

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

STOCKTON UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2012030889

DECISION

Administrative Law Judge (ALJ) Theresa Ravandi, Office of Administrative Hearings (OAH), State of California, heard this matter on May 23 through 25, 2012, in Stockton, California.

Student's legal guardian (Guardian) appeared on behalf of Student and was present throughout the hearing. Student was present the first day of hearing. Attorney S. Diane Beall represented the Stockton Unified School District (District). Kelly Dextraze, director of special education for the District, was present throughout the hearing as the District's representative.

On March 22, 2012, Student filed a request for a due process hearing (complaint) with OAH. On April 5, 2012, OAH granted the District's Notice of Insufficiency as to Student's complaint and authorized Student to file an amended complaint. Student filed an amended complaint on April 17, 2012, and all timelines recommenced as of that date. At hearing, oral and documentary evidence were received. The matter was continued to June 20, 2012, to allow the parties to submit written closing arguments.

The record closed on June 20, 2012, upon timely receipt of the closing arguments, and the matter was submitted for decision.<sup>1</sup>

## ISSUES<sup>2</sup>

1) Did the District deny Student a free appropriate public education (FAPE) because it failed to provide Guardian with notice of procedural safeguards at the time of the manifestation determination (MD) individualized educational program (IEP) team meeting of February 17, 2010?<sup>3</sup>

2) Did the District deny Student a FAPE when it failed to reconvene and complete the MD IEP team meeting started on February 17, 2010?

3) Did the District deny Student a FAPE when it failed to conduct a reassessment of Student to determine if his eligibility for special education should be emotional disturbance (ED), pursuant to the reassessment plan signed by Guardian following the MD IEP team meeting of February 17, 2010?

4) Did the District deny Student a FAPE when it removed Student's behavior support plan (BSP) from his IEP in June 2011, without Guardian's consent?

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<sup>1</sup> To maintain a clear record, Student's closing argument is designated as Student's Exhibit S-1, and the District's closing argument is designated as District's Exhibit D-57.

<sup>2</sup> Student's issues as delineated in the amended complaint were discussed and revised for clarity during the course of the prehearing conference on May 16, 2012. For further clarity of decision writing, the issues have been slightly re-worded and re-numbered. No substantive changes have been made.

<sup>3</sup> Student's claims were subject to a motion to dismiss by the District based upon the application of the statute of limitations. The motion is discussed below.

## CONTENTIONS

Student contends that the District denied him a FAPE when it failed to provide Guardian with a notice of procedural safeguards at the February 17, 2010 MD IEP team meeting, failed to reconvene and complete the February 2010 MD IEP meeting, and failed to assess him for ED pursuant to a signed assessment plan dated February 17, 2010. Student asserts the District denied him a FAPE when it removed his BSP in June of 2011 without Guardian's prior knowledge and consent. It is Student's position that the District did not provide him with a copy of the May 2011 IEP which deleted Student's BSP and, even though Guardian signed consent for the May 2011 IEP, the District was required to provide him prior written notice of the intent to delete the BSP.<sup>4</sup> Student requests that OAH find him to be the prevailing party on all issues and order the District to provide "fair compensation" and ensure that all of his special education rights are safeguarded.

The District contends that Student was provided with written notice of his procedural safeguards pursuant to well-established protocols at the February 2010 MD IEP team meeting. The District maintains that Student's subsequent voluntary transfer to an alternative school was tantamount to a reconvening of the February 2010 MD IEP meeting, and that the District was not required to reconvene the MD IEP meeting because it allowed Student to return to school and Guardian subsequently agreed to a change of school. The District claims that any failure to reconvene the MD IEP team meeting did not result in a denial of a FAPE to Student, nor deny Guardian a significant opportunity to participate in the IEP development process. The District contends that its failure to assess Student for ED did not constitute a procedural violation because intervening circumstances prevented it from completing the assessment, and Student's

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<sup>4</sup> Lack of prior written notice was not identified as an issue for hearing and therefore no factual findings are made in this regard.

circumstances changed such that an assessment was no longer warranted. Even if its failure to assess is considered a procedural violation, the District asserts this violation did not result in a denial of a FAPE. The District maintains there were sound educational reasons for deleting the BSP, and Guardian consented to removing the BSP when he signed the May 2011 IEP.

In this Decision, the ALJ evaluates the evidence in light of the parties' contentions, and finds that Student met his burden of persuasion as to Issue Two only.

## PRELIMINARY MATTERS

### EXHIBIT ATTACHED TO STUDENT'S CLOSING ARGUMENT

Student attached to his closing argument a June 5, 2012, letter on San Joaquin County Probation Department letterhead addressed to Student. This letter has been marked for identification as S-2. In his closing brief, Student seeks an "exemption to the exhibit rule for good cause." Student's request is considered a motion to re-open the record for further evidence. The District has not filed any response to Student's request. Student's motion is hereby denied. This exhibit has not been admitted into evidence nor relied upon in the writing of this decision as it is untimely, lacks foundation, constitutes inadmissible hearsay, and is irrelevant to the matters at issue.

### STUDENT'S MOTION TO STRIKE DISTRICT'S CLOSING BRIEF

On June 25, 2012, Student filed a motion to strike the District's closing brief on the grounds that it was untimely. The District filed a response on June 25, 2012, and attached in support a facsimile transmission confirmation report which indicates that the District's brief was successfully and fully transmitted by facsimile to OAH at 4:34 p.m. on June 20, 2012. Also attached was its proof of service on Guardian. The District timely filed its closing argument with OAH and served Guardian by United States mail on June 20, 2012. Service is complete at the time of deposit into a receptacle that is maintained

by the United States Postal Service for that purpose.<sup>5</sup> The fact that Guardian did not receive the District's brief until June 21, 2012, does not render the filing and service untimely. Student's motion is denied.

STATUTE OF LIMITATIONS: ARE STUDENT'S ISSUES ONE, TWO, AND THREE TIMELY?

The District maintains, by way of an affirmative defense, that Guardian is precluded from pursuing any claim arising more than two years prior to the filing of Student's amended complaint. Student filed his original complaint on March 22, 2012, and his amended complaint on April 17, 2012. The District contends that any claim arising prior to April 17, 2010, is time barred due to the two-year statute of limitations. This defense applies as to Student's Issues One, Two and Three and each will be addressed in turn. Although Guardian first raised the issue of not receiving a copy of his procedural rights in his amended complaint filed April 17, 2012, the District provides no legal authority for its contention that the date of the amended complaint, as opposed to the date of the original complaint, triggers the two-year filing time frame. In light of the broad remedial purposes of the Individuals with Disabilities Education Act (IDEA) which requires that pleadings be liberally construed in favor of their sufficiency, it logically flows that the petitioner, when authorized to amend his complaint to address an insufficiency, not be burdened with the imposition a new start date for the running of the statute of limitations.

Congress intended to obtain timely and appropriate education for children with special needs and did not intend to encourage the filing of claims under the IDEA many

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<sup>5</sup> Although these proceedings are not governed by California Rules of Court, or the Code of Civil Procedures, OAH may look to them for guidance. Code of Civil Procedure section 1013, subdivision (a) addresses when service by mail is complete.

years after the alleged wrongdoing occurred.<sup>6</sup> An extended delay in filing for relief under the IDEA would frustrate the federal policy of quick resolution of such claims. A denial of a FAPE results in substantial harm to a student which must be remedied quickly. Consistent with federal law, due process complaints filed after October 9, 2006, are subject to a two-year statute of limitations in California.<sup>7</sup> In general, the law provides that any request for a due process hearing shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request.<sup>8</sup> In effect, this is usually calculated as two years prior to the date of filing the request for due process.

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<sup>6</sup> *Alexopoulos v. San Francisco Unified Sch. District* (9th Cir. 1987) 817 F.2d 551, 555-556.

<sup>7</sup> 20 U.S.C. §§ 1415(b)(6)(B), 1415(f)(3)(C); 34 C.F.R. §§ 300.507(a)(2), 300.511(e); Ed. Code, § 56505, subds. (l) and (n). All references to the federal regulations are to the 2006 promulgation of those regulations.

<sup>8</sup> Ed. Code, § 56505, subd. (l); 20 U.S.C. §1415(f)(3)(C). See also, *Draper v. Atlanta Ind. Sch. System* (11th Cir. 2008) 518 F.3d 1275, 1288.

A claim accrues for purposes of the statute of limitations when a parent<sup>9</sup> learns of the injury that is a basis for the action.<sup>10</sup> In other words, the statute of limitations begins to run when a party is aware of the facts that would support a legal claim, not when a party learns that it has a legal claim.<sup>11</sup>

Both federal and California State law establish exceptions to the statute of limitations. These exceptions exist when a parent was prevented from filing a request for due process due to: (1) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or (2) the local educational agency's act of withholding information from the parent that it was required to provide.<sup>12</sup> If a party files too late, and an exception does not apply, any claim outside the two-year period cannot be heard and decided at a due process hearing.

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<sup>9</sup> As Student's legal guardian by order of San Joaquin County Court from November of 2009, Guardian is considered a "parent" pursuant to the IDEA and implementing statutes and regulations. (20 U.S.C. § 1401(23)(B); 34 C.F.R. § 300.30(a)(3) and (b)(2); Ed. Code, § 56028, subds. (a)(3) and (b)(2).)

<sup>10</sup> *M.D. v. Southington Board of Educ.* (2d Cir. 2003) 334 F.3d 217, 221; *M.M. & E.M. v. Lafayette School Dist.* (N.D.Cal., Feb. 7, 2012 Nos. CV 09-4624, 10-04223 SI) 2012 WL 398773, \*\* 17 - 19.

<sup>11</sup> See *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039, citing *April Enter., Inc. v. KTTV and Metromedia, Inc.*, (1983)147 Cal.App.3d 805, 826 [195 Cal.Rptr. 421] ("[I]n ordinary tort and contract actions, the statute of limitations ... begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action ... does not toll the statute." [citation omitted].)

<sup>12</sup> 20 U.S.C. § 1415(f)(3)(D); Ed. Code, § 56505(l).

## Issue One

The District was required to provide Guardian with a copy of his procedural rights at the time of the February 2010 MD IEP team meeting, and also because he was asked to sign an assessment plan at that meeting.<sup>13</sup> At each IEP team meeting, the District must inform Guardian of state and federal procedural safeguards.<sup>14</sup> Student alleges that the District failed to provide him with a notice of these parental rights and procedural safeguards prior to, or during, the February 17, 2010 MD IEP meeting. Evidence on the applicability of the statute of limitations as to this issue was taken at hearing.

Guardian testified that he was unaware of his right to procedural safeguards until February 2012 when he went to the District office to request Student's records and received, for the first time, a copy of the notice of procedural safeguards. However, the District established that on February 17, 2010, Guardian was aware of whether or not he had been provided a copy of the procedural safeguards and therefore Student's claim, if any, arose on that day and is time barred.

Guardian claimed that he was never provided with the notice of procedural safeguards at any IEP team meeting that he attended. However, his testimony was persuasively countered by District witnesses.<sup>15</sup> Cynthia Adams began to work for the

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<sup>13</sup> Ed. Code, §§ 56500.3, subd. (k), 56321, subd. (a).

<sup>14</sup> Ed. Code, § 56500.1, subd. (b).

<sup>15</sup> The evidence, both testimonial and documentary, established that the District provided Guardian a copy of his parental rights and notice of procedural safeguards at the IEP team meetings on September 9, 2009, February 17, 2010 and May 11, 2010, as well as immediately following the May 4, 2011, IEP team meeting, that he declined to attend, and at the January 17, 2012, IEP MD team meeting. The District established that



District in 1997, first as a resource specialist and then as a program specialist since 2001. She worked with Student during the 2009-2010 SY. She presented as a well-qualified professional and was a persuasive witness whose testimony was accorded great weight.<sup>16</sup> Ms. Adams attended the February 17, 2010, MD IEP team meeting, along with Student's special education teacher Shauna Cantrell and psychologist Geraldine Pinkston. As case manager, it was Ms. Cantrell's job to provide Guardian with his rights. Ms. Adams has attended at least 25 IEP team meetings with Ms. Cantrell and is familiar with her practice and procedure in distributing the notice of procedural safeguards. Ms. Adams did not recall a time where she ever had to remind Ms. Cantrell to provide a parent with this notice. This testimony was corroborated by that of Ms. Pinkston.

In her 11 years as a program specialist, Ms. Adams has attended at least 1,000 IEP team meetings. She was very clear, detailed, and convincing in her testimony that as program manager, she ensures that three things happen at every IEP team meeting: (1) parents must be provided with the notice of rights and safeguards; (2) introductions must be made; and (3) the purpose of the meeting must be stated. If procedural safeguards are not handed out, she asks if the parent has a copy and if not, the team will break and someone will get a copy for the parent. She was genuine in her testimony that this is very important and something she strictly adheres to, as the team is asking a parent for informed consent to a program that affects the entire life of the child. The

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its practice is to provide parents with their rights and safeguards at the very beginning of each IEP team meeting and that these practices were consistently followed.

<sup>16</sup> Ms. Adams obtained her bachelor's of art in psychology in 1996 and a master's degree in curriculum and instruction in 1999 from the University of the Pacific. She holds education specialist level 1 and 2 teaching credentials. Her area of mastery is in assessment and she previously conducted academic assessments.

District established that Ms. Adams would not have allowed the meeting to go forward if Guardian did not receive a copy of his rights.

Further, the February 17, 2010, IEP document established that Guardian received notice of his procedural safeguards. Guardian signed under a pre-marked box on the IEP document, indicating that he received a copy of procedural safeguards. His testimony that he never intended his signature to constitute an acknowledgment of receipt of procedural safeguards was not persuasive.<sup>17</sup> Documentary evidence also established that Guardian signed a second acknowledgement of receipt of his procedural safeguards at the February 17, 2010, meeting when he signed the proposed assessment plan as discussed below. State and federal law require that a copy of the notice of a guardian's rights shall be attached to any assessment plan and shall include a written explanation of all procedural safeguards. Guardian signed the assessment plan under a pre-marked section indicating that he understood his "enclosed parental rights." Below his signature, in all capital letters is the advisement that the parent is to sign and return the assessment plan and "keep the enclosed parental rights and procedural safeguards."

Therefore, the evidence established that on February 17, 2010, Guardian was aware of whether he had received a copy of the procedural safeguards and therefore, his claim accrued on that day. Guardian filed the complaint in this matter on March 22, 2012. The complaint is filed outside of the two-year statute of limitations and this claim is barred.

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<sup>17</sup> Guardian was familiar with and understood the IEP documents, and ensured that his disagreement with a subsequent MD IEP was duly noted.

## Issues Two and Three

The District also contends that should the ALJ find that Guardian did receive his parental rights and notice of procedural safeguards in February of 2010, then Issues Two and Three are time barred. The District's position is incorrect.

Issue Two concerns the continuance of the February 2010 MD IEP team meeting. In its closing brief, the District claims that Student's voluntary transfer to an alternative school was tantamount to the reconvening of the February 2010 MD IEP team meeting. The District contends the school transfer avoided the need for further manifestation determination meetings due to Student's on-going suspensions. This school transfer was to occur, at the earliest, on or about April 7, 2010, within two years of the filing of the original complaint. Even if Student's claim is considered beyond the statutory time limit, the evidence established that the District led Guardian to believe that the MD IEP team meeting would be reconvened, thus causing him to believe that the problem would be resolved. Therefore, Student's Issue Two falls under the first exception to the statute of limitations. To the extent necessary, the circumstances warrant tolling of the statute of limitations as to Issue Two.

As to Issue Three, the District's failure to assess Student pursuant to the February 17, 2010, signed assessment plan, this claim became ripe on April 19, 2010, upon the expiration of the 60-day time line in which the District was required to assess Student and convene an IEP team meeting to discuss the results of the assessment.<sup>18</sup> Student filed his original complaint on March 22, 2012, within two years of the ripening of the failure to assess claim.

The District's statute of limitations defense fails as to Issues Two and Three which are analyzed in full below.

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<sup>18</sup> Ed. Code, §§ 56302.1, subd. (a), 56381, subd. (a)(1).

## FACTUAL FINDINGS

### BACKGROUND AND JURISDICTION

1. Student is presently 17 years of age and has resided with Guardian within the boundaries of the District since October of 2009. Prior to October of 2009, Student resided at the same residence but with an adoptive parent who passed away in September of 2009. On March 22, 2004, the adoptive parent designated Guardian to serve as Student's educational representative.

2. Student was first found eligible for special education services in February of 2003. He remains eligible under the category of specific learning disability (SLD). Student attended Marshall Elementary School (Marshall) and Stockton Intermediate Alternative School (Stockton) during the 2009-2010 school year (SY).<sup>19</sup> For the 2010-2011 SY, Student matriculated to Edison High School (Edison) where he experienced success on a regular high school campus and completed his freshman year. At the time of hearing, Student was completing his 10th grade year at Edison.

### STUDENT'S DISCIPLINARY HISTORY

3. During the 2009-2010 SY, Student displayed inappropriate behaviors, which are discussed below, that led to the District taking disciplinary measures against Student. In September of 2009, Student suffered the loss of his adoptive parent who had been in poor health for many years. Student was present at the time of her death. Ms. Pinkston testified on behalf of the District and opined that Student's behaviors, subsequent to the loss of his adoptive parent, were due to the emotional toll from this

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<sup>19</sup> Originally, Guardian testified that he believed the name of the school was "Fremont" but was not sure. According to school records, Student enrolled at Stockton on April 26, 2010.

loss.<sup>20</sup> Ms. Pinkston has worked as a school psychologist for over 35 years and started working for the District in 2005. She presented as forthright and sincere. The District contended that Student is required to prove that he is a child with ED and that because the behaviors were due to the loss of his adoptive parent and other home circumstances, Student cannot be considered a child with ED. This matter does not require the determination of whether Student is a child eligible for special education under the category of ED. Accordingly, no finding is made in this Decision in this regard.

4. Student has a history of being physically aggressive. He was suspended for fighting, threatening injury, using profanity and disrupting class. Student's disciplinary record reveals that he engaged in one behavior incident each in July and August 2009, and three discipline incidents in September 2009. The discipline record further reflects one incident in October and two in November of 2009, three incidents in January 2010, two in February, eight in March and two in May of 2010.<sup>21</sup>

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<sup>20</sup> Ms. Pinkston obtained her master's degree in school psychology from Ball State University in Indiana in 1975, and a doctorate in counseling psychology in 1989 from the University of Massachusetts.

<sup>21</sup> There is a slight variance between the discipline record's listing of days of suspensions per month and the attendance record. For the 2009-2010 SY, the attendance record notes: three days suspension in August (discipline record notes one); two in September (discipline record notes one); both records list one day of suspension in October, five suspension days for November and three for January; attendance record notes six suspension days in March (discipline record notes eight days); and, attendance record notes one day of suspension in April (discipline record notes zero).

## FEBRUARY 17, 2010 MD IEP TEAM MEETING

5. When a school district changes the placement of a special education student for acts in violation of a code of conduct, the student is entitled to certain procedural protections. A change of placement is defined as a removal, for instance through suspension, for more than 10 consecutive school days or a series of removals that constitute a pattern and total more than 10 school days in a school year. The district must conduct a review to determine if the disciplinary conduct is a manifestation of the student's disability. The review team must determine: (1) if the conduct in question was caused by or had a direct and substantial relationship to the pupil's disability; and/or (2) if the conduct in question was the direct result of the district's failure to implement the IEP. This is known as a manifestation determination and it must be performed within 10 school days of the decision to effectuate a change in placement. The incident triggering the MD IEP meeting of February 17, 2010, occurred on January 25, 2010. Student slammed a locker door on another student's head. Student was suspended for a three day period, bringing him beyond his 10th cumulative day of suspension for the 2009-2010 SY.

### Decision to Stop MD IEP Team Meeting and Reconvene at a Later Date

6. A reassessment of a special education student shall be conducted if the district determines that the educational or related services needs of the student warrant a reassessment, or if a parent or teacher requests a reassessment. Ms. Pinkston was the District IEP team member to bring up the issue of a need for additional assessment of Student during the February 2010 MD IEP team meeting. She did not recall using the term "emotional disturbance" as she considers this term emotionally laden. Although Ms. Pinkston had conducted a triennial assessment of Student for his September 2009 IEP, she felt she did not have the whole picture of Student. Given the large number of suspensions that Student had accumulated, she wanted to assess to see where he was at

emotionally. Between the time of her last assessment of Student in 2009 and this meeting, Student suffered the loss of his adoptive parent, and various relatives were taking care of him which resulted in less consistency in his life. Student displayed both verbal and physical aggression at school. Ms. Pinkston testified that his acting out could be related to his changing circumstances, or depression over the loss of his adoptive parent.

7. Testimonial and documentary evidence, including the MD IEP team notes prepared by Ms. Cantrell, established that during the MD IEP team meeting, Ms. Pinkston agreed to assess Student to determine whether he was a child with an ED. According to Ms. Adams, generally the team would consider Student's qualifying disability when answering the first question of whether Student's conduct was caused by or directly and substantially related to his disability. The team determined that Student's situation could have been bigger than his SLD qualification. During the meeting, Guardian provided additional information about Student, and the team determined that they did not have enough information about Student's emotional and social functioning to answer the question posed.

8. The team did not answer the question of whether Student's behavior was caused by or had a direct and substantial relationship to his disability. On the MD findings form, neither "yes" nor "no" is marked in response to the question of whether the behavior was caused by or had a direct and substantial relationship to the disability. In the comments section, the team noted, "The IEP team recommends further evaluation to rule out emotional disturbance as a secondary disability." Although Ms. Pinkston and Ms. Adams testified that the team did answer that Student's behavior was not a manifestation of his identified disability of SLD, this was not indicated on the form. The team concluded that the District did properly implement Student's IEP and checked "no" next to the box regarding whether Student's behavior was a direct result of a failure to implement the IEP.

9. Parental consent is required prior to a district conducting a reassessment of a student. The district must provide the parent with a written proposed assessment plan which describes the types of assessments to be conducted. During the MD IEP team meeting on February 17, 2010, Guardian signed an assessment plan which called for additional assessment in the area of "social/emotional/behavior status." The IEP team agreed to meet again to review the results of the assessment and complete the MD IEP team meeting. Student returned to Marshall. Ms. Adams testified that with 400 students on her case load, she cannot possibly oversee all the processes and did not realize the MD IEP team meeting never reconvened.

#### Subsequent Change in Schools

10. After the deferred MD IEP meeting in February 2010, Student was suspended for a total of eight days for five separate behavior incidents. The District did not convene an MD meeting to address these on-going suspensions which resulted in a disciplinary change in placement. However, Student did not identify this as an issue for hearing, or argue that these additional suspensions resulted in a denial of a FAPE, so no factual findings are made regarding the legal effect of these additional suspensions.

11. On March 25, 2010, the date of Student's last suspension from Marshall, Guardian and Ms. Adams had a telephone conversation. Ms. Adams informed Guardian that the District did not want to go forward with expulsion but that Student would be better off being voluntarily placed at Stockton.<sup>22</sup> Stockton is a community school for students who are expelled, or who go through the School Attendance Review Board

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<sup>22</sup> It was Guardian's belief that the District was pursuing expulsion of Student and that Student was still facing this possible disciplinary action at the time the 2010 MD IEP team meeting was stopped.



(SARB) process.<sup>23</sup> Ms. Adams informed Guardian that Student was headed for Stockton given his continuing suspensions for behavioral issues. According to Ms. Adams, Student would either be recommended for expulsion, or referred to SARB if he accumulated more than 12 days of suspension.<sup>24</sup> Guardian was informed that one or the other was likely to happen with the end result being the same – Student would be sent to Stockton. Ms. Adams did not discuss any other placement options. She told Guardian that the District did not want Student to remain at Marshall. Ms. Adams did not want Student to have any more negative experiences, and she did not think Guardian would want him to stay at Marshall because of all the problems he was experiencing. Guardian agreed to move Student.

12. In its closing argument, the District maintains that it met the requirement for reconvening the MD IEP team meeting by effectuating a change in Student’s schooling location from Marshall to Stockton in April 2010, to avoid the need for further MD IEP team meetings. However, this is not supported by any legal authority. The District’s contention that by obtaining Guardian’s verbal acquiescence, over the phone, outside the IEP team process and without a full discussion of the continuum of placements, to a “voluntary” placement change from the local elementary school to a

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<sup>23</sup> Students who violate compulsory education laws by a pattern of unexcused absences, may be referred to the SARB. The goal of the SARB is to keep students in school by accessing community resources, although when necessary, students and their parents can be referred to formal court proceedings to address truancy issues. (See Ed. Code, § 48320 et seq. Ed. Code, § 48260 defines “truant” as being absent without excuse three days per SY or tardy or absent for more than a 30 minute period, three times in a SY, or any combination.)

<sup>24</sup>.Attendance and disciplinary records showed that through April 6, 2010, Student had already accumulated at least 17 days of suspension for the 2009-2010 SY.

community school, it was absolved of any obligation to conduct a complete, meaningful MD IEP team meeting is without merit.

13. As soon as Ms. Adams informed Guardian that Student was heading to Stockton because of his behaviors, the District's obligation under the IDEA to reconvene the February 2010 MD IEP team meeting renewed. Ms. Adams' conversation with Guardian evinced a predetermination by the District to send Student to the alternative school. The District prevented Guardian from participating in the MD IEP team process by operating outside the safeguards of this statutorily required team meeting.<sup>25</sup> The evidence established that the District never reconvened the MD IEP team meeting to answer the question of whether Student's behavior was a manifestation of his disability, and continued to repeatedly suspend him from school through his disenrollment on April 7, 2010. The District's protestation that it did not want to expel Student and that effectuating a voluntary change in location prevented the need to reconvene the MD IEP team meeting falls flat.

14 Ms. Adams told Guardian that the end of spring break would be a natural transition time for Student to transfer to a new school. She made arrangements for the transfer and informed Guardian of how to officially enroll Student at Stockton. Ms. Adams' testimony established that if Guardian timely followed her directions, Student would have been enrolled at Stockton the week of April 7, 2010, following spring break. However, Student was not enrolled at Stockton until April 26, 2010, and Guardian provided no explanation for this delay.

15. The evidence established that the District committed a procedural violation when it failed to complete the February 2010 MD IEP team meeting within 10

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<sup>25</sup> 20 U.S.C. § 1415(k).

school days of its decision to change Student's placement.<sup>26</sup> While a school district's compliance with the IDEA's procedural requirements is mandatory, not every procedural error automatically results in a denial of a FAPE. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process in the provision of a FAPE; or (3) caused a deprivation of educational benefits.

16. The District failed to reconvene the MD IEP team to discuss any other placement option with Guardian or strategize as to how to properly assist Student in managing his behaviors at his local school placement. This failure to reconvene the MD IEP team meeting denied Student a FAPE by depriving Guardian of any meaningful participation in the process. Ms. Adams initially testified that she believed an IEP team meeting was needed to change Student's placement, but that she wanted the IEP meeting to be held at Stockton by the new team at the receiving school site. She then indicated that she felt she had the authority to proceed with the placement change given Guardian's consent and her belief that this did not constitute a change in program for Student.<sup>27</sup> Ms. Dextraze, the District's director of special education and director of

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<sup>26</sup> The District also failed to commence the MD IEP team meeting within the statutory 10 school day time frame. The District decided to suspend Student for three days on January 25, 2010, which placed him beyond an accumulated total of 10 days of removal for the 2009-2010 SY. Giving the District the benefit of the doubt in calculating time lines, the MD IEP team convened, at the earliest, on the 12th school day after the removal. However, Student did not raise this as an issue.

<sup>27</sup> Both Ms. Adams and Kelly Dextraze, special education director, testified that this was not a change of placement as the services in Student's September 2009 IEP matched those provided at the new site, and his program continued to be a mild to moderate SDC, with the same staff ratio, the same curriculum, and similar access to

the Special Education Local Plan Area (SELPA) for the past four years, testified that switching Student to Stockton was appropriate as he needed a new locale where his special education services could be more appropriately delivered, given his ongoing suspensions from Marshall.<sup>28</sup>

17. Richard Blackston is a special day class teacher at Stockton where he teaches fourth to eighth graders. Student attended his class for a short period of time during the fourth quarter of the 2009-2010 SY. Student made academic progress and did not display any of his previous behavioral problems. Progress reports from Stockton for the fourth quarter of the 2009-2010 SY, indicated that Student was receiving a "satisfactory" in many areas and doing well in class. Mr. Blackston testified persuasively that Student benefited from his class and made good progress.

18. Despite Student's subsequent progress at Stockton, the fact remains that the District's recommendation that a mid-year change in schools occur because of Student's behaviors, outside of and in lieu of the MD IEP team meeting process, denied Guardian his right to meaningfully participate in the decision-making process. Guardian was not presented with any options regarding appropriate placements. The District simply informed Guardian that this change in schools would be occurring and it could

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typical peers. However, at issue here, is the District's decision to effectuate a *disciplinary* change in placement, which must comport with the requirements of title 20, section 1415(k) of the United States Code.

<sup>28</sup> Ms. Dextraze received her bachelor's of art in speech and hearing in 1982 from the University of California at Santa Barbara and her master's degree in communication disorders in 1983 from Emerson College. She has been employed by the District for the past 24 years, serving as a speech and language pathologist, SDC teacher, program specialist, assistant principal, administrator of special education and most recently as the director of special education.

be through the stressful processes of an expulsion hearing or SARB hearing or through his "consent" to a voluntary transfer.<sup>29</sup> The team did not address if Student's disciplinary conduct resulted from his disability and if so, how they could more appropriately meet his needs at Marshall. Student met his burden of proof as to Issue Two.

#### DISTRICT'S FAILURE TO ASSESS STUDENT

19. Whether Student qualified as having an ED was not at issue during the hearing and is not addressed in this decision. At issue is whether the District's failure to assess Student, pursuant to a signed assessment plan, significantly deprived Guardian of his right to meaningful participation in the decision-making process, impeded Student's access to a FAPE, or resulted in a deprivation of educational benefit.

20. An IEP meeting must be held within 60 days of receiving parental consent to the assessment plan, exclusive of school vacations in excess of five school days and other specified days. When a school district fails to meet the statutory timelines for assessing a student and holding an IEP meeting, it is a procedural violation.

21. The District contends in its closing brief that there was no procedural violation in its failure to assess Student for an ED because intervening circumstances prevented it from conducting the assessment. In support of its position, the District asserts the following: a) Student did not present as having an ED; b) Ms. Pinkston was simply planning to "rule out" that Student had an ED; c) Student was not present at school the times she tried to assess him; d) Guardian did not timely enroll him at Stockton; and e) it was unlikely that Guardian would have brought Student in to the office for the assessment had he been asked to do so. The District failed to establish these contentions.

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<sup>29</sup> There was no evidence that Guardian provided informed written consent as defined in 34 C.F.R. § 300.9 and Ed. Code, § 56021.1.

22. The District provided no legal basis for its contention that Student's subsequent improved behavior constituted a change in circumstance such that the District was not required to conduct the assessment. That Student's behavior subsequently improved with his change in location to first Stockton and later Edison did not excuse the District from its obligation to assess as consented to by Guardian. Its contention that Student would not have qualified as a child with an ED, had he been assessed, is misplaced and does not justify the District's inaction.

23. Ms. Dextraze has known Ms. Pinkston for close to 12 years and has never known her to not complete an assessment, as happened in this case. She knows Ms. Pinkston to be a very conscientious and competent school psychologist. According to Ms. Dextraze, the policy is that once the District was aware that an assessment had not been completed pursuant to a signed assessment plan, all attempts to complete it would be undertaken even if beyond the 60-day time frame. Robbie Diestler, the school psychologist at Edison, also confirmed that if there is a signed assessment plan, the psychologist is required to complete the assessment even if the student no longer exhibited behaviors which led to the assessment plan.<sup>30</sup>

24. The District alleged that Student failed to cooperate and impeded its attempts to complete the assessment. The District did not establish that Guardian prevented it from fulfilling its obligation by repeatedly failing or refusing to produce Student for the evaluation. Ms. Pinkston went to Marshall twice to assess Student. Student was not present either day. On the second attempt, she was informed he was

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<sup>30</sup> Ms. Diestler obtained her master's degree in psychology in 2004 and began to work for the District that same year.

no longer enrolled.<sup>31</sup> She did not call Guardian or Stockton to arrange an assessment of Student at a location other than Marshall. The 60-day date for completing the assessment fell on or about April 19, 2010. Although Student was dis-enrolled from Marshall as of April 7, 2010, and Guardian did not enroll him at Stockton until April 26, 2010, Guardian's failure to timely enroll Student does not demonstrate a lack of parental cooperation with the assessment process nor excuse the District's failure to assess.

25. The District argued, but did not establish, that Guardian's failure to complete the parent edition of the Behavioral Assessment Scales for Children, second edition (BASC-2) thwarted the assessment process.<sup>32</sup> Ms. Pinkston believed she gave the parent edition to Ms. Cantrell, Student's special education teacher at Marshall, and asked her to give it to Guardian. Guardian testified he never received it. Ms. Pinkston admitted that it was not necessary for her to receive this parent scale in order to complete her assessment. She testified that Guardian did not thwart her assessment. The evidence established that Ms. Pinkston did not follow through with the assessment, that she did not prepare a report indicating an inability to complete the assessment, and that all relevant District team members simply forgot to follow through and ensure the completion of the assessment.

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<sup>31</sup> Student was no longer enrolled at Marshall as of April 7, 2010. Ms. Pinkston's second and final attempt to assess Student occurred on or after April 7, 2010, despite the assessment plan having been signed on February 17, 2010.

<sup>32</sup> The BASC-2 is an assessment tool that includes rating scales to measure a student's level of functioning in various categories. Parents, teachers and students complete separate editions.

26. Guardian did not learn until January 2012, that the District never evaluated Student pursuant to the February 2010 assessment plan.<sup>33</sup> District counsel spent some time questioning Guardian as to why he did not ask about the status of the assessment of Student for ED during the May 11, 2010 IEP team meeting. The law places the burden on the District to devise an appropriate assessment plan, obtain consent, complete the assessment, and timely report back the results to the IEP team. Guardian was consistent and credible in his testimony that he did not ask about the results as he believed the District would be doing what they were required to do, and what they agreed to do. Guardian persuasively testified that he was focused on the issues currently before the May 2010 IEP team and busy “dealing with what we are doing today” as opposed to expressing concerns to the IEP team about the past agreed-upon assessment and whether it was completed. The evidence established that Guardian actively and meaningfully participated in the May 2010 IEP meeting, notwithstanding the failure of the District to complete its promised assessment.

27. The District committed a procedural violation when it failed to conduct an assessment of Student in the area of social/emotional and behavior, suspected areas of disability and need, pursuant to a signed assessment plan dated February 17, 2010. The District failed in its obligation to complete the assessment, provide the report to Guardian and convene an IEP team meeting by April 19, 2010.

28. A student is eligible for special education and related services in California under a variety of categories, which include ED, if the child needs specialized instruction and services to receive a FAPE. However, as long as a child remains eligible for special education and related services, the IDEA does not require that the child be placed in the

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<sup>33</sup> At the January 17, 2012 MD IEP team meeting, Guardian informed the team that Student was assessed in 2010 for ED. Ms. Diestler reviewed the file and informed Guardian that no assessment was ever conducted.



most accurate disability category, so long as the child receives services that meet his unique needs. A properly crafted IEP addresses a student's individual needs regardless of his eligibility category.

29. Ms. Dextrase's testimony established that even if an assessment determined that Student met the criteria for having an ED, a change in his program and services was not necessary. Services are delivered as a result of Student's needs and his services matched his needs. The District provided a supportive environment for learning by way of an SDC, accommodations, a modified curriculum, and access to typical peers. The ALJ found Ms. Dextrase to be highly qualified in her field and credited her testimony.

30. The evidence established that Student made academic and behavioral progress during the remainder of his 2009-2010 SY and the year following. Student did not introduce any evidence that he was denied appropriate goals or an appropriate education program or special education services to address his unique needs during this time period. He demonstrated good progress academically and behaviorally at Stockton. There is no evidence in the record that an assessment report would have provided any information in addition to, or different, from that considered by the IEP team that would have affected the discussion and subsequent development of an educational program for Student for the 2010-2011 SY. Student did not present evidence that he could not access the curriculum, or that he was not receiving educational benefit as a result of the District's failure to assess. The absence of injury precludes any remedy under the law. Student did not meet his burden of proof in establishing that District's violation resulted in a denial of a FAPE, or prevented Guardian from full participation in the IEP process.

31. However, the District's failure to complete a required assessment is a very serious violation of Student's special education rights. Although the special education director characterized this situation as an anomaly, her testimony established that the District has a very transient population which makes it difficult to keep track of students.

This testimony suggests the problem with a lack of compliance may go beyond this one student and underscores the need for the District to be prompt and thorough in its efforts to assess students. Should the District determine this is a systemic problem, it is highly recommended that the District devise a protocol or implement a District-wide training to ensure that all relevant staff are aware of the necessary and timely steps that must be taken to ensure students' rights to complete and timely assessments are safeguarded. This is not an Order and Student shall have no right of enforcement as to this recommendation.

### 2010 BEHAVIOR SUPPORT PLAN

32. During the September 2009 IEP team meeting, the District team members and the Guardian expressed concern about Student's behaviors. An IEP team must consider whether a student's behavior impedes his learning or that of others. If it does, the team must consider the use of positive behavior interventions and supports, and other strategies to address the behavior. The team reviewed and adopted a BSP for Student which called for using anger management counseling and prompting Student to take a time-out when needed. A BSP describes the targeted behaviors, the environment in which the behaviors occur, and the events preceding the behaviors. A strategy is then developed to either prevent the targeted behavior or to control it if it cannot be prevented using positive reinforcement.

33. In preparation for the February 2010 MD IEP team meeting, and to assist the team in determining whether the BSP was still effective, Ms. Pinkston conducted an FBA. The general purpose of an FBA is to provide additional information and strategies for dealing with difficult behaviors which interfere with the learning process. Ms. Pinkston interviewed Student, reviewed his disciplinary record, and observed him in class on February 3, 2010. She also reviewed eight years of available records on Student dating back to 2002. As part of the FBA, Ms. Pinkston devised a hypothesis of the

function of the behavior – a sense of why the behavior occurred based upon her knowledge of Student. She concluded that Student’s home situation contributed to his incidents of school discipline. Student’s inconsistent home environment and his inability to process his feelings resulted in anger and frustration which he displayed through acts of aggression. Peer pressure also contributed to Student’s acting out behaviors and he would act out to gain respect from his peers.

34. Ms. Pinkston estimated Student’s level of need for a BSP to be moderate. His fights and profanity were disruptive to the class and interfering with his education and that of others. Student demonstrated moderate acting out of intense feelings and required formalized classroom opportunities to express his concerns. This would be the responsibility of the classroom teacher and could include social groups within the class or offering Student the opportunity to pull a staff member aside to talk.

35. Ms. Pinkston provided her FBA to Ms. Cantrell who then developed the 2010 BSP and presented it to the IEP team at the MD IEP team meeting in February 2010. The target behaviors consisted of: yelling profanities, kicking over desks, throwing items, not responding to directions, physically attacking other students when frustrated, and leaving class and refusing to return. The 2010 BSP indicates Student had a serious need for interventions as these behaviors occurred daily. Environmental changes and supports included extra seating space between Student and peers, providing smaller amounts of class work at a time, and allowing frequent breaks. Student was to learn anger management techniques and be prompted to self-evaluate and decide if a time-out without penalty is needed, to prevent escalation. The BSP called for staff to provide Student with positive rewards for appropriate behaviors.

36. Ms. Pinkston recommended that Student’s BSP be used within the classroom and especially when a switch occurred between activities such as in the

cafeteria, at recess, and when moving from one location to another.<sup>34</sup> Even when staff were present during these less structured times, it would not be realistic to expect that they could always prevent Student from engaging in a behavior incident or keep it from escalating. Student's 2010 BSP was virtually identical to the BSP developed at the September 2009 IEP team meeting. The BSP was continued without modification in May 2010, when the IEP team met to discuss Student's placement for the 2010-2011 SY.

### MAY 11, 2010 IEP

37. The staff at Stockton reported no concerns regarding Student from the date of his enrollment on April 26, 2010, through the convening of the IEP team meeting on May 11, 2010. Although progress reports for the fourth quarter revealed that Student was identified as performing far below basic in his visual and performing arts class, and below basic in language arts, writing and mathematics, Mr. Blackston credited Student with doing well in his class. Student earned personal development markings of satisfactory in many areas of citizenship including following directions, paying attention, working well with others, following rules, and showing respect. Ms. Adams described this IEP meeting as "all positive energy." Student was happy at his new school and experienced success. All team members felt positive about the placement. Guardian was pleased that Student did well for the short time he was at Stockton. The May 2010 IEP document indicates that Student's BSP was continued. There was no evidence regarding

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<sup>34</sup> The District did not establish that Student's BSP was intended solely for use in the classroom to target classroom behaviors. The evidence did not support its contention that had the BSP remained in place, it was not designed to prevent Student's subsequent 2011 fight in the hallway and the 2012 fight in the gym during his general physical education class.

any changes to the BSP or the reason the team agreed to retain the BSP for the next school year.

38. The IEP team decided that Student would attend a mild/moderate SDC at a District high school for the following school year. Student would continue to receive specialized academic instruction for 300 minutes per day with a general education class for physical education. Student would spend 76 percent of the time in his SDC and 24 percent of the time in the regular class, extracurricular and nonacademic activities.

#### 2010-11 Freshman Year

39. Student did very well his ninth grade year at Edison. He enjoyed participating on the wrestling team, tried his best, and had good attendance. April Young was Student's ninth and 10th grade teacher.<sup>35</sup> Since August of 2001, she has taught in the same class, a self-contained SDC predominantly for students with a SLD in Grades nine through 12.<sup>36</sup> Ms. Young teaches approximately 14 students at a time and has the assistance of one paraprofessional aide. After winter break, at the beginning of 2011, Ms. Young called Guardian to request that he ensure Student complete and turn in his homework. Guardian was willing to assist. Student was doing very well in class. Guardian told Ms. Young that she was doing an excellent job, and shared, "Whatever you are doing, it is nothing short of a miracle."

40. Ms. Young reviewed Student's 2010 BSP and IEP before he entered her class. She knew he had been sent to an alternative school, and had engaged in very aggressive behaviors. She was nervous as she thought about strategies that would work

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<sup>35</sup> Ms. Young obtained her special education teaching credential in 2003 and a master's degree in special education from Grand Canyon University in May of 2011.

<sup>36</sup> A self-contained class refers to a class where special education students spend most of their day in this class, but may take an elective elsewhere.

best with Student. Ms. Young was surprised to find that Student's behaviors in class were not consistent with those described in his BSP. Student did not demonstrate any behavior problems in class during his 2010-2011 SY. Student attended to class and appropriately contributed to the discussions. For the 2010-2011 SY, Student was an average high school student. He got along well with classmates as demonstrated by his ability to play games with them, engage in group work and hold conversations. Student developed and maintained friendships in class.

41. During the 2010–2011 SY, Ms. Young did not need to implement the BSP. Student did not engage in the behaviors targeted by the BSP such as yelling profanities, throwing items, being disrespectful, or walking out. Student showed his teacher respect by addressing her formally when he arrived to class and when he left, and by doing what she asked of him, "most of the time." There was no evidence that Student engaged in any maladaptive behaviors during this school year in any setting.

#### May 4, 2011 IEP and Deletion of BSP

42. Ms. Young prepared the notice of meeting for the May 4, 2011 IEP team meeting. The evidence established that Guardian received both the mailed notice and the notice sent home with Student. Guardian first returned a notice of meeting indicating that he would attend. He then sent a second notice indicating that he could not attend and that the team could hold the meeting without him. He could not recall why he was not available to attend. Ms. Diestler testified that Guardian was unable to attend due to health reasons.

43. A district must notify parents of an IEP team meeting early enough to arrange a mutually convenient date and ensure that they will have an opportunity to attend. Districts are required to take steps to ensure that the parent or guardian is present at each IEP team meeting. As regards the May 2011 IEP, there was no evidence that the District made any attempts to persuade Guardian to attend after he indicated

he could not attend, and that the District could proceed in his absence. However, any failure on the part of the District to ensure the presence and participation of Guardian at the May 2011 IEP team meeting, was not raised as an issue in Student's amended complaint and is not at issue in this due process hearing. No factual findings are made in this regard.

44. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. When the team creates an IEP, it looks at the unique needs of the child, creates goals to be achieved over the next 12 months, basing those goals on the child's present levels of performance, and then determines what services the student needs, and what educational placement will best meet those needs.

45. Immediately prior to the winter break, Ms. Young realized that Student no longer needed the BSP. Student did not display any of the behaviors that the BSP was designed to target. At the May 2011 meeting, the IEP team determined that Student was doing well and no longer required the BSP. Student's discipline record did not list any behavior incidents for the entire year. Student appeared happy and proud of his progress. Therefore, the team agreed to replace the BSP with two behavior goals. The first behavior goal was in life skills, and was designed to increase Student's completion of assignments. The second behavior skills goal addressed the provision of additional speaking time for Student which he was allowed as an accommodation in class.<sup>37</sup> This goal was designed to teach Student appropriate classroom language and assist him in making appropriate remarks in class and gain life skills for future interactions with authority figures. The goal was based upon the past concern of Student's use of profanity. Student was not displaying inappropriate classroom language as

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<sup>37</sup> Student displayed a reluctance to write at times.

demonstrated by the reported baseline that Student treats others with respect. This goal allowed for partial preservation of the BSP.

46. At the end of the meeting, Ms. Young tabbed the areas for signature on the IEP and explained to Student where Guardian needed to sign. She was clear, detailed and persuasive in her testimony that she placed the notice of procedural safeguards and the entire IEP, including the IEP team notes, in an envelope for Student to bring home. The notes contained the information that Student was no longer in need of a BSP. The IEP document indicates that behavior goals are a part of the IEP. Ms. Young was certain that she did all these things because this is her standard practice.

47. The District established that Student timely returned the signed IEP in the same envelope but without the procedural safeguards. Ms. Young looked at all the tabbed pages and saw that Guardian signed consent to the IEP but had not signed the form excusing the general education teacher from the IEP meeting. She pointed this out to Student and asked him to take it back to Guardian for his signature. Ms. Young again placed the entire IEP, along with the executed signature page and the excusal form all stapled together, back into the envelope and asked Student to deliver it back to Guardian for his further signature.

48. Student returned the complete IEP document along with the signed excusal form to Ms. Young. She then processed the IEP in accordance with school policies, and sent a copy of the entire IEP back home with Student. The IEP included the BSP which had been deleted. She told Student this was Guardian's copy.

49. Guardian did not provide the District with any information that Student was not living with the Guardian at this time. Student went to stay with a family friend in February or March of 2011, for a cooling off period after an incident of defiance. Guardian and Kim Akoma, a family friend, testified that Student was staying with Ms.



Akoma at the time of the May 2011 IEP meeting.<sup>38</sup> Guardian maintained that the only copy of the May 2011 IEP he received was provided to him by Ms. Akoma in the spring of 2012. At that time, Ms. Akoma found an old IEP for Student, crumpled up under the bed in the room Student previously shared with her son. She gave this document to Guardian.

50. Guardian testified that he only received the signature page for the May 2011 IEP from the District. He claimed he did not receive a copy of the IEP or notice of procedural rights and safeguards from the District following the May 2011 IEP team meeting. Guardian's testimony was not persuasive in light of the detailed testimony by Ms. Young as to her clear recollection of sending the complete IEP back and forth through the Student and receiving back the signed pages, stapled to the complete IEP.

51. The evidence established that Guardian signed consent to the May 2011 IEP. Consent means that a parent has been fully informed of all relevant information for which consent is sought, that the parent understands and agrees in writing to the proposed action and realizes that his consent is voluntary and may be revoked. The District provided Guardian with the IEP document which fully described the program to be implemented, including the removal of the BSP and substitution of behavior goals. The evidence established that the Guardian did not read the IEP prior to agreeing to it and did not inform himself of its contents. This was not through any fault of the District. Guardian did not ask Student what happened at the IEP team meeting, nor did he subsequently ask the District team members any questions. Guardian never contacted anyone in the District to ask why the BSP had been deleted from Student's May 2011 IEP. Guardian had the option to withhold his consent to the IEP and was familiar with the consent requirement from his prior participation in the IEP development process.

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<sup>38</sup> Ms. Akoma was unclear on the actual dates that Student stayed with her but believed he came in February of 2011 and returned home in May of 2011.

52. Guardian contended at hearing that the District was required to send him prior written notice of the IEP team's decision to delete the BSP and replace it with two goals. Districts are required to provide a parent with prior written notice of any proposal or refusal to initiate or change the identification, assessment, or educational placement of a student or the provision of a FAPE. The notice must include a description of the action proposed or refused, an explanation of the district's position and what it relied upon, and what other options were considered, in addition to informing the parent that they have protections under the procedural safeguards. However, failure to provide prior written notice was not identified as an issue for hearing, and the May 2011 IEP which was sent home with Student for Guardian's signature contained substantially all the written information required by law that constitutes prior written notice.

53. Guardian maintained that the District should have mailed the IEP document to him, as opposed to hoping the Student would ensure delivery. However, this does not change the fact that he never asked the District to mail this IEP to him, and he did not inform the District that Student was staying with a family friend at the time. Guardian overlooks the fact that he consented to the IEP being held without him, and subsequently signed his consent to the IEP.

54. Guardian testified that even though Student had a good freshman year with no behavioral problems at school, he would have benefitted from the BSP based upon his past history and his "roller-coaster type" behavior patterns. He saw the BSP as a safeguard. The validity of an IEP is measured by what was objectively reasonable at the time the IEP was written and in light of a snapshot of the information available to the IEP team when its decisions were made. The "snapshot rule" means that information that was unavailable to the District when the IEP was written, cannot be used to undermine the team's decisions. Although there was evidence that Student engaged in some of the behaviors addressed by his previous BSP during the 2011-2012 SY, and that the IEP team is again recommending a 2012 BSP for Student, this information cannot be used

to undermine the team's decision to remove the BSP in May of 2011, and was not found to be relevant for the purposes of this decision due to the "snapshot rule."<sup>39</sup> At the time of the May 2011 IEP team meeting, the District established that Student had no demonstrated need for the BSP.

55. The team considered all the relevant data, agreed that the BSP was no longer needed and had not been utilized for the past year, and presented the IEP document to Guardian who signed his consent to implementation. The law requires no more. Although Student engaged in problematic behaviors during the 2011-2012 SY, which subsequently led to disciplinary action, there was no evidence that having the BSP in place would have prevented these behaviors. Student did not meet his burden of proof as to Issue Four.

#### REMEDIES

56. In general, when a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. Because the District denied Student a FAPE by significantly impeding Guardian's ability to participate in the MD IEP team process, Student is entitled to relief.

57. The evidence established that despite the District's failure to reconvene the February 2010 MD IEP team meeting, Student benefited from his placement and services and progressed academically and behaviorally. Student did not introduce any

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<sup>39</sup> The District introduced substantial evidence regarding Student's 2011-2012 SY, including his participation in two fights, the District's "second fight policy," its recommendation for expulsion and subsequent reversal of this recommendation, its unsuccessful attempts to engage Guardian in the development of a new BSP for Student and to obtain consent for Student's September 2012 triennial assessment. This evidence was immaterial to the issues for hearing.

evidence in support of an award for direct compensatory education services. An order providing appropriate relief in light of the purpose of the IDEA may include an award of school district staff training regarding the area of the law in which the violation was found, to benefit the specific student involved or to prevent procedural violations that may befall other students.

58. Here, Ms. Adams admitted that she could not possibly oversee all processes for each student, and the evidence established that the District failed to timely convene and conclude Student's MD IEP team meeting. The evidence further established that the District lacks any established mechanism to ensure compliance with this procedural safeguard in disciplining students with disabilities. Because Student will continue to receive special education placement and services from the District for several more years, and there exists the possibility that he may be subject to discipline again during the remainder of his educational career, the District shall provide training to all district staff involved in calendaring and administration of IEP team meetings for students with disabilities, regarding the importance of and requirements for timely convening IEP team meetings and MD team meetings. The District shall also develop a protocol to ensure the timely completion of such meetings.<sup>40</sup>

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<sup>40</sup> This remedy is designed to address the procedural violations specific to Student. However, there is no guarantee that specific personnel shall remain on Student's case throughout the rest of his educational career, accordingly this remedy requires the District to train all staff who are responsible for the calendaring and administration of IEP team meetings. To the extent that this training may benefit other students with special education needs, that benefit is incidental.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49, 58 [126 S.Ct. 528, 163 L.Ed.2d 387], the party who filed the request for due process has the burden of persuasion at the due process hearing. In this case, Student filed for a due process hearing and therefore bears the burden of persuasion as to all issues.

### ELEMENTS OF A FAPE

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.) The term “free appropriate public education” means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the state educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the state involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of title 20 of the United States Code. (20 U.S.C. § 1401(9).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student’s abilities. (*Id.* at p. 198.) School districts are required to provide only a “basic floor of opportunity” that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 950-953.) The Ninth Circuit has also referred to the educational benefit standard as “meaningful educational benefit.” (*N.B. v. Hellgate Elementary School Dist.*

(9th Cir. 2008) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*.)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid*.)

#### PROCEDURAL VIOLATIONS

5. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation 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); Ed. Code, § 56505, subd. (f)(2).); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*.)

6. Where a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892-895 (*Amanda J.*) [school's failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award]; *Target Range, supra*, 960 F.2d at pp. 1485-1487 [when parent participation was

limited by district's pre-formulated placement decision, parents were awarded reimbursement for private school tuition during time when no procedurally proper IEP was held].)

7. The decision of a due process hearing officer shall be made on substantive grounds based on a determination of whether the child received a FAPE. (20 U.S.C. § 1415 (f)(3)(E); Ed. Code, § 56505, subds. (f)(1).) The hearing officer "shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program." (Ed. Code, § 56505, subd. (j).)

#### MANIFESTATION DETERMINATION

8. A special education student's placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to him. (Cal. Code Regs., tit. 5, § 3042(a).) The removal of a special education student from his placement for more than 10 school days in a school year, based upon a series of removals that demonstrates a pattern, constitutes a change of placement. (34 C.F.R. § 300.536(a).)

9. When a school district changes the placement of a special education student for specific conduct in violation of a student code of conduct, the student is entitled to certain procedural protections. The district is required to conduct a review to determine if the conduct that is subject to discipline is a manifestation of the student's disability. This is known as a "manifestation determination." (20 U.S.C. § 1415(k)(1)(E).) It must be accomplished within 10 school days of the decision to change the student's placement. (*Ibid.*)

10. A manifestation determination must be made by the school district, the parent, and relevant members of the IEP team as determined by the parent and the school district. (20 U.S.C. § 1415(k)(1)(E)(i).) The manifestation determination analyzes the child's behavior as demonstrated across settings and across times. All relevant information in the student's file, including the IEP, any observations of teachers, and any relevant information from the parents must be reviewed to determine if the conduct was caused by, or had a direct and substantial relationship to the student's disability, or was the direct result of the district's failure to implement the student's IEP. (34 C.F.R. § 300.530(e); Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed.Reg. 46540, 46720 (Aug. 14, 2006) (Comments on 2006 Regulations).)

11. If the IEP team determines the conduct is not a manifestation of the student's disability, then normal school disciplinary procedures may be used to address the incident in the same way as they would be applied to non-disabled students. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c).)

#### MEANINGFUL PARTICIPATION

12. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) "Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan." (*Amanda J.*, *supra*, 267 F.3d 877, 882.) Violations that impeded parental participatory rights "undermine the very essence of the IDEA." (*Id.* at 892.)



13. A district must notify parents of an IEP team meeting "early enough to ensure that they will have an opportunity to attend," and it must schedule the meeting at a mutually agreed on time and place. (34 C.F.R. § 300.322(a)(2); Ed. Code, §§ 56043, subd. (e), 56341.5, subds. (b),(c).) A district may not conduct an IEP team meeting in the absence of parents unless it is "unable to convince the parents that they should attend," in which case it must keep a record of its attempts to schedule a mutually agreed on time and place, including: 1) detailed records of telephone calls made or attempted and the results of those calls; 2) copies of correspondence sent to the parents and any responses received; and 3) detailed records of visits made to the parents' home or place of employment and the results of those visits. (34 C.F.R. § 300.322(d); Ed. Code, § 56341.5, subd. (h); see, *Shapiro v. Paradise Valley Unified School Dist., No. 69* (9th Cir. 2003) 317 F.3d 1072, 1077-1078.)

14. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d 1479, 1485; *Fuhrmann v. East Hanover Board of Education (Fuhrmann)* (3d Cir. 1993), 993 F.2d 1031, 1036.) The standard for "meaningful participation" is an adequate opportunity to participate in the development of the child's IEP. (*Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133.) A parent has an adequate opportunity to participate in the IEP process when he or she is present at the IEP team meeting. (34 C.F.R. § 300.322(a); Ed. Code, § 56341.5, subd. (a).)

15. A parent has meaningfully participated in the development of an IEP when he is informed of his child's problems, attends the IEP team meeting, expresses his disagreement with the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP process in a meaningful way. (*Fuhrmann, supra*, 993 F.2d 1036.)

## PREDETERMINATION

16. For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.) Federal commentators distinguish the manifestation review team from the IEP team. Some courts have applied the same principles to manifestation determination review meetings. (See *Fitzgerald v. Fairfax County Sch. Bd.* (2008) 556 F.Supp. 2d 543, at p. 559-561 [principles of fundamental fairness and predetermination applied to review team meeting]; *Student v. San Diego Unified School District*, (2009) Cal.Ofc. Admin.Hrngs. Case No. 2009060881, p. 9-10 [review team did not predetermine outcome].)

### ISSUE TWO: DID THE DISTRICT DENY STUDENT A FAPE WHEN IT FAILED TO RECONVENE AND COMPLETE THE MD IEP TEAM MEETING STARTED ON FEBRUARY 17, 2010?

17. The first inquiry when evaluating an alleged procedural violation is whether a violation occurred. As established by Legal Conclusions 4-11 and Factual Findings 5-15, the District's decision to effectuate a "voluntary" change in placement due to the Student's behaviors, in lieu of reconvening the February 2010 MD IEP team meeting constituted a procedural violation. The District stopped the February 2010 MD IEP team meeting prior to addressing the question of whether Student's behavior had a direct and substantial relationship to his disability. The MD findings sheet establishes that the team did not answer the question of whether Student's behavior was a manifestation of his disability. The IEP team notes and the MD findings sheet clearly reflect the District's intent to reconvene the MD IEP team meeting upon completion of

the social/emotional/behavior assessment of Student. The District led Guardian to believe that the status quo would remain pending a complete assessment of Student and the reconvening of the MD IEP team. The District concedes that the MD IEP team never reconvened, and the evidence established that the District determined that Student needed to be removed from Marshall due to his behaviors. This decision to remove Student triggered the District's legal obligation to reconvene the MD IEP team meeting.

18. The second inquiry upon the establishment of a procedural violation is whether this violation resulted in a denial of a FAPE to Student by either significantly impeding Guardian's right to meaningfully participate in the IEP process or by blocking the Student's right to a FAPE or resulting in a deprivation of educational benefit. As established by Legal Conclusions 5-7 and 12-16, and Factual Findings 10-18, the District's failure to reconvene the February 2010 MD IEP team meeting denied Guardian his right to meaningfully participate in the process of determining whether Student's behaviors were a manifestation of his disability, and if so, what changes should be made to his IEP, including placement, supports or services. The manner in which the District pursued Guardian's agreement to remove Student from Marshall and enroll him at the community school evinces a predetermination that Student needed to leave his home school and be placed at the community school for the remainder of his eighth grade year because of his behaviors. The District asked Guardian to make an important decision apart from the safeguards of the IEP process and provided Guardian no real choice but to go along with their plan and "consent" to a new placement at Stockton. The District's decision to pursue Guardian's acquiescence to a change in placement, in lieu of reconvening the relevant and necessary members of the MD IEP team meeting for a full discussion of the nature of Student's conduct and its relationship to his disability deprived Guardian of his participatory rights. Accordingly, Student prevailed as to Issue Two.

## ASSESSMENTS

19. In evaluating a child for special education services, the district assesses the student in all areas related to his or her suspected disability (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and District agree otherwise, but at least once every three years unless the parent and District agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related service needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain that consent, the District must develop and present an assessment plan. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) The assessment may commence immediately upon obtaining parental consent and must be completed and an IEP team meeting held within 60 days of receiving consent. Ed. Code, § 56302.1, subd. (a) and § 56381, subd. (a)(1); sec. 56043, subd. (f)(1); 56344, subd. (a). The term "assessment" shall have the same meaning as the term "evaluation" in the IDEA. (Ed. Code § 56302.5)

20. A school district's assessments shall be conducted by trained and knowledgeable personnel, except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. (Ed. Code, § 56320, subd. (b)(3).)

21. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033 (*Park*))

## ELIGIBILITY CATEGORIES

22. In order for a child to be eligible for special education in California, the child must have a disability as defined by state and federal law. (Ed. Code, § 56026, subd. (d); 34 C.F.R. § 300.8.) However, nothing in the IDEA requires children to be classified by their disabilities (20 U.S.C. § 1412(a)(3)(B)), and the IDEA “does not give a student the legal right to a proper disability classification.” (*Weissburg v. Lancaster School District* (9<sup>th</sup> Cir. 2010) 591 F.3d 1255, 1259.)

23. A properly crafted IEP addresses a student’s individual needs regardless of his eligibility category. (See *Fort Osage R-1 School Dist. v. Sims* (8<sup>th</sup> Cir. 2011) 641 F.3d 996, 1004 [category “substantively immaterial.”]) “The very purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself.” (*Pohorecki v. Anthony Wayne Local School Dist.*, (N.D. Ohio 2009) 637 F.Supp.2d 547, 557.)

24. When a student is found eligible under any category, the analysis of whether he was denied a FAPE shifts to an examination of whether his IEP was tailored to meet his unique needs. “The IDEA does not concern itself with labels, but with whether a student is receiving a [FAPE]. A disabled child's [IEP] must be tailored to the unique needs of that particular child . . . . The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe [a student’s] disabilities.” (*Heather S. v. State of Wisconsin* (7<sup>th</sup> Cir. 1997) 125 F.3d 1045, 1055.) In other words, once a student is determined eligible, the category of eligibility becomes irrelevant to the analysis of whether he was denied a FAPE.

ISSUE THREE: DID THE DISTRICT DENY STUDENT A FAPE WHEN IT FAILED TO CONDUCT A REASSESSMENT OF STUDENT TO DETERMINE IF HIS ELIGIBILITY FOR SPECIAL EDUCATION SHOULD BE ED, PURSUANT TO THE REASSESSMENT PLAN SIGNED BY GUARDIAN FOLLOWING THE MD IEP TEAM MEETING OF FEBRUARY 17, 2010?

25. As set forth in Legal Conclusions 19-21 and Factual Findings 2-4, 9, and 19-27, the District failed to meet its legal requirement to assess Student to determine whether he met the criteria for having an ED within 60 days of receiving Guardian's consent to the assessment plan. Student met his burden of proof that the District should have assessed him in the areas of social-emotional and behavior. The District did not prove that Student's actions, or those of Guardian, impeded its ability to complete the assessment. Ms. Pinkston went to Student's class only two times without making prior arrangements to ensure that Student was present. She never called Guardian to arrange an assessment appointment when informed that Student was no longer enrolled at Marshall. The District did not establish a factual or legal basis in support of its contention that intervening circumstances prevented it from completing the assessment. In applying the two-pronged inquiry, the evidence established that the District's failure to assess Student was a procedural violation of the IDEA.

26. As for the second prong of the procedural violation analysis, as demonstrated by Legal Conclusions 2-5, 7, 12-15, and 22-24, and Factual Findings 28-30, 37-41, and 45, the evidence amply established that Student subsequently received educational benefit, i.e. a FAPE, within the meaning of *Rowley*, and Guardian was not denied meaningful opportunity for participation in the IEP process because the promised assessment was not completed. The short time he attended Stockton, Student demonstrated good behavior and academic progress. The May 2010 IEP offer of a mild/moderate SDC classroom at a District high school, while made without the benefit of a completed social-emotional assessment, was an offer of a FAPE, and this was confirmed by his remarkable progress in that program his freshman year at Edison.

Guardian attended the May 2010 IEP and participated in a meaningful way. There was no evidence to the contrary. The evidence demonstrated that the District's proposed program was designed to address Student's needs, not his eligibility classification. This was in accordance with special education law. Student's services matched his needs. The evidence established that Student required and was provided a supported environment for learning in a SDC with access to typical peers including a general education elective, accommodations, and a modified curriculum.

27. Although Student demonstrated that the District committed a procedural violation, based on the facts in this case, he failed to demonstrate at hearing that the violation impeded his right to a FAPE, Guardian's opportunity to participate in the decision making process or caused a deprivation of educational benefits. Student did not establish that the District's failure to assess him resulted in any harm. Accordingly, Student did not prevail on this issue.

#### REQUIREMENTS OF AN IEP

28. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(II); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(III); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

29. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams, supra*, 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann, supra*, 993 F.2d 1031,

1041.) The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

#### PRIOR WRITTEN NOTICE

30. A school district must provide written notice to the parents of a pupil whenever the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a FAPE to the pupil. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) The notice must contain: 1) a description of the action refused by the agency; 2) an explanation for the refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refusal; 3) a statement that the parents of a disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards; 4) sources of assistance for parents to contact; 5) a description of other options that the IEP team considered, with the reasons those options were rejected; and 6) a description of the factors relevant to the agency's refusal. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4, subd. (b).) A district's failure to provide adequate prior written notice is a procedural violation of the IDEA.

#### CONSENT

31. In California, parental consent is needed to implement an IEP. (Ed. Code, § 56346, subd. (a).) Consent means that the parent has been fully informed of all relevant information regarding the proposed action; the parent understands and agrees in writing to the proposed action; and the parent understands that the granting of consent is voluntary and may be revoked, although any revocation is not retroactive. (34 C.F.R. §sec. 300.9; Ed. Code, § 56021.1.)



## BEHAVIOR INTERVENTIONS

32. If a student's behavior impedes learning, but does not constitute a serious behavior problem, the IEP team must consider behavior interventions as defined by California law. Less serious behaviors require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. (20 U.S.C. §1414(d)(3)(B)(i); 34 C.F.R. §300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *Escambia County Bd. of Educ. v. Benton* (S.D. Ala. 2005) 406 F.Supp.2d 1248, 1266-1267.)

33. In California, less serious behaviors may be addressed by the development of a BSP. In California, an FBA is a behavior assessment for less severe behaviors. It is distinct from the functional analysis assessment which is a statutorily-defined assessment performed under prescribed conditions and governed by a panoply of requirements pursuant to title 5, California Code of Regulations, section 3052, subdivision (b). Although Education Code section 56331 references an FBA, there are no other California statutes or regulations related to FBA's and BSP's.

### ISSUE FOUR: DID THE DISTRICT DENY STUDENT A FAPE WHEN IT REMOVED STUDENT'S BSP FROM HIS IEP IN JUNE 2011, WITHOUT GUARDIAN'S CONSENT?

34. As established in Legal Conclusions 12-14, and 30-31, and Factual Findings 32-36, 42-43, 46-52 and 55, Guardian provided informed, written consent to the May 2011 IEP which deleted Student's BSP. The District invited Guardian to attend and be a full participant in the May 2011 IEP team meeting. Guardian received timely notice of this IEP meeting, authorized District to conduct this IEP meeting in his absence, and signed full consent to the resulting IEP at a later date. Guardian had a responsibility to educate himself as to what he was authorizing when he consented to the IEP. The District provided Guardian with a full copy of the May 2011 IEP. Guardian's testimony

that he only received the signature page was not credible in light of the persuasive testimony of Ms. Young. Ms. Young sent the entire May 2011 IEP, along with the newly deleted BSP home with Student three times. The first two times, the IEP was sent home to obtain Guardian's signatures. Guardian provided his consent to the IEP and Student returned it to Ms. Young. She returned it home the second time to obtain Guardian's signature consenting to the excusal of an IEP team member. Student again returned the IEP packet to school. The third and final time, Ms. Young sent the complete, fully executed IEP home for Guardian to retain a full copy.

35. The May 2011 IEP notes document the team's determination that Student no longer required the support of the BSP due to his improved behaviors for the past year. As set forth in Legal Conclusions 28-29 and 32-33, and Factual Findings 39-41, 44-45, and 54-55, the District had sound educational reasons for removing the BSP. The "snapshot" of information available to the IEP team in May of 2011 was that Student had not required the support of his BSP for an entire year. Student failed to produce any evidence that the District failed to appropriately address any behavior issues. Even though Student was not involved in any disciplinary incidents during the 2010-2011 SY, the IEP team agreed to add two behavioral goals to assist Student and preserve a portion of his BSP as a safeguard. The District was not obligated to continue to provide a service that was included in a prior year's IEP if the IEP team determined that the service was no longer required to provide a FAPE. The team appropriately addressed Student's needs, provided Guardian with full information as to what was proposed, and Guardian provided his consent. Accordingly, Student failed to meet his burden of proof in regards to this issue.

## REMEDIES

36. ALJ's have broad latitude to fashion equitable remedies appropriate for a denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1996) 471 U.S.

359, 369-370.) School districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a free appropriate public education. (*Student W. v. Puyallup School District*, (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Ibid.*) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

37. Staff training is an appropriate remedy; the IDEA does not require compensatory education services to be awarded directly to a student. An order providing appropriate relief in light of the purposes of the IDEA may include an award of school district staff training regarding the area of the law in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Park, supra*, 464 F.3d 1025, 1034; *Parents v. Reed Union Sch. Dist.* (Jan. 23, 2009) Cal.Ofc.Admin.Hrngs. Case No. 2008080580 [requiring training on predetermination and parental participation in IEP’s]; *San Diego Unified Sch. Dist.* (Cal. SEA 2005) 42 IDELR 249 [105 LRP 5069] [requiring training regarding pupil’s medical condition and unique needs]; *Portland Pub. Sch. Dist.* (Or. SEA 2005) 44 IDELR 143 [105 LRP 32230] [requiring training for staff involved in implementing IEP’s].)

38. Based on Legal Conclusions 36-37 and Factual Findings 56-58, Student did not request nor provide evidence in support of an individualized award for compensatory education. An appropriate order of relief may include district staff training in areas of deficits. As determined by the United States Supreme Court,

“Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard.” (*Rowley, supra*, 458 U.S. at 205-206.). The District’s failure to timely complete Student’s MD IEP team meeting is a serious matter. The program specialist admitted that due to the number of children on her case load, she cannot possibly oversee all processes. The District has an obligation to Student to ensure that its staff are fully trained and in a position to adhere to the strict timelines in convening IEP team meetings and MD team meetings, and ensuring that the rights of Student are protected during disciplinary actions and decisions effectuating a change in placement. The District is hereby ordered to provide, within 120 days of this decision a district-wide training to all relevant special education staff, on the importance of and requirements for the timely convening of IEP team meetings and MD team meetings, and to develop a written protocol to ensure the timely completion of IEP team meetings and MD team meetings. Within 30 days of completion of said training and development of the protocol, the District shall forward proof of its compliance with this order to Guardian.

## ORDER

1. District is ordered to provide, within 120 days of this decision, a district-wide training to all relevant special education staff, on the importance of and requirements for the timely convening of IEP team meetings and MD team meetings, and to develop a written protocol to ensure the timely completion of IEP team meetings and MD team meetings.

2. Within 30 days of completion of said training and development of a written protocol, the District shall forward proof of its compliance with this order to Guardian.

3. All other claims of relief for Student are 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. The Student prevailed as to Issue Two. The District prevailed as to Issues Three and Four.

## NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: July 26, 2012

\_\_\_\_\_/s/  
Theresa Ravandi  
Administrative Law Judge  
Office of Administrative Hearings