

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

In the Matter of:

STUDENT,

Petitioner,

OAH No. N 2005090199

vs.

LA CANADA UNIFIED SCHOOL
DISTRICT,

Respondent.

DECISION

Anahid Hoonanian, Administrative Law Judge (ALJ) of the Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on February 2, 3, and 7, 2006, in La Canada, California.

Petitioner (Student) was represented at the hearing by his mother (Mother). Respondent, La Canada Unified School District (District), was represented at the hearing by Patrick J. Balucan, of Atkinson, Andelson, Loya, Ruud & Romo. The District's director of special education, Tamara Jackson, was also present during the hearing.

Before taking evidence in this matter, the ALJ granted the District's motion to limit the time periods at issue in this hearing to those allegations arising after December 2, 2003. The basis of the District's motion was that, on December 2, 2003, Mother and the District entered into a final settlement agreement, whereby Mother released the District of any of Petitioner's claims for a free appropriate public education (FAPE) against the District through the date of the settlement agreement. In addition, the ALJ denied the District's motion exclude evidence and the issue that the District failed to

address the bullying and harassment of Student by his peers. The ALJ denied Respondent's motion on the grounds that bullying or harassment may result in a denial of FAPE within the meaning of Education Code section 56501.

During the hearing, Petitioner called the following witnesses: Jennifer Hendler, Student's teacher in the sixth grade; Donna Robinson, principal at Paradise Canyon Elementary School; Mother; Victoria Baca, educational advocate; and Student's father (Father). Respondent called the following witnesses: Jennifer Hendler; Donna Robinson; Kathryn Wullschlager, the speech and language specialist assigned to Paradise Canyon Elementary School; Carol Mispagel, school psychologist; Wendy Sinnette, principal at La Canada High School; and Tamara Jackson, the District's director of special education.

Oral and documentary evidence was received. The parties agreed that the record would remain open until February 17, 2006, pending receipt of their written closing arguments. On February 17, 2006, the ALJ received the District's closing argument, which was timely filed and made part of the record as Respondent's exhibit 31. On February 27, 2006, the ALJ received Petitioner's closing argument, which was not timely filed but nevertheless was made part of the record as Petitioner's exhibit 145.

PROCEDURAL HISTORY

On February 28, 2005, Petitioner filed this due process complaint with the California Special Education Hearing Office (SEHO). On March 7, 2005, the mediator assigned to this matter informed SEHO that the hearing would be taken "off calendar" so the parties could mediate the matter. On August 1, 2005, the parties reached an interim mediation agreement and the matter remained "off calendar." On August 25, 2005, Petitioner requested a trial setting conference from OAH, because the parties had not been able to reach a final settlement agreement through mediation. On September 21, 2005, OAH convened a trial setting conference and set this matter for hearing

beginning on December 6, 2005. On November 22, 2005, OAH conducted a pre-hearing conference.

At the hearing, on December 6, 2005, Petitioner's attorney and Mother informed the ALJ that Mother wished to terminate her attorney's representation and wanted a continuance of the hearing in order to obtain new counsel. Respondent's counsel opposed continuance of the hearing. The ALJ granted Petitioner's request for a continuance, and Mother and Respondent's counsel agreed that the hearing would commence on February 2, 2006. On December 12, 2006, OAH issued a Notice of Continuance of Due Process Hearing and Scheduling Order that, if Mother was unable to obtain counsel by February 2, 2006, Petitioner shall be prepared to proceed to hearing.

On January 30, 2006, Mother made a written request to continue the February 2, 2006, hearing date on the ground that she had not had yet retained new counsel. The Presiding ALJ denied Mother's request for a continuance. On the first day of hearing on February 2, 2006, Mother renewed her request for a continuance. The ALJ determined that the Presiding ALJ had already denied Petitioner's January 30, 2006, request for a continuance and denied Mother's renewed request. The ALJ also denied Mother's request that she be allowed to withdraw her hearing request without prejudice. The hearing proceeded with Mother representing Petitioner herself.

ISSUES¹

I. Did the District fail to address the bullying and teasing of Student such that it denied him a Free Appropriate Public Education (FAPE)?

¹ Student's issues for hearing have been reorganized for clarity of analysis

- II. Did the District fail to provide Student with a FAPE since December 2, 2003:
- a. by failing to design a program to meet all his needs because it failed to adequately identify those needs – visual processing deficits, written language deficits, ADHD combined type, depressive disorder, possible anxiety disorder, and possible auditory processing deficits?
 - b. by failing to provide services, mentor program and counseling, discussed at IEP meetings?
 - c. by employing teachers and staff who have not had the education or ability to respond to Student’s needs?
 - d. by committing procedural violations?
- III. Did the District inappropriately determine that Student was no longer eligible for language and speech services (LAS) at the March 2, 2004, IEP meeting?
- IV. Are Student’s parents entitled to reimbursement for psychological and educational services they have obtained for Student at their own expense?

FACTUAL FINDINGS

1. Student is a fourteen-year-old boy who lives within the jurisdictional boundaries of the La Canada Unified School District. Student is a friendly, kind, and polite boy. He works hard to succeed and wants to please others. Student has lagged behind in social skills and can be immature or naïve in his relationships with peers. Student did not speak until he was about two or three years old and was later diagnosed with speech delay.

2. Student was initially identified as eligible for special education services as a student with a speech and language disorder. According to Student’s June 4, 1999, IEP, Student was eligible for special education based on delays in receptive and expressive language as well as a disorder in visual motor integration and auditory processing,

which interfered with his achievement in school. Student was later diagnosed with Attention Deficit Hyperactivity Disorder, combined type, (ADHD), and became eligible for special education and services under the category of Other Health Impairment (OHI)

3. Due to his disabilities, Student has a history of struggling with attention issues and problems with peers. Student exhibits impulsivity and has difficulty controlling his actions. This has resulted in Student having poor social skills and difficulty with peer relationships, which usually manifest outside the classroom at recess, lunch, the locker room, and the gym during physical education (P.E.). He relates better to adults as well as to children who are younger than him. Student is easily distracted. He has difficulty remembering information and often forgets things. For example, when given detention for an incident, he did not show up for detention, and the principal had to remind him about attending detention. Student did not show for detention simply because he had forgotten what he needed to do. Even at home, Mother has to repeat the same information to Student two or three times; otherwise, he forgets the information.

4. Student attended La Canada Elementary School from kindergarten through fifth grade. While attending elementary school, Student was teased and harassed by his peers. As a result of the emotional impact of the bullying and teasing, he required individual psychological therapy, which was paid for by his Parents. In its May 31, 2001, triennial assessment of Student, the District concluded that due to emotional, social, and behavior concerns, Parents "may wish to continue Student's individual therapy, as this appears to be beneficial to him." At that time, the District noted that Student exhibited weaknesses in auditory processing and visual processing skills. The District psychologist found that Student's performance on the cognitive test scores at that time may have been depressed due to "attention issues, as well as auditory and visual processing weaknesses."

5. In November 2002, Student's pediatrician referred him to educational psychologist, Jane Lewis, Ph.D, for a complete psychological and psychoeducational assessment. Dr. Lewis found that Student's cognitive functioning was affected by ADHD that resulted in problems sustaining attention, working memory deficits, and impulsivity. She also concluded that there was a possibility of auditory processing deficits and that Student's self-esteem was low.

During this assessment, Student reported a long history of teasing by peers. For example, he reported being teased for going to speech therapy when peers told him "the little baby doesn't know how to talk." Other students passed out notes making fun of Student. As a result of the teasing, recess and lunch were the most difficult times for Student. The daily teasing hurt Student, but he would try not to show his hurt feelings. Once he arrived at home, he would cry. Dr. Lewis concluded that the combination of Student's disabilities and teasing made Student's school situation very stressful at that time.

6. By 2002, the bullying at school had become a chronic problem. Student pleaded with Mother that he not be forced to go to school, because other students picked on him. Student returned home from school sad. His parents took Student to family and individual psychological counseling sessions to deal with the emotional impact of the teasing and bullying.

7. On or about April 18, 2003, while Student was still attending La Canada Elementary School, the District convened an annual IEP meeting. The IEP provided that Student displayed "significant deficits in his auditory reasoning and processing skills which adversely affect his educational performance." While Student had shown improvement, he had not met all of his educational goals. Student continued to be the subject of teasing and bullying.

At the conclusion of the IEP meeting, the District recommended placement in general education with a resource specialist program (RSP) in language arts and math and agreed to provide Student an instructional assistant for one-on-one help. The Parents disagreed with the proposed placement. Citing the hostile learning environment due to the bullying and harassment, they requested placement in a non-public school instead. The Parents indicated to the District that Student had deteriorated socially and emotionally due to the constant teasing and bullying. The Parents did not consent to the IEP.

2003-2004 SCHOOL YEAR

8. Sometime after the April 13, 2003, IEP meeting, the Parents requested a due process hearing. The District and the Parents participated in mediation, and the parties agreed that, beginning in October 2003, a month after school had already begun, Student would transfer from La Canada Elementary to Paradise Canyon Elementary School as a sixth grader. The Parents agreed to transfer Student, because they believed Student would get a fresh start and be free from the ongoing teasing and bullying. The District and the Parents reached a final settlement agreement on December 2, 2003.

In addition to the provision that, during the 2003-2004 school year, Student would attend the sixth grade general education program at Paradise Canyon, the settlement agreement provided that Student would receive resource teacher services for 180 minutes per week; LAS two times per week, 30 minutes per session; one-to-one designated instruction; and (DIS) counseling, one time per week, for 30 minutes. In addition, the District agreed to contract with Education Spectrum, a non-public agency, to provide Student with one 50- minute session per week of social skills training at their clinic. The settlement agreement also provided that Education Spectrum would provide up to four hours of consultation with the school staff and make recommendations for

consideration of the IEP team regarding Student's social skills needs. Finally, the agreement also provided that the District would contract for individual tutoring services four times per week, 60 minutes per session, in order to help Student with his transition to Paradise Canyon.

9. Shortly after Student began attending Paradise Canyon in October 2003, Student became the subject of bullying and teasing. Some of the same students who had been harassing and bullying Student at La Canada Elementary were now attending Paradise Canyon. As early as Student's first week at Paradise Canyon, former peers from La Canada Elementary began teasing and harassing Student. About three weeks into his attendance at Paradise Canyon, the teacher had eleven of Student's peers write letters of apology to Student, in which they apologized to Student for making fun of him, teasing him, calling him "weird and annoying", and spitting sunflower seeds at him.

10. At Paradise Canyon Student was chased by a peer with a golf tee. Student's teacher claimed that this was a positive circumstance, because other children had come to Student's aid when he was being chased.

Later in the school year, a male peer ran up behind Student and punched him on his back. The same peer spat at Student and called him a "bastard". Another boy who saw this cheered the bully and gave him a "high five." Student reported the incident to a school staff member, who responded with: "I don't care." Mother notified the principal of this incident, who told teachers to report any other similar incidents to the principal. Later that month, Student was hit on the back of his neck. Father reported the incident to the District's director of special education.

On March 18, 2004, some girls put grass in Student's bag. The next day, the same girls put a sign on Student's back that said "kick me". About one month later, during P.E., a teacher's aide told all the students that, if he did not make a basketball shot, Student would get suspended for three days, and if he did not make the shot, all the

students would have to run three laps. The students cheered for the teacher's aide. Student went home demoralized and humiliated by the teacher's aide. After the P.E. class, two boys passed around a sign up sheet to "get Student suspended." While Student was leaving, another boy "flipped" Student off. Mother reported the incident to the principal, who responded that the teacher's aide's remark was very inappropriate, and that she was addressing the "personnel side" of the situation. The principal disciplined the boy who made the gesture at Student and the boys who came up with the idea of passing around a petition to get Student suspended. The next day, the students involved in the incident wrote Student separate notes apologizing for flipping him off and for being mean to him during the school year.

11. In a questionnaire about Student's behaviors, his sixth grade teacher, Ms. Hendler, wrote: "I really feel he has control over a lot of his behavior. We have seen him behave appropriately and perfectly in front of adults however when adults are not present he engages in very inappropriate and/or annoying behavior this seems manipulative and is a big concern amongst his teacher, principal and social psychologist. He continues to make the same mistakes and verbally indicates he will change his behavior yet his actions do not demonstrate sincere efforts towards this promise."

While Student was in the sixth grade, if he was fidgety or tapping on desk, which are typical symptoms of his ADHD, he could have been re-directed with a gentle hand on the shoulder. Instead, his teacher told Student to leave class and sit outside until he could control himself. Some of the school staff set an example that Student was not desired in group learning experiences. At one point, Student was paired with a peer diagnosed with Touretts Syndrome and seated in the back corner of the classroom and was told that he was too much of a disturbance in the class. The District excluded Student from academic activities due to his behavior.

12. In 2004, in order to ensure that Student's experience at Paradise Canyon would be a positive one, Parents retained Dr. Barney Rosen, a child psychologist specializing in the treatment of children diagnosed with ADHD, to make a presentation to Student's sixth grade teachers on the needs and behaviors of children diagnosed with ADHD and the strategies that teachers could use in order to assist Student. Dr. Rosen was specifically assisting Student and his Parents in addressing Student's needs related to his ADHD diagnosis. Dr. Rosen gave the Parents guidance with his school program.

During Dr. Rosen's presentation at school, some of Student's teachers interrupted the presentation and indicated that they already knew about ADHD and wanted to express their frustrations in addressing Student's behaviors. Mother felt that the teachers were resentful, because they thought they were being treated as though they did not know how to deal with children diagnosed with ADHD. Mother made Dr. Rosen available to the teachers to give them the latest findings on ADHD and to help them understand how to use positive reinforcement, instead of using a negative behavior chart or check mark system.

13. In February 2004, the District conducted a triennial evaluation of the Student. As part of that evaluation, Student reported that he did not get along well with others, was teased a lot, and was not liked by others. Student's academic skills ranged from the low average range in math reasoning and written expression to the average range in all other areas. The District considered eligibility under the category of Emotionally Disturbed; however, since the behaviors were not evident "across all settings," and particularly since Parents did not note behaviors in the home, the District did not find Student eligible for special education and services under the category of emotionally disturbed.

14. As part of this triennial assessment, the District's psychologist, Ms. Mispagel, administered the Berry Test of Visual Motor Integration in order to test

Student's visual motor skills. Student scored in the 5th percentile, indicating this that was an area of weakness for him. According to Ms. Mispagel, the fact that Student's score was low did not necessarily indicate that he had a visual processing deficit, because this was just one test that involved copying shapes. In looking at his other tests that involved visual processing, Student scored in the average range. For example, on the symbol search on the Wechsler Intelligence Scale, which is a test of visual motor processing speed, he scored in the average range. On the perceptual reasoning subtest on the Wechsler Student scored a 90 out of an average score of 100. In her opinion, if Student had a deficit in visual processing, it would have been apparent on the Berry Test. Ms. Mispagel concluded that there was no indication that Student had a visual processing disorder. Ms. Mispagel's testimony in this area was credible and persuasive.

15. For Student's triennial evaluation, Kathryn Wullschlager, the District's speech and language specialist, conducted a speech and language assessment. She concluded that Student had made significant progress in speech and language skills and that he no longer met eligibility criteria as a student with language impairment.

Ms. Wullschlager administered the Word Test, to measure Student's semantic abilities, i.e. his knowledge of how words, such as synonyms and antonyms, are used. His standard score of 103, which was at the 52nd percentile, indicates that he is within age level range. Previously, he had a standard score of 93 corresponding to the 26th percentile, which demonstrates that he made improvement in semantics. Ms. Wullschlager also administered the Expressive One Word Vocabulary test. Student obtained a standard score of 105, which corresponds to the 63rd percentile rank or 13.1 age level equivalency.

Ms. Wullschlager administered the Test of Auditory Reasoning and Processing, which tests the ability to use common sense, ingenuity and insightfulness in solving problems. Student's score was in the 37th percentile, with a standard score of 95 out of

100, indicating to Ms. Wullschlager that Student's auditory processing was within the average range. Based on the tests she administered, Ms. Wullschlager concluded Student was within age level expectancy and did not continue to qualify for LAS. In her opinion, there were no reasons to make him eligible for LAS.

16. Ms. Wullschlager testified she did not see any indications that Student had an auditory processing issue. According to Ms. Wullschlager, she could identify the possibility of an auditory processing weakness in a younger student by the fact that when one speaks to the student, the student would know that that the person was speaking, but the student would not know what the speaker was saying. However, with someone closer to Student's age, she would expect that the student would be able to cover up the auditory processing deficit with inappropriate behaviors or by talking about another topic. She testified that she can usually spot whether a student is covering up an auditory processing deficit, but that she did not observe this with Student. At the same time, Ms. Wullschlager testified that Student had preferential seating, which is a modification the District would provide when a student is diagnosed with auditory processing. However, she testified that she was not aware that Student was diagnosed with auditory processing deficits and that he had only been diagnosed with a speech and language delay. The ALJ determines that Ms. Wullschlager's testimony regarding Student's lack of auditory processing issues was not credible.

17. On October, 28, 2003, Ms. Wullschlager began providing Student with speech therapy during the time Student was scheduled to be in P.E. class. According to Ms. Wullschlager, from the second grade on, the students were required to get to their speech therapy sessions on their own. The evidence established that, from November 20, 2003, to February 4, 2004, Student did not show for eight consecutive speech therapy sessions, even though he was in school. According to Ms. Wullschlager, if a student was a "no show" for two speech sessions, she would send a note to the

student's homeroom teacher, who would remind the student that he or she has speech. There was no evidence that either Ms. Wullschlager or any other District employee took any measures to address why Student missed eight consecutive speech therapy sessions. The District did not inform the Parents that Student had missed eight consecutive LAS sessions.

MARCH 2004 TRIENNIAL IEP

18. After the triennial assessment, the District convened an IEP team meeting on March 2, 2004, to review the assessment results and propose a placement and services for the Student. The IEP was reconvened twice and finally concluded on March 17, 2004.

19. Student's March 2004 IEP included the following goals:

- i. Personal/social goal: During class, Student will raise his hand before talking and will talk with peers only when appropriate 90% of the time. Under the heading of "current level of performance" the IEP states that during class time, Student frequently talked out and liked to joke with others but did not seem to know when to stop or when it was appropriate to joke.
- ii. Personal/social goal: Student will improve peer interactions. Under the heading of "current level of performance" the IEP states that Student had difficulty regulating his behavior with peers.
- iii. Academic goal: Student will write a paragraph essay with 80% complete sentences. Under the heading of "current level of performance" the IEP states that Student had improved his writing and understood how to put together a one or two paragraph essay, though he used fragments and omitted words.

20. At the March 2004 IEP meeting, Nathan Roettger of Education Spectrum Mr. Roettger presented a report to Student's IEP team. The IEP team agreed with and adopted his report. Mr. Roettger made recommendations to assist in developing

Student's social skills. He noted that Student readily sought friendships and attention from peers and desired to be part of the peer group. However, Student was not able to read subtle social cues in determining when particular behaviors were either not appropriate or were no longer wanted by the peer group and would continue to engage in the behavior. For instance, rather than understanding that the group no longer considered a topic amusing, Student read that as a signal to heighten his level of action on the topic in order to get the same response.

Student was struggling due to his challenges with both reading social cues and self-directing during less structured interactions with peers. Student also displayed difficulty interpreting situations. Mr. Roettger determined that this could result in having a hard time making and maintaining peer relationships. He recommended the teaching of specific skills related to appropriate social behavior be part of Student's educational program. Education Spectrum reported that Student was beginning to make progress in the group social skills sessions he was attending.

21. The IEP noted that "talking out in class, inappropriate interactions with peers, such as teasing and joking, were behavioral concerns which impeded Student's learning. At the IEP meeting, the parents vehemently disagreed with the District's proposed use of a behavior chart. However, the District began using the behavior chart, which required that at the end of each period, Student to go up to the classroom teacher for a "daily check out" to rate his behavior.

22. At the March 2004 IEP meeting, the District offered Student placement in a general education sixth grade class at Paradise Canyon Elementary School, social skills training through Education Spectrum at one 50 minute session per week, DIS counseling one time a week in 30 minute sessions, RSP at five times week in 50 minute sessions in the RSP room, and transportation. In order to address Student's needs, the District

offered modifications and accommodations including preferential seating, positive reinforcement when he raises his hand, extra time on tests, extra time on assignments, and study guides before big tests.

As set forth in the December 2003 settlement agreement, the District had provided Student with academic tutoring through January 2004. However, at the conclusion of the IEP on March 17, 2004, while the Parents still believed that Student continued to need academic tutoring, the District believed that Student was “doing well academically”, and therefore, did not offer tutoring.

23. Based on Ms. Wullschlager’s speech and language assessment, the District also recommended that Student be exited from speech and language services. The District’s speech and language therapy attendance report verified that on March 11, 2004, Student was “dismissed” from LAS. Mother did not agree with the District’s March 2004 determination to terminate LAS. Mother attended the IEP meeting, but did not sign the IEP. However, at the conclusion of the IEP on March 17, 2004, Father consented to the IEP. Father signed the IEP, because he believed that, unless he signed the IEP, Student would not be receiving any special education services until the Parents and the District were able to reach an agreement.

Shortly after the March 17, 2004, IEP meeting and after thinking about the IEP, Father called the principal’s office to inform the District that he was rescinding his consent to the IEP. He then faxed a letter to the principal’s office revoking his consent and received verbal confirmation from the principal’s office that the school had received his letter.

24. In a memorandum dated June 1, 2004, Education Spectrum wrote Ms. Jackson to inform her that Student had missed three of his four social skills groups at Education Spectrum. Education Spectrum assumed that Student was not returning to the social skills group. After receiving the memorandum, and based on the information

in the memorandum, Ms. Jackson, the District's director of special education, had the impression that Student was no longer attending the social skills program. Thus, the District discontinued funding the social skills group at Education Spectrum. The District funded the social skills group at Education Spectrum from October 2003 through May 2004. However, the Parents paid for the social skills group at Education Spectrum themselves, and Student continued to attend the program.

25. On June 11, 2004, three months after the March 2004 IEP meeting, during a meeting or conversation with school officials, the District informed Father that the District was not aware of Father's faxed letter revoking his consent to the IEP. On the same day, Father provided the District with a hand-written note "re-affirming" his rescission of the IEP. On June 11, 2004, when the District received Father's letter revoking his consent to the March 2004 IEP, the District began providing Student with speech therapy. Student did not receive speech therapy for three months from March 11, 2004, to approximately June 11, 2004.

2004-2005 SCHOOL YEAR

26. On August 31, 2004, the District convened another meeting of Student's IEP team. Parent's requested Student to be in a "directed studies class" for seventh grade and to be in regular math and language arts classes. In directed studies class, which would be Student's homeroom, Student could get help with his class work without being in "special education" or RSP class. Because the District had found Student no longer qualified for speech and language services and due to being teased for being a special education student, the IEP team agreed that it would appropriate to give Student a chance to see if he would be successful in general education. Mother consented to the addendum to the IEP.

27. Shortly after starting seventh grade in general education, in an email dated September 13, 2004, Mother informed the principal that, Student continued to

experience bullying and teasing in school. Mother explained that it was very difficult for Student to report the incidents to anyone, because Student feared that the bullying would only get worse. Mother stated that the constant harassment was affecting Student's sense of well-being. Student's pediatrician had informed the Parents that the daily anxiety that Student felt at school made him hypersensitive, and if it continued, it would lead to depression.

A few days later, as suggested by one of the teachers, Mother reported a list of recent bullying incidents directly to the principal. Mother reported that, a male peer put ketchup on Student's back; two male peers repeatedly pulled Student's backpack off; a male peer threw dirt at Student; another peer told Student that he was the "loser of the school"; later, a male peer spat on Student. Student reported the incidents to one of the school staff.

28. By January 2005, Student told his father that the harassment in school was becoming unbearable. Other students hit Student as he walked to his classes. Student pleaded with his parents to stay home from school. On January 20, 2005, a male peer kicked Student during P.E. Later, four other peers took his gym clothes and threw them around teasing Student. One of the peers took his gym clothes, rubbed them on his genitals, and shoved them in Student's face. He then threw the gym clothes so Student had to go pick them up. Then, other students took Student's backpack and threw it so far that his books fell out. Student reported this to a teacher, who knew who the boys were and was not surprised. Mother reported these incidents to the principal and explained that the harassment and bullying was making Student feel unsafe and anxious about going to school. Following the reporting of these incidents, the principal assured Mother that the school would investigate and discipline the culpable students.

FAA

29. While Student was attending La Canada Junior High School as a seventh grade student, his parents were concerned that Student was not evaluated by any outside evaluator and that he was only being labeled as a behavior problem by his teachers. The District contracted with Dr. Roy Mayer to perform an independent Functional Analysis Assessment (FAA). Dr. Mayer is a professor at California State University at Los Angeles and is well known for conducting FAAs. In a report dated February 22, 2005, Dr. Mayer presented his evaluation and recommendations. Dr. Mayer found that Student tends to imitate what has been done to him, and he will tease another student in a manner in which he was teased. Dr. Mayer determined that, due to his poor social skills, Student was being perceived by his peers as irritating, annoying, and different. As a result, he was being teased, bullied, and excluded by some of his peers.

30. As part of his FAA, Dr. Mayer observed Student on February 3, 2005, in his P.E. class for forty minutes. He observed the following:

- (a) As students waited to be called into the gym by the coach, three male peers threw small objects at Student. Student ignored them initially, but then told them to stop. The peers smiled, ran off, and then returned to toss small objects at him again.
- (b) Once students were called into the gym, Student stood near his locker talking to several other students. A peer came up behind him and pushed and poked him. Again, after ignoring it for some time, Student said: "[s]top! leave me alone." The peer continued the harassment.
- (c) When Student took his lock to the coach, a peer removed an item from Student's locker and threw it on top of the lockers where it could not be seen.

- (d) On the way from the lockers to the field, several other students held the gym doors shut for about a minute so Student could not get out. As Student was walking to the field, a peer ran by him and spat on him. Student yelled at him to not spit on him.
- (e) On the field, another peer poked at Student. Again, Student ignored it and then eventually yelled at him to stop. The peer ran off laughing and kept returning until the coach arrived. During this time, Student interacted appropriately with other classmates.
- (f) Most students ignored what was going on, some interacted positively with Student, but a few were constantly teasing and harassing Student until the coach completed the locker checks and joined the group.

31. Dr. Mayer noted that language delays can delay the development of appropriate social skills. He determined that Student was teased and bullied during non-structured and non-supervised times. Dr. Mayer also found that negative comments by teachers and peers may have prompted some of the teasing and bullying by peers, while other teasing and bullying may have been prompted by Student's lack of awareness of social cues. He recommended specific intervention goals to teach Student peer relationship skills, such as recognition of cues from other students to stop what he is doing and respecting an individual's space, decision-making skills, and various ways of responding to the bullying.

32. In his report, Dr. Mayer stated that bullying is serious, not only for the victim, but also for the bullies and bystanders. The victim may experience depression, low self-esteem, and a desire not to go to school. In fact, Student's doctor prescribed an anti-depressant for him. Student suffered from poor self-esteem and pleaded with his Mother not to go back to school. Dr. Mayer opined that bullying interferes with the school's learning environment. Even the District's director of special education agreed

that bullying, like any other emotional problem, would impact learning. Dr. Mayer emphasized in his report that to reduce bullying, the school climate must be changed. He noted that it is "NOT just a few problem students causing the problem. The problem is pervasive and needs to be addressed school wide. *The school administration has the responsibility to assure that all students are provided an opportunity to attend school free from fear and intimidation.*" (Emphasis in original).

33. In his FAA report, Dr. Mayer listed a series of recommendations as to what administrators can do, including: assessing the level of bullying at the school by conducting focus groups, surveys, and class meetings; notifying students and parents of the school rules regarding harassment, intimidation, and assaultive-type behavior; ensuring that the school has all the legally required policies and grievance procedures for such acts; establishing a climate throughout the school that promotes understanding, acceptance, and appreciation of individual differences; encouraging the development of a school environment that provides positive recognition of inclusive, cooperative, respectful, and caring student behaviors; providing close monitoring of cafeterias, playgrounds, and "hot spots" where bullying is likely to occur away from direct adult supervision; encouraging teachers to develop classroom rules that address bullying, and establishing a confidential reporting system

34. Dr. Mayer recommended that pupils who commit bullying should be taught social skills, such as assertiveness, negotiating, sharing, taking turns, inviting others, asking for permission, in place of aggression and intimidation. Additionally, Dr. Mayer made specific recommendations regarding what teachers can do to prevent bullying in school, including the following:

- (a) Posting and discussing clear rules regarding how students should behave, such as helping others who are being bullied by getting adult assistance or speaking out, and trying to include all students in activities.

- (b) Reinforcing students who follow the rules for positive inclusive behavior. In addition to praise and social recognition, teachers could send home certificates or positive notes that might address one or more anti-bullying behaviors.
- (c) Conducting weekly class meetings to discuss bullying and what to do about it.
- (d) Modeling respect for individual differences.
- (e) Pairing isolated students with friends, outgoing prestigious peers, or an older student, and not including victims and bullies in the same group and ensuring that the buddy has been taught the importance of reporting any instance of bullying to teachers.

35. In order to implement his recommendations, Dr. Mayer also recommended that the District assign a school staff member the responsibility of over-seeing and assuring program implementation. Specifically, the staff person overseeing the program implementation would collect data to monitor the progress of the program, keep a record of social skills taught, and evidence of the anti-bullying program.

Finally, Dr. Mayer recommended periodic consultations and reviews of the anti-bullying program. Specifically, he recommended that the school psychologist and counselor meet and confer with the teachers to support the implementation of the social skills training in the classroom. These meetings could occur about twice a week to provide support in reinforcing Student's social skills. Once the teachers become skilled in recognizing and reinforcing Student's social skills, the meetings could occur less and less frequently. If major modifications were needed, an IEP team meeting would be called.

36. The Parents agreed with Dr. Mayer's assessment report, and the District accepted Dr. Mayer's recommendations, but implemented only two of Dr. Mayer's

recommendations. First, the District utilized Dr. Mayer's report in developing Student's March 2005 IEP. Second, on October 25, 2005, the District provided in-service or training to the teachers at La Canada Junior High School by having Dr. Mayer present information to the staff regarding bullying prevention. The in-service was about two hours. In the last three years, this has been the only in-service training provided by the District regarding bullying.

INDEPENDENT SPEECH AND LANGUAGE ASSESSMENT

37. In February 2005, and around the same time that Dr. Mayer conducted the FAA, Student's parents continued to disagree with the District's decision in March 2004 to terminate Student's LAS. Parents requested an independent educational evaluation (IEE) in speech and language. After mutually agreeing upon the assessor for the IEE, the District contracted with Suzanne Barnes, Speech & Language Associates, to perform an independent speech and language assessment.

38. In February 2005, Ms. Barnes administered the Test of Adolescent and Adult Language 3rd Edition (TOAL-3). Student's Overall General Language Score, which measures global competence relative to reading, writing, listening, and speaking, was 74, which is 25 standard points below the norm. Student's Listening Quotient, the ability to understand the spoken language of other people, and Speaking Quotient, the ability to express one's ideas orally, both fell 27 points below the norm.

Student's Spoken Language Quotient (the ability to listen and speak) fell 30 standard points below the norm, while his Written Language Quotient (the ability to read and write) fell only 18 points below the norm. Student's Vocabulary Quotient (the ability to understand and use words properly in spoken and written communications) fell 17 points below the norm. Ms. Barnes concluded that poor vocabulary skills should be of concern, because vocabulary growth is an indicator of language development in general and of success with written language. Student's Grammar Quotient (the ability

to understand and generate proper Standard English syntactic structures in both spoken and written communications) was significantly low, falling 32 points below the norm.

39. Ms. Barnes also administered the Test of Auditory-Perceptual Skills – Upper Level (TAPS-UL), which measures the ability of the brain to understand and interpret what the ears hear, and, based on the understanding and interpretation, the ability to express the meaning. Student’s overall auditory perceptual quotient was 88, which fell within the low average range. The percentile rank of 21 indicates that 21 percent of children his age scored below him on this assessment. Student scored within the average range on three of the subtests (auditory number memory reversed subtest, auditory word discrimination subtest, and the auditory processing subtest.) He presented with significant difficulties on all of the other subtests, scoring below the average range from one to two standard deviations. Ms. Barnes concluded that Student’s performance indicated that he has auditory working memory problems as well as language problems.

40. In addition, Ms. Barnes also administered the Expressive One-Word Picture Vocabulary (EOWPVT). Student’s standard score of 108 fell within the average range. His percentile rank of 70 indicates that 70 percent of children scored below him on this assessment. His performance was equivalent to that of a 15 year 3 month old child, approximately 2 years above his chronological age.

Finally, Ms. Barnes administered the Receptive One-Word Picture Vocabulary Test (ROWPVT) to assess Student’s receptive vocabulary skills. Student’s standard score of 94 fell within the average range. His percentile rank of 34 indicates that 34 percent of children scored below him on this assessment. Student’s performance was equivalent to that of an 11 year old 11 month old child, approximately 1 year and 4 months below his chronological age. Ms. Barnes determined that the significant discrepancy between the expressive and receptive scores may further indicate auditory processing issues. The

evidence established that the District has not evaluated Student's needs in the area of auditory processing.

41. Based on her independent speech and language assessment, Ms. Barnes concluded that Student has a significant language disorder characterized by poor listening, speaking, reading, and grammar skills. She explained that, although Student's overall auditory processing score fell within the low average range, his performance on several of the subtests indicates a moderate auditory memory and processing disorder. Ms. Barnes also found that Student's social and pragmatic skills also appear to be below average. Student appears naïve and presents with reduced abilities to understand social cues, sarcasm, and nonverbal language. Ms. Barnes recommended that Student receive speech therapy two times a week, one hour per session.

42. On February 25, 2005, Petitioner filed a complaint requesting a hearing.

MARCH 2005 IEP

43. On March 9, 2005, the District convened a meeting of Student's IEP team. The IEP team reviewed the FAA by Dr. Mayer and the independent speech assessment conducted by Ms. Barnes. The District offered Student general education placement with RSP directed studies for one period daily, speech and language services for one and a half hours per week, and DIS counseling one 30-minute session per week. At that time, Student was participating in a social skills group provided by the school psychologist intern and the school counselor for one hour per week.

44. The IEP team relied on Dr. Mayer's FAA and developed a goal to help Student in the way he responds to the bullying and teasing he receives in school. The goal provided that Student will verbalize and use his decision making skills when problems arise and use strategies suggested in Dr. Mayer's report. Another social skills goal provides that Student will identify personal and peer space, contribute appropriate

comments, increase turn-taking, and begin to learn to read non-verbal cues to regulate behavior.

45. At the March 9, 2005, IEP meeting, the team also developed speech and language goals based on Ms. Barnes' speech report. The District offered Student LAS based on the report from Ms. Barnes that showed Student would benefit from having the speech pathologist working with him in the areas of reading verbal and non-verbal cues and semantics, because these are all part of social skills.

46. At the March 2005 IEP, the IEP team discussed the fact that sometimes Student needs the teacher to stay with him while he works on academic problems. When Student does not know how to work on a particular academic problem, he gets frustrated. Student's teacher was concerned about having the time to work with Student independently. The IEP team knew that Student receives outside tutoring for one and a half hours a day, five days a week. The evidence showed that, at the March 2005 IEP meeting, the District knew that Student required one-to-one attention from the teacher and did not provide the Student with one-to-one academic support. Instead, the District depended on the Parents to provide academic tutoring in order to maintain his academic performance.

47. Student's Parents were in attendance at the March 2005 IEP meeting; however, they did not consent to the IEP, because they had concerns with the LAS goals and objectives. Specifically, Mother believed that the percentages stated in the goals needed to be modified. Mother discussed this issue with the District's director of special education and the speech therapist. The District agreed to revise the goals and objectives. However, the District did not present the Parents with a revised and final version of the IEP for their consent and signature.

48. On June 6, 2005, after exiting the school bus, two boys hit and kicked Student and left him at a dumpster behind a real estate office. One of the real estate

agents in the office found Student and took him home. Mother reported the incident to the police and the school. The District expelled one of the assailants from riding the school bus and suspended both boys from school.

Shortly after this incident, a female peer defaced Student's yearbook by writing in his yearbook "you are such an asshole! I hate you so much! You really need to go and #\$\$%& your mom! Fag!" Mother was angry that Student had to receive what she saw as vile and humiliating treatment at school. Mother told the school that the District had failed to protect Student from bullying and harassment. The principal offered to repair the yearbook and the female peer covered up her offensive writing. However, Mother was more concerned with the emotional damage the peer's words caused Student. This episode highlighted to the Parents what they saw as the devastating amount of pain and suffering Student carried with him as he continued to struggle to get through the days at school. She noted that Student's emotional turmoil had been debilitating at times, many times ending in Student's pleas to stay home from school in order to avoid the teasing, hitting and name calling. On June 17, 2004, the principal informed Mother that she had punished the girl severely. The principal told Mother that she was not sure what else Mother wished her to do, because the principal had already suspended 14 students who had harassed Student.

2005-2006 SCHOOL YEAR

49. For the current 2005-2006 school year, Student is an eighth grader at La Canada Junior High School. While the number of incidents of bullying has decreased during the current school year, peers continue to tease and bully him.

On the first day of school on August 30, 2005, Student was hit by a senior on the school bus. Two eighth grade students paid the senior to "hit" or "mess up" Student. Both boys were counseled, given detention, and wrote apology letters to Student. The

principal warned the two students that suspensions would be issued for future transgressions.

A few days later, a male peer followed Student around and called him names ("stupid," "nerd," "stupid Jew," "big nose"), touched the Student's belongings, kicked Student's gym clothes around, and pushed Student during P.E. Later in the same month, on or about September 9, 2005, Student went home and had an emotional breakdown due to the frustration of having other students tease him on a daily basis. His peers had taken his P.E. clothes and thrown them on the floor, kicked his tennis shoes around, and opened his locker, and threatened to take Student's belongings. Student yelled at them "[s]top!" hoping someone could hear but, there was no response.

50. Less than a month later, on October 4, 2005, when Student was on the school bus, a student came over and sat next to Student and began harassing him by saying derogatory things about his mother and also teasing Student about being homosexual. A ninth grader told Student that he should handle his own problems and accused Student of getting one of the boys involved in the June 2005 beating incident expelled from riding the school bus.

51. On or about January 25, 2006, Student went home and was acting strange. He told Mother that he was tired of his peers teasing and bullying him, but when they made horrible remarks about his mother, it really made Student angry and depressed. At around the same time, Student was accosted and threatened with a beating while he was in line to get on the school bus. If it had not been for the school bus driver being there and intervening, Student would have had to hit back in order to defend himself. Ms. Sinnette, the principal, assured the Parents that she would speak to the other student involved and would also ask the bus driver to keep a close watch to make sure Student is not hit again.

52. In addition to privately funding visits with psychologists to address the emotional impact of the bullying and harassment, Student's Parents have provided him with outside tutoring since the fifth grade. As set forth in the December 2003 settlement agreement, the District funded academic tutoring through January 2004; however, Parents continued funding the tutoring after January 2004. Student expends so much emotional focus and energy defending himself from bullying that, without tutoring, he would not keep on track academically. Parents persuasively testified that, through the academic tutoring, Student has been able to keep up with his peers academically. Parents believe that if Student is able to keep his grades up, his peers and teachers will be able to include Student in the classroom and school as opposed to having to also address his academic needs if he were to fall behind.

53. In addition to tutoring, Parents have provided Student with specialized summer camp programs to help him with his communication and social skills. The Parents first sent Student to Super Camp in 2004 and they discovered that the students in Super Camp were not functioning at the same level as Student. The Parents then searched out other camps that would appropriately address Student's social and academic needs. The Parents placed Student at the summer camps because they were trying to support his academic learning. At these camps, the Student received one-to-one academic tutoring and participated in group learning activities such as role playing to practice social skills.

The Parents have also had Student evaluated at the Lindamood-Bell program. However, they have not provided Student with this program, because it would require Student to miss school for a few weeks.

54. As a result of the constant bullying and harassment, Student sometimes has emotional breakdowns when he returns home from school. It takes Mother an hour and a half holding Student to soothe him as he cries. Student is sometimes afraid to

bullying incidents, because his peers already call him a “tattle tale” and think of him as “an idiot”. During the current academic year, Student has been able to establish a relationship with the principal. He trusts her enough to tell her of some of the incidents of bullying and abuse taking place in school.

55. In addition to the depression and anxiety caused by the bullying, Student has suffered a loss of self-esteem. Sometimes Student would say to his parents that maybe he should be dead because no one wants his “germs” or wants to touch him at school. Recently, Student’s emotional response to the teasing and bullying has turned into anger. Student is older now and his peers have discovered that, if they verbally tease Student about his mother, Student gets greatly upset. This, in turn, angers Student. Recently, on a school field trip to San Diego, some peers threatened to throw Student out of a third story balcony. The Principal spoke with the peers. This year Student is more afraid and angry more than in the past. The daily incidents of bullying happened throughout the 2003-2004, 2004-2005 and have continued in the current school year. Student is an easy target of bullying and harassment. The number of incidents has decreased this year and Student is not reporting incidents daily. The incidents are occurring once every two or three days. The Parents attribute the decrease of the bullying incidents to the principal at La Canada Junior High School. During the current school year, the principal walks around the campus to make sure that no inappropriate conduct is taking place.

56. As a result of the chronic bullying and teasing, Student has been diagnosed with anxiety and depression. His Parents have taken Student to a child psychiatrist, Dr. Leonard Baker, who has evaluated Student and seen him on a number of follow up visits since 2004. Due to the increase in Student’s anxiety and depression from the teasing at school, Dr. Baker prescribed Student anti-depressant medication. Instead of having Student take the anti-depressant, the Parents have provided him with

individual counseling sessions with psychologists who have seen Student regularly in order to assist him and his family in addressing his anxiety and fears about going to school.

In order to address Student's self-esteem and anxiety related to the teasing and bullying at school, Parents have provided Student with private therapy. For a short while, Student saw two psychologists, Dr. Kessler and Dr. Rosen. Student saw Dr. Rosen on Saturdays and Dr. Kessler on Wednesdays in order to maintain his school work and remaining emotionally and psychologically stable.

Dr. Kessler helped Student to deal with the emotional frustration, depression, and anxiety that Student felt as a result of the bullying. Dr. Rosen helped to address Student's anxiety about school and about the teasing and bullying he received from his peers. Dr. Rosen informed Parents that the bullying and harassment could lead to depression. After the weekly therapy session with Student, Dr. Rosen also met with Mother and discussed what Mother can do at home to support the strategies that Dr. Rosen presented to Student during the therapy sessions. Already, Dr. Baker had recommended that Student take anti-depressant medication.

LEGAL CONCLUSIONS

1. Under both State law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a Free Appropriate Public Education (FAPE). (20 U.S.C. §1400; Ed. Code, § 56000.) The term "Free Appropriate Public Education" means special education and related services that are available to the student at no cost to the parents, that meet the State educational standards, and that conform to the student's Individualized Education Program (IEP). (20 U.S.C. § 1401(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).)

Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term “related services” includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (2 U.S.C. § 1401(26).) California Education Code section 56363, subdivision (a), similarly provides that designated instruction and services (DIS), California’s term for related services, shall be provided “when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program.” These services include psychological services. (Ed. Code, § 56363, subd. (b).)

2. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student’s IEP must be reasonably calculated to provide the student with some educational benefit, but that 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. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a “basic floor of opportunity” that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

Federal special education law requires states to establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which he is entitled and that parents are involved in the formulation of the student’s educational program. (*W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483.) The Supreme Court in *Rowley* also recognized the

importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at p. 1484.) Procedural violations may constitute a denial of FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parent's opportunity to participate in the IEP process.

3. Therefore, the inquiry under the IDEA is twofold. The first question is whether the school district has complied with the procedures set forth in the IDEA. The second is whether the IEP developed through the IDEA's procedures is reasonably calculated to enable the student to receive an educational benefit. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of the District's proposed program. If the District's program was designed to address Petitioner's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then District provided a FAPE, even if Petitioner's parent preferred another program and even if his parent's preferred program would have resulted in greater educational benefit. The District was also required to provide Petitioner with a program which educated him in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of her disabilities was such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.) Therefore, under the IDEA and *Rowley*, the program the District offered must have met the following four requirements to be have constituted an appropriate educational program for Student: (1) be designed to meet his educational needs; (2) be reasonably calculated to provide him some educational benefit; (3) comported with his IEP; and (4) provided him an education in the least restrictive environment.

ISSUE I: DID THE DISTRICT FAIL TO ADDRESS THE BULLYING AND TEASING OF STUDENT SUCH THAT IT DENIED HIM A FAPE SINCE FEBRUARY 2, 2003?

4. Petitioner alleges that the District has denied Student a FAPE by not addressing the bullying, teasing and harassment to which Student has been subjected. The District contends that it investigated every incident of bullying and punished the peers who were teasing and bullying Student.

5. There is no dispute that Student is a polite and bright boy. Also, it is undisputed that, due to his disability, Student has a lack of impulse control, is unable to read social cues, and has difficulty with peer relationships. The District does not dispute the fact that Student has been subjected to teasing, harassment, and bullying. Student's Parents have been providing him with intensive academic tutoring and ongoing psychological counseling in order to make sure that despite the chronic bullying, Student can maintain his academic work.

6. Educational benefit is not measured only by grades and scores on standardized tests. (*Seattle School District No. 1 v. B.S.* (9th Cir 1996) 82 F3d 1493, 1500.) The term "unique educational needs" shall "be broadly construed to include the handicapped child's academic, social, health, emotional, communicative, physical and vocational needs." (*Ibid.*, citing R.Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

In *M.L. v. Federal Way School District* (9th Cir. 2005) 394 F.3d 634, the Ninth Circuit Court of Appeals addressed whether a pupil who was subject to teasing was denied a FAPE. The Court noted that neither the IDEA nor any court has directly addressed the question whether unremedied teasing can constitute a denial of FAPE. The Court then referred to a Seventh Circuit Court of Appeals decision holding that "'at least in principle relief is available under the IDEA' when a teacher invited her pupils to express their complaints about a disabled student which led to humiliation, fistfights, mistrust, loss of confidence and self-esteem, and disruption of his educational progress."

(*Cf. Charlie F. ex rel. Niel F. v. Bd. Of Educ.* (7th Cir 1996) 98 F3d 989, 993.) In *M.L. v. Federal Way School District*, the Ninth Circuit Court of Appeals held that by removing the pupil from his school after only five days, the parents failed to give the District a reasonable opportunity to find a way to prevent the other students from teasing the pupil.

7. As set forth in Factual Findings 32 and 55, the evidence established that Student has low self-esteem. He has pleaded with his Parents not to go to school and be subjected to more bullying and teasing. As a direct result of the emotional difficulties caused by the constant bullying and teasing, Student's doctor has recommended that he take anti-depressant medication. See Factual Findings 35 and 56. He has had to seek the help of a psychologist and psychiatrist as well as educational tutors in order to maintain his emotional balance and his grades. Student has made comments such as he should be dead, because no one wants his germs at school. Given Student's willingness to perform well and his cognitive abilities, Student has been able to maintain his grades due to the outside help that his Parents have provided him. See Factual Finding 36. However, the District has completely failed to prevent the bullying and teasing and has failed to address his social skills needs. As a result, Student has developed new areas of concern, such as anxiety and depression due to the emotional harm caused by the chronic bullying and teasing.

8. The District asserts that it is due to Student's own behaviors that he has been teased. The District points to the very needs of Student, his inability to respect the others' space, his lack of impulse control and his inability to read other's cues, as the reason for the bullying. See Factual Findings 11 and 12. This belies the District's failure in addressing Student's primary needs in social interaction, social skills, and pragmatic communication skills. The District addressed the bullying only after bullying incidents occurred and only after Student sustained more emotional damage and trauma. The

District has not taken any adequate measures to prevent bullying from happening. It only implemented one of Dr. Mayer's school-wide recommendations by having Dr. Mayer provide one short in-service to its staff. The District has failed to address Student's emotional issues. After abruptly terminating Student's social skills program at Education Spectrum, the District also failed to properly address Student's social skills needs. The evidence established that Student continues to have needs in the area of social skills and that he would continue to benefit from social skills training.

9. As set forth in Factual Findings 3 and 31, the District knew that the bullying and teasing occurred while Student was at recess, lunch, on the school bus, on the playground or at other unsupervised and unstructured times, such as the P.E. class. The Parents asked the District to provide appropriate supervision at those times when the bullying was more likely to take place. With adequate supervision, the District could have prevented up to eleven other students teasing and bullying Student. The District knew that Student was an easy target for bullying, yet it did not offer any additional support or supervision to prevent the bullying. Only in the current academic year has the District, through the efforts of the principal, taken some minimal measures in addressing the prevention of bullying. For example, the principal has been walking around the campus to make sure that no inappropriate acts are taking place. The ALJ finds that Student has made de minimis progress, largely due to the emotional harm he has suffered as a result of the daily bullying and teasing.

As set forth in Factual Findings 56 and 56, the ALJ finds that, due to the fact that the District has not prevented the chronic bullying and teasing directed toward Student, Student suffered harm and did not benefit from his education. Accordingly, the District has not provided Student with a FAPE .

ISSUE II(A): DID THE DISTRICT FAIL TO PROVIDE STUDENT WITH A FAPE SINCE DECEMBER 2, 2003, BY FAILING TO IDENTIFY AND ADDRESS STUDENT'S NEEDS?

11. Petitioner alleges that the District failed to design a program to meet all of the Student's needs because it failed to adequately identify all of Student's needs, including visual processing deficits, written language deficits, ADHD combined type, depressive disorder, possible anxiety disorder, and possible auditory processing deficits. The District contends that it has identified Student's needs and has designed a program that would meet those needs.

12. A local educational agency must assess a special education student in all areas related to his suspected disability, including the student's social and emotional status. (Ed. Code, § 56320, subd. (f).) An evaluation must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the eligibility category of the student. The school district must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the student. The school district must use assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the student. (34 C.F.R. § 300.532(h), (i), & (j).) In addition, the school district must use a variety of assessment tools and strategies to gather both relevant functional and developmental information about the child, including information provided by the parent. (34 C.F.R. § 300.532(a), (b), (g), (h), (i), and (j).)

AUDITORY PROCESSING

13. The February 28, 2005, independent speech assessment conducted by Suzanne Barnes states that although Student's overall auditory processing score fell within the low average range, his performance on several of the subtests indicates a moderate auditory memory and processing disorder. Student scored in the 70th

percentile in the Expressive One-Word Picture Vocabulary test, indicating that his performance was approximately two years above his chronological age. However, on the Receptive One-Word Picture Vocabulary Test Student scored in the 34th, indicating that his performance was approximately 1 year and 4 months below his chronological age. As set forth in Factual Findings 15, 39, and 40, Student exhibits auditory processing issues and the District has not assessed Student in this area.

14. The District asserts that, when pressed by Petitioner's parents to explore Student's needs in the related to auditory processing, the District offered to conduct a Central Auditory Processing Disorder assessment. The District contends that to date, Parents have not provided their consent to that assessment. Mother maintains that the reason Petitioner's parents did not consent to the assessment is due to the District's failure to provide Parents with information regarding the qualifications of the evaluator the District recommended.

15. The independent speech and language assessment by Ms. Barnes establishes that Student's auditory processing is an area of concern. The ALJ determines that the District did not assess Student in all areas of his suspected disability, specifically in the area of auditory processing.

ANXIETY AND DEPRESSION

16. Dr. Baker, psychologist, began seeing Student in March 2004, and by then Student had been diagnosed with depression. As a result of the impact of the bullying and teasing, Student became anxious and discouraged, prompting Dr. Baker to prescribe him medication for his anxiety. Student's emotional and the underlying social and behavior concerns were not new information for the District. Even in its own triennial evaluation conducted in 2001, the District stated: "[D]ue to reported emotional social and behavior concerns, parents may wish to continue Student's individual therapy, as this appears to be beneficial to him."

17. The testimony of the school psychologist, Ms. Mispagel, that there were no concerns related to anxiety is not persuasive. As part of the 2004 triennial assessment, Ms. Mispagel administered the Achenbach Behavior Rating Scale, which was completed by Student. She also provided the Behavior Evaluation Scale, which was completed by Student's teachers and by Mother. Ms. Mispagel testified that Student's scores fell within the average scale, except for social problems (getting teased a lot and not being liked by others) and semantic complaints – where Student complained of physical anomalies like being tired, his stomach hurting. As set forth in Factual Findings 55 and 56, Student's areas of need included the anxiety and depression brought on by the chronic bullying and teasing.

18. Therefore, the ALJ determines that the District did not address Student's emotional needs, including the anxiety and depression, which resulted from the bullying and teasing at school.

VISUAL PROCESSING, WRITTEN LANGUAGE, AND ADHD

19. As set forth in Factual Finding 14 and 19, Petitioner did not present any evidence regarding visual processing and written language deficits that were not identified or addressed. Student's IEPs included objectives to address his writing deficit. Furthermore, as set forth in Factual Finding 22, the evidence did not support Petitioner's contention that the District failed to adequately identify Student's needs related to his ADHD.

ISSUE II(B): DID THE DISTRICT FAIL TO PROVIDE STUDENT WITH A FAPE SINCE DECEMBER 2, 2003, BY FAILING TO PROVIDE STUDENT A MENTOR PROGRAM AND COUNSELING AS PROMISED IN HIS IEP?

20. At the hearing in this matter, Petitioner contended that the District denied Student a FAPE since December 2003 by failing to provide services it had promised.

Specifically, Parents allege that the District offered Student a mentor program, where an older student would be paired up with Student to support Student with his social difficulties.

21. Sometime in the 2004-2005 school year, Mother and the District's director of special education discussed a mentor program. Once the IEP team develops an IEP and the parents consent to the IEP, the school district must implement the IEP as soon as possible. (Cal. Code Regs., tit. 5, § 3040, subd. (a).) However, the District did not offer Student a mentor program in any of his IEPs. The evidence did not establish that the District offered Student the mentor program as part of its obligation to provide Student a FAPE. Since Student's IEPs do not specifically state that the District would provide Student with a mentor program, the ALJ finds that the District did not deny Student a FAPE by failing to provide him with a mentor program.

22. As to the allegation that the District failed to provide Student with counseling services, Petitioner did not present any evidence on this issue.

ISSUE II(C): DID THE DISTRICT FAIL TO PROVIDE STUDENT WITH A FAPE SINCE DECEMBER 2, 2003, BY EMPLOYING TEACHERS AND STAFF WHO HAVE NOT HAD THE EDUCATION OR ABILITY TO RESPOND TO STUDENT'S NEEDS?

23. Petitioner contended that District staff and teachers did not have the education or the ability to respond to Student's needs. Petitioner did not present sufficient evidence to prove this allegation.

ISSUE II(D): DID THE DISTRICT FAIL TO PROVIDE STUDENT WITH A FAPE SINCE DECEMBER 2, 2003, BY COMMITTING PROCEDURAL VIOLATIONS?

PRIOR WRITTEN NOTICE

24. Petitioner contended that when the District dismissed Student from LAS in March 2004, it did not provide the Parents with prior written notice. The District asserted

that since Ms. Wullschlager's assessment results and the District's determination to terminate speech therapy were discussed at the March 2004 IEP meetings, it was not required to provide a separate written notice to the Parents.

25. The Supreme Court in *Rowley* recognized the importance of adherence to the procedural requirements of the IDEA. (*Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 201.) Federal special education law requires states to establish certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled and that parents are involved in the formulation of the student's educational program. (*W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483.)

Procedural errors on the part of the District that seriously infringe on the parent's opportunity to participate in the IEP process or that result in the loss of educational opportunity to the student may result in the denial of FAPE. (*Id.* at 1483-1484.) One of the procedural rights afforded to parents of students with disabilities is written prior notice when the district proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a FAPE. (20 U.S.C. § 1415(b)(3)(A) and (B).)

A school district is required to provide written prior notice to the parents of a child with a disability when it proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3).)

26. In this case, Student's March 2004 annual IEP meeting began on March 2, 2004. The meeting was continued on March 11, 2004 and it finally concluded on March 17, 2004, when Father consented to the IEP. At the IEP meeting, the IEP team reviewed the results of Student's assessments, including the speech and language assessment conducted by Ms. Wullschlager. As set forth in Factual Finding 23, Parents participated

in the IEP, and Father consented to the IEP. Petitioner did not establish that he was denied a FAPE due to the District's failure to provide Parents with prior written notice of its decision to terminate Student's speech therapy.

MEASURABLE GOALS AND OBJECTIVES

27. At the hearing in this matter, Student contended that the goals and objectives in Student's April 2003 and March 2004 IEPs were not measurable. Special education law requires that an IEP contain, among other things, the present levels of a student's performance, including how the pupil's disability affects the pupil's involvement and progress in the general curriculum, and measurable annual goals, including benchmarks or short-term objectives related to meeting the student's needs that result from the student's disability to enable the pupil to be involved and progress in the general curriculum. (Cal. Ed. Code, § 56345, subd. (a).) The purpose of short-term objectives or benchmarks is to provide a mechanism for a child's teachers and parents to monitor the child's progress – or lack thereof – in special education over the course of the year. (34 C.F.R. § 300, Appendix A to Part 300 of the Federal Regulations.)

28. The April 2003 IEP contained six goals. The math goal provides: "[I]mprove skills for class work and long term assignments." The baseline for the goal provides: "[D]ifficulty understanding math concepts and successfully doing math work." The objectives for this goal address the ability to solve problems involving addition, subtraction, multiplication, and division and explain why a particular operation was used for a given situation 4 out of 5 times. The ALJ determines that, while the objectives are measurable, the baseline and the goal are not measurable. The issues for this hearing were limited to claims arising after December 2, 2003. Therefore, the ALJ's determination regarding the inadequacy of the April 2003 IEP only applies to the time period from December 2, 2003.

29. The March 2004 IEP contains four goals. Student's social goal provides that Student "will improve peer interactions." The baseline or current of level of performance provides that Student "has difficulty regulating his behavior with peers." One of the objectives for this goal provides: "[I]n peer situations, [Student] will participate in a game/activity using appropriate personal space and social language in 3 out of 5 opportunities." The ALJ finds that while the objectives for this goal are measurable, the baseline and the goal itself are not measurable.

30. The ALJ concludes that the lack of accurate baseline information and measurable goals were not de minimis errors. It is unclear how the IEP team could have adequately tracked progress.

ISSUE III: DID THE DISTRICT INAPPROPRIATELY DETERMINE THAT STUDENT WAS NO LONGER ELIGIBLE FOR LANGUAGE AND SPEECH SERVICES AT THE MARCH 2, 2004, IEP MEETING?

31. Petitioner contends that the District inappropriately determined that Student was no longer eligible for language and speech services at the March 2004 IEP. The District asserts that it appropriately assessed Student in the area of speech and language and the fact that Student was again found eligible for speech and language services is not inconsistent with that determination.

32. In Ms. Wullschlager's opinion, the fact that about one year after she found Student did not need speech and language therapy, an independent evaluator found Student eligible did not affect the accuracy of her evaluation. In Ms. Wullschlager's opinion, at the time she administered the tests, assessment results were accurate and that she had administered the appropriate tests to Student. Ms. Wullschlager believed that the test results were valid. The ALJ determines Ms. Wullschlager's testimony in this area was persuasive and credible.

33. The evidence did not establish that the District's February 2004 speech and language assessment was inappropriate. After the District's assessment, the March 2004 IEP team discussed the assessment and determined that Student would not receive speech and language therapy. Father initially consented to the IEP. Once the District was informed of Father's revocation of his consent, the District began providing Student with speech therapy.

34. Since then, the District funded a speech and language independent assessment conducted by Ms. Barnes. The March 2005 IEP team accepted the Barnes' assessment report and relied on it to develop goals and objectives, because it found that Student would benefit from having the speech pathologist work with him on reading verbal and non verbal cues and semantics because semantics and pragmatics are part of social skills. At the March 9, 2005 IEP meeting, based on the Barnes' speech assessment report, the District agreed to provide speech and language services.

MISSED LAS SESSIONS

35. As set forth in Factual Finding 17, at the hearing in this matter, it was established that Student missed eight consecutive sessions of speech therapy from November 20, 2003 to February 4, 2004. The evidence established that one of the manifestations of the Student's disability is that he has difficulties with memory. Yet, the District expected that any student from the second grade on would have to remember to go to their speech therapy sessions. Even after Student missed eight consecutive speech therapy sessions while he was attending Paradise Canyon, none of the District staff or teachers took any steps to address his absences from speech therapy. No one contacted or informed Student's parents that he had missed the sessions. Ms. Wullschlager testified that she was ready to provide Student with his speech therapy sessions and that Student simply missed those sessions. She testified that there was nothing to indicate to her that if left to his own devices Student would not go to the

speech therapy sessions. In light of the evidence regarding Student's memory problems, this testimony is not credible. As set forth in Factual Finding 3, the evidence established that Student forgets things and needs to be prompted and reminded.

36. Given Student's disability and needs, the District inappropriately assumed that Student would be able to remember and attend his speech therapy sessions. Student's main areas of deficit are his social skills and his deficits in perceptive language, his inability to read social cues and use pragmatic speech. Missing eight speech therapy sessions denied Student a FAPE because he was not able to improve his social skills and pragmatic communication skills. Student's Parents continued to provide Student with daily tutoring by tutors experienced in teaching pupils diagnosed with ADHD. The Parents continued to provide Student with social skills at Education Spectrum. It is due to these outside services that Student's skills have not deteriorated any further.

ISSUE IV: REMEDIES

37. Petitioner requested that, as a remedy for the District's denial of FAPE, the District do the following:

- (a) Provide Student with a mentor program;
- (b) Provide school staff with in-service regarding how to address needs of Students diagnosed with ADHD;
- (c) Reimburse Parents for costs of specialized camps, academic tutoring, social skills training from Education Spectrum, psychological counseling and therapy, and educational advocacy they obtained for Student.

38. Parents may be entitled to appropriate relief, including reimbursement for the costs of placement or services that they have independently procured for their child, when the school district has failed to provide a FAPE and the private placement or services are determined to be proper under IDEA and are reasonably calculated to provide educational benefit to the child. (*School Committee of the Town of Burlington v.*

Department of Education (1985) 471 U.S. 359, 369, 105 S. Ct. 1996; *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F. 3d 1489, 1496.)

In *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 13, 113 S.Ct. 361, the Supreme Court specifically exempted parents from having to meet certain requirements of the IDEA in their unilateral placements. For example, parents are not required to conform their unilateral placement to the content of the student's IEP or provide a placement that is certified by the state. (*Ibid.*) The Court has recognized that the parents' placement does not have to meet a standard as high as a school district's must meet; however, the parents' placement must still meet other requirements of the IDEA, such as providing a placement that addresses the student's needs and provides the student educational benefit. *Id.*

39. The evidence established that Student received educational benefit from the social skills training, psychological counseling, specialized camp, and tutoring obtained and paid for by Parents.

40. The ALJ determines that Parents are entitled to reimbursement for the following:

- (a) specialized camp costs accrued after December 2, 2003, at Super Camp for the session from July 25, 2004, through August 3, 2004, at \$2,195.00; SOAR camping program for the Summer of 2005 at \$2,150.00; and Wilshire Boulevard Temple Camps for the session from June 22, 2005, through July 10, 2005, at \$3,075.00;
- (b) academic tutoring costs accrued after January 2004;
- (c) social skills training provided by Education Spectrum after May 2004; and
- (d) psychological counseling and therapy provided by Dr. Rosen and Dr. Kessler after December 2, 2003.

41. Petitioner did not establish that he is entitled to the following: mentor program, in-service for school staff regarding how to address the needs of Students

diagnosed with ADHD, and any costs accrued before December 2, 2003. In addition, the ALJ determines that Parents are not entitled to reimbursement for costs of retaining an educational advocate. Parents are entitled to obtain only attorney's fees if they prevail in the due process hearing. (20 U.S.C. § 1415 (i)(B).) An educational advocate is not an attorney. Therefore, Petitioner's request for reimbursement for advocacy services provided by an educational advocate is denied.

PREVAILING PARTY

Pursuant to California Education Code § 56507(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 the statute:

- Issue I: The Student prevailed.
- Issue II (a): The Student partially prevailed on this issue.
- Issue II (b): The District prevailed.
- Issue II (c): The District prevailed.
- Issue II (d): The Student partially prevailed on this issue.
- Issue III: The District partially prevailed on this issue.
- Issue IV: The Student prevailed.

ORDER

1. Within 30 calendar days from the date of this Decision, the District shall convene an IEP meeting in order for the IEP team to select a mutually agreed upon non-public-agency to provide Student with social skills training.
2. Within 30 calendar days from the date of this Decision, the District shall convene an IEP meeting in order for the IEP team to select a mutually agreed upon independent assessor to conduct a Central Auditory Processing Disorder. Following the

completion of the independent assessment, the District shall pay for the attendance of the independent assessor at an IEP at Student's school of attendance.²

3. Within 30 calendar days from the date of this Decision, the District shall convene an IEP meeting in order to select a mutually agreed upon non-public-agency to provide Student with eight 30-minute sessions of speech and language therapy. The District shall arrange for and pay all necessary fees and transportation costs in relation to the eight sessions of speech and language therapy.

4. Within 30 calendar days from receipt of invoice and cancelled check(s), the District shall reimburse Parents for their expenses as follows:

- (a) specialized camp costs accrued after December 2, 2003, at Super Camp for the session from July 25, 2004, through August 3, 2004, at \$2,195.00; SOAR camping program for the Summer of 2005 at \$2,150.00; and Wilshire Boulevard Temple Camps for the session from June 22, 2005, through July 10, 2005, at \$3,075.00;
- (b) academic tutoring costs accrued after January 2004;
- (c) social skills training provided by Education Spectrum after May 2004; and
- (d) psychological counseling and therapy provided by Dr. Rosen and Dr. Kessler after December 2, 2003.

RIGHT TO APPEAL THIS DECISION

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

² California special education law requires that the IEP required as a result of an assessment of a pupil shall be developed within a total time not to exceed 60 days from the date of receipt of the parent's written consent for assessment, unless the parent agrees, in writing, to an extension. (Ed. Code § 56344.)

DATED: April 11, 2006

Anahid Hoonanian
Administrative Law Judge
Office of Administrative Hearings
Special Education Division