

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

In the Matter of:

STUDENT,

Petitioner,

v.

PALMDALE ELEMENTARY SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2006100458

DECISION

Stella L. Owens-Murrell, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division (OAH), heard this matter on January 3 and 4, 2007, April 18 and 19, 2007, and on May 22, 2007, in Palmdale, California.

Petitioner/Student (Student) was represented by Angela L. Gilmartin, Attorney at Law. Student's mother (Mother) was present at the hearing on Student's behalf only on April 18, 2007.

Respondent Palmdale Elementary School District (District) was represented by Lee G. Rideout, Attorney at Law, Fagen Friedman & Fulfrost. Dr. John Porter, Director of Special Education, and David B. Brown, Assistant Superintendent, Special Education/Student Services, were also present throughout the hearing on behalf of District.

PROCEDURAL HISTORY

On October 5, 2006, Student filed his due process hearing request (Complaint). The hearing on the Complaint was initially scheduled to commence on December 5, 2006,

but was continued to January 3, 2007. On December 20, 2006, District filed a motion to dismiss the case in its entirety on grounds that the issues raised therein were moot. District asserted that it agreed to and offered to resolve the issues raised by Student in his Complaint. District contended that because of its offer, OAH should dismiss the matter because there were no remaining issues ripe for adjudication and the matter was moot. The ALJ ruled that the issues for due process hearing were not resolved. The parties did not execute a binding agreement or otherwise stipulate to dismiss the complaint. District's motion was denied.

The due process hearing was set for three days beginning January 3, 2007. Testimony was taken on January 3, 2007. On January 4, 2007, Student moved for a continuance on the grounds of death in the family. District did not object and stipulated to continue the hearing to February 6 through February 8, 2007.

On January 29, 2007, Student again moved for a continuance on the ground that Student's expert witness was out of the country and unavailable for the hearing. District did not object to the continuance and the matter was continued to April 17 to and including April 19, 2007.

On March 28, 2007, Student moved to continue the due process hearing for two weeks based upon a schedule conflict for Student's attorney who was scheduled to appear in Superior Court on an unrelated matter for one day on April 17, 2007. The ALJ denied the motion but permitted the hearing to go dark April 17, 2007, to accommodate Student's attorney. The hearing reconvened on April 18, 2007.

On April 19, 2007, after Student rested his case in chief, Student moved in District's direct case, for contempt sanctions and in the alternative to reopen his case, and for monetary sanctions for an alleged bad faith refusal of a District witness to comply with Student's subpoena duces tecum. The ALJ denied Student's motion for contempt sanctions, and ordered Student to file a noticed motion for monetary sanctions. The ALJ granted Student's motion to reopen his case. Because Student wanted time to review

documents produced by the witness at hearing on April 19, 2007, and confer with his expert witness, the matter was continued to May 22, 2007. District filed opposition to the motion for sanctions. The ALJ issued an order denying Student's motion on May 17, 2007.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing, Student requested time up to and including June 18, 2007, for the parties to file closing briefs. The parties timely filed closing briefs. The ALJ closed the record and submitted the matter for decision on June 18, 2007.

ISSUES

1. Did District deny Student a free and appropriate public education (FAPE) for the 2006-2007 school year, by reason of the following:

A. Failing to provide properly trained teachers and aides to implement Student's February 28, 2006 Individualized Education Program (IEP)?¹

¹ Student originally framed the issue to state: Did District deny Student a FAPE for the 2006-2007 school by failing to provide a safe classroom environment free from harm? The ALJ has clarified the issue statement based upon the Complaint and according to the evidence presented at the hearing. Moreover, District objected to Student's statement of the issue, for the first time, in its closing brief, on grounds that OAH lacked jurisdiction under the Individuals with Disabilities in Education Act (IDEA), and California Education Code, section 56501, subdivision (a), to hear Student's claim he was denied a safe classroom environment, which caused him harm. Though District did not object to Student's statement of this issue at the prehearing conference or at trial, subject matter jurisdiction is not waived and may be raised at any time during the proceedings. However, the ALJ's clarification of the issue obviates the need to reach the question of OAH's jurisdiction to decide Student's safety claim.

B. Failing to provide Designated and Instructional Services (DIS) in Speech and Language (LAS) and Occupational Therapy (OT) pursuant to the February 28, 2006 IEP?

C. Failing to offer Student an appropriate placement?²

2. Is Student entitled to compensatory education, in the form of OT, LAS, behavioral services, social skills training, a social recreational program, and a change of placement at another public school within the District or placement at a non-public school (NPS)?³

CONTENTIONS OF THE PARTIES

Student contends that District failed to implement Student's IEP dated February 28, 2006, in the 2006-2007 school year. Specifically, Student alleges that District failed to identify Student's needs and to provide Student with DIS in speech and language therapy and occupational therapy, as required in the IEP. Student contends that Student is currently placed at Manzanita Elementary School in a severely handicapped special day class (SDC) where he was mishandled by his teacher, and para educators or special circumstances aides (SCA) who lacked sufficient training in the proper behavior

² Issue 1C was not specifically set forth in the Prehearing Conference Order but was raised in the Due Process Complaint, (California Education Code, section 56502(i)). Student also presented evidence at hearing concerning the IEP offer of placement. Accordingly, this issue has been framed by the ALJ for decision.

³ Prior to hearing, Student modified his proposed remedy in the Complaint to reflect that a change in placement included placement at another public school within the District.

intervention techniques required to instruct Student. As a result, Student was improperly restrained in the classroom, and was locked out of the classroom and left unattended with no supervision. Student also alleges District failed to fully implement the IEP when Student was placed for substantial periods of time each week alone sleeping in the "sensory room," depriving him of the ability to interact with his peers, which denied Student educational benefit. Student further contends that he was mishandled by at least two of the aides assigned to the classroom in the presence of his classroom teacher, he was left to feed himself without proper assistance, which exposed him to choking hazards, and he was neglected and left to wear soiled and wet clothes all day in the classroom. Student contends that the February 28, 2006 IEP denied Student a more appropriate placement, and that the preferred placement is at another school within the District, or placement in a NPS. Student contends that he is entitled to a change of placement in another school, whether a NPS or another District school. Student also contends he is entitled to the following compensatory education: OT, LAS, behavioral services, social skills training, and a social recreational program.

District contends that it has consistently offered and provided Student a FAPE. District contends that Manzanita was an appropriate placement for Student, and that its teachers and personnel were trained and qualified to provide Student with the appropriate interventions and services. District further contends that the February 28, 2006 IEP was fully implemented commencing in September 2006, after Student's mother consented to the IEP, and that the IEP provided Student a FAPE in the least restrictive environment. District denies that Student is entitled to relief.

FACTUAL FINDINGS

JURISDICTION

1. Student was born on July 16, 1996. He is 10 years and 11 months old, and he resides with his adoptive mother in the District. Student has attended Manzanita

Elementary School (Manzanita) since September 2004. He is enrolled in a sixth grade Special Day Class-intensive (SDC), a self-contained special education program designed for students with moderate to severe disabilities and with intensive needs. During the 2006-2007 school year, the SDC class contained approximately 9 to 12 students and five adults. Student is eligible for special education services as a child with severe mental retardation and autistic-like behaviors.⁴

BACKGROUND

2. Prior to his adoption Student lived with his biological parents until he was two years old. Student was removed from his biological parents' custody after an incident where his father threw him out of a window. According to the medical history in evidence, Student began to walk at two years of age and he developed his first words at seven years of age. Student is considered to be nonverbal. He suffers from a seizure disorder and is on several medications. As of February 2006, the medication included Adderal for Attention Deficit Hyperactivity Disorder (ADHD), Tegretol for the seizure disorder and Risperdal for adverse behaviors.

3. Student is a client of the North Los Angeles County Regional Center (Regional Center) where he currently receives services. Student was initially medically diagnosed with ADHD, severe mental retardation, seizure disorder, and chronic otitis media⁵

⁴ District determined Student's secondary eligibility under the category of autistic-like behaviors in a subsequent IEP issued on October 27, 2006, after Student had filed the Complaint at bar. Student did not amend his Complaint to include the matters considered in the subsequent IEP. On the fourth day of hearing the parties stipulated that Student was also eligible as a child with autistic-like behaviors.

⁵ Otitis media is an infection or an inflammation of the middle ear with some

4. The Regional Center referred Student to District in 1999. On September 17, 1999, an initial IEP found Student eligible for special education services under the category of mental retardation, and speech and language services were provided. The IEP recommended a referral for consideration of placement with the Los Angeles County Office of Education (LACOE). In November of 1999, a special IEP was held to discuss Student's placement because of behavioral concerns. These behaviors included banging his head, temper tantrums, and breaking and throwing items. The IEP noted that Student needed behavioral interventions. Student was placed with LACOE in 1999. In an IEP dated January 2000, LACOE recommended Student's return to the Palmdale Elementary School District. Student was returned to District where he attended Manzanita in an SDC for students with severe disabilities. He continued to receive speech and language services and adapted physical education (APE). Student was placed in Mesquite Elementary within the District in September 2000. In February 2001, an IEP team meeting was held to discuss Student's behaviors. Student was beginning to demonstrate more protesting behaviors, including hitting, yelling, screaming, tantrums, throwing objects. The IEP team added a Behavior Intervention Plan (BIP). The BIP addressed Student's self-injurious behavior, aggression toward others, and his high activity level. Student was returned to Manzanita in September 2004.

THE FEBRUARY 28, 2006 TRIENNIAL IEP

5. District convened Student's IEP team meeting on February 28, 2006. Student's mother attended on his behalf. District was represented by Mike Ohren, IEP administrator; Irene Orloff, special day class teacher; Joanne V. Brace, general education

hearing loss in his right ear, a repaired cleft palate, and a history of prolonged bleeding. The Regional Center subsequently had Student reevaluated, and diagnosed Student with autism spectrum disorder.

teacher; Elaine Hooker, R.N., school nurse; John Corugedo, program specialist; Carmen Duran, occupational therapist; Kathy Rheinhardt, language-speech pathologist; Tom Jorgenson, adapted physical education specialist; and Joan Monarch, school psychologist. The IEP noted that Student required a small group specialized instructional setting for more than 50 percent of the day, and itinerant DIS services. Student required an alternate setting for specialized instruction. Student spent 85 percent of the school day outside of the general education setting in non academic curriculum. Student was receiving APE and LAS services in a group setting. Student also had a special circumstances assistant (SCA) assigned to him for the entire six and one-half hours school day. The IEP discussed Student's current classroom setting and noted that the SDC class served the needs of children with moderate to severe disabilities, and also implemented a functional curriculum. The IEP team reviewed previous goals and objectives, and specifically discussed discontinuation of a previous goal that focused on Student developing and maintaining eye contact.⁶ The IEP noted that while Student consistently needed visual and verbal prompting and redirection in his classroom activities, Student had improved in his interaction with others in the classroom. Student also showed improvement in his receptive language skills meeting one of his goals by demonstrating an understanding of prepositional concepts such as the words "in" or "on". The IEP also noted that Student had improved in a particular area of concern in that he no longer engaged in stripping

⁶ The IEP noted this goal was discontinued because requiring Student to maintain eye contact with his classroom aide or teacher sometimes created an adversarial situation where Student would become frustrated. The IEP team determined that another method to alleviate the situation would be to provide verbal prompts to Student and allow him to use an icon exchange system to push a switch on a specially designed device to express his needs and wants.

activities where he would remove his clothes. The IEP team attributed this change in Student's behavior to the classroom staff becoming more proactive and because Student's mother clothed him in belted jeans with high top shoes. Student also demonstrated an understanding of the toileting process but he still did not initiate the process with any degree of independence. The IEP also noted a significant decrease in Student's protesting behaviors and tantrums except when he was receiving medications or when he grew tired in the afternoons.

6. The IEP team reviewed Student's triennial academic, psychoeducational, speech and language, health, APE, and OT assessments. The academic assessment report noted that Student demonstrated interest in preferred objects such as books but not consistently. Student did not yet demonstrate an interest in colors and could not recognize or name colors. The assessment report noted that Student's teacher had considered developing an icon exchange system to help Student communicate his interests and needs. The overall psychoeducational assessment established that Student functioned in the severe range of mental retardation. The speech and language assessment demonstrated that while Student's strength was in articulation of sounds, his delays in both expressive and receptive language continued to require the support of the speech and language therapy program. The health assessment noted that while Student had a history of seizures, he was generally in good health and continued to take a variety of medications including medications to control his seizures. The APE assessment noted improvement in Student's gross motor and object control skills, which fell in the three- to five-year range, and that he was most likely to perform tasks when prompted by his SCA. The assessment concluded with a recommendation that Student continue participation in the APE program. The OT assessment noted that Student exhibited sensory processing deficits and recommended Student continue to receive OT services to develop his attention span, and behavioral integration. The assessment also noted that OT services were needed to develop Student's fine-motor skills and oral-motor skills to reduce

Student's drooling and to improve his saliva control. The general education teacher discussed the appropriateness of a general education program for Student. The District IEP team concluded that because of Student's short attention span and inability to stay focused, Student would best be served by continuing to participate in "reverse mainstreaming." Reverse mainstreaming is a process by which one or two of Student's nondisabled peers from a general education sixth grade classroom attended Student's classroom and spent 15 to 30 minutes a day interacting with Student and his classroom peers.⁷

7. The IEP team also reviewed Student's Functional Analysis Assessment (FAA) which had recently been conducted. The FAA identified crying as one specific target behavior to be replaced with a more appropriate behavior that met the same need for Student. Antecedents for the crying behavior were identified as when: Student was tired and sleepy; he was given an undesirable request or task to perform; and he was taken to receive medication. The crying behaviors were indicative of Student's desire to avoid or escape his need for sensory input. As a result of the FAA a Positive BIP (PBIP) was developed to replace Student's inappropriate behaviors with more appropriate ones. These included Student communicating his needs and wants through verbal requests or a sign or gesture. The PBIP also included a segment to teach Student through modeling and role-playing. The assessment team recommended the use of a "buddy book" at school. Staff was to implement the PBIP by collecting data on a daily basis. The plan also included a schedule for the school psychologist to consult with Student's teacher and staff for a 20 minute period every other week to monitor Student's progress.

8. In addition to these assessments, the IEP team also reviewed Student's areas

⁷ These activities included reading a story, assembling puzzles, playing with Legos, matching and sorting exercises, coloring, and assisting students with clean up activities.

of need, and then-present levels of performance in the areas of social, emotional and behavioral domains, functional academics, independent living/self-help skills, language and communication, health and medical, and motor skills development. The team established annual goals and objectives based on needs and Student's level of performance in areas of need. The IEP team discussed the areas where Student had met his goals and areas where further improvement was needed. The IEP offered Student the following program and services for the remainder of the 2005-2006 school year and for the 2006-2007 school year: (1) placement in a SDC-intensive at Manzanita; (2) speech and language therapy provided twice per week for 20 minutes in a group session, and once per week for 20 minutes in an individual session; (3) APE services two times per week for 30 minutes in a group session; (4) OT once per week for 30 minutes in an individual session; (5) an SCA daily for the entire school day; (6) consultation between psychologist and staff for 20 minutes every other week to review Student's behavior program; and (7) door-to-door transportation to and from school. District's offer also included extended school year (ESY) for Student to participate in his SDC program with LAS, APE, OT, and the assignment of a SCA for four hours a day.⁸

9. Student's mother did not consent to the IEP at the time of the IEP team meeting and she did not write in the IEP the basis for her disagreement with the IEP offer. Instead, Mother requested time to review the IEP with her attorney, who did not attend the meeting. Sometime after the IEP team meeting Mother stated that she disagreed with the offer of placement, but eventually consented to the IEP in September 2006. Thereafter, District began to implement the IEP.

10. As of the date of the IEP, Student remained eligible for special education

⁸ At hearing, Ms. Orloff testified that Student could have attended the ESY for 2005-2006 but mother took Student out of the state for the summer.

and services solely under the category of mental retardation. Based upon the triennial assessments, and other factors considered by the IEP team, the February 28, 2006 IEP offered Student a FAPE. The IEP addressed Student's unique needs in academics, social, emotional and behavioral domains, independent living/self-help skills, language and communication, health and medical and motor skills development.⁹ The IEP was reasonably calculated to provide Student with some educational benefit, and as will be discussed more fully in the decision, the IEP offered Student the appropriate placement in the least restrictive environment.

DID DISTRICT DENY STUDENT A FAPE IN THE 2006-2007 SCHOOL YEAR BY FAILING TO PROVIDE STAFF PROPERLY TRAINED TO IMPLEMENT THE IEP?

11. Student contends that the classroom teacher and aides were inadequately trained in implementation of the programs and services offered in the February 28, 2006, IEP, specifically Student focused on the staff's implementation of the PBIP.

12. A failure to implement a Student's IEP will constitute a violation of the Student's right to a FAPE if the failure was material. There is no statutory requirement that

⁹ Student's expert witness Betty Jo Freeman, PhD, a licensed Clinical Psychologist, testified that the IEP did not meet Student's needs. Dr. Freeman's testimony concerning Student's educational needs was based on her opinion, without having conducted an eligibility assessment, that Student exhibited autistic-like behaviors and was obviously autistic. Further, Dr. Freeman did not evaluate Student until September 2006, several months after the IEP. Dr. Freeman's opinion is not persuasive because the IEP must be evaluated in light of the information available at the time it was developed. As of February 28, 2006, the IEP team appropriately relied on and considered the assessments available to them which identified Student's needs as a child with severe mental retardation.

a District must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the services a school district provides to a disabled student fall significantly short of the services required by the Student's IEP.

13. Irene Orloff was Student's SDC teacher in the 2006-2007 school year. Ms. Orloff was a credentialed special education teacher with extensive knowledge, training, and experience in working with moderate to severely disabled pupils with mental retardation and autism. She earned a master's degree in educational leadership from Pepperdine University. She also earned certifications in moderate to severe, including behavior modification techniques. Ms. Orloff held a multi subject credential, a single subject credential in mild to moderate and moderate to severe disabilities, an administrative credential, she was also trained in nonviolent crisis intervention. Ms. Orloff took the classes offered by the Antelope Valley Special Education Local Planning Area (AV SELPA) in the 2005-2006 school year on instructing children with moderate to severe disabilities. Ms. Orloff was responsible for supervising the adult aides, including SCAs, who supported her in the classroom. She was responsible for implementing portions of Student's IEP goals and objectives in the classroom, including Student's PBIP. Ms. Orloff also communicated with Student's mother to keep her aware of any concerns about Student's performance in the classroom. Ms. Orloff was qualified to teach Student's SDC.

14. Ms. Orloff conducted Student's academic assessment and wrote portions of Student's goals and objectives, and the PBIP, included in the February 28, 2006 IEP. The IEP was not fully implemented until around September or October, 2006 because Student's mother did not consent to the IEP until sometime in September 2006. Ms. Orloff continued to implement Student's 2005 IEP until Student's mother signed the February 2006 IEP. Following mother's consent to the IEP Ms. Orloff prepared lists of Student's goals and objectives and provided them to his SCA for implementation. Ms. Orloff made daily progress notes and logs to track Student's performance.

15. During the 2006-2007 school year, Ms. Tawnya Pauley was employed as Student's SCA. Ms. Pauley was assigned to assist and work with Student for the entire school day. She was trained to work with severely impaired children, and trained in nonviolent crisis intervention. She was responsible for providing for all of Student's needs in the classroom including his toileting needs. She was familiar with Student's goals and objectives and worked with Ms. Orloff to implement some of Student's goals in the classroom. She considered Student to be a generally happy individual who always wanted to help in the class. Ms. Pauley testified that she was one of five adult aides in the classroom and she was assigned exclusively to Student. Ms. Orloff or another of the aides in the classroom worked with Student only in Ms. Pauley's absence or during Ms. Pauley's breaks. Ms. Pauley was a qualified SCA.

16. The academic assessment, written by Ms. Orloff and considered by the IEP team, noted that Student was demonstrating less protesting behaviors including yelling, screaming, tantrums, throwing objects, and destruction of property, such as tearing books and tearing up bulletin boards. The assessment also noted that Student's tendency toward task avoidance had somewhat decreased, especially when Student was allowed to work with a preferred adult or aide. However, Student still continued to cry and tantrum under certain circumstances.

17. When a child exhibits a serious behavior problem, such as self-injurious or assaultive behavior, California law imposes specific and extensive requirements for the development of a functional analysis assessment and a behavior intervention plan. An IEP team must consider whether a child's behavior impedes his or her learning or that of others. If the team determines that it does, it must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior.

18. As discussed in Findings of Fact 4 and 7, Student demonstrated a history of significant behaviors that impeded his learning. District's FAA, conducted on February 24, 2006, identified crying as one specific target behavior to be replaced with a more

appropriate behavior that met the same need for Student. Antecedents for the crying behavior were identified as well as the principal reasons for the behaviors. As a result of the FAA, a Positive BIP (PBIP) was developed to replace Student's inappropriate behaviors with more appropriate ones. These included Student communicating his needs and wants through verbal requests or a sign or gesture.¹⁰ The PBIP also included a segment to teach Student through modeling and role-playing, and the assessment team recommended the use of a "buddy book" at school and staff was to implement the PBIP by collecting data on a daily basis. The plan also included a schedule for the school psychologist to consult with Student's teacher and staff for a 20 minute period every other week to monitor Student's progress.

19. Ms. Orloff and Ms. Pauley worked together to implement the relevant portions of Student's IEP in all aspects including the PBIP. Ms. Pauley emphasized that Student occasionally required the use of two adult aides to physically prompt or assist him from one activity to another in the classroom and that this was primarily because Student was short but heavy.

THE INCIDENT REPORT OF OCTOBER 2, 2006

20. The parties dispute that a series of incidents took place in early October 2006 where Ms. Orloff and/or adult aides failed to address Student's needs in the classroom. Ms. Kathy Carillo described four incidents that Student claims support his

¹⁰ According to Ms. Orloff, Student was "somewhat non verbal" but had the capacity to speak certain phrases such as "please," "thank you," "I want my hat," and other phrases when communicating with his aide and other District staff. The IEP also noted that Student had the ability to inconsistently initiate one to two word phrases. He generally paired with the word "please" with the name of a desired object or activity in imitation of a model provided by his teacher or aide.

contention that the teacher and aides were inadequately trained in the implementation of his IEP. Ms. Kathy Carillo, was employed by a non-public agency (NPA) called Going Onward and Living Successfully, G.O.A.L.S., Inc. She was hired through G.O.A.L.S., Inc. to work as a one-to-one aide for another child in Student's SDC class at Manzanita. She began working in the classroom in either late September or early October 2006. Ms. Carillo did not know Student prior to this assignment and she was not assigned to work with Student, but she believed that she may have worked with Student ten percent of the day during learning center time and at recess. She believed she observed Student being grabbed, pulled by his arm, and seated in a forceful manner, left to eat and drink without assistance, left with soiled clothes after eating his meal, and locked outside the classroom for twenty minutes while screaming and crying. She also believes that Student was placed in learning center activities¹¹ that exceeded his actual capabilities. Ms. Carillo wrote a report and referred it to individuals outside the District, including the Los Angeles County Sheriff's Department. Ms. Carillo did not identify the aides she believes she observed mishandling Student. She had experience working with disabled pupils but she was not a credentialed special education teacher, nor was she a trained therapist. Ms. Carillo's account of these incidents was refuted by both Ms. Orloff and Ms. Pauley. Ms. Pauley testified that as Student's SCA she was responsible for accommodating his needs and at no time was Ms. Carillo assigned to Student. Ms. Orloff also explained that Student was generally able to feed himself. When he was permitted to do so, he would spill food or liquid on himself, which prompted staff to change his clothes. Student's mother was aware of this and provided the staff with at least two changes of clothes for instances where Student may spill food on himself.

¹¹ The SDC classes at Manzanita shared a learning activity center where students would rotate to centers containing different subject matter. This allowed a team teaching approach.

21. Student's mother testified only briefly at the hearing. Mother testified that Student had been moved from another SDC to Ms. Orloff's classroom because of allegations Student was abused by an aide in another classroom at Manzanita. This move was part of the resolution of a prior due process complaint filed by Student's Mother pertaining to alleged incidents occurring in the 2004-2005 school year, and was not factually related to the due process complaint filed on October 5, 2006.¹² Mother further testified that Ms. Orloff spoke nicely of Student to her. Mother visited Student's classroom approximately three to four times during the 2006-2007 school year and never saw the teacher, Student's SCA, or any other aides handling Student inappropriately. She always sent at least two outfits to school with Student so that he could be changed if necessary, and she never saw Student arrive at home wearing soiled or wet clothes. He did arrive home on one occasion with his wet clothes in a bag. Mother related one incident where Student came home from his class with a couple of scratches but she did not know "who to blame." Mother related another incident where Student came home wearing a change of clothes with someone else's belt. Other than these accounts, Mother testified that Student did not come home from Ms. Orloff's class with bruises nor did he appear to have been physically mishandled at school.

¹² Student made allegations of abuse and cruelty in a prior due process complaint, OAH Case Number N2006010878, filed January 18, 2006, which was resolved by settlement in or about July, 2006. Student alleged he was abused by an aide and/or teacher employed by District at Mesquite Elementary School, and that the alleged perpetrator was prosecuted by the Los Angeles County District Attorney in an unrelated civil or criminal action involving other students at Manzanita. Those claims of alleged abuse did not go to a due process hearing and are in no way relevant to the current due process complaint.

22. There is no credible evidence to support Student's contention that these incidents took place, as reported, on October 2, 2006. Dr. John Porter, Director of Special Education testified that he was not in the classroom on the day of the alleged incidents. However, he was involved in the investigation of Ms. Carillo's report by the Los Angeles County Sheriff, who concluded that Ms. Carillo's allegations were unsubstantiated.

23. Student's expert Dr. B.J. Freeman visited Student's class on two separate occasions between September and October 2006, and observed that the class was somewhat chaotic.¹³ She also observed, on one of those occasions, Student being prompted by two aides who picked him up from the ground by the arms and carried or "dragged" him to a learning center activity. She generally questioned the training and qualifications of Ms. Orloff and the aides to apply appropriate behavior interventions with Student. Dr Freeman believed Ms. Orloff and the classroom aides needed more behavior management training and proper methods to more appropriately address Student's tantrums. Dr. Freeman admitted she did not personally witness incidents like those alleged by Ms. Carillo, but she felt that keeping Student in his current classroom environment was in and of itself inappropriate. Dr. Freeman's testimony was largely based upon her in-office assessment of Student and her two brief visits to Manznita. Dr. Freeman's opinion testimony was not persuasive and is insufficient to support Student's contention concerning the District's failure to provide trained staff to implement Student's IEP.

24. Student failed to prove District denied him a FAPE in its implementation of

¹³ One of Dr. Freeman's visits was specifically to audit the special education classes at Manzanita and to develop a proposal for an Autism Training Program. This visit was not connected with Dr. Freeman's evaluation of Student. There is no evidence whether District accepted Dr. Freeman's proposal.

the February 28, 2006 IEP.

THE SENSORY ROOM

25. Student also contends he was inappropriately placed by the teacher and aide in the sensory room unattended for substantial periods of time where he would sleep, and that his placement in the room deprived him of interaction with his peers, which deprived him of educational benefit.

26. The PBIP established reactive strategies to be employed in the event of a recurrence of Student's problem behaviors. The first step was to prompt Student to switch to a replacement behavior. The second step was to describe how staff should handle the problem behavior should it recur, the third step called for positive discussion with Student after the behavior ends, and the fourth step called for informing Student of any necessary classroom consequences, and the plan established an alternative procedure, which allowed Student to move to a quiet area of the classroom or the sensory room to rest or calm down, or to take a break by walking. The sensory room appeared to be the preferred strategy as it related to Student's problem behaviors. Ms. Orloff credibly testified that the sensory room was utilized for numerous purposes. The room was used when aides or the teacher needed a quiet place to work with a pupil or when a pupil needed to calm down. In Student's case, he had been placed in the sensory room, on occasion, to calm down when he went into a tantrum. Ms. Orloff explained that Student had a tendency to become fatigued in the afternoons and he was prone to fall asleep while in the sensory room because of his daily medication regimen. Ms. Pauley presented as a credible witness. She referred to Student as "her child." She took Student into the sensory room to work with him, he was not in the sensory room for more than 20-30 minutes at a time, and at no time was he left unattended or unsupervised during the time she was assigned as his SCA.

27. There is no credible evidence that Student's placement in the sensory room

unreasonably deprived him of interaction with his peers.

DID DISTRICT DENY STUDENT A FAPE BY FAILING TO PROVIDE SPEECH AND LANGUAGE AND OCCUPATIONAL THERAPY SERVICES OFFERED IN THE FEBRUARY 28, 2006 IEP?

28. Student contends that District denied a FAPE because it did not provide the OT and the LAS offered in the IEP.

29. 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. To provide a FAPE, school districts are required to provide access to specialized instruction and related services which are individually designed to provide educational benefit. If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE.

30. Ms. Orloff recounted, that Student began receiving both LAS and OT within weeks after Mother consented to the IEP sometime in the fall of the 2006-2007 school year. Ms. Orloff could not state the quantity of these services Student had received.

31. Before Student rested on the fourth day of hearing, the parties stipulated to provide Student with compensatory education in the amount of 240 minutes of OT and 420 minutes of LAS (including 270 minutes of individual SAL and 150 minutes of group LAS). As a result, no additional evidence was presented on this issue. The stipulation resolved the issue and Student is entitled to compensatory OT and LAS services in accordance with the stipulation.

DID THE IEP OFFER STUDENT AN APPROPRIATE PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT?

32. Student contended that Manzanita was not a suitable environment for him,

and the IEP offer of placement at Manzanita was not appropriate. Student requested placement at another school within the District, or in the alternative, placement in a NPS.

33. A student's placement must be in the least restrictive environment. In order to measure whether a placement is in the LRE, four factors must be considered: (1) the academic benefits available to the disabled student in a general education classroom, supplemented with appropriate aids and services, as compared with the academic benefits of a special education classroom; (2) the non-academic benefits of interaction with children who are not disabled; (3) the effect of the disabled student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the disabled student in a general education classroom. Removal from the regular education environment should occur 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 cannot be achieved satisfactorily.

ACADEMIC AND NON-ACADEMIC BENEFITS

34. Student did not have an academic curriculum. Student's placement was in an intensive SDC class where he was taught under a functional curriculum. He was placed in a class specially designed to deliver intensive services to disabled students with a small teacher to student ratio. The SDC also provided Student opportunities to participate in reverse mainstreaming where he mingled with general education students during lunch, recess, and for 15 to 30 minutes each day in the classroom. Para educator, Charles Sims credibly testified that during the 2006-2007 school year he worked as an aide in another SDC at Manzanita. He had some contact with Student during the school day on some days when the SDC classes shared the learning center activities. Mr. Sims also testified that Student was a loveable individual with whom he got along quite well. He further testified that Student was well received by the other students and Student appeared to get along with others during this activity.

STUDENT'S CLASSROOM PRESENCE

35. Dr. Freeman believed that Student's behaviors were "out of control" such that he needed to be placed in a more restrictive environment until appropriate behavior interventions were applied for his benefit as well as that of his peers. Her testimony suggested that Student's presence in the classroom compromised the learning environment for his fellow students and staff. Contrary to Dr. Freeman's beliefs there is no evidence that Student is a disruptive or dangerous presence in the classroom. The evidence also establishes that Student's negative behaviors had improved since the last IEP. The PBIP developed in the February 28, 2006 IEP put in place behavior interventions that were utilized in Student's classroom. The testimony of Student's teacher and aide describe Student as happy, loveable, and helpful and to others. The IEP offered Student appropriate supplementary aids and services sufficient to support his placement in the SDC at Manzanita.

COST OF MAINSTREAMING STUDENT

36. Dr. Porter related that, while there were SDC programs in other schools in the District, none of them provided the intensive services designed to meet Student's unique educational needs, with opportunities for mainstreaming as were offered at Manzanita. As described in Finding of Fact 6, District's program consisted of "reverse mainstreaming" where general education students spent time in Student's SDC class interacting with the special education students. The cost of mainstreaming Student was not raised as a factor. Dr. Porter believed that Manzanita was the most appropriate placement for Student.

37. Dr. Freeman knew of no NPS that would be appropriate for Student and offered no suggestion of what would be a more appropriate placement for Student in the District. However, her opinion that Student should be removed from the classroom and placed in a smaller setting until the implementation of more effective behavior

interventions, suggested that Student be placed in a more restrictive environment. Such a placement would be inappropriate, given Student's progress toward some of his goals. Student offered no evidence of more appropriate placements, whether a NPS or another school within the District.

38. The evidence overwhelmingly establishes that Student's placement at Manzanita constituted a far less restrictive environment than that suggested by Student. Under these circumstances, Student's contention that the IEP offer of placement at Manzanita was inappropriate is without merit. Student presented no specific credible evidence that any aspect of the school environment negatively impacted his progress or his ability to access his education. District presented evidence that Student's placement and program at Manzanita were appropriate for him. The law defers to the school district with respect to the type of program selected for a student. Student's placement at Manzanita was appropriate, and it was in the least restrictive environment.

COMPENSATORY EDUCATION

39. Student contends that he was also entitled to compensatory education in the areas of behavioral services, social skills training, and a social recreational program.

40. Compensatory education is an equitable remedy that courts may employ to craft appropriate relief for an aggrieved party. Equitable relief requires review of the conduct of both parties to determine whether relief is appropriate.

41. Except for the stipulated award in Finding 31 of LAS and OT, there is no support for an additional award of compensatory education in the areas enumerated in Finding of Fact 39, above. Compensatory education can only be awarded where it is found that there was a procedural or substantive denial of FAPE. Student did not prove he was entitled to compensatory education in the areas discussed in 39, above. Moreover, even if Student had proved a procedural violation and hence his entitlement to compensatory education, Student presented no evidence of how compensatory education would or

should be determined for behavioral services, social skills training or a social recreational program.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. The burden of proof in an administrative hearing challenging an IEP is on the party seeking relief, whether it is the disabled child or the school district. *Schaeffer v. Weast, Superintendent, Montgomery County Public Schools, et al., Weast* (2005) 546 U.S. 126 S.Ct. 528, 163 L.Ed.2d 387.) In the case at bar, Student has the burden of proof. (*Schaeffer v. Superintendent, Montgomery County Public Schools, et al., Weast* (2005) 546 U.S. 49, [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA) and, effective July 1, 2005, the Individuals with Disabilities in Education Improvement Act (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.)¹⁴ 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. § 1402(9).) "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. § 1402(29).)

3. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, [102 S.Ct. 3034] (hereafter, *Rowley*), the United States Supreme Court

¹⁴ All statutory citations to the Education Code are to California law, unless otherwise noted.

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.)

4. To determine whether a school district substantively offered FAPE to a student, the adequacy of the school district's proposed program must be determined. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) Under *Rowley* and state and federal statutes, the standard for determining whether a district's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. While this requires a school district to provide a disabled child with meaningful access to education, it does not mean that the school district is required to guarantee successful results. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301.)

5. School districts are required to provide each special education student with a program in the least restrictive environment, 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, subd. (a)(5)(A); Ed. Code, § 56031.) Mainstreaming is not required in every case. (*Heather S. v. State of Wisconsin* (7th Cir.

1997) 125 F.3d 1045, 1056.) However, to the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (Ed. Code, § 56031.) In order to measure whether a placement is in the LRE, four factors must be considered: (1) the academic benefits available to the disabled student in a general education classroom, supplemented with appropriate aids and services, as compared with the academic benefits of a special education classroom; (2) the non-academic benefits of interaction with children who are not disabled; (3) the effect of the disabled student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the disabled student in a general education classroom.

Sacramento Unified School District v. Holland (9th Cir. 1994) 14 F.3d 1398, 1403.)

6. School districts receiving federal funds under IDEA are required under 20 United States Code, section 1414, subd. (d)(1)(A)(i) to establish an IEP for each child with a disability that includes: (1) a statement regarding the child's then-present levels of academic achievement and functional performance; (2) measurable annual goals, including academic and functional goals designed to meet the child's educational needs and enable the child to make progress; (3) a description of how the child's progress will be measured; (4) a statement of the special education and related or supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child; (5) a statement of the program modifications or supports that will be provided; (6) an explanation of the extent to which the child will not participate with nondisabled children in the regular class; and (7) other required information, including the anticipated frequency, location, and duration of the services. (See also, Ed. Code, § 56345, subd. (a).)

7. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be

evaluated in terms of what was objectively reasonable when the IEP was developed.

(*Ibid.*) The focus is on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist, supra*, 811 F.2d at p. 1314.)

8. A failure to implement a Student's IEP will constitute a violation of the Student's right to a FAPE if the failure was material. There is no statutory requirement that a District must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the services a school district provides to a disabled student fall significantly short of the services required by the Student's IEP. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 481 F.3d 770 (hereafter, *Van Duyn*).)

9. An IEP team must consider whether a child's behavior impedes his or her learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i), (b); Ed. Code, § 56341.1, subd. (b)(1).) if the team determines that it does, it must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior.

10. When a child exhibits a serious behavior problem, such as self-injurious or assaultive behavior, California law imposes specific and extensive requirements for the development of a functional analysis assessment and a behavior intervention plan. (Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052.) There are many behaviors that will impede a child's learning or that of others that do not meet the requirements for a serious behavior problem requiring a behavior intervention plan.

11. These less serious behaviors require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment. (*Ibid.*) An IEP that does not appropriately address behavior that impedes a

child's learning denies a student a FAPE. (*Neosho R V Sch. Dist., v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *Escambia County Bd. of Educ. v. Benton* (S.D. Ala. 2005) 406 F.Supp.2d 1248, 1265.)

12. An Administrative Law Judge may order a school district to provide compensatory education to a pupil who has been denied a FAPE. (*Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1486.) Compensatory education is an equitable remedy that courts may employ to craft appropriate relief for an aggrieved party. The law does not require that day-for-day compensation be awarded for lost or missed time. Equitable relief requires review of the conduct of both parties to determine whether relief is appropriate. (*W.G. v. Bd. Of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) As the court indicated in *Miller v. San Mateo-Foster City Unified School District*, supra, 318 F.Supp.2d 851, 859-860: "equitable relief is a fact-specific inquiry in which the Ninth Circuit had held that 'the conduct of both parties must be reviewed to determine whether relief is appropriate.'"

DETERMINATION OF ISSUES

Based on the factual findings and applicable law, it is determined as follows:

Issue 1A: Did District deny Student a free, appropriate, public education (FAPE) for the 2006 – 2007 school year by failing to failing to provide adequately trained staff, including teacher and aides, to implement the IEP?

13. Relying upon Factual Findings 1 to 27 and Legal Conclusions 1 to 8, the February 28, 2006 IEP provided Student a FAPE. District's SDC teacher and Student's SCA were more than adequately trained and sufficiently competent to implement Student's IEP, including the PBIP.

Issue 1B: Did District deny Student a free, appropriate, public education (FAPE) for the 2006 – 2007 school year, by failing to provide speech and language and occupational therapy services under the February 28, 2006 IEP?

14. As set forth in Factual Findings 38 to 40 and Legal Conclusions 1 to 8, and 12, the issue was resolved by stipulation. Student will receive an award of OT and SAL as compensatory education.

Issue 1C: Did District deny Student the appropriate placement in the least restrictive environment?

15. Based upon the standards enunciated by the ninth circuit in *Sacramento Unified School District v. Holland, (Rachel H), Supra*, as set forth in Legal Conclusion 5 to 7, to the maximum extent appropriate, special education students should have opportunities to interact with general education peers. Applying the four pronged test of *Rachel H.*, the IEP considered that Student required placement in a small specialized instructional setting for more than 50 percent of the day. The SDC intensive at Manzanita provided such a setting. The evidence established Student derived some educational benefit from his placement where he participated in reverse mainstreaming with general education students. Moreover, Student presented no persuasive evidence that he should be removed and placed in an even more restrictive environment where he should remain until he developed other social skills. The IEP clearly addressed whether Student's continued placement at Manzanita was of benefit and correctly concluded that it was appropriate. Also of note is the absence of any evidence by Student of other placements that Student might deem appropriate.

Based upon the Findings of Fact 1 to 10 and 33 to 38, and Legal Conclusions 5 to 7, the IEP offer of placement at the Manzanita SDC was the appropriate placement for Student in the least restrictive environment.

Issue 2: Is Student entitled to compensatory education in the area of behavioral services, social skills training and a social recreational program?

16. Relying on Findings of Fact 39-41 and Legal Conclusions 12, Student did not meet his burden of proof that he is entitled to compensatory education in the area of behavioral services, social skills training and a social recreational program.

ORDER

1. District is ordered to provide Student compensatory education in the amount of 240 minutes of OT and 420 minutes of LAS (including 270 minutes of individual LAS and 150 minutes of group LAS).
2. The offer of placement in the Manzanita SDC was appropriate, in the least restrictive environment, and provided Student a FAPE.
3. District provided adequately trained teachers and aides to implement Student's February 28, 2006 IEP.
4. Student is not entitled to compensatory education in the area of behavioral services, social skills training and a social recreational program.

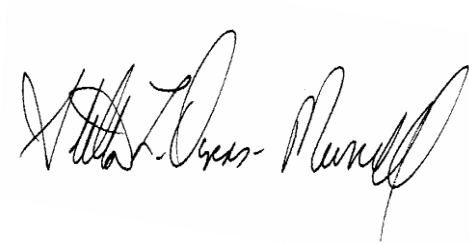
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to this mandate, it is determined that the Student prevailed on issue 1A and District prevailed on issues 1B, 1C and 2.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

July 2, 2007

A handwritten signature in black ink, appearing to read "Stella L. Owens-Murrell". The signature is fluid and cursive, with the first name "Stella" being the most prominent.

STELLA L. OWENS-MURRELL
Administrative Law Judge
Office of Administrative Hearings