BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. LANCASTER ELEMENTARY SCHOOL DISTRICT.	OAH CASE NO. N2008010456

DECISION

Administrative Law Judge (ALJ) Susan Ruff of the Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter on April 15, 2008, in Lancaster, California.

David Burkenroad, Esq., represented the Student (Student) at the hearing. Brian Allen, an educational advocate, represented Student during the morning prior to Burkenroad's arrival and assisted Burkenroad during the hearing. Student's father was present during the hearing. Student was not present.

Kathleen LaMay, Esq., represented Lancaster Elementary School District (District) at the hearing. Benay Loftus and Janis Rivera also appeared on behalf of the District.

Student's due process complaint was filed on January 8, 2008. On February 8, 2008, the parties stipulated to a continuance of the hearing, and the case was continued. At the conclusion of the hearing, the parties requested time to file written closing

argument. The matter was taken under submission upon the receipt of Student's reply closing argument on May 6, 2008.[1]

PROCEDURAL MATTERS

Student's counsel Burkenroad was not present at the start of the hearing. Brian Allen appeared at the hearing with Student's father. Allen explained that Burkenroad was delayed in traffic due to the high winds in the region. He said that Burkenroad had authorized Allen to proceed in his absence, and that Burkenroad would arrive in about an hour. After further discussion, Allen produced a letter from Burkenroad. The letter stated that Burkenroad had a hearing in Norwalk at 8:30 a.m. that morning, that Allen was authorized to start Student's hearing, and that Burkenroad would be at Student's hearing at "11:30 am and/or close to lunch time." The letter was dated April 14, 2008. Burkenroad had not filed that letter with OAH or informed OAH that he had a conflicting court appearance that morning.

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[1] In order to maintain a clear record, the parties' written closing arguments have been marked as exhibits for identification purposes. The District's written closing argument has been marked as Exhibit 24.

Student filed two different versions of Student's closing argument and Student's reply to the District's closing argument. It is not clear why Student filed two different versions of each document, but in each instance one version was signed by Attorney Burkenroad and a different version was signed by Brian Allen. These four documents have been marked as Exhibit Q (closing brief signed by Burkenroad), Exhibit R (closing brief signed by Allen), Exhibit S (reply signed by Burkenroad), and Exhibit T (reply signed by Allen).

Prior to Burkenroad's arrival, Allen objected to the District's exhibits on the basis that the exhibit book had not been served on Student prior to the hearing. The District produced a proof of service for the exhibit book, and it was discovered that the documents had been served at the wrong address for Allen.[2] Allen made a motion to have the District's exhibits excluded from the hearing. However, he withdrew that motion in favor of a request that the case be delayed to the afternoon to give Student a chance to review the documents. His request was granted and the case was delayed until 1:00 p.m., giving Student approximately from 10:15 a.m. until 1:00 p.m. to review the documents.

When the case resumed at 1:00 p.m., Attorney Burkenroad was present and confirmed that Allen had his authority to act as Student's representative that morning. Burkenroad made a motion to exclude all the District's exhibits from evidence because the exhibit book had not been timely served. The motion was denied on the basis that Allen had withdrawn his motion in favor of a delay in the start of the hearing time.[3]

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[2] Allen represented Student during the telephonic prehearing conference. During the prehearing conference, Allen requested that the District's exhibit book be served on Allen at an address different from Burkenroad's law office. That request was granted and the service address was listed in the prehearing conference order. The District staff served the papers at an old address for Allen instead of the address stated in the prehearing conference order.

[3] Even though Allen withdrew the motion to exclude, to make absolutely certain that there is no prejudice to Student from the District's error in service of the exhibit book, the ALJ relied upon Student's exhibits and the testimony of the witnesses, not the District's exhibits, in deciding this case. The only District exhibit considered was exhibit nine, the OAH decision in case number N2007060309, a prior case between these same

The District filed a motion to place the District's costs at issue and award sanctions against Burkenroad and Allen. On April 22, 2008, Burkenroad and Allen filed an opposition to that motion.[4] That motion will be addressed below.

ISSUES

1. Did the District deny Student a free appropriate public education (FAPE) by failing to complete the Department of Mental Health (DMH) AB 3632 referral, beginning with the June 8, 2007 IEP meeting?

2. Did the District deny Student a FAPE by failing to meet the requirements of California Code of Regulations, title 2, section 60040, subdivision (a), beginning with the June 14, 2007 IEP meeting?

3. Did the District commit a procedural violation that resulted in a FAPE denial relating to the DMH AB 3632 referral and assessment?

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parties related to this current matter. Because Burkenroad and Allen represented Student during the due process proceeding in that case, there will be no prejudice to Student from use of that decision, even if it was not timely served prior to the hearing. As will be discussed below, Student's own exhibits and the testimony of Student's father provide a sufficient basis for denying Student relief, even without reliance upon the District's exhibits.

[4] To maintain a clear record of this proceeding, the District's moving papers in support of the motion for sanctions were marked as Exhibit 22 for identification purposes during the hearing. The declaration of Kathleen LaMay was marked as Exhibit 23. The opposition papers have been marked as Exhibit U.

4. Did the District commit a procedural violation that resulted in a FAPE denial pursuant to California Code of Regulations, title 2, section 60040, subdivision (a), 34 Code of Federal Regulations part 300.502 (2006), and Education Code section 56320?

FACTUAL FINDINGS

1. Student is a 15-year-old high school student.At the time of the two individualized education program (IEP) meetings in issue in this case in June 2007, Student attended middle school within the District.His eligibility category for special education at that time was specific learning disability.The District's jurisdiction only extends to elementary and middle school, so when Student began attending high school in September 2007, he left the District's jurisdiction and entered the local high school district.

2. On June 1, 2007, Student was caught in possession of tobacco and marijuana at school.Prior to that date, Student had never possessed those two substances or any other forbidden substances at school.Student had previously been suspended from school for defiance of adult authority and fighting, but not related to possession of forbidden substances.Student's parents insisted that Student had never possessed illegal substances at home and that the marijuana belonged to someone else, not to Student.

3. Prior to June 1, 2007, Student's IEP contained a behavior support plan (BSP). That BSP dealt with Student's failure to complete class work, not disruptive behavior or forbidden substances.The District staff who testified at the hearing confirmed that the BSP had been working well with Student, and his grades had improved.Among the designated instruction and services (DIS services) called for in Student's IEP, Student had been receiving counseling services at school to assist him with more appropriately expressing his frustration with work and social situations.

4. The District commenced expulsion proceedings based on Student's June 1 conduct. On June 6, 2007, the school staff conducted a functional behavioral assessment and determined that Student's behavior was a one-time incident, not an on-going pattern of behavior.

5. On June 8, 2007, an IEP team meeting was held to determine whether Student's possession of marijuana and tobacco was a manifestation of Student's disability. Brian Allen acted as an educational advocate for Student's parents at that meeting. The District team members determined that the possession incident was not caused by Student's disability, nor did it have a direct and substantial relationship to that disability. They also found that the behavior was not a result of failure to implement Student's IEP.

6. During the meeting, Allen requested that a behavior plan be developed for Student to address the June 1 conduct. The District staff attending the meeting explained that a behavior plan was not appropriate because this was a one-time incident, not a pattern of conduct. However, at the insistence of Allen, the IEP team agreed to develop a behavior plan for Student. The IEP team also agreed to increase Student's DIS counseling services and placed Student on independent study pending his expulsion hearing.

7. Allen also insisted that the District make a referral for Student to the Los Angeles County Department of Mental Health (DMH) for assessment and possible mental health services.[5] The District IEP team members disagreed that such a referral was necessary or proper at that time. DMH would not normally accept such a referral because Student's behavior was a one-time incident and the District would be expected to try other interventions first before involving DMH. However, Allen insisted on the

[5] This type of referral to DMH is also called an AB 3632 referral.

referral. In an attempt to avoid the time and expense of a due process proceeding, the District staff members agreed to make a referral to DMH.

8. On June 8, 2007, Student filed a request for an expedited due process hearing to challenge the District's determination that Student's conduct in possessing tobacco and marijuana at school was not a manifestation of his disability.

9. A follow-up IEP meeting was held on June 14, 2007, to review the proposed behavior plan and obtain the signatures of Student's parents to start the referral process to DMH. Allen accompanied Student's parents to the meeting and acted as their advocate. The behavior plan had been difficult for the school staff to draft, because there was only one incident, not a pattern of behavior, but a proposed plan was drafted and discussed at the IEP meeting. The school staff asked Student's parents to sign a form entitled: "Consent to Refer, Observe, and Release Information to Los Angeles County Department of Mental Health." Student's mother signed the form during the meeting. The second page of that form was entitled "Release of Confidential Records." That second page was signed by Student's mother during the IEP meeting, but was not completely filled out.

10. Because there was so little time left before the end of the school year, the IEP team decided not to go forward with the expulsion process, but instead to keep Student on independent study and permit Student to transfer to high school in the typical fashion. Student was able to complete his school year in middle school and transitioned to high school in September 2007.

11. There is a factual dispute as to what happened to the original consent form signed by Student's mother on June 14. When the school staff started to assemble the paperwork for the DMH referral, they discovered that the signed consent form was not in the school's file. Student contends that the District staff lost or misplaced the original form. However, during the hearing, Student's father testified that Student's

parents had taken the form home to complete it. He did not specifically recall why they did not complete it, but he thought they might have forgotten to do so.

12. Despite the testimony that Student's parents took the original form with them to complete, Student's written closing argument insists that the District misplaced the original consent form. Student makes no mention of the testimony of Student's father and it is not clear why Student still continues to maintain that the District misplaced the original.[6]

13. It is possible that Student's father may have been confused by the questioning about the original form during the hearing. He was nervous during his testimony and was confused more than once by the questioning. For example, during the direct examination of Student's father, Attorney Burkenroad asked Student's father questions about a form marked as Exhibit C. Student's father testified that the exhibit was the consent form misplaced by the District and that his wife and he were required to sign it again because the District misplaced it. A few minutes later Burkenroad realized that he had been questioning the witness about the wrong document. He then asked Student's father the same questions about Exhibit J, and Student's father gave the same answers.

14. However, Attorney Burkenroad did not seem at all surprised by the testimony of Student's father that the parents took the original form with them. When Burkenroad conducted the redirect examination of Student's father, he did not question

[6] Strangely, the opposition to the District's motion for sanctions (which was signed by Brian Allen) states, in part: "Meanwhile, Mr. Allen had in his possession the signed copy, of the signed AB3632 referral form signed June 14, 2007." If Allen admits he had the original document, it is not clear why Student's written closing argument contends that the District misplaced the form.

the father's admission that he had taken the original consent form or ask if Student's father had been confused by the line of questioning. Instead, the following exchange occurred:

> **Attorney Burkenroad**: Do you know if the June 14, 07 release was sent to the District or did they receive it?
>
> **Student's father**: Yes.
>
> **Attorney Burkenroad**: It was sent?
>
> **Student's father**: Yes.

15. At no point did Burkenroad's questioning clarify when the signed consent form was supposedly mailed back to the District. The evidence does not support a finding that the original, signed consent form was mailed back to the District prior to the filing of Student's compliance complaint with the California Department of Education (CDE). In his contact with the District, Allen never stated that the original form had been mailed back. There is no evidence that Allen ever told CDE that his clients had taken the original signed form and mailed it back to the District after the meeting. As discussed in Factual Finding 20 below, as of September 2007, Allen or his clients were able to provide a copy of the signed consent form to the high school to use in its mental health referral, prior to the time the complaint with CDE was filed and during the time the consent form was supposedly misplaced.

16. The evidence supports a finding that the District did not misplace the signed consent form. Instead, Student's parents took the original signed form with them when they left the meeting. The evidence also supports a finding that Student's parents failed to return the signed consent form to the District so the District was unable to process the mental health referral. The District is required to have a signed consent form

before referring a child to DMH. Without the signed consent form, no referral can be made.

17. The school staff did not know that the parents had taken the original form home to complete it. They assumed that the form had been misplaced. After discovering that the consent form was not in the file, the District acted promptly to remedy that situation. On June 29, 2007, one of the school staff telephoned Student's parents and spoke with Student's mother. The staff member explained that the school could not find the signed consent form in the file and asked if the parents would sign another form so the referral could be made.

18. During the telephone conversation, Student's mother agreed to sign another consent form. According to testimony of Student's father,[7] Student's mother did not have transportation to get to the school that day, so she did not sign the form at that time. The school staff made several other attempts to obtain a new signed consent form from the parents over the summer, but the parents never filled out another form or sent a copy of the form they had already signed back to the District.

19. On July 9 and 19, 2007, Student's expedited due process hearing on the manifestation determination was held before ALJ Slifkin, in OAH case number N2007060309. Burkenroad and Allen represented Student's parents at the hearing, and both of Student's parents attended the hearing. At no time during this hearing did

[7] Student's mother did not appear at the hearing or testify, so all testimony regarding the actions of Student's mother came from the testimony of Student's father.

Student's parents, their attorney or advocate return the original signed consent form or a copy to the District staff or counsel for the District.[8]

20. On September 7, 2007, Brian Allen sent a fax to the District asking about the status of the DMH referral. Because Student was in high school by then, the District forwarded his request to the high school district. At some point in September, Allen or Student's parents provided a copy of the June 14 signed consent form to the high school. The high school district then submitted a referral to DMH using that form. DMH denied the referral because the consent form was over 90 days old and because "a referral to AB3632 requires documentation of school district pre-referral interventions (such as reasonable trial of DIS [designated instruction and services] counseling) and this was missing…."

21. Allen did not inform the District that the parents had taken the original referral form, and the District continued to believe that the form had been misplaced. The District sent Allen a follow-up note on September 20, 2007, which stated, in part:

> The form the parent signed was misplaced. A replacement form was done & numerous attempts have been made to obtain a parent signature, since June, with no results.
>
> The form has now been hand delivered to Mike Morgan, Psychologist, at Eastside High School. Please have the parent

[8] The OAH Decision in that case found that there was no violation by the District with respect to the manifestation determination or the disciplinary proceeding and denied Student's request for relief.

contact Mr. Morgan, at their son's school & arrange to sign the form.

22. Student got into further trouble while in high school, and was ultimately expelled in October 2007. Student contends that had the District completed and sent in the referral to DMH in June 2007, the referral would have given Student needed counseling services and prevented his expulsion from high school.

23. In October 2007, Student filed a complaint with CDE alleging that the District had failed to comply with the IEP requirement for the referral and failed to submit the referral to DMH within the time required by law.

24. On December 17, 2007, CDE issued a Compliance Complaint Report and evidentiary summary regarding its investigation (CDE Report). CDE concluded that the District failed to meet the requirements of California Code of Regulations, title 2, section 60040, subdivision (a), because the District "did not check to see if all forms were present at the June 14, 2007, IEP meeting, before the last day of school." CDE determined that the District should have provided the referral package to DMH within five working days of receiving the signed consent, and that the District had misplaced the consent form. CDE ordered the District to provide memoranda to the applicable District personnel regarding the legal requirements of Education Code section 56320, California Code of Regulations, title 2, section 60040, and 34 Code of Federal Regulations part 300.502. The District was also ordered to make sure that the referral for Student was submitted to DMH by January 15, 2008.

25. Student then filed the current request for due process hearing on January 8, 2008.

26. The evidence does not support a finding that the District denied Student a FAPE by failing to complete the DMH referral beginning with the June 8, 2007 IEP meeting. The evidence supports a finding that Student's parents prevented the District

from completing that referral by taking the original consent form home and then failing to return it to the District. Without that consent form, the District could not complete the referral process. Even if the parents forgot that they had the original form at home, they knew by June 29, 2007, when the school staff contacted them, that the District did not have the signed consent form and needed them to sign another. The lack of transportation is not an excuse – they appeared at the manifestation determination due process hearing on July 9 and July 19, with their attorney and advocate. They could have returned the original signed form or a copy of the form at that time.

27. Student bases Student's entire case on the findings of the CDE Report that the District was out of compliance. However, CDE did not have the benefit of the live testimony of Student's father when it conducted its investigation. CDE's findings were based, in part, on its belief that the District misplaced the form. The CDE Report is of no help to Student.

28. However, even if the District misplaced the consent form as found in the CDE Report, there was still no denial of FAPE. As discussed in Legal Conclusions 5 – 7, the purpose and focus of a CDE compliance complaint are very different from the purpose and focus of a due process hearing alleging a denial of FAPE. In a due process case, in order for a procedural violation to constitute a substantive denial of FAPE, it must impede the child's right to a free appropriate public education, significantly impede the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child, or cause a deprivation of educational benefits. Likewise, in a due process proceeding, only a *material* failure to implement an IEP constitutes a denial of FAPE.

29. The wrongdoing found in the CDE Report was the failure by the District to "check to see if all forms were present at the June 14, 2007, IEP meeting, before the last day of school." At most, this violation affected Student for approximately two weeks,

until the District staff realized the consent form was not in the file and contacted the parents to get another form signed. The District was very quick in trying to remedy the situation once the problem was discovered. It was Student's parents who delayed the process by failing to return the signed original or signing another form. There is no dispute that Student's parents or their advocate had either the original or a copy of the signed form. They could have mailed a copy to the District at any time after June 29, 2007, or brought a copy with them to the due process hearing in July.

30. Further, the evidence supports a finding that, even if the District had the completed form on June 14 and sent in the referral, DMH would have denied the referral because the necessary predicates to DMH services were not met. Student's behavior was a one-time incident. Because it had never occurred before, the District had not yet attempted any interventions to deal with the conduct. Without those attempted interventions, DMH would have denied the referral. When DMH denied the high school's referral in September 2007, DMH based its decision, in part, on the lack of pre-referral interventions attempted by the high school district. The District witnesses, who had extensive experience with DMH referrals, testified that DMH would not typically consider a referral under these circumstances, but they agreed to send in the referral because Allen insisted that they do so.

31. The evidence supports a finding that the failure by the District to "check to see if all forms were present at the June 14, 2007, IEP meeting, before the last day of school" did not impede Student's right to a FAPE, cause a deprivation of educational benefits or impede the parents' opportunity to participate in the process. To the contrary, the District tried to get the parents involved in the process by contacting them to obtain another consent form. It was the parents who never made an effort to provide the original or a copy of the form they had in their possession to the District to allow the process to continue. Assuming that there was any failure to implement the IEP's

requirement for a DMH referral, it lasted only until the District contacted the parents to obtain a new referral form. It was not a material failure to implement the IEP.

32. The evidence supports a finding that the District did not deny Student a FAPE by failing to meet the requirements of California Code of Regulations, title 2, section 60040, subdivision (a), beginning with the June 14, 2007 IEP meeting. Although Student lists this as a separate issue, it is essentially the same issue as Student's issue number one. A district is required to provide the referral package for mental health services to the mental health department "within five (5) working days of the [district's] receipt of parental consent for the referral of the pupil to the community mental health service." (Cal. Code Regs., tit. 2, section 60040, subd. (a).) Because the parents took the consent form with them, the District never received written parental consent and the five day time period never began.

33. However, even if the District had received the form and then misplaced it as Student claims, there was still no violation of FAPE. The error would have affected Student for only a few days, until the District discovered the form was gone and contacted Student's parents to obtain another signed form. As more fully described in Factual Findings 28 – 30 above, the procedural error would not have given rise to a substantive violation of FAPE.

34. Student's final two issues fail for the same reasons. The District did not commit a procedural violation that resulted in a FAPE denial relating to the DMH AB 3632 referral and assessment. The District did not commit a procedural violation that resulted in a FAPE denial pursuant to California Code of Regulations, title 2, section 60040, subdivision (a), 34 Code of Federal Regulations part 300.502, and Education Code section 56320. The evidence does not support a finding that there was any procedural error. However, even assuming there was a procedural error, the District took steps to remedy that error promptly, but was prevented from doing so by the parents' actions.

Further, the evidence showed that, even if the District had timely sent in the referral packet, DMH would have denied the referral because the necessary prerequisites had not been met. There was no denial of FAPE by the District.

FINDINGS REGARDING PLACING COSTS IN ISSUE

35. At all times relevant to this case, Brian Allen acted as an educational consultant for Student's parents. It is not clear to what extent Attorney David Burkenroad participated in the representation of Student and Student's parents prior to the afternoon of the hearing on April 15, 2008, but it is clear that he permitted Allen to use his name and status in bringing this due process case.

36. Allen attended both the June 8 and June 14 IEP meetings. He was the one who insisted upon the referral to DMH. He was present when Student's mother signed the consent form. It is not clear whether he knew that his clients had taken the original consent form with them after the meeting. However, the evidence is clear that, by September 2007, he had actual knowledge of the District's efforts to obtain a new signed consent form from the parents. He had spoken with his clients and contacted the District.

37. The evidence also established that, at least by September 2007, Allen either had possession of the original or a copy of the signed consent form or knew that his clients had the form. Allen or his clients provided a copy of that signed form to the high school for its referral packet to DMH in September 2007.

38. On September 7, 2007, Allen sent a fax to the District inquiring about the status of the DMH referral. His fax made no mention of the attempts by the District to contact the parents or the fact that Allen (or his clients) had either the original or a copy of the consent form in their possession. Instead, his fax asks about the mental health referral as if Allen and his clients believed the paperwork had been sent to DMH.

39. It also appears that Allen made no attempt to alert CDE to the correct situation, but instead allowed CDE to be misled about what had happened to the signed consent form.

40. This is not the first time Burkenroad and Allen have run afoul of a situation involving a mental health referral consent form. In *Allen v. Alvord Unified School District*, United States District Court, Central District, case number EDCV 06-00311 SGL, the federal court upheld an order of sanctions against Burkenroad and Allen based on a factual situation similar to the instant case.

41. According to the federal decision in that prior case, on June 8, 2005, a child's IEP team agreed that the child should be evaluated by the local mental health agency. The school psychologist mailed the parent a consent form on June 14, 2005. About a week later, the assistant principal sent a letter stating that the District had not received the signed form. On July 21, 2005, Allen called the school asking about the referral and stated that the child's mother had mailed the form. The District staff member informed him that they had not received the form and began a search for it. Allen filed a request for due process hearing on that same day on the basis that the referral had not been timely made. Allen and Burkenroad offered to settle the dispute one week later for payment of $420 in attorneys' fees.

42. Part of the federal court's decision stated:

> In any event, the delay was caused by plaintiff's own failure to return the referral form and was remedied with no more effort on the plaintiff's part than a phone call and completion of a second form. Not every difficulty encountered in fashioning a school child's education plan should be subjected to litigation. The underlying due process complaint

was unmeritorious, imprudent, inadequate, premature, and frivolous.

43. The instant case differs somewhat from the prior case, because in the instant case Allen first submitted a compliance complaint to CDE and then filed for due process based on the results of that compliance complaint. However, in many other respects the two cases are very similar. In this case, as in the prior case, the problem could easily and quickly have been resolved with cooperation from the parents. The parents took the *original* consent form. Allen was in contact with the parents during the July 2007 due process hearings. He should have spoken with his clients about it in July. By September 2007, if not beforehand, he had actual knowledge of the situation regarding the original form and either he or his clients provided a copy to the high school for its DMH referral.[9]

44. The CDE Report does not help Allen and Burkenroad. It was based on the incorrect information that the District had misplaced the form. Further, it was not based on conduct constituting a denial of FAPE. Burkenroad and Allen knew the District attempted to remedy the missing consent form but their clients did not cooperate.

[9] In Student's opposition papers to the sanctions motion (signed by Allen) Allen admits that he "provided the Districts (sic) special education department with billings of $1,500.00 for attorneys fees and for his services in connection with the CDE complaint and this matter simultaneously." However, he denies that he offered to drop this case if his fees were paid. The papers go on to state: "On January 18, 2008, Mr. Allen contacted the District and spoke to a secretary stating that he would like to settle and compromise the attorney fees for the amount of $1,250.00 of his $1,500.00."

45. The District has provided sufficient prima facie evidence that it could succeed in proving Burkenroad and Allen should be subject to monetary sanctions for bad faith litigation tactics.

46. However, there is insufficient evidence to support a finding of sanctions against Student's parents. Student's father is a sincere man who cares about his son. During the hearing, it quickly became apparent that he was not familiar with special education law and was completely dependent on his advocate and attorney to advise him of his son's rights. There is no indication that Student's father committed any action in bad faith.

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(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 decision making process regarding the provision of a free appropriate public education to the parents' child; or

(C) Caused a deprivation of educational benefits.

5. California law creates two parallel procedures for enforcing special education laws. First, California law provides that a parent may request a due process hearing before an Administrative Law Judge from OAH as set forth in Education Code section 56501.

6. Second, a parent may file a compliance complaint with the CDE if a parent believes that his or her child is "is not receiving the special education or related services specified in his or her individualized education program (IEP)." (Cal. Code Regs., tit. 5, § 4650, subd. (a)(7)(D).) If CDE determines there has been a failure by a district to comply with the child's IEP, CDE can issue an order requiring the district to take corrective action. These regulations serve the important function of allowing CDE to police the local school districts to ensure absolute compliance with IEP terms.

7. Unlike a CDE compliance complaint, the purpose of a due process hearing is to determine whether a school district has offered or provided a FAPE to a child. Both the courts and the legislature have determined that absolute compliance with the letter of the law is not required for an offer of FAPE. As stated in Legal Conclusion 4 above, only certain types of procedural violations give rise to a denial of FAPE. (Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School District*, *supra*, 960

F.2d at p. 1484.) Likewise, in a due process hearing, only a material failure to implement a child's IEP constitutes a denial of FAPE. (*Van Duyn v. Baker School District* (9th Cir. 2007) 502 F.3d 811, 815.)

8. Student's due process request alleges a procedural violation pursuant to Education Code section 56320, 34 Code of Federal Regulations part 300.502 (2006), and California Code of Regulations, title 2, section 60040, subdivision (a). Education Code section 56320 requires a district to assess a child's educational needs in all areas related to the suspected disability and sets forth the requirements for assessments. 34 Code of Federal Regulations part 300.502 (2006) sets forth the parents' right to obtain an independent educational evaluation if the parent disagrees with a district's assessment.

9. California Code of Regulations, title 2, section 60040, subdivision (a), provides, in part:

> An LEA [local education agency], IEP team, or parent may initiate a referral for assessment of a pupil's social and emotional status pursuant to Section 56320 of the Education Code. Based on the results of assessments completed pursuant to Section 56320, an IEP team may refer a pupil who has been determined to be an individual with exceptional needs or is suspected of being an individual with exceptional needs as defined in Section 56026 of the Education Code and who is suspected of needing mental health services to a community mental health service when a pupil meets all of the criteria in paragraphs (1) through (5) below. Referral packages shall include all documentation required in subsection (b) and shall be provided within five (5) working days of the LEA's receipt of parental consent for

the referral of the pupil to the community mental health service.

. . .

(2) The LEA has obtained written parental consent for the referral of the pupil to the community mental health service, for the release and exchange of all relevant information between the LEA and the community mental health service, and for the observation of the pupil by qualified mental health professionals in an educational setting.

. . .

(5) The LEA has provided counseling, psychological, or guidance services to the pupil pursuant to Section 56363 of the Education Code, and the IEP team has determined that the services do not meet the pupil's educational needs; or, in cases where these services are clearly inappropriate, the IEP team has documented which of these services were considered and why they were determined to be inappropriate.

10. As set forth in Factual Findings 1 – 34 above, there was no violation of FAPE based on the District's conduct with respect to the DMH referral in this case. First, the evidence supports a finding that the District never received the completed consent form from the parents. Although the parents signed the form on June 14, 2007, they took the form with them when they left the meeting to complete it and then failed to return it. Without the signed consent form, there could be no referral. After the District

realized the consent form was not in the file, the District acted promptly to notify the parents and try to obtain another consent form. It was the parents who did not cooperate.

11. Even if the District misplaced the form as the Student claims, the result is still the same. Student's parents or their advocate had a copy of the signed form and could have sent it to the District at any point after the District first contacted the parents on June 29, 2007. Even if the District misplaced the form, at most there should have been a delay of no more than two weeks in sending the referral package to DMH. Student presented absolutely no evidence that a two week delay in submitting the referral packet would have impeded Student's right to a FAPE, caused a deprivation of educational benefits or impeded the ability of Student's parents to participate in the decision making process. In fact, the evidence established that DMH would likely have denied the referral even if it had been made.

12. The CDE Report does not change this result. As stated above in Factual Findings 24 – 30, the CDE report concluded that the District was out of compliance because the District "did not check to see if all forms were present at the June 14, 2007, IEP meeting, before the last day of school." The CDE findings were based on the assumption that the consent form was misplaced by the District. At that time, neither CDE nor the District had the benefit of the admission under oath of Student's father that the parents had taken the consent form.

13. However, even if the District had indeed misplaced the original consent form, the violation of failing to "check to see if all forms were present at the June 14, 2007, IEP meeting, before the last day of school" was, at most, a procedural violation of special education law. It was a violation that the District swiftly attempted to remedy, but could not do so without parental cooperation. The parents or their advocate, on the other hand, could have remedied the problem at any point by simply mailing a copy of

the signed consent form in their possession to the District or by signing another consent form. They chose not to do so. Any deprivation of educational benefits or denial of FAPE was caused by the delays of the parents and/or their advocate, not the District. Likewise, even if there was a failure to implement the part of the IEP that required a DMH referral, the failure lasted for two weeks, at most, and did not constitute a material failure to implement the IEP.

CAUSE EXISTS TO PLACE THE DISTRICT'S COSTS IN ISSUE

14. Title 20 United States Code section 1415(i)(3)(B)(i)(II) authorizes an award of monetary sanctions in favor of a prevailing local educational agency against the attorney of a parent who files a complaint that is frivolous, unreasonable, or without foundation or continues to litigate after the litigation clearly becomes frivolous, unreasonable or without foundation. Title 20 United States Code section 1415(i)(3)(B)(i)(III) authorizes sanctions to a prevailing local education agency if the complaint was presented for any improper purpose, such as to harass, to cause unnecessary delay, or needlessly increase the cost of litigation. California Code of Regulations, title 5, section 3088, subdivision (b), authorizes the presiding hearing officer to issue contempt sanctions and/or place expenses in issue. Government Code section 11455.30 authorizes monetary sanctions in administrative proceedings for bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

15. By reason of Factual Findings 35 – 46, cause is established to place the District's expenses in issue and to order David Burkenroad and Brian Allen to show cause why monetary sanctions should not be issued against them in this matter.[10]

[10] OAH will serve a notice setting a date and time for the Order to Show Cause hearing.

ORDER

Student's request for relief against the District is denied.

PREVAILING PARTY

Pursuant to 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 prevailed on all issues in this case.

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 Education Code section 56505, subdivision (k).

Dated:June 4, 2008

SUSAN RUFF

Administrative Law Judge

Office of Administrative Hearings