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

In the Matter of: STUDENT, Petitioner, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	OAH CASE NO. N 2007010315

DECISION

Administrative Law Judge (ALJ) Charles Marson, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on July 16 through 20, 2007, in Los Angeles, California.

Attorney Chike G. Onyia, of Martin & Martin, represented Student. Student's mother (Mother) attended the hearing, accompanied on July 20, 2007, by Student's uncle.

Attorney Angela Gordon, of Fagen Friedman & Fulfrost, represented the Los Angeles Unified School District (District). District due process consultant Victoria McKendall attended the hearing, except for a portion of July 17, 2007, when District due process specialist Cynthia Y. Shimizu attended.

Student's request for due process hearing was filed on January 10, 2007. A continuance was granted on March 13, 2007. At hearing, oral and documentary evidence were admitted. On July 20, 2007, at the close of hearing, a continuance until August 10, 2007, was granted for the purpose of filing declarations and closing briefs. On August 6, 2007, an additional continuance was granted for that purpose until August 20, 2007. The

record was closed and the matter submitted on August 20, 2007.

ISSUE

Did the District fail to offer Student a free appropriate public education (FAPE) during the 2006 extended school year (ESY) and the 2006-2007 school year (SY) by:

A. Failing to offer a placement in which Student could be fed using the plunge method of gastrostomy tube feeding, or

B. Failing to place Student in a nonpublic school that could feed him using the plunge method of gastrostomy tube feeding?

REQUESTED REMEDIES

Student requests compensatory education including placement in a nonpublic school, speech and language therapy, occupational therapy, physical therapy, educational therapy, adapted physical education, and assistive technology.

CONTENTIONS

Student, who is fed only through a gastrostomy tube (G-tube),[1] contends that the only safe way he can be fed at school is by use of the plunge method of G-tube feeding; that if he is not fed by that method he cannot attend school and access his curriculum; and that the District, by failing to make that method of feeding part of its placement offer and refusing to permit him to be fed at school by that method, has denied him a FAPE. The District contends that Student can be safely fed at school by the gravity method, which has

[1] A gastrostomy is a surgical opening into the stomach through the surface of the abdomen. A plastic device (gastrostomy button) is inserted into the opening and remains in place at all times, and is capped by a safety plug between feedings. Gastrostomy tube feeding is used for persons who cannot be fed by mouth.

been part of its placement offers, and that there is no medical reason Student cannot attend school and be fed by that method. The District also contends that Student's arguments may not be relitigated here because they were resolved against him in a previous proceeding between the parties.

Student also contends that he presented to the District a valid prescription[2] for G-tube feeding at school by the plunge method; that the District was required to implement that prescription; and that its failure to do so denied him a FAPE. The District contends that Student did not present a valid prescription in time for it to be implemented during the school year, that Student's Mother never agreed to the collaboration between the prescribing doctor and District medical staff needed for the implementation of such a prescription, and that, since the plunge method is not needed for Student to attend school and access his curriculum, the District was under no obligation to implement such a prescription even if it had been presented.

FACTUAL FINDINGS

BACKGROUND

1. Student is a nine-year-old boy who resides within the District with Mother and his twin sister. He is eligible for special education and related services on the basis of multiple disabilities-orthopedic, mental retardation, and other health impairment. Student has cerebral palsy, mental retardation, and developmental delays. He is nonverbal but

[2] "Prescription," as used herein, means the "written statement from a physician detailing the name of the medication, method, amount and time schedules by which the medication is to be taken" that is required under Education Code section 49423, subdivision (b)(1), in order to authorize the provision at school of a specialized physical health care service such as G-tube feeding.

ambulatory and fairly functional. Although he has many unique needs, the only one at issue here concerns the method of feeding him by G-tube at school.

2. Student was born prematurely at 26 and 1/2 weeks, resulting in severe medical complications. He was hospitalized for the first 16 months of his life and had multiple surgeries, including insertion of a gastrostomy button. As a result of his medical condition, Student's swallowing muscles did not develop normally. Consequently, Student is fed exclusively by G-tube.

3. Mother feeds Student four times a day, at 7:30 a.m., 12 noon, 4:00 p.m., and 8:00 p.m. The only feeding that occurs during regular school hours is at noon. Mother currently feeds Student a homemade mixture of pureed foods through his G-tube by using a syringe plunger to push the food through the tubing (the plunge method). On this diet, Student has generally been healthy, well-nourished, and within the normal ranges of height and weight.

4. There are other methods of G-tube feeding, principally the gravity (bolus) method and the pump method. The gravity method is preferred by the District because it is thought to be safer. In the gravity method, a specific amount of food is administered through a syringe barrel that fits into a feeding port. The syringe barrel is raised three to six inches above stomach level, and the food enters the stomach by gravity.

5. G-tube feeding in a school setting, by any method, is a specialized physical health care service (SPHCS) that requires a physician's prescription, renewed annually.

6. For most of SY 2004-2005, Student attended a special day program for children with multiple disabilities at the District's Sellery Special Education Center (Sellery). He was fed at noon by the gravity method, pursuant to a physician's prescription and in accordance with the District's standard protocol and practice.

7. In mid-May 2005, Mother withdrew Student from Sellery because of an incident in which Student's bus brought him home one hour and forty minutes late from

school. She has never re-enrolled him in any District school, and he has not attended school since mid-May, 2005. Although Mother's withdrawal of Student from school originally related to transportation, Mother now refuses to send Student to school unless he is fed there by the plunge method.

THE DISTRICT'S PLACEMENT OFFERS

8. The District has declined to offer Student a placement that includes feeding by the plunge method, and has consistently offered placements that include feeding by the gravity method. At an IEP meeting on April 28, 2006, the District offered to Student a placement for the ESY 2006 and SY 2006-2007, the only time periods at issue here.[3] That offer was to place Student in the special day program at Sellery, with related services including speech and language support, occupational therapy, physical therapy, adapted physical education, transportation, and a health care assistant to help feed him by the gravity method. In subsequent IEP meetings on January 26, February 26, and April 24, 2007, the District reiterated this offer with minor variations not relevant here. None of the offers was accepted. The only part of any of the offers in dispute here concerns the method of feeding Student his noon meal at school.

THE PREVIOUS ACTION

9. Most of the issues herein were resolved in a previous proceeding before OAH. On July 17, 2006, Student filed a request for due process hearing, naming the District as respondent. In that matter he alleged that the District had denied him a FAPE for ESY 2005 and SY 2005-2006 because it refused to administer his feedings at school using the plunge method, and failed to offer him a placement in a nonpublic school that would feed him using the plunge method. That matter, entitled *Student v. Los Angeles Unified School*

[3] References herein to SY 2006-2007 include ESY 2006 unless otherwise noted.

District, was given OAH Case No. N2006070443 *(Student I)*. It was heard by ALJ Erlinda G. Shrenger on November 27 through December 1, 2006, and on January 16, 18, and 19, 2007. The record was closed and the case submitted on March 1, 2007. On March 26, 2007, Judge Shrenger issued a 16-page decision ruling for the District in all respects.[4]

10. In *Student I,* Judge Shrenger made several findings of fact that are important to the resolution of this matter. Among them were the following:

> 25. Student did not establish, by sufficient or persuasive evidence, that the plunge method is the only viable method of feeding Student at school or that he is unable to attend school without the plunge method.
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> 32. Dr. Idries's testimony does not establish Student's claim that the plunge method is the only way he can be fed at school. Dr. Idries admitted that the plunge method is not the only medically viable option for feeding Student at school.
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> 33. Dr. Mercado [the District's physician] testified persuasively that Mother's success with the plunge method is due to the fact that she knows her son better than anyone, and over the years has become skilled and experienced at determining the amount of pressure required to safely plunge the food through the tube. The plunge method is unsafe in a school setting because there is no guaranteed continuity of the same person administering the feeding.
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> 36. In sum, the District did not deny Student a FAPE by its refusal to allow the plunge method of feeding at school. The evidence did not establish that Student had a physician prescription authorizing the plunge method of feeding. Student did not establish his claim that the plunge method is the only way he can be fed

[4] Official notice is taken of the decision in *Student I*, and its contents are incorporated by this reference. Much of the description here of the parties' dispute is taken from the decision in *Student I,* which describes the dispute in greater detail.

through his G-tube at school. Nor did the evidence establish Student's claim that he is unable to attend school unless he is allowed to be fed by the plunge method.

11. Student has appealed the decision in *Student I* to a court. That appeal is pending.

ISSUES THAT HAVE BEEN RESOLVED AND MAY NOT BE RELITIGATED HERE

12. Under the doctrine of collateral estoppel, once a tribunal has decided an issue of fact or law necessary to its judgment, that issue may not be relitigated in a suit on a different cause of action involving a party to the first case. The doctrine serves many purposes, including relieving parties of the cost and vexation of multiple lawsuits, conserving judicial resources, and encouraging reliance on adjudication by preventing inconsistent decisions.

13. The District contends that every issue in this action is barred by the doctrine of collateral estoppel because every issue was litigated and decided in *Student I.* Student argues that the issues in this matter are different because they concern a different school year: the ESY 2006 and SY 2006-2007. That difference in school years is the only difference between the requests for due process hearing in *Student I* and in this matter; they are otherwise identical in substance.[5] The District made a prehearing motion to dismiss this matter, and a motion for summary judgment during hearing, on the ground that the entire action was barred. Those motions were denied. At the conclusion of Student's case in chief the District also moved to dismiss, on the ground that Student's failure to produce new evidence demonstrated that his case had already been litigated and decided against him

[5] Official notice is taken of the request for due process hearing in *Student I.*

and was barred by collateral estoppel. That motion was taken under submission.[6]

14. Absent new legal or factual circumstances, the fact that this action involves a subsequent school year does not preclude application of the rule of collateral estoppel. There are three closely related issues that were finally resolved by the decision in *Student I.* Student made no showing here that there were any new legal or factual circumstances bearing on those issues. The findings made on those issues are therefore binding on the parties, and resolve most of the issues presented here.

15. First, the decision in *Student I* establishes that the plunge method is not the only viable way to feed Student at school. *(Student I,* Factual Findings (FF) 25, 36.) Before Mother withdrew Student from school in May 2005, Student was fed at school by the gravity method. *(Student I,* FF 38.) Student argued unsuccessfully in *Student I* that feeding by the gravity method caused him to suffer frequent regurgitation, burping, and other difficulties. *(Id.,* FF 30.) Student had a full and fair opportunity to litigate that issue in *Student I.* The issue was essential to the decision, since, if the plunge method were the only viable method of feeding Student at school, the District would have denied Student a FAPE unless it fed him by that method.

16. There has been no change since the previous hearing in Student's ability to tolerate being fed by the gravity method at school. Since he has not been regularly fed by that method since May 2005, no new evidence could be produced.[7] There was no evidence, and Student did not argue, that his unique needs with respect to feeding had changed in any way. Student is therefore precluded by collateral estoppel from relitigating

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[6] In light of the outcome of this Decision, the District's motion to dismiss is moot.

[7] In spring 2006 Mother privately conducted one experiment in feeding a particular blend of food to Student by the gravity method, and reported that the experiment was unsuccessful. That evidence was considered in *Student I.*

here the findings that the plunge method is not the only viable way to feed him at school, and that he also can be fed by the gravity method.

17. Second, the decision in *Student I* establishes that Student is not unable to attend school unless he is fed by the plunge method, and that there is no medical reason he cannot attend school and be fed by the gravity method. *(Student I,* FF 25, 36, 44.) Student had a full and fair opportunity to argue to the contrary in *Student I,* and did so, but was unsuccessful. The factual findings were essential to the ALJ's decision because, if Student could not attend school without being fed by the plunge method, the District would have denied him a FAPE unless it fed him by that method.

18. There was no evidence, and Student did not argue, that circumstances have changed in any way that would affect the finding that Student is not unable to attend school unless he is fed by the plunge method, or the finding that there is no medical reason he cannot attend school and be fed by the gravity method. Student is therefore bound by those findings here.[8]

19. Third, the decision in *Student I* establishes that, for ESY 2005 and SY 2005-2006, the District did not deny Student a FAPE by its refusal to allow the plunge method of feeding at school. *(Student I,* FF 36.) Student had a full and fair opportunity to argue to the contrary, and did so, but did not prevail. The factual finding was essential to the ALJ's

[8] Student argues that a letter and prescription from his gastroenterologist dated March 18, 2007 and May 29, 2007, constitute "new evidence" on this issue. They do not. Each document supports use of the plunge method, but does not present any new evidence about the viability of the gravity method. The two documents are not new evidence that gravity feeding might not work, only that plunge feeding could also be done. As long as the gravity method is viable, Student does not require feeding by the plunge method at school. The 2007 documents do not affect that finding.

decision to deny relief. Student is therefore precluded by collateral estoppel from relitigating that finding here.

ISSUES NOT RAISED IN THE REQUEST FOR DUE PROCESS HEARING

20. The District contends that the two principal issues described by Student as new cannot be considered here because they do not appear in his request for due process hearing. The only issues appropriately addressed in a special education due process hearing are those set forth in the request. The petitioner may seek to amend the request, or the opposing party may agree to the addition of issues.

21. In his request in this matter, filed January 10, 2007, Student made no allegation that he had presented to the District a valid prescription authorizing G-tube feeding by the plunge method at school. He alleged only that his "physicians have ... determined that the appropriate method of feeding" is the plunge method, and that the District "refuses to administer [Student's] prescribed diet." When Student later became aware of documents he now argues are valid prescriptions, he did not seek to amend his request to allege their existence or their relevance to his claim of denial of FAPE.

22. Student made no allegation in his request that the District's G-tube protocol was based on obsolete guidelines from the California Department of Education, although he was, or should have been, aware of that issue when the request was filed. Nor did he make any effort to amend his request later to allege the existence or relevance of that issue.

23. Consideration of the two issues Student presents as new is therefore barred by Student's failure to raise those issues in his request for due process hearing, to seek to amend his request to set them forth, or to seek the District's agreement to addressing them. Those issues are considered below only in the alternative.

A VALID PRESCRIPTION FOR SY 2006-2007

24. In order to implement a SPHCS at school, a district must receive, *inter alia,* a prescription for the service; that is, a written statement from the student's physician detailing the name of the service, the method of application, the amount or dosage, and a time schedule for implementation. Student argues that he presented three such written statements to the District during SY 2006-2007 that called for feeding him at school by the plunge method, and that the District was obliged to implement them but did not.

The District's procedures for implementing prescriptions

25. The District follows an established procedure when requested by a parent to provide a SPHCS to a student at school. It maintains a set of protocols for various services that set forth the procedures by which the services are routinely performed. In order to be useful to medical and nonmedical staff, the protocols are detailed and specific. The protocol on G-tube feeding by the gravity method, for example, is four pages long.

26. The District also maintains a standard packet of four forms (the authorization packet) that it routinely gives to parents who request a SPHCS. The first, and most important, is entitled Physician Authorization for Specialized Health Care Services (Physician Authorization). The form calls for all the information found in a valid prescription. Near the bottom of the form, the physician is advised: "The service cannot be provided until your orders have been received." (Emphasis in original.) The second form in the authorization packet is an Authorization to Receive/Release Medical Information that, if signed by a parent, authorizes a prescribing physician to release information to the District. The third form is a Parent Authorization for Specialized Physical Health Care, which is required by statute. The fourth is the District's protocol for the specific procedure requested. The Physician Authorization gives the prescribing physician three choices: she may agree to the District's protocol; she may attach modifications of the District's protocol to the form; or she may attach an alternative procedure and recommendations. The District

does not require that the prescribing physician complete the Physician Authorization, but it insists on receiving some equivalent document or it will not implement the procedure requested.

27. If a prescribing physician modifies the District's protocol or substitutes her own, District medical staff then must work closely with the physician to develop precise written instructions to staff that comply with the protocol preferred by the physician.[9] This is done by obtaining consent from the parent to the direct sharing of medical information with the prescribing physician. The Physician Authorization ends with an authorization for the exchange of medical information and a signature line for the parent.

28. At some time in 1996, Mother was given the authorization packet and informed that she had to have it completed and returned before the IEP team would consider a placement that allowed for feeding Student at school by the plunge method. Mother was aware that a prescription was required to accomplish that end. She had previously obtained a completed Physician Authorization and a prescription so that Student could be fed at school during his attendance at Sellery before May 2005. She was told by a school nurse in January 2006 that a prescription was required for G-tube feeding.

The September 15, 2006 gastroenterology outpatient note

29. Dr. Shaheen Idries is Student's gastrointestinal physician. She earned her medical degree in 1985 and received her California medical license in 1992. For ten years she has been employed by Pediatric Subspecialty Incorporated, which is affiliated with

[9] Student's continued insistence that he should receive placement in a nonpublic school that can feed him by the plunge method is premised on the claim that the District's G-tube feeding protocol is always binding on the District and cannot be varied or departed from in a particular case. No evidence supported that claim. The Physician Authorization, and the testimony explaining it, showed that the claim was not correct.

Children's Hospital of Orange County. She specializes in pediatric gastroenterology, with a focus on gastrointestinal disorders, and has substantial experience with children whose feeding requirements are like Student's.

30. On September 15, 2006, at Mother's request, Dr. Idries wrote a computer-generated document "To Whom It May Concern" under the heading "Gastroenterology Outpt [Outpatient] Note." The note described Student's history, his medical condition as it related to his feeding, and the method by which Mother currently fed him: "by plunging [his food] into the stomach. The feeding volume according to the mother is about 15 to 20 ounces per meal." Dr. Idries described the first of two visits by Mother and Student to her office, in April 2006. "Knowing that it is not safe to plunge the food via gastrostomy tube," Dr. Idries continued, "mother was discouraged to demand the same type of feeding methods to be applied at school." Dr. Idries then described the results of Mother's experiments with various mixtures and consistencies of food. "I propose," Dr. Idries wrote, "that mother can train one of the caretakers at school ... with the feeding method she is using at home." Dr. Idries then stated: "I would strongly urge the school district to look into this possibility to help [Student] get all the care that he deserves to help him with his progress." The note was not signed. In place of the signature was the printed word "Unreviewed."[10]

31. Dr. Idries testified at hearing that she did not intend the September 15, 2006 note to be in the nature of a prescription; it was a request to the school district.

32. Dr. Rosa Mercado is the District's school physician, and has worked for the

[10] The September 15, 2006 note reported some of Mother's previous complaints about the effect on Student of feeding him by the gravity method. That note and those complaints were before the ALJ and were considered in *Student I. (Student I,* FF 30, 31-32, 35-36.)

District for 17 years. She graduated from medical school in 1985, and was licensed in California after a pediatric residency at Children's Hospital of Los Angeles. She considers herself a general pediatrician, and is experienced in working with students who are fed by G- tube. As a school physician, Dr. Mercado provides consultative services to nurses at District schools. She spends a substantial amount of her time collaborating with family physicians in order to facilitate the implementation of their prescriptions at schools.

33. Dr. Mercado testified at hearing that she did not consider the September 15, 2006 note a prescription. It was merely informative. Even if it had contained the four necessary specifics of a prescription (type, method, amount, and time schedule), it was insufficiently directive to be a prescription.

34. The September 15, 2006 gastroenterology outpatient note was not a valid prescription authorizing use of the plunge method for feeding Student at school. It contained a method of delivery (the plunge method), but did not identify any particular mix or blend of food to be used. It left that decision to Mother, who was to supply the food. It did not order or recommend an amount to be administered; it merely reported within a wide range what Mother was then administering at home. It did not contain a time schedule for application. In her note, Dr. Idries did not purport to accept medical or legal responsibility for deciding or prescribing anything. Instead, she urged the District to "look into this possibility," leaving the decision and the responsibility to the District. The informal and unsigned nature of the note supported the conclusion that it was not a prescription.

The March 18, 2007 gastroenterology outpatient note

35. On January 26, 2007, at Mother's request, the District convened an IEP team meeting to discuss Student's method of feeding. Mother presented to the team Dr. Idries's September 15, 2006 gastroenterological outpatient note, and requested that the District act on it. The District members of the team stated that they were willing to consider the

request, but needed further specific medical information before they could do so, and needed a completed authorization packet. Mother promised to obtain the information requested and to report it at the next IEP meeting on February 26, 2007. She declined, however, to consent in writing to the sharing of information between the District and Dr. Idries. District staff gave Mother another copy of the authorization packet, explaining the need to complete it. Mother did not give the packet to Dr. Idries.

36. At the February 26, 2007 IEP meeting, Mother stated that she had been unable to reach Dr. Idries since the January meeting, so she did not have any new medical information to provide. Mother asked the District to put its medical questions in writing on school letterhead, which the District agreed to do.

37. In response to Mother's request, the school nurse and the principal at Sellery wrote to her on March 6, 2007, setting forth seven medical questions about Student's feeding needs for Dr. Idries to answer. The letter included another copy of the authorization packet. Mother forwarded the letter to Dr. Idries but not the authorization packet.

38. Dr. Idries wrote another gastroenterology outpatient note on March 18, 2007, addressed to the school nurse and principal and generally answering the seven questions in their letter of March 6. Student argues that the March 18 note was itself a prescription, or was a prescription when taken together with the September 15, 2006 note, a copy of which was enclosed with the March 18, 2007 note.

39. The March 18, 2007 note identifies the substance to be administered and the method of administration. It does not set forth a time schedule or an amount of food to be administered. The September 15, 2006 note states that "The feeding volume according to the mother is about 15 to 20 ounces per meal." There is no time schedule for administration in either letter. Dr. Mercado did not regard the March 18, 2007 note as a prescription, even in combination with the earlier note. She credibly testified that, on the

basis of her experience, it would be medically risky to have a prescription spread through multiple documents, forcing staff to go looking for its terms. She had never seen such a prescription. In her opinion, the staff who actually implement the prescription need all the information clearly set out in one place. They also need information that is current, not six months old. There was no evidence that a prescription can be extracted from multiple documents written over time.

40. Dr. Idries, who wrote the March 18 note, testified that she did not intend that it be acted upon as a prescription. It was a response to the questions sent to Mother by the school. The text of the note supports her testimony. In it Dr. Idries stated that Mother brought the letter to her in order "to clarify the feeding method" and "[t]o reiterate and clarify the information you are requesting." Later in the note Dr. Idries stated: "I concur to continue with the same method of feeding," and "strongly urge [the District] to work with the mother ... and give him a chance with this unique method of feeding..."

41. Like the September 15, 2006 gastroenterology outpatient note, the March 18, 2007 note failed to set forth with clarity all of the specifics required in a prescription. Dr. Idries did not take medical and legal responsibility in the note for prescribing feeding by the plunge method, but encouraged the District to do so. It was neither intended nor understood to be a prescription, and it was not.[11]

The May 29, 2007 Prescription

42. Shortly before May 29, 2007, Mother gave the authorization packet to Dr.

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[11] The parties dispute whether the District actually received the March 18, 2007 note in the mail.

Since the note was not a prescription or a request for an IEP meeting, the District was not obliged to respond to it. Thus there is no need to resolve that dispute here.

Idries for the first time. On May 29, Dr. Idries wrote a prescription on a prescription form used by her employer, and attached it to the Physician Authorization, which she completed. She then sent the Authorization and its attachment to Mother, who gave it to the District on June 1. After the word "PRESCRIPTION:" the document stated:

> 20 ounces of pureed food, provided by the Parent, administer via Gastrostomy tube using Plunge Method at 12 noon by the school personnel trained by the mother. Flush the GT afterwords with 30 cc of water.

This document was a prescription. However, for several reasons the school could not promptly implement it. Dr. Idries's insistence that the feeding be done by "school personnel trained by the mother" violated the governing California regulation, which permitted such training to be done only by "a qualified school nurse, qualified public health nurse, qualified licensed physician or surgeon, or other approved programs..." (Cal. Code Regs., tit. 5, § 3051.12, subd. (b)(1)(E)(2).) Mother is a licensed nurses' assistant, and the evidence showed that she has successfully trained numerous aides in feeding Student by the plunge method at home. However, the regulation makes no exception for training by someone who is in fact qualified to do it; the trainer must be one of the named professionals or part of an approved program, and Mother is not. Thus the prescription insisted on the training of school personnel to feed Student by someone who was, by law, not allowed to do so.

43. Moreover, the prescription could not have been implemented before the end of the school year. As Mother had been repeatedly advised, a change in Student's feeding method at school was a change of placement that required an IEP meeting. The District had previously promised only to "consider" plunge feeding if a proper prescription was presented, and the feeding method was controversial among members of the IEP team. Patricia Bowman, the Principal of Sellery, testified that the school year ended on June 20,

2007, and that it usually took about two weeks to convene an IEP meeting for Student. The prescription furnished on June 1 was not a request for an IEP meeting. If it were construed as such a request, the District would have had 30 days in which to convene an IEP meeting, not counting days between the Student's regular school sessions, terms, or days of school vacation in excess of five school days. Since only 19 calendar days elapsed between the presentation of the prescription and the start of summer vacation, the District would have been under no obligation to hold an IEP meeting until after the beginning of the next school year.

44. Even if the District had convened an IEP meeting within two weeks and changed its placement offer to include feeding by the plunge method, several obstacles still remained before the prescription could be implemented. Student was not enrolled in the school, and had not been since May 2005. The school would have had to add him to a class that had nearly completed its work. Someone who could adequately and legally train school personnel in the use of the plunge method would have had to be found, a specific written protocol for feeding Student would have had to be written, and the personnel who would actually be feeding Student would have had to be trained. Only then could Student have been fed by the plunge method at school. It is not likely that all this could have been accomplished in the 13 school days remaining in the school year. Student did not prove that implementation of the May 29, 2007 prescription was possible in SY 2006-2007 even if the District had been completely cooperative.

45. Finally, although Dr. Idries had properly completed the Physician Authorization on May 29, 2007, Mother had refused to sign the consent for sharing of information on the bottom of the form. Since feeding by the plunge method was not part of the District's protocol, the school's medical staff was required by law to work out step-by- step instructions for the implementation of the prescription in consultation with the prescribing physician. Mother's refusal to consent to the exchange of information between

them would have prevented the school from writing a specific protocol for Student that could safely have been used by school staff to feed him.

46. The May 29, 2007 prescription was not before the IEP team at any of its IEP meetings, the last of which occurred on April 24, 2007, and therefore could not have been considered in formulating or restating the offer at issue here.

The necessity for direct consultation

47. In implementing a prescription for a SPHCS, a district has a duty to collaborate and communicate with the prescribing physician. That duty has two aspects. First, a specific standardized protocol for the individual student must be developed in collaboration with the prescribing physician. Second, the school physician or nurse who supervises the actual delivery of the service must consult and maintain communications with the prescribing physician.

48. Dr. Mercado has been involved in the administration of prescriptions at schools for 18 years. A large part of her job, she testified, is to consult with private physicians to develop the best ways to deliver those services at school. Until this dispute arose, she had never failed to reach an acceptable accommodation with a private physician on a method of service delivery. Dr. Mercado attributes this success to the process of collaboration and compromise that direct communication with the private physician allows. She established that open communication between school staff and the prescribing physician is important so that staff can discuss, for example, a student's adverse reaction to a procedure, or clarify any questions about the procedure the physician has ordered.

49. Connie Moore is the Director of District Nursing Services. She supervises 600 school nurses in the District, oversees their professional development, and works on policy matters. Previously she was a Field Coordinator for Nursing in the District, and a school nurse. She established in her testimony that if a physician approves a District protocol for the delivery of a SPHCS, no consultation with that physician is necessary. However, if the

physician modifies the protocol or substitutes her own, it would be necessary for the District and the physician jointly to develop a step-by-step protocol for the student. This is important because most such services are actually delivered by non-medical staff who need to understand exactly what to do. Moore credibly testified that the "standard of care" was that staff have access to the prescribing physician "in case something goes wrong."

50. Linda Davis-Alldritt has been a health education program consultant for the California Department of Education since 1996. Her background is in school nursing. Her duties include training and technical assistance on school health issues, policy analysis, and providing information to parents, students, teachers, school nurses and school administrators statewide. Davis-Alldritt established that, in implementing a prescription for a SPHCS at school, it is critical to the student's safety that the school physician or nurse can communicate actively with the prescribing physician. The need to do so is no different than it is in a hospital.

Mother's refusal to allow direct consultation

51. Throughout SY 2005-2006, Mother refused to consent to the direct exchange of medical information between the District and Dr. Idries or any other physician involved with Student's feeding. This became an obstacle to Mother's attempts to persuade the District to offer a placement that included feeding by the plunge method. *(Student I,* FF 28.)

52. Throughout the school year at issue here, Mother continued to refuse to consent to the direct exchange of medical information between the District and Dr. Idries. The District attempted many times to persuade her to consent, most notably at the January 28, 2007 IEP meeting. At that meeting Mother stated that she would only consent if she and her attorney were present during any consultation. There was no evidence that this offer was ever made in writing, and Student does not argue that it was.

53. It is not clear whether the District agreed to consultations between Dr.

Mercado and Dr. Idries at which Mother and her attorney would be present. Mother's testimony, an excerpt from a tape recording of the meeting, and a sentence in the notes of the IEP meeting suggested that the District did not agree. Testimony by District witnesses suggested that the District at first refused, but eventually relented on the condition that the District's attorney also be present for the consultations. It is not necessary to resolve this dispute. Assuming without deciding that the District refused Mother's conditional offer, it was justified in doing so.

54. Dr. Mercado persuasively testified that the presence of attorneys in the consultation and collaboration would make it "very awkward" and may not allow for freedom of "thinking outside the box." Connie Moore credibly testified that the presence of attorneys might stifle open dialogue, collaboration, and discussion between the physicians. There was no evidence to the contrary.

55. The evidence showed that, in a non-emergency situation, the presence of attorneys during collaborative talks between the school and family physicians would stifle free dialogue and substantially interfere with the collaborative process. It showed that, in an emergency situation, the requirement that attorneys be involved would render communications impractical and probably impossible, since school staff would have to arrange, at a minimum, a conference call among two physicians, two attorneys, and Mother before any communication with Dr. Idries could occur. Mother's oral consent to direct collaboration between Dr. Mercado and Dr. Idries only if she and her attorney were present did not constitute adequate consent to the collaborative process that the law and sound medical practice require.

The obligation to implement a valid prescription

56. Student incorrectly assumes that if he had presented to the District a valid prescription for plunge feeding in time for it to be implemented in SY 2006-2007, and had allowed the necessary sharing of medical information, the District would have had a duty

to implement the prescription. However, a prescription for a SPHCS must be implemented only if, *inter alia*, implementation is necessary during the school day to enable the child to attend school. The decision in *Student I* conclusively established that Student did not need to be fed by the plunge method in order to attend school. The District therefore had no duty to implement a prescription even if it was timely presented and valid.

THE OBSOLETE CDE GUIDELINES

57. At some time after 1990, the District used Guidelines from the California Department of Education (CDE) as one of several models in developing protocols for delivering SPHCS, including G-tube feeding. The decision in *Student I* mentioned that the District's G-tube feeding protocol was "consistent with" the CDE Guidelines. *(Student I,* FF 19.) Arguing that the Guidelines were obsolete, Student made a post-hearing motion to strike all reference to them as "fraudulent," which was denied as untimely. *(Student I,* FF 19 and fn. 9.) Student now argues that the decision in *Student I* is not binding, or is invalid, because it relied on obsolete CDE guidelines. Although the argument is not barred by collateral estoppel because it was not essential to the previous decision, it has no merit.

58. Mary Hudler, Director of the Special Education Division of CDE, testified that in 1990 the Special Education Division published a handbook entitled *Guidelines and Procedures for Meeting the Specialized Physical Health Care Needs of Pupils.* It was written by CDE with help from a wide variety of stakeholders in the health and education communities, and was distributed to school districts throughout the state. It became known as the CDE Guidelines, or the Green Book. The Guidelines were not binding on districts. At some time in the late 1990s, CDE decided that the Guidelines had been made obsolete by medical and technological change, and no longer should be regarded as the official guidance of CDE. Neither Hudler nor any other witness knew whether the Department's decision to abandon the guidelines was announced to districts at the time. It was announced, or announced again, this year as a result of this litigation.

59. The obsolescence of the CDE Guidelines did not matter to the outcome in *Student I,* and does not matter here. The decision in *Student I* mentioned the Guidelines in one paragraph in explaining the District's protocol *(Student I,* FF 19), but made no suggestion that the Guidelines were important to the decision. The reasoning of *Student I* compels the conclusion that they were not. In *Student I,* Student complained not of the application of nonbinding CDE Guidelines, but of the application of the District's protocol and practices. There was no evidence in *Student I* or here that the District's protocol or practices would have been any different had the CDE Guidelines never existed. There was no evidence that the District consulted the CDE guidelines after, rather than before, they became regarded as obsolete.

60. The CDE Guidelines as a whole may have been made obsolete by rapid developments in medicine and technology, but the G-tube feeding guideline has not. The evidence showed that although there have been many technological improvements in the materials used in the manufacture of G-tubes, the basic methods of feeding through G-tubes have not changed significantly since the device was invented.

61. The District's SPHCS protocols are current. They were developed, and are reviewed every year, by a large group of school physicians and nurses, public and private physicians and hospitals, and pediatric organizations, and are modeled not just on state guidelines but guidelines and protocols from other districts in and out of California. The District's G-tube feeding protocol was last reviewed in November 2006. And the protocol itself is not inflexible; as shown on the Physician Authorization form, the District is willing to implement modifications of the protocol, or even substitutions for it, in an appropriate case.

62. For the above reasons, the obsolescence of the CDE Guidelines has no bearing on whether the District offered Student a FAPE.

PRIVATE PLACEMENT

63. Since the District offered Student a FAPE by offering him a placement in public school that included G-tube feeding by the gravity method, there is no need to consider Student's contention that the District should have offered him a placement in a private school.

CONCLUSIONS OF LAW

BURDEN OF PROOF

1. Student, as petitioner, has the burden of proving the essential elements of his claim. *(Schaffer* v. *Weast* (2005) 546 U.S. 56, 62 [163 L.Ed.2d 387].)

ELEMENTS OF A FAPE

2. Under the Individuals with Disabilities Education Act (IDEA) and state law, children with disabilities have the right to free appropriate public education (FAPE). (20 U.S.C. § 1400(d); Ed. Code, § 56000.) FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

3. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. *(Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-07.) Second, the tribunal must decide whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. *(Ibid.)*

4. In determining whether a district offered a student a FAPE, the proper focus is on the adequacy of the District's placement, not on any alternative proposal. *(Gregory K.*

v. Longview SchoolDist. (9th Cir. 1987) 811 F.2d 1307, 1314.) As long as a school district provides a FAPE, methodology is left to the district's discretion. *(Rowley, supra,* 458 U.S. at p. 208.)

COLLATERAL ESTOPPEL

5. Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under the related doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.[12] The doctrines serve many purposes, including relieving parties of the cost and vexation of multiple lawsuits, conserving judicial resources, and, by preventing inconsistent decisions, encouraging reliance on adjudication. *(Allen v. McCurry* (1980) 449 U.S. 90, 94 [66 L.Ed.2d 308]; see, 7 Witkin, Cal. Procedure (4th ed. 1997) Judgments, § 280 et seq.).

6. If a state accords collateral estoppel effect to a prior administrative decision, the doctrine applies to special education due process hearings under IDEA in that state. *(Manchester School Dist. v. Crisman* (1st Cir. 2002) 306 F.3d 1, 33-34; *Mr. G. v. Timberlane Regional School Dist.* (D.N.H., Jan. 4, 2007, Case No. 04-cv-188-PB) 2007 U.S.Dist. Lexis 1544; *Patricia N. v. Lemahieu* (D.Hi. 2001) 141 F.Supp.2d 1243, 1256; *Moubry v. Independent School Dist. 696* (D.Minn. 1998) 9 F.Supp.2d 1086, 1109, fn. 11.)

7. In California, collateral estoppel applies to a decision reached in a quasi-judicial admininstrative proceeding. *(Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 944; *People* v. *Sims* (1982) 32 Cal.3d 468, 479-84; see also,

[12] More modern and precise terms for res judicata and collateral estoppel are claim preclusion and issue preclusion. (See, 7 Witkin, Cal. Procedure (4th ed. 1997) Judgments, § 282, p. 822.)

Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control (1961) 55 Cal.2d 728, 732 [res judicata].) Accordingly, collateral estoppel applies to special education due process hearings in California (see, e.g., *Student v. San Diego Unified School Dist.* (Aug. 1, 2005) SEHO No. SN 2005-1018 ["The Hearing Office has long applied the doctrine of res judicata to its own decisions."]), and many other states as well. (See, e.g., Ross *v. Board of Educ.* (7th Cir. 2007) 486 F.3d 279, 282-83 [giving preclusive effect to *Board of Educ. v. Ross* (7th Cir. 2007) 486 F.3d 267]; *Pace v. Bogalusa City School Bd.* (5th Cir. 2005) 403 F.3d 272, 290-91; *Manchester School Dist. v. Crisman, supra,* 306 F.3d at pp. 33-34.)

8. The requirements for the application of collateral estoppel are: 1) the issue to be precluded must be identical to that decided in the prior proceeding; 2) the issue must have been actually litigated at that time; 3) the issue must have been necessarily decided; 4) the decision in the prior proceeding must be final and on the merits; and 5) the party against whom preclusion is sought must be in privity with the party to the former proceeding. *(People* v. *Garcia* (2006) 39 Cal.4th 1070, 1077.)

9. Collateral estoppel is not avoided simply because a party chose not to introduce evidence in the first proceeding. The doctrine bars relitigation by means of evidence that was, or could have been, presented in the first action. *(People v. Sims, supra,* 32 Cal.3d at p. 481; *Teitelbaum Furs, Inc. v. Dominion Ins. Co.* (1962) 58 Cal.2d 601, 607; *Interinsurance Exchange of the Auto. Club v. Superior* Court (1989) 209 Cal. App.3d 177, 181.) Collateral estoppel may not apply, however, if a party can make a sufficient showing of changed circumstances. *(United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 Cal.App.4th 607, 616.)

10. Issues are identical for the purposes of collateral estoppel if identical factual allegations are at stake. *(Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342.)

11. An issue in an IDEA due process hearing may be identical to that in a previous hearing, even though the second hearing involves a different school year.

(Frutinger v. Hamilton Central School Dist. (App.Div. 1996) 644 N.Y.S.2d 582, 584]["The mere fact that a subsequent [IDEA] action involves different years does not render the doctrine of res judicata inapplicable .... [T]he gravamen of the wrong is the same ... ."];*M.C.G. v. Hillsborough County School Bd.* (Fla.App. 2006) 927 So.2d 224, 227[parents, having lost due process hearing concerning school year 2003-2004, collaterally estopped from pursuing second hearing on school year 2004-2005 "at least where there has been no material change of circumstances."]; see also, *WestmountHealth Facility v. Commissioner, N.Y. State Dep't of Health* (App.Div. 1994)[613 N.Y.S.2d 965][claimant barred by collateral estoppel from relitigating Medicare reimbursement rate when issue decided in first proceeding for earlier years], *Ritter* v. *City of Binghamton* (App.Div. 1990)[561 N.Y.S.2d 850][res judicata applied to different tax years and dollar amounts when disputed method of computation had not changed].)

12. The requirement that a decision be final is interpreted less strictly for collateral estoppel than for res judicata. It is enough that the previous judgment includes any prior adjudication of an issue "that is determined to be sufficiently firm to be accorded conclusive effect." *(Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 936; see, 7 Witkin, Cal. Procedure (4th ed. 1997) Judgments, § 312.) A decision in an IDEA due process hearing is entitled to conclusive effect. Education Code section 56505, subdivision (h), provides: "The hearing conducted pursuant to this section shall be the final administrative determination and binding on all parties."

RELATED SERVICES

13. "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363(a).) The services must be

"sufficient ... to permit the child to benefit educationally from that instruction." *(Rowley, supra,* 458 U.S. at p. 203.) Related services include "school health services . . . provided by a qualified school nurse or other qualified person." (34 C.F.R. § 300.34(c)(13).) Health and nursing services are specifically included as DIS services in California. (Ed. Code, § 56363, subd. (b)(12).) Health and nursing DIS services may include providing services by qualified personnel and managing the individual's health problems on the school site. (Cal. Code Regs., tit. 5, § 3051.12, subds. (a)(1), (2).)

REQUIREMENTS FOR DELIVERY OF SPHCS IN SCHOOLS

14. "Specialized physical health care services" (SPHCS) means those health services prescribed by the child's licensed physician and surgeon requiring medically related training for the individual who performs the services and "which are necessary during the school day to enable the child to attend school." (Cal. Code Regs., tit. 5, § 3051.12, subd. (b)(1)(A).) "Specialized physical health care" may be provided as described in Education Code Section 49423.5." *(Id.,* subd. (b).) SPHCS are to be provided pursuant to "protocols and procedures developed through collaboration among school or hospital administrators and health professionals, including licensed physicians and surgeons and nurses" *(Id.,* subd. (b)(1)(B).) A district is required to maintain "specific standardized procedures" for each student with exceptional needs who receives SPHCS. *(Id.,* subd. (b)(3)(E).) The implementation of the prescription must supervised by a school physician or nurse, who must consult with appropriate personnel and maintain communication with health agencies providing care to the student. (see, Ed. Code, § 49423.5, subd. (a)(2); Cal. Code Regs., tit. 5, § 3051.12, subds. (b)(3)(D)(2), (3).) Medically related training must be done by "a qualified school nurse, qualified public health nurse, qualified licensed physician and surgeon, or other approved programs. ." (Cal. Code Regs., tit. 5, § 3051.12, subd. (b)(1)(E)(2).)

15. Gastric tube feeding is a SPHCS. (Ed. Code, § 49423.5, subd. (d).) It may be

provided in school only in compliance with Education Code section 49423.5. (Cal. Code Regs., tit. 5, § 3051.12, subd. (b).) Education Code section 49423.5(b), in turn, requires that a SPHCS be provided "pursuant to the procedures prescribed by Section 49423." Section 49423(b) requires that a school district obtain two written statements before providing a SPHCS. The first is "a written statement from the physician detailing the name of the medication, method, amount and time schedules by which the medication is to be taken. ." The second is "a written statement from the parent ... of the pupil indicating the desire that the school district assist the pupil in the matters set forth in the statement of the physician." (Ed. Code, § 49423(b)(1).) The statements must be provided at least annually. *(Id.,* subd. (b)(3).)

16. A SPHCS must be arranged by a school physician or nurse so that it is routine for the pupil, poses little potential harm to him, is performed with predictable outcomes, and does not require a nursing assessment, interpretation, or decisionmaking by the school personnel delivering the service. These arrangements must be made by the school's physician or nurse "in consultation with the physician treating the pupil..." (Ed. Code, § 49423.5, subd. (a)(2).)

TIMING OF REQUESTED IEP MEETING

17. When a parent requests an IEP team meeting to review an IEP, the meeting must be held within 30 days, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the written request. (Ed. Code, § 56343.5.)

RELEASE OF STUDENT RECORDS

18. With exceptions not relevant here, a school district may not release individually identifiable student records or information to a third party without the "written consent" of his parents. (20 U.S.C. § 1232g(b)(1).)

LIMITATION OF ISSUES

19. A party who requests a due process hearing may not raise issues at the hearing that were not raised in the request, unless the opposing party agrees otherwise. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.) A party may obtain agreement from its opponent or leave from a hearing officer leave to amend its request. (20 U.S.C. § 1415(c)(2)(E)(i); Ed. Code, § 56502(e).)

DID THE DISTRICT FAIL TO OFFER STUDENT A FAPE DURING THE ESY 2006 AND THE SY 2006-2007 BY FAILING TO OFFER A PLACEMENT IN WHICH STUDENT COULD BE FED USING THE PLUNGE METHOD OF GASTROSTOMY TUBE FEEDING, OR FAILING TO PLACE STUDENT IN A NONPUBLIC SCHOOL THAT COULD FEED HIM USING THE PLUNGE METHOD OF GASTROSTOMY TUBE FEEDING?

20. The District did not fail to offer Student a FAPE during the ESY 2006 or SY 2006-2007. Based on Factual Findings 9-19 and Legal Conclusions 2-12, the plunge method of G-tube feeding was not the only viable method by which Student could be fed at school. He could also safely be fed by the gravity method, which was part of the District's placement offers. There was no medical reason Student could not attend the District's school and be fed by the gravity method. Feeding by the plunge method was not necessary for him to attend school or access his curriculum. Student had a full and fair opportunity to litigate those issues in *Student I,* did so unsuccessfully, and is bound by the resolution of those issues in that proceeding. The IEP had before it no new information requiring a different offer at any of its meetings in 2007.

21. Based on Factual Findings 20-23 and Legal Conclusion 19, Student's failure to allege in his request for due process hearing that he had presented a valid prescription for plunge method feeding during the school year at issue, or that the CDE Guidelines are obsolete, and his failure to amend his request to set forth those issues, bar consideration

of those issues here. Student argues that since a court reviewing an IDEA decision can consider evidence arising after the administrative hearing under review, a hearing officer should consider arguments made after a request for due process hearing is filed. The comparison is flawed. A court reviewing an administrative decision made under IDEA has specific statutory authority to receive additional evidence. (20 U.S.C. § 1415(i)(2)(C)(ii).) A hearing officer has no comparable power, and is governed by the limitations of title 20, United States Code, section 1415(f)(3)(B) and Education Code section 56502, subdivision (i).

22. Based on Factual Findings 24-56 and Legal Conclusions 13-18, during SY 2006-2007 Student never timely presented to the District a valid prescription under which he could have been fed by the plunge method at school. The gastroenterology outpatient notes of September 15, 2006 and March 18, 2007, did not, alone or together, constitute valid prescriptions. The prescription of May 29, 2007, was presented too late in the school year to be considered by the IEP team or implemented, and required the training of personnel by someone not allowed by law to train them. Mother never gave the required written consent to the exchange of medical information that would have been needed to develop specific instructions for school personnel to use in feeding Student by the plunge method and to maintain communication with Dr. Idries in case consultation with her became necessary in the course of feeding Student by the plunge method.

23. Based on Factual Findings 57-62 and Legal Conclusions 2-4, the fact that the CDE Guidelines have become obsolete has no relevance to the outcome of this proceeding and had no importance to the outcome of *Student I.* The Guidelines may have been current when consulted by the District. They were nonbinding. The District used other models for its G-tube feeding protocol, which is current and was recently reviewed. The protocol itself is flexible and can be modified in an appropriate case.

ORDER

For the foregoing reasons, Petitioner's requests are denied.

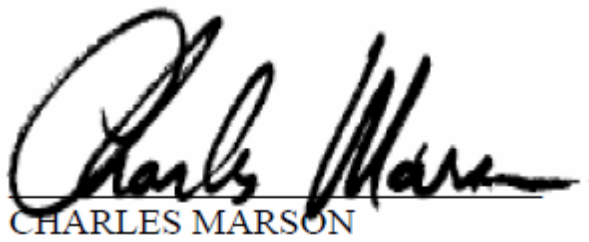
PREVAILING PARTY

Education Code section 56507, subdivision (d) requires this decision to indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

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

Dated: August 30, 2007



CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings