BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. CLOVERDALE UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2010081062

DECISION

Charles Marson, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on November 30 and December 1-2, 2010, in Cloverdale, California.

Taymour Ravandi, Attorney at Law, represented Student. Jared Laiti, law clerk, assisted Mr. Ravandi. Student's Mother was present throughout the hearing. Student was not present.

Marco H. Fong, Attorney at Law, represented the Cloverdale Unified School District (District), and was accompanied by Margaret M. Merchat, Attorney at Law. The District was represented at various times during the hearing by Claudia Franzen, the District's Superintendent of Schools; Julie Hermosillo, the District's Director of Instruction and Student Services; and Gail Austin, school psychologist for the District.

Student filed his request for due process hearing on August 26, 2010. A continuance was granted on October 27, 2010. At the hearing, oral and documentary evidence were received. At the close of the hearing, the matter was continued to

January 11, 2011, for the submission of closing briefs.[1] On that day, the record was closed and the matter was submitted for decision.[2]

ISSUES

1) Did the District deny Student a free and appropriate public education (FAPE) in the school year (SY) 2008-2009 because Student was suspended from school for more than ten school days, thereby changing his placement?
2) Did the District deny Student a FAPE in SY 2008-2009 by failing to provide him with an appropriate education while he was suspended?[3]

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[1] For clarity of the record, Student's brief has been marked Student's Exhibit 332, and the District's brief has been marked District's Exhibit 54.

[2] Student attached as Exhibits A and B to his brief a document from the California Department of Education describing the California Modified Assessment and a document from the District containing a Principal's Message and other matters, and made factual assertions in his brief based on those exhibits. The District has moved to strike the documents and any reference to them from the brief on the persuasive ground that these matters were not produced at or before hearing and the District has therefore not had an opportunity to contest or address them. The District's motion is granted. Student's motion for judicial notice of these materials, filed January 19, 2011, is denied as untimely.

[3] The ALJ has reorganized and restated the issues for clarity.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is an 11-year-old male who resides with Mother within the geographical boundaries of the District. Since May 2006, he has been eligible for and has been receiving special education and related services due to emotional disturbance. Student is intelligent and capable, but has been unable to regulate his behavior in school.

2. In SY 2008-2009, Student was a fourth grader in general education at the District's Washington School (Washington). Due to his undesirable behaviors in class and on school grounds, Student was suspended from school between 50 and 64 times, typically for the rest of a school day, and as a result missed almost one third of the school year's in-class instruction.

3. At the end of SY 2008-2009, Parents and the District agreed to place Student in North Valley School (North Valley), a certified non-public school that is a level 14 facility specializing in the education of emotionally disturbed children. Student has been enrolled at North Valley from that time to the present, and has modified his behavior and made progress there. This dispute concerns only Student's fourth grade year at Washington.

STUDENT'S SUSPENSIONS

4. When a school district decides to change the placement of a special education student for violating a code of student conduct, the district must convene an individualized education plan (IEP) meeting within 10 school days to determine whether the conduct that gave rise to the violation of the school code is a manifestation of the student's disability. If the IEP team finds that the conduct was a manifestation of the student's disability, the district must order a functional behavioral assessment of the

child, and implement a behavioral intervention plan (BIP) for the child, or review and, if necessary, modify the child's existing BIP. The district must also return the child to the placement from which he was removed unless it and the child's parents agree otherwise.

5. A special education student's placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to him. The removal of a special education student from his placement for more than 10 consecutive school days constitutes a change of placement. A placement can be changed without a physical transfer of a student from one campus to another.

6. A change of placement also occurs when the child has been subjected to a series of removals that constitute a pattern because the child's behavior is substantially similar to his behavior in previous incidents that resulted in the series of removals, and because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. In such a case, the school district determines on a case-by-case basis whether a pattern of removals constitutes a change of placement, subject to review through due process and judicial proceedings.

PATTERN OF THE SUSPENSIONS

7. From the beginning of Student's fourth grade year at Washington, Student was frequently unable to control his behavior and engaged in conduct in class and on school grounds that violated the applicable code of student conduct, and caused him to be suspended. For example, he would talk loudly in class, throw things, push or hit other students, verbally defy the teacher's instructions, use profanity, refuse to participate in the tasks at hand, and leave class without permission. The propriety of these suspensions is not in dispute.

8. On February 4, 2009, Student's IEP team met and determined that the conduct for which he had been repeatedly suspended was a manifestation of his

disability. Nonetheless, the team decided to leave Student in general education classes at Washington.[4]

9. The pattern of Student's suspensions was described by Dr. Gordon Ulrey, Student's principal expert witness. Dr. Ulrey is a distinguished psychologist licensed by the state who has nearly 40 years of experience in assessing and helping disabled children. He is an associate clinical professor of psychiatry and psychology at the University of California at Davis School of Medicine, where he supervises psychotherapy, interviewing, and psychological and neuropsychological assessments. He graduated from Purdue University and has a doctoral degree in clinical and developmental psychology from Boston College, where he also taught. At various times he has held such positions as director of psychology at Children's Hospital in Boston, chief of psychology at the John F. Kennedy Child Development Center, and instructor of clinical psychology at the Harvard University Medical School. He is a member of the National Academy of Neuropsychology, the American Association for the Advancement of Science, the American Association for Medical Colleges, and the California Psychological Association, among other organizations. He is the author of dozens of peer-reviewed articles and papers about disabled children dating back to 1973. For many years he had a private practice in Davis in which he concentrated on disabled children.

[4] In light of the introduction in evidence of the minutes of the February 4, 2009 manifestation determination meeting as Student's Exhibit 210, the District's claim in its brief that there was "no Parent evidence about manifestation determinations" is far from accurate. IEP documents and the report of Dr. Gordon Ulrey mention several other manifestation determinations. There was no evidence that they came to a different result.

10. Dr. Ulrey assessed Student in July and August 2010. He examined an extensive collection of Student's educational records, observed Student in his current placement at North Valley, interviewed all three of Student's teachers there, and administered several standardized tests and non-standardized surveys of Student's intelligence, achievement, memory, psychological state, and behavior. He wrote a detailed report on his findings.

11. Dr. Ulrey was a highly qualified witness whose testimony was credible in all respects. He spoke and wrote carefully, answered questions thoughtfully, and lost no credibility on cross-examination. His view also appeared balanced; he gave the District well-deserved credit for its extensive efforts during SY 2008-2009 to improve Student's program and manage his behavior.[5] He also acknowledged that Student's suspensions were not the sole cause of his educational difficulties.

12. In his testimony and report, Dr. Ulrey described the conduct for which Student was suspended as part of a pattern of conduct caused by Student's emotional disturbance in which he challenged others, failed to regulate his behavior and anger, and failed to develop social relationships that were continual. That pattern typically included "defiance of authority, hitting, pushing, [and] teasing and harassing peers . . . ."

[5] The District held numerous IEP meetings during SY 2008-2009 in an attempt to address Student's problems. It provided Student a part-time one-to-one aide, then a full-time aide, and then an aide who was a behaviorist from a non-public agency. It conducted a functional analysis assessment and modified Student's behavior plans four times. It explored a wide range of options in addressing Student's behavior, and eventually proposed and now supports Student's placement at North Valley. The adequacy of these efforts is not in dispute here.

13. Many of the incidents for which Student was suspended are described in his IEP documents, behavior support plans, and a District document entitled "Assertive Discipline Record," in which the District records the details of suspensions. All those descriptions confirm the existence of the pattern Dr. Ulrey described. For example, the Assertive Discipline Record reports the following events leading to suspension: On April 20, 2009, Student pushed a student at recess, tripped another student, punched his aide, and refused to comply with instructions. On April 27, 2009, Student refused to work, threw a ball in his aide's face, left the office without permission, and refused to return. On May 11, 2009, Student refused to work in the classroom, climbed on top of a picnic table, threw rocks at his aide, and used profanity. On May 13, 2009, Student threw food at another student, used profanity, and threatened another student.

14. The examples above illustrate the similarity of the conduct for which Student was suspended during SY 2008-2009. The evidence showed that the incidents giving rise to these suspensions displayed a pattern of substantially similar conduct in their nature, duration, and proximity to each other. The suspensions must, therefore, be aggregated for the purpose of calculating the length of Student's suspensions from school.

THE NUMBER OF THE SUSPENSIONS

15. Typically Student was suspended for one day at a time, although occasionally he was suspended for two or three consecutive days. A few of his suspensions were "in-school" suspensions during which he would be placed at a desk in the hall outside the principal's office. On most occasions he was simply suspended and sent home. During several in-school suspensions he continued to misbehave, left his desk, and was eventually sent home for the rest of the day.

16. The parties dispute the number and dates of Student's suspensions during SY 2008-2009. Student claims he was suspended 64 times, including 10 in-school

suspensions and 54 at-home suspensions. The District claims Student was suspended 50 times, including 7 in-school suspensions and 43 at-home suspensions.

17. Student's calculation of the number and dates of his suspension is based on an Excel spreadsheet prepared by Mother. She testified that, early in the school year, she became concerned about the frequency of Student's suspensions and decided to track them in an organized way. Every time she received the two documents that the District sent her to announce a suspension (a mailed letter and a referral form from the teacher), she would record the suspension on the spreadsheet. According to that spreadsheet, Student was suspended for the eleventh day in the school year on September 30, 2008.

18. The District's calculation is based on a 23-page printout entitled "Student Assertive Discipline Record" and on a single-page attendance sheet. The attendance sheet records only absences, but the Assertive Discipline Record purports to describe each incident of suspension and to list, by column, the number of hours Student was suspended on each listed day. According to that record, Student was suspended for the eleventh time on December 9, 2008.

19. The District argues that Mother's spreadsheet is unreliable. It notes, for example, that Mother failed at first to print out the entire Excel workbook containing her comments and, during her case in chief, offered only the summary page, thus raising a question of authenticity of subsequent related documents ("books") containing notes. It argues that the entire workbook would have been the best evidence of Student's position. It notes that Mother repeatedly received documents showing the District's different calculation of suspensions and took no steps to correct those documents. While some of these criticisms may have some merit, they merely detract somewhat from the persuasive value of the spreadsheet.

20. Even giving some weight to the District's criticisms, Mother's spreadsheet appears more reliable than the District's documents because the latter are wholly unexplained. Superintendent Franzen testified that the District's records, in general, are usually reliable, but not always correct. No one testified specifically that the Assertive Discipline Record or the attendance sheet was accurate, or about the circumstances surrounding the preparation of assertive discipline records or attendance sheets in general, or about Student's Assertive Discipline Record and attendance sheet in particular. There is no way to tell how many layers of hearsay they contain. There was no evidence at hearing that the entries made in the Assertive Discipline Record or the attendance sheets were made by any person who could be identified; were made by anyone with knowledge of the events described; were made in the usual course of business; were made at or about the time of the incidents described; or were made in any other fashion that usually supports the conclusion that a business or official record is reliable.

21. The Assertive Discipline Record and the attendance sheet are frequently inconsistent. For example, the Assertive Discipline Record lists September 11 and 12, 2008, as days of suspension, while the attendance sheet does not list September 11 as a day of suspension, and lists September 12 as a day of excused absence. The Assertive Discipline Record does not list December 2 and 3, 2008, as days of suspension, but the attendance sheet does. The number of hours recorded as lost on the Assertive Discipline Record frequently is inconsistent with the textual explanation. For example, the hours lost on September 15, 2008, are recorded as "0" but the textual description reports that Student was suspended for one day. Neither Student nor the District

introduced the letters and referral forms sent home to Mother that would have best documented the suspensions.[6]

22. Mother's spreadsheet, whatever its drawbacks, does not contain major inconsistencies and is at least supported by the testimony of the person who prepared it about the circumstances and timing of its preparation. The preponderance of evidence, therefore, showed that Mother's spreadsheet was the more accurate record of Student's suspensions. It showed that, starting on September 30, 2008, Student was suspended from school for a total of more than 10 days for substantially similar conduct in violation of the District's code of student conduct, resulting in a change in his placement. The record also shows without contradiction that Student was not returned to his placement as the law required; instead, the District simply continued to suspend him from that placement on approximately 53 additional occasions during the school year. This constituted a violation of the procedural protections of the Individuals with Disabilities Education Act (IDEA).

STUDENT'S PROGRAM DURING HIS SUSPENSIONS

23. When a district changes the placement of a special education student for engaging in conduct that violated a code of student conduct and was a manifestation of his disability, the district must ensure that the student continues to receive educational services so as to enable him to continue to participate in the general education

[6] In its brief the District is particularly critical of Mother for not introducing the letters and referral forms in evidence, but the District, which generated the documents, did not introduce them either. The District could easily have done so, or presented the testimony of a witness who had searched for and counted the documents, but it did not.

curriculum, and to progress toward meeting the goals set out in his IEP. Student argues that the District failed in that duty during his suspensions in SY 2008-2009.

THE IN-SCHOOL SUSPENSIONS

24. Claudia Franzen, the District's Superintendent of Schools, has worked for the District for 38 years. She was also the principal of Washington for much of the school year in question. During that period it was part of her duties to oversee in-house suspensions at Washington, and she described Student's treatment during those suspensions primarily from personal observation. Ms. Franzen testified that at those times Student would be removed from class and placed at one of three desks in the hall outside the Principal's office. He would be supervised either by a teacher support person or by Ms. Franzen herself. Student would be assigned to work on his schoolwork while sitting at the desk in the hall. After December 7, 2008, he was assigned an instructional aide, who would help him with that work as well as in class. Ms. Franzen, who is also a certified teacher, at times helped Student with his work. Ms. Franzen testified that these arrangements were for all students suspended in-house, and there was no evidence to the contrary.

25. Mother testified without contradiction that Student frequently received no instruction during in-school suspensions because he would leave his desk outside the Principal's office and go to the playground, where he would either play or engage in conduct that resulted in his being sent home. Ms. Franzen confirmed that testimony. There was no evidence that a nondisabled student would have been treated any differently for such conduct.

THE AT-HOME SUSPENSIONS

26. During his fourth grade year Student had four goals, all of which were behavioral. The parties' witnesses agreed that Student could not work on those goals when he was not in a school setting with his peers.

27. When Student was suspended and sent home from Washington during SY 2008-2009, either directly or after an unsuccessful in-school suspension, he received no instruction at home. Because he was not among his peers or in any social or educational setting at home, he could not work on his goals there.[7]

LEGALITY OF SUSPENSIONS OF 10 SCHOOL DAYS OR LESS

28. A district may suspend a child with a disability who violates a code of student conduct from his current placement for not more than 10 school days in the same manner and under the same conditions that it would suspend a nondisabled student. There is no requirement that the child be afforded a FAPE during such a suspension.

29. It is therefore not necessary to evaluate Student's educational program during his first 10 school days of suspension. The evidence showed that in suspending Student before September 30, 2008, the District treated Student as it would have treated a nondisabled student. On those days the District did not deprive Student of any educational program to which he was entitled, and did not commit a procedural violation of the IDEA.

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[7] District witnesses testified that Student was frequently sent home because they were concerned about his safety and that of others. However, the District made no effort to seek an order from an ALJ transferring Student to a safer environment, as the law permits it to do.

LEGALITY OF SUSPENSIONS OF MORE THAN 10 SCHOOL DAYS

30. The evidence also showed that, starting with the suspension on September 30, 2008, and including approximately 53 additional suspensions, the District changed Student's placement. However, it failed in its duty to ensure that Student continued to receive educational services so as to enable him to continue to participate in the general education curriculum, and to progress toward meeting the goals set out in his IEP. This was a violation of the procedural protections of the IDEA.

PREJUDICE AND THE DENIAL OF A FAPE

31. A procedural violation of IDEA results in a denial of a FAPE if it impedes the Student's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to her child, or causes a deprivation of educational benefits.

SCOPE OF EVIDENCE CONSIDERED

32. Student seeks relief in this matter only for the events of SY 2008-2009, his fourth grade year. There is some merit in the District's argument that Student's educational and behavioral losses, if any, should be measured as of June 2009, the end of his fourth grade year, when he left Washington and started at North Valley, and not by later developments. It points out, for example, that Dr. Ulrey's testing in July 2010 reflects Student's achievement both at Washington and at North Valley, and its persuasive value is therefore well less than it would have been had he tested Student a year earlier. This Decision accordingly relies on information from Student's fourth grade year to the extent possible.

33. However, information relating to events subsequent to June 2009 is not, as the District argues, entirely irrelevant. Student's fourth grade losses are confirmed

retrospectively by the perceptions of Student's fifth grade teachers, and in Student's test results in the fifth grade. The District itself relies on testimony by the principal of North Valley concerning Student's fifth grade year to support its argument that Student did grade level work in the fourth grade.

EVIDENCE OF ACADEMIC LOSS

34. As a result of the District's violations of the procedural protections of the IDEA, Student missed approximately 54 days of education during the fourth grade. That constituted about 30% percent of the District's 180-day instructional year. The District argues that there was "no or minimal educational harm" from that loss because Student's scores on standardized tests in the spring of 2009 showed that he was "at or near grade level"; that he "remained within the instructional level of the general education classroom"; and that Student "presented no evidence that established that Student had suffered, as of June 2009, any academic or behavioral regression as a direct result of the suspensions." The record refutes those claims.

35. Dr. Ulrey stated in his report that Student was performing at grade level at the end of the third grade, but suffered "significant educational decline" beginning in SY 2008-2009, "when many opportunities for academic learning were missed because of suspensions, in-house suspensions, and other days of absence." From his examination of Student's records, his interviews, and his own testing, Dr. Ulrey persuasively testified that Student suffered significant educational decline, primarily in math and written language, due in part to his suspensions during SY 2008-2009. He further testified that this decline was apparent by the second half of Student's fourth grade school year.

36. Student has taken the Woodcock-Johnson Tests of Achievement, Third Edition (WJ-III) four times in recent years: once in April 2007 in second grade; again in March 2009, during the school year at issue; in February 2010 at North Valley; and in July 2010 for Dr. Ulrey. Even excluding Dr. Ulrey's results because they were more

remote in time, a comparison of those test results shows a clear pattern of educational decline:

WJ-III Results	4/07 (grade 2)		3/09 (grade 4)		2/10 (grade 5)	
	Standard Score (SS)	Percentile	SS	Percentile	SS	Percentile
Broad Reading	105	64	102	56	97	45
Broad Math	112	78	99	47	90	25
Broad Language	106	66	97	41	86	17

Dr. Ulrey established that a decline of greater than 15 standard score points is clinically significant and indicates a significant decrease in skills.

37. The parties agree that at the end of his third grade year Student was performing at grade level. Therefore, although he was not administered the WJ-III in third grade, it is assumed that his standard scores and percentiles remained approximately the same at the end of the third grade as they were in April 2007.

38. Since the WJ-III is standardized, its percentile ratings display how Student's performance has compared to that of his grade level peers. The percentile rankings show that from third to fourth grade, Student dropped from the 78th percentile to the 47th percentile in broad math, and from the 66th percentile to the 41st percentile in broad language. Thus, even without considering developments after June 2009, Student's WJ-III scores show a significant decline in performance and grade level in broad math and broad language.

39. Student's educational loss during SY 2008-2009 was confirmed by his fourth grade teacher, Candace Kelly. Ms. Kelly received her special education credential from California State University at Long Beach in 1998 and has a clear multiple subjects teaching credential. Before she came to the District she taught at the Bellflower Unified School District, the Paramount Unified School District, and the Long Beach Unified

School District. During SY 2008-2009 she taught Student primarily in language and math.

40. Ms. Kelly described Student as "wonderfully capable" but testified that he was distractible and distracting from the beginning of the year. He started by doing only half the work, and his completion of work declined from there. She placed him in the lowest group for math. She testified that he had difficulty primarily with math calculation and written language.

41. The District's report cards use grades of Advanced, Proficient, Basic, Below Basic, and Not Yet Taught. On Student's report card for the first quarter of SY 2008-2009 Ms. Kelly gave him a grade of Proficient in Reading Comprehension, but Basic in Written English Language, Below Basic in Writing, and Basic in Number Sense in Mathematics (the only math grade she could give him at the time). Ms. Kelly testified that a grade of basic is not grade level but is working toward grade level.[8] She testified he was not quite doing fourth grade work in the first quarter, and that his performance declined during the year. His report cards confirm that testimony.

42. Ms. Kelly attributed Student's poor performance primarily to his suspensions. She testified that he was "losing ground because he was not in school."

43. Mother testified that Student's IEPs and report cards during his fourth grade year showed that he was not doing grade level work. By December 2008 Student was switched from California state standard testing to the California Modified Assessments.

[8] School psychologist Gail Austin testified that basic meant grade level, but the view of Student's teacher is more reliable because she gave the grades.

44. The evidence summarized above was substantial and showed that, at least in math and written language, Student was not performing at grade level during the fourth grade, and that his performance declined throughout the year.

45. Moreover, Student's and the District's witnesses agreed that education is cumulative; it builds on previous lessons learned. A student who misses instruction in short division, for example, will struggle with long division. As Dr. Ulrey testified, the effects of Student's educational loss in the fourth grade inevitably retarded his performance in fifth grade. Information about Student's fifth grade year at North Valley confirms this effect. All three of student's fifth grade teachers at North Valley told Dr. Ulrey that Student was performing below grade level in the fifth grade. By late March 2010, Student required academic goals, two of which reported present levels of performance at third-grade levels.

46. The District argues that Student's "academic and cognitive test results from the spring of 2009 show him to be at or near grade level," and therefore he suffered little or no educational loss during the fourth grade. The District's argument depends primarily on the testimony of Gail Austin, the District's school psychologist. Ms. Austin has a Master's degree and a pupil personnel services credential from San Francisco State University. She has a credential in school psychology and has worked as a school psychologist for about 20 years. She has assessed many disabled children, including many who were emotionally disturbed.

47. Ms. Austin conducted a psychoeducational assessment of Student in March 2009. As part of that assessment she administered the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV), and found that nearly all of Student's skills were in the average range. Ms. Austin also interpreted scores Student had achieved on the WJ-III in that month, which are included in the table above. From these tests, Ms. Austin concluded that Student "was able to perform solidly within the average range"

and was performing generally within the average range of fourth graders during his fourth grade year.

48. Ms. Austin's testimony fell short of establishing that Student was performing at grade level in the fourth grade in mathematics or written language. It focused solely on his skills and abilities, not his performance in class. That performance was characterized as below grade level by his teacher, Ms. Kelly. Ms. Austin's view relied on WJ-III scores that were reported in broad categories such as Broad Written Language and Broad Math, which amalgamate several more specific scores. In some areas, Student was above average. An examination of Student's more specific WJ-III scores in March 2009 showed that his math calculation skills were at the grade equivalent of 3.5 and his written expression at the grade equivalent of 3.9. Ms. Austin conceded that Student's math skills dropped during the school year.

49. The District also relies on the testimony of Kathleen Merrill, a behavior specialist for the Special Education Local Plan Area to which the District belongs. Ms. Merrill was the principal of North Valley during most of Student's fifth grade year, and observed him frequently in class. Ms. Merrill, who has 30 years of experience in teaching, testified generally that Student was capable of grade level work, that she saw him performing grade level work at school, and that he used grade level textbooks. This general observation was repeated by Phillip Smith, who is credentialed as a Clear Level II Education Specialist and is Student's "community contact," essentially his case manager, at North Valley. Mr. Smith greets Student when he arrives in the morning on the bus, frequently observes him in class, and serves as the school's liaison with Parents.

50. On cross-examination, however, when Ms. Merrill was asked specifically about Student's performance in math and written language, she admitted he "struggled" in those subjects. When asked whether Student was given some third grade work in his fifth grade year, she first said "yes," and then stated she did not know the

grade level at which North Valley teachers addressed his skills. She admitted that Student was provided some instruction "from time to time" below fourth grade level. She further admitted that the homework given him was fourth grade level "hopefully to have success."[9]

51. Even if it had been established that Student was performing at fourth grade level in March 2009, that would not necessarily demonstrate that he did not suffer educational loss. The goal of the IDEA and related laws is not merely to bring a disabled student up to grade level; it is to compensate for the negative effect that the student's disability has on his access to education. Even a gifted and high-achieving student can be eligible for special education if his disability adversely affects his educational performance. The important question is not whether Student had skills equal to other fourth graders; it is whether Student himself suffered from missing so much instruction.

EVIDENCE OF BEHAVIORAL LOSS

52. During his fourth grade year Student was entitled according to his IEPs and behavioral plans to behavioral support, social skills training, and counseling. For example, his behavior support plan of January 29, 2009, required use of a visual timer so he could plan his work, a computer for writing, a choice of topic, access to other students and facilitated conversations with them, and debriefing after difficult situations. The evidence showed that these services were largely unavailable to him during his suspensions.

53. All of Student's goals during SY 2008-2009 were intended to develop his behavioral and social skills. For example, one of his goals was that Student would "use

[9] Mother testified that Student's fifth grade homework was marked as fourth grade level at the bottom of its pages.

positive conversational exchanges as taught during social skills instruction to gain peer attention . . . ." Judy Simon, a District behavior specialist, led the IEP team in drafting Student's behavioral goals and behavior support and intervention plans. She readily conceded that, during Student's suspensions, he could not work on his behavioral goals without being in a school setting with his peers.

54. Student was unable to work on his behavioral goals either during suspensions at home, when no District employee was present, or during in-school suspensions while sitting in the hallway outside the principal's office. After December 2008 he was sometimes accompanied in the hallway by an aide, but he did not have a behaviorally-trained aide until late spring 2009.

55. By April 2009 Student's behavior had deteriorated so much that the IEP team requested a mental health assessment under Chapter 26.5 of the Government Code (AB 3632), and it was completed in late spring. The county mental health agency found Student emotionally disturbed and eligible for AB 3632 mental health services, and has been providing Student about two hours a month of one-to-one mental health counseling that began shortly after his arrival at North Valley.

56. According to Mr. Smith, Student's community contact at North Valley, Student had serious behavioral difficulties in his first three months at the school and did not settle down until the fall. Those difficulties constitute some evidence that Student's emotional condition at the end of his fourth grade year, after spending many days at home with no behavioral support, had degenerated considerably. And Dr. Ulrey persuasively testified that the suspensions may have aggravated student's behavioral difficulties. He explained that the more instruction Student missed, the more frustrated he became by his inability to keep up in class, and that frustration led to greater misbehavior. Student's frustration at keeping up with his peers is confirmed in notes from the April 2009 IEP meeting. All three of Student's teachers at North Valley told Dr.

Ulrey that Student struggled with sustaining appropriate social and peer relationships in the fifth grade.

57. The District does not forthrightly argue that Student did not suffer significant loss in behavioral support during his suspensions in SY 2008-2009; it merely claims, incorrectly, that there was no evidence he suffered such a loss. In its brief it concedes that "[a]s a legal matter, services should have been offered and provided" during his suspensions, and states that if any compensatory education is to be awarded, "the evidence would support the provision" of one hour of social skills work or counseling for every three days of suspension, and six hours of time to develop a plan for managing Student's behavior at home.

58. The preponderance of the evidence described above showed that Student suffered significant educational loss in mathematics and written expression, and significant loss of necessary behavioral support, in his fourth grade year at Washington. The District's procedural violations of the IDEA therefore denied Student a FAPE during SY 2008-2009.

REMEDIES AND COMPENSATORY EDUCATION

59. An ALJ has broad discretion to remedy a denial of FAPE and may, among other things, order a school district to provide compensatory education to the student involved. Any such award must be based on a highly individualized determination. Compensatory education is an equitable remedy that may be reduced or denied for a variety of reasons, and the District argues that any award of compensatory education to Student should be reduced or denied for the reasons discussed below.

EMOTIONAL UNAVAILABILITY

60. Any award of compensatory education should be reduced or denied, the District argues, because during some of the time of his suspensions Student was

emotionally unavailable for learning. This, the District argues, would make any award impractical and pointless.

61. The District analogizes Student's emotional unavailability to cases in which compensatory education was reduced or denied because the student could not access his educational program due to a lack of motivation, drug abuse, or imprisonment. These situations are not analogous because they do not involve manifestations of a disability. Student's emotional unavailability was a manifestation of his disability. The District's argument would justify reducing or denying a compensatory education award to any emotionally disturbed student based on the consequences of his emotional disturbance. To deny an otherwise deserving student an award of compensatory education based on the manifestations of his qualifying disability would contradict the goals of the IDEA.

62. Moreover, it is Student's ability to receive instruction now, not years ago, that matters for the purpose of relief. Student and District witnesses agreed that, while Student is still moody and uneven in his attention to his school work, he has significantly improved his ability to regulate his conduct at North Valley and is now much more receptive to instruction.

DIFFICULT FAMILY LIFE

63. The evidence showed that Student's family is troubled by marital strife and its consequences. Parents are divorced and live apart, and have struggled over child custody, visitation and similar matters. The District argues that these stresses have contributed to Student's emotional disturbance and should therefore result in a reduced award of compensatory education, if any is awarded.

64. The District's argument is unpersuasive. A similar argument could be made about many families because divorce, separation, family disputes and their consequences are so common in our society. These factors may have contributed to

Student's emotional state, but they do not justify reduction of an award. The evidence showed that the family difficulties the District identifies have existed in Student's home life for several years, and did not diminish his educational performance before the fourth grade. In addition, emotional disturbance is the disability that qualifies Student for special education. Congress did not intend in the IDEA that a hearing officer parse the causes of a student's qualifying disability, attribute some of it to non-educational factors, and reduce relief accordingly. No authority supports reduction of compensatory education on that ground, and as a matter of discretion it would be unwise.

UNCLEAN HANDS

65. Since equitable discretion governs the award of compensatory education, an award may be reduced or denied if a parent had "unclean hands" -- that is, if a parent did not act in good conscience or good faith concerning the subject matter of the dispute. For example, reimbursement for an independent assessment of a child has been denied because parents refused to present their child to the district for assessment.

66. The District argues that Mother has unclean hands because it offered to place Student in a non-public school in April, 2009, and Mother delayed accepting that offer until June. However, that relatively brief delay was not unreasonable, nor did it constitute conduct that was unconscionable or in bad faith. A reasonable parent could understandably hesitate to make the grave decision to move her child from a general education environment to a level 14 locked facility for the emotionally disturbed. The District itself had only recently come to the realization that Student might be better placed in such a school. In February 2009, at the manifestation determination meeting, the IEP team decided to keep Student in a general education classroom. In late March 2009, the District proposed placement in a special day class it had not yet identified, and encouraged parents to visit possible placements. The April IEP offer was for a non-

public school, but it did not identify the school, and it noted that parents still needed to finish visiting possible placements. There was nothing unreasonable, unconscionable, or in bad faith in the timing of Mother's acceptance of the offer.

67. The District also argues in its brief that unspecified lack of cooperation on Mother's part may have contributed to Student's emotional distress. According to the report card given Student by Ms. Kelly, his fourth grade teacher, Mother was "very supportive." Her difficulty in agreeing with North Valley on a home behavior plan involves a different school year, is unrelated to the District's liability here, and is therefore not connected to the subject matter of this action.

68. For the reasons above, it would not be an appropriate exercise of discretion to reduce or deny an award of compensatory education for any of the reasons advanced by the District.

STRUCTURE OF ORDER FOR COMPENSATORY EDUCATION

Competing Models

69. In fashioning an award of compensatory education, an ALJ may order relief in an amount mathematically calculated to compensate, day-for-day or hour-for-hour, for a student's loss. The District favors an award calculated in that manner, if any award is made. The District proposes that Student be awarded one hour of one-to-one academic tutoring for every day lost to unlawful suspensions, and one hour of social skills training, counseling, or other behavioral support for every three days missed. Student prefers a more flexible approach, also authorized by law, based on an estimate of how much educational and behavioral help in total he would need to make up for his loss. Using that model, Dr. Ulrey testified that Student should receive at least 200 hours of academic tutoring and 100 hours of behavioral support.

70. The mechanical model is not appropriate for this case. First, there is no firm baseline from which an award could be calculated. While Mother's Excel spreadsheet is a somewhat more accurate record of Student's suspensions than the District's documents, it suffers from several of the flaws the District has noted. Neither Mother nor the District identified the criteria each used to determine whether a District action constituted a suspension. Most of the suspensions involved sending Student home, but there is no record of the varying times of day at which these suspensions were implemented. The in-school suspensions also occurred at varying times during the school day that are not recorded. Sometimes an in-school suspension evolved into a home suspension, but there is no record of how many times that happened, or at what time of day, or how much instruction Student missed as a result. It is therefore not possible, on this record, to determine how many days or hours Student lost with enough accuracy to calculate a formulaic award.

71. Second, the number of days and hours Student was suspended does not fully capture his educational and behavioral losses. As noted above, since education is cumulative, the District's unlawful suspensions diminished Student's fifth grade performance, although the extent of that diminution cannot be quantified, and left him in an emotional state at the end of his fourth grade year that probably contributed to his months-long difficulty in making the transition to North Valley.

72. Finally, the District's proposal is not based on Student's individual needs. Superintendent Franzen testified that the formula of one hour of tutoring for one missed day of school is a rule of thumb applied by the District to students having a home and hospital placement or on independent study, and said it seems to work well for them. However, the IDEA strongly favors compensatory education based on a fact-specific inquiry into the needs of the particular student involved. That goal is better served by the flexible and individualized approach advocated by Dr. Ulrey.

73. Dr. Ulrey's proposal was the only one following the flexible model. As noted above, Dr. Ulrey was a highly qualified, balanced, and persuasive witness, and his recommendations for compensating Student are entitled to significant weight. For the most part the District does not address his specific recommendations.

74. The District does argue that Dr. Ulrey's recommendations should be discounted because he has an unduly negative impression of Student's current needs based on inaccurate testing. Dr. Ulrey conducted eight assessments in a five-hour period, with breaks, on a single day. School psychologist Austin and Mr. Smith, Student's current case manager, testified that Student's attention span, energy level and anxiety made it unlikely he would have performed up to his abilities on tests so concentrated in time, and that they would have spread the tests out more. They interpret phrases in Dr. Ulrey's report such as "by the end of the second session [Student] began to ask how long the evaluation would continue" as indications of fatigue, noncompliance, and unwillingness to give full answers. Ms. Austin testified that her test results were significantly higher than Dr. Ulrey's because she spread her tests over two days.

75. The District's view of Dr. Ulrey's testing techniques has some limited persuasive value. However, Ms. Austin gave only one, or at most two, of the eight tests Dr. Ulrey gave, so her results are not readily comparable. The District witnesses' reading of phrases in Dr. Ulrey's report is speculative because they were not present at the time. Dr. Ulrey, who observed what he reported, did not interpret Student's words and conduct that way, and did not think Student was exhausted. Dr. Ulrey, a quite experienced evaluator, reported that Student "put forth appropriate levels of effort to complete the tasks appropriately with a reliable measure obtained." In addition, Dr. Ulrey did allow for these factors to some degree in his evaluation, which states that Student's verbal scores "may represent a low estimate of his ability because of some

resistance and/or reticence related to expanding his answers." He also based his recommendation on a wide variety of factors in addition to his test results.

76. The difference between Dr. Ulrey's test results and Ms. Austin's results could have had many causes. There is no way to know whether Ms. Austin's working relationship with Student was better than Dr. Ulrey's, or the same, or worse. The different scores may have merely been the result of Student's daily mood swings, as Ms. Austin conceded. Mr. Smith also testified that Student's test scores would vary "totally" from day to day with his fluctuating emotional state. At most, this criticism of Dr. Ulrey's testing methods justifies only a small reduction in his recommendations.[10]

77. Dr. Ulrey's recommendations should also be discounted slightly because they reflect the consequences of the first ten school days of Student's suspensions, which were not unlawful. However, those suspensions occurred first, were concentrated in a single month, and are the least likely to have had the cumulative effects discussed above, so this factor does not support any more than a moderate reduction.

78. Based on his current interactions with Student at North Valley, Mr. Smith made helpful suggestions about the details of any award of compensatory education. He testified that tutoring would be most likely to work if Student were pulled out of one of his four daily academic periods to receive it Mr. Smith opined that Student

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[10] It bears emphasis that little weight is given to Dr. Ulrey's July 2010 test results in determining the extent of Student's educational loss, not because they were inaccurate, but because they were relatively distant in time from SY 2008-2009 and therefore complicated by intervening events. At most those tests simply confirmed the general downward trend of Student's performance amply proved by evidence from earlier times. Dr. Ulrey's test scores themselves do not form the basis for any finding made in this decision.

would likely refuse to do the work at night, on weekends, after school, or during other activities he enjoys more than academics. As an example, Mr. Smith noted that Student's AB 3632 counselor could not gain Student's cooperation in her twice-monthly visits to the campus until she began counseling him by pulling him out of an academic class. Student was then significantly more cooperative.

79. Mr. Smith also recommended that any counseling and social skills training awarded should be coordinated with Student's current program. Student now participates in the "Toolbox" program at North Valley, in which he and other students are counseled in class on twelve techniques, presented once a month, to use in responding to difficulty, such as breathing deeply or throwing something in a trash can rather than responding negatively to a provocation. These techniques are then the subject of exercises in the classroom. And Mr. Smith testified persuasively that Student's program at school should be coordinated with his activities at home. To that end, Mr. Smith testified, up to ten hours of parental or family counseling might make a substantial difference. Mother testified that she felt such counseling was needed, so she could know better how to manage the manifestations of her son's disability.

Details of the Order

80. Based on all the evidence in this matter, and in light of the findings made above, it is an appropriate exercise of discretion to award to Student 175 hours of one-to-one academic tutoring in math and written language by a credentialed special education teacher such as a resource specialist or someone with equivalent credentials. As Dr. Ulrey suggested, these hours should be spread over two years so they can be coordinated with Student's current program at North Valley. These sessions may be given during one of Student's four daily academic periods at North Valley, since the evidence showed that Student is most likely to be receptive to it at that time. Accepting the District's uncontested view that one hour of one-to-one tutoring approximates one

day of classroom instruction, Student will still be receiving a substantial net gain in academic instruction even though he misses one of his four academic periods. The timing of these sessions will be determined by Mother after consultation with the tutor, Student's IEP team, and her attorney, based on then-current circumstances.

81. Based on all the evidence in this matter, and in light of the findings made above, it is an appropriate exercise of discretion to award to Student 100 hours of mental health counseling and individual and small group social skills training over the next two years by a professional with at least the credentials of a licensed clinical social worker, subject to the following discounts. The counseling Student now receives under AB 3632 may be deducted from this total, but if that counseling should be reduced or ended for any reason, the District shall ensure that the counseling sessions that are lost are made up by an equivalent effort. The time Student spends in North Valley in small group instruction directly concerning the techniques of the Toolbox program may also be deducted from this total, but only up to an hour a month since the Toolbox program presents one technique a month and does not provide one-to-one counseling. These services may also include up to ten hours of parent or family counseling. The timing of these sessions will be determined by Mother after consultation with the counselor, Student's IEP team, and her attorney, based on then-current circumstances.

82. Mother lives with Student in Cloverdale and does not have an automobile. She cannot transport Student to any distant place at which the above services might be delivered. It is therefore appropriate to order the District to provide to Student the related service of transportation to and from the services ordered above if they are delivered at a location not readily accessible by Student.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Student filed the request for due process hearing, and therefore has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [163 L.Ed.2d 387].)

FAPE AND RELATED SERVICES

2. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A 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. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs, coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) 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, subd. (a).) Behavioral support, mental health services, and transportation are related services. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

SUSPENSIONS OF TEN SCHOOL DAYS OR LESS

4. A student receiving special education services may be suspended or expelled from school as provided by federal law. (Ed. Code, § 48915.5, subd. (a).)

5. Whether a district must provide a FAPE (insofar as reasonably possible) to a disabled student during the first 10 school days of suspension is not entirely clear. The IDEA provides that a district may suspend a child "for not more than 10 school days (to the extent such alternatives are applied to children without disabilities)." (20 U.S.C. § 1415(k)(1)(B); see also 34 C.F.R. § 300.530(b)(1)(2006).) That provision does not require any particular educational programming during suspensions of not more than 10 school days.

6. A district has a general duty to provide a FAPE to disabled students, "including children with disabilities who have been suspended or expelled from school." (20 U.S.C. § 1412(a)(1)(A).) That phrase could support the argument that a district's duty to provide a FAPE continues during the first 10 days of a disabled student's suspension. However, another section of the IDEA provides that a disabled child removed from his current placement must "continue to receive educational services . . . so as to enable the child to continue to participate in the general education curriculum . . . and to progress toward meeting the goals set out in the child's IEP … ." (20 U.S.C. § 1415(k)(1)(D)(i).) There is no similar provision pertaining to such shorter suspensions. By negative implication that language arguably suggests that education services do not have to continue during suspensions that do not change a child's placement.

7. Subsection 300.530(d)(3) of title 34 of the Code of Federal Regulations provides:

> A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.

Thus, during suspensions of 10 school days or less, the IDEA requires a district to provide to a disabled child only the services that it also provides to nondisabled students during such suspensions. The United States Department of Education's Office of Special Education Programs (OSEP) has stated that the programming required during such suspensions may be no programming at all:

> [P]ublic agencies need not provide services to a child with a disability removed for 10 school days or less in a school year, as long as the public agency does not provide educational services to nondisabled children removed for the same amount of time.

(Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540, 46717 (Aug. 14, 2006) (Comments on 2006 Regulations).)

8. OSEP has advised that the duty to deliver a FAPE to a disabled student does not apply during suspensions of less than 10 school days. (*OSEP Memorandum 97-7, Initial Disciplinary Guidance Related to Removal of Children With Disabilities From Their Current Educational Placement for Ten School Days or Less* (OSEP 1997) 26 IDELR 981.) In that Memorandum OSEP asked and answered a series of questions as follows:

> QUESTION 2: Does the right to a free appropriate public education extend to children with disabilities who are suspended or expelled?
>
> ANSWER: Yes. A free appropriate public education must be made available to all eligible children with disabilities, including children with disabilities who have been suspended

> or expelled from school. (Section 612(a)(1)[20 U.S.C. § 1412(a)(1)].)
>
> QUESTION 3: What is the meaning of the phrase "children with disabilities who have been suspended or expelled from school"?
>
> ANSWER: The Department believes that the phrase means children with disabilities who have been removed from their current educational placement for *more than* ten school days in a given school year.
>
> QUESTION 4: Must educational services be continued during the removal of a child with a disability from his or her educational placement for ten school days or less?
>
> ANSWER: No. The Department does not believe that it was the intent of Congress to *require* that FAPE be provided when a child is removed for ten school days or less during a given school year.

(Emphases in original.) OSEP prefaced this analysis by observing that "the statute is susceptible to a number of interpretations …, but the position enunciated below represents what we believe is the better reading of the statute." (*Ibid.*)

9. Since OSEP administers the IDEA and writes its regulations, the agency's interpretation of the statute is entitled to some deference. (See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 [81 L.Ed.2d 694](1984).) Moreover, by re-enacting the IDEA in 2004 without changing the relevant provisions, Congress may be said to have accepted the agency's interpretation. (See *Barnhart v.*

Walton (2002) 535 U.S. 212, 220 [152 L.Ed.2d 330].) Student does not dispute (or even address) OSEP's interpretation, and the facts in the record concerning the educational program delivered to Student during his first ten days of suspension are scarce and vague. OSEP's interpretation will therefore be followed in this matter.

10. It thus appears that, except for the duty to treat disabled and nondisabled students equally, there is no special education law, regulation or decision that requires any particular educational programming for a special education student during suspensions of 10 school days or less, and Student cites none. Student argues that, during his first several suspensions, the District violated Education Code section § 48911.1, subdivision (a), by failing to provide him a "supervised suspension classroom." However, that subsection only states that, during a suspension, school authorities "may" place a student in such a classroom, and in any event section 48911.1 is not a special education law and OAH lacks jurisdiction to enforce it.[11]

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[11] The District incorrectly relies on section 300.530(d)(4) of title 34 of the Code of Federal Regulations, which provides:

> After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under § 300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

SUSPENSIONS OF MORE THAN TEN SCHOOL DAYS

11. A special education student's placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to him, as specified in his IEP. (Cal. Code Regs., tit. 5, § 3042, subd. (a).) The removal of a special education student from class or school for more than 10 consecutive school days for violating a code of student conduct constitutes a change of placement. (34 C.F.R. § 300.536(a)(1)(2006).) The physical transfer of a student from one campus to another is not a necessary element of a change of placement.

A Series of Removals

12. A change of placement also occurs when the child has been subjected to a series of removals that constitute a pattern because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals, and because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. (34 C.F.R. § 300.536(a)(2)(ii), (iii)(2006).) In such a case, the school district determines on a case-by-case basis whether a pattern of removals constitutes a change of placement, subject to review through due process and judicial proceedings. (34 C.F.R. § 300.536(b)(2006).)

13. For the purpose of determining whether there has been a series of removals that constitutes a change of placement, an in-school suspension counts as a

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That subsection does not apply here because before September 30, 2008, Student had not been removed for 10 school days, and starting with September 30, 2008, Student's placement was changed by suspensions for substantially similar conduct in excess of ten school days.

day of suspension unless the child is able to appropriately participate in the general curriculum, continues to receive the services specified in his IEP, and is able to participate with nondisabled children to the same degree the child could do so before suspension. (Comments on 2006 Regulations, *supra,* 71 Fed.Reg. at p. 46715.) Student did not have those abilities during his in-school suspensions, so they must be counted as days of suspension in determining whether his placement was changed.

14. When a school district decides to change the placement of a special education student for violating a code of student conduct, the district must convene an IEP meeting within 10 school days to determine whether the conduct that gave rise to the violation of the school code is a manifestation of the student's disability. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e)(2006).) If the IEP team finds that the conduct was a manifestation of the student's disability, the district must order a functional behavioral assessment of the child, and implement a BIP for the child or review, and if necessary modify, the child's existing BIP. (20 U.S.C. § 1415(k)(1)(F)(i), (ii); 34 C.F.R. § 300.530(e), (f)(1)(2006).) Absent special circumstances, the district must also return the child to the placement from which he was removed unless it and the child's parents agree otherwise. (20 U.S.C. § 1415(k)(1)(F)(iii); 34 C.F.R. § 300.530(f)(2)(2006). Whether or not the child is removed to an interim alternative educational setting, the district must ensure that the student continues to receive educational services so as to enable him to continue to participate in the general education curriculum, and to progress toward meeting the goals set out in his IEP. (20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d)(1)(i)(2006).)

Change of Placement for Safety Reasons

15. A hearing officer may remove a special education student from his placement to an interim alternative educational setting if maintaining the student in his current placement "is substantially likely to result in injury to the child or to others." (20 U.S.C. § 1415(k)(3)(B)(ii)(II).)

PROCEDURAL VIOLATIONS AND PREJUDICE

16. A procedural violation of the IDEA results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii).)

ISSUE NO. 1: DID THE DISTRICT DENY STUDENT A FAPE IN SY 2008-2009 BECAUSE STUDENT WAS SUSPENDED FROM SCHOOL FOR MORE THAN TEN SCHOOL DAYS, THEREBY CHANGING HIS PLACEMENT?

17. Based on Factual Findings 1-3, 7-27 and 30-58, and Legal Conclusions 1-13 and 16, the District denied Student a FAPE during SY 2008-2009, starting on September 30, 2008, by suspending him for more than ten school days, thus changing his placement, without enabling him to continue to participate in the general education curriculum, or progress toward meeting the goals set out in his IEP. The suspensions constituted a series of removals that resulted from a pattern of behavior substantially similar to Student's behavior leading to previous removals, were of similar length, included about 30 percent of an instructional year, and were proximate to each other. The unlawful suspensions caused Student significant losses in academic instruction and behavioral support.

ISSUE NO. 2: DID THE DISTRICT DENY STUDENT A FAPE IN SY 2008-2009 BY FAILING TO PROVIDE HIM WITH AN APPROPRIATE EDUCATION WHILE HE WAS SUSPENDED?

18. Based on Factual Finding 29 and Legal Conclusions 1 and 4-10, the District did not deny Student a FAPE before September 30, 2008, by failing to provide him an

appropriate education. Whatever the deficiencies of the program provided, it was the same program afforded to nondisabled students suspended in similar circumstances.

19. Based on Factual Findings 1-3, 7-27 and 30-58, and Legal Conclusions 1, 4-13 and 16, the District denied Student a FAPE from and after September 30, 2008, by failing to enable him to continue to participate in the general education curriculum or progress toward meeting the goals set out in his IEP. He had no opportunity during those in-school and at-home suspensions to continue to participate in the general education curriculum, work on his goals, or receive the behavioral support to which he was entitled.

COMPENSATORY EDUCATION

20. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) The authority to order such relief extends to hearing officers. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. [129 S.Ct. 2484, 2494, fn. 11; 174 L.Ed.2d 168].)

21. Compensatory education is an equitable remedy and must rely on a fact-specific and individualized assessment of a student's current needs. (*Puyallup, supra*, 31 F.3d at p. 1496; *Reid v. District of Columbia* (D.C.Cir. 2005) 401 F.3d 516, 524 (*Reid)*; *Shaun M. v. Hamamoto* (D. Hawai'i, Oct. 22, 2009 (Civ. No. 09-00075)) 2009 WL3415308, pp. 8-9 [current needs]; *B.T. v. Department of Educ.* (D. Hawai'i 2009) 676 F.Supp.2d 982, 989-990 [same].) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid, supra*, 401 F.3d at p. 524.) This standard should not be confused, as the District does, with the "some benefit" standard set forth in *Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-207 [73 L.Ed.2d

690](*Rowley*), which is a measurement of whether an IEP was reasonably calculated to enable the child to receive educational benefit.

22. Once a significant denial of a FAPE has been established, it is a rare case in which an award of compensatory education is not appropriate. (*Puyallup, supra*, 31 F.3d at p. 1497.)

Relevance of Grade Level

23. The District offers no authority in support of its argument that a student who has suffered the denial of a FAPE may nonetheless be denied compensatory education because he managed to retain grade level skills. Bringing a student to grade level is not the goal of the IDEA. Even a gifted student can be eligible for special education if his disability adversely affects his educational performance. In *Williamson County Bd. of Educ. v. C.K.* (M.D.Tenn., Feb. 27, 2009 (No. 3:07-0826)) 2009 WL 499386 [nonpub. opn.], for example, a student with an IQ of 143 who scored in the average-to-superior range in reading, math, and written language on the WJ-III was nonetheless found eligible for special education. He had been receiving As and Bs, but his disability, attention deficit hyperactivity disorder, caused him to be impulsive and angry, to fight with other students, and to refuse to turn in homework, thus lowering his grades and causing his suspension. The district court affirmed the hearing officer's finding that the student was eligible for special education and affirmed an award of two years of compensatory education, holding that "[u]nder the law, it is not enough that [Student] managed to earn average to above average grades overall by the end of each school year in order to advance to the next grade level." (*Id.* at p. 18; see also 34 C.F.R. § 300.101(c)(1) (2007) [child may be eligible even if advancing from grade to grade]; *Letter to Anonymous* (OSEP 2010) 55 IDELR 172 [gifted students may be eligible].)

24. Courts typically analyze a student's educational progress not by comparing his performance to his grade level peers, but by examining the student's own

achievement over time. (See, e.g., *Walczak v. Florida Union Free Sch. Dist*. (2d Cir. 1998) 142 F.3d 119, 131; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *Derek B. v. Donegal School Dist.* (E.D.Pa. 2007, No. 06-2402) 2007 WL 136670, pp. 12-13; *M.H. v. Monroe-Woodbury Central School Dist*. (S.D.N.Y. March 20, 2006, No. 04-CV-3029-CLB) 2006 WL 728483, p. 4; *Houston Indep. School Dist. v Caius R*. (S.D.Tex. March 23, 1998, No. H-97-1641) 30 IDELR 578; *El Paso Indep. School Dist. v. Robert W*. (W.D.Tex. 1995) 898 F.Supp.442, 449-450 [grade level comparison "irrelevant"].)

Reduction or Denial for Equitable Reasons

25. The District relies on *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 444 F.3d 1149 (*Park*) in arguing that compensatory education should be reduced or denied. In *Park* the student was disabled by cri du chat (5p-syndrome), a genetic defect that caused him developmental delay, deficient cognitive ability, poor muscle tone, speech and language delay, gross and fine motor delay, difficulty in muscle training and coordination, difficulty assimilating toilet training, self-care difficulty, drooling and behavioral difficulties. His IQ was below 70 and his primary language was Korean. (*Id.* at p. 1152.) The hearing officer found there was no evidence that it would help the child to receive compensatory education directly, so awarded it instead in the form of training for his teachers so they could better address his needs. The issue was not whether compensatory education should be awarded or subjected to equitable reduction; it was whether training for the teacher was a proper form of compensatory education, and the court held that it was. (*Id.,* 444 F.3d at p. 1156.) That ruling has no application here, where the ability of Student to benefit from direct tutoring and counseling is established by the testimony of Dr. Ulrey and other evidence and is not questioned by the District.

26. The other decisions the District cites in support of reduction or denial of compensatory education do not remotely resemble this case. In *Van Duyn v. Baker*

School Dist. 5J (9th Cir. 2007) 481 F.3d 770, 783, the court held that no compensatory education was warranted because the student failed to establish any material failure by the district in implementing his IEP. In *Hester v. District of Columbia* (D.C.Cir. 2007) 505 F.3d 1283, 1285-1286, the court held that a district had not breached a contractual agreement to provide compensatory education in a prison when prison authorities refused to admit district personnel. In *Gregory-Rivas v. District of Columbia* (D.D.C. 2008) 577 F.Supp.2d 4, 10-11, the student was denied compensatory education because he had not established he had been denied a FAPE. In *Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal. 2007) 2007 WL 1574569, p. 7 [nonpub. opn.], the court held that a two-week lapse in the delivery of behavioral services was not a material failure to implement a student's IEP and did not constitute a denial of a FAPE. In *Student v. Bellflower Unified School Dist.* (2010) Cal.Offc.Admin.Hrngs. Case No. 2007020519, a district had deprived a student of two small-group speech and language sessions. Although the student was not motivated to attend speech and language sessions, compensatory education was denied on the different ground that the failure of implementation was *de minimus* and not a material failure.

27. There are decisions holding that a school district does not violate IDEA if a disabled student's lack of progress is attributable to factors other than flaws in his educational programming. (*Garcia v. Board of Educ.* (10th Cir. 2008) 520 F.3d 1116, 1127 [poor attitude and bad habits]; *Bend-Lapine School Dist. v. DW* (9th Cir. 1998) 152 F.3d 923 [student's resistance][nonpub. opn.]; *Walczak v. Florida Union Free Sch. Dist.*, *supra,* 142 F.3d at p. 133 [resistance to peer interaction]; *Ashland Sch. Dist. v. Parents of Student R.J.* (D.Ore. Oct. 6, 2008, No. 07-3012-PA), 2008 WL 4831655, p. 19 [sexual conduct]; *Blickle v. St. Charles Community Unit Sch. Dist. No. 303* (N.D.Ill. July 29, 1993, No. 93-C-549) 1993 WL 286485, p. 4, fn. 7; p. 8, fn. 10 [truancy and substance abuse].)

But these decisions relate to the measurement of progress under the rules of *Rowley, supra;* they have nothing to do with discretion in awarding compensatory education.

28. The District cites no authority in support of its argument that an emotionally disturbed student denied a FAPE should nonetheless be denied compensatory education because he was emotionally unavailable for instruction. Nor does it cite any decision reducing or denying compensatory education for any conduct of a student that manifested his or her disability.

29. "The doctrine [of unclean hands] bars relief to a plaintiff who has violated conscience, good faith or other equitable principles in his prior conduct . . . ." (*Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.* (9th Cir. 1989) 890 F.2d 165, 173 (citations omitted)(*Dollar Systems).*) "It is fundamental to [the] operation of the doctrine that the alleged misconduct by the [party] relate directly to the transaction concerning which the complaint is made.'" (*Dollar Sytems, supra,* 890 F.2 at p. 173 (quoting *Arthur v. Davis* (1981) 126 Cal.App.3d 684, 693-694).) "[U]nclean hands does not constitute 'misconduct in the abstract, unrelated to the claim to which it is asserted as a defense.'" (*Jarrow Formulas, Inc. v. Nutrition Now, Inc.* (9th Cir. 2002) 304 F.3d 829, 841 (citing *Republic Molding Corp. v. B.W. Photo Utils.* (9th Cir. 1963) 19 F.2d 347, 349); see also *Seller Agency Council, Inc. v. Kennedy Center for Real Estate Educ., Inc*. (9th Cir. 2010) 621 F.3d 981, 986-987.)

30. The decisions the District cites in arguing that Mother had "unclean hands" are far removed from the facts of this case. In *Patricia P. v. Board of Educ. of Oak Park* (7th Cir. 2000) 203 F.3d 462, 468-469, parents were held not entitled to reimbursement because they had refused to make their child reasonably available for assessment. In *Student v. Morgan Hill Unified School Dist.* (2009) Cal.Offc.Admin.Hrngs. Case No. 2009040473, reimbursement for "Vital Stim" therapy was denied because it was unreasonable for Mother to have incurred the unilateral expense. The District cites no

decision holding that a parent had unclean hands because she unreasonably delayed in signing an IEP.

ORDER

1. The District shall provide to Student a minimum of 175 hours of one-to-one academic tutoring in math and written language as follows:

   a. The tutoring shall begin within 30 days of the date of this Order.

   b. The tutoring shall be delivered over two years from the date of its inception and coordinated with Student's current program at North Valley School or other placement. Tutoring at North Valley may take place during one of Student's four daily academic periods.

   c. The tutor shall be a credentialed special education teacher such as a resource specialist or someone having equivalent credentials.

   d. The timing of the tutoring sessions shall be determined by Mother after consultation with the tutor, Student's IEP team, and her attorney, based on then-current circumstances.

2. The District shall provide to Student a minimum of 100 hours of mental health counseling and individual and small group social skills training as follows:

   a. The counseling and training shall begin within 30 days of the date of this Order.

   b. The counseling and training shall be delivered over two years from the date of its inception and coordinated with Student's current program at North Valley or other placement.

   c. The counselor or trainer shall have at least the credentials of a licensed clinical social worker.

   d. The twice-monthly counseling Student now receives under AB 3632 may be deducted from the total hours, but if that counseling should be reduced or

ended for any reason, the District shall ensure that the counseling sessions lost are made up by an equivalent effort.

e. Up to one hour a month of the time Student spends in North Valley directly addressing the techniques of the Toolbox program may be deducted from the total.

f. The counseling may include up to ten hours of parent or family counseling.

g. The timing of the counseling and training sessions shall be determined by Mother after consultation with the counselor, Student's IEP team, and her attorney, based on then-current circumstances.

3. The District shall transport Student to and from the services ordered above if they are delivered at a location not otherwise readily accessible by Student.

4. The terms of this Order may be altered only by written agreement of the parties.

5. Student's other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing Decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed fully on Issue Number One, and prevailed on Issue Number Two with respect to all suspensions from and after September 30, 2008.

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: January 20, 2011

/s/

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings