

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

RAVENSWOOD CITY SCHOOL
DISTRICT.

OAH CASE NO. 2008040747

DECISION

Administrative Law Judge Rebecca P. Freie, Office of Administrative Hearings, State of California (OAH), heard this matter in East Palo Alto, California, on June 9 and 11, 2008.

Advocate Cleo D. Simon represented Student. Student's surrogate parent (Surrogate) was present for most of the hearing.¹ Student, Student's father, and paternal grandmother were present for part of the hearing.

Linda Lee, Director of Special Education, represented Ravenswood City School District.²

¹ Student's father assigned Student's educational rights to the Surrogate who is a family friend. She is not a surrogate parent as defined by Government Code section 7579.5.

² Ms. Lee was recently hired by the District and has not yet assumed the full duties of Director of Special Education.

Student filed a request for due process hearing on April 24, 2008. Oral and documentary evidence were received during the hearing. Written closing arguments were received on June 25, 2008, and the record was closed and the matter was submitted for decision on June 27, 2008.³

ISSUES⁴

1. Was Student eligible for special education services under the category of emotional disturbance (ED) during the 2007-2008 school year?
2. Did the District fail to conduct a functional analysis assessment (FAA) and develop a behavior intervention plan (BIP) for Student after one was requested in January 2008?⁵

³ For the purpose of establishing a clear record, Student's closing argument is designated as Exhibit 7, and the District's closing argument is designated as Exhibit H.

⁴ For clarity of decision writing, the issues have been reorganized, but are the same issues that were discussed and agreed upon at the beginning of hearing as the only issues for hearing.

⁵ At the commencement of the hearing, two issue were resolved by stipulation of the parties: the District stipulated it failed to assess Student's behavior for special education and related services after the Surrogate requested the assessment in writing on or about April 16, 2007, and it further that it failed to provide the Surrogate with a written assessment plan within 15 days of the written request for assessment. Therefore, these issues are not discussed in this decision.

3. Will a District-funded placement for Student in a nonpublic school (NPS) that addresses behavioral issues provide him with a “free appropriate public education” (FAPE) for the 2008-2009 school year?

CONTENTIONS

Student contends that he is eligible for special education services under the category of ED. Student argues that his problematic behaviors, over which he has no control, make him eligible. These behaviors include fighting, extreme defiance and disrespect of teachers, and serious profanity in the classroom. Student contends that the District has intentionally kept few records of his misbehavior which has resulted in the District concluding that he is not eligible for special education. Student further contends that during the 2007-2008 school year, when Student acted out in a class, he was removed from that classroom and sent to another classroom, sometimes spending the entire day in a kindergarten classroom. Student also contends that although his Surrogate requested that the District conduct a FAA and create a BIP in January 2008, the District has failed to complete the FAA report. As a result, Student claims he is entitled to an independent FAA at District expense. Finally, Student argues that because he is eligible for special education services, and his behavior is out of control, he requires placement at an NPS that will be able to deal with his problematic behaviors.

The District contends placement decisions about Student cannot be made until the individualized education program (IEP) team meets and finds Student eligible for special education services. The District has been ready to convene an IEP team meeting since March 2008 when a psycho-educational and other assessments were completed and integrated into a report. The District argues that Student is not eligible for special education services because his behaviors do not affect his ability to learn, as demonstrated by his academic achievement and cognitive functioning assessment results. The District admits that it did not complete the FAA in a timely manner, but has

completed one now. Finally, the District argues that even if Student is found eligible for special education services, an NPS is an inappropriate placement at this time.

FACTUAL FINDINGS

JURISDICTION

1. Student is 13 years of age. For the past two years he has resided with his paternal grandparents within the District boundaries. Student began attending Belle Haven Elementary School (Belle Haven) in the District in August 2006 and just completed the seventh grade in June 2008. Student is not currently eligible for special education services. There is no evidence that he was assessed and found eligible for special education services by previous districts.

ELIGIBILITY

2. For a student to qualify to receive special education services under the category of ED, the student must show the existence of a serious emotional disturbance over a long period of time, and to a marked degree, such that it affects the student's academic performance, and the student must satisfy one of the following five criteria: (1) an inability to learn which cannot be explained by intellectual, sensory, or health factors; (2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (3) inappropriate types of behavior or feelings under normal circumstances exhibited in several situations; (4) a general pervasive mood of unhappiness or depression; or (5) a tendency to develop physical symptoms or fears associated with personal or school problems.

3. Student lived with his biological mother until the 2005-2006 school year, when he began living with his father and the Surrogate. From March 2004 through February 2005, at two different schools, Student was disciplined for numerous inappropriate behaviors including: grabbing a female student around the waist and

performing pelvic thrusts (March 5, 2004); throwing another student to the ground (April 6, 2004); throwing a timer across the classroom and, when sent outside for a time out, disrupting the class by repeatedly kicking the door (April 20, 2004); and bringing a pellet gun to school, pointing it towards other students, and firing it into the ground (February 5, 2005). The Surrogate provided the District with records concerning these incidents shortly after Student began attending Belle Haven. Student exhibited other problematic behaviors during this time as well, although Student's father could not provide details because he was not fully informed of these other incidents by Student's mother with whom Student resided during that time period.

4. When Student began living with his father and the Surrogate in 2005, he was enrolled in a parochial school in Mountain View, California for the 2005-2006 school year. While attending that school, Student was frequently disciplined for speaking disrespectfully to a teacher in the classroom, using foul language, "flipping people off," and making racial comments to adult staff. His report card indicates that he talked excessively, lacked self control and would not cooperate with adults. At the end of the school year he became angry when a teacher was talking to him, hit a classroom door with his fist and broke his hand.

5. As a result of the foregoing behaviors, the parochial school would not permit Student to enroll for the following school year. Student was then sent to live with his paternal grandparents who reside in the District as his father wanted him to go to school in the District. He was enrolled at Belle Haven Elementary School in August 2006 to begin the sixth grade. Student's father informed the school that Student had been expelled from the parochial school and documentation of all but the last incident was provided to Belle Haven.

6. During the 2006-2007 school year, Student exhibited similar inappropriate behaviors. They included extreme profanity, extreme defiance, refusal to comply with

teachers' directives, arguing with the teachers, and fighting with other students.

Student's teacher frequently contacted the Surrogate and members of Student's family about Student's behaviors. There was a notation in the comment section of the fourth quarter report card for sixth grade that Student had a poor attitude and behavior that created interference in class.

7. On numerous occasions during the 2006-2007 school year, the school called Student's father, grandparents or the Surrogate during the school day and asked them to pick him up from school and keep him out for the rest of the day. In some instances Student's family was told he could not return to school for a subsequent day or days. However, the school failed to document these removals and discipline problems. School personnel explained to Student's father that they did not want him to have a "bad" school record. The evidence did not disclose whether any disciplinary records for Student exist for the 2006-2007 school year. In spite of his behaviors, Student's final report card contains one A grade, three B grades and one C grade.

8. Student continued to exhibit problematic behaviors during the 2007-2008 school year. Student routinely defied teachers and was "sent home" for two or three days in October 2007. In November 2007, he tried to take a soccer ball away from another student, "kneed" him, then kicked the ball away. On December 4, 2007, Student showed disrespect in classroom and fought in the bus zone. On December 10, 2007, Student called one of his teachers an obscene name. In March 2008, Student took another student's backpack and tossed it and its contents on the playground, then lied to two teachers about the incident. The District had records of these incidents because Student was referred to the office.

9. In October 2007, the school's vice principal and Student's language arts teacher, Maudra Anderson, devised a "behavior plan" for Student to address his excessive defiance and arguing with teachers, as well as his extreme profanity in the

classroom. Prior to formulating the plan, Ms. Anderson met with Student to ask him for suggestions of ways to de-escalate his behaviors. The vice principal met with the school psychologist, Rafael Banaag, to hear his suggestions about how teachers could deal with Student's behaviors.

10. The evidence did not establish if the "behavior plan" devised by Ms. Anderson and the vice principal was written. Ms. Anderson, the lead teacher for the seventh grade, discussed the plan with Student's other seventh grade teachers. The plan called for Student to be sent to another classroom when he was misbehaving. Most of the time he would be sent to Ms. Anderson's class because she was thought to have better control over him. When Student then acted out in that classroom, or Ms. Anderson's classroom was not available, he was sent to a kindergarten classroom with his assignments. Sometimes he would remain in the kindergarten class all day. Student established that he would complete his school work in an hour, and spend the rest of the day playing with the "little kids." The behavior plan strategies did not improve Student's behaviors, and it was never reviewed or modified.

11. Student routinely exhibited problematic behaviors in the mathematics class of Ms. Kirk, the social studies/science class of Nelly Robillo and the language arts class of Ms. Anderson. At least three times per week, in each of these classes, Student would become upset and swear. He argued with his teachers and acted very defiant, refusing to comply with their requests. Student could not be calmed down, and these incidents ended with Student either leaving the classroom in anger to wander the campus, or the teacher sending Student to another classroom. According to Ms. Anderson, on at least five occasions, Student's behavior was so out-of-control in her

classroom that she would have called the school's "Crisis Team"⁶ for assistance, but Student left the classroom on his own before she could do so. No records were kept of these incidents as the teachers were expected to handle these situations at the classroom level.

12. During the 2007-2008 school year, Student's father, the Surrogate and the grandparents were asked to go to the school more than a dozen times to pick up Student and take him home due to behavior issues. The school referred to these days, and subsequent days when the family was to keep Student home, as "out of school days," not suspensions. The school kept no records concerning "out of school days."

13. In addition to classroom removals and "out of school days" during the 2007-2008 school year, Student received lunchtime detentions 25 to 30 times for severe defiance, extreme profanity and fighting incidents. When Student received lunchtime detention, no report was made to the office, and no record was kept.

14. Student also exhibited some of the same behaviors at home with his grandparents and during visits with the Surrogate as he did at school, although less frequently. He pushed objects, stomped his foot, acted defiant and disrespectful and refused to stop talking. Student was disciplined at home for his misbehavior at both school and at home. However, those consequences failed to decrease the frequency or intensity of his behaviors.

15. Student participated in therapy with the school counselor at the parochial school, and his family enrolled him in weekly therapy offered through their medical plan on at least two separate occasions during the past three years. These interventions failed to improve his behaviors. The last time his family took him to therapy was in January

⁶ The Crisis Team consists of the vice principal, the school psychologist, and staff trained to deal with physically aggressive students.

2008. The therapy stopped because the family was concerned that Student had not developed a positive relationship with the therapist. There was persuasive evidence that the school recently sent Student for a few sessions of on-grounds group therapy during the school day without informing the family or obtaining consent.

16. Student's behaviors requiring intervention escalated significantly during the 2007-2008 school year. Student's presence and behaviors in several of his classes made it difficult for a teacher to control the rest of the students in the classroom. Student did not work well in a group setting and was unable to control his anger. Ms. Robillo's testimony established that Student's behaviors are similar to the types of behaviors of a student in her class with an IEP who receives counseling and the services of a one-to-one aide.

17. Several witnesses provided evidence that Student's behaviors were more than occasional, and were not volitional. Ms. Anderson established that she could tell by Student's demeanor when he arrived in her class in the morning whether he was going to have a "good" or a "bad" day. Student's grandmother established that some days Student behaved very well, and other days it "was almost like two different children." The Surrogate testified that while she was usually able to control Student, he was physically aggressive with her preschool-aged grandchildren and she would not leave him alone with them. Student's father established that although Student loved to play sports, he would not let him participate in organized sports because he was afraid student would become angry and physically aggressive towards other participants.

18. Student is bright and engaging. He patiently observed the proceedings for most of the afternoon on the first day of hearing. Student said that when he had outbursts it was because he was angry because he felt he was being treated unfairly. Student established that he often could not control his outbursts and negative

behaviors, or stop them once they started. Based on Student's demeanor, which was thoughtful and reflective, his testimony was credible.

19. Student's behaviors impact his education, and also impact other students in his classes. He often has multiple outbursts in his three academic classrooms in which he spends most of the school day. He is then removed from those classrooms. The testimony established that Student is removed from each of these classes three times per week per class. Student is missing 50 percent of the instructional class time in math, social studies, science and language arts. Student's problems are greatest in the academic setting, although they also affect him at home and in the community.

20. While Student's behaviors were problematic, they did not rise to the level of ED. This failure was due to a lack of assessment data because the District failed to properly assess Student as discussed below.

DISTRICT'S ASSESSMENTS

21. When a parent asks that a student be assessed for special education, a school district must assess that student in all areas of suspected disability.⁷ The District must also assess a student when it has reason to suspect a disability. When a student exhibits serious behavior problems, and a behavior support plan has been ineffective in controlling the behavior, the district can conduct an FAA so that a BIP can be formulated. A parent is not precluded from requesting an FAA as part of the initial assessment. Within 15 days of the request the district must send an assessment plan to the parent. Within 60 days the assessment must be completed and an IEP team meeting must be convened. If a parent disagrees with the district's assessment, the parent may

⁷ If the district disagrees with the parent and believes the student does not have a disability, the district can request a due process hearing.

request an independent educational evaluation (IEE), and under certain circumstances the district will be required to pay for the IEE.

22. In April 2007, Student's father appointed the Surrogate to act on behalf of Student and exercise the father's educational rights. On April 16, 2007, the Surrogate notified the District, in writing, that she held the father's educational rights for Student and enclosed an authorization to that effect signed by the father. In the same letter, the Surrogate asked the District to assess Student for special education due to behavioral issues. The Surrogate received no response to her April 16, 2007 letter. On at least three occasions, she or the advocate wrote to the District asking the status of the assessment request.

23. In October 2007, the advocate filed a complaint with the California Department of Education (CDE) concerning the District's failure to assess Student. CDE investigated the complaint and ordered the District to send an assessment plan to the Surrogate, assess Student, and hold an IEP meeting.

24. Both the school psychologist, Mr. Banaag, and the District's Positive Behavior Support Coordinator, Rebecca Mendolia are trained as behavioral intervention case managers (BICM). Their testimony established that if a student has a behavior plan, it should be reviewed at least every other week to determine if it is working, and if it is not, the plan should be modified. If the plan cannot be modified, a formal assessment such as a functional behavioral assessment (FBA) or FAA should be conducted. As discussed in Factual Finding 9, the behavior plan devised for Student in October 2007 was never reviewed to determine if it was working or needed to be modified.

25. The evidence established that the District has several internal procedures related to discipline. Teachers must refer students to the office only for the most serious offenses (drugs, alcohol, fighting and possession of weapons). A teacher is expected to exhaust classroom-level interventions such as loss of privileges, lunchtime detention,

and removal to another class, before “minor” behaviors, such as extreme defiance, rise to the level of warranting an office referral. If a student is referred to the office 15 times, a referral will be made for the initiation of a formal behavioral support plan or an assessment of a student’s behavior. Also, a behavioral assessment will not be conducted without a meeting between parents and school officials, even if parents request an assessment.

26. On January 17, 2008, the District sent an assessment plan to the Surrogate and advocate. The District proposed to assess Student in the following areas: academic achievement, social/adaptive and cognitive development. The Surrogate faxed her consent for these assessments to the District the same day. She simultaneously requested and consented to District assessments in the areas of motor development, communication development, hearing, vision, and health. Additionally she requested a “Behavior Assessment and Functional Analysis Assessment,” and a resultant BIP. The District failed to respond to this request and it never asked to meet with the Surrogate to discuss the request for an FAA and BIP.

27. Mr. Banaag, a credentialed school psychologist, directed the assessments of Student and wrote an “Integrated Evaluation Report” (IER) dated March 4, 2008. The IER discussed a cognitive assessment, achievement testing and a speech and language assessment. The IER states the school nurse tested Student’s vision and hearing. The IER does not discuss social/adaptive or motor development assessments, an FAA or a BIP.

28. The IER reflects that Student has normal health, vision and hearing. His cognitive level, as assessed by a developmental neuropsychological assessment tool called the NEPSY,⁸ is in the average to superior range. His academic achievement scores,

⁸ The evidence did not establish the formal name of the assessment tool referred to by the acronym, “NEPSY.”

as assessed by the Woodcock-Johnson III (W-J III), are above average in language arts and in the superior range in written expression. However, his math calculation skills are at a low fifth grade level. Speech and Language development, as assessed by the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4) showed Student scoring in the 84th percentile in receptive language, but in the 37th percentile in expressive language. Student scored in the 14th percentile with another language test, the Expressive Vocabulary Test (EVT).

29. On March 7, 2008, the Surrogate received an invitation to an IEP meeting for March 10, 2008. However, she and the advocate refused to proceed with an IEP meeting until all of the assessments, including the FAA, had been completed, and copies of all the assessment reports were provided to them. The Surrogate did not receive the IER until March 14, 2008, and as of the dates of hearing, still had not received the FAA report.

30. Mr. Banaag testified that the social/adaptive assessment was not completed because father never returned a survey, the Behavior Assessment Scale for Children (BASC), which was mailed to him in February 2008.

31. Mr. Banaag was responsible for making recommendations in the IER. He did not recommend Student be found eligible for special education. Mr. Banaag explained that because Student scored well on the W-J III, better than other students he has tested in the District, he was clearly learning in spite of his anger control issues. Mr. Banaag testified that unless there was a discrepancy between a student's actual ability and level of academic achievement, a student would not be eligible for special education services under any category. This is not the legal standard for ED eligibility.

32. Mr. Banaag was not aware of how often Student was being removed from his classrooms or the school, in part because the school failed to keep records of in-class discipline. For the purposes of the IER, Student, his father and two of his teachers,

Ms. Robillo and Ms. Kirk, were interviewed. Mr. Banaag did not interview Ms. Anderson because he was unaware that Student had behavioral issues in her class. Mr. Banaag also believed Student lived with his father. However, the IER reflects that Student told Mr. Banaag that he lived with his grandparents. Because Student lives with his grandparents, they should have been interviewed about behavior problems at home.

33. The FAA was delayed. As of the date of the hearing, a final draft existed but had not received final approval for distribution. Although Mr. Banaag was aware that the Surrogate and advocate represent Student regarding educational issues, he only contacted Student's father to discuss the need for an FAA. When the father said he was not aware that an FAA had been requested, work on the FAA stopped.

34. Part of an FAA is the completion of a "scatter plot." This consists of multiple observations of the subject of the FAA, over the course of several days, for the purpose of recording exhibitions of targeted behavior, including antecedents of that behavior. A complete "scatter plot" will cover an entire school day and every targeted behavior, although all of the observations for a behavior will not have occurred on the same day. After being told to complete the FAA in March or April 2008, Mr. Banaag delayed completion due to difficulty finding personnel to complete "scatter plot" observations. While some observations were done, the "scatter plot" in the FAA was not complete. Therefore the draft of the FAA awaiting final approval at the time of the hearing was inadequate

35. Mr. Banaag reviewed information contained in Student's cumulative file to determine what behavioral problems Student had at both his current school and his prior school. However, because the District kept and maintained few records of Student's behavioral problems and disciplinary actions, Mr. Banaag was unaware of the true scope of Student's behavior problems. Also, in either March or April 2008, some documents pertaining to Student's behaviors were removed from Student's cumulative

file. There was no evidence that these documents were removed by anyone other than school personnel.

36. Because the IER and FAA are incomplete, it cannot be determined if Student is eligible for special education services due to ED, or another eligibility category. Assessment data is necessary before an IEP team can convene to determine Student's eligibility for special education. The District is solely responsible for the significant and unwarranted delay in assessing Student, and the incompleteness of the IER. Student is therefore entitled to independent assessments at District expense.

PLACEMENT FOR THE 2008-2009 SCHOOL YEAR

37. Student requested placement at Seneca NPS in Oakland, which has an on-site psychologist and accepts students with severe behavioral issues. Because Student is not eligible for special education services, this request is denied. Further assessment is necessary to determine eligibility for the 2008-2009 school year.

LEGAL CONCLUSIONS

APPLICABLE LAW

Burden of Proof

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. Student filed the request for due process, and therefore has the burden of persuasion in this matter.

Was Student eligible for special education services under the category of ED for the 2007-2008 school year?

2. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA or the Act) and California law. (20 U.S.C. § 1412(a)(1)(A);

Ed. Code, § 56000.) Special education is defined in pertinent part as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56363.) Special education related services include psychological services as may be required to assist the child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

3. A child may be eligible for special education and related services under the category of ED if the following conditions are met:

Because of a serious emotional disturbance, a pupil exhibits one or more of the following characteristics over a long period of time and to a marked degree, which adversely affect educational performance:

- (1) An inability to learn which cannot be explained by intellectual, sensory, or health factors.
- (2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (3) Inappropriate types of behavior or feelings under normal circumstances exhibited in several situations.
- (4) A general pervasive mood of unhappiness or depression.
- (5) A tendency to develop physical symptoms or fears associated with personal or school problems. (Cal.Code. Regs., tit. 5, § 3030, subd. (i).)

4. Student has exhibited serious behavior problems for at least four years at four different schools, and at home. These problems include bringing a pellet gun to school and sexually assaulting a girl at school, as well as fighting, extreme defiance towards teachers and excessive profanity in the classroom. Therefore, it can be concluded that Student's behavioral issues have been in existence for a "long period of time." (Factual Findings 2 to 19; Legal Conclusions 2 and 3.)

5. Student's grades and scores on the W-J III demonstrate that if Student does have a serious emotional disability, it is not manifesting itself as an inability to learn. There was insufficient evidence to establish a finding that student has "an inability to build or maintain satisfactory interpersonal relations with peers and teachers." There was no evidence that Student suffers from "a general pervasive mood of unhappiness or depression," or has physical symptoms or fears associated with his problems. Therefore, the only relevant criteria under the ED category is whether Student exhibited to a marked degree, and over a long period of time, inappropriate types of behavior or feelings under normal circumstances in several situations. The evidence did not establish this criteria. (Factual Finding 20; Legal Conclusions 3 and 4.)

6. Although a student may be obtaining satisfactory grades, and have the knowledge and skills typical of a student of his age and in his grade at school, he may still qualify for special education services as student with ED. *Student v. Los Gatos-Saratoga Joint Union High School District* (2004) 41 IDELR 227; *Student v. Fresno Unified School District I2* (2003) 39 IDELR 28; and *Student v. Board of Education of the Massapequa Union Free School District* (2007) 49 IDELR 89.)

7. It was established that Mr. Banaag did not believe a student with behavior problems could be eligible for special education services unless there was a discrepancy between the student's academic ability and achievement. The District did not consider the possibility that Student could be eligible under the category of ED because he was receiving satisfactory grades. Therefore, there was insufficient evidence to establish special education eligibility for Student under the ED category. (Factual Finding 31, Legal Conclusions 3, and 5 to 6.)

8. Student exhibits extreme defiance and profanity both at school, and to some degree at home, as well as other behaviors, such as fighting at school, that have resulted in disciplinary action. The testimony of Student, his grandmother, his father, the

Surrogate, Ms. Anderson and Ms. Robillo, established that Student is currently unable to control or stop his outbursts and behaviors. The District's informal behavior plan failed to modify Student's behaviors, and he missed at least 50 percent of instructional time in three academic classrooms due to his behaviors and resultant disciplinary actions. However, this evidence is insufficient to establish eligibility for special education under the ED category on the basis that he exhibited "inappropriate types of behavior or feelings under normal circumstances exhibited in several situations." (Factual Findings 3 to 20; Legal Conclusions 2 and 3.)

Did the District fail to conduct an FAA and develop a BIP for Student after one was requested in January 2008?

9. The IDEA places an affirmative duty on the state to identify, locate, and evaluate all children with disabilities residing in the state. (20 U.S.C. § 1412(a)(3).) California specifically obligates the district to actively and systematically seek out "all individuals with exceptional needs." (Ed. Code, § 56300 et seq.) A district's child find obligation toward a specific child is triggered when there is reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

10. Before any action is taken with respect to an initial placement of an individual with exceptional needs in special education, the school district must assess the student in all areas of suspected disability. (20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.532(f); Ed. Code, § 56320.) The tests and assessment materials must be validated for the specific purpose for which they are used, and must be selected and administered so as not to be racially, culturally, or sexually discriminatory, and must be provided and

administered in the student's native language or other mode of communication unless not clearly feasible, and must be administered by "trained personnel in conformance with the instructions provided by the producers of such tests." (Ed. Code, § 56320, subds. (a), (b).)

11. When a student exhibits serious behavior problems, and a behavior support plan has been ineffective in controlling the behavior, the district can conduct an FAA so that a BIP can be formulated. (Cal. Code Regs., tit. 5, § 3052.) A student's parent or guardian, teacher or other service provider may make a request for assessment including an FAA. (Ed. Code, § 56029; Cal. Code Regs., tit. 5, § 3052(b).) Within 15 days of the request, the district is obligated to give the parent a written assessment plan. The parent then has 15 days to consent to the assessment in writing. Once the parent has provided consent, the district then has 60 days to complete the assessment and hold an IEP meeting.⁹ (Ed. Code, § 56344(a).)

12. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an independent educational evaluation (IEE) at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(a)(1); Ed. Code, § 56329, subd. (b).) "Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1) and (b)(2).) If the district believes its evaluation was appropriate and it does not wish to pay for an IEE, it must request a due process hearing and prove that the evaluation was appropriate. (34 C.F.R. § 300.502(b)(2).)

⁹ There are some exceptions to the 15 day rule when school is not in session that are not relevant here.

13. The District failed to conduct an FAA in a timely manner. The Surrogate initially requested a behavioral assessment of Student in April 2007. The District admits it failed to comply with this request. When the District sent the assessment proposal to the Surrogate on January 17, 2008, and the Surrogate signed the consent and returned the forms on the same date, she requested that the District also conduct an FAA on Student as well as other assessments. The District failed in its duty to conduct the FAA and have it completed in a timely manner. As of the date of the due process hearing, the FAA was not finalized-- nearly five months after the District received the Surrogate's request and consent for the FAA. (Factual Findings 22 to 24, 26 and 27, 29, and 33 and 34; Legal Conclusions 9 to 11.)

14. As stated in Factual Finding 34, one of the assessment tools for the FAA, the scatter plot, had not been completed properly because all of the necessary observations had not been completed in accordance with scatter plot protocol. Therefore, based on Legal Conclusion 10 and Factual Finding 34, the District did not conduct a proper FAA. Because of the District's wholesale failure to complete a timely and legally sufficient FAA, the District shall pay for an independent FAA and establishment of a BIP for Student by an evaluator of Student's choosing who meets the District's minimum criteria for such an assessment. (Factual Findings 22 to 24, and 33 to 36; Legal Conclusions 9 to 12.)

14. As stated in Factual Finding 31, the IER dated March 4, 2008, did not find Student eligible for special education. However, the IER did not contain the social-adaptive and motor development assessments, and the school psychologist did not interview all of Student's teachers, nor did he interview the grandparents with whom Student lives. Further, because the school failed to document and maintain records concerning Student's behaviors, there were few records available to establish the extent of Student's behavioral issues. As a result, the IER is inadequate and incomplete. (Factual

Findings 7 to 13, and 30 to 32; Legal Conclusions 9 to 12.) Further assessment is needed to determine whether Student is eligible for special education. (Factual Finding 36; Legal Conclusions 9 to 11.)

15. Because the District failed to adequately assess Student in a timely manner, a new psycho-educational assessment must be completed to assist the IEP team to determine eligibility. Therefore, the District shall fund an independent psycho-educational assessment for the purpose of assisting the IEP team in determining eligibility and services. Factual Findings 30 to 32; Legal Conclusions 9 to 12.)

16. The independent FAA and psycho-educational assessment reports shall be completed and an IEP team meeting convened to consider the reports and their recommendations no later than 60 days following the receipt of this decision. (Legal Conclusions 10 11.)

Will a District-funded placement of Student in an NPS that addresses behavioral issues be one that will provide him with a FAPE for the 2008-2009 school year?

17. Student has not yet been found eligible for special education services, and no evidence was presented by way of an assessment or testimony of a qualified evaluator that recommended placement in a NPS. Accordingly, Student is not yet entitled to a FAPE and no IDEA placement may be ordered, despite the District's failure to adequately and timely assess Student. (Factual Finding 37, Legal Conclusion 8.)

ORDER

1. Student is not eligible for special education at this time.
2. The District shall pay for Student to receive an FAA, meeting the requirements of California Code of Regulations, title 5, section 3052, subdivision (b). This assessment shall be performed by an independent assessor chosen by Student, who

shall meet the requirements of California Code of Regulations, title 5, section 3052, subdivision (b), and a written report shall be prepared.

3. The District shall fund an independent psycho-educational assessment of Student performed by a qualified school psychologist of Student's choosing. The independent assessor shall draft a written report.

4. The independent FAA and psycho-educational reports shall be presented to Student's IEP team for consideration. The District shall pay for the independent assessors' IEP attendance.

5. District shall convene an IEP team meeting within the legal timeframes to consider the results of the assessments and evaluations, and to determine eligibility, and, if applicable, to develop an appropriate IEP to meet Student's behavioral and other needs.

6. Student's request for placement at a NPS specializing in students with behavior issues is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on Issue 2. The District prevailed on Issues 1 and 3.

RIGHT TO APPEAL THIS DECISION

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

Dated: July 24, 2008

A handwritten signature in cursive script, reading "Rebecca P. Freie".

REBECCA P. FREIE

Administrative Law Judge

Office of Administrative Hearings