

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

In the Matter of:

STUDENT,

Petitioner,

v.

DOWNEY UNIFIED SCHOOL DISTRICT,

Respondent.

OAH NO. N 2005100822

DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings, in Downey on February 9 - 10 and March 9 - 10, 2006.

Petitioner student was represented by David Kim, Attorney at Law, of Adams ESQ. Respondent Downey Unified School District was represented by Eric Bathen, Attorney at Law. Petitioner's parents were present during the hearing and the mother was provided the services of an interpreter.

Petitioner filed a Request for Due Process Hearing with the Office of Administrative Hearings, Special Education Division, on October 24, 2005. Petitioner's counsel requested a due process hearing and a Spanish language interpreter for the proceedings. On November 18, 2005, OAH scheduled a telephonic trial setting conference and issued a Notice of Telephonic Trial Setting Conference to the parties. On December 6, 2005, a trial setting conference was held and the

hearing on the due process complaint was ordered to begin for four days beginning on February 7, 2006. On January 27, 2006, a prehearing conference was held with the parties. On February 7, 2006, which was to be the first scheduled day of the hearing, the parties stipulated to a continuance and the hearing was continued for two days. The hearing commenced on February 9, 2006.

During the hearing, petitioner presented the testimony of the father and educational psychologist Delaina A. Martinez. Respondent presented the testimony of administrator and speech and language specialist Barbara Tucker, Principal Teresa Helen Ford, and special education director Paul K. Halbmier. Documentary evidence of the parties was admitted into evidence.

At the conclusion of the hearing on March 10, 2006, the parties waived statutory deadlines for issuance of a decision and the matter was continued for the parties to file written argument. On March 21, 2006, respondent filed a Motion to Supplement Evidence and requested that the Individualized Education Program dated March 20, 2006, be marked and admitted to evidence as District's Exhibit 41. On March 27, 2006, petitioner filed an opposition which was marked as Exhibit CC31. The Administrative Law Judge overrules petitioner's objection and admits into evidence respondent's Exhibit 41 for the limited purpose of discerning an appropriate resolution and order for this matter, if applicable.

On March 24, 2006, respondent filed its Closing Brief which was marked as District's Exhibit 42. On March 24, 2006, petitioner filed his Closing Brief which was marked as petitioner's Exhibit CC32.

Oral, documentary, and stipulated evidence having been received and written argument considered, the Administrative Law Judge finds as follows:

## ISSUES

The issues presented for decision in this due process matter are as follows:

1. Did respondent school district deny the student a free and appropriate public education in the 2002-2003, 2003-2004, and 2004-2005 school years by failing to design an educational program to meet his unique needs;
2. Did respondent school district deny the student a free and appropriate public education by failing to conduct assessments of student in all areas of suspected disability;
3. Did respondent school district deny the student a free appropriate public education by failing to provide services that comported with his March 2004 and/or March 2005 individual educational programs;
4. Did respondent school district commit a procedural error or deny the student a free and appropriate education by suspending him for more than ten days without conducting a manifestation determination review;
5. Did respondent school district violate the parents' procedural rights by failing to provide copies of the student's educational records, by failing to give prior written notice of a change in the student's March 2005 individual educational program, or by failing to provide copies of individual education programs in the parents' native language of Spanish; and
6. Is petitioner entitled to reimbursement for a private psychoeducational assessment.

## FACTUAL FINDINGS

1. Petitioner (hereinafter student) is a ten-year child who lives with his parents, younger brother, and grandparents in Downey. The student is a fifth grade pupil at Rio San Gabriel Elementary School which is within the Downey Unified School District (school district). He has been a pupil in the school district since in or

about April 1999 and is eligible for special education and services based on a diagnosis of an autism-like condition.

2. (A) In November 1998, a clinical psychologist diagnosed the student with autism. In December 1998, a physician from the Stramski Child Development Center at the Long Beach Memorial Hospital found that the student had autism with severe expressive and receptive language delays.

(B) In or about June 1998, the student was found by the school district to be eligible for special education under the category of an autism-like condition and he began attending a preschool early intervention program. In June 1999, he began receiving designated instructional services (DIS) for adaptive physical education. In the fall of 1999, he started attending kindergarten in a special day class within the school district. In June 2002, the student began receiving DIS in occupational therapy.

(C) The student's father was born in Cuba. He immigrated to this country as a youngster and attended high school here. After high school, he enlisted in the U.S. Navy and, while serving in the military, he became more proficient in English. He speaks both English and Spanish. The student's mother is from Honduras where she attended college and was teacher. She speaks Spanish. At home, the family speaks both languages but the primary language is Spanish. The student speaks and is spoken to in both languages. His younger brother, who has also been diagnosed with autism, uses primarily English. The grandparents speak Spanish.

#### PRIOR SCHOOL YEARS

3. (A) On March 28, 2000, the school district held an annual individualized education plan (IEP) meeting to review the student's accomplishments, develop goals and objectives, and discuss placement for the next school year. The student was five years old at the time and enrolled in a preschool special day class. In the

area of self-help, the student was able to drink from a cup and feed himself with a spoon but was not toilet trained. His teacher stated that strict, consistent toilet training had to be implemented at home. In the area of fine motor skills, the student was able to string beads and hold a pencil in his fingers but could not use scissors. As for his general knowledge, the student was able to name 11 body parts, match 11 colors, and match upper and lower case letters. He enjoyed looking at books. In math, he was able to count to and recognize numbers up to the numeral 20. The student met his objectives in adaptive physical education (PE). He was able to walk sideways and throw a ball overhead to a distance of six feet.

(B) At the March 2000 IEP meeting, the student's parents expressed concern about the student's aggressive behavior at home. The parents indicated they were going to receive behavioral training for the student at home from the regional center. According to the IEP document, school staff reported that his behavior at school was appropriate and the staff had not experienced any difficulty with the student hitting or pushing at school. However, the student's preschool special day class teacher reported that the student's behavior had improved quite a bit and his behavior was "no where near as it was when [he] first started." He still occasionally threw a chair or item if made to do something he did not want to do, such as obeying a time-out. The IEP team stated that the school would continue to monitor the student's behavior.

(C) Following the March 2000 IEP meeting, the school district determined that the student would be placed in a first grade special day class (also SDC) at an elementary school for the 2000-2001 school year. The school district continued providing him with adapted physical education services and transportation. The student was integrated with the general education student body for recess, lunch, assemblies, and other activities as deemed appropriate by his teacher.

4. On February 7, 2002, the school district convened an "addendum" IEP meeting to discuss occupational therapy (OT) services. The student was enrolled in first grade at Gallatin Elementary School and receiving DIS services in adapted PE and speech and language therapy. He had demonstrated difficulty in his visual motor skills as related to printing and he sought out vestibular input. An occupational therapist had evaluated the student and found that he had inefficient tactile and vestibular processing, delays in his fine motor and visual motor skills, and delays in his behavioral organization that directly affected his academic performance. Based on the OT evaluation, the school district began providing the student with once weekly OT group therapy for 50 minutes and once monthly OT consultative service for 50 minutes and set goals for OT. The OT services were to focus on improving the student's tactile and vestibular processing so that he could more fully participate and succeed in the classroom.

5. Two months later, on April 9, 2002, the school district held an annual IEP meeting for the student who was now a seven year old first grader in a special day class at Gallatin Elementary School. The student was found to benefit from the smaller class size, modified pacing, and structured activities of his special day class. His speech was primarily echolalic but he was able to express a few of his wants and needs. He continued to have difficulty with oral motor movements especially lifting his tongue to his palate. He traced his first name and read color words and number words from one to ten. He achieved his goals in adaptive PE. As result of this annual review meeting, the IEP team continued providing the student with speech and language therapy, adapted PE, OT group services, and OT consultative services along with general education access for lunch, recess, and assemblies. The parents were unable to attend this meeting but approved the IEP shortly thereafter.

## 2002-2003 SCHOOL YEAR

6. For the 2002-2003 school year, student was enrolled in a special day class at Gallatin Elementary School. His teacher was Hilary Gunsaulus. Student received speech and language therapy, adaptive physical education, and occupational therapy.

7. (A) On March 6, 2003, an occupational therapist from Gallagher Pediatric Therapy in Fullerton completed an Occupational Therapy Progress Report, noting that the student was receiving occupational therapy on a collaborative and consultative basis to monitor and improve his visual motor skills and vestibular sensory processing. Occupational therapy was being provided to Student in once weekly group sessions. The occupational therapist found that student had not met his goal of improved visual motor skills in that he was not copying or tracing geometric shapes at least 75 percent of the time. His teacher also reported that the student's writing was not altogether legible due to poor letter formation and he had difficulty staying within the boundaries of one-inch lined paper when printing. Student achieved his goal in vestibular activities by performing vestibular movements such as jumping or hopping in place in the classroom and running and swinging during recess. He engaged in group activities, including relay games, obstacle courses, and musical chairs, that provided vestibular input and improved his ability to maintain joint stability, posture, balance, motor control and stable visual field. He was able to sit and maintain his attention to "adult imposed activities" for ten to 15 minutes and responded well to verbal cues reminding him to stay on task.

(B) The occupational therapist determined that the student continued to experience mild delays in his visual motor skills. The occupational therapist recommended that he continue to receive OT services on a teacher and therapist consultative model, opining that this approach would enable his teacher and

occupational therapist to discuss and incorporate various strategies into his daily educational program and would facilitate the development of his visual motor skills.

8. (A) That same month, on March 13, 2003, the school district held a meeting to conduct an annual review of the student's IEP. The student's father attended this annual IEP meeting. The IEP team reviewed reports of the speech pathologist, occupational therapist, adapted PE specialist, and school psychologist. His special day class teacher discussed his progress in adaptive PE and classroom academic areas. The student's progress towards his goals was reviewed. His father indicated that he wanted to see his son read and talk more.

(B) In the area of speech and language, the IEP team learned that the student had made excellent progress in that he was able to imitate all consonant sounds and express two to three word combinations with the use of picture symbols. The speech pathologist recommended two new goals for the student in the area of comprehending and imitating sentences without using picture symbols. The occupational therapist reported that the student had been receiving OT services on a collaborative and consultative basis to monitor his visual motor skills and sensory processing. The IEP team established the OT goal that the student should improve his visual motor skills for academic work by being able to print letters and numbers legibly. In the area of adaptive PE, the IEP team heard that the student had accomplished some of his goals and objectives and set goals for the student to develop his motor skills with respect to dropping and catching a tennis ball and jumping rope.

(C) At the March 2003 annual IEP meeting, the special day class teacher reported that the student had made progress throughout the school year and had met or exceeded all of his classroom goals. He was able to write his first and last name, read 20s sight words consistently, read simple sentences, add using manipulatives up to sums of 14, order numbers through 100, and recognize coins.



New academic goals were developed in that the student read more sight words, subtract numbers using Touch Math or manipulatives, count coins, and work independently on tasks for increased minutes.

(D) As result of the March 2003 annual meeting, the IEP team continued the student's ongoing instructional program and services. He remained in a special day class and received DIS services in speech and language therapy, adaptive PE, and occupational therapy in both a once weekly group session and once monthly consultative basis. The special day class was more restrictive than a general education classroom but was smaller in size with only ten to 15 pupils and there was an aide in addition to the teacher. The student was also provided with extended school year programming. The parents consented to the program and services.

(E) On or about March 13, 2003, the school district represented that it would translate the IEP document into Spanish for the parents. However, the school district failed to translate the document and the parents did not receive a Spanish language version of the IEP.

#### 2003-2004 SCHOOL YEAR

9. For the 2003-2004 school year, student was enrolled in a third grade special day class at Gallatin Elementary School. His special day class teacher was Karen Lambert and he received DIS services in speech and language therapy, adaptive physical education, and occupational therapy. OT services were provided on a collaborative and consultative basis.

10. On September 15, 2003, the occupational therapist from Gallagher Pediatric Therapy completed a progress report. During the prior school year, the student's teacher had expressed concerns to the occupational therapist about his visual motor skills, particularly for writing tasks. The student was able to form numbers and letters but he had difficulty in writing correctly formed, sized, and

spaced numbers and letters and aligning them within the boundaries of lined paper. His writing was not legible and affected his performance on certain classroom tasks and activities. His teacher was given different strategies to increase student's legibility and printing, including visual cues, special lined paper, highlighting, and tracing, but the student demonstrated "very little, if any, progress in this area." As reported by the teacher, the student was using an awkward grasp to hold his pencil which contributed to his poor legibility in writing numbers and letters. In order to address the student's visual motor and fine motor delays, the occupational therapist recommended that the student's OT services be increased or changed to direct services on a once weekly basis for 30 minutes each session.

11. On September 18, 2003, the school district convened an IEP meeting to discuss the recommendation of the occupational therapist. Based on the student's slow progress in developing visual motor skills and his teacher's concerns for his poor performance in writing, the IEP team recommended that the student's OT services be increased or intensified from collaborative and consultative services to direct services. The school district thus implemented direct OT services for the student on a once weekly basis for 30 minutes each session and determined that the direct OT services should continue until the triennial assessment scheduled for March 2004. The IEP team also found that the student had not achieved his goal in OT that was developed earlier in the year at his March 2003 IEP and decided that the OT goal should be continued.

12. (A) On February 13, 2004, the student's adaptive physical education specialist administered the Test of Gross Motor Development to the student and wrote a Report of Teacher Assessment for his upcoming triennial evaluation. The specialist found that the student's gross motor skills were delayed. The student was able to gallop rhythmically by leading with his right foot but he slid sideways when leading with either foot. He was able to hop but did not swing his arms and non-

supporting leg in a pendulum fashion to increase force. He was able to jump horizontally but did not integrate his preparatory movement or arms into his jump. He could not perform jumping jacks or jump rope. The specialist also found that the student's object control skills were delayed. When batting, he could not contact a ball or grip the bat correctly. When throwing a tennis ball, the student did not use a proper wind-up, did not rotate his hips and shoulders, did not shift his weight, and did not perform a proper follow-through. The specialist opined that the student's physical education needs would be best met in a DIS adapted PE class.

13. (A) On March 3, 2004, a speech language pathologist for the school district completed a Triennial Speech and Language Evaluation of the student. The pathologist noted that both English and Spanish were spoken in the student's home. His father spoke both English and Spanish and his mother spoke only Spanish but the student was not fluent in either language. He used primarily English at school. The speech and language evaluation consisted of classroom observations, administration of standardized tests, informal measures, and parent and teacher input. The evaluation was conducted in English and focused on the student's social communication skills.

(B) During the standardized and informal testing, the student was cooperative, attentive, and followed simple directions. He repeatedly touched the pathologist's hand with one finger after every three or four items of testing. While being observed in the classroom, the student hit his teacher several times during a math lesson. In expressive language and communication, the student used verbal words, both spontaneous and echolalic, but his utterances were largely spontaneous. His running speech was difficult to understand and often unintelligible due, in part, to increased rate of speech. He used other means, such as gestures, gazing, tantrums, and crying, to communicate his wants and needs. At home, his parents reported that he communicated his protests by kicking and crying. In social

interaction, the student did not spontaneously greet people, had minimal verbal interaction with other students at school, displayed minimal eye contact, and did not initiate interactive play with other pupils. He did initiate hugs or soft finger touches with adults. His teacher reported that the student screamed as a warning to others and hit them if he was still upset. He would then feel sorry for hitting another person and initiate a hug. In the area of receptive language, the student was able to follow simple directions, answer questions with one or two words, and respond to his name. At home, he understood his parents if they repeated what they said. In the area of cognitive play skills, the student had difficulty sharing with others in the classroom without adult supervision and had a ritualized recess routine. He threw tantrums if unable to follow his routine. Periodically, he returned to an adult aide to touch her with one finger and would run and hit another pupil as soon as the bell rang to end recess. He liked certain activities and would throw tantrums if interrupted.

(C) Following her evaluation, the speech language pathologist reached the impression that the student had a severe language disorder. His articulation of single words had improved but he continued to speak rapidly in running speech such that some of what he said was unintelligible.

14. (A) In February 2004, an occupational therapist from Gallagher Pediatric Therapy completed a Triennial Assessment for the purpose of determining the student's current level of functioning. He had been receiving occupational therapy since February 2002. Based on classroom observations, the student displayed adequate or functional fine motor skills needed to succeed in his educational program. He switched between an awkward but functional four-finger grip and a static tripod grasp when using writing instruments and used a mature pincer grasp on small objects. He had adequate hand strength and coordination and

could perform two-handed tasks and in-hand manipulation skills. He was able to open food containers, open plastic-wrapped utensils, and use eating utensils.

(B) In the area of visual motor skills, particularly for writing, the student demonstrated some progress. He partially achieved his OT goal to write within the boundaries of one-inch lined paper with good letter formation but he continued to have difficulty in aligning and spacing letters and numbers. He was able to copy from visual models onto paper and cut along lines with verbal cues. The occupational therapist had used various strategies to improve the student's ability to align letters and numbers, including the use of a writing program. Overall, the student showed slow progress in writing. His rate of writing was limited due to decreased wrist stability and inability to rest his forearm on a supporting surface. Strategies to strengthen his wrist and forearm were not successful. An adult assisted the student with resting his forearm on a desk to promote wrist extension and used verbal cues to remind him to rest his arm when writing. The student showed a lack of interest in writing.

(C) In the area of sensory processing, the student did not show significant sensory-seeking behavior in the classroom and his teacher did not report any such behaviors. He was able to sit and maintain his attention to adult-imposed activities for up to 30 minutes and responded well to verbal cues to stay on task.

(D) In summary, the occupational therapist opined that the student had made some progress during OT sessions and had partially achieved his OT goal. He had adequate or functional fine motor skills and improved visual motor skills but continued to have difficulty in aligning letters and words. The occupational therapist recommended the continuation of direct OT services one time per week for 30-minute sessions to address the areas of concern.

15. (A) On March 5, 2004, a school psychologist for the school district performed a triennial evaluation of the student and completed a Confidential

Psycho- Educational Report. The psychologist conducted interviews, made observations, reviewed records, and administered several tests. While he was evaluated, the student was quiet and did not consistently respond to direct questions. During the classroom observation, the student was able to follow simple verbal directions and remained on task during certain activities. On the Leiter International Performance Scale, Revised, the student obtained a nonverbal intelligence quotient of 52 but the school psychologist cautioned against accepting this result because she used nonstandard verbal prompts during the test.

(B) In measurement of his academic performance under the Wide Range Achievement Test, Revision Three, the student showed reading ability that was below expectancies. He was able to identify random letters of the alphabet but his spelling of words dictated to him was in the low average range. He was able to spell his first and last name and some simple words. He could not write on a straight line. His math ability was in the below average range. He was able to count objects and performed a simple addition problem. The student's special day class teacher reported that his reading had improved over the course of the school year. He was able to read simple sentences and books and spontaneously picked up books and read them on his own. He responded to comprehension questions when presented in visual rather than verbal form.

(C) In the measurement of visual motor ability, the student performed in the low range in the copying of abstract geometric figures. He was able to copy a circle and triangle but had difficulty with more complex figures. On the Vineland Adaptive Behavior Scales, the student scored in the low range for adaptive performance. As reported by his parents, his communication skills, including ability to express himself verbally, were in the low range. He could deliver a simple message and read a simple story. His daily living skills were likewise in the low range. He had difficulty tying his shoelaces and fastening buttons on his clothes. He needed

assistance in bathing and brushing his teeth. His socialization skills, including how he interacted with others, were also low. His special day class teacher corroborated that the student had low communication, daily living, and socialization skills. Overall, the student's adaptive functioning was low when compared to peers of his age.

(D) For the March 2004 triennial evaluation, the school psychologist noted that both the parents and special day class teacher noticed that the student had displayed an increase in inappropriate, aggressive behavior, such as kicking. The parents attributed the change in his behavior to a recent move of the family's residence from a house to an apartment. When the family lived at the house, the student was able to swing for long periods of time on a swing in the yard. There was no swing at the apartment. The special day class teacher had implemented a behavior plan to address the student's increasingly aggressive behavior.

(E) In summary, the school psychologist found that the student performed in the delayed range. His academic functioning was below expectancies in the areas of reading, writing, and math. His ability and interest in reading had improved over the past school year. His adaptive functioning was in the low range. The student exhibited autistic-like behaviors including inability to use oral language for communication, a history of relating to people in an inappropriate manner, and continued impairment in social interaction. The school psychologist recommended, in part, that the student receive oral directions in simple form and one step at a time and be provided with gestures and visual cues to maximize his understanding of new information.

16. (A) On December 1, 2003, the student's special day class teacher, Karen Lambert, noted that he had made good progress in his IEP benchmarks. He had mastered single digit addition with use of touch math and his reading of sight words had increased. He tried to hit other pupils outside of the classroom even when he was closely supervised.

(B) On March 1, 2004, the special day class teacher reported that the student could write numbers 1 to 100, tell time to the hour, and identify coins. He could subtract single digit numbers from double digit numbers with touch math although he was not consistently accurate. He could read 170 out of 180 sight words and was reading at the first grade level with 92 percent accuracy. He continued to display aggressive behavior by hitting fellow pupils and the staff had a concern about his aggressive behavior that was to be discussed at his upcoming IEP meeting.

(C) On a progress report dated June 1, 2004, the special day class teacher reported that the student's reading skills had continued to improve; he was reading at the upper first grade level and doing well at reading sight words. He had been inputting the classroom's daily oral language sentence onto the computer with proper capitalization and punctuation. In math, he could add and subtract double digit numbers using touch math and with good accuracy. However, with respect to behavior, the student's aggressive behavior had not improved even with the use of multiple sensory interventions.

17. (A) On March 16, 2004, the school district convened the student's triennial IEP meeting. Participants in this IEP meeting included the student's parents, special education teacher, speech and language pathologist, an administrator, a general education teacher, adaptive PE teacher, school psychologist, and a regional center representative. The IEP team reviewed and discussed the aforementioned written reports described in Findings 12 - 16 above and heard the oral presentations of the adapted PE specialist; a general education teacher who taught the student one and one-half hours each week in art, science, and music; the speech and language pathologist who reported that the student continued to demonstrate severely disordered language; his special day class teacher; school psychologist who recommended a behavior support plan for the student; and occupational therapist.



(B) The IEP team discussed the student's aggressive behavior and his touching of other pupils and staff at school and on the school bus. The student's father asked whether his son could be outfitted with a weighted vest to help curb or decrease his aggressive behavior. The father reported that the family had moved from a house with a yard and swing to an apartment and the student was no longer able to swing. The IEP team discussed the efficacy of a weighted vest for the student and his need for more sensory input at school and home.

(C) In reviewing the student's present levels of performance, the IEP team noted that he was a visual learner who did well with a visual daily schedule, worked best in small groups, and at times needed a one to one aide to stay on task. Since October or November 2003, the student had displayed aggressive behavior towards other pupils and adults in his classroom. He wore a pull-up diaper to school to avoid toileting accidents. His parents expressed their desire that their son continue to improve his reading comprehension, behavior, and speech.

(D) For the IEP meeting on March 11, 2004, the student's special day class teacher prepared a Teacher's Academic Report. The teacher reported that the student had made progress in reading and reading comprehension. He was reading at the first grade level E with 92 percent accuracy, was able to match pictures to sentences describing the pictures with 100 per cent accuracy, and did well on his spelling list of five first grade words. He participated in a small reading group of four students and loved reading books at his level. For the next year, the IEP developed objectives in reading and reading comprehension, including the objectives that he be able to read 250 sight words with 90 percent accuracy and write three to four word sentences with the help of picture cues and verbal prompts.

(E) In math, the special day class teacher reported that the student's progress in math had been slow. He had learned to solve single digit addition and was learning to subtract double-digit numbers with the Touch Math program. The

student had learned to identify coins, count by fives by using nickels, and tell time by the hour. The IEP team identified that his math goals should include that he be able to tell time by the first quarter and half-hour with 70 percent accuracy and add and subtract double-digit numbers with the Touch Math program.

(F) In writing, the special day class teacher indicated that, with the assistance of prompts, the student was able to complete a sentence verbally and participate in daily oral language activities. His writing was large and scrawling and he was receiving OT to change his awkward pencil grip and improve his writing skills.

(G) In the areas of social and emotional growth and behavior, the special day class teacher expressed concerns about the student's behavior and feared that another person could be seriously injured unless the student's behavior was addressed. The student had a difficult time waiting for his turn in small group activities. He tended to hit, pull, and tackle other students. When the student was not in the classroom, an adult had to accompany and watch him closely to prevent him from hitting others. Over the past several months, the student's aggressive behavior had escalated to his hitting, kicking, and spitting on teachers and/or staff. The staff addressed his aggressive behavior by redirecting him, changing staff, and giving him time outs for five minutes. A month earlier, in February 2004, the student had to be sent home because of his physical aggression towards pupils and staff. On two occasions in the week before the IEP meeting, the student hit and kicked others when he was not allowed to sit near a particular pupil on the bus. That pupil did not want to sit next to the student because he touched and pulled on her clothes during the bus rides home. The student was removed from the bus and his parents called to take him home. Teachers and staff tried to reduce the student's aggressive behavior by reinforcing his use of "soft hands", allowing him to earn a desired activity with appropriate behavior, and giving him structured activities during recess. These

efforts had limited effectiveness due to limited number of staff who could work with the student and reinforce appropriate behaviors.

(H) In the area of speech and language, the IEP team determined that the student should improve his ability to answer questions without pictures and use self-generated phrases with subject nouns and predicate verbs, to answer either "yes" or "no" to questions without the help of picture icons, to sort and name objects or pictures into categories, and to correctly place objects or select pictures in response to requests.

(I) In the area of adaptive PE, the IEP team heard from the student's adapted PE specialist who also submitted supplemental information. The adapted PE specialist reported that the student had accomplished half of his goals and objectives and provided details on the student's delays in gross motor and object control skills. The specialist reiterated the recommendation from her written report that the student continue in DIS adapted PE. The IEP team determined that the student would improve his ability to kick a soccer ball and jump rope with others turning the rope. In the area of occupational therapy, the IEP team determined that, by end of the year, the student would type on the computer or print two or three sentences within the boundaries of lined paper and with proper alignment and spacing for 50 percent of the time with verbal and visual cues. In addition, the student's goal for next year's IEP was to show improved visual motor skills by independently typing on a computer or writing three or four properly aligned and spaced sentences on lined paper for at least 75 percent of the time.

18. (A) Following the triennial IEP meeting on March 11, 2004, the IEP team determined to provide the student with the same programming that was in place at the time. The IEP team recommended that he stay in a special day class and receive DIS services in speech and language therapy, adapted PE, and OT. The

parents agreed with the goals and objectives of the IEP and granted consent for the student to be placed in a special day class and receive these services.

(B) On March 11, 2004, the school district IEP team also developed a Behavior Support Plan for the student after determining that the student had poor self-control and hit teachers and pupils in the classroom and playground and that his behaviors were interfering with his learning. As part of the strategies and supports to address this behavior, the IEP team recommended that teachers have the student read a social story in the morning and before or after morning recess and lunch. The social story was to relate to appropriate behavior in the classroom and playground, including "quiet hands." In addition, first thing in the morning, the student was to be allowed to swing for up to ten minutes. To reinforce appropriate behavior, the IEP team started a reward system in which the student would receive one token for every 15 minutes that he did not hit others. After he earned three tokens, he would be rewarded with five minutes of desired activity, such as watching a video or reading a book. The student was also to receive frequent praise for appropriate behavior and his behavior would be charted in the classroom to facilitate any necessary modifications to the Behaviors Support Plan. The occupational therapist was to consult with the special day class teacher on other sensory activities that the student could perform in the classroom and was to check into the use of a weighted vest. At home, the parents agreed to reinforce appropriate behaviors for the classroom.

(C) For the Behavior Support Plan, the IEP team also noted that the student had begun to refuse to board the bus to go home after school unless he was able to sit next to a particular pupil. To address this behavior, the IEP determined that a one-on-one aide would temporarily board, sit, and ride the bus with the student until he arrived home. Before getting on the bus, the aide would read a social story with pictures to the student in order to reinforce appropriate bus

riding behavior. The student would also be allowed to listen to music with earphones while riding the bus and receive praise for appropriate behaviors. The aide was required to monitor the student's behaviors so that changes could be made to the plan and the parents were to reinforce appropriate bus riding behavior at home. The bus aide was to be assigned to the student only until appropriate behaviors on the bus became "more permanent."

19. For the remainder of the 2003-2004 school year, the student completed third grade in his special day class at his elementary school and continued to receive DIS services.

#### 2004-2005 SCHOOL YEAR

20. For the 2004-2005 school year, the student was enrolled in a fourth grade special day class at Rio San Gabriel Elementary School. Pursuant to the March 2004 triennial IEP, the student was placed in a special day class, provided with DIS services, and included in general education for recess and lunch, and for music, dance, and health. His special day class teacher was Jocelin Rickett. For the 2004-2005 school year, the school district implemented the student's Behavior Support Plan developed at the triennial IEP meeting in March 2004.

21. (A) Later in the school year, on March 16, 2005, the school district held an annual meeting to review the student's individualized educational program. The student's parents participated in this IEP meeting along with his special education teacher, a general education teacher, school principal, and occupational therapist. The IEP team noted that the purpose of the meeting was to review the student's progress towards his goals that were set last year and to set goals for the upcoming year. The parents expressed an interest in their son learning to use a word processing program or device.

(B) In reviewing the student's present levels of performance, the IEP team noted that he was a visual learner who does well with a visual daily schedule, works best in small groups, and at times needs a one to one aide to stay on task. Since October or November 2003, the student had displayed aggressive behavior toward other pupils and other adults in his classroom. He wore a pull-up diaper to school to avoid toileting accidents. His parents expressed their desire that their son continue to improve his reading comprehension, behavior, and speech.

(C) The student was termed echolalic in speech and initiated conversations when upset. He continued to have difficulty in his fine and visual motor skills. His writing was more legible if given compensatory strategies and adapted pencil grips. He was able to express his personal wants or needs, such as asking to go to the bathroom. In social and emotional development, the student displayed "slight[ly] aggressive behaviors towards others in class." He tapped or touched the arms of other pupils or sometimes pulled their hair. When emotional or frustrated, he verbalized louder, pushed his desk and/or chair, and sometimes tipped the furniture over.

(D) At the IEP meeting, the student's special day class teacher discussed his progress and outlined his goals. In the area of reading comprehension, the teacher reported that the student was reading at the "I" through first grade level. He could read words but needed extra prompting to answer comprehension questions. He performed better when there were little or no distractions and items were pointed out to him. When given a choice, the student chose a book familiar to him and skimmed through the book. He was said to have met his reading comprehension goal for the year and his goal for next year was to be able to put six pictures and four sentences in sequential order with no more than two prompts in four out of five trials. In the area of reading, the teacher revealed that the student was able to read sight and familiar words, identify objects in pictures, and follow

simple directions. He was said to have met his reading goal for the year and his goal for the next year was to be able to identify common signs and labels when expressed by another or in written form for 95 percent of the time. In writing, the student was reported to be able to copy from dictated responses and could write sentences dictated to him. He was able to write his first and last name and date although he had trouble with sizing and spacing of letters and needed constant reminders to use capital letters and punctuation. He was able to give simple answers to questions asked many times and worded differently and able to write the answer from verbal or written cues. The student partially met his writing goal for the year; his goal for next year was to be able to write his last name and date with no prompts and to print legibly with appropriately spaced letters, words, and sentences in four out of five trials. In math, the teacher reported that the student was able to complete addition with regrouping problems and subtraction with borrowing problems and met his math goal for the year. His next year's goal was to complete multiplication problems for certain numbers with minimal assistance and 90 percent of the time. His teacher reported that the student was able to identify, name, and count combination of coins; tell time to the one-half hour; and to follow along with classroom calendar activities. The teacher indicated he met his time-telling goal for the year. His goal for the next year was to match coins and/or bills to decimals and symbols with 90 percent accuracy.

(E) In the area of behavior, the special day class teacher reported that the student had trouble keeping his hands to himself on the playground and sometimes in the classroom. He was being taught that touching others was not acceptable at school and was rewarded verbally and given access to certain items when he was able to keep his hands to himself. The IEP team set the behavioral goal and objective that the student learn to keep his hands to himself with minimal adult attention.

(F) With respect to OT performance and goals, the occupational therapist reported to the IEP team that the student had demonstrated "minimal progress", for he continue to show delays with visual motor skills needed for writing assignments. He continued to have difficulty staying within boundaries, forming letters, and spacing letters and numbers. He showed improvement with letter sizing and legibility when given visual cues such as highlighted lines and marked boundaries. The student also continued to use his wrist in a flexed position raised off the table while writing and needed physical cues to keep his wrist in a neutral position on the writing surface. The IEP team developed short-term instructional objectives and long-term instructional goals in OT for the student, including that he demonstrate improved shoulder, wrist, and hand control for classroom activities such as writing. The occupational therapist represented that she would continue to work with the student on his visual motor control skills and would instruct him how to use the Alpha-Pro word processing device so that he could complete his assignments.

(G) In the area of speech and language, the IEP team learned that the student had difficulty answering questions during conversation. He often made utterances that did not pertain to the other party and responded better to questions requiring a "yes" or "no" answer rather than to abstract questions. The student had a limited vocabulary and had difficulty identifying prepositions. The IEP team set goals and objectives that the student answer questions with one to two word phrases without picture cues and learn to select the correct picture representing a written or spoken English sentence or prepositional phrase.

(H) In the area of adaptive physical education, the adapted PE specialist reported that the student was able to jump rope turned by others times ten times when given verbal prompts and five times when not given verbal prompts. He could jump back and forth across a line without assistance. He did not always follow verbal cues and sometimes needed physical cues to be successful in PE. The student also



enjoyed ball play and was able to punt a soccer ball ten feet, catch a 8.5 inch ball from 15 feet, and catch a tennis ball from six feet with two hands only. He was able to throw a tennis ball without opposition but with consistent aim. The IEP team set goals and objectives for the student in jumping and catching a tennis ball.

22. (A) At the conclusion of the IEP meeting on March 16, 2005, the IEP team determined that the student should continue to be placed in a special day class for the upcoming year. The school district was to provide the student with the following DIS services: speech and language therapy eight times monthly in 30 minute sessions, adapted PE twice weekly in 30 minute sessions, and OT once weekly in 30 minutes sessions. The school district further also offered to provide transportation to the student to and from home and school. The IEP team also determined that, due to his instructional, academic, and/or behavioral needs, the student needed to be placed in a classroom with a low pupil to adult ratio. The student's parents signed the March 2005 IEP and granted permission to the school district to provide the placement and services described therein.

(B) On March 16, 2005, the IEP team determined that, based on his present levels of performance, the student required assistive technology devices and services, such as visuals and manipulatives. The IEP team further decided that the student did not need any supplemental aids or services to advance towards his goals and school personnel did not need any other additional support to educate the student.

(C) The IEP team also determined that the student did not need any behavioral goals or objectives incorporated into his IEP and did not address any of his behavioral issues. It was not established that the IEP team discussed the efficacy of the Behavior Support Plan that was developed after the triennial review meeting held the previous year in March 2004. The IEP team did not incorporate or continue the Behavior Support Plan developed at that 2004 triennial IEP meeting.

23. Following the March 2005 IEP meeting, the student was sent home by his school for behavioral problems on two separate occasions in April and May 2005. Consequently, he missed approximately five hours of classroom instruction or services.

24. The IEP team directed that the March 2005 IEP be translated into Spanish for the benefit of the student's parents. However, the school district did not provide, and the parents did not receive, a Spanish translation of this IEP.

#### 2005-2006 SCHOOL YEAR

25. For the 2005-2006 or current school year, the student was enrolled in a fifth grade special day class at Rio San Gabriel Elementary School. His special day class teacher was Melanie L. Evans. He received DIS services in speech and language therapy, adapted PE, and OT from the school district. However, as established by the testimony of the school principal, the school district and/or the special day class teacher did not implement any behavior support plan from the start of or during the current school year.

26. (A) The student's behavior worsened from the commencement of the 2005-2006 school year. On three days in September 2005 and three days in October 2005, the student was sent home by the school principal for behavior problems. From September until early December 2005, the student was referred by his teacher to the principal's office for behavioral issues approximately two times each week. The student was sent to the principal's office approximately 32 times during the first semester of the current school year. The student lost instructional time as a result of being sent home and to the principal's office.

(B) At the hearing, the student's father recalled that, during the first four weeks of the current school year, the school sent his son home approximately two or three times per week for hitting or kicking teachers and other pupils. In or about

October 2005, the student poked or stabbed another pupil in the chest with a pencil and his mother was asked to pick him up from school.

27. (A) When sent to the principal's office, the student was often able to calm down and he acted less aggressively or agitated in the office. Nevertheless, beginning in September 2005, the student's school principal and his special day class teacher took action to deal with the student's behavior. The school principal advised the school district's special education office of the student's aggressive behaviors and requested support of the school district. The special education office approved the consultative services of a school district specialist in applied behavioral analysis. The principal observed the student in the classroom on a weekly basis and consulted with the ABA specialist to review behavioral strategies.

(B) The special day class teacher consulted with the resource specialist and observed the classrooms and discussed behavioral strategies with other SDC teachers. The SDC teacher consulted with the school district speech and language specialist regarding the use of visual cues, a token system, and visual schedule to improve the student's behavior. In October 2005, the principal held a meeting with the SDC teacher, speech and language specialist, and occupational therapist to discuss behavioral issues and strategies, including the use of social stories. The SDC teacher started using social stories. In or about October 2005, the special education office asked Vista Behavior Consulting, a non-public agency (hereinafter also Vista Behavior), to perform an evaluation of the student's behavior. That month, Vista Behavior personnel observed the student at school on three occasions. In November 2005, the school district assigned a "support aide" to the student to help with his behaviors in the classroom. On December 6, 2005, Vista Behavior Consulting issued its Functional Behavior Assessment report.

28. (A) On December 7, 2005, the student hit a five year old girl on the arm while riding on the school bus. The student had tried to hit the girl on the previous two days. The bus driver filed a bus conduct report.

(B) On December 7, 2005, the student jumped on an adult aide during PE and pulled her hair. The student caused the aide to fall to the ground. The student hurt the aide. The school suspended the student for three days and notified his parents of a special meeting to be held on December 13.

29. (A) On December 13, 2005, following the student's suspension from school, the school district held an IEP meeting to discuss the student's progress and placement and the independent functional behavioral assessment and recommendations of Vista Behavior Consulting. The student's father participated in the meeting. The IEP team had the impression that the student's primary reasons for his aggressive behavior were his needs for attention and sensory input. The IEP team reviewed the findings and recommendations of Vista Behavior, discussed placement, and reviewed the progress report of the student's adapted physical education teacher. The IEP team learned that, during the jump rope exercise in his larger adapted PE class, the student hit and swung the jump rope at other pupils, particularly girls, when he and the other pupils began jumping by themselves. The student also hit the teacher's assistant and other pupils unless the teacher stood with him. Subsequently, the student was moved to a smaller adapted PE class of four pupils and his behavior improved.

(B) On December 13, 2005, while noting that the special day class at Rio San Gabriel Elementary School was the appropriate placement for the student, the IEP team determined to implement the recommendations of the Vista Behavior Consulting. The IEP team thereupon placed the student at the Vista Behavior clinic in Cypress for four hours per day effective the next school day. The IEP team determined that student was to remain at the clinic through the winter break and

until January 15, 2006. Transportation to and from the clinic was provided for the student. School personnel were to receive training from Vista Behavior and the student was to receive visual supports. The IEP team suspended the provision of DIS services while the student was placed at the clinic and indicated that it would discuss DIS services after the student returned to school. After the winter break, the IEP team indicated that the student could return to school on a "limited day" basis depending upon an evaluation by Vista Behavior and the student's progress at the clinic. The IEP scheduled a follow-up IEP meeting for January 5, 2006.

(C) Following the December 2005 meeting, the student's father signed the IEP document and gave permission to the school district to place his son in the clinical program discussed during the meeting. The school district translated the December 2005 IEP into Spanish for the student's parents and gave them a copy of the Spanish-language version.

30. Beginning on December 14, 2005, and continuing through the dates of the hearing in this matter, the student was placed and received behavioral services at the Vista Behavior Counseling clinic. He has not been attending school or receiving any educational or DIS services from Vista Behavior Consulting or the school district during this time.

31. (A) On January 5, 2006, the school district held an IEP meeting to discuss the student's progress at Vista Behavior Consulting. The student's father participated in the meeting. As reported by Vista Behavior staff, the student had made progress at the "restricted setting" of the clinic and was ready to return to a classroom setting. The father reported that the student seemed to like being at the Vista Behavior clinic but he had behavioral issues at home. The IEP team discussed DIS services, placement alternatives, and training for teachers and school staff.

(B) On January 5, 2006, the school district prepared a transition plan for the student's return to school. The IEP team determined that, beginning on January

17, 2006, the student would attend the Vista Behavior clinic each morning from 9:00 a.m. until 12:00 p.m. and then go to school at Rio San Gabriel Elementary School in the afternoon from 12:30 until 2:45 p.m. The school district offered to provide the student with taxi service from home to the Vista Behavior clinic and from the clinic to school. After school, the student was to take the school bus home. The IEP team also agreed to resume DIS services in speech and language therapy, adapted PE, and OT and to implement the behavior plan developed by Vista Behavior when the student returned to school on January 17, 2006. The school district also agreed to pay for up to 25 hours of parent and staff training in autism and behavioral intervention provided by Vista Behavior Consulting. A speech and language assessment was to be conducted by March 9, 2006. This transition plan was to remain in effect until March 11, 2006, which is the date of the annual review of the student's IEP.

(C) On January 5, 2006, and through the dates of the hearing in this matter, the student's father has declined to give his consent to the educational programming and services offered by the school district in the IEP. The father noted on the IEP document that he only participated and attended the IEP meeting. In part, the father disagreed with the amount of time that his son would spend at school for academics under the January 2006 IEP. At the same time, the father conceded that the student enjoys being at the Vista Behavior clinic rather than at the school.

#### FUNCTIONAL BEHAVIORAL ANALYSIS

32. (A) In or about October 2005, the school district requested that Vista Behavior Consulting perform a functional behavior assessment of the student. The school district reported to Vista Behavior that the student had exhibited physical aggression towards people, particularly blond-haired girls, had destroyed property, and spit at others. The student was reported to have severe language delays, difficulty attending to tasks, and delays in social interaction. For the functional

behavior assessment, Vista Behavior conducted directed observations of the student in the school, home, and clinic setting; conducted interviews of school staff and parents; reviewed records; and administered the Slosson Intelligence Test. On behalf of Vista Behavior Consulting, a clinical psychologist, case supervisor, and behavior consultant prepared and/or signed the report of the functional behavior assessment.

(B) From the review of prior evaluations and its interviews, Vista Behavior determined that the student's cognitive functioning was in the delayed range, his speech was intelligible if he did not speak rapidly, and his daily living and socializing skills were in the low range. In prior school years, the student had displayed "increasing challenging behaviors" beginning in October 2003 after the family moved from the house where he could swing daily. In the 2004-2005 school year, he "continued to display behavioral excesses." According to the Slossum Intelligence Test, the student's "mental age" did not correspond to his chronological age. He showed the ability to copy simple shapes and count items and had strong skills in imitation and understanding information presented in concrete visual manner.

(C) Vista Behavior Consulting conducted a functional analysis of the student's behaviors. In the area of property destruction, Vista reported that the student broke, tore, threw, or defaced his property and the property of others on the average of 1.1 times per day at school in the month of October 2005. The severity of the behavior was said to be mild. He purportedly began destroying property in 2003 when the family moved from the house with a swing. School staff reported that the student's behavior in damaging or destroying property appeared to increase after he took his medication. When the student engaged in this behavior, school staff used verbal or physical prompts or sent him to the office. School staff tried to manage the behavior with the use of verbal cues, loss of an activity, or token reward system but the student's behavior had not changed significantly. Vista Behavior hypothesized that the student's primary functions in destroying property was to gain attention and

access to desired activities or items and the strong reactions or attention that he received from others reinforced the negative behavior. With respect to interventions, Vista Behavior recommended that school staff maintain a calm and neutral demeanor when the student engaged in property destruction and provide him with attention during the school day only when he is not engaging in such behavior.

(D) For the behavior of physical aggression, Vista Behavior reported that the student had a moderate to severe problem in that he hit, pushed, kicked, pulled hair, and scratched others on the average of 1.9 times per day at school in October 2005. He first began showing aggression in 2003 after moving from the house with a swing. He displayed physical aggression more frequently when in the presence of blonde-haired girls, during recess or adapted PE, and when denied access to desired activity or item. He had recently begun striking dark-haired girls. His behavior was more frequent when a familiar aide was not present. School staff tried to manage the student's aggressive behavior by using verbal cues to de-escalate or redirect him, a token reward system, and physical restraints of his hands and feet. Vista Behavior opined that the student's primary function for his physically aggressive behavior was to seek attention and recommended that school staff always remain calm and neutral and provide him with attention and praise only when he is not aggressive.

(E) Regarding his spitting behavior, Vista Behavior determined that the student spit on the average of 0.33 times per day at school in October 2005. He spit more often in the morning after recess and when a particular aide left the classroom. He had engaged in this behavior for the past year. The school staff's response to the spitting was to tell the student to stop or to clean up. Staff also tried to redirect the student, took away desired activities, and used a token reward system. Vista opined that the student spit to obtain sensory input, access to an activity, and attention.



Vista recommended that school staff maintain a calm and neutral demeanor and use pro- active strategies to reinforce positive behavior.

33. (A) With respect to recommendations, Vista suggested that the student's primary instructor implement a positive behavior intervention plan and consult with the behavior support staff. The student's case manager and administrator were advised to support the teacher by facilitating an individualized schedule for the student and understanding the behavior intervention plan. Instructional assistants and support staff should know his IEP and implement a positive and least restrictive behavior techniques. The parents were advised to be actively involved in their son's behavior intervention plan by participating in training, communicating with the school, and attend regular clinic meetings.

(B) As long range goals, Vista Behavior recommended that the student progress on behavioral objectives so that he can initiate communication and then communicate with others, increase his ability to complete classroom assignments independently, and learn more appropriate functional communication skills. In addition to decreasing his aggressive behaviors, Vista Behavior recommended that the student learn to initiate requests, raise his hand, and accept alternatives and/or wait independently before getting what he has requested. Under the applied behavior analysis approach to changing behavior, Vista Behavior also recommended changes to the student's curriculum and environment as well as implementation of positive programming, focused support, and positive behavior support. Vista Behavior suggested that school staff, teachers, and specialists have knowledge of the student's diagnosis for autism spectrum disorder, positive behavior intervention, and crisis management. Vista Behavior also made recommendations for the student's educational program and individualized programming, including one to one behavior support during all of his school day, structured educational programming during school breaks, and additional opportunities for building different skills and

making requests. Vista Behavior prepared a Positive Behavior Intervention Plan to manage and improve the student's aggressive behaviors.

#### RECORDS REQUEST

34. On or about August 23, 2005, petitioner filed an Authorization for the Release of Records and requested educational records of the student. On the request letter, petitioner provided the student's name and school but used an incorrect birth year for the student.

35. On October 7, 2005, petitioner filed a second request for records for the student. Again, petitioner provided the student's name and school but gave an incorrect birth year for the student.

36. On an undetermined date after October 7, 2005, the school district provided petitioner with copies of the requested education records for the student.

#### MARCH 2006 IEP--EXHIBIT 41

37. (A) On March 20, 2006, the school district convened an IEP meeting to conduct annual review of the student's educational programming and services and to review his progress at the Vista Behavior clinic. The IEP team reviewed the student's progress and developed goals for him in adapted PE, speech and language, classroom or academic performance, and occupational therapy. Vista Behavior Consulting reported that the student had met six of 14 goals recommended by the school district. When he was able to select his activities and few demands were placed on him, the student acted less aggressively. However, when asked to perform more academic tasks, the student scratched, hit, and kicked more often. Vista Behavior suggested classroom and new behavior goals and recommended that the student continue receiving services at its clinic through September 2006.

(B) Because the student was making progress at the Vista Behavior clinic and has difficulty with transitions, the IEP team determined that he should continue receiving services at the clinic for 28 hours per week. On Mondays and Wednesdays, the student is to return to Rio San Gabriel School to receive adapted PE and speech and language services in 30-minute sessions each. The IEP team recommended that the student receive occupational therapy at the Vista Behavior clinic and the school district would provide OT consultative services to the clinic once monthly. The IEP team also agreed to provide a RSP teacher to consult with the clinic on the student's academic goals and objectives and 20 to 2 hours of parents training. The IEP team agreed that the student needed services for the extended school year and determined to meet again to discuss the student's transition back to school, extended school year services, and staff training. The IEP team scheduled another meeting for May 2006.

(C) The student's father participated in the IEP meeting on March 20, 2006, and gave his consent for the student to be continued to be placed at the Vista Behavior clinic and to receive the educational and DIS services set forth in the resultant IEP document.

(D) At the IEP meeting on March 20, 2006, the school district developed and agreed to implement a Behavior Support Plan for the student.

#### PETITIONER'S EXPERT WITNESS

38. (A) At the hearing in this matter, Delaina A. Martinez, Psy.D., was called as an expert witness by petitioner. Dr. Martinez is a licensed educational psychologist who is currently employed by a school district. On or before September 2, 2005, while she was working for American Testing Evaluation Corporation, Dr. Martinez was retained by the student's parents and their attorney to conduct a psychoeducational assessment of the student. When he filed his Request for Due

Process Hearing, petitioner indicated that he was "reserv[ing] the right to an independent assessment at public expense." However, it was not established that, before hiring Dr. Martinez to conduct the private assessment or any time thereafter, the student's parents or attorney expressed disagreement with any particular evaluation performed by the school district.

(B) For her assessment, Dr. Martinez reviewed records and interviewed the parents to obtain background information and history of the student and his family. The most recent IEP reviewed by the psychologist for the assessment was the March 2004 IEP. Dr. Martinez administered the Wechsler Intelligence Scale for Children to the student to assess his cognitive abilities and the Beery VMI and Bender Gestalt II tests to assess his visual motor integration skills. The educational psychologist did not assess the student's auditory processing skills due to his "history of communication difficulties, and lack of verbal responses" and attempted to assess his academic achievement by using two subtests of the Woodcock-Johnson III Tests of Achievement. Dr. Martinez interviewed the student and his parents to assess his social emotional and adaptive functioning and to list his problem behaviors. She interviewed the student for approximately two hours and saw him together with his brother for another hour or so. Based on her assessment, Dr. Martinez made certain recommendations for the student, including consultation with a specialist in applied behavioral analysis to develop a behavior training program and behavioral intervention such as discrete trial training.

(C) Dr. Martinez was not a persuasive witness and her assessment and recommendations have limited probative value for purposes of this matter. First, Dr. Martinez offered no helpful testimony regarding the behavioral goals or objectives for the student. While she indicated that she was able to review all of the IEP's before the hearing, Dr. Martinez did not speak to the absence of behavioral goals or support plan for the student in the March 2005 IEP. Her assessment report and

testimony, in fact, provided no additional information from that which was already contained in the IEP documents and school district evaluations. Second, Dr. Martinez indicated that her assessment took place over two days but she saw the student for only two hours and her report reveals that she had difficulty communicating with him. She did not observe the student in a classroom setting or at home with his parents. Third, the educational psychologist was not a knowledgeable witness. She recommended, in part, that the student be placed in a non public school but was not aware of the services that the school district could provide to the student. When asked to explain applied behavioral analysis, Dr. Martinez sighed and stated under her breath something to the effect that she really did not want to give this testimony. When asked how many hours of discrete trial training that she would recommend for the student, she declined to give a recommendation. The educational psychologist offered no specifics on a behavioral intervention plan that would be appropriate for the student. In short, Dr. Martinez was not a particularly helpful or candid witness.

Based on the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

## LEGAL CONCLUSIONS

1. Summary of Applicable Law: Under the federal Individuals with Disabilities Education Act (IDEA) and state law, pupils with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. §1400 (2005); Ed. Code §56000 et seq.) The term “free appropriate public education” means special education and related services that are available to the pupil at not cost to the parents, meet state educational standards, and conform to the pupil's individualized education program. (20 U.S.C. §1401(9).) This right to FAPE arises only after a pupil has been assessed and determined to be eligible for special education.

In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 485 U.S. 176, 200-202, 102 S.Ct. 3034 (1982), the United States Supreme Court addressed the level of instruction and services that must be provided to a pupil with disabilities to satisfy the requirements of the IDEA. The *Rowley* Court determined that a pupil's IEP must be reasonably calculated to provide the pupil with some educational benefit but that the IDEA does not require school districts to provide special education pupils with the best education available or to provide instruction or services that maximize a pupil's abilities. (*Ibid.* at 198 - 200). Finding that Congress included no language suggesting an obligation to maximize the potential of disabled pupils, the *Rowley* Court stated 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 pupil. (*Ibid.* at 201).

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District*, 811 F.2d. 1307 (9th Cir. 1987).) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special educational services to a disabled pupil to constitute a free appropriate public education under the IDEA and the *Rowley* case, a school district's offer of educational services and/or placement must have been designed to meet the student's unique needs, comports with the student's IEP, and was reasonably calculated to provide the pupil with some educational benefit.

The United States Supreme Court in the *Rowley* case also recognized the importance of adhering to the procedural requirements and protections afforded by the IDEA, which are designed to ensure effective parental participation in the IEP process and careful consideration of a pupil's educational needs. (See 20 U.S.C.

§1400 et seq.) The United States Supreme Court noted in *Rowley* that, "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation" at every step "as it did upon the measurement of the resulting IEP." (*Board of Education of the Hendrick Hudson Central School District v. Rowley, supra*, 458 U.S. at 205-206.) For example, one of the rights afforded to parents is the right to be provided a formal written offer of placement by the school district. (*Union School District v. Smith*, 157 F.3d 1519 (9th Cir. 1994); cert. denied 115 S. Ct. 428 (1994).) In the *Union* case, the Circuit Court of Appeals noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether or not to accept the offer. (Ibid.)

However, not every procedural flaw constitutes a denial of a FAPE. Procedural flaws must result in the loss of educational opportunity to the student, or seriously infringe on the parent's participation in the IEP process, to constitute a denial of a FAPE. (*Board of Education of the Hendrick Hudson Central School District v. Rowley, supra*, 458 U.S. at 206-07; see also *Amanda J. v. Clark County School District*, 267 F.3d 877 (9th Cir. 2001).) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP formulation process are insufficient to support a finding that a pupil has been denied a free appropriate public education. (*W.G. v. Board of Trustees of Target Range School District No. 23*, 960 F.2d 1479, 1482 (9th Cir. 1992).)

In general, a pupil shall be referred for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code §56303.) All referrals for special education and related services shall initiate the assessment process and shall be documented. (Cal. Code Regs., tit. 5, §3021, subd. (a).) All school staff referrals

shall be written and include a brief reason for the referral and documentation of the resources of the regular education program that have been considered, modified, and when appropriate, the results of intervention. (Cal. Code Regs., tit. 5, §3021, subd. (b).) Upon initial referral for assessment, parents shall be given a copy of their rights and procedural safeguards. (Ed. Code §56301, subd. (c).)

A school district shall develop a proposed assessment plan within 15 calendar days of referral for assessment, unless the parent agrees in writing to an extension (Ed. Code §56043, subd. (a)), and shall attach a copy of the notice of parent's rights to the assessment plan (Ed. Code §56321, subd. (a)). A parent shall have at least 15 calendar days from the receipt of the proposed assessment plan to arrive at a decision whether to consent to the assessment plan. (Ed. Code §56403, subd. (b).) A school district cannot conduct an assessment until it obtains the written consent of the parent prior to the assessment (unless the school district prevails in a due process hearing relating to the assessment); assessment may begin immediately upon receipt of the consent. (Ed. Code §56321, subd. (c).) Thereafter, a school district must develop an individualized education program required as a result of an assessment no later than 50 calendar days from the date of receipt of the parent's written consent to assessment, unless the parent agrees in writing to an extension. (Ed. Code §56043, subd. (d).)

After an initial assessment, a school district must reevaluate a child with a disability if it determines that the educational or related services needs of the child warrant a reevaluation. (20 U.S.C. §1414(a)(2)(A).) A reevaluation must occur at least once every three years unless the parent and school district agree that it is not necessary. (20 U.S.C. §1415(a)(2)(B).) State law adds that a reassessment of a pupil shall be conducted at least once every three years or more frequently, if conditions warrant a reassessment, or if the pupil's parent or teacher requests a reassessment and a new IEP to be developed. (Ed. Code §56381, subd. (a).)



In conducting an evaluation, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information that may assist in determining the content of the child's individualized education program. (20 U.S.C. §1414(b)(2)(A).) No single assessment measure or procedure is used as the sole criterion for determining an appropriate educational program for a child. (20 U.S.C. §1414(b)(2)(B); Ed. Code §56320, subd. (e).) An individual assessment of the pupil's educational needs must be conducted by qualified persons before any action can be taken with respect to the initial placement of an individual with exceptional needs in a special education instruction. (Ed. Code §56320.) The assessment and other evaluation materials used to assess a child must be administered by trained and knowledgeable personnel and the child must be assessed in all areas related to his or her suspected disability including, if appropriate, health and development, language function, general intelligence, communicative status, academic performance, motor abilities, and social and emotional status. (20 U.S.C. §1414(b)(3); 34 C.F.R. §300.532; Ed. Code §56320, subd. (f).)

In the case of a child whose behavior impedes his learning and that of others, the IEP team must take into consideration the use of positive behavioral interventions and supports and other strategies to address that behavior. (20 U.S.C. §1414(d)(3)(B); 34 C.F.R. §300.346.) State law allows the use of behavioral interventions for individuals with exceptional needs receiving special education and related services and likewise requires the description of positive behavioral interventions in a pupil's IEP, if appropriate. (Ed. Code §56523.)

Behavioral intervention is defined, in part, as the systematic implementation of procedures that result in lasting positive changes in the individual's behavior. (Cal. Code Regs., tit. 5, §3001, subd. (b).) A behavioral intervention plan 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; the behavioral intervention plan must become part of the IEP and include a summary of relevant and determinative information gathered from a functional analysis assessment. (Cal. Code Regs., tit. 5, §3001, subd. (f).) Serious behavior problems is defined as the individual's behaviors which are self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional or behavioral approaches specified in the student's IEP are found to be ineffective. (Cal. Code Regs., tit. 5, §3001, subd. (aa).) An IEP team shall facilitate and supervise all assessment, intervention, and evaluation activities related to an individual's behavioral intervention plan. (Cal. Code Regs., tit. 5, §3052, subd. (a)(1).) Behavioral intervention plans shall be based upon a functional analysis assessment and shall be specified in the IEP. (Cal. Code Regs., tit. 5, §3052, subd. (a)(3).)

An IEP must be evaluated in light of what was objectively reasonable and the information that was available to the IEP team at the time that it developed the IEP and must not be judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

2. Issue No. 1-- In this proceeding, petitioner raises two basic issues with respect to the educational and related services offered and/or provided to the student during the three school years from 2002 through 2005.

First, in his Request for Due Process Hearing, petitioner contends that the school district denied the student a free appropriate public education because it provided inadequate or inappropriate educational services and the student made only minimum gains in his academic performance. This contention is not supported by the probative evidence.

During the three school years at issue in this matter, the school district conducted an annual review of the student's IEP in March 2003, a review of

occupational therapy services in September 2003, a triennial review of his IEP in March 2004, and an annual review in March 2005. For the March 2003 annual IEP review, the school district reviewed the student's needs and progress in speech and language, OT, adaptive PE, and academics and developed goals for him in these areas. The student had made excellent progress in speech and language, accomplished some of his OT goals, and met or exceeded all of his classroom academic goals. At the September 2003 IEP meeting, the school district reviewed the occupational therapist's report, discussed the student's progress in visual motor skills and writing, and followed the therapist's recommendation to intensify OT services for him to direct services.

For the triennial IEP review in March 2004, the school district had the student's adaptive PE specialist, speech and language pathologist, occupational therapist, and school psychologist perform progress assessments and/or triennial evaluations reviewing his progress and goals. The IEP team reviewed the reports and discussed the student's present levels of performance, needs, progress, and goals and objectives. The student exhibited a severe language disorder; had made some progress in OT; improved his reading, reading comprehension, and math skills; showed academic functioning below expectancies; and had met half of his adapted PE goals. His interest in reading had improved, could complete a sentence verbally, and participated in daily oral language activities. The information available to the IEP team demonstrated that the student had made academic progress, met some of his goals, and received educational benefit from his educational program. The IEP team determined new goals and objectives and continued his educational programming and DIS services. For the student's behavioral issues, the IEP team developed a Behavior Support Plan.

One year later, in March 2005, the school district convened an annual IEP meeting in which it reviewed the student's progress and set new goals for him. The

IEP team reiterated that the student was a visual learner who did best in small groups and needed an aide at times to stay on task. He continued to have difficulty in his fine and visual motor skills; met his reading comprehension and reading goals; partially met his writing goal; met his math goal for the year; and had made minimal progress in his OT goals. Due to his instructional needs, the IEP team again placed the student in a SDC setting with low pupil to adult ratio and continued his DIS service in speech and language, adaptive PE, and OT. The school district also provided him with assistive technology device.

Based on Findings 6 – 22 above, for the three school years in question (2002-2005), the evidence demonstrated that the school district offered and provided the student with educational services and placement that were designed to meet and did meet his unique needs, comported with his IEP's, and were reasonably calculated to provide the student with some educational benefit. The school district assessed and evaluated the student's needs in academic and related areas, developed manageable goals and objectives, and reviewed his progress. The student showed progress in reading and math, indicating that he received educational benefit from his programming. As such, the student was not denied a free appropriate public education by reason of the educational programming and DIS services provided to him by the school district.

The only evidence at which petitioner points to support his position that the school district's educational services were inadequate or inappropriate is the report and testimony of his expert witness. As set forth in Finding 38 above, Dr. Martinez was a reluctant and not a persuasive witness. With respect to academic performance, Dr. Martinez conceded in her report that the student has learned many basic academic skills, including reading sight words and adding and subtracting two digit numbers, and used appropriate math skills. Dr. Martinez opined that the student has not developed the ability to use his academic skills in a functional manner but she

did not test him in this area. She did not give him tasks that required him to use his academic skills because she found him unable to respond to the tasks or remain on task. Moreover, Dr. Martinez's recommendations did not focus on academic issues. She recommended that the student's IEP goals reflect academic skills, that he be placed in a nonpublic school, and he be allowed to use the computer more often. The student's IEP goals and objectives have included development of academic skills and the use of the computer. Dr. Martinez did not explain why non-public school placement was appropriate in this matter when the student has received educational benefit from his public school programming.

Second, as set forth in his due process request and Closing Brief, petitioner contends that the school district denied the student a FAPE by failing to design IEP services to meet his unique behavioral needs. The school district, petitioner asserts, knew that the student had a behavioral problem and failed to address this problem by conducting a functional behavioral assessment and developing a behavior support or intervention plan for inclusion in his IEP. Insofar as the 2004-2005 school year is concerned, the probative evidence demonstrates that petitioner's argument has merit.

Beginning in or about October 2003 of the 2003-2004 school year, the student began displaying aggressive behavior, including kicking, that he directed towards other pupils and adult staff in the classroom. The parents attributed the change in his behavior to the fact that the family had moved from a house to an apartment and student could not swing any longer. His SDC teacher reported that the student tried to hit other pupils even when supervised, she had implemented a behavior support plan herself to deal with his increasing aggressive behavior in the classroom, and she indicated that staff was concerned about the student's aggressive behavior that was to be discussed at the upcoming triennial IEP meeting. The speech pathologist noted in the triennial evaluation that the student hit his

teacher several times during a math lesson, threw tantrums and protested by kicking and crying, screamed and hit others.

At the March 2004 triennial IEP meeting, the SDC teacher expressed concerns about the student's behavior and her fear that he would hurt another person unless his behavior was addressed. The teacher reported that the student hit, pulled, and tackled other pupils; an aide had to accompany him to prevent him from hitting others; he hit and kicked when not allowed to sit next to a particular pupil whom he touched and whose hair he pulled; and his behavior had escalated in the past several months to hitting, kicking, and spitting on teachers and staff. In February 2004, the student was sent home due to his physical aggression. Teachers and staff had tried to teach the student to curb his aggressive behavior by redirecting him, using time-outs, reinforcing use of soft hands, and using a reward system. The efforts of the teachers and staff had limited success due to the small number of available staff.

As result of the March 2004 triennial IEP meeting, the school district determined that the student's behavior was interfering with his learning and developed a Behavior Support Plan. The Behavior Support Plan recommended that the student's teachers read a social story to him, allow him to swing, institute a reward system for not hitting others, and give him praise for appropriate behavior. The occupational therapist was to consult with his SDC teacher on employing other sensory activities. And the school district assigned an aide to ride with the student on the bus.

Based on the reports of his teacher and staff and the decisions of the IEP team as set forth in Findings 9 – 22 above, the student's physically aggressive behavior was a serious behavior problem at the time of the March 2004 triennial IEP such that a functional analysis assessment and behavioral intervention plan was advisable. The student's behavior was assaultive towards other pupils and staff. The student's behavior was so disruptive that teachers and staff were compelled to start

their own behavior interventions. The IEP team determined that the student's behavior interfered with his learning.

Subsequently, the school district and his teachers implemented the Behavior Support Plan for the student in the classroom, playground, and bus for the remainder of the 2003-2004 school year and for the major part of the following 2004- 2005 school year. While his SDC teacher reported in June 2004 that the student's behavior did not improve with the use of sensory interventions, there was no evidence that the student displayed physically aggressive behavior at school from March 2004 when the Behavior Support Plan was implemented and until his next annual IEP in March 2005. He was reported to have displayed only slightly aggressive behavior such as touching others, pulling their hair, and pushing over his desk or chair. No teacher or staff reported any incidents of hitting, kicking, pulling, or spitting at pupils or staff in the next 12 months.

Based on the absence of any physically aggressive behavior, the clear preponderance of evidence supports the conclusion that the Behavior Support Plan was effective in helping teachers and staff greatly reduce the behavior and the student to learn to control his behavior such that the student's behavioral problem was not serious and he was able to make progress in his educational program and services.

Because the Behavior Support Plan was effective, the decision of the school district not to conduct a functional analysis assessment and develop a behavioral intervention plan at the March 2004 IEP meeting did not result in the denial of a FAPE to the student. The Behavior Support Plan was designed to meet the student's behavioral and classroom needs, comported with the March 2004 IEP, and was reasonably calculated and did result in educational benefit to the student. However, that was not the case for the subsequent action of the school district at the March 2005 IEP meeting.

One year later in March 2005, the student's IEP team met again to conduct an annual review meeting and found that he had met some of his goals and made progress in his academic performance. The student having received the benefit of strategies and supports under the Behavior Support Plan for one year, there were no behavioral incidents or concerns reported or discussed at this IEP meeting unlike the triennial meeting of a year ago. Unfortunately, the IEP team, perhaps because the student had been doing well, determined that he did not need any behavioral goals or objectives incorporated in his IEP and did not address any behavioral issues. The IEP team did not continue or include the Behavior Support Plan in his IEP. After March 2005, the Behavior Support Plan was not implemented by the school district to the educational detriment of the student. And, of course, the school district did not perform a functional analysis assessment or develop a behavioral intervention plan.

After March 2005, the student's aggressive behavior progressively worsened. In April and May 2005, the student was sent home for behavioral problems. Early in the fall 2005 semester, the student was sent home on six occasions for behavior problems. He was also sent to the principal's office on 32 occasions for behavioral issues in the classroom. In October 2005, the student stabbed another pupil with a pencil. The student's SDC teacher consulted with specialists to discuss behavioral strategies to deal with the student's aggressiveness. The school principal asked for the assistance of the school district special education office. In October 2005, the school district hired Vista Behavior to conduct a functional behavior assessment of the student. In December 2005, the student hit a female pupil on the bus and then jumped on an adult aide, hurting her. The student was then suspended and placed at the Vista Behavior clinic for behavioral intervention services. In other words, the student's physically aggressive behavior became assaultive and constituted a serious behavior problem after the March 2005 IEP meeting when the Behavior Support



Plan, which had been effective, was not continued or implemented. The student lost classroom instruction time, was suspended, and placed in a behavioral clinic where he did not receive the educational instruction or DIS services required under his March 2005 IEP. The school district was compelled to retain Vista Behavioral Consulting to perform its Functional Behavioral Analysis.

Based on Findings 23 – 33 above, it was proven by the preponderance of the evidence that the school district failed to properly address or continue to address the student's serious behavior problem at the March 2005 IEP meeting. In March 2005, the school district discontinued the Behavior Support Plan and did not address any of the student's behavioral issues. The school district did not order a functional behavior assessment or develop a behavioral intervention plan after having information a year earlier that the student had a serious behavioral problem. As a result of the school district's failure to design a behavioral intervention plan to address the student's unique behavioral needs, the student's behavioral problems caused him to miss classroom instruction time and interfered with his education and learning. Therefore, the school district's IEP in March 2005 was not adequate to meet the student's unique needs and was not reasonably calculated to provide the student with some educational benefit. The student did not receive a free appropriate public education due to the school district's determination not to address his behavioral issues at the March 2005 IEP.

3. Issue No. 2 -- In the Request for Due Process Hearing, petitioner asserts that the school district should have assessed the student for ADHD. In his Closing Brief, petitioner contends that the school district should have conducted a behavioral assessment of the student as early as March 2000. Both of these assertions are not supported by the evidence.

First, it was not established that school district conducted any assessments that failed to properly evaluate or diagnose the student with ADHD or that the

student exhibited symptoms or behaviors associated with ADHD. In March 2004, the school district psychologist performed a triennial evaluation of the student and employed several assessment tools including interviews, observations, records review, and tests such as the Wide Range Achievement Test and the Vineland Adaptive Behavior Scale. Petitioner did not demonstrate that the school psychologist was not properly trained or knowledgeable, the assessments tools were invalid or improperly interpreted, or the triennial evaluation was not comprehensive so as to identify the student's needs or help the IEP team determine an appropriate educational program for him. On the other hand, the only evidence that the student has ADHD was the testimony and report of petitioner's expert witness who stated that the student presented many behaviors associated with ADHD. Petitioner's expert did not explain her diagnostic impression and was not a credible witness.

Second, it was not established that the student showed serious behaviors warranting a behavioral assessment, or that the school district had notice of such behaviors, as early as March 2000 or any other date earlier than 2003-2004. The father's testimony that his son had behavior problems at school during the school years from 2000-2001 through and 2002-2003 was based on hearsay statements and notes attributed to the student's teachers and principal. The father did not personally witness any behavior problems at school in these earlier school years. And no direct evidence, such as testimony or notes by school personnel, was presented to substantiate or corroborate these statements or behavior problems.

The probative evidence from the hearing demonstrated that the student did not display behavioral problems at school until 2003-2004 school year. Three years earlier, at the March 2000 IEP meeting, the parents indicated that the student exhibited aggressive behavior at home but they were to receive behavioral training from the regional center. The teacher reported that the student's behavior at school had improved. Subsequently, no behavioral issues were discussed at the IEP

meetings in March 2002 or March 2003. Beginning in late 2003 or early 2004, school district staff reported a change in the student's behavior. The speech pathologist saw the student hit his teacher several times in the classroom. Teachers reported that he threw tantrums to communicate his wants; screamed at others; and hit, kicked, tackled, and spit at staff and fellow students in the classroom, playground, and on the school bus. In February 2004, the student had to be sent home from school due to his physical aggressiveness to other children and staff. On another occasion, he was removed from the bus. The student's SDC teacher expressed concern that he would seriously injure another person unless his behavior was addressed. His parents attributed the change in his behavior to the fact that the family had moved from a house with a swing. While the school district did not perform a functional behavioral analysis during the 2003-2004 school year, or before the March 2004 IEP the school district acted reasonably and prudently by developing a Behavior Support Plan that proved effective in reducing the aggressive behaviors and facilitating the student's learning and progress at school. The school district did contract for the Functional Behavior Analysis in the fall 2005 semester.

With respect to this issue, petitioner did not present any probative evidence demonstrating that the school district's assessments were inadequate or inappropriate or that the school district failed to assess the student in all areas of suspected disability.

4. Issue No. 3--Petitioner also asserts that the school district denied the student a free appropriate public education because it did not provide the student with the services that comported with his March 2004 IEP and March 2005 IEP. These claims are not supported by the evidence.

First, petitioner argues that the school district did not provide services under the March 2004 IEP because it is unclear whether the Behavior Support Plan was ever implemented. Because petitioner bears the burden of proving his contentions in the

due process hearing (See *Schaffer v. Weast* (2005) 546 U.S., 126 S.Ct. 528), it behooves petitioner to present evidence that substantiates his claim. If petitioner has not presented such evidence or is unable to draw attention to certain evidence that substantiates his claim, then his claim should be denied. Here, it is clear that the school district developed a Behavior Support Plan for the student in the March 2004 IEP. The best evidence that the school district implemented the Behavior Support Plan is that student had very few behavior issues over the next year. Only after the school district determined not to continue the Behavior Support Plan following the March 2005 IEP did the student's behavior become a serious problem.

Second, petitioner complains that, after the change of placement in December 2005 to the Vista Behavior clinic, the student was not provided with DIS services in speech and language therapy, adapted PE, and occupational therapy in conformity with his March 2005 IEP. Petitioner's complaint is not supported by the evidence. On December 13, 2005, after the student was suspended for hitting a student and jumping on and hurting an aide, the school district convened an IEP meeting and changed his placement to the Vista clinic to address the recent escalation in his aggressive behavior. The school district discontinued his DIS services during this interim placement and winter break but indicated he could return to school after winter break.

After winter break, on January 5, 2006, the school district reconvened an IEP team meeting and offered a transition plan to the student in which he could return to school on a half-day basis and resume DIS services beginning on January 17. However, the parents did not consent to this transition plan and the student remained at the Vista clinic without receiving any DIS services. In other words, the school district amended the student's March 2005 IEP by temporarily placing him at the behavioral clinic and suspending his DIS services for a short time and during winter break when the student would not have been in school and not received DIS

services anyway. After winter break, the school district offered to resume DIS services but could not do so without the parents' consent. The actions of the school district in this regard were designed to meet the student's emotional and behavioral needs and were reasonably calculated to provide him with some educational benefit. The school district cannot be said to have denied the student a free appropriate public education for suspending DIS services in this time frame from December 13, 2005, through January 5, 2006.

5. Issue No. 4--In his Request for Due Process Hearing, petitioner contends that the school district denied the student a free appropriate public education by suspending him from school for more than ten days without holding a manifestation determination review. Federal law requires that, within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency must convene a meeting of the IEP team and review all relevant information to determine if the conduct was a manifestation of the child's disability. (20 U.S.C. §1415(k)(1)(E).) A change of placement occurs if the child is removed from a current educational placement for more than 10 consecutive school days or is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year. (34 C.F.R. §300.519.) Here, during the fall semester of the current school year, the student was sent to the office or to home and then suspended in December 2005 for disciplinary reasons. However, the evidence did not show that he was removed or suspended from school for 10 consecutive school days or for 10 cumulative school days in the school year. As such, the school district was not required to hold a manifestation determination meeting and no prejudice resulted to the student by the lack of such meeting.

6. Issue No. 5—As stated above, procedural violations may warrant relief under the IDEA if the procedural violations deprived the pupil of an educational

opportunity, significantly infringe upon the parents' opportunity to participate in the formulation of the IEP, or impeded the child's right to a free appropriate public education. (20 U.S.C. §1415(f)(3)(D)(ii); *W.G. v. Board of Trustees of Target Range School District, No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) In the present matter, petitioner claims that the parents' procedural rights were violated by the school district failing to provide them with copies of the student's educational requests, failing to provide prior written notice of a change in services set forth in the March 2005 IEP, and failing to provide them with copies of IEP's in the parents' native language of Spanish. It is implied that the procedural violations, and each of them, resulted in a denial of a free appropriate public education. Petitioner's claims are not persuasive.

First, parents of a child with a disability have the right to examine all records relating to the child. (20 U.S.C. §1415(b)(1).) In addition to the right and opportunity to examine school records, parents have the right to receive copies of all school records within five days after such request is made by the parent. (Ed. Code §56504.) Here, petitioner made an initial request for records of the school district on August 23, 2005. Because petitioner used an incorrect birthdate for the student on the initial request, the school district did not provide the educational records until after a second request filed on or about October 7, 2005. Nevertheless, petitioner failed to show how the student may have been prejudiced or lost educational opportunity by the timing or timeliness of the school district's production of records. The production of record had nothing to do with the subsequent suspension of the student from school or his change of placement in late 2005. Petitioner was able to file its due process complaint and then prosecute its case by presenting records and evidence in the due process hearing. Petitioner does not contend that the timeliness of the school district's records production infringed upon the parents' opportunity to participate in the IEP process.

Second, a school district is required to provide prior written 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 free appropriate public education to the child. (20 U.S.C. §1415(b)(3).) Petitioner contends that the school district violated the parents' procedural rights by failing to give prior written notice following the March 2005 IEP meeting that it was discontinuing the student's Behavior Support Plan and consultative services in occupational therapy. Petitioner's contention is not persuasive, for the IEP document itself constituted prior written notice of the change in the student's services. The parents participated in the IEP meeting and gave their consent to the resultant programming.

Third, petitioner argues that the school district violated the parents' procedural rights by failing to provide Spanish language versions or translations of the IEP's. Among the due process rights afforded to a child with a disability or his or her parents is the right to be present at each IEP meeting and to participate in the development of the IEP. (20 U.S.C. §§1414(f), 1415(b)(1); Ed. Code §§56341, 56341, subd. (a).) The school district must take whatever action is necessary to ensure that the parent understands the proceeding at the IEP meeting, including arranging for an interpreter for parents whose native language is other than English. (Ed. Code §56341.5, subd. (i).) The school district must give the parent a copy of the individualized education program at not cost to the parent. (Ed. Code §56341.5, subd. (j).)

Here, following a number of IEP meetings, the school district did not provide Spanish language versions of IEP's to the student's parents whose first or primary language is Spanish. However, petitioner did not show that the school district's failures to provide Spanish language translations of IEP's to the parents necessarily resulted in the denial of a free appropriate public education for the student for any

pertinent school year. The student's father was present and participated in almost every IEP meeting. While his first language is Spanish, the father, who attended high school in this country and served in the U.S. military, is fluent and conversant in English. He was able to meaningfully participate in and understand the discussions and decisions of the IEP team meetings. At the meetings, the father was able to voice the family's concerns about the student's education and progress and consented to the implementation of programs and services. The father did not consent to the January 2006 IEP document because he wanted to consult with his attorney. As such, the procedural flaws in the school district not providing Spanish translations of IEP's did not significantly infringe upon the father's participation in the IEP process and did not result in any loss of educational opportunity for his son.

7. Issue No. 6 -- Petitioner contends that the student's parents are entitled to reimbursement for the psychoeducational assessment performed by Dr. Alaina Martinez because the privately retained assessment was appropriate and the school district's last assessment from March 2004 failed to address behavioral concerns and was inappropriate. Petitioner's contention is not persuasive. Education Code section 56329, subdivision (b), provides that a parent may obtain an independent educational evaluation from a qualified specialist at public expense if the parent disagrees with an assessment obtained by the public educational agency. Here, petitioner did not establish that the parents or their counsel disagreed with any particular school district assessment before hiring Dr. Martinez. The parents exerted their right to have the student undergo an independent educational assessment but are not entitled to be reimbursed for the cost of that assessment without first having made known their disagreement with a school district assessment.



## PREVAILING PARTY

Under Education Code section 56507, subd. (d), this Decision must indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to said mandate, it is determined that petitioner prevailed on Issue No. 1, in part, as set forth in Conclusions of Law No. 2 above, and respondent school district prevailed on every other issue heard and decided in this matter.

## NOTICE OF APPEAL RIGHTS

This is the final administrative decision and both parties are bound by this Decision. Under Education Code section 56505, subdivision (k), either party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt of the Decision.

Wherefore, the Administrative Law Judge makes the following Order:

## ORDER

The request of petitioner-student for relief and/or services from respondent Downey Unified School District is granted, in part, based on Conclusions of Law No. 2 above.

Accordingly, respondent school district shall implement the behavior intervention plan developed for the student by Vista Behavior Consulting. In addition, respondent school district shall provide educational tutoring to the student for each of the school day hours missed as a result of disciplinary and other actions due to the student's behavior from March 17, 2005, through December 13, 2005, and as a result of the subsequent placement at the Vista Behavior Consulting clinic. In addition, respondent school district shall provide designated instructional services hours in speech and language therapy, adapted physical education, and

occupational therapy, as set forth in the March 2005 individualized education plan, which were likewise missed or not received due to the same disciplinary actions and placement. The hours of educational tutoring and designated instructional services shall be discerned and the method or manner of delivery developed at an individualized education plan meeting.

In all other respects, the due process complaint of petitioner-student shall be dismissed, based on Conclusions of Laws Nos. 3 – 7 above.

Dated: 5/18/2006

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VINCENT NAFARRETE  
Administrative Law Judge  
Office of Administrative Hearings