

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

In the Matter of:

STUDENT,

Petitioner,

v.

RIALTO UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2006120397

DECISION

Wendy A. Weber, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter on February 5 at Rialto Unified School District, Rialto, California, and on March 16, 29 and 30, and April 13 and 27, 2007, at East End SELPA, Colton, California.

Petitioner (Student) was represented by his Mother (Parent). Also present during portions of the hearing was Student.

Respondent Rialto Unified School District (District) was represented by Gail Lindberg, Program Manager, East Valley SELPA. Also present on behalf of the District during the hearing was Dawn Meade, Coordinator of Special Education for the District, and Barbara Mori, Ph.D., Director of Special Education.

On December 12, 2006, Petitioner filed a Due Process Hearing Request. A due process hearing was scheduled for February 5, 2007.

After the hearing was held and evidence received, the parties requested closing briefs which were due by mail on May 25, 2007. Petitioner's brief was sent via email to the ALJ, but not received until June 1, 2007. Petitioner did not serve Respondent with his brief,

so the ALJ faxed it to Respondent on June 8, 2007. The matter submitted for decision on June 8, 2007.

ISSUES¹

1. Did the District appropriately assess Student in mental health for the 2004-2005 school year?
2. Did the District appropriately assess Student in mental health for the 2005-2006 school year?
3. Did the District deny Student a free appropriate public education (FAPE) for the 2004-2005 school year by:
 - A. Failing to offer additional behavior services?
 - B. Failing to offer vocational training?
4. Did the District deny Student a free appropriate public education (FAPE) for the 2005-2006 school year by:
 - A. Failing to offer additional behavior services for Student?
 - B. Failing to provide mental health services since the AB 2726 referral in August 2005?
 - C. Failing to offer vocational training?
 - D. Failing to notify Parent of the manifestation determination meeting in December 2005, and inappropriately determining that Student's conduct which subjected him to expulsion in December 2005 was not a manifestation of his disability?
5. Is Student entitled to compensatory educational services?
6. Are parents entitled to reimbursement for the independent assessment conducted by UCLA in 2002?

¹ Petitioner clarified his issues the first day of hearing. The remaining issues are reorganized for clarity.

PARTIES' CONTENTIONS

Petitioner contends the District failed to assess Student in mental health, and that Student was denied a FAPE as the District failed to offer behavior counseling, mental health services and vocational training. Petitioner also contends the manifestation determination conducted by the District in December 2005 was procedurally and substantively improper because Parent was not notified of the meeting, the AB2726 referral was not done, and the District inappropriately determined Student's behaviors were not related to his disability. Petitioner contends he is entitled to compensatory educational services in all academic areas, as well as behavior and mental health services; and parents seek reimbursement for an independent assessment conducted by UCLA in 2002.

The District contends it appropriately assessed Student in all areas of suspected disability, provided Student a FAPE for the years at issue, followed appropriate procedures for expulsion and the manifestation determination, and that the manifestation determination was substantively correct. The District also contends Petitioner is not entitled to compensatory educational services, and parents are not entitled to reimbursement for the 2002 UCLA assessment.

FINDINGS OF FACT

BACKGROUND

1. Student, currently in 7th Grade, is eligible for special education services under the category of specific learning disability (SLD),² and at all relevant times, was a resident in the District. Student repeated second grade, so was 10 years old in third grade when he started receiving special education services in April 2004 at Fitzgerald Elementary.

² Student's eligibility for special education is not in dispute.

ASSESSMENTS IN MENTAL HEALTH

2. Petitioner contends the District failed to properly assess Student in mental health for the 2004-2005 and 2005-2006 school years. Before any action is taken with respect to the initial placement of an individual with exceptional needs, a school district is required to ensure a full and individual evaluation to determine if a child is a child with a disability and the educational needs of the child. The student must be assessed in all areas related to his suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program for the student.

2004-2005 School Year

3. In April 2004, a psychoeducational evaluation was conducted by Anne-Marie Foley, M.S., a school psychologist for the District. Student, then 10 years old in third grade, was referred for academic concerns. Ms. Foley conducted a review of records, interviews, and observations, and performed the Woodcock-Johnson III (WJ-III) in broad reading, broad math and written expression, the WJ Language Proficiency Battery, Visual-Motor Integration, Visual-Perceptual Skills, Auditory-Perceptual Skills, Behavior Assessment System for Children Self Report of Personality (BASC), and Conners' Teacher Rating Scales (CTRS). She noted testing done at UCLA in 2002 identified a reading disorder, visuo-perceptual and visuo-motor deficits, and Attention Deficit Hyperactivity Disorder (ADHD),³ combined type. Academically, Student scored in the borderline range in reading, low-average to average in math, and below average to average in written expression. Since he exhibited a severe discrepancy between intellectual ability and academic achievement, he

³ ADHD is a condition that becomes apparent in some children in the preschool and early school years. It is difficult for these children to control their behavior and/or pay attention.

qualified for special education under the specific learning disability (SLD) category.

4. Ms. Foley observed Student's behavior and attention in the classroom. He was attentive for short periods of time, easily distracted and impulsive, worked best in an individual setting with the teacher, responded well to praise, but gave up easily when frustrated, and peer interactions varied from positive to negative. In social/emotional functioning, Student's behavior ranged from cooperative and engaged, to disruptive, inattentive, and distractible. His responses to the BASC showed average scores in all scales, but slightly elevated in social stress. Student's ratings of himself did not indicate any emotional concerns. Results of the CTRS, however, indicated significant levels of behaviors consistent with ADHD.

5. Although Student exhibited behaviors symptomatic of a child with ADHD, the evidence did not establish that Student required a mental health assessment for the 2004-2005 school year.

2005-2006 School Year

6. In July/August 2005, an incident occurred at Hughbanks Elementary School after Student had been placed in a special day class (SDC), and was receiving special education instruction in reading and written expression, as well as behavior services. Although Student began behavior services in July 2005 for anger management, conflict resolution, and social skills, his behaviors resulted in numerous school suspensions and other disciplines. In July/August 2005, Student stated he was going to kill himself, the police were called, and Student was hospitalized on a "5150 hold".⁴ Although Student was

⁴ California Welfare and Institutions Code section 5150 allows a qualified officer or clinician to involuntarily confine a person deemed a danger to himself or others, e.g. the person must be an immediate threat to themselves, usually by being suicidal. During the confinement, the individual is to be evaluated by a mental health professional to determine if a psychiatric admission is warranted. Confinement and evaluation usually

placed on the 5150 hold, no evidence was presented as to whether he was evaluated by a mental health professional.

7. An IEP meeting was held on August 5, 2005, at Mother's request to discuss Student's program and services in light of the 5150 incident. Mother and Student attended the IEP meeting where Student's behavior problems were discussed. Mother reported Student had received some private counseling during the 2005-2006 school year, and was prescribed Risperdal for ADHD, which he took sporadically. The IEP team age-promoted Student to sixth grade at Kucera Middle School for the fall semester as the team believed his behavior problems would improve if he was attending school with same-aged peers. Behavior services were continued to discuss appropriate behaviors with Student two to four times per month, and the classroom teacher continued to implement a daily behavior chart.

8. At that IEP meeting, the District offered to complete an AB2726 referral⁵ to San Bernardino County Behavioral Health (SBCBH) for a mental health assessment and counseling. Although Mother consented to the referral, the referral was never made, and Student was not provided a mental health assessment.

9. Student's behavior problems escalated after he was age-promoted to Kucera Middle School. Instead of following up on the AB2726 referral, the District held a pre-expulsion IEP and manifestation determination meeting in December 2005. At that meeting, the IEP team determined Student's behaviors were not due to his disabilities, and he was suspended from Kucera Middle School from November 30, 2005, through January 25, 2006, and referred to the San Bernardino County School Board for expulsion. During

occur in a county mental health hospital or in a designated emergency department.

⁵ Mental health services under the IDEA are frequently referred to by the Assembly bills which created the laws that govern interagency responsibilities for the provision of such mental health services, e.g. AB2726.

the suspension, Student was not allowed on campus and received only one hour of RSP instruction after school.

10. Based upon the results of the manifestation determination, in January 2006, the School Board placed Student on "suspended expulsion,"⁶ and Student was transferred to an elementary alternative program (EAP) at Trapp Elementary. At Trapp Elementary, Student received no special education instruction from February to May 2006, so was transferred to Kolb Middle School for the remainder of the 2005-2006 school year; and in September 2006, he was transferred to a county community day school (CDS). Mother removed Student from the CDS in December, and shortly thereafter, Student ran away from home. In January 2007, Student was sent to Loma Linda Behavioral Health Hospital, where it was recommended he be sent to Oak Grove Institute, a program for children with behavior problems. Student was placed at Oak Grove in February 2007, where he received counseling on an out-patient basis at Loma Linda.

11. The District failed to properly assess Student in mental health during the 2005- 2006 school year. The failure to refer Student for a mental health assessment constitutes a procedural violation which caused a loss of educational opportunity and impeded Student's right to a FAPE. Although Mother consented to the AB2726 referral in

⁶ On January 25, 2006, the School Board determined Student's presence at school would cause a danger to persons or property that would disrupt the instructional process. Student was expelled for the remaining nine school days of the first semester and all of the second semester (until June 15, 2006), and was referred to the Trapp Elementary EAP for immediate enrollment. Because Student was not yet in seventh grade, the expulsion was suspended to the end of the 2005-2006 school year to allow Student to attend school on a District campus rather than a county community day school (CDS). Student could return to Kucera Middle School on June 15, 2006, if readmission requirements imposed by the School Board were fulfilled.

August 2005, the referral was never done; and the District proceeded with a pre-expulsion IEP/manifestation determination meeting with no information regarding Student's mental health status. In light of Student's escalating, serious behavior problems, the District was obligated to ensure Student was assessed in all areas of suspected disability. Without the mental health assessment, there was no way for the District to ensure Student's behaviors were not related to an emotional disturbance. Instead of obtaining the necessary assessment, Student was suspended, was not provided special education instruction and services he required to receive a FAPE in light of his SLD and ADHD, and was eventually expelled from school.

THE DISTRICT PROVIDED STUDENT A FAPE DURING THE 2004-2005 SCHOOL YEAR

12. A school district must offer a student eligible for special education an IEP that is reasonably calculated to afford some educational benefit.

13. For the 2004-2005 school year, the operative IEP was developed at an initial IEP meeting on April 16, 2004, when Student, then 10 years old, was in third grade at Fitzgerald Elementary. Student's unique needs were identified in the areas of reading, math, written expression, with processing deficits in sensory-motor skills, visual perception, auditory discrimination, and attention, based on Ms. Foley's psychoeducational assessment, and a health assessment which identified diagnoses of asthma and ADHD.

14. Student's present levels of performance (PLOPs) were reviewed in reading, math, written expression, language/communication, social behavior, fine/gross motor, self-help, prevocational, visual/hearing, and attention. Student's reading scores were borderline, decoding strategies were limited, he gave up quickly when reading for comprehension, and had difficulty applying context clues. In math, Student scored low-average to average, was able to complete multi-digit addition and subtraction with regrouping and single-digit multiplication, but not division facts, and scored low-average in the fluency subtest due to speed of functioning. In written expression, Student ranged

from below average on the fluency subtest to average on the writing samples subtest. On the fluency subtest, he received credit for 5 of 17 items because he did not follow instructions; and on the writing samples subtest, he was able to write sentences given a picture prompt, but sentences were short and simple with errors in punctuation, capitalization, and spelling. In language/communication, Student communicated effectively with peers and adults, but demonstrated low-average to average vocabulary, listening comprehension, and language processing skills. Oral language was in the low-average range overall. STAR results from May 2003 showed Student scored in the 11th percentile in math, 6th percentile in reading and language, and 1st percentile in writing. In social/behavior, he ranged from cooperative and engaged to oppositional, argumentative, disruptive, inattentive, and distractible. He responded well to praise, but was quick to give up when frustrated. BASC scores were average, and self-ratings showed no emotional concerns, but CTRS scores indicated significant levels of behaviors consistent with ADHD. In prevocational, he completed homework most of the time, but was absent 15 times and tardy 10 times by April 2004.

15. A program was designed to address Student's unique needs. Annual goals and objectives were written in reading, written language, and prevocational. Student's academic delays required special education support in a small group setting on a part-time, pull-out basis. He was provided general education classroom instruction 26 hours per week (for math, science, social studies, physical education, recess, lunch, and whole school activities), and RSP in small group, pull-out collaborative 60 minutes four days per week from April 16, 2004, to April 16, 2005. Program accommodations, modifications and supplemental aids and services included weekly consultation between the general education and RSP teachers, and modification of language arts assignments, class tests and seating arrangement. Parents attended, were provided their procedural rights, and consented to the IEP.

Development of a Behavior Support Plan

16. Student elicited problem behaviors throughout the 2004-2005 school year which necessitated the development of a behavior support plan (BSP)⁷ by the general education and RSP teachers. The BSP was added to the IEP with Parents' consent at an addendum IEP meeting on February 25, 2005. The IEP team believed the need for a BSP was serious; and that Student's behaviors impeded learning because disciplinary actions removed him from the learning environment. From April 2004 to February 2005, Student was referred to the office 13 times, suspended eight times, had as many as five referrals in one month, and was absent and tardy on numerous other occasions. Behaviors included physical aggression (fighting, poking with pencil, slapping, slugging), bullying (threatening, stealing, pushing first-grader), and defiance of authority; and occurred whenever Student was with other students (classroom, lunch and playground). The IEP team believed Student's behaviors were due to his need to be in control, to exert power over peers, and he gained self-esteem from bullying.

17. Alternative behaviors, interventions, and reinforcement procedures to increase positive behaviors and self-esteem were identified; and two behavior goals were added to the IEP (comply with adult's requests and improve peer interactions). Alternative behaviors included increasing self-esteem by positive actions. Interventions included seating away from others, providing free-choice time after completing a task, materials of interest at his skill level, and choices or leadership opportunities. Reinforcement of positive behaviors included teaching appropriate social skills, providing opportunities to develop skills in other areas such as music, art or sports, individual teaching time in the RSP room, structure during playground or lunch, or removal from the unstructured environment.

⁷ A BSP is designed to address a student's unique needs when a child's behavior impedes his or her learning or that of others. Positive behavioral interventions and supports are utilized to address the behavior. (34 C.F.R. § 300.346(2)(i).)

18. Implementation and ongoing monitoring of the BSP would be conducted by the special education teacher. If the behavior continued, disciplinary procedures, including in-school suspensions, would be imposed.

19. In spite of Student's behavior problems, the District's program and services provided Student a FAPE during the 2004-2005 school year. Student's PLOPS as of April 13, 2005 showed little, if any, academic progress, but STAR results in May 2004 showed 16 percent math, 17 percent reading, 15 percent language, and 6 percent spelling.

20. Although Student failed to meet any goals or objectives in reading, written expression, math and behavior, his poor progress during the 2004-2005 school year did not result from any flaw in the District's IEP or in its delivery of curriculum to Student. Stephen White, principal of Fitzgerald Elementary, credibly testified that a continuum of strategies were used at Fitzgerald Elementary, including special accommodations, extra time with the RSP teacher, and informal counseling to discuss appropriate behaviors. In spite of these measures, Student's behaviors interfered with his learning. His lack of progress was due to tardies and absences, inattention and misbehavior in class, and refusal to do class and homework. In prevocational, Student did not consistently complete class or homework; and in social adjustment, he had difficulties with peers and adults. His behavior varied greatly depending on his mood. Although he could be cooperative and attentive with work he perceived as easy with no other students nearby, there was frequent tension with peers, and the IEP team felt he did not take responsibility for learning.

Additional Behavior Services

21. Although Petitioner contends Student was denied a FAPE because the District failed to offer additional behavior services, no evidence was presented additional behavior services would have helped Student receive educational benefit from his program. The existing behavior services were appropriate, and the District was properly addressing Student's behaviors during the 2004-2005 school year.

Vocational Training

22. Since Student was not 16 years old during the 2004-2005 school year, the District was not obligated to provide him with vocational training.

STUDENT WAS DENIED A FAPE DURING THE 2005-2006 SCHOOL

April 13, 2005 Annual IEP Meeting

23. For the 2005-2006 school year, the operative IEP was developed at an annual IEP meeting on April 13, 2005, when Student was attending Fitzgerald Elementary. Parents attended and were provided their procedural rights.

24. Student's unique needs were identified based on the 2004 psychoeducational assessment, and his PLOPs were reviewed. Student continued to have significant academic delays and processing deficits in sensory-motor skills, visual, perception, auditory discrimination, and attention. In reading, Student scored in the borderline range with limited phonics decoding strategies. In math, he scored in the low average range, could perform multi-digit problems with addition and regrouping, but not with subtraction and borrowing. Written expression scores were in the borderline range, and Student wrote brief sentences that lacked detail.

25. In prevocational, Student did not consistently complete assignments, and social behavior varied greatly depending on his mood. He could be cooperative and attentive with work he perceived as easy and with no other students nearby. Socially, there was frequent tension with peers, and it was reported that Student did not take responsibility for learning. By April 13, 2005, Student's behaviors resulted in additional office referrals, and he was absent 24 times, including 16 suspensions.⁸ Mother reported

⁸ The evidence failed to establish how the suspensions were calculated. Although the parties presented copies of what were identified as attendance records for Student, no evidence was presented as to how many total days Student was suspended, if he was removed from class whole or partial days, or if he continued to receive instruction during

Student was receiving private counseling and took Risperdal for ADHD.⁹

26. The IEP team recognized that Student exhibited deficits in all academic areas and was failing to make progress. Believing Student required a more structured environment, he was placed in a special day class (SDC) at Hughbanks Elementary¹⁰ five days per week from April 17, 2005, to April 13, 2006 (25 hours per week), with participation in general education for lunch, recess and whole school activities (five hours per week). Annual goals and objectives were written in reading, written language, prevocational (complete assignments without talking, touching other students, or teacher prompting), and behavior (comply with adult requests and improve peer interactions by no incidents of physical aggression). Behavior services were added in consultation pull-out for 30 minutes two to four times per month from April 14, 2005, to April 13, 2006. Behavior services were to be provided by Laura Mollet, a District behavior specialist. Her services focused on addressing anger management, conflict resolution and social skills. Student was to meet with her one to two times per month to discuss appropriate behaviors.

27. Although the IEP offered accommodations and program modifications to address Student's functioning academic level, assignments and District assessments, no goals, accommodations or modifications were written to address Student's attention deficits.

the suspensions. It is unclear as to whether the suspensions exceeded ten cumulative days in one school year which would constitute a change of placement necessitating an IEP meeting and manifestation determination hearing. (20 U.S.C. § 1415(k); 34 C.F.R. §§ 300.530(a), 300.536(b)(1) & (2).)

⁹ Risperdal is an antipsychotic medication prescribed for children with ADHD and/or bipolar disorder.

¹⁰ Fitzgerald Elementary did not have an SDC class on campus.

Revised Behavior Support Plan

28. The BSP was “revised” to note that Student now had a total of 16 suspensions during the school year. In spite of the increased suspensions, however, the BSP was identical to the February 2005 BSP. The classroom teacher was to continue to implement a daily behavior chart. No change was made to identification of behaviors impeding learning, predictors of the behavior, alternatives, interventions, reinforcements, or behavior goals; and no evidence was presented that the BSP addressed Student’s attention deficits due to his ADHD.

August 5, 2005 IEP Meeting

29. As noted above, in July/August, Student threatened suicide and was hospitalized on a 5150 hold. On August 5, 2005, an addendum IEP meeting was held at Hughbanks Elementary at Mother’s request. Mother and Student attended the meeting.

30. Due to Student’s escalating behavior problems, the IEP team believed Student would function better with age-appropriate peers, so promoted him to a sixth grade SDC at Kucera Middle School five days per week from August 5, 2005, to April 13, 2006 (25 hours per week). Behavior consultation services were continued with Ms. Mollet, with pull-out 30 minutes two to four times per month from April 14, 2005, to April 13, 2006. Mother consented to the program and services.

31. The IEP team agreed to reconvene in October to discuss Student’s progress, but no IEP meeting was held. The District did not complete the paperwork necessary for the AB2726 referral until the end of October 2005; and even after the referral was finally made, the District failed to follow up on the referral.

Kucera Middle School—September to December 2005

32. Student began attending Kucera Middle School in September 2005, where he received instruction in the SDC class six hours a day, and sporadic behavior counseling. Student’s behavior problems continued. Teachers reported he refused to do assignments

and homework, slept a lot when he did not want to do something, threatened, made gestures and noises, and distracted students.

33. In November 2005, Student was involved in several behavior incidents which led to suspension and an expulsion referral. Student slammed a folding chair/desk to the ground; threatened an adult aide; and on November 29, 2005, after being referred to the office for a class suspension, attempted to leave campus. A security officer was called, and when Student tried to run, he grabbed Student, they fell to the ground, and Student tried to bite the officer.

Suspension from Kucera Middle School

34. After the November 29, 2005 incident, Monique Conway, principal at Kucera Middle School, suspended Student from November 30, 2005, through January 25, 2006, and initiated expulsion proceedings due to Student's behavior, accumulating days of suspension, and the November 29 incident. Ms. Conway based her actions on violations of student codes of conduct set forth in California Education Code sections 48900(k), 48900(a)(1) and 48900.4 (willfully defied school personnel and official authority, caused attempted to cause, or threatened to cause physical injury to another person, and intentionally engaged in harassment or threats against school personnel).

35. On November 29, 2005, the District sent parents written notice of a pre-expulsion IEP meeting to be held on December 6, 2005.

December 13, 2005 Pre-Expulsion IEP Meeting

36. When parents did not appear for the IEP meeting on December 6, 2005, it was rescheduled to December 13, 2005 at Mother's request. Written notice of the rescheduled meeting was sent; and the meeting proceeded with Mother appearing by telephone. Also in attendance were Monique Conway, principal; a general education physical education (PE) teacher; Karen Ylurralde, SDC teacher; Ivette McNally, school psychologist; and Barbara Mori, Director of Special Education. Ms. Mollet did not attend,

but submitted a summary of her behavior services.

37. The IEP team reviewed Student's PLOPS, which showed he had difficulties in reading identification, fluency and comprehension, math, and written language. Student was reading at a mid-first grade level, was functioning in the borderline range in written expression, and could only write a simple sentence. In pre-vocational, Student did not consistently complete or return class and homework. Student's behavior continued to vary greatly depending on his mood. He was cooperative when he desired, but constantly needed attention from his peers; was not well accepted by his peers due to his behavior toward them; and did not take responsibility for his learning, completion of assignments, or his actions. He was absent 23-26 days per period.

38. During suspension from Kucera, the IEP team determined Student would receive small group SDC separate class 60 minutes five times per week from December 14, 2005, to January 18, 2006. From January 19, 2006 to December 13, 2006, he would be placed in an SDC separate class five hours per day, with participation in general education for physical education, lunch, and assemblies. Pull-out behavior services were also continued, but decreased to two times per month for 30 minutes each session. Program modifications, accommodations and supports were written and included small group and one-to-one instruction, repetition of directions, rewards, change in seating, and accommodations for District and STAR assessments. New annual goals and objectives were written in reading, written language, prevocational, and behavior. Prevocational goals included remaining in seat, staying on task, refraining from touching other students or their belongings, hitting, name-calling, harassing and challenging other students. Behavior goals included complying with adult requests, following rules, and improving peer interactions.

Second Revised BSP

39. The IEP team recognized the need for a BSP was now *extreme*. Student was

referred to the office and suspended 15 days since the beginning of school in September 2005. Student's physical aggression, bullying and defiance impeded his learning because disciplinary actions took him out of the learning environment. Predictors of behavior were expanded to now include anytime Student was with other students, i.e. the classroom, physical education, lunch, after school, and in the neighborhood. The IEP team believed cause of the behaviors remained the same (behaviors occurred due to Student's need to be in control and exert power over his peers; and he gained self-esteem from bullying and attention.) The IEP team continued to recommend teaching the same alternative behaviors and appropriate social skills, but imposed stricter interventions (limiting unsupervised student interactions). The same reinforcers, replacement behaviors, and behavior goals to reduce the frequency of the problem behavior were rewritten into this BSP.

40. Although the IEP team recognized the need for behavior services was *extreme*, behavior services were decreased to two times per month, and no functional analysis assessment (FAA) or behavior intervention plan (BIP) were considered or completed. Although the IEP team suggested a social-emotional evaluation, Mother refused as she wanted the mental health assessment.

The District Failed to Appropriately Assess Student's Behavior Problems

41. When a student's behaviors impede his or her learning, or that of other students, the IEP team must consider the use of positive behavioral interventions, supports, and strategies to address that behavior. A behavioral assessment may be an appropriate tool to provide the IEP team with analytical data regarding the undesirable behavior, and to provide the team with proposed or tested interventions and strategies. If a student has an existing behavior support plan (BSP), the team may determine whether modifications or further information are necessary. In the event of a serious behavior problem, a behavior intervention plan (BIP) *must* be developed and *must* be based on a functional behavior

analysis or assessment (FBA or FAA).¹¹

42. The evidence establishes that Student's behavior problem escalated to an *extreme* behavior problem during the 2005-2006 school year which necessitated an FAA and a BIP.

43. As noted above, Student elicited behavior problems during the 2004-2005 school year, which necessitated the development of a BSP in February 2005. Although the BSP was revised in April 2005, Student's maladaptive behaviors continued throughout the 2005-2006 school year.

44. During the 2005-2006 school year, Student was referred for discipline 14 times and suspended 15 days. In April 2005, Student was suspended one day for threatening and tripping a student; and one day for throwing a rock at a student and swearing at the administrator, running out of the office and kicking chairs in the office. In May 2005, Student was suspended two days for flipping, punching, kicking and pushing a student. In addition to the suspensions, Student was referred numerous times to the office, given detention and time-outs, lost playground privileges for various behaviors, including hiding, refusing to go to class, being disrespectful of the teacher and student, disturbing the class, leaving class, refusal to return to class, refusal to do class work, scratching other students, running out of class because he was angry with the teacher, kicking the office door, unwilling to follow directions, playing in the bathroom and hallway,

¹¹ The primary difference between an FAA pursuant to state law and an FBA under federal law is that the former is required when a student has a "serious behavior problem." A "serious behavior problem" is defined as behavior that is assaultive, self-injurious or other severe behavior problems that are "pervasive and maladaptive for which instructional/behavioral approaches specified in student's IEP are found to be ineffective." (Cal. Code Regs., tit. 5, § 3001, subd. (aa).) Both an FAA and an FBA require a BIP, not a BSP. (34 C.F.R. § 300.346(2)(ii).)

going to class late, and bullying students. From September 2005 through November 2005, Student was disciplined for teasing, not following directions, disrupting school activities, willful defiance, preventing a teacher from entering a room, telling an adult aide he hated her, fighting after school, threatening physical injury, being defiant of the dress code, hitting a candy machine, arguing, and attempting to bite a security officer.

45. Throughout the 2005-2006 school year, Student's behaviors were pervasive and maladaptive for which instructional and behavioral approaches specified in his IEP and BSPs were ineffective. Based solely on classroom observations and teacher interviews, the IEP team continued to believe Student's behaviors were due to low self-esteem, that he could control the behaviors, and that he gained control over bullying and misbehaving. Although the BSP was revised in April 2005, the same interventions and/or disciplines of conflict management, warning by personnel, suspension and detention, were imposed. Student sporadically received anger and social skills management, but the sessions were not regularly conducted or attended.

46. The BSPs were designed to offer reinforcement for appropriate behavior and to teach more acceptable replacement behaviors by focusing on Student's self-esteem. No analytical data regarding the undesirable behavior was obtained in light of Student's unique needs in sensory-motor, visual, auditory, and attention processing deficits. Rather, interventions focused on teaching Student techniques to improve anger management and social skills. No in-depth assessment was done to look beyond the behavior itself. No analysis or problem-solving process was instituted to focus on a description of the problem, or to identify the purpose of the problem behaviors. No analysis was done focusing on identifying significant, pupil-specific social, affective, cognitive and/or environmental factors associated with the occurrence and nonoccurrence of specific behaviors.

47. Laura Mollet, behavior specialist, did not conduct an in-depth assessment of Student's behaviors. Ms. Mollet has a Bachelor of Arts in learning disabilities and

social/emotional disorders and a Master of Arts in education. She was a special education teacher for several years, has been a behavior specialist for the District since 2000, and received training as a behavior intervention case manager (BICM) through SELPA. Her duties as a behavior specialist include assisting with writing BSPs and FAAs, if asked. She assessed Student by observation, records review, and teacher interviews; and assisted Student's classroom teacher in developing the initial BSP and behavior goals. Although she developed a behavior chart to earn rewards, she did not write any progress reports; and she was not asked, and did not conduct, an FAA. Instead, her behavior services focused on anger management, conflict resolution, and social skills.

48. Although behavior goals, a BSP and behavior services were added to the April 13, 2005 IEP, the District denied Student a FAPE because no FAA or BIP were considered or conducted to address Student's escalating behavior problems throughout the 2005-2006 school year.

49. The failure to conduct an FAA allowed a disconnection between Student's unique needs and his behavior problems. Information gathered to develop the BSPs was woefully inadequate and uncoordinated. Some teachers were aware that Student had sporadically taken Risperdal for ADHD, but Ms. Mollet was not. Although Ms. Mollet was aware Student had been referred for AB2726 services, she was not aware the referral had not been completed, and was not aware if Student had received counseling. Ms. Mollet believed Student could control his behavior if he wanted, but was also aware Student was impulsive due to ADHD, which contributed to his SLD. No District personnel conducted interviews with Student or his parents, no referral was made to a school psychologist, and even as late as the December 13, 2005 pre-expulsion IEP meeting, the AB2726 referral had still not been completed.

50. Mother and Student's grandmother, a retired special education teacher, testified that Student's behaviors were due to his impulsivity, inattention and frustration as a result of his ADHD. Mother recognized Student became frustrated and acted out when

given a difficult task; and even the District's witnesses admitted that Student was impulsive, inattentive, and became frustrated when assignments were difficult. Yet, no effort was made to analyze Student's behaviors in light of these disabilities. Complete, coordinated, and analyzed data was required to adequately assess Student's functional behavior levels to assist the IEP team in modifying his behavioral support, so Student could access his educational program. Student's misbehavior was frequent, not controlled by District personnel, and implementation of the BSPs and sporadic behavior services were ineffective in managing the misbehavior. By December 2005, Student's attendance, refusals to do the school work, and disruptive behaviors were so problematic that no grades were given. The inability to grade Student reflects that his behaviors severely impeded his learning.

December 13, 2005 Manifestation Determination Meeting

51. The same IEP team members then proceeded with the manifestation determination. The general education PE teacher reported Student did not follow directions, had poor participation, was truant twice and tardy three times in the first quarter, distracted other students, was defiant, knew right from wrong, was not impulsive, and made deliberate choices. Ms. Ylurralde, Student's special education math and science teacher since September, reported Student was defiant, did not follow directions, did no class or homework, and knew right from wrong. The special education language arts and social studies teacher did not attend the meeting, but reported Student was generally well behaved, did assignments, and knew right from wrong. Although the IEP team was aware Student was on medication for ADHD, and that the AB2726 referral had not been completed, the IEP team concluded Student was not impulsive, made deliberate choices, did not follow instructions, was defiant, did not do class or homework, and knew right from wrong. He was frequently tardy, handled peer difficulties on his own instead of going to the teacher, and had difficulty accepting responsibility.

52. The IEP team reviewed Student's IEP and placement. Although they noted

Student had significant deficits in reading and writing with associated sensory motor, visual, auditory discrimination, and attention processing deficits, the IEP team concluded Student's behavior was not a manifestation of his disability, and that his current IEP was being implemented. The IEP team believed Student's IEP and placement were appropriate at the time of the incidents in relation to the behavior subject to discipline; special education services, supplementary aids and services, and behavior intervention strategies provided were consistent with his IEP and placement; and Student's disability did not impair his ability to understand the impact and consequences of his behavior, or his ability to control his behavior that was the subject of disciplinary action. The IEP team recommended proceeding with the expulsion process.

53. Mother disagreed with the IEP team's conclusions, and did not consent to the IEP. Mother maintained that Student was impulsive due to his ADHD, his medication was not controlling his behavior, and she was still waiting for the AB2726 referral for a mental health assessment and counseling.

Expulsion from Kucera Middle School

54. After a manifestation determination decision, the District may proceed with suspension, expulsion and/or assessment. After the December 13, 2005 manifestation determination meeting, Student was referred to the School Board for expulsion for violating student codes of conduct.

55. The District's recommendation for expulsion was affirmed by the District Administrative Hearing Panel and School Board on January 9, 2006. Statutory notice and procedural requirements were met before and after the suspension. Parents did not attend the expulsion hearing. The School Board determined Student's presence at school would cause a danger to persons or property that would disrupt the instructional process; and expelled Student for the remaining nine school days of the first semester and all of the second semester (until June 15, 2006). On January 25, 2006, the Board imposed a

suspended expulsion for May 2006 to the end of the 2005-2006 school year. Student was eligible to return to Kucera Middle School on June 15, 2006, if readmission requirements imposed by the Board were fulfilled.

56. Written notice of the Board's decision to expel Student was sent by certified mail to Student's parents on January 24, 2006, informing them of the action and that they had 30 days to appeal the decision. Student could be reinstated to the District's schools with a suspended expulsion contingent on academic performance, behavior and attendance. The School Board referred Student to an educational alternative program (EAP) at Trapp Elementary for immediate enrollment.

57. Mother did not appeal the manifestation determination or expulsion decision; and did not request an expedited hearing to contest the manifestation determination.

Remainder of 2005-2006 School Year

58. Student attended Trapp Elementary EAP from February to May 2006, where he was placed in Troy Holland's general education class. Mr. Holland holds a Bachelor of Science, Master of Arts and teaching credential, and has been a teacher at Trapp Elementary for eight years. He is not a special education teacher and has no experience teaching special education students. He used core curriculum with modifications, and worked on Student's goals and the BSP in class. He felt Student was making progress, but noted he was impulsive, made unkind remarks to students and school staff, antagonized other students, was able to control his behavior, and completed some work when he wanted to do so. Mr. Holland admitted Student should have received special education services at Trapp Elementary EAP, but did not.

59. When Mother discovered Student was not receiving special education services at Trapp Elementary EAP, he was transferred to an SDC at Kolb Middle School in May 2006 for the remainder of the 2005-2006 school year.

60. Student did not meet the requirements for readmission to Kucera Middle

School by the end of the school year, so was transferred to Bob Murphy Community Day School (CDS) on September 6, 2006.¹² Mother withdrew Student from the CDS on November 14, 2006.

Student Failed to Make Educational Progress During the 2005-2006 School Year

61. As of December 2005, Student's PLOPS showed the District's program did not provide Student educational benefit. He met no goals or objectives in reading, written expression, math or behavior. He was at the first grade level in English, reading, SDC general science and math, and the second grade level in social studies and PE. Any slight benefit Student received from his program in 2004-2005 was lost due to the lack of special education instruction, as well as Student's behavior problems that went almost unchecked during the 2005-2006 school year, and which continued to interfere with his ability to obtain a benefit from his education.

The IEPs Failed to Provide Student Educational Benefit

62. During Student's suspension from Kucera Middle School, the IEP team determined one hour of special education instruction after school five days a week was

¹² Student received no behavior services at the CDS. Anger management counseling for ten weeks was provided for all students at the CDS as a condition of rehabilitation. Student's behavior problems continued at the CDS (he received detention for leaving school without permission; was suspended one day for swearing at the teacher; suspended five days for throwing a rock at school personnel; refused to go to class; came to school late; took a teacher's pen; and the police were called when Student was seen with another's student's purse). Student received an F in electives, no credit in all other academics, and earned no GPA. He was tardy and suspended numerous times, and absent 15 days in 12 weeks.

appropriate in light of his behaviors around other students. However, after Student was expelled and transferred to Trapp Elementary EAP, he received no special education instruction at all. Since both the August 5, 2005 and December 13, 2005 IEPs called for special education instruction of 25 hours per week in all academic areas from January 25, 2006, to April 13, 2006, the failure to provide the services denied Student a FAPE.

63. Student was also denied a FAPE because the District failed to provide two hours of behavior services per month from January 25, 2006, to April 13, 2006 as recommended by the IEP team in December 13, 2005.

64. The evidence established Student's behaviors adversely impacted his academic performance. He was not completing class work, not turning in homework, not performing well in class, and was creating class disruptions with adults and peers. His misbehaviors had escalated to requiring a 5150 hold, and the District offered to send Student for a mental health evaluation. During this time, Mother reported Student had difficulty staying on task for a long period of time; had trouble paying attention; was impulsive; at times acted before thinking; became frustrated when he could not perform a task; was easily distracted; and that he only sporadically took his ADHD medication. No IEP during the 2005-2006 school year addressed the 2004 psychoeducational assessment that found Student had attention difficulties, was easily distracted and impulsive, gave up when frustrated, or that the CTRS results indicated significant levels of behaviors consistent with ADHD. Although some effort was made to address the attention deficits at Fitzgerald Elementary during the 2004- 2005 school year, no goals were written in attention in the April, August or December 2005 IEPs; and not until the December 2005 IEP were accommodations written into the IEP which specifically focused on Student's attention deficits.

65. A psychoeducational reevaluation should have been done prior to conducting the manifestation determination to determine whether Student continued to have a particular category of disability, ascertain Student's present levels of performance

and educational needs, whether he continued to need special education and related services, and whether any additions or modifications to the special education and related services called for in the IEP were needed to enable him to meet the measurable annual goals, to the extent appropriate, in the general curriculum. (20 U.S.C. § 1414(c)(1)(B)(iv); 34 C.F.R. § 300.533(a)(2).) In any event, suspending Student from Kucera Middle School for two months, decreasing his special education instruction by four-fifths and behavior services by one-half, and sending him to a general education class at Trapp Elementary EAP with no special education services or instruction, constitutes a significant change in placement which necessitated a reevaluation. (34 C.F.R. § 104.35(a) (a reevaluation must be performed before action is taken to make a “significant change in placement”).)

66. The District was also obligated to reassess Student when the AB2726 referral process was initiated in August 2005. By the time the IEP team determined Student’s conduct was not a manifestation of his disabilities, the AB2726 referral was still not done. Although Student was identified as potentially requiring mental health services, the District did not request the participation of the county mental health agency at the December 13, 2005 IEP in violation of Education Code section 56331, subdivision (b). As a consequence, the District failed to provide specialized instruction, including related services such as counseling services, parent counseling and training, psychological services, or social work services.

Additional Behavior Services are Not Appropriate

67. Although Petitioner contends Student was denied a FAPE because the District failed to offer *additional* behavior services, no evidence was presented additional services would have helped Student to receive educational benefit from his program. On the contrary, although BSPs were developed and behavior services implemented, the BSPs and services were ineffective in managing Student’s behaviors.

The District Failed to Provide Mental Health Services

68. Petitioner's contention Student was denied a FAPE because the District failed to provide mental health services after the August 2005 AB2726 referral is correct. The District failed to complete the AB2726 referral. As a result, no mental health services were provided for Student.

Vocational Training Not Indicated

69. Student was not 16 years old during the 2005-2006 school year. Accordingly, the District was not obligated to provide Student with vocational training.

The District Properly Notified Parent of the Manifestation Determination Meeting, but Inappropriately Determined Student's Conduct was not a Manifestation of His Disabilities

CHANGE OF PLACEMENT AND PROCEDURAL REQUIREMENTS

70. An expulsion or suspension for more than ten days is a "change in placement" requiring procedural compliance of notice and parental involvement and endorsement. On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents of the procedural safeguards notice described in 34 C.F.R. part 300.504.

71. Student's suspension from Kucera Middle School from November 30, 2005, to January 25, 2006, constituted a change of placement that exceeded ten consecutive school days. On November 29, 2005, the District sent parents written notice of a pre-expulsion assessment to be held on December 6, 2005. A new IEP meeting was noticed and convened within ten school days of the District's decision to expel Student. Petitioner and his parents were provided written notice, the pre-expulsion IEP/manifestation determination meeting was rescheduled, and Mother participated in the meeting by telephone. The District complied with the notice requirement.

THE DISTRICT FAILED TO IMPLEMENT STUDENT'S AUGUST 2005 IEP

72. The manifestation determination was fundamentally flawed because Student's August 5, 2005 IEP was not properly implemented. The AB2726 referral was not completed; the October 2005 IEP was not held as recommended by the IEP team to discuss Student's progress; and Student did not receive any behavior services after he was suspended from Kucera Middle School on November 30, 2005.

73. Although the District failed to implement Student's August 2005 IEP, no evidence was presented Student's conduct was the direct result of the failure to implement it.

74. Although no evidence was presented that Student's conduct was the direct result of the failure to implement the August 2005 IEP, the District's failure to conduct appropriate assessments not only denied Student a FAPE, it undermined a proper manifestation determination process. The manifestation determination was based on observations of Student's classroom behaviors at Kucera Middle School by teachers who had known Student for only three months; a review of Ms. Mollet's behavior summary;¹³ and a cursory review by Ivette McNally, school psychologist, of the 2004 psychoeducational assessment. As noted above, no psychoeducational reevaluation was conducted, no mental health assessment was done, and no FAA or BIP was performed or

¹³ Although she provided behavior services since July 2005, Ms. Mollet did not attend the manifestation determination meeting. Her summary showed Student was cooperative and knew the right responses to questions about behavior, could conceptualize the right choices to make, but made no effort to change his behavior habits and was not motivated to change his behavior, stay out of trouble, be successful in school, or earn incentives. Although impulsive, she believed he could sometimes control his behavior, became frustrated due to inability to do tasks and/or dealing with peers, and occasionally needed re-direction.

implemented.

75. Ms. McNally has a Master of Arts in education, credentials in school psychology and behavior intervention, and has been employed as a school psychologist with the District for 12 years. Although she agreed with the IEP team's determination, she relied on teacher reports. She did not conduct her own assessments or tests; never observed Student or interviewed Student or his parents;¹⁴ and was familiar with his disability and current academic functioning only by what was reported in the 2004 psychoeducational assessment. Although she was aware Student had behavior issues for a long time, Ms. McNally reviewed no records, made no comment regarding Student's lack of educational progress, and recommended no additional testing, assessments, or crisis counseling, even in light of the 5150 hold. Moreover, in spite of recommending the AB2726 referral in August 2005, she agreed with the IEP team's determination without obtaining the referral; and although she recommended age-promotion at the August 2005 IEP meeting, she admitted it was not successful.

76. Ms. Foley was not present at the manifestation determination meeting; and no one asked for her input regarding Student's conduct. When she conducted the 2004 psychoeducational assessment, she found Student was impulsive, had difficulty focusing, staying on task, and was easily frustrated. Although Ms. McNally noted Ms. Foley's findings, she dismissed those findings as merely referring to test behavior.

77. There is no indication the IEP team making the manifestation determination recognized any connection between Student's emotional outbursts and his SLD, attention deficits, or ADHD. Instead, a BSP was developed which focused solely on anger management and social skills. This narrow focus precluded consideration of further analysis of the cause of the behavior problems; and from the outset caused the District to

¹⁴ In fact, no evidence was presented that the IEP team interviewed Student's parents at any time.

conclude that Student's behaviors were not related to his disabilities. Little consideration was given to Mother's concerns about the relationship between Student's behaviors, his ADHD, the lack of proper medication regulation, and request for the mental health evaluation.

78. The District failed to ensure the AB2726 referral was completed, failed to conduct an FAA, and failed to reassess Student's needs in attention in relation to his escalating behavior problems. The failure to obtain the AB2726 referral precluded input by a mental health professional in light of Student's diagnosis of ADHD and being prescribed an antipsychotic medication. No psychological services were provided to assess and address Student's behaviors; and the IEP team had no information as to whether Student had a diagnosed mental health condition affecting his behavior. Without these necessary assessments, it is inconceivable the IEP team could determine if Student's conduct was a manifestation of his disabilities. The failure to conduct the assessments and to take Mother's concerns into consideration constituted a procedural violation which impeded Student's right to a FAPE and significantly infringed on Mother's opportunity to participate in the IEP process.

STUDENT IS ENTITLED TO AN AWARD OF COMPENSATORY EDUCATIONAL SERVICES

79. Petitioner seeks compensatory educational services. Compensatory education serves as an equitable remedy for a past denial of FAPE, and may be awarded if appropriate.

80. The District was aware of its obligation to provide Student the specialized instruction he needed due to his disabilities; and the evidence shows the programs developed for Student during the 2004-2005 school year were appropriate to address his unique needs in reading and written expression. The undisputed testimony of Mr. Holland established Student received educational benefit from the program and services offered during the 2004- 2005 school year. Student could access his general education curriculum

with RSP services, supports and accommodations. Although Student clearly missed special education instruction in reading and written expression, the failure to receive those services was due, in most part, to Student's misbehaviors.

81. Although Student's behaviors presented the District with a difficult situation, he is entitled to compensatory educational services in all academic areas for the denial of FAPE during the 2005-2006 school year. Although the August 2005 and December 2005 IEPs called for 25 hours of special education instruction in all academic areas, Student received no special education instruction from a credentialed special education teacher at Trapp Elementary EAP from January 26, 2006, to April 13, 2006.¹⁵

82. Student was deprived of 10 weeks of special education instruction during his expulsion, for a total of 250 hours. Although an award of compensatory educational services is not customarily granted on an hour for hour calculation, equity in this case necessitates the result. Not only did the District fail to provide any special education services for Student during the expulsion, there was absolutely no IEP team follow-up during the expulsion, no annual IEP meeting was held in 2006 to monitor Student's progress, and no assessments were conducted during the 2005-2006 or 2006-2007 school years to determine and monitor Student's educational progress. After the District conducted the flawed manifestation determination and recommended expulsion, it completely ignored its obligations under federal and state law. To deny compensatory educational services under these circumstances would award the District's unlawful conduct.

¹⁵ Although the IEP team offered to provide special education instruction one hour per day after school by Ms. Ylurralde, Student received a total of only 11 hours of services from December 14, 2005, to January 25, 2006. The primary reason for the failure to provide the instruction was due to Student's failure to appear for the instruction.

REIMBURSEMENT FOR THE 2002 UCLA INDEPENDENT EDUCATIONAL EVALUATION

83. A psychoeducational evaluation was conducted at parent's request at UCLA in April 2002 at a cost of \$583.50. Parents are not entitled to reimbursement for the evaluation as the cost was incurred more than two years prior to filing this due process request. (Ed. Code, § 56505, subd. I.)

CREDIBILITY OF MOTHER

84. Mother presented as a very concerned parent, and in spite of no legal training, did a remarkable job presenting Petitioner's case. She was direct and on point in her presentation of evidence; and valiantly attempted to show through the District's witnesses that Student's behaviors were caused, in part, by his ADHD. Although her memory regarding some dates and events did not coincide with the documents and other witness testimony, her credibility was bolstered by her forthright admission that Student had severe behavior problems.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Petitioner has the burden of proving non-compliance with the IDEA by a preponderance of evidence. (*Schafferv. Weast* (2005) 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387.)

2. Before any action is taken with respect to the initial placement of an individual with exceptional needs, a school district is required to ensure a full and individual evaluation to determine if a child is a "child with a disability" under title 34 of the Code of Federal Regulations part 300.7, and the educational needs of the child. (34 C.F.R. § 300.320; Ed Code, § 56320.) The student must be assessed in all areas related to his suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program

for the student. (20 U.S.C. § 1414(a)(2), (3); Ed Code, § 56320, subds. (e) & (f).) A school district must conduct a reassessment of a child with a disability not more frequently than once a year, but at least once every three years. (20 U.S.C. § 1414(a)(2)(B); Ed Code, § 56381, subd. (a)(2).) A district must conduct a reassessment if it “determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation.” (20 U.S.C. § 1414(a)(2)(A)(i); Ed. Code, § 56381, subd. (a).)

3. A school district must conduct a reassessment if it determines that the educational or related service needs, including improved academic achievement and functional performance of the child warrant a reevaluation. As part of any reassessment, the IEP team shall review existing data on the pupil, including assessments and information provided by the parents, current classroom-based assessments and observations, and teacher and related services providers’ observations. On the basis of the review, and with input from parents, the IEP team must determine what additional data, if any, is needed to determine whether any additions or modifications to the special education and related services are needed to enable the pupil to meet the measurable annual goals set out in the IEP and to participate, as appropriate, in the general curriculum. The LEA shall administer tests and other assessment materials needed to produce the data identified by the IEP team. (Ed Code, § 56381(a)(1), (b)(1), (b)(2)(B) & (D) & (c).)

4. If the IEP team and other qualified professionals, as appropriate, determine that no additional data is needed to determine the educational needs of the pupil, the LEA must notify the pupil’s parents of that determination and the reasons for it, and the right of the parents to request an assessment to determine whether the pupil continues to be an individual with exceptional needs, and to determine the educational needs of the pupil. The LEA is not required to conduct an assessment, unless requested by the pupil’s parents. (Ed. Code, § 56381(d).) A failure to properly or timely assess may be a procedural violation if it significantly impeded the ability of the parents to participate in decisions regarding the

student's education, or if it deprived the student of an educational opportunity.

FAPE

5. A child with a disability has the right to a FAPE under the IDEA and California special education law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.6.) A FAPE consists of special education and related services provided at public expense and under public supervision and direction that meet the State's educational standards and conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56040; Cal. Code Regs., tit. 5, § 3001, subd. (o).)

6. The term "related services" includes developmental, corrective, and supportive services as are required to assist a child with a disability to benefit from special education, and include psychological and counseling services. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(a)(10).) California similarly provides that designated instruction services (DIS) shall be provided "when the instruction and other services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363(a).) Psychological services are related services that include: administering psychological and educational tests and other assessments; interpreting assessment results; obtaining, integrating and interpreting information about child behavior and conditions relating to learning; consulting with other staff in planning school programs to meet the special needs of children as indicated by psychological tests interviews, direct observation, and behavioral evaluations; planning and managing a program of psychological counseling services to children and parents; and assisting in developing behavioral intervention strategies. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34.)

7. A child receives a FAPE if the program: (1) addresses his unique needs; (2) is reasonably calculated to provide some educational benefit; and (3) comports with the IEP. (*Capistrano Unified Sch. Dist. v. Wartenberg*, 59 P.3d 884, 893 (9th Cir. 1995) (citing *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176,

188-189.) A district must provide a basic floor of opportunity consisting of access to specialized instruction and related services which are individually designed to provide educational benefit to the child with a disability. (*Rowley*, 458 U.S. at pp. 200-201.) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Id.* at pp. 198-199.)

8. In determining whether the District offered a FAPE, the focus is on the adequacy of the proposed placement. A placement is adequate if it is reasonably calculated to provide educational benefit to the student. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) The requirement that the District's program be "reasonably calculated" to enable a child to receive educational benefits is prospective, i.e. based on an evaluation done by a team of experts prior to the student's placement. (*Furhmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031.)

PROCEDURAL SAFEGUARDS

9. The IDEA also provides procedural safeguards to children and their parents. (20 U.S.C. § 1415.) A procedural violation does not result in the denial of a FAPE, unless the violation causes a loss of educational opportunity, significantly infringes on the parents' opportunity to participate in the IEP process, or impedes the student's right to a FAPE. (*W.G. v. Bd. of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479. *See also* 20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subds. (f)(2), (A), (B), & (C).)

DEVELOPMENT OF AN IEP

10. In developing a child's IEP, the IEP team shall consider the strengths of the child and the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child, and as appropriate the results of the child's performance on any general State or district-wide assessment programs. (34 C.F.R. § 300.346; Ed. Code, § 56341.1.) An IEP is a snapshot, not a retrospective of what was, and

was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141.)

11. Once a student has been determined eligible for special education, the IEP must include a statement of the student's abilities and present levels of educational performance, outlines of measurable educational goals, specification of educational services to be provided, and appropriate evaluation procedures, as well as an explanation to what extent the student will participate with nondisabled children, a projected date for beginning of services, frequency, location and duration, how progress toward annual goals would be measured, and how parents would be informed of progress. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.347.) The goals and objectives developed at the IEP meeting apply not only to meeting a student's needs for enabling him to be involved in and progress in the general curriculum, but also to "meeting each of [his] other educational needs that resulted from [his] disability." (20 U.S.C. § 1414(d)(1)(A)(ii).) *See also Rowley*, 458 U.S. at p. 203) (noting that Congress "equated an 'appropriate education' to the receipt of some specialized educational services".)

BEHAVIOR SERVICES

12. In the case of a child whose behavior impedes the child's learning or that of others, the IEP team shall consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); Ed. Code, §§ 56341.1, subd. (b)(1), 56523; 34 C.F.R. § 300.346(a)(2).) If the IEP team considers behavioral factors, and if the team determines that a child needs a particular service, "including an intervention, accommodation, or other program modification in order for the child to receive FAPE," the team must include a statement to that effect in the IEP. (34 C.F.R. § 300.346(c).)

13. "Behavioral intervention" means the design, implementation, and evaluation of individual or group instructional and environmental modifications, including programs

of behavioral instruction, to produce significant improvements in human behavior through skill acquisition and the reduction of problematic behavior. Behavioral interventions are designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual's right to placement in the least restrictive educational environment as outlined in the individual's IEP. (Cal. Code Regs., tit. 5, § 3001(d).)

14. One such intervention is a behavior support plan (BSP). A BSP is designed to address a student's unique needs when a child's behavior impedes his or her learning or that of others. Appropriate strategies are utilized, including positive behavioral interventions and supports to address the behavior. (34 C.F.R. § 300.346(2)(i).)

15. Another intervention involves a behavior intervention plan (BIP), a document that is developed when a student exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of his IEP. (Cal. Code Regs., tit. 5, § 3001, subd. (f).) A "serious behavior problem" is behavior that is self-injurious or assaultive, causes serious property damage, or is pervasive and maladaptive and not effectively controlled by the instructional and behavioral approaches specified in the student's IEP. (*Id.* at subd. (aa).)

16. A BIP must contain a summary of the results of a functional analysis assessment (FAA) or functional behavioral assessment (FBA), objective and measurable descriptions of the targeted maladaptive behaviors and the replacement positive behaviors, a schedule for recording the frequency of the use of the interventions, phasing or fade out criteria, and specific dates for periodic review, among other information. (Cal. Code Regs., tit. 5, § 3001, subd. (f); § 3052.) An FAA should occur when the IEP team determines that other instructional or behavioral approaches in the IEP have been ineffective; and should involve District personnel with documented training in behavior analysis, including positive behavioral interventions. (Cal. Code Regs., tit. 5, § 3001, subd. (e); § 3052(a)(1).)

17. A BIP shall become part of the IEP, and shall describe the frequency of the consultation to be provided by the behavior intervention case manager to the staff members and parents who are responsible for implementing the plan. A copy of the plan shall be provided to the person or agency responsible for implementation in noneducational settings, and shall include: (1) a summary of relevant and determinative information gathered from a functional analysis assessment (FAA); (2) an objective and measurable description of the targeted maladaptive behavior(s) and replacement positive behavior(s); (3) the individual's goals and objectives specific to the BIP; (4) a detailed description of the behavioral interventions to be used and the circumstances for their use; (5) specific schedules for recording the frequency of the use of the interventions and the frequency of the targeted and replacement behaviors; including specific criteria for discontinuing the use of the intervention for lack of effectiveness or replacing it with an identified and specified alternative; (6) criteria by which the procedure will be faded or phased-out, or less intense/frequent restrictive behavioral intervention schedules or techniques will be used; (7) those behavioral interventions which will be used in the home, residential facility, work site or other noneducational setting; and (8) specific dates for periodic review by the IEP team of the efficacy of the program. (Cal. Code Regs., tit. 5, §§ 3001(f)(1)-(8), 3052.)

18. An FAA must occur after the IEP team finds the instructional/behavioral approaches specified in the student's IEP have been ineffective, or if the parent requests one. FAA personnel gather information from three sources: direct observation, interviews with significant others, and review of available data such as assessment reports prepared by other professionals and other individual records.

19. An FAA must be conducted by, or be under the supervision of, a person who has documented training in behavior analysis with an emphasis on positive behavioral interventions. An FAA shall include all of the following: (A) systematic observation of the occurrence of the targeted behavior for an accurate definition and description of the

frequency, duration, and intensity; (B) systematic observation of the immediate antecedent events associated with each instance of the display of the targeted inappropriate behavior; (C) systematic observation and analysis of the consequences following the display of the behavior to determine the function the behavior serves for the individual, i.e. to identify the specific environmental or physiological outcomes produced by the behavior. The communicative intent of the behavior is identified in terms of what the individual is either requesting or protesting through the display of the behavior; (D) ecological analysis of the settings in which the behavior occurs most frequently. Factors to consider should include the physical setting, the social setting, the activities and the nature of instruction, scheduling, the quality of communication between the individual and staff and other students, the degree of independence, the degree of participation, the amount and quality of social interaction, the degree of choice, and the variety of activities; (E) review of records for health and medical factors which may influence behaviors (e.g. medication levels, sleep cycles, health, diet); and (F) review of the history of the behavior to include the effectiveness of previously used behavioral interventions. (Cal. Code Regs., tit. 5, § 3052(b)(1)(A)-(F) (Emphasis added).)

20. Upon completion of the FAA, an IEP team meeting shall be held to review results and, if necessary, to develop a BIP. The IEP team shall include the BICM, the BIP shall become a part of the IEP and shall be written with sufficient detail so as to direct the implementation of the plan. (Cal. Code Regs., tit. 5, § 3052, subds. (b) & (c).)

DISCIPLINE PROCEDURES

21. A pupil who commits any offense related to school activities or attendance involving physical injury to another, profanity, disruption/defiance, theft, or receipt of stolen property, may be removed from the school setting through suspension, expulsion, or involuntary transfer to a continuation school, opportunity program, or county community school. (Ed. Code §§ 48432, 48900, et seq.) School personnel may remove a

child with a disability who violates a code of student conduct from his current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days, and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct, as long as those removals do not constitute a change of placement. (34 C.F.R. § 300.530(a) & (b)(1).)

22. A “change of placement” is a fundamental change in, or elimination of, a basic element of a child’s educational program. (34 C.F.R. § 300.536(a).) Expulsion or suspension for more than ten days is a “change of placement.” (*Honig v. Doe* (1988) 484 U.S. 305.) The IEP team must meet within ten days of a decision to change a child’s placement due to a disciplinary code of conduct; and the District must provide parents with procedural safeguards. (20 U.S.C. § 1415(k)(1)(E)(i); 34C.F.R. § 300.530(h).)

23. After a child with a disability has been removed from his current placement for 10 school days in the same school year, during any subsequent days of removal the school must continue to provide educational services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP; and receive, as appropriate, an FBA, and behavior intervention services and modifications, that are designed to address the behavior violation so that it does not recur. (20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d)(1)(i).) If the removal is a change of placement under part 300.536, the IEP team determines appropriate services. (20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.536(d)(1)(ii).)

MANIFESTATION DETERMINATION

24. Once a student’s removal is deemed a change of placement, the IEP team must conduct a manifestation determination meeting to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or if the conduct in question was the direct result of the local educational

agency's failure to implement the IEP. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).) The decision is made by "the LEA, the parent, and relevant members of the child's IEP team (as determined by parent and the LEA)." (34 C.F.R. § 300.530(e)(1).) Commentary distinguishes between the team that does the manifestation determination and the IEP team that makes decision about services for the student who is being removed as a result of a change of placement. (Federal Register, Vol. 71, No. 156, at 46720 (8/14/06).)

25. 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 LEA, the parent, and relevant members of the child's IEP team must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine: (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) if the conduct in question was the direct result of the LEA's failure to implement the IEP. (34 C.F.R. § 300.530(e)(1).) The manifestation determination will analyze the child's behavior as demonstrated across settings and across times when determining whether the conduct in question is a direct result of the disability. Comments, Congressional Conference Committee's Report, page 46720. The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP team determine that a condition in either (i) or (ii) of this section was met.

26. If the IEP team determines the conduct is not a manifestation of the disability, then normal school disciplinary procedures may be used to address the incident, the same as applied to non-disabled students. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c).) However, since the IDEA also guarantees that the student must continue to receive appropriate services, albeit in an "interim alternative setting," some IEP team follow-up is required. (20 U.S.C. § 1415(k)(1)(H)(2) (an interim alternative educational setting must be determined by the IEP team). Services are not just educational in nature, but also behavioral, including "behavioral intervention services and modifications that are designed

to address the behavior violation so that it does not recur.” (20 U.S.C. § 1415(k)(1)(D)(2); 34 C.F.R. § 300.530(d)(1)(ii).) A change of placement for disciplinary reasons must enable the student to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals set out in the IEP. (71 Fed.Reg. 46716 (August 14, 2006).)

27. On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in title 34 of the Code of Federal part 300.504.

28. The parent of a child with a disability who disagrees with any decision regarding placement under title 34 of the Code of Federal part 300.530, or the manifestation determination under part 300.530(e), may appeal the decision by requesting a hearing pursuant to parts 300.507 and 300.508(a) and (b). In making the determination, the hearing officer may: (i) return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of part 300.530 or that the child’s behavior was a manifestation of the child’s disability; or (ii) order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. (34 C.F.R. § 300.532(b)(2).)

COMPENSATORY EDUCATION

29. Compensatory awards are an equitable remedy for a past denial of FAPE, and are aimed to place disabled children in the same position they would have occupied but for the District’s violation of the IDEA. (*Reid v. D.C.* (2005 D.C. App.) 401 F.3d 516.) Because Student’s test scores showed he did not receive more than a *de minimus* educational

benefit during the 2005-2006 school year, he is entitled to receive compensatory education. The complete cessation of special education and behavior services for Student during the expulsion period is unconscionable, and entitles Student to an award of compensatory education. (*Student v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489.)

30. Appropriate relief is relief designed to ensure the student is appropriately educated within the meaning of the IDEA, and there is no obligation to provide a day-for-day compensation for time missed. An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. C., supra.*) When determining an award of compensatory education, the inquiry must be fact-specific. (*Ibid.*) To obtain relief in the form of compensatory education, the student must present specific evidence as to how the compensatory education should be calculated. (*Id.* at p. 524.) The award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Ibid.*)

DETERMINATION OF ISSUES

ISSUE 1: DID THE DISTRICT APPROPRIATELY ASSESS STUDENT IN MENTAL HEALTH DURING THE 2004-2005 SCHOOL YEAR?

1. As set forth in Factual Findings 2 through 5 and Legal Conclusions 2 through 4, the evidence established Student was appropriately assessed in all areas of suspected disability for the 2004-2005 school year. No evidence was presented that Student had any additional areas of suspected disability not assessed by the District.

ISSUE 2: DID THE DISTRICT APPROPRIATELY ASSESS STUDENT IN MENTAL HEALTH DURING THE 2005-2006 SCHOOL YEAR?

2. The District failed to appropriately assess Student in mental health during the 2005-2006 school year. (Factual Findings 6 through 11 and Legal Conclusions 2 through 4.)

ISSUE 3: DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2004-2005 SCHOOL YEAR?

3. Based on Factual Findings 12 through 20 and Legal Conclusions 5 through 14, the District provided Student a FAPE for the 2005-2006 school year.

FAILURE TO PROVIDE ADDITIONAL BEHAVIOR SERVICES

4. Petitioner's contention that a failure to provide behavior services resulted in a denial of FAPE fails. No evidence was submitted that Student's behaviors would have improved with additional behavior services. The program was designed to allow Student achieve educational progress in his placement at the District, and the District met its responsibilities to provide special education and related services that were reasonably calculated to enable Student to receive educational benefit. (Factual Finding 21 and Legal Conclusions 12 through 14.)

FAILURE TO PROVIDE VOCATIONAL SERVICES

5. Petitioner's contention the District failed to provide vocational services is unsupported by the evidence. Student was not 16 years old during the 2004-2005 school year. (Factual Findings 1 and 22; Ed. Code, § 56345, subd. (a)(8).)

ISSUE 4: DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2005-2006 SCHOOL YEAR?

6. Student was denied a FAPE during the 2005-2006 school year as the April 13, 2005, August 5, 2005, and December 13, 2005 IEPs did not provide educational benefit. (Factual Findings 23 through 66 and Legal Conclusions 5 through 14.)

7. The District denied Student a FAPE when it failed to provide the special education instruction and services set forth in the August 5, 2005, and December 13, 2005 IEPs. (Factual Findings 23, 27, 31, 38 through 40, and 70 through 78, and Legal Conclusions 5 through 11.)

8. Student was denied a FAPE because the District failed to conduct a psychoeducational reassessment and failed to appropriately assess Student's behavior problems. As found in Factual Findings 23 through 66, 68, and 70 through 78, and Legal Conclusions 2 through 28, the District failed to assess Student's behavioral needs during 2005-2006 school year. Student's behaviors drastically interfered with his educational program. Yet, no reassessment was conducted to obtain updated information, interpret assessment results, obtain, integrate and interpret information about Student's behavior and conditions relating to learning; consult with the IEP team in planning school programs as indicated by psychological tests; plan and manage a program of psychological counseling services to Student and parents; and assist in developing behavioral intervention strategies. Typically, a student who requires psychological services to benefit from his special education program may have a specific behavioral problem that requires a behavior plan, or may require psychological counseling as a result of an emotional issue that is interfering with his adjustment in school. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34.)

9. No evidence was presented to explain how the IEP team members could conclude that Student's excessive absences and tardies, increasing misbehaviors, the 5150 hold, and the altercation with the security officer did not relate to Student's specific learning disability, ADHD, a chronic inability to have satisfactory interpersonal relationships, and inappropriate behaviors. The sounder conclusion is that Student's IEP in effect at the time of the November incidents was *not* appropriate. Children with ADHD are impulsive and may have little control over their actions, and may have developed maladaptive responses to social situations. It is the intent of the Legislature that LEAs promote coordination between special education and regular education programs to ensure that all pupils, including those with ADHD, receive appropriate instructional interventions, and that adaptations be implemented in regular education programs to address the instructional needs of pupils having ADHD. (Ed. Code, §§ 56339(c), (d).) With Student's history of behavior problems and suspensions, it is obvious the cause of his behavior problems in

light of his attention deficits and ADHD were not assessed and/or appropriately addressed.

10. What should have occurred prior to conducting the December 2005 pre-expulsion IEP meeting was a reassessment of Student, including an FAA and, if necessary, the development of a BIP. Surely, it was obvious to Student's teachers, both special and regular, to the school psychologist, and the school administrators, that Student's then-current educational program was failing. A central tenet of Student's IEP should have incorporated a treatment program for his behavior problems, as well as focused on his poor academic skills.

11. An FAA and/or BIP should have been performed as part of a reassessment. Student elicited behavior problems since he was initially determined eligible for special education in 2004. During the 2004-2005 school year, Student was placed in a general education classroom, with RSP services to address his SLD. He was described as cooperative and engaged, but could be oppositional, resistant and argumentative, and gave up easily when frustrated. By February 2005, Student had 13 office referrals and eight suspensions for physical aggression. The IEP team recognized the need for a BSP was serious, so one was developed to address Student's social skills interactions with peers and adults. At the annual IEP meeting in April 2005, the BSP was revisited and two behavior goals were added. The need for a BSP remained serious, and in just two months, Student had accumulated 16 suspensions, and had as many as five office referrals in one month. The BSP was clearly not effective in addressing Student's behaviors, but the IEP team made no changes to the plan. Instead, Student was transferred to a more structured environment, the SDC class at Hughbanks Elementary.

12. In spite of the more structured environment at Hughbanks Elementary, Student's misbehaviors continued. The revised BSP and behavior services were delayed by the District until July 2005, and when finally implemented, were not effective in managing Student's behaviors. He did not perform well in class, did not complete class or homework, and continued to create class disruptions. Student's behavior problems escalated

throughout the 2005-2006 school year to the point where he made a suicide threat and was placed on a 5150 hold in July/August. Instead of the 5150 alerting the District to the need for a complete assessment of Student's behavior issues, the IEP team decided to "age-promote" Student to Kucera Middle School; and although the District offered to refer Student for a mental health assessment in August 2005, the referral was never done.

13. Student's misbehaviors continued at Kucera Middle School, and culminated in a physical altercation with a security officer. Again, rather than consider further assessment, and in spite of characterizing Student's behavior problems as "extreme," the District proceeded with suspension and recommendation for expulsion. As established by Student's February, April, August and December 2005 IEPs and BSPs, Student had a serious behavior problem which necessitated an FAA and BIP. His behaviors were assaultive, and so pervasive and maladaptive, he rarely attended classes due to the suspensions and office referrals. As a result, the instructional and behavioral approaches specified in his IEPs and BSPs were ineffective; and his behaviors significantly interfered with the implementation of the goals and objectives set forth in his IEP. Clearly, by November 2005, Student's misbehaviors had escalated, in spite of the BSPs and behavior services.

14. The instructional and behavioral approaches specified in the revised BSPs developed for Student were ineffective; and Student's behaviors escalated. Even the IEP team recognized the need for a BSP in December 2005 was extreme. Student was suspended from school and shuffled through several programs from April 2005 to November 2006, with little or no success or learning. Although the District recognized Student's need for an AB2726 referral, and was aware of Student's usage of Risperdal, the right to a FAPE cannot be premised on the condition Student be medicated without evaluation by a mental health professional who could provide input into Student's behavior problems. The District failed to investigate the possibility of an FAA; and, as a result, Student was denied a FAPE. The increase in the frequency and severity of his problem behavior necessitated the development of an FAA and BIP. (*Washington Sch. Dist.* (SEA PA

1997) 28 IDELR 211; *Kelseyville U.S.D.* (SEA CA 1997) 25 IDELR 1115.) The failure to do so resulted in a denial of FAPE. As Student's performance evidenced, the program and services developed by the District provided, at best, only de minimus benefit.

15. The District failed to provide Student an educational benefit by not developing and implementing an appropriate FAA and BIP as required by his IEPs. (*See e.g. Neosho R- V Sch. Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022.) The need for—and the ability to create—a proper FAA and BIP existed long before the District age-promoted Student to Kucera Middle School in August 2005; and was clearly required after the 5150 incident.

16. The District's narrow focus on the hypothesis that Student's behavioral problems were caused solely by his own decision to act out prevented them from taking a closer look at the dynamics of the general education and SDC classes, and to question why the BSPs and behavior services were not more effective. Ms. Mollet's informal review of Student's behavior needs was based on anecdotal information from the District's staff, and her unknown observations that were not reduced to writing. No one assessed how or whether the classroom teachers were or were not actually addressing Student's behaviors, his need for directions, or the behavior plan. No evidence was presented the District's staff adequately assessed the immediate antecedent issues prior to the behavior incidents, or whether Student received the necessary close attention and constant redirection that he needed to access classroom lessons.

17. The District's contention the IEPs appropriately addressed Student's behavior problems and the denial of a FAPE are intertwined. Particularly in light of Student's learning disabilities and attention deficits, he acutely needed to be present in class for as much of his scheduled educational instruction as possible. Repeatedly sending him to the office or home deprived him of educational instruction altogether on many days. During the 2005-2006 school year, the incidents of sending Student home were so numerous that the IEP team should have developed a FAA and BIP sooner, and should have developed an

appropriate FAA and BIP focusing on consequences that did not rely heavily on exclusion from school. The failure to do so was a denial of FAPE.

FAILURE TO PROVIDE MENTAL HEALTH SERVICES

18. As discussed under Factual Finding 68 and Legal Conclusions 2 through 28, Student was denied a FAPE because the District failed to ensure the AB2726 referral was conducted. As a result, mental health services were not provided.

The District was not obligated to provide vocational Training

19. Since Student was not 16 years old during the 2005-2006 school year, the District was not obligated to offer Student vocational training. (Factual Findings 1 and 69; Ed. Code, § 56345, subd. (a)(8).)

The District notified Parent of the manifestation determination meeting, but inappropriately determining that Student's conduct which subjected him to expulsion in December 2005 was not a manifestation of his disabilities

20. Although Mother contends she was deprived of the opportunity to participate in the pre-expulsion and manifestation determination hearing because she was not given notice of the meetings, the District provided adequate notice of the proceedings. (Factual Findings 70 and 71, and Legal Conclusion 9.)

21. Based on Factual Findings 72 through 78 and Legal Conclusions 21 through 28, the manifestation determination hearing was procedurally flawed. The District failed to implement Student's August 5, 2005 IEP by failing to obtain the AB2726 referral, failed to conduct an IEP meeting in October 2005; failed to conduct a psychoeducational reassessment and an FAA, and failed to provide behavior services. Moreover, after Student was expelled from Kucera Middle School, the District failed to provide any special education instruction and behavior services during his educational placement at Trapp Elementary EAP. As such, Student did not receive a FAPE as mandated by the IDEA and its implementing regulations. (34 C.F.R. §§ 300.520(a)(1), 300.530.)

22. The issue is not whether the District can expel a student for serious behavior problems. Assuming the IDEA's procedural dictates are followed, a school district may discipline a child in the same manner that it would discipline any other child, including suspension or expulsion from the regular school setting. The issue here, is narrower. Rather, it is whether a school district must provide the IDEA-qualified student educational services during the expulsion period, i.e. an "appropriate" education. There is no exception in the IDEA for misbehavior. (*Maygar v. Tucson USD* (D.C. AZ 1997) 958 F.Supp 1423, 1438.)

23. The procedural violations leading up to the manifestation determination meeting caused a loss of educational opportunity, significantly infringed on the parents' opportunity to participate in the IEP process, and impeded Student's right to a FAPE. There is no excuse for the District's failure to ensure Student received that to which he was entitled under the August 5, 2005 IEP.

ISSUE 5: IS STUDENT ENTITLED TO COMPENSATORY EDUCATIONAL SERVICES?

24. Based on Factual Findings 79 through 82, and Legal Conclusions 29 and 30, Petitioner is entitled to 250 hours of compensatory educational tutoring services in all academic areas. It is incomprehensible to believe that reducing Student's specialized instruction by four-fifths, and ultimately eliminating it altogether, could provide Student other than de minimus educational benefit, especially in light of his complete failure to progress. The time period during which Student received either little instruction or no instruction from a credentialed special education teacher was a clear violation of the IDEA's requirement that Student receive "the basic floor of opportunity." (*Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982.)) Not only did the District fail to provide special education services to Student for a significant segment of the year, it failed to provide him any instruction, special or otherwise, for another segment of the year. That failure denied Student educational benefit for which an award of

ISSUE 6: ARE PARENTS ENTITLED TO REIMBURSEMENT FOR THE COST OF THE PSYCHOLOGICAL ASSESSMENT CONDUCTED AT UCLA IN 2002?

25. Parents may be entitled to reimbursement for the costs of services they have procured for their child when the school district has failed to provide a FAPE, and the services were appropriate under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Comm. of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-71.) However, any request for reimbursement must be made within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (Ed. Code, § 56505, subd. (l).)

26. Based on Factual Finding 83, Student's parents are not entitled to reimbursement for the cost of the 2002 UCLA psychoeducational assessment.

ORDER

1. The request of Petitioner for relief from Respondent Rialto Unified School District is granted in part and denied in part.

2. The District shall ensure that a mental health assessment is completed no later than 60 days of the effective date of this decision.

3. The District shall conduct a functional analysis assessment of, and develop a behavior intervention plan for, Student, and hold an IEP meeting 60 days of the effective date of this decision, and shall convene an IEP meeting to review the assessment results and make appropriate modifications to Student's IEP, if any.

4. The District shall provide Student 250 hours of tutoring services in all academic areas.

5. Parent's request for reimbursement for the UCLA psychoeducational assessment is denied.

6. All of Student's other requests for relief are denied.


PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), Petitioner prevailed on Issues 2, 4A, 4B, 4D, and 5. Respondent Rialto Unified School District prevailed on Issues 1, 3A, 3B, 4C, and 6.

NOTICE OF APPEAL RIGHTS

This is the final administrative decision and both parties are bound by this Decision. Under California 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.

DATED: August 16, 2007



WENDY A. WEBER

Administrative Law Judge

Office of Administrative Hearings

Special Education Division