BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: FREMONT UNIFIED SCHOOL DISTRICT, v. PARENTS on behalf of STUDENT,	OAH CASE NO. 2008090878
PARENTS on behalf of STUDENT, v. FREMONT UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2008100774

DECISION

This hearing convened in Oakland, California, on December 1-5, 9, 10, 15, 16, and 19, 2008, before Administrative Law Judge (ALJ) Suzanne Brown, Office of Administrative Hearings (OAH).

Damara Moore, Attorney at Law, appeared on behalf of Fremont Unified School District (District). Jack Bannon, Director of Special Services, attended the hearing on behalf of the District on most days. On days when Mr. Bannon was not present, either Charlene Okamoto, Assistant Director of Special Services, or Diane Dooley, Education Specialist, attended on behalf of the District.

Mandy Leigh, Attorney at Law, appeared on behalf of Student. Attorneys Sarah Fairchild and Jessica Cochran also represented Student during some portions of the hearing. Student's mother (Mother) attended the hearing on Student's behalf. Student's

father (Father) attended some portions of the hearing.

On September 25, 2008, OAH received the District's due process hearing request (complaint), identified as Case No. 2008090878. Following a Notice of Insufficiency and Determination of Sufficiency of Due Process Complaint, the District filed an amended complaint on October 6, 2008. On October 24, 2008, OAH received Student's due process complaint, which OAH identified as Case No. 2008100774. On October 27, 2008, OAH granted a motion to consolidate both cases and a motion to continue the consolidated case. That order also specified that all applicable timelines and hearing dates would be those of OAH Case No. 2008100774.

During the hearing, both parties asked to deliver their closing arguments in writing. The ALJ determined that there was good cause for a continuance for the parties to submit written closing arguments. On January 16, 2009, OAH received the parties' written closing briefs. On that date, the record was closed and the matter submitted for decision.

DISTRICT'S ISSUES[1]

1. Prior to Student's initial individualized education program (IEP) meeting on October 31, 2007, did the District assess Student in all areas related to his suspected disability?

2. Did the District's October 31, 2007 IEP offer appropriate goals which addressed all of Student's areas of unique educational need, specifically in the areas of

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[1] Regarding both the District's issues and Student's issues, some issues have been rephrased slightly for purposes of clarity. No substantive changes have been made to any issues. Throughout this Decision, references to IDEA encompass the current amended version of the statute, the Individuals with Disabilities in Education Improvement Act (IDEIA).

pre-academics, communication, motor development, pre-vocational, self-help and behavior/social/emotional needs?

3. Was the District's October 31, 2007 IEP offer, as clarified in the June 11, 2008 IEP, of a special day class (SDC) for five hours per day, five days a week, with related services of transportation, extended school year (ESY), 60 minutes of speech-language therapy a week, 60 minutes of occupational therapy (OT) a week, designed to address all areas of Student's needs and reasonably calculated to provide educational benefit?

4. Did the District meet its obligations under the Individuals with Disabilities Education Act (IDEA) and state special education law after the February 26, 2008 behavioral incident by meeting with Parents and offering to assess Student on or around March 4, 2008, to determine whether Student had additional behavioral needs?

5. Was the District's June 11, 2008 amendment to the October 31, 2007 IEP an appropriate offer of ESY services with appropriate behavioral supports?

STUDENT'S ISSUES

1. Did the District's October 2007 assessment plan deny Student a free appropriate public education (FAPE) because it failed to assess Student in all areas related to his suspected disability?

2. Did the District deny Student a FAPE when it refused Parents' request for a functional analysis assessment (FAA) in or about October 2007?

3. Did the District's October 31, 2007 IEP offer deny Student a FAPE because it failed to:

A. Offer appropriate OT services;

B. Address his behavioral needs with behavioral goals and a behavioral intervention plan (BIP);

C. Offer appropriate speech-language services; and

D. Offer an appropriate classroom placement that addressed his unique needs?

4. Did the District's December 14, 2007 IEP addendum deny Student a FAPE because it failed to:

A. Consider the views of his parents and their expert, who stated that Student required uninterrupted services to avoid regression;

B. Offer appropriate services during winter break; and

C. Conform to Student's October 31, 2007 IEP because it reduced the amount of time he would receive his OT and speech-language services on a one-to-one basis?

5. Did the District participants at the March 4, 2008 meeting deny Student a FAPE by failing to:

A. Offer a one-to-one aide; and

B. Consider the parents' input regarding their request for a one-to-one aide?

6. Did the District's April 1, 2008 IEP deny Student a FAPE by failing to:

A. Conduct an FAA pursuant to parents' request;

B. Ensure that a continuum of alternative placements was available to meet Student's needs; and

C. Offer appropriate behavioral support, specifically a behavior support plan (BSP), BIP, and/or appropriate classroom plan to address Student's unique needs in the area of behavior?

7. Did the District's June 11, 2008 IEP deny Student a FAPE by failing to offer:

A. An appropriate BSP or BIP; and

B. An appropriate ESY program?

8. For all of the IEPs listed above, did the District procedurally deny Student a FAPE by offering only a predetermined program?

9. If the District denied Student a FAPE, is Student entitled to remedies including: compensatory education in areas such as applied behavioral analysis (ABA),

OT, speech and functional academics, social skills and behavioral services; reimbursement for educational expenses at I Can Too! Learning Center, Inc. (I Can Too) and Pacific Autism Center for Education (PACE); and prospective placement at I Can Too and PACE?

FACTUAL FINDINGS

JURISDICTION

1. Student is four years and three months old. During all times at issue in this case, he was a resident within the boundaries of the District, where he lives with his family. Student has been diagnosed with autism and is eligible for special education services with autistic-like behaviors as his primary disability category, and mental retardation as his secondary category.

FACTUAL BACKGROUND

2. In July 2006, Student received his initial diagnosis of Autism Spectrum Disorder from the Autism Spectrum Disorder Clinic at Kaiser Permanente. In August 2006, Student was determined eligible for and began receiving Early Start services pursuant to an individual family service plan (IFSP) from Regional Center of the East Bay (RCEB). In September 2006, pursuant to his IFSP, Student began attending Autism Resource Center (ARC), an agency operated by the District at the District's Glankler School (Glankler). Student attended ARC funded by RCEB. Pursuant to his IFSP, Student received other services from agencies funded by RCEB, including OT and speech-language services.

3. In July 2007, Mother attended a transition meeting with RCEB and District staff, to plan Student's transition into the District's services when he turned three years old. Mother consented to a Referral for Assessment for a special education assessment by the District, and also consented to release to the District information from Kaiser Permanente and Student's service providers. In October 2007, Mother signed the District's Assessment

Plan, and thereafter District staff conducted assessments of Student in several areas.

4. During October 2007, Student was also evaluated by I Can Too, pursuant to a referral from RCEB, although District staff were not aware of this evaluation at that time. In November 2007, Student began receiving behavioral intervention services from I Can Too, which were funded by RCEB.

5. On October 31, 2007, Student's IEP team held its initial meeting. Mother attended the meeting accompanied by Dr. Kent Grelling, a psychiatrist from Kaiser Permanente's Autism Spectrum Disorder Clinic. The IEP team reviewed the assessment reports and determined Student was eligible for special education, with autistic-like behaviors as his primary disability and mental retardation as his secondary disability.[2] The team reviewed Student's present levels of performance and developed goals. For the time period from October 31, 2007, to October 31, 2008, the District offered a program including: placement for five hours per day, five days a week in an autism SDC taught by Evelyne Novello at Glankler; OT twice a week for 30 minutes per session; speech-language therapy twice a week for 30 minutes per session; transportation; ESY services; modifications such as use of Picture Exchange Communication System (PECS) and implementation of a picture schedule; a specialized health care plan; and training of classroom staff regarding Student's pica behaviors (eating non-food items). The IEP notes state that the IEP team would reconvene no later than December 14, 2007, to discuss the possibility of services for Student during winter break and August 2008. On November 8, 2007, Mother signed her consent to this IEP.

[2] At this meeting, Mother and Dr. Grelling expressed some concern about the District's recommendation that mental retardation should be identified as Student's secondary disability category. Subsequently, the diagnosis of mental retardation was confirmed and is not in dispute.

6. On November 12, 2007, Student began attending school at Glankler pursuant to his October 31, 2007 IEP. On December 14, 2007, the IEP team reconvened. The team members agreed to change some of Student's IEP goals and to add a goal for Student's use of PECS. For the period when school would be out of session during winter break, the District members of the team offered six days of services from ARC, for two hours per day. For summer ESY, the District members of the team stated that the District was not offering any services during August. Mother consented only to the changes and additions to the IEP goals, and did not consent to the other aspects of the IEP.[3]

7. Student continued to attend Ms. Novello's SDC at Glankler. During his attendance at Glankler, Student exhibited behaviors which interfered with his learning, including dropping to the ground during a task or while transitioning from one activity to another. On February 26, 2008, an incident occurred in which Student dropped to the ground while walking from the playground to the SDC. Because Student had dropped in front of a door, the instructional aide accompanying him determined that she needed to move him out of the range of the door and out of the path of other pupils who might walk through the door. The instructional aide moved Student approximately three feet by lifting part of the backpack that he was wearing. Mother observed the aide move Student and was very upset at how the move was performed, describing it as "being dragged across the floor like an animal being taken to the slaughter." After visiting the school office to register a complaint, Mother returned to the SDC and took Student home. Thereafter, Mother refused to allow Student to return to school at Glankler.

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[3] One proposal from the District members of the IEP team was that Student might need to be moved to a different SDC in January 2008, because Ms. Novello's SDC was overenrolled. Mother did not agree to this proposal. Subsequently, the District did not try to move Student to a different SDC.

8. On February 26, 2008, Mother sent an e-mail to Jack Bannon, the District's Director of Special Services, requesting an "emergency IEP meeting." Mr. Bannon and Glankler's principal, Bonnie Curtis, responded to Mother's e-mail and sought to schedule a meeting to discuss and resolve the issues related to Student's removal from school. On March 4, 2008, District staff members met with Mother, a parent advocate, an RCEB case manager and an RCEB supervisor.[4] The meeting participants discussed several topics related to the February 26, 2008 behavioral incident, including what steps the District could take to address Mother's concerns regarding Student's safety at Glankler. Mother, her advocate, and the RCEB employees raised the topic of providing Student with a one-to-one aide from an outside agency such as RCEB. District staff responded that, to determine whether Student required a one-to-one aide, they needed to follow a procedure of evaluating that need, beginning with developing a behavior plan. Ms. Curtis filled out an Assessment Plan for a functional behavioral assessment (FBA) by the District's behaviorist. Mother took the Assessment Plan but did not immediately sign it. Mother did not consent to any of the proposals at the March 4, 2008 meeting.

[4] District staff explained that the meeting was technically not an IEP meeting because Mr. Bannon was not present. There is no applicable legal provision for an emergency IEP, and the District had 30 days, excluding school vacations, to schedule an IEP meeting following Mother's request for the meeting. In any event, whether the meeting was technically an IEP meeting is irrelevant to the hearing issues. Student does not argue that any procedural violation occurred due to any failure to ensure the required participants at the March 2008 meeting. The District does not dispute that Parents had the same rights to participate in the decision-making process at this meeting as they would have at any IEP meeting, and that the meeting participants were still obligated to revise the IEP document if warranted.

9. Student remained out of school in spring 2008.[5] On April 1, 2008, the IEP team reconvened. Mother attended the meeting accompanied by attorney Timothy Walton, Student's RCEB case manager, and Parents' advocate. The team members discussed several topics, including whether Student needed a one-to-one aide provided by RCEB, an FBA, and/or an independent educational evaluation (IEE). The District agreed to develop a safety protocol, to be implemented when Student returned to Glankler, for how Student could be safely moved if he was in a harmful situation. The District members of the team offered ESY services, but indicated that they would postpone "until June progress reports" the decision about whether Student also needed ESY services during the month of August 2008. Mother did not consent to this IEP addendum.

10. Shortly after the April 1, 2008 IEP meeting, the District provided the proposed safety protocol. Thereafter, Mr. Walton and Mr. Bannon corresponded regarding Parents' questions about, and proposed changes to, the safety protocol, which the District also referred to as an emergency BSP. In a letter dated April 15, 2008, Mr. Walton informed Mr. Bannon that Parents were giving 10 days' notice that they would be obtaining private services for Student and would seek reimbursement for those services from the District.[6] On or about May 1, 2008, Mother signed the March 4, 2008 Assessment Plan for an FBA. In May 2008, Parents began placing Student on waiting lists for private placements.

11. On June 11, 2008, the IEP team convened again. Mother attended the meeting accompanied by her parent advocate, Student's RCEB case manager and RCEB supervisor, and Drs. Pilar Bernal and George Mutch from Kaiser Permanente. The team members discussed several topics including ESY services and how to transition Student

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[5] Student continued to receive behavioral services from I Can Too.

[6] Also in April 2008, Mr. Walton filed a due process complaint with OAH on behalf of Parents and Student. Thereafter, the complaint was withdrawn without prejudice.

back to school at Glankler. For the ESY period from June 30 to July 31, 2008, the District offered placement in an SDC at Glankler, with OT and speech-language services. The District also offered to provide 34 hours of ARC services over the course of the summer, agreed to conduct the FBA when Student returned to school in September 2008, and reiterated its offer of the safety protocol/emergency BSP. Mother signed her consent only to the 34 hours of ARC services and the FBA.

12. In a letter dated June 26, 2008, received by the District on July 2, 2008, Mother wrote that she wanted to clarify that she believed the ESY offer made at the June 2008 IEP was "not appropriate or sufficient because the program does not address the unique needs of my child." Mother further wrote that she was giving 10 days' notice that she would be placing Student in a "private school/educational program," and would be seeking reimbursement from the District for those expenses. In or about July 2008, Student began attending PACE pursuant to a unilateral placement by Parents. That unilateral placement included OT and speech-language services at PACE and in-home behavioral services from I Can Too.[7]

OCTOBER 2007 ASSESSMENT: BEHAVIOR

13. Student contends that the District failed to adequately assess him in the area of behavior. The District argues that it appropriately assessed Student in all areas related to his suspected disability.

14. Before any action is taken with respect to the initial special education placement of a pupil, the pupil must be assessed in all areas related to the suspected disability including, if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status,

[7] In August 2008, Student's health insurer, Kaiser Permanente, began funding the I Can Too services.

self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. A local educational agency (LEA) must conduct a full and individual initial evaluation that shall consist of procedures to determine whether a child is a child with a disability and to determine the educational needs of the child. Each LEA must ensure that, in evaluating each child with a disability, the evaluation is sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the category in which the child has been classified.

15. The process for a special education assessment begins with a written referral for assessment by the parent, teacher, school personnel, or other appropriate agency or person. Within 15 days of referral, the parent must be given a written assessment plan which explains the types of assessments to be conducted. Upon receiving the assessment plan, the parent shall have at least 15 days from the receipt of the proposed assessment plan to arrive at a decision. The LEA has 60 days from the date it receives the parent's written consent for assessment, excluding vacation and days when school is not in session, to complete the assessments and develop an initial IEP, unless the parent agrees in writing to an extension.

16. Pursuant to the October 2007 Assessment Plan, the District assessed Student in the following areas: health/developmental history; perceptual-motor skills; cognitive skills; pre-academic achievement; communicative development; personal, social, and emotional development; and "occupational/sensory evaluation." Subsequently, the District's preschool assessment team conducted assessments and produced assessment reports including a speech-language assessment, an OT assessment, a health and developmental screening, a pre-academic assessment, and a psycho-educational assessment entitled "Preschool Assessment Report."

17. The October 2007 Assessment Plan left blank the box listing "Behavioral" as an area to be assessed. The District did not conduct a specific behavioral assessment,

although some of its assessments touched on aspects of Student's problem behaviors. In particular, the Vineland Adaptive Behavior Scales-II (Vineland), administered by the school psychologist as part of the Preschool Assessment Report, revealed that Mother had concerns about Student's tantrums, impulsivity, and other behaviors. The Preschool Assessment Report further noted that, in addition to his autistic disorder, Student "presents with sensory seeking behaviors such as self-stimulating screaming" and had tantrums related to his refusal of specific interventions such as discrete trial training (DTT).

18. Other information available to the District in October 2007 indicated that Student's behavior was an area of concern. For example, the September 2007 Follow-Up Multidisciplinary Evaluation from Kaiser Permanente's Autism Spectrum Disorders Center reports that Student had been having daily temper tantrums that "consist of him dropping to the ground and screaming and flailing." An October 2007 ARC progress report noted that Student had previously made improvements in behavior, but had since regressed and begun "whining and crying to escape all tasks. However, this behavior has decreased as the intensity of the program had decreased." Another section of that report noted that Student "will whine and cry for up to an hour to escape tasks," but that his resistance had decreased once ARC staff decreased the intensity of the program.

19. When District staff were conducting Student's assessments in October 2007, Mother verbally asked speech-language pathologist (SLP) Anne Nakai about having the District conduct an FBA. Ms. Nakai told Mother that the District would not offer an FBA at that point because Student was already in a behavior program. Ms. Nakai mentioned Mother's FBA request to District school psychologist Michelle Goddard. Mother did not repeat her request during the October 31, 2007 IEP meeting. Instead, the primary behavior problem discussed at that IEP meeting was Student's pica behaviors.

20. Even assuming, despite all of this information, that District staff did not know at the October 31, 2007 IEP meeting that behavior was an area related to Student's

disability, they clearly should have known once Student began attending the Glankler SDC in November 2007. Although the behavior later decreased somewhat, initially Student would drop to the floor 15 to 20 times per day at Glankler when he did not want to perform a task or transition to a new activity, particularly when he did not want to leave the indoor playground area. Credible, undisputed testimony from knowledgeable witnesses such as Ms. Goddard and Ms. Novello, Student's SDC teacher, established that these behaviors impeded Student's learning.

21. There is no dispute that it is necessary to conduct a behavior assessment in order to develop a behavior plan. Dr. Koji Takeshima, the current director of the ARC program, established that, if behavior impedes learning in the classroom, one would expect there to be a behavior plan. For several reasons, Dr. Takeshima was an excellent witness. His resume and testimony established that he has extensive knowledge, experience and expertise in addressing behaviors of preschool students with autism. Moreover, while he is an employee of the District, he did not tailor his testimony to suit the District's position, and would not take a position on a particular topic if he felt that he needed more information to form an opinion. Hence, Dr. Takeshima was a particularly candid, independent, and credible witness.

22. Dr. Rebecca Fineman and Dr. Ronald Leaf also persuasively testified that Student's behaviors warranted a behavioral assessment. As Dr. Leaf explained, it is paramount to address this type of behavior that Student exhibited, because when a child is exhibiting disruptive behaviors he is not learning.

23. In contrast, Ms. Novello and Ms. Goddard both testified that, while Student's behaviors, in particular his frequent dropping to the floor, impeded his learning, his behaviors did not require a behavior assessment or a behavior plan because the behaviors were not at all unusual for an autistic preschooler and would be addressed by the supports and structure of the SDC. While Ms. Novello and Ms. Goddard were both knowledgeable

witnesses who gave credible testimony on several topics, on this point their testimony was less persuasive than the testimony of Drs. Takeshima, Fineman, and Leaf. Ms. Goddard stated that a behavioral assessment was not necessary because Student's behaviors were all related to his autism. However, this explanation is unconvincing because the purpose of an assessment is not only to determine eligibility, but also to determine the pupil's educational needs.

24. Hence, as of the October 31, 2007 IEP meeting, District staff should have known that Student's behaviors were likely to impede his learning and demonstrated an area of need related to his suspected disability. Even if District staff did not have that information at the October 31, 2007 IEP meeting, they certainly should have known shortly after Student began attending the Glankler SDC in November 2007, and should have recommended a behavior assessment at that time. This failure to assess in the area of behavior constituted a failure to assess in all areas of suspected disability.

25. Credible testimony from Dr. Takeshima, Dr. Leaf, Jack Bannon, and other witnesses established that a behavioral assessment for a pupil with autism needs to be conducted in the location where the behavior plan will be implemented.[8] As Dr. Takeshima explained, the assessor cannot conduct a behavioral assessment to address behaviors in the classroom without collecting data in that classroom. Dr. Leaf acknowledged that it would be difficult to conduct a behavioral assessment of a pupil in a setting without observing the pupil in that setting. Thus, the District could not have adequately assessed Student's behaviors until he began attending school in the Glankler SDC. Accordingly, while the District should have given Parents an assessment plan to assess in the area of behavior, the behavioral assessment would not have been completed until after Student

[8] Student's arguments in his closing brief that this testimony stood for the opposite proposition are unpersuasive and contrary to the evidence.

began attending the SDC in November 2007.

26. On March 4, 2008, at Mother's request, the District gave Mother an assessment plan for an FBA. Absent any evidence regarding how long it would take the District's behaviorist to complete the FBA, it is reasonable to assume that the District would have completed the FBA 60 days after Parent signed the assessment plan. Because Parents had at least 15 days to consider the assessment plan, and the behaviorist conducting the FBA needed to observe Student in the SDC, the District would not have been able to complete the FBA until approximately 75 days after it offered that assessment plan.[9]

OCTOBER 2007 ASSESSMENT: INTELLIGENCE

27. One of the tests administered to Student as part of the school psychologist's psycho-educational assessment was the Wechsler Preschool & Primary Scales of Intelligence-III (WPPSI-III). Student argues that the District should not have administered that test because it is not a technically sound instrument. In conducting a special education assessment, the LEA shall use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. Tests and other assessment materials shall be administered in accordance with any instructions provided by the producer of the assessments.

28. Testimony from Ms. Goddard, a credentialed school psychologist, established that the WPPSI-III is a widely-used cognitive measure that she administered to Student accordance with the instructions provided by the producers of that test. Ms. Goddard noted in her report that the WPPSI-III is appropriate for children between the

[9] While it is possible that the District could have completed the FBA in less than 60 days, there was no evidence on that point. Therefore, utilizing the statutory timelines constitutes a reasonable estimate of how long it would have taken for the FBA to be completed.

ages of two and a half to five years old; Student was within that age range when Ms. Goddard assessed him. Ms. Goddard credibly explained that Student's inability to perform some of the components of the WPPSI-III, such as his inability to give verbal answers, was part of what the WPPSI-III measures. Ms. Goddard's educational background, experience and testimony established that she was knowledgeable about administration of cognitive measures such as the WPPSI-III and understood the legal requirements for administration of such assessment tools as part of a school district's special education assessment. Moreover, the psycho-educational report and Ms. Goddard's testimony both established that administration of the WPPSI-III yielded useful information about Student's functioning.

29. There was no evidence establishing that the WPPSI-III was not a technically sound instrument. Student points to testimony from Dr. Rebecca Fineman that the WPPSI-III was an inappropriate assessment tool because it requires a child to be able to sit and understand spoken language. However, given the evidence that these skills are part of what the WPPSI-III measures, Dr. Fineman's testimony did not establish that the WPPSI-III was not a technically sound instrument. Moreover, in her evaluation of Student, Dr. Fineman instead administered the Bayley Scales of Infant Development (Bayley) to measure Student's cognitive development.[10] At the time Dr. Fineman administered the Bayley to Student, his age exceeded the age range specified in the Bayley's test instructions. Dr. Fineman explained that the Bayley was still an appropriate measure for Student because of his developmental level and level of engagement. However, the District's school psychologist could not have used the Bayley to assess Student, because state and federal law require that an LEA's assessment shall be administered in accordance

[10] Page 7 of Dr. Fineman's report states that she used the second edition of the Bayley, while page 14 of the same report states that she used the third edition.

with any instructions provided by the producer of the assessments.

30. The results of Ms. Goddard's administration of the WPPSI-III appear to be consistent with other assessment information and Student's then-present levels of performance. In addition, Student does not allege, nor does the evidence indicate, that the use of the WPPSI-III resulted in any inaccurate assessment results. Indeed, Student's scores on the WPPSI-III appear consistent with Dr. Fineman's conclusion that Student has mental retardation. For all of these reasons, the District's administration of the WPPSI-III did not violate the legal requirements governing its assessment of Student.

FAA AND BIP

31. Student contends that the District denied him a FAPE when it refused Parents' request for an FAA in or about October 2007. The District argues that Parents did not request an FAA. The District further argues that it was not obligated to conduct an FAA because Student did not require one and did not meet the legal conditions for one.

32. An FAA is a creation of California law, developed as part of the state's behavior intervention regulations which supplement federal special education law.[11] In California, an LEA must conduct an FAA, resulting in a BIP, when a student develops a "serious behavior problem" and the IEP team finds that instructional/behavioral approaches specified in the student's IEP have been ineffective. A serious behavior problem means the individual's behaviors are self-injurious, assaultive, or the cause of

[11] In contrast, an FBA is a creation of federal law. One significant difference between an FAA pursuant to state law and an FBA under federal law is that the former is required only when a student has a "serious behavior problem." Moreover, state law contains numerous specific requirements for what an FAA must contain, while federal law does not impose similar requirements for what an FBA must contain. An FAA is a type of FBA, but not all FBAs meet the narrow requirements for an FAA.

serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the pupil's IEP are found to be ineffective. State law defines a BIP as a written document which is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP.

33. Student exhibited non-compliant behaviors in school settings, such as tantrums and dropping to the floor. These behaviors were often difficult to manage and interfered with his learning. However, the evidence did not support Student's position that his behaviors constituted "other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the pupil's IEP are found to be ineffective."[12] Testimony from Dr. Fineman established only that she viewed the behaviors as "maladaptive." However, Dr. Fineman was not familiar with the requirements for an FAA, and her testimony never addressed whether Student's behaviors met all of the legal definition's requirements for finding "other severe behavior problems." Testimony from Dr. Leaf had the same limitations; he was not familiar with the legal requirements for an FAA, and his testimony did not address whether Student's behaviors met this legal definition.[13] In light of all of the above, the evidence did not establish that

[12] Student also implied that his behaviors met this definition merely by being "maladaptive," without meeting all of the definition's requirements of "other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the pupil's IEP are found to be ineffective." Student offered no legal authority to support relying solely on only a small part of the definition, and no such authority was found.

[13] Dr. Leaf testified that he and other professionals in his field tend to use the terms FAA and FBA interchangeably.

Student's behaviors constituted a severe behavior problem warranting an FAA. Therefore, the District did not deny Student a FAPE by failing to conduct an FAA or develop a BIP as a result of an FAA.

34. In addition, the evidence established that Mother did not request an FAA. In October 2007, when the District's preschool assessment team was in the process of conducting Student's initial special education assessment, Mother verbally asked District SLP Anne Nakai about having the District conduct an FBA. Ms. Nakai told Mother that the District would not offer an FBA at that point. In her testimony, Mother confirmed that she had never personally requested an FAA, although her attorney later requested one in the due process complaint filed on her behalf. Thus, the evidence established that Parents did not request an FAA in or around October 2007.

OCTOBER 31, 2007 IEP: GOALS

35. An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability.

36. The October 31, 2007 IEP offered goals in the areas of attention, preacademic readiness, fine motor skills, social skills, language comprehension, communication, sound development, gross and sensory motor skills, and self-help skills. Assessment reports confirm, and there is no dispute, that these were all areas of need for Student. Testimony from SLP Anne Nakai established that the language comprehension, communication, and sound development goals were designed to meet Student's unique needs and constituted appropriate goals for him. Similarly, testimony from occupational therapist Shanti Malladi established that the goals in fine motor skills, gross and sensory motor skills were designed to meet Student's unique needs and were appropriate goals for him. Education specialist Diane Dooley drafted the goals in attention, preacademic

readiness, fine motor skills, social skills, and self-help skills for the IEP, and her testimony established that those goals were designed to meet Student's needs. Ms. Dooley gave knowledgeable and persuasive testimony on this topic, and there is little evidence to the contrary.

37. None of Student's criticisms of the goals established that the goals failed to meet the legal requirements. For example, in his closing brief, Student argued generally that some of the goals were vague. However, there was no evidence to support that contention. The goals appear clear on their face, and neither the District staff nor Student's experts were confused about what the language of the goals meant or how to implement them.

38. Some of Student's witnesses offered opinions about how some of the goals could have been designed differently, but none of that evidence established that the goals failed to comply with the law. For example, Elizabeth Peace, director of I Can Too, testified that she believed the IEP goals were somewhat broad, and that she would have broken some into smaller goals. Regardless of whether Ms. Peace is correct, her opinion would not indicate that the goals failed to meet legal requirements. Dr. Fineman testified that two of the eleven IEP goals, specifically the social skills goal and preacademic goal for quantity concepts, were above Student's developmental level. However, Dr. Fineman's opinion did not establish that those two goals were not designed to meet Student's unique needs. As the District points out, the goals were designed to cover an entire calendar year, so while some skills may have been beyond Student's level in October 2007, they would have been within Student's developmental range by October 2008. Other evidence, such as the PACE director's testimony about Student's progress, indicated that Student was developing parallel play and other social skills consistent with this IEP's social skills goal. Thus, the evidence established that the eleven goals contained in the October 31, 2007 IEP were measurable goals that were designed to meet Student's unique needs.

39. Student also argues that the IEP goals were lacking because they failed to meet his other areas of unique educational need, specifically his behavioral needs. Testimony from District staff established that the IEP goals in other areas, such as attention and social skills, also addressed behavior. However, as determined above in Factual Finding 21, Student had behaviors that impeded his learning, and behavior was an area of need for Student that should have led to a behavioral assessment. Student needed behavioral goals, and the evidence clearly supports such a finding. For example, Ms. Dooley acknowledged that a child needs behavioral goals if the child's behavior is interfering with his functioning at school. Dr. Fineman testified that behavioral goals would have been appropriate following completion of a behavioral assessment of Student, and there is no evidence to the contrary. Accordingly, since Student's behaviors interfered with his learning and warranted further positive behavioral interventions, such as an FBA, the absence of behavioral goals based upon the FBA's results violated the legal requirement that the IEP must include goals designed to meet Student's unique educational needs.

40. Because of the determination in Factual Finding 25 that the District could not have been expected to complete the FBA until 60 days after Student began attending the Glankler SDC in mid-November 2007, it logically follows that the District was not required to add the resulting behavioral goals until completion of the FBA. There was no evidence that the IEP team could have or should have designed the behavioral goals without the results of the FBA. Thus, the failure to offer appropriate goals in the area of behavior created a denial of FAPE for Student, but it did not begin until late January 2008, 75 days after he began attending the Glankler SDC.

41. Finally, Student argues in his closing brief that the IEP goals were inadequate because they did not include pre-vocational goals or additional self-help goals. However, there was no credible evidence supporting this argument. Student was three years old at the time. There was no evidence that pre-vocational skills were an area of Student's need

that could be addressed during the 2007-2008 school year, or how pre-vocational goals would differ from pre-academic goals. While Student had self-help needs, the evidence did not establish that additional self-help goals were warranted at that time. Accordingly, the absence of pre-vocational goals or additional self-help goals did not deny Student a FAPE.

OCTOBER 31, 2007 IEP: OT

42. Student contends that the offer of a total of one hour of direct OT services per week was insufficient to address his needs, and that he instead needed two hours of OT per week. The District argues that its offer of one hour of OT per week was appropriate.

43. When developing each pupil's IEP, the IEP team must consider the pupil's strengths, the parents' concerns, the results of the most recent assessments, and the academic, developmental, and functional needs of the pupil. An educational program offered by a school district must be designed to meet the unique needs of the student and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment (LRE). A school district must offer a pupil related services as may be required to assist the child to benefit from special education. However, school districts are not required to offer instruction or services to maximize a student's abilities. In addition, an IEP cannot be judged in hindsight and must take into account what was, and what was not, objectively reasonable at the time the IEP was drafted.

44. Ms. Malladi, a District occupational therapist, conducted Student's OT assessment, wrote Student's OT goals, and delivered Student's OT services. In addition to the two 30-minute sessions of direct OT services she delivered to Student per week, Ms. Malladi also spent time providing OT consultation to the SDC staff regarding Student. Ms. Malladi is an experienced occupational therapist whose background, experience, testimony, and written assessment report established that she was familiar with Student's OT needs and knowledgeable about the OT needs of preschool pupils with autism. Ms. Malladi gave credible testimony establishing that the District's offer of one hour of OT

services was sufficient to address Student's unique needs and reasonably calculated to allow him to receive educational benefit in that area. Ms. Malladi established that Student had made some progress on his OT goals during the time that she worked with him. Allison Gaughan, an occupational therapist at PACE, testified to her recommendation for two hours per week of OT services. While Ms. Gaughan was also a knowledgeable witness regarding OT, her opinion was not ultimately persuasive. While Student would likely have benefited from additional OT services, the evidence did not establish that he needed it.

45. In disputing the amount of OT services the District offered, Student points to December 2006 and July 2007 reports from Ascend Rehab Services (Ascend) that recommended two hours per week of OT services. Pursuant to Student's IFSP, RCEB funded those OT services as part of his Early Start services.[14] Ascend's OT services were delivered in the home setting. Ms. Malladi credibly explained how Student's need for OT services differed in the school setting, because in the school setting he received sensory input in the SDC five days a week.

46. Dr. Fineman also recommended two hours a week of OT services. However, Dr. Fineman does not hold any educational degrees, licenses or credentials in OT, and she has never worked as an occupational therapist. Dr. Fineman acknowledged that she is not

[14] Student's Early Start services under Part C of the amended IDEA (United States Code title 20, section 1431 et seq.) and the Lanterman Developmental Disabilities Services Act (Welfare & Institutions Code section 4500 et seq.) are governed by a different legal standard than is applicable under Part B of the IDEA and relevant sections of the California Education Code, which govern the District's obligations to provide special education and related services to eligible pupils beginning at age three.

qualified to write OT goals.[15] The evidence established that OT is outside of Dr. Fineman's area of expertise, and thus her OT recommendations are given little weight.

OCTOBER 31, 2007 IEP: SPEECH-LANGUAGE SERVICES

47. Student contends that the District's offer of two 30-minute speech-language therapy sessions per week was insufficient to address his needs, and that he required two hours of speech-language services a week in order to receive a FAPE. The District argues that its offer of two 30-minute speech-language therapy sessions per week was designed to meet Student's unique needs and reasonably calculated to provide educational benefit.

48. Beth Johnson is the District SLP who delivered Student's speech-language therapy at Glankler. Ms. Johnson credibly described how Student made progress on his speech, language and communication goals during their speech-language therapy sessions from November 2007 to February 2008. Similarly, Ms. Nakai, the SLP who assessed Student, established that Student did not require additional speech-language therapy. Ms. Nakai credibly explained that Student had already received a lot of speech-language therapy in his infant program, and needed time to try other interventions, like PECS, that would be implemented in the classroom environment.

49. There was no credible evidence to contradict the persuasive testimony of Ms. Johnson and Ms. Nakai on this point. No SLP testified on behalf of Student. Dr. Fineman recommended additional speech-language services for Student, but she does not hold any license, credential, or educational degree in speech-language pathology. She has never worked as an SLP and has never delivered speech-language therapy. She testified that she is not qualified to write speech-language goals. Thus, Dr. Fineman's expertise does not

[15] Given that IEP goals generally constitute the key basis for recommending services, it is unclear how an OT expert could be qualified to recommend OT services but not to develop the underlying goals.

extend to making determinations regarding how much speech-language therapy a pupil such as Student needs to receive educational benefit. Therefore, Dr. Fineman's recommendations on this question are given little weight. Hence, the evidence established that the 60 minutes per week of direct speech-language therapy was designed to meet Student's unique needs and reasonably calculated to provide educational benefit.

OCTOBER 31, 2007 IEP: PLACEMENT IN SDC

50. The Glankler SDC had many components of an appropriate placement for preschoolers with autism, including a small class size, low teacher-to-student ratio, trained and experienced staff, and use of appropriate interventions such as ABA and PECS. When Student attended, the class had nine pupils, taught by one teacher, two full-time instructional aides, and two instructional aides who shared a full-time position. The class schedule was designed so that half of the students arrived at school early for DTT, while the other half stayed late to receive their DTT; thus, each pupil received one-to-one instruction during DTT for an hour each school day.

51. The question is whether the Glankler SDC was appropriate for Student given the intensity of his needs. Ms. Novello described how the Glankler SDC addressed Student's educational needs and how Student made progress during the relatively brief time that he attended there.[16] Student was one of two lower-functioning pupils in the class, although he was more verbal than the other pupil. Because of Student's needs, he received one-to-one attention during academic instruction and tasks.

[16] Other District witnesses whose testimony supported Ms. Novello's on this point included Ms. Goddard and Ms. Dooley. While Dr. Takeshima and Anita Allardice both gave knowledgeable, credible testimony about the components of the Glankler SDC program, neither witness could give an opinion about whether the SDC was appropriate for Student.

52. In contrast, Dr. Leaf testified that Student's behaviors were far more extreme than behaviors of the other pupils he observed in the Glankler SDC, and that the Glankler staff did not effectively address disruptive behaviors at the level that Student exhibited. Dr. Leaf explained that he observed the Glankler staff addressing problem behaviors with social reinforcement, which is not effective for autistic pupils at Student's level of functioning. Instead, most autistic pupils with disruptive behaviors, such as Student, need behavior plans.

53. Dr. Fineman also testified that the Glankler SDC was not sufficiently intensive to address Student's needs, in part because Student required a one-to-one aide in order for a program to be sufficiently intensive for him. She also explained that the SDC was inappropriate for Student because the other pupils appeared to be significantly higher functioning than he was, the pupils did not have implemented behavior plans, there was little one-to-one teaching, and she did not observe any DTT.

54. The testimony of Drs. Leaf and Fineman was persuasive on some points and unpersuasive on others. Dr. Leaf is a renowned autism expert who testified candidly and did not tailor his testimony to either party's position. However, it was evident that Dr. Leaf's opinions and recommendations were not based on the FAPE standard applicable here, but rather on a higher standard. For example, Dr. Leaf found that both Glankler and PACE were inappropriate for Student, and instead recommended an extraordinary program that would significantly exceed the FAPE level that the District is legally required to offer.

55. Dr. Fineman was a knowledgeable witness on this subject who provided useful information about Student. Her education, experience, and training establish that she has particular expertise as a psychologist who treats children diagnosed with autism. However, some of her opinions were unpersuasive because they were based in part on incorrect information about the SDC. For example, Dr. Fineman testified to her opinion that the SDC was not an intensive program because she did not observe pupils receiving DTT,

TEACCH or one-to-one instruction. However, testimony from District witnesses such as Ms. Novello and Dr. Takeshima established that pupils in the SDC received all of those things, and that Student in particular received one-to-one instruction for academic tasks. Moreover, it was previously determined in Factual Findings 46 and 49 that Dr. Fineman made recommendations outside of her area of expertise, which has some negative impact on her overall credibility.

56. Testimony from Ms. Novello was also persuasive only in part. Ms. Novello was a very experienced, well-qualified teacher who testified sincerely and honestly. Her testimony established that many aspects of the Glankler SDC addressed Student's needs, and that he made some progress during the short time he attended the SDC. However, her testimony that the structure and supports of the classroom were sufficient to address Student's behavioral needs was not persuasive, as she appeared to minimize the extent that Student's disruptive behaviors were impeding his learning. Instead, as also discussed in Factual Findings 21 to 23, if Student's behaviors were interfering with his learning, he should have had a behavior plan. Dr. Takeshima established that, if behavior impedes learning in the classroom, one would expect there to be a behavior plan. Dr. Leaf explained credibly that Student was not learning when he was dropping to the floor and displaying other behaviors. Because of the greater expertise of Drs. Takeshima and Leaf about autism, their testimony on this point was more persuasive than Ms. Novello's. Hence, Student needed additional positive behavioral interventions, such as an FBA and a resulting behavior plan, to address his behaviors that impeded his learning.[17] Without additional

[17] It is not at issue here whether the behavior plan resulting from the FBA should have been called a BSP or a BIP. When a pupil's behavior violates a school code of conduct resulting in a disciplinary change of placement, and the IEP team determines that the behavior was a manifestation of the pupil's disability, the LEA may be required to conduct an FBA and implement a BIP for the pupil. (34 C.F.R. § 300.530(f).) Federal law

behavioral interventions, the Glankler SDC did not address Student's behavioral needs, and thus was not an appropriate placement for him.

DECEMBER 14, 2007 IEP ADDENDUM: CONSIDERATION OF VIEWS OF PARENTS AND THEIR EXPERT

57. Student contends that the District staff at the December 14, 2007 IEP meeting failed to adequately consider the views of Mother and Dr. Grelling regarding Student's need for ongoing services during school vacations.[18] The District contends that District staff fully considered the opinions of Parents and their expert, and that it offered services during the winter holiday break.

58. Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. An LEA must fairly and honestly consider the views of parents expressed in an IEP meeting. An LEA that does not consider the parents' requests with an open mind has violated the parents' right to participate in the IEP process.

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does not specify what that BIP should contain. Federal law also does not specify what the resulting behavior plan should be called when an FBA is developed because the pupil's behavior impedes his learning but does not result in a manifestation determination. In the present case, to avoid confusion with the type of BIP required following an FAA, this Decision will refer to the behavior plan that would have been developed following Student's FBA as a BSP.

[18] Dr. Grelling attended the October 2007 IEP meeting and also provided a letter regarding Student's need for ongoing academic support during school breaks. Dr. Grelling did not attend the December 2007 IEP addendum meeting.

59. The participants in the December 14, 2007 IEP addendum meeting were Mother, Ms. Johnson, Ms. Dooley, and Bonnie Curtis, who was principal of Glankler at that time. The team first had a lengthy discussion about Student's IEP goals, then discussed Mother's request for services during the winter holiday break. District staff offered a total of 12 hours of services to be delivered by ARC during the winter break, but did not make any offer regarding what services would be provided in August 2008. Following the District's offer, the participants discussed whether the District was actually required to provide services during school vacations.

60. During that discussion, Ms. Curtis incorrectly informed Mother and the other IEP team members that the District could never be required to provide services on days when school was closed. While the District nevertheless agreed to offer some services during the school vacation, the District's employees relied on Ms. Curtis's position in refusing to consider whether Student needed additional services during the school break. Hence, even though District staff fairly considered Mother's input on other topics at this meeting, they did not fairly consider with an open mind whether Student actually required services during winter break in order to receive a FAPE.

61. Predetermination of an IEP offer significantly interferes with the parents' right to participate in the IEP decision-making process, which constitutes a procedural denial of FAPE. To the extent that Mother was seeking different or additional services during winter break, the District's predetermination significantly interfered with her participation in the decision-making process. Thus, the District's predetermination regarding services during the December 2007 winter holiday break constituted a denial of FAPE.

62. However, that predetermination did not affect the offer of services for August 2008. As Mr. Bannon testified, the IEP team could wait until later in the school year to determine what services Student would need during the summer; doing so allowed the

team to better determine what Student's needs would be during the summer. As discussed below, in June 2008 the District eventually offered services to be delivered in August 2008. Thus, the District's decision in December 2007 not to offer services for August 2008 did not constitute a procedural violation, and therefore did not procedurally deny Student a FAPE.

DECEMBER 14, 2007 IEP ADDENDUM: APPROPRIATE SERVICES DURING WINTER BREAK

63. ESY services are special education and related services that are provided to a child with a disability beyond the normal school year of the public agency. ESY services must be provided only if a child's IEP team determines that the services are necessary for the provision of FAPE to the child.

64. This Decision has already found that the District procedurally denied Student a FAPE regarding the services for winter holiday break that were offered at the December 14, 2007 IEP addendum meeting. Thus, that offer denied Student a FAPE, regardless of whether that offer was substantively appropriate. Nevertheless, in the interest of comprehensively addressing all hearing issues, this Decision will determine whether the District's offer of winter holiday break services was substantively appropriate.

65. The District offered six two-hour sessions of behavioral services to be provided during late December 2007 and early January 2008. Those services were to be delivered on a one-to-one basis by Wanda Fields, a senior therapist at ARC. As described in an October 2007 letter from Dr. Grelling, a psychiatrist at Kaiser Permanente, the purpose of providing Student with services during school breaks was to prevent regression and maintain Student's progress on his IEP goals. Testimony from Dr. Takeshima and ARC Coordinator Dee Macedo described some of the behavioral services provided by ARC staff, and supported the District's position that these services were reasonably calculated to allow Student to avoid regression over the holiday break. Moreover, there was little evidence to the contrary. Testimony from Dr. Leaf about his observation of ARC did not

establish that the proposed winter break services would have been inappropriate to address Student's need to avoid regression during that break. In light of all evidence, the District's offer of ARC services for winter break was designed to address Student's unique needs and reasonably calculated to allow meaningful educational benefit.

66. Student argues that the ARC services offered during the December 2007 IEP meeting for winter break cannot be considered part of a FAPE offer, because ARC owed Student those hours due to missed early intervention services. Student did not receive approximately 34 hours of the early intervention services from ARC that he was supposed to receive when RCEB funded his attendance there, prior to his third birthday. However, the District was not legally required to provide those ARC services to Student after he turned three, and Student does not cite any legal or contractual authority to establish otherwise. Instead, Mr. Bannon established in his testimony that neither RCEB policy nor ARC's vendor agreement with RCEB require ARC to make up missed hours after a child turns three years old.[19] Testimony from Kim Limato, Student's RCEB case manager, did not contradict this explanation. Thus, given that the District was not otherwise legally obligated to fund the ARC services, the December 2007 IEP offer of ARC services over the winter holiday break can be evaluated as the District's FAPE offer for winter break services.

DECEMBER 14, 2007 IEP ADDENDUM: AMOUNT OF TIME FOR OT AND SPEECH-LANGUAGE SERVICES

67. Student's October 31, 2007 IEP provided that he would receive OT for two 30-minute sessions per week, and speech-language therapy for two 30-minute sessions per week. The IEP does not specify whether the services would be delivered in a one-to-one setting or in a small group. In November 2007, Student began receiving the services in

[19] RCEB had not actually paid for the 34 hours that were not delivered, because ARC does not bill hours to RCEB until they are provided to the pupil.

a one-to-one setting. In addition, the occupational therapist and the SLP each worked with Student in a small group setting for 30 minutes per week during his classroom time using a "push-in" model. In late November 2007, the occupational therapist and SLP agreed that it might benefit Student to deliver his OT and speech-language therapy services at the same time. The occupational therapist, Ms. Malladi, wrote in her notes dated November 29, 2007, that she talked to Mother about how Student would benefit from combining the two services, and that Mother liked the idea. Thereafter, Ms. Malladi and Student's SLP, Ms. Johnson, delivered their services to Student at the same time.

68. Student argues that the change from delivering OT and speech-language services separately to delivering those services concurrently constituted a failure to deliver the amount of DIS specified in the October 31, 2007 IEP. The District argues that the concurrent delivery still comported with Student's IEP. The District further argues that, even if this change did not conform to the IEP, the nonconformity was minor and did not constitute a material failure to deliver the services specified in the IEP.

69. At the December 14, 2007 IEP addendum meeting, District staff wrote in the meeting notes that "Beth explained that she & Shanti are working together for 1hr 1x a week & it is working so much better than 2x 30 minutes." The transcript of the December 2007 meeting does not reflect any discussion about this topic. Mother specifically consented only to the IEP addendum's goals, and wrote that she was not in agreement with anything else on the IEP addendum page, and specifically did not agree regarding the amount of services Student would receive in August and a proposal to change Student's classroom. However, because Mother had expressed specific disagreement only concerning the August services and the proposed change of placement, and Mother had previously told the occupational therapist that she agreed to combine the delivery of OT and speech-language therapy, District staff believed Mother still agreed to the concurrent delivery method. Testimony from Ms. Malladi and Ms. Johnson established that

combination of the two services was more effective than their separate delivery, and there was no credible evidence to the contrary.

70. Nonetheless, the October 31, 2007 IEP provided for 60 minutes of OT per week, and 60 minutes of speech-language therapy per week. The October 2007 IEP team clearly envisioned that the OT and speech-language services would be delivered separately. The services are listed separately on that IEP document, and a plain reading of that document would cause a reasonable person to believe that the services would be delivered separately. Mother's written comments on the December 2007 IEP document did not indicate consent to change that arrangement. Therefore, the change from a separate delivery of the services, totaling 120 minutes per week, to a concurrent delivery of the services, totaling 60 minutes per week, failed to comport with the IEP.

71. When a school district does not perform exactly as called for by an IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when the services provided to a disabled child fall significantly short of those required by the IEP. The reduction of time for OT and speech-language services by delivering the services concurrently constituted a significant decrease in services, and thus materially failed to implement 60 minutes per week of Student's related services.

DISTRICT'S ACTIONS FOLLOWING FEBRUARY 26, 2008 INCIDENT

72. As determined in Factual Findings 7 and 8, an incident occurred on February 26, 2008, when an instructional aide moved Student by lifting part of his backpack, and Mother became very upset when she observed the aide's actions. The District argues that, after the February 26, 2008 incident, it met its legal obligations and acted appropriately by holding a meeting to discuss Parents' concerns and by offering to conduct an FBA. Student contends that the District denied him a FAPE by failing to reassess him and by failing to

develop behavioral supports that could be implemented immediately.[20]

73. As described in Factual Finding 8, following the incident on February 26, 2008, Mother requested an "emergency IEP meeting." District staff met with Mother and her representatives on March 4, 2008. During the course of that meeting, the participants discussed and proposed different options for modifying Student's placement. District employees at the meeting sought Mother's opinions about what changes she wanted to Student's educational placement, and gave Mother an assessment plan that proposed conducting an FBA.

74. Student contends that the District denied him a FAPE by failing to reassess him. However, at the March 4, 2008 meeting, the District agreed to conduct an FBA. This Decision has already determined that Student's behaviors did not warrant an FAA, and there were no other areas that warranted reassessment. Thus, following the District's presentation of the Assessment Plan on March 4, the District had proposed to assess Student in all areas of suspected disability, and the District was not required to assess

[20] In his closing brief, Student also raises the new argument that the District failed to follow the legal requirements following use of an emergency intervention. Because that argument was not raised previously, it is not an issue in this Decision. In any event, that argument would not succeed because the legal requirements for use of an emergency intervention do not apply here. A behavioral emergency is the demonstration of a serious behavior problem: (1) which has not previously been observed and for which a BIP has not been developed; or (2) for which a previously designed behavioral intervention is not effective. (Cal. Code Regs., tit. 5, § 3001, subd. (c).) Because Student's behaviors did not meet the legal definition of serious behavior problem, the February 26, 2008 incident did not constitute a behavioral emergency as defined in the California regulations.

Student further.

75. Student also contends that the District denied him a FAPE following the February 26, 2008 incident by failing to revise his IEP and develop behavioral supports that could be implemented immediately. After the incident, Ms. Novello and other District staff proposed some interventions to use when Student dropped to the floor, such as crossing Student's legs, then offering him a hand to assist him in standing up. However, evidence including testimony from Dr. Leaf, established that these interventions alone were not sufficient to address the behaviors that impeded Student's learning. Absent more significant behavioral interventions, such as from an FBA and BSP, the Glankler SDC did not address Student's behavioral needs. Hence, the District needed to develop additional behavioral supports that could be implemented immediately, to allow him to return to the SDC without a behavior plan in place.

76. Therefore, following the February 2008 incident, the District met its legal obligations to the extent that it properly held a meeting with Mother and several members of Student's IEP team, and also agreed to conduct an FBA. However, the offer to return Student to the SDC without any additional behavioral supports was not designed to meet Student's unique needs for the period that he would be attending the SDC without a BSP. As determined in Factual Finding 26, that period would have lasted for approximately 75 days from the District's presentation of the behavioral assessment plan to Mother on March 4, 2008.

MARCH 4, 2008 MEETING: PARENTS' INPUT REGARDING ONE-TO-ONE AIDE

77. During the March 4, 2008 meeting, District staff asked Mother several times what changes she wanted to address her concerns about Student's placement. District staff inquired about various options, such as moving Student to a different classroom or a different school. During the discussion, Mother requested that a full-time, independent one-to-one aide from an outside agency be added as a component of Student's

educational program. Ms. Curtis explained that she could not agree to that request at that point, because they had to follow a process to determine whether Student needed a one-to-one aide. During the discussion, Ms. Dooley stated that, while she could not predict what would happen, it was her guess that Parents would have to consider filing a due process complaint if they did not agree that the District was offering a FAPE. Thereafter, Mr. Bannon participated in the meeting by telephone and explained that the IEP team needed to take additional steps, including having the behaviorist observe Student, to determine whether a one-to-one aide was appropriate. Mr. Bannon asked Mother to meet with him to discuss this the following day, when he would be back at work.

78. There is nothing in the actions of the District staff that indicates they had predetermined the outcome of the March 4, 2008 meeting, or that they were not considering Mother's views. To the contrary, District staff sought Mother's opinion and demonstrated that they were open to various options. The District's refusal to immediately agree to Mother's request for an independent one-to-one aide does not evidence predetermination. Rather, statements from Mr. Bannon and Ms. Curtis about the need to obtain additional information evidence the District's willingness to consider that request. Mr. Bannon's request that he and Mother further discuss the request the following day, when he would be back at work and could speak with Mother in person, again demonstrates the District's willingness to consider the request. In addition, there is no indication that Ms. Dooley's statement about Parents' options for due process meant that she or other District staff had predetermined the outcome of the meeting.

MARCH 4, 2008 MEETING: ONE-TO-ONE AIDE

79. This Decision has already determined that the Glankler SDC was inappropriate due to the lack of sufficient positive behavioral interventions, such as an FBA and BSP. While Student needed to return to the SDC in order for the District to conduct the FBA and develop the BSP, the SDC would remain inappropriate until the BSP was in

place. Had the necessary behavioral supports been in place, Student may not have required a one-to-one aide. However, given the absence of the BSP, Student required additional supports to address his behavioral needs. Testimony from Drs. Fineman and Leaf established that a one-to-one aide would have been an appropriate support for Student in the SDC, given the lack of sufficient behavioral supports. Thus, while a one-to-one aide was not necessarily the only option, it was an appropriate option to address Student's behavioral needs until the District could complete the FBA and develop the BSP.[21]

APRIL 1, 2008 IEP MEETING: FAA

80. Student argues that the District denied him a FAPE at the April 1, 2008 IEP meeting by failing to agree to Mother's request for an FAA. The District argues that an FAA was not necessary for Student, and that no one requested an FAA at that time. The District further contends that, in any event, an FAA could not have been conducted until Student returned to the classroom.

81. As determined above in Factual Finding 33, Student did not require an FAA because his behaviors did not meet the legal definition of a serious behavior problem. Instead, Student required an FBA, which the District offered when it presented Mother with an assessment plan on March 4, 2008. Because Student did not meet the requirements for an FAA, no violation occurred.

82. Furthermore, the evidence consistently indicates that neither Mother nor her representatives requested an FAA at the April 1, 2008 IEP meeting. A letter dated March 5, 2008, to Mr. Bannon from Student's then-attorney, requested an FBA. The transcript of the April 1, 2008 IEP meeting reflects the participants' discussion of an FBA. As determined

[21] There was no evidence that the one-to-one aide needed to be an employee of an outside agency, rather than a District employee.

above in Factual Finding 34, Mother testified that she had not personally requested an FAA until the filing of Student's due process complaint several months later. Accordingly, because Mother did not request an FAA at the April 1, 2008 IEP meeting, there is no violation on that basis.

APRIL 1, 2008 IEP: CONTINUUM OF ALTERNATIVE PLACEMENTS AVAILABLE

83. Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. This continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. Services provided by nonpublic schools (NPSs) and nonpublic agencies (NPAs) shall be made available and shall be provided under contract with the LEA if no appropriate public education program is available.

84. Student contends that the District violated this requirement because it does not make NPA services available as part of its continuum of alternative placements. However, the statutes and regulations regarding continuum of placements state only that a continuum must be available, not that the IEP team must consider a continuum for each pupil. Here, testimony from Mr. Bannon established that the District offers NPA services if a pupil needs those services and no appropriate District program is available. Likewise, while only a few pupils in the District receive ABA services from NPAs, those NPA services are available to a pupil if the IEP team determined that that the pupil needs them and that no appropriate services are available from the District. Mr. Bannon's testimony on this topic was credible, and there was no persuasive evidence to the contrary. Hence, the District has a continuum of alternative placements available, and did not violate this requirement.

APRIL 1, 2008 IEP: OFFER OF APPROPRIATE BEHAVIORAL SUPPORT

85. As determined in Factual Finding 33, Student did not require an FAA because

his behaviors did not meet California's legal definition of a serious behavior problem. Instead, on March 4, 2008, the District presented Mother with an assessment plan for an FBA, which would have led to the development of a behavior plan such as a BSP. As determined in Factual Finding 25, Student's FBA would need to be conducted in the location where it would be implemented, so the District could not conduct the FBA or develop the BSP until Parents allowed Student to return to attending the SDC.

86. This Decision has already determined that the SDC would have remained inappropriate until the FBA was conducted and the resulting behavior plan was in place. For the same reasons discussed above in Factual Finding 75, the District's proposed safety protocol for moving Student did not constitute the level of behavior supports that he needed. In light of the absence of the BSP, Student required additional supports to address his behavioral needs. Therefore, the failure to offer additional behavioral supports constituted a failure to offer a program designed to meet Student's needs.

87. In addition, Student contends that, at the April 1, 2008 IEP meeting, the District revoked its offer to conduct the FBA. In discussions during the April IEP meeting, Mr. Bannon explained that he did not believe an FBA was warranted because the SDC teacher reported that the regular classroom plan was sufficient to address Student's behaviors. Ms. Curtis noted that they could not conduct the FBA until Student returned to school. Mr. Bannon was not aware that Ms. Curtis had already given Mother an assessment plan for the FBA. A few weeks later, when Mr. Bannon learned of the existence of that assessment plan, he agreed that the District would conduct the FBA if Mother or Father signed the assessment plan.

88. Mother had the assessment plan and could have signed it at any point. Mother was represented by an attorney at this IEP meeting. No one ever told Mother that the District was revoking the assessment plan. Mr. Bannon's expression of his opinion that the FBA was not necessary did not operate to revoke the assessment plan. Indeed, Mr.

Bannon confirmed in his testimony that he never revoked the assessment plan. Thus, the evidence does not support Student's contention that the District withdrew its offer to conduct an FBA.

JUNE 11, 2008 IEP: BSP OR BIP

89. This Decision has already determined that Student needed additional positive behavioral interventions, such as an FBA and a BSP developed from that FBA. At the June 11, 2008 IEP meeting, the District confirmed that it would conduct the FBA once Student returned to the SDC when school began in September 2008. Mother signed her consent to that provision of the IEP. As determined already in Factual Findings 21 and 22, to conduct the FBA, the behaviorist needed to observe Student in the specific setting where the BSP would be implemented; as a result, the District could not have conducted the FBA before Student returned to the SDC. Accordingly, as of March 4, 2008, the District met its obligation to offer an FBA and a BSP, and did not deny Student a FAPE on that basis.

90. This Decision has already determined in Factual Finding 33 that Student did not meet the requirements for an FAA. Therefore, the District's failure to offer a BIP developed from an FAA did not deny Student a FAPE.

JUNE 11, 2008 IEP: ESY

91. ESY is the period of time between the close of one academic year and the beginning of the succeeding academic year. ESY services shall be provided for each special education student who has unique needs and requires special education and related services in excess of the regular academic year. Such individuals shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level

of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition. An extended year program shall be provided for a minimum of 20 instructional days, including holidays. For reimbursement purposes, a maximum of 55 instructional days, excluding holidays, shall be allowed for individuals in special classes or centers for the severely handicapped.

92. At the June 2008 IEP meeting, the District offered the ESY program, which would have occurred from June 30 to July 31, 2008. For the month of August, the District offered a total of 34 hours of services from ARC, to be delivered in the ARC classroom.

93. Student argued that the amount of ESY services was insufficient because it did not include services for August, and that the ARC services could not be considered in this evaluation because the District already owed those services to Student. However, as determined in Factual Finding 66, the District's offer of ARC services can be evaluated as part of the District's FAPE offer. Thus, the District offered 34 hours of one-to-one behavioral services in August. As determined in Factual Finding 65, Student needed these services to avoid regression when he returned to school after summer vacation. The evidence established that the 34 hours of one-to-one ARC services was sufficient to prevent regression and allow Student to receive a FAPE, and there was no credible evidence to the contrary.

94. Student also argued that the ESY program at Glankler did not address his unique needs. The evidence about the ESY program indicated it was comparable to the Glankler SDC program during the regular school year, although Ms. Novello was not the ESY teacher. However, the ESY SDC would have similar classroom structure, similar activities, and approximately the same adult-to-pupil ratio. Like the Glankler SDC placement during the regular school year, the evidence indicated that the ESY program had some aspects that would be appropriate for Student and allow him to avoid significant regression. However, the same problem regarding the lack of sufficient behavioral

supports would have existed. As determined in Factual Findings 56 and 79, the SDC would have remained inappropriate until the FBA was completed and the resulting BSP was in place. Given the absence of the BSP, Student required additional supports to address his behavioral needs. To that extent, the SDC placement offered for the ESY program denied Student a FAPE.

PREDETERMINATION/PARENTS' MEANINGFUL PARTICIPATION IN IEP PROCESS

95. Student contends that, at each of the IEP meetings during the 2007-2008 school year, the District predetermined his educational program and therefore procedurally denied him a FAPE. The District contends that Mother has always fully participated in IEP meetings, that District staff sought out and considered Mother's opinions, and that no predetermination occurred.

96. As determined in Factual Findings 77 and 78, the District did not predetermine what would be offered at the March 4, 2008 meeting. As determined in Factual Findings 59 to 61, at the December 14, 2007 IEP meeting, District staff did not fairly consider with an open mind whether Student actually required services during winter break in order to receive a FAPE. However, that predetermination occurred due to the school principal's misunderstanding of the narrow legal question of whether the District is obligated to provide services during school vacations, and only affected the District's offer of services related to that issue. As determined in Factual Finding 59, District staff fairly considered Mother's input on other topics at the December 14, 2007 IEP meeting, and did not predetermine any other topics at that meeting.

97. The only evidence supporting Student's claims of predetermination is testimony from Mr. Bannon and Ms. Dooley, who both testified that they typically give more weight to the opinions of educators who work with the pupil than to the opinions of

other IEP team members, including parents.[22] By itself, this testimony tends to support Student's position that the District did not sufficiently consider Mother's input. However, when the entirety of the evidence is examined, including transcripts and recordings of the IEP meetings, the evidence establishes that District staff did not predetermine the IEP meetings and, instead, fairly considered the opinions of Mother and the individuals she invited to the IEP meetings. Those documentary exhibits and testimony describing the IEP meetings consistently reflect that District staff sought out Mother's opinions and made changes based on those opinions and requests. For example, at the October 31, 2007 IEP meeting, the District placed Student in Ms. Novello's class at Mother's request, and agreed to an additional speech-language therapy session each week at Mother's request. At the December 14, 2007 IEP meeting, the District changed Student's IEP goals at Mother's request. Following that meeting, the District followed Mother's request not to change Student's classroom assignment. At the March 4, 2008 meeting, District staff repeatedly asked Mother what needed to be changed to allow Student to return to school, and demonstrated openness towards various suggestions. The discussions at the April and June 2008 IEP meetings were similarly open.

98. Throughout the records of the IEP meetings, District staff expressed that they were open to the views and opinions of Mother and the individuals she brought to the meetings. In one typical example, at the June 2008 IEP meeting, the various team members

[22] In his closing brief, Student also points to Ms. Curtis's testimony that Mother, her advocates, and her RCEB representatives were acting like "bullies" at the March 4, 2008 meeting. This testimony does not support Student's claim of predetermination or failure to consider parental input. Rather, given the conflicts that arose at that meeting, Ms. Curtis's testimony simply reflects her belief that those individuals unfairly pressured her during the meeting.

discussed whether Student needed ESY that summer; Mr. Bannon opened the discussion by stating that "the issue or the option of [ESY] is still open. We have to weigh the plusses and minuses for that. I'm not precluding that at all." Following that comment, Mother and the other participants discussed whether Student needed ESY, and how he would transition back to the SDC. This evidence is consistent with the testimony of witnesses who described that IEP meeting. Indeed, other than the limited topic of winter break services at the December 2007 IEP, nothing indicated that District staff had predetermined what would be offered or failed to give due consideration to the opinions of Mother or her outside experts. District staff credibly established in their testimony that, prior to the IEP team meetings, they did not discuss with one another what would be offered, and no one from the District told them what they could or could not offer.

99. Thus, the evidence established that, other than as determined above in Factual Findings 59 to 61, the District did not predetermine the IEP meetings, and Mother fully participated in those meetings.

REMEDIES

100. Appropriate equitable relief can be awarded in a due process hearing. An award of compensatory education need not automatically provide day-for-day or session-for-session replacement for the opportunities missed. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE. Parents need not provide the exact proper placement or services required under IDEA, but rather must only provide a placement or services that address the student's needs and provide the student with educational benefit.

101. As determined in Factual Findings 20 to 26 and 50 to 56, the District's failure to assess Student's behavioral needs, and failure to develop a BSP to address behaviors that interfered with his learning constituted a failure to offer a program that was designed

to meet his unique needs, and therefore constituted a substantive denial of FAPE from November 2007, to March 4, 2008. On March 4, 2008, the District remedied its failure to assess Student's behavioral needs by offering to conduct an FBA. However, as determined in Factual Findings 75 to 76, 79, and 86, because the District did not offer additional behavioral supports for Student to receive in the SDC while the FBA was being conducted, the District's failure to offer an educational program designed to meet his unique needs continued. Because the SDC lacked sufficient behavioral supports, Parents were unwilling to allow Student to return to the SDC; because Student did not return to the SDC, the District could not conduct the FBA. As determined in Factual Finding 94, the lack of sufficient behavioral supports continued to deny Student a FAPE for the ESY program offered in the Glankler SDC in or about July 2008. In addition, as determined in Factual Findings 39 to 40, the District failed to develop Student's behavioral IEP goals beginning in late January 2008; again, the District's conduct of the FBA would have remedied this failure, except that the SDC's lack of sufficient behavioral supports caused Parents to be unwilling to allow Student to return to the SDC so that the District's behaviorist could conduct the FBA.

102. This Decision also determined in Factual Findings 59 to 61 that the District procedurally denied Student a FAPE for the brief period of the winter holiday break in late December 2007 and early January 2008, due to the District's predetermination of the offer of services during that holiday period. Finally, as determined in Factual Findings 67 to 71, the reduction of time for OT and speech-language services by delivering the services concurrently materially failed to implement 60 minutes per week of Student's DIS. Other than these findings, Student's further claims of denial of FAPE did not succeed.

103. Student seeks remedies including the following: reimbursement for educational expenses at I Can Too and PACE; prospective placement at I Can Too and PACE; compensatory education in OT, speech-language, and ABA, including the services

from Autism Partnership recommended by Dr. Leaf; reimbursement for the IEE conducted by Dr. Fineman; and reimbursement for Student's health insurance premiums paid to Kaiser Permanente.

104. In light of this Decision's findings of denial of FAPE, as described above, reimbursement for Parents' expenses in a unilateral placement shall be considered. I Can Too is a certified NPA that delivered one-to-one ABA services to Student in his family's home. The I Can Too staff designed a program to address Student's areas of need in functional communication, behavior, social skills, cognitive/play skills, and self-help skills. Testimony from Director Elizabeth Peace and reports from I Can Too established that Student made some progress in areas such as following instructions, transitioning between activities, functional communication, and self-help skills. Dr. Fineman's testimony and report also supported Student's position that the I Can Too program was appropriate.

105. The District argued that I Can Too was inappropriate because it was not in the LRE for Student. However, there is no requirement that a parent's unilateral placement must be in the LRE. In any event, it is inherent in the nature of one-to-one ABA instruction that the services are delivered in a restrictive setting, regardless of whether an LEA or NPA is providing the services. As discussed below, Student's unilateral placement also included instruction and services from the PACE program, which was in a less restrictive environment.

106. Beginning in July 2008, Student's unilateral placement also consisted of his attendance at PACE's Sunny Days Preschool (Sunny Days), a private preschool for children up to six years old. The pupil population is approximately 60 percent pupils with autism and 40 percent typically developing pupils. Each autistic child at Sunny Days is assigned a one-to-one aide. All of the PACE staff are trained in working with children with autism. Sunny Days is not an ABA program, but instead uses other methodologies designed for pupils with autism, such as TEACCH and Pivotal Response Training. Documentary exhibits

from PACE and testimony from Mother, Dr. Fineman, and Gina Baldi, PACE's Director of Early Intervention Programs, established that the program was designed to provide Student with social interaction. Mother and Ms. Baldi established that Student made some progress at PACE, including improved behavior, increased social skills, greater participation in activities, and ability to follow his picture schedule and the school's daily routine.

107. The District's arguments that I Can Too and PACE were inappropriate and should not be reimbursed were not persuasive. The District relied on testimony from Dr. Takeshima about his observation of both programs, but Dr. Takeshima did not reach an opinion about whether either program was appropriate for Student. While Dr. Leaf expressed some criticisms of the programs, his testimony did not establish that the programs were inappropriate for Student. PACE did not have a formal written behavior plan for Student, and I Can Too did not implement a behavior plan for Student until October 2008. However, in light of the entirety of the evidence about the programs, the lack of a formal behavior plan did not render either program inappropriate. The evidence established that Student was nevertheless able to receive educational benefit in the programs. Student had one-to-one instruction in both settings, which allowed the therapists to give greater attention to his behaviors than in a setting with a higher adult-to-pupil ratio. Moreover, parents are not required to obtain a perfect placement for their child, but only one that addresses the student's needs and provides the student with educational benefit. Thus, the evidence established that Parents' unilateral placements at I Can Too and PACE met the standard for parental placement because the programs were designed to meet Student's unique needs and reasonably calculated to allow him to receive educational benefit.

108. RCEB funded Student's receipt of I Can Too services until May 2008. Parents then funded the I Can Too program until August 2008, when Student's health insurer, Kaiser Permanente, took over funding that program. Invoices from I Can Too and

testimony from Mother established that Parents spent a total of $3,360.50 on 71.5 hours of behavioral services from I Can Too from May to August 2008.

109. Parents also funded Student's attendance at PACE from July 2008 through December 2008. Student's attendance at PACE cost $150 per day. Invoices from PACE and testimony from Mother and Ms. Baldi established that Parents spent a total of $14,500 from July through September 2008. Testimony from Mother and Ms. Baldi established that Parents paid a total of $2,300 per month for the months of October and November 2008, and would pay $1,800 for December 2008.[23] Thus, Parents spent a total of $20,900 for Student's attendance at PACE from July to December 2008.

110. Reimbursement for Student's attendance at I Can Too and PACE is warranted to remedy the District's denial of FAPE. Parents put Student in this unilateral placement following the District's failure to offer a placement with sufficient behavioral interventions and supports. Pursuant to Factual Findings 104 to 107, the instruction and services delivered by I Can Too and PACE under Parent's unilateral placement were reasonably calculated to provide the educational benefits that likely would have accrued from special education services the District should have supplied in the first place. Hence, the District shall reimburse Parents in the total amount of $24,260.50 for Parents' expenses for PACE and I Can Too.

111. Equitable considerations may be considered when fashioning relief for violations of the IDEA, and reimbursement for the costs of a private school may be

[23] The IEP in dispute concerned the time period from October 31, 2007, to October 31, 2008. However, there was no evidence that the District offered a different program for the time period after October 31, 2008. Thus, in light of all circumstances, reimbursement for November and December 2008 is warranted as compensatory education.

reduced or denied if the parents acted unreasonably. Here, the District's arguments that Parents' actions warrant a reduction or denial of reimbursement were not persuasive. Although their behavior was not perfect, Parents generally tried to be cooperative with the District. Parents' failures to disclose I Can Too's initial assessment and Student's use of the prescription drug Risperdal to the District ideally should not have occurred, but did not rise to the level of conduct warranting reduction or denial of reimbursement. There was no evidence that the failure to disclose this information had any effect on the District's ability to accurately assess Student or offer an appropriate educational program for him.

112. Student also seeks compensatory education in the form of ABA, OT, and speech-language services, including the services from Autism Partnership or a similar agency as recommended by Dr. Leaf. In light of the above award of reimbursement, further compensatory education is not warranted. Reimbursement for Parents' unilateral placement at PACE and I Can Too is sufficient to remedy the denial of FAPE by the District. Moreover, the program Dr. Leaf recommended exceeds an equitable remedy for the District's denials of FAPE determined herein.

113. Similarly, there is no basis for awarding prospective placement at PACE or I Can Too. Other than as a form of compensatory education, prospective placement is not at issue because the issues concerned only FAPE claims for past time periods. Furthermore, as determined above, the reimbursement for PACE and I Can Too is sufficient to remedy the denials of FAPE that occurred. This award of reimbursement for the PACE and I Can Too services is reasonably calculated to provide the educational benefits that likely would have accrued from special education services the District should have supplied in the first place. In addition, this Decision makes no finding about whether PACE or I Can Too would be prospectively appropriate for Student.

114. Student also seeks reimbursement for the IEE conducted by Dr. Fineman, which resulted in a written report dated November 9, 2008. An IEE is an assessment

conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. To obtain an IEE at public expense, the pupil must disagree with an assessment obtained by the public agency and request an IEE. Following the request for an IEE, the public agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its assessment is appropriate, or ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing that the assessment obtained by the parent did not meet agency criteria.

115. This Decision has determined that the District's October 2007 assessments were appropriate, except that the District failed to sufficiently assess Student in the area of behavior. Dr. Fineman's IEE did not include a behavioral assessment. The District's assessments were appropriate in all areas covered by Dr. Fineman's IEE. Accordingly, there is no basis for reimbursement of Dr. Fineman's IEE. Because of this finding, there is no need to determine whether Dr. Fineman's evaluation constituted an IEE or, as the District claims, was conducted primarily to obtain the opinions and testimony of an expert witness for hearing.

116. Finally, Mother testified at the hearing that Parents seek reimbursement for half of the monthly premiums they have paid for their family's health insurance with Kaiser Permanente, on the grounds that Kaiser Permanente began funding Student's I Can Too program in August 2008. For several reasons, this request is denied. First, this Decision has already determined that the reimbursement already awarded for amounts that Parents paid directly to I Can Too and PACE is a sufficient remedy for the District's denial of FAPE. Second, the evidence established that Kaiser Permanente only pays for Student's medical expenses, whereas a special education due process hearing concerns only a pupil's educational needs. Medical needs are specifically excluded from an LEA's obligation to provide a FAPE, and this Decision can only award reimbursement for educational expenses,

not medical expenses. Third, there is no evidence that Kaiser Permanente's funding of the I Can Too services has created any additional expense for Parents. Mother testified that her family's monthly health insurance premium cost $900 for their entire family of five, and they would incur that expense in any event.

LEGAL CONCLUSIONS

1. The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

2. In an administrative hearing, the petitioner has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) Here, the Student has the burden of proof on his issues, and the District has the burden of proof on its issues.

3. A child with a disability has the right to a FAPE under the IDEA. (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education and related services that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student's IEP. (Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o); 20 U.S.C. § 1401(9).) The term "related services," includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (Ed. Code, § 56363, subd. (a); 20 U.S.C. § 1401(26).) In California, the term "designated instruction and services" (DIS) means related services. (Ed. Code, § 56363, subd. (a).)

4. There are two parts to the legal analysis in claims brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley*, (1982) 458 U.S. 176, 200 [102 S.Ct. 3034].) Second, the court must assess whether the LEA's proposed program was designed to meet the child's unique needs, was reasonably calculated to enable the child to receive educational benefit, and comported with the

child's IEP. (*Rowley*, 458 U.S. at pp. 206-07.) In addition, the educational program must be in the LRE. (See *Sacramento City Unif. Sch. Dist. Bd. of Educ. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398; cert. denied (1994) 512 U.S. 1207; 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114; see, Ed. Code, §§ 56031, 56342, subd. (b), 56364.2, subd. (a).)

5. Procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) Recent Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) ___ F.3d ___, 2009 WL 349795; *Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn.3.)

6. The IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley*, 458 U.S. at pp.198-200; see, *Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1995) 82 F.3d 1493, 1500.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit has referred to *Rowley's* "some educational benefit" simply as "educational benefit" (See, e.g., *M.L. v. Fed. Way Sch. Dist*. (9th Cir. 2004) 394 F.3d 634, 645.) It has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B v. Hellgate Elementary School Dist.* (9th Cir.2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

7. To determine whether the District offered Student a FAPE, the analysis must

focus on the adequacy of the District's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) Additionally, the Ninth Circuit has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight … an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon, supra,* 195 F.3d at p.1149 (citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041).)

DISTRICT'S ISSUES

PRIOR TO STUDENT'S INITIAL IEP MEETING ON OCTOBER 31, 2007, DID THE DISTRICT ASSESS STUDENT IN ALL AREAS RELATED TO HIS SUSPECTED DISABILITY?

8. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil's educational needs shall be conducted. (Ed. Code, § 56320.) The student must be assessed in all areas related to the suspected disability including, if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (Ed. Code, § 56320, subd.(f); see, 20 U.S.C. § 1414 (b)(3); 34 C.F.R. § 300.304(c)(4) (2006).)

9. Initial special education evaluations must consist of procedures to determine whether the child is a child with a disability and to determine the educational needs of such child. (20 U.S.C. § 1414(a)(1)(C)(i).) Each LEA must ensure that, in evaluating each child with a disability, the evaluation is sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the category in which the child has been classified. (34 C.F.R. § 300.304(c)(6) (2006).) In conducting a special education assessment, the LEA shall use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in

addition to physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3) (2006).) Tests and other assessment materials shall be administered in accordance with any instructions provided by the producer of the assessments. (20 U.S.C. § 1414(b)(3)(A)(v); Ed. Code, § 56320, subd. (b)(3).)

10. The process for assessment begins with a written referral for assessment by the parent, teacher, school personnel, or other appropriate agency or person. (Ed. Code §§ 56302, 56321, subd. (a); Cal. Code Regs., tit. 5, § 3021.) Within 15 calendar days of referral (with exceptions not applicable here), the parent or guardian must be given a written assessment plan which explains, in language easily understood by the general public, the types of assessments to be conducted. (Ed. Code, §§ 56043, subd. (a), 56321, subd. (b).) The parent or guardian then has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c).) The LEA has 60 days from the date it receives the parent's written consent for assessment, excluding vacation and days when school is not in session, to complete the assessments and develop an initial IEP, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043, subds. (c) and (f), 56302.1.)

11. Pursuant to Factual Findings 13 to 30, and Legal Conclusions 2 to 10, the District's failure to conduct a behavioral assessment constituted a failure to assess Student in all areas related to his suspected disability. By the time Student had been attending the Glankler SDC for a few weeks, District staff should have known that behavior was an area related to Student's disability. However, because the behavioral assessment needed to be conducted in the SDC, the District would not have been able to complete that assessment until approximately 75 days after it offered that assessment plan. Other than the failure to conduct a behavioral assessment, the District's October 2007 assessment met the legal requirements.

DID THE DISTRICT'S OCTOBER 31, 2007 IEP OFFER APPROPRIATE GOALS WHICH ADDRESSED ALL OF STUDENT'S AREAS OF UNIQUE EDUCATIONAL NEED, SPECIFICALLY IN THE AREAS OF PRE-ACADEMICS, COMMUNICATION, MOTOR DEVELOPMENT, PRE-VOCATIONAL, SELF-HELP AND BEHAVIOR/SOCIAL/EMOTIONAL NEEDS?

12. Among the information that shall be stated in an annual IEP is a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (Ed. Code, § 56345, subd. (a)(2); 20 U.S.C. § 1414(d)(1)(A)(iii).)

13. Pursuant to Factual Findings 35 to 41, and Legal Conclusions 2 to 7 and 12, the District failed to offer appropriate goals in the area of behavior. This failure created a denial of FAPE for Student beginning in late January 2008, 75 days after he began attending the Glankler SDC. Other than the failure to offer behavioral goals, the IEP's goals met all legal requirements.

WAS THE DISTRICT'S OCTOBER 31, 2007 IEP OFFER, AS CLARIFIED IN THE JUNE 11, 2008 IEP, OF AN SDC FOR FIVE HOURS PER DAY, FIVE DAYS A WEEK, WITH RELATED SERVICES OF TRANSPORTATION, ESY, 60 MINUTES OF SPEECH-LANGUAGE THERAPY A WEEK, 60 MINUTES OF OT A WEEK, DESIGNED TO ADDRESS ALL AREAS OF STUDENT'S NEEDS AND REASONABLY CALCULATED TO PROVIDE EDUCATIONAL BENEFIT?

14. When developing each pupil's IEP, the IEP team shall consider the pupil's strengths, the parents' concerns, the results of the most recent assessments, and the academic, developmental, and functional needs of the pupil. (Ed. Code, § 56341.1.)

15. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324 (2006); Ed. Code, § 56341.1, subd. (b)(1).) As noted by

the comments to the 2006 federal implementing regulations, "[D]ecisions [as to the interventions, supports, and strategies to be implemented] should be made on an individual basis by the child's IEP team." (Vol. 71, No. 156, 64 Fed.Reg. 12620 (2006).) California law defines behavioral interventions as the "systematic implementation of procedures that result in lasting positive changes in the individual's behavior," including the "design, implementation, and evaluation of individual or group instructional and environmental modifications . . . . designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual's right to placement in the least restrictive environment as outlined in the individual's IEP." (Cal. Code Regs., tit. 5, § 3001, subd. (d).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029.)

16. Pursuant to Factual Findings 41 to 49, and Legal Conclusions 2 to 4, 6, 7, and 14, the related services of OT and speech-language therapy offered in the October 31, 2007 IEP were substantively appropriate for Student and did not deny Student a FAPE.

17. Pursuant to Factual Findings 50 to 56, and Legal Conclusions 2 to 4, 6, 7, 14, and 15, the District failed to offer sufficient behavioral interventions such as a BSP to address Student's behaviors that impeded his learning. To this extent, the October 31, 2007 IEP was not designed to address all areas of Student's unique needs, and therefore substantively denied Student a FAPE.

DID THE DISTRICT MEET ITS OBLIGATIONS UNDER THE IDEA AND STATE SPECIAL EDUCATION LAW AFTER THE FEBRUARY 26, 2008 BEHAVIORAL INCIDENT BY MEETING WITH PARENTS AND OFFERING TO ASSESS STUDENT ON OR AROUND MARCH 4, 2008, TO DETERMINE WHETHER STUDENT HAD ADDITIONAL BEHAVIORAL NEEDS?

18. Pursuant to Factual Findings 72 to 79, and Legal Conclusions 2 to 7, 12, 14 and 15, following the February 26, 2008 incident, the District met its legal obligations to the extent that it properly held a meeting with Mother and agreed to conduct an FBA. However, the offer to return Student to the SDC without any additional behavioral supports was not designed to meet Student's unique needs for the 75-day period that he would be attending the SDC without those supports. To that extent, the District's offer failed to address Student's behavioral needs, and therefore constituted a substantive denial of a FAPE.

WAS THE DISTRICT'S JUNE 11, 2008 AMENDMENT TO THE OCTOBER 31, 2007 IEP AN APPROPRIATE OFFER OF ESY SERVICES WITH APPROPRIATE BEHAVIORAL SUPPORTS?

19. ESY services shall be offered and provided if the IEP team determines that the services are necessary for the provision of a FAPE to the pupil. (Ed. Code, § 56345, subd. (b)(3); see, 34 C.F.R. § 300.106 (2006).) Such individuals shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in light of the pupil's disability. (Cal. Code Regs., tit. 5, § 3043.) Extended year is the period of time between the close of one academic year and the beginning of the succeeding academic year. (Cal. Code Regs., tit. 5, § 3043, subd. (c).) An extended year program shall be provided for a minimum of 20 instructional days, including holidays. (Cal. Code Regs., tit. 5, § 3043, subd. (d).) For reimbursement purposes, a maximum of 55 instructional days, excluding holidays, shall be allowed for individuals in special classes or centers for the severely handicapped. (Cal. Code Regs., tit. 5, § 3043, subd. (d)(1).)

20. Pursuant to Factual Findings 91 to 94, and Legal Conclusions 2 to 4, 6, 7, and 19, the District's offer of 34 hours of ARC services to be provided in August 2008 was designed to address Student's need to avoid regression over summer vacation, and thus did not deny Student a FAPE. Regarding the ESY program at the Glankler SDC, the SDC lacked sufficient behavioral supports; to that extent, the SDC placement offered for the ESY program denied Student a FAPE.

STUDENT'S ISSUES

DID THE DISTRICT'S OCTOBER 2007 ASSESSMENT PLAN DENY STUDENT A FAPE BECAUSE IT FAILED TO ASSESS STUDENT IN ALL AREAS RELATED TO HIS SUSPECTED DISABILITY?

21. Pursuant to Factual Findings 13 to 30, and Legal Conclusions 2 to 11, the District's October 2007 assessment plan met the legal requirements, except for the failure to assess Student in the area of behavior, which denied Student a FAPE. However, because the behavioral assessment needed to be conducted in the SDC, the District would not have been able to complete that assessment until approximately 75 days after it offered that assessment plan. Other than the failure to conduct a behavioral assessment, the District's October 2007 assessment met the legal requirements.

DID THE DISTRICT DENY STUDENT A FAPE WHEN IT REFUSED PARENTS' REQUEST FOR AN FAA IN OR ABOUT OCTOBER 2007?

22. In 1990, California passed Education Code section 56520, et seq., which is commonly known as the Hughes Bill, concerning behavioral interventions for pupils with serious behavior problems. Regulations implementing the Hughes Bill require that an LEA conduct an FAA, resulting in a BIP, when a student develops a "serious behavior problem" and the IEP team finds that the instructional/behavioral approaches specified in the student's IEP have been ineffective. (Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052, subd.

(b).) A serious behavior problem means the individual's behaviors are self-injurious, assaultive, or the cause of serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the pupil's IEP are found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (aa).)

23. Pursuant to Factual Findings 31 to 34, and Legal Conclusions 2 to 10, and 22, the District did not deny Student a FAPE by refusing Parents' request for an FAA in or about October 2007. Student did not have a serious behavior problem as defined in the California regulations, and therefore did not meet the conditions for an FAA. In addition, Parents did not request an FAA in or around October 2007. Therefore the District did not refuse Parents' request for an FAA at that time, and no denial of FAPE occurred on that basis.

DID THE DISTRICT'S OCTOBER 31, 2007 IEP OFFER DENY STUDENT A FAPE BECAUSE IT FAILED TO OFFER APPROPRIATE OT SERVICES?

24. Pursuant to Factual Findings 42 to 46, and Legal Conclusions 2 to 4, 6, 7, 14, and 16, the District's offer of OT services was substantively appropriate and did not deny Student a FAPE.

DID THE DISTRICT'S OCTOBER 31, 2007 IEP OFFER DENY STUDENT A FAPE BECAUSE IT FAILED TO ADDRESS HIS BEHAVIORAL NEEDS WITH BEHAVIORAL GOALS AND A BIP?

25. A BIP is "a written document which is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP." (Cal. Code Regs., tit. 5, §§ 3052, subd. (a)(3), 3001, subd. (h).) A BIP shall be based upon an FAA. (Cal. Code Regs., tit. 5, § 3052, subd. (a)(3).) Before the BIP can be written, an FAA describing a systematic observation of the occurrence of the targeted behavior, the immediate antecedents to the targeted behavior,

the consequences of the target behavior, and ecological analysis of the settings in which the behavior occurs most frequently, must be conducted. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1).)

26. In his closing brief, Student erroneously claims that "OAH has held that an FAA doesn't require explicit observation in a classroom, only 'direct observation," and cites the decision in *Anaheim City School District v. Student*, OAH Case No. N2005100214 for this proposition. In fact, that decision never reaches such a holding. Instead, that decision essentially reaches the opposite conclusion, finding that a school district's FAA failed to meet the legal requirements because it failed to include an observation of the pupil on the school bus, and therefore "failed to observe Student in all settings relevant to his education." (*Anaheim City School District v. Student*, OAH Case No. N2005100214.)

27. Pursuant to Factual Findings 31 to 34, and Legal Conclusions 2 to 10, 22, 23, and 25, Student did not meet the requirements for an FAA, and therefore did not need a BIP. However, pursuant to Factual Findings 13-26, 33, 35-41, and 50 to 56, and Legal Conclusions 2 to 7 and 12 to 15, Student required behavioral goals and additional behavioral interventions, such as a BSP resulting from an FBA. The lack of behavioral goals and sufficient behavioral supports constituted a failure to address Student's unique needs and to offer a program reasonably calculated to allow meaningful educational benefit, which substantively denied Student a FAPE.

28. Pursuant to Factual Findings 25 and 26, the FBA needed to include observation of Student in the SDC, and therefore the behavioral goals could not have been developed until the FBA and BSP were completed. As a result, the failure to develop behavioral goals denied Student a FAPE beginning in late January 2008.

DID THE DISTRICT'S OCTOBER 31, 2007 IEP OFFER DENY STUDENT A FAPE BECAUSE IT FAILED TO OFFER APPROPRIATE SPEECH-LANGUAGE SERVICES?

29. Pursuant to Factual Findings 47 to 49, and Legal Conclusions 2 to 4, 6, 7, 14, and 16, the District's offer of speech-language services was substantively appropriate and did not deny Student a FAPE.

DID THE DISTRICT'S OCTOBER 31, 2007 IEP OFFER DENY STUDENT A FAPE BECAUSE IT FAILED TO OFFER AN APPROPRIATE CLASSROOM PLACEMENT THAT ADDRESSED HIS UNIQUE NEEDS?

30. Pursuant to Factual Findings 21 to 23 and 50 to 56, and Legal Conclusions 2 to 4, 6, 7, 14, 15, and 17, the classroom placement did not address Student's unique needs to the extent that he required additional behavioral interventions, such as from a BSP. To that extent, the offer of the SDC substantively denied Student a FAPE.

DID THE DISTRICT'S DECEMBER 14, 2007 IEP ADDENDUM DENY STUDENT A FAPE BECAUSE IT FAILED TO CONSIDER INPUT FROM HIS PARENTS AND THEIR EXPERT WHO STATED THAT STUDENT REQUIRED UNINTERRUPTED SERVICES TO AVOID REGRESSION?

31. A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414 (d)(1)(B)(i); 35 C.F.R. § 300.344(a)(1); Ed Code, § 56341, subd. (b)(1).) Among the information that an IEP team must consider when developing a pupil's IEP is the concerns of the parents or guardians for enhancing the education of the pupil. (Ed. Code, § 56341.1, subd. (a)(2).) In *W.G. v. Target Range Unif. Sch. Dist., supra,* 960 F.2d at p.1483, the Ninth Circuit recognized the IDEA's emphasis on the importance of meaningful parental participation in the IEP process. An LEA's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) Predetermination occurs "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (*H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007)

2007 WL 1989594 [107 LRP 37880, 48 IDELR 31].)

32. Pursuant to Factual Findings 59 to 61, and Legal Conclusions 2 to 5, 19, and 31, the District failed to consider Mother's opinions about services during winter holiday break because District staff incorrectly believed that the District could not be required to provide those services. This constituted a procedural violation regarding the winter holiday break period in late December 2007 and early January 2008. That violation significantly interfered with Parents' participation in the IEP decision-making process, and therefore constituted a procedural denial of FAPE for that time period.

DID THE DISTRICT'S DECEMBER 14, 2007 IEP ADDENDUM DENY STUDENT A FAPE BECAUSE IT FAILED TO OFFER APPROPRIATE SERVICES DURING WINTER BREAK?

33. Pursuant to Factual Findings 64 to 66 and Legal Conclusions 2 to 4, 6, 7, 19, and 31, the District's offer of 12 hours of ARC services during the winter holiday break was designed to address Student's need to prevent regression over the holiday break, and therefore did not substantively deny Student a FAPE.

DID THE DISTRICT'S DECEMBER 14, 2007 IEP ADDENDUM DENY STUDENT A FAPE BECAUSE IT FAILED TO CONFORM TO STUDENT'S OCTOBER 31, 2007 IEP BECAUSE IT REDUCED THE AMOUNT OF TIME HE WOULD RECEIVE HIS OT AND SPEECH-LANGUAGE SERVICES ON A ONE-TO-ONE BASIS?

34. When a school district does not perform exactly as called for by an IEP, the district does not violate the IDEA unless it is shown to have "materially failed to implement the child's IEP. A material failure occurs when the services provided to a disabled child fall significantly short of those required by the IEP." (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 481 F.3d 770, 773.) For example, a brief gap in the delivery of services may not be a material failure to implement the IEP. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal., May 30, 2007, No. C 06-4098 PJH) 2007 U.S.Dist. LEXIS 39025, pp. 22-23 [2007 WL 1574569].)

35. Pursuant to Factual Findings 67 to 71, and Legal Conclusions 1 to 4, 6, 7, and 34, the District's concurrent delivery of OT and speech-language services constituted a nonconformity with the IEP that materially failed to implement 60 minutes per week of Student's related services, and to that extent substantively denied Student a FAPE.

DID THE DISTRICT'S MARCH 4, 2008 MEETING DENY STUDENT A FAPE BY FAILING TO OFFER A ONE-TO-ONE AIDE?

36. Pursuant to Factual Findings 21 to 23, 50 to 56, and 79, and Legal Conclusions 2 to 4, 6, 7, 14, and 15, Student required additional supports to address his behavioral needs. While a one-to-one aide was not necessarily the only option, it was one appropriate option to address Student's behavioral needs until the District could complete the FBA and develop the BSP. Thus, the failure to offer additional behavioral supports such as a one-to-one aide denied Student a FAPE.

DID THE DISTRICT'S MARCH 4, 2008 MEETING DENY STUDENT A FAPE BY FAILING TO CONSIDER THE PARENTS' INPUT REGARDING THEIR REQUEST FOR A ONE-TO-ONE AIDE?

37. Pursuant to Factual Findings 77 and 78, and Legal Conclusions 2 to 5, and 31, the District considered Parents' opinions at the March 4, 2008 meeting, and did not predetermine what would be offered. Thus, no procedural violation occurred, and the District did not deny Student a FAPE on this basis.

DID THE DISTRICT'S APRIL 1, 2008 IEP DENY STUDENT A FAPE BY FAILING TO CONDUCT AN FAA PURSUANT TO PARENTS' REQUEST?

38. Pursuant to Factual Findings 31 to 34 and 80 to 82, and Legal Conclusions 2 to 10, and 22 to 23, Student did not have a serious behavior problem as defined under California law, and therefore did not meet the requirements for an FAA. Moreover, Parents did not request an FAA at the April 1, 2008 IEP meeting. Accordingly, the District did not

deny Student a FAPE on this basis.

DID THE DISTRICT'S APRIL 1, 2008 IEP DENY STUDENT A FAPE BY FAILING TO ENSURE THAT A CONTINUUM OF ALTERNATIVE PLACEMENTS WAS AVAILABLE TO MEET STUDENT'S NEEDS?

39. LEAs must ensure that a continuum of alternative placements is available to meet the needs of individuals with exceptional needs for special education and related services. (34 C.F.R. § 300.115(a) (2006).) This continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. (34 C.F.R. § 300.115(b)(1) (2006); Ed. Code, § 56361.) Services provided by NPSs and NPAs shall be made available and shall be provided under contract with the LEA if no appropriate public education program is available. (Ed. Code, § 56365, subd. (a).)

40. Pursuant to Factual Findings 83 and 84, and Legal Conclusions 2 to 7, and 39, the District fulfilled its obligation to ensure that a continuum of alternative placements was available. The District makes NPA services available to a pupil if the IEP team determined that that the pupil needs them and that no appropriate District services are available. Moreover, the law requires only that a continuum must be available, not that the IEP team must consider a continuum for each pupil. No procedural violation occurred on this basis, and therefore the District did not deny Student a FAPE on this basis.

DID THE DISTRICT'S APRIL 1, 2008 IEP DENY STUDENT A FAPE BY FAILING TO OFFER APPROPRIATE BEHAVIORAL SUPPORT, SPECIFICALLY A BSP, BIP, AND/OR APPROPRIATE CLASSROOM PLAN TO ADDRESS STUDENT'S UNIQUE NEEDS IN THE AREA OF BEHAVIOR?

41. Pursuant to Factual Findings 31 to 34 and 80 to 82, and Legal Conclusions 2 to 10, 22, 23, and 38, Student did not require an FAA, and therefore the District was not required to offer an FAA or the BIP that results from an FAA. The District's offer of an FBA, which would lead to development of a BSP, was designed to address Student's behavioral

needs, and to that extent constituted a substantive offer of FAPE. However, pursuant to Factual Findings 25 and 85, the District could not conduct the FBA or develop the BSP until Parents allowed Student to return to attending the SDC. Pursuant to Factual Findings 50 to 56, 85 and 86, and Legal Conclusions 2 to 4, 6, 7, 12, 14, and 15, until the BSP was implemented, Student required additional supports to address his behavioral needs. Therefore, the failure to offer additional behavioral supports constituted a failure to offer a program designed to meet Student's needs until the FBA and BSP could have been completed.

DID THE DISTRICT'S JUNE 11, 2008 IEP DENY STUDENT A FAPE BY FAILING TO OFFER AN APPROPRIATE BSP OR BIP?

42. Pursuant to Factual Findings 89 and 90, and Legal Conclusions 2 to 4, 6, 7, 12 14 and 15, the District met its obligation to offer an FBA and a BSP, and did not deny Student a FAPE on that basis. Student did not meet the requirements for an FAA and BIP, and therefore the District's decision not to offer a BIP did not deny Student a FAPE.

DID THE DISTRICT'S JUNE 11, 2008 IEP DENY STUDENT A FAPE BY FAILING TO OFFER AN APPROPRIATE ESY PROGRAM?

43. Pursuant to Factual Findings 91 to 94, and Legal Conclusions 2 to 4, 6, 7, 19, and 20, the District offered appropriate services for August 2008. However, the offer of ESY summer school at the Glankler SDC failed to offer additional supports to address his behavioral needs. To that extent, the SDC placement offered for the ESY program denied Student a FAPE.

FOR ALL OF THE IEPS LISTED ABOVE, DID THE DISTRICT PROCEDURALLY DENY STUDENT A FAPE BY OFFERING ONLY A PREDETERMINED PROGRAM?

44. Pursuant to Factual Findings 59 to 61, and 96 and Legal Conclusions 2 to 5, 19, and 31, the District predetermined one aspect of the offer at the December 14, 2007

IEP meeting, which constituted a procedural denial of FAPE solely regarding the winter holiday break period in late December 2007 and early January 2008. Pursuant to Factual Findings 62, 77, 78, and 95 to 99, and Legal Conclusions 2 to 5, and 31, the District did not predetermine what would be offered at any of the other IEP meetings. Other than the offer of winter break services at the December 2007 IEP meeting, no predetermination occurred and the District did not procedurally deny Student a FAPE on this basis.

IF THE DISTRICT DENIED STUDENT A FAPE, IS STUDENT ENTITLED TO REMEDIES INCLUDING: COMPENSATORY EDUCATION IN AREAS SUCH AS ABA, OT, SPEECH AND FUNCTIONAL ACADEMICS, SOCIAL SKILLS AND BEHAVIORAL SERVICES; REIMBURSEMENT FOR EDUCATIONAL EXPENSES AT I CAN TOO AND PACE; AND PROSPECTIVE PLACEMENT AT I CAN TOO AND PACE?

45. When a school district denies a child with a disability a FAPE, the child is entitled to relief that is appropriate in light of the purposes of the IDEA. (*School Comm. of the Town of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996].) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief which may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (See e.g. *Parents of Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of the IDEA." (*Id.* at p. 1497.) An award of compensatory education does not require the automatic provision of day-for-day or session-for-session replacement for the opportunities missed. (*Park, supra*, 464 F.3d at p. 1033 (citing *Parents of Student W., supra,* 31 F.3d at p. 1496).)

46. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE and the private placement or services were appropriate under the IDEA and replaced

services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra,* 471 U.S. at 369-370; *Parents of Student W., supra,* 31 F.3d at p.1496).) The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent Sch. Dist. v. State Bd. of Educ*. (6th Cir. 1986) 790 F.2d 1153, 1161.) However, the parents' placement still must meet certain basic requirement of the IDEA, such as the requirement that the placement address the child's needs and provide him educational benefit. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14 [114 S.Ct. 361].)

47. Equitable considerations may be considered when fashioning relief for violations of the IDEA. (*Florence County School Dist., supra* at p.16; *Parents of Student W., supra* at p. 1496.) Reimbursement for the costs of a private school may be reduced or denied if the parents acted unreasonably. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.)

48. An IEE is "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i) (2006).) To obtain an IEE at public expense, the parent must disagree with an assessment obtained by the public agency and request an IEE. (Ed. Code, § 56329, subd. (b); 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b) (2006); see Ed. Code, § 56506, subd. (c).) Following the parent's request for an IEE, the public agency must, without unnecessary delay, either: (i) file a due process complaint to request a hearing to show that its assessment is appropriate; or (ii) ensure that an independent educational assessment is provided at public expense, unless the agency demonstrates in a hearing that the assessment obtained by the parent did not meet agency criteria. (Ed. Code, § 56329, subd., (b); 34 C.F.R. § 300.502 (b)(2) (2006).) If the final result of the due process hearing is that the public agency's assessment is appropriate, then the parent maintains the right to an

independent educational assessment, but not at public expense. (Ed. Code, § 56329, subd. (c); 34 C.F.R. § 300.502 (b)(3) (2006).)

49. FAPE includes only special education and related services, not medical care, other than related services which are not required to be administered by a physician and are provided for diagnosis and assessment only as may be required to assist an individual with exceptional needs to benefit from special education. (20 U.S.C. § 1401(9); Ed. Code, § 56363, subd. (a); 34 C.F.R. §§ 300.17, 300.34(a) (2006); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883 [104 S.Ct. 3371]; *Cedar Rapids Community Sch. Dist. v. Garret F. ex rel Charlene F.,* (1999) 526 U.S. 66 [119 S.Ct. 992].)

50. Pursuant to Factual Findings 100 to 116, and Legal Conclusions 2 and 45 to 49, reimbursement for Student's attendance at I Can Too and PACE is warranted to remedy the District's denial of FAPE. The District shall reimburse Parents in the total amount of $24,260.50 for their expenses for PACE and I Can Too.

ORDER

1. Within 45 days of the date of this Order, the District shall reimburse Parents in total amount of $24,260.50 for their educational expenses at PACE and I Can Too.

2. All of Student's other claims for relief are denied.

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. The following findings are made in accordance with this statute:

Regarding District's Issues 1 through 5, each party prevailed in part on each of the five issues.

Regarding Student's Issues, the District prevailed on Issues 2, 3(A), 3(C), 4(B), 5(B), 6(A), 6(B),7, and 8. Student prevailed on his Issues 4(A), 4(C), and 5(A). On Student's Issues

1, 3(B), 3(D), 6(C), and 9, each party prevailed in part.

RIGHT TO APPEAL THIS DECISION

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

Dated: February 20, 2009

/s/

SUZANNE B. BROWN

Administrative Law Judge

Office of Administrative Hearings