

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

In the Matter of:

STUDENT,

Petitioner,

v.

TEMECULA VALLEY UNIFIED SCHOOL
DISTRICT and RIVERSIDE COUNTY
DEPARTMENT OF MENTAL HEALTH,

Respondents.

OAH CASE NO. N 2007090088

DECISION

Administrative Law Judge (ALJ) Susan Ruff of the Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter on January 8, 9, 10, 11, 14, 15 and 16, 2008, in Temecula, California.

Ellen Dowd, Esq., represented Petitioner (Student) at the hearing. Student's mother was present during most of the hearing. Student was not present.

Peter Sansom, Esq., of Lozano Smith, represented Respondent Temecula Valley Unified School District (District) at the hearing.¹ Terrance Davis, Director of Special Education for the District, also appeared on behalf of the District.

Geoffrey Winterowd, Esq., of Filarsky & Watt, represented Respondent Riverside County Department of Mental Health (CMH).² Dianne Radican and Lynne Overturf also appeared on behalf of CMH.

¹ Ronda Chow, Esq., of Lozano Smith, assisted Mr. Sansom with the representation of the District on January 11, 2008.

² Mr. Winterowd was assisted during the hearing by Cathrine Cartwright, an employee of Filarsky & Watt.

Student's due process complaint was filed on September 5, 2007. On October 1, 2007, the parties stipulated to a continuance of the hearing. On October 11, 2007, OAH issued an order granting the continuance and scheduling a telephonic trial setting conference. At the close of the hearing on January 16, 2008, the parties requested time to file written closing argument. The matter was taken under submission on January 24, 2008, upon receipt of the parties' written closing argument.³

ISSUES

1. Did the District fail to offer and provide a free appropriate public education (FAPE) to Student in the 2005-2006 school year by failing to timely provide an appropriate behavior support plan (BSP) to address all of Student's social/emotional and behavioral needs?⁴

2. Did the District and CMH fail to offer and provide a FAPE to Student in the 2006-2007 school year by failing to timely provide an updated BSP to address all of Student's social/emotional and behavioral needs?

3. Did the District and CMH fail to offer and provide a FAPE to Student in the 2006-2007 school year by failing to reassess Student in the areas of social/emotional and behavior within 10 days after receiving written notice of unilateral placement and request for reimbursement from the District on May 2, 2007, and making an appropriate placement offer at the May 15, 2007 individualized education program (IEP) team meeting?⁵

4. Did the District and CMH offer a predetermined placement of home hospital instruction (HHI) at the May 15, 2007 IEP, which failed to afford the parent the right to participate in the development of the IEP and to be informed of the availability of free appropriate public education, including all program options, and of all available alternative programs, both public and nonpublic, as provided by California Education Code sections 56321, 56301 and 56506?

5. Did the District and CMH fail to timely conduct reassessments in the areas of social/emotional and behavior in order to determine the appropriate level of placement for Student for the 2007-2008 school year?

³ Student's written closing argument has been marked as Exhibit S-40 in order to maintain a clear administrative record. The District's written closing argument has been marked as Exhibit D-58. CMH's written closing argument has been marked as Exhibit C-36.

⁴ This issue originally also charged the District with failure to provide an AB 2726 referral, but that portion of the issue was dismissed at Student's request during the hearing.

⁵ Student alleged the IEP meeting was held on May 16, 2007, because that was the date on the first page of the IEP document. However, the correct date of the meeting was May 15, 2007, so the May 15 date will be used in this Decision.

6. Did the District and CMH fail to identify Student's special education needs in the 2007-2008 school year and to offer and provide a FAPE to Petitioner for the 2007-2008 school year?

FACTUAL FINDINGS

Did the District fail to offer and provide a FAPE to Student in the 2005-2006 school year by failing to timely provide an appropriate BSP to address all of Student's social/emotional and behavioral needs?⁶

1. Student is a 14-year-old boy who is eligible for special education under the primary eligibility category of emotional disturbance (ED). He currently attends a nonpublic school (NPS) run by the residential facility where he lives. He is in the ninth grade, and his parents reside within the jurisdiction of the District.

2. Student contends that the District failed to timely provide an appropriate behavior support plan (BSP) to address Student's social/emotional and behavioral needs during the 2005-2006 school year. If a pupil's behavior impedes his or her learning or that of others, an IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

3. A BSP is a document that may be drafted by an IEP team when a child's behaviors are interfering with his education. A BSP does not contain "goals" as an IEP does, but instead focuses on certain targeted behaviors. It sets forth desired alternative behaviors for the child and the supports that will be used to help accomplish those alternative behaviors. Not every child with an IEP has a BSP. A BSP goes above and beyond the normal IEP goals to deal with targeted behaviors. It typically is used to address the most critical behavioral areas that the IEP team believes should be addressed.

4. During the 2005-2006 school year, Student's seventh grade year, Student attended Gardner Middle School, a school within the District. When Student began the 2005-2006 school year, he was being educated pursuant to an IEP that had been developed during the prior school year. That IEP placed Student in a general education program for most of his school week, with resource specialist instruction and counseling for approximately a quarter of the week. His IEP included goals relating to behavior and completion of homework and assignments.

5. At the start of the 2005-2006 school year, Student had a BSP in place that had been developed by the IEP team the previous year. That BSP addressed behaviors which included: "Inappropriate and impulsive comments made to peers that are rude, insulting, or threatening in nature. Comments are made in the classroom and around the campus." The BSP stated that the behaviors interfered with Student's learning because Student's

⁶ The wording of this issue was revised slightly from the wording alleged in Student's Prehearing Conference Statement for the purpose of clarification.

“comments cause a disruption to the learning process in class and prevents (sic) his participation in small group activities with peers. [Student’s] comments also damage his relationship with peers on all levels.” The BSP found that the behaviors occurred multiple times nearly every day and the intensity ranged from “mild verbal confrontation to physical conflict.” Student was often the instigator of the conflicts due to his comments. The plan called for the adults to make Student aware of the inappropriateness of his comments and to teach him appropriate comments to use instead.

6. Student continued to have verbal and physical conflicts with peers during the first part of the 2005-2006 school year. Between September 21, 2005, and November 18, 2005, his conduct included behaviors such as placing another student’s backpack in a puddle of milk, throwing food, hitting students, pushing students, and throwing water on other students. He was also defiant in class, lied to adults about his activities, and was tardy to class on many occasions. In order to address these issues, the District tried informal interventions, such as having an aide shadow Student and keeping Student away from one particular peer who was involved in many of these incidents with Student. Those informal interventions were successful for a while, but Student’s aggressive behaviors appeared again in January 2006.

7. On November 4, 2005, Student’s annual IEP meeting was held. Student remained in a general education program with resource specialist instruction and weekly counseling provided by a non-public agency. The IEP team discussed student’s behavioral problems, including his peer conflicts, his trouble staying on task during class and his difficulty completing assignments. The IEP noted that he had made partial progress on his goals from the previous year, but had met only one of the goals (that he attain a score of “basic” on the statewide achievement tests). The IEP team developed the following behavior-related goals for Student’s IEP:

- 1) [Student] will enter all assigned homework in his binder reminder on a daily basis and complete all assigned class and homework completely and on time 100% of the time; and
- 2) The student will respond appropriately and in a timely manner when given a verbal direction from an adult, requiring no more than 1 prompts (sic), 80% of the time....

8. The IEP called for the following program modifications, supplementary aids and accommodations: “Use of binder reminder for home/school communication regarding homework completion, extra time for writing assignments (pre-arranged), assistance with handling social interactions in small group activities.”

9. During the fall of 2005, the District conducted Student’s triennial assessment. The assessment report noted that Student’s verbal aggression had decreased compared to the previous year, but he still continued to engage in some conflicts with peers. The report also discussed Student’s off-task behavior and need for prompting in the classroom.

10. The triennial assessment stated that:

[Student's] grades have been negatively impacted by his failure to turn in assigned work and his last reported G.P.A. was 1.20. [Student's] behavior concerns have largely occurred in unstructured situations out on campus such as lunch, break, and passing periods. [Student's] behavior within the classroom is reported as manageable. [Student] tends to be off task and somewhat distractible in class but is generally cooperative with teacher requests.

11. The assessment report went on to make recommendations for interventions that could be used to assist Student with homework completion, off-task behavior in class, and problems with peers during unstructured school times, including monitoring by adult staff, communication between home and school regarding missing assignments, and positive reinforcements for completing work.

12. At the end of the fall semester of the 2005-2006 school year, student's grades contained two Fs in his classes, including an F in his science class.

13. On January 12, 2006, the IEP team held a meeting to review Student's triennial assessment and update his educational program. A follow-up IEP team meeting was held on January 20, 2006. The IEP team kept Student in his general education program, but increased his amount of time out of the general education classroom to 33 percent of his time, by adding resource specialist instruction for "advisement/silent reading." Under present levels of behavior, the IEP noted that Student:

...has difficulty focusing on classroom work. He is often interested in what others are doing in the RSP setting. In general ed. classes, he is not disruptive but often off-task and needs reminders to complete work. In the RSP classroom, he is beginning to acknowledge some of his behaviors....

14. The IEP team noted partial progress on Student's goal relating to noting assignments in his "binder reminder." However, as to the other goals, it stated that the goals were just written in November and there had not been sufficient time to meet the goals. In addition to academic goals, the IEP team expanded Student's goals to include separate goals relating to: 1) entering his homework in his "binder reminder;" 2) completing all class assignments on time 90 percent of the time; 3) completing and turning in 90 percent of his homework on time; 4) being on task 80 percent of the time, in his seat, paying attention and ready to work; 5) maintaining an organized notebook with folders and tabs for each subject; 6) asking questions when he needs clarification of assignments 80 percent of the time; and 7) consulting or seeking assistance from adults when faced with a situation of peer conflict that he is unable to resolve on his own 90 percent of the time.

15. The IEP included additional program modifications from the ones in the previous IEP, including, but not limited to "long-term projects broken down into smaller

parts, tests taken in small groups, opportunity for test retakes for grades below C level, shadow monitoring by an adult staff member during breaks and lunch for a period of one month, critical lectures provided in written form or [Student] able to tape record” and opportunity to take tests orally. The IEP team discussed behavioral strategies for dealing with Student’s peer conflicts and off-task behavior, including the shadow aide, preferential seating in classes, a reward system for on-task behavior, counseling services, and special computer software to assist with task completion.

16. The IEP team also developed a new BSP for Student. This BSP focused on Student’s “verbal and/or physical aggression toward peers” and his “off task behavior” in the classroom.

17. After the new BSP was implemented, Student’s physical conflicts with peers began to decrease. He had several physical confrontations with peers in January and February, but there were no disciplinary referrals for physical altercations in March or April.

18. On February 21, 2006, the parties had an IEP meeting to discuss the shadow aide who was following Student during unstructured times. The team agreed to gradually phase out the shadow aide, as long as there were no further serious behavior incidents.

19. In May, there were several aggressive incidents, such as threatening others, calling names, stealing another student’s backpack and ruining it, stealing candy from a classroom, and using obscene language. He was also disciplined on May 9, 2006, for dialing “911” from the band room and then blaming it on another child.

20. On May 10, 2006, the IEP team met again at the request of Student’s mother. The team discussed a referral to CMH for counseling services, a plan for fading out the shadow aide, and changing the BSP to focus on task initiation. The team updated the BSP to phase out the adult monitoring and include different reinforcements for good behavior.

21. Student’s school counselor submitted a report on the date of the IEP meeting in which she stated that school counseling was not meeting Student’s current needs, and she recommended a referral to CMH. She explained that at times Student had insight into his behaviors, but at times he lacked such insight and would “do a behavior that is very impulsive.”

22. After the IEP meeting, the District submitted a referral to CMH for mental health services for Student (AB 2726 services). The referral form noted his problem behaviors, including failure to complete tasks without prompting and direct teacher supervision, difficulty with independent work, reluctance to participate in general education classroom discussions, and peer conflicts during unstructured times and in the physical education locker room. The referral concluded that the current interventions were not meeting Student’s needs because Student “continues to experience peer conflict – verbal & physical aggression, limited task completion, that results in suspensions, disciplinary action, & lowered class performance.”

23. Despite the behavioral problems and the need for the referral to CMH, Student made academic progress during the 2005-2006 school year. By the end of the spring semester, Student's grade in science had risen to a D. The rest of his grades were C- or higher. Student had started to complete more of his class work and had fewer confrontations with peers. Although he still had trouble turning in his homework, he had improved in that area and his grades reflected that improvement. His teachers modified his assignments to give him more time to complete the work or fewer problems to complete, but he still earned his grades and was learning in his classes.

24. The three progress reports for Student's IEP goals in March, May and June 2006 noted Student was making progress on all his goals. However, for each of the 12 goals listed on the progress report, a box number was checked on the form to indicate that Student might not meet the goal by the time of the IEP meeting during the following school year. Student's case manager explained during the hearing that she checked that box for every goal because she did not know what would happen the following school year. It did not mean that he was not making sufficient progress.

25. The evidence does not support a finding that the District denied Student a FAPE during the 2005-2006 school year by failing to timely provide an appropriate BSP to address all of Student's social/emotional and behavioral needs. Instead the evidence shows that the District acted appropriately. When Student's aggressive behaviors manifested themselves at the beginning of the school year, the District first tried informal interventions and then revised his BSP after his triennial assessment was conducted. Those interventions were successful and Student made significant behavioral progress as the year progressed. By the end of the year, there were few physical confrontations and even his verbal confrontations had lessened. As his behavior improved, the District began to focus the BSP on his off-task behavior in class. When he still had behavior issues at the end of the year, the District took another step and referred him to CMH for further mental health interventions. The District witnesses and experts were unanimous in their testimony that the behavioral interventions were appropriate and effective for Student during that school year.

26. Student contends that the District should have addressed homework completion and assignment completion in the BSP. However, those issues were addressed in the goals and objectives in the IEP. Student's teachers testified that he was making some progress on those goals by the end of the school year.

27. Student argues that the District's own IEP goal progress reports proved Student was not making progress. While it is true that each form had boxes checked to indicate that he might not meet the goals by the following year's IEP, Student's case manager testified that she checked that for every progress report because she did not know what would happen the following year. While it might have been preferable for her to indicate a more realistic measure of his progress in those reports, her failure to do so does not prove that he was making no progress.

28. Student also contends that Student's grades were modified to show progress when he, in fact, made no progress. The evidence does not support such a finding. There is no question that Student's assignments were modified during the second semester of the 2005-2006 school year. Teachers reduced the number of problems he would receive, gave him extra time to complete assignments and gave him the other modifications the IEP team listed in the January 2006 IEP. However, the teachers testified that he still earned his grades and that he had started to complete more assignments in the second semester of the school year. Those modifications enabled him to make educational progress.

29. The evidence supports a finding that Student gained educational benefit, both academically and behaviorally, during the 2005-2006 school year. The District acted appropriately in modifying his program according to his changing needs during that year. There was no denial of FAPE.

Did the District and CMH fail to offer and provide a FAPE to Student in the 2006-2007 school year by failing to provide an updated BSP to address all of Student's social/emotional and behavioral needs?

30. At the start of the 2006-2007 school year, CMH conducted an assessment of Student and concluded that Student needed CMH mental health services to benefit from his education. The assessment report was drafted by Russell Sprague, a Clinical Therapist working for CMH. He recommended counseling sessions twice a month and listed suggested treatment goals in his report.⁷

31. On September 6, 2006, there was an addendum to the IEP in which the team agreed to discontinue the shadow aide. Student's mother signed her agreement to that addendum on September 13, 2006.

32. During the fall semester of the 2006-2007 school year, Student did not exhibit the aggressive and physical behavior problems of the previous years. However, his failure to complete class assignments and homework caused him to earn failing grades in several of his classes. On October 23, 2006, the school staff decided to let Student "start fresh" by excusing him from the missing assignments in his classes up to that point.

33. On October 31, 2006, an IEP team meeting was held at the request of Student's mother because of her concerns regarding Student's failing grades. Russell Sprague of CMH participated in the meeting. The IEP team proposed several interventions to deal with the problems, including weekly counseling sessions with CMH, participation in

⁷ In Student's written closing argument, Student argues that CMH did not abide by the terms of the interagency agreement regarding provision of mental health services for the District because Sprague's goals were not included in Student's IEP. Even if that could be grounds for denial of FAPE, Student did not allege any violations related to this conduct in Student's due process complaint, so the conduct is not at issue in this case.

Likewise, despite the contentions in Student's written closing argument, Student's due process complaint contained no allegations that CMH failed to provide all of the required weekly counseling sessions for Student.

a weekly social skills group, and daily email communications between District staff and Student's mother. The IEP team also proposed that the BSP be adjusted to include organizational strategies to help Student with completion of work. Student's mother did not agree to the IEP on the date of the meeting, but later signed her agreement on November 3, 2006.

34. After the meeting, Student's case manager and her aide began sending email messages to Student's mother on a daily basis to let her know what Student's assignments were and how he was progressing. School psychologist John Kroncke met with Student regarding his organizational skills, as directed by the IEP team, although no new BSP was signed at that time. Student continued to have difficulties with turning in his projects despite the new interventions and the attempts of Student's mother to help Student with his homework. At the end of the fall semester, Student received an F in science, Ds in four other classes, and a C in math.

35. On January 12, 2007, the IEP team met for Student's annual review. CMH attended the meeting. The team agreed that Student would continue in the general education setting, with part of his instruction provided by the resource specialist. The IEP called for outpatient counseling provided by CMH once a week, for 45 minutes each session. In addition, the District special education counselor would see Student for six sessions for the purpose of high school transition. Student's mother consented to the IEP.

36. The IEP team noted that Student had met three of his IEP goals – two of his academic goals and the goal requiring him to seek adult assistance relating to peer conflicts. He had made substantial progress on his on-task goal in the resource class, but not in his general education classes. He had made no progress on his goals relating to entering his work in his binder, completing his class work, completing his homework, organizing his folders or asking for clarification when he did not understand an assignment. The IEP continued the goals relating to entering his work in his binder, completing class assignments, and seeking adult assistance to clarify assignments. The IEP team added goals that he would “initiate and complete the task directed with no more than 2 prompts, in 3 out of 5 trials,” and that he would develop and use a check list for organization and self-editing work.

37. The IEP team continued the modifications, supplementary aides, and accommodations from the previous IEPs, but added several new supports, including taking science and social studies tests in the resource room, extended time for class work and long term projects, having no penalty for missed work, grading for content only, repeated directions, and similar strategies.

38. The IEP team also revised Student's BSP. By the time of the January IEP meeting, Student's aggressive behaviors of the previous years had ceased to be a problem, so the BSP was revised to focus on his problems with off-task behavior, task completion and organizational skills. The BSP called for Student to earn reinforcements such as five minutes of free time in the resource class, an early lunch pass, or a fast food coupon if Student complied with the BSP requirements. If Student was not responsive to teacher prompting

during general education classes (where his off-task behavior occurred), he would be sent to the resource room as a consequence. Student did not like to go to the resource room. The BSP also provided for interventions to assist Student, such as use of aides to make sure there were entries in Student's binder reminder and to monitor his work completion.

39. These BSP interventions and strategies were successful. Student began to complete and turn in more of his assignments during the next few months. Although he still had problems completing work, he did improve in that area and his class grades began to improve.

40. In February 2007, Patricia Mathis, the assistant principal at Gardner Middle School, directed Student's case manager Jacquelyn Armstrong to type a legible copy of the January 12, 2007 IEP report. Ms. Armstrong did as she was instructed. However, in addition to typing the portions of the IEP that had previously been handwritten, she also made numerous changes to the IEP, including adding "baselines" to IEP goals that were not included in the handwritten IEP, changing Student's goal related to turning in assignments from 90 percent compliance to 80 percent compliance, checking boxes on the IEP form that had not been checked during the meeting, changing the boxes checked for which program options were considered and recommended by the IEP team, changing the IEP team's findings regarding Student's progress on his on-task goal to show partial progress instead of substantial progress in the resource class, and similar changes. At some later point, an unknown District employee changed the statement of the amount of time that Student would spend in the general education class on the front page of the IEP from 33 percent to 53 percent.

41. After Armstrong completed the typed IEP, the District staff contacted Student's mother and requested that she come to the school office to sign the document. Student's mother never came into the office to review the document and never signed it. However, at some point between February 2007 and April 20, 2007, a District employee either took the signature page from the original January 12, 2007 IEP and stapled it to the typed IEP or affixed a color photocopy of the January 12 IEP signature page to the typed IEP. The page numbers on the signature page were deleted using correctional fluid, and new page numbers were handwritten on it to correspond with the page numbering on the typed document.

42. Armstrong testified that she kept a copy of the real, handwritten January 12 IEP in her classroom, and that was the IEP she used with Student. She did not rely upon the typed IEP in providing services to Student.

43. The evidence supports a finding that once the signature page was affixed to the typed version of the IEP, District personnel (besides Armstrong) began to rely on it as Student's actual IEP. The typed version of the IEP was used by the home hospital instructor discussed in Factual Finding 44 and may have been the version relied upon by at least one of

the District's experts.⁸ The typed IEP was the version of the IEP included in the District's Exhibit Book submitted at the start of the due process hearing. The typed IEP was also the version of the IEP that the District's representative brought to the due process hearing as the "original" IEP in response to the request of Student's counsel.⁹

44. In April 2007, Student's doctor recommended that Student be placed on home/hospital instruction (HHI) due to problems with his back. The IEP team met on April 20, 2007, and agreed that Student would be placed on HHI and that a teacher would visit Student's home to provide one-to-one instruction for Student. Student did not return to Gardner Middle School after that date.

45. The April 20, 2007 IEP stated on the front page that HHI services would continue from April 20, 2007, to June 15, 2008. However, Patricia Mathis testified that "2008" was a typographical error. Her testimony is supported by the writing on the second page of the document which states "Home/Hospital Services will be provided for the duration of the school year." The evidence supports finding that the IEP team intended the HHI placement to last only through end of the 2006-2007 school year.

46. Because Student was not attending Gardner Middle School after April 20, 2007, there was no need for a BSP to address Student's behaviors after that time. Student was working one-to-one with his HHI instructor prior to his hospitalization and did not have any difficulties with attention or task completion.¹⁰

47. At the end of the 2006-2007 school year, Student had a D in science, but Cs and Bs in his remaining classes, including a B+ in social studies.

48. The evidence does not support a finding that the District and CMH failed to offer and provide a FAPE to Student in the 2006-2007 school year by failing to provide an updated BSP to address all of Student's social/emotional and behavioral needs. In fact, the evidence shows just the opposite. When it became apparent during the first semester of the 2006-2007 school year that Student's behavioral needs had changed, the District responded appropriately with an updated BSP. The previous BSP had benefited Student greatly, and he made significant behavioral progress in the areas of aggression and peer conflict. By January

⁸ Expert witness Coral French first testified that the version of the January 12 IEP that she reviewed in preparation for her testimony at hearing was typed, not handwritten. Later, after cross-examination by Student's counsel about the differences between the two versions, the witness admitted that she did not know which one she had reviewed.

⁹ Because Student's counsel first learned about the problems with this typed IEP when the District's counsel brought the "original" version to the due process hearing, she was unable to amend Student's due process request to add a procedural violation of IDEA based on the District's use of the typed IEP. (Ed. Code, § 56502, subd. (e).) Therefore, no findings are made regarding any procedural violations based on the typed version of the IEP, and no findings are made with respect to the allegations of fraud raised in Student's written closing argument.

¹⁰ The events which occurred after April 20, 2007, will be addressed in the Factual Findings relating to Student's other issues below.

2007, there was no longer a need for a BSP to address aggressive conduct. Therefore, the District directed the new BSP to address his problems with task completion and remaining on-task in class.

49. Student contends that the BSP should have been revised prior to January 2007. Student argues that the lack of progress on Student's goals as acknowledged at the January 2007 IEP meeting shows that the District's BSP from the prior year was inadequate.

50. While the lack of progress on Student's goals is some evidence of an improper BSP, that evidence is not persuasive in light of the other evidence at the hearing. The District's experts and employees were unanimous in their testimony that their interventions and BSPs had been appropriate at each step of the way. Student called no experts to dispute their testimony. Student's main behavioral problem during the 2005-2006 school year had been aggressive behavior, so it was appropriate for the BSP to address that critical need. At the end of the 2005-2006 school year, the IEP goals related to task completion seemed to be working, and Student's grades improved. Therefore, it was reasonable for the District to continue with those same IEP goals and BSP at the start of the 2006-2007 school year.

51. During the early part of the 2006-2007 school year, when it appeared that the IEP goals and accommodations from the previous year might not be sufficient to address Student's off-task behavior and failure to complete assignments, the District responded appropriately by attempting new interventions – CMH counseling, meeting with Student regarding strategies for organization, and daily communications with Student's mother.

52. In January 2007, when these new interventions were not sufficient, the District revised the BSP to focus on task completion. At that point, Student's aggressive behavior was no longer the critical behavior interfering with his academic progress, so the switch in focus to task completion was appropriate. The new BSP was successful. Student began to turn in more assignments, his on-task behavior improved, and his grades improved by the end of the year.

53. Student's mother believes that Student was only successful because the District staff modified the standards to give him grades he did not deserve. For example, he was given a "clean slate" despite not having turned in documents (so he got credit for work he never completed), and he was allowed to use aids during tests such as prewritten index cards. Although Student's mother is correct that some accommodations and modifications were made, the evidence does not support a finding that Student failed to gain educational benefit during the 2006-2007 school year.

54. Student's teachers testified that that the aids and accommodations enabled him to make academic progress. Student's social studies teacher confirmed that Student began completing his writing assignments toward the end of the year. She explained that the prewritten index cards that Student's mother described were permitted as an aid for all the pupils in her general education class, not just Student. Student's science teacher testified that Student began to complete more of his assignments during the second semester. During the

first semester, he gave Student the opportunity to turn in assignments late, but Student did not turn them in. During the second semester, Student started turning them in and his grade went up. Despite the modifications and accommodations, Student earned his grade.

55. Student relies on testimony from Student's HHI instructor that Student was behind grade level when he provided the HHI instruction, but that alone does not prove Student failed to gain academic benefit during the school year or that the District's response to his behavioral issues was inappropriate. There was no denial of FAPE during the 2006-2007 school year due to the failure to provide an updated BSP.

Did the District and CMH fail to offer and provide a FAPE to Student in the 2006-2007 school year by failing to reassess Student in the areas of social/emotional and behavior within 10 days after receiving written notice of unilateral placement and request for reimbursement from the District on May 2, 2007, and making an appropriate placement offer at the May 15, 2007 IEP team meeting?

56. On April 25, 2007, while Student was still on HHI placement, a crisis arose at his home.¹¹ As a result of the events underlying that crisis, Student became very distraught and threatened to commit suicide. Russell Sprague of CMH met with Student and his mother for an emergency counseling session. After interviewing Student during that session, Sprague determined that an involuntary psychiatric hold under Welfare and Institutions Code section 5150 was not necessary. However, he felt Student should be monitored, so he assisted Student's mother with finding a voluntary placement for Student in a psychiatric hospital paid for by private insurance. He told Student's mother that he believed Student needed a higher level of care, but Student's needs did not come within AB 2726 services because they were not educationally related, and therefore CMH would not fund the placement.

57. With Sprague's assistance, Student's mother contacted the Sharp Mesa Vista psychiatric hospital and placed Student there on April 25, 2007. The following day, Sharp Mesa Vista contacted Sprague to request input on possible placement for Student in a group home after discharge from the hospital. Student's mother gave Sprague permission to speak with Sharp Mesa Vista. Sprague spoke with the hospital staff about Student's placement after his hospitalization. Sprague told the hospital and Student's mother that residential placement under AB 2726 was for educational purposes, and that Student's mother should pursue a placement under her private insurance.

58. On April 26, 2007, Student's mother sent an email to Patricia Mathis requesting an emergency IEP meeting. When the District learned that Student was being hospitalized at Sharp Mesa Vista in San Diego County, the District did not notice an IEP meeting. The District informed Student's mother that she should contact San Diego Unified

¹¹ To protect the minors involved in the events underlying that crisis, those events will not be described in this Decision. The important issues for this due process Decision involve Student's reaction to that crisis and the subsequent actions of the District and CMH.

School District. However, when Student's mother contacted San Diego Unified School District, she was informed that she did not live within that district's jurisdiction.

59. Student remained hospitalized in the Sharp Mesa Vista psychiatric facility from April 25, 2007, until May 12, 2007. On May 1, 2007, Mark McDonough, a psychologist retained by Sharp Mesa Vista to consult on Student's case, conducted an assessment of Student at the psychiatric hospital. Sharp Mesa Vista asked him to address three issues: 1) to determine whether Student was mentally retarded; 2) to determine whether Student was suffering from post traumatic stress disorder; and 3) to determine whether Student suffered from a psychotic disorder.

60. As part of the assessment, McDonough interviewed Student and his mother, administered tests to Student including the Rorschach Ink Blot Technique, the Wechsler Intelligence Scale for Children – 4th Edition, the Minnesota Multiphasic Personality inventory – Adolescent, and the Incomplete Sentence Blank – High School Form. During his interview with Student, he found that Student embellished aspects of his history and did not give typical responses to the psychiatric testing. Student exaggerated experiences in a way that did not make sense. For example, Student said that he had been suspended 100 times from school, but never expelled, and that he had been suspended 14 times for fighting with the same person. Student did not seem suicidal, but was depressed. At times, Student would contradict what he had previously told McDonough. McDonough concluded that Student was not psychotic, but suffered from a delusional disorder, a disorder on the lower end of the psychotic spectrum. Student seemed unaware of the truth, but not to the level of psychosis. McDonough recommended a residential treatment program placement for Student after Student was released from the psychiatric hospital. He believed that anything less than a residential facility would be insufficient for Student given the depth of his pathology.

61. McDonough did not observe Student in a school placement or speak with any of Student's teachers as part of his assessment. He did not review any of Student's school records and did not know that Student had been receiving mental health services from CMH. His purpose in conducting his assessment at the time was not to determine educational needs, but to consult with the hospital on the questions posed to him. However, at the hearing, he gave his opinion that Student's delusional behavior warranted a residential placement to meet his educational needs, because his psychiatric problems would impede his learning. He explained that a child who is delusional might engage in fights at school because his delusions could cause him to misinterpret another's motives toward him. His delusions might also affect his school work – for example, a delusional child might read about Lincoln's assassination and think people should act that way.

62. Prior to April 25, 2007, Student had not exhibited delusional or psychotic behavior or threatened suicide during the 2005-2006 or 2006-2007 school years.

63. On May 2, 2007, Student's advocate sent an email to the District staff explaining that, in light of the District's decision not to hold an emergency IEP meeting, Student's mother would unilaterally place Student and seek reimbursement from the District.

64. On approximately May 9, 2007, Russell Sprague wrote a letter regarding Student's condition to assist Student's mother with locating an appropriate residential placement for Student after he left the psychiatric hospital. In his letter, Sprague concluded that Student's behaviors were not related to his education and were beyond the services that CMH would provide pursuant to AB 2726.

65. On May 12, 2007, Student returned home from the psychiatric hospital. An IEP meeting was held for Student on May 15, 2007. Russell Sprague attended the meeting on behalf of CMH. At the meeting, Student's mother presented the IEP team with a redacted version of Dr. McDonough's assessment report. The redactions removed all references to the underlying events that led to Student's hospitalization, but left in McDonough's conclusion that Student was delusional. Student's mother reported that Student had threatened suicide and been hospitalized, but refused to provide the District with any details relating to the underlying cause. Sprague explained that CMH had been involved in the hospitalization process.

66. Student's mother and her advocate requested that the IEP team place Student in a residential placement at public expense. The District and CMH requested that Student's mother sign a release to allow them to obtain copies of Student's records from the psychiatric hospital, but Student's mother refused to sign it. Sprague did not tell the IEP team about anything that was discussed during his crisis counseling session with Student on April 25, 2007, because he believed it was confidential. As of the date of the IEP meeting, the District staff had no knowledge of the events underlying Student's suicide attempt and had no means to obtain that information, because Student's mother refused to sign the releases.

67. Sprague told the IEP team that CMH believed Student's hospitalization was not educationally related, but that CMH had recommended a higher level of outpatient services for Student. At hearing, Sprague testified that the higher level of service would have been beneficial for Student, but he did not know if it was required. He told the team that CMH would consider the Student's request for residential placement and respond in writing within 10 days. Student's mother requested that the hours of HHI instruction be increased to six hours per day, but the HHI instructor explained that he did not think Student could tolerate that much time. The IEP team determined not to increase the time. Sprague suggested the possibility of a District-provided home behavior specialist, but the team agreed that Student's needs would not be met by a behavior specialist at home.

68. During the meeting, Student's mother and her advocate requested an assessment to determine if Student required residential placement and gave notice that Student's mother intended to unilaterally place Student in a residential facility and seek reimbursement. John Kroncke, the school psychologist for the District, and the other District members of the team agreed that a reassessment was warranted. Sprague told the IEP team that he would speak with Children's Case Management to see how CMH would proceed. The IEP team agreed to meet again in 10 days to respond to the request by Student's mother for an assessment. Both Sprague and the District staff believed that CMH would be the

appropriate entity to reassess Student's mental health needs, if a reassessment was necessary. The District deferred to CMH's expertise to make the determination.

69. Children's Case Management is the branch of CMH that has responsibility for children who are residentially placed. They are also the branch of CMH that determines if a child needs a residential placement. Any reassessment of Student for residential placement purposes would have been handled by Children's Case Management.

70. Sprague spoke with Dianne Radican, the supervisor at Children's Case Management, about the request for a reassessment and the request for a residential placement of Student. Sprague sent Children's Case Management a packet of documents, including his AB 2726 assessment, Student's IEP, the prior psychoeducational assessment, and the letter he had written on May 9. The CMH employees believed that the motive of Student's mother in seeking residential placement was to get Student out of the home and avoid problems with Child Protective Services based on the events that led to the April 2007 crisis. They did not believe that the mother wanted residential placement for educational reasons. After review of the records and discussions with various CMH personnel, Radican determined that residential placement was not necessary for educational purposes and that CMH was not required to fund those services under AB 2726. She felt that a residential placement would not be the least restrictive educational environment for Student and that other interventions should be tried first.

71. Radican reviewed McDonough's redacted report but believed it was flawed because McDonough made his diagnosis of delusional disorder after only one day of observation, when a DSM classification of delusional disorder requires at least 30 days of continuous conduct. She also questioned McDonough's report because McDonough relied on Student and Student's mother for all his information regarding Student's history and condition. She believed that Student's conduct described by McDonough was a function of distorted thinking related to Student's Asperger's syndrome¹² and other disabilities rather than delusional thinking. However, Radican never met with Student or conducted her own assessment of Student to rule out a delusional disorder.

72. Radican concluded that no new assessment was necessary to determine if residential placement was warranted. On May 16, 2007, Sprague wrote a letter in conjunction with Radican, in which he set forth CMH's determination that "a referral for a Residential Treatment level of care assessment under AB2726 is not warranted at this time."

73. On May 16, 2007, after the letter had been finished, Sprague met with Student at his home for a counseling session. He forgot to bring a copy of the letter with him, but informed Student's mother of CMH's determination. Sprague and Student discussed Student's move to a residential treatment center and what to expect during the transition. Student was sullen during their meeting and worried about what would happen, but Sprague

¹² Although Student's primary eligibility category is emotional disturbance, prior assessments have also found him to have Asperger's Syndrome and other disabilities.

did not notice any delusional or psychotic symptoms. Student did not appear to be heavily medicated during their meeting, but Sprague admitted that he might have been medicated. Sprague did not see Student again after that date.

74. In CMH's written closing argument, CMH contends that the records review conducted by Dianne Radican and the discussion amongst the CMH staff constituted a reassessment. The evidence does not support that contention. Sprague testified at hearing that no reassessment was performed, and his May 16 letter stated that no assessment was warranted. No written assessment report was prepared by CMH after May 15, 2007, although the interagency agreement between the District and CMH called for written assessment reports. No CMH employee conducted any testing of Student or interviewed Student's parents or non-CMH treating professionals. Although Sprague met with Student on May 16, 2007, he clearly did not consider that to be an assessment, since he testified unequivocally that no reassessment was conducted. Further, his counseling session with Student occurred *after* CMH had already drafted the letter denying the reassessment.

75. District school psychologist John Kroncke believed that CMH should have reassessed Student. He was surprised by CMH's decision not to reassess. In his opinion, the District did not have sufficient information in May 2007 to determine whether Student needed to be placed in a residential facility. There needed to be an assessment by the individuals who were providing Student's mental health services. The factors that a District looks at in determining a child's post-hospitalization placement include evaluation of mental health status, recommendations by mental health professionals as to the level of mental health care the student may need, and whatever progress may have been reported from the last time the child was receiving services from the school.

76. The District contends that Student's mother never requested the District to reassess Student, and that only a request for a mental health assessment was made. The evidence does not support that contention. Student's mother requested an assessment to determine whether residential placement was necessary to meet Student's needs. She did not specify what type of assessment that should be. The District believed that it should be a mental health assessment done by CMH. However, when CMH refused to reassess, the determination could also have been made by a social/emotional/behavioral assessment conducted by the District.

77. After Student returned home from the hospital, the HHI instructor visited Student at his home for one last session. That was the last time Student received educational instruction from a District employee. The HHI instructor did not notice any anger, depression or suicidal thoughts by Student on that occasion.

78. On May 21, 2007, the District sent prior written notice to Student's mother denying the request for residential placement and denying the request for additional HHI hours.

79. On May 24, 2007, the IEP team met again. The IEP team discussed CMH's denial of the request to reassess and refusal to offer Student a residential placement. The District continued its offer of FAPE from the April 20, 2007 IEP. Student's mother informed the IEP team that Student had been placed in a residential facility in Texas. Student stayed at the residential facility in Texas during the summer.

80. The evidence does not support a finding that the District and CMH should have reassessed Student within 10 days of receiving the advocate's email on May 2, 2007. At that point the District and CMH did not have sufficient information to warrant a reassessment. However, the evidence supports a finding that, as of May 15, 2007, the District and CMH had sufficient reason to reassess. In addition to the specific request by Student's mother to reassess, there were strong indications that Student's educational needs had changed. By May 15, 2007, the District and CMH knew that Student had threatened suicide, had been hospitalized for psychiatric reasons, and had been diagnosed by a psychologist to be delusional. CMH had actual knowledge of the underlying events that triggered Student's suicide threat. Given all those factors, a reassessment was essential to determine whether Student needed a residential placement for educational reasons. The refusal by Student's mother to sign the release of information and her redactions to the McDonough report hampered the efforts of the District and CMH to understand Student's needs, but that did not alter the need for a reassessment.

81. The District employees recognized the need for a reassessment. John Kroncke testified that the District did not have sufficient information at the May 15 IEP meeting to determine if Student needed a residential placement. He also testified that, had he known the additional information regarding the underlying reason for Student's situation, he would still have believed a reassessment was necessary. Even CMH recognized that Student's educational needs had changed and offered additional outpatient services for Student during the meeting.

82. Although the CMH employees criticized McDonough's assessment, they did not conduct an assessment of their own to see if Student's needs had changed. They simply made their determination that no assessment was warranted because they believed that the parent's motives for seeking a residential placement were not educational. However, rather than basing a decision on the parent's motives, they should have addressed the actual needs of the child and whether those needs had changed. Their failure to do so under these circumstances was a violation of federal and state special education law.

83. As set forth in Legal Conclusions 4 and 14 below, a failure to assess is a procedural violation of special education law. A procedural violation can lead to a substantive denial of FAPE if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. In the instant case, the evidence supports a finding that the failure to assess impeded Student's right to a FAPE, because the failure to assess led to the failure of the District and CMH to make a proper FAPE offer at the May 15, 2007 IEP meeting.

84. The only offer of placement and services made by the District and CMH at the May 15 and May 24 IEP meetings was to continue the HHI placement from the April 20 IEP meeting. However, the District admits that the District did not have sufficient information in May 2007 to determine if that was still an appropriate placement. Aside from one HHI visit and one counseling session by Sprague, neither the District nor CMH had any current knowledge of Student's condition and whether that condition had changed.

85. Student met his burden of demonstrating that Student's needs had changed by May 15, 2007, warranting a reassessment and possible revision of his IEP. McDonough found that Student needed a residential placement. At hearing, he explained that Student's delusional disorder could impede Student's educational progress in school and lead to behavioral problems. Although the CMH experts criticized McDonough's assessment, McDonough was the only person who tested or assessed Student after Student entered the psychiatric hospital. There was no persuasive evidence at hearing to counter his opinion.¹³

86. The District contends that CMH was the entity responsible for conducting the mental health reassessment, and that the District cannot be held responsible for that failure to reassess. Even if that is correct, the District was still responsible for offering a FAPE to Student. The District did not do so.¹⁴

87. The evidence supports a finding that the failure to reassess Student led to a denial of FAPE to Student from May 15, 2007, to the end of the 2006 – 2007 school year.

Did the District and CMH offer a predetermined placement of HHI at the May 15, 2007 IEP, which failed to afford the parent the right to participate in the development of the IEP and to be informed of the availability of free appropriate public education, including all program options and of all available alternative programs, both public and nonpublic, as provided by California Education Code sections 56321, 56301 and 56506?

88. As set forth in Factual Findings 65 – 68 above, the evidence does not support a finding that the District or CMH offered a predetermined placement at the May 15, 2007 IEP meeting. To the contrary, the evidence established that the District staff arrived at the IEP meeting with an open mind, trying to obtain additional information to determine if Student's

¹³ Other evidence at hearing corroborated Student's contention that Student's educational needs had changed. As stated in Factual Finding 92 below, during the 2007-2008 school year Student has regressed into physical violence in his NPS classroom and had verbal altercations with his peers. Student had to be moved from one group home and was restricted from having a roommate because of his behavior. Although CMH and the District did not have this additional information at the time of the May 15, 2007 IEP meeting, there were still sufficient "red flags" on May 15 to alert the District that the April 20 IEP offer was no longer a FAPE for Student.

¹⁴ The actions of CMH may be significant in determining which government agency is responsible for reimbursement to Student's mother for her expenses incurred in educating Student during and after May 2007, but reimbursement is not at issue in the current proceeding. The issue of the appropriate remedy for the denial of FAPE was bifurcated from the current proceeding pursuant to stipulation of the parties and order of the ALJ during the hearing. The bifurcated proceeding will be heard on February 28 – 29, 2008.

needs had changed. During the meeting, the District discussed several options, including Student's request for residential placement, additional hours of HHI instruction, a home behavioral aide, and additional outpatient services by CMH. The District staff determined that the District needed more information to address Student's request for residential placement and supported the mother's request for a reassessment.

89. Student contends that CMH had already decided not to offer residential placement before the May meeting and refused to reconsider that position. However, the testimony of Dianne Radican established that CMH did, in fact, consider whether to reassess. After the May 15 meeting, Radican reviewed many pages of documents and spoke at length with other CMH employees about the request. She did not believe that the redacted version of McDonough's report presented a sufficient basis to reassess, but she still considered it. A decision not to reassess is not automatically the same as a predetermined placement. There was no predetermination and no procedural violation of IDEA based on predetermination.

Did the District and CMH fail to timely conduct reassessments in the areas of social/emotional and behavior in order to determine the appropriate level of placement for Student for the 2007-2008 school year?

90. The 2007-2008 school year began on August 20, 2007. The District assumed that Student would begin school at Great Oak High School. When he did not attend there, the District contacted Student's mother and learned that he was in a residential placement.

91. Around the beginning of the 2007-2008 school year, Student returned from Texas, and Student's mother placed him at a residential facility in Vista, California. The facility operates a non-public school (NPS) called New Haven School, and Student began attending that school during the 2007-2008 school year. The NPS is certified by the state, and most of the students who attend that facility are placed there by county mental health agencies or school districts. The residential portion of New Haven is operated in a number of group homes that usually have three bedrooms with two boys in each bedroom. There are about 10 boys in Student's NPS classroom.

92. Student has had a difficult time behaviorally at New Haven. Because of a sexual incident that occurred in one of the group homes, Student was moved to a different New Haven home and is not permitted to have a roommate. He has had problems with peers at New Haven, including one physical fight in his classroom and numerous verbal conflicts. At one point, he threatened to kill himself and ran around the neighborhood crying. He has threatened to harm himself and others, though he has not actually inflicted physical injury on himself. He also has ongoing problems with organizational skills. Student is not given homework at New Haven, but he gets "deepwork" assignments related to his therapeutic goals. Student's counselor at New Haven believes that Student exaggerates and obsesses about certain topics. For example, his counselor believes that he is obsessed with electronics such as video games, so she will not allow him any access to those. She also reported that he does not have any real friends at New Haven, and that he does not seem motivated to do

school work. When he first arrived at her home, he was sleeping and not doing school work, but that has improved over time.¹⁵

93. On September 19, 2007, the District's counsel sent a letter to Student's counsel requesting information regarding Student and offering to keep the provided information confidential.

94. On October 1, 2007, the District sent a letter to Student's mother noticing an IEP meeting for either October 15, 17 or 19, 2007. The letter included releases for records for the parent to sign to be sent to the various health, residential and educational facilities that had worked with Student. The letter also stated that the District was considering whether a reassessment of Student might be warranted "particularly in the areas of behavior and social-emotional."

95. On October 9, 2007, the District sent a proposed assessment plan to Student's mother. The plan called for Student to be reassessed in the areas of academic achievement, perceptual-motor development, social/emotional/behavioral development, health and medical development, and observations and interviews concerning Student's "academic and behavioral functioning in the school and/or natural setting." The letter also included copies of the release forms for Student's mother to sign.

96. Student's mother did not respond to the October 1, 2007 and October 9, 2007 letters, so Jeff Janis, a program specialist for the District, contacted Student's mother by telephone about the proposed IEP meeting dates. Student's mother asked him to contact her educational advocate Allan Roth to determine his availability for the meeting. Janis telephoned Roth's office and Roth's staff said they would get back to him with dates. However, they did not call him back.

97. On November 13, 2007, Janis sent a letter to Student's mother by both regular and certified mail explaining that Roth had not called him back. He explained that the District had noticed a new IEP meeting for December 10, 2007. The letter once again requested that Student's mother sign the releases. The letter did not mention the proposed assessment plan.

98. At some point, Student's mother contacted her advocate, and the advocate contacted the District. Student's advocate informed the District that he would not be available for an IEP meeting on December 10, 2007. Student's mother and her advocate were unavailable to meet again until January 30, 2008, and requested that the IEP meeting be set for that date. On December 7, 2007, Janis sent another letter to Student's mother setting Student's annual IEP meeting for January 30, 2008. The District once again sent the release of information forms to Student's mother.

¹⁵ During Student's direct examination, the New Haven witness gave her opinion that Student would not be successful in a regular high school placement. However, during cross examination, Student admitted that the New Haven witness was not an expert, so her opinion about the propriety of Student's placement is of limited value.

99. On December 12, 2007, Student's mother signed the District's assessment plan, consenting to the District's proposed assessments. Student's mother also signed a release permitting the District to obtain records from New Haven School. At the time of the hearing, the District was in the process of conducting the reassessment of Student.

100. As set forth in Factual Findings 56 – 87 above, the evidence supports a finding that the District and CMH should have reassessed Student after May 15, 2007. Student's mother and her advocate specifically requested a reassessment on that date. The District staff recognized the need for a reassessment. The school psychologist knew the District did not have sufficient information to determine whether Student needed a residential placement for educational purposes.

101. That failure to reassess was even more significant in the 2007 – 2008 school year. When school started on August 20, 2007, the District and CMH did not know enough about Student's current condition to make an appropriate offer of FAPE. Based on McDonough's report and Student's behavioral problems at New Haven, there was strong evidence that Student's educational needs had changed. The District and CMH should have conducted an assessment of Student to determine Student's educational needs. The failure to do so was a violation of federal and state law. As set forth in Legal Conclusions 4, 14, and 20 below, because that procedural violation prevented the District and CMH from making a proper FAPE offer, that procedural violation impeded Student's right to a free appropriate public education and constituted a substantive denial of FAPE.

102. The District raises the defense that the District attempted to reassess Student by sending Student's mother an assessment plan on October 9, 2007. Student's mother failed to sign that plan until December 12, 2007.

103. During the time period that Student's mother prevented the District from reassessing Student by failing or refusing to sign the proposed assessment plan, the District and CMH were not responsible for the failure to assess. However, aside from that small time period between 15 days after the time she received the assessment plan and the time she signed it, the failure to assess denied Student a FAPE for the 2007-2008 school year, up to and including the dates of the hearing.

104. As discussed in Factual Findings 105 – 111 below, the evidence supports a finding that the District's failure to reassess impeded the Student's right to a FAPE, because it caused the District to offer placement and services for the 2007 – 2008 school year that no longer met Student's educational needs. Therefore the failure to assess caused a substantive denial of FAPE.

Did the District and CMH fail to identify Student's special education needs in the 2007-2008 school year and to offer and provide a FAPE to Petitioner for the 2007-2008 school year?

105. As set forth in Factual Findings 56 – 87 and 90 – 104 above, the District and CMH failed to identify Student's needs and offer Student a FAPE for the 2007-2008 school

year. Given all the factors known by the District and CMH at the May 15, 2007 IEP meeting, a reassessment should have been done. However, the District contends that, despite the failure to reassess, the District still offered Student a FAPE for the 2007-2008 school year. The evidence does not support that contention.

106. No IEP meeting was held between May 24, 2007, and the dates of the hearing in this case. Therefore the District's offer of FAPE for the 2007 – 2008 school year was either the HHI instruction agreed to during the April 20, 2007 IEP meeting or the January 12, 2007 IEP offer of general education with resource specialist support and CMH counseling.

107. The District does not contend that HHI was appropriate during the 2007 – 2008 school year. Instead, the District contends that the April 20, 2007 IEP expired by its own terms at the end of the 2006 – 2007 school year. After it expired, the January 12, 2007 IEP became the offer for Student for the 2007 – 2008 school year.

108. The evidence was disputed at hearing as to whether the parties had agreed to the automatic reversion to the January 12 IEP. However, even if they did, the evidence supports a finding that the January 12 IEP did not offer a FAPE to Student.

109. As discussed in Factual Findings 40 – 43 above, the evidence indicates that the District would have been using the incorrect version of the January 12, 2007 IEP, not the handwritten version the parent actually signed. But even assuming the District would have implemented the correct January 12, 2007 IEP, that IEP was based on Student's needs at the time. However, the evidence at hearing indicated that Student's needs had changed. McDonough's assessment determined Student was delusional. Student's behavior at New Haven took a drastic turn for the worse. Despite the small size of his classroom at the NPS, he had physical and verbal altercations with peers, including a physical fight in class.

110. The District's expert Coral French testified that Student's January 12, 2007 IEP could be implemented at the District's proposed high school placement, but she could not know whether those IEP goals and services still met his needs. Without a reassessment there is no way to be certain if Student's changes in behavior necessitated different placement and services than those offered in the January 12, 2007 IEP. Under these circumstances, neither her opinion nor the opinion of the other District experts is sufficient to overcome McDonough's assessment findings.

111. The District contends that the failure by Student's mother to agree to an IEP team meeting prior to January 30, 2008, prevented the District from making a proper offer. However, the evidence presented at hearing did not establish a deliberate attempt by Student's mother to delay the IEP process. Instead, the issue seemed to be one of scheduling. That is not a sufficient basis to excuse the District's failure to offer an IEP to

meet Student's unique needs during the 2007-2008 school year.¹⁶

LEGAL CONCLUSIONS

1. The Student has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Under the federal Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(a)(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

3. The congressional mandate to provide a FAPE to a child includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034], the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the child's IEP to determine if it was reasonably calculated to enable the student to receive educational benefit. (*Id.* at pp. 206 – 207.)

4. However, not every procedural violation of IDEA results in a substantive denial of FAPE. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484.) According to Education Code section 56505, subdivision (f)(2), a procedural violation may constitute a substantive denial of FAPE only if it:

- (A) Impeded the child's right to a free appropriate public education;
- (B) Significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (C) Caused a deprivation of educational benefits.

Did the District fail to offer and provide a FAPE to Student in the 2005-2006 school year by failing to timely provide an appropriate BSP to address all of Student's social/emotional and behavioral needs?

5. When a child's behavior "impedes the child's learning or that of others," a school district must "consider the use of positive behavioral interventions and supports, and

¹⁶ If there is evidence of a deliberate attempt to delay the meeting, that evidence could be relevant during the bifurcated portion of the proceeding.

other strategies, to address that behavior....” (20 U.S.C. § 1414(d)(3)(B)(i); Ed. Code, § 56341.1, subd. (b)(1).)

6. When a child “exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives” of the child’s IEP, a district must develop a formal behavior intervention plan (BIP), which becomes part of the child’s IEP. (Cal. Code Regs., tit. 5, § 3001, subd. (f).) Serious behavior problems are defined as “behaviors which are self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches in the student’s IEP are found to be ineffective.” (Cal. Code Regs., tit. 5, § 3001, subd. (aa).) Before a BIP is developed, the district must conduct a functional analysis assessment (FAA). (Cal. Code Regs., tit. 5, § 3052, subd. (a)(3).) An FAA is a detailed assessment of a child’s behavior, which includes, among other things, systematic observation of the occurrence of the targeted behaviors, systematic observation of immediate antecedent events associated with the behavior and the consequences of the behavior. (Cal. Code Regs., tit. 5., § 3052, subd. (b)(1).)

7. Unless a pupil’s behaviors are serious enough to warrant a formal BIP, there is no specific statutory or regulatory requirement for a BSP to address behaviors. A BSP may be developed to help the IEP team focus on eliminating problem behaviors, but it is not required as a formal document. In the instant case, Student does not contend that Student required a formal BIP to address his behaviors. The evidence shows that Student’s BSP was sufficient to address his physical and verbal confrontations with peers and that no BIP was necessary.

8. A pupil’s IEP is required to contain a statement of measurable annual goals designed to meet the pupil’s educational needs. (Ed. Code, 56345, subd. (a)(2).) In the instant case, Student’s IEP properly contained goals related to task completion and on-task behavior.

9. As set forth in Factual Findings 1 – 29 above, the District acted appropriately during the 2005-2006 school year by addressing Student’s aggressive behaviors in a BSP and addressing his difficulties with task completion in his IEP goals. Student’s primary behavioral problem during that school year was his aggressive behavior. The IEP team’s BSP strategy for that aggressive behavior was successful. Student made significant progress on his aggressive behaviors. Student also made progress on his task completion during that school year based on his IEP goals. There was no legal requirement that the task completion be addressed in his BSP. As Student’s aggressive behavior began to improve, his BSP focused on issues such as on-task behavior. That was a perfectly appropriate course of action to address Student’s unique needs. There was no denial of FAPE.

Did the District and CMH fail to offer and provide a FAPE to Student in the 2006-2007 school year by failing to provide an updated BSP to address all of Student's social/emotional and behavioral needs?

10. As set forth in Factual Findings 30 – 55, and Legal Conclusions 5 – 9, there was no statutory or regulatory authority requiring the District to include Student's task completion issues in a BSP. The District acted appropriately in addressing the more serious aggression issues first. Once those abated, the BSP was revised to focus on the task completion problems. Prior to the BSP revision, those task completion issues were appropriately addressed in Student's IEP goals. There was no denial of FAPE.

Did the District and CMH fail to offer and provide a FAPE to Student in the 2006-2007 school year by failing to reassess Student in the areas of social/emotional and behavior within 10 days after receiving written notice of unilateral placement and request for reimbursement from the District on May 2, 2007, and making an appropriate placement offer at the May 15, 2007 IEP team meeting?

11. Prior to making a determination of whether a child qualifies for special education services, a school district must assess the child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.)¹⁷ The request for an initial assessment to see if a child qualifies for special education and related services may be made by a parent of the child or by a state or local educational agency. (20 U.S.C. § 1414(a)(1)(B).) After the initial assessment, a school district must conduct a reassessment of the special education student not more frequently than once a year, but at least once every three years. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) A duty to reassess is also triggered if a "local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment." (Ed. Code, § 56381, subd. (a)(1).)

12. Student's written closing argument cites to no statutory or case authority mandating a duty by a District to reassess a child within ten days after receiving a letter from a parent explaining that the parent intends to unilaterally place a child. However, as set forth in Factual Findings 56 – 87, once the parent made the request for reassessment at the May 15, 2007 IEP meeting, the District and CMH had a duty to consider reassessment to determine if Student's educational needs warranted a residential placement. The District recognized that duty and also recognized that factors existed at the time of the May meeting compelling a reassessment.

13. The District makes a strong argument in its written closing argument that CMH should bear the responsibility for the failure to reassess Student. That argument may be significant during the bifurcated portion of this proceeding, in which the issue of the appropriate remedy will be addressed. However, no matter which government agency was

¹⁷ The federal code uses the term "evaluation" instead of the term "assessment" used by California law, but the two terms have the same meaning for these purposes.

ultimately responsible for the failure to reassess, the evidence is plain that *someone* should have reassessed Student after his hospitalization to address his mental health, social-emotional, and/or behavioral needs. There was significant evidence placed before the IEP team to indicate that Student's needs had changed, but no reassessment was conducted.

14. Because the failure to reassess constituted a procedural violation of special education law, it is necessary to consider the factors set forth in Legal Conclusion 4 above. The evidence supports a finding that the failure to reassess impeded Student's right to a free appropriate public education and therefore led to a substantive denial of FAPE. An IEP is required to include goals and services designed to "meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum...and meet each of the child's other educational needs that result from the child's disability...." (20 U.S.C. § 1414(d)(1)(A)(II), (IV).) Despite the evidence that Student's unique needs had changed, including a psychologist's opinion that Student's needs mandated a residential placement, the District and CMH continued to offer the same IEP that had been in place before Student's needs changed. Their failure to assess and their offer of an IEP that did not meet Student's needs denied Student a FAPE from May 15, 2007, until the end of the 2006-2007 school year.

15. In its written closing argument, CMH argues that it never received a referral package from Student's IEP team for a reassessment after May 15, 2007, so no requirement for a reassessment was triggered. There is no merit to that contention. The Student specifically requested a reassessment at the May 15 IEP meeting. Sprague told the IEP team that CMH would consider the request. The next day, CMH prepared a letter stating that no reassessment was warranted. At no time did Sprague or anyone else from CMH tell the IEP team that a referral package was necessary to perform the reassessment.

16. CMH also cites to *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1315, and argues that Student's mother waived Student's right to reassessment by failing to sign the release for information at the May meeting. However, that case dealt with a parent who refused to permit the school district to conduct a reassessment. In the instant case, the parent *requested* the reassessment in May 2007. CMH refused the reassessment, not Student's mother.

Did the District and CMH offer a predetermined placement of HHI at the May 15, 2007 IEP?

17. Student contends that the District and CMH predetermined the placement offer made at the May 15, 2007 IEP meeting. As set forth in Factual Findings 88 – 89 above, the evidence does not support such a finding.

18. A predetermined placement occurs when a district arrives at an IEP meeting with a set idea for what will be offered and refuses to consider alternatives. For example, in *Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840, a school district had already decided not to offer an autistic child applied behavior analysis services despite

all evidence of the child's need for those services. (See also *Ms. S. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131 [“...school district may not enter an IEP meeting with a ‘take it or leave it’ position...”].)

19. As set forth in Factual Findings 88 – 89, although there was some evidence that CMH came to the May 15 IEP with a set position on residential placement, the stronger evidence supports a finding that CMH gave real consideration to the issue when asked by the parent to reassess. The District came to the meeting with an open mind, ready to consider any alternatives that would meet Student's needs. The District employees agreed that a reassessment was warranted, and many different alternatives were discussed at the IEP meeting. The procedural violation in this case was the failure to reassess, not predetermination.

Did the District and CMH fail to timely conduct reassessments in the areas of social/emotional and behavior in order to determine the appropriate level of placement for Student for the 2007-2008 school year?

20. As set forth in Factual Findings 90 – 104 and Legal Conclusions 11 – 16 above, the District and CMH should have reassessed Student in May 2007 to determine if Student's needs had changed to the extent that a residential placement was warranted. After Student returned from his summer program in Texas, the need to reassess was even greater. The failure to reassess impeded Student's right to a free appropriate public education during the 2007 – 2008 school year and constituted a substantive denial of FAPE.

21. However, the evidence also established that, at least for part of the 2007 – 2008 school year, the failure to assess was due to the failure by Student's mother to sign the District's proposed assessment plan. Case law has established that, if a parent wishes his or her child to receive special education services from a school district, the parent must permit the district to assess the child to determine his or her educational needs. (*Gregory K. v. Longview School District, supra*, 811 F.2d at p. 1315; *Dubois v. Connecticut State Board of Education* (2d Cir. 1984) 727 F.2d 44, 48.)

22. A parent has 15 days from the date of receipt of a proposed assessment plan to review and sign the plan. (Ed. Code, §§ 56321, subd. (c); 56381, subds. (e), (f).) The evidence at hearing did not establish the date that Student's mother received the proposed assessment plan. However, further evidence regarding this issue can be raised by the parties during the bifurcated portion of this proceeding, because it may have relevance to the determination of the appropriate remedy for the denial of FAPE.

23. The District and CMH denied Student a FAPE due to the failure to assess during the 2007 – 2008 school year, up through and including the days of the hearing, except for the period starting 15 days after Student's mother received the October 9, 2007 proposed assessment plan to the date she signed that proposed assessment plan on December 12, 2007.

Did the District and CMH fail to identify Student's special education needs in the 2007-2008 school year and to offer and provide a FAPE to Petitioner for the 2007-2008 school year?

24. As stated in Factual Findings 105 – 111 and Legal Conclusions 20 – 23 above, either CMH or the District should have conducted a reassessment of Student when requested by the IEP team at the May 15, 2007 IEP meeting. They did not do so. Without that reassessment, they could not adequately determine Student's unique educational needs for the 2007-2008 school year.

25. Student presented evidence at hearing, including the opinion of Dr. McDonough and the evidence regarding Student's aggressive behavior at New Haven, to show that Student's educational needs have changed since the January 12, 2007 IEP and that the January 12 IEP no longer offered a FAPE to Student. Although the District's experts testified that they could have implemented Student's January 12 IEP at the high school, they could not persuasively state that the January 12 IEP was sufficient to meet Student's needs. They did not know those needs and whether that IEP could meet those needs. Without testimony by experts with knowledge of Student's post-hospitalization condition to counter McDonough's opinion that Student's pathology necessitates a residential placement for educational reasons, the weight of the evidence supports a finding that the District and CMH failed to offer a FAPE to Student for the 2007 – 2008 school year, up to and including the dates of the hearing (except during the period starting 15 days after Student's mother received the proposed assessment plan, and ending on December 12, 2007, when she signed that plan).

ORDER

Issues one, two and four of Student's request for due process are dismissed. Student has prevailed on the remaining issues. Determination of the appropriate remedy will be made at the bifurcated portion of this proceeding.

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. In accordance with that section the following finding is made: the District and CMH prevailed on issues one, two and four. Student prevailed on issues three, five and six.

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 in accordance with California Education Code section 56505, subdivision (k).

Dated: February 11, 2008



SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings
Special Education Division