

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

In the Matter of :

STUDENT,

Petitioner,

v.

COMPTON UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2005120325

DECISION

Clara L. Slifkin, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on April 5, 6, 7, 2006 and May 3, 4, 5, 2006 in Compton, California.

Attorney Chike G. Onyia represented petitioner (Student). Also present, throughout the hearing, was Student's mother (Mother).

Attorney Daniel L. Gonzalez represented respondent Compton Unified School District (District).

On December 8, 2005, Student filed a request for mediation and due process hearing.

On December 23, 2005, the District filed a notice of insufficiency with OAH and on December 29, 2005, OAH issued a determination of insufficiency of due process complaint and order vacating hearing date. On January 12, 2006, Student filed an amended mediation and due process hearing request with OAH. On May 5, 2006, after the conclusion of the presentation of evidence, the parties agreed to waive the forty-five day time limit for the ALJ to render a decision. The record was held open until May 26, 2006, for the parties to

submit closing briefs. Student's brief was timely filed and was marked Exhibit 29 for identification. The District's brief was timely filed and was marked Exhibit Q for identification.

ISSUES

Whether the District's November 16, 2005, IEP offer failed to provide Student a free and appropriate public education (FAPE) because it did not include: (1) a behavioral therapist and behavioral intervention services; and (2) a one-to-one classroom aide.¹

FACTUAL FINDINGS

BACKGROUND

1. Student is a nine-year-old who resides with her Mother and four sisters, ages 19, 15, 12, and 7. They live within the jurisdictional boundaries of the District.

2. When Student enrolled in the District in 2002-2003 for kindergarten, her teacher noted that Student moved around the classroom at will, could not sit still, and had difficulty focusing. In October 2002, Student's pediatrician Dr. James Saunders referred her to Dr. Briceno, a psychologist for diagnostic testing. Dr. Briceno confirmed that Student had attention deficit hyperactivity disorder (ADHD) and prescribed the medication Concerta. In December 2002, the District convened a Student Success Team (SST) meeting. The team recommended that Student receive tutoring services and be assessed for possible ADHD. Mother failed to inform the SST team that Student had been diagnosed as having ADHD.

¹ The issues were discussed and framed at the Pre-Hearing conference. The Amended Mediation and Due Process Hearing Request Form filed on January 12, 2006, proposed a resolution of the problem that relates to compensatory education: behavioral intervention services in the form of one-to-one assistance for approximately 20- 30 hours a week.

During Student's first grade school year (2003-2004), she received no additional educational assistance.

3. During Student's second grade year (2004-2005) Mother stopped administering the medication because Student had adverse side effects. Pursuant to Mother's request, on March 1, 2005, the District convened another SST meeting. The SST notes revealed that although several modifications to Student's SST plan had been implemented, including preferential seating and less work, Student still exhibited difficulty focusing and staying on task. The team recommended a psychoeducational assessment by Mr. Rafael Cardenas, District school psychologist.

4. During March and April 2005, Mr. Cardenas conducted a psychoeducational assessment of Student to determine her eligibility for special education services. Mr. Cardenas found Student exhibited a heightened alertness to environmental stimuli that resulted in limited alertness with respect to her educational environment, due to chronic or acute health problems "ADHD." Consequently, Mr. Cardenas concluded she met the criteria as an individual with exceptional needs under the classification of Other Health Impaired (OHI).

5. On April 26, 2005, the District convened an individualized education plan (IEP) meeting to discuss the results of the diagnostic assessments. The team determined that Student was eligible for special education and related services under the category of OHI. The District found the least restrictive environment for Student was in a general education program with "pull out service assistance" from a resource specialist for 125 minutes, five days each week. Student's Mother and father were present and participated in this meeting, but did not sign or consent to the IEP.

6. On June 14, 2005, a due process hearing was held to resolve allegations that the District failed to meet its "seek and serve obligation" to Student and provide her with an IEP designed to meet her unique needs. On September 22, 2005, Judith E. Ganz, Hearing Officer for the California Special Education Hearing Office (Judge Ganz) issued a decision in

Case No. SN05-00684, *Student vs. Compton Unified School District (Student One)*.² In *Student One*, Judge Ganz reviewed Student's assessments, unique needs, District's child find obligations and compensatory education request through April 2005. Judge Ganz found that Student was not entitled to behavioral services because Student's behaviors did not rise to the "assaultive" or "self-injurious" level requiring a functional analysis assessment (FAA). (California Code of Regulations (Cal. Code of Regs.), title 5, §§ 3001, subdivision (f), and 3052.) The judge ordered District to arrange for a behavioral intervention case manager to conduct a functional behavioral analysis, and if necessary, draft a behavioral support plan (BSP). (Cal. Code of Regs., tit. 5, § 3001, subdivision (e).)³

7. Pursuant to Judge Ganz's order, District conducted an IEP meeting on October 13, 2005, and contacted Mr. Martins to perform a functional behavioral analysis (FBA). From October 20, 2005 through November 10, 2005, Mr. Martins observed Student in different settings (home and school), recorded what he observed and talked to teachers

² Official notice is taken of *Student One* (September 22, 2005) Case Number SN05-00684 (Decision). In addition, Student and District offered this Decision into evidence, and it was admitted as Exhibit 14 and Exhibit L.

³ The primary difference between an FAA pursuant to state law and an FBA under the federal law is an FAA is required when a student has a "serious behavior problem" as defined by state law. A Behavior Intervention Plan (BIP) is a written document, developed when an individual's behavior significantly interferes with the implementation of the goals and objectives of the individual's IEP. (Cal. Code of Regs., tit. 5, § 3001, subdivision (f).) Both an FBA and an FAA require a BIP not a BSP. Thus, Judge Ganz's order requiring District to perform an FBA and if necessary formulate a BSP, is mistaken. (34 Code of Federal Regulations (C.F.R.) § 300.346(2)(ii).) Prior administrative law cases are used for guidance, not precedent. Moreover, a hearing decision without reasoned findings deserves little deference. (See *Kerkam v. Superintendent, D.C. Pub. Schs.* (D.C.Cir. 1991) 931 F.2d 84, 87.)

that worked with Student in order to create a comprehensive BSP. A BSP uses positive behavior intervention techniques to improve targeted behavior. Targeted behavior included behavior that interfered with Student's and her classmates' learning. Mr. Martins observed Student in her regular and RSP class for approximately eleven hours and made notes on data collection sheets of how teachers reacted to Student's behavior. He also noted how her teachers should approach Student to positively impact her behavior.

8. Martins' training and experience make him well qualified to design a BIP or a BSP for Student. He received a Master's Degree in Special Education from California State University, Dominguez Hills with a behavior management concentration. As the District's Behavior Specialist, Mr. Martins has used behavior contracts with approximately 20 to 30 children who have a diagnosis of ADHD. He had an approximate 80 percent success rate, as measured by the students being able to transition to a less restrictive environment. Mr. Martins found that behavior contracts have been successful with students who have Student's level of ADHD.

DISTRICT'S NOVEMBER 16, 2005 OFFER

9. On November 16, 2005, the District convened an IEP meeting to consider the newly designed BSP and address Student's unique needs. In attendance at this IEP meeting were: Student's Mother; Clinton principal, Carmen Stewart; Ms. Kennedy, the RSP teacher; Mr. Wilson, school psychologist; Lupe Alvarado, District's Program Coordinator; Ms. Harris, general education teacher; Mr. Martins, District's Behavioral Specialist; Student's attorney, Areva Martin; and District's attorney, Daniel Gonzalez.

10. The District believed that the least restrictive environment would be a regular education class with RSP services in language arts and math. The IEP team set two annual goals, benchmarks and objectives in the social and emotional skills area. First, Student was to follow routines (sit in her chair, raise her hand before speaking and walk up and down the stairs appropriately) and achieve this behavior 80 percent of the time for a ten week period. Second, Student will remain on task for 20 minutes, and achieve this behavior 80

percent of the time for a ten week period. The IEP team concluded that the least restrictive environment for her was to continue in the general education setting with RSP support for 35 percent of the time. Mother agreed with this placement, but requested behavior intervention services and behavior therapy, and a one-to-one aide .

11. In the RSP classroom, Student was doing well when she had small group instruction, frequent reinforcement, resulting in a structured environment to control her disruptive behaviors. However, Student was disruptive in her general education classroom because she would constantly speak without raising her hand, and leave her seat and walk out of the classroom without permission. Student did exhibit impetuous behavior without thinking about the possible consequences. For example, Student leaned back in her chair, stood up without permission, spoke without raising her hand, and walked backwards up and down the stairs. In the general education class, Student's behavior interfered with her ability to access her education and derive an educational benefit.

BEHAVIOR SUPPORT PLAN V. BEHAVIORAL INTERVENTION SERVICES/PLAN

12. To address Student's behavior problems and unique needs, Mr. Martins designed a BSP as a part of the November 2005 IEP. The BSP listed specific behavior interventions and recommended that a behavior contract be designed between teacher and Student, so that Student could learn to manage her behavior. Mr. Martins filled out a form for submission to the IEP team, entitled "Behavior Support Plan for Behavior Interfering with Learning of Students of Peers." He indicated that the need for Student's BSP was serious. Its design addressed Student's unique needs to increase her ability to stay on task, and decrease her oppositional and non-compliant behaviors. The BSP included developing a "behavior contract", using behavioral supports and proactive intervention strategies, to help Student access academics and to help Student regulate her behavior. The contract is one of the most individualized and personalized interventions to improve behavior and meet Students unique needs. The teacher, the student and the parents work together to improve and reinforce positive behaviors. The absence of a behavior contract

from the BSP would prolong the time needed for modification of Student's behavior. The contract helps a student to manage and regulate his or her own behavior. In designing the behavior plan, Mr. Martins considered Student's disability OHI/ADHD, and her ability to understand the contract. Once the BSP was in place Mr. Martins was to consult with a student's teacher, aide and tutor to see if they needed his help in implementing the plan.

13. District's IEP team members found that the BSP was crucial to implementing the IEP's behavioral goals, benchmarks and objectives. During the IEP meeting, Mr. Martins explained the behavior interventions which should be implemented. These interventions for Student included: sit in front of the teacher; work in small supervised study groups; work with a buddy; and peer or adult tutoring. The interventions for the teacher to implement included: give oral prompts; give directions in small steps; break down tasks into small steps; provide a routine schedule; keep daily monitoring sheets; create a classroom performance contract; model desired behavior; and increase positive comments. Because it was important for Student to be able to monitor her own behavior, a behavior contract was an integral part of the BSP.

14. Student has requested behavior intervention services that require a behavior intervention plan (BIP) as opposed to a BSP. A BIP is based on a (FAA or FBA) and must be specified in the IEP and contain specific interventions. Such interventions are used only to replace specified maladaptive behaviors with alternative acceptable behaviors. (Cal. Code Regs., tit. 5, 3052, subdivisions (a) (2) and (a) (3).) The primary difference between an FAA pursuant to state law and an FBA under federal law is that the former is required when a student as a "serious behavior problem."⁴ A BSP is designed to address a student's unique

⁴ A "serious behavior problem" is defined as behavior that is assaultive, self-injurious or other severe behavior problems that are "pervasive and maladaptive for which instructional /behavioral approaches specified in student's IEP are found to be ineffective." (Cal. Code of Regs., title 5, §§ 3001, subdivision (aa).)

needs when a child's behavior impedes his or her learning or that of others. Appropriate strategies are utilized, including positive behavioral interventions and supports to address the behavior. (34 C.F.R. § 300.346(2)(i).)

15. The IEP team recommended that the November 16, 2005 IEP with its goals and objectives and the BSP be implemented. After further discussion, Mother signed the IEP but objected to the BSP and the refusal of the District to provide behavior intervention services and requested a one-to-one aide. Mother also requested additional services: 10 hours of behavior intervention; an aide to assist in the classroom three days per week; and a full psychoeducational assessment. The District ordered another full psychoeducational assessment and tabled Mother's one-to-one aide request. The District indicated that it would respond to Mother's request for an aide in the classroom and behavior intervention services within a reasonable amount of time. Mother disagreed with the goals of the BSP, because she believed a child with ADHD could not "self-modify" her behavior. She requested that the District not implement the proposed behavior contract. Mother rejected the behavior contract; as a consequence, Student's progress was slower than it might have been.

16. According to the testimony of Student's expert, Dr. Olujimi Bamgbose, behavior intervention services cover many types of services including social skills training, psychological counseling, tutoring and a one-to-one aide. Dr. Bamgbose received his doctorate in clinical psychology in 1977 from California School of Professional Psychology. From 1979 to present, he has served as the Director of PsychSpecialists, Inc. and he performs assessments and comprehensive psychological testing. He has testified numerous times as an expert witness at hearings before the Social Security Administration, and in civil, criminal, and workers' compensation trials. Dr. Bamgbose discussed strategies for Student to be successful in the classroom: removing her from class to calm her down; counting from 1 to 10 when setting limits; walking around outside the classroom; and having the teacher rephrase the request. Dr. Bamgbose's strategies were similar to the positive interventions

suggested by Mr. Martins in his BSP. Moreover, Dr. Bamgbose testified he believed that a BSP could help Student.

17. Although Dr. Bamgbose is well-trained and a very experienced psychologist who is a credible witness, the value of his testimony is limited. Dr. Bamgbose's expert opinion is based on a 45 minute interview of Student and a review of Mr. Cardenas' psycho- educational assessment of Student. Dr. Bamgbose failed to gather important information by: observing Student in the classroom; speaking to her current or former teachers; reviewing the psychoeducational assessment performed by Mr. Martins; administering psychological tests and standard assessments; and getting updated information on Student prior to testifying (i.e., District is providing Student with a tutor.) Dr. Bamgbose testified that without behavior intervention Student's progress would be limited academically and interpersonally. However, he admitted that Student could make some educational progress without behavior intervention services and with a BSP.

18. Student does not have a serious behavior problem and has not been subject to discipline that requires a BIP. The IEP team found that the instructional/behavioral approaches in Student's IEP were effective. The District's BSP was appropriate and the instructional and behavioral approach specified in the BSP could have been effective.

ONE-TO-ONE AIDE

19. From October 25, 2005 through March 2006, pursuant to the October 13, 2005 IEP meeting and November 16, 2005 IEP, Student was in Ms. Harris' general education class and received one and one-half hours of RSP per day in Ms. Kennedy's class.⁵ Student was the only special needs student in her class of 20 children.

⁵ Pursuant to Mother's request, the District instructed Mr. Byron Wilson, school psychologist to conduct a psychoeducational assessment of Student. From December 2005 to January 2006, Mr. Wilson observed and tested Student. On March 1, 2006, the District convened another IEP team meeting. Student transferred to Ms. Marivic Nilo's special day

20. While in Ms. Harris' class, Student asked many questions, constantly moved around and leaned back in her chair. Student enjoyed working one-to-one with the teacher. She talked to other students and to herself, she moved around and tapped her pencil. Thus, Student generated distracting noise for approximately half of the school day. Student would not follow instructions, complete classroom assignments, and would sometimes become frustrated about her inability to complete her assignments and then become angry. The IEP notes indicated that since October 2005, Ms. Harris had implemented some behavior interventions to address Student's disruptive behavior, but the interventions did not stop the behavior. Ms. Harris consulted with Ms. Saucier (school counselor) at least three times a week and the school principal two to three times a week regarding Student's behavior problems. At different times, the school counselor and the principal would go to Ms. Harris' classroom, escort Student out and walk with and then talk to Student to calm her down. Student's behavior impacted her learning at least 50 percent of the time. Student needed a one-to-one aide in her general education class.

21. Ms. Kennedy instructed Student for one and one-half hours per day in math and language skills in her RSP class. As a special day class teacher for 32 years and an RSP teacher for the past eight years, Ms. Kennedy had the experience to work well with Student in a small class environment. Even though Student worked very well with Ms. Kennedy, Student's behavior was "good" only 50 percent of the time. Ms. Kennedy's firm teaching style (tone of voice) kept Student more on task than in her regular education class. Student fidgeted and moved around, taking time away from Ms. Kennedy's limited time with Student. Ms. Kennedy prevented Student from leaving her classroom by standing next to her or requesting her aide to stand next to Student. At the November 16, 2005 IEP meeting, Ms. Kennedy recommended a one-to-one aide, because of Student's behavior problems.

class as a result of a March 1, 2006 IEP team meeting; the IEP was signed by Mother on March 1, 2006. The March IEP is not an issue in this due process hearing.

Ms. Kennedy testified that Student's behavior impacted her behavior, because it interfered with her ability to complete her work.

22. Student has behavioral problems that interfere with her accessing her education, particularly in the general education class of 20 children for 65 percent of the time. At the November 16, 2005 IEP, the decision of a one-to-one aide was tabled.

23. No evidence was presented regarding the date that Ruth Dickens, District Special Needs Director, was consulted by a member of the IEP team about Student's request for a one-to-one aide. Ms. Dickens rejected the one-to-one aide during a conversation with Lupe Alvarado, the Special Education Coordinator. Ms. Dickens did not consult with the entire IEP team or any of its other members before making her decision. Prior to making this decision, Ms. Dickens did not review any of Student's academic records and the November 16, 2006 IEP. Ms. Dickens did not personally know Student.

24. Student required a one-to-one aide in her general education class because her ADHD and OHI resulted in Student constantly moving and needing prompting to get her back on task. District employee, Ms. Kennedy, and Dr. Bamgbose testified that Student required a one-to-one aide to access her education and meet her unique needs. Ms. Harris' testimony supported Student's need for a one-to-one aide in her classroom. The one-to-one issue was tabled and determined by Ms. Dickens who had limited information about Student. Student needed a one to one aide in her general education class in order to access her education; District's decision to deny Student a one to one aide resulted in District's failure to offer Student a FAPE at the November 16, 2005 IEP meeting.

COMPENSATORY EDUCATIONAL SERVICES

25. As a result of Mr. Wilson's psychoeducational assessment, the IEP team met on March 1, 2006, and revised Student's placement. The team concluded that the least restrictive environment at this time was an SDC setting. Mother endorsed the March 1,

2006 IEP.⁶ In order to address Student's unique needs, the District convened its third IEP team meeting regarding Student in less than six months.

26. On March 20, 2006, the District transferred Student from her general education class with RSP services to a special day class of nine children taught by Ms. Nilo. Ms. Nilo has been teaching SDC classes for three years and has a "waiver from the state" that permits her to teach special education. As of the time of Ms. Nilo's first day of testimony on April 6, 2006, Student had attended her class for only 12 days. Student generally did not disrupt the class and completed her assignments. However, Student stood up without permission, sharpened pencils without permission, and moved hurriedly despite Ms. Nilo's request that she slow down. Student's behavior improved after Ms. Nilo employed several positive interventions. For example, she assigned Student to a seat next to her desk and gave Student leadership responsibility. On April 3, 2006, Student finished her work and won a package of biscuits as a prize. Despite some behavior problems, Student progressed in her academics and behavior.

27. On May 3, 2006, Ms. Nilo testified to clarify some of the issues from her prior testimony. Ms. Nilo indicated that Student's behavior is a "bit better" because she stopped sharpening pencils for other children and was not restless everyday. However, Student would get up from her seat about 10 times a day without permission. Out of nine daily reports for April 2006, Ms. Nilo rated Student's behavior on five days as fair and on two days as good. Student continued to make educational and behavioral progress in Ms. Nilo's SDC classroom. The Student-teacher ratio in the SDC classroom is superior to the general

⁶ This ALJ makes no legal findings regarding the propriety of Student's SDC placement and no determination on whether SDC is the least restrictive environment. Any factual findings pertaining to the SDC class are limited to the issue of compensatory education.

education class. Thus, Student will be able to receive more individual instruction and behavior interventions to address her unique needs.⁷

LEGAL CONCLUSIONS

APPLICABLE LAW

1. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. §1412(a)(1)(A)⁸; Ed. Code, § 56000.⁹) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(8); Cal. Code Regs., tit. 5, § 3001, subdivision (o).) Special education is defined, in pertinent part, as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(22); Ed. Code, § 56031.) Special education related services include, in pertinent part, developmental, corrective, and supportive services, such as speech-language pathology services and

⁷ In May 2006, the District was in the process of hiring an aide to assist Ms. Nilo which would further improve the student teacher ratio.

⁸ The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The allegations in this matter involve IEPs developed after July 1, 2005. Accordingly, the IDEIA will be applied and all citations to Title 20 United States Code are to sections in effect after to July 1, 2005. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 fn. 1.)

⁹ The California Education Code was amended, effective October 7, 2005, in response to the IDEIA. (Stats. 2005, ch. 653.) All citations to the Education Code are to sections in effect after October 7, 2005.

occupational therapy, as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

2. A school district must provide “a basic floor of opportunity . . . [consisting] of access to specialized instruction and related services which are individually designed to provide educational benefit to the [child with a disability].” (*Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201.) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child’s potential.¹⁰ (*Rowley, supra*, 458 U.S. at pp. 197, 200; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

3. The *Rowley* opinion established that as long as a school district provides an appropriate education, the methodology employed in so doing is left up to the district’s discretion. (*Rowley, supra*, 458 U.S. at 208.) A hearing officer must give “appropriate deference to the decisions of professional educators.” (*MM v. School Dist. of Greenville County* (4th Cir. 2002) 303 F.3d 523, 533.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d at 84 (citing *Roland M.*, 910 F.2d at 992-93).)

4. The public educational benefit must be more than *de minimis* or trivial. (*Doe ex rel. Doe v. Smith* (6th Cir. 1989) 879 F.2d. 1340.) Just how much more than a *de minimis* educational benefit is required is unclear. The Third Circuit has held that an IEP should confer “a meaningful educational benefit.” (*T.R. ex rel. N.R. v. Kingwood Township Bd. of Education* (3rd Cir. 2000) 205 F.3d 572, 577 (citing *Polk v. Cent. Susquehanna Intermediate Unit 16* (3rd Cir. 1988) 853 F.2d 171, 182.) If Parents disagree with the IEP and proposed

¹⁰ A substantially similar standard was codified in the IDEIA. (20 U.S.C. § 1415(f)(3)(E)(ii).)

placement, they may file a request or notice for a due process hearing. (20 U.S.C. § 1415(b)(7)(A).)

5. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)¹¹ “An IEP is a snapshot, not a retrospective.” It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.* at 1149). (See also *Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212; and *Pitchford v. Salem-Keizer School Dist. No. 24J* (D.Or. 2001) 155 F. Supp.2d 1213, 1236.) The focus is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the parents. (*Gregory K., supra*, 811 F.2d at 1314.)

6. On the issue of behavioral supports or interventions, 20 U.S.C. § 1414 (d)(3)(B)(i) provides that the IEP team shall: “in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” (See also 34 C.F.R. § 300.346(a)(2).) The Code of Federal Regulation requires that if the IEP team considers behavioral factors, and if the team determines that a child needs a particular service, “including an intervention, accommodation, or other program modification in order for the child to receive FAPE,” the team must include a statement to that effect in the IEP. (34 C.F.R. § 300.346(c).)

7. California Code of Regulations, title 5, section 3001 provides in pertinent part:

¹¹ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212), and District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (*Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236).

- (d) Behavioral Intervention means the systematic implementation of procedures that result in lasting positive changes in the individual's behavior. 'Behavioral intervention' means the design, implementation, and evaluation of individual or group instructional and environmental modifications, including programs of behavioral instruction, to produce significant improvements in human behavior through skill acquisition and the reduction of problematic behavior. 'Behavioral interventions' are designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual's right to placement in the least restrictive educational environment as outlined in the individual's IEP. . . .
- (f) 'Behavioral intervention plan' is a written document which is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP. The 'behavioral intervention plan' shall become part of the IEP. The plan shall describe the frequency of the consultation to be provided by the behavioral intervention case manager to the staff members and parents who are responsible for implementing the plan. A copy of the plan shall be provided to the person or agency responsible for implementation in noneducational settings. The plan shall include the following:
- (1) a summary of relevant and determinative information gathered from a functional analysis assessment . . .

8. California Code of Regulations, title 5, section 3052, and subdivision (a)(3) provides for the development and implementation of a behavioral intervention plan. "Behavioral intervention plans shall be based upon a functional analysis assessment, shall be specified in the IEP, and shall be used only in a systematic manner in accordance with the provisions of the regulation."

9. California Code of Regulations, title 5, section 3052, subdivisions (b) and (c) provides in part:

(b) A functional analysis assessment shall occur after the individualized education plan team finds the instructional/behavioral approaches specified in the student's IEP have been ineffective. Nothing in this section shall preclude a parent or legal guardian from requesting a functional analysis assessment pursuant to Education Code sections 56320 et seq. Functional analysis assessment personnel shall gather information from three sources: direct observation, interviews with significant others, and review of available data such as assessment reports prepared by other professionals and other individual records.

(c) Upon the completion of the functional analysis assessment, an IEP team meeting shall be held to review results and, if necessary, to develop a behavioral intervention plan.

10. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9 hCir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts

may employ to craft “appropriate relief” for a party. Appropriate relief means “relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” (*Id.* at p. 1497.) To obtain relief in the form of compensatory education, the student must present specific evidence as to how the compensatory education should be calculated. Just as IEPs focus on a student’s individual needs, so do awards compensating past violations rely on individual assessments. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.)

11. As the petitioner, the Student has the burden of proving that the District has not complied with the IDEA. (*Schaffer v. Weast* (2005) 546 U.S.____, 126 S.Ct 528.)

DETERMINATION OF THE ISSUES:

Did the District’s November 16, 2005, IEP offer fail to provide Student FAPE because it did not include a behavioral therapist and behavioral intervention services?

1. Student did not demonstrate by a preponderance of the evidence that the Behavior Support Plan was inappropriate or that the instructional or behavioral approaches specified in her IEPs and Behavior Support Plan were ineffective. (See Cal. Code Regs., tit. 5, §§3052, subdivision (b); 3001, subdivision (f).). In summary, the evidence did not show that District denied a FAPE to Student by denying behavior intervention services or behavior therapy. Student is not entitled to any of the services requested.

2. Based on factual findings 7-11, and 12-18, the District’s proposed BSP, which included a behavior contract in the November 16, 2005 IEP was designed to meet Student’s unique needs. She had only been a student in Ms. Harris’ classroom for about one month prior to the November 16, 2005 IEP. Many of the interventions in the BSP are the same as the behavior interventions suggested by Dr. Bamgbose. Mr. Martins testified that Student would benefit from a behavior contract as part of the BSP.

3. Based on factual findings 7-11, and 12 -18, the District’s BSP was reasonably calculated to provide Student with meaningful educational benefit. The evidence does not

support Student's request for behavioral intervention services and behavioral therapists. Student is not entitled to these services.

Did the District's November 16, 2005 IEP offer fail to provide Student FAPE because it did not include a one-to-one classroom aide in order to access the educational curriculum?

1. Based on factual findings 19-24, District was obligated to provide Student with a one-to-one aide. Student had behavioral problems that interfered with her accessing her education in the general education class. District employees who worked with Student identified the need for a one-to-one aide. In addition, the District's Special Education Director made the decision to deny the one-to-one aide without consulting the IEP team and without reading Student's file. Because of Student's disruptive behavior, the District's offer was not reasonably calculated to provide an educational benefit and Student could not make educational progress in the general education class if she did not have a one-to-one aide.

2. The District's November 16, 2005 individual education program did not offer Student a free and appropriate public education, an educational program to meet her individual and unique needs for school year 2005-2006 because it failed to consider her disruptive behavior in the general education classroom that prevented her from accessing her education and the recommendation of its experienced RSP teacher at the November IEP meeting.

Is Student entitled to compensatory educational services?

1. Based on factual findings 25-27, Student is not entitled to compensatory educational services. In March 2006, after its third IEP team meeting in less than six months, Student transferred to a SDC classroom with only nine students. The District has addressed the problems Student had in a general education setting. Thus, Student is not entitled to compensatory educational services.

ORDER

Student's requests for relief are denied.

PREVAILING PARTY

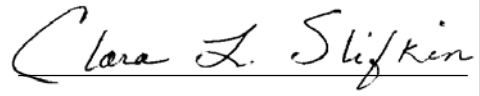
Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on the request for a one-to-one aide.¹² The District prevailed on the request for behavior intervention services and behavior therapy.

RIGHT TO APPEAL THIS DECISION

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

¹² While no award of services or reimbursement was made, Student prevailed by proving the District denied a FAPE by failing to provide a one-to-one aide in its November 2005 IEP.

DATED: August 10, 2006.

A handwritten signature in cursive script, reading "Clara L. Slifkin", written in black ink. The signature is positioned above a horizontal line, and a vertical red line is to its right.

CLARA L. SLIFKIN

Administrative Law Judge

Special Education Division

Office of Administrative Hearings