

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

In the Matter of:

STUDENT,

Petitioner,

v.

BUENA PARK ELEMENTARY SCHOOL  
DISTRICT,

Respondent.

OAH CASE NO. N 2005100530

DECISION

Keith J. Kirchubel, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division (OAH), heard this matter on June 20-23 and July 5, 2006, in Buena Park, California. Student's due process request was filed with the Special Education Hearing Office (SEHO) on April 15, 2004.

Petitioner Student (Student) was represented by Andrea Marcus of the Law Offices of Andrea Marcus.

Respondent Buena Park Elementary School District (District) was represented by Karen Gilyard of the law firm of Atkinson, Andelson, Loya, Ruud and Romo.

Oral and documentary evidence were received. The parties agreed to simultaneously submit closing briefs. The briefs were filed with the OAH on July 21, 2006.<sup>1</sup>

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<sup>1</sup> Student's 23 page closing brief included nine pages of single-spaced text despite counsel having been ordered to submit no more than 25 pages of double-spaced text. Accordingly, the brief was substantially overlength. On July 24, 2006, Student's counsel submitted a longer brief with 13 substantive changes not included in her original brief

## ISSUES

Student's due process hearing request identifies three issues with corresponding requests for relief. Because the issues identified in the Complaint substantially overlap, the ALJ has recast the issues to be resolved as follows:

1. Did the District fail in its duty to identify Student as eligible for special education and related services (Child Find) during the time period April 15, 2001, through November 18, 2003?
2. Did the District assess Student in all areas of suspected disability?
3. Did the District provide Student with a Free Appropriate Public Education (FAPE) in the least restrictive environment during the period April 15, 2001, through June 15, 2005?

## CONTENTIONS OF THE PARTIES

Student contended that the District failed in its duty to identify him as eligible for special education and related services prior to February 2004. In particular, Student maintained that his poor behavior and declining academic performance in third and fourth grade triggered the District's obligation to assess him for special education eligibility. Once the District commenced assessment of Student following a request from his mother in November 2003, Student contended that he was not properly assessed in all areas of suspected disability, that District assessors were not qualified, and that the administration of District assessments was flawed and produced inaccurate results. Student sought outside assessments and contended that his mother is entitled to reimbursement of expenses she

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because she neglected to review a hardcopy of the original brief until July 22, 2006, the day after it was filed. These defects notwithstanding, Student's closing brief was considered by the ALJ. Finally, Student's counsel attached a document as an appendix to the brief that was not admitted as evidence during the hearing. The appendix to the brief was therefore not considered.

incurred as a result. Lastly, Student contended that the educational program offered to him by the District denied him a FAPE for the time period covered by the Complaint.

The District contended that it complied with all Child Find obligations. It maintained that Student's performance in third and fourth grades did not warrant referral for assessment. Once assessment was requested by Student's mother, the District contended that it conducted appropriate and timely assessments that produced valid and accurate results. The District contended that it offered Student a program that constituted a FAPE in the least restrictive environment.

## FINDINGS OF FACT

1. Student is a thirteen-year-old male who resided with his mother within the boundaries of the District during the 2001-2002, 2002-2003, 2003-2004, and 2004-2005 school years. He was first determined to be eligible for special education and related services in February 2004, in the category of specific learning disability in the area of written expression. His primary eligibility was later determined to be in the category of other health impaired based on a diagnosis of attention deficit hyperactivity disorder (ADHD) in March 2004.

### THE DISTRICT'S CONTINUOUS CHILD-FIND SYSTEM

2. The District has established written policies and procedures for initiating a referral for special education, also termed the District's "child-find" obligation. Every year the District sends written notices to all parents of children enrolled in District schools; the notices describe the parents' rights and the process for obtaining a special education referral. The Orange County Office of Education, in cooperation with the District, also posts a notice regarding special education eligibility in several newspapers with circulation in the local area. The District makes pamphlets available in school offices explaining special education eligibility. General education and special education Teachers, administrators, and

other special education staff receive training regarding the special education referral process each fall.

3. Pursuant to District policy, a pupil may be referred for special education as a result of a parent's request for assessment or the recommendation of District staff. A District recommendation may be based on lack of adequate academic progress measured by standardized testing or persistent behavior problems, including defiance toward adults or confrontations with other children. If a teacher is unable to satisfactorily correct academic or behavioral problems through interventions in the classroom, then the matter is taken to the Student Intervention Team (SIT) at each school site.

4. The SIT comprises teacher representatives from different grade levels, an administrator, special education staff, and a school nurse where necessary. The purpose of the SIT is to brainstorm possible interventions and solutions in response to the reported problems. The SIT may also trigger an evaluation for special education. At no time relevant to this matter was Student referred to the SIT by District personnel.

#### CHILD-FIND DURING THE 2001-2002 SCHOOL YEAR

5. During the 2001-2002 academic year, Student was enrolled in third grade at the District's Beatty Elementary School. Student was first assigned to Ms. Chung's third grade class, but transferred to Ms. Fuson's class and then ultimately to Ms. Long's class all within the first two months of the school year. Ms. Eva Long reviewed Student's scores on assessments administered by Ms. Chung at the beginning of the school year. Student performed higher than average in mathematics and reading.

6. Student kept pace with the curriculum in Ms. Long's third grade class. He performed above average in mathematics and well above average in reading. Student's third grade progress report further evidences his average to above-average performance across the curriculum. Student learned in Ms. Long's class. She did not refer Student to the SIT because she was not concerned with his academic performance.

7. Student's behavior in third grade was more problematic. Student occasionally had trouble getting along with other children, playing fairly, keeping his hands to himself, and engaging in name-calling. Student's behavior was disruptive to the class approximately once or twice per day, but Ms. Long determined that Student's behavior was not negatively impacting his ability to learn. Student respected Ms. Long's authority and refocused on the task at-hand at her direction. Accordingly, she did not refer Student to the SIT based on his behavior.

8. Student's mother and Ms. Long spoke with each other frequently during the year regarding Student's performance at school, including his distractibility and other behavioral issues. Student's mother formed a very positive view of Ms. Long and her efforts to assist Student in the curriculum. Student's mother never requested a special education assessment during the 2001-2002 school year.

9. Student failed to establish that the District had a duty to initiate a referral for special education and related services during his third grade year. Although Student exhibited the behavioral problems described above, he performed at grade level and advanced to the fourth grade on the unanimous recommendation of his third grade teachers without the need for special education and related services.

#### CHILD-FIND DURING THE 2002-2003 SCHOOL YEAR

10. During the 2002-2003 academic year, Student was enrolled in fourth grade at the District's Beatty Elementary School. Student was first assigned to Ms. Laura Rexford's<sup>2</sup> class but was subsequently transferred to Mr. Karl Hermreck's class in October or November. Based on standardized assessments, Student was initially placed in a high-level mathematics class and a mid-level language arts class for a portion of the school day as

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<sup>2</sup> Due to a subsequent marriage, Ms. Rexford's name has changed to Laura Uruburu. In order to maintain consistency with references to Student's educational records, Ms. Uruburu will be referred to herein as Ms. Rexford.

part of the District's curriculum leveling program. Ms. Rexford established that a general education classroom setting was appropriate for student as he was capable of participating in class and answering questions correctly when he was motivated to do so.

11. Student's mother observed that Student developed a personality conflict with Ms. Rexford that interfered with his education. Student started to hate school during fourth grade. Ms. Rexford described Student as defiant, disrespectful and disruptive to the class. She established that Student's behavior adversely affected his ability to learn. Student did not respond to Ms. Rexford's rules for classroom discipline. His performance in math, reading and writing all declined in Ms. Rexford's class. Subsequently, Student's poor math performance resulted in him being moved down to the mid-level math placement.

12. At the request of Student's mother, Student was transferred to Mr. Hermreck's combination fourth/fifth grade class for the remainder of the 2002-03 school year. Student responded positively to his placement in Mr. Hermreck's class. Student's performance started getting better after the transfer. Mr. Hermreck made sure that Student kept busy and involved Student in the class in ways that made him feel successful. Student completed over ninety percent of his assignments at or slightly below his grade level. He and Mr. Hermreck enjoyed a good interaction and Student's behavior, though occasionally disruptive, did not stand out as inappropriate. Mr. Hermreck was able to state objectives clearly to Student and Student responded in a positive manner.

13. Multiple witnesses established that Student's lack of effort was a concern during class time and also during various assessments. During the early portion of Student's fourth grade year, he would routinely fail to complete assignments or deliberately cross-out the assignment with a large "X" without completing any of the required information. Student openly challenged Ms. Rexford's authority, calling her a "liar" in class in the presence of other students. This same conduct was not manifested in Mr. Hermreck's class. Accordingly, without the benefit of hindsight, Student's lack of effort and poor academic performance in Ms. Rexford's class could have been reasonably attributed to his near-complete dissatisfaction with her as a teacher.

14. Mr. Hermreck determined that Student made progress in the fourth grade curriculum despite the fact that some of Student's progress report marks are lower in the third trimester as compared to the second. Taking Social Studies as an example, he attributed Student's lower scores toward the end of the year to the increased complexity of the material presented. Student's mother opined that Student had made no progress in fourth grade based on her review of standardized test results from the end of the year.

15. Although District Psychologist Dr. Judy Proctor Lemen's Multidisciplinary Assessment Report summarizes Student's performance on standardized tests during his fourth grade as reflecting "basic proficiency," this conclusion is not borne out by the scores reported on the corresponding progress report. Student's STAR test reading level was rated at a grade equivalent of 3.9, 2.5, and 1.5 in the first, second and third trimesters respectively. The latter two scores are below proficiency. These scores are inconsistent with Mr. Hermreck's progress report ratings of Student's reading skills as largely proficient or basic proficient.<sup>3</sup> Each of Student's reported Standards Master scores in math and language arts were also flagged as below proficiency.

16. Student failed to establish that the District had a duty to initiate a referral for special education during his fourth grade year. While he did not consistently perform at grade level academically and his behavior was a significant problem during his time in Ms. Rexford's class, Student demonstrated progress in both areas after transferring to Mr. Hermreck's class. The evidence adduced at hearing created a clear inference that Student's poor performance was primarily attributable to his conflict with Ms. Rexford. After Student changed teachers, Mr. Hermreck never felt that referral to the SIT team was warranted and Student's mother never requested an assessment for special education during the year.

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<sup>3</sup> Student's mother also testified that reading was an area of relative strength during his fourth grade year.

## THE 2003-2004 SCHOOL YEAR

17. During the 2003-2004 academic year, Student was enrolled in fifth grade at the District's Pendleton Elementary School. Student was assigned to Ms. Charlene Ball's class. Student's inconsistent academic performance continued and his poor behavior persisted. Ms. Ball recorded Student as being proficient or basic proficient in reading, writing, spelling, social studies and science/health throughout fifth grade. His standardized test scores also rebounded to proficient levels in reading and writing, math, and overall language arts in the fall trimester. Ms. Ball noted that Student grew in his understanding of math concepts during the fall trimester, but made little progress throughout the year as a whole. In the spring, his overall Standards Master math and language arts scores were rated below proficient.

18. Ms. Ball characterized Student as very serious and found him to be alternately defiant and helpful. Student treated Ms. Ball with disrespect and frequently disrupted the class. He had difficulty staying on task, spoke out of turn, and did not get along well with others in the class. Student's behavior prevented him from being productive in class. Ms. Ball and Student's mother corresponded regularly by email and the mother described her as an outstanding teacher.

19. Ms. Ball attempted interventions to address Student's behavior including modified seating arrangements, closer physical proximity between Ms. Ball and Student, discussions regarding inappropriate behavior and implementation of a behavior contract. These strategies were ineffective and Ms. Ball began the process of referring Student to the SIT in November of 2004. She did not continue that process after his mother requested a special education assessment. Ms. Ball concurred with Student's mother that assessment was appropriate.

20. Student's mother requested that he be assessed for special education in a letter dated November 18, 2003. The letter sought assessment in all areas of suspected disability, including the disciplines of psycho-education, speech and language, audiometrics

(auditory processing) and behavior. On December 1, 2003, the District proposed an assessment plan in response to parent's request. Student's mother consented to the initial assessment plan on December 15, 2003. As detailed below, the process of assessing Student in the areas of academic achievement, social/adaptive behavior, perceptual motor, language/speech/communication development, vision and hearing screening began in January, 2004. Parent's request for assessment terminated the District's duties regarding child-find.

21. Student failed to establish that the District had a duty to initiate a referral for special education prior to November 18, 2003. Student's academic performance was substantially proficient, but his poor behavior caused Ms. Ball to pursue a referral to the SIT as a first step pursuant to the District's systematic Child Find system. Ms. Ball's decision to initiate the SIT process was an appropriate response to Student's classroom behavior.

22. Following completion of the initial assessments and review of the results, the District drafted subsequent assessment plans on February 26, 2004, (occupational therapy) and March 10, 2004, (assistive technology). Student's mother consented to the implementation of these plans on February 26, 2004, and March 17, 2004, respectively. The District's assessment of Student and consideration of the results in the IEP process are discussed below beginning with Factual Finding 27.

23. No special education services were implemented for Student during his fifth grade year. Ms. Ball recommended that Student be advanced to sixth grade based on his academic progress in selective areas and the fact that he was never placed on the District's "at-risk" list. Children are placed on the list if their performance on the District's Standards Master fall assessment is below 30 percent, indicating that they may not be promoted.

#### THE 2004-2005 SCHOOL YEAR

24. During the 2004-2005 academic year, Student was enrolled in sixth grade at the District's Pendleton Elementary School. Student was assigned to Ms. Natalie Phillips' class. Ms. Phillips established that Student made steady academic progress throughout the

year although no special education services had been implemented based on the assessments from the prior academic year. Student achieved grade level scores on the reading skills portion of the California STAR test. His scores on the math, writing and language arts portions of the District's Standards Master were within the proficient range in the spring, although the math and writing scores for the fall test administration were below proficient. The grades assigned by Ms. Phillips were primarily in the proficient and basic proficient range. Student achieved advanced marks in spelling, word analysis, and vocabulary development and below proficient marks in reading fluency, selected math concepts, and third trimester science/health.

25. Student's behavior during sixth grade was characterized by distractibility, continued disrespect toward his teacher and his peers, difficulty following directions, speaking out without raising his hand, and use of inappropriate language. His behavior was disruptive and interfered with Ms. Phillips' ability to teach Student and other children in the class. The poor behavior he exhibited was not necessarily associated with reading or writing assignments. Ms. Phillips considered Student's misbehavior to be caused by a defiant attitude, not a failure to understand her instructions. However, Ms. Phillips established that Student's behavior was manageable. She employed a variety of corrective techniques with temporary success.

26. Although Student was resistant to writing tasks, he completed eighty-to-ninety percent of his writing assignments in class. Student performed at grade level on approximately seventy percent of these assignments. Ms. Phillips established that Student's writing was in the upper portion of the class when evaluated on a curve.

#### ASSESSMENT OF STUDENT FOR SPECIAL EDUCATION ELIGIBILITY

27. The District commenced its assessment of Student on January 13, 2004. On that date, Student received hearing and vision screening. Student passed the pure tone hearing test for both left and right sides. He also passed his vision test.

28. On January 15, January 16, January 21 and February 4, 2004, District psychologist Judy Lemen, Ph.D., administered a battery of standardized assessments including the Wide Range Assessment of Memory and Learning (WRAML), Test of Visual Perceptual Skills non-motor Revised (TVPS-NM-R), Beery Buktenica Developmental Test of Visual-Motor Integration (VMI), Children's Depression Inventory (CDI), and Test of Written Language (TOWL). Dr. Lemen noted that Student often looked away during administration of the tests during the first three sessions and seemed reluctant to provide responses during the first two sessions. During the fourth session, Student again exhibited an uncooperative attitude and Dr. Lemen modified the standardized test procedures on one subtest of the TOWL.

29. Student scored in the very low range of the VMI, which evaluates the ability to coordinate visual input and motor output. Student scored in the average range for many of the subcategories of the TVPS-R, but showed relative weakness with low average scores in the areas of visual discrimination (identification of forms) and visual closure (ability to determine a whole form from incomplete parts). Student's performance on the TOWL was affected by his distress in approaching the writing tasks in the "style" portion and Dr. Lemen's subsequent modification of the administration procedures. With this in mind, Student's poor performance nevertheless indicated that writing was an area of relative weakness for him.

30. Dr. Lemen's testimony regarding the validity of the testing she administered was found to be credible. She exercised her professional judgment in adjusting the protocol for administration of one subtest of the assessments and advised caution in the interpretation of selected results based on her observations of Student's disengagement during the process. Dr. Lemen established that she knew and followed the proper protocols for administration across the battery of assessments conducted in the areas of visual-motor integration, visual perceptual skills, written language, behavior, memory and learning. Contrary to Petitioner's contention, the accuracy and reliability of the test results were not adversely affected by the manner in which the assessments were given.

31. On January 26, 2004, District Resource Specialist Sandra Sellers administered two additional standardized academic assessments: the Woodcock-Johnson III (WJ-III) and the Wide Range Achievement Test 3 (WRAT-3). Ms. Sellers noted that Student was cooperative and appeared to try his best during the testing. Student's scores all fell within the average range meaning that he performed as most regular education children would on these tests. Student's performance on these tests did not reveal any significant discrepancy or deficit between his ability and his achievement.

32. On January 28 and February 5, 2004, District Speech and Language Specialist Hannah Morgan administered the following assessments: selected subtests of the WORD Test – Revised, the Test of Auditory-Perceptual Skills – Revised (TAPS-R), the Listening Test and vocabulary lists and teacher check lists from *Multicultural Students with Special Language Needs* (Roseberry-McKibbon). Ms. Morgan reported that Student was respectful, cooperative and attentive during the testing sessions. Student performed in the average to high average ranges on most of the listed assessments, with low average scores in three of the sixteen total categories.

33. Ms. Morgan holds a bachelor's degree in Speech and Language Pathology and holds a California credential in special education. She had administered the subject tests more than 100 times prior to her assessment of Student and established the validity of the results. Ms. Morgan also established that the results did not qualify Student for the speech/language program because his speech and language skills appeared to be within normal limits.

34. Ms. Morgan understood the high co-morbidity of ADHD and auditory processing disorders (APD). She also understood that she was not qualified to diagnose an APD. Given that this information and knowledge of Student's distractibility and difficulty with following instructions was available to the District and that Student's mother had requested assessment in the area of auditory processing, the District was obligated to conduct such an assessment in this area of suspected disability. At no time relevant to this matter did the District provide an auditory processing assessment by a licensed audiologist.

35. The results of these various tests were compiled into a Multidisciplinary Assessment Report (MAR). The MAR was presented at an Individualized Education Program (IEP) meeting convened for Student on February 20, 2004. Student's mother attended and was provided with a document setting forth her parental rights. She informed the other IEP team members that Student had recently been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Dr. Lemen summarized the findings of the MAR as indicating problems with behavior, delayed learning, memory and sensory-motor skills, and low-average visual perceptual skills. The meeting adjourned due to time constraints.

36. On February 26, 2004, the IEP team reconvened to continue the discussion of Student's assessment results. Student's regular education teacher, Ms. Ball, reported that he occasionally has difficulty copying from the board and taking notes in class. Ms. Morgan reported that Student tends to be distracted by auditory stimuli. His mother requested additional assessments in the areas of occupational therapy and assistive technology. The IEP team concluded that Student qualifies for special education services in the category of specific learning disability in written expression. Ms. Sellers proposed goals and objectives related to written language and behavior and specifying supplementary strategies and modifications to support Student's educational program. Student's mother did not consent to implementation of the IEP developed at the meeting.

37. On March 4, 2004, the IEP team reconvened and further discussed Student's assessment results. The team concluded that Student's eligibility would be more accurately described as other health impaired based on his ADHD diagnosis. The team concluded that Student did not meet the criteria for severe emotional disturbance. The team signed a statement regarding Student's eligibility for special education. Student's behavioral problems were discussed and Ms. Laura G. Beach, Program Specialist with North Orange County SELPA, raised the need for a structured classroom environment and a range of strategies to address his ADHD symptoms. Ms Ball stated that Student benefited from direct attention focused on him by the teacher. Student's mother declined the offer of behavioral counseling raised at the prior meeting. The team revised goals and objectives related to

language and on-task behavior. The team also approved a referral for assessment of Student's motor functioning by an occupational therapist. Student's mother did not consent to the implementation of the IEP developed at the meeting.

38. On March 29, 2004, Student's visual processing and perceptual skills were evaluated by C. Gene Wilkins, O.D. Dr. Wilkins did not testify at the hearing and no other witness explained the assessment methodologies he employed or the results he obtained. During the testimony of occupational therapist Ms. Lisa Swikart, counsel for Student attempted to establish that administration of the VMI assessment is invalid if conducted within six months to one year after a previous administration. Ms. Swikart and Dr. Lemen established that repetition of an assessment within a short period of time might yield invalid results because the test subject develops familiarity with the content. In this regard, it is significant that Dr. Wilkins administered the VMI to Student only 73 days after Dr. Lemen had administered.<sup>4</sup> For the foregoing reasons, the Wilkins findings are entitled to less weight than other evidence.

#### IDENTIFICATION OF SPECIAL EDUCATION PLACEMENT AND RELATED SERVICES

39. On March 31, 2004, the IEP team created a detailed statement of Student's present levels of performance, revised and expanded the proposed goals and objectives, and included additional appropriate modifications and accommodations. Student's mother agreed that the PLP's contained accurate information but she felt they omitted some of Student's needs. The team agreed that additional information from further assessments would be considered at future IEP meetings. The first goal addressed paragraph composition with correct spelling capitalization and punctuation supported by assistive technology (alphasmart) and small group instruction. This goal was specifically tailored to Student's unique needs in the areas of written expression and distractibility. The second

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<sup>4</sup> Dr. Wilkins also re-administered the TVPS-R to Student 67 days after he had completed that assessment with Dr. Lemen.

goal addressed the vocational skill of staying on-task supported by close proximity to the instructor, verbal reminders and positive reinforcement. The third goal further addressed the vocational skill of completing work independently with minimal prompts. To support this goal, Student would receive verbal redirection, peer modeling, small group instruction, and a quiet location as needed. The fourth goal addressed Student's social and emotional needs by focusing on increasing appropriate responses to peer conflict. The goal was to be implemented through small group instruction regarding environmental triggers to peer conflict and conflict management strategies, positive reinforcement, verbal praise and allowing Student to help in the speech room. These strategies were directly responsive to concerns expressed by Student's mother that his behavioral problems were caused by environmental factors and that he benefits from situations where he can help with other children. Student's mother did not consent to the implementation of the IEP developed at the meeting.

40. On April 15 and April 30, 2004, Student was assessed for assistive technology needs by Orange County Department of Education's Maria Straith. Ms. Straith has a bachelor's degree in vision and holds multiple subject and special education (visual handicap) credentials. She is certified as a resource specialist and as an assistive technology specialist and has been consulting in the field since 1999. Ms. Straith administered the Lifespace Access Profile (LAP), a criterion-referenced assessment, to Student. She noted that he was cooperative during the process. Student passed the vision and hearing screening portions of the assessment. Ms. Straith focused on Student's needs in the area of writing, distractibility and organization of his work. Student did not exhibit touch-typing skills, but was able to use a computer keyboard and mouse effectively. Accordingly, Ms. Straith recommended keyboard training and use of an alphasmart for use with writing assignments. Ms. Straith also recommended use of a graphical organizer to assist Student with written expression and motivation and attention. With regard to Student's distractibility and visual processing needs, Ms. Straith recommended use of colored overlays and methods to block information into pieces to enhance his ability to focus.

Lastly, Ms. Straith suggested use of books on tape to provide stimulus beyond visual. She stated that these strategies were valid for Student based on her experience, but that some trial and error would be necessary to arrive at the most appropriate solutions for Student's needs.

41. On May 20, 2004, Student motor skills were evaluated by Ms. Lisa Swikart. Ms. Swikart holds a master's degree in occupational therapy and board certification in California. Ms. Swikart observed Student in his class and conducted a variety of assessments and observations in her office. She verified that Student has a physical anomaly in that he is missing the distal interphalangeal joints on the index and middle fingers of both hands. This condition deprives him of flexibility in the tips of those fingers and affects his fine-motor skills, including his pencil grip. However, Student has developed a variety of compensations to enable him to function adequately despite this anomaly. Ms. Swikart concluded that Student did not require occupational therapy services, and Student's retained psychologist, Dr. Robert Patterson, concurred. Additionally, both Ms. Straith and the specialist retained by Student, Stanley Tom, concluded that none of the occupational therapy findings impacted their conclusions regarding Student's assistive technology needs.

42. On May 27, 2004, Student was evaluated by Carol J. Atkins, clinical audiologist. Ms. Atkins noted that Student was restless during the testing and required some modification of the test protocols to encourage him to continue. Student's hearing was confirmed to be within the range of normal limits bilaterally. The other assessments conducted by Ms. Atkins revealed Student's various strengths and weaknesses in auditory processing. For example, Student's high scores on the Random Gap Detection test suggested that he was able to process speech that is spoken rapidly and to hear complex combinations. Ms. Atkins documented his scores on the Staggered Spondaic Word test as being better than the published national limit in the aggregate, though selective subtest scores were more than 2 standard deviations below the mean. For those areas, Student's performance indicated difficulty with sequential memory functions. Ms. Atkins was unable to state conclusively that her findings regarding binaural fusion actually impacted Student's

education. Student's performance on the SCAN-C assessment was also varied but led Ms. Atkins to conclude that he has trouble with filtered words and background noise.

43. Ms. Atkins diagnosed Student with an auditory processing disorder with features of three separate areas. A decoding deficit is characterized by poor auditory discrimination and closure leading to difficulty with note-taking, spelling and following directions. An integration deficit is characterized by poor speech-in-noise skills and memory deficits leading to difficulty extracting key information or synthesizing multiple pieces of information. Students with integration deficits require extra time to complete work. An organizational deficit results in difficulty with reversals and temporal sequencing leading to problems following directions and remembering assignments. With the exception of spelling, Student actually exhibited the problems characteristic of these diagnoses during. Ms. Atkins recommended a number of strategies to address these problems, many of which were intended for implementation away from school. Ultimately, Ms. Atkins provided input into Student's goals and objectives and modifications/accommodations and concurred that they were appropriate for his auditory processing needs.

44. Ms. Atkins established that Student's mother paid for all of her time that went into the assessment, but she did not quantify the amount of time, her rate, or any amount actually paid by Student's parent(s).

45. On June 17 and June 21, 2004, Student was evaluated by Julie Berg Ryan, O.D. Dr. Ryan is a licensed optometrist in California, a diplomate in binocular vision and board certified in vision development. She determined that Student has visual processing deficits in the areas of fixation (ability to move eyes quickly and accurately from point to point), letter reversals, and visual-motor integration and speed. The latter deficit adversely affected Student's ability to copy sentences and math problems with proper organization, causing him to misalign numbers, for example. Dr. Ryan recommended a program of vision therapy and a series of classroom accommodations to aid Student's performance at school.

46. On July 2, 2004, the results of the assistive technology and occupational therapy assessments were presented to the IEP team. The reports by Dr. Wilkins, Ms Atkins,

and Dr. Ryan were presented to the team. No new goals and objectives were proposed. However, the District consented to the request of Student's mother to provide one-to-one resource support to Student in his regular education classroom. The parent did not consent to implementation of any other aspect of the District's offered program.

47. The District attempted to schedule further IEP meetings during August and September 2004, but Student's parent was not available. The mother requested a meeting on October 14, 2004, that was eventually held on October 18, 2004, but she did not attend because she was not available. The team incorporated the assistive technology recommendations into Student's listed supplemental strategies and modifications. Members of the IEP team present on October 18, 2004, also reviewed the private assessments by Dr. Wilkins, Ms. Atkins, and Dr. Ryan.

48. The private assessments were reviewed on October 18, 2004, by Ms. Stacy Tolkin-Gillis, a credentialed school psychologist with seven years experience in the District during which time she evaluated approximately 100 students per year for special education eligibility in the category of specific learning disability, including auditory processing, visual processing, attention and sensory-motor deficits. The review by Ms. Tokin-Gillis revealed discrepancies between the Wilkins and Ryan reports in the areas of distance acuity, fusion and processing speed. She disagreed with the recommendations for vision therapy on the basis that less-restrictive modifications or accommodations might succeed for Student and should be tried first. Other recommendations for classroom modifications, including minimizing copying from the chalkboard, reducing the visual field for visually complex paperwork, and highlighting visually relevant information were added to the strategies in Student's IEP document. Ms. Tolkin-Gillis also focused on Student's difficulty with attention as common to all of the assessments. Throughout the course of the hearing, multiple witnesses established a high co-morbidity of attention deficit disorders and deficits in auditory and visual processing.

49. On October 18, 2004, the IEP team also reviewed the audiological assessment by Ms. Atkins with the assistance of Ms. Fluer-de-Lis Arceta, District speech and language

specialist. She confirmed that Student has difficulty filtering out background noise in order to focus on a single auditory stimulus, needs additional time to process auditory information, and may require repetition of auditorily presented directions or prompts to get started on his work. The IEP team adopted the recommendations for modifications to Student's classroom setting and Ms. Arceta committed to provide support and training to Student's teachers for implementation of the program components.

50. In addition to the assistive technologies adopted to support Student's goals and objectives, the IEP team drafted a comprehensive list of accommodations and modifications on October 18, 2004, for implementation in Student's overall education program as follows:

- Create close proximity between Student's desk and his teacher
- Teacher to stand near student and make eye contact when giving direction
- Avoid distracting visual and auditory stimuli
- Provide of supplementary instructional materials (highlight reversals)
- Permit Student to use audio, visual and computer equipment
- Repeat directions to make sure they are understood
- Have Student review key points orally
- Teach through multi-sensory modes
- Provide visual aides and reduce visual distractions
- Provide mnemonic aides
- Provide a written outline of lesson and minimize chalkboard copying
- Give extra time on assignments and exams
- Simplify complex directing
- Praise specific positive behaviors
- Cue Student to stay on task with non-verbal signals and positive affirmation
- Provide in-service to teachers on Student's disability

51. The combination of placement, services and accommodations set forth in the IEP document created at the October 18, 2004 meeting were appropriate to Student's

unique needs. Student's mother did not consent to the implementation of the program described above.

52. On October 20, 2004, Student's parent and the District agreed to implement three goals and objectives set forth in the March 31, 2004 IEP as well as 60 minutes per day of "push-in" resource specialist support for the period October 25, 2004, through the end of the 2004-2005 school year.

53. On November 24 and December 2, 2004, Student was evaluated by Stanley Tom, Student's retained assistive technology (AT) specialist. Mr. Tom holds bachelor's and masters degrees in geography. He completed 40 to 60 hours of coursework and fieldwork in AT during 2004 and received a certificate in that field from CSU Northridge in 2005. Mr. Tom's assessment of Student consisted of reviewing the District's AT and occupational therapy reports and observing Student perform a variety of tasks using selected assistive devices and computer software. Mr. Tom consulted with an occupational therapist employed in his office regarding Student's fingers and concluded that the lack of distal interphalangeal joints on four fingers did not affect his AT findings. Mr. Tom did not disagree with the findings of Ms. Straith's AT report, though he considered them to be relatively "low-tech" in comparison to his own. In particular, Mr. Tom recommended use of a computer-run visual focusing system known as WYNN, whereas the District's AT recommendation proposed a manual system for the same purpose. Mr. Tom agreed that AT frequently involves a trial- and-error approach. By way of example, both Mr. Tom and Ms. Straith recommended use of an alphasmart keyboard to address Student's problems with and aversion to writing tasks. However, Student's retained education psychologist, Dr. Patterson, opined in no uncertain terms that an alphasmart was not appropriate for Student. The District offered to provide an alphasmart as early as February 26, 2004, but only experience would reveal whether Student actually benefited from it. With respect to the District's offer of lower technology AT solutions, this was reasonable as a first step to determine if Student could succeed with these measures. Dr. Patterson also specifically endorsed this approach and opined that there was nothing inherently wrong about solving

a problem with a low technology solution. There was no evidence that the District refused to consider more complex or more costly options if its initial approach did not achieve desired results.

54. Student was evaluated by Robert Patterson, Psy.D., on September 15 and December 16, 2004. Dr. Patterson established his extensive background and expertise in childhood education and psychology. He conducted multiple standardized assessments of Student, including repetition of the TOWL and WJ-III. Dr. Patterson opined that significant findings were derived from Student's performances on the Peabody Individual Achievement Test-Revised (PIAT-R), the Motor-Free Visual Perception Test-3 (MVPT-3)<sup>5</sup> and the Conners' Parent Rating Scale-Revised (Conners). Dr. Patterson agreed in principle with the findings of the MAR, but opined that his battery of assessments revealed more detail about the extent of Student's deficits, particularly in the area of writing. He also agreed with the description of Student's unique needs in the MAR, but disagreed with some of the interpretations of the causes stated in the MAR. Dr. Patterson did not comment on the appropriateness of the educational program set forth in the October 18, 2004, IEP. He did opine that the issue of compensatory education in Student's case is difficult because any damage to Student was, in his words, speculative. Dr. Patterson did not agree with Student's counsel that the Prentice School was necessarily an appropriate placement for Student because the amount of redundancy tailored to dyslexia (which Student did not exhibit) might be frustrating to him. Dr. Patterson offered no specific recommendation regarding compensatory education. With regard to assistive technology, Dr. Patterson identified a number of devices that varied from those recommended by Mr. Tom and Ms. Straith, but endorsed the idea of trial-and-error as described above.

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<sup>5</sup> Dr. Patterson noted that Student was familiar with a number of the forms used in this test due to his having been tested in this area previously a number of times. Dr. Patterson did not say whether this fact invalidated the results in his opinion.

55. On March 15, 2005, the IEP team reconvened to discuss the findings of Dr. Patterson. Dr. Patterson was present and provided a detailed account of his assessments and the results. The team discussion focused largely on Student's behavior. Student's mother, through counsel, requested that the District assess Student's behavior specifically using a functional analysis assessment (FAA).<sup>6</sup> The evidence established that Student's behavior impeded his learning and that of his classmates and the District agreed to conduct a behavior analysis. The IEP team also discussed Student's recent classroom performance, noting that he preferred to address questions to his teacher, rather than the resource specialist when she was present in the classroom. The team decided to permit Student to access resource services in the resource room.

56. On April 26, 2005, the IEP team met to receive input from Ms. Atkins and Dr. Ryan regarding their assessments. Ms. Arceta was present and worked with Ms. Atkins to refine Student's goals and objectives and accommodations related to his auditory processing deficit. Dr. Ryan described Student's progress in vision therapy arranged by his mother and also committed to draft goals and objectives related to his visual processing deficit for use by the IEP team.<sup>7</sup> Student's mother indicated partial consent to the IEP

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<sup>6</sup> An FAA is defined by California Education Code sections 56520 through 56524 and is also referred to as a Hughes Bill assessment. An FAA is required when a student exhibits a "serious behavior problem" defined as "self-injurious, assaultive, or cause serious property damage." (Cal.Code Regs., tit 5, §3001(aa). There is no evidence that Student exhibited a serious behavior problem. By federal law, a functional behavior analysis (FBA), including the use of positive behavior interventions and supports, shall be considered by an IEP team when a student's behavior impedes his learning. (20 U.S.C. §1414(d)(3)(B).)

<sup>7</sup> Dr. Ryan testified that Student was making progress in vision therapy as of June 2005. She has not seen Student since that time and could not state definitively whether he still requires therapy.

document developed at this meeting. Student's mother established that she paid for Dr. Ryan's participation in the IEP meeting, although Dr. Ryan, herself, did not recall participating. Student put on no evidence of the amount of time Dr. Ryan spent on her assessments or discussing her findings with the IEP team. Nor was there any evidence of Dr. Ryan's rate or an amount of money actually paid to her by Student's parent(s).

57. On May 20, 2005, Melody Anton, School Psychologist for the District, transmitted to Student's mother a draft behavior intervention plan as requested. That plan was reviewed by the IEP team at a meeting on May 23, 2005. The team also modified Student's proposed goals and objectives and accommodation plan. Following the meeting, Student's mother signed the IEP document indicating her consent to its implementation, with the exception of the behavior intervention plan. On May 24, 2005, Ms. Anton revised the plan as requested by Student's mother at the IEP team meeting.

58. Prior to the last day of the 2004-2005 school year, student's mother removed him from school. Since that time he has relocated to Oklahoma where he resides now.

## CONCLUSIONS OF LAW

### APPLICABLE LAW

1. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA), and the Individuals with Disabilities in Education Improvement Act of 2004 (IDEIA), children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the State educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1401(8)(IDEA 1997); 20 U.S.C. § 1402(9)(IDEIA 2004).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(25)(IDEA 1997); 20 U.S.C. § 1402(29) (IDEIA 2004).)

2. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, 102 S.Ct. 3034, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

3. The Supreme Court in *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the procedural inadequacies impeded the child's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); see *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

4. The Ninth Circuit Court of Appeal has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

5. Petitioner has the burden of proving at an administrative hearing the essential elements of his claim. (*Schaffer v Weast* (2005) 546 U.S. \_\_\_\_ [126 S.Ct. 528, 163 L.Ed 2d 387].)

6. Special education students must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for

determining whether the student has a disability or an appropriate educational program for the student. (20 U.S.C. § 1414 (a)(2), (3); Ed Code § 56320, subd.(e), (f).) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code § 56320, subd. (a), (b).)

7. If the parent or guardian obtains an independent educational assessment a district is required to consider the assessment. (Ed. Code § 56329, subd. (c).)

8. The IDEA and State law impose an affirmative duty on school districts to ensure that all disabled children who are in need of special education and related services are “identified, located, and evaluated.” (20 U.S.C. § 1412(a)(3); Ed. Code § 56300). Districts are required to establish written policies and procedures for a continuous child-find system. (Ed. Code § 56301.) A district’s duty is not dependent on any request by the parent for special education testing or referral for services. The duty arises with the district’s knowledge of facts tending to establish a suspected disability and the need for IDEA special education services. Under State law, a child may be referred for special education only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code § 56303.)

9. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the district’s proposed program. (*Gregory K. v. Longview School District* (9<sup>th</sup> Cir. 1987) 811 F.2d 1314.) If the school district’s program was designed to address Student’s unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if Student’s parents preferred another program and even if his parents’ preferred program would have resulted in greater educational benefit.

10. School districts are also required to provide each special education student with a program in the least restrictive environment (LRE), with removal from the regular education environment occurring only when the nature or severity of the student’s disabilities is such that education in regular classes with the use of supplementary aids and

services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.550(b); Ed. Code, § 56031.) To the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (*Id.*) The law demonstrates “a strong preference for ‘mainstreaming’ which rises to the level of a rebuttable presumption.” (*Daniel R.R. v. State Board of Education* (5<sup>th</sup> Cir.1989) 874 F.2d 1036, 1044-45; see also *Sacramento City Unified School Dist. v. Rachel H.*, (9<sup>th</sup> Cir. 1994) 14 F.3d 1398, 1404, *cert. denied*, 114 S.Ct. 2679 (1994).)

11. In determining the placement of a child with a disability, each public agency shall ensure that the placement decision is made in conformity with LRE provisions, that the child’s placement is based on the child’s IEP, and that the placement is as close as possible to the child’s home. (34 C.F.R. § 300.552.) The public agency shall also ensure that, unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled. (34 C.F.R. § 300.552(c).)

12. An IEP is a written statement that must be developed, reviewed, and revised for each student with a disability. (34 C.F.R. § 300.340(a); Ed. Code, § 56345.) The IEP must include a statement of the child’s present levels of educational performance, including how the child’s disability affects the child’s involvement and progress in the general curriculum (i.e., the same curriculum as for nondisabled children). The IEP must also include a statement of the goals and short-term objectives/benchmarks, of the special education and related services, and of the program modifications or supports for school personnel that are to be provided to enable the student to be involved in and progress in the general curriculum, and to be educated and participate with disabled and nondisabled peers in extracurricular and other nonacademic activities. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.347; Ed. Code, §§ 56343, 56345.)

13. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider appropriate strategies, including positive behavioral interventions, strategies, and supports to address that behavior. (Ed. Code § 56341.1; 34 C.F.R. § 300.346.)

*Determination of Issue 1.* Did the District fail in its duty to identify Student as eligible for special education and related services (Child Find) during the time period April 15, 2001, through November 18, 2003?

As discussed above, the District is required to have in place a continuous Child Find system, which must include written policies and procedures, written notice to all parents of the procedures for initiating a referral for special education assessment. As determined in Factual Findings 2, 3 and 4, the District had an established and appropriate Child Find system in place during the relevant time period.

Moreover, as determined in Factual Findings 9, 16 and 21 and Legal Conclusion 8, the District had no obligation to initiate a referral for special education for Student during the relevant time period. The District had no knowledge of facts tending to establish that Student had a suspected disability or needed special education and related services and therefore no duty to refer Student for assessment. While Student's behavior was intermittently problematic, Ms. Long and Mr. Hermreck established that Student was manageable and his behavior in third and fourth grade did not negatively affect his ability to learn. Student's academic performance during this time period was inconsistent but not so far below standards to suggest that a disability interfered with his ability to learn. Student's mother, who closely followed Student's performance in school and who has held herself out as an advocate for children with special needs and an authority regarding issues confronting the families of such children since 1999, conceded that only after she was aware of the results of Student's assessments in 2004 did she conclude that Student should have been assessed in third grade. Thus, only with the benefit of hindsight was Student's disability reasonably apparent during 2001 through 2003. The District cannot be held to that standard. Viewing the facts of Student's performance as they unfolded prior to November 18, 2003, the District was not obligated to initiate a special education referral at that time.

Prior to initiating a special education referral, the District was first required to exhaust the resources of the regular education program (Ed. Code §56303.) The evidence

established that the measures employed during the 2001-2002 and 2002-2003 academic years were sufficiently successful in correcting Student's behavioral problems that he was able to advance in his grade-level curriculum. During the early part of the 2003-2004, Ms. Ball had determined to initiate a SIT referral when that process was interrupted by Student's mother's request for assessment. Once that occurred, the District's obligation was to assess Student in all areas of suspected disability. (Ed. Code §56320.)

*Determination of Issue 2.* Did the District assess Student in all areas of suspected disability?

The District was required to assess Student in all areas of suspected disability before taking action with respect to his initial placement in a special education program. (Ed. Code §56320.) Pursuant to Legal Conclusion 6, Student was required to be assessed in all areas of suspected disability, utilizing multiple procedures administered by trained individuals in conformance with the test instructions.

As established in the Factual Findings above, in late 2003/early 2004 Student exhibited occasionally disrespectful behavior, distractibility, increasing difficulty with written expression and mathematics, and inability to follow directions on a consistent basis. The IEP team agreed that these areas represented Student's suspected areas of disability. Additionally, these facts, coupled with Student's ADHD diagnosis, warranted assessment of auditory processing as an area of suspected disability as determined in Factual Finding 34. Student's mother specifically requested assessment in the area of auditory processing on November 18, 2003. Following parent's consent to its assessment plan, the District conducted assessments in nearly all areas related to these demonstrated needs: vision and hearing, health and developmental history, visual-motor and visual perceptual skills, auditory perceptual skills, written language, social skills and behavior, memory, achievement and learning. In addition to testing student directly, District assessors obtained and considered input from Student's mother and teachers.

Student contended that District assessors were not qualified to determine whether he suffered from a visual processing deficit and/or an auditory processing disorder. With

regard to the presence of a visual processing deficit, Student cited California Code of Regulations, title 5, section 3051.7 for the proposition that a potentially “visually impaired” child may be assessed by an “eye specialist” defined as a “licensed optometrist, ophthalmologist, or other licensed physician and surgeon.” Setting aside the fact that the cited regulation is stated in permissive, rather than mandatory terms, there is no evidence in this case that Student’s education is affected by a visual impairment. Although he wears glasses, his corrected vision is within normal limits as confirmed by District testing and by Dr. Wilkins. Student’s deficit results from his inability to mentally process visual information and this was indicated by the results of the District’s assessments. Significantly, when Dr. Wilkins assessed Student for visual processing deficits, he administered the very same tests as Dr. Lemen had. Thus, Student did not establish that District personnel failed to or were not qualified to assess his visual processing deficit.

The evidence adduced by both parties established that an auditory processing disorder (APD) can only be diagnosed by a licensed audiologist. The District’s initial assessment by Ms. Morgan in the area of speech and language determined that Student’s performance in that area was within normal limits. The results of Dr. Lemen’s assessments did not address the presence of an APD. Ms. Atkins’ subsequent assessments credibly established an APD. Her findings were presented to Student’s IEP team and her recommendations eventually incorporated into the accommodations and modifications offered by the District. As determined in Factual Findings 34 and 48, the District’s knowledge of Student’s particular behavioral history, his ADHD diagnosis, the request for assessment by his mother, together with the acknowledged co-morbidity of ADHD and APD should have led the District to assess Student in this area in early 2004. It failed to do so.

Student also contended that the results of Dr. Lemen’s testing were invalidated by her modification of the administration of one subtest and her cautionary statements regarding Student’s lack of focus and cooperation in the MAR. As established by Factual Finding 30, this contention is without merit. In addition, Student’s retained educational

psychologist, Dr. Patterson, agreed with the substance of Dr. Lemen's findings in the MAR. Although Dr. Patterson testified to a disagreement over the etiology of some of Student's educational needs as stated in the MAR, that opinion is not relevant to the issues in this proceeding.

Student's mother requested assessment in the area of behavior. The District's assessments were sufficient in this area. Given that the mother informed the District of a prior medical diagnosis of ADHD at the first IEP meeting on February 20, 2004, no further action was required of the District beyond what it undertook in this respect.

With regard to the area of assistive technology, there was no significant discrepancy between the findings of the District's assessor and Student's retained assessor. Both agreed to the offer of an alphasmart (or equivalent) keyboard to minimize Student's problems with handwriting; both recommended use of modifications/accommodations to assist with Student's focus on tasks in class; both agreed to a trial and error approach; and both agreed that Student had no unique needs that required occupational therapy. The District's "lower technology" approach was reasonable as a first step to determine if such strategies would effectively assist Student with his needs. Accordingly, Student failed to establish that the District did not properly assess Student in the area of assistive technology.

*Determination of Issue 3.* Did the District provide Student with a Free Appropriate Public Education in the least restrictive environment during the period April 15, 2001, through June 15, 2005?

Based on the Determination of Issue 1, the District did not violate its Child Find obligations from April 15, 2001, through November 18, 2003. Subsequent to Student's request, the District diligently pursued assessment until, on February 26, 2004, the IEP team first concluded that he was eligible for special education and related services. Accordingly, Student was not entitled to a FAPE prior to February 26, 2004.

As determined in Factual Finding 51, the District's offer of October 18, 2004, appropriately addressed Student's unique needs and was therefore reasonably calculated to provide him with some educational benefit. The majority of services proposed in that IEP

were offered in Student's regular education classroom, with 30 minutes per day of "pull-out" resource specialist assistance to be provided in the resource room. Two days later, on October 20, 2004, the District and Student's mother agreed to modify the offer to move the resource specialist assistance to a "push-in" model delivered in the regular education classroom.<sup>8</sup> This offer of special education and related services constituted a FAPE in the least restrictive environment for the remainder of the 2004-2005 school year.

The remaining time for consideration is the period between the date when Student was determined to be eligible, February 26, 2004, and October 18, 2004. The District established that it attempted to schedule IEP meetings in August and September of 2004, but that Student's mother was not available until mid-October. Accordingly, as Student's mother was a key member who provided valuable input to the IEP team, the District was not responsible for the delay in making its offer on October 18, 2004. The District remained responsible for providing Student a FAPE for the period of February 26, 2004, through the end of the school year in June 2004. The District's offer of March 4, 2004, proposed draft goals and objectives and minimal classroom modifications/accommodations. However, the IEP team adjourned its meeting on that date because of time constraints. The March 31, 2004 IEP offered more extensive and appropriate PLPs, goals and objectives and accommodations/modifications as part of Student's proposed special education program. The IEP team adjourned with the acknowledgement that a further meeting would be required to review the results of pending assessments. That meeting occurred on July 2, 2004.<sup>9</sup>

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<sup>8</sup> Subsequently, on March 15, 2005, Student's teacher Ms. Ball opined that Student seemed uncomfortable with resource services being provided in the classroom. Student was brought into the meeting and expressed his preference for going to the resource room.

<sup>9</sup> As determined in Factual Finding 46, Student's assistive technology needs were not known before then.

The March 2004 IEPs focused largely on Student's behavior which had been a major concern in fourth grade and fifth grade to that point. The goals and objectives and modifications/accommodations related to behavior and social skills needs were appropriate and adequate. Likewise, most of the IEP provisions related to Student's academic needs were reasonably calculated to confer an educational benefit. As set forth in Legal Conclusion 3, a procedural violation of the IDEA, such as failure to conduct a required assessment, constitutes a substantive denial of FAPE if the violation deprives the child of educational benefit or significantly impedes the student's parent's opportunity to participate in the decision-making process regarding the provision of FAPE. Here, due to the District's failure to timely assess Student's auditory processing function and assistive technology needs, the March 2004 IEPs omitted components such as multisensory teaching methods, preferential seating, repetition of verbal instruction, and use of a planner that were necessary to confer an educational benefit on Student for the remainder of the 2003-2004 school year. Therefore, the District did not offer a FAPE in the period February 26, 2004, through June 2004.

#### APPROPRIATE RELIEF

As to Issue 1, Student did not prevail and is therefore not entitled to relief.

As to Issue 2, Student established that the District did not conduct a required assessment of his auditory processing needs. Student's needs in this area affected his ability to learn and were not revealed by other testing conducted by the District. The strategies suggested by Ms. Atkins were incorporated into the District's subsequent offers and, thus, Student's mother is entitled to reimbursement of the cost of this assessment. Ms. Atkins established that Student's parent paid for all of her time to conduct the assessment. However, Student did not adduce any evidence of the amount of time the assessment required or Ms. Atkins' rate for professional services. Thus, the ALJ does not have the information necessary to state the specific amount to be reimbursed.

As to Issue 3, the typical remedy for failure to provide a FAPE is compensatory education. The purpose of compensatory education is to remediate harm that resulted from the failure to provide special education and related services necessary to confer an educational benefit. Student established that the District did not offer a FAPE between February 26, 2004, and the end of the 2003-2004 school year. Student requested compensatory education, but adduced no evidence in support of that claim. To the contrary, Student's retained psychologist, Dr. Patterson testified that any opinion of educational damage to Student was speculative. Dr. Patterson did not endorse Student's placement in the Prentice school, the only potential compensatory placement referenced by Student during the course of the hearing. Student's retained audiologist, Ms. Atkins, and optometrist, Dr. Ryan, had not seen Student in over a year and did not offer any opinion about his past educational harm, his current level of functioning, or his need for compensatory education. No other witness established the nature and/or extent of any educational harm that may have occurred from the denial of a FAPE between February and June 2004. Moreover, Student currently resides in Oklahoma, and adduced no evidence to show how the District in Buena Park, California could deliver appropriate compensatory education services in Oklahoma. Neither the geographic location nor the details of the proposed placement of the Prentice School was established by evidence. Student has the burden of establishing the need and appropriateness of compensatory education, but failed to do so. Accordingly, no relief is awarded related to Issue 3.

## ORDER

Within 30 days after the date of this Decision, Student shall provide to counsel for the District a properly authenticated invoice from Ms. Atkins and competent proof of payment, under penalty of perjury, related only to the assessment conducted on May 27, 2004, and preparation of the corresponding report (Petitioner's exhibit F/221-227). Within 30 days after receipt of that information, the District shall pay Student's mother the amount indicated. No other relief is awarded related to Issue 2.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute. The District prevailed as to Issue 1. The Student prevailed as to Issue 2 with regard to the auditory processing assessment only. The District prevailed as to the remaining aspects of Issue 2. The Student prevailed as to Issue 3 for the period February 26, 2004, through June 2004, only, but did not establish the right to relief. The District prevailed as to all other time periods relevant to Issue 3.

## RIGHT TO APPEAL THIS DECISION

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

IT IS SO ORDERED this 28<sup>th</sup> day of August, 2006.



KEITH J. KIRCHUBEL

Administrative Law Judge

Office of Administrative Hearings

Special Education Division