

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

In the Matter of

STUDENT,

Petitioner,

v.

TORRANCE UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2006060157

DECISION

Administrative Law Judge Judith L. Pasewark, Office of Administrative Hearings, Special Education Division, State of California, heard this matter in Torrance, California, on September 8, October 10, 12, 13, 14, 2006.

Petitioner, Student, was represented by attorneys, N. Jane Dubovy and Kari Watts. Mother attended the hearing on behalf of Student. Student also attended one day.

Attorney Sharon Watt represented the Torrance Unified School District (District). Aaron Benton, Director of Special Education, attended the hearing on behalf of the District.

Petitioner, on behalf of Student, filed this request for due process hearing on July 14, 2006. No continuances were granted. Closing briefs were received, and the record closed on November 1, 2006.

ISSUES

1. Whether the District failed to offer or provide Student with a free and appropriate public education (FAPE) during the 2003-2004 school year by reason of one or more of the following:

- A. Failing to meet its Child Find obligation by failing to locate and identify Student as a child with a disability;
- B. Failing to conduct sufficient and/or appropriate assessments;
- C. Failing to assess Student in all areas of suspected disabilities;
- D. Failing to sufficiently delineate the services and supports in the Individual Education Program (IEP);
- E. Failing to set appropriate goals in the IEP;
- F. Failing to make an appropriate offer of placement and failing to offer appropriate related services in the IEP;
- H. Failing to implement accommodations for Student contained in the IEP.

2. Whether the District failed to offer or provide Student with a FAPE during the 2004-2005 school years by reason of one or more of the following:

- A. Failing to conduct sufficient and/or appropriate assessments;
- B. Failing to assess Student in all areas of suspected disability;
- C. Failing to sufficiently delineate the services, supports and placement offers in the IEP;
- D. Failing to set appropriate goals in the IEP;
- E. Failing to make and appropriate offer of placement and failing to offer appropriate related services in the IEP;
- F. Failing to implement accommodations and supports for Student;
- G. Failing to ensure that an IEP was in place for the commencement of the 2005-2006 school year.

3. Whether the District failed to offer or provide Student with a FAPE during the 2005-2006 school year by reason of one or more of the following:

- A. Failing to conduct sufficient and/or appropriate assessments;
- B. Failing to assess Student in all areas of suspected disability;

- C. Failing to sufficiently delineate the services, supports and placement offers in the IEP;
- D. Failing to set appropriate goals in the IEP;
- E. Failing to make an appropriate offer of placement and failing to offer appropriate related services in the IEP;
- F. Failing to timely develop an assessment plan for adaptive physical education when requested during the IEP;
- G. Failing to give prior written notice of refusal to evaluate Student in area of adaptive physical education;
- H. Failing to give prior written notice of its refusal to change Student's education program when her parents requested another placement.

4. Whether Student is entitled to any or all of the following:

- A. An individual educational evaluation/assessment (IEE) as requested in Mother's letter of October 18, 2005;
- B. Reimbursement for tuition and costs, including transportation, at Village Glen West, a non-public school;
- C. Compensatory education services from October 2003, through the present;
- D. An IEP meeting to determine necessary services;
- E. Prospective placement at Village Glen.

CONTENTIONS

Petitioner contends that the District failed to identify Student as a child with a disability who was in need of special education. Student had been diagnosed with Asperger's Syndrome in the fifth grade. No assessments or services were offered by the District prior to the initial assessment in 2003. Petitioner contends the District had a child find obligation to assess upon learning Student had Asperger's. The District denies any violation, as Student did not exhibit a need for educational assistance prior to 2003.

In 2003, the District conducted its initial assessment of Student and found that she qualified for special education under the classification of autistic-like behavior. Student continued to qualify for special education under this classification until 2005, when, upon

reassessment by the District, Student also qualified for special education under emotional disturbance (ED) and speech and language disability (SLD). Petitioner contends that the District failed to assess Student in all areas of suspected disability in the school years 2003-2004, 2004-2005, and 2005-2006. The District denies this allegation, and contends that Student was assessed in all suspected areas of disability at the time of each assessment.

In 2003, Mother informed the District that Student had difficulties with gross and fine motor skills. This concern was repeated in 2004 and 2005. No specific testing was done in the areas of OT and PT, and no services were recommended in these areas. As a result, Petitioner contends that the assessments performed by the District were inappropriate and/or insufficient. Petitioner further contends that, if the assessments were inappropriate and insufficient, the District was unable to set appropriate goals and objectives in the 2003, 2004 and 2005 IEPs. The District denies these allegations and contends that Student's motor skills were observed in the assessments, and no services were required in these areas.

In 2003 the District prepared Student's initial IEP. Petitioner contends that the IEP failed its procedural requirements to (1) sufficiently delineate the services and supports; (2) make an appropriate offer of placement; and (3) offer appropriate related services and accommodations. Petitioner contends that similar procedural violations continued in the 2004 and 2005 IEPs. Petitioner further contends that the services offered in the 2004 IEP failed to extend Student's services or transition Student into high school. As a result, Student had no IEP in place at the commencement of high school. With regard to the 2005 IEP, Petitioner contends that the IEP failed to address Student's unique needs, and contained no accommodations regarding Student's bathroom, sensory or transitional issues. The District denies these allegations, and contends that each IEP delineated its services and supports, and offered appropriate placement and services for Student for each school year.

Petitioner contends that Student had several unique needs which needed to be addressed in each IEP. Initially in 2003, Student's unique needs regarding bathroom and sensory issues were addressed with specific accommodations contained in the 2003 IEP. Similar accommodations were contained in the 2004 IEP. Petitioner contends, however, that neither of these IEPs was provided to the high school, where Student attended classes. Therefore, Petitioner contends the District failed to implement Student's 2003 and 2004 IEP in the high school setting. The District denies these allegations.

Petitioner contends that during the 2005 IEP, Mother requested assessments in the area of adaptive physical education. The District never assessed Student as requested nor provided her parents with a written notice of denial. The District contends there were no issues in the area of adaptive P.E.; therefore, no assessment was necessary.

Petitioner contends that she is entitled to an Independent Educational Evaluation (IEE). On October 18, 2005, Mother made a written request of the District for an IEE. The District did not provide the IEE as requested and did not issue its written denial of the request until July 31, 2006. The District contends this was not a violation of the IDEA as there is no statutory deadline for notice regarding IEEs.

Petitioner contends that each of the above alleged failures of the District represents a denial of FAPE to Student in the 2003-2004, 2004-2005 and 2005-2006 school years. Consequently, Student is entitled to an IEE, compensatory education services, and reimbursement for and prospective placement in Village Glen, a non-public school. The District denies any denial of FAPE and contends the remedies sought by Petitioner are unwarranted.

FACTUAL FINDINGS

Jurisdictional Facts

Student is a 15 year old female who resides with her parents within the geographical boundaries of the District. She has been diagnosed with Asperger's Syndrome and is eligible for special education and related services. In 2005, Student qualified for special education due to secondary disabilities of ED and SLD.

2003-2004 School Year

Child Find

"Child Find" refers to the affirmative, ongoing obligation of local school districts to identify, locate and assess all children with disabilities residing within their jurisdiction who are suspected of having disabilities and are in need special education as a result of those disabilities. The duty arises with the district's knowledge of facts tending to establish a suspected disability and the need for special education services.

3. Petitioner contends that the District was aware that Student had been diagnosed with Asperger's and failed to identify and assess Student as child with a disability who was in need of special education. The District denies that Student exhibited any educational need for assessment or services.

4. Student was diagnosed with Asperger's in the fifth grade. As described by Mother, Student was "nerdy." Teachers began to note that Student was teased by peers. Student, however, was compliant and doing well academically.

5. Beginning in the 2001-2002 school year, and each year thereafter, Mother completed and returned a Health History Information form to Student's schools. Mother indicated on each form that Student had mild Asperger's. Aaron Benton, the District's Director of Special Education, described the District's "Search and Serve" Program which was designed to fulfill its child find obligations and serves those children who qualify for special education. Among other things, the District sends letters and fliers to area pediatricians and preschools, provides notices to newspapers, maintains a speaker's bureau and participates in special events designed to disseminate information. The health form

completed by Mother was not part of the District's child find tools nor was it intended for educational use. The health form was designed for medical reference by the school nurse only. It was not shared with teachers or staff.

6. In the 2002-2003 school year, Student was referred to the Gifted and Talented Education (GATE) Program. Placement in GATE was based upon test scores, grades and other information provided by Student's parents and teachers. The Parent Information form did not reference Student's Asperger's or any of her Asperger's symptoms. One teacher recommendation did mention Student's mild Asperger's, yet concluded that Student would gain immensely from being in GATE. Report cards indicate that Student maintained high grades and excellent citizenship. Further, no one suggested or requested an assessment. Prior to the 2003 Assessment, there was no evidence that Student's Asperger's interfered with her education. The District did not violate its child find obligation.

2003 Assessment

7. A student must be assessed in all areas related to the suspected disability, including, if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status.

8. Petitioner contends that the District conducted inappropriate or insufficient assessments in Student's 2003 Assessment. Further, the District failed to assess in all areas of suspected disability.

9. In the fall of 2003, Student was in the seventh grade at Calle Mayor Middle School. Student began having difficulty with her school work. Student was more distracted. Her affect became flatter and flatter. The District assessed Student. On the Parent Questionnaire, Mother indicated no other disabilities than Asperger's. The additional information conveyed by Mother, provided descriptions of the Autism Spectrum Disorders (ASD) manifestations, rather than other disabilities.

Asperger's Syndrome is difficult to assess through standardized testing. According to Dr. John Stephenson, Ph.D.¹, Asperger's children are characteristically highly intelligent; therefore, a diagnosis is determined more by observation than by testing. In addition to having been assessed by Dr. Stephenson, Student has also been in therapy with

¹Dr. Stephenson is a neuropsychologist and has a doctorate in clinical psychology. He is a licensed psychologist and Qualified Medical Evaluator. Dr. Stephenson has experience working with ASD children, including Asperger's. Dr. Stephenson evaluated Student in July 2005, as part of a referral to Harbor Regional Center. No services were provided to Student as Asperger's Syndrome does not qualify for mental health services through the Regional Center.

Jan Simon.² Their opinions regarding Asperger's were based upon the Diagnostic and Statistical Manual, Fourth Edition (DMVM-IV-TR) for Asperger's Disorder,³ plus their observations of Student. Both witnesses were well versed on the subject of Asperger's and presented credible testimony, based upon their observations, to explain Student's more prominent unique needs.

11. As described by both Ms. Simon, and Dr. Stephenson, Asperger's Syndrome can be observed as a major impairment of social interaction and emotional skills. Student has difficulty understanding and following social rules, and is viewed as strange by others. This leads to teasing and ostracism by peers. According to Dr. Stephenson, an Asperger's child is extremely vulnerable in teenage years. Ms. Simon concurred, adding that the effects of puberty exacerbate Asperger's. The teasing can lead to depression, further isolation, and destruction of self-esteem. Ms. Simon reported that Student felt socially isolated and inept. Self-advocacy is very difficult for Student. As Student is aware of her disability, she retreats in social settings. She will not ask questions or speak up in a group setting, as she feels she will look awkward or incompetent.

12. In Asperger's children, attention deficit hyperactivity disorder (ADHD) is presumed. Student has difficulty maintaining concentration.

13. An Asperger's child lacks a range of emotion. Student's flat affect is readily observable. Her eye contact is often limited. Since she cannot express emotions well; it is difficult to determine the depth of Student's sadness or fear. According to Dr. Stephenson, Student was suffering more than she could express.

14. For Asperger's children, sensory sensitivity, often auditory, is common. For Student, sudden or loud noises are terrifying, and her reactions appear to be obsessive/compulsive or phobic. Student is terrified by flushing toilets and loud noises in general. As it is a sensory impairment, it cannot be "cured" by behavior modification. Rather, it must be treated through avoidance of the stimuli or desensitization.

15. A key trait of Asperger's is a lack of intuition and figurative interpretation. Student is best taught by repetition and scripted role playing. As a result, Student has major difficulties with transitions. Any sudden changes can be stressful and overwhelming to her. She needs to be walked through things. If overwhelmed, she shuts down.

16. In conducting the assessment, the District must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in

² Jan Simon is a Licensed Clinical Social Worker and has a Master's Degree in social work. She has been in private practice since 1972. She has experience with the ASD, particularly Asperger's Syndrome. She has been treating Student since 2004.

³The DSM-IV was referenced and used in testimony of both parties.

determining whether the student is a child with a disability, and the content of the student's IEP, including information related to enabling the child to be involved and progress in the general education curriculum.

17. The District prepared a Psycho-Educational Assessment of Student in December 2003. The assessment contained information from Student's parents, a health report, teacher observations, psychological and cognitive testing. Based upon information provided by the parents and the Student's pediatrician, the diagnosis of mild/moderate Asperger's Syndrome was acknowledged as a given. No autism-specific testing was administered. There was no evidence of any other disability.

18. Petitioner raised no issues regarding the validity of those tests actually given or the qualifications of the evaluators. Student was given the Test of Nonverbal Intelligence, Third Edition, (TONI-3), Learning Channel Preference Checklist (LCPC), and Sentence Completion and Interview. Student's non-verbal cognitive abilities were at the upper end of the average range. No processing disorders were noted. Student's academics were well within or above grade level in all areas of reading, math and written expression. No severe discrepancies were present. Student's social, emotional, and behavioral functioning were considered autistic-like, and related to her diagnosis of Asperger's. As a result, it was concluded that Student's educational needs could not be met solely through the general education curriculum and services. Special education was warranted.

19. A speech and language pathologist (SLP) for the District prepared a Speech and Language Evaluation of Student. Neither the validity of the testing nor the evaluator's qualifications were challenged by Petitioner. Student was administered the Peabody Picture Vocabulary Test-Third Edition (PPVT-3), Test of Problem Solving-Adolescent (TOPS), Oral and Written Language Scales (OWLS), Clinical Evaluation of Language Fundamentals, Third Edition (CELF-3), and Test of Pragmatic Language (TOPL). The SLP also conducted an informal interview with Student based on the Australian Scale for Asperger's Syndrome to observe Student's peer social interactions. The evaluator found that Student had difficulties in the area of pragmatics and social skills, specifically in understanding figurative language and peer social interactions, which appeared directly related to her diagnosis of Asperger's. The evaluator concluded that Student's difficulty understanding and/or using spoken language adversely affected her educational performance and could not be corrected without special education and related services.

20. In her Parent Questionnaire for the assessment, Mother noted that Student had slightly awkward gross motor and fine motor skills, including difficulty writing and drawing. The evaluator found that Student's fine motor skills appeared quite adequate. Student's writing was neat and legible in manuscript, her preferred style. An examination of test protocols and work samples indicated no difficulty in the areas of sensory motor skills, visual processing or auditory processing. All perception modalities appeared intact. As a result, there were no recommendations for Occupational Therapy (OT) or Physical Therapy (PT) services.

21. The District completed both a psycho-educational and speech and language assessment of Student. Unquestionably, the assessments failed to define Student's unique needs as comprehensively as Dr. Stephenson and Ms. Simon did at hearing. Nevertheless, each of the assessments contained various testing protocols, and input from numerous sources. Observations of Student were specifically included. The assessments concluded that Student qualified for special education and services by virtue of autistic-like functioning. There was no evidence of any other disability. The District did not fail to assess in all areas of suspected disability. Further, the tests administered by the District were appropriate, and met all procedural requirements.

December 11, 2003 IEP

22. Student's initial IEP meeting was held on December 11, 2003. Mother and all necessary parties from the District, including a special education teacher, general education teacher, psychologist and speech/language pathologist attended the IEP meeting.

23. An IEP must include an assessment of the present performance of the child, a statement of measurable annual goals designed to meet the student's individual needs, the specific services to be provided, the extent to which the child can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved.

24. Petitioner contends that the 2003 IEP failed to sufficiently delineate services and supports offered to Student.

25. The IEP team found that Student met the criteria for special education and services under the classification of autistic-like behavior. As Student was academically successful, the IEP team determined that Student's needs could best be served in the general education classroom with support from the Resource Specialist Program (RSP), which would include study skills. Student was provided RSP services for 60 minutes per week through December 11, 2004; speech and language services for 30 minutes per week through December 11, 2004; designated instructional services (DIS) group counseling services for 30 minutes per month through December 11, 2004. Student was also provided accommodations, including special seating, shortened homework, and note taking support. The IEP also provided Student with a specific bathroom accommodation in the nurse's office.⁴ The District did not fail to sufficiently delineate services and supports in the IEP.

26. Petitioner contends that the District failed to set appropriate goals and objectives in the IEP that were clearly described and measurable.

⁴ The IEP notes indicated that Student had a "panic attack" in a public bathroom when she was four years old. There is no reference to any association that Student's bathroom issue was a unique need related to her disability.

27. An IEP must include a statement of measurable annual goals designed to meet the student's needs that result from the disability and procedures for determining whether the instructional objectives are achieved.

28. Mother wrote on the IEP that she was concerned that Student would become depressed due to lack of friends. The IEP team concurred and recommended a goal to address socialization issues. A goal in the area of "friendship" was created to deal with interpersonal relationships and interaction with peers. This was an appropriate goal for Student. The objectives were subjective, to be measured by observation.

29. Mother indicated Student had difficulty speaking up for herself and asking for assistance. The IEP team recommended a behavioral goal to address increasing conversation skills and the ability to ask questions. This was an appropriate goal for Student. The objectives again were subjective, to be measured by observation.

30. Speech and language goals and objectives were created to deal with Student's problems with pragmatics and semantics. The IEP set out an adequate description of goals to learn literal and figurative meanings of words and phrases to be measured by teacher observations. These were appropriate goals and objectives for Student.

31. The placement, services, and accommodations offered in the initial IEP of December 2003, were appropriate at that time. The District provided Student with an appropriate offer of placement and services. Mother concurred with the recommendations and consented to the IEP.

32. For the remainder of the seventh grade, Student's grades returned to generally As and Bs. The SLP indicated that Student made progress in social interaction with peers. Although Student remained distressed with the bathroom accommodations, she identified no specific negative incidents. The District offered Student a FAPE through the end of the seventh grade.

School Year 2004-2005

Implementation of the December 11, 2004 IEP

33. In order for a student to receive the services and supports contained in the IEP, the District shall ensure that the teacher or teachers, the special education teacher or teachers, and other persons who provide special education, related services, or both to the student, have access to the student's IEP, are knowledgeable of the content of the IEP, and are informed of his or her specific responsibilities related to implementing the student's IEP. A copy of each IEP shall be maintained at each school site where the pupil is enrolled.

34. Petitioner contends that the District failed to implement Student's December 11, 2003 IEP by failing to provide the IEP to the South High School staff, where Student was attending three classes.

35. Student began the eighth grade at Calle Mayor in the fall of 2004. Student had completed much of the middle school curriculum. Therefore, the District provided Student with high school curriculum classes in Geometry, Science and Spanish. As a result, Student attended three classes on the high school campus at South High, and three classes at Calle Mayor.

36. Since Student was still in middle school at the time the 2003 IEP was developed, there was no plan contained in the IEP to transition Student to the high school environment. When authorizing Student to take three high school classes, there was no consideration of Student's disability, unique needs or the existing IEP. The Resource Specialist Program teacher (RST) at Calle Mayor did not contact the school psychologist or relevant staff at South High. As a result, Student's IEP was never communicated or provided to the relevant parties at South High.

37. Scott McDowell is the principal at South High School, at which there were approximately 2,200 students enrolled in the fall of 2004. Mr. McDowell had no knowledge of Student's presence on the high school campus during the 2003-2004 or 2004-2005 school years. He was unaware of Student's IEP. Mr. McDowell explained that there was no specific policy regarding eighth graders with IEPs who attend high school classes. He noted that in high school special education, students are assigned "Advocates." Student, however, would not have been assigned an Advocate until the ninth grade.⁵ Mr. McDowell assumed that Calle Mayor provided an "advocate" or similar service for students while on the South High campus. Additionally, at South High, a "snapshot" of information is prepared on each special education student, and is given to each teacher. There was no "snapshot" of Student. Mr. McDowell further related that the only accommodations provided eighth graders were a letter sent regarding their academics and conduct in high school, and a subsequent group meeting to discuss class expectations and conduct. Otherwise, eighth graders on the high school campus received the same treatment as others on campus.

38. Student's science teacher at South High, knew that Student had Asperger's. He believed he was given a copy of Student's IEP. His recollection, however, lacks credibility. No other member of the South High staff had been provided a copy of the IEP. The teacher further recalled he did not provide Student with all of her IEP accommodations. Specifically, he did not shorten assignments or homework. Student eventually dropped his class in the second semester.

39. Student felt it was scary being around older kids in the high school environment. There were too many people in her classes for her, and it was too noisy and distracting. She became overwhelmed with the class work in the high school curriculum. She was afraid to ask for help because she did not want others to think she was stupid. As a result, she often did not complete assignments she did not understand. Student was unable to

⁵ Stephanie Oswald, an Advocate at South High, concurred that it was the middle school's job to convey the Student's IEP and special education information to the high school.

satisfactorily complete her science class. Student was provided none of her IEP accommodations on the high school campus.

40. The bathroom issue became a problem. Student was not provided bathroom accommodations at South High. Because of the time and distance required to walk between the two schools, Student had several humiliating “accidents.” This contributed to more teasing and stress. Ultimately her grades dropped. Student dropped her science class in the second semester and received Ds in Spanish and geometry. Student shut down and became more isolated. Mother observed Student talking to herself. Although the 2003 IEP initially offered Student a FAPE, the failure to implement the IEP at South High impeded Student’s right to that FAPE and resulted in a deprivation of educational benefit to Student. Student was denied a FAPE in the fall 2004 semester of the eighth grade.

2004 Assessment

41. After the initial assessment and IEP, reassessments of the student must be conducted if conditions warrant an assessment or if the parent or teacher requests a reassessment, but at least once every three years.

42. Petitioner contends that the District failed to conduct sufficient and appropriate assessments and failed to assess in all areas of suspected disability.

43. The District prepared no new assessments for the 2004 IEP. Although Student had done poorly in her high school classes, she still performed well at the middle school. Neither her parents nor teachers requested a reassessment. There were no apparent changes in circumstances to warrant a reassessment. As the District was not requested to prepare an assessment at this time, it was not required to do so. The District did not fail to sufficiently or appropriately assess, or fail to assess Student in all areas of suspected disability.

December 9, 2004 IEP

44. The IDEA imposes upon the school district the duty to conduct a meaningful IEP meeting with the appropriate parties. Those parties who have first hand knowledge of the student’s needs and who are most concerned about the child must be involved in the IEP process.

45. Student’s annual IEP review was held on December 9, 2004. All members of the IEP team were from Calle Mayor. Both Mother and Student attended. There were no representatives from South High even though Student was then attending the high school for half of her classes. Further, the 2004 IEP would encompass the fall 2005 semester, which would take place entirely in the high school setting. The lack of IEP team members from the high school significantly limited the information presented at the IEP meeting.

46. An IEP must contain a statement of Student's present levels of performance.

47. The middle school teachers reported that Student had met her prior social interaction goals. There were no reports from Student's high school teachers, in spite of the fact that Student's high school grades and progress reports indicated that Student was struggling with these classes. There was no information or observations presented to indicate how Student was fitting in with peers or dealing with her communication skills on the South High campus. Without the input from high school staff, it was impossible to measure Student's true progress under the 2003 IEP, or determine Student's present levels of performance for the 2004 IEP. The District failed to adequately determine Student's present levels of performance for the 2004 IEP.

48. An IEP must contain the specific services to be provided along with the projected initiation date and anticipated duration of those services. It must also contain a statement of the program modifications and supports that will be provided to the student to allow the student to advance appropriately towards attaining the annual goals and make progress in the general education curriculum.

49. Petitioner contends that the District failed to delineate the services, supports and placement offered in the 2004 IEP.

50. The IEP team recommended that Student continue in the general education classrooms with support from the RSP as the least restrictive environment (LRE).⁶ The IEP specified 60 minutes per week of group RSP through June 23, 2005, thereafter increased to 53 minutes daily from September 7, 2005, through December 9, 2005; 30 minutes per week of group language arts services (LAS) through December 12, 2005; and 90 minutes per month of DIS group counseling through June 23, 2005, thereafter reduced to 30 minutes per month from September 7, 2005, through December 9, 2005. The IEP indicated Student would be transitioning from middle school to high school. Accommodations, including bathroom access, remained the same. There was no information provided to define how Student would access the bathroom or which facilities were available to Student at South High.

51. Mother wrote on the IEP that she was concerned that Student "doesn't know how to ask for things she needs or that are necessary." The IEP notes repeated Mother's concern. The IEP, however, referenced no further discussion or resolution of this concern. Student's group counseling sessions were increased through June 23, 2005, but then decreased to 30 minutes as of September 7, 2005. There was no explanation as to why counseling was reduced for the new school year, given the need at that time for a significant increase in sessions. The District failed to sufficiently delineate the services, supports and placement offer in the December 9, 2004 IEP.

⁶ South High was not specifically named as a placement. However it was clear that Student was being offered placement in general education at her high school, the same high school she was currently attending for three classes a day.

52. An IEP must include a statement of measurable annual goals and objectives.

53. Petitioner contends the District failed to set appropriate goals and objectives in the 2004 IEP.

54. Student's new goals were based upon her middle school performance only. As previously determined in Factual Findings 45 and 47, there was no input from Student's high school teachers. Student's present levels of performance were inaccurate; they did not reflect the difficulties Student was facing in the high school environment. The goals and objectives developed for the 2004 IEP were designed only to enhance Student's interpersonal skills and expand her recreation and leisure activities with friends. Preparation of progress reports and measurement of progress were to be provided by the middle school RST. No plans for dispensing services were included for the high school portion of the IEP. As example, no reference was made to the high school "Advocate" taking over for the RST when Student transitioned into high school. As a result, the goals and objectives did not adequately address Student's continuing services for the first semester of ninth grade. With no explanation, Student's counseling was reduced from 90 to 30 minutes. The only goal which actually carried into the ninth grade was: "Student will participate in school activities two to three times per month."

55. The Speech and Language portion of the IEP indicated that Student had met her goals. This determination had been made by the SLP who had measured Student's progress. This was appropriate as the services were not impacted by Student's high school experiences. Student's new goals regarding literal and figurative language remained appropriate and were designed to increase Student's independence from minimal assistance. Student demonstrated some difficulties in age appropriate pragmatics. Her goals were modified to include appropriate interrupting strategies within a classroom. These goals were to be measured by teacher made assessments. Unfortunately, although the IEP offered LAS services for 30 minutes per week through December 9, 2005, there were no S/L goals or objectives beyond June 2005. Nothing was specifically identified or offered for the fall 2005 high school semester. The lack of appropriate goals and objectives deprived Student of educational benefit.

56. A transition plan box was marked on the IEP, and specifically included transition activities of teacher-to-teacher contact, records review and visitation by June 2005. There were no specifics contained in the IEP which would assist Student with her transition into high school or which defined her accommodations on the South High campus. The District was aware that Student had unique needs involving difficulty with transitions and sensory problem regarding loud noises and crowds. Having failed to include Student's high school teachers or others from South High, the IEP team lacked pertinent information to address those needs. Although the 2004 IEP indicated that transition activities would take place by June 2005, none transpired. As a result, the middle school RSP services, which were the only services designed to assist Student with her anxiety issues, ended in June 2005. Nothing was in place to address these issues for the fall 2005 semester. According to Mother,

by the end of the eighth grade, Student was overwhelmed and unable to keep up with her homework. Her grades had dropped. She had experienced severe difficulty in the high school setting. The lack of an appropriate transition plan and the provision of adequate accommodations impeded Student's right to a FAPE. The 2004 IEP failed to offer Student a FAPE.⁷

Summer 2005 Request for Assessment

57. A reassessment of the Student must be conducted if the parent requests a reevaluation. If the request for an assessment is given within 10 days of the end of the student's school year or during the student's school vacations, the duty to provide the parent with the proposed assessment plan within 15 days shall recommence on the date that the student's regular school days reconvene.

58. On July 18, 2005, Mother wrote Director of Special Education Aaron Benton, regarding her concerns about Student's placement at South High. In the letter, Mother expressed detailed concerns regarding Student's transition into high school and questioned the District's ability to comply with the IEP, based upon current problems. Mother requested the District's cooperation in reassessing Student prior to the beginning of the fall semester. No request for OT or adaptive physical education was made in this letter. Mr. Benton did not respond to Mother's letter.

59. A week later, on July 25, 2005, Mother wrote South High Principal McDowell and enclosed a copy of the July 18 letter. Mother wrote in bold type that she was requesting a psycho-educational evaluation, an IEP, and non public school (NPS) funding for placement at Village Glen. No request was made for assessment in OT or adaptive P.E. at this time. Mother again requested that the assessment and IEP take place prior to the commencement of the fall semester.

60. Mr. McDowell contacted Mother by telephone and discussed Mother's concerns regarding Student's transition into high school. Mr. McDonald, who has no training with ASD, was unable to address all of Mother's concerns. He indicated that he would have to discuss the issues further with the special education advocates. Mother was told that not all school employees, such as the advocates, worked during the summer months; therefore, the IEP could not be scheduled until school resumed. Mother believed that Student was left in limbo without an IEP which addressed her needs. In August 2005,

⁷ Additionally, Petitioner contended that District failed to implement accommodations and supports for Student as contained in the 2004 IEP. Having been previously determined that the 2004 IEP did not offer Student a FAPE, this issue becomes moot. Had the District offered a FAPE, there was still no evidence that the 2004 IEP was given to the South High staff in December 2004. Student was still attending classes at South High through June 2005. As with the 2003 IEP in Factual Finding 34, the District failed to provide and maintain a copy of Student's IEP at each school site where Student was enrolled. Therefore none of the services or accommodations were provided to Student on the high school campus through June 2005. For the same reasons, there was no IEP in place for the fall 2005 semester. The transition plan in the 2004 IEP was never implemented. This further supports the evidence that the District did not provide South High with a copy of the 2004 IEP. Both of these failures impeded Student's right to a FAPE.

Mother enrolled Student at Valley Glen School, a NPS, which specializes in educating ASD children. Mother did not provide the District with confirmation that Student had been unilaterally placed at Village Glen at this time; however the psycho-educational assessment dated October 6, 2005, indicates the District was aware of the placement.

61. School resumed on September 7, 2005. The District prepared the Assessment Plan, and Mother signed it on September 12, 2005.

2005-2005 School Year

2005 Assessment

62. As indicated in Factual Finding 16, when conducting an assessment, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the student.

63. Petitioner contends that the District failed to conduct appropriate or sufficient assessments of Student and further failed to assess Student in all areas of suspected disability.

64. David Feldman, Ph.D., a school psychologist for the District,⁸ administered the psychological testing, and prepared the Psycho-Educational Evaluation presented at the 2005 IEP. The assessment consisted of standardized testing, observations of student's teachers at Village Glen, informal interviews, sentence completion, Achenbach Youth Self-Report, Achenbach Child Behavior Checklist (CBLC), Draw a Person (DAP), and records review. No issues were raised regarding the testing procedures or qualifications of the assessors.

65. The "Health" portion of the evaluation reported that Student "presented with a medical diagnosis of Asperger's which is within in the Autism Spectrum Disorders." Behaviors consistent with the DSM-IV criteria for Asperger's Syndrome were confirmed based upon Mother's observations of Student.

66. Stephanie Oswald, a Special Education teacher for the District, administered Student's academic testing.⁹ No issues were raised as to her qualifications. Student was administered the Wechler Intelligence Scale for Children, fourth edition (WISC-IV), Verbal Comprehension Index (VCI), Full Scale IQ (FSIQ), Woodcock-Johnson, third edition (WJ-III), and the Beery-Buktenica Developmental Test of Visual Motor Integration (VMI). Ms. Oswald found that, when compared to others at her age level, Student's academic skills and

⁸ Dr. Feldman has a Ph.D., in psychology. He has a PPL credential and is a licensed Marriage and Family Counselor. Dr. Feldman is familiar with the Autism Spectrum and autistic-like behavior.

⁹ Ms. Oswald has a B.A. in Communications. She has completed her studies and in December 2006, will receive her teaching credential in special education for mild to moderate disabilities. This is her fourth year teaching for the District. She is currently teaching study skills in all subjects, and has experience with autistic students.

fluency with academic tasks were both within the superior range. Her ability to apply academic skills was average. Student's performance was very superior in reading, high average in mathematic, and written language, and average in written expression. Student's writing skills were lower than as tested in 2003. Ms. Oswald did not consider this to be a considerable discrepancy, and noted that Student's writing samples were relatively weak because Student needed to handwrite the sentences. Mother reported that Student had difficulty with handwriting, but her writing ability on the computer was superior.

67. The assessment also found that Student secondarily qualified for special education under the criteria for emotional disturbance (ED). Dr. Feldman concluded Student qualified as ED as evidenced by inappropriate feelings or behavior under normal circumstances in her fear of toilets and loud noises. Additionally Student exhibited a general pervasive mood of unhappiness or depression which was discerned from Mother's observations, and Student's self-reporting. Ultimately these factors had adversely Student's educational performance and progress.

68. A Speech and Language Assessment was also performed on Student by a district SLP. The District administered Student the OWLS, Test of Language Competence (TLC); Test of Problem Solving – Adolescent, the Word Test 2 – Adolescent; and CELF-3. Student as well as both of her parents responded to the Social Skills Rating Scale (SSRS).

69. The SSRS provided a broad assessment of pragmatics and Student's social behaviors and addressed the areas of cooperation, assertion, self-control, problem behaviors, academic competence, responsibility and empathy. Student and her parents completed the questionnaire. The results of each found that Student lacked assertion skills, including initiating behaviors such as asking others for information, introducing oneself and responding to the actions of others.

70. In comparing the standard scores of the Test of Problem Solving given in 2003 and 2005, there was a significant drop of 41 points. There was also a drop of eight points on the CELF-3 total score. The assessment concluded that Student had a significant delay in language skills that adversely affected her educational performance in the areas of semantics and pragmatics. This was also recognized as a secondary disability.

71. The assessment specifically referenced adaptive P.E., and stated that no adaptive P.E. services were indicated.

72. The District assessed Student in her functional, developmental, academic, and social skills areas. No evidence was presented to suggest that the assessments were inappropriate or violated statutory procedural requirements. The assessment identified two areas of secondary disabilities, ED and SLD. Although Student's handwriting was discussed as an obstacle to her writing skills, there was no evidence to suggest that her handwriting had deteriorated from the 2003 assessment, where it was discussed at length. The District did not fail to appropriately or sufficiently assess Student or fail to assess Student in all areas of suspected disability.

October 7, 2005 IEP

73. An IEP was held on October 7, 2005, and was considered the triennial IEP advanced from December 9, 2005. The District staff attending the IEP meeting met appropriate procedural requirements. Both parents attended on behalf of Student. Student's therapist also attended for a portion of the meeting. No teachers or representatives from Village Glen were present.

74. Petitioner contends that the District failed to sufficiently delineate the services, supports and placement offer in the 2005 IEP.

75. The IEP team determined that Student qualified for special education on the basis of autistic-like behavior, emotional disturbance and language impairment. The service options considered were: general education classroom, special day classroom (SDC), Resource Special Program (RSP), language and speech services (LAS) and counseling.¹⁰ The District offered placement in the general education classroom at the high school with one period of RSP per day, 30 minutes of individual counseling per week, and group speech and language services, 30 minutes, twice a week.

76. Although discussed in the IEP notes, there were no bathroom or other sensory accommodations provided in the IEP. The IEP notes reflected discussion of several issues which related to Student's unique needs but were omitted from the IEP services and accommodations. As example, Student's therapist reported on Student's detachment. Dr. Feldman noted the need for some monitoring of Student's whereabouts; however, nothing was added to the accommodations to address this issue. The possibility of a shadow aide was discussed in the IEP notes but no offer was developed.

77. Student's ongoing bathroom issues were discussed in the IEP notes. Dr. Feldman reported that a balance needed to be struck where Student understood and progressed towards the fact that it was OK when toilets flushed. Dr. Feldman further indicated he wanted to work toward overcoming this phobia. Student's sensitivity toward sound was referenced. In spite of these notes, no accommodation was included in the IEP regarding the bathroom. No plan was specified to work towards Dr. Feldman's goals. Mr. Campbell, who attended the IEP meeting, was aware from the prior IEPs and discussions that the bathroom issue had been identified a major area of concern. He confirmed that there were no bathroom accommodations in the IEP. He simply assumed the existing plan would remain in place.

¹⁰ Pursuant to the July 25, 2005 letter, Mother had specifically requested placement at Village Glen. Although it was discussed in the IEP notes in the context of LRE, Village Glen was not a placement option considered by the District.

78. The IEP notes reflect a discussion regarding Student's fears and anxieties in relation to a large high school campus. Student's therapist Ms. Simon, who attended the IEP with Mother, expressed concern that the large high school campus itself was problematic. The sheer size, number of students, and noise or "hustle and bustle" would overwhelm Student in Ms. Simon's opinion. Historically, when Student was overwhelmed, she shut down. Dr. Feldman discussed the possibilities of a shadow aide, locker placement, leaving early and arriving late to class to avoid the crowds, and leaving class in the event of anxiety. The notes state, "There are many opportunities for assistance that will help Student towards dealing with her fears." None of these "opportunities" were expressly included as accommodations. As stated by Mr. Campbell, "the IEP team would meet after the meeting to determine the specifics."

79. Ms. Simon stressed that Asperger's children live in a very narrow world. Problems with transition are a major trait of Asperger's. Any type of transition ranges from difficult to terrifying. As a result, Student needed a very carefully architected transition plan to meet her next level of education. Ms. Simon did not see how Student could go off to high school without a transition plan in place prior to the commencement of attendance. Dr. Feldman also acknowledged that it would be difficult for Student to transition from Village Glen back to the high school. The IEP, however, provided no plan for Student to transition back into the high school setting.

80. Ms. Simon felt strongly that, although the IEP stressed Student's academic competence as established on various tests, not one member of the IEP team understood the implications of Student's Asperger's or her severe emotional problems. She felt the IEP team did not adequately address both her and Mother's observations and concerns about Student's extreme social fears and autistic traits. Ms. Simon left the IEP meeting feeling that the services offered Student would not meet her needs.

Petitioner's expert, Dr. Stephenson reviewed the 2005 IEP. He agreed that the goal of the IEP needed to help Student overcome her fears so she could function as an adult in a larger society. He disagreed with Dr. Feldman's conclusion that smaller classes would impair Student's independence. It was Dr. Stephenson's opinion that finding a way to reduce the teasing and ostracism that Student experienced in school was critical. Dr. Stephenson was concerned that Student would continue to be socially traumatized and would experience increasing levels of anxiety and depression if changes were not made to her classroom environment. In order for Student to succeed in the regular high school setting, sensory issues would need to be addressed regarding classroom size and noise. Student would continue to need accommodations for the bathroom as well as other sensory and social/emotional issues.

82. The omission of these services and accommodations from the IEP impeded Student's right to a FAPE. Further, the omission of the accommodations with the intent to determine them at a later date procedurally violated the parent's opportunity to participate in

the decision making process of the IEP. The October 7, 2005 IEP failed to offer Student a FAPE.¹¹

Adaptive Physical Education Assessment

83. A reassessment of the student must be conducted if the parent requests a reevaluation. The pertinent portion of California Education Code, section 56321, subdivision (a), requires that a parent shall give a proposed assessment plan within 15 days of the referral for assessment.

84. Petitioner contends that the District failed to respond to Mother's request for an adaptive P.E. assessment, and failed to assess Student as requested.

85. The 2005 IEP stated that no adaptive P.E. services were indicated. Mother disagreed, and requested an adaptive P.E. assessment at the October 7, 2005 IEP. The IEP notes reflect that Dr. Feldman suggested the possibility of an adaptive P.E. assessment. Student, however, was not assessed as requested. Mr. Campbell indicated that the subject was considered but not acted upon; therefore, there was no recommendation for an assessment. Dr. Feldman stated the IEP team did not complete the specifics of the offer because Mother had indicated she was not interested in returning to the high school. The District failed to conduct an adaptive P.E. assessment of Student as requested and failed to provide her parents a written notice of denial of the request.

Request for an Independent Educational Evaluation (IEE)

86. A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district. When a parent requests an IEE at public expense, the school district must either initiate a due process hearing to show that its evaluation is appropriate, or provide the IEE at public expense.

87. Petitioner contends that the District failed to provide Student with an IEE as requested in her letter of October 20, 2005.

88. On October 15, 2006, Mother provided the District with written notice that she was withdrawing Student from the District. On October 20, 2005, Mother wrote the Director of Special Education for the District, and requested an IEE.

89. Petitioner filed a request for due process hearing on July 3, 2006. On July 31, 2006, the District provided Mother with a written denial of her request for an IEE, denial of her request for reimbursement of the Village Glen tuition and costs for 2005-2006, and

¹¹ Petitioner also asserted procedural violations concerning the 2005 IEP goals and objectives. With the determination that the IEP failed to offer Student a FAPE on other grounds, it is unnecessary to fully develop this issue. In essence, the District did commit procedural violations in the drafting of the goals and objectives, however none of them individually constituted a denial of FAPE.

denial of the request for funding and placement at Village Glen for 2006-2007. The District did not initiate a due process hearing to determine if its assessment was appropriate prior to the filing of Petitioner's request for hearing. Student was entitled to an IEE at public expense.

Village Glen School

90. Village Glen is a non-public school for children with learning disabilities. There are approximately 220 students, most of whom are within the spectrum of autistic disorders. Village Glen School is located in Culver City, California. Round-trip transportation is required for Student. The cost of the 2005-2006 school year was \$25,268.00. On average, there are 10-12 students per class, with one teacher and one aide. Dr. Stephenson indicated that he was familiar with the school and believed it to be well-regarded nationally. He further opined that it would be an appropriate school for Student if the high school could not meet Student's social and emotional needs. Once attending Village Glen, Student began to show improvement. Mother observed that within four weeks of enrollment, Student began talking again, her depression lifted, and she could engage in homework on her own. Student's grades improved. She began to interact with peers. The District offered no evidence to suggest Valley Glen could not provide an appropriate education for Student.

LEGAL CONCLUSIONS

Applicable Law

1. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA or the Act) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7, 2005, in response to the IDEIA.

2. A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined in pertinent part as specially designed instruction at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) Special education related services include developmental, corrective, and supportive services, such as speech-language pathology services and occupational therapy, as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

3. In addition to the substantive requirements, the Supreme Court recognized the importance of adhering to the procedural requirements of the IDEA. Thus, the analysis of whether a student has been provided a FAPE is two-fold: (1) the school district must comply with the procedural requirements of the IDEA, and (2) the IEP must reasonably be calculated to provide the child with educational benefits. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458, U.S. 176, 205.)

4. “Child find” refers to the affirmative, ongoing obligation of states and local school districts to identify, locate and assess all children with disabilities residing within the jurisdiction who either have or are suspected of having disabilities and need special education as a result of those disabilities. (20 U.S.C. § 1412(a); Ed. Code, § 56301.) A district’s duty is not dependent on any request by the parent for special education testing or referral for services. The duty arises with the district’s knowledge of facts tending to establish a suspected disability and the need for IDEA special education services. The District shall be deemed to have knowledge that a child is a child with a disability if, among other things, the behavior or performance of the child demonstrates the need for such services. (20 U.S.C. § 1415(k)(8)(B)(ii).)

5. Before any action is taken with respect to an initial placement of an individual with exceptional needs in special education, the school district must assess the student in all areas of suspected disability. (20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.532(f); Ed. Code, § 56320.) The student must be assessed in all areas related to the suspected disability, including, if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (34 C.F.R. §300.532(g); Ed. Code, § 56320, subd. (f).)

6. If an assessment is to be conducted, the parent of the student shall be given, in writing, a proposed assessment plan within 15 days of the referral for assessment, not counting days between the pupil’s regular school sessions or terms or days of school vacation in excess of five school days from the date of receipt of the referral, unless the parent or guardian agrees, in writing, to an extension. In the event the request for assessment is given within 10 days of the end of the student’s school year or during student school vacations, the 15 day time shall recommence on the date that the student’s regular school days reconvene. (Ed. Code, § 56321, subd.(a).)

7. After the initial assessment and IEP, reassessments of the student must be conducted if conditions warrant a reassessment or if the parent or teacher requests a reassessment, but at least once every three years. (20 U.S.C. § 1414(a)(2)(A); Ed. Code, § 56381, subd. (a).)

8. In conducting the assessment, the District must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining whether the student is a child with a disability, and the content of the student’s

IEP, including information related to enabling the child to be involved and progress in the general education curriculum. (34 C.F.R. §§ 300.304(b)(1)(i) and (ii).) No single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or for determining an appropriate educational program for the student. (34 C.F.R. §300.304(b)(2).)

9. Once the child has been referred for an assessment to determine whether the child is an individual with exceptional needs and to determine the educational needs of the child, an IEP meeting shall occur, within 60 days of receiving parental consent for the assessment. (Ed. Code, § 56302.1, subd. (a).)

10. A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); 35 C.F.R. § 300.344(a)(1); Ed Code, § 56341, subd. (b)(1).) The IEP team must consider the concerns of the parents of enhancing their child's education throughout the child's education. (20 U.S.C. §§ 1414(c)(1)(B)[during assessments], (d)(3)(A)(i)[during development of IEP], (d)(4)(A)(ii)(III)[during revision of IEP]; 34 C.F.R. §§ 300.343(C)(2)(III)[during IEP meetings], 300.533(a)(1)(i) [during assessments]; Ed Code, § 56341.1, subd. ((a)(2) [during development of IEP], subd. (d)(3) [during revision of IEP], and subd. (e) [right to participate in an IEP].)

11. The IDEA imposes upon the school district the duty to conduct a meaningful IEP meeting with the appropriate parties. (*W.G. v. Bd. of Trustees* (9th Cir. 1992) 960 F. 2d. 1479, 1485.) Those parties who have first hand knowledge of the child's needs and who are most concerned about the child must be involved in the IEP creation process. (*Shapiro v. Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317 F. 3d. 1072, 1079, citing *Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F. 3d. 877, 891.)

12. An IEP is a written statement that includes a statement of the present performance of the student, a statement of measurable annual goals designed to meet the student's needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student 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)(II) and (III); 34 C.F.R. § 300.320 (a)(2) and (3); Ed. Code, § 56345, subd (a)(2) and (3).) It shall also include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student 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. §§ (a)(4)(i) and (ii); Ed. Code, § 56345, subd.(a)(4)(A) and (B).)

13. Measurable annual goals enable the student, parents and educators to monitor progress and to revise the IEP consistent with the student's instructional needs. While the required elements of the IEP further important policies, "rigid" adherence to the laundry list

of items [required in the IEP]’ is not paramount.” (*W. G.*, 960 F. 2d 1479, 1484, *supra*, citing *Doe v. Defendant I* (6th Circuit 1990) 898 F.2d 1186, 1190-1191.)

14. In determining an appropriate placement, the District must consider the least restrictive environment for the student. To the maximum extent appropriate, a child with disabilities is to be educated with children who are not disabled. Special classes, separate schooling, or other removal of a child with disabilities from the regular educational environment may occur only when the nature or severity of the disability of the child is such that the education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

15. An IEP is assessed in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be assessed in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

16. Once identified and assessed, the District is required to have an IEP in effect for each student with exceptional needs within its jurisdiction at the beginning of each school year. (34 C.F.R. § 300.342; Ed. Code, § 56344, subd.(b).) An IEP team is required to meet at least annually. (20 U.S.C. § 1414(d)(4)(A); Ed. Code, § 56343, subd. (d).)

17. In order to see that a student receives the services and supports contained in the IEP, the District shall ensure that the teacher or teachers, the special education teacher or teachers, and other persons who provide special education, related services, or both to the student, have access to the student’s IEP, are knowledgeable of the content of the IEP, and are informed of his or her specific responsibilities related to implementing the student’s IEP. A copy of each IEP shall be maintained at each school site where the pupil is enrolled. (Ed. Code, § 56347.)

18. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 892.) In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: (1) impeded the child’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f).)

19. A district must provide parents with prior written notice when it refuses to initiate or change the identification, evaluation, or educational placement of a child or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); 34 C.F.R §300.503(b)(1)-(7).)

20. A parent is entitled to obtain an Independent Educational Evaluation (IEE) of a child. (20 U.S.C § 415(b)(1).) An IEE is an evaluation conducted by a qualified examiner not employed by the school district responsible for the child’s education. (34 C.F.R. § 300.502 (a)(3)(i).) A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1); Ed Code, § 56329, subd. (b).) When a parent requests an IEE at public expense, the school district must either initiate a due process hearing to show that its evaluation is appropriate, or provide the IEE at public expense. (34 C.F.R. § 300.02 (c)(1); Ed. Code, § 56329, subd. (c).)

21. When a District fails to provide a FAPE to a student with a disability, the student is entitled to relief that is appropriate in light of the purposes of the IDEA. Parents may be entitled to appropriate relief including reimbursement for the cost of private placement or services that they have independently procured for their child, when the school district has failed to provide a FAPE and the private placement or services are determined to be proper under the IDEA and are reasonably calculated to provide educational benefit to the child. (*Burlington School Committee v. Department of Education* (1985) 471 U.S. 359, 369.)

22. Under the IDEA, a “free appropriate public education” includes not only special education, but also “related services.” Related services include transportation and other supportive services as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(a)(17); *Union High School District v. B. Smith* (1994) 15 F. 3d 1519, 1527.)

23. The U.S. Supreme Court has ruled that the petitioner in a special education administrative hearing has the burden to prove their contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49.)

Determination of Issues

Child Find

24. Mother provided on the Health History Information form regarding Student’s Asperger’s diagnosis. Based upon Factual Finding 5, this form was not part of the District’s Child Find program, nor was it intended for educational use. Even assuming the health form could provide information which might affect Student’s education, it did not. Based upon Legal Conclusions 4 and 5, a district shall be deemed to have knowledge of that Student is a child with a disability when Student’s behavior or performance demonstrates the need for such services. In spite of the information contained on the health form, based upon Factual Findings 4 and 6, Student’s classroom behavior and grades did not suggest that Student was in need of special education services. The District did not fail to meet its Child Find obligations.

2003 Assessment

25. Petitioner contends that in 2003, the District failed to assess in all areas of suspected disability, and failed to conduct sufficient and/or appropriate assessments. Based upon Factual Findings 17 through 20, and Legal Conclusions 5 and 8, Asperger's Syndrome within the ASD was Student's only suspected disability in 2003.

26. Based upon Factual Finding 17, the District did no Asperger's or autistic-specific testing of Student. In doing so it accepted broad, generalized traits which make up the generic DSM-IV-TR diagnosis. Based upon Factual Finding 17, the District accepted the diagnosis of autistic-like behavior and qualified Student for special education and services.

27. The 2003 Assessment was also required to identify Student's unique needs in order to determine appropriate services and/or goals and objectives. Student's unique needs were explained by Dr. Stephenson and Ms. Simon in Factual Findings 11 through 15. Based upon Legal Conclusion 8, the District was required to use a variety of assessment tools and strategies. In this case, dealing with Student's unique needs required that the District look at the subtleties of the Student's individual traits within the diagnostic criteria. Based upon Factual Finding 10, Dr. Stephenson explained that Asperger's is determined more by observation than by testing. Based upon Factual Findings 17, 19 and 20, in addition to testing, the assessment included information from Student's parents, teacher observations, as well as a health report from Student's pediatrician. Further, based upon Factual Findings 18 and 19, Petitioner raised no issues with the adequacy of the tests actually given, their results, or the qualifications of the assessors.

28. While Student's fear and "phobic-like" reaction to flushing toilets was clearly noted in the Parent's 2003 Questionnaire and Health Services Summary, it was not addressed in the assessment. Based upon testimony from Dr. Stephenson and Student's therapist, Ms. Simon in Factual Finding 14, it is apparent that this issue represented a unique need for Student, closely related to her Asperger's. Although no-autistic specific testing was done, there was no evidence presented to suggest that any other form of testing or assessment could have provided relevant information on this particular issue.

29. OT and PT are areas of services, not disabilities. Although Mother did not suggest any other disabilities, she did report problems with Student's gross and fine motor skills. Based upon Factual Finding 20, however, these issues were examined by the evaluator, noting that Student's fine motor skills appeared quite adequate. As a result, there were no recommendations for OT or PT services, and therefore no specific OT or PT testing.

30. The District did not fail to assess Student in all areas of suspected disability in the 2003 Assessment. Further, Petitioner failed to establish that the assessments conducted in 2003 were insufficient or inappropriate.

December 11, 2003 IEP

31. California Education Code, section 56345, as described in Legal Conclusion 12, delineates the required content of an IEP. Based upon Factual Finding 25, the frequency and duration of the services and accommodations offered to Student were contained in the IEP. The District did not fail to clearly describe the frequency and duration of services.

32. The results of the December 11, 2003 Assessment, as contained in Factual Findings 18 and 19, concluded that Student's academics were all well within or above grade level. Student's social, emotional and behavioral functions were considered autistic-like. This was most clearly evident in Student's speech and language evaluation, which determined that Student had difficulties with semantics and pragmatics. Goals and objectives were set in three areas.

33. Based upon Factual Finding 28, the IEP noted Mother's concern regarding Student's lack of friends. A social interaction was developed in the area of friendships to assist Student to improve her interpersonal skills. As stated in Factual Finding 10, it is difficult to assess Asperger's. Assessing, or in this case, measuring progress, also may best be determined by observation. Concurrently, defining Student's interpersonal skills and peer interaction is somewhat relative. As a result, some leeway must be given to define and measure Student's social and emotional progress. This goal was appropriate at the time it was developed.

34. Based upon Factual Finding 29, the IEP addressed Student's difficulty with self-advocacy and asking questions. A behavioral goal was developed to increase Student's social/conversational skills and ability to ask questions. The problems regarding definition and measurement were the same as above, and for the same reasons, this goal was appropriate.

35. Based upon Factual Finding 30, the IEP addressed Student's problems with pragmatics and figurative speech. A speech and language goal was developed to deal with figurative language. This goal provided adequate clarity and was appropriate.

36. As stated in Finding 20, the evaluator had determined that no OT or PT services were necessary; therefore no goals were developed. This was appropriate at this time. Although Student's P.E. teacher attended the IEP meeting, there was no evidence that Student was in need of these services at this time; therefore, further assessments were not required.

37. The District did not fail to set appropriate goals in the 2003 IEP, nor did the District fail to sufficiently delineate the services and supports offered therein.

Pursuant to Legal Conclusion 14, the District has the obligation to place a child in a regular classroom, if it can be achieved satisfactorily with the use of supplemental aids and services. Further, based upon Legal Conclusion 15, the offer of placement and

services contained in an IEP is judged in light of information available at the time it was developed. As stated in Factual Finding 18, Student's cognitive abilities were at the upper end of the average range. Student was academically functioning well within or above grade level while in the regular classroom setting. Pursuant to Factual Finding 25, the District offered placement in the regular education classroom with DIS services and accommodations. Mother agreed with the placement and services offered. At the time, there were no indications that the services and accommodations offered Student could not adequately satisfy her unique needs. The District did not fail to make an appropriate offer of placement and related services in the 2003 IEP. Student was provided a FAPE through the end of 2003 school year.

2004 Fall Semester

39. The December 11, 2003 IEP was created for services to be rendered for the remainder of the seventh grade and first semester of eighth grade. The issue is not whether the accommodations were appropriate, they were. The issue is whether the accommodations were implemented. They were not.

40. As stated in Factual Finding 25, the IEP provided Student access to the nurse's bathroom in lieu of the public facilities at school. Pursuant to Factual Findings 35, 36, 37, 39, and 40, Student was denied access to alternate bathroom facilities at South High, as the IEP had not been shared with high school personnel. This implementation issue reaches further than the bathroom issue alone. Pursuant to Factual Findings 37 and 38, the Calle Mayor RST did not forward Student's IEP to South High. No one else at South High, the Principal, Program Specialist, SLP or Special Education teacher/Advocate, recalled having seen the IEP prior to the 2005 IEP. There was no additional evidence to suggest that the 2004-2005 IEP was shared with the South High staff for the second semester of the eighth grade or in preparation for the Fall 2005 semester at South High.

41. In its closing argument, the District pointed out that neither Student nor her mother ever made the District staff aware of the fact that she was not taking advantage of the accommodations contained in the IEP: "Without such information it was impossible for the staff to modify the accommodation to adapt to Petitioner's additional wariness." This is true; however, the duty to inform the South High staff of the contents of the IEP lay with the District, not the Student. As stated in Legal Conclusion 3, the district must comply with the procedural requirements of the IDEA. Pursuant to Legal Conclusions 17 and 18, the failure to provide the 2003-2004 IEP to the appropriate high school staff constituted a procedural violation of the IDEA. By failing to provide the IEP to the South High staff, it was impossible to implement any of Student's accommodations on the high school campus during the eighth grade or Fall semester of 2005.

42. Determination that a procedural violation constitutes a denial of FAPE requires that the violation (1) impeded Student's right to a FAPE; (2) caused a deprivation of educational benefits; or (3) significantly impeded the parent's opportunity to participate in the decision making process. Based upon Factual Findings 36, through 40, the lack of an

IEP on the high school campus caused Student substantial hardships which affected her academic performance and already limited social skills. The District failed to implement Student's IEP on the high school campus which resulted in Student dropping her science class, and becoming more socially isolated. This failure caused a significant deprivation of educational benefits and constituted a denial Student's right to a FAPE. The District failed to offer Student a FAPE during the 2004-2005 school year.

2004 Assessment

43. With regard to the 2004 IEP, Petitioner contends the District failed to assess Student in all areas of suspected disability and failed to conduct appropriate or sufficient assessments. A subsequent IEP was developed on December 9, 2004, as a result of Student's annual IEP review. No new assessments were requested, nor were they required by law. Pursuant to Legal Conclusion 7, an assessment is required at least once every three years. The District did not fail to assess Student at this time. As the District was not required to assess, and did not do so, the District also did not fail conduct inappropriate assessments.

December 9, 2004 IEP

44. Based upon Factual Finding 45, the entire IEP team was made up of representatives from the middle school. Based upon Legal Conclusion 11, the District was required to conduct a meaningful IEP which included those parties who had first hand knowledge of Student. The failure to include information or representatives from South High, which represented one-half of Student's existing education, prevented the IEP team from adequately evaluating Student's progress and current needs. As such, the entire IEP process failed. Based upon Factual Finding 50, the IEP clearly delineates placement and services. Those statements, however, were invalidated by the lack of complete and meaningful information regarding Student.

45. Based upon Factual Finding 10, and the Determination of Issues 33 and 34, it was determined that Student's goals and objectives were best measured by observation. Based upon Factual Findings 35 and 36, in the 2004-2005 school year, Student had attended three classes on the high school campus. As of the Fall of 2005, it was anticipated that Student would be attending high school for all classes. Pursuant to Factual Finding 45 and 47, none of Student's high school teachers were present for this IEP. There were no representatives from the high school special education department or other high school administration or staff. The IEP contained no reports or observations from anyone who observed Student on the high school campus. The entire IEP team was made up of members from the middle school. Based upon Legal Conclusions 11 and 12, the lack of high school personnel at the IEP restricted the IEP team's ability to meaningfully discuss Student's progress and needs in all areas. Observations of Student in the middle school environment, a smaller, familiar environment, where she was consistently receiving the benefit of her IEP, did not correlate with Student's descriptions of her high school experience, Mother's observations of Student's stress, or Student's drop in grades in the high school classes as indicated in Factual Findings 38 through 40.

46. Based upon Factual Findings 15 and 79, Student's unique needs required assistance with transitions. Without the inclusion of high school staff, the team was unable to provide transition accommodations for Student. Further the high school staff was unable to comment on the feasibility of those services and accommodations which would follow Student to high school for the Fall semester. Failing to include representatives who were currently responsible for Student half of the school day, and who would be responsible for Student for the entire school day in the second half of the IEP period, prevented meaningful discussion of those critical transition issues. The goals and objectives were therefore insufficient to address Student's unique needs. This constituted a procedural violation of the IDEA.

47. This lack of input from the high school staff also skewed the present performance observations of Student and automatically invalidated the rationale for the proposed goals and accommodations for Student. Assuming the goals were coincidentally appropriate, they still lacked in sufficiency. As example, the Speech and Language goal in particular was impaired. Based upon Factual Finding 44, although the LAS service continued through December 9, 2005, the goal terminated as of June 2005. Nothing was included for the high school semester. This was a procedural violation of the IDEA.

48. Pursuant to Legal Conclusion 18, the procedural violations in the 2004 IEP were fatal. Without valid observations and sufficient goals and objectives, the IEP team could not make an appropriate offer of placement. Based upon Factual Findings 50 through 56, the services, as developed, were insufficient to support the proposed placement. As such, the plan as developed in the IEP was inappropriate and did not meet Student's unique needs.

49. Based upon Legal Findings 18, as a result of the multiple procedural failures of the 2004 IEP, and the District's failure to implement the 2004 IEP on the high school campus during Student's eighth grade year, Student experienced a substantial loss of educational opportunities. As such, Student was denied a FAPE for the 2004-2005 school year.

2005 Fall Semester

50. Based upon Factual Finding 50, the December 9, 2004 IEP was intended to cover the 12-month period of December 11, 2004 through December 12, 2005. Therefore, the 2004 IEP was theoretically in place at the commencement of the 2005-2006 school year.

2005 Assessment

51. Petitioner contends that the 2005 Assessment failed to assess Student in all areas of suspected disability. Pursuant to Factual Findings 64 through 72, the 2005 Assessment contained a large range of testing and observations. Based upon Factual Finding 67, the assessments determined that Student exhibited additional disabilities which provided her with secondary qualifications for special education in the areas of emotionally disturbed

and language impaired. The District did not fail to assess in all areas of suspected disability nor were the assessments inappropriate or insufficient.

2005 IEP

52. It is noted that although the District obtained information from Student's new teachers at Village Glen, there was no inquiry made of Student's high school teachers from the prior year. This failure to include information from last year's teachers was not as egregious as the year before. In developing the 2005 IEP, the team did not solely rely on the observations and progress reports as they had in 2004. In 2005, the IEP team had an entirely new assessment available and included high school teachers and staff in the IEP.

53. Based upon Factual Finding 76 through 78, the IEP failed to include services and accommodations which were directly connected to Student's unique needs.

54. Although Factual Findings 76 through 78, reflect that there were several discussions related to Student's unique needs, Student's most compelling unique needs were not included on the IEP accommodations. Remarkably, the IEP contained no specific provision for Student's bathroom access. There were no accommodations to help Student deal with the sheer size of the high school, number of students or noise. Based upon Factual Findings 11 through 15, and 79, as well as Dr. Feldman's findings of ED in Finding 67, the Student's most obvious unique needs were totally ignored.

55. Clearly these unique needs were discussed at the IEP. Their omission was explained by the District in Finding 78. Dr. Campbell indicated that the IEP team would get together after the meeting to determine specifics. Based upon Legal Conclusions 11, 12, and 19, this tactic eliminates the parent from meaningful participation in the IEP. Dr. Feldman indicated he felt it unnecessary to address Mother's concerns, because it was apparent Mother was rejecting the placement. Each rationale violates the procedural requirements of the IDEA. Based upon Legal Conclusions 3 and 18, and Factual Findings 76 through 79, the omission of accommodations which addressed Student's unique needs regarding bathroom facilities, sensory issues and the transition to the high school setting, was a violation of the IDEA. The violation not only prevented the parents from participating in a meaningful IEP, but would significantly impede Student's right to a FAPE. The District's failure to adequately provide Student with accommodations in the IEP denied Student a FAPE.

As the District failed to provide sufficient services and accommodations to Student which resulted in a denial of FAPE, its offer of placement in the October 7, 2005 IEP becomes insupportable as a matter of law.

Adaptive P.E. Assessment

57. Based upon Factual Finding 85, Mother requested an adaptive P.E. assessment at the October 7, 2005 IEP meeting. No other evidence was submitted to

substantiate a need for adaptive P.E. Regardless, Mother did make the request, and the District did not provide Mother with notification it was denying her request for assessment, pursuant to Legal Conclusion 19.

Request for IEE

58. Pursuant to Factual Finding 88, Mother requested an IEE on October 20, 2005. Based upon Legal Conclusion 19, the District was required to notify the parent when it refused to initiate or change an evaluation. The District responded to Mother's request on July 31, 2006. The District's response, nine months after the initial request, was untimely. The District has an obligation to seek resolution of the issue in a timely fashion. Even without a statutory time limit on responding, as argued by the District, the delay was unreasonable. Once the due process request was filed, the delay became incurable. Student is entitled to an IEE at public expense.

59. Petitioner contends that the District failed to give prior written notice of its refusal to change Student's educational program when her parents requested another placement at the 2005 IEP. Based upon Factual Finding 59, Mother initially sought non-public schooling for Student in her letters in July 2005. Formally, Mother notified the District of Student's withdrawal from school on October 15, 2006. Based upon Factual Finding 89, the District formally provided a written denial for Mother's request on July 26, 2006. The unreasonableness of the District's delay is discussed above in Issue Determination 58. It is unnecessary to discuss the issue further, as it has previously been determined that the District's did not offer Student a FAPE in the 2005 IEP.

Compensatory Education and Reimbursements

Petitioner requests compensatory education services from October 2003 to the date of filing of the due process hearing request, to be provided in the non-public school setting of Village Glen, plus reimbursement for tuition and related services. Petitioner also requests reimbursement for IEE expenses.

61. Petitioner has requested compensatory education. Based upon Legal Conclusion 21, a party is entitled to compensatory relief when the district has failed to provide a FAPE. Compensatory education may include placement in a non-public school. The purpose of compensatory education is to provide Student a remedy for her lost opportunities. The requested compensatory education is appropriate in view of a denial of FAPE beginning in the fall semester of the eighth grade. Based upon Factual Finding 90, placement at Village Glen was appropriate and designed to provide Student with educational benefits which should have accrued from services provided by the District. Therefore, it is determined that Student required placement in Village Glen, a non-public school for the 2005-2006 school year. Petitioner has presented sufficient evidence to establish the sum of \$25,268.00 as the cost of tuition and transportation for the 2005-2006 school year.

62. As stated in Legal Conclusion 14, placement in a NPS generally does not represent the LRE for a student. In this case, the District failed to provide Student a FAPE in

the 2005 IEP, which was intended to provide her services and accommodations through December 9, 2006. Pursuant to Factual Findings 78, 79, and 81, it is clear that Student faced serious obstacles with her inability to handle transitions. Based upon the October 7, 2005 IEP offer, there is currently no plan for Student to transition back into the high school setting. Based upon Factual Findings 76, 77, and 78, there are currently no accommodations or services designed to deal with Student's sensory problems, or Student's struggle with the high school environment itself. As such, the District is currently unable to offer Student placement in the general education arena. Therefore, Student shall continue in her placement at Village Glen for the remainder of the 2006-2007 school year.

Student has requested compensatory services. Clearly, all three IEPs indicated Student had difficulties in speech and language, and social skills. The December 9, 2005 IEP found that Student had an additional disability of SE. No services have been provided to Student since September 2005. Pursuant to Factual Finding 90, Student began making gains since attending Village Glen. No doubt Student is in need of continuing services from the District, however, Petitioner failed to present sufficient evidence of Student's current levels on which to base an award of compensatory services.

ORDER

1. Student shall continue to be enrolled in Village Glen, a non-public school, for the 2006-2007 school year. The District shall pay Student's tuition and related costs, including transportation, for the 2006-2007 school year. Petitioner is entitled to reimbursement in the amount of \$25,268.00, for the 2005-2006 school year.

2. Student is not entitled to compensatory services.

3. Student is entitled to obtain a psycho-educational IEE at public expense, which shall include assessment of Student's suspected unique needs in the areas of OT and APE.

Student's annual IEP review date is in December 2006. Therefore, there is no need to set an additional IEP meeting.

PREVAILING PARTY

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

1. Petitioner prevailed on issues, 1G; 2C, D, E, F, and G; 3C, D, E, F, G, H; and 4A, B, and E.

2. The District prevailed issues, 1A, B, C, D, E, and F; 2A and B; 3A; and 4C and D.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, §56505, subd. (k).)

Dated: November 16, 2006


JUDITH L. PASEWARK
Administrative Law Judge
Special Education Division
Office of Administrative Hearings