has determined did not meet the educational needs of the pupil, or were clearly inadequate or inappropriate to meet the pupil's educational needs.

125. County's mental health assessment report was issued September 1, 2010. The assessment was conducted by Bridget Kenevan, a licensed marriage and family therapist with a master's degree in integral counseling psychology. Ms. Kenevan has been employed with County's Chapter 26.5 school-based mental health program since 2008, and as a County therapist for at-risk youth since 2002. She has conducted over 300 mental health assessments, was qualified as an expert on adolescent mental health assessments without objection, and was qualified to conduct Student's assessment.

126. Ms. Kenevan reviewed the mental health referral packet sent to the County by District, and found that it contained all types of information required by law, including County's mental health child/youth June 2008 intake assessment, the April 2008 YFES assessment, the September 2009 DCNC assessment, Student's January (and presumably February), and May 2010 IEP's, and an August 2010 memorandum prepared by County's licensed clinical psychologist, Dr. David McIntyre, containing his opinions based on review of the above documents. District's referral package contained representations as to the services District had provided in the school setting. Ms. Kenevan also interviewed Student twice; and interviewed his Educational Rights Holders; Student's County therapist Mr. Rutherford; both DCNC assessors, Dr. Stivers and Ms. Harvell; and the following District personnel: Director of Pupil Personnel Services Ms. Segalas, transition specialist Ms. Jacobs-Levine, Student's one-to-one aide Ms. Jhinnu, and others, including Vice Principal Barbour.

²² In his closing brief, Student's claim that County failed to timely complete the assessment by holding an IEP team meeting was eliminated, and addressed only in connection with the claim that District failed to timely convene the IEP team meeting, as found above.

Ms. Kenevan did not observe Student in the school setting because she had already met him and did not think she could observe him discreetly.

127. Ms. Kenevan's assessment report considered the salient points of view of each person she interviewed, as well as all of the IEP and assessment data. Based on all information gathered, she found that Student would benefit from being educated in a smaller, structured setting with additional on-site support for his mental health needs. Ms. Kenevan also found that Student had apparent difficulties with planning realistically, and differentiating fantasy from reality. Student was critical that this view was based on old data from several years ago when he engaged in "ninja" like behaviors in one instance. However, following Grandmother's death, Student thought that he could continue to live in her house without regard to finances. While Student's postsecondary goal of attending a community college and engaging in productive work may be no less realistic than the dreams of any teenager, Student did not appreciate the disparity between his inability to complete school assignments and his visions of accomplishment. Student did not have a sense of what steps to take to accomplish things, including earning a high school diploma, which is consistent with his neurodevelopmental ADHD and executive functioning deficits as outlined by the DCNC, as well as with his psychologically impaired thinking due to emotional disturbance, including PTSD, depression and attachment disorder. Student's behaviors have included not just failing to turn in assigned work, but acting impulsively when feeling threatened, including potential aggression, not attending classes or arriving late due to depression or adjustment of medications, withdrawal, shutting down, difficulty sleeping, anxiety, and only engaging in preferred activities such as art.

128. Based on the information at hand, County came to the conclusion that Student was eligible for Chapter 26.5 mental health services and recommended providing mental health services to Student within the context of County's TDS placement. The recommended services include individual therapy, group therapy, medication management as needed, and collateral services as needed.²³ County's assessment did not consider or address any options for delivery of these services other than in a TDS placement.

129. The primary flaw with County's assessment, and its conclusions, is that critical data as to what interventions and services District had provided prior to the referral for mental health services were flawed and incorrect. While County determined that District submitted the types of information required by law for the referral, it was then County's responsibility to evaluate the effectiveness of Student's school-based services and interventions in order to find him eligible for Chapter 26.5 mental health services. Student was only eligible if, before referring him for a mental health assessment, District put in place

²³ Student is already receiving medication management services from the County under the umbrella of another program. County's psychiatrist, Rashmi Garg, testified that she has prescribed several psychotropic medicines since 2008 that have had to be adjusted, addressing depression, mood stabilizers, agitated episodes, difficulty sleeping, and other symptoms. Dr. Garg established that she has not seen a dramatic improvement in Student's behaviors.

appropriate counseling and guidance services, psychological services, parent counseling and training, social work services, or behavioral interventions, which the IEP team then determined did not meet his educational needs. Educational Rights Holders informed Ms. Kenevan that District had failed to provide appropriate services, but their opinions were disregarded. When Ms. Segalas signed the pre-referral form informing the County that District had provided multiple accommodations and modifications to support Student, she relied on information from District staff that this Decision has found not to be the case. For example, the form stated that District had provided Student counseling and guidance services since 2008. As found herein, District failed to implement the office hours goal from January 2009 to January 2010, only implemented the counselor check in goal for a few months in 2010, and did not offer any IEP related service for psychological counseling. The fact that County provided Student private therapy beginning in June 2008, under a different County program, did not relieve the District from providing educationally related counseling services in the school setting. In addition, many of Student's annual goals and accommodations were missing, inappropriate, or poorly implemented. Thus, County's assessment was based on inaccurate information which skewed the results. Based on the foregoing, County's mental health assessment was inappropriate and did not comply with the law.

Predetermination and Failure to Consider Parental Concerns

130. Student contends that County denied Student a FAPE for the 2010-2011 school year by predetermining his placement in the TDS placement. However, as found above, District was Student's LEA responsible to provide him with a FAPE, and District did not predetermine his placement offer at the IEP meetings. Student did not provide any legal authority for the position that County was an LEA responsible to provide a FAPE, merely because it conducted a mental health assessment. County was required by law to attend Student's IEP team meeting to review the assessment when Student disagreed with the assessment and County was invited to the IEP team meeting. Even if County was an LEA, the evidence did not establish that County predetermined its recommendations to the IEP team. Rather, County relied in good faith on information gathered during the course of its assessment, some of which was inaccurate. There is no evidence that County predetermined to agree with District's proposed TDS placement prior to the assessment. In fact, Ms. Kenevan requested Dr. McIntyre's review of Student's prior assessments in order to obtain another opinion. County did not deny Student a FAPE with respect to this issue.

District's Placement Offer for the 2010-2011 School Year

131. District contends that its offer for a TDS program placement and related services in September 2010, as modified in November 2010, offered Student a FAPE in the least restrictive environment. District claims that Student's mental health needs have prevented him from making satisfactory progress in the general education setting. Student contends that the TDS program is not the least restrictive environment in which Student may obtain educational benefit, because his executive functioning needs have prevented him from making satisfactory progress. Student also asserts that, since November 2008, District failed

to offer or provide appropriate supports and services for him to learn strategies and tools to overcome or minimize those deficits and increase his production of assigned school work.

132. To offer a pupil a substantive FAPE, the proposed program must be specially designed to address the pupil's unique needs, and be reasonably calculated to provide the student with some educational benefit. To the maximum extent appropriate, children with disabilities should be educated with children who are not disabled, unless due to either the nature of the disability, or its severity, education in a regular class cannot be achieved satisfactorily even with the use of supplementary aids and services.

133. District's November 3, 2010 IEP offered placement in the Serramonte TDS, five days a week, and changed the mental health psychological services from two 30-minute sessions per month offered in the September 2010 IEP, to one 40-minute weekly group session, along with one 40-minute weekly group session of occupational therapy, plus 40 minutes every other week for individual occupational therapy. The offer provided that 100 percent of Student's time would be spent outside the general education environment.

134. The evidence established that County's proposed TDS program for Student provides "integrated mental health and special education services for adolescents who are at risk of psychiatric hospitalization, residential placement, or school failure." The program includes a daily structured positive behavior management system, based on the "token economy" method of a point system, where therapeutic staff are available in the classroom to provide a safe environment in which to encourage pupils to focus on thoughts and behaviors, and gently challenge beliefs, that interfere with their progress. The program combines academic instruction from a teacher with a daily community meeting, an independent living skills group, a weekly vocational group and individual occupational therapy to focus on each pupil's transition plan, and crisis response.

135. Although the County TDS placement had much to recommend it to meet Student's needs, including the opportunities for one-to-one instruction and therapy, the placement did not offer him a FAPE for several reasons. First, as found above, County's finding of eligibility under Chapter 26.5 was fundamentally flawed because Student had not received qualifying services from the District prior to the referral. Even if his IEP goals and accommodations could conceivably qualify as the type of focused mental health counseling or behavioral interventions required by law to be provided by the school district prior to referral, District's IEP's did not provide material annual goals or accommodations because they were missing, inappropriate, or not implemented for significant periods of time.

136. Second, related to the skewed mental health assessment results, the proposed program did not address Student's unique needs related to his executive functioning and ADHD deficits, but focused on his mental health needs. District and County argue that Student's "mental health has prevented him from making satisfactory progress in the general education setting." In making the TDS offer, District and County relied in great part on the opinion of County psychologist Dr. McIntyre, who chose to emphasize two and a half year-old findings in the YFES report that Student had no neurodevelopmental impairment,

without regard for the DCNC's careful evaluation and findings of severe executive functioning deficits. Dr. McIntyre also relied on District's inaccurate referral information in concluding, unpersuasively, that Student's emotional issues interfered with his ability to function and produce written school work to the extent that he had to be removed from a comprehensive campus.

137. The preponderance of the evidence established, as cogently explained by the DCNC assessor, Dr. Stiver, that both sides of the equation of Student's complex disabilities are involved with his lack of written work. His neurodevelopmental executive functioning and ADHD deficits, along with an emotional disturbance impairment based on PTSD, depression, and attachment disorder, all play a part in adversely impacting his ability to produce work in high school. While Dr. Brentar downplayed Student's mental health needs, he agreed that Student is at risk of school failure without significant mental health and executive functioning supports. Both Dr. Brentar and Dr. Stiver were more persuasive that Student demonstrates severe executive functioning deficits. The DCNC reported that nearly all persons who have disordered executive functioning, or disordered self-management abilities and mental organization, also display deficits in attention and impulse control that result in a diagnosis of ADHD. Dr. McIntyre did not consider or mention Student's ADHD, diagnosed by the age of 10. Dr. McIntyre's opinions were therefore accorded less weight.

138. Lastly, District did not sustain its burden to establish that the TDS placement is the least restrictive environment for Student at the present time. Under Chapter 26.5, the law provides that a school district is not required to place a pupil in a more restrictive educational environment in order for the pupil to receive the mental health services specified in the IEP, if those services may be appropriately provided in a less restrictive setting. Under the IDEA, a pupil shall not be removed from the regular education environment unless necessary to obtain educational benefit. In this case, County's assessment did not address any options for delivery of the recommended mental health services to Student other than in a TDS placement. From the fall of 2008 to the present, Student's IEP's have provided him with placement in the general education environment for 80 percent of his school days, for all subjects except the RSP Tutorial class, which Student has received only every other day for one period. In the fall of 2010, District did not merely propose an increase in Student's participation in the special education setting on a comprehensive campus, such as increased RSP classes, with continued access to his typically developing peers, but proposed his complete removal from the high school campus to a restrictive and isolated special education environment.

139. Applying the four criteria to evaluate the least restrictive environment detailed by the Ninth Circuit in the case of *Rachel H.*, the evidence demonstrates that placement in a restrictive special education TDS program is not the least restrictive environment for Student at this time. The academic benefits to Student of placement in the general education environment have included his successful participation and learning at grade level on an oral basis in all of his classrooms, where, for the most part, teachers and peers have appreciated his participation and oral contributions. Student has demonstrated that he is capable of retaining information, and has passed the CAHSEE. On the other hand, the academic

detriment has been that, without significant special education supports, which he has not received on a consistent and intensive level, Student has not been able to turn in sufficient class work to make meaningful progress toward a diploma. However, for the present school year, Student has, overall, made some strides in improving his attendance and grades. As of the November 23, 2010 IEP team meeting, teachers reported that Student was passing all courses except English/History.

140. The non-academic benefits of a general education placement include Student's enthusiasm and desire to learn, as well as the positive social network and continuity of friends at school even though his home life has changed and he is in a foster home. Since Student will not graduate with some of his peers, however, that network is also subject to change. In addition, although District has shown that the TDS program has active vocational and employment training opportunities available to support a pupil's transition plan for postsecondary goals, District is obligated by law to support Student's ITP's at Oceana as well. Overall, there was no evidence that Student's presence in general education classes has had a negative impact on his teachers and peers, although some of his teachers have expressed their confusion about his accommodations, frustration about his lack of written work production, and the impression that Student does not "try." The obligations of the general education teachers to work with Student's RSP teacher and District special education staff to have an agenda and check list for him, and to provide accommodations and modifications of his class assignments were not inordinate, and Student's aide handled most of the paperwork. There was no evidence relative to the financial costs of his placement.

141. Finally, it is difficult to find that the TDS placement is the least restrictive environment in light of the violations found in this Decision. Since District has not appropriately supported Student in the general education setting with sufficient legally compliant annual goals, accommodations, modifications, and related services, prior to removing him to a restricted special education setting, District's TDS proposal was premature. As found above, District's failure to have Student's RSP teacher actively work with him, to train and supervise his aide, and to develop and implement appropriate goals and accommodations have impeded his progress as well. Instead of teaching Student skills and strategies to do homework during a temporary period of "drastically reduced homework," as recommended by the DCNC, District has eliminated homework; instead of teaching him how to take notes and how to fill out class check sheets, District is paying an aide to simply do those things for him. Instead of having a clear accommodation for Student to have extended time to turn in assignments, due to his disabilities, District has now offered, in the November 23, 2010 IEP, to change the accommodation to allow general education teachers to use their own discretion whether to permit Student extended time or refuse, leaving Student with no bright line rule to follow about when and how to turn in work, and leaving the implementation of special education accommodations up to general education teachers. In addition, as found above, the November 3, 2010 placement offer failed to contain a clear offer as to what accommodations were, or were not included in the offer, and making it virtually impossible for a teacher to figure it out. Prior to removing Student from Oceana, District should be required to provide appropriate services. Having done that,

District could then be justified to propose a restrictive removal from a comprehensive campus.²⁴

142. District seeks an order requiring Student to attend the County special education TDS, or absolve the District of any responsibility for his public education. As found above, however, District's offer of a TDS placement is not appropriate because County's assessment was flawed, District did not offer or provide Student adequate annual goals and accommodations, and the TDS is not the least restrictive environment at this time. Based on the foregoing, District's September and November 2010 offers for a TDS placement at Serramonte did not comply with the law and denied Student a FAPE.

Remedies

143. An ALJ has broad discretion to remedy a denial of FAPE and may, among other things, order a school district to provide compensatory education to the pupil involved. Any such award must be based on a highly individualized determination. School districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a free appropriate public education. An award of compensatory education need not provide a "day-for-day compensation."

144. As found in this Decision, Student sustained his burden to establish multiple procedural and substantive violations of the law. Based on the findings, Student is entitled to compensatory education to provide a remedy. In determining the length of time over which compensatory instruction services should be provided as an equitable remedy for District's violations, it is noted that many of the denials of FAPE occurred when Student was 16 through 18 years of age, and in his 10th and 11th grade years of high school, a critical period of time in his life. Student requests a new assessment for written production of school work, compensatory education for executive functioning and academic deficits, training for his aide, and District's consultation with experts for his IEP and transition goals, ITPs, and accommodations. Most of Student's requests propose compensatory education by "mutually agreeable" persons or agencies. However, given the contentious nature of the case, providing such an order is problematic. In addition, District has demonstrated over time that

²⁴ Given Student's age, it is noted that he has refused District's offer of the TDS placement. District and County witnesses testified credibly and persuasively that, in order to be effective, the parent needs to support the TDS placement and the pupil must "buy in," and be willing to attend, however reluctantly at first. For example, District school psychologist Ms. Fickers was emphatic that the provision of mental health services in the TDS program cannot be forced, and that if the pupil is unwilling, the District would make another offer. County's Chapter 26.5 supervisor for over 20 years, Nancy Littlefield, a licensed clinical social worker, concurred with that view. The placement would be ineffective without Student's consent. However, if the program were otherwise legally appropriate, Student's lack of consent would not prohibit the placement.

its staff was not able to develop legally compliant programs and services. Consequently, the ALJ orders Student to select his direct compensatory education providers, and for District select the IEP and transition experts as ordered below.

145. First, Student requests 360 hours of compensatory education from Dr. Brentar or an equally qualified NPA, plus transportation, calculated at the rate of two hours per week of direct instruction in executive functioning and assistive technology, plus two hours per week of “assistance with academics and integration of skills,” for a total of four hours a week times 45 weeks per year, for two years, for a total of 90 weeks. It is inferred that Student calculated 45 weeks per school year to include a summer ESY period. Student’s request for direct executive functioning, including academic assistance and skill integration instruction for a total of four hours per week appears reasonable in the absence of other proposals. Given the length of time that has passed, Student is entitled to remediation of lost educational benefit. However, the law does not require a week for week remedy. The evidence supports calculation of Student’s lost educational benefits based primarily on the period after the DCNC assessment was issued and District committed multiple violations, from January 2010 to the present, and therefore bases the remedy on a total of 64 school weeks instead of 90 school weeks.

146. District shall contract with Dr. Brentar, or an NPA or nonpublic school (NPS) selected by Student, with qualifications substantially equivalent to Dr. Brentar’s in the area of executive functioning, to provide Student with direct executive functioning instruction, including academic assistance, integration of skills, and supervision of instruction, if any, for four hours per week, for a total of 256 hours (calculated based on a total of 64 school weeks), in the following areas: self-management, problem-solving, decision-making, organizational skills and meeting deadlines, written production, and other executive functioning skills. Dr. Brentar, the NPA, or NPS have discretion to allocate the services provided the total number of hours is four hours a week. If all or part of the instruction is not delivered at Student’s school, District shall fund round-trip transportation based on the standard mileage reimbursement rate for the San Mateo County Special Education Local Plan Area (SELPA).

147. Student requests an order for the District to fund Dr. Brentar’s services to provide training to a one-to-one aide. To be consistent with Student’s request for executive functioning training, the same NPA, which may or may not be Dr. Brentar, should conduct both Student’s executive functioning training and the aide’s training. In the absence of other information, the ALJ has estimated not less than 10 hours of training. Therefore, District shall fund not less than 10 hours of training for Student’s aide, in the area of effective assistance and instruction as a special education aide to support Student’s acquisition of the executive functioning skills listed above.

148. Student also requests that District provide him with a credit recovery program as compensatory education, since he did not pass classes and lost credits toward graduation during the time periods of the above violations. At the rate of 25 units of credit to be earned for every 100 hours of individual instruction, Student requests 300 hours of credit recovery instruction, or a total recovery of 75 credits. Since Student was only able to complete about

76 hours of individual instruction and earned 15 credits over the 2010 summer, and would need to attend school during the school year, Student's request could extend well over three or four years and is in excess of a reasonable amount of compensatory credit recovery in light of the violations. Student's request is accordingly reduced. District shall provide 200 hours of credit recovery instruction by funding a qualified tutor, NPA, or NPS selected by Student. At a minimum, the tutor shall be a credentialed teacher or supervised by a credentialed teacher.

149 In addition, Student requests an order for his continued placement at Oceana, with District to convene an IEP team meeting, and to fund Dr. Brentar's attendance and consultation with the IEP team to develop appropriate annual goals to meet Student's unique needs, and to clearly document the accommodations and modifications he needs to receive a FAPE. District shall fund Dr. Brentar's attendance at Student's IEP team as a provider of the services ordered in this Decision. The IEP team is required by law to consider his input, but is not required to adopt his recommendations. However, the evidence established that District was not able to develop annual goals and accommodations that met Student's unique needs. District shall therefore contract with an independent, qualified expert in the development of IEP goals and accommodations to attend Student's IEP meeting and provide consultation services to assist the IEP team to develop annual IEP goals and accommodations to meet Student's needs.

150. In addition, Student requests that District be ordered to contract with an independent qualified transition expert to develop an appropriate transition plan and services. The evidence established that District was not able to develop transition plans for Student in compliance with the law. Therefore, District shall contract with an independent qualified transition expert to provide consultation services to assist District to develop Student's ITP, and transition goals and services. The IEP and ITP experts may be the same person or entity at District's discretion.

151. Student asks for an order that he be able to select a trusted person for a daily check in and on-campus counseling for one hour per week. No order is required as a daily check in with a counselor remains a current annual IEP goal, and the IEP team may review the goal. In addition, Student's requests for assistive technology training are denied based on the determinations made in this case.

LEGAL CONCLUSIONS

1. Student and District both have burdens of proof in this proceeding. District has the burden of proof in its case, and Student has the burden of proof in his case. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

FAPE and Related Services

2. The IDEA provides states with federal funds to help educate children with disabilities if the state provides every qualified child with a FAPE that meets the federal statutory requirements. Congress enacted the IDEA "to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs" (20 U.S.C. §§ 1400(c), 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.)

3. FAPE is defined as special education and related services that are available to the pupil at no cost to the parent or guardian, that meet the state educational standards, and that conform to the pupil's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) In addition, the educational needs include functional performance. (Ed. Code, § 56345, subd. (a)(1).) There are two parts to the legal analysis of whether a school district offered a pupil a FAPE, whether the LEA has complied with the procedures set forth in the IDEA, and whether the IEP developed through those procedures was substantively appropriate. (*Board of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley* (1982) 458 U.S. 176, 206-07 [102 S.Ct. 3034, 73 L.Ed.2d 690], (*Rowley*).)

4. "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, which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

Assessments

5. Before any action is taken with respect to the initial placement of a child with special needs, an assessment of the pupil's educational needs shall be conducted. (Ed. Code, § 56320.) The pupil must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (e), (f).) Thereafter, special education students shall be reassessed at least once every three years, and may be reassessed not more frequently than once a year, unless the parent and the local educational agency (LEA) agree otherwise. (Ed. Code, § 56381, subd. (a)(2).)

6. In performing a comprehensive reassessment, such as a triennial assessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); Ed.

Code, § 56381, subd. (b)(1).) Based upon such review, the district must identify any additional information that is needed by the IEP team to determine the present levels of academic achievement and related developmental needs of the pupil and to decide whether modifications or additions in the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The district must perform assessments that are necessary to obtain such information concerning the pupil. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).)

Student's Issue 1: In connection with District's triennial assessment dated November 20, 2008, did District fail to adequately assess Student by failing to adequately assess his ability to produce written work?

7. As set forth in Factual Findings 7 through 24, and Legal Conclusions 5 and 6, District did not adequately assess Student's ability to produce written work, primarily because the writing portions of the WJ-III were flawed, Student's writing fluency was not assessed, and his executive functioning and dysgraphia deficits were minimized. As a result, the District, and all members of Student's December 2008 IEP team, received inaccurate information about Student's functional and academic writing abilities. Grandmother's rights to participate in the IEP process were therefore necessarily negatively impacted, and Student's right to a FAPE was impeded, and he was therefore denied a FAPE.

Substantive FAPE

8. For a school district's IEP to offer a pupil a substantive FAPE, the proposed program must be specially designed to address the pupil's unique needs, and be reasonably calculated to provide the student with some educational benefit. (20 U.S.C. § 1401(9).) FAPE must provide a threshold "basic floor of opportunity" in public education that "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." (*Rowley, supra*, 458 U.S. at p. 189.) The *Rowley* court rejected the argument that school districts are required to provide services "sufficient to maximize each child's potential commensurate with the opportunity provided other children." (*Id.* at pp. 198-200.) The court determined that the IEP must be reasonably calculated to provide the pupil with some educational benefit. The IDEA does not require school districts to provide special education pupils with the best education available, or to provide instruction or services that maximize a student's abilities. (*Id.* at p. 198.) The Ninth Circuit refers to the "some educational benefit" standard of *Rowley* simply as "educational benefit." (See, e.g., *M.L. v. Fed. Way School Dist.* (2004) 394 F.3d 634.) It has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).) Other circuits have interpreted the standard to mean more than trivial or "de minimus" benefit, or at least "meaningful" benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341; *L.E. v. Ramsey Bd. of Educ.* (3d Cir. 2006) 435 F.3d 384.)

9. The IEP is the “centerpiece of the IDEA’s education delivery system for disabled children” and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401(14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) An IEP is a written statement that includes a statement of the present performance of the pupil, a statement of measurable annual goals designed to meet the pupil’s needs that result from the disability, a description of the manner in which progress of the pupil towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the pupil can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2), (3) (2006); Ed. Code, § 56345, subds. (a)(2), (3).) It shall also include a statement of the program modifications or supports for school personnel that will be provided to the pupil to allow him or her to advance appropriately toward attaining the annual goals and be involved and make progress in the general education curriculum and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii) (2006); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

10. An IEP is to be evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams, supra*, 195 F.3d at p. 1149.) The Ninth Circuit has endorsed the “snapshot rule,” explaining that “[a]n IEP is a snapshot, not a retrospective.” The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid*; *Christopher S. v. Stanislaus County Off. of Ed.* (9th Cir. 2004) 384 F.3d 1205, 1212; *Pitchford v. Salem-Kaiser School Dist. No. 24J* (D.Ore. 2001) 155 F.Supp.2d 1213, 1236.) To determine whether a school district offered a pupil a FAPE, the focus is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

Transition Plans and Transition Goals and Services

11. Beginning not later than the first IEP to be in effect when a child with a disability turns 16, and updated annually thereafter, the IEP must include appropriate measurable postsecondary goals related to training, education, employment, and, where appropriate, independent living skills. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); 34 C.F.R. § 300.320(b) (2006); Ed. Code, § 56345, subd. (a)(8).) The postsecondary goals must be updated annually. (*Ibid.*) In addition, every IEP beginning with age 16 must also include transition services to assist the child in reaching those postsecondary goals. (*Ibid.*)

12. “Transition services” means “a coordinated set of activities for an individual with exceptional needs” that: (1) is designed within a results-oriented process that is focused on improving the academic and functional achievement of the individual with exceptional needs to facilitate the movement of the pupil from school to post-school activities, including postsecondary education, vocational education, integrated employment, including supported employment, continuing and adult education, adult services, independent living, or

community participation; (2) is based upon the individual needs of the pupil, taking into account the strengths, preferences, and interests of the pupil, and (3) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a).)

13. The failure to properly formulate a transition plan may be a procedural violation of the IDEA that warrants relief upon a showing of a loss of educational opportunity or a denial of a FAPE. (*Board of Education v. Ross* (7th Cir. 2007) 486 F.3d 267, 276 [despite transition plans being a mandatory component of an IEP, notation in IEP that the transition plan would be “deferred” was procedural violation]; *A.S. v. Madison Metro School Dist.* (D. Wis. 2007) 477 F.Supp.2d 969, 978 [allegation of inadequate transition plan treated as procedural violation].)

Material Failure to Implement IEP Services

14. A failure to implement an IEP will constitute a violation of a pupil’s right to a FAPE only if the failure was material. There is no statutory requirement that a district must perfectly adhere to an IEP, and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the services a school district provides to a disabled pupil fall significantly short of the services required by the IEP. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 502 F.3d 811, 822.) A party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and instead, must demonstrate that the school district failed to implement substantial and significant provisions of the IEP. (*Ibid.*) “[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail.” (*Ibid.*)

Student’s Issues 2, 4, and 6: Beginning on November 8, 2008, did District deny Student a FAPE for the 2008-2009, 2009-2010, and 2010-2011 school years, and 2010 summer school, by failing to offer or provide him with the following:

15. (a) *Appropriate, Measurable Annual Goals:* Based on Factual Findings 36 through 54, and Legal Conclusions 2 through 4, and 8 through 10, for the 2008-2009 school year, Student was without annual goals to address his writing and math needs for over a year, from December 2008 to the next annual IEP team meeting in January 2010. Since his poor ability to write was a primary impediment to his progress, and he needed to pass Algebra I, the absence of both of these material goals impeded his education. Therefore, District’s failure to offer those goals denied Student a FAPE. For the 2009-2010 school year through January 2010, District failed to offer or provide Student with any annual goals in the areas of written expression, math, and organization. Thereafter, District’s annual goals for self-advocacy and written language were appropriate. However, the other goals for work production, organization, and math did not meet his needs, were vague and not measurable, and therefore denied Student a FAPE. Beginning on May 25, 2010, through the end of the

school year, the January and February 2010 IEP's remained in effect. The annual math goal still did not meet Student's needs as previously found, did not comply with the law, and denied him a FAPE. For the 2010-2011 school year to the time of the hearing, the January, February, and May 2010 IEP's remained in effect, and Student's math goal did not meet his needs as previously found, did not comply with the law, and denied him a FAPE.

16. *(b) One-to-One Instruction Services for Executive Functioning:* Based on Factual Findings 55 through 57, and Legal Conclusions 2 through 4, and 8 through 10, for the 2008-2009 school year, Student's IEP provided that his RSP teacher, Mr. Salazar, would provide instructional oversight to assist him to implement strategies and tools to complete his work. Based on the knowledge District had at that time, the IEP provided for oversight, facilitation, and support for strategies and tools to diminish, if not overcome, Student's executive functioning deficits. Therefore, District's offer was reasonably calculated to provide meaningful educational benefit and the December 2008 IEP's lack of an offer for one-to-one instruction by an educational psychologist to address Student's executive functioning deficits accordingly did not deny him a FAPE. By the January 2010 IEP team meeting, the IEP team reviewed the DCNC's recommendations, and decided to offer Student an aide. DCNC did not make any recommendation as to the qualifications of service providers, including an instructor for executive functioning skills. Thus, Student's own witnesses from DCNC did not support his contention on this issue. Accordingly, District's decision not to offer to hire an educational psychologist to instruct Student at any time during 2010 did not deny him a FAPE.

17. *(c) Adequately Trained One-to-One Instructional Aide:* Based on Factual Findings 58 through 65, and Legal Conclusions 2 through 4, 8 through 10, and 14, since the December 2008 IEP offered the services of Mr. Salazar to oversee and help Student with strategies and tools to deal with his executive functioning deficits, Student did not sustain his burden to establish that he also needed an instructional aide in addition to the services of the RSP teacher every other day. By the beginning of the 2009-2010 school year, or at least after receipt of the DCNC's assessment dated September 23, 2009, District should have known that Student needed significant, intensive supports to make progress in the school setting. District's failure to provide an aide or call an IEP team meeting denied Student a FAPE until District offered Student an aide in the January 2010 IEP, who was hired by the end of February 2010. The IEP team intended the aide to provide effective services to not only support Student, but to assist him to acquire independent skills, which therefore called for the aide to have some skills and training. Overall, the evidence established that District failed to train and supervise Ms. Jhinnu to be anything more than a note taker, prompter, and reminder aide for Student. The aide's daily prompting of Student was a good start. However, given the severity of his deficits, and District's intended goal for Student to learn self-regulation and acquire executing functioning skills to move into adulthood, District's lack of adequate training and supervision of the aide did not serve either the aide or Student sufficiently. Overall, while Student's academic performance has increased slightly, the aide's supports did not result in much increased production of work and turned-in assignments, and there is no evidence that District's special education staff were actively monitoring or supervising her services. Based on the foregoing, Student established that

District's provision of a substantially untrained and unsupervised aide to address his unique needs related to his disabilities was a material failure to implement the IEP's provision for an aide, and denied him a FAPE.

18. *(d) Transition Plan, and Transition Goals and Services:* Based on Factual Findings 66 through 74, and Legal Conclusions 11 through 13, District's December 2008 transition plan did not comply with the law because the postsecondary education goal for college had no corresponding transition service or annual goal, and the employment goal was not accompanied by any annual goal. That violation continued throughout 2009, impeded Student's educational progress, and denied him a FAPE. Beginning in January 2010, similar ITP violations continued. By May 2010, Student's grandmother had passed away, he was placed in foster care as a ward of the Court, was at risk of academic failure, and was entitled to independent living skills services and goals in his ITP. Therefore, at that time, District's failure to offer any goal or service in the area of independent living skills was also a procedural violation that denied Student a FAPE. District's narrow and short-sighted view that Student did not need detailed transition services belied the purpose of the transition laws, which is to help high school pupils prepare and plan for adulthood. Overall, District's failure to have annual goals and services associated with Student's ITP's constituted a procedural violation for each school year that impeded Student's educational progress and denied him a FAPE.

19. *(e) School-Based Counseling Services:* Based on Factual Findings 75 through 79, and Legal Conclusions 2 through 4, and 8 through 10, for the 2008-2009 school year, the evidence established that Student voluntarily saw a school counselor on different occasions when he needed help dealing with things. District was aware that, in addition to Student's significant ADHD and executive functioning deficits, Student had significant emotional problems along with PTSD, depression, ADHD, and attachment disorder. At the January 2010 IEP team meeting, District offered a daily "check in" with a trusted counselor as an annual goal which was accepted. However, District never offered school-based counseling services to Student as a related service with a specific frequency and duration during any of the years at issue. District was required to address Student's mental health issues with some focused psychosocial counseling or behavioral interventions prior to referring him to the County for mental health services. Aside from that requirement, the law required District to offer counseling or psychological services in order for Student to make educational progress because his complex mental health issues adversely affected his education. District did not offer school counseling as a related service, and therefore denied Student a FAPE.

20. *(f) Failure to Implement Student's IEP Goals, Accommodations, and Modifications:* Based on Factual Findings 80 through 91, and Legal Conclusion 14, for the 2008-2009 school year, the evidence established that District did not implement the December 2008 office hours goal beyond Mr. Salazar's one-time meetings with teachers and Student. This was a self-advocacy goal and Student did not advocate for help to implement the goal. The December 2008 IEP also provided that Student would have a note taker, and copies of class notes, but there was no evidence that this accommodation was ever implemented during the remainder of the 2008-2009 school year, or the first half of the 2009-

2010 school year until it was offered again in January 2010. For the 2009-2010, and 2010-2011 school years, Mr. Salazar did not provide Student's teachers with a complete list of his accommodations and modifications, but only provided them with a summary in a binder, that contained an incomplete list. Overall, District failed to implement many of Student's goals, accommodations and modifications beginning in January 2009. Consequently, the services Student received fell significantly short of the services required by his IEP's. District therefore materially failed to implement components required by his IEP's, and denied Student a FAPE.

21. (g) *Additional Accommodations and Modifications*: Based on Factual Finding 92, and Legal Conclusions 2 through 4, and 8 through 10, Student's contention that he did not receive modified grading was not supported by the evidence, and District did not deny Student a FAPE by failing to modify his grades.

22. (h) *DCNC Recommendations to Address Student's Executive Functioning Deficits*: Based on Factual Finding 93, Student abandoned this as a separate issue.

23. (i) *Assistive Technology Services, Supports And Equipment*: Based on Factual Finding 94, and Legal Conclusions 2 through 4, and 8 through 10, Student did not claim that District failed to perform an assistive technology assessment as an issue in this case. In addition, at no time did Student or his Educational Rights Holders ask District for an assistive technology assessment, or present evidence regarding specific technologies, other than general testimony. District was therefore not obligated to offer assistive technology at any time from November 2008 to the present. District therefore did not deny Student a FAPE as to this issue.

24. (j) *Failure to Implement Summer Home Instruction Services*: Based on Factual Findings 95 through 97, and Legal Conclusions 14, at the May 25, 2010 IEP team meeting, District agreed to provide 10 hours per week of instructional services to Student for 10 weeks during the summer of 2010, for a total of 100 hours. Ms. Jacobs-Levine provided 78.5 hours of services to him from June through November 2010. Consequently, District failed to implement, and still owes Student 21.5 hours of instruction. The amount of hours that remain undelivered constitute about 20 percent of the total hours, and are consequently a material departure from the IEP. The failure to complete those hours at any time during the 2010-2011 school year through the time of the hearing therefore denied Student a FAPE.

Procedural Requirements

25. Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

Required Attendees at IEP team meetings

26. The IDEA and California education law require certain individuals to be in attendance at every IEP team meeting. In particular, the IEP team must include not less than one regular education teacher of the child, if the child is or may be participating in the regular education environment. (20 U.S.C. § 1414 (d)(1)(B); Ed. Code, § 56341, subd. (b).) The purpose of the attendance of a regular education teacher is to obtain that teacher's input and participation, so that the parents and other members of the IEP team will have accurate information upon which to base a decision, and an LEA's failure to ensure this input seriously infringes on the parents' participation in the IEP team meeting. (See *Target Range, supra* at 1484; *Amanda J. v. Clark County School Dist., supra*.) The Ninth Circuit has determined that the failure to have a general education teacher on the IEP team in these circumstances invalidates the IEP. (*M.L. v. Federal Way School Dist.* (9th Cir. 2003) 394 F.3d 634.) The general education teacher need not be the Student's present teacher. (*R.B. v. Napa Valley Sch. Dist.* (9th Cir., July 16, 2007) 2007 U.S. App. LEXIS 16840.) The IEP is invalidated either as a structural defect or under the harmless error standard. (*Ibid.*).

Student's Issue 3: Did District procedurally deny Student a FAPE during the 2008-2009 school year by failing to have a general education teacher at his December 2008 IEP team meeting?

27. Based on Factual Findings 30 through 34, and Legal Conclusions 2 through 4, 8 through 10, 25, and 26, the evidence established that, at the IEP team meeting on December 8, 2008, Student's special education RSP teacher, Mr. Salazar, and other District staff were present at the meeting, but that no person then employed by the District as a general education teacher was present. Two District persons present at the meeting, Mr. Salazar and Mr. Barbour, held general education credentials, but there was no evidence either of them was a general education teacher for the District at that time. Student was enrolled in six general education classes for 82 percent of the school day, and his failure to pass core academic classes during the previous year in ninth grade made it critical for the District to have a general education teacher at the IEP team meeting in order to provide information to the team about how to support Student in the general education environment. Accordingly, District committed a procedural violation. Grandmother's rights to participate in the IEP process were negatively impacted, and Student lost educational benefit. The violation therefore denied Student a FAPE.

Convening IEP team meetings

28. A school district must conduct an IEP team meeting for a special education pupil at least annually "to review the pupil's progress, the [IEP], including whether the annual goals for the pupil are being achieved, and the appropriateness of placement, and to make any necessary revisions." (Ed. Code, § 56343, subd. (d); see, 20 U.S.C. § 1414(d)(4)(A)(i).) A district must also convene an IEP team meeting when a parent requests a meeting to develop, review, or revise the IEP. (Ed. Code, § 56343, subd. (c).) In California, the IEP team meeting must be held within 30 days from the date of receipt of the

written request, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays. (Ed. Code, § 56343.5.)

29. The parents of the child with a disability are critical members of the IEP team. California law requires the school district to give the parents notice of the meeting early enough to ensure an opportunity to attend. (Ed. Code, § 56341.5, subd. (b).) The law also requires the IEP team meeting to be scheduled at a mutually agreed-upon time and place. (Ed. Code, § 56341.5 (c).) A district may hold an IEP team meeting without a parent in attendance if the district is unable to convince the parent that he or she should attend. (Ed. Code, § 56341.5, subd. (h).) However, if a district holds a meeting without the parent in attendance, it must “maintain a record of its attempts to arrange a mutually agreed-upon time and place” such as detailed records of telephone calls made or attempted, or copies of correspondence sent to the parent. (*Ibid.*)

Predetermination

30. Predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) A district may not arrive at an IEP team meeting with a “take it or leave it” offer. (*J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, n. 10.) However, school officials do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP team meeting. (*N.L. v. Knox County Schs., supra*, 315 F.3d at p. 693, fn. 3.)

31. School officials are permitted to engage in preparatory activities to develop a proposal or response to a parent proposal that will be discussed at a later meeting. (34 C.F.R. § 300.501(b)(1) & (b)(3)(2006); *T.P. and S.P. on behalf of S.P. v. Mamaroneck Union Free School District* (3d Cir. 2009) 554 F.3d 247, 253.) School district personnel may bring a draft of the IEP to the meeting; however, the parents are entitled to a full discussion of their questions, concerns and recommendations before the IEP is finalized. (Appen.A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed.Reg. 12478 (Mar. 12, 1999); see *JG v. Douglas County School Dist., supra*, 552 F.3d 786, 801, fn. 10.) There is no requirement that the IEP team members discuss all placement options, so long as alternative options are available. (See, *L.S. v. Newark Unified School District*, (N.D.Cal., May 22, 2006, No. C 05-03241 JSW) 2006 WL 1390661, p. 6.)

Clear Written Offer

32. An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decisions based on it. (*Union School Dist. v. Smith*, (9th Cir. 1993) 15 F.3d 1519, 1526.) In *Union*, the Ninth Circuit observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional

assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Ibid.* at p. 1526). The requirement of a formal, written offer alerts the parents to the need to consider seriously whether the offered placement was an appropriate placement under the IDEA, so that the parents can decide whether to oppose the offered placement or to accept it with the supplement of additional education services. (*Ibid.*; *Glendale Unified School Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1107 (citing *Union, supra*, 15 F.3d at p. 1526).)

Student's Issue 5 and 7: Did the District procedurally deny Student a FAPE during the 2009-2010, and 2010-2011 school years by:

33. (a), (b), and (c) *Failing to Convene an IEP Team Meeting Between September 2009 and January 2010:* Based on Factual Findings 98 through 102, and Legal Conclusions 2 through 4, 8 through 10, 25, and 28, Student's annual IEP team meeting was due in December 2009. On November 20, 2009, Grandmother submitted a written request to the District to schedule an IEP team meeting. District therefore was required to schedule an IEP team meeting within 30 days thereafter and did not do so. District committed a procedural violation when it did not hold the IEP team meeting by December 20, 2010. District corrected the violation when it held the IEP team meeting on January 29, 2010. The delay of over one month impeded Student's right to a FAPE and deprived him of educational benefit during a time when material deficiencies existed in his IEP, and he was denied a FAPE.

34. (d) *Failing To Make a Clear Offer Of FAPE in the District's IEP Offers:* Based on Factual Findings 103 through 109, and Legal Conclusions 2 through 4, 8 through 10, 25, and 32, Student claimed that many components of District's IEP's for the school years at issue in this case failed to have clear written offers as required by law. Only one, however, was sustained. District's IEP's did not set forth the offered accommodations in one place, but were written throughout the IEP's in a variety of places, which made it confusing and difficult to find and understand them. This confusion and lack of clarity in the IEP documents as to the accommodations constituted a procedural violation because it was prejudicial to Student, his teachers, and the IEP teams. As a result, general education teachers were not informed of all of the accommodations and many of them were not implemented or implemented poorly. District therefore committed a procedural violation by failing to clearly delineate the accommodations in each offer, which impeded Student's right to a FAPE, and denied him a FAPE.

35. (e) *Failing to Review Student's Progress on His Annual Goals:* Based on Factual Findings 110 through 113, and Legal Conclusions 2 through 4, 8 through 10, and 25, District failed to document Student's measurable progress or lack of progress on his annual IEP goals during the year. However, Student did not sustain his burden to establish that District violated the law, which only required it to review Student's annual goals and PLOP's annually. For 2010, District held numerous IEP team meetings which discussed, but did not document, a review of Student's progress on his goals. Therefore, Student was not denied a FAPE on this basis.

36. *(f) Predetermining Student's Placement and Failing to Consider Parental Concerns:* Based on Factual Findings 114 through 117, and Legal Conclusions 2 through 4, 8 through 10, 25, 30, and 31, Student did not establish that District refused to consider his concerns and those of his Educational Rights Holders at the May 5, and November 3, 2010 IEP team meetings, and predetermined his placement in a TDS program, as claimed. Student's TDS placement included a referral process to the County and was contingent on his qualification for Chapter 26.5 services. At the November 3, 2010 IEP team meeting, Student was already in possession of District's September 2010 IEP offer for the TDS placement. Student disagreed with the offer and a placement option to remain at Oceana was discussed, along with his progress. The fact that District disagreed with Student's requests did not mean that his requests were not considered. The evidence established that the District members of the team listened to and considered Student's concerns. Therefore, District complied with the law and did not predetermine the IEP offer.

37. *(g) Failing to Timely Convene the September 2010 IEP Team Meeting at a Mutually Agreeable Time:* Based on Factual Findings 118 through 122, and Legal Conclusions 2 through 4, 8 through 10, 25, 28, and 29, Student and District began in mid-August 2010 to negotiate mutually agreeable dates to schedule an IEP team meeting to review County's mental health assessment. Over a period of about two weeks, the parties could not agree on a date due to unavailability, Student's attorney requested records to be produced before they would attend the meeting, and, on September 1, 2010, District served a unilateral IEP team meeting notice for September 15, 2010, a date on which Student's attorney, Ms. Lew, was not available. District held the IEP team meeting without Student and his representatives on September 15, 2010, and thereafter mailed a copy of the IEP offer to them, along with prior written notice. District therefore committed a procedural violation when it scheduled and held the mental health assessment IEP team meeting at a time that was not mutually agreeable and was unavailable to Student and his representatives, without making further reasonable attempts to jointly schedule a meeting. The procedural violation impeded Student's right to a FAPE and impeded Educational Rights Holders' rights to participate in the IEP process, as critical decisions were made at the September 15, 2010 IEP team meeting without Student's involvement or input. The violation was corrected when District convened an IEP team meeting on November 3, 2010.

Chapter 26.5 Mental Health Services

38. In 1984 the California Legislature passed AB 3632, adding Chapter 26.5 to the Government Code (Gov. Code, § 7570 et seq.). Chapter 26.5 divided responsibility for the delivery of mental health services to special education pupils between the Superintendent of Public Instruction and the Secretary of Health and Human Services. Under Chapter 26.5, the county mental health agency "is responsible for the provision of mental health services" to the pupil "if required in the individualized education program" of the pupil. (Gov. Code, § 7576, subd. (a).) The school district remains ultimately responsible for making a FAPE available to a pupil needing mental health services. (20 U.S.C. § 1414(d)(2); Ed. Code, § 56040, subd. (a).)

39. Under Chapter 26.5, a school district, an IEP team, or a parent may initiate a referral to a county mental health agency by requesting a mental health assessment. (Gov. Code, § 7576, subd. (b).) A pupil may be referred to the county mental health agency for assessment if he or she meets all of the following criteria: (a) the pupil has been assessed by school personnel and determined to be a special education pupil suspected of needing mental health services; (b) the LEA obtained written parental consent for the referral, for the release of information, and for the observation of the pupil by mental health professionals in the educational setting; (c) the pupil has emotional or behavioral characteristics that are all of the following: (1) observed by qualified educational staff in the educational setting; (2) impede the pupil from benefiting from educational services; (3) are significant as indicated by rate of occurrence and intensity; (4) are associated with a condition that is not a social maladjustment or temporary adjustment problem, and cannot be resolved with short-term counseling; (d) the pupil's cognitive functioning is sufficient to enable him or her to benefit from mental health services; and (e) the LEA has provided appropriate counseling and guidance services, psychological services, parent counseling and training, social work services in the pupil's IEP pursuant to Education Code section 56363, or behavioral intervention pursuant to Education Code section 56520, and the IEP team has determined that the services do not meet the educational needs of the pupil or that they are clearly inadequate or inappropriate to meet the pupil's educational needs, and has documented the determination. (Gov. Code, §§ 7576, subds. (b)(1) - (5); Cal. Code Regs., tit. 2, § 60040, subd. (a).) Education Code section 56363 provides for related services (designated instruction and services) necessary for a pupil to receive a FAPE, and Education Code section 56520 provides for positive behavior interventions in IEP's.

40. The mental health assessment must be conducted by qualified mental health professionals, and must follow the IDEA's special education assessment procedures. (Gov. Code, §§ 7572, subds. (a) & (c).) The county agency must meet with the parent and appropriate members of the IEP team to review the results prior to the IEP team meeting to ascertain whether the parent agrees or disagrees with the recommendation, in order to prepare for the IEP team meeting. (Gov. Code, §§ 7572, subd. (d)(1).)

Student's Issue 8: Did County fail to conduct an adequate mental health assessment in the fall of 2010?

41. As set forth in Factual Findings 123 through 129, and Legal Conclusions 38 through 40, County's September 2010 mental health assessment of Student complied with most of the legal requirements for the assessment. However, County's assessment was fundamentally flawed because critical data from District as to what interventions and services District had provided prior to the referral for mental health services were incorrect. Educational Rights Holders informed the County that District had failed to provide appropriate services. County did not critically analyze the data, including a pre-referral form informing the County that District had provided multiple accommodations and modifications to support Student when that was not the case. County's assessment was therefore based on inaccurate information which skewed the results. None of Student's IEP's demonstrated that

District provided the kinds of focused mental health counseling, guidance, or behavioral interventions required for eligibility. Student's private counseling outside of school did not meet the statutory requirement. Based on the foregoing, County's mental health assessment was inappropriate and did not comply with the law.

Student's Issue 9: Did the County deny Student a FAPE during the 2010-2011 school year by predetermining Student's placement?

42. As set forth in Factual Finding 130, and Legal Conclusions 30, 31, and 38 through 40, County did not deny Student a FAPE by predetermining its recommendations that Student qualified for Chapter 26.5 mental health services, and to deliver those services to him in the TDS program at Serramonte. County relied in good faith on the referral information provided by District, reviewed all submitted documentation, and interviewed many people who knew and worked with Student. The evidence established that County made the recommendation of eligibility for its mental health services, and receipt of the services in District's TDS program, only after and as a result of its assessment. County therefore complied with the law on this issue and did not deny Student a FAPE.

Placement

43. Federal and state laws require school districts to provide a program in the least restrictive environment to each special education pupil. (Ed. Code, §§ 56031; 56033.5; 34 C.F.R. § 300.114 (2006).) A special education pupil must be educated with nondisabled peers to the maximum extent appropriate and may be removed from the regular education environment only when 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) (2006).) To determine whether a special education pupil could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) the educational benefits of placement full-time in a regular class; 2) the nonacademic benefits of such placement; 3) the effect the pupil had on the teacher and children in the regular class; and 4) the costs of mainstreaming. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402.) If it is determined that a child cannot be educated in a general education environment, then the analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.)

44. Under Chapter 26.5, the California Legislature has provided that a school district is not required to place a pupil in a more restrictive educational environment in order for the pupil to receive the mental health services specified in the IEP, if those services may be appropriately provided in a less restrictive setting. (Gov. Code, § 7576, subd. (a).)

District's Issue 10: Did District's IEP offer dated September 15, 2010, as modified on November 3, 2010, for a TDS placement, including specialized academic instruction, psychological services, and occupational therapy, offer Student a FAPE?

45. Based on Factual Findings 131 through 142, and Legal Conclusions 2 through 4, 8 through 10, 38 through 41, 43, and 44, District's offer of a County TDS placement was not reasonably calculated to provide Student some educational benefit and did not constitute a FAPE for several reasons. First, County's finding of eligibility for the TDS program was fundamentally flawed because Student had not received qualifying services from the District prior to the referral and County based its assessment on materially inaccurate information. Even if Student's IEP goals and accommodations could qualify as the type of focused mental health counseling or behavioral interventions required to be provided by a school district prior to referral, District's IEP's did not provide material annual goals or accommodations because they were to a significant degree inappropriate, immeasurable, or were not implemented. In addition, the proposed program was not reasonably designed to address Student's unique needs related to his executive functioning and ADHD deficits, but focused on his mental health needs. The evidence established that both Student's executive functioning and ADHD deficits, along with an emotional disturbance impairment based on PTSD, depression, and attachment disorder adversely impact his ability to produce work in high school. Finally, District did not sustain its burden to establish that the TDS placement is the least restrictive environment for Student at the present time. The academic and nonacademic benefits of Student's participation in the general education environment are significant, with minor negative impact to his peers or teachers. District's proposal to change Student's placement from 82 percent in general education at Oceana, to 100 percent in special education at a remote site, did not address less restrictive options, other than individual study to take the GED. There is no evidence that Student engaged in disruptive negative behaviors at school, although his emotional fragility called for counseling. In any event, in view of the violations found, District should provide Student with an appropriate program at Oceana before removing him.

Remedies and Compensatory Education

46. When an LEA fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of Burlington v. Department of Educ.* (1996) 471 U.S. 359, 369-371 [105 S.Ct. 1996, 85 L.Ed.2d 385]; 20 U.S.C. § 1415(i)(2)(C)(3).)

47. School districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a free appropriate public education. (*Student W. v. Puyallup School District, supra*, 31 F.3d at p. 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Ibid.*) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v.*

District of Columbia (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

Based on Factual Findings 1 through 142, and Legal Conclusions 1 through 47, Student established that during the school years at issue, District violated the procedural and substantive requirements of the law in the provision of Student’s assessment, and special education and related services that constituted a denial of FAPE. Consequently, Student is entitled to equitable relief. Student is entitled to an assessment of his abilities to produce written work; compensatory education in the form of both academic tutoring or credit recovery instruction, and direct instructional training regarding executive functioning skills and strategies to produce written school assignments; training for his aide; and District’s funding of IEP and ITP experts to attend his IEP meeting as found in Factual Findings 143 through 151, and ordered below.

ORDER

1. Within 30 days of the date of this order, Student shall submit to the District the names of up to three qualified independent assessors who meet the SELPA’s criteria for independent assessors, to assess his current academic and functional abilities to produce written work. Within 15 days of receipt of Student’s choices, District shall select the assessor from Student’s list, and deliver an assessment plan to Student for the assessment. District shall timely contract with the assessor, fund the assessment, and convene an IEP team meeting as provided by law to review and consider the assessment. Educational Rights Holders shall make Student reasonably available for the assessment.

2. Within 30 days of the date of this Decision, District shall contract with Dr. Brentar or his agency, if he or the agency are certified by the state as either an NPA or nonpublic school (NPS), to provide Student with direct executive functioning instruction, including academic assistance, integration of skills, and supervision hours for the training, for four hours per week, for a total of 256 hours, in the following areas: self-management, problem-solving, decision-making, organizational skills and meeting deadlines, written production, and other executive functioning skills. If Dr. Brentar or his agency is not certified as an NPA or NPS, Student shall select another qualified NPA or NPS to provide these services. Dr. Brentar, the NPA, or NPS shall have discretion to allocate the scope of the services, provided the total number of hours is four hours a week. Unless otherwise agreed upon, the services shall be delivered at Oceana. The services shall be used between the effective date of this Decision and December 30, 2013. If any part of the instruction is not delivered at Student’s school, at the service provider’s discretion, District shall fund round-trip transportation based on the SELPA’s standard mileage reimbursement rate.

3. Within 30 days of the date of this Decision, District shall contract with the same person or entity retained to train Student in executive functioning skills as directed in Order 3 above, and shall fund not less than 10 hours of training for Student’s aide, in the area

of effective assistance and instruction as a special education aide to support Student's acquisition of the executive functioning skills listed above.

4. Within 30 days of the date of this Decision, District shall contract with a qualified tutor, NPA, or NPS selected by Student, and fund the provision of 200 hours of academic credit recovery instruction or tutoring, to be provided between the effective date of this Decision and December 2013. At a minimum, the tutor shall be a credentialed teacher or supervised by a credentialed teacher. Educational Rights Holders shall determine the tutoring schedule and location in consultation with Student, the tutor or educational agency, and District.

5. District shall contract with and fund Dr. Brentar's attendance at Student's IEP team meeting directed in Order 1 above, and any subsequent IEP team meeting(s) to which the assessment review may be continued, as a member of the IEP team providing the services ordered in this Decision.

6. District shall also contract with an independent, qualified expert in the development of IEP goals and accommodations and fund his or her attendance at the IEP meeting directed in Order 1 above, and any subsequent IEP team meeting(s) to which the assessment review may be continued, and provide consultation services to assist the IEP team to develop annual IEP goals, accommodations, modifications and related services to meet Student's needs.

7. District shall also contract with an independent, qualified expert in the development of ITPs, and transition goals and services, and fund his or her attendance at the IEP meeting directed in Order 1 above, and any subsequent IEP team meeting(s) to which the assessment review may be continued, to provide consultation services to assist the IEP team to develop Student's ITP, and transition goals and services. The IEP expert and ITP expert designated by District may be the same person or entity at District's discretion.

8. All of Student's and District's 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. Student prevailed on Student's Issues 1; 2(a), (c), (d), (e), and (f); 3; 4(a), (c), (d), (e), (f), and (j); 5(a), (b), (c), and (d); 6(a), (b), (d), (e), (f), (g); 7(b) and (e); and 8; and District's Issue 10. District prevailed on Student's Issues 2(b), and (g), 4(b), (g), (h), and (i); 5(e) and (f); 6(c), (h), (i), and (j); 7(a), (c), and (d); and 9.

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: June 9, 2011

/s/

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings